

COVERAGE SECTION 5. FIDUCIARY LIABILITY COVERAGE



I. INSURING CLAUSE

The Insurer shall pay on behalf of the **Insureds** all **Loss** for which the **Insureds** become legally obligated to pay on account of any **Claim** first made against the **Insureds** during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act** taking place before or during the **Policy Period** by an **Insured** or by any person for whose **Wrongful Acts** the **Insured** is legally responsible.

II. DEFENSE AND SETTLEMENT

- A. The Insurer shall have the right but not the duty to assume the defense of any **Claim** to which this Coverage Section applies. In the event the Insurer does not assume the defense of any **Claim**, the **Insured** shall allow the Insurer to associate effectively with the **Insured** in the investigation, defense and settlement of such **Claim**. The Insurer shall not be obligated to pay any **Loss** or continue in the defense of any **Claim** after the Insurer's Limit of Liability has been exhausted by the payment of **Loss**.
- B. The Insurer has the right to investigate any **Claim**. The Insurer shall not settle or compromise any **Claim** without the **Insured's** consent. If the **Insured** refuses to consent to a settlement or compromise recommended by the Insurer which is acceptable to the claimant, then the Insurer's liability shall be limited to **Loss** which would have been incurred had the settlement or compromise been accepted.

III. DEFINITIONS

When used in this coverage section:

A. **Administration** means:

1. interpreting or giving advice or notice to employees or participants; or
2. effecting enrollment, termination or cancellation of employees or participants under a **Benefit Program**; or
3. the handling of records in connection with a **Benefit Program**.

B. **Benefit Program** means:

1. any **Pension Benefit Plan** qualified under the Employee Retirement Income Security Act of 1974, as amended, sponsored by the **Named Insured** or any **Subsidiary**;
2. any past or present **Employee Welfare Benefit Plan** sponsored by the **Company** which existed at the inception date of this policy or of any policy of which this Coverage Section is a renewal;
3. any government-mandated insurance program for workers' compensation, unemployment, social security or disability benefits for employees of the **Company**, including the Consolidated Omnibus Budget Reconciliation Act of 1985 and amendments thereto;
4. any **Pension Benefit Plan** or **Employee Welfare Benefit Plan** created or acquired by the **Company** during the **Policy Period**, subject to the provisions of the Subsection IV. F.(1) of the Common Policy Terms of this policy; or
5. any other employee benefit plan or program not subject to Title I of the Employee Retirement Income Security Act of 1974, as amended, sponsored solely by the **Named Insured** for the benefit of the employees of the **Named Insured**;

provided, however, **Benefit Program** shall not include any multi-employer plan, as defined in the Employee Retirement Income Security Act of 1974, as amended.

C. **Claim** means:

1. a civil proceeding commenced by the service of a complaint or similar pleading; or
2. a criminal proceeding commenced by a return of an indictment; or
3. a written demand for monetary damages or other relief; or

4. a formal administrative or regulatory proceeding, including a fact finding investigation by the Department of Labor, the Pension Benefits Guaranty Corporation or a similar government agency located anywhere in the world, commenced by the filing of a notice of charges, formal investigative order, or similar document;

against any **Insured** for a **Wrongful Act**, including any appeal therefrom.

- D. **Defense Costs** means that part of **Loss** consisting of reasonable and necessary costs, charges, fees (including but not limited to attorneys' fees and experts' fees) and expenses (other than regular or overtime wages, salaries or fees of the directors, officers or employees of the **Insured**) incurred in defending or investigating **Claims** and the premium for appeal, attachment or similar bonds, provided, however, the Insurer has no obligation to apply for or to furnish such bond.
- E. **Employee Welfare Benefit Plan** means any plan so defined in the Employee Retirement Income Security Act of 1974, as amended.
- F. **Insured**, either in the singular or plural, means any one or more of the following:
 1. the **Company**;
 2. the **Benefit Programs**; or
 3. the **Insured Persons**.
- G. **Insured Persons**, either in the singular or plural, means any natural persons serving as a past, present or future trustee, director, officer, employee or volunteer of the **Company** or of any **Benefit Program**.
- H. **Loss** means the total amount which any **Insured** becomes legally obligated to pay on account of each **Claim** and for all **Claims** in each **Policy Period** and the Extended Reporting Period, if exercised, made against them for **Wrongful Acts** for which coverage applies, including, but not limited to, damages, judgments, settlements, **Defense Costs**, civil penalties of five percent (5%) or less imposed upon an **Insured** as a fiduciary under Section 502(i) of the Employee Retirement Income Security Act of 1974, as amended, and civil penalties of twenty percent (20%) or less imposed upon an **Insured** as a fiduciary under Section 502(l) of the Employee Retirement Income Security Act of 1974, as amended.

