



HANDBOOK

Ohio County Commissioners

Published by: County Commissioners Association of Ohio

209 East State Street • Columbus, Ohio 43215-4309
Phone: 614-221-5627 • Fax: 614-221-6986 • www.ccao.org

CHAPTER 8

LIABILITY, IMMUNITY AND INSURANCE

Latest Revision
November, 2008

8.01 GENERAL

This Chapter outlines the exposure the county and its officials and employees have to liability; how immunity protects the county and its officials and employees; insurance options available to cover property and liability risks, and procedures to procure insurance.

Running county government often means defending lawsuits and experiencing losses to county property. While aggressive loss control, safety, and risk management programs can reduce the likelihood of and magnitude of losses, some form of insurance protection is usually needed by counties.

8.02 LIABILITY AND IMMUNITY BACKGROUND

Historically, counties had no liability. In England, the King set up the courts, and so the King could not be sued in them. This tradition followed settlers to America, where "sovereign immunity" kept claimants from suing the government and its officials. Sovereign immunity was eroded slowly until buried by a court decision in 1982 (*Zents v Board of Commissioners*, 9 OS 3d 204). To restore some degree of protection to political subdivisions and their officials and employees, CCAO worked with the General Assembly and other public interest groups to enact ORC Chapter 2744, the Political Subdivision Tort Liability Law.

The following Sections of the *Handbook* will explain general terms the provisions of the law. In addition, please refer to Exhibit 1 at the end of this Chapter to see The Rules of Sovereign Immunity in Ohio.

8.03 STATUTORY IMMUNITY FOR COUNTIES

ORC Chapter 2744 classifies the functions of the county into either governmental functions or proprietary functions. Generally, the law exempts the county from liability “in damages in a civil action for injury, death, or loss to person or property allegedly caused by and act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function” except in the following activities that can result in liability for the county as an entity:

1. Negligence of an official or employee in driving a motor vehicle, unless the accident occurred during an emergency run by law enforcement, fire, or an emergency squad (ORC 2744.02(B)(1)).
2. Negligent failure to repair or remove obstructions from roads, including mandatory signage. The county responsibility does not include berms, shoulders, rights-of-way and non-mandatory traffic control devices (ORC 2744.02(B)(3)).
3. Negligence due to physical defects occurring within or on the grounds of public buildings used in connection with a governmental function, except jails and detention facilities (ORC 2744.02(B)(4)).
4. Liability expressly imposed by statute (ORC 2744.02(B)(5)). Examples include suits against county hospitals and suits for injuries caused by failure to have guardrails (ORC 2744.02, 5591.37).
5. Negligence in performance of "proprietary functions" (ORC 2744.02(B)(2)). These include activities customarily engaged in by non-governmental persons, and includes the operation of a cemetery, utility, sewer system, public auditorium and parking facilities (ORC 2744.01(G)).

8.04 GOVERNMENTAL AND PROPRIETARY FUNCTIONS

Since the county is liable for proprietary functions but not governmental functions, it important to understand the difference between the two functions. ORC Section 2744.01 defines a governmental function as a function “that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to a legislative requirement.” A governmental function is also a function that “is for the good of all citizens of the state and “that promotes or preserves the public peace, health, safety, or welfare.” It also “involves activities that are not engaged in or not customarily engaged in by nongovernmental persons and that is not ...a proprietary function.”

On the other hand, a proprietary function is a function that is not a governmental function as defined above and is a function that “promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.”

The statute also goes on to list some of the functions that are considered as governmental and proprietary functions. Following are some functions that are specified in the law as governmental functions:

1. Police, fire, and EMS.
2. Regulation of use of and the maintenance and repair of roads, bridges, and public grounds.
3. Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions.
4. Construction, repair, and maintenance and operation of buildings used in connection with a governmental function, including office buildings and courthouses.
5. Jails, juvenile detention facilities, and other detention facilities.
6. The enforcement of any law.
7. Regulation of traffic and erection of traffic signs, signals, or other control devices.
8. Collection and disposal of solid wastes including solid waste disposal facilities and the collection and management of household hazardous wastes.
9. Planning, design and construction of public improvements.
10. Operation of a job and family services department; operation of a health board; mental health facilities; operation of MRDD facilities, alcohol treatment centers, and children’s homes or agencies.
11. Building, zoning, sanitation, plumbing and similar types of code inspection services and plan approvals in conjunction with such activities.
12. Flood control measures.
13. Public defender services.
14. Functions the General Assembly mandates a county to perform.

