LEAGUE of MINNESOTA CITIES

INFORMATION MEMO

LMCIT Liability Coverage Guide

Learn about liability (casualty) coverage offered by the League of Minnesota Cities Insurance Trust (LMCIT), including unique coverage situations for land use litigation, airports, sewer backups, special events, joint powers entities, and more. Understand coverage limits and incentives. Includes information on filing a liability claim.

RELEVANT LINKS:

See LMC website, *About LMCIT.*
For more information contact the LMCIT Underwriting Department 651.281.1200. 800.925.1122.

For more information on liability see Handbook, *Insurance and Loss Control*. Handbook, *Liability*.

See Section II.J, *Joint powers entities* and Section II.R, *Separate city boards and commissions.*

I. Liability coverage

This guide provides a summary of liability coverage available through LMCIT. Members are urged to examine the coverage document for actual wording. In all cases, the coverage documents determine coverage, exclusions, and limitations.

LMCIT uses its own unique coverage to provide liability coverage to members, and it's designed to meet members' coverage needs as simply as possible. It uses a single coverage document, rather than issuing separate policies to cover things like municipal liability, errors and omissions, and police liability.

The industry term "general liability" or a "commercial general liability" (CGL) policy refers to coverage issued to organizations to protect them from liability claims for bodily injury, property damage, and advertising and personal injury. LMCIT's liability coverage is technically not a CGL, but it encompasses coverage for risks typically covered by a CGL. A key difference is that LMCIT's coverages are tailored specifically for cities and related entities in Minnesota and is much broader than a regular CGL policy.

A. Covered parties

The "member" (the governmental body or entity to which the LMCIT coverage is issued) is of course a covered party. But there are a few other nuances to keep in mind.

1. The member entity

The member entity named on the declarations page of the coverage agreement is a covered party. Independent agencies or commissions are not automatically covered under the "member's" LMCIT liability coverage. Action must be taken to secure liability coverage for the following agencies and commissions:

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RELEVANT LINKS:

- Gas, electrical, or steam utilities commissions.
- Port authorities, housing and redevelopment authorities (HRA), economic development authorities (EDA), municipal redevelopment authorities, or similar agencies.
- Municipal power or gas agencies.
- Joint powers entities.
- These entities must be either added by endorsement to the member's coverage or covered under a standalone liability coverage issued in their name.
- In contrast, relief associations of the member and some joint planning boards are automatically covered under the "member's" LMCIT liability coverage.

2. Member's officials, employees, and volunteers

In addition to the "member," covered parties also include the member's elected or appointed officials, employees, and volunteers. In other words, LMCIT will provide coverage for liability claims made against the member and/or its officials, employees, or volunteers.

Generally, independent contractors are not covered parties, but there are a couple exceptions: independent contractors acting in the administrative capacity of medical director or medical advisor to the city ambulance service; or serving as a member of or representing the city as a member of a committee, subcommittee, board, or commission.

See Section II.J, *Joint powers entities* and Section II.R, *Separate city boards and commissions.*

3. "Additional covered parties"

"Additional covered parties" (akin to "additional insureds") may also have access to the member's LMCIT liability coverage in narrow circumstances. Sometimes contracts required additional covered party status. LMCIT can provide additional covered party status by endorsement if required in a contract. Typically, additional covered party status only applies for claims made against the additional covered party if the claims arise out of the acts or omissions of the member, and not if the claim arising out of the acts or omissions of the additional covered party.

See Section II.J, *Joint powers entities* and Section II.R, *Separate city boards and commissions.*

An endorsement is not needed for persons or organizations from whom the member leases premises or equipment (except for autos) and to whom the member is contractually obligated to have named as an additional covered party. The member's LMCIT liability coverage automatically grants additional covered party status in these cases subject to the following limitations:

RELEVANT LINKS:

- Only with respect to, and to the extent of claims made against the additional covered party by reason of act or omission of the member or its agents or employees and not by reason of act or omission of the additional covered party or its agents or employees;
- Only with respect to bodily injury, property damage, and personal injury; and
- Only with respect to acts and omissions of the Member occurring during the terms of the lease.

B. Liability claims

LMCIT's municipal liability coverage is written on a claims-made basis, which means the coverage agreement that responds is the coverage agreement in effect when the claim is made. For land use litigation claims, the coverage agreement that responds is the coverage in effect when the suit is filed or served against the member. LMCIT's liability coverage provides protection for the member and other covered parties for amounts they are legally obligated to pay to a third party as damages as a result of a wrongful act (generally, a negligent act or omission). Under the liability coverage, LMCIT will defend and/or indemnify the member and other covered parties for these types of claims or lawsuits.

C. Liability exclusions

Since LMCIT's liability coverage is broad, it's easier to first look at what's not covered. Following are some of the standard exclusions. Members should contact their agent or underwriter if coverage is needed in any of these areas. LMCIT may be able to find a way to provide coverage, or at least help find coverage elsewhere.

1. Liability not covered

See Section II.N, *Open meeting law and bankruptcy lawsuits*.

- Damages arising out of a member's bankruptcy, except some defense cost reimbursement coverage is available for city officials under LMCIT's defense cost reimbursement coverage.
- Criminal proceedings.
- Most non-sudden pollution.
- Nuclear hazards.
- War.
- Amounts owed under contract.
- Condemnation, except some regulatory takings.
- Damage the member does to its own property.

RELEVANT LINKS:

- Fixing the member's own work.
- Not paying employees for the work they did.
- Recalling defective products.

2. Risks that must be specifically underwritten

Section II.A, *Airports.*
Section II.D, *Dams and downstream liability.*
Section II.H, *Fireworks.*
Section II.J, *Joint powers entities.*
Section II.R, *Separate city boards and commissions.*

- Airports.
- Dikes or Class I or Class II dams.
- Fireworks the member sponsors.
- Joint powers entities.
- Separate boards, commissions, and agencies.

3. Risks for which specialty coverage is needed

- Aircraft (a drone is not considered an "aircraft" if it's not designed for the transport of persons or property).
- Architects.
- Watercraft that is more than 25 feet in length or used to carry people or property for a charge.

Section II.B, *Cannabis.*

- Cannabis dispensaries.
- Medical professional services such as doctors, veterinarians, dentists, and pharmacists; and nurses, except for nursing activities provided in the capacity of EMT, paramedic, or first responder or when administering vaccinations to member employees or volunteers.
- Professional services provided by attorneys, engineers, and surveyors unless they're employees of the member.
- Liquor or cannabis product sales.

Section II.L, *Liquor liability*.
Section II.U, *Special events*.

- Motorized amusement rides, such as carnival rides.
- Motor vehicle demolition derbies, racing, pulling contests, or stunt driving.
- Prisons.
- Railroads.
- Rodeos.
- Specialty type operations such as hospitals, clinics, nursing homes and licensed childcare programs.

See Section II.U, *Special events*.

- Stunting activities or events that involve a significant risk of serious injury to the participant, performer, or others, such as high-wire acts, base or bungee jumping, skydiving, circus type acts, and acts involving dangerous animals.

RELEVANT LINKS:

D. Coverage limits

LMCIT gives members options for structuring their liability coverage. Members can also choose either to waive or not waive the monetary tort caps the statutes provide. It can also select from among several liability coverage limits.

1. LMCIT standard liability limits

Minn. Stat. § 466.04.

LMCIT's liability coverage provides a standard limit of $2 million per occurrence.

In addition, there are separate, specific annual aggregate limits (limits on the total amount of coverage for the year regardless of the number of claims) for the following types of claims:

- $3 million annual aggregate limit for "products hazard claims" (damages arising out of goods or products manufactured, sold, handled, distributed or disposed of by the member).
- $3 million aggregate limit for "failure to supply claims" (damages arising out of the failure to supply water, electricity, gas, steam, telecommunications, or electronic data transmission service).
- $3 million annual aggregate limit for "system security breach claims" (damages arising out of data security breaches and damages arising out of unauthorized viruses, hacking or access into the member's computer systems). A $250,000 sublimit, which is part of and not in addition to the $3 million aggregate, applies for Payment Card Industry fines, penalties, and assessments; and data security breach regulatory fines and penalties resulting from a data security breach claim).
- $3 million annual aggregate limit for EMF or "electromagnetic fields claims" (damages arising out of exposure to electromagnetic fields, electromagnetic radiation or stray voltage).
- $3 million annual aggregate limit for "limited contamination claims" (narrow exception to the broad pollution exclusion for a specific list of exposures; examples include the sudden and accidental release of pollutants beginning and ending within 72 hours and sewer backup claims).
- $3 million annual aggregate limit for sexual abuse and molestation claims.
- $3 million annual aggregate limit for wildfire claims.

See Section II.C, *Data security breach and computer-related risks*.

Other annual aggregate limits apply for the following:

- $1 million annual aggregate for land use and special risk litigation claims.
- $100,000 annual aggregate for employees' activities in outside organizations.

See Section II.K, *Land use and special risk litigation*.

See Section II.E, *Employees' activities in outside organizations*.

RELEVANT LINKS:

- $250,000 annual aggregate for organic pathogen claims (this limit applies whether claims are made under municipal liability, auto liability, or both).
- $200,000 annual aggregate for "limited law enforcement service contract claims" (law enforcement liability assumed in a service contract involving a law enforcement service agency that is not an LMCIT member).

2. Statutory liability limits

Minn. Stat. § 466.04.

Unless explicitly waived by the member, LMCIT will assert the statutory municipal tort caps which are a maximum of $500,000 per claimant and $1.5 million per occurrence. These limits apply whether the claim is against the member, against the individual officer or employee, or both.

