

# PARTICIPATOR

April 2011

## NDIRF ANNOUNCES \$2.8 MILLION CONFERMENT OF BENEFITS

*The conferment of benefits earned by NDIRF members in 2010, to be paid out on April 1, 2011, is nearly \$2.8 million (\$2,792,000). This brings the total of conferment payments across the seventeen-year span of the program to over \$54 million. A remarkable achievement for the Fund and its membership as we complete our first quarter-century of operations!*

NDIRF members will likely note that this conferment is higher than was paid last year (by approximately \$250,000) – due primarily to the continuing recovery in market value of the NDIRF’s investment portfolio and reduced incurred claim loss in 2010.

A more detailed description of the NDIRF’s financial performance last year will be presented in the 2010 NDIRF Annual Report, to be distributed in May. We hope, however, that the checks NDIRF members are receiving this month signify for you the Fund’s success over the past 25 years and your part in it. ■

### THE DO’S AND DON’TS OF DEALING WITH EMPLOYEE THEFT

*Do you suspect an employee is stealing from you? Often, the first reaction to those suspicions is emotional – you want to confront and discipline the wrongdoer. Although that may ultimately occur, the best initial response is to take a deep breath and call your attorney. Consulting with counsel will help protect the legal rights of both your company and the employee, and help you understand and manage the liability risks associated with accusations of employee theft.*

#### Do’s

Here are the things you should do if you suspect one of your workers of stealing from the company:

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- ✓ Consult with counsel.
- ✓ If you have reasonable suspicion (or actual proof) of employee theft, your attorney will likely suggest you conduct an investigation.
- ✓ Meet with the accused employee so he can respond to the evidence you’ve gathered.
- ✓ Meet with any other employees who have knowledge of the situation.

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- ✓ Determine if a reasonable explanation exists or if there are mitigating factors or circumstances that might be raised or need further investigation.
- ✓ Prepare a report of the incident, the investigation process, and its results, with appropriate recommendations on actions to be taken.
- ✓ If theft has occurred, you may need to make a report to law enforcement.

### **Don'ts**

You should steer clear of the following pitfalls:

- Do not detain or restrain an employee. False imprisonment is against the law, and charges can be filed against you if you force an employee to remain somewhere (e.g. your office) and there is no reasonable basis for the action. Depending on the situation and the employee you're dealing with, there may also be an element of personal danger involved in trying to detain someone. Contact the authorities or your attorney for specific advice if this situation comes up.
- Do not defame the employee. Publicizing the fact that an employee was fired because he stole six plants and some artwork from the office may not be worth the expense of a possible defamation claim.
- Do not threaten to prosecute if you're not sure you are going to file charges. Keep in mind that filing charges against someone is a money- and time-consuming process. Weigh the costs involved in prosecuting someone for theft, and make sure it's worth it.

### **Disciplining or dismissing an employee for theft**

If the employee's misconduct was serious enough to breach your trust and he has raised no mitigating factors or circumstances, dismissal and, possibly, criminal charges may be the appropriate course of action. However, employee theft that is less clear-cut may require discipline instead of dismissal.

Because even an employee who is dismissed (or disciplined) for suspicion of theft can file suit against her employer, there are a few things worth noting before you take that step, particularly if the employee has protected class status. First, you must demonstrate that on a balance of probabilities, it's more probable than not that the employee committed theft. Documentation of the investigation must focus on the allegation without reference to age, gender, national origin, disability, or any other protected status.

Second, if the employee is discharged, the investigation report must explain which items were taken and the effect of the theft on the company. There's a difference between the theft of a pen, for example, and the theft of a computer file. Essentially, the report should convey the breach of fundamental trust between the employer and the employee, justifying the dismissal.

### **Lessons for employers**

The best practice for minimizing employee theft is having good security practices – particularly with respect to protecting electronic data. Security is much more than a computer password. It's the ability to look back and find the tracks a computer-savvy employee-thief believes have been carefully covered or deleted. Perhaps the best possible deterrent is the ability to tell employees that your software retains information about what they do and when they do it.

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# RISK SERVICES

## INDEMNIFICATION AND ADDITIONAL INSURED STATUS

Almost any written business agreement (contract) will likely contain some type of indemnification and additional insured status provisions. These contract clauses can range from fairly innocuous to quite onerous in their requirements. NDIRF's member political subdivisions should request that these indemnification clauses and additional insured requirements be removed from agreements when their purpose is for the political subdivision to indemnify and/or add the other party as an additional insured.

