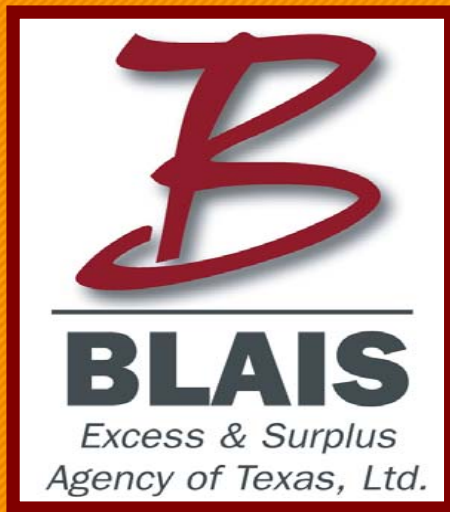


WEBINAR SLIDES



PRIVATE COMPANIES & MANAGEMENT LIABILITY INSURANCE

January 20, 2010 1:00 P.M.

WEBINAR PANELISTS



| | | |
|-----------------|---------------------|------------------------------------------------------------------|
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WEBINAR AGENDA



- ✓ INTRODUCTION: An explanation will be provided on the standard coverages included in management liability and additional coverages that may be added.
- ✓ NEED: The question, “Why should a private company purchase management liability insurance?” will be answered in this section.
- ✓ COVERAGE: The various coverages and special policy features that should be considered in the design and placement of management liability insurance will be discussed in this section.
- ✓ MARKETS: A review of the various markets providing private company coverage will be addressed in this section with a focus on coverage terms, conditions and provisions.
- ✓ CLAIMS: Specific examples of D&O, Fiduciary, Crime and EPL claims that have impacted private companies will be provided in this section.

INTRODUCTION



This webinar will focus on the standard management liability insurance coverage needs of a private company which include the following:

- ➔ Directors & Officers Liability (D&O)
- ➔ Employment Practice Liability (EPL)
- ➔ Fiduciary Liability (Pension Trust)
- ➔ Crime (Fidelity)

INTRODUCTION



Not all carriers offer the same lines of coverage under their respective private company forms. Most include what is considered the standard or core liability coverages (D&O, EPL, Fiduciary and Crime). Additional coverages may include:

| Cyber Liability | Third Party Discrimination | Kidnap Ransom | Intellectual Property |
|--------------------|----------------------------|--------------------|------------------------|
| Internet Liability | Identity Theft | Miscellaneous E&O | Employed Legal Counsel |
| Media Liability | Crisis Response | Workplace Violence | Other Forms |

NEED



Why should a private company buy D&O?

Board members personal assets are at risk. No Corporate shield.

Potential for catastrophic financial impact even if a claim is successfully defended. Complex nature and emotional content of the claims escalate defense costs.

D&Os of privately held corporations owe the same duties to shareholders as their publicly held counterparts.

Duty to Defend – access to the insurer's claims professionals and experienced attorneys.

Protect cash flows and corporate assets. Most companies can not fund a claim without seriously impacting their financial condition.

NEED



Key exposure questions that should be considered in the purchase of management liability.

Are there any equity investors in the company and if so, who are they?

How much non-public debt does the company have or will it take on in the next twelve months? Who are the lenders?

Is the company anticipating any layoffs, staff reductions and/or terminations?