The statute also lists the following proprietary functions:

1. County hospitals.
2. Utilities, including county water, sewer, airports, and transit.
3. Off street parking, stadiums, auditoriums, social centers, exhibit halls, etc.

The Ohio Supreme Court (OSC) has been eager to find that functions are proprietary and not governmental if the function could be performed by a private entity. For instance, the OSC ruled that a bull judging event conducted at the Greene County Fair was a proprietary function, and therefore was not immune from a lawsuit. (*Greene County Agricultural Society v. Liming*, 89 Ohio St.3d 551)

8.05 STATUTORY DEFENSES FOR COUNTIES

Even if one of these circumstances occurs allowing liability under state law, the county has the following defenses (ORC 2744.03(A)):

1. The employee was acting in a judicial, prosecutorial, or legislative function. This can cover the clerk of courts and others assisting in these functions.
2. The conduct was authorized by law or was necessary or essential to the exercise of powers of the county.
3. The conduct was discretionary to a person performing policy-making, planning, or enforcement duties.
4. The conduct was done by a person performing community service in conjunction with a court sentence by either an adult offender who was convicted or a juvenile who was adjudicated as delinquent.
5. The conduct involved the use of judgment in acquiring and using resources, so long as the judgment was not exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

8.06 LIABILITY AND IMMUNITY OF INDIVIDUAL OFFICIALS AND EMPLOYEES

Officials and employees (not independent contractors) are immune from liability, unless one of the following applies (ORC 2744.03(A)(6)):

1. The acts are manifestly outside the scope of employment or official responsibility.
2. The acts were made with malicious purpose, in bad faith, or in a wanton or reckless manner.

3. Liability is expressly imposed upon an employee by another section of the Revised Code. An example would be the action allowed against a county treasurer for misfeasance (ORC 321.37).

As a general rule the county has a statutory duty to defend and indemnify its officials, except in the relatively rare situations, where the official was outside the scope of employment, in bad faith, or acting with malicious purpose.

8.07 ADDITIONAL PROTECTIONS FOR COUNTIES

Under state law, damages are limited against counties (ORC 2744.05). Punitive damages are not allowed. Amounts paid to the claimant for the same harm, by other sources, are deducted from any award. Non compensatory damages, such as awards for pain and suffering, are limited to \$250,000. Judgment against counties may be paid in installments, and attachment of county property is limited (ORC 2744.06). If there is a finding against immunity by the trial judge, the county can immediately appeal to the court of appeals.

ORC Section 2744.05 (B) permits public entities to require claimants who are seeking recoveries for damages to first utilize other sources of recovery, including other available insurance, before collecting from the entity. This provision is commonly known as the Collateral Source Rule. The intent of the Collateral Source Rule is to spread the claims and losses of public entities among society as a whole, since public money is used to pay claims incurred by public entities.

The Collateral Source Rule is used most often in auto accidents. To illustrate, a county truck hits John Doe's car causing \$2,000 damage to the vehicle. The county driver is clearly at fault. John Doe's personal automobile policy has a collision deductible of \$250. Using the Collateral Source Rule, the county's insurance carrier pays John Doe's collision deductible of \$250. John Doe's insurance carrier pays the remaining \$1,750.

All insurance companies doing business in Ohio recognize and accept the Collateral Source Rule. They are prohibited from increasing rates or declining coverage solely as a result of the Rule being applied.

