

CLAIMS CONUNDRUMS AND COVERAGE TRAPS: HOW TO AVOID MANAGEMENT LIABILITY COVERAGE DISPUTES

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**CAYMAN
CAPTIVE
FORUM**
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LEGAL STUFF

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MANAGEMENT LIABILITY COVERAGES

Our focus today:

- Directors & Officers (D&O)
- Employment Practices Liability (EPL)
- Fiduciary

DIRECTORS AND OFFICERS LIABILITY



ABC'S OF D&O

Claim Against
Directors and
Officers

Can Entity Indemnify?

No -- "Side A"

Yes -- "Side B"

No Retention

Insuring Agreement A:
Natural Person Insureds

Personal Asset Protection

**Side A / Difference in
Conditions Coverage:**
Natural Person Insureds

Enhanced Personal Asset
Protection

Retention Applies

Insuring Agreement B:
Corporate Reimbursement to
a Natural Person Insured

Covered Claim
Against Entity

Entity Coverage "Side C"

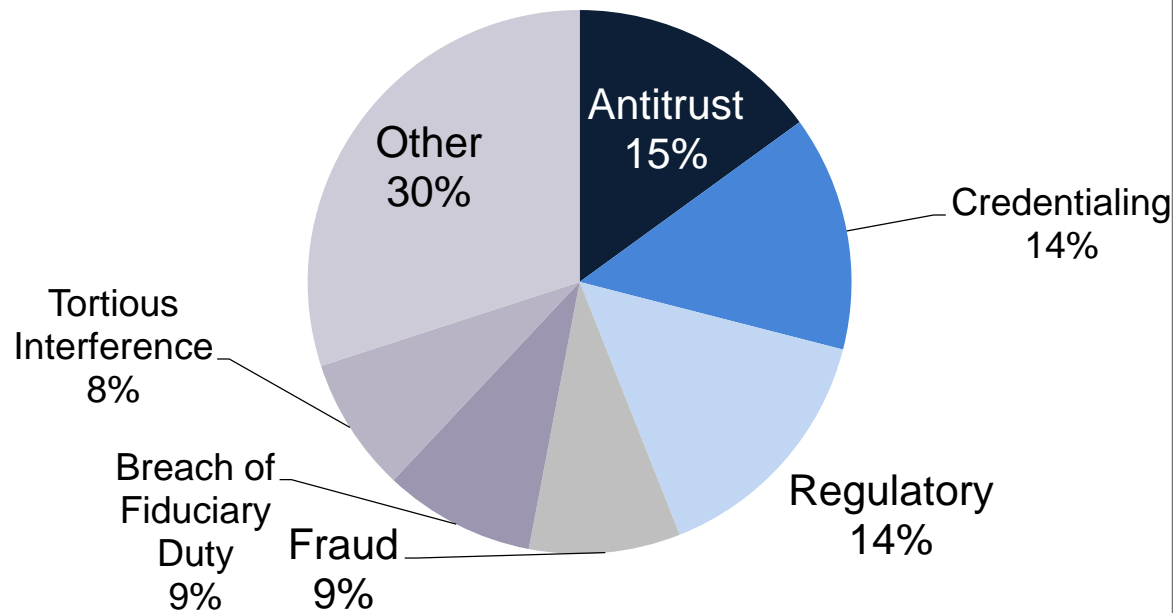
Retention Applies

Insuring Agreement C:
Corporate Coverage for
Claims Against the Entity

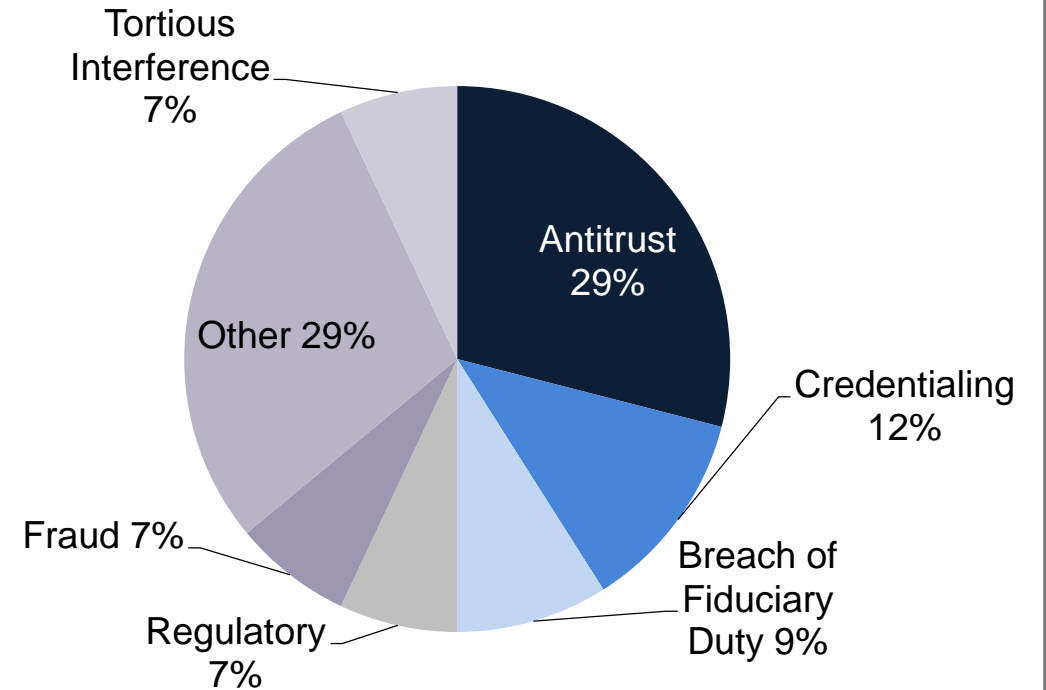


HEALTHCARE D&O CLAIM TRENDS

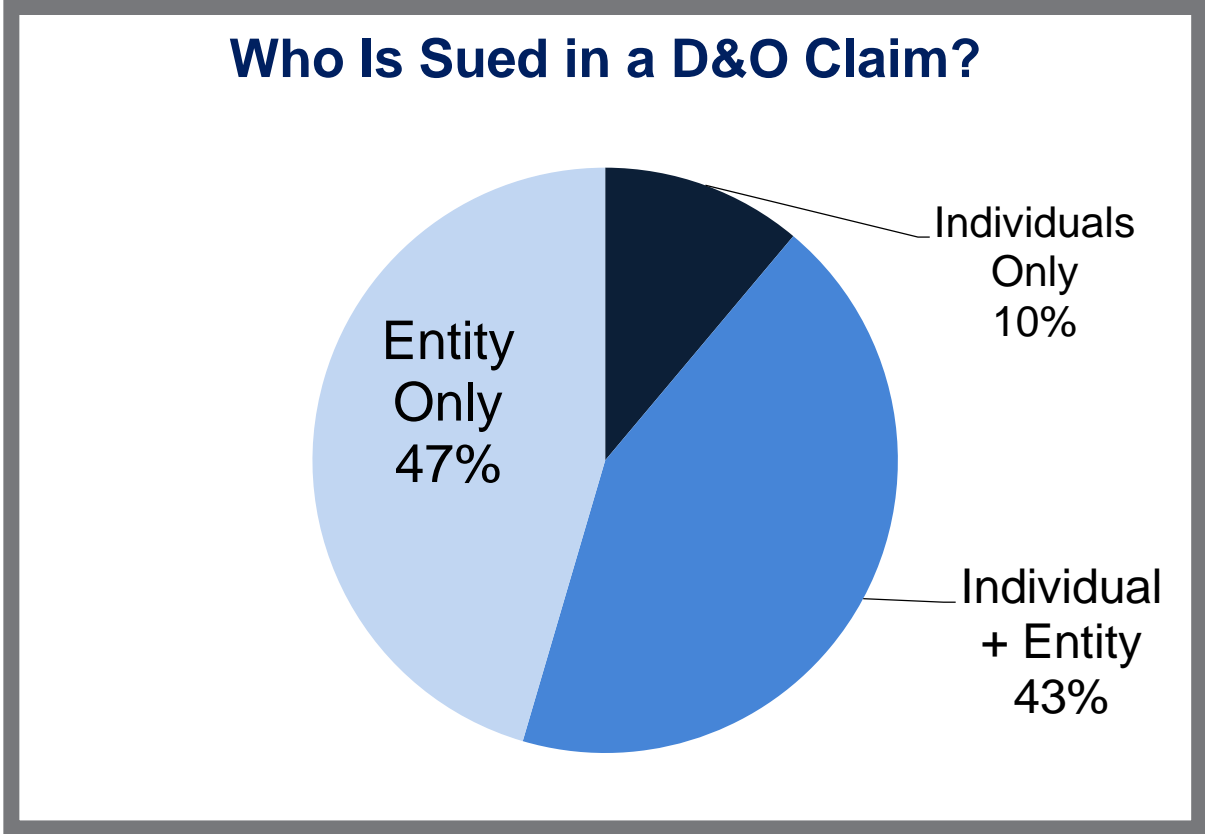
**Private/Not For Profit HealthCare
D&O Claims – % of Claim Types**



