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League of Minnesota
Cities Insurance Trust

Presentation Materials

Dan Greensweig is the Assistant Administrator of the League of Minnesota Cities Insurance Trust. He has also served as the Director of Operations and General Counsel for the Minnesota Association of Townships Insurance Trust, as an Assistant State Auditor and Director of that office's Tax Increment, Investment, and Finance Division, and as a shareholder at the Minneapolis law firm of Kennedy & Graven where his practice focused on municipal law and public finance. He was formerly a member of the Circle Pines city council and park board and chair of the city's planning commission.



CONNECTING & INNOVATING
SINCE 1913

LEAGUE OF MINNESOTA CITIES INSURANCE TRUST *MORE THAN JUST INSURANCE FOR LOCAL GOVERNMENTS*

The League of Minnesota Cities Insurance Trust (LMCIT) is a cooperative joint powers organization formed by Minnesota cities during 1980 – one of the first municipal self-insurance pools in the country. LMCIT provides property, liability, workers' compensation, employee benefit coverages and risk management needs to Minnesota cities. Members contribute premiums to a jointly-owned fund rather than paying premiums to buy insurance from a private insurance company. The funds are used to pay for members' claims, losses and expenses. LMCIT participation varies by program:

- The property/casualty program has more than 1,100 members.
- The workers' compensation program has more than 900 members.
- LMCIT sponsors life, disability and long-term care programs for members.

Long-Term Stability and Reasonable Rates

The private insurance market runs in cycles. Sometimes insurance is relatively cheap and easy to get. At other times, as in the late 1970s and again in the mid- and late-1980s, insurance became very expensive and hard to obtain.

In a “hard” cycle, if insurance companies view cities as undesirable or unpredictable risks, cities may not be able to find insurance at all. This happened during the late 1980s to cities throughout the country. Because LMCIT exists, Minnesota cities know they have a stable source of insurance coverage, regardless of private insurance industry cycles.

Members can count on competitive rates and may also receive dividends when there are extra funds that aren't needed for member losses, expenses or reserves. If LMCIT's income from premiums and investments is more than what is needed for losses and expenses, the extra funds go back to member cities. Since 1987, LMCIT has returned \$221 million in dividends to cities.

Cities also rely on LMCIT for its strength and superior member service. To ensure that LMCIT is able to meet its responsibility to pay cities' claims, the Board of Trustees work to ensure the organization is strong and financially stable. A conservative approach to rates and reserves, a solid reinsurance program with some of the strongest reinsurers in the world, and regular actuarial reviews all help ensure that LMCIT will remain sound. By conventional insurance industry measures, LMCIT is stronger financially than most insurance companies.

The following LMCIT Board members are member city officials appointed by the League Board to govern the activities of LMCIT.

- Todd Prafke, City Administrator, City of Saint Peter
- Del Haag, Councilmember, City of Buffalo
- Joel Hanson, City Administrator, City of Little Canada
- Mark Karnowski, City Administrator, City of Princeton
- Jim Miller, Executive Director, League of Minnesota Cities
- Desyl Peterson, City Attorney, City of Minnetonka
- Rhonda Pownell, Councilmember, City of Northfield

Unique Coverages and Features

Cities have unique needs that private insurance carriers don't address very well. LMCIT's coverages are specifically designed for cities and are broader than any type of coverage offered by private insurance carriers. As new needs or problems develop, LMCIT modifies coverage or develops new programs to meet those needs through coverages, training, and services.

LMCIT's basic coverages are very broad and are complemented with an array of innovative coverages like extraordinary expense coverage, accident coverage for volunteers, coverage for emergency response personnel affected by posttraumatic stress disorder, coverage for dredging and excavation claims and so on.

When members experience a claim, LMCIT's claim unit is there to provide coverage and indemnity against members' losses. This unit is a quality claim servicing group, with expertise in municipal liability, property, auto and workers' compensation claims. The workers' compensation unit is located at LMCIT. The property/casualty unit has six offices spread across Minnesota:

- North unit in Virginia and Moorhead.
- South unit in Mankato, Willmar and Rochester.
- Metro-east and metro-west at LMCIT.
- Small claims handling and specialty claim unit at LMCIT.

The property/casualty claims unit handles municipal liability, property, and auto claims. The unit also has a set of claims adjusters to handle specialty claims: small property, first party property, employment, police and land use. This department is well versed in addressing complex issues such as coverage issues, settlement terms, oversight and investigation, and litigation management. They work to develop strategies for case management and to determine the best and most logical method to bring a claim file to its conclusion.

The workers' compensation unit works with all parties to ensure the goal of the Workers' Compensation Statute is met. The claim adjusters investigate claims, regularly communicate with the city, employee and all parties involved, determine compensability, calculate and pay lost time benefits, and ensure appropriate medical care. The goal of this department is to assist an injured employee in obtaining appropriate medical care quickly to help the employee return as close as possible to his or her pre-injury condition.

Member-Focused Risk Management Assistance

The money LMCIT uses to pay claims belongs to the cities themselves - and every loss that is avoided saves money. That's why LMCIT places such a high priority in helping cities minimize risks and reduce losses. LMCIT has implemented a number of initiatives to help cities in this endeavor:

Training and Workshops

LMCIT offers general and customized training on land use, and for special job classes such as peace officers. Training is meant to deliver timely and important information to help cities mitigate risks.

- **Land Use.** LMCIT's land use attorneys provide a range of training services to assist cities with the unique concerns involved in land use decision making.
- **Police Accredited Training OnLine (PATROL).** This web-based learning tool for Minnesota law enforcement officers provides extensive web-based courses on current legal issues, and research on important developments affecting Minnesota law enforcement.
- **Safety Assistance Programs.** Minnesota cities have a range of state and federal OSHA mandates with which they must comply. LMCIT has developed the Regional Safety Groups initiative, which provides an array of subsidized services to participating cities, including hands-on and web-based safety training, safety audits, and one-on-one consulting. Cities enrolled in this program also have access to FirstNet Learning, a web-based training program endorsed by the National Safety Council. The program includes written information, questions and answers, scoring, and a supervisory tool to track your employees' progress.
- **Safety & Loss Control Workshops.** Each Spring, LMCIT holds a series of one-day workshops at locations throughout the state. These sessions focus on providing practical information for cities to help avoid losses and reduce the costs of losses that may occur. Several tracks are offered for various staff, including public works, fire, peace officers, administration, elected officials, and parks and recreation. These workshops are inexpensive and registration fees include informational materials from all the sessions.
- **Specialized Loss Control Workshops.** Half-day workshops are offered at various locations annually in the Fall on topics such as confined space entry; street, snow-plowing, and sewer maintenance policies; trenching; and chainsaw usage. Depending upon the topic, participants will participate in hands-on simulations, learn about OSHA standards and requirements, and receive sample policies and models, and more.

Contract Review Service

LMCIT's Contract Review Service program is a free service that helps guard member cities against common contract liability exposures by identifying defense and indemnification language that may be problematic. Advice and recommendations on insurance coverage also are provided to help ensure contracted activities fall within the scope of LMCIT coverages.