8.08 ADDITIONAL PROTECTIONS FOR EMPLOYEES

If the suit alleges actions occurring while the employee was within the scope of his employment and acting in good faith, the county must defend and indemnify the employee and indemnify him from any judgment (ORC 2744.07) An action may be brought to determine whether this protection is required (ORC 2744.07).

8.09 CIVIL RIGHTS CLAIMS AGAINST INDIVIDUALS

Under federal law, individuals who act under color of state law to deprive civil rights may be sued in federal court. Examples of such suits involve police brutality, jail conditions

cases, harassment, wrongful termination cases, and zoning cases. ORC Chapter 2744, and therefore the available immunities and defenses included in the Chapter, would not apply to actions brought in federal court. However, in federal court actions, generally an individual is immune if the employee acted in good faith or if the actions were reasonable to a reasonable observer (*Mitchell v Forsyth*, 472 U.S. 511, 1985). Attorneys fees, if permitted under the section of law referenced in the suit, are available for the successful claimant (*Carey v Phipus*, 435 U.S. 247, 1978).

8.10 CIVIL RIGHTS CLAIMS AGAINST COUNTIES

Civil rights claims against officials in their official capacity, or against the county or its departments as an entity, may only be maintained if the unconstitutional conduct of the county employee is part of a custom, policy or procedure of the county (*Monell v Dept. of Social Services*, 436 U.S. 658, 1978). An example is the county that had a policy of failing to train deputy sheriffs so that the deprivation of civil rights of others was in fact caused by the county (*City of Canton v Harris*, 489 U.S. 378, 1989). A successful claimant may receive attorney fees and compensatory damages from the county. In addition, the county may either be required to stop a practice (injunctive relief) or be required to take to perform specific tasks (declaratory relief), such as making a law library available to inmates.

8.11 STATUTE OF LIMITATIONS

Claims or lawsuits for injury or damage to property must be made within two years of when the injury or damage occurs. Although the two-year statute of limitations applies to the majority of claims and lawsuit, there are exceptions. The claims for employment discrimination may be brought up to six years after the wrongful act occurs.

8.12 ISSUANCE OF DEBT TO PAY CLAIMS AND ESTABLISH RESERVES

Counties are authorized to issue general or special obligation bonds for purposes related to liability insurance as follows:

1. To provide funds to pay judgments, losses, damages, and the expenses of litigation or costs to settle claims.
2. To provide funds for a county that establishes its own self insurance program to establish a special fund from which to pay claims.
3. To provide funds to pay the county costs, including the establishment of a reserve fund, for establishing and maintaining a joint self insurance pool.

These bonds need not follow normal issuance procedures specified in the uniform bond law unless the county elects to use these procedures. In such a case, they may be issued for not more than 20 years. Such bonds are exempt from the direct debt limit of ORC Section 133.05, but are subject to the indirect or constitutional debt limit.

Counties may also issue general or special obligations to pay claims against the county if monies are not otherwise available. Commonly referred to as judgment bonds, they may be issued to pay claims for a period not to exceed 25 years.

8.13 POPULAR INSURANCE OPTIONS

Counties have five primary options to insure their property and liability risk. County finances, the amount and type of risk the county is willing to assume, and the availability of proper insurance coverage, are some of the more common determining factors. Subsequent sections will discuss the legal authorities and requirements for the following primary insurance options:

