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### Maximizing a Nonprofit's Insurance Coverage

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#### Overview

Matching the potential risks faced by a nonprofit organization with its insurance policies can be a challenge for even seasoned executives and in-house counsel. Policies often use confusing language, and the diversity of nonprofit organizations means that no one insurance policy works for all. This QuickCounsel will identify some best practices to help nonprofits select the insurance coverage they need and increase the effectiveness of those policies.

#### Knowing the Options

Choosing which policies to purchase requires a careful examination of a nonprofit's programs and activities, its environment, the governing law, the size of a nonprofit's potential liabilities, and the willingness of a nonprofit to weather certain potential liabilities without insurance coverage. Some common policies include:

- **Automobile:** Even a nonprofit that does not own its own automobiles can purchase an automobile liability policy, which may provide better coverage at better rates for rental cars than rental car companies.
- **Commercial General Liability:** Often called the "CGL," this policy ordinarily provides broad, but not unlimited, coverage for unexpected accidents that injure people who are not associated with the nonprofit, such as attendees, customers, and visitors.
- **Directors & Officers:** Commonly referred to as "D&O," this policy protects directors, officers, and employees when they are sued in their personal capacities for alleged wrongful acts that occurred within the scope of their work and resulted in financial losses. It also protects the nonprofit itself for certain claims.
- **Errors & Omissions:** This policy focuses on negligence that occurs as part of a nonprofit's usual activities. Since this coverage can intersect with D&O insurance, a nonprofit must take care to understand what specifically is covered by each policy to determine the potential risks that may be left uninsured if it chooses not to use 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, equipment, supplies, and employee property.
- **Special Events:** This hybrid policy generally provides coverage focused on risks associated with conventions and meetings.
- **Umbrella or Excess:** This type of 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.

In addition, insurance companies offer specialty policies and endorsements to cover unique risks. The terms in these specialty policies may not be as well-known as those in traditional policies. The nonprofit organization should make detailed inquiries into the types of claims made under those policies and the risks that they do (and do not) cover, in order to determine whether these policies are worth the extra investment.

#### Understanding the Selected Policies

A nonprofit should be aware of the scope of its insurance coverage, particularly if it has what some

insurers call “association professional liability” or a “nonprofit organization” policy. These policies often combine aspects of D&O coverage, E&O coverage, and coverage against some liabilities related to employment. They do not insure against all risks a nonprofit could potentially face. For example, they typically do not cover a personal injury suit arising from an automobile accident or property damage to a nonprofit’s offices from a natural disaster.

Choosing policies also should involve a discussion of the part that the insurer will play when a potentially covered claim arises. An insurance company can play a large role in the event any litigation arises, and it is important to think about these issues beforehand. For instance, some policies allow nonprofit organizations to choose their own defense attorneys, but others allow the insurance company to choose for the insured. Further, some policies will reimburse for expenses like any lost time for an employee who is responding to a subpoena, whereas others will not.

Understanding the options also involves acknowledging that some risks cannot be insured. State statutes and case law can limit the circumstances in which any person or any organization can receive insurance coverage for certain activities, such as specific illegal conduct or actions resulting in **punitive damage awards**.

### **Clarifying Who Will Benefit**

A nonprofit should ensure that its policy properly identifies the “insured persons.” The nonprofit itself should be the insured, and the policy should use the nonprofit’s legal name, as well as its common or street name if it has one, and state the correct address for the nonprofit. In addition, the coverage should extend to all of the chapters, subsidiaries, and other affiliated organizations of the nonprofit. An insurer could find that because some types of subsidiaries are specifically covered in the policy and others are not, those other groups are not protected. These details can therefore be critical in the event of a dispute over insurance coverage.

A nonprofit also must carefully review which people are covered by its policies. This issue most commonly arises with **volunteers**, who are not always covered by insurance policies but can be a major part of how the nonprofit accomplishes its work. **State laws** sometimes protect volunteers for nonprofits against personal injury claims, but extending coverage to volunteers can still be beneficial. These state law protections do not extend to all types of nonprofits or to all types of volunteers. In addition, if the volunteer is being sued, proving that the volunteer is immune will require an attorney, and an insurer would pay for or provide those legal services.

### **Protecting What Has Been Purchased**

Making effective use of an insurance policy involves more than just purchasing the policy. During the policy period, there are several steps to be taken and practices that can be avoided to guarantee coverage. Having the policies themselves available and accessible is critical; some nonprofits do not keep copies of their policies on hand, which can cause delays in determining whether and how to submit a claim.

A nonprofit also can run into the problem of not keeping its insurers up to date on new developments in its structure or activities. For example, a D&O insurance policy that was previously designed to cover only certain activities for the nonprofit may not be effective when the nonprofit has taken up other functions. Where the insurer can argue that it would have issued a materially different policy had it known about these other activities, it may be able to avoid its obligations because of this unintentional misrepresentation. Keeping the nonprofit’s insurers advised of any changes in location, structure, or activities, and providing notice as part of any due diligence process, help to ensure that the insurance policy remains effective.

Similarly, when an insurer does not receive prompt notice of a claim, it also may be able to avoid its obligations in some instances. Policies themselves provide information on when a claim must be received. Some states will excuse the insurer from its obligations if the insurer can show it was **prejudiced** due to the delay in filing the claim. Even if the insurer cannot show prejudice, submitting claims on time will avoid this kind of dispute entirely.

### **Communicating with Brokers**

Insurance brokers are a critical part of maintaining an effective insurance policy. A nonprofit can and should rely on the broker for help in choosing which policies to purchase. It can be especially helpful to have a qualified insurance broker who understands and has experience with the unique needs of nonprofits.

Relying on an insurance broker alone is not enough. Having an active role in the maintenance and

application of the policy is also important for nonprofits. For instance, even if the broker will be reporting the claim, it is helpful to ask that the report be in writing and that the nonprofit receive a copy, and to conduct a follow-up to make sure the claim has been properly filed. Keeping track of the end dates for all policy periods is another way to stay on top of communication with the broker; reminders in advance of the end date of the policy can help make sure the broker and the nonprofit are both ready to discuss renewals or new terms and conditions.

Renewing policies presents another opportunity for the nonprofit to be active in understanding its insurance coverage. A renewal can sometimes include new exclusions or new limitations. A broker may find these changes unimportant and not bring them to the attention of the nonprofit, but a change that would not affect one nonprofit could be significant for another. Asking questions about the details of the policy or the proposed changes can help ensure that the policy is appropriate for the nonprofit.

### **Conclusion**

When facing a serious accident or large lawsuit, an additional dispute with the insurance company can be another source of concern and a drain on resources. Focusing on understanding the insurance policies, on diligent recordkeeping, and on communicating effectively with the insurer can help a nonprofit be in a better position to make efficient use of its insurance coverage, should the need arise.

Additional Resources

**You're Not Covered for Everything: Making Sure that Your Nonprofit's Directors & Officers Insurance Coverage Matches Your Expectations**, by **Jeffrey S. Tenenbaum**, Esq. and **David S. Gray**, Esq.

**Top Ten Legal Risks Facing Nonprofit Boards**, by Jeffrey S. Tenenbaum, Esq.

**Baby Steps, Big Consequences: How Minimal Efforts Can Maximize Nonprofits' Insurance Coverage**, by David S. Gray, Esq. (American Society of Association Executives presentation, 2012)

**Porning Over Your Foundation: Making Sure Your Nonprofit's Directors & Officers Insurance Coverage Matches Your Expectations** (ACC Webcast, 2012)

**Who Needs an Insurance Broker?**, Nonprofit Risk Management Center

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