RISKY BUSINESS

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Inside this issue:

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FYI...Contractual Risk Transfer

By Tom Judy

The Miami Valley Risk Management Association places a great deal of emphasis on the appropriate transfer of risk to third parties in our members' contracts. However, there is no denying that the process of requiring, requesting and verifying contractors' coverage can sometimes become tedious and time-consuming, not to mention aggravating. The majority of contract work is carried out without any insurance-related incidents. So, why all the fuss about contractual risk transfer? The answer could become painfully obvious when an incident does occur. A public entity can cost itself thousands, even millions, of dollars, by the failure to properly transfer risk in the contracting process.

Assess the Risks:

The first step in the contractual risk transfer process is to assess the potential risk to your city. Based on the contractor's scope of work, ask yourself "What could go wrong?" Keep in mind that the dollar amount of the contract should not be a major factor in this risk assessment; even small contracts sometimes come with big risks. This assessment of potential risk will form the basis for establishing the limits of liability coverage you will require the contractor to maintain.

Hold Harmless (Indemnity) Agreement:

It is possible for your city to be held accountable for damages caused by your contractors. A critical component of contractual risk transfer is to include a strong indemnity provision in your contracts in which the contractor agrees to hold the city harmless for costs that may accrue against the city as a result of the contractor's negligence. The indemnity agreement is generally the trigger for coverage under a commercial general liability policy, so the failure to have a written indemnity agreement in place could severely weaken your city's ability to access the benefits of your contractor's insurance.

Insurance Requirements:

The indemnity agreement makes the contractor responsible for the consequences of his work. However, you want assurance that he has the financial wherewithal to make good on that commitment. That is the role of insurance in the risk transfer process.

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FYI cont…

Commercial general liability (CGL) insurance is a fundamental coverage that contractors should be required to maintain. CGL covers claims for bodily injury, property damage and personal injury arising out of the contractor's activities. The risk assessment process discussed above will determine the limits of liability coverage you should require from your contractor. The MVRMA construction contract template (available to members at mvrma.com) requires the contractor to carry CGL coverage with a limit of at least $5 million per occurrence; however, remember that each situation is unique. The risk associated with some simple construction jobs may merit only $1 million or $2 million, while it is possible some jobs would merit higher limits.

For non-construction contracts, CGL limits of $1 million to $2 million will usually suffice; but each situation should be evaluated to determine if there are unusual risks.

Automobile liability coverage should be required of any contractor that uses an automobile in its work. Obviously, most construction contractors use vehicles in their work and should be required to carry automobile liability coverage. Less obvious are those contractors that use a vehicle just to carry their tools, equipment and employees to the work site. However, the law requires liability insurance for all vehicles, so your contractor should already have this coverage in place. The general rule is require automobile liability from all contractors. Limits of $1 million to $2 million per accident are generally sufficient.

Professional liability (errors and omissions) coverage should be required when the city contracts with professionals such as architects, engineers, medical service providers, accountants, attorneys and insurance professionals. Professional liability policies cover economic losses arising from errors or omissions associated with the insured's professional judgment, such as architectural design errors.

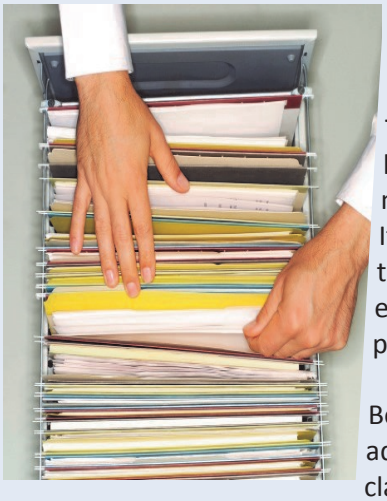
Additional Insured: Your usual practice should be to require any contractor doing work for the city to have the city, its officials, employees and volunteers named as additional insureds under the contractor's CGL and automobile liability policies for covered claims arising out of the contractor's work for the City. (Note that additional insured status is not available under professional liability policies.) Additional insureds have direct rights for defense and coverage under the contractor's insurance. An endorsement to the contractor's policy is necessary to add an additional insured. The particular endorsement used is often important, particularly in construction contracts. The MVRMA construction contract template addresses this important issue; please contact the MVRMA office if you have questions.

Primary Coverage: When you have been named an additional insured on another party's insurance, you want to require that their insurance will be the first to respond to any applicable claim. Your coverage would apply only after the other party's coverage is exhausted. An endorsement is normally required to make the other party's commercial general liability coverage primary.

Evidence of Coverage:

Contractors will usually provide evidence of their coverage through a Certificate of Insurance. A Certificate will show the coverages, limits, policy periods and insurers. If you are an additional insured, you should require that fact, as well as the primary coverage, to be reflected on the Certificate. (A tool called How to Check a Certificate of Insurance is available to members under "Loss Control" on mvrma.com.) Note that a Certificate of Insurance confers no coverage or rights; it is information only. It is recommended that you require the contractor to provide you with additional insured endorsements as proof of additional insured status; this is especially necessary on contracts with high risk exposure.