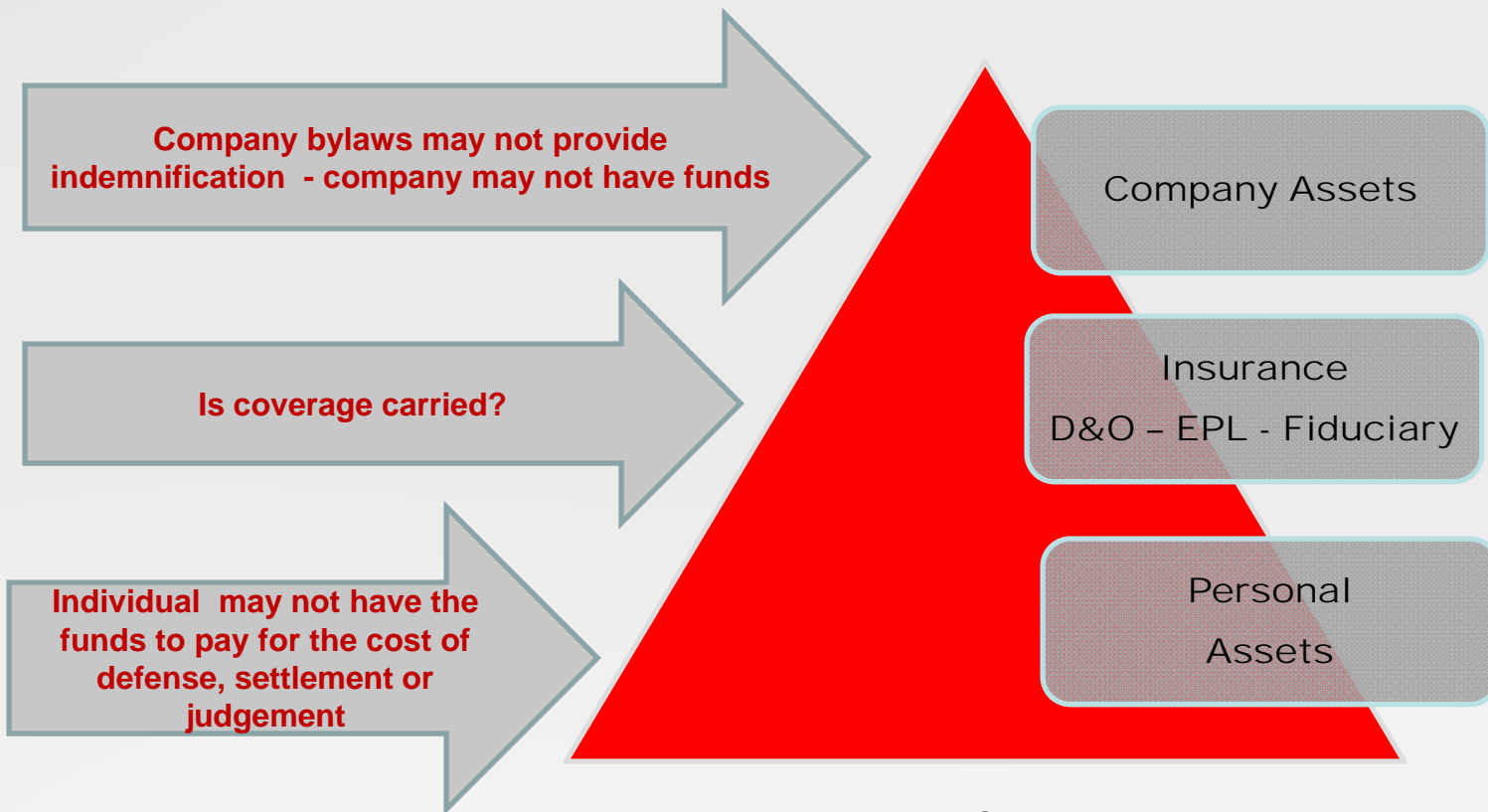
Does the company have a profit sharing plan and is it considering changing the options?

Is the company contemplating a merger, acquisition, sale or divestiture in the next twelve months?

NEED



A director or officer of a private company has only a few sources that can fund a claim:



NEED



SOURCES OF LAWSUITS AGAINST PRIVATE COMPANIES

| SOURCE | PROBABILITY FACTOR |
|--------------------|--------------------|
| Employees | High |
| Vendors | High |
| Customers | High |
| Shareholders | Low |
| Investor Groups | High |
| Federal Regulators | Medium |
| Local Governments | High |
| Others | Low - High |

NEED



EVENTS THAT TRIGGER LAWSUITS AGAINST PRIVATE COMPANIES

| | |
|-------------------------------|-------------------------------------|
| Mergers/Acquisitions | Financial Performance |
| Executive Compensation | Bankruptcy |
| Conflict of Interest | Inadequate/Inaccurate Disclosure |
| Stock or Other Offerings | Financial Reporting |
| Extension, Refusal of Credit | Restraint of Trade |
| Debt Collection | Dishonesty |
| Deceptive Trade Practices | Cost, Quality of Product or Service |
| Contract Dispute | Lender Liability |
| Anti-Trust | Prospective Company Acquisition |
| Copyright/Patent Infringement | Company Defamation |
| Business Interference | Tax Issues |
| Competitor Disputes | Regulatory/Other Gov Issues |

NEED



REASONS WHY COVERAGE SHOULD BE PURCHASED

1. It defends you personally and is based upon the premise that you are innocent until proven guilty.
2. Unlike some other forms of insurance, there is no “probability of success” clause as the outcome of any claim may well affect your reputation or livelihood.
3. In the event of a claim, it helps to prevent serious disruption to management time.
4. It provides protection against potential loss of personal assets including home and possessions.
5. It protects corporate assets from the costs of expensive legal proceedings.
6. It provides access to lawyers specializing in corporate issues and the framework for a focused strategy for dealing with lawsuits against Directors – especially the frivolous ones.
7. It allows Directors to focus on running the business, which is especially important in times of high risk activities, such as sale, merger or acquisition.
8. It can be extended to provide world-wide coverage to embrace the activities of international companies.
9. It can be extended to include EPL coverage as well as cover for claims made against the Company itself - Entity protection coverage.
10. If the company goes into bankruptcy, administration or liquidation, the policy would cover the action and potential for downstream claims.

