RISKY BUSINESS

A Publication of the
Miami Valley Risk Management Association
August 2017

Articles

FYI...Closure of Loss Year 23 (2011)

By Tom Judy

The Board of Trustees voted to close Loss Year 23 (2011) at their June meeting, resulting in a refund of $1,519,932 to the member cities. Total surplus loss reserves of nearly $16.8 million have now been returned to the members from the 23 closed loss years.

Funding for each loss year is determined through analysis performed by MVRMA's actuary, Pinnacle Actuarial Resources, Inc. The objective of this analysis is to determine a funding amount that will provide a high level of confidence that it will be sufficient to pay that year's claims and losses.

Once a loss year's funding has been set, the members pay their share as determined by the Pool Contribution Factor (PCF) formula. Claims and losses are deducted from the loss year in which the underlying event occurred. Meanwhile, balances in the loss funds earn interest.

It is highly unusual, but when the funding for a loss year is insufficient to pay that year's claims and losses, the Shock Loss Fund makes up the difference. By far the more common result, however, is that there is a balance remaining after the loss year's claims and suits have all been resolved. That balance is returned to the member cities in the same proportion in which they contributed to the loss year.

There were two significant losses charged to Loss Year 23 totaling over $1.6 million dollars, including a hail storm that affected four members. Fortunately, the 2011 loss fund was charged only for the first $250,000 of each of these claims. An excess insurance policy picked up the amounts over $250,000.

The refund of $1,519,932 represents 61% of the $2,485,000 contributed ty the members to Loss Year 23. The average refund percentage for all loss years is 58%.

The practice of returning unused loss funds, with interest, is quite a contrast from commercial insurers. The potential for surplus loss reserves in any given loss year provide an incentive for our members to practice effective loss control measures and transfer risk whenever possible. Member cities' risk management efforts benefit them directly and are essential to the success of the MVRMA program.

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Loss Control Lowdown...

Seat Belt Safety

Starr Markworth

While driving through member cities, I have noticed a startling trend. I have observed that many city employees are not wearing seat belts while driving city vehicles.

Seat belts saved an estimated 13,941 lives in America in 2015 (National Highway Traffic Safety Administration, 2016). Safety belts are the most effective means of saving lives and reducing serious injuries in traffic crashes. Unfortunately, only 68% of Americans wear their seat belts.

It is also the law. As it stands today, the Ohio safety-belt law requires front-seat passengers of cars, vans, pickup and delivery trucks, taxis, commercial trucks and tractor trailers, as well as buses with seat belts, to wear belts at all times while on public roadways. If the driver is under 18, all vehicle occupants must wear seat belts.

Reasons Given For Not Wearing A Seat Belt:

- *"I'm only going down the street."* Actually, this is the best time to wear a safety belt, since 80% of traffic fatalities occur within 25 miles of home and under 40 miles an hour.
- *"I won't be in an accident: I'm a good driver."* Your good driving record will certainly help you avoid accidents. But even if you're a good driver, a bad driver may still hit you.
- *"I'll just brace myself."* Even if you had the split-second timing to do this, the force of the impact would shatter the arm or leg you used to brace yourself.
- *"I'm afraid the belt will trap me in the car."* Statistically, the best place to be during an accident is in your car. If you're thrown out of the car, you're 25 times more likely to die. And if you need to get out of the car in a hurry - as in the extremely tiny percent of accidents involving fire or submergence - you can get out a lot faster if you haven't been knocked unconscious inside your car.
- *"They're uncomfortable."* Actually, modern safety belts can be made so comfortable that you may wonder if they really work. Most of them give when you move - a device locks them in place only when the car stops suddenly. You can put a little bit of slack in most belts simply by pulling on the shoulder strap. Others come with comfort clips, which hold the belt in a slightly slackened position. If the belt won't fit around you, you can get a belt extender at most car dealerships.
- *"I don't need a belt - I've got an airbag."* An air bag increases the effectiveness of a safety belt by 40 percent. But air bags were never meant to be used in place of safety belts.

40,000 people die each year in car accidents, the leading cause of death for people under the age of 35. Safety belts can prevent death in about half of these accidents. If you know this and are still not wearing a safety belt, you may need to ask yourself why not??

The Claims File…

Transportation Services

Craig Blair

Some of our members provide transportation services through their public works, parks, or senior centers such as taking people to special events, dinners, concerts, or camps. While this valuable service fills a need to their residents, cities need to be aware of the liability exposure they assume. When engaged in these activities the city is generally recognized as performing the duties of a common carrier. The courts may consider this to be a "proprietary function" rather than a "governmental function", which means the city would be held to a higher degree of care for the passengers. MVRMA would defend these type of claims but since they are a proprietary function the courts probably would not allow all the protections or immunities afforded to municipalities under Ohio Revised code 2744.