**Private/Not For Profit HealthCare
D&O Claims – % of Costs**



HEALTHCARE D&O CLAIM TRENDS



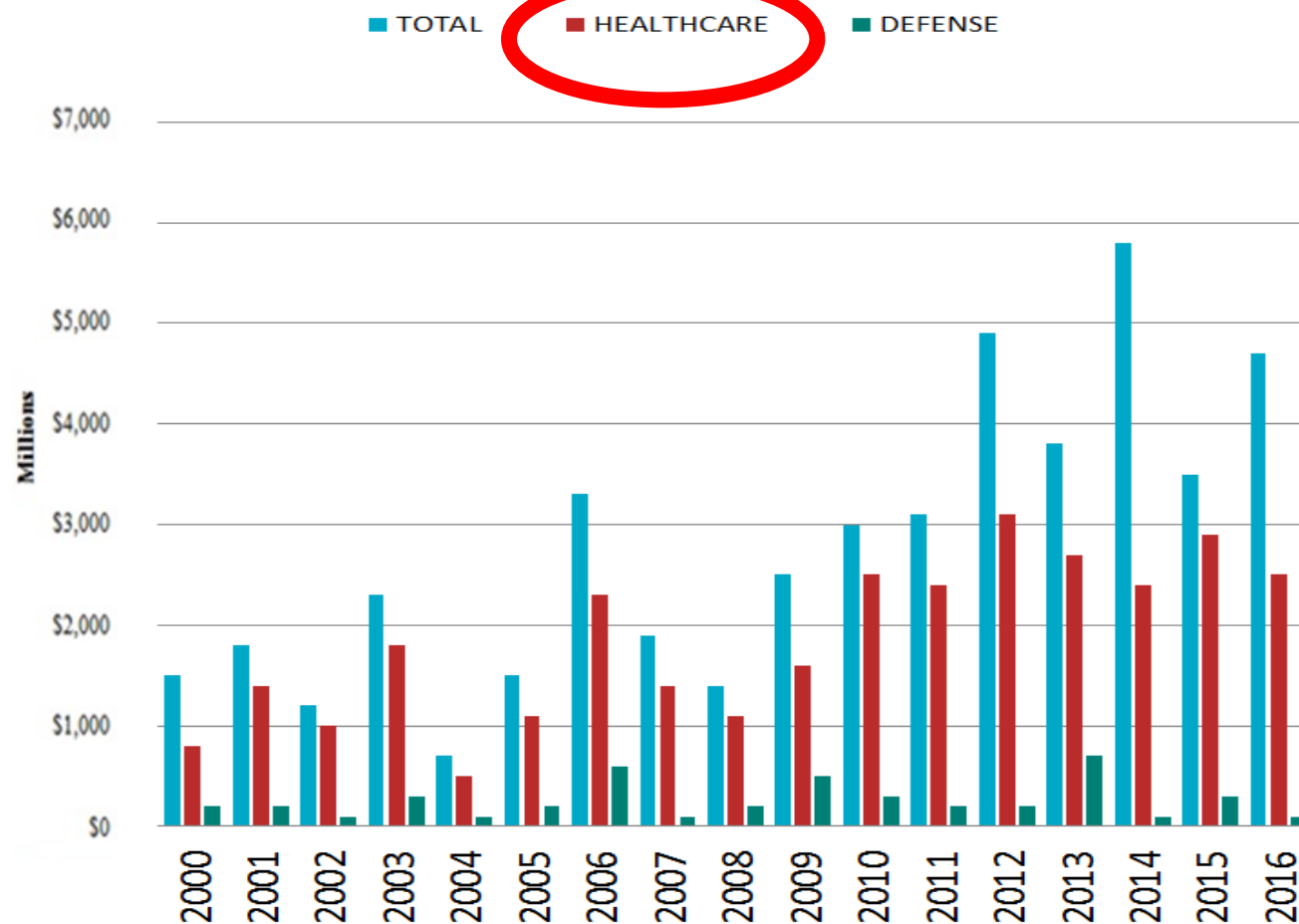
S7 | Claims data provided by Chubb for period between 2010 and 2017.