NEED



REASONS WHY COVERAGE SHOULD NOT BE PURCHASED

1. As a director or officer of a company, you have a complete grasp of all your responsibilities and duties.
2. As a director or officer of a company, you never make a mistake.
3. As a director or officer of a company, you are continually updating yourself of all new developments both within in the law or elsewhere that effect your personal liability.
4. As a director or officer of a company, you have full confidence in all your fellow directors, officers and employees.
5. As a director or officer of a company, you are absolutely certain that all parties you owe a duty to will never level allegations or file claims against you over actual or alleged mistakes.
6. As a director or officer of a company, you are certain that your company will never encounter problems, meet all set targets and continually achieve increasing profits.
7. As a director or officer of a company, you have a sufficient “fighting fund” available in the event that an action or an investigation is brought against you and your costs and expenses are not recoverable.

NEED



WHY DO I NEED CRIME INSURANCE?

1. Fraud and embezzlement in the workplace is on the rise, occurring in even the best work environments.
2. These frauds can go on for years, and when discovered the ultimate impact can be enormous. Smaller companies are especially vulnerable to Fidelity crimes.
3. Most business insurance policies either exclude or provide only nominal amounts of coverage for loss of money and securities, as well as employee dishonesty exposures.
4. The American Management Association has estimated that employee dishonesty causes as much as 20% of the nation's business failures.
5. White collar crime can have serious financial consequences, even threatening a private company's survival.
6. To put it bluntly, it is the loyal, long term, conscientious and trusted employee whose dishonesty can put you out of business. The programmer who never takes a vacation and is never sick. The long term employee who is "just like family." Let's face it. Only employees like this really have the opportunity steal over a long period of time. Only employees like this can take enough to jeopardize the financial survival of your firm.

NEED



WHY DO I NEED FIDUCIARY INSURANCE?

1. **EBL - Employee Benefit Liability Does Not Provide Broad Form Coverage:**

Both policies cover administrative errors and omissions; however, the EBL policy does not cover ERISA violations. Some companies have added the employee benefit liability endorsement (EBL) to their commercial general liability policy (CGL). This approach leaves a gap in coverage for ERISA law claims.

2. **ERISA Bond Does Not Provide Fiduciary Liability Coverage**

You are required by ERISA to bond or insure your plans from employee dishonesty in the lesser of \$500,000 or 10% percent of all plan assets. The Department of Labor has the authority to prescribe a bond in excess of \$500,000, up to 10% of the value of all plan assets as of the beginning of the plan year. Fiduciary liability is not required by ERISA, but recommended and has a great value.

NEED



WHY DO I NEED FIDUCIARY INSURANCE?

1. Under ERISA, fiduciaries may be held personally liable for breach of their responsibilities in the administration or handling of employee benefit plans. Fiduciary Liability Insurance is not required by ERISA; however, it is strongly recommended if you are a fiduciary of a welfare and/or pension plan because your personal assets are at stake. Many fiduciaries believe incorrectly that their ERISA fidelity bond protects their personal assets.
2. Many think that this type of coverage is included in their D&O policy. Most D&O policies exclude fiduciary liability exposures as well as those exposures pertaining to the Employee Retirement Income Security Act (ERISA).
3. ERISA also broadly defines the types of employee benefit plans for which fiduciaries are responsible. This extensive list can include pension plans, profit sharing plans, employee stock ownership plans (ESOPs), and even health and welfare plans.
4. Designated fiduciaries are not the only targets of such lawsuits. Targets can also include the employer and even the plan itself. Claims can be brought by plan participants, participants' legal estates, the Department of Labor, and the Pension Benefit Guaranty Corporation. Such claims may include allegations of:
 - Improper advice or disclosure
 - Inappropriate selection of advisors or service providers
 - Imprudent investments
 - Lack of investment diversity
 - Breach of responsibilities or fiduciary duties imposed by ERISA
 - Negligence in the administration of a plan
 - Conflict of interest with regard to investments

COVERAGE



By combining various exposures into one policy, the insured is less likely to:

- Encounter disputes between carriers;
- The administrative burden for both insured and carrier is lessened; and
- Premium economies can be achieved.

COVERAGE – D&O



The decisions made by the boards of privately-owned companies are not immune from public scrutiny.

As leaders of the company, the directors and officers can be held personally liable for their management decisions. Shareholders, employees, customers, suppliers, competitors, and even the government can sue a privately -owned company and its board.

D&O Liability Insurance coverage is specifically designed to help protect the personal assets of a privately-owned company's directors and officers, as well, as the financial well-being of the company itself.

COVERAGE - EPL



Employment Practice Liability insurance protects businesses from the costs associated with lawsuits arising from allegations that an employee's rights were violated. The EEOC collected record monetary relief – \$345 million – for victims of discrimination in 2007. Various conditions suggest a trend in the making. Employers face a growing collection of federal, state and local employment laws, such as the ADA, Civil Rights Act of 1991, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964. The EEOC is showing signs of becoming increasingly active in its litigation filings, and the surge in charges over the prior year – the largest annual increase in over a decade – suggests poor economic conditions translate into more discrimination claims.

COVERAGE – CRIME



Business fidelity insurance is designed to protect your company from many types of crime. Because crime is a common worry for businesses, a number of markets offer business protection to cover a company when employees decide they are entitled to the company's inventory or a thief robs a company of its cash. Working through such losses takes time and money – resources that would be better spent running a business.

