



LMCIT RISK MANAGEMENT INFORMATION
**RISK ALLOCATION AND COVERAGE ISSUES FOR
JOINT POWERS AND MUTUAL AID AGREEMENTS**

Introduction

This memorandum is intended to aid city attorneys and other city officials involved in the preparation and review of mutual aid agreements and agreements establishing joint powers entities. While mutual aid arrangements and joint powers entities give way to some different tactics for managing risk, the overall risk management objectives are the same in both scenarios:

1. Making sure the governmental entities involved have insurance coverage for activities carried out under the agreement;
2. Minimizing the potential for courtroom conflicts between the governmental units who have entered into the agreement; and
3. Minimizing the amount of resources necessary to defend the governmental units in the event of a third-party claim.

Mutual Aid Agreements

Mutual aid agreements essentially reflect a set of promises and a plan for how different governmental entities will provide assistance to one another for their common benefit. There are, of course, risks inherent in any operations covered under a mutual aid agreement (e.g., police activities, fire suppression and rescue activities). Yet there are also risks that arise from the mutual aid relationship itself. The goal in listing out these risks is not to dissuade municipalities from enjoying the benefits of mutual aid agreements; mutual aid can provide valuable and needed assistance in a cost effective manner. Rather, the goal is to make sure these issues are considered and appropriately addressed as agreements are created and revisited. Some of the more important issues to consider and manage include:

- A third party might be harmed and bring a lawsuit against one or more of the entities involved in the operation.
 - Your city could be vicariously liable for the actions of another city based on the mutual aid relationship.
 - More financial resources than necessary may be spent if each entity to the agreement has to separately defend against the claim.
 - Financial considerations may create an incentive for mutual aid members to assert positions adverse to one another (e.g., comparative fault).

- A judgment or verdict could exceed the amount of existing liability insurance coverage.

Third-party liability claims

There are two aspects to the financial risk presented by third-party claims. The first risk is having to pay money to the claimant as either a settlement or judgment. The second risk is using up financial resources to defend the claim. Claims arising out of mutual aid activities pose a heightened risk of using up resources because operations carried out under a mutual aid agreement involve more than one governmental unit. When a mutual aid activity gives rise to a claim, it follows that there is greater potential for multiple governmental entities to be named as defendants. The risk is that multiple cities may have to separately defend a single claim. It is important to design agreements in a way that will help alleviate this situation.

Some mutual aid agreements contain language along the lines of “each party will be responsible for its own liability.” Stated wryly, this is akin to saying: “we’re all in this together – until there’s a lawsuit – then it’s everyone for themselves.” This kind of language creates an incentive for the city, as well as a duty for the city’s advocate, to marshal and emphasize the evidence indicating that the other (governmental) defendants are comparatively more at fault. For the plaintiff, this ability to divide the defense creates valuable strategic advantages. Moreover, no one will know how much each party is liable until the jury returns a verdict, and most of the defense costs will already be incurred by that time. Inter-city disputes over which one is more at fault is an especially unnecessary use of resources when all the losses are being paid out of the same LMCIT risk pool.

Rather than leaving each party to fend for itself (and potentially setting up an expensive fight between the parties), LMCIT recommends the inclusion of defense and indemnity provisions in mutual aid agreements. When the agreement places responsibility for all defense costs and damage awards with one of the parties to the agreement, the financial incentive to shift fault to other governmental co-defendants may be reduced or entirely eliminated. It is also far more likely that one attorney can defend all involved cities and their employees, thereby minimizing defense costs.

Which party should agree to provide the defense and indemnity? There is no law or rule--only a theory that seems to make sense when applied to most circumstances. The party in the best position to control the risks should probably be the one to carry those risks. In mutual aid situations, it is very common to see provisions establishing the city requesting the assistance is in charge of the activities. Accordingly, a plausible way to allocate defense and indemnity responsibilities is to place them with the party requesting assistance. One can also invoke the principle of reciprocation and arrive at the same result: It seems fair that the party who is receives help should also bear the risk that something bad might happen.

