RISKY BUSINESS

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MIAMI VALLEY RISK MANAGEMENT ASSOCIATION

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From the Board Room...

At the December 17, 2012 Quarterly Board Meeting, the following actions were taken:

- Approved the Open Claims & Incurred Losses Report
- Eliminated the subsidy for HR Sentry
- Approved the 2013 Liability Coverage Document
- Approved the 2013 liability renewal with GEM for $2.5M x $500K
- Approved the 2013 liability renewal with Genesis for $7M x $3M
- Approved the 2013 Crime and Fidelity coverage
- Approved the 2013 Final Budget, PCF and Objectives/Work Plan
- Elected the following officers for 2013:
  - Mark Schlagheck, Bellbrook - Pres.
  - Nancy Gregory, Kettering - V.P.
  - Janine Cooper, Englewood - Treas.
  - Julie Trick, Vandalia - Sec'y
- Approved the following quarterly meeting dates for 2013:
  - March 18, June 17, September 30 and December 16

FYI

2013 Liability Renewal

-Tom Judy

One of the advantages of pooling is the ability to separate your public entity from the roller coaster of the commercial insurance market. A "soft market" with favorable premium rates is followed by a "hard market" with escalating rates, which tends to stretch the public budget. This process repeats itself over and again. It was a prolonged hard market that motivated six pioneering municipalities to form MVRMA in 1988.

According to a report by MarketScout, a Dallas-based insurance exchange, commercial insurance rates increased by 5 percent in December 2012 compared to December 2011.

In the report, MarketScout's CEO says, "This market turn is not like the last hard market of 2001 to 2005, when rates spiked up as much as 30 percent in the early stages. For the 2012 market turn, rates have adjusted slowly and steadily without any dramatic spikes. This slow and steady pace could foretell rate increases at a more sensible pace and for a longer period of time."

So, the "good" news is that increases will be slow and steady, but it is counter-balanced by the expectation that these increases will continue for a while.

The MVRMA program insulates member cities from the ups and downs of the market in two ways: 1) by retaining the risk of the first $500,000 of each liability claim and the first $250,000 of each property claim, and 2) by insuring the first layer of liability, in excess of the $500,000 pool retention, through Government Entities Mutual (GEM).

GEM is a "captive insurance company" domiciled in Washington, D.C. A "captive" is an insurance company owned by its insureds. MVRMA is one of 17 public entity pools that comprise GEM. In effect, GEM is a "pool of pools"

A captive has the same advantages for its insureds that an intergovernmental self-insured pool has for its members. As is the case with intergovernmental insurance pools, a captive insurance company requires a long-term commitment from its members.

The MVRMA Board approved membership in GEM in 2002 with the goal of helping MVRMA members maintain control over increasing insurance costs. By all measures, this move has been an unqualified success.

For the past several years, GEM has insured the $1.5 million liability layer in excess of the $500,000 pool retention. Genesis has insured the next $8 million in excess of $2 million for a total of $10 million per occurrence.

GEM has provided rate stability by giving MVRMA a rate freeze for 2011 and 2012. This year, GEM offered MVRMA a new three-year rate freeze in exchange for increasing the GEM layer by $1 million. For 2013, GEM will insure $2.5 million excess of the pool's $500,000 retention. Genesis will drop back to $7 million excess of $3 million for a total of $10 million per occurrence. As a side note, to date, MVRMA is the only GEM member to have been offered a rate freeze, which is a reflection of the excellent loss history of our members.

The new agreement with GEM provides at least three significant benefits to the pool: 1) it enables us to reduce liability reinsurance premium costs by about $19,000 in 2013; 2) it provides rate stability through 2015 on the important $2.5 million layer excess of the pool's retention; and 3) by increasing the layer held by GEM, of which MVRMA is a part-owner, we further separate ourselves from the market. Our relationship with GEM is one of the keys to helping MVRMA member cities control their insurance costs.

