RISKY BUSINESS

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FYI...Professional Services Contracts

By Tom Judy

When you contract with professionals, it is important to make sure they have professional liability insurance in addition to general liability coverage. For these purposes, professionals include architects, engineers, attorneys, medical service providers, accountants, insurance agents and brokers, technology consultants, safety professionals, and other such consultants. The key is whether you are relying on a consultant's professional judgment and if an error in judgment could lead to damages to your city or a third party.

A building contractor that is merely following the blueprints would generally not need professional liability insurance. However, if it is a "design-build" job, or if the contractor will be using judgment to modify the blueprints, then you should require them to carry professional liability insurance in addition to general liability.

Professional liability insurance, often called "errors and omissions" coverage, differs fundamentally from general liability coverage. General liability insurance applies only to claims of bodily injury, property damage, advertising injury, or personal injury claims. On the other hand, professional liability insurance protects against losses that occur when a professional fails to exercise the same standard of care that is usual and customary to that profession. The resulting claims include claims of negligence, misrepresentation, violation of good faith and inaccurate advice. These claims can cause damages to the professional's client that do not fall under bodily injury, property damage, advertising injury, or personal injury. Damages under a professional liability policy are generally economic in nature. For example, your city contracts with a mechanical engineer to design an HVAC system. You later find that the system was inadequately designed and incur significant costs to correct the deficiency.

Professional liability insurance is specialty coverage and is underwritten to cover only the professional practitioner. The insurer will generally not agree to add additional insureds under a professional liability policy.

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FYI cont...

Most professional liability coverage is written on a "claims-made" basis, rather than the "occurrence" basis. This means the policy in force on the date a claim is made against the consultant is the policy that responds to the loss, not the policy in force on the date damages occur. This presents a challenge because it can be months or years before the effects of a latent design defect present themselves. Therefore, it is recommended that you require the consultant to continue to maintain its professional liability coverage for at least three to five years after completion of the job.

As with all contracts, you will want the consultant to hold your city harmless for claims arising out of the consultant's acts or omissions. Be on the lookout for language in the consultant's boilerplate contract limiting their liability to a specific dollar amount or the dollar amount of the contract. These lesser limits of liability should be avoided if possible. The minimum liability limit should typically be $1,000,000. On larger projects or those with significant potential for loss, higher limits are appropriate.

MVRMA has prepared a bidding/contracting insurance template for professional services contracts. Members may access this template, along with other risk management resources, at mvrma.com. Also, members are encouraged to contact MVRMA staff with their questions about professional liability insurance and professional services agreements.

The Claims File

By Craig Blair

As spring has arrived and summer is on the way, our members will receive damage complaints related to rain and high wind events. It is important to be prepared on how to respond.

The first thing is to determine if the city is liable. As with any claim review, we must address what negligent act caused the loss, and whether our member was responsible for the act.

During the summer months heavy rains can cause the storm drains to become surcharged which can lead to sewer backups. As the storm is a natural act, the city as a rule cannot be held liable for the drainage system being over capacity. Ohio law provides protection for our members while engaged in "governmental functions" such as the design and construction of a storm/sewer system. However, the maintenance and upkeep of the lines is considered a proprietary function, thus it is a function for which the city can be held liable. To avoid liability, the city should be able to provide documentation of an inspection and cleaning schedule. Also, to avoid liability, once the city is notified of a blocked line, they are expected to remove the debris in a timely manner.

The city should review complaints from their residents concerning public safety issues, although they are not obligated to make changes unless warranted. A history of repeated backups in an area should not be ignored. The lines should be inspected to locate the problem which could be a result of conditions such as a grease build up, roots in the line, or a possible illegal hookup. Also, the city should determine if any recent development has caused the system flow to increase to capacity even during normal rain events. This due diligence by the city can be a defense for future claims.