HR & Benefits

Member cities can access a variety of Human Resource materials and services designed to help cities mitigate employment claims. Resources include:

- Flexible benefit plan services
- Model union contracts
- Salary & benefits survey
- GASB OPEB services
- City workforce planning
- Web-based training for leaders and supervisors
- HR Reference Manual
- Life, disability and long-term care insurance
- HR training program

Joint Powers

Minnesota cities continuously seek efficient ways to use limited resources, exploring opportunities to cooperate with other entities. These partnerships can provide efficiencies, but also can create unique liability issues. LMCIT provides a number of coverages, informational resources, and staff available to assist members with these agreements.

Land Use

More than 20 percent of all members' liability costs are the result of land use claims. Because these costs are significant, LMCIT's team of land use attorneys works with members to provide customized information and training, and acts as a resource to elected and appointed city officials and to city attorneys. LMCIT also has a land use incentive program, which rewards members that take a web-based training course focused on land use decision making.

Loss Control Advice

LMCIT attorneys, staff, and loss control consultants provide loss control advice to member cities as a supplement to city attorney's services. All are available to answer questions on legal loss control issues; the implications of employment-related decisions; review mutual-aid agreements, contracts, and more. Loss control consultants provide on-site assistance to improve safety programs and reduce employee injuries.

Minnesota Safety Council Membership

All LMCIT members automatically get access to the Minnesota Safety Council. This free membership allows cities to access:

- Discounts on safety training, on-site consultation and training tools on occupational safety and health training, First Aid/CPR/AED training and driver training/fleet safety/DOT compliance.
- An expansive video library featuring more than 700 industry-specific videos and DVDs.
- Free phone and e-mail consultation to help answer questions about workplace safety and health, traffic and fleet safety, first aid and off-the-job safety.
- Weekly e-newsletters for every staff person in your city who registers. These newsletters keep your crew up-to-date on regulatory changes and resources to support your safety programs.
- Off-the-job safety products, programs and materials to help cities support job safety.

Police & Fire

Minnesotans benefit from the emergency services delivered by cities. Sometimes fire and police services are provided directly to residents, other times cities collaborate for emergency services. Each of these services, though, presents a unique set of management and liability issues. LMCIT has developed materials and training to help members navigate these issues.

Safe Patient Handling

Minnesota cities that operate health care facilities face a high rate of injury among employees responsible for patient lifting. In an effort to demonstrate a means of reducing employee injuries and controlling Workers' Compensation loss costs, LMCIT partnered with Field Crest Care Center, a nursing home in Hayfield, to install no-lift technology and promote safe patient handling, and is using this project to educate and encourage other municipal health care facilities to find ways to reduce the physical burden on caregivers and decrease injuries to employees and patients, while maintaining a compassionate care environment.

Safety Loan Program

The Safety Loan Program is an affordable, reliable program that provides funding for safety improvements. Your city can make improvements in one year, and spread the costs across several budget years for personal protective equipment, fire suppression/detection equipment, job site safety equipment, and ergonomic equipment.

Sewers

Minnesota cities need to exercise reasonable care for sewer systems to avoid sewer back-up liability. This means cities must establish an inspection and maintenance program and emergency procedures. LMCIT has assembled a task force to develop recommendations and tools to help cities develop a sanitary sewer program.



RISK MANAGEMENT INFORMATION OPTIONAL “NO-FAULT” SEWER BACKUP COVERAGE

The League of Minnesota Cities Insurance Trust (LMCIT) offers property/casualty member cities “no-fault” sewer backup coverage. This optional coverage will reimburse a property owner for clean-up costs and damages resulting from a city sewer backup or from a city water main break, irrespective of whether the backup was caused by city negligence.

The “no-fault” sewer backup coverage option is intended to:

- Reduce health hazards by encouraging property owners to clean-up backups as quickly as possible.
- Reduce the frequency and severity of sewer backup lawsuits (i.e. property owners may be less inclined to sue if they receive conciliatory treatment at the time of the backup).
- Give cities a way to address the sticky political problems that can arise when a property owner learns the city and LMCIT won’t reimburse for sewer backup damages because the city wasn’t negligent and therefore not legally liable.

Many cities and their citizens may find this coverage option to be a helpful tool. However, it’s also important to realize it’s not a complete solution to sewer backup problems, and not every possible backup will be covered.

Which sewer backups are covered?

The “no-fault” coverage would reimburse the property owner for sewer backup damages or water main breaks, regardless of whether the city was legally liable, if the following conditions are met:

- The backup must have resulted from a condition in the city’s sewer system or lines. A backup caused by a clog or other problem in the property owner’s own line would not be covered.
- It’s not a situation that is specifically excluded in the coverage.
- The coverage limit has not been exceeded.

Which situations are excluded?

The “no-fault” coverage will not apply in several “catastrophic” type situations. Specifically, these are:

This material is provided as general information and is not a substitute for legal advice.
Consult your attorney for advice concerning specific situations.

- Any event, weather-related or otherwise, for which FEMA assistance is available;
- Any interruption in the electric power supply to the city’s sewer system or to any city sewer lift station which continues for more than 72 hours; or
- Rainfall or precipitation that exceeds the amount determined by the National Weather Service to constitute a 100-year storm event.

What costs would be covered?

The coverage would reimburse the property owner for the cost of cleaning up the backup, and for any damage to the property, up to the coverage limit. For purposes of the city’s deductibles, claims under the no-fault coverage are treated as liability claims, so the same per-occurrence and/or annual deductibles will apply.

However, there are certain costs that would not be reimbursed under the no-fault coverage:

- Any costs which have been or are eligible to be covered under the property owner’s own homeowner’s or other property insurance; and
- Any costs that would be eligible to be reimbursed under an NFIP flood insurance policy, whether or not the property owner actually has NFIP coverage.

What is the coverage limit?

The basic limit is \$10,000 per building per year. The city also has options to purchase additional limits of \$25,000 or \$40,000 per building. For purposes of the limit, a structure or group of structures that is served by a single connection to the city’s sewer system will be considered a single building.

Only true “no-fault” claims are counted toward the limit. Claims for damages caused by city negligence, for which the city would be legally liable in any case, are not charged against that limit.

What does it cost?

The premium charge is a percentage of the city’s municipal liability premium:

- 8.5% for the \$10,000 limit;
- 10.0% for the \$25,000 limit; or
- 12.5% for the \$40,000 limit.

Because the LMCIT Board’s intent is that this coverage be self-supporting, charges will be continually monitored and, if necessary, adjusted in the future.

Is every city automatically eligible?

No. To be eligible, the city must meet these underwriting criteria:

- The city must have a policy and practice of inspecting and cleaning its sewer lines on a reasonable schedule.
- If there are any existing problems in the city’s system which have caused backups in the past or are likely to cause backups, the city must have and be implementing a plan to address those problems.
- The city must have a system and the ability to respond promptly to backups or other sewer problems at any time of the day or week.
- The city must have in place an appropriate program to minimize stormwater inflow and infiltration.
- The city must have in place a system to maintain records of routine sewer cleaning and maintenance, and of any reported problems and responses.