1. **NO INSURANCE** - The county remains uninsured or, as it is commonly referred to, the county is "going bare." If the county selects this option it recognizes that an exposure to risk exists, but it simply does not insure against it. With this option the county is totally exposed and responsible for any loss or damage. This option should not be confused with "self insurance."
2. **COMMERCIAL INSURANCE** - The county purchases an insurance policy to cover the entire risk. Some coverages, such as property and auto physical damage, will normally have small deductibles while the public officials liability and law enforcement policies will require higher deductibles. Over the years, the number of insurance companies willing to provide liability coverage to counties has decreased. Insurance company rates can increase and decrease significantly, depending on the overall loss experience from both man-made and natural losses such terrorism and hurricanes, the economy, and the overall insurance market.
3. **SELF INSURANCE** - The county simply replaces an insurance company by establishing a dedicated fund to cover the losses. When the county establishes a dedicated fund to pay for liability losses, it must obtain an opinion from an actuary confirming that the reserves are based on sound actuarial principles
4. **PARTIAL SELF INSURANCE** - Under this option the county self insures, or goes bare, for the high frequency, low severity losses, and purchases insurance to cover the low frequency, high severity losses. If the county establishes a dedicated fund to pay for the portion of the self-insured losses, the county must also obtain an opinion from an actuary confirming that the reserves are based on sound actuarial principles.
5. **JOINT SELF INSURANCE POOLS** - This option allows counties to join together and spread the risk over a much larger base. This option generally requires the county to retain a small amount of risk through a deductible and transfer a large amount of risk to the pool. A loss fund is typically established to pay for losses that are retained by the pool, and the pool will normally protect itself against extreme losses by the purchase of excess insurance.

The vast majority of counties, along with municipalities and townships in Ohio, as well as in most states across the country, rely on pooling to provide protection for property and liability losses. Pooling enables counties to have the benefits of self-insurance without having to retain the large losses. The main benefit of pooling is cost stability. With the loss fund paying for the shared losses, pool members are relying much less on commercial insurance, and are not subject to the ups and downs of the commercial insurance market. Costs are reduced through the power of group purchasing. Pools typically provide coverage that is tailored to meet the needs of members which is not available from individual commercial insurance programs. Pools also offer comprehensive risk management services tailored to meet the needs of members, which again often are not available from commercial insurance companies.

CCAO established the County Risk Sharing Authority (CORSA) in 1987, which is a self-insurance pool for CCAO member counties. CORSA provides property and liability coverage and comprehensive risk management services to the majority of Ohio counties, along with numerous multi-county correctional facilities which are governed by member counties. Information about CORSA can be found on the CORSA web site (www.CORSA.org)

Simply because a county insures using one of these methods does not mean that the county is waiving any immunity or defense it may have under ORC Chapter 2744 (ORC 2744.08(A)).

8.14 DIFFERENCE BETWEEN BONDS AND INSURANCE COVERAGE

Occasionally there is confusion between the protection that is provided by bonds and the coverage that is provided by commercial insurance and risk sharing pools. Chapter 7 explains the protection provided by bonds. Bond coverage is a specific type of insurance, often required by law. Bonds protect the county's funds when an elected official or an employee of the county who is responsible for county funds fails to faithfully perform their duties or commits a fraudulent or dishonest act. The bond company, usually called a surety, will make the county whole again by replacing the funds up to the total amount of the bond.

Insurance coverage is used to protect the covered party (county, elected official, boards, employees, and/or volunteers), for claims alleging the covered party committed a negligent act or made an improper decision which caused bodily injury, personal injury, and/or property damage to a third party. However, insurance coverage is not permitted by law to cover criminal acts, which would include fraudulent or dishonest act.

Insurance coverage can also cover losses to money and securities that are not caused by fraudulent or dishonest acts of officials or employees. For example, insurance can be purchased to cover loss of money caused by fire, burglary, or robbery.

When a bond company pays for a loss, the elected official or employee responsible for the loss is obligated to reimburse the bond company. Insurance coverage will pay on

behalf of the covered party for a loss caused by their negligence. However, the covered party is only responsible for the deductible amount agreed to at the beginning of the coverage period. The insurance company will pay the balance of the claim up to the policy limit. Bonds are for the protection of the county and not the individual, while insurance coverage will protect the individual as well as the county.

8.15 AUTHORITY TO PURCHASE COMMERCIAL LIABILITY INSURANCE

1. LIABILITY INSURANCE COVERING MOTOR VEHICLES

Commissioners may obtain insurance to insure both elected officials and employees against liability resulting from damage or injury to persons or property, including wrongful death, resulting from the operation of vehicles, equipment, aircraft or watercraft, while engaged in activities in the course of their employment or official responsibilities. A resolution must be adopted stating the necessity for the purchase and the estimated cost of coverage. The cost of liability coverage or other insurance for vehicles of the county engineer may be paid from the road and bridge fund (ORC 307.44, 9.83). An insurer can not deny coverage under such a policy on the grounds that the vehicle was not being used in the course of employment unless the driver is convicted of a violation of ORC Section 124.71.