See *Summary of LMCIT Liability Coverage Options* and the effects of choosing the various coverage structure options.

At the member's coverage renewal each year, it must decide whether to waive or not waive the statutory limits. There is no right or wrong answer, and it's a discretionary decision each governing body must make.

a. Waiving the statutory limit

Members who waive the statutory limits are waiving the protection of the statutory limits, up to the amount of coverage the member has. A claimant could recover up to LMCIT's standard limit of $2 million, rather than the statutory limit of $500,000 per claimant. Because the waiver increases the exposure, the premium is higher for coverage under the waiver option.

A member may choose to pay more in premium for the waiver option because applying the statutory liability limit means an injured party may not be fully compensated for his or her actual, proven damages that were caused by city negligence. Some cities, as a matter of public policy, may want to have more assets available to compensate their citizens for injuries caused by the city's negligence. Waiving the statutory liability limits is a way to do that. Other cities may feel that the appropriate policy is to minimize the expenditure of the taxpayers' funds by taking full advantage of every protection the legislature has decided to provide. There's no right or wrong answer on this point. It's a discretionary question of city policy that each city council needs to decide for itself.

See Section I.D.3, *Purchasing higher liability limits*.

In cases where the member waives the statutory limit and purchases LMCIT's excess liability coverage, a claimant could potentially recover more. If, for example, the member has $1 million of excess coverage and chooses to waive the statutory tort caps, a claimant or claimants could recover up to $3 million in damages in a single occurrence.

The cost of excess liability coverage is higher if the member waives the statutory tort caps as waiving the statutory tort caps increases both the per claimant exposure and the per occurrence exposure.

RELEVANT LINKS:

(In other words, waiving the tort caps makes it more likely the excess liability limits will come into play.)

b. Not waiving the statutory limit

For members who choose not to waive the statutory limits, the member's liability for most liability claims is limited by the statute to no more than $500,000 per claimant and $1.5 million per occurrence. LMCIT's higher coverage limits would only apply for types of claims that aren't subject to the statutory limit.

See Section I.D.3.a, *Statutory limits may not apply*.

3. Purchasing higher liability limits

LMCIT makes available the option of carrying higher coverage limits than the basic limit of $2 million per occurrence. LMCIT's excess liability coverage is available in $1 million increments up to a maximum of $8 million. There are several reasons why cities may consider carrying the excess liability coverage.

a. Statutory limits may not apply

Minn. Stat. § 3.736.

The statutory tort caps do not or may not apply for the following types of claims:

42 U.S. Code § 1983.

- Claims under federal civil rights laws, including Section 1983, the Americans with Disabilities Act.
- Claims for tort liability the member has assumed by contract, which occurs when a member agrees in contract to defend and indemnify a private party.
- Claims for actions in another state, which may occur in border cities that have mutual aid agreements with adjoining states or when a member official attends a national conference.
- Claims based on liquor sales, which mostly affects members with municipal liquor stores, but it could also relate to beer sales at a fire relief association fundraiser, for example.
- Claims based on a "taking" theory, which are suits challenging land use regulations frequently included in an "inverse condemnation" claim, alleging the regulation amounts to a "taking" of the property.

b. Annual limits apply for specific risks

See Section I.D, *Coverage limits*.

Besides LMCIT's overall coverage limit of $2 million per occurrence, there are annual aggregate limits for certain risks. If the member has a loss or claim in one of these areas, there might not be enough limits remaining to cover the member's full exposure if there is another similar loss during the year.

RELEVANT LINKS:

There are, however, a couple important restrictions on how the excess coverage applies to risks that are subject to aggregate limits. The excess coverage does not apply to the following:

- Failure to supply utilities.
- Mold.
- Lead and asbestos.
- Excavation and dredging.
- Sudden and accidental release of pollutants below ground or within or on the surface of any body of water.
- Auto no-fault claims.
- Uninsured/underinsured motorist claims.
- Workers' compensation, disability, or unemployment claims.
- Claims under medical payments coverage.
- Claims arising from the activities of outside organizations.
- No-fault sewer backup.
- Liquor liability unless the member has specifically requested it.
- Data security breach claims or any other claim for damages arising out of unauthorized intrusive codes or programming, such as computer viruses or hacking.
- Claims arising out of or related to Per- and Polyfluorinated Substances (PFAS).
- Organic pathogen claims.
- Limited law enforcement service contract claims. (Law enforcement liability assumed in a service contract involving a law enforcement service agency that is not an LMCIT member.)

c. Contracts may require higher coverage limits

A contract might include a requirement the member carry more than $2 million per occurrence in coverage limits. Carrying excess coverage is a way to meet these requirements. Members can also request an endorsement to increase the member's coverage limit only for claims relating to that contract.

d. Multiple political subdivisions

There may be more than one political subdivision covered under the member's coverage, like an HRA, EDA, or port authority; or the member has agreed by contract to defend and indemnify or name another entity as a covered party.

See Section II.J, *Joint powers entities* and Section II.R, *Separate city boards and commissions.*

In this case, a claimant may be able to recover amounts from both the member and the other entity. Excess coverage is one way to provide enough coverage limits. Another solution is for the HRA, EDA, or port authority to carry separate liability coverage in its own name.

RELEVANT LINKS:

II. Coverage details on specific liability exposures

LMCIT's liability coverage is broad, but there are situations where the member needs to take additional action or be aware of special coverage terms.

A. Airports

LMCIT can provide airport liability coverage to members of its property/casualty program. Coverage is available for airports that are operated by a member city, by a joint powers entity that includes at least one member city, or by a special purpose district. Coverage is available for most municipal airports, except larger airports that have scheduled service are not eligible.

1. Coverage limits

The airport liability coverage is very broad and carries a per occurrence limit of $2 million and an annual aggregate limit of $3 million. It is subject to the same deductibles that apply to a member's municipal liability coverage. Higher limits can be provided through LMCIT's optional excess liability coverage, although it is not available as an option for airport risks only.

See Section I.D.3, *Purchasing higher liability limits*.

2. Coverage terms

Cities or joint powers entities that choose LMCIT's airport coverage option are provided coverage under the city's existing LMCIT liability coverage document. It is provided under an endorsement that modifies the airport exclusion in the basic municipal liability coverage document.

Since the airport liability exposure is under the basic LMCIT liability coverage document, the coverage for liability related to airport operations is extremely broad. It is specifically designed to address several important airport exposures, including:

- Damage to an aircraft that's in the city's care, custody, and control—or what is commonly referred to as "hangar keeper's liability."
- Products liability coverage for city fueling operations.
- Claims related to noise and vibration.
- Exposures related to errors and omissions such as employment liability and liability for damages other than bodily injury, personal injury, or property damage.

Following are a few specific airport-related exclusions:

- Any aircraft exhibitions, racing, stunting, aerobatics, skydiving, or similar activities the member sponsors or participates in.

RELEVANT LINKS:

- Liability relating to aircraft service, aircraft maintenance, or aircraft repair which the member performs.
- Liability relating to any aircraft products the city sells (there is an exception related to fueling operations).
- Liability for damage to an aircraft that's in the member's care, custody, and control while the aircraft is in flight.
- Liability arising from operation of an aircraft by the member is generally excluded, although there is an exception for situations where the member might operate someone else's aircraft simply for moving it on the airport premises. If a member employee flies an airplane on member business, separate liability coverage is needed.

See Section II.I, *Independent contractors*.

If a member contracts with an independent contractor for airport management or other services, the contractor needs their own liability coverage. Independent contractors are not covered parties under the member's coverage.

Transportation Security Administration.

If member police departments are providing backup security service as required by the Transportation Security Administration, LMCIT can cover this exposure by endorsement. Without that endorsement, the member's liability coverage won't respond to claims arising from this activity.

3. Premium costs

LMCIT doesn't make a specific charge for endorsing airport operations; rather, premiums are accounted for indirectly through LMCIT's standard liability rating system for all city operations.

4. Evaluating coverage under another carrier

LMCIT's primary goal in offering airport liability coverage is to improve cities' protection for the risks associated with operating an airport. Some conventional airport liability insurance policies can be very hard to read, with complicated language and multiple endorsements. Additionally, airport liability policy wording is not standardized. There can be variations in how definitions or coverage grants are worded and sometimes there can be problematic coverage gaps.

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Members should talk to their city attorney when evaluating an airport liability insurance policy. LMCIT can review defense and indemnification provisions at no additional charge to help protect the member's interests.

B. Cannabis

LMCIT's municipal liability coverage provides coverage for premises-type claims (e.g., slips and falls), but it contains two important exclusions related to cannabis product sales.

RELEVANT LINKS:

Minn. Stat. § 151.72, subd. 4, 5, and 5a.

Minn. Stat. § 342.81.

See Section II.L, *Liquor liability*.

LMC website, *Coverage for Cyber and Computer-Related Risks*.

Minn. R. 6115.0340.

See Section II.R, *Separate city boards and commissions*.

The first is an exclusion for damages arising out of the ownership of any cannabis business or the sale of cannabis products. However, this exclusion does not apply for low potency cannabis products, such as infused drinks, sold at on- or off-sale municipal liquor stores if the product complies with State regulatory guidelines. The types of products for which the exception applies fall within the requirements specified in Minn. Stat. § 151.72, subd. 4, 5, and 5a.

