

# Non-Profits – Director Liability Insurance Basics

Directors are required to exercise their power with competence (or skill) and diligence in the best interests of the non-profit organization they serve. They owe what is called a "fiduciary duty" to the organization - an obligation to act in the best interests of the organization with loyalty, honesty and good faith. A director can be held personally liable for his or her own actions or inactions. Situational examples include:

- where directors act without or beyond proper corporate authority
- where directors enter into a contract without proper authorization or on behalf of a non-existent corporation.
- for breach of fiduciary duty – i.e. not acting in best interests of the organization
- statutory liabilities - various personal obligations imposed on directors under federal and provincial legislation such as un-remitted taxes, source deductions and in some cases wages

Often the biggest personal exposure is to defence costs – long before the action is dismissed or settled. The protections available to directors are generally considered to be:

- Their own due diligence
- Indemnification by the organization,
- Insurance

The **General Liability Insurance** policy of a not-for-profit gives only limited coverage to directors or officers. This type of policy, which is commonly carried by corporations as part of a "Commercial Insurance Package", addresses claims arising out of third party bodily injury, property damage. (If the not-for-profit corporation's current General Liability insurance policy excludes claims for sexual abuse and the corporation faces a risk in this regard, the board should examine specialist insurance coverage.)

**Directors and Officers Liability Insurance** policies typically protect against claims arising out of board decisions or omissions, or out of actions or activities performed directly under the auspices of the board or directors. Bodily Injury and Property Damage are excluded because coverage is available under the "General Liability Insurance". Policy wordings and exclusions vary widely insurer to insurer. (You may even have an extent of coverage under your Homeowners Insurance.)

An example of a General Liability claim would be:

**Trip & Fall** - An elderly guest at a fund-raiser badly broke his arm in a fall caused by a poorly placed extension cord. The gentlemen brought an action against the organization raising the funds.

Below are claims examples that would likely trigger an organization's Directors and Officers Liability Insurance:

**Breach of Fiduciary Duty** - A foundation, established for the purpose of running an international event, received a federal government grant earmarked to finance the event. Later, it was discovered that the foundation had exceeded their revenue with incurred expenses. A government investigation concluded that the grant money had been used not as initially represented by the foundation. A claim was brought against the directors and officers for misrepresentation regarding the use of the funds and breach of fiduciary duty.

**Mismanaged Funds** - When a wealthy family made a substantial donation to a foundation, it was expected that the monies be 'earmarked' for a specific cause. After spending the money for another purpose, one that seriously contradicted the donors strong religious beliefs, action was made against the directors to recoup the funds.

**Fired Executive** - An association terminated a senior executive after complaints from employees with respect to behaviour including sexual misconduct and harassment. The executive successfully sued the association for wrongful dismissal and the directors for interference with contractual relations. The decision of the trial judge was then appealed successfully by the defendants following which the plaintiff sought to appeal to the Supreme Court of Canada but was denied. The total cost of defending the claim was more than \$250,000.

To determine the extent of coverage your Non-Profit board has or needs – please contact Brooke Hunter (416.323.9300 or [brooke.hunter@hunterscorners.com](mailto:brooke.hunter@hunterscorners.com)) to arrange a full review.

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