



Are You Covered?

Protecting Your Directors and Officers By Genny Dill

A Main Street organization's board of directors is extremely important to the operation and viability of the program. Often the board is made up of local individuals and business owners who volunteer their time to help revitalization efforts in a neighborhood or commercial district. These individuals, through their dedication and commitment, truly represent the best in our communities.

Board Members Have Unique Exposures

Main Street organizations, and their individual board members, face unique liability exposures that are not addressed in a standard General Liability policy. While a General Liability policy is designed to respond to actual physical damages, such as slipping and falling or damaging someone else's property, it will not help defend your organization if it faces lawsuits involving:

- > Alleged misuse and/or abuse of funds and contributions;
- > Discrimination (age, race, sex, employment, membership);
- > Harassment;
- > Wrongful termination of employees;
- > Misleading reports or other misrepresentations;
- > Libel and slander;
- > Acts beyond granted authority; or
- > Other claims related to governance or management of the organization.

Do State Volunteer Statutes Protect You?

To limit the liability of volunteer

board members of nonprofit organizations, many states have enacted volunteer protection statutes. However, each statute needs to be examined carefully before an organization relies on its protection. In many instances the statutes are deficient in that they:

- > Do not protect the organization itself;
- > Only apply to volunteers, leaving other individuals, like employees, exposed to personal liability;
- > May not apply to members of the board of directors, even as volunteers;
- > Limit damages, but do not affect defense costs;
- > Do not apply to allegations of gross negligence or willful misconduct, a common allegation; and
- > Do not apply to violations of law, such as discrimination, whether that violation was willful or accidental.

How Should Your Organization Protect Itself?

The best way to protect your organization and your board members is to obtain a Directors and Officers Liability Insurance policy, which should include

Employment Practices Liability, commonly referred to as "D&O" and "EPL" insurance.

While no two policies are identical, these two forms of coverage are often combined in a single policy for nonprofit organizations. The policy not only protects the organization itself; it also provides protection for the directors, officers, committee members, trustees, employees, volunteers, and even spouses for lawsuits related to the management and governance of the organization.

When updating your insurance coverage, look for an agency that will evaluate your organization's existing coverage and suggest ways to reduce risk, in addition to providing quotes on coverage. Some points to look for include:

- > **Competitive premiums.** Main Streets with an operating budget of less than \$100,000 can buy stand-alone D&O coverage for as little as \$500 annually, and packaged D&O/EPL for as little as \$825.
- > **Coverage for your Main Street organization should always include:**
 - > **Defense provided OUTSIDE the limit of liability:** This means that your insurance limit is unaffected by the insurance company's costs to defend you.
 - > **Prior Acts:** Coverage for claims occurring during the policy term for acts that took place prior to the effective date of your policy, of which you had no prior knowledge.
 - > **Employment Practices Liability:** Coverage for

employment-related allegations, such as sexual harassment, wrongful termination, racism, or even the decision not to hire. This coverage should include broad definitions of an insured, to include both employees and volunteers.

- > **Personal Injury.**
- > **Libel and Slander.**
- > **Publishers Errors and Omissions claims:** This coverage applies to newsletters, marketing materials, and other documents related to your Main Street program.
- > **Management Errors and Omissions claims:** This coverage applies to claims brought against the board of directors or an officer of the organization, alleging mismanagement of the organization or faulty decisions.
- > **Loss prevention tools and services:** Can your insurance company provide you with standardized copies of employee handbooks, or offer advice on reducing exposures in your by-laws or your operations? Can your agent offer advice on reducing your liability exposures?
- > **Broad definition of who is an insured:** Definitions should include the organization, directors, officers, committee members, trustees, employees, and volunteers
- > **Spousal liability:** Protects the spouse of a board member if that person is also named in a lawsuit related to the management of your Main Street program. When a board member is sued as an individual, spouses are often also named in the lawsuit.

This can occur whether or not the spouse had a role in the management of the organization.

- > **Severability:** Coverage is determined separately for each board member.
- > **Extended reporting period coverage:** This allows you to purchase additional coverage (“tail” coverage) for extended reporting of claims if you allow your policy to expire, cancel it, or switch insurance companies.
- > **Experienced law firms that will defend your organization:** The insurance company has the duty to defend you for covered claims and will bring in experts to defend you.
- > **Two-year policy terms:** This option gives your organization the ability to “lock in” an insurance rate for multiple years.
- > **Non-cancelable:** The insurance company cannot cancel your policy for any reason, other than non-payment or misrepresentation, once coverage begins.

Working with Your Agent

When choosing an insurance agent, look for more than just the agent with the best bottom line. Your most valuable asset in your insurance portfolio is your agent. Seek an agent that not only has the right price, but also has experience insuring organizations similar to yours.

Your agent should be able to provide you with the tools you need to make educated insurance decisions. Your agent’s first priority should be to make sure that you understand how your insurance works, in addition to providing your organization with the right coverage to protect itself. Any questions or concerns that you have about your policy should be answered in uncomplicated terms. Agents should not expect you to understand the language of insurance and should feel confident enough about the product they are selling to provide you with answers in writing.

