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# Liability of Not-for-Profit Organizations and Insurance Coverage for Related Liability

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## I. Introduction

In the past decade, legal claims against not-for-profit organizations have increased greatly in the United States. Not-for-profit organizations are now being drawn into lawsuits on a scale previously reserved for private businesses. The emerging lawsuits against not-for-profit organizations involve a wide variety of legal issues, including tort liability, wrongful employment practices, personal injury, membership discrimination, breach of fiduciary duty, and the liability of the parent organization.

Many executive directors of not-for-profit organizations are aware of their personal and organizational risk of exposure to legal liabilities. Those directors who are cognizant of their potential legal liability will want to learn the response to complex questions such as: "What is the extent of liability of not-for-profit organizations for the actions of their volunteers versus the scope of personal liability of their directors, officers, and employees? Does insurance coverage protect against these liabilities?"

In answering these questions, the not-for-profit organization's executive director will become aware that there is an extremely wide range of potential personal and organizational liabilities, depending upon each state's statutory immunities and the allowable activities for not-for-profit organizations. Of those executive directors who realistically examine the potential liabilities currently facing their organization, many will choose to insure their activities to protect themselves and their operations. As more not-for-profit organizations insure their operations, more will face disputes with their insurance providers over their future insurance claims.

This article briefly outlines the types of legal liabilities already experienced by not-for-profit organizations and the emerging legal issues related to those liabilities. It also provides information on the types of insurance available to cover these existing and emerging liabilities. Finally, this article will highlight various trends in insurance coverage disputes involving not-for-profit organizations.

### i. II. Charitable Immunity

Historically, the charitable immunity doctrine protected charitable organizations from tort liability but allowed injured parties to recover damages from volunteers and other employees of those organizations. In the 1940s, state court decisions and state legislation began to allow recovery of damages from not-for-profit organizations and, therefore, overturned portions of the charitable immunity doctrine. [\[2\]](#) By 1992, almost every state had abrogated all or parts of the charitable immunity doctrine.

Many courts, while addressing the issue of the charitable immunity doctrine, concluded that charitable organizations presumably have control over the activities of their employees and volunteers, and thus should have the ability to take precautions to guard against injuries caused by such activities. Moreover, since the solvency of many not-for-profit organizations is no longer in question, not-for-profit organizations are now in the position to exercise better management and make certain of the safety and compliance of their operations.

Since charitable immunity is no longer available, courts are now "free" to apply the doctrine of respondeat superior, making not-for-profit corporations vulnerable and potentially liable for the torts of their volunteers in the same manner that employers can be vicariously liable for their employees' actions. [\[3\]](#) As tort victims are no longer barred from recovering the costs of injuries caused by not-for-profit organizations or their employees or volunteers, not-for-profit organizations are likely to

increase their insurance coverage for such lawsuits. Such an increase in lawsuits and insurance coverage also will invariably lead to increased insurance coverage litigation by not-for-profit organizations as they attempt to recover from their insurers the legal costs and liabilities imposed by the courts in "covered" lawsuits.

### **III. Organizational Liability**

Not-for-profit organizations are involved in a wide range of activities, many of which expose the organization, its directors, officers, volunteers, and employees to potential liability because of their acts or omissions. Although the purpose of not-for-profit organizations is to serve the public interest, these organizations, their directors, officers, volunteers, and employees may cause harm to others and are thus susceptible to typical tort claims, as well as claims such as wrongful employment practices and membership discrimination, among others.

Many courts have applied the traditional doctrine of respondeat superior in actions against a not-for-profit organization for injuries caused by its volunteers and employees. There are a considerable number of cases addressing this issue and some of these cases are discussed in the Appendix, infra pp. 22-30. In order to impose the respondeat superior doctrine, three requirements must be met: (1) there must be an injury caused by the negligence or will of the servant (the employee or volunteer); (2) there must be a master-servant (employer) relationship; and (3) the servant must have been acting within the scope of her/his employment. [\[4\]](#)

#### *Negligence of the Servant*

The first requirement when applying the respondeat superior doctrine is that there must be a finding that the employee's or volunteer's conduct was negligent. In finding negligence, the courts will consider if whether there was a breach of the standard of care by the volunteer or employee. In that case, the expectations for standards of care may be lower for volunteers.

#### *Master-Servant Relationship*

A master-servant relationship is also required in order to apply the doctrine of respondeat superior. In theory, the employer (master) must have the right to control the physical conduct of the servant and must consent to receive the volunteer's or employee's services, while expecting some benefits from the service offered.

While addressing this issue, the courts require only the presence of the right to control rather than actual control itself. In addition, the courts may consider the director's or officer's lack of supervision responsibilities over the volunteer or employee irrelevant in order to find control. Finally, courts may consider how an organization represents its relationship with a volunteer to the public in determining the existence of the right to control a volunteer's activity. [\[5\]](#)

#### *Scope of Employment*

The third requirement to be met in order to apply the respondeat superior doctrine is whether the volunteer or employee who caused the injury was acting within the scope of her or his employment at the time of the injury. As usual, the tests to ascertain this requirement are by no means uniform throughout the country. The court also must conclude that the act giving rise to the complaint was done for the purpose of doing the work assigned. [\[6\]](#)

### **IV. Volunteers' Personal Liability**

Not-for-profit organizations play a very important role in the American society and economy. In recognizing that premise, legislatures have enacted several laws granting immunity to individual

volunteers of not-for-profit organizations and to governmental entities from liability for acts of ordinary negligence (with some exceptions) committed in the course of their volunteer work.

For example, in 1997, Congress adopted the Volunteer Protection Act ("Act"), which primarily provides protection to two types of organizations: (a) the not-for-profit organization described in Section 501(c)(3) of Internal Revenue Code of 1986 and; (b) any not-for-profit organization that is organized and conducted for the public benefit for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action that constitutes a hate crime. [\[7\]](#)

The Act defines a volunteer as an individual performing services for a not-for-profit organization or governmental entity who does not receive: (a) compensation for his or her services, other than reasonable reimbursement for expenses actually incurred, (b) or anything of value, in lieu of compensation, in excess of \$500 per year. This definition includes those who serve as a volunteer Director, Officer, or Trustee. The Act does not completely protect not-for-profit organizations from liability caused by a volunteer. It limits coverage to volunteers' acts that are within the scope of their responsibilities and that amount only to ordinary negligence, and do not constitute willful or criminal conduct, gross negligence, or reckless misconduct. In addition, volunteers are granted immunity from awards of punitive damages in cases seeking damages resulting from an act by a volunteer, when the volunteer was acting within the scope of his or her responsibilities. [\[8\]](#)

As noted, the Act does not cover willful conduct or criminal misconduct. Thus, if a claimant establishes that the volunteer's act or omission constituted willful or criminal misconduct that was a proximate cause of damage or loss, then volunteers could be held personally liable for the damages caused to the third party.

The volunteer presents a double concern to the organization if his or her act is in furtherance of the work or purpose of the agency. There are innumerable cases concerning the liability of an employer for the acts of an employee or independent contractor. These same principles of agency, scope of employment, delegation of authority, etc., all can apply to the relationship between the volunteer and the organization for which he or she is volunteering. Jurors may be prone to find that any volunteer who causes harm to a person is acting in some manner on behalf of the organization, thus making the organization liable for the acts of the volunteer. [\[9\]](#)

The following section briefly discusses some of the liabilities that have been faced by not-for-profit organizations in recent years.

## **V. Theories of Liability**

### *A. Tort Liability*

The type of litigation that has increased most for not-for-profit organizations in the recent past is tort liability claims. Tort claims involve all sorts of not-for-profit organizations and their parent and sister organizations, including, for example, religious organizations. Liability can be imposed for improper selection, assignment, training, and supervision of volunteers.

The extent of liability to which not-for-profit organizations are exposed is aggravated by the fact that not-for-profit organizations are liable for the torts of their volunteers to the same extent that companies are liable for the torts of their paid employees. Assuming the right to control, an imposition of liability is said to be justified because the tort system can properly encourage organizations, including not-for-profit organizations, to develop better volunteer management services. [\[10\]](#)

### *B. Wrongful Employment Practices*

Wrongful employment suits are usually brought by employees against employers for matters such as discrimination, sexual harassment, wrongful discharge, etc. The complaints in these cases seek

damages for a single or continuous bodily injury and have named as defendants not-for-profit entities such as churches, parishes, and sports associations, to name a few.