When establishing these criteria, the goal of LMCIT was to focus on reasonableness rather than on creating specific standards. The intent isn’t to set an arbitrary requirement that sewers be inspected and cleaned every six months, every three years, every five years, etc. What makes sense in one city with some older and sometimes sagging clay lines probably wouldn’t make sense in a city with newer plastic lines, and vice versa. From the underwriting standpoint, the real concern is that the city has considered its own situation and developed policies, practices, and schedules that make sense for its own situation.

More Information

For assistance in developing sewer policies, practices, and schedules, please see the [Sewer Toolkit](#).

How would the “no-fault” coverage work if a sewer backup was caused by city negligence, and where the city was legally liable for the resulting damages?

If the situation isn’t one where the “no-fault” coverage applies, the city’s LMCIT liability coverage would respond just as it does now. That is, LMCIT would investigate and if necessary defend the claim on the city’s behalf, and would pay the resulting damages if in fact the city is legally liable for those damages.

The same would be true for damages that exceed the \$10,000 no-fault limit, or for a subrogation claim against the city by the homeowner’s insurance company. The city’s existing LMCIT liability would respond just as it does now.

What’s the legal basis for this coverage? Wouldn’t it be a gift of public funds to pay for damages the city isn’t legally liable for?

First, as noted earlier, one goal is to help reduce health hazards by encouraging prompt clean-ups. That’s clearly a public purpose and in the public interest.

Second, the law and facts surrounding most sewer backup claims are rarely so clear that the liability issue is entirely black and white. There’s virtually always a way that a claimant’s attorney can make some type of argument for city liability. Having this coverage in place should help eliminate the need to spend public funds on litigation costs in many of these cases.

Finally, part of the process for putting the coverage in place is for the city council to pass a formal resolution that makes this no-fault sewer backup protection part of the agreement between the city and the sewer customer. The idea is that by paying their sewer bill, the sewer user is purchasing not just sewer services but also the right to be reimbursed for certain specified sewer backup costs and damages. In other words, the basis for the no-fault payments to the property owner would be the contract between the city and the sewer user.

How do we put coverage in place?

Contact your LMCIT underwriter for an application. If the city qualifies for coverage, we'll send the city a formal quote, along with a model resolution. To put coverage in place, the city council must formally pass that resolution, and send a copy to LMCIT.

If the city decides to add this coverage, it will also be important to make sure citizens know about it. LMCIT can also provide models for a press release, newsletter article, utility bill insert, etc.

Your League Resource

Contact your LMCIT underwriter at 651-281-1200 or 800-925-1122 for more information about the "no-fault" sewer backup coverage.

What if we decide to discontinue the coverage sometime in the future?

Make sure your agent notifies your LMCIT underwriter. In addition, it's important to let your citizens know if and when the coverage is discontinued. The council should formally rescind the resolution that made the no-fault sewer backup protection part of the agreement between the city and the sewer customer.

Pete Tritz 07/11

COMPREHENSIVE MUNICIPAL COVERAGE

No-Fault Sewer Back-up and Water Main Break Coverage Endorsement (\$10,000 Limit)

Section I, Coverage A, Municipal Liability Coverage, is amended to include no-fault sewer back-up and water main break coverage as outlined below.

1. No-fault sewer back-up coverage

- a. If all of the following four conditions are met, *LMCIT* will pay for claims presented by the *city* for *sewer back-up damage* to property of others which was not caused by *city* negligence:
 - (1) The sewer back-up resulted from a condition in the *city's* sewer system;
 - (2) The sewer back-up was not the result of an obstruction or other condition in sewer pipes or lines which are not part of the *city's* sewer system or which are not owned or maintained by the *city*; and
 - (3) The sewer back-up was not caused by or related to a *catastrophic incident*.
 - (4) The date of the *occurrence* giving rise to the claim for *damages* must be on or after the retroactive date shown on this endorsement.
- b. However, *LMCIT* will not pay for any *damages* or expenses:
 - (1) Which are or would be covered under a National Flood Insurance Program flood insurance policy, whether or not such insurance is in effect; or
 - (2) For which the property owner has been reimbursed or is eligible to be reimbursed by any homeowners' or other property insurance.

2. No-fault water main break coverage.

LMCIT will pay for claims presented by the *city* for *water main break damage* to property of others which was not caused by *city* negligence. But *LMCIT* will not pay for any *damages* or expenses for which the property owner has been or is eligible to be reimbursed by any homeowners' or other property insurance.

3. Definitions

For purposes of this endorsement, the following definitions apply.

- a. *Catastrophic incident* means any of the following:
 - (1) Any weather-related or other event for which FEMA (Federal Emergency Management Administration) assistance is available;

- (2) Any interruption in the electric power supply to the *city's* sewer system or to any *city* sewer lift station which continues for more than 72 hours; or
 - (3) Rainfall of precipitation which exceeds the amount determined by the National Weather Service to constitute a 100-year storm event.
- b. *Sewer back-up damage* means damage to property, including removal and clean-up costs, resulting from a sewer back-up.
 - c. *Water main break damage* means damage to property, including removal and clean-up costs, resulting from the rupture of a *city* water main, line, or pipe.

4. Limits

- a. *LMCIT* will not pay more than \$10,000 for *sewer back-up damage* to any building under this endorsement, regardless of the number of *occurrences* or the number of claimants. For purposes of this limit
 - (1) A structure or group of structures served by a single connection to the *city's* sewer system is considered a single building.
 - (2) If a single structure is served by more than one connection to the *city's* sewer system, the portion of the structure served by each respective connection is considered a separate building.
- b. *LMCIT* will not pay more than \$10,000 for *water main break damage* to any claimant, regardless of the number of *occurrences* or the number of properties affected.
- c. *LMCIT* will not pay more than \$250,000 for *water main break damage* resulting from any single occurrence. All *water main break damage* which occurs during any period of 72 consecutive hours is deemed to result from a single *occurrence*.

If the total *water main break damage* for all claimants in a single *occurrence* exceeds \$250,000, the reimbursement to each claimant will be calculated as follows:

- (1) A preliminary reimbursement figure is established for each claimant, equal to the lesser of the claimant's actual *damages* or \$10,000.
- (2) The sum of the preliminary reimbursement figures for all claimants will be calculated.
- (3) Each claimant will be paid a percentage of his or her preliminary reimbursement figure, equal to the percentage calculated by dividing \$250,000 by the sum of all claimants' preliminary reimbursement figures.

5. Deductibles

The amount *LMCIT* pays for *sewer back-up damages* or *water main break damage* under this endorsement is subject to the Municipal Liability Deductible shown in the Municipal Liability Declarations or the General Annual Aggregate Deductible if any shown in the Common Coverage Declarations.

For purposes of the Municipal Liability Deductible, all claims for *sewer back-up damages* which are covered under this endorsement, which occur within a 72 hour period, and which result from or are related to the same condition or conditions in the *city's* sewer system are deemed to be a single *occurrence*; and *water main break damage* which is covered under this endorsement and which occurs during any period of 72 consecutive hours is deemed to be a single *occurrence*.

6. Retroactive Date

The retroactive date for this endorsement is _____.

All other terms and conditions remain unchanged.

COMPREHENSIVE MUNICIPAL COVERAGE

No-Fault Sewer Back-up and Water Main Break Coverage Endorsement (\$25,000 Limit)

Section I, Coverage A, Municipal Liability Coverage, is amended to include no-fault sewer back-up and water main break coverage as outlined below.

