



## CLIENT ADVISORY

### Not-For-Profit D&O Liability Exposure

November 18, 2009

## To Serve and Protect:

### *Not-for-Profits Need to Protect Their Directors and Officers*

When it comes to local not-for-profit organizations, Savannah is fortunate in that our community willingly supports many such organizations with both their time and financial resources. One such Savannahian, Herschel V. Jenkins, established a trust fund in 1955 to pay the entire administrative and fundraising expenses for our local United Way...in perpetuity! Thanks to Mr. Jenkins' generosity, 100% of your local United Way contributions to go directly to dozens of local organizations.

#### **ACTION:**

Confirm that the not-for-profit organizations for which you serve as a board member or officer have adequate Directors & Officers (D&O) liability insurance.

So what does Savannah's charitable mindset have to do with insurance and risk? In addition to financial support, many Savannahians willingly volunteer to serve on the boards of not-for-profit organizations throughout the Coastal Empire. Serving as a board member for a not-for-profit brings with it certain risks which the organization itself as well as the individual should be aware.

#### **DEBUNKING THE MYTH**

First, let's de-bunk the myth that the board members and officers of not-for-profit organizations, including religious organizations, cannot be sued as there are no shareholders. In reality, board members and officers of not-for-profits can be sued for numerous reasons including "wrongful acts" related to mismanagement of assets, failure to provide services, and employment (*discrimination, harassment, and wrongful termination*). Board members can be sued by a variety of claimants, including:

- *Staff* — Current and former staff members are probably the largest source of legal actions against a not-for-profits' directors and officers.
- *Third-Parties* — Vendors, funding sources and other not-for-profits may allege harm caused by the nonprofit's directors or officers.
- *The Entity* — The not-for-profit itself or its members may bring an action against the organization's directors and officers.
- *Donors* — contributors may sue directors alleging misuse of a restricted gift.

- *Directors* — One director may sue another board member alleging violation of a duty. Under certain circumstances, board members may be compelled by law to sue another board member.
- *Members* —members of membership associations may allege harm caused by the association’s directors and officers.
- *Beneficiaries* — The people the organization is intended to help may bring claims against directors alleging wrongdoing.
- *State Attorney General* — The state attorney general, acting on behalf of the general public, may bring a claim alleging wrongdoing.

By now it should be clear that not-for-profit board members and officers are exposed to serious liability issues, despite their well intended actions. Being asked to serve as a board member on a prominent not-for-profit organization may be an honor, but with it comes risks. Without proper protection, you could be forced to use personal assets to defend against allegations of wrong-doing.

### PROTECTING YOUR BOARD MEMBERS

To protect board members and officers, not-for-profit organizations should purchase Directors & Officers (D&O) Liability coverage from a knowledgeable insurance broker. D&O policy forms are not “standard” therefore the coverage terms can vary widely. For example, some insurance companies extend coverage for “employment practices” while others do not. D&O policies are more complex legal contracts than most property and casualty policy forms thus proper due diligence should be undertaken when selecting your D&O insurance broker. Once policies are in place, not-for-profits can use the quality of their D&O coverage as a tool to attract and retain qualified board members.

In addition to purchasing D&O insurance, not-for-profits should conduct regular training for board members and volunteers to educate them on the organization’s specific mission and rules of governance. By clearly stating the organization’s goals, philosophies and corporate protocols, many liability risks can be minimized or hopefully eliminated.

Individuals should take proper precautions before agreeing to serve as an officer or board member for any not-profit-organization, regardless of how well respected the organization may be. If the entity does not have an appropriate D&O policy in place, you may be volunteering for more than you realize and putting your personal assets at risk.

### ONE FINAL NOTE

Don’t assume personal liability insurance policies such as your homeowner’s or personal umbrella policy will protect you from your actions on a board. Volunteer activities may be covered under such policies, but usually for bodily injury and property damage only, not for “wrongful acts” as a board member. Your personal insurance agent can determine if coverage currently exists or if adding D&O coverage is an option.

*This notice is provided as information only and should not be considered a legal opinion. If you have questions about this Client Advisory, please contact Seacrest Partners at 912-544-1900.*