As most of these services are designed to assist the elderly or physically handicapped, the first steps to mitigate risk are to review your hiring practices and provide appropriate training. The city must consider the physical abilities of the employee driving the vehicle. A job function which would create the most exposure would be assisting passengers when entering and exiting the vehicle without endangering themselves or the passengers; therefore, drivers should be trained on proper lifting techniques to accomplish this safely. The drivers also need training on the proper techniques and procedures to follow when assisting someone with special needs. It is important to remember whom you are transporting and realize a minor incident could lead to a serious claim for which no "governmental immunity" defenses may be available.

It is wise to have a waiver or release signed by passengers when transportation is provided through a city program to provide some protection against an injury claim. MVRMA can assist a member in drafting a waiver or release form for your program.

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2016 Award Recipients

At the June meeting, the MVRMA Board recognized member cities for their outstanding performance in controlling losses for the 2016 loss year.

Standard of Excellence Award

The City of Bellbrook, Village of Indian Hill, City of Kettering, City of Springdale, City of Troy and City of Vandalia were presented with the Standard of Excellence Award for incurring losses less than $100 per employee in 2016. Bellbrook and the Indian Hill received special recognition as the Overall Winners for achieving the lowest losses per employee.

Standard of Excellence Award, Overall Winners Pictured (L-R) Mark Schlagheck, City of Bellbrook; Dina Minneci, Village of Indian Hill

Departmental Zero Losses

The Board recognized the following departments that achieved zero losses in 2016:

DEPARTMENT	CITY
Fire	Bellbrook, Englewood, Mason, Piqua, Springdale, Tipp City, West Carrollton , Wilmington
Parks and Recreation	Blue Ash, Centerville, Englewood, Indian Hill, Madeira, Montgomery, Springdale, Tipp City, Vandalia, West Car-
Police	Bellbrook, Centerville, Englewood, Indian Hill, Madeira, Piqua, Springdale, Tipp City, Vandalia
Water/Wastewater	Bellbrook, Indian Hill, Mason, Troy, Wyoming
Streets/Refuse/PW	Bellbrook, Indian Hill, Miamisburg, Tipp City, West Carrollton

Standard of Excellence Award Pictured (L-r): Sue Knight, City of Troy; Amanda Zimmerlin, City of Springdale; Nancy Gregory, City of Kettering and Julie Trick, City of Vandalia

DEPARTMENT	CITY/CONSECUTIVE YEARS
Fire	Piqua (3), Springdale (3), Wilmington (3)
Parks and Recreation	Englewood (4), Indian Hill (3), Montgomery (16), Tipp City (3), Vandalia (3), Wilmington (3), Wyoming (8)
Water/Wastewater	Bellbrook (4), Mason, (7)

Broker's Beat

When Others Use Your Facilities, You Need the Protection of Special Event Insurance

It's summertime and many of MVRMA's members will host special events or allow other organizations to hold events on their property. While these events can generate revenue and positive publicity for your entity, they also pose substantial risk, ranging from major injuries to event participants to fatalities.

Generally, special events are one time, or infrequent, occurrences of limited duration that provide the general public or special interest groups with leisure and social opportunities beyond everyday experiences. Even if your entity does not organize the event, you still may have some responsibility if the activity is held on your premises, or if you provide any services.

Common special events include weddings, meetings, parties, parades, fairs, banquets, art festivals, block parties, marathons, bicycle tours, and spectator sports such as soccer or baseball games.

Recently a local university permitted a neighborhood church choir to perform in one of its campus auditoriums. While getting ready to perform, one of the choir members fell off the platform and sustained serious injuries that will prevent the individual from ever returning to a well-paying job. Fortunately, special events coverage was in place, and the case was settled within the $1 million limit.

In fact, a Tenant/User Liability Insurance Program (TULIP), or special events program, can be a critical management tool for your entity's risk management department.

Alliant has created a Special Events Program specifically to meet the needs of our public entity clients that require event holders to secure their own insurance. The program consists of three primary elements:

1. TULIP - This covers events held or sponsored by companies, organizations, or individuals that have been permitted to use a public entity's premises.

2. Nominee event program - This covers events that are held or sponsored by the public entity, or by any of its departments or divisions. Coverage can be expanded to cover co-sponsors if desired.

3. Instructor/recreation program - This covers events that are instructional to its participants.

The Special Events Program is designed to be both easy to administer and affordable, with low minimum premiums.

Program Highlights:

- Easy to use - available online
- Volunteer employees are insureds
- Entity or venue owner as additional insured
- Fire damage and medical payments
- Liquor liability with additional premium
- Lessees, instructors, or event holders as named insured
- "Primary/non-contributory" wording in regard to the public entity
- Premises and products/completed operations liability
- No deductible
- Vendors, exhibitors and concessionaries included with additional premium

Our goal is to help public entities ensure safe and well-planned events through special event liability insurance coverage that minimizes risk.