The second exclusion is for damages for which the member may be liable by reason of Minn. Stat. § 342.81, or any other law governing liability for illegal sales of cannabis. Note, however, coverage for low potency cannabis products is now available in the LMCIT liquor liability coverage, which is optional and standalone from LMCIT's municipal liability coverage.

C. Data security breach and computer-related risks

LMCIT's municipal liability coverage responds to claims resulting from data security breaches or other computer-related risks. The standard limit is $2 million per occurrence, but there is a $3 million annual aggregate (total amount of coverage for the year, regardless of the number of claims) for third-party liability claims arising out of data security breaches. A $250,000 annual sublimit (part of and not in addition to the $3 million data security breach aggregate) also applies for PCI fines, penalties, and assessments; and data security breach regulatory fines and penalties resulting from a data security breach claim.

D. Dams and downstream liability

LMCIT's liability coverage contains an exclusion for damages arising out of the failure or bursting of any dike, levee, or similar structure, as well as any Class I or Class II dam as classified by the commissioner of the Department of Natural Resources pursuant to Minnesota Rules. Damages arising out of the failure of a wastewater lagoon embankment is not subject to this exclusion.

Upon request, LMCIT can review the downstream liability exposure for structures that are excluded from coverage and may be able to remove the exclusion depending on the specific circumstances.

E. Employees' activities in outside organizations

Members need to decide whether an employee's participation in an outside organization is considered part of their duties as an employee. This section only affects organizations where an individual is a member of an outside organization, like the chamber of commerce, not organizations where the employee is a member of an organization created by the member's governing body, like a joint powers entity or HRA.

RELEVANT LINKS:

1. Coverage limits and terms

Members often have officers and employees who participate in outside organizations that are related in some way to their city duties. Examples include finance officers, fire instructors, or associations of wastewater operators. If the employee's activities in those organizations lead to a liability claim against the individual, the organization may or may not have insurance or assets to defend and indemnify the employee for the liability claim. If the organization is unable or unwilling to defend the individual, they will likely look to the member for protection.

LMCIT's liability coverage includes provisions addressing when and how its coverage will respond to claims against officers' or employees' activities in outside organizations. The definition of an outside organization includes:

- A formally organized membership organization.
- A professional organization.
- Any for profit or nonprofit corporation.

The first step in determining whether LMCIT coverage applies is for the member's governing body to determine whether an employee's activities in an organization are within the scope of their duties. The governing body's decision is final for purposes of coverage, and this determination can be made at any time; either in advance or after a claim has already occurred.

See Section I.D, *Coverage limits* and Section I.D.3, *Purchasing higher liability limits*.

When the governing body makes this determination, coverage for claims arising from that employee's activities are subject to a $100,000 annual aggregate limit. Members who purchase LMCIT's excess liability coverage cannot apply it to these types of claims.

When the member decides participation in an organization will be within the scope of an employee's duties, it also has implications for other areas besides liability. Here are considerations to keep in mind:

LMC information memos, LMCIT *Workers' Compensation Coverage Guide* and *Fair Labor Standards Act (FLSA): Determining Exempt vs. Non-Exempt Status*.

- If the employee is injured, they would be covered by LMCIT's workers' compensation coverage, assuming the member gets its workers' compensation coverage from LMCIT.
- For employees who are not exempt from the Fair Labor Standards Act, time spent on the outside organization's activities would likely be considered work time for purposes of calculating overtime and other measures.

2. Determining employees' status

Members should find out which organizations their employees are involved in that might arguably be considered related to municipal business. Identify the purpose and activities of each organization.

RELEVANT LINKS:

Employees' Activities in Outside Organizations Letter, LMC Model Form.

For coverage purposes, members can determine whether participating in an organization is within the employee's duties at any time; either in advance or after a claim has already occurred.

If a member determines participation is not part of the employee's duties, it should let the employee know that if they choose to participate in the organization, they are doing so on their own. It is good practice to provide that information in writing.

In cases where a member concludes an employee should be encouraged or even required to participate in an organization, the member will want to find out whether the organization has liability coverage to protect its employees and officers for claims arising from those activities. If the organization doesn't have coverage, the member has several options:

See Section I.D, *Coverage limits.*

Minn. Stat. § 466.07.

- The member can decide if it's comfortable assuming the risk. If participation in an organization is determined to be within the scope of an employee's duties, state law requires the city to defend and indemnify the employee for tort claims arising from that activity. If the cost exceeds the $100,000 coverage limit, the rest will be the member's responsibility.
- The member can decide that participating in the organization will not be considered part of the employee's duties. In that case, the member should ensure the employee understands that if they choose to participate, they are doing so on their own.
- The member may want to encourage the organization to obtain liability coverage. In some cases, depending on the organization's purpose and structure, LMCIT may be able to provide coverage.

If the member treats the employee's time spent participating in an outside organization's activities as paid work time, it will almost certainly be interpreted to mean the member considers it part of the employee's duties. That in turn would trigger both LMCIT coverage and the member's own duty to defend and indemnify, notwithstanding the member's stated intent to the contrary.

For more information see HR Reference Manual, ch. 7, *Personnel Policies*.

If the member wants to allow use of paid work time to participate in an organization it does not consider part of the employee's duties, consider formally structuring it as a type of paid leave. The member could adopt a formal policy.

Minn. Stat. § 317A.257.

Federal Volunteer Protection Act, Public Law 105-19.

In evaluating the risks involved when employees are participating in outside organizations, it's important to know state law provides some protection from liability claims for unpaid officers or members of a nonprofit corporation. The Federal Volunteer Protection Act also provides some liability protection for volunteers performing services for nonprofit or governmental organizations.

RELEVANT LINKS:

F. Employment practices and employment benefits liability

Equal Employment Opportunity Commission and MN Department of Human Rights.

LMCIT covers employment practices claims even though there is no specific coverage part for it. Most employment-related claims filed, including administrative charges made to the Equal Employment Opportunity Commission (EEOC), the Minnesota Department of Human Rights (MDHR), or a local human rights commission, are deemed claims for damages.

Similarly, while there is no specific coverage part for employment benefits liability in the LMCIT liability coverage, the LMCIT coverage applies for liability arising out of advisement to employees regarding an employee benefit plan.

Fair Labor Standards Act.

Back wages or back employment benefits for work that has been performed by an employee making the claim are generally excluded, except for those owed because of a violation of the wage and hour provisions of the federal or state Fair Labor Standards Acts; or owed because of a violation of any state or federal statute prohibiting discrimination in employment.

G. Firefighters

LMCIT covers claims arising out of fire departments, firefighter operations, or that of fire relief associations and their members, officers, and employees. They do not need to be scheduled or endorsed on the member's liability coverage.

See Section II.J, *Joint powers entities*.

There is an exclusion, however, for claims arising out of joint power fire departments or districts. It is therefore important that coverage is specifically arranged. LMCIT may be able to provide coverage.

H. Fireworks

LMCIT coverage contains an exclusion for any liability arising out of the city's ownership, sponsorship, or operation of fireworks displays. This exclusion applies both if employees or volunteers are setting off fireworks and if the member itself sponsors or contracts for a fireworks display.

LMC information memo, *Fire Department Management and Liability Issues*.

This exclusion does not apply to a fireworks display sponsored and operated by someone else. If the member's only role is regulating, licensing, or providing public safety services, the member's liability coverage will cover liability it incurs because of those activities.

To determine whether LMCIT can provide coverage for fireworks, complete the *City Fireworks Sponsorship Questionnaire Form*.

If the member is involved in fireworks as an operator or as a sponsor, it won't have liability coverage for any damages arising out of the display unless it secures coverage. In some circumstances LMCIT can delete the exclusion and provide liability coverage for a fireworks display.

RELEVANT LINKS:

Minn. Stat. § 624.22.

State Fire Marshal.

Regardless of whether the member contracts with someone else or operates on its own, every display must be supervised by an operator who has been certified by the State Fire Marshal. State law also requires any display meet safety guidelines developed by the State Fire Marshal. If someone else operates the display, which is the preferred loss control approach, they must apply for a display permit. Before granting the permit, the fire chief must ensure the applicant is properly certified and that the display will meet the applicable safety requirements and guidelines.

The member should also ensure the contractor has adequate insurance limits and lists the member as an additional insured under the contractor's insurance. By doing the latter, LMCIT can delete the fireworks exclusion from the member's coverage for a small cost. The member's liability coverage would then apply as excess over the contractor's coverage. This would give the member additional protection in case of a very large claim.

State Fire Marshal.

To determine whether LMCIT can provide coverage for a fireworks display, complete the *City Fireworks Sponsorship Questionnaire Form*.

Unfortunately, it's not always possible for members to hire a private contractor to handle a fireworks display. Sometimes the only feasible option is for the member to put on the display itself, using staff and volunteers. In this situation, LMCIT can, by endorsement, provide the needed liability coverage provided the member has adequately trained staff, a safe location for the display, and meets the State Fire Marshal's requirements for operator certification and fireworks display safety.

I. Independent contractors

Independent contractors are not covered parties under a member's liability coverage. The only exceptions are independent contractors acting in the administrative capacity of medical director or medical advisor to the member's ambulance service, and independent contractors serving as a member of, or representing the city as a member of a committee, subcommittee, board, or commission.

Members need to be concerned about a contractor's liability coverage. Members should ensure every contractor has liability insurance, which is typically in the form of a CGL policy and attempt to be named as an additional insured on the contractor's policy.

LMCIT Contract Review Service.

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If certain types of law enforcement contracts and some other types of non-professional service contracts are arranged in a manner that adequately reduces the member's liability exposure, members can potentially reduce their municipal liability coverage premium. Because of this, members should carefully review all contracts and requests for additional insureds with legal counsel and through LMCIT's Contract Review Service.

