



**You're Not Covered for
Everything: Making Sure that
Your Nonprofit's Directors &
Officers Insurance Coverage
Matches Your Expectations**

October 16, 2012

12:00 p.m. – 2:00 p.m. EDT

Venable LLP

575 7th Street, NW

Washington, DC 20004

Moderator:

Jeffrey S. Tenenbaum

Panelists:

David S. Gray, Esq., Venable LLP
Louis Novick, President, Novick Group, Inc.



Presentation



You're Not Covered for Everything: Making Sure Your Nonprofit's Directors and Officers Insurance Coverage Matches Your Expectations

Tuesday, October 16, 2012
12:30 p.m. – 2:00 p.m. EDT

Venable LLP
Nonprofit Organizations Practice
Washington, DC

Moderator:
Jeffrey S. Tenenbaum, Esq.

Panelists:
David S. Gray, Esq., Venable LLP
Louis Novick, President, Novick Group, Inc.



Upcoming Venable Nonprofit Legal Events

November 13, 2012 – [Office Leasing for Nonprofits:
Mastering the Key Issues](#)

December 11, 2012 – Exchanges under Health Care
Reform and “Private” Exchanges: What Does My
Nonprofit Need to Know?

January 8, 2012 – [Exempt or Non-Exempt? The Ten Most
Common Employee Classification Pitfalls Faced by
Nonprofits](#)



You're Not Covered for Everything: Making the Most of What You Have

October 16, 2012
12:30 p.m. – 2:00 p.m. EDT

David (D.S.) Gray, Esq.
Venable LLP



How likely are you to be sued
(a) in your personal capacity
and (b) for an act or an alleged
failure to act as a director or
officer of your nonprofit
organization?



More than 80% of those recently surveyed as part of a study focused on corporate executives and officers said:

“Not likely”

Insurer’s description of the data:

“Disconcerting”



“Associations and nonprofits should expect their annual premiums to increase for the next few years. But nonprofit organizations are still recovering from the Great Recession and money is tight. Many have already reduced their insurance costs by lowering policy limits, increasing deductibles, and/or eliminating coverages. How much lower can they go?”

Source: How Much Insurance is Enough? Risk Financing Decisions, <http://riskychronicles.wordpress.com/2012/05/22/how-much-insurance-is-enough-risk-financing-decisions/> (May 22, 2012, 11:59 am)



“Why Should I Care?”

- Suing you is not an alternative to suing your nonprofit organization.
- You may be another pocket.
- Suing you may offer a strategic advantage to the plaintiffs.
- Assume you correctly conclude that you are not liable and/or judgment-proof. Who’s going to pay for the outside counsel necessary to show that you are right?



“Why (Else) Should I Care?”

- Every bit of “common sense” covered today
 - Was learned the hard way by very sophisticated nonprofit organizations;
 - Raised the (sometimes realized) potential of thousands, if not millions, in liabilities and legal fees; ***and***
 - Could have been readily prevented.



Our (Expected) Journey

- I. Understanding How D&O Insurance Fits
- II. Matching Potential Risks with D&O Coverage
- III. The Matchmakers
- IV. Identifying Potential Gaps in D&O Coverage
- V. Satisfying Your D&O Obligations



Understanding How D&O Insurance Fits

What D&O Insurance IS

Purpose: To protect directors, officers, and other representatives of “insured organizations” against certain third-party losses arising from “wrongful acts” in their official capacities

Sides: A, B, and C

Policy Periods: Often in terms of years, with defined start dates, that typically concern the timing of claims

Claims made



Understanding How D&O Insurance Fits

What D&O Insurance IS NOT

- Errors & Omissions Insurance
- Automobile Insurance
- Commercial General Liability Insurance
- ERISA/Fiduciary Insurance



Understanding How D&O Insurance Fits

What D&O Insurance IS NOT

- Employee Dishonesty/Fidelity Insurance
- Property Damage Insurance
- Umbrella Insurance
- Workers' Compensation Insurance



Understanding How D&O Insurance Fits

Specialty Policies

- “Blanket” Policies
- “All Risk” Policies
- “Nonprofit Organization” Policies

One size does not fit all. Policies should be relatively, but realistically, custom-fitted.



Matching Potential Risks with D&O Coverage: Who Are You?

You should be the insured.

