

**DIRECTORS AND OFFICER'S LIABILITY INSURANCE RISK ANALYSIS**

1. STATUTORY AND PLAN PROVISIONS – this risk analysis begins with the immunity and indemnification provisions applicable to the Corporation, its employees and Board Members.

Citizens' Enabling Statute – 627.351(6)(s) provides:

- No liability on the part of, and no cause of action against the corporation, its employees, agents, board members, board member designees, committee members, assessable insurers and their agents for any action taken by them in the performance of their duties or responsibilities under Citizens statute.
- Exceptions to immunity –
  - willful tort (all)
  - corporation and producing agents (only) for breach of contract or agreement relating to insurance coverage
  - corporation (only) with respect to issuance or payment of debt
  - assessable insurer (only) for action to enforce obligations to corporation
  - corporation (only) in any action for breach of contract under a policy issued by the corporation

Comments: The only exception to immunity applicable to Board members is willful tort, there is otherwise blanket immunity for any action taken in the performance of their duties and responsibilities as board members. It is highly likely a willful tort, by any party, including Board members would be excluded from coverage under a D&O policy.

- The Corporation's exception to immunity with respect to issuance or payment of debt is the most significant exposure to be addressed in a liability policy. A potential risk which would also be addressed regarding issuance of debt is that parties could try to circumvent the immunity for Board members and employees by suing in federal court or other jurisdictions. It is unclear whether any such attack could avoid immunity but it is a discernable risk.

Sovereign Immunity – Torts Section 768.28

768.28 is a limited waiver by the state of sovereign immunity for torts. Citizens is included under 768.28 as a corporation primarily acting as an instrumentality of the state.

- Limitation of liability of state (including Citizens) for torts is \$200,000 per person \$300,000 aggregate per incident or occurrence
- No officer, agent or employee of the state or any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function unless such officer or employee acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.

Comment: Under 768.28, Board members and employees cannot be held personally liable or named as a party in any action for injury or damage suffered for actions in the scope of their function as board member unless they have acted in bad faith, malicious purpose or wanton and willful disregard for human rights, safety or property. Immunity does not apply to Federal Civil Rights

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actions. Section 762.28 protections are very well tested, and the exposure of Board members and employees for general tort liability is virtually nonexistent.

### Plan of Operation

- Indemnification –  
Current and former Board members and employees – indemnification shall be made by the Corporation where claims, proceedings or causes of action are based on allegations as to the conduct of any person contemplated by the Plan in the performance of its/his/her duties, or in the exercise of its/his/her discretion in the performance of duties owed to the Corporation.
- Cannot be indemnified where prohibited by State or Federal law.
- Duty to Defend – Corporation shall defend any Indemnifiable Person from all claims, proceedings and actions, whether in contract, regulatory, administrative or tort, whether arising in law or equity, where such claims, proceedings or actions are based on allegations as to the conduct of such persons in the performance of its/his/her duties or in the exercise of its/his/her discretion in the performance of duties owed the Corporation.
- The Corporation shall advance reasonable litigation costs and attorneys fees to any Indemnified Person upon proper demand.
- Limited Hold Harmless – Corporation shall hold harmless an Indemnified Person who makes request for payment, otherwise proper under Indemnification Section of the Plan, for reimbursement of final judgement or assessments, on money damages, restitution of Federal, State or local administrative penalties, fines or other monetary sanctions, including interest accrued and reasonable attorney's fees and cost incurred by Indemnified Person.
- Corporation may decide not to indemnify, hold harmless or pay fees and costs of an Indemnified Person subject to a criminal charge, publicly disclosed criminal investigation or internal investigation by the Corporation where the charge or investigation is based upon or arises out of alleged or possible criminal or unlawful conduct of Indemnified Person that is related to the conduct, claims, proceeding or cause of action for which indemnification is sought.
- If Indemnified Person is convicted or pleads nolo contendere to a criminal charge or is found liable or agrees as to liability to the Corporation based on unlawful conduct related to the conduct, claim, proceeding or cause of action for which indemnification is sought, the Indemnified Person shall reimburse the Corporation for all amounts advance or paid by the Corporation.

Comment: The Corporation, under the Plan, has absolute duty to current and former Board members and employees to indemnify, defend, and hold harmless where claims, proceedings or actions are based on allegations as to conduct of such person in the performance of duties or exercise of discretion in performance of duties owed the Corporation absent 1) prohibition in state or federal law; 2) criminal charge, criminal investigation or internal investigation by the Corporation; however, funds paid as indemnification or duty to defend must be reimbursed if Indemnified Person is convicted or pleads to a criminal charge or found or agrees to liability based on unlawful conduct.

### Applicability to D&O Liability Insurance Exposure:

There is very little direct liability of Citizens Directors and Officers that constitutes exposure under a D&O policy. The only exception to the board members' blanket immunity under Citizens' enabling law is "willful tort", which would likely be excluded from coverage in a D&O policy. Likewise, since officers and employees cannot be liable or named as a party defendant in a 762.28 tort action there is virtually no tort exposure under a D&O policy.

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The two main areas for a D&O policy to protect Citizens, its Board and employees are:

1. To obtain D&O proceeds to fund the Corporations' duty to defend.
2. To obtain coverage to address the Corporations exposure to liability for issuance or payment of debt, and to provide coverage to defend any effort to circumvent Board member and employee immunity in other jurisdictions.