For LMCIT members, the city’s LMCIT liability coverage includes tort liability the city has assumed by contract. That is, when the city agrees in a contract to defend and indemnify another party for tort claims, LMCIT will provide that defense and indemnification, assuming the underlying claim is a covered claim under the city’s insurance policy. Keep in mind that

LMCIT's coverage is subject to a one million dollar (\$1,000,000) per occurrence limit for damages.

In thinking about defense and indemnity provisions, it is also important to keep in mind that liabilities could exceed the amount of available insurance coverage. LMCIT provides insurance coverage in amounts equal to the governmental tort caps set forth in Minnesota Statutes, Chapter 466, unless the city has obtained excess coverage. For example, a federal civil rights claim, which is not subject to the tort caps in Chapter 466, could exceed your city's insurance coverage limits.

There are a number of other ways liability can exceed coverage limits which is discussed in more detail in the LMCIT Risk Management Information Memo "*LMCIT Liability Coverage Options - Liability Limits, Coverage Limits, and Waivers.*"

Reimer v. City of Crookston

A recent federal court case caused concern about liability resulting from joint activities although that concern has since been resolved. In 2005, the court in *Reimer v. City of Crookston* ruled liability arising from a joint venture or a joint powers entity's activities could exceed the current statutory tort limit of \$1,000,000. In that case, the Court said that the claimant could make a claim against each political subdivision that was a member of the joint powers entity, for damages caused by the joint powers entity's activities. The Court also ruled that a claimant could "stack" the statutory liability limits of each member, effectively multiplying the statutory tort limits by the number of members in the joint powers entity.

In response to *Reimer*, the League, in cooperation with other local government organizations, was successful in getting the state legislature to address the concerns caused by this decision. The state legislature amended the joint powers law, Minnesota Statutes, Section 471.59, by adding two provisions.

- First, the amendment provides that a governmental unit is liable for the acts or omissions of another governmental unit in a joint venture or joint enterprise only if it has so agreed in writing.
- Second, the amendment provides that governmental units operating together under the Joint Powers Act, and any joint boards created thereunder, are a single governmental unit. The total liability for the governmental units and any joint board may not exceed the limits on liability for a single governmental unit.

The joint powers amendment became effective on May 25, 2006. The risk of liability for the activities of a joint powers entity or for cities acting under a mutual aid agreement or some other type of joint venture is now no greater than the risk of liability for a single political subdivision acting alone.

Injuries to employees and damage to equipment

In addition to addressing third-party claims, mutual aid agreements should include provisions concerning workers' compensation coverage and damage to city property. LMCIT recommends each entity provide workers' compensation coverage for its own employees, and each party be responsible for any damage to or loss of its equipment. To eliminate conflicts between parties, LMCIT also recommends the parties waive any rights to recover damages from the others for workers' compensation costs and property damage occurring during mutual aid activities. Translated to more practical terms, the parties are essentially saying, "We're in this together, let's just cover the risks through insurance and be done with it, and agree that we're not going to waste public funds suing each other." Although a city risks being liable for another city's negligence, that city is just as likely to receive the same benefit in return. Over the long term, any competing interests are likely to balance.

Joint Powers Entities

A joint powers entity agreement results in the creation of a new legal entity. This new entity can be vested with the powers to own property, hire employees, and to sue and be sued. The units forming the entity are referred to below as "constituent members" of the entity.

Third party liability

In concept, the formation of a new legal entity eliminates a number of the risks inherent in mutual aid arrangements. Assuming the new entity has insurance coverage for itself, all of the constituent members share in a common source of financial protection for claims against the entity. And because an entity cannot sue itself, the incentive for constituent members to assert positions adverse to one another is reduced.

For insurance purposes, LMCIT treats joint powers entities as separate from the cities that formed them. The joint powers entity is not covered by the insurance policies that constituent member have obtained for themselves.