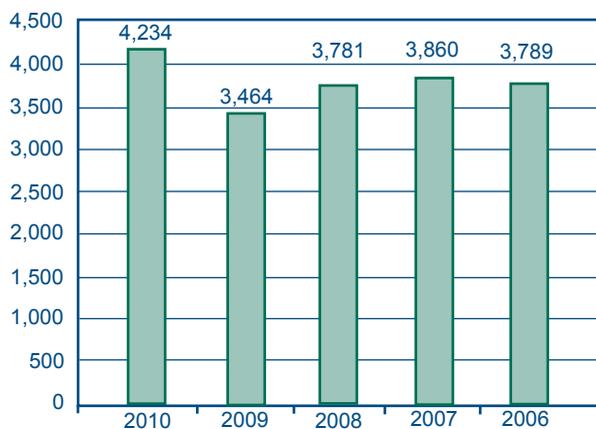
Why? From our research, current opinion is that North Dakota political subdivisions do not have express or implied statutory authority to provide such indemnity or additional insured status to another party except in very limited specific cases. Your legal counsel should be consulted regarding the appropriateness of indemnity clauses and additional insured status in agreements where these clauses will benefit another party.

NDIRF is not aware of relevant case law in North Dakota addressing this issue but there is a North Dakota Attorney General's opinion that discusses contractual indemnity requirements of political subdivisions (Letter Opinion 2009-L-04), stating they lack authority to indemnify other parties unless statutorily authorized to do so. In our view, requiring additional insured status may be seen as tantamount to requiring an indemnity and therefore should be considered similarly.

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## FINANCIAL INSIGHTS

### LOSSES PAID (in thousands)



This graph represents losses paid by NDIRF over the past 5 years, including payments made to adjusters and attorneys assisting in the claims settlement process. Since its inception in 1986, NDIRF has paid losses totaling \$73.0 million. ■

## FROM THE CEO

The NDIRF Annual Meeting will be held on May 18, 2011 beginning at 10:30 A.M. at the Doublewood Inn, Bismarck. By the time you see this column, NDIRF members will have received their information packets, including proxy statements, for the Annual Meeting.

While Fund members can, and do, make their wishes known for election of directors and other business by providing the proxies, I encourage you to attend at least one NDIRF Annual Meeting in person. We would like to meet you and I believe you would find the information presented to be of value – to put into perspective exactly what your participation in the Fund means. This would be an especially good year for a visit, as we celebrate the NDIRF's 25th anniversary.

Please take a moment to review the meeting materials and I hope you will consider joining us. There'll be coffee, door prizes and you are invited to a nice Doublewood luncheon afterward. See you there! ■

## RISK SERVICES

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The only statutory exception we are aware of that authorizes indemnity and, possibly, additional insured contract requirements is found in § 40-05-01(59) NDCC. If there are additional exceptions with which you are familiar, we would appreciate your advice on their citation.

Since there are at least some instances where political subdivisions are authorized to provide contractual indemnification or extend additional insured status, as described above, NDIRF coverage does include contractual indemnification and we will typically provide additional covered party (additional insured) status for other parties,

when requested by our members, in written contracts. It should be borne in mind, however, that the NDIRF does not intend to waive any defense a member has available in disputing the legality of these clauses. This means that if it is found a member did not have the statutory authority to indemnify another party in a specific instance, the NDIRF coverage will not respond to the party that was to be indemnified or provide that party any added covered party status.

From a risk management standpoint, we suggest NDIRF members have indemnity clauses and additional insured status requests that benefit another party eliminated from any contract. If these requirements are not eliminated, we strongly advise that any party who might have an expectation of indemnity and/or additional insured status be advised by your entity that the NDIRF does not waive any available defenses, including legal inability of your entity to agree to such contract provisions.

If you have any questions regarding this information, please contact Ross Warner at the NDIRF office. ■

## Mark Your CALENDAR

### April 2011

- 26: ND League of Cities Regional Meetings, NW Region, Crosby
- 27: NC Region, Westhope
- 28: SW Region, Killdeer

### May 2011

- 3: ND League of Cities Regional Meetings, NE Region, Grafton
- 4: SE Region, Valley City
- 5: SC Region, Jamestown
- 18: NDIRF Annual Meeting  
Doublewood Inn, Bismarck
- 18: NDIRF Board of Directors Meeting  
NDIRF offices, Bismarck

## North Dakota Insurance Reserve Fund Board of Directors

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