

THE GOOD, THE BAD AND THE UGLY

Liability Insurance for Non-Profit Agencies

September 15, 2016

Myrtle Beach, S.C.



H. Lee Davis, Jr., Attorney
Davis & Hamrick, LLP
336-725-8385

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Types of Insurance

- **Disability Insurance**
- **Life Insurance**
- **Homeowner's Insurance**
- **Health Insurance**
- **Automobile Insurance**
- **Accident Insurance**
- **Cancer Insurance**
- **Liability Insurance**

Definition of “Liability Insurance”

Any type of insurance policy that protects an individual or business from the risk that they may be sued and held legally liable for something such as malpractice, injury or negligence. Liability insurance policies cover both legal costs and any legal payouts for which the insured would be responsible if found legally liable.

Intentional damage and contractual liabilities are typically not covered in these types of policies.

Types of Liability Insurance

(for Non Profit Agencies to Consider)

- **Automobile (typically mandatory)**
- **General Liability (“CGL”)**
- **Director’s and Officer’s (“D&O”)**
- **Errors and Omissions (“E&O”)**
- **Workers Compensation (“WC”)**
- **Sexual Abuse Liability**
- **Liquor Liability**
- **Umbrella/Excess Liability**

Your Personal Automobile Liability Insurance Policy

(mandatory in most states)

- **Liability Coverage (30/60/25 minimum in NC)**
- **UM/UIM Coverage**
- **Collision Coverage**
- **Comprehensive Coverage**
- **Medical Payments Coverage**
- **Go Home and Check Your Coverage**

**MOST FREQUENT
QUESTION I AM ASKED**

**CAN I BE SUED
FOR THAT?**

YES !!

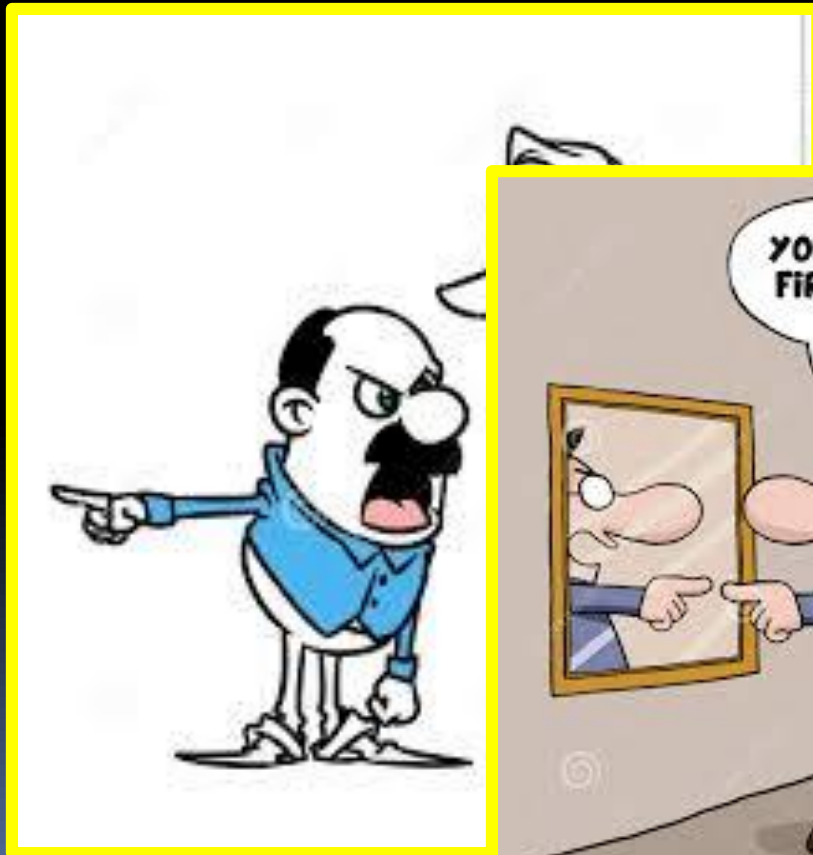
Hot Coffee Really is HOT!!



