To What Extent Does Insurance Protect Fiduciaries?

Insurance policies define claims the insurer accepts and claims it excludes or rejects.
The following policies routinely exclude all claims arising from ERISA violations.

- Employment Practices Liability Insurance
- Directors and Officers Insurance
- Employee Benefits Liability Insurance
- Errors and Omissions Insurance
- Fidelity Bonds
  - (Retirement plans purchase fidelity bonds to protect participants from theft. The bond does not protect fiduciaries.)

Sec. 1110 Liability removal not allowed; Insurance provisions

TITLE 29--LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
Subtitle B--Regulatory Provisions
Part 4--fiduciary responsibility
Sec. 1110. Exculpatory provisions; insurance

Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

Nothing in this subpart shall preclude a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, **if such insurance permits recourse by the insurer against the fiduciary** in the case of a breach of a fiduciary obligation by such fiduciary, a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

(Pub. L. 93-406, title I, Sec. 410, Sept. 2, 1974, 88 Stat. 886.)

Real Life Example | Will's Lawsuit

Will owns a business, did nothing wrong, but lost his lawsuit.
While this is not a fiduciary lawsuit, the insurance company's attitude is instructive.

Will owns a landscaping business; during the winter his trucks plow snow and salt ice. Will’s contract with an apartment complex required service at or above a certain accumulation. One morning the property manager called Will and reported that no service was necessary because the prior night’s snow accumulation was less than the minimum.

A resident slipped, broke her arm, and Will received notice of her lawsuit.

Will called the lawyer, "I am calling about this lawsuit." Why are you suing me?"
"My client broke her arm."
"Look, I talked to the property manager and he told me not to plow. I have used the same contract for twenty years, I didn't violate it and have never had a problem. You can't sue me."
"I don't care about your contract," the attorney shot back, as if contracts mattered.

Will reported the incident to his insurance company. "We'll take care of this for you," they said.

Will told his friend about his conversations. His friend said, "You are going to lose."
"Why? I didn't do anything wrong. "
"Look, buddy, your insurance company will settle with him outside the courtroom just before the trial. It will be cheaper to settle than pay the legal cost to fight in court and that's what is going to happen. The lawyer suing you knows it --that's why he felt so confident in suing you --and so does the insurance company's attorney. Damages will be about $7,000, plus medical costs not covered elsewhere. The insurance company will pay it, minus your deductible of course, which you will have to pay. It's a lock. There is nothing you can do."

That is exactly what happened. Will was then a "bad risk" and his insurance rates went up.

Fiduciaries cannot afford to be a Pollyanna, believing that their accuser must <u>prove</u> they are guilty of breaching their fiduciary duty.

- Fiduciaries must be prepared to provide a judge documents that show proper execution of fiduciary duty so strong that the case is dismissed without a trial.
- **We provide documentation and that's why.**