1. No-fault sewer back-up coverage

- a. If all of the following four conditions are met, *LMCIT* will pay for claims presented by the *city* for *sewer back-up damage* to property of others which was not caused by *city* negligence:
 - (1) The sewer back-up resulted from a condition in the *city's* sewer system;
 - (2) The sewer back-up was not the result of an obstruction or other condition in sewer pipes or lines which are not part of the *city's* sewer system or which are not owned or maintained by the *city*; and
 - (3) The sewer back-up was not caused by or related to a *catastrophic incident*.
 - (4) The date of the *occurrence* giving rise to the claim for *damages* must be on or after the retroactive date shown on this endorsement.
- b. However, *LMCIT* will not pay for any *damages* or expenses:
 - (1) Which are or would be covered under a National Flood Insurance Program flood insurance policy, whether or not such insurance is in effect; or
 - (2) For which the property owner has been reimbursed or is eligible to be reimbursed by any homeowners' or other property insurance.

2. No-fault water main break coverage.

LMCIT will pay for claims presented by the *city* for *water main break damage* to property of others which was not caused by *city* negligence. But *LMCIT* will not pay for any *damages* or expenses for which the property owner has been or is eligible to be reimbursed by any homeowners' or other property insurance.

3. Definitions

For purposes of this endorsement, the following definitions apply.

- a. *Catastrophic incident* means any of the following:
 - (1) Any weather-related or other event for which FEMA (Federal Emergency Management Administration) assistance is available;

- (2) Any interruption in the electric power supply to the *city's* sewer system or to any *city* sewer lift station which continues for more than 72 hours; or
 - (3) Rainfall of precipitation which exceeds the amount determined by the National Weather Service to constitute a 100-year storm event.
- b. *Sewer back-up damage* means damage to property, including removal and clean-up costs, resulting from a sewer back-up.
 - c. *Water main break damage* means damage to property, including removal and clean-up costs, resulting from the rupture of a *city* water main, line, or pipe.

4. Limits

- a. *LMCIT* will not pay more than \$25,000. for *sewer back-up damage* to any building under this endorsement, regardless of the number of *occurrences* or the number of claimants. For purposes of this limit
 - (1) A structure or group of structures served by a single connection to the *city's* sewer system is considered a single building.
 - (2) If a single structure is served by more than one connection to the *city's* sewer system, the portion of the structure served by each respective connection is considered a separate building.
- b. *LMCIT* will not pay more than \$25,000 for *water main break damage* to any claimant, regardless of the number of *occurrences* or the number of properties affected.
- c. *LMCIT* will not pay more than \$250,000 for *water main break damage* resulting from any single occurrence. All *water main break damage* which occurs during any period of 72 consecutive hours is deemed to result from a single *occurrence*.

If the total *water main break damage* for all claimants in a single *occurrence* exceeds \$250,000, the reimbursement to each claimant will be calculated as follows:

- (1) A preliminary reimbursement figure is established for each claimant, equal to the lesser of the claimant's actual *damages* or \$25,000.
- (2) The sum of the preliminary reimbursement figures for all claimants will be calculated.
- (3) Each claimant will be paid a percentage of his or her preliminary reimbursement figure, equal to the percentage calculated by dividing \$250,000 by the sum of all claimants' preliminary reimbursement figures.

5. Deductibles

The amount *LMCIT* pays for *sewer back-up damages* or *water main break damage* under this endorsement is subject to the Municipal Liability Deductible shown in the Municipal Liability Declarations or the General Annual Aggregate Deductible if any shown in the Common Coverage Declarations.

For purposes of the Municipal Liability Deductible, all claims for *sewer back-up damages* which are covered under this endorsement, which occur within a 72 hour period, and which result from or are related to the same condition or conditions in the *city's* sewer system are deemed to be a single *occurrence*; and *water main break damage* which is covered under this endorsement and which occurs during any period of 72 consecutive hours is deemed to be a single *occurrence*.

6. Retroactive Date

The retroactive date for this endorsement is _____.

All other terms and conditions remain unchanged.

COMPREHENSIVE MUNICIPAL COVERAGE

No-Fault Sewer Back-up and Water Main Break Coverage Endorsement (\$40,000 Limit)

Section I, Coverage A, Municipal Liability Coverage, is amended to include no-fault sewer back-up and water main break coverage as outlined below.

1. No-fault sewer back-up coverage

- a. If all of the following four conditions are met, *LMCIT* will pay for claims presented by the *city* for *sewer back-up damage* to property of others which was not caused by *city* negligence:
 - (1) The sewer back-up resulted from a condition in the *city's* sewer system;
 - (2) The sewer back-up was not the result of an obstruction or other condition in sewer pipes or lines which are not part of the *city's* sewer system or which are not owned or maintained by the *city*; and
 - (3) The sewer back-up was not caused by or related to a *catastrophic incident*.
 - (4) The date of the *occurrence* giving rise to the claim for *damages* must be on or after the retroactive date shown on this endorsement.
- b. However, *LMCIT* will not pay for any *damages* or expenses:
 - (1) Which are or would be covered under a National Flood Insurance Program flood insurance policy, whether or not such insurance is in effect; or
 - (2) For which the property owner has been reimbursed or is eligible to be reimbursed by any homeowners' or other property insurance.

2. No-fault water main break coverage.

LMCIT will pay for claims presented by the *city* for *water main break damage* to property of others which was not caused by *city* negligence. But *LMCIT* will not pay for any *damages* or expenses for which the property owner has been or is eligible to be reimbursed by any homeowners' or other property insurance.

3. Definitions

For purposes of this endorsement, the following definitions apply.

- a. *Catastrophic incident* means any of the following:
 - (1) Any weather-related or other event for which FEMA (Federal Emergency Management Administration) assistance is available;

- (2) Any interruption in the electric power supply to the *city's* sewer system or to any *city* sewer lift station which continues for more than 72 hours; or
 - (3) Rainfall of precipitation which exceeds the amount determined by the National Weather Service to constitute a 100-year storm event.
- b. *Sewer back-up damage* means damage to property, including removal and clean-up costs, resulting from a sewer back-up.
 - c. *Water main break damage* means damage to property, including removal and clean-up costs, resulting from the rupture of a *city* water main, line, or pipe.

4. Limits

- a. *LMCIT* will not pay more than \$40,000. for *sewer back-up damage* to any building under this endorsement, regardless of the number of *occurrences* or the number of claimants. For purposes of this limit
 - (1) A structure or group of structures served by a single connection to the *city's* sewer system is considered a single building.
 - (2) If a single structure is served by more than one connection to the *city's* sewer system, the portion of the structure served by each respective connection is considered a separate building.
- b. *LMCIT* will not pay more than \$40,000 for *water main break damage* to any claimant, regardless of the number of *occurrences* or the number of properties affected.
- c. *LMCIT* will not pay more than \$250,000 for *water main break damage* resulting from any single occurrence. All *water main break damage* which occurs during any period of 72 consecutive hours is deemed to result from a single *occurrence*.

