

RISK MANAGEMENT BULLETIN

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The Status of Boards or Commissions Created by Local Governments

In Maryland, the parameters of a local government's liability against tort claims are found in the Local Government Tort Claims Act ("LGTCA"). The LGTCA's definition of "local government" includes chartered counties, code counties, boards of county commissioners, and municipal corporations. Over the last several years, however, the LGTCA's definition of "local government" has grown to include county public libraries (or boards of trustees of county public libraries), special taxing districts, certain nonprofit community service corporations that are authorized to collect charges or assessments, housing authorities, sanitary commissions, and many other entities.

LGIT provides insurance coverage for its Member local governments. In this regard, LGIT's definition of "Member", found in Section IV of the Trust's Primary Liability Scope of Coverage, is similar to, but more expansive than, the definition of "local government" found in the LGTCA. LGIT defines "Member" as "[t]he Trust, a Local Government that is a member of the Trust, the Maryland Association of Counties, or the Maryland Municipal League." LGIT's definition of "Member" further includes "Any public entity that is sponsored for coverage in the Excess Liability Pool pursuant to the Trust Agreement"; "All lawfully elected or appointed officials of a Member while acting within the scope of their authority"; "All Employees of Member while acting within the scope of their employment and authority"; "All Volunteers, but only while acting within the scope of their authority and while providing the public service or performing the public duty for which they volunteered"; "All persons serving for and on behalf of a mutual pact, joint venture or similar contractual relationship between two or more Members"; and, with certain express limitations, "Sheriffs, deputy sheriffs and other members of a Sheriff's office". LGIT's definition of "Member" also includes *"All boards, councils, commissions and units and members thereof that are operated exclusively by, under the exclusive jurisdiction of and directly controlled by Member, while acting within the scope of their authority"*.

In light of the above, it is important to note that the issue of local government liability under the LGTCA is separate and distinct from the issue of whether boards and commissions established by LGIT Members are covered by LGIT's insurance policies. The pivotal inquiry in determining a local government's liability for the actions of its board or commission is dependent on whether the board or commission is a distinct corporation or independent body,

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or is actually a unit of the local government under the local government's control. To answer this inquiry, much emphasis will be placed on the wording of the statute, charter, code, or ordinance under which the board or commission is appointed. Specifically, courts will examine these laws to determine to what extent, if any, a local government exercises control over the board or commission. In answering this question, courts will look to factors such as: (1) Who appoints the members to the board or commission; (2) Who controls the daily activities of the board or commission; (3) Whether the board or commission is financially dependent on the local government; (4) Whether the board or commission has authority to enter contracts or act on the governmental body's behalf; and (5) Whether the local government is liable for the debts of the board or commission.

Conversely, the pivotal inquiry concerning LGIT's insurance coverage for boards and commissions is guided by the factors set forth in the language of LGIT's insurance documents: (1) Was the board or commission exclusively operated by, under the exclusive jurisdiction of, and directly controlled by, the local government Member; and (2) Were the individuals comprising the board or commission acting within the scope of their authority? The answers to these questions help determine whether or not LGIT's coverage is applicable.

Although these inquiries may seem straightforward, too often they are not. Boards and commissions have been used by various local governments in connection with entities that are enabled to function independently of the local government, and not just as an arm of that local government. Many boards and commissions are deemed to be public corporations in their own right, or, similarly, to be quasi (*i.e.* semi)-public corporations. The creation of many boards and commissions is mandated by State law, with the State retaining at least some portion of control over the operation of the entity. What boards and commissions exist, may be created, may be abolished, and who has authority to create and abolish them is dependent not only upon the pertinent local charter or code that governs them, but also upon pertinent State law.

These complex issues are exemplified by "local management board[s]". These boards are adjuncts to the State Office for Children, Youth, and Families. Their establishment is mandated by State law, specifically § 11 of Article 49D of the Maryland Code. This statute requires "each local jurisdiction" (*i.e.*, county) to establish or designate "a local management board to ensure the implementation of a local, interagency service delivery system for children, youth, and families." Article 49D, § 11(a). In establishing a local management board, a local jurisdiction may "elect" to: (1) designate a quasi-public nonprofit corporation *not to be considered* an instrumentality of the local government; (2) designate a public agency *to be considered* an instrumentality of the local government; or (3) designate a regional nonprofit corporation or public agency to represent multiple jurisdictions. Article 49D, § 11(b).

The statute raises the following questions: If the local management board is created as “a public agency”, and is thus considered “an instrumentality of the local government”, is it also a “local government” as defined by the LGTCA? Is the local management board a covered “Member” under LGIT’s insurance policies? Concerning the first question, it certainly can be argued that while the board is not itself a “local government”, it is an instrumentality of a local government and thus entitled to the protections of the LGTCA. Concerning the second question, namely, if the board is a “Member” of LGIT and entitled to coverage, the answer is solely dependent on whether the board is “operated exclusively by, under the exclusive jurisdiction of and directly controlled by the Member” and whether the individuals comprising the board acted “within the scope of their authority.” If the answers are yes, coverage exists.

In light of uncertainty as to the status of many of our Members’ boards and commissions, it is important for Members to assess, from both potential liability and potential coverage perspectives, all boards, councils, commissions, and units they have established. Liability and coverage issues concerning these entities should first be addressed to the Member’s County Attorney or other legal advisor. Specific inquiries can then be made to LGIT, which will work diligently with our Member to resolve all uncertainty. Even if it is determined that coverage is lacking, grounds may exist to extend the Trust’s insurance coverage to the board or commission as a public entity that is sponsored for participation in the LGIT program by a current LGIT Member.

If you have questions concerning this issue, please contact Hank Schomburg, Director, Loss Control & Underwriting Services, at 1-800-673-8231.

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