2. LIABILITY INSURANCE FOR ELECTED OFFICIALS AND EMPLOYEES

ORC Section 307.44 authorizes commissioners to purchase liability insurance for various elected officials and employees against liability arising from the performance of official duties or because of errors or omissions unknowingly made. This type of insurance is commonly referred to as error and omissions insurance (E&O), or public officials liability insurance (POL). Following are the specific provisions of law:

- a. For the clerk of courts and recorder, or their deputies, against liability because of errors or omissions unknowingly made for which they may be held liable.
- b. For the sheriff, coroner, engineer, auditor, each commissioner, treasurer, prosecutor, and for their assistants or deputies for liability arising from the performance of official duties.
- c. For any county employee against liability arising from the performance of official duties.
- d. For the director of human services, employees of the department, members of county welfare advisory boards, or foster parents, against liability arising from the performance of official duties.

- e. For the county public defender and members of a county public defender commission for liability arising from the performance of official duties.
- f. For common pleas or county court judges and court employees against liability arising from the performance of official duties.

If, however, commissioners purchase such a policy to insure any of the elected officials, with the exception of judges, they may not refuse to purchase such a policy for any of the other elected officials. The amount of insurance must be not less than \$50,000 for the recorder and clerk of courts. Although the law is unclear concerning a minimum amount of coverage for other officials, it would be safe to assume the \$50,000 minimum applies to all officials.

3. LIABILITY INSURANCE FOR THE COUNTY, EMPLOYEES, AND ELECTED OFFICIALS

ORC Section 2744.08 authorizes a county to buy insurance covering the potential liability of the county and its employees in civil actions for injury, death, or loss to persons or property caused by an act or omission of the county or any county employee. The limits of this insurance are determined by the commissioners and the period of the policy is not limited to a budget year.

8.16 COUNTY SELF INSURANCE PROGRAMS

Counties may also establish and maintain self insurance programs for potential liability in civil actions for the injury, death, or loss to person or property resulting from an act or omission of the county or its employees (ORC 2744.08(A)(2)). In this regard a county that establishes its own self insurance program has the following powers:

1. The county may reserve funds in a special fund in the county treasury. When the county establishes a reserve fund, it must obtain an opinion from an actuary that the reserves are based on sound actuarial principles, as of the last day of the fiscal year. (ORC 5705.13 (A)). The reserve funds and the applicable requirements are subject to review during audits performed by the State Auditor. The requirements for self-insurance reserve funds are outlined in AOS Bulletin 2001-005.
2. The county may allocate the costs of a self insurance program among funds or accounts in the county treasury on the basis of relative exposure and loss experience.
3. The county may contract for the administration of the self insurance program with any private person or company, another political subdivision or with a regional council of governments.

4. If the county has established a self insurance program it may mutually agree with any other political subdivision that has established its own self insurance program that the programs will be jointly administered. This, however, does not allow for a sharing of risk.

8.17 JOINT SELF INSURANCE POOLS

In addition to purchasing conventional insurance or having a county self insurance program, counties may obtain property and liability coverage from a joint self insurance pool (ORC 2744.081). A pool could involve two or more political subdivisions in the state. Such pools, however, may not include governmental entities from outside of Ohio (OAG 87-058).

The establishment of a joint self insurance pool must be done under written agreement(s) between the counties and other political subdivisions. In joining with other subdivisions to establish a pool, an agreement is executed with a separate legal entity which is usually a non-profit corporation or a council of governments. For example, CORSA is incorporated in Ohio as a not for profit corporation, and the required written agreement between CORSA and the member is the participation agreement. Unlike a county self insurance program, members of a pool may assume risks of other political subdivisions who are members of the pool, but the extent of such joint assumption of risk must be detailed in the written agreement with the separate legal entity. The pool may obtain excess insurance and also provide administration of a self insurance fund and risk management services for members of the pool.

