

# **Fiduciary Liability Insurance: Protection for Trustees of Public Pension Funds**

Timothy Bowen – Mesirow Insurance Services  
William K. Cavanagh – Ullico Inc.

Moderator: Jerry J. Marzullo, Esq. - Puchalski  
Goodloe Marzullo, LLP

# Agenda

- **Liability trends for public fund trustees**
- **Gaps in protection**
- **Fiduciary Liability insurance**

# Fiduciary Liability Trends

- **Public pension plans are under attack**
  - Media
  - Legislators
  - Taxpayers with pension envy in tough economy
  - Class action lawsuits

# Misconceptions

- **Governmental plan trustees often have two dangerous misconceptions:**
  - That ERISA fiduciary standards do not apply to them; and
  - That they are protected by sovereign immunity
- **The reality:**
  - Governmental trustees are held to high fiduciary standards similar to the federal ERISA duties; and
  - State law contains significant limits on indemnification protections for governmental fiduciaries

# Gaps in Protection

- **Limited Liability**

- Most states provide some form of protection to government plan fiduciaries, either through the statute governing the retirement system or generally through the state's sovereign immunity law.
- But most state statutes have gaps in fiduciary liability protection.

# Fiduciary Liability Insurance

- **Approximately twenty states, expressly authorize the purchase of fiduciary liability insurance for plan trustees – most other states are silent on the topic.**
- **The purpose of such insurance is to “protect the board and the state from liability to others and from loss of trusteed assets due to the acts or omissions of the trustees.”**

# **Fiduciary Liability Insurance: Who is Insured?**

- **Named Insured**
- **The Pension Fund and/or Retirement Fund**
- **Past, present and futures trustees, fiduciaries, directors and officers (including spouses and legal estate representatives).**
- **Past, present and futures employees, staff, plan administrators (including spouses and legal estate representatives).**

# Fiduciary Liability Insurance: What is Insured?

- **Insured Wrongful Acts**
  - Breach of Fiduciary duties; violation of the responsibilities, obligations or duties imposed by state or municipal pension codes (or similar such Pension Code)
  - Any act, error or omission in the performance of counseling participants, providing interpretations, handling records or effecting enrollment
- **Coverage Extends to:**
  - Written demand for monetary and injunctive relief
  - Criminal or civil proceedings commenced by service of complaint, return of an indictment and/or agency or regulatory proceeding
  - Defense costs / indemnity payments



# Common Claims

- **1. Imprudent investments, including real estate and alternative investments**
- **2. Breaches of fiduciary duty in selecting and monitoring a service provider**
- **3. Social investing**
- **4. Insufficient funding**
- **5. Dishonesty claims/Pay to Play**

# Critical Policy Features

- **Claims-Made Coverage: Do You Have Full Prior Acts Coverage?**
- **Do You Control Your Defense and have choice of counsel?**
- **Do You Have Coverage against allegations of illegal acts?**
- **Does your policy exclude specific exposures (funding, specific investments, past acts, etc.)?**
- **Does your policy include coverage for administrative errors?**

# Underwriting Process

- **Submission/Quoting Process**
  - Required: Application, Audited financial statements for pension fund
  - Markets: Ullico, AIG, Travelers, Chubb, RLI
- **Underwriting considerations that affect pricing:**
  - claim history
  - funding status
  - limits purchased
  - total assets in plan
  - how high profile a municipal pension plan may be
- **Critical Policy Features**
- **Formal Proposal of terms/conditions/pricing to Board**

# Questions

## **William K. Cavanagh**

Ullico Inc.  
202.682.6619  
bcavanagh@ullico.com

## **Timothy Bowen**

Mesirow Insurance Services  
312.595.8098  
tbowen@mesirowfinancial.com

## **Jerry J. Marzullo, Esq.**

Puchalski Goodloe Marzullo, LLP  
847.666.5680  
jmarzullo@pgm-law.com