Liebeck v. McDonalds

Most Common Lawsuits Against Non Profit Agencies

1. Contract Disputes



ation



1. Contract Claims

(almost never covered by insurance)

- Hiring Contractor
- Buying Equipment
- Renting Space
- Get a Written Contract !!!
- Think About What Could Go Wrong

2. Employment Related Claims

(might be covered by insurance)

- **Wrongful Termination**
- **Discrimination (Age, Sex, Race)**
- **Wage and Hour Claims**
- **Sexual Harassment**
- **Americans with Disabilities Act**

Other Claims

- **Fraud**
- **Defamation/Slander/Libel**
- **Infliction of Emotional Distress**
- **Inefficient Administration**
- **Waste of Assets**
- **Misleading Reports**
- **Acting Outside of Authority**
- **Failure to Deliver Service**

Personal Liability of Officers, Staff, Volunteers, Board Members

- **Incorporated?**
- **Intentional Act?**
- **Non Covered Acts?**
- **Unpaid Taxes!**

LIABILITY INSURANCE

THE GOOD

1. Indemnity - “We will pay damages for bodily injury or property damage for which any Insured becomes legally responsible because of....”
2. Defense Costs - “In addition to our limit of liability we will pay all defense costs we incur. ”

LIABILITY INSURANCE

THE BAD

- **Exclusions**
- **Intentional Acts**
- **Punitive Damages**
- **Conditions**
- **Limits of Liability**
- **Deductibles/Retention**
- **Time, Energy, Effort by Agency**

LIABILITY INSURANCE

THE UGLY

- **Time, Energy, Effort by Agency**
- **Reservation of Rights Letters**
- **Premium Increases**
- **Cancellation of Coverage**
- **Control of Litigation**

Who Can Sue a Non Profit Board

- Insiders – current & former staff
- Outsiders – vendors, funding sources
- The Entity
- Directors
- Beneficiaries
- Members
- The State Attorney General
- Other Government Entities (DOL, IRS)



Wyatt Non-Profit Liability Survey

- **One in four non-profits sued**
- **Average Defense Costs = \$35,000 - \$100,000**
- **Average Indemnity = \$457,000**
- **Auto Claims – 90% of Claims**
- **Auto Claims – 60% of Payments**

1. Automobile Insurance

- Check Your Liability Limits – Don't Forget Property Damage Claims!
- Suggest minimum of \$1,000,000 BI
- Consider Umbrella Coverage
- Ask Your Agent Who is Covered?
Think Outside the Box

2. Comprehensive General Liability Policy **(“CGL”)**

- **Property**
- **Liability**
 - **Bodily Injury**
 - **Property Damage**
 - **Employment Claims (maybe)**
 - **Other (Fraud, Slander, etc)**
- **Commercial Crime**

General Liability Exclusions

- Expected or Intended Injury
- Contractual Liability
- Liquor Liability (Endorsement?)
- Workers Compensation
- Employer's Liability (to Employee)
- Aircraft, Automobile or Watercraft
- Abuse or Molestation
- Employment Related Practices
- Canoes or Rowboats

3. Professional Liability **(“E&O” or malpractice coverage)**

- **Coverage for Negligence or Mistakes in the Performance of Professional Duties**
- **Professional Advice**
- **Services**
- **Generally Non Personal Injury Claims**
- **Includes Sexual or Physical Abuse or Molestation
(typically excluded under CGL)**

4. Directors and Officers Liability Insurance **(“D&O”)**

- **Does it Cover Employment Practice Claims?**
- **Does it Cover Non-Pecuniary Claims?**
(e.g. not fulfilling mission)
- **Does it Cover Civil Damages?**
- **Does it Cover Bodily Injury?**
- **Does it Cover Directors and Officers?**
- **Does it Cover Employees?**
- **Does it Cover Volunteers?**

Problem #1: Are You Responsible for Employees/Volunteers Driving?

- **Do employees use their own vehicles to go to the post office or bank on your company's behalf?**
- **Do you occasionally send an employee to pick up someone?**
- **Have you sent employees to pick up lunch, drop off mail or pick up office supplies?**
- **Have you ever rented a vehicle while on a business trip?**
- **Do you provide a car allowance for business use of their personal vehicles?**

Typical Auto Policy

Basic business automobile policies only cover employees while they operate company-owned vehicles to perform company business.

Business Auto Policy

The following are “Insureds”

- **“You” (the Agency)**
- **Anyone using your vehicle with permission**
- **Except –**

“Your employee if the auto is owned by that employee or a member of his household”



Non-Owned Hired Vehicle Coverage Endorsement

- **This type of coverage will kick in if there is an accident and your company is found legally liable.**
- **Typically, an employee's personal automobile insurance will provide primary insurance to both the employee and the business if the employee is using their own vehicle on company business.**
- **However, there is the chance that charges will exceed the employee's policy limit and would then be passed on to the company. Without non-owned and hired automobile liability coverage you may be vulnerable to a potentially costly exposure.**