If the total *water main break damage* for all claimants in a single *occurrence* exceeds \$250,000, the reimbursement to each claimant will be calculated as follows:

- (1) A preliminary reimbursement figure is established for each claimant, equal to the lesser of the claimant's actual *damages* or \$40,000.
- (2) The sum of the preliminary reimbursement figures for all claimants will be calculated.
- (3) Each claimant will be paid a percentage of his or her preliminary reimbursement figure, equal to the percentage calculated by dividing \$250,000 by the sum of all claimants' preliminary reimbursement figures.

5. Deductibles

The amount *LMCIT* pays for *sewer back-up damages* or *water main break damage* under this endorsement is subject to the Municipal Liability Deductible shown in the Municipal Liability Declarations or the General Annual Aggregate Deductible if any shown in the Common Coverage Declarations.

For purposes of the Municipal Liability Deductible, all claims for *sewer back-up damages* which are covered under this endorsement, which occur within a 72 hour period, and which result from or are related to the same condition or conditions in the *city's* sewer system are deemed to be a single *occurrence*; and *water main break damage* which is covered under this endorsement and which occurs during any period of 72 consecutive hours is deemed to be a single *occurrence*.

6. Retroactive Date

The retroactive date for this endorsement is _____.

All other terms and conditions remain unchanged.



RISK MANAGEMENT INFORMATION
**TORTS, IMMUNITIES & DAMAGES
UNDER THE MUNICIPAL TORT CLAIMS ACT**

This memo discusses the required elements of a negligence claim against a city and the unique defenses available to the city, including statutory and common law immunity defenses. We'll also cover the application of the tort damage caps under the Municipal Tort Claims Act as well as the relevant case law.

When reviewing this information, cities should be aware effective July 1, 2009, the statutory tort liability limits will increase to \$500,000 per claimant and \$1.5 million per occurrence for claims occurring after this date.

Cities, like other non-governmental defendants, are generally subject to liability for their torts and those of their officers, employees and agents acting within the scope of their employment or duties. However, cities have specific statutory and common law immunities afforded to them in addition to other general affirmative tort defenses under the law.

Additionally, cities have specific statutory caps on damages for these torts, which limit their liability in huge damage claims. The purpose behind both the immunity defenses and the tort damage caps are to protect and preserve limited public resources.

Elements of a Negligence Claim

Under Minnesota law, in order to prevail on a negligence claim, a plaintiff must establish all of these four elements: Duty of care, breach of duty of care, proximate cause, and damage or injury.

Duty of Care

Did the city owe the plaintiff a duty of care? Duty is a crucial element because if the city can establish no duty owed to plaintiff = no negligent cause of action = no lawsuit. This issue oftentimes comes down to whether the city owns, maintains or controls property where plaintiff was injured. This can be determined by reviewing deeds, contracts, or other documents.

Definition

Under the Municipal Tort Claims Act (Minn. Stat. §466.01-15), cities are vicariously liable for the torts of their employees or agents acting on the city's behalf.

Definition

A **tort** is a civil wrong or injury which arises out of a violation (breach) of a duty owed by the city to an injured or damaged plaintiff.

Public Duty Doctrine

The public duty doctrine precludes a negligence claim against a city. It states that the city does not owe a duty to an individual citizen when performing certain municipal functions, but to the public as a whole. Under this doctrine, even if the city may have done something that constitutes a breach of duty of care, there is no negligent claim available to the plaintiff against the city. Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979). This doctrine has been applied to such activities as fire fighting and building inspections.

Breach of Duty of Care

In order to show a breach of duty, one must show that the city had **notice**.

Proximate Cause

Was the city's negligence the cause or substantial factor in the Plaintiff's injuries or damages?

Damage or Injury

To establish the damage element, plaintiff must prove actual loss or injury. Plaintiff cannot simply speculate or surmise as to his/her loss or injury.

Municipal Immunities

Cities have a variety of statutory immunities available to them under the Municipal Tort Claims Act, Minn. Stat. §466.01-15. Cities also have common law official and vicarious official immunity available to them as a bar to suit. These immunities bar a lawsuit, even if city is potentially negligent.

Statutory Immunities

The statutory immunities are set forth within the Municipal Tort Claims Act, at Minn. Stat. §466.03. The most common statutory immunities are:

- Snow and Ice Immunity, Minn. Stat. §466.03, Subd. 4
- Statutory Discretionary Immunity, Minn. Stat. §466.03, Subd. 6
- Parks and Recreation Immunity, Minn. Stat. §466.03, Subd. 6e
- Municipal Authorizations Standard Immunity (Permit), Minn. Stat. §466.03, Subd. 10
- Road or Highway Right-of-Way Immunity, Minn. Stat. §466.03, Subd. 22

Snow and Ice Immunity, Minn. Stat. §466.03, Subd. 4

This immunity is most often applied in slip and falls and automobile accidents where the presence of snow and ice was a contributing factor to the accident. The claim must be based on snow and ice conditions on public highway or sidewalk, which does not about the publicly owned building or parking lot is necessary for this immunity to apply.

Definitions

Actual Notice is when a city is aware of dangerous or defective conditions through complaints; the area has been recommended for repair or replacement; or other accidents, injuries, or preexisting city created conditions.

Constructive Notice is established through evidence that the dangerous or defective condition was present for such a period of time that it constitutes notice. This exists if it can be proven that if the city was exercising reasonable care, it should have known of the dangerous condition.

What are the issues to consider when dealing with a snow and ice condition?

- Duration (how long was condition present)
- Characteristics of condition (glare ice, black ice, bumps, ridges)
- Causation (was the condition a causal factor or did it contribute to the accident and injury).

Was the condition caused or created by city?

- Look to city plowing/snow removal policy/procedure.
- What actually caused condition, i.e. drainage issues, freeze/refreeze?
- Was the condition naturally caused or artificially (i.e. awnings, overhangs, drain pipes)?

Remember: The highway/sidewalk cannot abut a publicly owned building or parking lot in order to assert the snow/ice immunity. Also, check the ownership of adjacent properties.

Statutory Discretionary Immunity Minn. Stat. § 466.03, (Subd. 6)

Cities are immune from “any claim based upon the performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.” This immunity is to protect policy or planning level decisions made by the city, not day-to-day or “operational” decisions. This policy or planning level decision must be based upon social, economic and political factors. The reviewing court analyzes the following factors to determine if immunity applies:

- Budget
- Personnel
- Safety
- Priority of other projects

These factors are often present in policies (i.e., snow plowing, sidewalk, sewer inspection or maintenance), city council or planning minutes, memorandums, contracts that the city has in its records. Use model policies available from LMCIT for your client cities.

Generally, the actual implementation of the policy/plan may be deemed “operational” and may not be protected by immunity. However, if the claim involves an “attack” upon the policy/plan itself, the Minnesota appellate courts have refused to separate or set forth a “bright line rule” and have afforded statutory immunity for the enactment as well as the implementation of the policy/plan. See, Zank v. Larson, 552 N.W.2d 719 (Minn. 1996).