Courts usually divide not-for-profit organizations into one of three categories: (1) religious organizations, (2) universities or private colleges, and (3) other private not-for-profit organizations. [\[11\]](#) While addressing the underlying issues, the courts balance particular issues related to each dispute, such as those related to religious careers, when interpreting the meaning of the policy. In the context of religious institutions, the courts have the tendency not to become involved in religious disputes. For instance, in *Powell v. Stafford*, [\[12\]](#) the District Court of Colorado found that application of the Age Discrimination in Employment Act of 1967 ("ADEA") would violate the First Amendment and ruled that ADEA would not apply to employees that perform primarily religious functions because application of ADEA in such cases would require the courts to make a fundamentally religious decision. In the same case, the court also ruled that the state's interest in protecting against age discrimination did not override the church's freedom of religious exercise, including the church's decisions as to who may be directly involved in the spiritual function of teaching ecclesiastical doctrine. [\[13\]](#)

Wrongful employment cases also will raise additional issues, especially in cases involving the intent of the party causing the injury and the scope of the directors' or officers' employment responsibilities.

### *C. Patent or Copyright Infringement*

Not-for-profit organizations are facing not only claims for wrongful employment and tort liability, but also for damage allegedly caused by infringement of patent or trademark law. The policyholders that are exposed to these types of claims include schools, publishing companies, athletic associations among others. The costs of these cases can be significant. As one commentator noted:

The minimum cost to take a patent infringement action to trial now ranges from \$150,000 to \$300,000. Fees often exceed \$1 Million and have reached as much as \$25 Million. [\[14\]](#)

The copyright infringement liability of governmental agencies and not-for-profit organizations does not extend to those organizations that have a primary mission to provide specialized services to the training, education, or adaptive reading information access need of the blind or other persons with disabilities. [\[15\]](#) However, the exemption granted to these organizations does not apply to standardized, secure, or norm-referenced tests and related testing materials, or to computer programs that are in conventional human language.

In patent and trademark infringement cases, insurance coverage may be found under advertising injury provisions in Comprehensive General Liability ("CGL") and Director and Officers ("D&O") liability policies. The coverage will be invoked if the presence of an injury or loss is proven to be caused by piracy, unfair competition or infringement.

### *D. Product Liability*

As product liability cases involving for-profit organizations have proliferated in recent years, they have drawn in not-for-profit organizations, which also have been named as defendants. The product liability exposure may involve all types of products and, thus, product liability doctrines may be applied to not-for-profits in the same manner as to for-profit organizations. Coverage for both kinds of organizations, is likely to be found in CGL policies.

Some of the substantive issues that may be addressed in product-related liability cases involving not-for-profit organizations often include the scope of liability and application of strict liability doctrine. For example, the Court of Appeals of Arizona, in *Dillard Department Stores, Inc. v. Associated Merchandising Corp.*, [\[16\]](#) held that a not-for-profit organization could not be held liable for injuries resulting from a defective product. The court relied on the fact that not-for-profit organization activities were intended solely to assist member stores to find potential manufacturers for

desired products, and the purchases of member stores were made directly from the manufacturers of their choice, without any direct involvement of the not-for-profit organization. In that case, the plaintiffs sought application of the strict liability doctrine, alleging that the defendant "AMC" was a broker in the chain of distribution, and thus could be held strictly liable for a defective product. However, plaintiffs' arguments did not prevail.

#### *E. Membership Discrimination by Not-For-Profit Organizations*

These suits involve cases in which a not-for-profit organization, generally a club, has denied membership or employment to, or discriminated against, a non-member. These claims usually are brought under state civil rights statutes prohibiting discrimination in places of public accommodation and are likely to be covered under CGL and D&O policies. The major types of discrimination include those based on race, color, sex, religion, ancestry, or national origin. In *Warfield v. Peninsula Golf & Country Club*, [171], the California Supreme Court reversed trial court's decision ruling that the Club constitutes a business establishment within the meaning of section 51 of California Civil Code (also known as the Unruh Civil Rights Act) and thus the application membership policies provided in section 51 by the Club did not violate its members' rights of association and privacy. [18] In *Harris v. Mothers Against Drunk Driving* [19], the parents of child killed in an alcohol-related accident were denied membership in Mothers Against Drunk Driving ("MADD"). The Harris', the parents of the killed child, sued MADD alleging arbitrary discrimination against them and violation of section 51 of the Unruh Civil Rights Act ("Act"). The Court of Appeals of the Second Circuit determined that "business establishment" terminology should be construed in the broadest meaning possible and that not-for-profit organizations should be included. In addition, the Court considered several factors to qualify a not-for-profit as "business establishment," including number of employees or staff, purpose of organization' activities, fees or dues charged to members, and business benefits provided with membership. [20]

#### *F. Liability of the Parent Organizations*

Not-for-profit parent organizations can be held liable for their chapters', parishes', or affiliates' wrongdoings. The liability will be imposed depending upon the amount of control exercised by the parent over its affiliate, as well as the public's perception of such control. Although it may appear impossible for a person to exercise ownership control over a non-stock, not-for-profit corporation, a person still be can held liable under the alter ego theory if evidence present that the dominant corporation controls and uses the other (affiliate) as a mere instrument to carry its own business plans, or if the acts of parent and affiliate are of such confusion as to make it impossible to determine who controls.

In *Jones v. Briley*, [21] the court concluded that allegations of injury suffered from an accidental shooting, posed against a not-for-profit organization, were insufficient to justify the imposition of alter ego theory, since the complaint alleged neither the presence of commingling of corporate and shareholders funds, nor a failure to follow the statutory formalities required by statute, nor was a failure to keep separate bank accounts and bookkeeping records. (See also *Communist Party of the United States v. 522 Valencia, Inc.* [22] "plaintiff was neither entitled to a constructive trust, nor could it use the alter ego doctrine to 'pierce the corporate veil' of a public benefit corporation. A constructive trust cannot exist unless there is evidence that property has been wrongfully acquired or detained by a person not entitled to its possession.")

#### *G. Breach of Fiduciary Duty/ Director Liability*

The directors or officers of not-for-profit organizations have certain fiduciary duties to the organization which primarily are the duty of care and the duty of loyalty. Not-for-profit statutes may limit or eliminate director or officer personal liability for breach of fiduciary duty, but directors and officers may still face the threat of potential liability for breach of the duty of loyalty. [23]

Breach of fiduciary duty is typically covered under D&O liability insurance. The major issue to be raised while litigating the underlying cases is the scope of fiduciary duty standards for not-for-profit

organizations set by each state. Surprisingly, not-for-profit organizations may face a higher exposure to the underlying claims, since the standard of care for not-for-profit corporations set by each statute is likely to be higher than the fiduciary standards of business corporations. [\[24\]](#)

The underlying claims also may present opportunities for coverage under errors and omissions insurance policies and multimedia liability policies.

## **VI. Directors and Officers Personal Liability (Focus on New York)**

Directors and officers of not-for-profit organizations could face personal liability for their grossly negligent acts, omissions, and intentional torts. Not-for-profit organizations may cover the risk exposure through insurance programs. Insurance companies have tended to be reluctant to cover the risk exposure posed by not-for-profit organizations and have restricted access to affordable insurance because the risk of volunteers' liability has been shown to be very high, considering that not-for-profit organizations often do not have a large measure of control over their volunteers and do not adequately supervise them. For this reason, many not-for-profit organizations operate on a self-insured basis and are exposed to a high liability risk as a result of their activities. The following is an example of the potential liability and risk absorbed by the not-for-profit when self-insured: The director of a not-for-profit organization orders the organization's volunteer (who happens to be seriously intoxicated) to drive a company car on business. The driver causes an accident and injures others. The director will be personally liable for the injuries because, under tort law, the director is required to act with the foresight that a reasonable person would exercise to ensure that his or her actions do not injure others in society. [\[25\]](#) The liability in this particular example is imposed because directors or officers of not-for-profit organizations have a duty of care while in the course of their activities and are expected to exercise reasonable care and diligence as well as informed decision-making. [\[26\]](#)

Directors or officers of not-for-profit organizations also may face liability for breach of fiduciary duty to members of the organization. However, they may avoid liability if they acted in good faith and to forward the best interests of the organization. [\[27\]](#)

Additionally, directors and officers may also face liability exposure to derivative suits. Generally, these suits are brought on behalf of the not-for-profit organization by persons who believe the organization has been damaged by acts of its directors or officers. Even though the majority of derivative suits are brought by such persons, these suits are unlikely to succeed, since the plaintiffs usually do not have the standing to bring such actions.