RELEVANT LINKS:

J. Joint powers entities

A joint powers entity is not a covered party on a member's liability coverage unless special arrangements have been made. Members must ensure any joint powers entity in which they participate has liability coverage. If not, it can be left with a coverage gap if sued because of something the joint powers board did or if a personal injury or property damage arises from the activities of the joint powers entity. LMCIT makes available two ways in which coverage can be provided for a joint powers entity and its members.

1. Definition

Minn. Stat. § 471.59.

A joint powers entity is an operating entity created by two or more governmental units entering into an agreement as provided by statute for the joint exercise of governmental powers. The agreement is deemed to create a joint powers entity if it establishes a board with the effective power to do any of the following, regardless of what the specific consent of the constituent governmental units may also require:

- To receive and expend funds.
- To enter contracts.
- To hire employees.
- To purchase or otherwise acquire and hold real or personal property.
- To sue or be sued.

LMCIT Contract Review Service.

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In evaluating whether a joint powers agreement creates a joint powers entity, it is important to review what the agreement does, not just what it is called. For example, most mutual aid agreements simply say that each party will agree to provide specified assistance to the other under specified circumstances. This situation does not usually involve a joint managing board with the kinds of powers to enter contracts, hire employees, and so on. Thus, it would not be considered a joint powers entity for coverage purposes.

In situations that involve a pure mutual aid agreement or other type of agreement that does not create a joint powers entity, the member does not need to take any special action to have coverage for liability claims arising out of activities under these kinds of agreements. The member's liability coverage will cover claims arising from activities pursuant to that agreement.

2. Obtaining coverage

There are two ways in which LMCIT can provide coverage for a joint powers entity and its members.

RELEVANT LINKS:

- The usual practice is for LMCIT to issue a separate liability coverage document to the joint powers entity. Covered parties include the entity itself; its officers and employees; the political subdivisions who are members of the joint powers entity; and the officers and employees of those political subdivisions. The idea is to put all the liability coverage for the entity's activities in one place so that everyone who might be held liable because of the entity's activities is covered in the same place.
- The second less common option is to add the coverage for the joint entity to one of the parties' coverages. This might make sense, for example, if the relationship between the parties is such that one controls the joint entity's activities and decision making. If the member prefers, LMCIT can provide the coverage this way by naming the joint powers entity as a covered party on one of the constituent's agreement. However, it's important to understand that if only one party is assuming the coverage for the joint powers entity, any claims related to the joint powers' activities will affect the one party's loss experience, deductibles, and premium.

It would not make sense to add the joint entity to *both* parties' coverages. That would result in duplicate coverage and create the potential for the kind of conflicts among defendants that members of a joint powers entity should try to avoid.

In those cases when governmental entities in other states are acting on behalf of a joint powers entity who is an LMCIT member, the out-of-state entity will be considered a covered party by LMCIT only if allowed by pooling or insurance laws of the other state.

3. Coverage limits

Minn. Stat. § 471.59.

Minnesota statute defines liability for joint powers entities. It states a governmental unit is liable for the acts or omissions of another governmental unit in a joint venture or joint enterprise only if it has so agreed in writing and that any governmental units operating together under the Joint Powers Act are a single governmental unit.

This means the risk of liability for the activities of a joint powers entity is no greater than the risk of liability for a single political subdivision acting alone. It is covered by the tort caps, just like a municipality. A municipality, however, will still be separately liable for its own independent acts or omissions that are not related to the actions of the joint powers entity.

Minn. Stat. § 466.04.

There is still, though, a risk of liability to the joint powers entity above the tort caps because some types of claims are not governed by the statutory liability limits, such as a federal civil rights claim. For this reason, LMCIT's liability coverage provides a higher limit of $2 million per occurrence for both a joint powers entity and an individual member.

See Section I.D, *Coverage limits* and Section I.D.3, *Purchasing higher liability limits.*

RELEVANT LINKS:

There could still be liability risk above this limit, which is why it's important to consider carrying LMCIT's excess liability coverage.

4. Overlooked joint powers entities

If a joint powers entity is inadvertently overlooked for purposes of liability coverage, LMCIT makes available a limited amount of retroactive coverage issued to any joint powers entity of which the party is an LMCIT member, and which does not already have coverage in its own name. This coverage carries the same retroactive date and the same inception date as the member's own coverage. It will then protect the joint powers entity, its member political subdivisions, and their respective officers and employees for claims arising from the joint entity's activities, including claims that have already been made at the time the coverage is issued.

There are two important limitations on the retroactive coverage.

- It includes a $200,000 annual aggregate limit, including defense costs.
- The premium for the retroactive coverage is higher than LMCIT's standard rates for many joint powers exposures.

See Section I.D, *Coverage limits.*

K. Land use and special risk litigation

See LMCIT's land use services to learn more about risk management programs available to members.

LMCIT has created a specialized approach to cover litigation relating to a member's land use regulation decisions, development and redevelopment activities, franchising, city enterprise operations, or debt obligations, which can be a significant financial burden.

Compared to conventional liability insurance, a key difference of LMCIT coverage is that litigation relating to these types of special litigation risks is covered regardless of whether the litigation includes a claim for damages.

1. Coverage terms

LMCIT provides coverage for five broad classes of land use and special risk litigation.

- *Land use regulation.* Any litigation relating to a member's regulation of the use of land or real property or the application or interpretation of a land use, zoning, subdivision, or similar ordinance or regulation.
- *Development.* Any litigation relating to a member's participation in or financing of any housing, development, or redevelopment project.
- *Franchising.* Any litigation relating to the granting, refusal, interpretation, or enforcement of any franchise, ordinance, permit, license, or other mechanism through which a member authorizes or regulates parties other than the member, regarding the provision of telecommunications, electricity, gas, heat, sewage treatment or refuse collection within the member's geographical limits.

RELEVANT LINKS:

- *Enterprise operations.* Any litigation relating to a member's authority to engage in enterprise operations, which is any arrangement under which the member offers goods or services for a fee, such as utilities, telecommunications services, or similar things.
- *City debt obligations.* Any litigation relating to bonds, notes, financing certificates, lease-purchase agreements, or other similar debt instruments or financial obligations proposed, guaranteed, approved, issued, or entered by the member.

Under the land use and special risk litigation coverage, the following types of litigation are excluded:

- *Physical takings*. Litigation that seeks only compensation or other relief for an actual or alleged physical occupation, invasion, or use of property by the member.
- *Special assessments*. Litigation that seeks only reduction or invalidation of a special assessment.
- *Negligent inspection*. Litigation that seeks only compensation for damages based on the member's actual or alleged negligent inspection or enforcement of the state building code or the state plumbing, electrical, fire, or similar state codes.
- *Contractual obligations*. Litigation that seeks only amounts owed pursuant to the explicit terms of any contractual obligation, including but not limited to any of the member's debt obligations.
- *Ordinary land use enforcement*. Litigation which was initiated by the member to enforce a land use regulation, and which does not involve a challenge to the constitutionality or interpretation of the regulation.
- *Criminal prosecution*. Criminal prosecutions by the member.
- *Other covered parties*. Litigation brought by LMCIT or the member against any other covered party.
- *City bankruptcy*. Litigation that arises from or is related to the actual, pending, or threatened bankruptcy of the member.
- *Pollution*. Litigation that makes only a pollution claim.
- *Unaffected property*. Litigation brought by an LMCIT member against a regulatory entity when that member's own property is not affected.

The land use and special risk litigation coverage applies to the following types of litigation costs:

- Costs for legal counsel selected jointly by the member and LMCIT to represent the member.
- Necessary legal fees for counsel to represent the member which the member incurs prior to reporting the litigation to LMCIT (fees are covered at 50 percent).
- Necessary litigation expenses other than legal fees.

RELEVANT LINKS:

- Most damages the member is required to pay.
- Supplementary payments, including up to $200,000 of statutory attorney's fees.

Most money damages that might be awarded against the member are covered as well. This specifically includes two types of damages frequently excluded under conventional liability insurance policies:

- Awards of attorney's fees in federal civil rights or state human rights actions.
- "Temporary taking" damages; inverse condemnation damages awarded for the claimant's loss of use of property prior to the time a land use regulation has been ruled by a court to be unconstitutional as a "taking" of property.

The following types of monetary damages that might be awarded against the member are not covered:

- Exemplary or punitive damages or attorney's fees awarded against a member officer or employee, unless they were acting within their duties and not guilty of malfeasance, willful neglect of duty, or bad faith.
- Fines or penalties.
- The cost of complying with an injunction or similar order.
- Repayment of any taxes, assessments, fees, or other charges the member wrongfully collected, or any interest on that repayment.
- Amounts paid for the permanent acquisition of property or property rights, or for the right to permanently enforce a land use regulation or restriction.
- Amounts owed pursuant to the explicit terms of any contractual obligation, including but not limited to a member's debt obligations.
- With respect to any litigation relating to a member's debt obligations, any profit, advantage, or remuneration to which the covered party was not legally entitled.

2. Coverage limits, co-pays, and deductibles

See Section I.D, *Coverage limits*.

Coverage for land use litigation costs is based on a sliding scale (for litigation between members, the coverage pays only one-half of the percentages described below, subject to a $500,000 maximum):

- 85 percent of first $250,000.
- 60 percent of amounts above $250,000.
- 50 percent of necessary legal fees members incur prior to reporting litigation to LMCIT.
- $1 million annual aggregate limit.

