

What's Inside

Contractual Liability

Page 1

Board of Trustees

Page 2

Laptop Computer Use in Police Cars

Page 2

LGIT's 19th Annual Meeting

Page 2

When the Mental Impressions and Thought Processes of Elected and Appointed Public Officials May Become Discoverable in Litigation

Page 3

Photos from the MACo Convention & Training Grant Award

Page 4

Public Works Liability Series: Duty to Warn

Page 5

Employment Law Hotline

Page 5

LGIT Congratulates

Page 6

Upcoming Seminars

Page 6

The Local Government Insurance Trust will provide coverage and risk management services at stable and competitive rates through an organization that is owned and managed by its local government members.



Fall 2006

News and Information for Maryland Local Governments

Contractual Liability

Local governments are constantly being asked to sign contracts in the normal course of their governmental business. Before a contract is signed, legally binding a local government, it should be reviewed by your county or municipal attorney. There have been cases where a local government executed a contract that obligated it to "protect and indemnify" the other party against all circumstances, including causes of loss for which the other party was totally at fault. In other words, you may be agreeing to accept responsibility not only for your own wrongdoings, but also for those of others. That is to say, a contractor or vendor is requiring the local government to provide coverage for them for its negligent acts that result in a claim, when it should be the contractor or vendor providing coverage to protect the local government. It is not uncommon to see contracts that require one party to protect the other in the event the first party does something that results in both parties being sued.

What are the potential problems, and what contracts should you review closely? All major contracts should be reviewed closely with special attention to those with "hold harmless" clauses, "indemnities" and "insurance provisions". What do these phrases mean?

- **Hold harmless** clauses mean one party agrees not to sue the other party for losses, irrespective of the fault of the other party (usually bodily injury, property damage and consequential loss claims, such as loss of income).

- **Indemnities** are where one party agrees to reimburse the other party for the other party's losses, often irrespective of whether the first party was negligent or not.
- **Insurance provisions** usually require that one or both parties take out certain insurances.

Why do you need hold harmless and indemnity clauses as well as insurance provisions? Well, a written agreement to hold someone harmless or indemnify him without that agreement being backed up by insurance is, except in cases involving very large companies, just a piece of paper. Generally, there are three types of hold harmless and indemnity clauses:

- **Broad Form** - one party is responsible for all losses, regardless of which party is at fault.
- **Intermediate Form** - one party is responsible for all losses, unless the injury or damage was due to the other party's sole negligence.
- **Limited Form** - each party is only liable for its own fault (i.e., as in common law).

Most general liability policies exclude liability assumed under a contract unless the insured would have been liable irrespective of that contract. However, insurance should not be an issue if sound risk management principles have been adopted.

Continued on page 6

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LGIT's 19th Annual Meeting

Please join us on November 13th, 2006, (for our Annual Meeting). It will be held at Turf Valley Resort & Conference Center in Ellicott City, Maryland.

Our Guest Speaker: Sylvia Henderson, Springboard Training
Our Concurrent Workshops:

- Public Information Act
- Conducting Effective Meetings

Registration information will be forthcoming.

Laptop Computer Use in Police Cars...

Driving while distracted could spell disaster. As your auto liability insurer, we can only advise that a distraction is just that, something that happens to divert your attention to somewhere other than on the road. It could be for only a second or two and there you are -- flying into another car, a tree or maybe a pedestrian.

The list of distractions that has been compiled in general for drivers is huge.



The most talked about are cell phones. Cell phones have been around long enough to show data which indicate that they are as dangerous as drunk driving. There are other numerous technological advances which have recently made the scene in automobiles, such as Blackberries, iPods or multi -channeled satellite radios.

Multi-tasking is a way of life in the police cruiser. Radios, radar, video cameras, weapons, emergency lights are all crammed into the vehicle cockpit. A laptop computer adds another layer of distraction. The pros and cons of having a laptop in the cockpit are numerous, but the benefit of the computer can only be judged by the professionals that use them, i.e., law enforcement. We are your insurance carrier and cannot do the cost benefit analysis. All we can do is advise that

laptops are a distraction from keeping eyes on the road and hands on the wheel.