A joint self insurance pool is not an insurance company and is not subject to insurance laws. The insurance pool entity is exempt from all state and local taxes.

8.18 COVERAGES AVAILABLE UNDER INSURANCE POOLS

Whereas a county self insurance program is for the purpose of providing insurance to the county and its employees for potential liability in civil actions for the injury, death, or loss to persons or property resulting from an act or omission of the county or its employees, a pool may provide a broader range of coverages including:

1. To pay judgments and settle claims, losses, and damages from an act or omission of the county or county employees.
2. To provide general liability, professional liability, and employee liability coverage.
3. To provide liability insurance related to the use of motor vehicles.
4. To provide aircraft liability and property coverage.
5. To provide fidelity, surety, and guarantee coverage.

6. To provide property coverage for losses resulting from fire, lightning, hail, flood, earthquake, snow, explosion, accidents, or other risks.
7. To provide marine, inland transportation, navigation, and boiler and machinery coverage.
8. To provide environmental impairment coverage.
9. To provide any other type of coverage that is not prohibited by statute or common law.

8.19 REQUIREMENTS FOR SELF INSURANCE POOLS (ORC 2744.081)

Unlike an individual county self insurance program, a joint self insurance pool is required to reserve funds to pay potential losses, in the exercise of sound and prudent actuarial judgment. The pool must contract with a member of the American Academy of Actuaries for the preparation of the written report outlined below. Funds must be reserved to the extent necessary to cover potential county and employee liability, expenses, losses, and damages.

No later than March 1 of each year or 90 days after the end of the program year, a report must be prepared and maintained in the office of the program administrator which includes the following:

1. Amounts of money reserved and disbursements made.
2. A written report of a member of the American Academy of Actuaries certifying whether the amounts reserved conform to the requirements of ORC 2744 .08.1, are computed in accordance with accepted loss reserving standards, and are fairly stated in accordance with sound loss reserving standards.
3. Disbursements made for the administration of the pool.
4. Claims Paid.
5. Costs of legal representation.
6. Fees paid to consultants.

The program administrator must make the report available for inspections by any person at all reasonable times during regular business hours and, upon request, must make copies of the report available at cost within a reasonable time. Note that with the passage of HB 152 effective July 1, 1993, pools are no longer required to submit these reports to the Superintendent of Insurance and the Superintendent of Insurance is no longer required to approve such reports.

8.20 ALLOCATION OF COSTS TO FUNDS

Counties may allocate the costs of procuring commercial liability insurance or costs associated with establishing a county liability self insurance program among funds or accounts in the county treasury on the basis of relative exposure and loss experience (ORC 2744.08(A)(2)(a)).

In this regard the Attorney General has ruled that the county engineer may be charged and pay from motor vehicle license and gas tax funds the costs allocated to his liability exposures under a county self insurance program (OAG 88-067). This opinion is reinforced by ORC 307.44 which states, "the premium for such (liability) insurance or any other insurance covering county vehicular equipment may be paid out of the county road fund."

The ability to pay insurance costs from the motor vehicle license and gas tax funds has been affirmed by two other Attorney General Opinions. OAG 94-031 held that the above revenues may be used to pay the portion of the costs of insurance which are allocable to liability imposed for acts or omissions of the county engineer or his employees while operating motor vehicles or other heavy equipment or machinery. While OAG No.97-020 stated that a settlement or judgment could be paid from the revenues, the opinion essentially re-affirms the preceding two opinions.

Likewise a county that is a member of a joint self insurance pool, which may provide both property and liability coverage other than liability, may also allocate the costs of funding the pool among accounts or funds in the budget on the basis of relative exposure and loss experience (ORC 2744.081(A)(4)). It appears that the reasoning of the Attorney General in OAG 88-067 is also applicable to this section.