For instance, according to New York law, very few individuals can bring a suit on behalf of not-for-profit organizations. Only the Attorney General, directors of the board, and members (if 5% or more of the membership agree to bring the action) may bring a derivative suit on behalf of the not-for-profit corporation. [\[28\]](#) The requirements to bring a derivative action against a board member are difficult to meet, and, thus, derivative suits usually are of little concern for directors and officers of not-for-profit organizations.

The Volunteer Protection Act of 1997 protects directors or officers from personal liability resulting from their negligent acts or omissions. The directors' or officers' intentional torts, grossly negligent acts, or omissions present a risk not covered under the Act. In fact, the risk exposure has proven to be a factor when directors or officers are offered management positions to direct not-for-profit organizations. The threat of tort liability and many other exposures has begun to pose a serious problem for the directors or officers of these organizations.

It is important to note that the litigation costs involved in each type of potential liability may reach astronomical sums. For this reason, insurance coverage will continue to be valuable protection for not-for-profit corporations, since insurance coverage carries the duty to defend the insured even in the most meritless case.



## **VII. Think Insurance**

### *Forms of Insurance Coverage for Not-for-Profit Organizations*

Faced with the developments of not-for-profit organizational exposure to liability, it is prudent for these organizations to purchase general liability insurance, as well as directors' and officers' liability insurance. In the case of existing liability insurance, the not-for-profit organization should evaluate its activities and existing insurance coverage to determine whether additional coverage is necessary to provide protection against the risks of liability. This section will briefly describe the types of insurance that may cover potential liabilities in the not-for-profit setting and will identify some of the major issues that policyholders may face in insurance coverage disputes.

#### *1. Commercial General Liability Insurance*

The Commercial General Liability ("CGL") insurance policy is the successor to the Comprehensive General Liability Policy that had been available since the 1940s. The CGL policy provides coverage for companies and individuals. CGL is a typical all-risk insurance policy that usually covers bodily injury or property damage caused by the insured to a third party, including bodily injury or property damage arising in connection with losses caused by the insured's operations. CGL insurance also provides liability coverage for bodily injury and property damage for the insured's products. Coverage under CGL insurance policies is typically quite broad. A CGL policy usually provides that the companies will pay for "all sums" that the insured shall become legally obligated to pay as damages because of bodily injury, property damage, personal injury, and advertising injury.

The issues raised in insurance coverage cases of not-for-profit organizations are likely to be the same as those raised in for-profit corporations, including, but not limited to: (a) the standard for the duty to defend; (b) the trigger of coverage; (c) the number-of-occurrences; (d) notice; (e) the intent to cause the particular injury; and (f) the definition of bodily injury within the meaning of the policy at issue.

#### *2. Directors' and Officers' Liability Insurance*

The extent of directors' and officers' ("D&O") liability insurance for not-for-profit organizations may be broader than that of traditional corporate D&O policies. [\[291\]](#) While traditional D&O policies cover directors and officers as well as a limited number of managers, D&O policies for not-for-profit organizations are likely to extend their coverage to other employees, and even volunteers of the organization.

D&O policies provide coverage for costs and expenses that board members, trustees, officers, employees, and volunteers may incur as a result of claims brought in connection with their service to the organization, as well as for expenses that the organization may incur to indemnify these individuals against such claims. D&O policies issued to a not-for-profit organization also may provide coverage for certain claims made directly against the organization. These policies typically cover claims made against the insured and are reported to the insurance company while the policies are in force.

The next sections of this article will outline the major issues and legal ramifications of insurance coverage with a focus on the not-for-profit organization.

##### *a. The Duty To Defend And Pay Defense Costs*

For many not-for-profit policyholders involved in any of the underlying claims out of which coverage disputes can arise, the provision of a defense in judicial actions and/or administrative proceedings is of paramount importance, because defense costs can far exceed the net amount of any judgments or settlements entered against policyholders in underlying cases. Liability insurance policies, such as



CGL and D&O policies, impose a duty on the insurance companies either to defend or to pay the policyholder's defense costs in any suit that does not exclude the possibility of coverage.

The insurer's duty to defend arises, as a matter of law, with respect to judicial and non-judicial actions against a policyholder, when any of the underlying allegations raise the potential for coverage under the insurer's liability insurance policies. Thus, if there is any possibility of coverage based on the allegations, the insurance company must defend and pay for the defense costs.

In order to avoid its defense obligations, the insurance carrier must demonstrate that no possible factual or legal basis exists on which it eventually might be obligated to indemnify the policyholder. [30] However, if the allegations of the underlying complaint assert a claim for which the policy potentially provides coverage, the insurance company must assume the defense of the action. [31]

The insurance company's defense obligation is independent of, and broader than, its duty to indemnify. Thus, the duty to defend is not dependent on a showing that the insurance company will be obligated to indemnify the policyholder. In addition, the insurance company is obligated to defend the policyholder even if the underlying allegations are groundless, false, or fraudulent. Moreover, if some, but not all, of the allegations might fall within the policy coverage, then the carrier's duty to defend extends to the entire case. [32]

Yet, the protection is not absolute. In *Tichenor v. Roman Catholic Church*, 32 F.3d 953 (5th Cir. 1994), the Court of Appeals decided that a CGL policy issued to a defendant did not provide coverage for a former priest accused of a sexual relationship with a minor, neither as named insured nor as an employee of the named insured. The court relied on allegations of the underlying complaint that involved conduct well outside of the scope of the priest's employment.

Some insurance policies, for example, directors' and officers' liability policies and other errors and omissions policies, certain excess liability policies, etc., explicitly provide that the insurance company does not assume any duty to defend. [33] Instead, the insurance company agrees to provide defense expenses coverage, pursuant to the "loss" provisions of the policy. [34]

#### *b. Choice of Law and Choice of Forum Concerns*

Choice of law embodies the determination of what state's law applies to the coverage case, while choice of forum determines where a suit may be brought. Both issues have become integrally tied in recent coverage cases and together represent one of the pivotal issues in coverage cases today.

In the past, choice of law was barely addressed by the courts. However, choice of law is no longer a non-issue. Since the early coverage cases were decided, courts throughout the country (on both the state and federal levels) have issued rulings in hundreds of coverage cases, particularly environmental insurance coverage cases, and the results are in no way uniform. Policyholders and insurance companies today, therefore, are engaging in complex choice-of-law analyses even before a coverage case is filed in order to find a forum with the law that will be advantageous to their position. Once the coverage litigation commences, the courts now almost uniformly engage in extensive choice-of-law analyses to determine which state's law will apply to the issues presented in a coverage action. Courts engaged in choice-of-law analysis, applying varying tests, generally have placed the greatest weight on either: (1) the place where the policies were contracted; [35] (2) the location of the underlying site (or sites) at issue; [36] or (3) the principal place of business, or headquarters, of the policyholder, [37] in making their choice-of-law determinations. Many of these courts have found that the laws of different states may apply to the different issues presented in the same coverage case.

#### *c. The Trigger of Coverage*

The trigger of coverage is the event or condition that determines whether an insurance policy applies to a claim. Liability insurance policies typically provide coverage (i.e., are triggered) either (a) in the case of personal injury liability, associated with an "offense arising out of [a] business. . .", or (b) in the case of bodily injury or property damage, when such "bodily injury" or "property damage" [\[38\]](#) is "caused by an occurrence." [\[39\]](#) In either case, where an offense or employment practice is long-standing or continuing in nature, multiple insurance policies may be triggered. [\[40\]](#)

The greatest amount of litigation regarding the trigger of coverage in recent years has involved bodily injury and property damage claims under CGL policies. The CGL policy provides that the policy applies "only to bodily injury or property damage which occurs during the policy period." The question then has been: When does injury take place? There are four trigger-of-coverage theories that most commonly have been adopted by the courts in insurance coverage cases: (1) the continuous trigger; (2) the exposure trigger; (3) the injury-in-fact trigger; and (4) the manifestation trigger.