Loss shall not include:

1. any amount not indemnified by the **Company** for which the **Insureds** are absolved from payment by reason of any covenant, agreement or court order;
2. taxes;
3. the cost to comply with any injunctive or non-monetary relief, or any agreement to provide any such relief; or
4. matters uninsurable under the law to which this policy is construed;

Loss shall include punitive damages, exemplary damages, and the amount of any multiplied damage award which is in excess of the damage award so multiplied, which shall be covered hereunder to the fullest extent permitted by law. Where the **Insured** reasonably determines that punitive damages are insurable under the applicable law, the Insurer shall not challenge that interpretation of insurability.

- I. **Pension Benefit Plan** means any plan so defined in the Employee Retirement Income Security Act of 1974, as amended.
- J. **Wrongful Act** means:
 1. any breach of the responsibilities, obligations or duties by an **Insured** which are imposed upon a fiduciary of a **Benefit Program** by the Employee Retirement Income Security Act of 1974, as amended, or by the common or statutory law of the United States, or other jurisdiction anywhere in the world;
 2. any other matter claimed against an **Insured** solely because of such **Insured's** service as a fiduciary of any **Benefit Program**; or
 3. any negligent act, error or omission in the **Administration** of any **Benefit Program** by an **Insured**.

IV. EXCLUSIONS

- A. The Insurer shall not be liable for **Loss** on account of any **Claim** made against any **Insured**:
 1. based upon, arising out of, or attributable to any fact, circumstance or situation which has been the subject of any written notice given under any policy of which this Coverage Section is a renewal or replacement;

2. for any deliberately fraudulent act or omission or any willful violation of any statute or regulation committed by such **Insured**, if a judgment or other final adjudication adverse to such **Insured** establishes such a deliberately fraudulent act or omission or willful violation;
 3. for libel or slander;
 4. for bodily injury, mental anguish, emotional distress, sickness, disease or death of any person or damage to or destruction of any tangible property including loss of use thereof;
 5. based upon, arising out of, or attributable to liability of others assumed by the **Insured** under any contract or agreement, either oral or written, except to the extent that the **Insured** would have been liable in the absence of the contract or agreement or unless the liability was assumed in accordance with or under the agreement or declaration of trust pursuant to which the **Benefit Program** was established;
 6. based upon, arising out of, or attributable to the failure of the **Insured** to comply with any law governing workers' compensation, unemployment, social security or disability benefits or any similar law;
 7. based upon, arising out of, or attributable to any demand, suit or proceeding pending, or order, decree or judgment entered against any **Insured** on or prior to the Pending or Prior Date set forth in Item 8. of the Declarations, or the same or substantially the same fact, circumstance or situation underlying or alleged therein; or
 8. based upon, arising out of, or attributable to such **Insured** having gained in fact any personal profit, remuneration or advantage to which such **Insured** was not legally entitled.
- B. The Insurer shall not be liable for that part of **Loss**, other than **Defense Costs**:
1. which constitutes fines or penalties (other than civil penalties expressly included within the definition of **Loss**), taxes or the multiple portion of any multiplied damage award;
 2. which is based upon, arising out of, or attributable to the failure to collect from employers contributions owed to a **Benefit Program**, unless the failure is because of the negligence of an **Insured**; or
 3. which constitutes benefits under or relating to a **Benefit Program** unless, and to the extent that, (i) the **Insured** is a natural person and the benefits are payable by such **Insured** as a personal obligation, and (ii) recovery for the benefits is based upon a covered **Wrongful Act**.

No fact pertaining to or knowledge possessed by any **Insured** shall be imputed to any other **Insured** for purposes of applying the exclusions set forth in Section IV.

V. CONDITIONS

A. TERMINATION OF ANY BENEFIT PROGRAM

If before or during the **Policy Period** the **Company** terminates any **Benefit Program**, coverage with respect to such terminated **Benefit Program** shall continue until termination of this policy for those who were **Insureds** at the time of such **Benefit Program** termination, or who would have been **Insureds** at the time of such termination had this Coverage Section been in effect, with respect to **Wrongful Acts** by such **Insureds** taking place prior to or after the effective date of such **Benefit Program** termination.

B. SEVERABILITY OF APPLICATION

The written application(s) for coverage shall be construed as a separate application for coverage by each of the **Insured Persons**. No statement in the application or knowledge possessed by any **Insured Person** shall be imputed to any other **Insured Person** or any **Benefit Program** for the purpose of determining if coverage is available. The statements in the application made by and knowledge possessed by the person(s) signing the application shall be imputed to the **Company** for the purpose of determining if coverage is available to the **Company**.