We would advise that laptop use in the cruiser be made less distracting by use of some of the newer features such as the "virtual partner" which communicates back to the officer verbally. There are also smart computers available which recognize the operator's voice and answer the officers' verbal requests. This would provide a heads up, hands on the wheel environment.

We would encourage law enforcement to consider laptop policies which require no use while driving or at least the use of the latest voice recognition technology to minimize typing and reading a screen while driving.



Vance Petrella
Manager, Loss Control

When the Mental Impressions and Thought Processes of Public Officials May Become Discoverable in Litigation

Lawsuits are often filed against local governments and/or public officials as a result of decisions made in the course of governing. What happens when a plaintiff in such a lawsuit wants to take depositions of the elected or appointed public officials who participated in the decisional process? Initially, if the public official is a legislator, he or she may assert legislative immunity in response to any effort to take the official's deposition. This immunity extends to all actions taken by the official in a legislative capacity. The actions of members of local governmental bodies are in a "legislative capacity" if they are an integral part of legislative actions undertaken by the local governmental body. In other words, an action is legislative if the facts involve generalizations concerning a policy or state of affairs and the establishment of a general policy affecting the larger population. The specific function performed by the officials determines whether their actions were legislative or not. Budget making, for example, is a quintessential legislative function. Unfortunately, the various activities performed even by legislators at the local level cannot always be as easily or definitively characterized as only legislative in nature.

If the plaintiff challenges action taken by a legislator or other elected or appointed official in the official's administrative, as opposed to legislative, capacity, legislative immunity will be of no assistance, and a different set of rules applies. The first step is to determine if the official truly acted in an administrative capacity. When does an official act in an administrative capacity? As a general rule, if the underlying facts relate to particular individuals or situations and the

decision made impacts specific individuals or singles out specifiable individuals, the decision made by the official is administrative. In this context, the plaintiff may contend that the official considered information outside of the administrative record or that the official engaged in *ex parte* communications (communications for the benefit of one party only) during the decisional process. The plaintiff may even allude to possible "bad faith," suggesting that the official may have been predisposed to reach a certain decision. For one, or all, of these and similar reasons, the plaintiff may seek to take an official's deposition. In response to such requests, public officials often claim that they should not be routinely subjected to extensive probing of their individual decisional thought processes. Officials may also contend that the disruption to the governmental process caused by placing them under pretrial scrutiny would be irreparable.

It is when this impasse is reached that courts are called upon to intervene. When doing so, our courts will be guided by the principles established by the Court of Appeals in *Public Service Com'n v. Patuxent Valley Conservation League*, 300 Md. 200 (1984). In that case, the court pointed out that it is "a fundamental principle of administrative law...that a party challenging agency action is ordinarily forbidden from inquiring into the mental processes of an administrative official." The court further emphasized that departure from this fundamental principle is extremely rare. There is, however, at least one possible limited exception. If the party challenging the decision making body's action can make a "strong showing" of, as opposed to a mere allegation of, the existence of fraud or extreme circumstances which occurred outside the scope of the administrative record, a deposition of the administrative decision maker might be permissible. This standard expressly recognizes that depositions

of administrative officials cannot be ordered solely upon a bald allegation of "bad faith" or "improper procedure." Rather, the aggrieved party must persuade the reviewing court that there were, in fact, or in all likelihood, factors present, not of record, which influenced the action. Even under these circumstances, circuit court discovery, including depositions, should not be permitted when a remand to the administrative agency or other decision making body is a viable alternative.

The reasoning underlying this approach is that judicial review of administrative decisions is generally confined to an objective examination of the record before the court. Absent exceptional circumstances, which preclude effective review of an agency's action on the record, an official who acted in an administrative capacity cannot be compelled to give testimony explaining the decision made by the decision-making entity.