Where there is bodily injury or property damage spanning multiple policy periods, the overwhelming number of cases, including those relating to sexual molestation claims, have adopted a form of continuous trigger requiring each policy in effect to provide coverage. In *Diocese of Winona v. Interstate Fire & Casualty Co.*, 858 F. Supp. 1407 (D. Minn. 1994) ("Diocese of Winona"), the Court found that the damage caused by former priest was not "expected" and concluded that sexual molestation acts committed by the priest constitute "one continuing occurrence," providing coverage under each policy of the various insurers, except those that contained a sexual abuse exclusion. [\[41\]](#)

Under the exposure theory, the trigger of coverage is the contact with the cause of injury. Under the injury-in-fact trigger of coverage, a policy is triggered when the injury or damage "actually" has happened. Several courts have adopted some form of the injury-in-fact trigger. [\[42\]](#)

Under the manifestation theory, an insurance policy typically is triggered either when the injury or damage is detected or when an action is brought against the policyholder. See, e.g., *Am. Motorists Ins. Co. v. E.R. Squibb & Sons*, 95 Misc. 2d 222, 406 N.Y.S.2d 658 (1978) (DES).

In contrast, D&O policies typically are "claims-made" and "reported parties" triggers. That is, they are triggered if the claims are made against the insured and reported to the insurance company during the policy period.

The array of trigger decisions in these cases demonstrates how varied the law is on coverage issues nationwide, and why choice of law and choice of forum (discussed supra) have become such pivotal issues in recent coverage cases. On the other hand, a policy may be written on an under "claims-made" basis. In that event, the act that gave rise to the underlying claim does not control whether the policy provides coverage. Rather, the insurance company agrees to provide coverage only for those claims which are "made against the policyholder" (and "reported to the insurance company" in some policy forms) during the policy period. [\[43\]](#) Additionally, the policyholder may raise issues about the definition of claims within the meaning of "insurance policy" and "known event," from the standard point of the insured, that would reasonably be expected to result in the filing of a claim.

#### *d. The "Expected or Intended" Issue*

In insurance coverage litigation involving "occurrence" policies, the insurance companies typically raise an issue of whether the policyholder's conduct satisfies the definition of an "occurrence." Some policies provide coverage for bodily injury or property damage resulting from a policyholder's intentional acts, as long as the policyholder did not intend to cause the specific injury or damage that which resulted. [\[44\]](#) The insurance companies have the burden of proving that the policyholder expected or intended to cause such specific injury or damage.

The phrase "neither expected nor intended" appears in the CGL policy as part of the definition of "occurrence." The "neither expected nor intended" language in the CGL policy covers legal liability for

damages that are unintended from the standpoint of the policyholder, even if those damages are the consequences of the policyholder's intentional acts.

The coverage does not extend to claims where the injury at issue was a substantially probable result of continuing exposure caused by insured's willful indifference. For example, in *Diocese of Winona*, a not-for-profit organization filed an insurance coverage action against its liability insurers, seeking a declaratory judgment that the archdiocese was entitled to coverage for the negligent and reckless supervision claims alleged by the victim who had been sexually abused by a former priest over several years. The court ruled that under Minnesota law, the continuous sexual abuse of the child by the priest, after the priest was transferred to another diocese, was "expected" by the insured and thus did not constitute an "occurrence" within the meaning of the initial diocese's liability insurance policy. The priest's malicious conduct had extended over fifteen years, leading the court to conclude that the diocese disregarded these known risks involving the priest and failed to provide adequate supervision; therefore, the initial diocese was not entitled to coverage by any of its insurers. [\[45\]](#)

This underlying decision is particularly interesting because the second diocese, the archdiocese, also involved in the claim, was granted coverage until December 1980. The court came to this conclusion because, while the priest was negligently transferred to another diocese, the archdiocese was not "apparently aware" of the priest's past behavior until late in 1980. Furthermore, not-for-profit organizations should be aware that the known or expected issue plays a major role while litigating claims involving continuous exposure, such as repetitive sexual abuse conduct committed by their volunteers, directors, or officers.

Moreover, other exclusionary provisions must also be carefully analyzed by not-for-profit organizations while purchasing liability insurance for special events. Many not-for-profit organizations purchase the CGL policy, which provides the standard coverage and exclusions. For instance, if a not-for-profit organization promotes an event that authorizes it to sell alcoholic beverages and a third person is injured as a result of a car accident, which is proved to have been caused by alcohol intoxication, the exposure of the not-for-profit organization is apparent. For example, in *Nichols v. Westfield Insurance Co.*, [\[46\]](#) the Georgia Court of Appeals held that a dram shop exclusion precluded a fraternal civic organization from obtaining coverage for wrongful death claims based on dram shop liability because the organization was "in the business" of selling alcohol. Although the policy did cover bodily injury, coverage of defense costs and liability was barred because an exclusion provision applied. The decision also considered that the term "business" in the policy was not considered ambiguous and, thus, the law did not distinguish between not-for-profit and for-profit organizations.

#### *e. The Meaning of "Bodily Injury" or "Property Damage" in the Policies at Issue*

Policyholders may seek coverage for business-related torts under the insuring agreements in some of their liability policies which provide for insurance coverage for "bodily injury" or "property damage." For example, these provisions in CGL policies generally provide that:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this policy applies, caused by an occurrence.

"Bodily injury" is generally defined as "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." An issue that may arise in bodily injury cases is just what constitutes "bodily injury" - - for example, whether underlying allegations of "emotional distress" constitute "bodily injury" within the meaning of the insuring agreements of the insurance policies. Several courts, including the highest court of New York, in varying types of cases, have found that emotional distress may constitute "bodily injury" under certain circumstances. [\[47\]](#)

"Property damage" generally is defined as: "(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed,

provided such loss of use is caused by an occurrence during the policy period.” Damage to tangible property may include damage from loss of use of the property during replacement or removal. Where there is damage to “tangible” property, the CGL policy clearly provides coverage.

#### *f. The Number-of-Occurrences Issue*

The concept of an “occurrence,” as that term is used in liability insurance policies gives rise to two related but independent issues. The first issue concerns the timing of the results of an occurrence, i.e., the trigger of coverage. The second issue concerns the number of occurrences for purposes of determining per occurrence limits of liability and per occurrence deductibles.

The timing issue depends on when the alleged injury that is the result of an occurrence took place. In contrast, the number of occurrences determines the number of times the limits of a triggered policy will apply to pay for a loss. The number of occurrences also may determine the number of deductibles or the retrospective premium, if any, that the policyholder must pay.

The number of occurrences can be important in many cases because the policyholder may have a large self-insured retention or per-occurrence deductibles in its policies, and a determination that injury was caused by multiple occurrences ultimately could result in little or no coverage under an insurance policy.

Generally, courts use four approaches to determine the number of occurrences for purposes of the policy limits and deductibles: (1) the cause test, used by the majority of courts, which calculates the number of occurrences based on the overall conduct ultimately resulting in the bodily injury or property damage for which the policyholder is seeking coverage; [\[48\]](#) (2) the effects test, which looks to the number of the ultimate effects of the conduct to determine the number of occurrences; [\[49\]](#) (3) the liability-triggering event test, which looks neither to the cause of the injury nor to the effects of an act to determine the number of occurrences, but rather looks to the event which triggers the liability of the policyholder; [\[50\]](#) and (4) the unfortunate event test, which, recognizing that there may be more than one cause for purposes of determining the number of occurrences, looks to the “unfortunate event” from which the claim or claims arose. [\[51\]](#)

#### *g. Allocation of Defense and Liability Payments*

The standard CGL policy provides that “the company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages.” Because the policy requires the carrier to pay “all sums,” the policyholder, therefore, should be entitled to coverage in full under each of the triggered policies at its option, up to the limits of liability, if any, of each policy, regardless of how many policies are triggered. The “other insurance” clauses in the subject policies should apply only to apportion liability among the insurance companies.

Policyholders generally argue in favor of allocation based on “joint and several” liability. They contend that, once triggered, an insurance policy provides full coverage for the policyholder’s liability. [\[52\]](#)

Insurance companies often argue for a pro rata allocation among the insurance companies on the risk, and often will include the policyholder in the pro rata allocation if the policyholder is self-insured, or was uninsured for any period of time. [\[53\]](#) A pro rata allocation formula was applied in *Diocese of Winona*. The court relied on *Northern States Power Co. v. Fidelity & Casualty Co.*, 523 N.W. 2d. 657, 664 (Minn. 1994), holding that each triggered policy bears a share of the total damages proportional to the time period it was on the risk relative to the time period coverage was triggered. Thus, the archdiocese must bear its share of the liability risk for the period in which it was self-insured.

Allocation issues presented by claims-made policies, such as D&O and other errors and omissions policies, are somewhat different. With regard to the duty to pay defense costs, case law construing such policies generally provides for allocation between covered and non-covered claims. Where coverage is unclear, insurers must pay all defense costs on an interim basis. *Rite Aid Corp. v. Great*

Am. Ins. Co., No. 1:CV-92-0146 (M.D. Pa. Feb. 1, 1993) (finding no allocation between costs of defense of corporation and costs of defense of director because corporation's liability was wholly derivative of that of director).

