

# RISKY BUSINESS

A PUBLICATION OF THE MIAMI VALLEY RISK MANAGEMENT ASSOCIATION

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## *FYI... Pooling as a Long-Term Strategy*

*By Tom Judy*

Public entity risk pools were created at a time of crisis when commercial insurers abandoned the municipal market in the 1970s and then again in the 1980s. Rather than a temporary stopgap measure, however, pools became a long-term strategy for local governments to reduce and stabilize insurance costs and to ensure stable access to desired coverage and services throughout all insurance market cycles. Let's step back and examine the success of public entity pooling.



According to the Association of Government Risk Pools (AGRiP), there are over 500 pools that serve municipalities, school districts and other U.S. and Canadian public entities. AGRiP estimates that at least 80 percent of the more than 90,000 public entities in the United States participate in at least one pool. Pools have gained in popularity as public entities have learned that they can take control of their insurance coverage needs, have stable premiums and superior coverage, receive dividends, have control over claims settlement, obtain value-added services to help reduce their losses and be a member-owner with a vested interest in the outcome of the company.

Pools have saved taxpayers billions of dollars. Several factors create this savings:

- Pools add no profit margin, which can be 10% to 15% for commercial entities. AGRiP estimates that commercial insurers' profit margin alone accounts for taxpayer savings of at least \$1 billion over the past forty years.
- Pools generally spend less than commercial insurers on advertising and marketing. This is especially true of MVRMA.
- Pools are usually exempt from taxes paid by commercial insurers.
- Pools generally have lower corporate overhead costs than commercial insurers.
- Perhaps most importantly, pools emphasize helping their members to control their losses.

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## *FYI continued*

AGRiP estimates that, over the long run, pool members have reduced their cost of insurance by an average of 10% to 20% compared to buying commercial insurance. The phrase “over the long run” is key as a pool may not necessarily be the lowest cost in any given year. Commercial insurers may see a profit opportunity and use their financial resources to undercut pools’ pricing on a short-term basis. The challenge for local governments is to understand that such short-term savings will likely be surrendered over time due to the greater long-term pricing volatility in the commercial insurance market or even a decision by the insurer to no longer write their business.

Pool members benefit in the long-term from viewing their membership as a relationship rather than the purchase of a commodity. The relationship between a pool and its member is a partnership with both parties recognizing a broader obligation to each other than exists in the relationship between a commercial insurer and its insured. Pools strive to help all members improve their risk profiles and decrease their costs over time. The various pool members rely on each other not just for insurance coverage, claims management and loss control, but also for new ideas, best practices and shared problem solving. This culture of collaboration allows the members to learn from each other and to efficiently share resources.

Because public entity pools are governed by local government officials for the benefit of local governments, they are knowledgeable of the public sector’s unique needs and can tailor coverage to meet those needs. This is a significant advantage over commercial insurance which can sometimes offer coverage on a take-it-or-leave-it basis.

MVRMA is an example of the best that public entity pooling has to offer. We believe MVRMA has been so successful because its members have made a long-term commitment to pooling. MVRMA members are active in the governance of their pool and accept their responsibilities to the pool and to each other. The members’ leadership has created a vibrant and financially strong pool that is positioned for continued long-term success.

## *The Claims File - Employment Practices Liability (EPL)*

*By Craig Blair*



Processing claims for MVRMA includes managing all lawsuits filed against our members, the number of which has remained consistently low the last few years. The types of lawsuits range from auto injury cases, police actions, municipal exposures, and employment practices liability (EPL). EPL lawsuits can involve employment or applicant discrimination, harassment, wrongful termination, retaliation/whistle blowing, ADA disability, or FMLA related issues. While EPL claims are not that common, they are the most difficult losses to defend and administer.

Termination of an employee is a sensitive matter for not only the former employee, but also for their co-workers and for the city. Administration sometimes has to make difficult decisions that the terminated individual or fellow employees may perceive as unfair treatment. This may lead to disruption or morale issues and ultimately to legal actions.

In today’s legal environment, it is important for employers to have detailed documentation before making the decision to terminate an employee. The city must thoroughly investigate, review and follow their policies before making this decision. Documentation should include regular performance evaluations, disciplinary action forms and steps taken to help the employee resolve the issues. If at any time the city believes these steps have not been followed, further corrective measures may need to be taken before terminating the employee.

