

FURMAN KORNFELD & BRENNAN LLP

**Are You Covered?
Risk Management & Insurance
for Professional Fiduciaries**

Andrew R. Jones, Esq.
Lawrence D. Hilton, Esq.
Ashley L. Glazewski, Esq.

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Introduction

Who Are we? ...And What Prompted this Session?

Overview

- i. Common Claim Scenarios
- ii. Understanding Insurance Terms that are Relevant/Important to Fiduciaries;
- iii. Knowing What to do and Expect in the event of a Claim or Potential Claim;
- iv. Avoiding Claims and Disputes - Risk Management.

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I. Common Claim Scenarios

- ▣ Many of the claims against fiduciaries arise from similar circumstances often involving a dispute between a family member of the ward/protected person and the insured assigned as fiduciary/trustee/conservator/etc.
- ▣ Common claim (and potential claim) scenarios include:
 - ▣ *Objections to Accountings*
 - ▣ *Petitions for Removal*
 - ▣ *Allegations of mismanagement of assets/funds*
 - ▣ *Requests for reimbursement of fiduciary/attorney's fees*

II. Understanding Insurance Terms that are most Relevant/Important to Fiduciaries

- ☐ Purchasing Appropriate Coverage:
 - ☐ Limits, Premiums, Deductibles.
- ☐ What does it Cover?
 - ☐ "Professional Services";
 - ☐ Scope;
 - ☐ Changes in Practice.
- ☐ Some things are Excluded:
 - ☐ Intentional Acts/Fraud (defense costs provided);
 - ☐ Insured vs. Insured;
 - ☐ Grievance Proceedings (defense allowance provided);
 - ☐ Reimbursement of Professional Fees.

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Claim Notification and Reporting

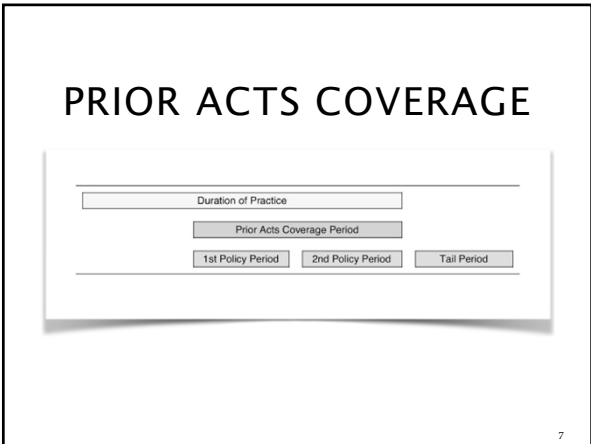
- ☐ Claims Made and Reported" Coverage.
 - +What Constitutes a "Claim"?
 - +Policy Language Controls: "...a demand received by the Insured for money or services, including the service of a lawsuit."
 - +Written v. Oral Demand.
- ☐ Notice of "Circumstances that May Lead to a Claim";
 - +Acts, errors or omissions that could be reasonably expected to lead to a claim (objective standard).
 - +Locks in coverage – claims later made based on those circumstances go back to date of notice.
- ☐ How does that relate to my "Retroactive Date?"
- ☐ The Insurance Application talks of Claims and Circumstances (Potential Claims). Why is the Application Important?
- ☐ "Misrepresentation" in the policy application, "Late Notice" to your insurer - be careful; call the Hotline!

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	Issue Type of concern	Call Hotline for Guidance?	Notify Insurer of Potential Claim or Claim?
1	Lawsuit naming Fiduciary		√ ¹
2	Petition for Removal ²	√	√
3	Letter Complaining ³	√	
4	Letter Complaining and asking for \$ back directly from Fiduciary ⁴		√
5	Objection to and request for revised Accounting ⁵	√	
6	Request for revised Accounting and do not charge fees ⁶		√
7	Request for revised Nursing Home contract and do not charge fees ⁷		√
8	Lawsuit naming Fiduciary, in capacity as Trustee or Guardian ⁸	√	
9	Fee claim (by or against Fiduciary) ⁹	√	
10	Other Affirmative Petition (by Fiduciary) ¹⁰	√	
11	Telephone Call and/or Threatening Voice Message ¹¹	√	

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III. Timely Notice/How to Proceed If A Claim Occurs

- ☐ Notice “immediately” or “as soon as reasonably practicable” (see your Policy).
- ☐ Notice to Insurer NOT your counsel or local broker.
- ☐ Insurer will Typically have “Claims Counsel” or “Coverage Counsel” contact you.

Coverage Counsel’s Role

- ☐ Check Policy Dates; Retroactive Date; Information in the Application.
- ☐ Questions regarding the Claim/Potential Claim.
- ☐ Help plan resolution Strategy;
- ☐ “Reservation of Rights” Letter;
 - ☐ *“The duty to defend is broader than the duty to indemnify”.*
 - ☐ E.g. Intentional Acts/Fraud;
 - ☐ E.g. Reimbursement of Professional Fees.

Other Significant Provisions

- ☐ Consent to Settle:
 - ☐ Carrier's participation;
 - ☐ Insured's right to settle.
- ☐ Typical Policy Clauses:

"... If the Insured refuses to consent to any settlement recommended by the Carrier, the Carrier may withdraw from the defense by tendering control of the defense to the Insured, and the Insured shall thereafter be obligated to pay all Costs, Charges and Expenses and defend such Claim independently of Carrier."
- ☐ Assistance and Cooperation.
- ☐ Extended Reporting Period ("ERP")/Retirement.

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IV. Avoiding Claims and Disputes - Risk Management Overview

1. Client Intake & Matter Screening (sample "Checklist" provided);
2. Engagement Letters (sample provided);
3. During Representation - Memorializing "Key" Decisions;
4. Proper Withdrawal/Disengagement (sample provided).

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Conclusion

1. Be familiar with your Policy.
Know the key terms of your Policy and any endorsements.
2. Report Claims and Potential Claims to your insurer.
Call and ask your insurer or broker if you have any questions.
3. Be a good communicator.
Both with your insurer and any appointed defense counsel.
4. View your insurer as your business partner.
5. Practice Smart.
You can easily build Risk Management habits into your daily routine and use them to practice better and promote your business.

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Questions?

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