Counselors' Comments

Dinsmore & Shohl

Ohio Supreme Court Intentional Tort Rulings Favor Employers

The Supreme Court of Ohio continued its trend to restrict liability for intentional torts by overruling two recent decisions from the Eighth District Court of Appeals that were decided in favor of employees' intentional tort claims against their employers. *Hewitt v. L.E. Myers Co.*, 2012-Ohio-5317 (Nov.20, 2012); *Houdek v. Thyssenkrupp Materials N.A., Inc.*, 2012-Ohio-5685 (Dec. 6, 2012).

As previously discussed in our July 2008 article "Seventh District Rules Intentional Tort Statute Unconstitutional," the old common law standard for intentional tort required only proof by the employee that the employer required the employee to perform some act knowing that an injury was "substantially certain" to occur. See *Fyffe v. Jeno's Inc.* (1991), 59 Ohio St.3d 115; *Hanna v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d at 487. However, effective April 7, 2005, through R.C. 2745.01(A), the Ohio Legislature specified that an employer is not liable for an intentional tort unless the employee proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur, defined in Subdivision (B) as acting "with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." R.C. 2745.01(A). The Ohio Supreme Court upheld the constitutionality of R.C. 2745.01 in 2010. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 280, 2010-Ohio-1027, 927 N.E.2d 1092.

Even after the statute was upheld as constitutional in 2010, the Eighth District Court of Appeals reversed a grant of summary judgment for an employer on claims that one of plaintiff's supervisors had directed him to work in an aisle of a warehouse where the plaintiff sustained injuries when a co-worker operating a sideloader struck him. The Eighth District determined that the statutory definition of "substantially certain" resulted from a scrivener's error, and held that the employer could be held liable for the employee's injuries if it objectively believed the injury was substantially certain to occur, notwithstanding the lack of proof of a deliberate intent. In a decision issued in December 2012, the Ohio Supreme Court disagreed that the definition was the result of a scrivener's error, and instead specifically identified the General Assembly's intent to limit claims for employer intentional torts to situations in which an employer acts with the "specific intent" to cause injury to another. *Houdek*, 2012-Ohio-5685.

The *Houdek* Court further held that R.C. 2745.01(C) which establishes a presumption that the employer intended to injure the worker if the employer deliberately removes a safety guard was inapplicable because plaintiff failed to provide any evidence that safety precautions such as adequate lighting conditions and safety devices such as orange cones could be considered "an equipment safety guard" as the term is used in the statute. Likewise, the *Houdek* Court determined that no evidence existed that the employer deliberately removed (i.e., "move by lifting, pushing aside, or taking away or off") any of those items.

Similarly, in September 2012, the Ohio Supreme Court provided a favorable ruling to employers in an intentional tort case involving an apprentice lineman who was injured by energized electrical lines after he was placed in a bucket alone, and his foreman allegedly told him that he did not need his protective gloves and sleeves because he would be working on de-energized lines. *Hewitt*, 2012-Ohio-5317. Following a jury trial which awarded damages to the injured employee on the intentional tort claim, the Eighth District

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The Claims File

- Craig Blair

One of the coverages provided through the MVRMA program is Employment Practice Liability (EPL). EPL coverage refers to claims that can be presented by former or current employees or even individuals who applied for jobs but were not hired. EPL provides coverage for claims of discrimination (race, gender, age and ethnicity), harassment, wrongful termination, retaliation/whistle blowing, disability and FMLA related issues, among others. Although infrequent, these claims are generally the most difficult for MVRMA to defend.

The termination of an employee can be a very emotional situation. Not everyone will agree with management's action, which may lead to disruptions and morale problems. When the employee perceives he has been unfairly terminated, he may file a lawsuit against the city.

It is imperative in this legal environment to thoroughly investigate, review and follow city policies before terminating an employee. The employee's file must be documented with regular job evaluations, reports of any discipline or other problems, and it must be thoroughly reviewed by management prior to termination. If management is not satisfied that all policies have been followed and properly documented, corrective measures should be considered before terminating the employee.

EPL claims for damages range from those not covered by MVRMA (i.e. lost benefits, back and front pay) to monetary awards for discrimination, emotional/mental stress, defamation, slander and pain and suffering, all of which are covered through the MVRMA program.