Business crime insurance coverage offers business protection and more. Highlighted below are the basic coverage components of a Crime Package Policy:

- Employee dishonesty
- Forgery or alteration
- Theft of money and securities
- Burglary or robbery
- Computer fraud

COVERAGE – FIDUCIARY



Under the Employee Retirement Income Security Act of 1974 (ERISA), fiduciaries can be held personally liable for losses to a benefit plan incurred as a result of their alleged errors, omissions or breach of their fiduciary duties. By aggregating limits for Fiduciary coverage, individuals exposed to this liability, including Human Resources employees, plan administrators and appointed fiduciaries, are protected. ERISA broadly defines “employee benefit plans” to include pension plans, profit-sharing plans, employee stock ownership plans and health and welfare plans, opening the door to litigation from a wide swath of constituents: plan participants and their legal estates, the Department of Labor, and the Pension Benefit Guaranty Corporation.

Fiduciary insurance policies cover:

- **Breach of fiduciary duties**
- **Negligent errors and omissions**
- **Improper disclosures to plan participants**
- **Remiss investment advice**
- **Imprudent choice of outside service provider (OSP)**
- **Faulty advice of counsel**
- **Improper amendments to plan documents.**

COVERAGE – FEATURES (General)



Highlighted below are a few coverage features that should be reviewed when considering the various forms that are available:

Privacy violation coverage

Employment event coverage

Choice of 'duty to defend' or 'pay on behalf'

Employed lawyers errors & omissions extension

Dedicated supplemental limit for insured persons

Non-profit outside directors liability

Private placement coverage

Coverage for criminal investigations and proceedings

Coverage for derivative demands (costs of investigation)

Expiration dates – Common or Broken

Limits – Shared vs Separated

Value added services

Continuity Date

Definitions – Employee/Claim/Subsidiary/Loss/Employment Practice Wrongful Act

Entity Coverage

COVERAGE – FEATURES (D&O Specific)



Management and company liability insurance

- Environmental mismanagement claims extension affords coverage for climate change and global warming disclosure claims and restricts the pollution exclusion so that it does not apply to traditional management liability exposures such as Side A coverage claims;
- Enhanced definition of claim includes written demand for non-monetary relief and request to toll or waive statute of limitations; civil, criminal, administrative or regulatory investigation of an Insured Person who has received a written notice; extradition requests; regulatory agency demand or subpoena to depose an insured person (solely for Side A); and
- In addition to the special provisions for retired independent directors and environmental mismanagement claims, enhanced Side A coverage includes non-rescindability and defense costs for certain pre-claim deposition costs of an Insured Person.

COVERAGE – FEATURES (EPL Specific)



Employment practices and third party discrimination liability insurance

- Additional insuring clause for third-party discrimination claims;
- Environmental mismanagement coverage extension for retaliation claims arising out of an environmental event.

COVERAGE – FEATURES (EPL Specific)



INSUREDS NEED TO REPORT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION EEOC PROCEEDINGS

Most **Employment Practices Liability** policies include in the definition of “**Claim**” language:

- “a formal administrative or regulatory proceeding commenced by the Insured’s receipt of a notice of charges, formal investigative order or similar document”
- “an administrative, regulatory or tribunal proceeding commenced by the issuance of a notice of charge, formal investigative order or similar document...”

Some insurers specifically refer to the Equal Employment Opportunity Commission Proceedings, but some do not. **THIS SITUATION POSES A GREAT PROBLEM TO INSUREDS WHO DO NOT REPORT EEOC SITUATIONS AND EVEN GREATER PROBLEMS TO THOSE WHO MOVE COVERAGE WITH AN UPDATED PRIOR AND PENDING LITIGATION DATE.**

COVERAGE – FEATURES (Fiduciary Specific)



Fiduciary liability insurance

- Additional insuring clause added for Voluntary Settlement Programs with a maximum limit of liability of \$100,000 combined, subject to the aggregate limit;
- Definition of claim includes a fact finding investigation by the Department of Labor or Pension Benefit Guaranty Corporation; and
- Definition of Loss includes Punitive damages (where insurable by law) and civil penalties pursuant to 502(i) or (l) of ERISA, COBRA or HIPAA.

COVERAGE – FEATURES (Crime Specific)



Crime insurance

- Employee theft coverage offers insurance protection for the unlawful taking of money, securities or other property by employees acting alone or in collusion with others; and
- Electronic data or computer programs restoration protection covers costs to restore or replace damaged or destroyed electronic data or computer programs, stored within the insured's computer system, resulting from a virus or vandalism by a person who has gained unauthorized access.

COVERAGE – APPLICATIONS



Underwriters will require the following when reviewing a submission:

- D&O/EPL/Crime/Fiduciary application
- Financials - or - Profit/loss with balance sheet & cash flow statement
- Employee Handbook with sexual harassment policy
- Schedule of all Subsidiaries to be insured
- Private debt or equity offerings documents



Application issues:

- Warranty Statement
- Prior & Pending Statement
- Date of application
- Financials – (Unaudited – Audited)

MARKET



Throughout 2009, carriers competed for the private company account and we anticipate the trend to continue through most of 2010. This market is inundated with competition and capacity, with a number of new players entering the market just this month.