If the member's liability coverage is written with a deductible, the deductible is applied to the percentage of the costs that would otherwise be paid by LMCIT. The member's co-pay amount, or the percentages of litigation costs and damages for which the member is responsible, does not count toward satisfying the member's deductible. In calculating whether the aggregate limit has been met, co-payments are not included, but deductible obligations are.

3. Litigation procedures

Coverage for land use and special risk litigation is triggered when the litigation is first filed or served on the member. Litigation counsel is selected by agreement between the member and LMCIT. Decisions on settlement and strategy are also made by agreement, in consultation with the attorney the member and LMCIT have agreed to retain.

a. When to report litigation

Coverage is triggered when the litigation is first filed or served on the member. Members should report the litigation to LMCIT immediately upon filing or being served with the summons and complaint that formally commences the litigation.

If the member is the plaintiff, the matter should be reported to LMCIT before the litigation is commenced, or as soon as the member becomes aware its ordinance's constitutionality or interpretation is being challenged. Litigation must be reported to LMCIT no later than one year after the litigation commences for coverage to apply.

Even if there is only the *likelihood* of litigation, LMCIT encourages members to report it. While general legal advice from the member's attorney is not normally considered part of litigation costs, it is possible the member could incur some litigation-related costs in anticipation of the litigation. If the member incurs litigation costs before reporting the actual or anticipated litigation, those costs will be reimbursed at 50 percent.

b. Selection of counsel

Litigation counsel is selected by agreement between the member and LMCIT. If in some unusual circumstance an agreement cannot be met, LMCIT will give the member a list of five qualified attorneys who are experienced in that type of litigation. The member then selects any of the five.

Except in very unusual circumstances, the member's own attorney will not be appointed to represent it in the covered litigation. LMCIT takes this approach because the attorney has often been intimately involved in providing legal advice about how to handle the situation.

RELEVANT LINKS:

If the attorney was selected to represent the member in the litigation, the attorney could become involved in having to defend their own recommendations, and to some degree the member might lose the benefit of an independent, detached evaluation of the strengths and weaknesses of the case.

c. Litigation management and strategy

Decisions on settlement and strategy are made by agreement between the member and LMCIT, in consultation with the attorney the member and LMCIT have agreed to retain. Neither LMCIT nor the member has the authority to agree to a settlement without the other's consent.

This collaborative decision-making process reflects the nature of this type of litigation. Unlike the tort claims that conventional insurance policies are designed to cover, the issues in this kind of litigation are often not just a matter of whether and how much money the member owes. The real issues at stake may be questions like whether a permit was issued, or a franchise granted – things which involve local policy issues, and which may require legislative or other official action by the governing body.

At the same time, it's important to keep in mind the funds used to pay LMCIT's share of the costs are really the joint property of all LMCIT members. Other members are entitled to know their funds aren't being wasted on frivolous disputes or in pointlessly prolonged litigation in which the member has little chance of prevailing. Involving both the member and LMCIT in the decision-making process is a means of trying to balance those potentially competing interests. The cost-sharing provisions are incorporated in the coverage for much the same reason.

L. Liquor liability

LMC information memo, *Liquor Licensing and Regulation*.

When alcohol is sold, there should be liquor liability coverage in place. The greatest possibilities for liability are:

- Sales to an obviously intoxicated person.
- After-hours sales.
- Sales to minors.
- Furnishing alcohol to minors.
- Negligence if a member or group did not provide adequate maintenance, supervision, or security when alcohol is used.

The same concepts apply for sales of low potency cannabinoid products.

LMCIT's municipal liability coverage provides coverage for premises-type claims (e.g., slips and falls), but it specifically excludes claims for the illegal sale of alcohol and cannabis.

RELEVANT LINKS:

Coverage can be provided by LMCIT, however, as an option to LMCIT members. The coverage applies to the sale of liquor, beer, wine, and low potency cannabinoid products.

1. LMCIT coverage for liquor liability

Download and complete the LMCIT Application for Liquor Liability and return it to your LMCIT underwriter (instructions are included in the application).

Optional coverage can be provided by LMCIT for member-related liquor liability in a standalone coverage agreement. The coverage is available for off-sale municipal liquor stores, on-sale municipal liquor stores, and special event liquor or beer sales by an organization that is an instrumentality of a member entity, including members that do not operate a municipal liquor store.

Effective November 15, 2023, LMCIT broadened the liquor liability coverage, so it applies in the same manner for low potency cannabinoid products as it does for illegal liquor sales. If the optional coverage isn't in place, LMCIT's municipal liability coverage otherwise contains an exclusion for damages for which the member may be liable by reason of the Minnesota Civil Damages Act (M.S. §340A.801-340A.802), or any other law governing liability for illegal sales of alcoholic beverages, as well as damages for which the covered party may be liable by reason of M.S.§ 342.81, or any other law governing liability for illegal sales of cannabis.

See Section II.B, Cannabis.

Minn. Stat. § 340A.801 and Minn. Stat. § 340A.802.

Minn. Stat. § 342.81.

a. Eligibility

Find a pre-approved vendor in LMCIT's brochure: *Alcohol Awareness Training*.

Members are required to demonstrate annual server training has been completed as a condition of coverage. The training must be obtained by a training vendor pre-approved by LMCIT.

b. Coverage limits and deductibles

Members can choose limits of either $500,000 per occurrence / $500,000 annual aggregate or $1 million per occurrence / $1 million annual aggregate. Higher limits can also be provided through LMCIT's excess liability coverage.

See Section I.D.3, Purchasing higher liability limits.

For cities that carry LMCIT's excess liability coverage, the excess coverage does not automatically apply to liquor liability. The excess coverage can on request be endorsed to apply to liquor liability for an additional charge.

c. Coverage terms

LMCIT's liquor liability coverage provides coverage for the liquor liability exposure. Coverage is on an occurrence basis. The member and the member's officers, employees, and volunteers are covered parties.

Each premise at which liquor sales are conducted must be specifically scheduled for coverage to apply.

RELEVANT LINKS:

Similarly, the coverage will not apply to any liquor, beer, or wine sales at any member-sponsored special event unless that event has been specifically scheduled. This includes both sales by an organization such as a fire relief association under a temporary license or sales by the municipal liquor store at a temporary off-premises location.

Rates are based on the gross receipts of the municipal liquor store or licensee. There is a simple 10 percent debit that applies if the member has had a liquor liability claim within the past 5 years.

If the renewal date of the member's municipal liability coverage is different from the inception date of the liquor liability coverage, the initial liquor liability coverage can be issued for a short term to coordinate the renewal dates.

Effective November 15, 2023, LMCIT broadened the liquor liability coverage, so that it applies in the same manner for low potency cannabinoid products, as it does for illegal liquor sales. LMCIT coverage does not apply for sales of products other than low potency cannabinoid products. The types of products for which the LMCIT liquor liability coverage now applies fall within the requirements specified in Minn. Stat. § 151.72, subd. 4, 5, and 5a.

Minn. Stat. § 151.72, subd. 4, 5, and 5a.

d. Selecting limits

There's no infallible rule for deciding how much coverage is adequate for a municipal liquor store. No matter what coverage limit is chosen, it's possible to imagine a situation in which it won't be enough.

Ultimately the city council needs to exercise its own judgment in deciding how much coverage to carry. LMCIT recommends any member with a municipal liquor store carry limits of at least $500,000, but members should strongly consider higher limits of $1 million or more.

While LMCIT can't give a definite answer for how much is enough, members should note that if it has a municipal liquor store, it must meet the same statutory financial responsibility requirements as a private liquor licensee. In general, the statute requires liquor sellers to have the following liquor liability insurance limits. LMCIT's liquor liability coverage meets these requirements.

Minn. Stat. § 340A.603.

Minn. Stat. § 340A.409.

- $50,000 of coverage because of bodily injury to any one person in any one occurrence;
- $100,000 because of bodily injury to two or more persons in any one occurrence;
- $10,000 because of injury to or destruction of property of others in any one occurrence;
- $50,000 for loss of means of support of any one person in any one occurrence;

RELEVANT LINKS:

- $100,000 for loss of means of support of two or more persons in any one occurrence;
- $50,000 for other pecuniary loss of any one person in any one occurrence; and
- $100,000 for other pecuniary loss of two or more persons in any one occurrence.

If the insurance policy includes an annual aggregate policy limit, that annual limit must be at least $300,000. The statutes do allow a liquor seller to post a surety bond with the same limits or to self-insure by depositing at least $100,000 with the state treasurer, but these options are seldom used.

The limits noted above are the minimum limits a member must have, but they are not the limits on how much the member can be sued or held liable for. If a member's liability on a liquor liability claim exceeds its coverage, for example, the member is responsible for the excess.

2. Coverage for other groups or individuals' liquor liability

See Section II.U, *Special events*.

Members should consider transferring risk when beer and liquor sales take place at a special event where the member does not sponsor it, but the event is held on its property, and when the member contracts with an alcohol vendor.

a. Require liquor liability coverage for special events not sponsored by the member

Minn. Stat. § 340A.409.

Minnesota statutes say liquor liability insurance requirements do not apply to licensees who establish by affidavit any one of the following. LMCIT, however, recommends members still strongly consider requiring the licensee obtain coverage.

- They are on-sale 3.2 percent malt liquor licensees with sales of less than $25,000 in the preceding year.
- They are off-sale 3.2 percent malt liquor licensees with sales of less than $50,000 in the preceding year.
- They are on-sale wine licensees with sales of less than $25,000 in the preceding year.
- They are temporary wine licensees.
- They are wholesalers who donate to an organization for a wine tasting conducted under Minn. Stat. § 340A.418 or 340A.419.