It is important for cities to know that their own LMCIT coverage will not provide protection against a claim arising out of the activities of a joint powers entity. For example, a police officer from City A is doing some work for a drug task force that is a joint powers entity. If there is a claim against City A or the officer arising out of the officer's task force activities, the claim will not be covered by City A's LMCIT coverage. On the other hand, LMCIT coverage issued to a joint powers entity covers both the entity and its constituent members for claims arising out of joint powers activities. So if the task force had LMCIT coverage, it would provide protection to the task force, City A and the officer from City A. Again, this common source of insurance coverage helps eliminate the incentive for intergovernmental disputes, and helps minimize the number of separate defenses necessary in response to a claim.

It is therefore important for the joint powers board to carry its own liability coverage or to be covered by name under one of the constituent member's liability coverage. The joint powers entity has two options for obtaining insurance from LMCIT. It can obtain a policy directly from LMCIT. Alternatively, one of the city members to the joint powers agreement can add the entity

– *by name* – to its own policy. Either way, for the entity to have insurance from LMCIT, there needs to be an insurance policy with its name on it.

How much insurance is enough?

Unless a city asks for excess coverage, the coverage issued by LMCIT will be equal to the governmental tort caps established by Minnesota Statutes, Chapter 466. Federal claims are not governed by these state limits, and the functions and activities of the joint powers entity should be considered in deciding how much insurance to carry. Many joint powers entities are organized to provide law enforcement services in particularly risk-prone areas (e.g., drug task forces, gang task forces, swat teams). The individual rights at issue when police conduct a search, use force, or make an arrest are often traceable to federal constitutional sources, meaning that state tort limits may not apply. Entities involved in these kinds of operations should consult with LMCIT to assist in determining the amount of insurance coverage. In view of the risk claims could exceed available coverage, LMCIT recommends:

- Your city should put a limit on the promise to defend and indemnify others. To avoid incurring uncovered exposure, limit the defense and indemnity obligations to the amount of your insurance coverage.
- You should decide in advance how any additional exposure will be handled among the participating governmental units. You might decide to allocate the uninsured exposure equally among the responding parties.

Uninsured/underinsured

Uninsured and underinsured exposures present the potential for conflict among constituent members. These situations could arise due to an exclusion in insurance coverage or where liability is more than the insurance coverage. If the agreement does not address how these uninsured/underinsured liabilities will be handled, it simply reserves the question for a later day when the stakes and emotions may all be running higher. Parties should consider including provisions in the agreement that describe how these costs will be allocated. The parties could decide to share the costs of these risks equally or in some other predetermined proportion. If the agreement fails to address this issue, it really means that if there is excess liability, the cities will be left with an unresolved conflict over who was at fault and who should bear the cost.

Workers' compensation

Generally, a joint powers entity will have to provide workers' compensation coverage for its employees.

If employees of the constituent members will be spending part of their work time performing joint powers activities, the agreement should specify who is responsible for providing workers' compensation insurance. If the joint powers' entity does not provide workers' compensation coverage, it generally makes sense for each government to agree to provide coverage for its own workers, even if they will be spending a portion of their time on joint powers activities.

Damage to equipment

The parties should also agree on how damage to equipment will be handled. If the joint powers entity is going to own equipment, it should have property insurance coverage for that equipment. If constituent members will be allowing their equipment to be used for joint powers activities, the agreement should specify who will be providing insurance coverage for it. Generally, the party that owns the equipment will provide the insurance for that equipment.

Subrogation

Constituent members of a joint powers entity should consider waiving their subrogation rights in regard to liability, property damage and workers' compensation claims. Suppose your city owns a piece of equipment that is destroyed due to the negligence of another city. Normally you (or your insurance company) could sue the negligent city for causing destruction of your equipment. Between cities who are members of LMCIT, this sort of subrogation effort probably is not worth it. The city whose property was destroyed will have the claim covered by LMCIT and any effort to subrogate against the negligent city would amount to LMCIT paying itself for the loss. Moreover, waiving your subrogation rights helps to eliminate conflicts between constituent members who are acting together to achieve a common goal.

For additional information or any questions, please contact one of the following LMCIT staff members via e-mail or telephone at (651) 281-1200 or toll-free at (800) 925-1122:

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