The increase in demand is basically associated with the fact that many private companies have witnessed the demise of the public sector and have come to realize the need to protect themselves from a similar fate.

While many anticipate the demand will be a bit tempered in 2010 by the economy's impact on businesses, with many private companies going under or cutting back on costs, brokers who understand the merits and cost benefits of the coverage can show the value.



Key market facts:

- ❑ Premium growth for 2009 was essentially flat even though competition was strong
- ❑ Rates were down 5 to 10 percent for good insureds, a bit more (10 to 20 percent) for the most attractive and aggressive insureds
- ❑ Deductibles were flat in 2009
- ❑ Reinsurance support was flat and did not tighten on 2010 contracts that renewed thus far.
- ❑ Coverage terms may start to tighten in late 2010

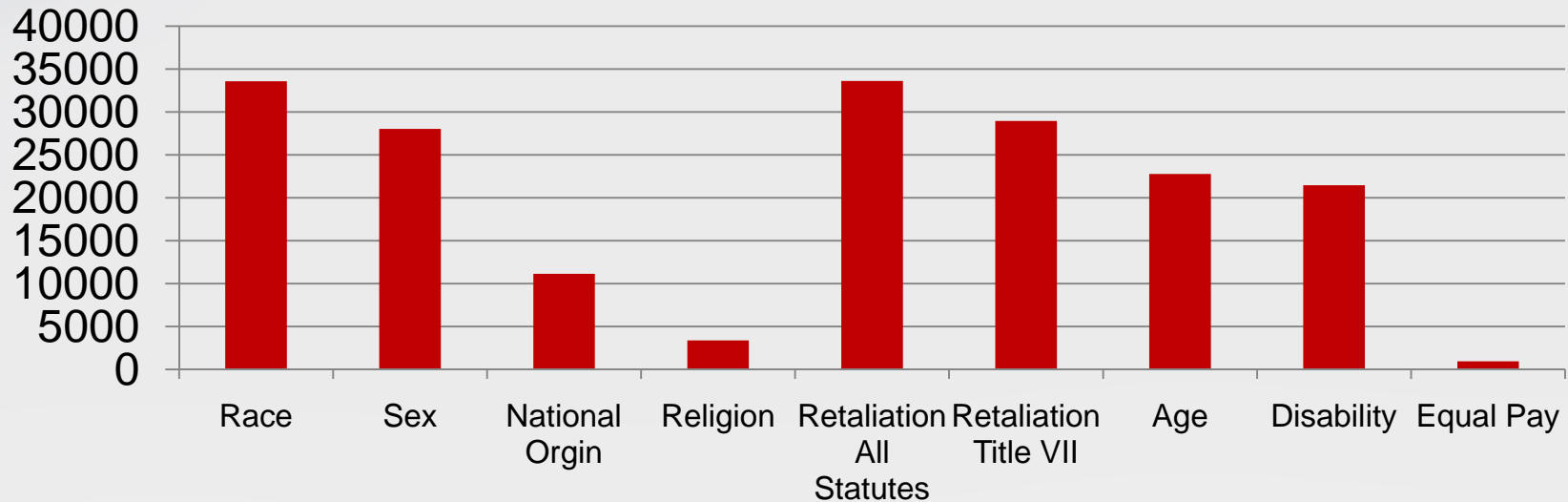
CLAIM EXAMPLES



Defense costs and settlement for the individually named defendant exceeded \$180,000.

Non-Entity EPL: Plaintiff agreed to help form and work for a company as its Chief Operating Officer. He alleges that his employment was terminated without cause. Further, it is alleged that the company hindered his attempt to find new employment by telling third parties that the plaintiff is prohibited from using trade secrets and intellectual property that allegedly belongs to the company. A complaint was filed against the company and a D&O which included causes of action for breach of contract, and unfair and deceptive trade practices.

CLAIM EXAMPLES



2009 EEOC FILINGS

(Source U.S. EEOC Statistics)

CLAIMS EXAMPLES



Relying on pre-hire background checks and untested internal controls, employers feel employee theft and fraud will not happen in their workplace or that misconduct will be spotted well before it becomes a costly problem. Statistics prove otherwise. It is estimated by the ACFE that American businesses lose 7% of their annual revenues to fraud. Applied to the projected 2008 U. S. Gross Domestic Product, this figure translates to approximately \$994 billion in fraud losses. The basic types of occupational fraud asset misappropriation include check forgery, theft of money, inventory theft, payroll fraud or theft of services, bribery and corruption in the form of kickbacks, shell company schemes, bribes, manipulation of contracts or substitution of inferior goods, and financial statement fraud through the manipulation of financial statements in order to create financial opportunities for an individual or Entity. These cost companies, on average, \$175,000 to \$2 million on a per fraud or per scheme basis. All these losses predicate another sobering statistic: employee theft is responsible for 33% of all business bankruptcies, as recorded by the Department of Commerce.