Minn. Stat. § 340A.418 and Minn. Stat. § 340A.419.

When thinking about the insurance requirement for liquor or beer sales and whether to require it if an event is held on member property, the member will want to consider:

RELEVANT LINKS:

- As a matter of public policy, it is arguably desirable to have coverage available to make sure an injured party is compensated if an illegal beer or wine sale caused the injury.
- It's not just the organization running the beer garden, for example, that can be sued. The individuals who tend the bar and sell the beer could also be sued as individuals.

Private individuals holding a special event on member property can obtain general liability and liquor liability coverage through GatherGuard.

- In addition to making sure liability coverage is in effect, the member should make sure the coverage applies to the premises location. Most companies require a vendor to notify them if alcohol, for example, will be sold somewhere other than its normal place of operation. The member should also have general liability coverage itself and require groups using member facilities to have general liability coverage. If an organized group does not have liability coverage, there is a greater risk to the member of being the target of a negligent claim or lawsuit.

b. Transfer risk if the member contracts with an alcohol vendor

If a member contracts with an alcohol vendor, the liability should rest with the vendor. The agreement should have a hold harmless and indemnification provision, which ensures the defense and payment by the vendor for any claim against the member related to the sale of alcohol.

If a community group serves alcohol in a social host setting, cities may require a representative to sign a hold harmless and indemnification provision. In an organized group, such as a nonprofit corporation, a representative can bind the group for the indemnification. If it is not an organized group but a group such as a wedding reception or snowmobile club, a representative cannot bind the individuals in the group to a hold harmless provision if an individual was injured.

LMCIT Contract Review Service.
Chris Smith, LMCIT Risk Management Attorney: csmith@lmc.org or 651.281.1269.

Members should talk to their attorney when developing written agreements and contracts. LMCIT will review defense and indemnification provisions at no additional charge to help protect the member's interests.

If a member hires an alcohol vendor or allows a vendor to sell alcohol on the member's city premises, another protection would be to have the member named as an additional insured on the vendor's liquor liability insurance policy. The member should also consider being named as an additional insured on a general liability insurance policy of a group serving alcohol on their premises. This means the member would be covered automatically under the other party's policy and would not depend upon any interpretation of language in any agreement.

RELEVANT LINKS:

If the member requires this, it should ask for a copy of the certificate of insurance showing the member was named as an additional insured. There have been cases where a party agreed to do this but never contacted its insurance company.

Generally, members do not require the additional insured status if their only contact with the alcohol sales is that they license the seller. The member's risk is remote in that type of situation.

M. Medical payments

See Section II.V, *Volunteers*.

LMCIT provides premises medical coverage to many members, which provides a relatively small amount of coverage for medical expenses to anyone who may be injured by a condition on member-owned property. Members have the option, however, to delete the coverage.

This coverage is provided on a no-fault basis, which means the injured person receives the benefit without having to show the injury resulted from the member's negligence. The coverage limits are $2,500 per person and $10,000 per occurrence. Essentially it is meant to cover medical costs an individual might otherwise be responsible for under the deductible on their health coverage.

There may be some questions around whether there is a valid purpose for members to pay these funds in situations when the member is not legally liable. Others argue the payments provide a simple and inexpensive way to possibly head off what might turn into a more expensive claim. LMCIT therefore gives the member the option to delete this coverage if it's not wanted.

N. Open meeting law and bankruptcy lawsuits

Minn. Stat. § 13D.

Coverage for open meeting law (OML) and bankruptcy lawsuits is automatically issued to any member that has LMCIT's liability coverage. It is called defense cost reimbursement coverage and provides defense protection to member officials that may be accused of violating the OML or to member officials involved in a member bankruptcy lawsuit.

The reason LMCIT provides this coverage is because it recognizes many OML violations are inadvertent, and some may even occur on an attorney's advice. An accusation of an OML violation can also force a member official to expend significant sums on defense regardless of the merits of the allegation.

RELEVANT LINKS:

Minn. Stat. § 13D.06.

Defense costs are often the most significant financial consequence of OML lawsuits. The statutory penalty of $300 might be relatively minor, but defense costs can easily run to thousands of dollars, and those costs are incurred whether the official is ultimately found to have violated the law. Sometimes, too, the threat of litigation could be used as a tactic to intimidate or coerce councilmembers in some cases. LMCIT assumes most councilmembers try in good faith to comply with the law, but sometimes even best faith efforts are not enough to head off an OML lawsuit.

See Section I.C.1, *Liability not covered*.

Regarding coverage for bankruptcy lawsuits, claims which arise from or relate to a member's bankruptcy is excluded from LMCIT's liability coverage. In the unlikely event a member declared bankruptcy, the exclusion would avoid a situation where the member's creditors turn their LMCIT liability coverage into an additional asset in the bankruptcy.

At the same time, though, LMCIT wants to make sure individual officials have some protection in these circumstances. Therefore, the defense cost reimbursement coverage provides defense costs to member officials for these types of claims. Coverage is excluded, though, for independent contractors' activities related to a member's bankruptcy and those who are representing the member as a representative of a committee, board, or commission.

1. Covered parties

Member's employees and elected or appointed officials are covered. Excluded from the coverage, unless specifically named in the coverage document, are officials or employees of a utilities commission, port authority, HRA, EDA, redevelopment authority, municipal power or gas agency, hospital or nursing home board, airport commission, or joint powers board.

2. Coverage limits and terms

The most LMCIT will reimburse any one covered individual for defense costs commenced during the coverage term is $50,000, regardless of the number of suits or the number of actual alleged violations. It covers defense costs incurred by the individual in defending an OML lawsuit and the costs against an individual that arises from the actual, pending, or threatened bankruptcy of the member entity.

There is also an aggregate limit of $250,000. This is the most LMCIT will pay for defense costs for all lawsuits commenced within the coverage term.

The coverage protects an individual who is accused of attending not only an illegal meeting of the council but the meeting of some other boards or commission as well. For example, suppose a councilmember is accused of violating the OML at a meeting of a joint powers board for which they serve on. The OML coverage would apply to that charge, but it would not pay for defending the other members of the board.

RELEVANT LINKS:

Unless the joint powers board has OML coverage itself, the other members would only be covered if their own cities have OML defense coverage.

This coverage will not cover any legal costs the member might incur if the member itself were somehow made party to the OML or bankruptcy litigation; unless, of course, it was part of a suit that included a covered claim for damages. It will also not reimburse any fine or penalty for violating the OML or any award that orders the individuals to pay for the opposing party's attorney's fees in an OML lawsuit.

The coverage is triggered when an OML or bankruptcy lawsuit is served on the member official. If a lawsuit is filed during the term of the agreement, the member official needs to immediately notify LMCIT of the litigation.

The defense cost reimbursement coverage does not pay legal costs on the member official's behalf. Instead, LMCIT will reimburse the official for defense costs to a maximum of $50,000 after the official has incurred those costs. The official remains responsible for paying the defense attorney, as well as any costs beyond the $50,000 limit.

The official retains control of the litigation and decides, among other things, what attorney to hire, whether to settle or compromise the litigation, and whether to appeal.

O. Police

LMCIT's liability coverage contains no general exclusions for claims arising out of law enforcement activities, but there are three specific situations where coverage is excluded.

See Section II.J, *Joint powers entities*.
See Section II.E, *Employees' activities in outside organizations* and LMC information memo, *Police Department Management and Liability Issues,* Section IV.B, *Off-duty employment (moonlighting)*.

- There is an exclusion for damages arising out of detention facilities intended and regularly used for confinement of persons for periods longer than 30 days. Contact LMCIT if involved in this type of operation.
- If the member is involved in a joint powers police or task force operation, it's important coverage is specifically addressed for that operation. LMCIT's liability coverage contains an exclusion for claims arising out of the activities of a joint powers entity, but coverage can be provided.
- An officer acting outside of their capacity as an employee is not a covered party for purposes of LMCIT's liability coverage.

P. Pollution

There is a broad exclusion in LMCIT's liability coverage for any pollution claims, but there are a few limited exceptions.

RELEVANT LINKS:

A pollution claim includes any claims for damages arising out of the actual, alleged, or threatened existence, discharge, dispersal, seepage, migration, release or escape of pollutants. Pollutants are defined as any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.

See Section I.D.1, *LMCIT primary liability limits*.

There is a narrow exception to the pollution exclusion for "limited contamination liability claims." which include the following:

- Pesticide or herbicide application operations.
- The accidental rupture, backup, or overflow of sewer or water supply systems.
- Excavation or dredging claims.
- A release or escape of pollutants which begins and ends within 72 hours.
- Lead or asbestos, mold, or organic pathogen claims
- Heat, smoke, or fumes from controlled burn which becomes uncontrollable or breaks out from where it was intended to be.

A few additional notes on the "limited contamination liability claims" exception to the broad pollution exclusion:

- Claims involving PFAS (perfluoroalkyl or polyfluoroalkyl substances) are not within the "limited contamination liability claims" exception.
- Generally, the "limited contamination liability claims" exception does not include the escape or release of pollutants, even if sudden and accidental, at or from at or from a landfill, dump, or other site used for handling, storing, disposing, processing, or treating, pollutants.
- There is a $3 million annual aggregate limit for "limited contamination liability claims."

Q. Public official's liability

There is no general exclusion in LMCIT's liability coverage for acts or errors and omissions of public officials.