In sum, when a plaintiff seeks to take the deposition of a public official who was part of the administrative decisional process, the burden rests on the plaintiff to make a compelling showing that action was taken by the official separate from the administrative process and that such separate action directed or influenced the official's decision. This is a heavy burden for any plaintiff to bear, and rightfully so. Any official from whom discovery is sought in these circumstances has an obligation to challenge a plaintiff's unsupported allegations and to demand that all evidence that even suggests that the administrative decision-making process was tainted be produced. Then, and only then, can a reviewing court determine if the plaintiff's burden has been met.



John Breads
Director
Legal Services

Reaching Out



LGIT Board Member, Nelson Bolender, President of the Board of County Commissioners, Cecil County stopped by the LGIT booth at the MACo Convention in Ocean City, MD.



Steven C. Horn, Director of Department of Planning, Carroll County at the MACo Convention in Ocean City, MD.



Jeff Perkins, Kathy Bauman, Jon Burrell, Scott Soderstrom, staffed the LGIT booth at the MACo Convention in Ocean City, MD.



Council President Kelly Porter; Deputy Police Chief Warren Finkleman; Police Chief Elliott Taylor; Larry Bohlen, LGIT.



LGIT Training Coordinator Larry Bohlen presents Seat Pleasant Council President Kelly Porter with a Training Grant check for the fall LGIT Training Grant cycle. The Grant will provide valuable Law Enforcement Risk Management Training for Seat Pleasant's Police Department.

Public Liability Series:

Duty to Warn

Local governments have a duty to maintain streets and sidewalks in a reasonably safe condition. These same maintenance operations, however, can create hazards and ultimately result in liability against a municipal or county government. Local governments have a duty to warn of dangers on streets and sidewalks when they become aware of hazards or create them during public works operations.

LGIT recently defended a lawsuit brought against a municipal member whose public works department was doing some extensive road work in a residential neighborhood. Several large portions of asphalt were removed from the roadbed, leaving substantial grade differences in the street. The project was left overnight and the public works department posted one "road work ahead" sign at the entrance of the street. A citizen's vehicle was damaged when the vehicle, which was traveling in the opposite direction of the sign, ran over the asphalt cut. The court found the city negligent and responsible for the citizen's damages because it had not properly warned of the hazard that it had created.

In another lawsuit which LGIT defended, a citizen brought suit against a county member whose public works department had been conducting "rolling" line painting activities on a winding road. As the citizen came around a bend, he was suddenly confronted by the county's painting vehicle and attempted to stop. While attempting to stop, the vehicle slid on gravel and into a tree. The citizen argued that the county failed to post

signs to warn of the line painting operations, thus creating a hazard on the roadway. The county argued that it was not negligent because federal DOT guidelines do not require warning signs or flagging operations for "rolling road work." Furthermore, the county argued that the vehicle operator was negligent for failing to keep a proper lookout. Although the county followed federal guidelines in conducting its operations, the court held that under the principles of Maryland law, the county was negligent because the work was being done on a winding road with no sight distance and that the county had a duty to warn motorists of a potential hazard ahead in the roadway.

Local governments must place signs to warn the public of potential hazards created by public works operations.

Please remember -

- Signs should be posted in both directions of travel.
- Warning signs should be placed ahead of the defect and at the
- Signs should warn of the specific defect such as "uneven pavement".
- Flashing hazard lights should be used at night.
- Warning signs should be inspected periodically to ensure that they have not been damaged, or
- Flaggers must direct traffic during maintenance activities.



*Sherri Butler
Director of Claims Services*

Free to Good Home!