The industry average reveals that 60% of EPL claims have to be settled. During the last ten years, MVRMA settled 57% of these claims. Remember,

(Cont. on Page 4 - See EPL)

Loss Control Lowdown

- Starr Markworth

Do You Have the Tools for Backing Safely?

The National Safety Council reports that up to one in four vehicle accidents is due to poor backing techniques. This statistic becomes alarming when you consider that the average driver operates in reverse only one percent of the time spent behind the wheel.

Backing accidents result in 15,000 injuries and 500 deaths per year. More than 100 worker deaths from motor vehicles/construction equipment accidents occur each year, and one-third of those are backover accidents. More than half of those accidents involve dump trucks. Loading docks, signs, overhanging roofs, cargo and other vehicles are among the property damage "victims" of backing accidents. According to the National Safety Council, the average direct cost for a single accident is $48,000.

Safe vehicle backing involves proactive training, both for drivers and for workers on foot. Upgrading existing safety programs is far less expensive than the cost of a typical incident. Training should provide drivers with the tools to reduce backing accidents.

- Slow down; stop and sound your horn at intersections, corners and wherever vision is obstructed.
- Use a spotter if no camera or obstacle detection is installed; maintain eye contact with the spotter using mirrors.
- Make a visual inspection of the area; check mirrors and camera and/or sensor alarms.
- When provided, use flashing warning lights or backup alarms when traveling in reverse.

Blind spots are one of the biggest hazards - not only should drivers be aware of the blind spots of the particular vehicle they are operating, but also pedestrian workers must know where the blind spots are in order to avoid them.

Video cameras with in-vehicle display monitors show drivers what is behind them, providing an actual view of the blind areas. Proximity detection devices (radar/sonar sensor systems) are activated, when a vehicle is in reverse, and sound an audible alarm to alert drivers to obstacles behind the vehicle. Using camera and sensor systems together on the same vehicle has definite advantages; the camera allows a view of the blind area to check the source of a sounding alarm, and the alarm alerts a driver to check the camera display to avoid a collision.

The cost of a detection system is insignificant compared to preventing one serious injury as shown below:

- Obstacle detection sensor system: $225 - $400

Shown above: Backing Sensors on Montgomery Fire Vehicle

- Single camera 18 LED with a 5.6" monitor: $360 - $800
- Integrated camera/sensor system: $520 - $900

"Accidents" are defined as "events occurring by chance from unknown causes." In reality, backing accidents are always preventable. Proper training and utilizing safe backing procedures, especially in combination with today's technology, will keep your vehicles and your employees on the job and working for you.

MVRMA has partnered with Mobile Awareness to provide discounted prices on its backing sensors and/or cameras. Several MVRMA cities have installed these devices on their vehicles. I spoke with Montgomery Fire Chief Paul Wright about the sensors installed on all of his department's apparatus.

"We won't know the accidents that are prevented through the sensors, but over time, we think we will see a significant decrease in backing accidents," said Chief Wright.

MVRMA will be hosting an informational meeting in late February at the City of Montgomery's Fire Station for members who are interested in learning more about Mobile Awareness. In order to show the capabilities, we will have vehicles present that have the sensors and/or cameras installed.

For more information, please contact Starr Markworth smarkworth@mvrma.com. Thanks to Terri Case, Mobile Awareness LLC, for providing statistics and information.

Brokers' Beat...

Like our August article, this one provides information about the exposure of car rentals by city employees in the course and scope of their employment. This one, however, discusses the property aspect rather than liability.

As a generality, when a vehicle is rented, the executed contract holds the renter responsible for all damage to the vehicle regardless of negligence or fault. The term "all" would include damage from weather related events, fire, collision and of course theft. The major focus of this article will be a discussion of the most effective ways to manage this risk.

