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May 1, 1989

The Honorable Donna A. Moss
Chairman
Medical, Military, Public and
Municipal Affairs Committee
P. O. Box 11867
Columbia, South Carolina 29211

Dear Representative Moss:

You have requested the legal opinion of this Office whether a South Carolina nonprofit corporation needs to purchase "umbrella coverage" to supplement its current liability policies to protect its directors and officers.[1] I note at the outset that whether the nonprofit corporation purchases the umbrella policy is a question of management and policy since the purchase of such coverage is not mandated by state law. This policy or management decision would, of necessity, involve a myriad of considerations including the financial resources of the corporate entity, the nature of the entity's operations and the adequacy of the basic coverage maintained by the entity, which would probably all have to be analyzed by a qualified risk manager. The legal opinion of this Office cannot resolve the management and policy decisions of the nonprofit entities; nonetheless, I will herein discuss the statutory provisions that provide a qualified immunity for directors and officers of nonprofit organizations.

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1. Umbrella policies generally provide excess coverage that supplements an insured's basic liability coverage. An umbrella policy does not supplant the basic carrier but instead is designed to be a comprehensive excess policy. Appleman, Insurance Law and Practice, Section 5071.65.

Section 33-31-180 of the amended South Carolina Code provides:

> (A) All directors, trustees, or members of the governing bodies of not-for-profit cooperatives, corporations, associations, and organizations described in subsection (B) are immune from suit arising from the conduct of the affairs of these cooperatives, corporations, associations, or organizations. This immunity from suit is removed when the conduct amounts to wilful, wanton, or gross negligence. Nothing in this section may be construed to grant immunity to the not-for-profit cooperatives, corporations, associations, or organizations.
>
> (B) Subsection (A) applies to the following:
>
> (1) electric cooperatives organized under Chapter 49 of Title 33;
>
> (2) not-for-profit corporations, associations, and organizations, as recognized in and exempted from taxation under Federal Income Tax Code Section 501(c)(3), (c)(6), or (c)(12).

This Office has earlier opined that pursuant to Section 33-31-180, "it is clear that the General Assembly has provided immunity to all directors, trustees, or members of governing bodies of not-for-profit cooperatives, corporations, associations and organizations as defined in the statute, from lawsuits arising from the conduct of the affairs of these entities." Opinion No. 88-55 (July 21, 1988). It must be noted, however, that the General Assembly has provided only a limited or qualified immunity for these officials and directors and this immunity is unavailable if the conduct giving rise to the lawsuits amounts to wilful, wanton or gross negligence.

Moreover, this qualified or limited immunity afforded to directors and officers of nonprofit organizations does not serve to limit any liability concerns these persons may have as a result of federally created claims; accordingly, whether these persons enjoy immunity for federally created claims would generally have to be resolved by analysis of the particular federally created claim.

You have also asked "should another state sue a South Carolina eleemosynary institution, which state's laws would apply?"

A precise answer would depend upon the particular facts, but as a general rule, "[w]ith reference to torts, the well-established rule is that the law of the place where the injury was occasioned or inflicted, governs in respect of the right of action, and the law of the forum in respect to matters pertaining to the remedy only." Rauton v. Pullman, 183 S.C. 495, 191 S.E. 416 (1937); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964).

In summary, I reiterate that whether a nonprofit organization should purchase an umbrella policy to supplement its basic liability coverage for its officers and directors is a question of management and policy since no state law mandates such coverage. Further, the statutory immunity afforded to directors and officers of nonprofit organizations is qualified and does not protect conduct that is wilful, wanton or grossly negligent. Moreover, this statutory immunity would not generally serve to protect these persons from liability for federally created claims. Finally, as a general rule, in tort actions all matters relating to the right of action are governed by the law of the place where the injury was occasioned or inflicted, and matters pertaining to the remedy are governed by the law in the forum where the case is brought.

I hope the information contained herein is helpful to you.

Very truly yours,

Edwin E. Evans
Chief Deputy Attorney General

EEE/shb

REVIEWED AND APPROVED:

Robert D. Cook

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