R. Separate city boards and commissions

Minn. Stat. § 412.111.

Statutes and some charters allow cities to create independent administrative boards to manage certain city operations. Utility commissions and hospital boards are common examples. Other statutes allow cities to create separate public corporations for certain purposes, such as a port authority, HRA, and EDA.

RELEVANT LINKS:

The statutes generally give these boards and authorities full power to manage the activities for which they are responsible, including the authority to purchase the appropriate liability, property, and other coverages needed for those activities.

If the city has one or more of the following, it needs to ensure there is adequate coverage for the board or commission's activities:

- Gas, electrical, or steam utilities commission.
- Port authority, HRA, EDA, municipal redevelopment authority, or similar agency.
- Municipal power or gas agency.
- Airport board or commission.
- Hospital, nursing home, or medical clinic board or commission.

Different types of boards and commissions pose different kinds of coverage issues. Here are some things to consider.

1. Port authority, HRA, or EDA

An HRA, EDA, and port authority are legally separate political subdivisions. These are not covered automatically under the city's liability coverage. This is true even if councilmembers are the board of the political subdivision.

Unless the city has specifically indicated these entities are to be covered, a claim against one of these political subdivisions would not be covered nor would claims against the city which arise from the activities of these entities be covered.

LMCIT offers two ways to provide coverage for the activities of an HRA, EDA, or port authority. One is having the EDA, HRA, or port authority named as an additional covered party on the city's coverage. The other is to have separate coverage issued to the EDA, HRA, or port authority.

a. Additional covered party on city's coverage

Minn. Stat. § 466.04.

Cities choosing this approach should keep in mind that since these entities are separate political subdivisions, theoretically a claimant could collect up to the $1.5 million statutory liability limit from both the city and the EDA, HRA, or port authority if both were involved in a single claim. Since LMCIT's liability coverage limits are $2 million per occurrence, regardless of the number of defendants, there is some added protection but there is a possibility the combined liability of the city and the entity could exceed the limit. One way to address this risk is to obtain LMCIT's excess liability coverage.

See Section I.D.3, *Purchasing higher liability limits.*

b. Separate coverage

Under this option, LMCIT will automatically name the city as a covered party on the entity's policy, and the city's coverage will be endorsed to make the city's coverage apply as excess over the entity's coverage.

This effectively makes the entity's coverage primary for both the city and the entity while at the same time making the city's coverage available as excess in case the combined liability exceeds the limits of the entity's coverage.

If an HRA, EDA, or port authority decides to purchase coverage from a private insurer, the city and the entity need to review a few questions to assure adequate coverage.

- What type of coverage is being provided to the city and the board?
- Is public officials' errors and omissions coverage included?
- Does it cover employment-related liability?
- Does it cover defense costs on litigation related to land use regulation or development which don't involve damage claims?
- Is the city named as an additional insured on the entity's board or commission policy?

LMCIT's liability coverage is designed to provide as much coverage as possible under one covenant, and to effectively coordinate coverages to eliminate most of the potential gaps in coverage.

If the city needs to address a coverage gap that's left by an HRA, EDA, or port authority's private insurance, contact your agent/broker or LMCIT underwriter.

2. Gas, electrical, or steam utility commission

Gas, electrical, or steam utility commissions or agencies are not covered automatically under the city's liability coverage. This is true even if the councilmembers also serve on the commission. In most cases LMCIT can provide the needed coverage for these entities' activities either by adding the board or authority onto the city's policy or by issuing separate coverage to the board or authority.

a. Additional covered party on city's coverage

A utility commission is normally not a separate political subdivision or separate corporation. Thus, there normally is not the same problem with diluting limits that arises if a city HRA, EDA or port authority is added as a covered party under the city's LMCIT coverage.

RELEVANT LINKS:

b. Separate coverage

If separate LMCIT coverage is issued to a utility commission, that covenant responds to claims arising out of the utility's operations, regardless of whether the claim names the city, the commission, or any city or commission officers or employees as defendants.

If the utility commission chooses to purchase coverage separately from a private insurer, the city and the utility commission need to carefully review the arrangements to assure adequate coverage. LMCIT does not automatically provide coverage to the city for these activities. If the utility commission purchases separate private insurance, the city can't assume the city's liability coverage will protect the city and fill any gaps the utility commission's insurance leaves. Here are some important questions to consider about separate private insurance.

- What type of coverage is being provided?
- Is public officials' errors and omissions coverage included?
- Does it cover employment-related liability?
- Does it cover claims for failure to supply utilities?
- Does the carrier understand that cities and utility commissions aren't two separate legal entities?

If the private carrier won't agree to cover everyone who might be the target of a claim arising from the utility commission's activities, or if the utility commission's private insurance leaves other gaps, contact LMCIT.

3. Airport board or commission

The city's liability coverage does not cover claims for bodily injury, property damage, or personal injury arising from airport operations. However, for most city airports, the city's liability coverage can be endorsed to cover this airport liability exposure. The cost is typically comparable to purchasing airport liability coverage from a private specialty insurer.

See Section II.A, *Airports*.

The city's liability coverage does cover other types of liability claims that might arise from airport operations including claims other than bodily injury, property damage, or personal injury. This is true whether the airport is managed by a separate board or directly by the council. If the city decides to cover these kinds of airport liability exposures through LMCIT, members of the airport board or commission will be automatically covered. The airport board will be covered for claims related to errors and omissions and employment-related liability; these boards do not have to be specially listed as a covered party.

See Section II.J, *Joint powers entities.*

Airports are often created as a joint powers entity which the city runs in cooperation with one or more other cities and/or counties.

RELEVANT LINKS:

The city's liability coverage will not automatically cover claims – either bodily injury, property damage, personal injury, or errors and omissions claims - arising from the operations of a joint powers airport. However, a joint powers board or entity with at least one city that is a member of LMCIT is eligible to purchase liability coverage through LMCIT, including LMCIT's airport liability coverage.

If the city chooses to purchase airport liability coverage from a private specialty carrier, it's important to review that insurance coverage carefully.

4. Hospital, nursing home, or medical clinic board or commission

Specialty liability coverage is needed for city hospital, nursing home, or clinic operations, since LMCIT does not provide or offer the professional malpractice coverages that hospitals, nursing homes, and clinics need. The city's liability coverage excludes coverage for bodily injury, property damage, or personal injury arising out of hospital, nursing home or clinic operations. The professional liability of physicians, nurses, pharmacists, and dentists is also excluded.

The city's liability coverage does, however, cover other types of liability claims that might arise from city hospital, nursing home, or clinic operations, including employment-related liability claims. Coverage applies even if the hospital, nursing home, or clinic is managed by a separate board or directly by the council.

If there is a separate managing board, the members of that city board are automatically covered parties under the city's liability coverage. These boards do not need to be specifically named as covered parties.

5. Municipal power or gas agency

Minn. Stat. § 453.52.

The statutes provide that a municipal power agency or municipal gas agency is legally a separate political subdivision and municipal corporation created by agreement between or among two or more cities. Thus, these organizations have some characteristics both of political subdivisions and of joint powers entities.

Any city that participates in a municipal power or gas agency should make sure the agency has appropriate liability coverage. The city's LMCIT liability coverage does not cover claims arising from the activities of a municipal power or gas agency. As a special purpose political subdivision, a municipal power or gas agency is eligible to become a member of LMCIT and obtain coverage.

RELEVANT LINKS:

S. Sewer backups

Liability coverage for sewer backups is a standard feature of LMCIT's liability coverage. There are no specific exclusions for claims arising out of sewer backups for which a member is negligent in causing. LMCIT offers no-fault sewer backup coverage as an extra cost option to members who want to provide coverage to property owners irrespective of whether the backup was caused by the member's negligence.

See Section II.S.2, *No-fault sewer backup coverage.*

1. Coverage limits and deductibles

A mandatory deductible of $2,500 per occurrence applies to all liability claims for sanitary sewer backups caused by a member's negligence unless the member participates in LMCIT's sanitary sewer incentive. Members using a higher deductible on their liability coverage are not affected by this; members using an aggregate limit are only impacted if the aggregate limit is reached and the maintenance deductible is less than $2,500; and members using LMCIT's no-fault sewer backup coverage automatically meet the criteria to avoid the mandatory minimum deductible.

Sanitary Sewer Incentive.

To qualify for the sanitary sewer backup incentive, members must complete a sanitary sewer system questionnaire and return it to LMCIT. If a member can confirm it meets the criteria, it will not be subject to the higher mandatory deductible. A member may certify they meet the criteria at any time. If qualification occurs midterm, LMCIT will issue an endorsement removing the minimum deductible.

Sanitary Sewer Incentive.

See *LMCIT Sanitary Sewer Backup Incentive Questionnaire.*

2. No-fault sewer backup coverage

As an option, no-fault sewer backup coverage is available for members that meet certain underwriting criteria. The optional coverage comes with an additional charge and will reimburse a property owner for cleanup costs and damages resulting from a member's sewer backup or water main break, irrespective of whether it was caused by the member's negligence.

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

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

RELEVANT LINKS:

The legal basis for this coverage is it helps reduce health hazards by encouraging prompt cleanups. This is clearly a public purpose and in the public interest. Additionally, the law and facts surrounding most sewer backup claims are rarely clear. There's virtually always a way a claimant's attorney can make some type of argument for member liability. Having this coverage in place should help eliminate the need to spend public funds on litigation costs in many of these cases.