HEALTHCARE D&O REGULATORY CLAIMS

2017 False Claims Act Statistics

- **\$2.4 billion** in healthcare settlements and judgments
- \$392 million to whistleblowers
- 669 qui tam suits filed – 12 new cases every week

Annual FCA Recoveries by Industry



D&O – COVERAGE TRAPS

Antitrust

- What is an antitrust claim?
- Why does it matter if a D&O claim is characterized as antitrust?
 - Higher retention
 - Co-insurance requirements
 - Sub-limits

False Claims Act

- Sublimits, retentions, co-insurance, defense only
- Notice
- Retaliation allegations – EPL claim?
- Potential for individual liability

Credentialing

- Breach of contract exclusion
- Who is an insured for credentialing claims?

Other Insurance Disputes

Side ‘A’ Claims

- Insolvency
- Shareholder derivative demands (infrequent in not-for-profit arena)
- Individual liability for corporate wrongdoing – regulatory billing issues, False Claims Act



D&O – WHAT ABOUT A CAPTIVE?

Little savings, big risk

- Side 'A' claims – defeats the purpose of Side 'A' coverage because individuals making decision about coverage often same decision makers that declined to indemnify the D or O seeking Side 'A' coverage
- Purpose of D&O insurance – strategic view of risk
- May lose access to carrier negotiated defense counsel rates and risk management tools
- Insuring the unknown

Where are captives used?

- Retentions and anti-trust co-insurance
- Regulatory exposures; risks not insurable in commercial market
 - Do you want to manage all claims against the organization?
 - Is there sufficient surplus to insure these risks?

EMPLOYMENT PRACTICES LIABILITY



HEALTHCARE EPL CLAIMS TRENDS

- Retaliation claims by False Claims Act whistleblowers
- High-wage earners (employed physicians) resulting in larger settlements and damage awards
 - Credentialing (May be D&O or EPL claim -- depends on carrier)
 - From 2010 to 2017, **average settlement of a claim brought by a physician was >\$1M** (including defense and indemnity)
- Aging workforce leading to age discrimination claims
- Home healthcare
 - Criminal background checks
 - Compliance with Fair Credit Reporting Act
- Workplace violence
- #MeToo

EPL – FINANCIAL COST

- In 2015, EEOC resolved 28,642 harassment allegations
 - 5,518 of those charges were concluded in favor of the claimant for **\$125.5M**
- From 2010-2016, employers have paid **\$698.7M** for harassment claims through the EEOC's admin enforcement *pre-litigation* process
- In 2012, largest jury award was **\$168M** for a physician's assistant in CA
- In 2018, two large employment practices verdicts against health systems:
 - **\$28M** Age Discrimination (\$26.375M punitive damages)
 - **\$28M** Retaliation (brought as racial discrimination & retaliation) (\$25M punitive damages)
- Indirect costs
 - Decreased productivity, increased turnover, and reputational damage