During 2006, the Ohio Supreme Court rendered a decision (Knox County Board of Commissioners v Knox County Engineer, 109 Ohio St. 3d 353 2006) that brought into question whether or not CORSA program costs could be paid from the gas tax and license fee revenues. The Court stated that the record in the case brought before the court did not contain evidence regarding whether the specific insurance premiums at issue were directly connected with a highway purpose, and therefore the premiums could not be paid from the gas tax and license fee revenues. The Court went on to say that if the record had contained information linking the premiums with a highway purpose, the outcome of the case might have been different.

The Knox County case addressed the program costs of CORSA, the self-insurance pool for CCAO member counties, as described in Section 8.13. CORSA and CCAO staff, working in conjunction with legal counsel, have provided CORSA members information which demonstrates that CORSA coverage costs are directly connected to a highway purpose. Using the information, county commissioners are able to assure county engineers that they are authorized to pay the appropriate portion of the CORSA program costs from the gas tax and license fee revenues. The Auditor of State has issued a letter stating that if CORSA provides information demonstrating that its liability

insurance premiums represent a “highway purpose”, such payments could be made using gas tax and license fee revenues.

Although the letter from the State Auditor refers to CORSA program costs, it appears that the reasoning of the State Auditor also applies to insurance premiums from commercial insurance, self-insurance, and other self-insurance pools. If Engineers are provided with information which demonstrates that the liability insurance premiums represent a “highway purpose”, then such payments could be made using the gasoline tax and license fee revenues. Commissioners should seek guidance from their prosecutor and insurance advisors before requesting payment from the engineer.

8.21 COMPETITIVE BIDDING EXEMPTIONS

The purchase of commercial insurance is exempt from normal competitive bidding requirements. In place of competitive bidding, for commercial insurance coverage, the following procedures apply:

1. The county must determine that compliance with normal competitive bidding would increase the cost of insurance.
2. The county retains a competent consultant to assist the county to obtain coverage at the best and lowest price. ORC Section 9.36 also authorizes counties to hire an insurance consultant (OAG 77-098).
3. The county requests companies to submit proposals pursuant to specifications that sets forth the desired coverage and cost.
4. The county then negotiates with such companies to obtain insurance at the best and lowest price reasonably available.

Advertising, notice, and bid bond requirements normally applicable to competitive bidding do not apply to the purchase of insurance. In place of notice requirements, an insurance company or agent may submit the name and address of an agent to the county who must establish a special notification list of agents to which it must send the request for an insurance proposal.

When submitting the request for an insurance proposal to agents on the special notification list the county must:

1. Include in the request for an insurance proposal the deadline and place for submitting the proposal.
2. Submit the request for an insurance proposal to the agents at least six weeks before the deadline for submitting proposals.

3. Request proposals and re-negotiate the insurance contract at least every three years from the date of execution of the contract.

The county may review the special notification list every five years and may remove an agents' name from the list, but must mail notice of the removal of the name from the list to the agent. The law also requires that the insurance consultant, that must be retained by a county, must disclose all fees or compensation the consultant received from the county or any other source including insurance companies in connection with county insurance (ORC 307.86(F)).

As it relates to a joint self insurance pool, counties need not comply with either competitive bidding or the request for insurance proposal procedure outlined above. A county that wants to join a pool must enter into a contract with the pool. Before such a contract is executed, however, full public disclosure of the terms and conditions of the contract must be made. This disclosure must include a statement listing all representatives made in connection with any possible savings and losses resulting from membership in the pool and potential liability of the county or any county employee. The proposed contract with the pool and the disclosure statement must be made and presented to the county commissioners at least one week before the commissioners authorize the execution of the contract with the pool (ORC 2744.081(A)(2)).

8.22 INSURANCE AGENT COMPENSATION

Various insurance industry practices, especially those related to the compensation of insurance companies and agents, have been the subject of investigations by a number of states in recent years. Issues related to compensation surfaced in 2004 when the New York Attorney General filed numerous lawsuits against insurance companies and national insurance brokers, alleging improprieties in pricing and placing insurance business.

