

# RISKY BUSINESS



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Editor: Kathy St. Pierre

4625 Presidential Way, Kettering, OH 45429 937/438-8878  
<http://www.mvrma.com>

MAY 2011

## From the Board Room...



At the March 21, 2011 Quarterly Board Meeting, the following actions were taken:

- Approved the Open Claims & Incurred Losses Report
- Accepted Bond-Tech's Report on MVRMA's 2010 Investment Portfolio Performance and 2011 Investment Outlook
- Ratified the DP&L Energy Resources - Generation Supply Agreement for electric generation and transmission services for the period March 2011-December 2012
- Directed staff to distribute the remaining Workers' Compensations funds to the 11 cities that participated during the period 2006-2010
- Appointed Sue Knight, Troy, chair of the Personnel & Compensation Committee
- Amended the MVRMA Committee Mission Statements by renaming the Membership & Marketing Committee the Membership Services & Marketing Committee and including the additional responsibilities of this group.
- Amended the Membership Selection Policy to include the new name for the Membership Services & Marketing Committee.

*In preparing for battle, I have always found that plans are useless, but planning is indispensable.*

Dwight D. Eisenhower

## FYI

- Mike Hammond

### The Risk Pool Advantage

One only has to take a quick look at the many news stories to see the economy's powerful impact on municipalities nationwide. According to CNNMoney.com, in 2008 alone, more than 45,000 government layoffs were announced. And, that number has been growing each year since. More recently, in the Dayton region, the local government/education sector had the biggest employment drop. About 1,600 jobs have been cut since January 2010. Faced with Governor John Kasich's budget proposal calling for a 50% reduction in local government funding by 2013, one would expect further cuts.

When money gets tight, it may be tempting to try to cut back on insurance related costs. Don't automatically assume that another insurer, who may promise lower initial cost, is a better value in the long term. There are too many examples of first year premium savings turning into second and third year price increases to recoup the first year's discounted pricing. Or worse yet, the insurer decides to no longer write your business and sends you scrambling to find another insurer, taking you away from your already thinly stretched administrative time.

The good news: By participating in a risk pool, you can stabilize premiums, purchase superior coverage, receive dividends, control claims settlement and obtain value added services that will help reduce losses.

Participation in a risk pool has been called the single most successful example of interlocal governmental cooperation. It is a model that has been copied by private sector businesses

such as auto dealers, golf course owners, the hospitality industry, trucking companies and more. Risk pooling is local governments working together to "pool" insurance coverage dollars in order to create their own "insurance" company. This cooperation has saved millions of taxpayer dollars.

Across America, more than 500 risk pools exist, providing coverage for everything from transit authorities, park districts, cities and counties to school districts. It is believed that in excess of 74,000, or roughly 85%, of all public entities participate in risk pooling for their insurance needs. Member pool contributions are estimated at \$13-17 billion annually. Public entity pooling is big business!

MVRMA, in existence since 1988, is an example of a successful, member-owned risk pooling program. It serves 20 municipalities in the Dayton-Cincinnati region and in 2004, received the Ohio City Management Association's Intergovernmental Cooperation Award. During its more than 22 years of operation, MVRMA has not only provided stable pricing and specialized coverages for its members but has also reduced their risk while saving millions of taxpayer dollars. This non-profit association has returned to its members \$7,680,871 or approximately 56% of the contributions received for loss funding to pay claims.

Traditional insurance companies exist to make money. Any profits are retained by the company or paid to shareholders. Pools, on the other hand, are not for profit. Pools exist to offer stable pricing and training programs to help reduce claims. As a result, public (Cont. on Page 4 - See FYI)

## Counselors' Comments



-Surdyk, Dowd & Turner

The Ohio Supreme Court recently clarified the steps required to perfect an appeal of a decision rendered by an administrative agency of a political subdivision. With its decision in *Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm.*, ---Ohio St.3d---, Slip Opinion No. 2011-Ohio-1604 ("*Welsh*"), the Court also settled a split of authority among the Ohio courts of appeals regarding what actions an administrative appellant must take to vest jurisdiction in a common pleas court for review of the administrative decision.