## **VIII. Conclusion**

Not-for-profit organizations, at one time immune from any liability, are now held liable for wrongdoings of their volunteers, employees, directors, and officers. In addition, the exposure to other types of liability is now higher than ever and many not-for-profit organizations are looking for new alternatives to compensate for or insure against the potential losses that will come.

The number of potential not-for-profit policyholders with coverage problems is on the rise as new underlying cases are filed in significant numbers. Many of these cases will not only raise new issues relating to the interpretation of policies that have previously been at issue in earlier coverage litigation but also will call upon courts to interpret new policy provisions and types of insurance policies as well.

When underlying claims come to the attention of the management of a not-for-profit, one of the first steps the organization as a policyholder needs to take is to ascertain what insurance it has that potentially may provide coverage for the claims, so that the policyholder can provide notice to its insurance companies promptly. Ideally, policyholders should have a complete picture of all of their insurance coverage (i.e., all policies, for all years of operation or existence) even before new underlying claims arise, since triggered policies are likely to be past policies. Then, when a potentially covered claim does arise, the policyholder can easily identify all insurance companies to whom notice is to be given, and can give a prompt notice, so that the policyholder receives all of the insurance coverage to which it is entitled.

## **Appendix**

### **Case Law**

#### **Survey of recent Not-For-Profit Case Law**

##### **I. New York Supreme Court, Appellate Division, First Department**

###### **1. Tort Liability**

###### **Schiavone v. Brinewood Rod & Gun Club, Inc. [\[54\]](#)**

A member of a not-for-profit recreational club suffered injury when he drove over a hole while riding a dirt bike on unimproved club property. The member brought a negligence action against the club. The club moved for summary judgment. The Supreme Court, Bronx County, denied the motion, and the club appealed. The Appellate Division, First Department, held that: (1) the affidavit of the club member's friend that there was grass growing in the hole did not create a factual issue precluding summary judgment; and (2) the member assumed the risk of injury. In holding that the defendant was entitled to summary judgment on the ground that the plaintiff assumed the risk as a matter of law, the court relied on *Morgan v. State*:

[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation ... risks which various participants are legally deemed to have accepted personal responsibility for because they commonly inhere in the nature of those activities. [\[55\]](#)

The court continued, relying on *Turcotte v. Fell*:

Under this formulation it follows that the duty of a landowner is “to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty.” [\[56\]](#)

## **2. Breach of Fiduciary Duty**

### **Westchester Religious Institute v. Kameron** [\[57\]](#)

A nonprofit corporation brought a breach of fiduciary relationship action against its former officers. Following remand, the Supreme Court, New York County, denied the officers’ motion for partial summary judgment dismissing the claims for an accounting on limitations grounds, and the officers appealed. The Appellate Division, First Department, held that the breach of fiduciary relationship action was filed within the six-year limitations period and affirmed the trial court decision.

## **3. Disability Discrimination**

### **Posner v. Central Synagogue** [\[58\]](#)

A parent of a child sued a tax-exempt, nonprofit religious institution for breach of contract and moved for leave to amend the complaint to allege a disability discrimination claim and to transfer the action from civil court to the New York Supreme Court. The Supreme Court, New York County, denied the motions and ordered the parent, who appeared pro se, to pay \$100 in motion costs to the religious institution’s counsel. The parent appealed. The Appellate Division, First Department, affirmed the trial court decision, holding: (1) the disability discrimination claim was insufficient on its face, since the plaintiff had failed to establish any factual or legal basis for the proposed amended claim that the defendant had engaged in discriminatory conduct; (2) the parent was not entitled to amend the ad damnum clause; and (3) the parent was properly sanctioned.

## **4. Gender Discrimination**

### **Elaine W. v. Joint Diseases North General Hospital, Inc.** [\[59\]](#)

A pregnant hospital patient with substance abuse problems brought an action against a hospital for alleged discrimination based on gender resulting from their exclusion from the hospital’s inpatient substance abuse program. The Supreme Court, New York County, denied the hospital’s motion for summary judgment, and the hospital appealed. The Appellate Division, First Department, reversed and dismissed the complaint, holding that the hospital’s policy was not gender-based discrimination, since the hospital did not illegally discriminate against pregnant substance abusers based on gender by excluding them from its inpatient substance abuse program, where the hospital did not have an obstetrics department, and the hospital’s policy was based upon sound medical judgment. On appeal, the Court of Appeals of New York reversed and denied the hospital’s motion for summary judgment, holding that the hospital had failed to establish that its blanket exclusion did not constitute unlawful sex discrimination merely by showing that it was not equipped, staffed, or licensed to provide obstetrical services.

## **II. Supreme Court of New York, Westchester County**

### **5. Tort Liability**

#### **Moskowitz v. Lambert** [\[60\]](#)

A personal representative of a decedent brought an action against a power authority alleging that the power authority was negligent in failing to maintain proper security at its nuclear facility and in failing to adequately supervise its personnel. The power authority moved to strike the representative’s cause of action seeking an award of punitive damages. The Supreme Court, Westchester County, agreed:

[G]iven defendant PANSY's performance of an essential governmental function in a non-profit setting as a "corporate municipal instrumentality", and the impact upon the public were the Court to rule otherwise, an award of punitive damages properly may not be assessed against this defendant in the situation presented herein. [\[61\]](#)

The court held that punitive damages could not be assessed against the power authority, given the power authority's performance of an essential governmental function in a nonprofit setting as a corporate municipal instrumentality and therefore granted the defendant's motion.

### **III. Supreme Court of New York, Appellate Division, Fourth Department**

#### **6. Defamatory Action**

##### **Sovik v. Healing Network [\[62\]](#)**

A senior teacher of traditional spiritual philosophy brought a defamation action seeking damages for libel individually and on behalf of all senior teachers, the institute to which he belonged (a branch center of Himalayan International), on the institute's own behalf, and on behalf of Himalayan International. The law suit was brought against a nonresident, nonprofit corporation and its officers, based on letters mailed to all or several members of the institute informing them of the training policies of Himalayan International. The complaint alleged that the letters stated: "Twenty-five years have passed since that training first began. In that time we have discovered that scores of women have been sexually coerced and exploited by Swami Rama and other senior teachers." [\[63\]](#)

The Supreme Court, Erie County, denied summary judgment to the defendants. An appeal was taken, and The Appellate Division, Fourth Department, agreed, holding that: (1) summary judgment was premature with respect to issues of long-arm jurisdiction, and whether the president of the corporation could be held liable; (2) a fact issue existed as to whether the letter was "of and concerning" the senior teacher of spiritual philosophy; and (3) the senior teacher was not a "public figure," and thus was not required to show actual malice in a defamation action against a nonprofit corporation.

### **IV. Supreme Court of New York, Cortland County**

#### **7. Membership Discrimination**

##### **Balaklaw v. American Board of Anesthesiology, Inc. [\[64\]](#)**

A physician, who was denied certification in his specialty of anesthesiology by the nonprofit corporation which administered the written examination, sued the corporation for damages. The corporation moved to dismiss the complaint. The Supreme Court, Cortland County, held that since the language of the application agreement was clear and unambiguous, and there was no implied promise that which would allowing the plaintiff the relief sought: (1) the "hold harmless" provision contained in the application for examination was enforceable; (2) the physician was not entitled to review his test pursuant to the implied promise theory; (3) the "hold harmless" provision in the application was not a contract of adhesion; and (4) the physician's failure to pass a standard written examination was not sufficient evidence to imply discrimination on the part of the corporation in certifying applicants. The defendant's corporation motion to dismiss was granted.

