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SPRING SERIES

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"Safeguards Against Risks of Tort Liability to Private Parties--
D&O Insurance, Volunteer Protection "

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- I. Introduction: In Maryland, the risks to charitable organizations and their principals of civil tort liability to private parties are reduced by statute and common law in recognition of the social good that the organizations provide and the difficulty otherwise of attracting volunteer assistance.
- II. Nature of the risks of liability to private parties
 - A. Risks borne by the organization:
 1. Maryland is one of a limited number of states that provide tort immunity under common law to charitable organizations. Abramson v. Reiss, 334 Md. 193, 638 A.2d 743 (1994).
 - a. The doctrine arises under a trust theory of immunity, that funds given to a charitable organization for charitable purposes should not be diverted to other purposes, including compensating victims of torts caused by the charity's activities. The doctrine was borrowed in the Maryland case of Perry v. House of Refuge, 63 Md. 20 (1885) from an English decision after the rule in the English decision had been abrogated.
 - b. The doctrine covers only charitable organizations. The court in Abramson adopted, for the definition of charitable organization, the definition that appears in the charitable solicitation statute that we considered last month, § 6-101 et seq. of the Maryland

Business Regulation Article, viz. "a person that is or holds itself out to be a benevolent, educational, philanthropic, humane, patriotic, religious, or eleemosynary organization and solicits or obtains contributions solicited from the public for charitable purposes." Abramson v. Reiss, 334 Md. at 197.

- (1) The immunity does not extend to the insurer of a charitable organization. § 19-103 of the Insurance Article.
 - (2) The immunity does not extend to employees of the charitable organizations who may be negligent. (See, below for a discussion of the risks to the employees.)
2. The immunity extends only to tort actions and only to those tort actions where the immunity has not been abrogated by statute.
- a. The immunity does not extend, for example, to most actions that might be brought by a disgruntled employee, since these either are based upon breach of an employment contract or of employment discrimination statutes that typical include non-profit organizations in the definition of employer. (See, e.g. Art. 49B, § 42, of the Maryland Code, authorizing ordinances in Montgomery, Prince George's, and Howard Counties barring employment discrimination; §27-19 of the Montgomery County Code.) The immunity should however protect against a tort claim such as defamation by an employee.
 - b. The immunity would almost certainly not apply to a suit for indemnification against the organization brought by a principal under general Maryland corporate law. § 2-418 of the Maryland Corporations and Associations Article. Such an action would likely be considered a contract action even if the request for indemnification arose in connection with a tort action against the principal.
 - (1) Unless limited by the articles of incorporation of the organization, an organization must indemnify a director, officer, employee, or agent against reasonable expenses incurred if he or she has been successful on the merits or otherwise in the defense of any action brought by reason of the his or her service unless his or her action was committed in bad faith or was the result of active or deliberate dishonesty, he or she actually received an improper personal benefit, or the action was brought by or

in right of the organization and he or she was adjudged to be liable to the organization.

- (2) If he or she was not successful in the defense of the foregoing action, the organization may still elect to indemnify him or her and may oblige itself to do so through provisions in the organization's article of incorporation or bylaws or by board resolution.
- (3) Any decision that indemnification is obligatory or permissible must be made by the board of directors, by special legal counsel, or by the members.

B. Risks to the principals of the organization.

1. As a general proposition, a principal, employee, or volunteer of an organization can be found personally liable for his or her own torts.
2. Generally, a tort victim, in a circumstance where a principal, employee, or volunteer of an organization may be at fault, will pursue his remedies against the organization rather than the individual. In Maryland, however, the charitable immunity doctrine might thus have made individuals more vulnerable to liability, but this risk has largely been obviated as to significant categories of non-profits by statute. See § 5-406 of the Maryland Courts and Judicial Proceedings Article (attached). (Since this coverage will likely be broader than that under the federal Volunteer Protection Act of 1997, 42 UCS 14501 et seq., the former will control. Id. at § 14502(a).)
- 3.

III. Availability of insurance to protect against remaining risks.

A. Insurance to protect the organization.

1. These are, by-and-large, the same policies of commercial liability insurance that are available to for-profit organizations. Types of policies and coverage include the following: Commercial General Liability, Auto Liability, Auto Physical Damage, Social Service Professional Liability, Improper Sexual Conduct, Directors and Officers Liability, Umbrella Liability, Liquor Liability, Employee Benefits Liability, Commercial Property Fidelity (Employee Dishonesty), and Student/Volunteer/Participant Accident.
2. D & O insurance covers liability for acts other than the standard "negligent" infliction of "bodily injury, personal injury, or property

damage." The principal category of additional coverage provided beyond general liability is for intentional acts, principally employee claims of wrongful discharge or discrimination (90% of those for which coverage is sought).

- a. D & O coverage should include, in addition to directors and officers, the organization itself and its employees and volunteers.
- b. The policy should require the insurer to advance the costs of defense.
- c. The policy should cover employment practices liability, and the definition of employment practices should include sexual harassment and discrimination on account of age and handicap.

B. Insurance to protect the organization principals.

1. Principals who are volunteers might find some protection in personal homeowner or excess liability policies.
2. The organization might be able to protect its principals (and protect against the need for indemnification) through D & O insurance (discussed above).