#METOO AND HEALTHCARE

Editorial

[« Back to Editorial](#)

What #MeToo means for nurses

February 2018 Vol. 13 No. 2

Research Letter

FREE

May 17, 2016

Sexual Harassment and Discrimination Experiences of Academic Medical Faculty

Reshma Jaggi, MD, DPhil¹; Kent A. Griffith, MS²; Rochelle Jones, MS¹; [et.al](#)

[» Author Affiliations](#) | [Article Information](#)

JAMA. 2016;315(19):2120-2121. doi:10.1001/jama.2016.2188

#MeToo in medicine: Women, harassed in hospitals and operating rooms, await reckoning

by Elizabeth Chuck / Feb.20.2018 / 4:35 AM EST / Updated Feb.23.2018 / 1:39 PM EST

HEALTH

#MeToo and Medicine

When you're a woman in a white coat, it's hard to know where to draw the line.

In #MeToo era, a call for more scrutiny of doctors who get arrested

By [Elizabeth Cohen](#), CNN Senior Medical Correspondent

🕒 Updated 11:58 AM ET, Wed May 2, 2018

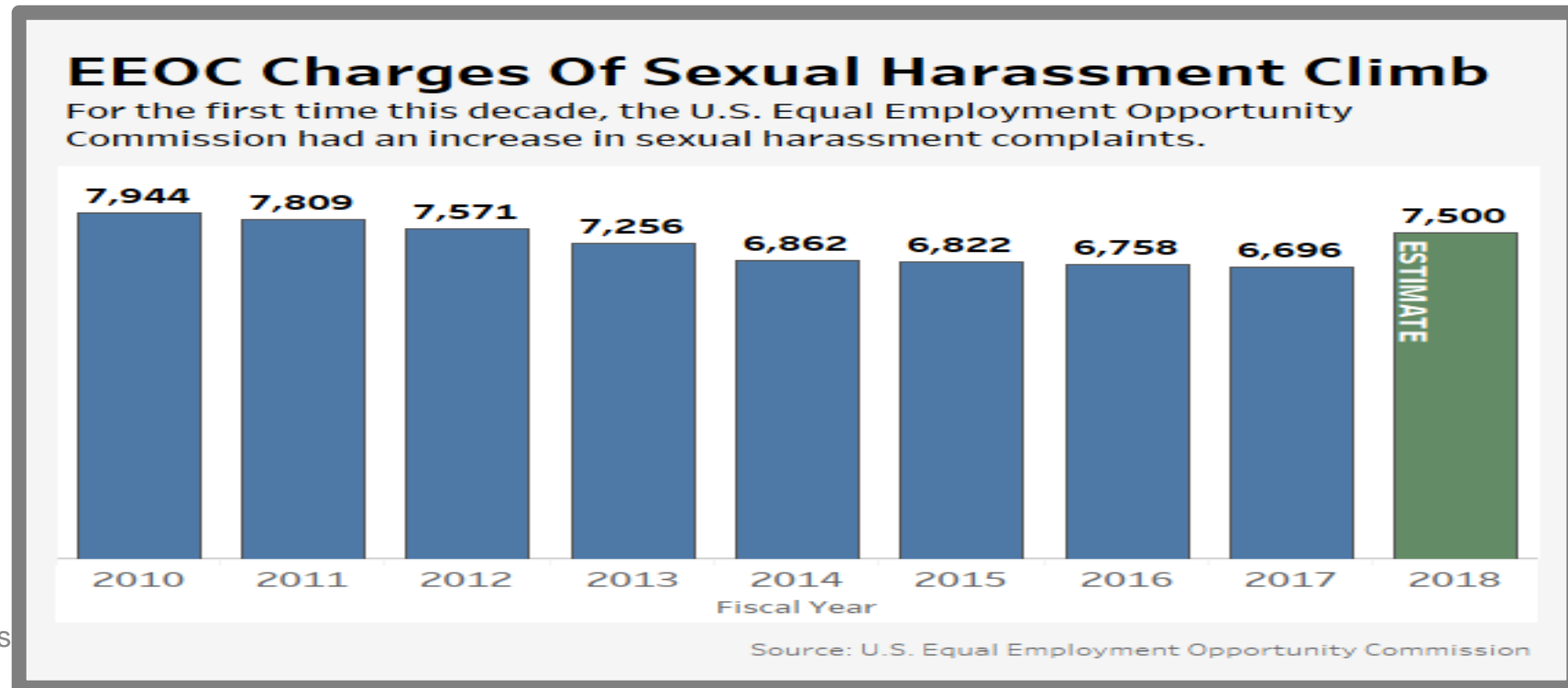
EEOC'S FY 2018 SEXUAL HARASSMENT DATA

(AS OF 10/4/18)

- EEOC filed 66 harassment lawsuits, including 41 that included sexual harassment allegations. That is more than a **50% increase** from 2017.
- EEOC charges alleging sexual harassment **increased more than 13.6%** from 2017

• EEOC recoveries
For sexual harassment
victims:

- FY 2017: **\$47.5M**
- FY 2018: **\$70M**



#METOO'S EFFECT ON MEDIATION / SETTLEMENT

Pre- #MeToo	Post- #MeToo
Assumed confidential	Confidentiality paid for or agreed upon in advance
Liquidated damages for breach of confidentiality	Happy if you can get confidentiality
Plaintiff did not demand discipline of the accused harasser	Demanding termination of alleged harassers
A "high" demand was \$350,000	Regularly receiving demands in excess of policy limits -- \$1M or more