CLAIM EXAMPLES



FIDUCIARY LIABILITY

MISHANDLING OF FUNDS

A particular state department of labor advises a company that it may commence a lawsuit against it for the funds that it allegedly lost from its 401(k) Plan. The company reportedly transferred the funds from a 401(k) plan managed by one company to another.

This situation settled without a lawsuit being brought against the company, but the defense costs exceeded \$25,000.

CLAIM EXAMPLES



FIDUCIARY LIABILITY

ERISA VIOLATION

The plan fiduciaries for a 401(k) Plan received a letter from DOL advising them that after an extensive investigation, it appears that they have violated several provisions of ERISA. The DOL alleges the plan fiduciaries: did not forward amounts withheld from employees on a timely basis; improperly allowed the plan to make loans to shareholder-employees; make delinquent employer contributions to the plan; failed to make timely distributions to terminated employees; and filed Annual 5500 Reports which falsely indicated that the plan was funded in accordance with the minimum funding requirements of ERISA.

Total defense costs and settlement exceeded \$250,000.

CLAIM EXAMPLES



FIDUCIARY LIABILITY

IMPRUDENT INVESTMENT DECISION

The trustees of an Employee Stock Ownership Plan (ESOP) were sued by the Department of Labor (DOL) and company employees who faulted the fiduciaries for making imprudent investment decisions. The court ultimately found the fiduciaries failed to conduct impartial reviews of investment options.

The suit finally settled for \$1,000,000.

CLAIM EXAMPLES



Total defense costs and settlement exceeded \$800,000.

Breach of Fiduciary Duty: A private company agrees to perform market research for a start-up company in the material management industry. In exchange for their services, the company allegedly agrees to pay the private company \$20,000 in cash and 5% of the privately placed issued shares in the company. The company denies that they explicitly or implicitly agreed to pay the private company in stock. The plaintiffs allege several causes of action, including breach of fiduciary duty.

CLAIM EXAMPLES



Total settlement and defense of the individually named defendants exceeded \$100,000.

Creditor Claim: Plaintiff filed a complaint against individual D&Os of a company alleging that its CEO, CFO, & COO conspired to use the plaintiff's services to furnish, install and repair the company's equipment knowing that it was insolvent and was planning to file for bankruptcy protection. Causes of action included: (1) fraud, misrepresentation and non-disclosure; (2) deceptive trade practices; and (3) civil conspiracy.

CLAIM EXAMPLES



Settled for over \$1 million and defense costs exceeding another \$1.4 million.

Class Action Complaint: Plaintiffs represent a class of non-insider stockholders who invested in the company. Plaintiffs allege that certain directors and officers failed to disclose material facts and provided them with inaccurate and misleading information. It is alleged that the materials did not disclose the high turnover of management and that the company's website had not yet been developed. The company later went bankrupt. The complaint included causes of action for: (1) common law fraud; (2) negligent misrepresentation; and (3) breach of fiduciary duties.

CLAIM EXAMPLES



The matter is currently being defended and defense costs have exceeded \$200,000.

Conspiracy & Negligence: A professional wrestler who competes in a wrestling circuit files a complaint against the organization - and its D&Os - which procures the talent for individual events across the country. Plaintiff alleges that he was excused by the organization from appearing at an event due to an illness in his family. The organization allegedly deemed that he was not properly excused pursuant to its rules and was suspended for a period of over one year. Plaintiff alleges that the suspension was done in an arbitrary manner and violated his contract. Plaintiff further alleges that his suspension was done in a conspiratorial manner in order to stifle competition. The plaintiff alleges the following causes of action: (1) breach of contract; (2) negligence; (3) fraud; (4) interference with prospective economic advantage/business relations; (5) conspiracy; (6) and intentional/reckless infliction of emotional distress. Plaintiff is not an Employee as defined by the policy.

CLAIM EXAMPLES



Defense and settlement of this matter exceeded \$1 million.

Dispute Over Inventorship: An inventor filed a complaint against a research and development company specializing in medical devices alleging that the company was founded by his former partner for the purpose of stealing his highly valuable and uniquely innovative technology. This technology was the subject of a patent application which listed the plaintiff as the sole inventor. Plaintiff's former partner, in charge of securing the patent, allegedly informed the plaintiff that he must also be listed as a co-inventor for the patent to be filed. When the plaintiff refused, his former partner withdrew the application. With the partnership subsequently liquidated and the application abandoned, the former partner immediately formed a new company and filed a new patent application virtually identical to the plaintiff's, but listed the former partner as the sole inventor. In his complaint, plaintiff alleges that the company and its D&O (his former partner) misappropriated technology that he developed, and utilized it to establish the research and development company. Plaintiff asserts causes of action for: (1) fraud; (2) negligent misrepresentations; (3) breach of fiduciary duty; (4) conversion; and (5) successor liability.