High winds during the summer months can lead to claims from branches blown down from city owned trees, causing damage to fences, houses, and automobiles or injuries to persons. Storms with high winds are considered natural acts, thus the City would not be considered negligent. The only exception to member liability would be if the city was on notice of a tree in poor condition and did not respond in a timely manner to trim or remove it. Other exceptions would include an open and obvious hazardous condition, such as a tree in a decayed condition or non-leafing limbs, indicating branches are dead or rotting.

The key to protecting the city is to respond and resolve the issue promptly and address any concerns about future problems.

Counselors' Comments
By Surdyk, Down & Turner

In December, the Ohio Supreme Court issued its opinion in *Walker v. Toledo*, — Ohio St.3d ——, 2014-Ohio-5461, — N.E.3d ——, which upheld the validity of the City of Toledo's automated camera system used to catch red-light and speeding violations. One day after the Ohio Supreme Court issued its opinion, Governor Kasich signed Amended Substitute Senate Bill 342 into law, which imposed significant restrictions on municipalities that use these automated camera systems. The bill took effect March 23, 2015. Several Ohio cities, however, in an attempt to preempt the application of this law, have successfully challenged its constitutionality and have obtained injunctions in courts of common pleas across the State. Municipalities with automated camera systems and those considering the purchase and use of these systems should pay close attention to the new restrictions and whether the laws will be overturned as violations of municipalities' home-rule authority.

The Ohio Supreme Court's Decision in *Walker v. Toledo*: Ohio Municipalities Have Home-Rule Authority to Establish Administrative Proceedings Related to Civil Enforcement of Traffic Ordinances

The City of Toledo enacted an ordinance to establish and enforce an automated camera system, which uses cameras and vehicle sensors to enforce traffic laws. When a vehicle is captured on the camera running a red light or speeding, Toledo, like other municipalities with these automated systems in place, forwards a notice of civil liability assessing a fine to the registered owner of the vehicle captured on camera. Also like other municipalities, Toledo has established an administrative process through which registered owners of the vehicles can challenge the notice and fine.

The case reached the Ohio Supreme Court on the issue of whether Toledo's civil administrative enforcement process violated the Ohio Constitution or other Ohio law. In the decision issued on December 18, 2014, the Ohio Supreme Court reaffirmed its 2008 decision in *Mendenhall v. Akron*, 117 Ohio St.3d 33, wherein the Court ruled that these automated camera systems imposing civil liability for traffic law violations are within municipalities' home-rule powers granted in the Ohio Constitution. The Court further held that Ohio municipalities have home-rule authority to establish administrative proceedings related to the civil enforcement of traffic ordinances, as the municipal courts do not have exclusive control over traffic law violations under Ohio law.

Senate Bill 342 Speeds through the Legislature, Placing Restrictions on Municipalities with Automated Camera Systems

On the heels of the Court's decision in *Walker*, the Ohio General Assembly passed Am. Sub. S.B. 342, which was signed into law by Governor Kasich on December 19, 2014, and took effect March 23, 2015. This law, as codified in Chapter 4511 of the Ohio Revised Code, significantly regulates the use of these automated camera systems. Namely, the new law requires that a municipality shall only use a photo-monitoring device to detect and enforce traffic law violations when a law enforcement officer is present at the location of the device at all times during the operation of the device and when the local authority complies with other sign requirements and prerequisites to deployment of the devices. In addition, the officer present may issue a ticket if he personally witnesses the traffic violation; however, if he does not witness a violation or does not issue a ticket, the law requires that an officer must later view the footage and photographs to confirm that a violation occurred before a ticket is issued. See R.C. 4511.093 to 4511.0912.

The new law also requires that prior to installing cameras at locations, local governments must conduct a study of traffic incidents at the intersection for three previous years and make such study available as a public record. See R.C. 4511.095. In addition, the law requires local jurisdictions to "conduct a public relations campaign" and provide a warning period of thirty days before issuing any tickets at any new automatic camera location. The law also, among other regulations, prohibits municipal authorities from issuing automated camera traffic enforcement tickets to speeders unless they are driving more than six miles per hour over the speed limit in school zones, park or recreation areas, or ten miles per hour above the speed limit in other locations. See R.C. 4511.0912.