## *The Claims File Continued*

The largest portion of an EPL settlement is usually for compensatory damages related to discriminatory acts, emotional stress, defamation and slander which are damages covered through MVRMA's program. Damages for lost benefits, as well as front pay and back pay are the member's responsibility. Although MVRMA covers the noted damages and the costs to defend, the city may face a large exposure if the case is lost in court.

Historically, MVRMA has been able to have all other lawsuits (not EPL related) dismissed approximately 60% of the time. On the other hand, MVRMA has had to settle nearly 60% of the EPL cases due to the court's ruling that the city failed to show just cause for termination. Also, the cost of an EPL case is approximately 50% greater than the average of all other lawsuits combined due the numerous motions and depositions taken in these cases.

Remember, documentation is the key to a successful defense. If a member has any questions or concerns regarding a potential EPL claim, please call MVRMA to discuss or review the case.

### *Loss Control Lowdown—*

### *OSHA: How It Applies To Your City.....It Does!*

*By Starr Markworth*

Were you aware that in the State of Ohio the Federal OSHA standard is applied differently to local governments?

With the ratification of Ohio House Bill 308 in December 1992, the Public Employment Risk Reduction Program (PERRP) went into effect. The purpose of the program is to ensure that public employees in the State are provided with a safe and healthy working environment. Prior to PERRP, only state agencies, under an executive order first enacted in 1973 and updated in 1982, were held responsible for the occupational safety and health of their respective employees. House Bill 308, therefore greatly expanded the responsibility of all public employers in Ohio as it extends safety and health coverage to approximately 600,000 employees across the state. However, House Bill 308 exempts peace officers, firefighters, and correctional officers in county or municipal correctional institutions from coverage. (See Ohio Revised Code 4167 for more detail on PERRP).

The role and mission of PERRP is to ensure public employees in Ohio have safe and healthy working conditions. Public employers must furnish each public employee a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm. This fundamental requirement is the foundation of House Bill (HB) 308, also called the Public Employment Risk Reduction Act (the Act) .

PERRP consultants are available for "no fee, no risk" on-site safety inspections, safety training, and hazard recognition at the employer's request for all public employees (except firefighters, peace officers, EMTs, paramedics, and correctional officers) in order to assist with compliance of all safety and health standards.

Citations are issued only if there is a fatality at your city or if a city employee refuses to work due to unsafe conditions and report it to PERRP.

Public employers are required to post PERRP posters in areas where there is employee traffic to inform them of their right to work in a place free from recognized hazards and must include a "notice" to inform employees of their rights and responsibilities. You can order a printed copy of



## *Loss Control Lowdown Continued*

PERRP, through a comprehensive safety and health consultation, strives to ensure a safe and healthy workplace for all public employees. PERRP, in conjunction with responsible management, identifies actual and potential hazardous conditions, reviews required written programs (bloodborne pathogens, hazard communication, confined space, etc.), and will prepare a detailed report for the employer, to assist in developing specific programs and abatement methods for the establishment.

If you would like more information regarding PERRP, please visit their website or use contact information below: <https://www.bwc.ohio.gov/employer/programs/safety/sandhperrp.asp>

Ohio Public Employment Risk Reduction Program (PERRP)  
13430 Yarmouth Drive  
Pickerington, OH 43147  
Phone: 800- 671-6858  
Fax: 614-621-5754



## *Brokers' Beat– Commercial Insurance Market Update*

The commercial insurance market is generally very healthy as natural disaster losses continue to be below the average for the past ten years. Policyholder surplus is at a record high (\$676.3B as of 03/31/16) and the P&C combined ratio is 100% (as of 9/14/16). Weather extremes and a continued decrease in investment earnings are areas of concern for the industry. For the first half of 2016, global catastrophic losses were at their highest level since 2011; global economic losses reached \$98 billion, with global insured losses at \$30 billion, still slightly below their 10-year averages of \$112 billion and \$31 billion respectively. In the U.S., the Property and Casualty insurance industry had a \$2.3 billion underwriting loss, according to AM Best. It is too early to determine the impact of Hurricane Matthew on the commercial insurance market, but overall, the market outlook is favorable.