LGIT has excess furniture and it is free to a good home. First come, first served. You must be able to pick it up. Call Arlene at 1-800-673-8231 or 410-312-0880. Here is what is offered:

- 2 — Executive Desks, walnut color, 5' x 2.5'
- 1 — Executive Desk Overhang, walnut color, 6' x 3.5'
- 2 — Work Tables, walnut color 3' x 6'

Employment Law Hotline

Below we show one inquiry of interest that was posed through the Hotline. The Hotline is a phone service available to Liability Program members that provides up to 30 minutes of free legal advice on employment matters.

This member service is provided by LGIT, with the assistance of Daniel Karp, Esquire and Kevin Karpinski, Esquire.

Hotline 800.845.8055
or 410.625.5981

Question:

A trust member local government has automatic electronic payment of salary to its employees. Some of the employees have automatic payment set for the same day their paychecks are to be deposited. There have been occasions when the bank has been late with the local government's deposit causing these certain employees to be charged an overdraft on their accounts. Is the local government liable to these employees for the overdraft amount?

Answer:

NO - The local government is not liable for the personal arrangements of the employees.

Such principles will indicate that liabilities should be avoided or reduced as much as possible, irrespective of insurance. The importance of contract review, risk identification and coordination with policy provisions should be emphasized. In addition, the principles should state that all major contracts should be reviewed by legal counsel before being executed. Additional information on this topic can be found in your Primary Liability Scope of Coverage, Risk Management Manual:

Module 15:
Appendix F
Hold Harmless Agreements
Appendix I
Qualifying Contractors
or you may contact the
LCU Department.



Ellen Nudd
Underwriter

Upcoming Seminars

LGIT invites member employees and public officials to take advantage of the following:

Regional Defensive Driving Classes (DDC)

12/05/06 - Worcester County (Snow Hill)

EVOC (Emergency Vehicle Operations Course)

3 day class

11/15/06 - 11/17/06 Training Commission Sykesville

Certified Flagger Training

11/30/06 - TBA Mt. Rainier

12/13/06 - TBA Elkton (Cecil Co. Solid Waste Division)

Sexual Harassment

12/01/06 - District Heights

PESA Fall Conference on Safe Driving Initiatives

PESA (Public Employees Safety Association) will hold their Fall Conference on Friday, October 27 from 8:30 am - 3:30 pm at the popular location of the Cozy Inn in Thurmont, Maryland. The Conference will feature safe driving initiatives and fleet management. The cost of the Conference is \$30 for members and \$40 for non-members; \$5 discount for any five or more registered from the same organization. The cost includes a continental breakfast and great buffet luncheon. Please RSVP by October 20. If you have any questions on this Conference or PESA, please feel free to contact Carolyn Gutermuth at 410-494-2170 or by email to cgutermuth@iwif.com. Also, visit the PESA website at www.pesamd.com.



Larry Bohlen
Loss Control Training Coordinator

LGIT Congratulates!

Congratulations go to the following LGIT Members for their loss control and safety efforts:

Worcester County – George Bradley, Risk Manager for working with LGIT Loss Control Staff to ensure that property values are accurate and that the county's property schedule is up to date.

Harford County – John Walter, Risk Manager for the excellent interview and article in the September issue of Public Risk Magazine. John's insight into risk management for local governments is a great help to Trust members.

Town of Preston – for its detailed recommendation response to the Loss Control's department Hazard Evaluation. A special note for the Town Commissioners who approved a motion to become the Safety Team for the town.

The following courses are approved for the IGS Academy of Excellence In Local Governance

Conflict Resolution

(Municipal & County Track Elective Course)
12/7/06 - LGIT Headquarters, Columbia



Public Information Act

(Municipal & County Track Core Course)
11/13/06 - LGIT Annual Meeting
Turf Valley Resort, Ellicott City

Conducting Effective Meetings

(Municipal & County Track Core Course)
11/13/06 - LGIT Annual Meeting
Turf Valley Resort, Ellicott City

For seminar descriptions, directions

and registration forms, visit www.lgit.org.

For more information, call Larry Bohlen, Training

Coordinator at 1.800.673.8231

or by email at lbohlen@lgit.org.