### **V. New York Supreme Court, Appellate Division, Third Department**

#### **8. Miscellaneous**

##### **Hoston v. New York State Department of Health [\[65\]](#)**



Ministers and pastors of religious congregations in the Rochester, New York area challenged the New York State Department of Health's approval of a Planned Parenthood medical clinic's application to expand its facilities to provide abortion services. The Supreme Court, Albany County, denied the clinic's motion to dismiss for lack of standing. The clinic appealed. The Appellate Division, Third Department, reversed, holding that the ministers and pastors lacked standing to challenge the approval of the application because they did not demonstrate an injury-in-fact. The court ruled that the plaintiffs' allegations, namely that the over-supply of abortion services in the community would make it more difficult to counsel their congregation about choosing childbirth rather than abortion, did not constitute an injury within the "zone of interests" relating to the statutory "goals of 'cost containment and the promotion of efficiency in health care planning.'" [\[66\]](#)

## **9. Idem**

### **In re Versailles Foundation, Inc. [\[67\]](#)**

The plaintiff foundation sought to compel a decedent's executor to deliver specific property that which the foundation claimed was an enforceable charitable donation. The foundation offered letters from the decedent, thanking officers of the foundation for luncheons and other entertainment, as proof of a charitable contract. The Surrogate Court, New York County, denied the foundation's motion, and the foundation appealed. The Appellate Division, First Department, affirmed, noting that thank you letters could not be considered clear and convincing evidence of a charitable contract. The court found that "wining and dining" of a potential donor could not be considered reliance sufficient to make a charitable pledge enforceable. In addition, the court noted that the foundation had already received a clock worth \$20,000 and cash gift of \$500 from the decedent.

## **10. Wrongful Termination**

### **Ransom v. St. Regis Mohawk Education & Community Fund Inc. [\[68\]](#)**

Discharged employees of a not-for-profit corporation, organized to provide education and health services to members of the St. Regis Mohawk Tribe, brought an action against the corporation and its directors, who were also the Tribal Chiefs, claiming that their dismissal was not in compliance with the Tribe's employment policy and procedures manual. The Supreme Court, Franklin County, directed the corporation to reinstate the employees. The corporation appealed. The Appellate Division, Third Department, reversed and remitted. On remand, the Supreme Court determined that the corporation did not enjoy sovereign immunity. On appeal, the Appellate Division, Third Department, reversed and dismissed the petition. The employees appealed. The Court of Appeals held that: (1) as a tribal entity, the corporation enjoyed sovereign immunity; (2) the incorporation by reference in the corporate charter of the statutory power to sue and to be sued did not satisfy the requirement of express and unequivocal waiver of immunity; and (3) the directors acted within the scope of their authority and were thus protected by the corporation's immunity.

## **Non-New York Insurance Decisions**

### **11. U.S. District Court for District of New Mexico**

#### **Servants of the Paraclete, Inc. v. Great American Insurance Co. [\[69\]](#)**

This case arises out of a dispute between an insured and its insurers over the duty to defend and the duty to indemnify. In 1992, the plaintiff nonprofit organization was sued in state court actions by children in Minnesota and New Mexico for sexual abuse committed by a former priest at the organization. As a result of the insurers' refusal to pay losses incurred in the lawsuits, the insured/plaintiff filed a declaratory action alleging that Great American Insurance Company, Catholic Mutual Relief Society of America, and St. Paul Fire and Marine Insurance Company breached their respective duties to defend and to indemnify the plaintiff. The insurers moved for summary judgment.

The district court addressed many issues such as trigger of coverage, duty to defend, and duty to indemnify. The district court denied St. Paul's motion for summary judgment that it had no duty to defend the plaintiff in the Minnesota actions but granted the summary judgment motion that St. Paul had no duty to defend in the New Mexico actions, since the plaintiff had failed to show that the claimants had alleged any "injury" during the period of the policy. The court held that Catholic Mutual had a duty to defend, but not a duty to indemnify, since the underlying actions did not allege that "bodily injury" occurred during the period of coverage. Finally, the court ruled that because Great American's policies were unclear, and thus ambiguous, Great American had a duty to defend. Further, because there was a sufficient nexus between the alleged negligence and the injuries claimed, Great American had a duty to indemnify.

## **12. U.S. Court of Appeals, Fifth Circuit**

### **Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans [\[70\]](#)**

In this case, a priest was accused of sexually molesting a child, and also of defamation and invasion of privacy by marketing videotapes and/or photographs of the plaintiff. The priest claimed that the insurance company that insured his church had a duty to defend him. The court held that the insurance company had a duty to defend its insured, which included the church, directors, member churches, officers, and any employee working within "the scope of his duties." The court held that, because the priest's actions were clandestine activities not within the scope of his employment, the insurance company had no duty to defend the priest.

## **13. U.S. District Court for District of Minnesota, U.S. Court of Appeals, Eighth Circuit**

### **Diocese of Winona v. Interstate Fire & Casualty Co. [\[71\]](#)**

This case involves a priest who sexually abused children while he was employed by the plaintiff diocese from 1958 to 1985. The insured diocese and archdiocese sued the defendant insurance companies for coverage for underlying negligent and reckless supervision. The insurance companies argued that they did not have a duty to either defend or indemnify the churches because the acts of the priest were not covered by the insurance policies for the following reasons: (1) the policies did not cover intentional acts [by the priest] or acts which were expected by the plaintiffs; and (2) the act in question was a single occurrence which only triggered the insurance policy at the outset of the abuse. The district court ruled that the priest's acts did not preclude the churches from coverage because the churches did not intentionally direct the priest to conduct the sexual abuse, and that the knowledge of the priest's past acts of abuse did not lead them to expect that the priest would continue to abuse children. Further, the district court concluded that the sexual abuse was a single continuous act which caused actual harm during the policy period. Therefore, the defendant insurance companies had the duty to indemnify the plaintiff churches. Both parties appealed, and the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part, holding that: (1) the sexual abuse was "expected" by the insureds, and thus the victim's claims did not involve a covered "occurrence"; (2) the diocese was not liable to the archdiocese's insurer for reimbursement of that insurer's overpayments to the archdiocese; and (3) the insureds were not entitled to coverage for litigation expenses, either in the underlying action or in the appeal.

## **Notes**

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[2] See Daniel L. Kurtz, Protecting Your Volunteer: The Efficacy of Volunteer Protection Statutes and Other Liability Limiting Devices, available at WL at C726 ALI-ABA 263, 267 (Apr. 9, 1992).

[3] Jeffrey D. Kahn, Comment, Organizations' Liability for Torts of Volunteers, 133 U. Pa. L. Rev. 1433, 1436-44 (1985).

[4] See Restatement (Second) of Agency § 219 (1957).

[5] See *Leno v. Young Men's Christian Ass'n*, 17 Cal. App. 3d. 651, 658, 95 Cal. Rptr. 96, 100 (1971). The issue of how an organization presents its relationship with its volunteers to the public was emphasized by the Supreme Court in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). See also Kahn *supra* note 3, commenting on footnote 52 ("Although this case involved an antitrust action against a professional society composed of volunteer members (and thus falls outside the scope of this Comment), it is worth noting because it is the only time that the Supreme Court has held that an organization may be liable for acts committed by its volunteers. In holding the organization liable under the antitrust laws for the acts of their volunteers, the Court relied primarily on the doctrine of apparent authority. Significant to this analysis in this Comment is the Court's note that the association was in the best position to prevent these volunteers from violating the law.")

[6] See *Mistletoe Express Serv., Inc. v. Culp*, 353 P.2d 9 (Okla. 1959).

[7] Thomas L. Frenn, The 1997 Federal Volunteer Protection Act: Limited Protection for Volunteers, Wis. Law, Dec. 1998, at 19, 20, available at WL at 71-Dec Wis. Law. 19.

[8] See Kahn, *supra*, note 3, at 14.

[9] Robert W. McMnamin, The Volunteer and Liability: Words to the wise for those who use volunteers and those who counsel them, Or. St. B. Bull., Jan. 1995, at 15, available at WL at 55.

[10] See Kahn, *supra*, note 3, at 1445-46.

[11] Samantha L. Bley et al., Survey of 1994 Nonprofit Case Law, 30 U.S.F. L. Rev. 187 (1995).

[12] See 859 F. Supp. 1343 (D. Colo. 1994).

[13] See *id.*

[14] See Eugene R. Anderson & David A. Einhorn, Patent Infringement Actions – Insurance to the Rescue, 73 J. Pat. & Trademark Off. Soc'y 527, 527-28 (1991).

[15] See Peter D. Rosenberg, 1 Pat L. Fundamentals § 5.04 (2d. 2000)

[16] See 162 Ariz. 294, 782 P.2d 1187 (1989)

[17] 896 P.2d. 776 (Cal. 1995)

[18] See *id.* at 798.

[19] 46 Cal. Rptr. 2d. 833 (Ca. App. 1995).

[20] *Id.* at 834

[21] See 593 So. 2d. 391 ( La. App. 1991).

[22] See 41 Cal. Rptr. 2d. 618 (CT. App. 1995).