- Use the legal name of your nonprofit organization.
 - If you use a trade name, a street name, or some other identifier, your policies also should reflect that name.
 - If your nonprofit organization changes its name, be sure that your applications and your policies reflect that change.



Matching Potential Risks with D&O Coverage: Who Are You?

- **Do not assume that your insurers know who “you” are.**
 - Subsidiary organizations
 - Parent organizations
 - Affiliated organizations
 - Member organizations
 - Committees
 - Branches



Matching Potential Risks with D&O Coverage: Who Are You?

- **Do not assume that your insurers know who your “directors and officers” are.**
 - Boards of directors
 - Boards of trustees
 - Those with dual responsibilities
 - Shareholders
 - Managers
 - Officers
 - Spouses



Matching Potential Risks with D&O Coverage: Who Are You?

- **Do not assume that your insurers know who your other insured persons are.**
 - Employees
 - Volunteers
 - Students Earning Credit
 - Interns



Matching Potential Risks with D&O Coverage: Who Are You?

- **Do not assume that your insurers know what your insured persons expect.**
 - Right to retain (and duty to pay) counsel
 - Conflicts of interest
 - Personal indemnification
 - Intersection with articles of incorporation, bylaws, and other issues of corporate governance



Matching Potential Risks with D&O Coverage: What Do You Do?

- Define the scope of your activities.
 - Be clear.
 - Be comprehensive.
 - Don't be shy.
- Redefine your activities as your organization changes.



Matching Potential Risks with D&O Coverage: Where Do You Do What You Do?

- Where have your activities been?
- Where are your activities now?
- Where will your activities be during the policy period? In the foreseeable future?



The Matchmakers

YOU need to be involved
in determining the scope
of your organization's
D&O coverage.



The Matchmakers

Your qualified insurance broker needs to be involved in that determination.

- Understanding your organization
- Understanding your goals
- Understanding your claims history
- Understanding your competitors
- Understanding threats from potential plaintiffs



The Matchmakers

Your qualified insurance broker needs to be involved in that determination.

- Frankly assessing your potential liabilities
- Helping you address potential liabilities, to the extent possible
- Helping you achieve an optimal level of coverage



The Matchmakers

- **Your insurance carriers should be involved in that determination.**
- **Coverage counsel also can help address your concerns about various issues.**
 - Scope of the coverage provided
 - Who may be an insured
 - What potential liabilities may be excluded



Identifying Potential Gaps in Your D&O Coverage

Your organization's D&O needs are not set in stone.

- Ongoing, continuous, thoughtful self-evaluations
- Reconsidering risks as activities (and potential liabilities) expand
- Learning from your own claim history



Identifying Potential Gaps in Your D&O Coverage

Your organization's D&O coverage is not set in stone.

- You must keep track of your "policy periods."
- Be sure to include sufficient time to reassess your risks, needs, people, and goals before time runs out on a policy.
- Closely review a "renewed" D&O policy to assess how it matches your risks and how it changes the coverage provided.



Satisfying Your D&O Obligations

You should consider D&O coverage (and all other insurance policies) to be **part** of a risk management program, not **the** risk management program.



Satisfying Your D&O Obligations

Outside the Four Corners of Your Policy

- Identifying and addressing risks that you can and/or should eliminate
- Identifying and addressing risks that you can and/or should limit
- Raising awareness about your risks



Satisfying Your D&O Obligations

Inside the Four Corners of Your Policy

- Read your D&O policy.
- Understand your D&O policy.
- Keep your D&O policy.



Satisfying Your D&O Obligations

- **Exclusions** explicitly preclude insurance coverage for losses arising from certain conduct, activities, or circumstances
 - “We will defend against and indemnify you against certain kinds of losses, but...”
 - The effect that any given exclusion will have on your organization depends on, among other things, the risks that your organization faces



Satisfying Your D&O Obligations

Safe Harbors

- Sometimes insurers provide a respite from broad exclusions—sometimes with, sometimes without an additional premium.
- Safe harbors can mean the difference between no coverage for certain risks and conditional coverage for certain risks.



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Satisfying Your D&O Obligations

Safe Harbors

Dishonesty exclusion

Example: “This policy excludes coverage for loss arising from an insured’s dishonest, fraudulent or criminal acts or omissions. If a claim would invoke the insurer’s duty to defend but for the allegations, then the insurer will defend the claim until there is a final adjudication by a fact finder, or admission by the insured...”