The *Welsh* case concerned two 2005 appeals from separate decisions of the Regional Planning Commission ("WCRPC"). In the first case, *Welsh* sought preliminary plat approval for Phase I of a proposed subdivision, which contained 588 single-family lots. In the second case, *Welsh* returned to the WCRPC for preliminary plat approval for Phase II, which included another 155 lots. The WCRPC denied the Phase I preliminary plat. Approximately a month later, the WCRPC approved, with conditions, Phase II.

*Welsh* took virtually the same actions to perfect both appeals. It sent a Notice of Appeal to the Clerk of the Warren County Common Pleas Court along with instructions to serve the WCRPC. *Welsh* sent a courtesy copy of its cover letter to the clerk and copies of unfiled documents to the Warren County Assistant Prosecutor. In neither case did *Welsh* directly serve the WCRPC with its Notice of Appeal. The WCRPC's first awareness of either appeal was when it received summons and the Notices of Appeal from the Clerk of Courts. In both cases, the WCRPC received service from the Clerk of Courts within the thirty-day appeal period. Both the Warren County Common Pleas Court and the Twelfth District Court of Appeals held *Welsh*

Development did not perfect its appeal. The Supreme Court reversed the lower courts and rejected the majority view of the Ohio appellate courts in *Welsh*.

The procedure to perfect administrative appeals from agencies of political subdivisions is established in Chapter 2505 of the Ohio Revised Code. Section 2505.04 states: "An appeal is perfected when a written notice of appeal is filed...in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved. ...[N]o step required to be taken subsequent to the perfection of the appeal is jurisdictional." As a practical matter, a notice of appeal must also be filed in common pleas court, which acts as a reviewing court for administrative appeals. As the *Welsh* Court stated, "We have held repeatedly that when the right to appeal is conferred by statute, an appeal can be perfected only in the manner prescribed by the applicable statute."

In *Dudukovich v Lorain Metropolitan Housing Authority* (1979), 58 Ohio St.2d 202 the court determined that an administrative appellant who mailed a copy of her notice of appeal to the administrative agency complied with the statutory procedure. The Court stated that since there was no evidence that the agency did not receive notice within the appeal period, the appellant's mailing of the notice of appeal satisfied the statutory requirements.

The WCRPC attempted to distinguish *Dudukovich* because, in that case, the appellant mailed the notice herself, while *Welsh* instructed the clerk of courts to serve the notice upon the agency; thereby using the judicial process to perfect jurisdiction. The Court saw no distinction. The Court held, "An administrative appeal is considered filed and perfected for purposes of R.C. 2505.4 if the clerk of courts serves upon the administrative agency a copy of the notice of the appeal filed in the court of common (Cont. on Page 4 - See COMMENTS)

## The Claims File



-Craig Blair

MVRMA members receive numerous requests for the use of their parks or other facilities. These events range from softball to concerts and provide good exposure for the city and a benefit to the residents. MVRMA staff can assist with the risk management component of these events.

Generally, there are three types of event sponsors: (1) the city, (2) non-profits or (3) profit making groups. How you treat the exposure is related to the category.

The first category will have city employees involved in the set up, administration and clean-up. With these events, we assume proper precautions have been taken. Usually no fee is charged, but if one is, the city may be held to a different/higher standard of negligence should a loss occur. Special Event Coverage may be available. Contact MVRMA for more information.

For the other two categories, the city should have a policy and/or application which lists the responsibilities of the event sponsor. The sponsor should be required to provide details of the event in order to determine if the venue requested accommodates the activity. Older buildings may not have sufficient electrical capabilities or enough accessible exits to handle the expected crowd. The city must be able to safely control the traffic generated inside and outside the venue, and the flow of participants through the event must be free of obstructions or electrical cords.

In addition to reviewing the safety aspects of the event, the city should execute a contract with the sponsor that includes a hold harmless and indemnity clause and requires the sponsor's insurance to name the city "additional insured." If the sponsor does not have insurance, Special Events Coverage through Alliant may be an option.