Editor's Note: MVRMA staff can assist members with placing coverage through the Alliant Special Events program.

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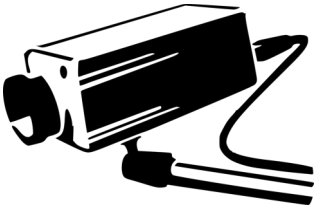
Counselor's Comments

By Surdyk, Dowd & Turner



Second Appellate District Court of Appeals Affirms Decision Granting Judgment to West Carrollton, Trotwood, and Dayton in Red Light Camera Cases

The Second District Court of Appeals recently considered the issue of whether the City of West Carrollton's, City of Trotwood's, and City of Dayton's ("Cities") automated traffic enforcement ordinances are facially constitutional pursuant to Article I, Section 16 of the Ohio Constitution. *Toney v. City of Dayton*, 2d Dist. Montgomery No. 27245, 2017 WL 2829594 (June 30, 2017). Twelve Plaintiffs-appellants appealed the decision of the Montgomery County Court of Common Pleas in their civil actions contesting notices of civil liability issued under the Cities' municipal ordinances implementing automated traffic enforcement systems. The trial court overruled Appellants' motion for summary judgment and class certification, and sustained the Defendants-appellees' motions for summary judgment and judgment on the pleadings, which included the aforementioned Cities, two Chiefs of Police, a Public Safety Director and Deputy City Manager, and the company that designed and installed the systems, RedFlex Traffic Systems, Inc. ("Redflex").

Under the Cities' ordinances, which implemented automated traffic enforcement systems, the Cities installed automatic camera stations at selected locations to detect red light and speed limit violations. *Id.* at ¶ 2. When the camera stations photograph a vehicle in the midst of a violation, a notice of civil liability is mailed to the vehicle owner, who may then pay the monetary penalty or request an administrative hearing to contest the notice. *Id.* Some of the Appellants received at least one notice, but did not request an administrative hearing; some Appellants received at least one notice and requested an administrative hearing; and some Appellants did not receive a notice.

In three separate complaints filed against the Cities, their named employee, and Redflex, Appellants alleged claims for 1) a declaratory judgment concerning the jurisdiction of the administrative tribunals established by the ordinances; 2) a declaratory judgment concerning the constitutional validity of the Ordinances pursuant to the Ohio Constitution's due process clause; 3) a request for injunctive relief; and 4) a claim for unjust enrichment. *Id.* at ¶ 6. The trial court ultimately granted summary judgment to West Carrollton, Dayton and Redflex, and granted judgment on the pleadings to Trotwood. *Id.* at ¶ 7.

Appellants' first assignment of error raised a facial challenge to the Ordinances, arguing that they violate the Ohio Constitution because they fail to provide sufficient procedural due process guarantees. "A facial constitutional challenge posits that 'a statute, ordinance, or administrative rule, on its face and under all circumstances, has no rational relationship to a legitimate government purpose.'" *Id.* at ¶ 9. Specifically, Appellants claimed that the Ordinances violated Article I, Section 16 of the Ohio Constitution, which provides that persons who suffer harm to their lands, goods or reputation, shall have remedy by due course of law; that is, the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at ¶ 11. The Court examined the Ordinances under a rational-basis test (used for reviewing ordinances on due process grounds), which finds ordinances constitutionally valid if they bear "'a real and substantial relation to the *** health, safety, morals or general welfare of the public' and [are] 'not unreasonable or arbitrary.'" *Id.*

The constitutional shortcomings of the Ordinances' provisions on administrative hearings, as identified by Appellants, were fourfold: 1) the use of hearsay testimony in the absence of discovery and subpoena power; 2) limitations on affirmative defenses; 3) abrogation of spousal privilege; and 4) the bond requirements. Paraphrasing the Court's summation of the Appellants' argument, the crux of the shortcomings, respectively, were that the administrative tribunals rely on hearsay evidence while at the same time do not provide the opportunity to compel attendance of the declarant; the limitations imposed on supporting evidence that may be introduced at trial are unreasonably restrictive; the spousal privilege is abrogated where the Ordinances allow the vehicle owner to avoid civil liability by providing the name and address of the person driving the vehicle at the time of the violation; and the bond requirement effectively denies indigent defendants the remedy of an administrative hearing. *Id.* at ¶ 13-14. The Court analyzed these alleged shortcoming using the three factors articulated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). Those factors include 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of that private interest through the official procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, which includes the function involved and fiscal and administrative burdens imposed by additional or substitute procedural requirements. *Mathews* at 335. The Court pointed out that where the interest is purely economical as in,

Counselor's Comments

this case, a civil fine, the Ohio Constitution demands only a meaningful opportunity to be heard. Ultimately, the Court held that all three factors weighed in favor of the Cities.