PROBLEM # 2

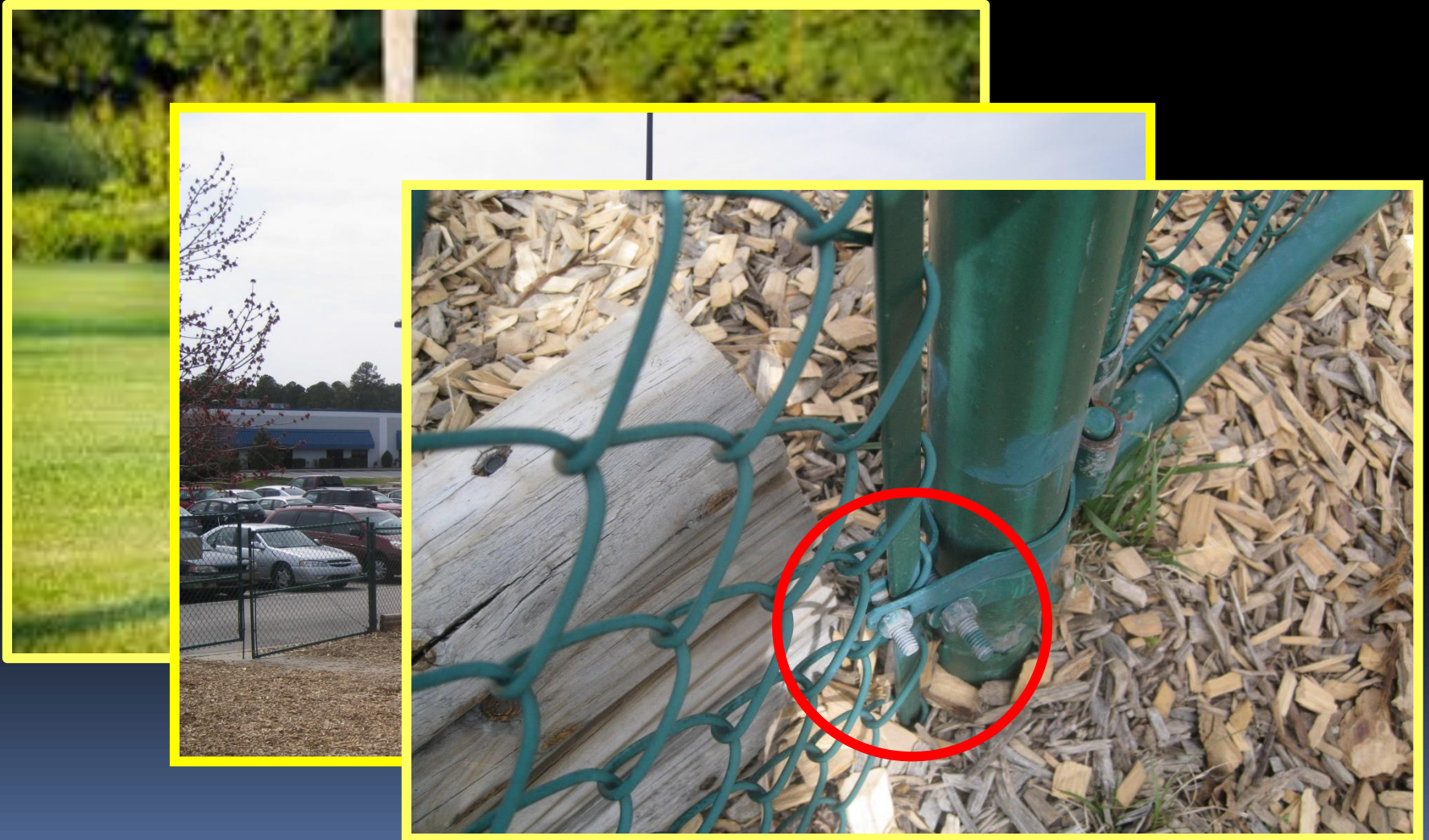
Volunteer who was trained to deliver Meals on Wheels is riding with her mother (who was neither trained nor signed-up) and they hit a motorcyclist, resulting in serious injury.

PROBLEM # 3

- **UM/UIM v. WC**
- **Ash-Luck Case**

PROBLEM # 4

Playground Accident



PROBLEM # 5

Reservation of Rights Letters

PROBLEM # 5

Mathis v. Patsy Dowling and Mountain Projects, Inc.

(with permission)

- **Facts**
 - **2004 Floods in Haywood County**
 - **Un-Met Needs Committee (Gang of 7)**
 - **2006 Funds Missing**
 - **2007 Charges Dismissed**
 - **2010 Lawsuit Filed**
- **Malicious Prosecution**
- **Reservation of Rights Letters by CGL/EO**
- **2012 – Lawsuit Dismissal**
- **2013 - Appealed**

PROBLEM # 5

Mathis v. Patsy Dowling and Mountain Projects, Inc.

- **2010 - Lawsuit Filed**
- **Immediately Reported to CGL Insurance Carrier**
- **Immediately Reported to D & O Insurance Carrier**
- **Received Reservations of Rights Letters**

CGI Reservation of Rights Letter

“Your executive officers and directors are insureds, but only with respect to their duties as your officers and directors.”