Counselors' Comments cont…

Ohio Cities Take Swift Action to Prevent the Implementation and Enforcement of Am. Sub. S.B. 342

Between February 20 and March 20, 2015, the cities of Akron, Toledo, Dayton and Columbus filed actions against the State of Ohio in their respective county common pleas courts, seeking declarations from the respective courts that S.B. 342 violates the Home Rule Amendment of the Ohio Constitution and injunctions prohibiting the State of Ohio from enforcing the law.

On April 2, 2015, the Montgomery County Court of Common Pleas issued a decision in the suit filed by the City of Dayton, *Dayton v. State of Ohio*, Montgomery C.P. No. 2015-CV-1457 (Apr. 2, 2015). In that decision, the court granted judgment in favor of the City of Dayton declaring unconstitutional the parts of the law that (1) require the presence of an officer at the location of all photo-monitoring devices (R.C. 4511.093(B)(1), (3)), (2) the provision that requires a three-year safety study before deploying any traffic law photo-monitoring devices (R.C. 4511.095), and (3) the provision prohibiting the issuance of a ticket unless the vehicle in question exceeds the posted speed limit by not less than six miles per hour in a school zone, park or recreation area, and ten miles per hour in any other area (R.C. 45.0912). The court held that these provisions violate the Home Rule Amendment of the Ohio Constitution. The court also permanently enjoined the State's enforcement of those sections of the law against the City of Dayton.

In that decision, the court examined whether these provisions of S.B. 432 violate the City of Dayton's home-rule authority and held that those portions of S.B. 342 (1) improperly limit the legislative powers of local jurisdiction by mandating how to allocate their law enforcement personnel, (2) improperly limit the city's power to enforce their traffic control laws and enforcement procedures by requiring the three-year study, and (3) improperly limit the ability of the city to enforce its traffic laws by prohibiting the city from issuing automatic traffic camera tickets to drivers unless they are a certain number of miles over the speed limit. In addition, the court found that these provisions of S.B. 342 erroneously serve as a directive to municipal legislative bodies and do not proscribe a rule of conduct upon citizens generally.

Shortly before the judgment was issued in the City of Dayton case, the Lucas County Court of Common Pleas granted a preliminary injunction in favor of the City of Toledo in the suit filed by the city; however, this injunction is temporary and applies until the court rules on the merits of the case. Thus, the Montgomery County Court of Common Pleas is the first court to grant a permanent injunction against the State of Ohio to prevent the State's enforcement of these provisions. On April 8, 2015, the State of Ohio filed its notice that it will be appealing the court's decision. Because this is the first suit regarding the constitutionality of S.B. 342 to reach an Ohio court of appeals, it will be the case to watch in the continued debate over Ohio cities' use of automated camera systems and the State's attempt to restrict such use.

Loss Control Lowdown

By Starr Markworth

Time for Spring Cleaning?

It has long been recognized that good housekeeping plays an important role in setting the tone for workplace safety. A worksite with good housekeeping presents a safer work environment. Worksites that tend to have poor housekeeping generally have many more serious safety problems.

Good housekeeping also creates efficiency on the job and prevents accidental injuries. Poor housekeeping can frequently contribute to accidents by hidden hazards that cause injuries. If the sight of paper, debris, clutter and spills is the accepted norm, then other more serious health and safety hazards may be taken for granted.

Loss Control Lowdown cont….

Housekeeping is not just cleanliness. It includes keeping work areas neat and orderly; maintaining halls and floors free of slip and trip hazards; and removal of waste materials (e.g., paper, cardboard) and other fire hazards from work areas. It also requires paying attention to important details such as the layout of the whole workplace, aisle marking, the adequacy of storage facilities, and maintenance. Good housekeeping is also a basic part of accident and fire prevention.

