



MEMORANDUM

To: BWC Board of Directors

From: James A. Barnes, Chief Legal Officer and General Counsel, BWC

Date: December 14, 2009

Re: Fiduciary Liability Insurance Coverage

This memorandum summarizes the existing fiduciary liability insurance coverage for the BWC Board of Directors and its members.

I. BACKGROUND

The statutory basis for providing coverage is found in R.C. 4121.121, 4121.127, 9.821, and 9.822.

There is some interplay between the need for coverage and state limits on liability (sovereign immunity). In 1975, the Ohio General Assembly passed the Court of Claims Act. The Act permits many types of civil actions against the state that were previously barred by the doctrine of sovereign immunity. The state's limited waiver of sovereign immunity permits any liability of the state to be determined in accordance with the rules of law that apply to private parties. Any action must result from previously recognized claims for relief for which the state would have been liable except for sovereign immunity. A later amendment to the statute provides civil immunity to officers and employees of the state, except:

- For activities arising from the operation of a motor vehicle
- For actions in which the state is a plaintiff
- For actions where an officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner or whose conduct was manifestly outside the scope of employment.

II. EXISTING COVERAGE

1. **Blanket Bond**

The State of Ohio base policy (\$1 million) Crime Insurance is commonly referred to as the Blanket Bond or Fidelity Bond. R.C. 4121.121(E) states that "[e]very fiduciary of the bureau shall be bonded or insured for an amount of not less than one million dollars for loss by reason of acts of fraud or dishonesty." The BWC Board of Directors has crime insurance (blanket bond) limits of \$1,000,000 for dishonest acts under the state's government crime insurance. A fidelity blanket bond and crime insurance are synonymous terms. The policy protects the state from financial loss due to the fraudulent activities of an officer or employee or a group of officers and employees. The

loss can be the result of the employee's theft of money, securities, or other property of the employer. BWC pays a \$5,000 per occurrence deductible, which is recoverable through criminal restitution. The Ohio Attorney General would represent the state in any such action. R.C. 109.361.

2. Fiduciary Liability Primary and Excess Policies

The Fiduciary Liability Primary and Excess Policies obtained from Wells Fargo (Beazley Insurance) provide much larger protection than the state blanket bond. As a contract of insurance, the Wells Fargo policy describes its core terms in the "Insuring Clause," page 1 of the Policy. The Insuring Clauses provide that the policies will cover, subject to its terms, conditions, and exclusions, any actual or alleged violation of any of the responsibilities, obligations, or duties imposed on fiduciaries by the common or statutory law of the United States of America or of any state or other jurisdiction therein. The policy defines fiduciaries as any one or more natural persons duly elected or appointed as directors, officers, trustees, or managers of the BWC Board of Directors. Fiduciary is defined according to the definition applying to ERISA plans.

If a claim arises, BWC pays a \$75,000 per claim deductible. The fiduciary policy and the Excess fiduciary Liability each provide ten million dollars coverage, a total of twenty million dollar (\$20,000,000.00) to each member of the Board.

III. LIMITS OF COVERAGE

In the parlance of insurance, if a claim is made, then the insurer "owes a defense" and must provide legal counsel. However, before that obligation arises, the insurer must receive timely notice of the claim, and the insurer retains the right to select the attorney to defend the claim. Per R.C. 109.361, the Ohio Attorney General represents the state, and would act as co-counsel in the defense of any claims against the Board or its members.

It is important to note that insurance coverage is generally designed to protect against *fortuitous* loss. As a basic principle, it does not protect against intentional wrongdoing, and the BWC's fiduciary policy includes an important exclusion in this regard. (Clause III, Exclusion L.)

IV. HOW COVERAGE WAS OBTAINED

The BWC, with the assistance of the Department of Administrative Services, Risk Management Office (DAS), obtained fiduciary insurance coverage through the request for proposal process. The available insurance market was very limited. The selected vendor was Lloyds of London, Syndicate 2623/623, Beazley USA.

12-Month Governance Committee Calendar

Date	December 2009	NOTES
12/16/2009	1. Director and Officer Liability Coverage	
Date	January 2010	
1/22/2010	1. Administrator Performance Review and Action Items to date	
	2. Board Self-assessment and Action Items to date	
Date	February 2010	
2/25/2010		
Date	March 2010	
3/25/2010		
Date	April 2010	
4/29/2010	1. Launch Administrator Review	
Date	May 2010	
5/27/2010	1. Finalize Administrator Review	
	2. Launch Board and Committee Self-assessment	
Date	June 2010	
6/17/2010	1. Finalize Board and Committee Self-assessment	
	2. Committee membership recommendations	
	3. Develop Education Plan	
	4. Administrator's Objectives for FY 11	
Date	July 2010	
7/29/2010		
Date	August 2010	
8/26/2010		
Date	September 2010	
9/23/2010		
Date	October 2010	
10/21/2010		
Date	November 2010	
11/18/2010		
Date	December 2010	
12/15/2010		