Definition

The ***Mere Slipperiness Doctrine*** is a common law or case law rule whereby the Minnesota appellate courts have held, “A city is not liable for the mere slipperiness resulting from the natural accumulation of ice and snow on streets and sidewalks. However, the rule has its exceptions and does not protect the city in the case where the accumulation of ice and snow is negligently permitted to remain for such a period of time as to cause the formation of ‘slippery and dangerous ridges, hummocks, depressions, and other irregularities that develop there.” Refer to Doyle v. City of Roseville, 524 N.W.2d 461 (Minn. 1994).

Something to Think About

Self-serving conclusory affidavits from city employees have been rejected by the Minnesota appellate courts. See Conlin v. City of St. Paul, 1999 WL 2096045 (Minn. App. 1999).

Park and Recreational Use Immunity (Subd. 6e)

If the property is owned or leased by city and is intended or designated for use as a “recreational facility”, and the plaintiff is injured while using the facility, the actual use by plaintiff is irrelevant.

Examples include:

- Stiele v. City of Crystal, 646 N.W.2d 251 (Minn. App. 2002). (young child climbing tennis fence in park who fell and was injured).
- Doyle v. City of Roseville, 524 N.W.2d 461 (Minn. 1994) (plaintiff slipped and fell while walking in parking lot of public ice rink).
- Habeck v. Quverson, 699 N.W.2d 907 (Minn. App. 2003) (plaintiff injured while being transported by a hay wagon from parking lot to fairgrounds).
- Hinnenkamp v. City of Columbia Heights, 2002 WL 233824 (Minn. App. 2002) (plaintiff injured when coffee pot in community center tipped over).

Requirements of Trespassers Standard of Care

The plaintiff must meet all requirements in order to survive the immunity. This must be a condition created or maintained by city and it must be likely to cause death or serious bodily harm (i.e., high voltage lines, razor wire, bodies of water, excavations, etc.). Also, the city must have actual notice that the condition in question is likely to cause death or serious bodily harm (i.e., prior accidents, injuries, or complaints). Upon a brief inspection, the condition must be visible. This doesn't mean the plaintiff didn't see the condition, it just confirms it was visible upon a quick inspection.

Something to Think About

City is immune unless the plaintiff can meet trespasser standard of care set forth in Restatement of Torts 2d §335. Only in rare circumstances will child trespass standard set forth in §339 be used.

LMCIT has been able to successfully defend these cases at both the trial and appellate court level so that the current law is very favorable toward municipalities.

Official Immunity and Vicarious Official Immunity

Overview of Official Immunity Doctrine

The common law doctrine of official immunity protects government officials from suit for their discretionary actions taken in the course of their official duties. Official immunity applies when the official's conduct involves the exercise of judgment or discretion, but malicious conduct is not immunized. Official immunity is designed to protect public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties.

Definitions

A **discretionary act** requires the exercise of individual judgment in carrying out the official's duties.

A **ministerial act** is an absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts.

In the absence of malice, the critical issue in a claim of official immunity is whether the public official's conduct is discretionary or ministerial. Discretion has a much broader meaning in the context of official immunity than it does under the state and municipal tort claims statutes. Whether discretion was involved and official immunity applies turns on the facts of each case.

Courts focus on the discretion exercised by the city official when making a decision.

Application of Official Immunity

- Police/Pursuit/Emergency Response: Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992).
- Fire & Ambulance: Kari v. Maplewood, 582 N.W.2d 921 (Minn. 1998); Bailey v. City of St. Paul, 678 N.W.2d 697 (Minn. App. 2004); Nisbet v. Hennepin County, 548 N.W.2d 314 (Minn. App. 1996); Woehrle v. City of Mankato, 647 N.W.2d 549 (Minn. App. 2002).
- Snowplowing Decision-making: In re: Alexandria Accident of Feb. 8, 1994, 561 N.W.2d 543 (Minn. App. 1997)
- Traffic Engineering Decision-making: Ireland v. Crow's Nest Yachts, Inc., 552 N.W.2d 269 (Minn. App. 1996)
- Employment Decision-making: Rico v. State, 472 N.W.2d 100 (Minn. 1991).

Learn More

For further information on specific cases, please refer to:

Janklow v. Minnesota Bd. of Examiners for Nursing Home Adm'rs, 552 N.W.2d 711 (Minn. 1996). (This is a discretionary act)

-And-

Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988).

Official Immunity and Vicarious Immunity

Vicarious official immunity protects the governmental employer from liability when its public official is entitled to official immunity. The rationale behind extending immunity to the governmental employer is that the threat of liability against the employer would influence the governmental employee and hinder them from exercising independent judgment and discretion. It is very rare for a court to find official immunity but to deny the government employer vicarious official immunity.

Learn More

For more information on Official versus Vicarious immunity, please refer to: Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992).

Municipal Tort Caps

Minnesota Statutes §466.04 addresses the tort liability of municipalities, limiting the financial liability of any municipality to \$500,000 to any one claimant, and up to \$1,500,000 for all claimants per incident. No award for damages on any tort claim shall include punitive damages. The damages awarded are limited to compensatory damages.

Learn More

For more information on municipal tort caps, please refer to: Minn. Stat. §466.04, subd. 1(a)(1)(2)(3).

What claims are covered by the cap?

Any tort liability claims.

- Wrongful death.
- Personal injury.
- Negligence.
- Dram shop.
- Nuisance.
- Trespass.

Indemnification

Subject to the tort cap limits in Minn. Stat. §466.04, a city must defend and indemnify any employee or official whether elected or appointed, for damages claimed against the employee or official, provided that the employee or official was:

- Acting in the performance or scope of the duties of the position.
- Not guilty of malfeasance, willful neglect of duty, or bad faith.

City employees or officials are often personally named as defendants in lawsuits, as well as the city. Subject to the above limitations, the city must indemnify and defend the employee or official.

Which Claims are Not Covered by the Cap?

Non-tort claims

- Breach of contract.
- Eminent domain/condemnation.
- Constitutional claims.
- Any federal claims based upon federal statute or the constitution (e.g. Section 1983, ADA).

Liability Insurance and Waiver of Statutory Cap

Procurement of Liability Insurance

Excess coverage. The governing body of any municipality may procure insurance against liability of the municipality and its officers, employees, and agents for damages . . . resulting from it torts . . . The insurance may provide protection in excess of the limit of liability imposed by Section 466.04 . . . The procurement of such insurance constitutes a waiver of the limits of governmental liability under Section 466.04 only to the extent that valid and collectible insurance . . . exceeds those limits and covers the claim. Procurement of commercial insurance, participation in a self-insurance pool pursuant to Minn. Stat. §471.981, or provision for an individual self-insurance plan . . . shall not constitute a waiver of any governmental immunities or exclusions. Minn. Stat. §466.04.

Membership in Self-Insurance Pool and Waiver of Tort Cap

Minn. Stat. §471.981, subd. 1. specifically provides a [city] may, by ordinance or resolution of its governing body,

Highlight

Minn. Stat. §471.981 allows for cities to by ordinance or resolution to self-insure or join a self-insurance pool such as LMCIT to provide insurance coverage for damages resulting from its torts.

extend the coverage of its self insurance to afford protection in excess of any limitations on liability established to law. Unless expressly provided in the ordinance or resolution extending the coverage, the statutory limitation on liability shall not be deemed to have been waived.