Private Interest Affected by the Official Action

With respect to this factor, the Court looked at the civil penalties involved with each Ordinance. The maximum civil fine and penalty ranged from $100.00 in West Carrollton, $135.00 in Trotwood, and $275.00 in Dayton. The private interest involved, therefore, entailed a civil fine which the Court noted "would be a significant expense to the average motorist, [but] is comparatively insubstantial with respect to the overall cost of owning and operating a vehicle." *Toney* at ¶ 15.

The Risk of an Erroneous Deprivation of the Private Interest through the Procedures Used

Pursuant to the Ordinances, the Court noted that a defendant must receive a notice, the defendant has a right to an administrative hearing, and the defendant may introduce some evidence at the hearing to support his defense. The Ordinances also set forth a list of affirmative defenses to avoid liability, which include showing that the violation was necessary to yield the right-of-way to emergency vehicles or a funeral procession; that the vehicle or registration plates were stolen before the violation occurred; that at the time and place of the violation, the traffic control signal or speed sensor were not operating properly; or that the driver of the vehicle was not the person named in the notice. Although the Court noted that "these procedures fall short of the due process accorded a defendant in a civil trial, they suffice to minimize the risk of penalizing the wrong party." *Id.* at ¶ 17. Further, the Court concluded that "additional or substitute procedural safeguards would likely have little value" given the defenses of this kind, and that the discovery obstacles to challenge the camera systems based on faulty equipment does not rise to the level of a constitutional infirmity because a defendant has no right to confront witnesses in a civil proceeding. *Id.* at ¶ 17-18.

The Government's Interest and Fiscal and Administrative Burdens Entailed by Additional Procedural Requirements

The last factor also tipped in favor of the Cities, with the Court noting that the Ordinances were an exercise of each city's police powers intended to promote traffic safety. The Court was critical of the additional procedural safeguards suggested by Appellants, such as vesting the tribunal with subpoena power and granting defendants the right to engage in discovery, because they would "certainly result in a dramatic increase in the city's costs and administrative burdens" and such increased fiscal and administrative burdens "would outweigh the potential benefit of enhanced procedural due process protections." *Id.* at ¶ 19. Ultimately, the Court held that, pursuant to the *Mathews* factors, the Ordinances provide situationally appropriate levels of procedural due process protection," and that the Ordinances bear "a real and substantial relation to public safety and implement a streamlined, low-cost system of traffic enforcement." *Id.* at ¶ 25-26. Thus, the Ordinances are constitutionally valid on their face as they "bear a rational relationship to a legitimate governmental function, and they are neither unreasonable nor arbitrary." *Id.* at ¶ 41.

Effect of *Toney v. City of Dayton*

Although the Second District's decision is yet another victory for cities that hope to regulate traffic and make their streets and intersections safer through the use of automated traffic enforcement systems, it likely is not a bellwether against future challenges of such ordinances. Statistics show that the use of such systems does have a significant impact on decreasing the number of accidents due to speeding and red light violations, and they also have the tangential benefit of generating revenue for cities. Therefore, municipalities considering the implementation of such systems should closely examine those ordinances that have been challenged and withstood constitutional scrutiny if they decide to use automated traffic enforcement systems.

[1]The trial court eventually consolidated all three cases.

[2]At Appellants' request, the trial court dismissed Count I in all three cases.

[3]A defendant also has the right to an administrative appeal and call witnesses.

[4]The Court also found the other alleged constitutional infirmities unavailing (limitations on affirmative defenses, abrogation of the spousal privilege, and the bond requirement denies due process to indigent defendants).

[5]Appellants also raised a second assignment of error, claiming that the trial court improperly granted judgment in favor of Appellees on Appellants' unjust enrichment claim. The Court determined that the error was moot since the claim was based on the argument that the Ordinances were facially unconstitutional.

Calendar of Events

Upcoming Training Events

Please continue to check our website, mvrma.com for upcoming training dates:

- Dealing with Problem Employees - October 3rd
- Driver Training - October TBD
- Trenching and Excavating - TBD
- Snow and Ice Control for Supervisors - TBD

Upcoming Board Events

Committee Meetings
Risk Management - September 5th 10:00 AM
Finance - September 5th 1:30 PM

Board Meeting
September 18th, 9:30 AM

From The Board Room

Actions taken at the June 19, 2017 Board meeting included approval of:

⇒ 2016 Annual report

⇒ Pinnacle's Actuarial Report

⇒ 7/1/17 Property Renewal

⇒ Huntington Bank Depository Agreement

⇒ GEM's proposed changes to the accounting for member's surplus contributions

⇒ Closure of LY23

⇒ Changes to the P&C Policy