We are, however, seeing a hardening of the liability insurance market for large municipalities, particularly those with urban police exposures. The market has coined the current challenge related to law enforcement as the “Ferguson Effect”, which began with the Michael Brown shooting death in Ferguson, Missouri, in August 2014. Subsequent altercations involving police departments and their communities have resulted in a cultural shift in America. This development has shaped an underwriting environment that is centered on careful consideration and actuarial analysis. It has also caused a restriction in available carriers for larger cities as a number of insurers have decided to leave the city liability arena due to this challenging environment, which may have a trickle-down effect on municipal pools.

Looking ahead, expectations are that rates will remain flat to slightly down into 2017 - barring an increase in claims severity and/or any industry changing events (*i.e. hurricane, new legislation, court decisions, insurer insolvency*). Some lines of coverage will see modest decreases, while others such as law enforcement liability, flood, commercial automobile liability and employment practices liability (EPL) may see price increases.



## **New Public Records Appeals Process in Ohio**

Generally, when a request for public records is submitted, the requested records must be made available for inspection. R.C. 149.43(B)(1). In addition, when the requested records contain information that is exempt from the Public Records Law, the information in the public record that is not exempt must still be made available. *Id.*

Ohio Senate Bill 321 modifies this area of law by providing two options for individuals whose public records requests have been denied, and by simplifying the appeals process.

According to R.C. 149.43(C)(1), once a public records request has been denied, an allegedly aggrieved individual may do one of the following:

- (1) File a complaint with the clerk in the Court of Claims or the Common Pleas Court, as described under “Action in the Court of Claims;” or
- (2) Commence a mandamus action to obtain a judgment, ordering the public office to comply with the Public Records Law, awarding court costs and reasonable attorney fees to the person who instituted the mandamus action and, if applicable, including an order fixing statutory damages.

Pursuant to S.B. 321, the Court of Claims will have exclusive, original jurisdiction to hear complaints relating to the denial of access to public records, and the clerk of the Common Pleas Court will act as the clerk of the Court of Claims for the purposes of accepting such complaints, related filing fees, and perfecting service of the complaints.

### **Complaint with the Court of Claims:**

Under the first option, set forth in R.C. 149.43(C)(1), the allegedly aggrieved individual must file the complaint on a form provided by the Court of Claims. The individual must also attach copies of the original records request, as well as any other written communication or responses, to the complaint, and pay a \$25.00 filing fee to the clerk. The clerk of the Court of Claims will then assign a case number to the complaint, as well as a special master to review the claim.

Upon receipt of a complaint, the special master must refer the matter to mediation services, and any further proceedings will be stayed until mediation is concluded. R.C. 2743.75(E)(1). If an agreement is reached during mediation, the court will dismiss the complaint. R.C. 2743.75(E)(2). However, if an agreement cannot be reached during mediation, the public office from which the records were requested must file a response to the complaint within ten days. *Id.* Within seven days of receiving a response, the special master must submit a Report and Recommendation to the Court of Claims. R.C. 2743.75(F)(1). The parties will then have seven days to object to the Report and Recommendation. R.C. 2743.75(F)(2). Upon the filing of an objection, the other party will have seven days to file a response. *Id.* The Court of Claims will then issue a final order within seven days, wherein it adopts, modifies, or rejects the special master’s Report and Recommendation. *Id.* If neither party objects, the Court of Claims will issue a final order, adopting the Report and Recommendation of the special master. *Id.*

## *Counselors' Comments Continued*

If the Court of Claims determines that the aggrieved party was denied access to public records, in violation of the Public Records Law, and no appeal of the court's final order is taken, both of the following apply:

- (1) The public office must permit the aggrieved person to inspect or obtain copies of the records that the court requires to be disclosed; and
- (2) The aggrieved person is entitled to recover the \$25.00 filing fee, and any other costs associated with the action, from the public office.