High degree of confidence that a case would settle at the end of a long day of mediation	Cases not settled through mediation; mediators charging extra for additional time spent

EPL – COVERAGE TRAPS

- **Notice, notice, notice**
 - When is a claim a “Claim”?
 - Narrow notice provisions to certain individuals (General Counsel or Risk Manager)
 - EEOC charge and claim savings provisions
 - Denials only if prejudiced or, even better, materially prejudiced
 - Retaliation claims generally need to be reported directly to carrier and not via a bordereau report
- **Defense counsel billing rates**
- **Sexual Assault/Sexual Misconduct Exclusions**
 - Who do you want to insured for bad conduct (e.g., Larry Nassar, Jerry Sandusky)?
- **Punitive Damages**



EPL – WHAT ABOUT A CAPTIVE?

Little savings, big risk

- Severity claims and punitive damages
- May lose access to carrier negotiated defense counsel rates & risk management tools

Where captive may be used?

- Retentions
- Risks not insurable within commercial market (collective bargaining disputes)

FIDUCIARY LIABILITY



FIDUCIARY CLAIMS

Excessive fees -- cases alleging that the plan fiduciaries breached their obligations to the plan and its participants by charging or permitting excessive fees and expenses for plan services provided by third parties, such as investment management, recordkeeping, and asset custody

Church plan – cases alleging that plans of religious-affiliated organizations should be subject to ERISA

Investment imprudence -- cases alleging that plan fiduciaries breached their duties to invest plan assets prudently, breached their duty of loyalty, had conflicts of interest, and/or engaged in prohibited transactions

