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FKB LLP Professional Liability Update:

The following is a general guide and does not represent a complete analysis of the issues covered. It is intended to highlight matters that may be of interest to insureds, but insureds should always seek specific guidance on particular matters.

Professional Fiduciary Liability Insurance
- Evolution of a Need*

Two-thirds of the people who have ever reached 65 are alive today.[1] In other words, two out of every three people who have ever attained the age of 65 since the beginning of time, are currently alive. As startling a statistic as that may seem, it is perhaps not surprising considering that today's "older population" (those aged 65 or older), enjoy better health and financial security than any other previous generation. Indeed, according to data compiled by the Administration on Aging, in 2009: 39.6 million people aged 65 years or older resided in America, 12.9% of the U.S. population, or roughly one out of every eight Americans. By 2030, the number is anticipated to increase to 72.1 million, 19% of the population and more than double the number of people aged over 65 when compared to 2000.[2]

As average life expectancy continues to increase, so does the need for assistance-based services. Many new services have developed to assist with the special needs of retirees and persons who require additional assistance because of disabilities attributable to mental and/or physical impairment. Commonly referred to as "Fiduciaries," a fiduciary is one who for the benefit of another person accepts the responsibility for taking care of the needs or property of that person.[3] Fiduciary is a term which covers a broad variety of roles, including: Guardians,

[1]As emphasized by a recent HSBC New York City Subway 'World's Potential' advertisement. See http://www.hsbcusa.com/ourcompany/pressroom/2010/news_09302010_newyork_discover.html.

[2] See Administration of Aging http://www.aoa.gov/aoaroot/aging_statistics/index.aspx.

[3] See Arizona Fiduciary website http://www.azfid.org/content/what_is_a_fiduciary.

Conservators, Executors or Estate Administrators, Personal Representatives, Trustees, and Power of Attorneys.[4] Fiduciaries, whether serving for a fee or not, are governed by state law and must be certified by their respective state of practice. Fiduciaries may be court appointed or retained privately. Numerous seniors with family willing to assist them still prefer to appoint a Professional Fiduciary - to avoid inconveniencing family members who may be already burdened by work and home responsibilities, or may not live near the senior.

In all roles, Fiduciaries are expected to act in the best interests of their clients[5] and manage affairs solely for the benefit of the client and not for others. The element of trust becomes crucial when the person receiving fiduciary services is frail, incapacitated, or vulnerable. Most conflicts, however, arise from disputes about whether decisions were truly made in the best interests of the client and, based on our experience, are generally raised by third parties (e.g. family members unsatisfied with how the senior's care and/or finances are being managed) as opposed to by the senior themselves.

Conflicts between siblings or other relatives often place the Fiduciary in the middle of family feuds and typically make the Fiduciary an easy target to lay fault on. Claims against Fiduciaries may stem from allegations of inadequate supervision of a vulnerable adult, charging excessive fees, refusal to issue a distribution from a trust, and/or failure to safeguard funds or property of the client. We have encountered claims wherein one family member may retain a Fiduciary to perform services while another family member will file a breach of duty claim or allege a different type of fault committed by the Fiduciary. Frequently, the Fiduciary is free of fault but is nonetheless forced to defend his or her retention and innocence through litigation.

[4] In some states, conservatorships are called adult guardianships, but the terms mean roughly the same thing. A Guardian is traditionally appointed by a court to ensure that the personal and medical needs of an incapacitated person are met, while a Conservator is generally appointed by a court to manage the financial affairs of someone who is determined to be unable to manage his or her own finances or property.

[5] The terms "client" and "ward" are often used interchangeably. We understand and appreciate, however, that many Fiduciaries prefer to refer to their clients solely as "wards," further demonstrating the unique position of trust that Fiduciaries occupy.

Recently, we have seen a number of claims filed against Fiduciaries for failing to properly invest funds or for investing funds in the “wrong” stocks, despite the common downward trend in the stock market. We have seen these claims alleged by wards, distributees, and the Court itself prior to approving of a Fiduciary’s accounting. These claims try to seek justification and compensation for the downward market trend and put the Fiduciary in a position wherein they are forced to somehow “guarantee” situations which are out of their control.

Claims for breach of duty against Fiduciaries are common once the Fiduciary submits its accounting for approval, as any party may question whether a decision was in the best interests of the client. Additionally, in situations where a client has multiple children, claims may arise from sibling disagreement on what the Fiduciary’s role and responsibilities should entail. One recent claim was raised by the niece of the Court-Appointed Fiduciary’s client after the client was deemed incapable of taking care of herself by the state. The Fiduciary placed the client into a private care facility believing that this was in the best interests of the ward. The ward’s niece opposed her Aunt’s placement into the facility by petitioning the Court to become her Aunt’s Guardian. After the Court granted the niece control over the person and property of her Aunt, the niece filed a breach of fiduciary duty claim against the Fiduciary on behalf of the ward.

With this broad range of potential liability, Fiduciaries have a broad need for insurance, including fiduciary bonds, property/casualty insurance, and professional liability insurance, to protect against claims arising out of errors or omissions in rendering professional services. These insurances may be purchased from a number of providers and typically provide coverage for “any act, error or omission of the [Insured] in rendering or failing to render Professional Services [a defined term].”[6] Most policy forms require that a claim be made and reported during the applicable policy period and that adequate notification be provided to the Insurer for all potential circumstances that may later rise to the level of a “Claim.” Typical exclusions include claims made by one Insured under the Policy against another Insured under the same policy; claims seeking the return or reimbursement of fees, costs or expenses paid to the Insured; and

[6] Professional Services is defined term, usually including, “services provided by an Insured to others for a fee, unless acting as a volunteer or in an official pro bono capacity, on behalf of the Named Insured in any of the following capacities: Fiduciary, Daily Money Manager, Computer Consultant, Care Manager, or Bookkeeper.” See Fiduciary Professional Liability Insurance issued via Dominion Insurance Services, Inc. on behalf of Certain Underwriters At Lloyd’s, London.

claims arising out of commingling, conversion or misappropriation of funds, premium, escrow of tax money or other property, for personal profit or advantage.

Because of the variety of potential claims that can be raised against Fiduciaries, it appears increasingly vital for Fiduciaries to protect themselves adequately by purchasing insurance. While a number of allegations against Fiduciaries may be frivolous and/or ultimately found in favor of the Fiduciary, the cost of defense can be substantial to an independent Fiduciary. By purchasing insurance, the Fiduciary helps protect his or her interests, allowing for the Fiduciary to better focus on protecting the interests of their client/ward. In a litigious age where professional assistance of the elderly looks set to grow dramatically, the need for increased understanding of the role and significance of Professional Fiduciary Liability Insurance appears paramount.

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