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Satisfying Your D&O Obligations

Safe Harbors

Intentional acts exclusion

Example: “This policy excludes coverage for loss arising from acts expected or intended to cause property damage or bodily harm, except that this exclusion does not pertain to any Wrongful Acts as defined by this policy.”



Satisfying Your D&O Obligations

Conditions

Even if a “covered event” occurs and even if no exclusions apply, the insurer’s assistance can be lost.

- Duty to report potentially covered event promptly and/or within a certain number of days
- Duty to cooperate with the insurance company



Nonprofit Directors & Officers Liability You're Not Covered for Everything... Get Over It

October 16, 2012
12:30 p.m. – 2:00 p.m. EDT

Louis Novick, President
Novick Group, Inc.



Who Is Covered?

- **Just about everyone**
(acting within the scope of their authority)
 - The Nonprofit Organization
 - Directors
 - Officers
 - Committee Members
 - Volunteers
 - Employees



What Is (May Be) Covered?

	Frequency	Severity
Employment Practice Liability	High	Low
Personal Injury (e.g., libel & slander)	Low	Low-Moderate
Publishers Liability (e.g., plagiarism, Copyright infringement)	Low	Low
Accreditation/Certification/Standard Setting	Low	Moderate-High
Breach of Contract (defense costs only)	Low	Low
Antitrust	Low	High



When is \$1M More than \$2M?

How much coverage is of **FAR** less importance than how good the underlying terms and conditions of coverage.



Top Five Policy Provisions You Probably Don't Read

- Defense
- Severability
- Cancellation
- Fraud Exclusion
- Coverage Territory
- Notice



Can We Get It for Less?

Remember you're not talking about which brand of AA batteries to buy.



Takeaway

The application is more important than you think. Make certain responses are candid and complete. If you're new to the position, review the prior year(s) application.



Questions

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To view Venable's index of articles, PowerPoint presentations, recordings and upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications, www.Venable.com/nonprofits/recordings and www.Venable.com/nonprofits/events.



Speaker Biographies



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AREAS OF PRACTICE

Tax and Wealth Planning
 Antitrust
 Political Law
 Business Transactions Tax
 Tax Controversies
 Tax Policy
 Tax-Exempt Organizations
 Wealth Planning
 Regulatory

INDUSTRIES

Nonprofit Organizations and Associations
 Credit Counseling and Debt Services
 Financial Services
 Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

BAR ADMISSIONS

District of Columbia

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, credit and housing counseling agencies, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was the inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the 2012 *Legal 500* rankings, and was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in *The Best Lawyers in America 2012* and *2013* for Non-Profit/Charities Law, and was named as one of Washington, DC's "Legal Elite" in 2011 by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

REPRESENTATIVE CLIENTS

AARP
 American Academy of Physician Assistants
 American Association for the Advancement of Science
 American Association for Marriage and Family Therapy
 American Association of Museums
 American College of Radiology
 American Institute of Architects
 Air Conditioning Contractors of America
 American Society for Microbiology
 American Society for Training and Development
 American Society of Anesthesiologists
 American Society of Association Executives
 American Society of Civil Engineers
 American Society of Clinical Oncology
 American Staffing Association
 Associated General Contractors of America
 Association for Healthcare Philanthropy
 Association of Corporate Counsel

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

Association of Private Sector Colleges and Universities
Automotive Aftermarket Industry Association
Brookings Institution
The College Board
Council on Foundations
Cruise Lines International Association
Foundation for the Malcolm Baldrige National Quality Award
Goodwill Industries International
Homeownership Preservation Foundation
Independent Insurance Agents and Brokers of America
Institute of International Education
Jazz at Lincoln Center
The Joint Commission
LeadingAge
Lincoln Center for the Performing Arts
Lions Club International
Money Management International
National Association of Chain Drug Stores
National Athletic Trainers' Association
National Coalition for Cancer Survivorship
National Defense Industrial Association
National Fallen Firefighters Foundation
National Hot Rod Association
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
National Telecommunications Cooperative Association
The Nature Conservancy
NeighborWorks America
New York Blood Center
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America
Texas Association of School Boards
Trust for Architectural Easements
United Nations High Commissioner for Refugees
Volunteers of America

HONORS

Recognized as "Leading Lawyer" in the 2012 edition of *Legal 500*, Not-For-Profit

Listed in *The Best Lawyers in America 2012* and *2013* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.)