CLAIM EXAMPLES



*Total
defense
costs and
settlement
exceeded
\$350,000.*

Competitor Disputes: The plaintiff filed a complaint against their competitor alleging that a former employee, now working at the competition, engaged in unauthorized use of confidential and proprietary information and committed other acts of unfair competition. As a result, the plaintiff alleges it has suffered irreparable and immediate injury. In addition, the plaintiff alleges that the defendant has possession of its confidential information and intellectual property. The plaintiff asserts causes of action for: (1) misappropriation of trade secrets and confidential information; (2) violation of the Computer Fraud and Abuse Act; (3) unlawful access to stored information; and (4) unfair competition. The plaintiff seeks: (1) attachment of a computer server; (2) attachment of certain files and documents; (3) injunction - preservation; (4) injunction - proprietary information; (5) injunction – surrender of possession; (6) injunction - non-compete; (7) compensatory damages; (8) exemplary and punitive damages; and (9) attorneys' fees and costs.

CLAIM EXAMPLES



The defense and settlement of this case exceeded \$500,000.

Shareholder: The plaintiff alleges that certain directors have exerted complete domination and control over the company and used the company as a vehicle for their own business purposes at the expense of the company and minority shareholders. Specifically, the plaintiff alleges that certain directors helped to renegotiate a service contract and booked all of the revenue during one quarter instead of over the three year life of the contract. The plaintiff also contends that this service contract received steep discounts and would cause other customers to request similar discounts resulting in lost revenue to the company.

CLAIM EXAMPLES



This claim is currently being defended and defense costs have exceeded \$450,000.

Misappropriation of Trade Secrets: A wholesale supplier and distributor of food products meets with a sales representative of a new product line they are considering. The sales representative communicated that in order to develop a long-term exclusive relationship within the designated territory, the wholesaler must provide her with information regarding its business operations, customers, and trade secrets. Later on, the sales representative opened her own wholesale distributorship within the same territory.

CLAIM EXAMPLES



Total defense costs and settlement exceeded \$350,000.

Breach of Investment Agreement: A company enters into an investment agreement with a third party and agrees not to negotiate with other entity regarding financing or a potential acquisition for a two week period. During the exclusivity period, the company engages in negotiations with another investment group. The third party alleges breach of investment agreement and intentional and negligent misrepresentation.

CLAIM EXAMPLES



Total defense costs and settlement exceeded \$500,000.

Shareholder Derivative Action:

A shareholder derivative action is taken against a company for breach of fiduciary duties on behalf of the directors. The plaintiffs contend that the defendants have failed to provide them with certain information, such as shareholder listings, financial data and other corporate records. They also allege that certain directors borrowed money from the company without the Board's approval and subsequently, these loans were forgiven.

CLAIM EXAMPLES



Total defense costs and settlement exceeded \$1,000,000.

Misrepresentation/Deceptive Trade Practices: A private software company represents that it can write software for a major corporation according to the corporation's specifications; provide maintenance services for four years; and execute updates and upgrades to the software. The private company misses key delivery dates. The software fails key functionality tests and ultimately crashes and becomes inoperable. The corporation decides to withhold payments until certain milestones are met. The private software company allegedly indicates to the corporation that it needs the payments in order to remain solvent. The plaintiff alleges that the private software company represented that it could produce the software and that it was a financially stable company. The plaintiff alleges the following causes of action: misrepresentation and deceptive trade practices and breach of covenant of good faith and fair dealing.

CLAIM EXAMPLES



After an extensive trial, the allegations were dismissed due to lack of circumstantial evidence, but the defense costs and fees incurred were in excess \$750,000.

Government Agency:

The federal government sued the CEO, the President and other officers of an East Coast manufacturing company for price fixing.

CLAIM EXAMPLES



*Total
defense
costs
exceeded
\$250,000.*

Deceptive Trade Practices: A private company that manages and runs a major natural resource receives a claim against the company and various members of the board of directors. The plaintiff alleges that the board of directors have used their position for their own private benefit and personal advantage, and for the benefit and advantage of their private employers. The plaintiff also alleges that the board of directors assigned a valuable contract without receiving any consideration. The plaintiff further alleges that such assignment also constitutes misappropriation of valuable assets for the benefit of private party in violation of state codes.

CLAIM EXAMPLES



Total defense costs and settlement exceeded \$500,000

Inaccurate Disclosure: A class action suit was commenced by various investors who participated in an internet startup company's Private Placement that raised in excess of \$5 million to fund capital expenses, to provide working capital and to cover operating losses. An investigation made by and through counsel, primarily from corporate records and public records and documents, shows that the Private Placement Memorandum contained an unaudited year end balance sheet and statement of profits and losses which were materially misleading.

CLAIM EXAMPLES



The plaintiff agreed to accept the company's offer to convert the promissory note to stock in the company, but the defense costs exceeded \$100,000.