For Ohio political subdivisions, investigations conducted by the Ohio Department of Insurance have focused on health insurance agents who receive a consulting fee and then receive compensation from an insurance company without the knowledge of the public entities. Although the investigations have to date involved health insurance, the same issues also apply to property and liability insurance.

For political subdivisions purchasing commercial insurance and self-insurance, the compensation issue was addressed in a revision of ORC Chapter 3905. An agent is permitted to receive compensation from an insurance company or third party, in addition to compensation from the political subdivision, if the agent receives documentation that the entity is aware of the additional compensation prior to placement of the insurance (ORC 3905.56).

ORC Chapter 3905 does not apply to self-insurance pools. Local insurance agents for members of risk sharing pools are normally paid by the pool, and generally do not receive any additional compensation from the pool member. Full disclosure is essential

to prevent conflicts with the law. The agent should advise the county if there is more than one source of revenue earned by the agent while providing service on behalf of a self-insurance pool.

Exhibit 1

THE RULES OF SOVEREIGN IMMUNITY IN OHIO

For Claims Arising After April 9, 2003

RULE NO. 1

Political subdivisions are immune for all activities in Ohio, except:

- 1. Auto accidents, except that “emergency runs” have a wanton/willful standard. R.C. 2744.01(B)(1)**
- 2. Proprietary functions (for example, providing water and sewer service, or otherwise acting as a private entity might act). R.C. 2744.02 (B)(2)**
- 3. Negligent failure to keep roads in repair, or other negligent failure to remove obstructions from public roads. R.C. 2744.02 (B)(3)**
- 4. Negligence occurring on the grounds of and due to physical defects on the grounds of buildings used for governmental functions. R.C. 2744.02 (B)(4)**
- 5. Political subdivisions are liable if another statute “specifically imposes liability.” This does not include statutes which say “shall” or those which give criminal penalties. R.C. 2744.02 (B)(5)**

RULE NO. 2

Even if there is an exception to immunity, a political subdivision has additional defenses:

- 1. If the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function. R.C. 2744.03 (A)(1)**
- 2. If the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee. R.C. 2744.03 (A)(2)**
- 3. If the action or failure to act by the employee was within the discretion of the employee with respect to policy-making, planning, or enforcement**

powers by virtue of the duties and responsibilities of the office or position of the employee. R.C. 2744.03 (A)(3)

4. If the action or failure to act by the employee involved resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who was serving any portion of his sentence by performing community service work for or in the political subdivision or resulted in injury or death to a child who was found to be a delinquent child and who was performing community service or community work in accordance with the order of a juvenile court, or the person or child was covered in connection with the community service or community work for or in the political subdivision. R.C. 2744.03 (A)(4)
5. If the loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire equipment, supplies and other resources unless the judgment was exercised with malicious purpose, in bad faith or in a wanton or reckless manner. R.C. 2744.03(A)(5)

RULE NO. 3

Employees are not liable for their actions unless:

1. The employee's acts or omissions were manifestly outside the scope of his employment. R.C. 2744.03(A)(6)
2. The employee's acts or omissions were malicious, in bad faith, or were wanton or reckless. If wanton or reckless, the *political subdivision* must indemnify. R.C. 2744.03 (A)(6):2744.07

RULE NO. 4

Without regard to coverage, a *political subdivision* has a duty to defend and indemnify its employee if they were in good faith and not acting manifestly outside the scope of their employment. If there is a dispute, there is a process after discovery to determine the duty to defend. R.C. 2744.07

RULE NO. 5

You may set off any other benefits that are available to the claimant. R.C. 2744.05

RULE NO. 6

Non-economic damages are capped at \$250,000. R.C. 2744.05

RULE NO. 7

If you lose summary judgment on immunity, you can take an immediate appeal. R.C. 2744.02(C)

***Prepared By:* Mark Landes, Esq • Isaac, Brant, Ledman & Teetor LLP
250 East Broad Street, Suite 900 • Columbus, OH 43215-3742 • 614-221-2121**