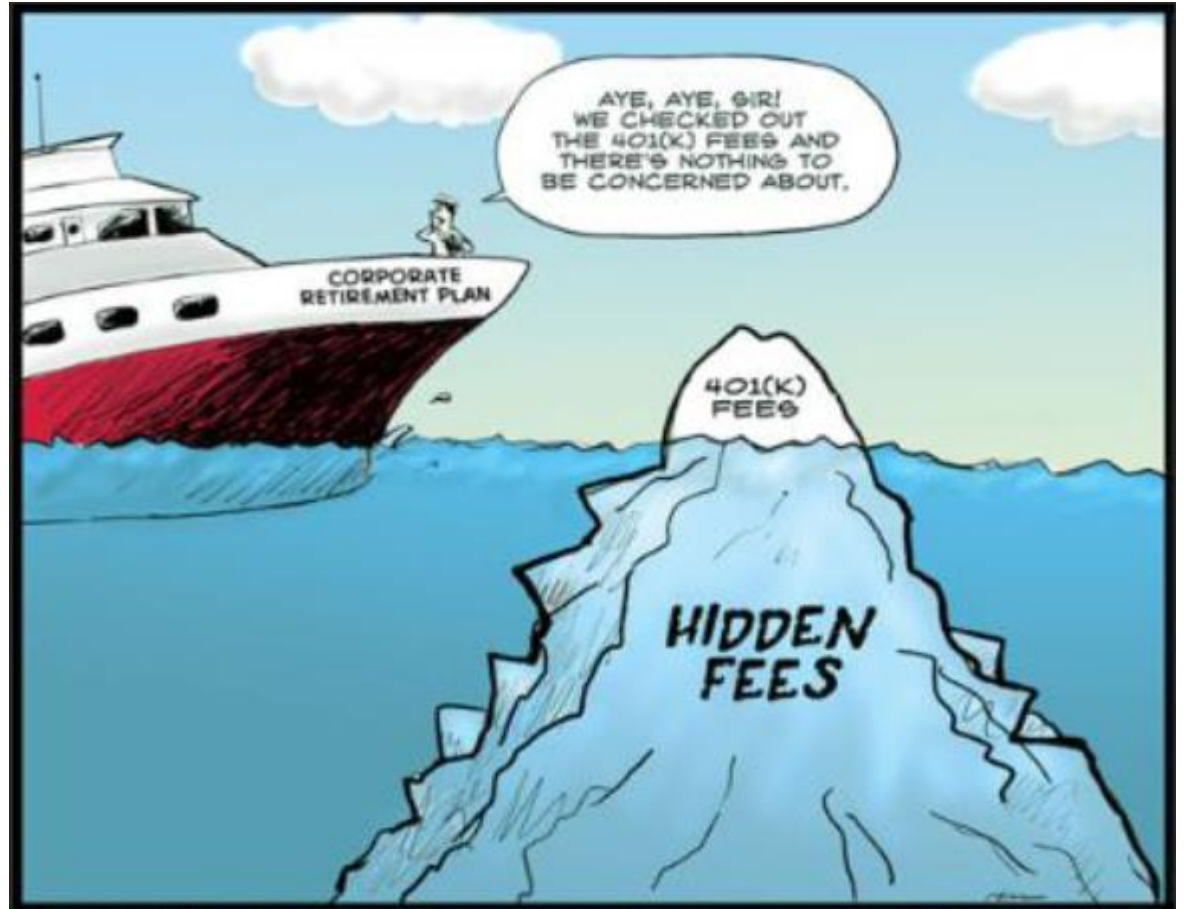
“Anti-cutback” -- cases alleging that benefits (such as severance) were promised and vested under the plan document and improperly cut back in anticipation of a change in control or during a time of corporate need

Class action welfare plan -- cases that can also take various forms, including retiree medical cases alleging that the plan sponsor or the plan fiduciaries improperly changed or terminated post-retirement medical benefits



FIDUCIARY – COVERAGE TRAPS?

- **Settlor v. administrator liability**
- **Benefits due exclusion**
- **DOL investigations**



FIDUCIARY – WHAT ABOUT A CAPTIVE?

Little savings, big risk

- Little actuarial data
- Claims handling experience – captive v. commercial carrier

Where captive may be used?

- Retentions

TIPS TO AVOID A COVERAGE DISPUTE

- Timely notice
- If you change carriers, be sure to report all claims and circumstances
- Get carrier's approval for **all** defense counsel
 - Even better, add your choice of counsel to your policies
- Obtain carrier's consent before you settle
- Review the definition of "insured"
- Review exclusions
 - Breach of contract, sexual assault, professional liability
- Analyze other insurance provisions before there is a claim – know what your policies say



THANK YOU

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