The Claims File
By Craig Blair



MVRMA is in the process of developing its 2015 Budget. Part of that process involves the calculation of the Pool Contribution Factor (PCF) for each member.

The PCF is used to determine what percentage each city pays to fund the annual budget. There are several factors that go into the PCF such as number of employees, number of vehicles, insurable property, and of course the member's loss experience. It should be noted that the member's loss figures are weighted to account for one-third of the PCF. Because of this, the loss claims experience number becomes the largest "driver" for the change, upward or downward, in the percentage each member will pay to MVRMA for any loss year.

Because loss experience data is so important, when the pool was founded, the Board adopted a "Claims Reporting Policy" to define members' responsibilities to report claims to MVRMA. There are really only 3 criteria to consider when determining if a claim is required to be reported to MVRMA:

- All 3rd party (damage to other parties) claims, regardless of the amount, are required to be reported, and paid through MVRMA.
- All 1st party (city property) claims, over $1,000, are required to be reported and paid through MVRMA.
- All lawsuits received by the city are required to be reported to MVRMA immediately, for review of coverage and assignment of defense counsel.

This policy, and all other MVRMA policies, are available for members to review in the MVRMA Handbook at mvrma.com.

Counselors' Comments
By Surdyk, Dowd & Turner

Employees of Municipalities Remain Immune for Certain Claims Alleged Under Ohio's Anti-Discrimination Statute

An employee of a political subdivision is generally entitled to immunity in a civil action seeking to recover damages for injury, death, or loss to person or property. The employee is immune from liability unless the injured party can establish one of the following exceptions: (1) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (2) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) Civil liability is expressly imposed upon the employee by a section of the Revised Code.

The third exception to an employee's immunity is not satisfied by simply referring to any provision of the Revised Code that conceivably imposes a duty on a political subdivision or its employees. In fact, "[c]ivil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term 'shall' in a provision pertaining to an employee." The issue underlying this exception to an employee's immunity is whether another section of the Revised Code "expressly impose[s]" civil liability upon an employee of a political subdivision.

This particular exception to an employee's immunity was addressed in a recent Supreme Court decision, captioned *Hauser v. Dayton Police Department, et al.*, -- N.E3d --, 2014-Ohio-3636. This case involved an employment-discrimination

action filed by Anita Hauser against the Dayton Police Department ("DPD") and one of its employees. Hauser, a female over age 40, worked as a police officer for DPD. Her complaint asserted a variety of claims, including age- and sex-based discrimination in violation of R.C. Chapter 4112 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq. ("Title VII"). Specifically, Hauser alleged that DPD, through one of its employees, took employment actions against her that were not imposed against other employees, subjected her to "frivolous" internal investigations, and denied her opportunities for career advancement.

Ultimately, DPD and the individual employee moved for summary judgment. The employee argued that she was immune under R.C. 2744.03(A)(6) as a supervisor employed by a political subdivision and thus, could not be held individually liable in a discrimination action. The trial court granted the motion in all regards except Hauser's claim of sex discrimination under both state and federal law. The trial court also denied the motion as it related to the employee's claim of immunity, reasoning that there were genuine issues of material fact regarding the employee's status as a manager or supervisor and whether this employee had discriminated against Hauser based on sex. The employee appealed the trial court's decision to the Second District Court of Appeals but fared no better before that court as well. The appellate court also denied the employee's claim of immunity. The majority relied on R.C. 2744.03(A)(6)(c), which states that an employee of a political subdivision is not entitled to immunity if a section of the Revised Code expressly imposes civil liability, and concluded that "civil liability is expressly imposed upon managers or supervisors under R.C. 4112.01(A)(2) for their individual violations of [Ohio's Anti-Discrimination Statute.]" As a result, the matter was accepted for review by the Ohio Supreme Court.

The Supreme Court was tasked with determining whether R.C. § 4112.02(A) "expressly impose[s]" civil liability upon an employee of a political subdivision so as to invoked the exception to immunity under R.C. § 2744.03(A)(6). Section 4112.02(A) of the Revised Code makes it an unlawful discriminatory practice for "any employer" to discriminate on a number of different grounds—including, sex—and a violation of that provision subjects the employer to civil liability. The General Assembly has defined "employer" to include "the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer." In order to resolve the conflict, the Supreme Court's analysis was centered on the meaning of the last category listed in R.C. § 4112.01(A)(2) —"any person acting directly or indirectly in the interest of an employer." According to the Supreme Court, and reading the statute as a whole and consistently with the legislative intent behind R.C. Chapter 4112, it concluded that R.C. 4112.01(A)(2) and 4112.02(A) do not expressly impose civil liability on political-subdivision employees so as to exempt them from immunity under R.C. 2744.03(A)(6)(c), but rather only subject a political-subdivision to vicarious liability for the discriminatory acts of its employees.