Effective housekeeping is an ongoing operation, it is not a random cleanup completed occasionally. Periodic "panic" cleanups are costly and ineffective in reducing accidents.

Workplace housekeeping should be part of your day-to-day operations. Housekeeping can also be translated into vehicle and equipment care, once the employees begin to take pride in their workplace cleanliness. The behavior will trickle over into their care for their equipment and vehicles. For example, it is easier to leave the excess salt in the back of the dump truck once the snow storm has passed, but the exposure of the salt in the bed over time will cause rust, thus reducing the life of the vehicle. Why not take the time to clean out the bed of the truck and preserve its paint and overall appearance?

There is no time like springtime to begin a housekeeping program. If you would like more information on planning a good housekeeping program, please contact me at 438-8878 or via email at smarkworth@mvrma.com.

Remember…..each employee is responsible for maintaining good housekeeping, so do your part to keep your workplace clean, safe and efficient.

Alliant

Brokers' Beat

The Effects of Weather on the Insurance Industry and Being Prepared for a Catastrophe

Weather patterns are changing. The reason for this change is heavily debated and a topic better left for politicians and scientists, but regardless of the cause, these changing weather patterns are having an impact on the insurance industry. There is no question severe weather has caused an inconvenience and havoc on our own personal lives, but insurance underwriters are paying close attention to severe weather patterns for a much different reason. In 2014, severe thunderstorms, winter weather, and flooding accounted for more than 98% of the insured losses related to natural disasters in the United States. Since the beginning of the 2015, the harsh winter and record cold is expected to result in billions of dollars in insurable losses.

With the frequency of earthquakes and hurricanes down in recent years, severe weather, specifically in the Midwest, has caught the attention of the insurance industry. Although we do not expect the insurance carriers to make a monumental shift and change their view of what has historically been a benign risk, in the Midwest, we are closely monitoring underwriter appetites and underwriting practices.

Controlling the weather is not something your entities can do, but you can control how you respond to a weather event by having a disaster recovery plan in place. Following a catastrophe, it is imperative that your organizations continue to provide essential services to your residents, employees, and the businesses that operate within your community. Severe weather is one reason your entities may have to put your disaster plan into action but there are a number of other catastrophes you should be prepared for. Some of these include hard drive meltdowns, building fires, epidemic illness, or terrorist attacks. Although it is unlikely you will experience a catastrophe, these types of events do happen and without proper planning, the implementation of any disaster recovery plan could be a disaster itself. We have included some important aspects of a disaster recovery plan your leadership should be considering below:

Brokers' Beat cont…

- A list of key personnel, including the actual recovery team, who should be available during the recovery process;
- A description of the responsibilities of each member of the recovery team, and of all other entity employees;
- A plan as to how the entity will continue operations until normal operations are re-established;
- A list of materials the entity needs to continue operations and how they will be obtained;
- Identification of the space to be used by the entity during the disaster; and
- A schedule for developing and periodically reviewing and updating the plan.

The weather is changing. Are you prepared? Your response to a catastrophe is critically important and although it may be the last thing on your mind during a disaster, being able to mitigate the insurable losses will have an effect on your future insurance premiums and how underwriters view your entity's unique risk profile. Additional information is available on the Ohio Emergency Agency's website http://ema.ohio.gov/ and Alliant Loss Control is another resource available to you if you are interested in learning more about disaster recovery plans.

Upcoming Training Events

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

Police Report Writing
May 12, 2015
City of Centerville, Police Department

Risk Management
Gordon Graham
September 10, 2015
Location TBD

From The Board Room

Actions taken at the March 26, 2015 Board meeting included:

- Approved investment policy revision.
- Approved extension of contract with Alliant for brokering services.

Upcoming Board Events

MVRMA Strategic Planning Retreat
May 8, 2015 9:00 AM
The Golf Club at Yankee Trace

Board Meeting
June 15, 2015, 9:30 AM
MVRMA Office