For questions or assistance with any special event, contact the MVRMA office.

## Loss Control Lowdown

-Starr Markworth

### Playground Safety is No Accident

Member city parks and recreation departments spend a great deal of money annually to develop and maintain play spaces because they provide positive places for children to be outside, active and social.

While most professionals agree playgrounds are needed, these spaces have risks. Across the country, more than 200,000 children under age 14 are seen in emergency rooms annually for playground injuries. As a result, the CPSC has developed playground-safety guidelines to combat the most typical injuries related to falls, design problems and maintenance issues.

Studies describing how children play and use playground equipment are continuously reviewed to make changes to the guidelines as well as to reduce injury incidences. The most recent changes in 2008 address issues such as new playground designs, the effects of sun over time and playground surfacing.

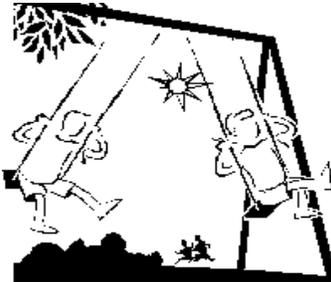
As parks and recreation departments continue to invest in play spaces, there must also be continued maintenance and evaluations. The more a playground is used, the more likely it is to incur problems. For example, playground surfacing is worn away by shoes while swing chains wear out, and nuts are loosened from bolts. Weather also affects equipment - paint chips, metal rusts and plastics crack. Evaluations should be

conducted by trained, certified playground inspectors who know where to look for problem areas. Once issues are identified, they must be fixed. It is recommended that every agency have a playground maintenance plan and a certified playground evaluator on staff.

To get started, follow these 10 tips for implementing playground safety initiatives:

1. Identify any equipment within the agency's jurisdiction that has caused a reported injury due to poor maintenance, lack of repairs or poor design that does not comply with CPSC guidelines and ASTM standards. If the cause of the injury has not been corrected, remove the equipment.
2. Remove any existing playground equipment that is not recommended for use on public playgrounds in the CPSC guidelines and ASTM standards, including: heavy animal-figure swings, multiple-occupancy swings (excluding tire swings), rope swings, swinging exercise rings and trapeze-bar swings, swinging gates and giant strides (Maypole). For added protection: cover or replace exposed concrete footing, remove cement landing pads in use zones and evaluate older playground equipment for the presence of toxic substances.

(Cont. on Page 4 - See LOWDOWN)



## Brokers' Beat...



In the last *Risky Business* article, we detailed information on cyber liability and discussed how this coverage typically does not address crime coverage for the loss of first party money and securities from computer fraud activities.

In this issue we would like to discuss computer related coverage for the fraudulent loss of money and securities from funds transfer activities that is available under the MVRMA Crime policy.

The funds transfer fraud insuring agreement under MVRMA's Crime policy states "We will pay for loss of funds resulting directly from a fraudulent instruction directing a financial institution to transfer, pay or deliver funds from your transfer account." Funds are defined as money and securities, and a fraudulent instruction means an electronic, telegraphic, cable, teletype, telefacsimile or telephone instruction which purports to have been transmitted by you, but which was in fact fraudulently transmitted by someone else without your knowledge or consent. The term also includes (Cont. on Page 4 - See ALLIANT)

## A Picture is Worth a Thousand Words

Troy's Park Department is practicing good risk management with its tree inspection. It recently cut down the tree pictured here, when Park Superintendent Timothy Mercer noticed a large crack in the main trunk. This tree was located "smack-dab" in the middle of the levee where thousands of people gather for such events as the Strawberry Festival, Fourth of July fireworks, the Hovercraft Races and many others. As stated by Mr. Mercer, "This tree was brought down today on our terms, under a controlled environment." Who knows what damage or injuries may have been avoided by the actions of this department.



## FYI (Cont./Page 1)

entity pools' loss experience is better than industry averages. Additionally, a pool's profits are used for the benefit of its members. It is the major difference that has made pools so successful.

