

Fiduciary Liability PLUS+SM

Excuses, Excuses, Excuses

There are plenty of excuses for not purchasing a fiduciary liability policy. Let's take a look at some of them.

WE HAVE A 401(K) PLAN AND OUR EMPLOYEES MAKE THEIR OWN INVESTMENT DECISIONS, SO WE DON'T HAVE ANY EXPOSURE, RIGHT?

Actually, **YOU DO HAVE EXPOSURE**. Plan fiduciaries can never fully insulate themselves from liability under ERISA, the federal law that governs employee benefit plans. **EVEN WITH A PARTICIPANT DIRECTED 401(K) PLAN**, fiduciaries can be held liable for a variety of reasons including the determination of what investment options to include in the plan, monitoring those investment options and educating employees on those options.

MY FIDELITY BOND WILL COVER ANY EXPOSURE I MAY HAVE.

Think again. The majority of plan fiduciaries believe that their ERISA mandated fidelity bond protects their personal assets. It doesn't! That bond protects the plan from loss due to theft by the fiduciaries; it doesn't cover fiduciaries and it doesn't cover claims for breach of fiduciary duty. St. Paul Travelers Bond's Fiduciary Liability PLUS+SM policy specifically **COVERS THE PLAN FIDUCIARIES' PERSONAL ASSETS** in the event of an allegation of breach of fiduciary duty or errors in the administration of employee benefit plans.

MY COMPANY BUYS AN EMPLOYEE BENEFITS LIABILITY (EBL) ENDORSEMENT TO ITS COMMERCIAL GENERAL LIABILITY POLICY AND THAT'S ALL THE COVERAGE I NEED.

Not exactly. The EBL endorsement was designed primarily to provide limited coverage for administrative errors and omissions for benefit plans. EBL endorsements typically contain many exclusions that eliminate coverage for things that give rise to personal liability on the part of a plan fiduciary like breach of fiduciary duty.

ALL OF MY COMPANY'S PLAN INVESTMENT ACTIVITIES ARE HANDLED BY A BANK, INSURANCE COMPANY, PROFESSIONAL INVESTMENT FIRM OR TPA, SO WE'VE TRANSFERRED THIS RISK.

Not quite. Plan fiduciaries cannot transfer their responsibilities to another party. While fiduciaries can take steps to reduce their personal liability by hiring a competent team of experts, the fiduciary remains ultimately responsible for the management and administration of the benefit plans. Simply put, the fiduciaries may still be on the hook if the TPA does something wrong. **DELEGATING** management or administration of a plan to a bank or other TPA **DOES NOT ELIMINATE THE FIDUCIARIES' EXPOSURE**.

MY COMPANY CAN'T AFFORD TO PURCHASE THIS COVERAGE AND IT'S PROBABLY COVERED IN OUR D&O POLICY.

Check that policy carefully. You may be surprised to find that fiduciary liability exposures and claims under ERISA are expressly excluded. And as for affording the coverage, you may want to check that, too. Fiduciary liability coverage is **REMARKABLY AFFORDABLE**. Weighing the cost of this policy against the prospect of personal liability will probably bring you to the conclusion that you can't afford not to buy it.

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Examples of Claims Against Plan Fiduciaries

With your personal assets at risk, could you afford to pay these claims? Consider the following claims examples...

\$250,000

Employees sued the plan fiduciaries alleging that they breached their fiduciary duties by providing an option to invest in a guaranteed investment option backed by a poorly performing insurance company. They further alleged that plan fiduciaries **BREACHED THEIR DUTY OF DISCLOSURE** by providing misleading or incomplete communications to participants. The case eventually settled for \$250,000.

\$858,000

Legal action brought by employees alleged the wrongful elimination of a profitable investment option and improper selection of another and **FAILURE TO MONITOR** the actions of the outside investment manager. Defense costs were \$358,000 and the jury awarded the plaintiffs \$500,000 in damages.

\$400,000

Plan participants alleged that the fiduciaries of a **401(K) PLAN** had failed to divest the plan of an investment option that was not keeping pace with the performance of the comparable index and **RESULTED IN POOR RETURNS**. The case settled for \$250,000 after \$150,000 in legal fees had been spent.

\$350,000

Two employees approaching retirement age discovered they had never enrolled in the company's 401(k) plan. The employees sued the company and plan trustees alleging the plan **ADMINISTRATORS FAILED TO PROPERLY ADVISE** them how to enroll and the enrollment was not automatic. The value of the alleged lost benefits exceeded \$150,000, and defense expenses were in excess of \$200,000.

\$1,250,000

A group of employees alleged that the newly selected outside plan administrator **IMPROPERLY DELAYED TRANSFERRING FUND BALANCES** in the plan from one investment option to another, as directed by the participants. Subsequently the employees sued the plan trustees to recover more than \$1,000,000 in lost investment income. Defense expenses were \$250,000.

\$440,000

Trustees of a profit sharing plan were accused of improperly concentrating plan investments in a single industry and in a limited number of stocks. The plan fiduciaries were found to have breached their fiduciary duties by **FAILING TO DIVERSIFY** the plan's investments. Damages were \$320,000 and legal fees were \$120,000.

\$530,000

Participants of a health plan sued the plan's trustee alleging that the **TRUSTEE DID NOT MONITOR** the performance of its third party administrator (TPA) and paid excessive fees. Damages and defense expenses totaled \$530,000.

\$120,000

Due to a miscalculation by plan fiduciaries, the plan was under-funded and benefit payments were incorrect. **THE DEPARTMENT OF LABOR** found plan fiduciaries had breached their fiduciary duties and made a 502(l) assessment against them for which they were personally liable in the amount of 20% of the recoverable funds.

\$550,000

Trustees of six plans were accused of **IMPROPERLY INVESTING PLAN ASSETS** in a residential real estate development loan that defaulted. The trustees were found to have failed to evaluate the borrower's creditworthiness and determine the economic feasibility of the project. Damages and defense costs totaled \$550,000.

\$600,000

Fiduciaries of a 401(k) plan failed to notify retirees of a **BLACKOUT PERIOD** that occurred to accommodate a switch to a new administrator. The retirees were unable to change their investment options during that period and brought suit claiming that had they been notified they would have moved their funds prior to the blackout. The settlement was \$600,000.

The above illustrate potential loss scenarios, and are based on actual claims or hypothetical examples. Insurance policy coverage ultimately depends upon the facts of each case and the terms, exclusions and limitations of each policy. This coverage may not be available in all states.