



## **Defense Coverage for Board Members in Takings and Administrative Action**

Water District and River Authority boards of trustees have been under growing pressure from property owners when a flood, administrative actions, or rules allegedly “take” something from them. A recent example is a suit by homeowners against the Sabine River Authority after a record rainfall threatened to overtop the dam at Toledo Bend, the ninth largest reservoir in the United States. The Authority had to release water to prevent an unimaginable catastrophe should the dam be overtopped and breached. The suit is still working its way through the legal process. Other examples of actions that affect board members and other officials or employees of the district or authority include suits regarding rates, rulemaking, and board decisions denying approval of permits. One of the unfortunate things that happens in some of these suits is that board members or district officials are individually named in the suit even though the potential liability is the District or Authority’s. To help address this and other issues impacting individual board members, the Fund added three new coverages and a Board policy described below.

### **Additional Defense for Takings Claims**

The “takings” coverage was described in the renewal letter sent to all members for the 2019 – 2020 Fund year. The coverage was added for all members who carried errors and omissions:

The Board of Trustees approved an additional coverage under the Liability Coverage Document for the 2019-2020 Fund Year: **Additional Defense for Takings Claims**. This new coverage provides a defense for allegations of takings to all members of the Liability Program and has a \$50,000 per claim and annual \$50,000 aggregate limit. The coverage applies to the entity, its board members, and its employees and automatically **applies to all members that carry Errors and Omissions Liability with the Fund at no additional charge**. There is no deductible. The coverage states, “TAKINGS means a **claim** based upon the operation of the principles of eminent domain, inverse condemnation, or **claims** under the Takings Clause of the 5th Amendment to the U.S. Constitution or Article 1, Section 17 of the Texas Constitution.”

Although \$50,000 may not be enough to see the district all the way through a takings case, it may help get individual board members and officials dismissed from the suit and help engage competent legal counsel to defend the district.

### **Expanded Defense of Public Officials (Optional)**

This coverage extends an optional coverage for an expanded defense for public officials who are named in a claim which would otherwise be denied such as an ultra vires action

based on the administrative function of the district. Suits contesting permit denial, well spacing, water rights, or easements are examples where the Fund's current coverage documents would not provide coverage. This optional coverage applies only to the public official and not the member. The insuring agreement states:

The **Trust** shall defend a civil **claim** against any **member's** officer, director, elected or appointed official, member of a board or commission, and employee, when such persons are acting in **good faith** within the scope of their duties or employment, for the **member** regardless of allegations which would otherwise exclude coverage under the **agreement**.

### **Reimbursement for Criminal Defense Coverage**

In recognition of rare instances when board members or other public officials of the district might be erroneously charged for criminal offenses in the course of their duties for the District, the Fund introduced coverage to reimburse legal expenses after charges were dismissed:

Reimbursement for Criminal Defense Coverage extends an automatic coverage to reimburse for criminal defense for public officials who are subject to a criminal proceeding arising out of the course and scope of their duties or employment after the person is exonerated by the court. This automatic coverage includes a sublimit of \$10,000 and \$50,000 aggregate with no deductible. The agreement states, "Notwithstanding any exclusions in this **agreement**, the **Trust** shall reimburse any **covered party**, where allowed by law, for: reasonable attorneys' fees; and reasonable and necessary costs, excluding loss of income, when incurred in defense of any **criminal proceeding** arising out of what otherwise would be within the course and scope of the **covered party's** duties or employment by the **member**."

### **Resolution of Disputes**

Another action of the Board of Trustees independent of any of the coverages offered by the Fund formalized a dispute resolution process that had always been available to members. This was partly in response to the fact that there may be situations when coverage would not apply but the interest of fairness or precedent affecting many other members justifies action by the Board.

The Board Policy provides an outline for resolving disputes between a covered party and the Fund (Part II, V) which describes the long-standing understanding that the member can bring any dispute to the Board for resolution. This section also explains that the Fund and covered party intend to mediate any dispute through a specified process but does not mandate mediation.

The Board exercises this process on rare occasions to provide support for litigation against members where the liability coverage would not respond. This may involve providing money to support appellate litigation or the filing of an amicus brief.

As the legal environment evolves in Texas, the Fund will continue to adjust and expand coverage when it can to give Board members, executives, managers, and employees some certainty that they will be protected while performing their duties and responsibilities for the District or Authority. The Fund is always alert for changing needs and encourages its members to keep us informed. Excerpts from the three coverages follow taken from the current 2023 – 2024 coverage documents.