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, published by the American Society of Association Executives, and is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. He also is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. In addition, he is a frequent author for ASAE and many of the other principal nonprofit industry organizations and publications, having written more than 400 articles on nonprofit legal topics.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer for ASAE and many of the major nonprofit industry organizations, conducting over 40 speaking presentations each year, including many with top Internal Revenue Service, Federal Trade Commission, U.S. Department of Justice, Federal Communications Commission, and other federal and government officials. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *The New York Times*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal issues on Voice of America Business Radio and Nonprofit Spark Radio.



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AREAS OF PRACTICE

Appellate Litigation
 Class Action Defense
 Commercial Litigation
 Litigation
 Product Liability and Mass Torts

INDUSTRIES

Consumer Products and Services
 Drugs, Medical Devices and
 Biologics
 Nanotechnology
 Nonprofit Organizations and
 Associations
 Pharmaceuticals

BAR ADMISSIONS

Maryland

COURT ADMISSIONS

U.S. Court of Appeals for the
 Fourth Circuit
 U.S. District Court for the District
 of Maryland
 U.S. Supreme Court

EDUCATION

David (DS) Gray represents manufacturers of a variety of products, including vaccines, pharmaceuticals, medical devices and construction materials, in personal injury litigation. From drafting complaints to pursuing appeals, Mr. Gray meticulously evaluates all available legal, procedural, factual and scientific avenues to empower clients to achieve their litigation objectives. He has written preliminary motions to force adversaries to dismiss or limit their claims. Having coordinated plaintiff-specific discovery in nationwide litigation, solicited favorable testimony in depositions taken throughout the Mid-Atlantic region, and used informal discovery techniques to secure game-changing evidence, he has spearheaded efficient, effective discovery to unearth weaknesses in those claims. He also has worked with experts in various fields, such as immunology, epidemiology, otolaryngology, regulatory affairs and hepatology, to translate the complex defenses to those claims into plain language.

Mr. Gray is equally adept at commercial litigation, often working through intricate issues of contract or insurance law. He has worked on behalf of large, institutional clients in a variety of industries, including banking, education, consumer products and steel, to protect their interests in pretrial, trial and appellate proceedings.

Mr. Gray does not limit his practice, however, to matters that cross the courthouse steps. He likewise works with Venable clients to assess, limit and account for their potential litigation exposure. By way of example, he has counseled clients about the advisability of proposed contractual terms, the safety of products in development, warnings to alert product users of potential hazards, and gaps in insurance policies purchased by for-profit and nonprofit clients.

SIGNIFICANT MATTERS

- Currently represents a vaccine manufacturer in nationwide litigation involving allegations that a preservative in vaccines causes various neurological conditions and developmental delays.
- Co-authored a successful motion to dismiss personal injury claims attributed to a client's vaccine and based on a legal issue of first impression in the United States.
- Co-authored a successful motion to dismiss personal injury claims attributed to a client's vaccine based on the National Childhood Vaccine Injury Act of 1986.
- Currently represents a manufacturer of an antiepileptic drug in nationwide litigation involving allegations of birth defect injuries.
- Defended a major medical research institution and researcher against accusations of research fraud.
- Co-authored a successful opposition to a motion to certify a nationwide class action of users of a client's contraceptive product.
- Counsels nonprofit organizations throughout the United States concerning various insurance coverage issues.

