Towards A Fruitful Ministry, Sam Gore

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CHARITABLE IMMUNITY

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.

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.

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.

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