Inadequate Financial Reporting:

A technology company received a complaint from an investor who alleges the company improperly induced the plaintiff to issue a note payable to the company. The plaintiff specifically alleges the company made false representations and other false statements regarding the company's forecasted rate of growth and failure to disclose its tax lien. The company defaulted on the promissory note when it failed to make the required principle and interest payments. The plaintiffs issued a demand letter and filed suit against the company.

CLAIM EXAMPLES



Total defense costs and settlement exceeded \$250,000.

Loan Default: A diversified sports product company received a lawsuit against the President, CEO, and Chairman of the Board for not honoring a promissory note. The plaintiff alleges that it lent \$1 million to the company. The company allegedly agreed to pay the funds back within a month pursuant to the promissory note. Despite requests for return of the money, plus interest, the company has not returned the funds to the plaintiff.

CLAIM EXAMPLES



*Total
defense
costs and
settlement
exceeded
\$750,000.*

Foreclosure/Unfair Competition: A shareholder commenced a derivative action against the president of a company which develops and markets chemical compounds, after all its assets were sold. The company entered into an agreement to allow a corporation to test and evaluate its compounds. The corporation subsequently received various patents for the compounds; however, it refused to enter into a licensing agreement with the company. The plaintiff concludes that the company can assert causes of action against the corporation for: breach of contract; breach of fiduciary duty; misappropriation of trade secrets; unfair competition; fraudulent concealment; and intentional misrepresentation. The plaintiff also alleges the company series B shareholders did not approve certain loans. Subsequently, after the company defaulted on the loans, the president decided to execute a foreclosure sale of the company's assets and he advised the shareholders that he is resigning. The plaintiff alleges that the president did not promptly advise the shareholders of the foreclosure sale and he breached his fiduciary duties when failed to have the Company commence litigation against the corporation that was retained to test its compounds. The complaint is comprised of four causes of action, including: (1) negligence, (2) breach of fiduciary duty; (3) concealment; and (4) unfair competition.

CLAIM EXAMPLES



Damages alleged in the lawsuit exceeded \$15 million.

Shareholder Claim: A Midwest domiciled home products company retained an independent research firm to evaluate its new home product. Based on a favorable review by the outside firm, the company raised in excess of \$10 million for the production and marketing of the new product. Prior to releasing the product, the company's internal evaluation team discovered, after extensive testing, that the new product did not work properly. Shareholders have brought suit against the company and the directors and officers for misrepresentation in the offering documents. The plaintiffs assert causes of action for violation of various state securities laws and the Securities and Exchange Act of 1934.



BLAIS CLICKQUOTES

A special quoting program has been developed that allows agents to go online to develop a quote for Executive Line products.

The quoting program is called “ClickQuotes”. The quoting carrier is Scottsdale Insurance Company. Just type www.blaisexcess.com and click on ClickQuotes



QUESTIONS/ANSWERS

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Listed below are various questions that were raised during the seminar and the answers provided by the Blais panelists:

- **QUESTION:** Under Employment Practice Liability – is an EEOC complaint a covered claim? **ANSWER: Yes** – it is important to key in on the definition of claim and the notice provisions of the policy. Many agents and insureds fail to notice these situations and often are denied coverage under the late reporting provision of a policy. In addition, there are circumstances where coverage can be denied under a prior & pending exclusion endorsement when coverage was moved from carrier to another and/or under an updated warranty statement.
- **QUESTION:** Employee Benefit Liability (Part of GL) – if I have it and also purchase Fiduciary should I drop the EBL? **ANSWER: No** – while the coverage has some overlap, the cost of the EBL is minimal and should be preserved.

QUESTIONS/ANSWERS

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• **QUESTION:** Can you touch on some of the added values an organization has if it carries a D&O policy and the organization is sold during the policy period.

ANSWER: A D&O policy is a form of Reps & Warranty cover (albeit it is not fact specific), runoff terms can be secured and the coverage serves has a contingent liability value that makes all parties (buyer & seller) feel comfortable .

• **QUESTION:** Should we always select a form that has defense "in addition to" vs one that has "defense part of" the limit of liability? **ANSWER:** When selecting a form a number of factors should always be considered such as cost, capacity, continuity and coverage. The selection of coverage should not pivot off one given coverage issue. With respect to the issue of "defense in addition to" position offered by some carriers, it should be noted that it is rare that a carrier will allow an insured to utilize both defense limits and payment limits if in fact defense is in addition to.

QUESTIONS/ANSWERS

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- **QUESTION:** Is General Partnership Liability the same as Directors & Officers Liability? **ANSWER:** No – The standard D&O policy does not contain the proper wording (unless endorsed to do so) that covers general partner exposures.
- **QUESTION:** When will a company not indemnify a director or officer? **ANSWER:** A company can refuse to indemnify a director officer or employee if it is financially unable to fund a claim, its indemnification agreements do not allow or it just flat refuses to do so and/or the law prohibits it to do so (certain derivative claims).
- **QUESTION:** Is a public debt offering covered under a Private Company D&O form? **ANSWER:** Most private company D&O policies do not cover a public offering of any type. Most are restricted to private offerings only, and some exclude all types of offerings.



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