J.D., *summa cum laude*, University of Baltimore School of Law, 2000

Graduated first in class

Member, Heusler Honor Society

Editor-in-Chief, *University of Baltimore Law Review*, 1999-2000

Staff Member, *University of Baltimore Law Review*, 1998-99

Recipient, Mount Vernon Scholarship

B.S., *summa cum laude*, Frostburg State University, 1997

Editor-in-Chief, *The Bottom Line* (student newspaper), 1995-97

JUDICIAL CLERKSHIPS

Honorable Deborah S. Eyler, Court of Special Appeals of Maryland, 2000 - 2001

MEMBERSHIPS

Maryland Bar Association

Defense Research Institute

- Co-authored a successful motion to dismiss a putative class action against a nationwide trade association based on alleged personal injuries resulting from the medical products used by its members.
- Co-authored an amicus brief in support of a dismissal of personal injury claims against a statewide trade association, which the Court of Special Appeals of Maryland affirmed.
- Defended a product manufacturer in regional litigation involving claims of hearing loss.
- Co-authored a successful motion to dismiss punitive damages, fraud and breach of contract claims filed against a chemical manufacturer, which the plaintiffs subsequently dismissed.
- Co-authored a successful motion for summary judgment in favor of a product manufacturer based on the doctrine of misuse—a decision that the Court of Appeals of Maryland ultimately upheld.
- Co-authored a successful motion for summary judgment concerning the potential liability of an equipment manufacturer for personal injuries allegedly resulting from alleged asbestos-containing materials in replacement components affixed to the client's products.

HONORS

Recipient of the Benjamin R. Civiletti Pro Bono Lawyer of the Year Award, 2009

ACTIVITIES

Mr. Gray serves on the board of directors for the Pro Bono Resource Center of Maryland. Mr. Gray's significant matters for pro bono clients have included:

- Representation of a criminal defendant challenging ballistics evidence admitted during his trial for first degree murder, co-authoring the briefs filed in the Court of Special Appeals of Maryland.
- Representation of a nonprofit organization in a collection matter.
- Representation of an Iraqi interpreter assisting American armed forces in seeking asylum in the United States.

PUBLICATIONS

- September 28, 2012, Five Steps to Maximizing a Nonprofit's Insurance Coverage
- June 7, 2012, Baby Steps, Big Consequences: How Minimal Efforts Can Maximize Nonprofits' Insurance Coverage
- October 2011, Looking Backward to Move Forward with Your Defense: Using History to Overcome Jurors' Misunderstandings about Science, *Defense Counsel Journal*
- June 29, 2011, Staying Current on Insurance Issues Confronting Nonprofit Organizations
- July 2009, The Myths and Realities of Self-Insured Entities' Responsibilities in Light of Recent Changes to the Medicare Secondary Payer Act and Recent CMS Guidance, Product Liability Update
- January 2008, FDA Subcommittee Finds that FDA Cannot Perform its Mission, Product Liability Update
- March 1, 2007, Synthesizing the Ubiquitous: Venable LLP's White Paper on Nanotechnology Law
- June 1, 2002, Overlapping Multiple-State Class Actions: Federal Legislation May Be on the Way, *IADC Newsletter*
- 2000, The Medical Treatment Hearsay Exception in Maryland: A Low Point in Clarity for Practitioners and Protection for Litigants, *29 U. Balt. L. Rev.* 237

SPEAKING ENGAGEMENTS

- October 16, 2012, You're Not Covered for Everything: Making Sure that Your Nonprofit's Directors & Officers Insurance Coverage Matches Your Expectations
- July 26, 2012, ACC Webcast: "Poring over Your Foundation: Making Sure Your Nonprofit's Directors & Officers Insurance Coverage Matches Your Expectations (and Vice-Versa)"
- June 7, 2012, "Baby Steps, Big Consequences: How Minimal Efforts Can Maximize Nonprofits' Insurance Coverage" at ASAE's Finance, HR & Business Operations Conference
- June 29, 2011, "Current Issues in Nonprofit Insurance Coverage," Lorman Audio Conference
- December 14, 2010, Legal Quick Hit: "Understanding the Strengths and Weaknesses of Your Safety Net: Common Insurance Coverage Issues for Nonprofits" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- December 2001, "Epidemiology: It Sounds Good in Theory, But Does It Work at Trial?" American Conference Institute



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Lou Novick is President of the Novick Group, Inc., a commercial property & casualty broker located in Rockville, MD, a suburb of Washington, DC. The firm, which is licensed to operate in all fifty states, celebrated its twenty-fifth anniversary in January 2012. Prior to starting the firm, Lou worked for Marsh & McLennan in the Washington, DC office of Smith-Sternau (now Marsh Affinity).

Lou writes extensively and speaks regularly on topics related to insurance and risk management to a diverse range of nonprofit organizations and industry groups. For more than thirty years he has been actively involved in the exempt/nonprofit insurance market with special emphasis in the D&O, Publisher's, Fiduciary, and Miscellaneous Errors & Omissions lines. Lou has served on the boards of a number of nonprofit organizations including the Greater Washington Society of Association Executives, the ASAE Center For Association Leadership and the Finance and Administration Roundtable, serving as its chair in 2007-2008.