The Supreme Court's interpretation of R.C. § 4112.01(A)(2) and R.C. 4112.02(A) was consistent with the opinions of several federal circuit courts in the context of discrimination lawsuits filed under Title VII. Federal case law interpreting Title VII has persuasive value in cases like this one, which involves comparable provisions under Ohio's Anti-Discrimination statute. According to the Supreme Court, there is no material difference between R.C. 4112.01(A)(2)'s use of the phrase "person acting in the interest of an employer" and Title VII's use of the phrase "agent of" an employer under 42 U.S.C. § 2000(e) (b). Both phrases reflect the purpose of only exposing employers to liability for the acts of their employees. And, consistent with this philosophy, an employee's immunity is not breached under the third exception to immunity in R.C. § 2744.03(A)(6) based upon an allegation of discrimination under Ohio's Anti-Discrimination Statute.

Loss Control Lowdown
By Starr Markworth

Working in the Cold

With the arrival of winter not too far off, employees who work outdoors face an additional occupational hazard—exposure to the cold. Prolonged exposure to the freezing temperatures can result in health problems as serious as frostbite and hypothermia.

According to the Centers for Disease Control, from 1999 to 2011, a total of 16,911 deaths in the United States, an average of 1,301 per year, were associated with exposure to excessive natural cold. Each year in the United States, more than 700 people die of hypothermia.

It is important that all employees who work out in the extreme winter weather receive training on how to protect themselves while working outdoors.

How to Protect Workers:

- Recognize the environmental and workplace conditions that lead to potential cold-induced illnesses and injuries.
- Learn the signs and symptoms of cold-induced illnesses/injuries and what to do to help workers.
- Train workers about cold-induced illnesses and injuries.
- Encourage workers to wear proper clothing for cold, wet and windy conditions. Layer clothing to adjust to changing environmental temperatures. Wear a hat and gloves, in addition to underwear that will keep water away from the skin (polypropylene).
- Be sure that workers take frequent short breaks in warm dry shelters to allow the body to warm up.
- Try to schedule work for the warmest part of the day.
- Avoid exhaustion or fatigue because energy is needed to keep muscles warm.
- Use the buddy system -- work in pairs so that one worker can recognize danger signs.
- Drink warm, sweet beverages (sugar water, sports-type drinks) and avoid drinks with caffeine (coffee, tea, sodas or hot chocolate) or alcohol.
- Eat warm, high-calorie foods such as hot pasta dishes.
- Remember, workers face increased risks when they take certain medications, are in poor physical condition or suffer from illnesses such as diabetes, hypertension or cardiovascular disease.

For free copies of OSHA's Cold Stress Card, click link below: https://www.osha.gov/Publications/OSHA3156.pdf
MVRMA has several winter safety video programs in the multimedia library. Please contact me for further information or to borrow videos smarkworth@mvrma.com or by phone 937-438-8878.

Alliant *Brokers' Beat*

The Property & Casualty commercial insurance market is stable and the outlook continues to be favorable, due in large part to the lack of catastrophic losses in 2013 and through the first half of 2014. According to Munich Re, the statistics for natural catastrophes for the first half of 2014 have been marked by pleasingly low levels of global claims. Insured losses of $17 billion to the end of June were considerably below the average for the past ten years ($25 billion). We are midway through hurricane season and the outlook is 30% less active than a typical year.

Brokers' Beat cont…

Based on first quarter 2014 results released by the Insurance Information Institute, the industry is running a Combined Ratio of 97.4%. Essentially for every premium dollar collected, the insurance industry is paying out 97 cents in expenses and claims; underwriting profit, and Policyholder Surplus is at a record high, $662 billion as of 3/31/14. All signs point to an improved market.

However, weather extremes, catastrophic loss and investment earnings are areas of concern for commercial insurance carriers. P&C industry investment earnings are still below their 2007 pre-crisis peak; falling again in 2014. The recent hurricanes in Mexico, the drought conditions in the West and the Napa earthquake are all reminders of the potential for a catastrophic loss to have an impact on the commercial insurance industry.

Looking ahead, we see the marketplace as being essentially flat for January renewals and the expectation is that rates will remain flat into 2015 barring an increase in claims severity and/or any industry changing events (i.e. hurricane, new legislation, court decisions, insurer insolvency) between now and when coverage renews.

Upcoming Events

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

RISK MANAGEMENT/LEGAL
Legal and Effective Employee Evaluations
And Constructive Feedback
12/11/14, Time TBA
City of Mason

Board Meeting
12/15/14, 9:30 AM
Annual Holiday Luncheon
12/15/14, 11:30 AM
Presidential Banquet Center

From The Board Room

Actions at the September 22, 2014 Board meeting included:

- Approved revisions to the Special Events Insurance Requirements Policy
- Accepted the Annual Financial Report and audit for YE 12/31/13
- Accepted the Loss Funding Study for 2015
- Approved the 2015 reinsurance renewal with Genesis for $7M x $3M
- Reviewed the preliminary 2015 Budget
- Approved the Prospective Member List
- Approved the Awards Policy