R.C. 2743.75(F)(3). Notably, the parties may not appeal a final order that adopts the special master's Report and Recommendation, unless an objection to that report was filed. R.C. 2743.75(G)(1). If the final order materially modifies the special master's Report and Recommendation, either party may appeal the final order with respect to the modified issue, alone. *Id.* Additionally, appellate courts must give these cases precedence over other matters to ensure that these disputes are resolved quickly and efficiently. *Id.* With respect to attorney fees, an aggrieved party may only recover attorney fees if the court of appeals determines that the public office filed an appeal with the intent to delay compliance with the final order, or to unduly harass the aggrieved person. R.C. 2743.75(G)(2). There is no provision to permit the public office to recover its fees if it prevails on appeal.

### **Mandamus Action:**

If a mandamus action is filed, and the reviewing court orders the public office to comply with the Public Records Law, S.B. 321 requires that court costs be awarded to the relator. R.C. 149.43(C)(3)(a)(i). Additionally, S.B. 321 allows courts to award reasonable attorney fees to the relator if the court orders the public office to comply with the Public Records Law, or one of the following applies:

- (1) The public office failed to respond to the public records request in accordance with the time allowed under the Public Records Law; or
- (2) The public office promised the relator that it would make the records available for inspection within a specific period of time, and failed to do so.

R.C. 149.43(C)(3)(b)(i) and (b)(ii). Moreover, S.B. 321 permits an award of attorney fees when the court determines that the public office acted in bad faith when making the records available for inspection for the first time after the filing of a mandamus action, but before the court issued any order as to whether the public office must comply with the Public Records Law. R.C. 149.43(C)(3)(b)(iii). When attorney fees are awarded, they cannot exceed the amount of reasonable attorney fees incurred before the public record was made available to the relator. R.C. 149.43(C)(4). A court may also reduce the amount of attorney fees awarded if it finds that an alternative means should have been pursued to resolve the issue more effectively than a mandamus action. *Id.*

## *Counselors' Comments Continued*

S.B. 321 further modifies the current law in this area by prohibiting a court from awarding attorney fees to a relator if the court determines that both of the following apply:

- (1) The public office reasonably believed, based upon the law at the time of the alleged failure to comply with the Public Records Law; that its conduct with respect to the public records request did not constitute a failure to comply with an obligation under the Public Records Law; and
- (2) A well-informed public office would reasonably believe that the conduct in the response to the public records request would serve the public policy that underlies the authority asserted as permitting the conduct at issue.

R.C. 149.43(C)(3)(c). Additionally, if the court declines to issue a writ of mandamus, and finds that the mandamus action was frivolous, the court may award court costs, expenses, and reasonable attorney fees to the public office. R.C. 149.43(C)(5).

### **Additional Modifications by S.B. 321:**

S.B. 321 further states that, when a public office provides access to public records on a free public website, it may limit the number of records that it will provide in digital format to requestors to ten per month, unless the requested records are not on the public website.

Additionally, with respect to criminal records, S.B. 321 mandates that when a defendant in an action, the defendant's attorney, or any agent of the defendant, requests public records relating to that action, the request must be considered a demand for discovery under the Criminal Rules. R.C. 149.43(G). The requestor must serve a copy of the request to the prosecuting attorney in these circumstances, as well. *Id.*

Overall, the changes set forth in S.B. 321 allow for the expedited resolution of issues pertaining to public records requests. Further, the new options are more cost effective, and allow both parties to avoid long delays, waiting for courts to issue decisions on these disputes. Additionally, the introduction of a mediator at the outset of these claims may facilitate resolution of these matters without commencing litigation. However, the bill seems to effectively ensure that, even in matters where mediation is unsuccessful, the process will be guided by strict deadlines for filings by the parties, as well as decisions by the special masters and courts.

# Calendar of Events



## *Upcoming Training Events*

Please continue to check our website, [mvrma.com](http://mvrma.com) for upcoming training dates:

### Upcoming Training

- Snow and Ice  
November 10th - Mason Fire Station  
November 17th- West Carrollton Fire Station
- Law Enforcement Legal Update  
November 15th - Centerville Police Training Room

## *Upcoming Board Events*

Board Meeting

December 19, 2016, 9:30 AM

MVRMA Office

Christmas Luncheon to follow after meeting-

Kohler Catering and Banquet Center

## *From The Board Room*

Actions taken at the September 2016 Board meeting included approval of:

- Financial Audit and CAFR for the year ended 12/31/15
- 2017 Loss Funding Study
- 2017 Preliminary Budget
- 2016-2017 Property coverage