If the vehicle is rented personally,

(Cont. on Page 4 - See Alliant)

Alliant (Cont./Pg. 3)

most Personal Auto Policies that include Comprehensive and Collision (damage to your personally owned autos) will extend that coverage automatically to rental vehicles. However, this is not always the case, and the renter should periodically check with his Personal Auto Policy carrier to discuss the rental car extension. The discussion should include the type of vehicle to be rented (private passenger, truck, RV, etc.), the location of the rental (US or a foreign country) along with an inquiry about the deductible that will apply.

If the deductible under the Personal Auto Policy is significant, this can be offset by using a premium credit card that reimburses for deductibles. However, the use of the deductible feature of premium credit cards often times can be restrictive and can exclude coverage for rental SUVs, 4-wheel drive vehicles, sports cars and higher value vehicles. You should check with your credit card company to see if it extends this coverage under your particular credit card, and then be aware that the coverage will only trigger if that particular card is used as payment for the rental.

Last, if the above measures will not provide coverage, you can purchase Collision Damage Waiver (CDW) coverage directly from the rental car company. However, the CDW coverage is very expensive (often $10-$15 per day) and has its own set of restrictions. Recently, we are finding some moderation in this pricing because the rental business is becoming more competitive. This coverage is highly recommended if the rental is taking place in a foreign country.

As an example of the risk that is imposed upon you when you rent a vehicle and none of the above measures are in place when your rental vehicle is stolen: 1) the rental car company will take immediate steps to charge the cost of a replacement vehicle on your credit card (Yes, that could be $20,000, $30,000 or higher); 2) if attempts to place the charges on your credit card fail, the company will immediately seek legal action to recover these costs from you personally. The rental car companies have large dedicated departments that work exclusively to recover these damages, and they are very effective. Given the high value of this personal exposure, even while conducting city business, we encourage a review of the above steps to make sure you have mitigated the risk.

EPL (Cont./Page 2)

the jury will most likely be workers rather than management types. They may identify with the plaintiff and therefore view him as a "victim." The city will have to prove it did due diligence and followed city policies to be successful in front of a jury.

EPL files have averaged only about 20% of MVRMA's litigation during the last ten years but has accounted for 35% of the total monies spent. The total cost per claim (defense and indemnity) averaged $45,726, while all other litigation averaged $31,750. Due to the sensitive nature of these claims, MVRMA has to work closely with the member and defense counsel regarding the city's position, understand the allegations and facts that will go to the jury and consider the insurance industry's history with EPL actions before making a decision to mediate, settle or defend a case.

Torts (Cont./Page 2)

Court of Appeals determined it was permissible for a jury to find the employer liable for intentional tort because protective rubber gloves and sleeves constituted "equipment safety guards" under R.C. 2745.01(C), and the employer's decision to put plaintiff alone in the bucket without requiring him to wear the gloves was thus a "deliberate removal of an equipment safety guard." *Id.*

In *Hewitt*, the Ohio Supreme Court disagreed, overruled the Eighth District and determined that protective rubber gloves and sleeves are personal items that an employee controls and do not constitute equipment safety guards for the purposes of R.C. 2745.01(C). *Id.* The Court specifically determined that the term "equipment safety guard" should not be construed to include any "generic safety-related items," including any free-standing items that serve as physical barriers between the employee and potential exposure to injury." *Id*. Rather, for the purpose of R.C.2745.01(C), "equipment safety guard" means "a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." *Id*. The Court also determined that an employee's failure to use them or an employer's failure to require an employee to use them does not constitute the deliberate removal by an employer of an equipment safety guard. *Id.*

Reading these two cases together, the message from the Ohio Supreme Court is that: (1) failure to provide additional safety items like orange cones, reflective vest, retractable gates, protective gloves and sleeves do not constitute safety guards for the purposes of R.C. 2745.01(C); and (2) failure to provide such safety items does not constitute a deliberate removal by the employer. Furthermore, these two decisions confirm that O.R.C. Section 2745 means what it says -- outside of workers' compensation, employers are only liable for injuries sustained by employees at work if the employer acts with deliberate intent to cause the employee injury. Absent the employer's removal of an equipment safety guard, such claims will be very difficult to prove.

Coming Events

Visit mvrma.com for upcoming training events

March 18
MVRMA Quarterly Board Meeting
9:30 am