[23] Dean Papademetriou, *Legal Issues for NonProfit Cultural Organization: A Primer for Lawyers and Board Members*, Boston B. J., Oct. 2000, at 12, available at WL at 44-Oct BBJ 12.

[24] See *Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket*, 320 Mass. 311, 69 N.E.2d 463 (1946).

[25] Peter Swords, *An Examination of Nonprofit Board Members Exposures to Liability*, available at WL at C479 ALI-ABA 165 (Mar. 28, 1990).

[26] See James J. Fishman & Stephen Schwarz, *Nonprofit Organizations: Cases and Materials*, (2nd Ed. Foundation Press 2000) at 187.

[27] Charles Engel, *Personal Liability of Nonprofit Directors*, J. Kan. B. Ass'n, May 1991, at 28, 31, available at WL at 60-May J. Kan. B.A. 28.

[28] See Swords, *supra* note 18, at 173.

[29] See Elaine L. Johnston & Annemarie Thomas, *Nuts and Bolts of Insurance: Directors' and Officers' Liability [and] Media Liability*, available at WL at SF12 ALI-ABA 363 (Mar. 23, 2000).

[30] See *Solo Cup Co. v. Fed. Ins. Co.*, 619 F.2d 1178, 1185 (7th Cir. 1980); *Sch. Dist. No. 1 v. Mission Ins. Co.*, 58 Or. App. 692, 650 P.2d 929, 937 (1982).

[31] See *Great Am. Ins. Co. v. Hartford Ins. Co.*, 85 Ohio App. 3d 815, 820-22, 621 N.E.2d 796, 800 (11th Dist. 1993) (invasion of privacy potentially or arguably states a claim); *United States Fire Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 31 Ohio App. 3d 270, 272, 511 N.E.2d 127, 129 (1986).

[32] See, e.g., *Puritan Ins. Co. v. 1330 Nineteenth Street Corp.*, 1984 Fire & Cas. Cases 1149, 1154 (D.D.C. 1984).

[33] See, e.g., *Gon v. First State Ins. Co.*, 871 F.2d 863, 868 (9th Cir. 1989) ("Gon") ("There is no language in the policy stating that [the insurer] will defend any claims."); see also *Nat'l Union Fire Ins. Co. v. Ambassador Group, Inc.*, 157 A.D.2d 293, 556 N.Y.S. 2d 549 (1st Dep't 1990), appeal dismissed without opinion, 77 N.Y.2d 873, 571 N.E.2d 85, 568 N.Y.S.2d 915 (1991).

[34] One typical defense payment provision in a D&O policy provides:

The Company has not, under the terms of this policy, assumed any duty to defend, nor any of the costs, charges and expenses of defense payable by the Company in addition to the limit of liability. Costs, charges and expenses of defense are elements of loss incurred under this policy and as such are subject to all of the provisions of this policy.

Under this type of policy, therefore, the policyholder retains defense counsel of his or her choice, and maintains control over the defense of the underlying action. The insurance company, though, pays the defense costs. Defense costs generally include the costs of appeal and attachment or similar bond.

[35] E.g., *Asbestos Removal Corp. of Am. v. Guar. Nat'l Ins. Co.*, 48 F.3d 1215 (table), 1995 WL 83783 (4th Cir. 1995); *Am. States Ins. Co. v. Mankato Iron & Metal Inc.*, 848 F. Supp. 1436 (D. Minn. 1993); *Gould Inc. v. Cont'l Cas. Co.*, 822 F. Supp. 1172 (E.D. Pa. 1993); *Reichhold Chem. Inc. v.*

Hartford Accident & Indem. Co., No. CV88-0351982 (Conn. Super. Ct. Feb. 24, 1993); Am. Motorists Ins. Co. v. Rust-Oleum Corp., No. 36,474 (Ind. Cir. Ct., Johnson City Mar. 26, 1991) (court applies Illinois law); Terminix Int'l Co. v. Md. Cas. Co., No. 88-2186-4/B (W.D. Tenn. Apr. 9, 1991), aff'd on other grounds, 956 F.2d 270 (6th Cir. 1992).

**[36]** E.g., Gilbert Spruance Co. v. Pa. Mfrs.' Ass'n Ins. Co., 134 N.J. 96, 98, 629 A.2d 885, 886 (1993) ("Gilbert Spruance") ("when the parties to the insurance contract can reasonably foresee that a New Jersey waste site will receive the insured's waste products, New Jersey law should dictate the proper interpretation of the insuring agreement."); Am. Cas. Co. v. Gen. Metals of Tacoma, Inc., No. C92-5192B (W.D. Wash. Feb. 8, 1994); CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 839 F. Supp. 124 (D.R.I. 1993) (follows Gilbert Spruance), writ of mandamus refused, No. 94-1056 (1st Cir. Jan. 28, 1994), aff'd, 46 F.3d 1211 (1st Cir. 1995); A. Johnson & Co. v. Aetna Cas. & Sur. Co., 741 F. Supp. 298 (D. Mass. 1990), aff'd, 933 F.2d 66 (1st Cir. 1991); Champion Int'l Corp. v. Aetna Cas. & Sur. Co., No. 90-2-09616-5 (Wash. Super. Ct. Sept. 27, 1991), reconsideration denied (Oct. 21, 1991); Joy Techs., Inc. v. Liberty Mut. Ins. Co., 187 W. Va. 742, 421 S.E.2d 493 (1992);. But see NL Indus., Inc. v. Commercial Union Ins. Co., 65 F.3d 314 (3d Cir. 1995) (suggesting another standard applies in New Jersey in non-environmental cases); Butler & Smith Inc. v. Liberty Mut. Ins. Co., No. 93-4494 (DRD) (D.N.J. Sept. 17, 1995) (emphasis on location of site diminished where insured risk is multistate in nature); Ins. Co. of N. Am. v. Asarco, Inc., No. L-6164-93 (N.J. Super. Ct. Jan. 17, 1997) (location of particular site is less important where sites at issue are multistate in nature).

**[37]** E.g., Imperial Cas. & Indem. Co. v. Kingsbury Mach. Tool Corp., No. C-92-348-L (D.N.H. Dec. 14, 1993); Monsanto Co. v. Aetna Cas. & Sur. Co., No. 88C-JA-118 (Del. Super. Ct. Oct. 29, 1991) (court applies Missouri law); E.I. DuPont de Nemours & Co. v. Admiral Ins. Co., No. 89C-AU-99 (Del. Super. Ct. Oct. 22, 1991) (court applies Delaware law); accord Md. Cas. Co. v. W.R. Grace & Co., No. 88 Civ. 4337 (JSM) (S.D.N.Y. June 8, 1992); Smith v. Hughes Aircraft Co., 783 F. Supp. 1222 (D. Ariz. 1991), aff'd in part and rev'd in part on other grounds, 10 F.3d 1448 (9th Cir. 1993).

**[38]** The question of what constitutes "bodily injury" and "personal injury" is discussed below in Section e.

**[39]** One example of the definition of an "occurrence" is: "an accident, including injurious exposure to conditions which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured".

**[40]** See, e.g., Nat'l Cas. Ins. Co. v. City of Mt. Vernon, 128 A.D.2d 332, 515 N.Y.S.2d 267 (2d. Dep't. 1987) (personal injury claim for false imprisonment over a period of years triggers multiple policies).

**[41]** The appeals court reversed the district court decision and concluded that the acts committed by the priest were expected, and thus no occurrence was found.

**[42]** See, e.g., Aetna Cas. & Sur. Co. v. Abbott Labs., Inc., 636 F. Supp. 546 (D. Conn. 1986) (pharmaceuticals); Sandoz, Inc. v. Employers' Liab. Assurance Corp., 554 F. Supp. 257 (D.N.J. 1983) (pharmaceuticals); First State Ins. Co. v. Minn. Mining & Mfg. Co., No. C3-94-12780 (Minn. Dist. Ct. July 14, 1997) (breast implants).

**[43]** Some claims-made policies also exclude retroactive coverage, and, therefore, only provide coverage for claims which not only are made during the policy period but further require that the events giving rise to the claim also fall within the policy period for coverage to attach.

**[44]** Other policies may specifically exclude coverage for "expected or intended" damage or injury, or in other ways limit coverage for intentional acts. See, e.g., Quality Painting, Inc. v. Truck Ins. Exch., 26 Kan. App. 2d 473, 988 P.2d 749 (1999) (intentional acts exclusion bars coverage for sexual harassment claim against painting company).