The Minnesota Federal District Court has held even if cities do not enact an ordinance or resolution indicating that they are self-insured or members of a self-insurance pool, if the evidence establishes membership in LMCIT or other self-insurance pool, then the statutory tort caps are applicable unless expressly waived by the city.

Learn More

See Reimer v. City of Crookston and Crookston Public School District #593, 2003 WL 22703218 (D. Minn. 2003) for more information.

The LMCIT policy documents specifically state that although the city may have elected to purchase coverage in excess of the statutory limits [to cover non-tort or federal claims], the city has opted to not waive the tort cap limits. Thus, unless city expressly waives tort cap liability limits, purchase of excess or additional coverage will not affect the statutory tort cap limit. Please refer to the attachment entitled “LMCIT Liability Coverage Options, Liability Limits, Coverage Limits and Waiver” for complete discussion on these issues.

Multiple Claimants and the Municipal Tort Caps

35 W Bridge Collapse

On August 1, 2007, the I35W Bridge spanning the Mississippi River near downtown Minneapolis collapsed, resulting in the death of 13 people and injuring over 100 others.

Learn More

See McCarty, et. al. v. City of Minneapolis, et. al., 654 N.W.2d 353 (Minn. App. 2002) for more information.

The Minnesota Legislature deemed, “the collapse was a catastrophe of historic proportions...No other structure owned by the state has ever fallen with such devastating physical and psychological impact on so many.”

Since the state owned and maintained the I35W Bridge, it was the primary target defendant. However, the state was protected by an individual tort cap of \$300,000 per individual claimant as well as a \$1 million per occurrence cap. There was simply no way to adequately compensate the 179 claimants from that tort cap pool.

Learn More

See *Minn. Stat. 3.7391-7394* signed by Governor Pawlenty on May 8, 2008.

To avoid a potential constitutional challenge to the tort cap limits and to attempt to provide compensation for the victims of the I35W Bridge collapse, the Minnesota Legislature enacted special legislation to deal with this tragedy.

The essential terms of the bridge fund are as follows:

- Non-liability based fund determined claimants didn't need to establish fault.
- State individual tort cap retroactively adjusted to \$400,000 effective August 1, 2007.

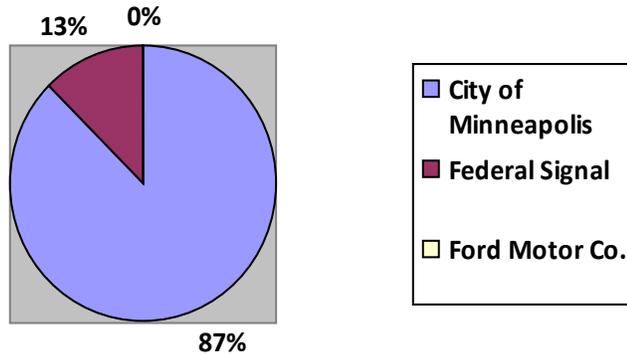
- State waived per occurrence tort cap for this specific incident.
- State appropriated \$36.5 million for fund to compensate victims. A three person panel was created to determine compensation.
- Victims who accepted the offer of compensation had to sign a release to the State of Minnesota.
- All 179 claimants accepted settlement offers.

The Holiday Case

On December 4, 1998, at the Holiday parade in downtown Minneapolis, Minneapolis Police Officer, Thomas Sawina accidentally depressed the accelerator rather than the brake pedal on a police van. The van lurched into a crowd of parade goers, causing two deaths and numerous serious injuries. One girl, age seven, was severely injured, which required the amputation of her right arm at the elbow.

The injured girl’s family brought suit against the city, Ford Motor Co. (the manufacturer of the van) and Federal Signal Corp. (the manufacturer of a flasher system installed on the van which failed to properly work when Officer Sawina accidentally pressed the accelerator rather than the brake).

The Hennepin County jury apportioned liability as follows:



The jury awarded damages to the injured girl of \$3.815 million, \$30,000 to her injured brother, and \$172,455.06 to her father.

The district court limited the city’s liability under the municipal tort cap statute (Minn. Stat. §466.04) to \$750,000 for all claimants in a single occurrence. Thus, the district court awarded the injured girl \$300,000 (limit for a single plaintiff) and her brother \$7,522 and her father \$14,185.

As to Federal Signal, the district court apportioned liability to it pursuant to the existing joint and several liability statute, (Minn. Stat. §604.02) to 50% of the total verdict amount under the “15 x 4” rule, Federal Signal’s 12.5% liability (12.5% x 4).

Appeal by Plaintiffs

Plaintiffs appealed the district court's apportionment, but the Court of Appeals affirmed the district court's decision. In their holding, the Court of Appeals specifically held that the "liability cap on municipal liability is rationally related to the legitimate government objective of insuring fiscal stability to meet and carry out the manifold responsibilities of government." Thus, the tort cap is constitutional.

The St. Paul Gas Explosion Case (In Re: Maria Avenue Natural Gas Explosion, 1999 WL 417345) (Minn. App. 1999)

On July 22, 1993, a City of St. Paul public works crew was working at the corner of Third and Maria Avenue and struck a gas line. The city notified the gas company and began evacuating residents. Approximately 20 minutes later, an explosion occurred and three people were killed and several others were seriously injured. Additionally, several buildings were destroyed.

The Plaintiff sued the city and argued that the statutory tort caps were unconstitutional. The city moved for summary judgment, which was granted by the district court.

The Minnesota Court of Appeals affirmed the district court's grant of summary judgment to the city. The court held that the application of the "rational basis" test to the tort liability limits has a legitimate purpose of maintaining a municipality's fiscal integrity and that the legislature could have reasonably believed that the enactment of the liability caps would promote this legitimate purpose. The court also rejected Plaintiff's argument that the statutory tort limits were unconstitutional because the legislature had prospectively raised the caps during the course of the litigation. The court held that, "By simply adjusting the tort limits, the legislature has continued to examine the opposing policies of making victims of municipal torts whole while balancing the municipal fiscal integrity."

Conclusion

Notwithstanding these unique defenses (immunities) and tort damage caps available to cities, every city should attempt to actively prevent and limit potential lawsuits by utilizing loss control and risk management methods, and should vigorously investigate and be prepared to defend these cases when they arise.

Brian Gaviglio 03/10

Your League Resource

Questions regarding this information? Contact Brian Gaviglio, Litigation Management Attorney at (651) 281-1200 or (800) 925-1122.



RISK MANAGEMENT INFORMATION WHEN LMCIT DENIES A LIABILITY CLAIM

When the League of Minnesota Cities Insurance Trust (LMCIT) denies a liability claim, it is usually not an issue of coverage – i.e. whether or not the city’s LMCIT liability coverage covers the claim. Rather, the issue is liability; that is, is the city legally liable for the damages of each particular claim?

A scenario

A water main breaks and your city’s sewer system backs up into several homes causing major damage; or someone falls and is injured on a city sidewalk; or a tree falls in a windstorm and damages a car. A citizen has a loss and is looking to the city to pay for it. Your city has liability coverage through LMCIT, so you report the claim to LMCIT – and the claim is denied. City officials quickly hear from angry citizens demanding to know why LMCIT won’t pay for such losses and what the city is going to do about it.

