



# Fiduciary Liability:

Current Trends in Claims,  
Litigation and Placement

*Presented By:*  
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*Hays Companies, Inc., an owned  
subsidiary of Brown & Brown, Inc.*



# Presentation Agenda



1

**Claim Trends and Issues**

2

**Litigation Environment**

3

**Policy Placement Issues in the Marketplace**

4

**Q&A**

# Panelists



**Aaron Stone**

*Brown & Brown, Moderator*



**Jane Hahn**

*Brown & Brown, Panelist*



**James Hynes**

*Travelers, Panelist*



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*Morgan, Lewis & Bockius, LLP, Panelist*



**01**

# **Claim Trends and Issues**

# Fiduciary Liability Overview

**ERISA:** The Employee Retirement Income Security Act of 1974 (ERISA) is the U.S. statute which regulates privately sponsored pension and welfare benefits provided for employees and their beneficiaries. The federal law sets the minimum standards for most voluntarily established retirement and health plans in the private sector to provide protection for individuals and beneficiaries of these plans.

## Who Is A Fiduciary?

- The ERISA definition of a fiduciary is very broad. It is any person so named in the plan or any person who exercises any discretionary authority or control with respect to the management or administration of the plan or its assets.

## What Exposures Do Fiduciaries Face?

- The rules and regulations of ERISA include strict guidelines for fiduciaries. Failure to comply can result in lawsuits from employees, former employees, and beneficiaries, as well as the Secretary of Labor, Treasury Department, and Pension Benefit Guarantee Corp. The sponsor corporation as well as the individual fiduciaries are at risk.

## What Is A Wrongful Act?

- A Wrongful Act includes any violation of the responsibilities, obligations, or duties imposed on fiduciaries by the Employee Retirement Income Security Act (ERISA), as well as acts, errors, or omissions in the performance of the duties of the plan administrator.

## What is an ERISA Bond?

ERISA mandates the purchase of an ERISA bond which protects plan assets against employee theft. This is not part of a Fiduciary Liability policy, but rather a separate Crime/Fidelity Bond policy.

## What Is Fiduciary Liability?

- Fiduciary liability provides coverage for loss that the insured becomes legally liable to pay for any alleged wrongful act by such insured or by any other person for whom the insured is legally responsible.

It also covers the defense costs in connection with a covered claim. The policy is written on a claims made form.

## Why Purchase Fiduciary Liability Insurance?

- Most fiduciaries are unaware of their personal financial risk or that of the sponsor organization. Fiduciary liability coverage provides one way of reducing the risk and providing protection for the sponsor organization and individual fiduciaries.

# Fiduciary Liability Overview

## What Is Considered An Employee Benefit Plan?

- ERISA also has a broad definition of what is considered an employee benefit plan. It includes any plan, fund, or program established or maintained for the purpose of providing employee benefits to its participants or beneficiaries.