[45] In this case, court also found that environmental continuous contamination was analogous to the repetitive sexual abuse alleged by the plaintiff. In concluding that, the court made important distinction between occurrence from injury, stating that occurrence was the continuous and repeated exposure, while injury was the actual abuse. Under Minnesota law, applied in the case at issue, the time of the actual injury that is what actually triggers the policy. In fact, in the case, the court rejected the argument that a single, continuous occurrence spanning multiple policy periods constitutes a single occurrence in each policy period. See *N. States Power Co. v. Fid. & Cas. Co.*, 523 N.W.2d 657, 664 (Minn. 1994); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1393 (E.D.N.Y. 1988).

[46] 509 S.E.2d. 149 (Ga. App. Ct. 1998)

[47] E.g., *Williamson v. Historic Hurtsville Ass'n*, 556 So. 2d 103 (La. Ct. App. 1990) (bar owner's claims of embarrassment, mental anguish, and suffering because of alleged slander constitute "bodily injury"); *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 607 A.2d 1255 (1992) ("bodily injury" is ambiguous as it relates to emotional distress accompanied by physical manifestations); *NPS Corp. v. Ins. Co. of N. Am.*, 213 N.J. Super. 547, 550, 517 A.2d 1211, 1212 (App. Div. 1986) (court holds "bodily injury" includes "emotional and psychological sequelae allegedly resulting from the unauthorized invasion of the complainant's person"); *Lavanant v. Gen. Accident Ins. Co. of Am.*, 79 N.Y.2d 623, 630-31, 595 N.E.2d 819, 822 (1992) (court finds the term "bodily injury" to be ambiguous and states that "in upholding such claims, we have recognized that emotional trauma may be as disabling as physical injury, and that whether a person suffers one form of injury or the other may be a fortuity determined solely by the particular vulnerability of an individual"); *State Farm Mut. Auto. Ins. Co. v. Ramsey*, 368 S.E.2d 477, 478 (S.C. Ct. App.), *aff'd*, 374 S.E.2d 896 (1988) (in non-employment case, court observes that "negligent infliction of emotional trauma is a bodily injury for which damages may be recovered under a standard policy of insurance"); *Tara N. v. Economy Fire & Cas. Ins. Co.*, 197 Wis. 2d 77, 540 N.W.2d 26 (in sex abuse case, child's psychological injury constitutes "bodily injury"), review denied, 542 N.W.2d 155 (Wis. 1995). But see *ERA Franchise Sys., Inc. v. N. Ins. Co.*, 32 F. Supp. 2d 1254 (D. Kan. 1998) (lawsuit accusing investment service of giving bad investment advice did not allege bodily injury or property damage caused by an occurrence), *aff'd*, 208 F.3d 225 (table), 2000 WL 192834 (10th Cir. 2000); *Mut. Serv. Cas. Ins. Co. v. Co-op Supply, Inc.*, 699 F. Supp. 1438 (D. Mont. 1988) (claims for humiliation and mental and emotional distress do not trigger duty to defend); *Allstate Ins. Co. v. Diamant*, 401 Mass. 654, 518 N.E.2d 1154 (1988) (claims for emotional distress and injury to reputation are not "bodily injury" claims); *SL Indus., Inc. v. Am. Motorists Ins. Co.*, 128 N.J. 188, 202-06, 607 A.2d 1266, 1274-75 (1992) (ordinary meaning of "bodily injury" connotes "some sort of physical problem").

[48] E.g., *Peco Energy Co. v. Boden*, 64 F.3d 852, 856 (3d Cir. 1995); *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982); *Am. Red Cross v. Travelers Indem. Co.*, 816 F. Supp. 755, 760-61 (D.D.C. 1993); *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 773 (E.D. Pa. 1989); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515, 1527-28 (D.D.C. 1984); *Transp. Ins. Co. v. Lee Way Motor Freight, Inc.*, 487 F. Supp. 1325 (N.D. Tex. 1980).

[49] E.g., *Anchor Cas. v. McCaleb*, 178 F.2d 322, 325 (5th Cir. 1949); *Elston-Richards Storage Co. v. Indem. Ins. Co. of N. Am.*, 194 F. Supp. 673, 682 (W.D. Mich. 1960), *aff'd*, 291 F.2d 627 (6th Cir. 1961).

[50] E.g., *Mich. Chem. Corp. v. Am. Home Assurance Co.*, 728 F.2d 374, 383 (6th Cir. 1984).

[51] E.g., *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2d Cir. 1995) ("Stonewall"), modified on other grounds on denial of reh'g, 85 F.3d 49 (2d Cir. 1996); *In re Prudential Lines, Inc.*, 158 F.3d 65 (2d Cir. 1998) ("Prudential").

[52] See, e.g., *Prudential*, 158 F.3d at 83-87; *TPLC v. United Nat'l Ins. Co.*, 44 F.3d 1484 (1995); *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1050-51 (D.C. Cir. 1981); *C.E. Thurston & Sons, Inc. v. Chicago Ins. Co.*, No. 2:97cv1034 (E.D. Va. Oct. 2, 1998); *Armstrong World Indus., Inc. v.*



Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690 (1996), review denied, 1996 Cal. LEXIS 4708 (Cal. Aug. 21, 1996); Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co., 145 Ill. App. 3d 175, 494 N.E.2d 634 (1986), aff'd, 118 Ill. 2d 23, 514 N.E.2d 150 (1987); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993).

[53] See Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230, 1242-43 (E.D. Mich. 1978) ("Forty-Eight Insulations"), aff'd, 633 F.2d 1212, 1225-26 (6th Cir. 1980), clarified and aff'd on reh'g, 657 F.2d 814 (6th Cir. 1981); Stonewall, 73 F.3d 1178; EEOC v. S. Publ'g Co., 894 F.2d 785, 791 (5th Cir. 1990) (court follows Forty-Eight Insulations in sexual harassment coverage dispute); Reichhold Chems., Inc. v. Hartford Accident & Indem. Co., No. X03-CV 880858 845, 1999 Conn. Super. LEXIS 2066 (Conn. Super. Ct. Feb. 11, 1999); Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 650 A.2d 974 (1994).

[54] 283 A.D.2d 234, 726 N.Y.S.2d 615 (1st Dep't 2001).

[55] Id. at 236, 726 N.Y.S.2d at 617 (alteration in original) (quoting Morgan v. State, 90 N.Y.2d 471, 484, 685 N.E.2d 202, 207-08, 662 N.Y.S.2d 421, 426-27 (1997)).

[56] Id. (quoting Turcotte v. Fell, 68 N.Y.2d 432, 439, 502 N.E.2d 964, 968, 510 N.Y.S.2d 49, 53 (1986)).

[57] 262 A.D.2d 131, 691 N.Y.S.2d 502 (1st Dep't 1999).

[58] 202 A.D.2d 284, 609 N.Y.S.2d 195 (1st Dep't 1994).

[59] 180 A.D.2d 525, 580 N.Y.S.2d 246 (1st Dep't 1992), rev'd, 81 N.Y.2d 211, 613 N.E.2d 523, 597 N.Y.S.2d 617 (1993).

[60] 158 Misc. 2d 563, 601 N.Y.S.2d 510 (Sup. Ct. Westchester County 1993).

[61] Id. at 566, 601 N.Y.S.2d at 512.

[62] 244 A.D.2d 985, 665 N.Y.S.2d 997 (4th Dep't 1997).

[63] Id. at 986, 665 N.Y.S.2d at 999.

[64] 149 Misc. 2d 11, 562 N.Y.S.2d 360 (Sup. Ct. Cortland County 1990).

[65] 203 A.D.2d 826, 611 N.Y.S.2d 61 (3d Dep't 1994).

[66] Id. at 828, 611 N.Y.S.2d at 62 (citation omitted).

[67] 202 A.D.2d 334, 610 N.Y.S.2d 2 (1st Dep't 1994).

[68] 204 A.D.2d 781, 611 N.Y.S.2d 935 (3d Dep't 1994), aff'd, 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995).

[69] 857 F. Supp. 822 (D.N.M. 1994).

[70] 32 F.3d 953 (5th Cir. 1994).

[71] 858 F. Supp. 1407 (D. Minn. 1994), aff'd in part, rev'd in part, 89 F.3d 1386 (8th Cir. 1996). The court decided that a) sexual abuse was expected by insureds, and thus victim's claims did



not involve a "covered occurrence"; b) the diocese was not liable to the archdiocese's insurer for reimbursement of that insurer's overpayments to the archdiocese; and c) the insureds were not entitled to coverage litigation expenses, either in the underlying or present action.