CGL Reservation of Rights Letter

“If evidence is discovered during the course of the lawsuit that your actions were not in the course and scope of your duties as Executive Director such actions would not be covered.”

CGL Reservation of Rights Letter

Exclusion –

This insurance does not apply to

“personal and advertising injury”

“Personal and Advertising Injury”

includes “Malicious Prosecution.”

CGL Reservation of Rights Letter

“This policy does not provide coverage for any Liability arising from any wrongful act of any director or officer.”

CGL Reservation of Rights Letter

“The Insurance Company will provide a defense to you subject to the above exclusions, but there may not be coverage or a duty to indemnify you for damages.”

D&O Reservation of Rights Letter

“The Insurer will not pay the loss arising from any willful violation of the law.”

D&O Reservation of Rights Letter

“The Insurer reserves all of its rights to deny coverage of this matter including any claim for punitive damages.”

D&O Reservation of Rights Letter

“The Insurer’s right and duty to defend includes the right to appoint defense counsel. We appoint _____ at the rate of \$225/hr. This policy includes a retention which is applicable towards defense costs.”

Service on Boards, Committees or Other Community Service

- Are you serving on a Board or Committee because of your position?
- Does the Board you serve on have D&O coverage?
- Does your Agency D&O coverage cover you?
- Maybe: if 501(c)(3) and you serve because of position and your Board approves your service.

PROBLEM # 6

Other Claims

Against

Non - Profits

REAL CASES

**CAN
I GET SUED
FOR THAT?**

**A. Susan G. Komen Foundation
v.
Non-Profits**



Komen has identified and filed legal trademark oppositions against more than a hundred charities, including Kites for a Cure, Par for The Cure, Surfing for a Cure and Cupcakes for a Cure - and many of the organizations are too small and underfunded to hold their ground

B. AGE DISCRIMINATION

- A non-profit organization advertised an open position for a camp counselor.
- The organization received seven applications.
- Of the seven applicants, one man was not chosen to be interviewed.
- This applicant alleged he was not interviewed because of his age, and he filed suit against the non-profit organization for age discrimination.
- The organization denied any wrongdoing but settled the case for \$15,000 to avoid full litigation costs.

C. LACK OF SUPERVISION

A lawsuit was brought against a nonprofit board of trustees for failing to supervise the executive director. When they submitted their legal bill to their D&O carrier, they learned for the first time that no payments would be made until a settlement had been reached. Legal costs piled up until a settlement was reached....five years later! The prohibitive costs caused the organization to close its doors forever.

D. MISAPPROPRIATION OF DONATIONS

- **Donor made a large contribution to be used to aid impoverished children's educational and health care needs.**
- **Instead, the nonprofit, through its executive director and board of trustees, used the gift to expand the building**
- **Donor filed suit, alleging misappropriation of funds.**
- **The damages included return of the full contribution plus interest.**
- **Money was already spent; nonprofit was financially unable to return the entire donation.**
- **Personal assets of the directors and officers of the nonprofit organization were exposed when the organization ran out of funds to pay damages**

E. LAPSED POLICIES

- An officer served a term on the board of directors of her church.
- Eighteen months after completing her service, she was named in a suit alleging mismanagement of church funds for the last five years.
- The ex-officer discovered that the current board had failed to renew its insurance policy, so even though she had diligently maintained insurance coverage throughout her term of service, the former officer was left with no coverage for this suit.

F. MISAPPROPRIATION OF FUNDS

A grant making foundation receiving private donations was alleged to have used those funds for purposes not associated with the foundation's underlying mission. A group of supporters sued the foundation's board alleging misappropriation of funds and breach of duty. Defense costs exceeded \$65,000.

G. BREACH OF BY-LAWS

Members of an association filed a lawsuit alleging the recent election of a new Executive Director did not follow the correct procedures outlined in the association's bylaws. Members argued that the majority vote required was not obtained and the by-laws were modified to suit the self-interests of the board. Defense costs and settlement exceeded \$75,000.

LESSONS LEARNED

- Do an Inventory of Your Potential Liabilities (ex. Do you endorse a fundraiser where alcohol is served)
- Inventory your policies and coverage limits and exclusions
- Ask Questions – Think Outside the Box

What to Do to Protect the Agency (and Yourself)

- Talk to Agency Attorney (or an attorney well versed in insurance issues)
- MEET with Your Insurance Agent
- Ask Questions
- Ask About Scenarios
- Don't agree to sit on a Board without investigating coverage

What To Do If Sued

- Call Your Insurance Agent Immediately
- Report to Agent and Insurance Company by Telephone and in Writing Immediately
- Call Your Agency Attorney
- Request Counsel to Defend
- Advise Your Board in Writing

QUESTIONS ???



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