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Understanding the Nature of Public Officials E&O Risk

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Risk Advisory Role

- Our firm currently acts as the broker and risk advisor to the City
 - General oversight of major risks
 - Evaluate the adequacy of coverage placed, as well as alternative strategies for handling risk
 - Detailed coverage and financial review
 - Claims and service performance
 - Placement of supporting coverages not included in the risk programs
 - Specific training on selected risk or safety planning topics
 - Onsite risk management support or review



What type of risks do boards have?



“We’ve considered every potential risk, except the risks of avoiding all risks.”



Overview

- History
- What the policies cover
- What is *not* covered
- Preventing claims
- Common causes of claims



History of Responsibility

- Higher probabilities for claims against elected officials



Historic Duties of an Elected Official

- Approve the budget
- Set Ordinances
- General oversight of government



Typical Duties of Elected Officials Today

- The major areas of council authority and responsibility are:
 - Judging the qualification and election of members
 - Setting and interpreting rules governing its own proceedings
 - Exercising all the powers of cities that the law does not delegate to others
 - Legislate for the city
 - Directing the enforcement of city ordinances
 - Appointing administrative personnel
 - Transacting city business
 - Managing the city's financial operations
 - Appointing members of the boards
 - Conducting the city's intergovernmental affairs
 - Protecting the welfare of the city and its inhabitants
 - Providing community leadership
 - Other specific powers



Typical Duties of the Mayor

- Head of the city
 - Speaks for city government and the community
 - Presiding officer of the city council
- Strong Mayor
 - Represent the city
 - Receive visitors
 - Leadership in official affairs
 - Execute official documents
 - Power to appoint
 - Preside at council meetings
 - Declare emergencies
 - Oversee elections



Duties of elected officials are more complex

- People expect a higher standard of performance
- Responsibilities are often handled in a limited budget environment with many decisions made with budgetary considerations



History

- E&O coverage first became widely available in the 1980s
- Arose because elected officials grew concerned that decisions could create liability for the entity or the individual.
- E&O is typically included with the package of liability coverages



What the policies cover

- “Wrongful acts” of the elected officials, administrative personnel, and employees
- The key rests with how ‘wrongful act’ is defined by the policy.
- The better policies include:
 - Acts, errors, and omissions of the covered person
 - Failure to perform a prescribed duty
 - Misstatement
 - Violation of anti-trust
 - Negligent ministerial acts



What the policies do *not* cover

- Breach of contract or contractual disputes with other parties or failure to perform as specified in a contract (unless liability can be established outside of the contractual responsibilities)
- Inverse condemnation or zoning decisions, unless such decisions involve an allegation that would trigger coverage, such as a violation of due process or a constitutionally protected right (if the policy provides this coverage)
- Outside board involvement not related to the organization
- Criminal, malicious, dishonest, or fraudulent acts
- Debt financing



What the policies do *not* cover

- Exposures that are generally insured elsewhere
 - Workers' compensation
 - Auto liability
 - Employment practices liability
- Declaratory, injunctive or other non-monetary relief costs.
- Most policies will afford a defense for these items, if there are other covered items in the claim



- Clearly defined duties and procedures

“When a claim arises, it generally is in an area where an error or oversight occurred, which results in damages to other parties.”



Common Causes of Claims

- Failure to follow a prescribed duty
- Conflicts of interest
- Over reaching organizational authority
- Over reaching individual authority
- Violation of protected rights



Examples



Failure to Follow a Prescribed Duty

- Organizations establish clearly defined procedures, which prescribe duties and responsibilities.
- If procedures are not followed legal liability is created.
- Legal liability may arise if procedures are not followed or if individuals are not trained to the specific procedures.



Failure to Follow a Prescribed Duty

- An example from established driving procedures.
 - Entity A crafts a set of procedures, which establishes a specific duty to review employee motor vehicle records every 6 months and prescribes non driving status with major violation or excessive minor violations.
 - In the interest of efficiency entity B obtains a copy of entity A's driving procedures.
 - Entity B reviews and adopts these procedures, but does not change their custom of reviewing driving records from every two years, to every six months.
 - An accident occurred involving comparative negligence of both drivers. However, the driver from entity B had a driving record with excessive moving violations, which would have been screened at a six month interval and should have resulted in non driving status.
 - Since the accident involved significant medical injuries, the damages were substantial.
 - Entity B settled the case due to the failure to follow their own driving procedure.



Failure to Follow a Prescribed Duty



“It is sound practice to carefully review procedures and make them fit the unique culture and circumstance of the entity.”



Conflicts of Interest

- When an official does not disclose outside interest prior to decisions being made, those decisions may be challenged.
- If the challenge is successful, then the damages can be substantial.



Conflicts of Interest

- A mayor and a city council member voted against a zoning change for a proposed development in their town.
- The developer challenged the decision because the mayor and council member were working on a competing development.
- The town was sued, and the jury found in favor of the development.



Conflicts of Interest

- Damages were awarded based on the amount of potential economic interest lost, which ran into the millions of dollars.
- This could have been avoided if the Mayor and City Council member had disclosed their conflict and excused themselves from discussion or voting on a competing development.





“Under disclosure rules, I’m required to tell you I own stock in the company whose drug I’m prescribing.”



Over Reaching Organizational Authority

- Claims can arise when a City Council or appointed board makes a decision which clearly exceeds their legal authority, or exceeds their capacity to deliver the promises made.
- Discussion on the dynamics of the Tooele Associates, LP v. Tooele City case which ultimately resulted in a judgment against the City in excess of \$22mm.



Over Reaching Individual Authority Outside the organization

- Officers make promises or agreements to those that are outside of the organization, which exceed their individual authority.
- For example: an elected official, or appointed board member may become involved in negotiations for sale or acquisition of land, but they do not have authority to commit the organization without the approval of the board.
- A successful challenge by the aggrieved party may result in damages arising from the economic loss, which may include potential unrealized profit from the proposed use or development.



Over Reaching Individual Authority Within the organization

- When administrative or executive decisions are delegated by the elected officials to professional managers, these manager are given the latitude and responsibility to manage the process.
- Individual board members should not override the administrative or executive powers that are granted to the professional management.
- This scenario can result in a host of potential legal liabilities, related to vendor relationships, employment practices, violating established procedures, as well as federal and state mandates.



Violation of Protected Rights

- Elected officials may set local ordinances or codes that could be in conflict with protected rights of individuals or federal mandates, such as the Fair Housing Act.
- Kirby Vacuum v. Kaysville City (2006)
- Hancock et al v. Duchesne County (2011)
- Alamar Ranch LLC v. Boise County Idaho (2011)



Protected Information

- The information that is allowed to be presented to the public needs to be carefully reviewed to:
 - Assure full transparency when it is necessary
 - Prevent the inappropriate release of personal protected information.
- Many individuals and entities use email, as well as social media for distribution of information.
- It is essential to carefully screen information that is intended to be released, as well as set policies and training regarding the use or release of other types of information.



Protected Information

- Elected officials or staff may inadvertently release protected information.
- For example, an open discussion about a specific worker injury or medical incident may involve a violation of HIPAA
- Release of documents or information that has not properly been screened or redacted, which has personal identifiable information.
- Other examples may arise from the release of protected employment information regarding circumstances related to the termination of employment or expressed opinions that may constitute personal injury claims.



Summary

- Effective coverage planning to cover the risks associated with elected officials or appointed boards involvement protects both the organization and the individual.
- This has become a key area in risk and insurance planning.
- It is also an area where the risks associated with elected officials and appointed board involvement can be reduced through effective policies, training, and review by the City's legal department.





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