Who Sues?

After major fiascos like Enron and WorldCom, even nonprofits are under great scrutiny, and perhaps are held to an even higher standard than their for-profit counterparts.

Since Main Street organizations rely on community funding for projects and operations, it is imperative that the community’s investment be protected and its trust be maintained. The acts of one individual on the board can erase not only years of hard work, but could completely destroy the community’s trust in the organization itself and its objectives.

According to a recent study, employees brought more than 50 percent of all lawsuits against non-profit organizations. While many lawsuits are dismissed without merit, the defense costs that can accumulate up until dismissal can seriously damage the small budget of local nonprofits. If the suit is found to have merit, the defense costs combined with judgment will likely devastate a smaller organization.

But employees aren’t the only ones suing nonprofits. Below are some potential claims scenarios for Main Street exposures.

Who Gets the Grant?

Your Main Street has recently acquired \$20,000 in grants earmarked for façade improvements for Main Street businesses, and has decided that these funds will be distributed in \$2,500 increments. Only eight businesses can receive these funds, but 15 qualify and request the funds. Some of the businesses that receive the funds belong to board members (which is typical for a Main Street organization). One of the business owners who did not receive façade improvement funds sues your organization, alleging that favoritism played a role in distribution to businesses owned by members of the board. True or not, this is a serious allegation that would require funds for defense costs even if a judgment is never entered. If you have a good Directors and Officers Liability policy, your defense costs and judgment would be covered under the “Management Errors and Omissions” coverage.

Fun and Friendly Volunteers

You have a tight-knit, fantastic crew of volunteers dedicated to the “Clean & Green” aspect of your Main Street program. Everyone is excited to clean up Main Street in anticipation of weekend shoppers.

The volunteers have a blast being outside in the warm summer air and socializing with the other volunteers and business owners. At the end of the evening, you give your pals a friendly hug and the gals a peck on the cheek, telling them you will see them next week.

Two weeks later, you get a letter from an attorney’s office, stating that one of the women in the group felt “uncomfortable” and “intimidated” by the affection, insinuating that your peck on the cheek was meant as an invitation for something less innocent. The letter goes on to demand \$10,000 in compensation for mental anguish. You are completely blindsided and totally unprepared for this reaction to a friendly gesture of kindness.

In today’s very litigious climate, this type of claim is not unusual and can come from employees or volunteers. Your Directors and Officers liability policy should include Employment Practices Liability with Broad Form Insured Definitions that include volunteers.

But it’s Only One Day!

Your Main Street is organizing a new shopping event for your downtown. There will be sidewalk sales by your merchants, outside food and beverage vendors, and fun activities for the kids. You need a really catchy name for the event, maybe playing off a well-known line from a TV commercial or popular song. Your event goes off without a hitch, and that catchy title really got some attention. Congratulations on a job well done! Well...almost.

You soon receive a letter from ABC Co., seeking damages for unauthorized use of a title. If you have the right Directors and Officers Liability policy, defense costs and judgment would be covered under the Publishers Errors and Omissions coverage, which includes copyright infringement and unauthorized use of title.

Disgruntled Building Owner

Your Main Street is pristine and an absolutely gorgeous place to stop, shop, and eat...except for that one building across the street from your store. No matter how many times you’ve tried, you just can’t get through to the building owner. Perhaps he’s busy, perhaps

he doesn’t have the money, or perhaps he doesn’t care. In an article for your Main Street newsletter, you mention this property, its derelict condition, the negative impression it gives your constituency, and the difficulty in getting through to the owner – smartly omitting his name or address.

Guess what? You get a letter from an attorney and are being sued for Defamation of Character. The letter states that by giving the location and description of the property, and the negative connotation of your article, you have defamed his client who now feels that he is being judged by the public. Yeah, maybe he is being judged, perhaps you were a bit harsh, and perhaps he had it coming, but with “Libel and Slander” coverage your organization will be prepared to deal with it.

The fact remains that anyone can sue you, and you need to be prepared for that – or risk putting your Main Street in serious financial jeopardy. Take the time to discuss your Main Street program and activities with an insurance agent to make sure you have ample coverage to prevent any litigious surprises from becoming financial disasters that could lead to the demise of your program.

Genny Dill has worked in the property and casualty insurance market for nearly 13 years, the first half in her native state of California. She joined National Trust Insurance Services in 2003 and has been providing technical assistance, education, and other insurance services to historic property owners, Main Streets, preservation organizations, and historic theatres nationwide.

Representatives from the National Trust Insurance Services, LLC, will be presenting the session “Preparing for Disaster: Helping to Insure the ‘Re-Vitalization’ of Main Street” at the National Main Streets Conference as well as being available in the Expo Hall to answer your Main Street-related questions. For more information, please visit www.nationaltrust-insurance.org or call 866.269.0944.