## Who Is Insured?

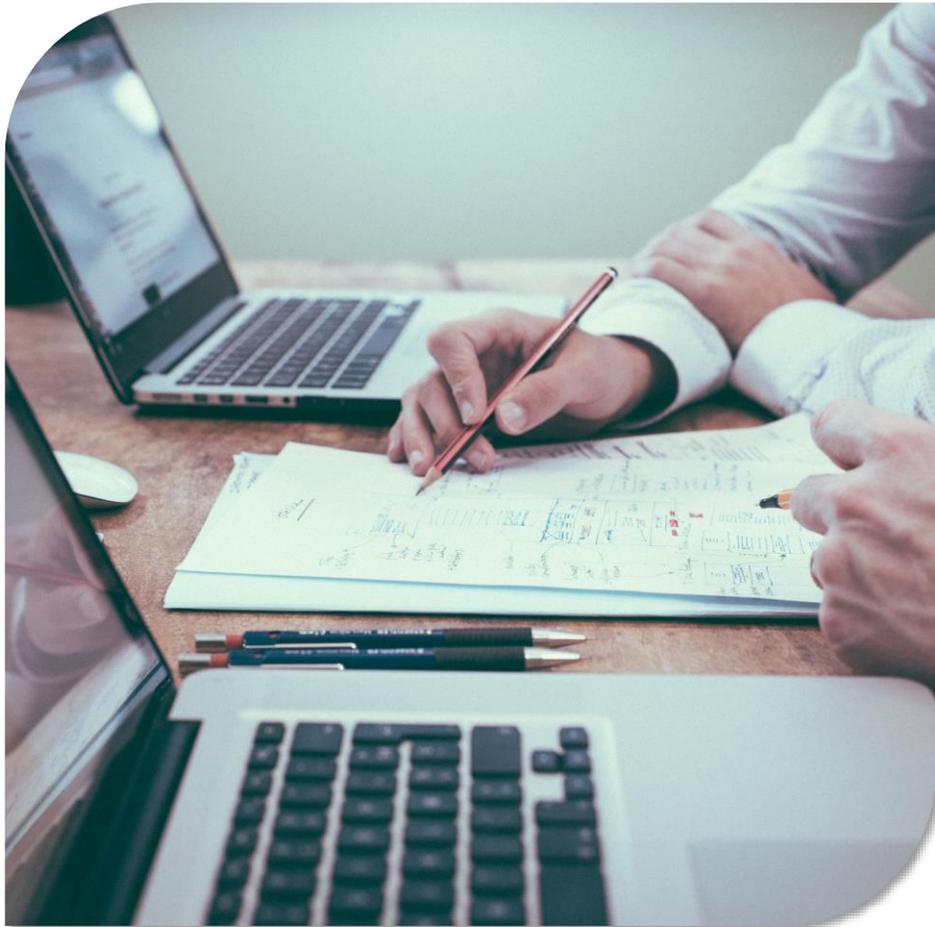
- Under a fiduciary liability policy, the insured includes the following:
  - The sponsor organization
  - The plan(s)
  - Any natural person in his / her capacity as fiduciary or administrator of the plan(s)
- Typically, ESOPs and multiemployer plans must be scheduled for coverage to apply

## What Does The Policy Pay For?



# Claim Trends and Issues

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## Common Types of Claims

- Mismanagement of Plan Assets
  - » Maximize returns/mitigate losses
  - » Excessive Fees
    - Most common type
    - Class actions
- Benefits Claims
  - » Defense costs coverage only
- Non-Benefits Monetary Claims
- Settlor Claims
  - » Business decision regarding Plan
- Failure to Enroll and other issues in the administration of benefits

# Claim Trends and Issues

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- **Common Coverage Issues**
  - » Who is alleged to have acted wrongfully, and in what capacity?
  - » What is considered a Covered Plan?
  - » Duty to Defend v. Indemnity
  - » Selection of Counsel
  - » Benefits Due Exclusion
- **Claim resolution issues**
  - » Settle v. Defend
- **Other issues**



**02**

## **Litigation Environment**

# Litigation Environment

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- Increased volume of Claims
  - » By Type of Claim
  - » By Jurisdiction
    - Traditional difficult jurisdictions
    - Emerging challenging jurisdictions
    - Forum shopping
  - » Aggressive plaintiffs' bar
  - » Size of Company
- Impact on settlements and verdicts



**03**

## **Policy Placement Issues in the Marketplace**

# How Do Insurers Assess the Risk?

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## HOW IS IT UNDERWRITTEN?

Plan Type / Total Plan Assets

Diversity & Profitability of Investment Options

Total Number of Plan Participants

Cost per Plan Participant

Prior Claims / Litigation

Employee Stock Ownership Plan Exposures

Multi-Employer Plans

Financial Condition of Sponsor Organization

# Placement Issues

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- Insurer response to Claim Trends and Losses
  - » Excessive Fee/Multi-Party SIR
  - » Capacity Management
  - » Impact on Premium
- Actions to reduce UW scrutiny
- Terms and Conditions negotiations
  - » Exclusions
  - » Sublimits
- Challenges in building larger programs



04

## Questions and Answers





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