Additional Information

Articles

September 28, 2012

Five Steps to Maximizing a Nonprofit's Insurance Coverage

Related Topic Area(s): Miscellaneous

Matching the potential risks faced by a nonprofit organization with its insurance policies can challenge even seasoned executives. Policies often employ arcane, confusing language. The diversity of nonprofit organizations defies a one-size-fits-all mentality. Significant shifts in priorities, as well as new programs and activities, may require shifts in insurance coverage. And let's be honest—few people start or go to work for a nonprofit because they yearn to monitor insurance issues.

Based on our experience counseling nonprofit organizations, we have identified the following five fundamental steps that can maximize the effectiveness of insurance policies without diverting too many resources. If missed, however, these steps can result in uncertainty and uninsured risk.

Step 1: Understand the Options That a Nonprofit Has.

Although every insurance policy is different, there are some principal types of policies from which a nonprofit can choose:

- **Automobile** – Even a nonprofit that does not own its own automobiles can sometimes purchase an automobile liability policy that provides better coverage at better rates for rental cars than the coverage purchased at a car rental desk.
- **Commercial General Liability** – Known colloquially as the “CGL,” this policy remains something of a blanket policy for unexpected accidents that injure attendees, customers, visitors, and others generally unaffiliated with the nonprofit.
- **Directors & Officers** – Often described as the “D&O,” this policy typically protects directors, officers, and employees facing personal liability for alleged wrongdoing that occurs within the scope of their work and results in financial losses (including employment-related liabilities), as well as protects the nonprofit itself for such claims.
- **Errors & Omissions** – This policy focuses more on negligence that occurs as part of a nonprofit's activities. As errors & omissions coverage may intersect with D&O coverage, a nonprofit must take care to understand the potential risks that may be left uninsured if it forgoes an “E&O” policy.
- **Employee Dishonesty/Fidelity** – This policy can cover the losses that may result from an employee misusing a nonprofit's property or assets for personal use.
- **ERISA/Fiduciary** – This policy generally protects a nonprofit from certain liabilities related to retirement, profit-sharing, and health insurance plans.
- **Property Damage** – This policy can cover physical damage to a nonprofit's office space and employee property.
- **Special Events** – This hybrid policy generally provides coverage focused on risks associated with conventions, meetings, and the like.
- **Umbrella** – This policy is triggered once catastrophic events exhaust the limits of underlying policies, such as a CGL.
- **Workers' Compensation** – This policy may protect a nonprofit from litigation involving workplace injuries to its employees.

Selecting which policies to purchase requires a careful examination of a nonprofit's programs and activities, its environment, governing law, the size of a nonprofit's potential liabilities, and the ability and willingness of a nonprofit to weather those liabilities without insurance coverage.

By no means is this a complete list, as insurance companies offer specialty policies and endorsements to cover unique risks. While they may result from outside-the-box thinking, the terms in specialty policies may not be as well known as those in traditional policies. Pointed inquiries about claims made under those policies, the risks that they do (and do not) cover, and additional resources for guidance are necessary to make sure that these policies warrant the investment.

AUTHORS

David S. Gray
Jeffrey S. Tenenbaum

RELATED PRACTICES

Insurance

RELATED INDUSTRIES

Nonprofit Organizations
and Associations

ARCHIVES

2012 2008 2004
2011 2007 2003
2010 2006 2002
2009 2005

Step 2: Understand the Options that a Nonprofit Has Chosen.

A nonprofit can encounter problems if it tries to use traditional policies to cover unique risks or risks typically covered by other policies. Some insurers offer “association professional liability” or “nonprofit organization” policies, which sometimes combine certain aspects of D&O coverage, E&O coverage, and coverage against certain employment-related liabilities. Such policies do not insure all of a nonprofit’s expected risks. For instance, they generally do not protect a nonprofit sued by unhappy customers for personal injury damages. Nor do they generally cover personal injuries from automobile accidents, damage to the lobby caused by a flood, or breach of contract claims.

Policy decisions also should follow from critical thinking about the role that insurers will play. Some policies permit organizations to select their own defense attorneys; others give that choice, in whole or in part, to the insurer. Some insurance policies will reimburse certain expenses, such as certain lost employee time and expenses incurred by responding to subpoenas or investigative requests, whereas other policies will not. If organizations start thinking about these issues after a subpoena or claim has been served, it is often too late to do anything about them.