## VI. ADDITIONAL COVERAGE FOR DEFENSE OF TAKINGS CLAIMS

- A. Part X, Exclusions Applicable to All Coverages, Exclusion T. is amended to allow for a limited defense for allegations of **takings** made against **covered parties** under this PART IX, ERRORS AND OMISSIONS LIABILITY COVERAGE. (2023/2024 Cov. Doc.)
- B. **TAKINGS** means a **claim** based upon the operation of the principles of eminent domain, inverse condemnation, or **claims** under the Takings Clause of the 5th Amendment to the U.S. Constitution or Article 1, Section 17 of the Texas Constitution.
- C. The per **claim** limit of liability for coverage under this Part VI, Additional Coverage for Defense of Takings **Claims** shall not exceed \$50,000 for each **claim** or \$50,000 in the aggregate annually regardless of the number of individuals sued or number of **claims** made.
- D. This limit of liability shall not be in addition to any other coverage afforded under this Part IX, ERRORS AND OMISSIONS LIABILITY COVERAGE, including any optional coverages included therein.
- E. This sublimit of liability is included within the annual aggregate limit applicable to this PART IX, ERRORS AND OMISSIONS LIABILITY COVERAGE.
- F. Any deductible under this **agreement** shall not apply to this Part VI, Additional Coverage for Defense of Takings **Claims**.
- G. The **Trust** shall pay the reasonable legal expenses of an attorney approved by the **Trust**.
- H. This Part IX, Section VI, Additional Coverage for Defense of Takings **Claims** coverage is defense only coverage and does not include coverage for indemnity for **damages** or any sum awarded against the **covered party**.

## X. EXPANDED LEGAL DEFENSE FOR PUBLIC OFFICIALS ENDORSEMENT [OPTIONAL]

If Expanded Legal Defense for Public Officials Endorsement is elected and affirmatively indicated in the **declarations**, and the appropriate additional

contribution is paid, the following provisions apply to coverage under the **agreement**:

- a. The **Trust** shall defend a civil **claim** against any **member's** officer, director, elected or appointed official, member of a board or commission, and employee, when such persons are acting in **good faith** within the scope of their duties or employment, for the **member** regardless of allegations which would otherwise exclude coverage under the **agreement**.

Under this Part IX, Section X, Expanded Legal Defense for Public Officials endorsement, good faith shall be determined by:

- i. An affirmative vote of the majority of the **member's** active governing board, or
- ii. Upon a written appeal to the **Trust** and an affirmative vote of the majority of the Board of Trustees of the Texas Water Conservation Association Risk Management Fund or their designees.

**GOOD FAITH** means the sincere and honest intention to act in a lawful purpose without malice or without taking an unfair advantage over another person.

- b. The **Trust** shall pay the reasonable legal expenses of an attorney approved by the **Trust**.
- c. This Part IX, Section X, Expanded Legal Defense for Public Officials Endorsement coverage is defense only coverage and does not include coverage for indemnity for **damages**, civil fines or penalties, or any other sum awarded against the public official.
- d. This Part IX, Section X, Expanded Legal Defense for Public Officials Endorsement coverage shall not extend to the **member**.
- e. The **Trust's** annual limit of liability for coverage under this Part IX, Section X, Expanded Legal Defense for Public Officials Endorsement shall not exceed \$50,000 for each **claim** or \$50,000 in the aggregate annually regardless of the number of individuals sued or number of **claims** made.

Under no circumstances shall the **Trust** be liable for an amount greater than the sublimit of liability indicated on Part IX, Section X, Expanded Legal Defense for Public Officials Endorsement.

This sublimit of liability is included within the per **claim** and annual aggregate limit shown on the Part IX, Section X, Expanded Legal Defense for Public Officials Endorsement. Any amounts paid toward the sublimit of liability shall reduce the remaining available annual aggregate by the same amount.

- f. Any deductible under this **agreement** shall not apply to this Part IX, Section X, Expanded Legal Defense for Public Officials Endorsement coverage.

## **V. ADDITIONAL COVERAGE FOR REIMBURSEMENT OF CRIMINAL DEFENSE EXPENSES**

- A. Notwithstanding any exclusions in this **agreement**, the **Trust** shall reimburse any **covered party**, where allowed by law, for: reasonable attorneys' fees; and reasonable and necessary costs, excluding loss of income, when incurred in defense of any **criminal proceeding** arising out of what otherwise would be within

the course and scope of the **covered party's** duties or employment by the **member**.

**CRIMINAL PROCEEDING** means the criminal prosecution of a **covered party** commenced by the filing with the court of an information or an indictment, alleging that the **covered party** had, during the **Trust Year**, and within the **agreement territory**, committed one or more crimes. Any such prosecution shall be considered a single criminal proceeding, notwithstanding the fact that the prosecution may involve multiple incidents, multiple counts or charges, and/or multiple trials and/or multiple appellate proceedings.

B. Reimbursement shall be made only if the **covered party** is exonerated by a court of law from all charges or all charges are subsequently withdrawn or dismissed without any admission of guilt and requested written proof is provided to the **Trust**.

C. When a **covered party** is one of two or more defendants represented by the same attorney or law firm, payment shall be limited to the **covered party's** proportionate share of the total of the reasonable attorneys' fees and the reasonable and necessary costs paid.

D. LIMITS OF LIABILITY

1. The limit of liability of the **Trust** for each **criminal proceeding** shall not exceed \$10,000 per **claim**, with a \$50,000 annual aggregate, regardless of the number of **covered parties** that may be defendants in the **criminal proceeding**.

2. In the event there are multiple **covered parties** as defendants in the same **criminal proceeding**, payment or reimbursement shall be limited or divided between the **covered parties** according to each **covered party's** proportionate share of the total of all reasonable attorneys' fees and reasonable and necessary costs paid.

E. DEDUCTIBLE

Any deductible under this **agreement** shall not apply to this Part IX, Section V, Additional Coverage for Reimbursement for Criminal Defense Expenses coverage.