LMCIT Background

LMCIT provides liability coverage to over 800 Minnesota cities. LMCIT is not an insurance company – it is a cooperative self-insurance organization of cities. The idea behind LMCIT is that rather than paying premiums to an insurance company, the cities pool those funds and use them to cover claims. Any funds LMCIT collects from its members that are not needed to cover losses or expenses are returned to member cities as dividends. LMCIT has returned over \$210 million in dividends to its member cities since 1987.

About liability

When a third party makes a claim against the city and the city submits that claim to LMCIT, the key issue is liability. It’s important to remember the city isn’t automatically liable simply because the injury occurred on city property, or because city equipment or personnel were involved.

It’s very much an over-simplification, but, in general, for the city to be liable for someone else’s damages, three conditions must be met:

1. The city must have been *negligent*. That is, the city must have done something it shouldn’t have done, or failed to do something it should have done.
2. The damages must have been *caused* by the city’s negligence.

Something to Think About

In order for the city to be liable for someone else’s damages:

1. The city must have been negligent.
2. The damages must have been caused by the city’s negligence.
3. It must not be one of the areas in which the city is immune from liability.

3. It must not be one of the areas in which the city is *immune* from liability.

When the city reports a liability claim to LMCIT then, the key issue for LMCIT's claims staff is whether the city is legally liable for the damages that are being claimed. Sometimes it's very clear from the facts the city is liable. In such cases, the adjuster's job is to pay the claimant a fair settlement of the damages as quickly as possible. In other cases, it may be very clear the city is not liable, in which case the adjuster will deny liability and decline to offer any settlement.

In many cases though, it may not be obvious whether the city is liable. The facts may be unclear or disputed; it may be debatable whether or not the city acted negligently; other parties' negligence (including the claimant's) may be involved; there may be questions about what really caused the damages; and so on. It's harder to generalize about these cases. Depending on the particular facts and circumstances and how likely it seems the city will ultimately be held liable, LMCIT's claims staff may or may not attempt to negotiate a compromise settlement in these kinds of cases.

Ultimately, of course, evaluating and deciding on liability is what the court system is for. If a claimant disagrees with LMCIT's denial of a claim, the claimant can bring the issue to the courts. If that happens, it's LMCIT's responsibility to pay for the cost of defense and to pay the damages the court awards against the city.

Legally, the burden is on the person making the claim to prove the defendant is liable. In other words, it's the claimant's responsibility to show the city is liable – not the city's responsibility to show the city *isn't* liable. That doesn't mean LMCIT's adjusters will simply sit back and do nothing, waiting for the claimant to assemble and present the evidence. The LMCIT adjuster's job is to investigate the claim, collect the relevant facts and information, and make a reasonable evaluation of whether the city is liable. It does mean, though, that if the investigation doesn't produce good evidence to show the city is liable, LMCIT's position will be to deny city liability. Keep in mind too that when LMCIT denies liability on a claim, it shouldn't necessarily be interpreted as saying the damage is the claimant's own fault.

Why does LMCIT stick to a legal liability standard in deciding whether or not to pay a liability claim?

No one – neither city officials, nor LMCIT staff – enjoys telling a citizen the city is not responsible for their damages because their problem was not caused by city negligence. But if we apply the standard of legal liability, sometimes that's exactly what we have to say.

Sometimes that means city officials will hear complaints from an angry citizen. The reaction is very understandable: I've been injured, and it was the city's tree (or sidewalk or sewer or whatever) and I didn't do anything wrong. From a political standpoint, it would sometimes be a lot easier to simply make a payment to the damaged party, even though legally the city isn't liable for that payment. However, there are at least three good reasons why it wouldn't be appropriate for LMCIT to do so:

- First, the funds LMCIT uses to pay claims are *public* funds that are really the joint property of LMCIT's member cities. Because we are dealing with public funds held by LMCIT in trust,

we have a duty to ensure those funds are paid out only when legally owed. To do otherwise would amount to making a gift of those public funds to a private individual.

- Second, the funds LMCIT uses to pay claims really belong jointly to all LMCIT member cities. LMCIT is simply holding the money in trust for these members. Each member city has the right to expect that LMCIT will pay those funds out only if the money is in fact legally owed.
- Finally, we have to be concerned about setting a precedent. If LMCIT were to make a payment on one such claim to one person in one city, LMCIT would have to be prepared to do so for every claimant in every member city that faces a similar situation.

What if we disagree with the LMCIT adjuster's determination?

There's often a good deal of judgment involved in evaluating liability, and it's certainly possible that city officials may disagree or have questions about the LMCIT adjuster's evaluation and conclusions. Those disagreements can be in either direction; it could be a case where you think a claim LMCIT has denied should be paid, or a case where you think a claim LMCIT plans to pay should be denied.

The first thing to do is to talk with the adjuster. If there are facts or information the adjuster isn't aware of, or if there are issues that s/he hasn't investigated which you feel should be, give the adjuster a call. It's not the adjuster's job to do everything possible to either deny or to pay a claim; the adjuster's job is to try to get it right.

In some cases, you may still have concerns or questions after talking with the adjuster. If so, please call Doug Gronli, LMCIT Claims Manager, at (651) 281-1279, or Pete Tritz at (651) 281-1265. We'll be glad to review the claim to make sure we're comfortable with the position the adjuster has taken on LMCIT's behalf, or to modify that position if it's appropriate.

If LMCIT has denied liability on a claim, and the city believes it should be paid, can the city pay the claim itself, using the city's own funds?

City officials may feel it's appropriate to pay a claim denied by LMCIT out of city funds. They may feel it is the city's responsibility to take care of its citizens, regardless of legal liability, or they may simply and understandably feel sympathy for the claimant's situation. Obviously, the city council is responsible for the city's funds and has the power to decide when and how those funds should be spent. But while it's clearly the council's call, the city also needs to think about some of the same issues that LMCIT has to consider.

One important question, of course, is whether this is an appropriate and authorized use of city funds. We'd suggest cities discuss this with the city attorney before making a payment in these kinds of circumstances.

Another important issue is the precedent the city would set by making a voluntary payment in a particular case. Once the city has made a payment in one circumstance, it would be very difficult not to do so again for the next citizen who's in a similar circumstance. Depending on the size and number of such future claims, the total cost to the city could be much greater than the amount in question on this one claim.

While it is, of course, up to the council to decide what to do, in many cases a better solution may be to focus on solving the problems that have resulted in claims against the city, and to provide citizens with the information they need to protect themselves from loss.

LMCIT is here to help

If you receive questions from citizens or the press, or if you have questions regarding your city's coverage, your city's liability, LMCIT's investigation of the claim, or any related area of concern, please call the LMCIT staff. We'll do everything we can to answer your questions, to get you the information you need, and, if necessary, to correct any mistakes or problems there may be.

Pete Tritz 12/09

Your LMC Resource

Dealing with a denied claim can be a difficult process, especially in times of community hardship. If you have any questions about the information contained in this article, or any other concerns related to LMCIT, please call Pete Tritz, Doug Gronli, or Laura Honeck at 651-281-1200 or 800-925-1122.