## Alliant (Cont./Pg. 3)

a written instruction issued by you which someone other than you has forged or altered without your consent. A transfer account is defined as an account maintained by you at a financial institution from which you can initiate the transfer or payment or delivery of funds. There are a number of exclusions that apply to this coverage including indirect losses that result from funds transfer activities and legal fees, costs and expenses associated with these losses. Of note is that there are no territorial restrictions associated with this coverage, and it does not need to be computer related.

As we outlined in January, while cyber liability coverage typically does not cover first party crime exposures, the MVRMA Crime policy does address and cover two major cyber related exposures, computer fraud and funds transfer fraud.

## Lowdown (Cont./Pg. 3)

3. Ensure that adequate surfacing material exists below each piece of playground equipment. It has been widely documented that almost 70% of playground injuries can be avoided or minimized by providing soft landing materials.

4. Identify any tall equipment that requires a landing surface that exceeds the maximum fall height of the underlying protective surfacing material. Agencies should consider removing this equipment unless a tested surfacing (ASTM F 1292) 200 G and 1000HIC impact standard is available and placed below this equipment with an acceptable use zone.

5. Adjust playground borders and/or when possible relocate equipment to accommodate CPSC and ASTM Layout

and Spacing Guidelines (use zone requirements).

6. Identify and repair areas of non-compliance on playground equipment by beginning or improving a regular playground-inspection and maintenance program. A major playground-equipment manufacturer study alleges that more than 30% of playground accidents are caused by inadequate maintenance practices by operators. Inadequate maintenance inspections and lack of follow-up corrective procedures are common causes of playground accidents. The resulting lack of inspections or poor documentation may be a basis for legal action against a public agency.

7. Conduct a comprehensive playground safety audit of each playground site to determine the adequacy of its compliance with the 2008 CPSC handbook and the current ASTM standards. This audit will assist agencies developing playground replacement schedules by identifying and prioritizing serious areas of non-compliance in existing playground equipment and park/playground sites as a whole. The results of the audit will also identify some conditions that are correctable by agency staff as well as those that may be abated by contacting manufacturers for retrofit upgrades. Because standards have changed throughout the last 20 years, it is suggested that you determine with legal counsel those standards that apply to your playgrounds.

8. Formalize maintenance policies and procedures.

9. Establish a long-term action plan to upgrade playground sites. Your plan should be reflected in your agency's capital-equipment replacement program, existing staff resources and maintenance/repair budget.

10. Obtain an ongoing commitment from each person who is actively involved in providing safe and challenging playgrounds in the community.

For more information, visit these websites: [www.cpsc.gov/cpsc/pub/pubs/325.pdf](http://www.cpsc.gov/cpsc/pub/pubs/325.pdf) and [www.astm.org/Standards/F2223.htm](http://www.astm.org/Standards/F2223.htm).

## Coming Events

**May 7-13**

IAPD Heavy Vehicle Recertification/  
New Instruction Certification

**May 19-20**

**May 26-27**

**June 9-10**

**June 16-17**

IAPD Heavy Vehicle Drive Training

**June 20**

MVRMA Quarterly Board Meeting  
MVRMA Offices  
9:30am

## Comments (Cont./ Page 2)

pleas and the administrative agency is served within the time period prescribed by R.C. 2505.07 [30 days]." The court warned practitioners, however, that filing is not accomplished merely by filing a notice of appeal with the clerk of courts with instructions to serve the agency. "The administrative agency must still receive the appropriate complaint and notice within 30 days after entry of the final administrative order. The appellant may use any method reasonably certain to accomplish delivery to the agency within the required 30 days, which is filing that satisfies the jurisdictional requirement for an administrative appeal."

It appears that the Court's focus was a practical "no harm - no foul" approach. As long as the WCRPC was aware of the appeal within the thirty-day period provided by statute, the Court believed the purpose of the statutory procedure was satisfied. "We hold today that the purpose of R.C. 2505.04 is to give timely notice of the appeal to the administrative agency." For political subdivisions, the Court's decision likely means that, by whatever means the agency receives notice of an administrative appeal, as long as it receives notice within thirty (30) days of its decision, the appeal is perfected.