Those decisions also should acknowledge the fact that some risks cannot be insured. Even to the extent not excluded by insurance policies, state law can limit the circumstances in which anyone or any organization can receive insurance benefits for certain activities, such as intentional misconduct, certain illegal conduct, or actions resulting in punitive damage awards.

Step 3: Make Clear Who Will Benefit from the Policies.

Not identifying the right “insured persons”—those who should benefit from any coverage purchased—can lead to unwanted surprises. Insurance policies often misidentify the nonprofit that purchased them, include the wrong address for the nonprofit, or fail to extend coverage to all of the organizations that should receive insurance benefits, such as subsidiary or affiliated organizations. These are easily correctable issues that, if left uncorrected, can have potentially serious repercussions.

Nonprofits sometimes overlook the importance of ensuring that their policies extend coverage to all of the people who perform their work. This issue frequently arises with regard to volunteers, who are not always among the classes of people to whom coverage is extended. Even in states that protect volunteers for certain nonprofits against personal lawsuits, extending coverage to volunteers may benefit the organization; proving that a volunteer is immune from suit may require an attorney retained and paid by an insurer. Moreover, state volunteer protection statutes generally do not extend to all types of nonprofits.

Step 4: Protect What the Nonprofit Has Purchased.

Simply purchasing policies does not guarantee coverage, even during the policy period. Some nonprofits do not even keep copies of their policies—a practice that can impede determinations of whether they should submit a claim and the insurers to which a claim should be submitted.

A nonprofit also can encounter problems if it does not report new locations or activities that impact the risks insured by their policies. If an insurer prices its D&O coverage based on an understanding that a nonprofit engages in certain activities, but would have issued a materially different policy had it known that the nonprofit engages in other activities, it may be able to avoid its coverage obligations. Such unintentional misrepresentations can occur when, during a policy period, a nonprofit enters a new line of activity without advising its insurance companies. Adding a nonprofit’s insurers and broker to the list of those that must be advised of such developments or making that notice part of any due diligence process may protect the insurance coverage purchased.

Similar problems can occur if an insurer does not receive prompt notice of a potential claim. Policies often require that insurers receive notice about a claim promptly or within a certain number of days. If a claim falls through the cracks, some states will not excuse an insurer’s obligations unless it can prove prejudice resulting from the delayed claim. Avoiding that argument altogether by submitting a timely claim is the preferred course.

Step 5: Insist on Ongoing, Effective Communication.

To some extent, a nonprofit can (and should) rely on its insurance broker to identify the right policies to purchase and advise insurers about material developments. Identifying the appropriate times, manners, and messages to send is one of many reasons why a nonprofit should maintain an active relationship with a qualified insurance broker, particularly one who understands the unique challenges of securing adequate insurance for a nonprofit. The critical importance of this relationship cannot be overstated.

A nonprofit's emphasis nonetheless should be on delegation, not abdication. Even if a broker will report a claim or other significant development to an insurer, the nonprofit should insist that the communication be in writing, receive a copy, and follow up to make sure that the message was delivered. Calendaring the end of all policy periods, including six-week to one-month reminders, so that new terms and conditions can be negotiated, is another way to make sure that the nonprofit and broker are on the same page.

This participation cannot be passive. A nonprofit that fails to understand and ask its insurers, broker, and/or insurance coverage counsel about materials related to its policies is ill positioned to complain about a missed development. A nonprofit should remain diligent even when "renewing" insurance policies, which sometimes include new exclusions and new limitations. These developments also may escape notice because many insureds and brokers may find them inconsequential; inserting a new endorsement that precludes coverage for lobbying activities may not affect most insureds, but it would radically affect the desirability of a policy if a nonprofit has an active federal or state lobbying program.

Conclusion

When faced with a multi-million-dollar claim, the aftermath of a natural disaster, or other potential catastrophe, adding a dispute with its insurance company is hardly the way to protect a nonprofit. Although no silver bullets exist, these steps are intended to help protect nonprofits and their leadership from the misunderstandings that can result in such disputes. Taking these small steps should help put the nonprofit in a favorable position; not taking them may just add to the worries that it hoped to avoid by purchasing insurance in the first place.

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