Many members may find this coverage option 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.

a. Coverage terms

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

- The sewer backup resulted from a condition in the member's sewer system.
- The sewer backup was not the result of an obstruction or other condition in sewer pipes, lines, or infrastructure which are not part of the member's sewer system, or which are not owned or maintained by the member.
- The water main break damage to property of others was not caused by the member's negligence.
- The sewer backup or water main break was not caused by or related to an excluded incident.
- The date of the occurrence giving rise to the claim for sewer backup or water main damages must be on or after the retroactive date shown on the member's endorsement.

LMC information memo, *National Flood Insurance Program*.

The no-fault coverage will not pay for any damages or expenses which are or would be covered under a National Flood Insurance Program (NFIP) flood insurance policy, whether such insurance is in effect; or for any costs which the property owner has been reimbursed or is eligible to be reimbursed by any homeowners' or other property insurance.

Following are other incidents that are specifically excluded under the no-fault coverage:

- Obstructions or other conditions in sewer pipes or lines which are not part of the member's sewer system, or which are not owned or maintained by the member.
- Any weather-related or other event which has been declared by the President of the United States to be a major disaster pursuant to the Stafford Act.

42 U.S.C. §§ 5121-5206.

RELEVANT LINKS:

- Any interruption in the electric power supply to the member's sewer system or lift station which continues for more than 72 hours.
- Rainfall or precipitation which exceeds 2.0 inches in a 1-hour period; or 2.5 inches in a 3-hour period; or 3.0 inches in a 6-hour period; or 3.5 inches in a 12-hour period; or 4.0 inches in a 24-hour period; or 4.5 inches in a 72-hour period; or 5.5 inches in a 168-hour period.
- Any claims arising directly or indirectly out of unauthorized intrusive codes or programming, such as computer viruses or hacking.

b. Coverage limits

Members can select a limit of $10,000, $25,000, or $40,000 per claimant per year, which applies regardless of the number of occurrences. The selected limit also applies to each building per year. In other words, the most a claimant can recover in a year under the coverage is the selected limit, but if multiple claimants are involved in damage to a single building, the most LMCIT will pay for the building for the year is the selected limit. (A structure or group of structures that is served by a single connection to the member's sewer system is considered a single building.) Additionally:

- LMCIT will not pay more than $250,000 for water main break damage resulting from any single occurrence. All water main breaks which occur during any period of 72 consecutive hours is deemed to result from a single occurrence.
- LMCIT will not pay more than $1,000,000 for sewer backup damage resulting from any single occurrence. All sewer backup damage which occurs during any period of 72 consecutive hours is deemed to result from a single occurrence.
- LMCIT will not pay more than $2,000,000 in total for the coverage term.

Only true no-fault claims are counted toward the limit(s). In other words, claims for damages caused by the member's negligence, for which the member would be legally liable, and for which the member would be covered under LMCIT's standard liability coverage, are not charged against the limit(s) noted above. However, no-fault sewer backup and water main break claims do count toward the $3 million annual aggregate limit for limited contamination claims, as stated in the Municipal Liability Coverage Document.

See Section II.S, *Sewer backups.*

See Section I.D.1, *LMCIT primary liability limits*.

c. Premium costs

The no-fault sewer backup premium charge is based on the limit chosen and on a per sewer connection basis. It also includes an experience-rating component. Members that have incurred no losses under this coverage within a three-year rating period receive a 10 percent credit.

RELEVANT LINKS:

Members that have incurred losses within the rating period at a per-connection frequency that is higher than the LMCIT program average receive a 10 percent debit.

d. Eligibility

To be eligible for the no-fault sewer backup coverage, members must meet these underwriting criteria:

For assistance in developing sewer policies, practices, and schedules, please see the *Sanitary Sewer Toolkit: A Guide for Maintenance Policies and Procedures*.

- The member 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 member's system which have caused backups in the past or are likely to cause backups, the member must have and be implementing a plan to address those problems.
- The member 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 member must have in place an appropriate program to minimize storm water inflow and infiltration.
- The member must have in place a system to maintain records of routine sewer cleaning and maintenance, and of any reported problems and responses.

e. Applying for no-fault sewer backup coverage

Members interested in applying for the no-fault sewer backup coverage should first contact LMCIT. If the member qualifies for coverage, LMCIT will provide a formal quote. If the member decides to purchase the coverage, the governing body must pass a formal resolution making the no-fault sewer backup protection part of the agreement between the member and the sewer customer. Once LMCIT receives a copy of the resolution, coverage can be bound.

LMCIT requires a resolution because the coverage is really a contract between the member and the sewer user. In other words, the basis for the no-fault payments to the property owner would be the contract between the member and the sewer user. 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.

f. Discontinuing no-fault sewer backup coverage

Members need to notify LMCIT if they decide to discontinue coverage. The governing body should also formally rescind the resolution that made the no-fault sewer backup protection part of the agreement between the member and the sewer customer. The member should also notify its sewer users that coverage was discontinued.

RELEVANT LINKS:

See LMC information memo, *Park and Recreation Loss Control Guide* for skate park loss control recommendations.

T. Skate parks

LMCIT's liability coverage automatically applies to claims arising out of skate park operations.

U. Special events

See Section II.L, *Liquor liability*, for more information about member-related liquor liability and individuals and groups that serve or sell alcohol on member property.

See LMC information memo, *Park and Recreation Loss Control Guide,* Section VIII, for more specific loss control recommendations for special events.

LMCIT's liability coverage does not have a general exclusion for special events that are sponsored by the member, but there are exclusions that apply for specific types of events or activities. This section addresses what kinds of activities are and are not covered and which individuals and organizations are and are not covered.

There are a different set of questions to ask when a member allows a private party to hold an event on member property where there is no member involvement. The question becomes whether the member should require private groups to have insurance and whether insurance should only be required from certain groups depending on its criteria.

1. Events sponsored by the member

a. Coverage terms

LMCIT's liability coverage will apply to the member's activities connected with a special event unless that activity is excluded. The most important exclusions to be aware of are:

- Motor vehicle races, stunts, demolition derbies, and so on.
- Motorized amusement rides, such as carnival type rides.
- Rodeos.
- Stunting activities or events that involve a significant risk of serious injury to the participant, performer, or others, such as high-wire acts, base or bungee jumping, skydiving, circus type acts, and acts involving dangerous animals.
- Liquor, beer, and cannabis sales, although LMCIT may be able to provide coverage.
- Fireworks displays, although LMCIT may be able to provide coverage.

See Section II.L, *Liquor liability* and Section II.H, *Fireworks*.

In some cases, LMCIT can provide coverage for exposures related to fireworks displays and liquor, beer, and low potency cannabis sales. For the other excluded activities, there are two basic ways to handle the liability exposure:

RELEVANT LINKS:

- Purchase specialty liability coverage from an insurer who specializes in that type of risk.
- Hire an independent contractor to conduct that operation.

See Section II.I, *Independent contractors*.

When hiring an independent contractor, the member should require the contractor hold the member harmless and indemnify the member for liability arising out of the activity.

The contract should also require the contractor to carry appropriate types and limits of liability coverage, and to name the member as an additional insured on that insurance policy. Using a contractor to run some of these riskier activities has another advantage besides solving the liability coverage question. It also means, hopefully, the member has experienced professionals involved who know how to run these operations safely.

LMCIT Contract Review Service.

Chris Smith, LMCIT Risk Management Attorney: csmith@lmc.org or 651.281.1269.

Members should talk to their attorney when developing written agreements and contracts. LMCIT will review defense and indemnification provisions at no additional charge to help protect the member's interests.

b. Covered parties

For events that are run and sponsored by the member, LMCIT covers not only the member but also the member's officers, employees, and individual volunteers and volunteer organizations acting on behalf of the member. There is also coverage for city boards, commission, and committees, but there are some exceptions.

See Section II.R, *Separate city boards and commissions*.

See Section II.V, *Volunteers*.

If a volunteer organization like the Lion's Club were to provide volunteer assistance to the member in putting on an event that is run and sponsored by the member, LMCIT's coverage would cover both the individuals and the organization for any claims arising out of their activities as volunteers. This assumes, of course, the claim isn't one of the types that are excluded (e.g., a claim arising out of running a demolition derby).

What can get confusing is determining whether an individual volunteer or volunteer organization is acting on behalf of the member. In many cases, an organization like the Lion's Club is really the entity that's in charge of the event. A common approach is for the organization to form a nonprofit corporation whose only function is to operate the event. This kind of organization will obviously rely heavily on volunteers, but these volunteers would not be acting on behalf of the member. Rather, they would presumably be acting on behalf of the organization that is sponsoring, organizing, and operating the event. Since these people are not acting on behalf of the member, LMCIT's coverage would not provide them any protection.

RELEVANT LINKS:

In many cities, of course, those community-minded people who tend to get involved in city government are the same ones who tend to be willing to donate their time to a civic organization putting on a community event. One problem is it can get difficult to determine on whose behalf the individual is acting at any time.

For purposes of coverage, LMCIT must determine whether an event is a member-sponsored event or something else. A resolution declaring the governing body's intent would be one element in making that determination; however, simply saying it doesn't make it so. Other factors in determining coverage include:

- How the decisions relating to the special event are made and by whom.
- How and in whose name contracts are let.
- How the funds are handled. If the money from the event is run through the member's treasury and disbursed by check with the governing body's approval, it looks more like a member-sponsored event. If another group has its own bank account in which it places and expends money, it doesn't really look like a member-sponsored operation.

Even with an event organized and run by a private group, the member will often have some sort of role. For example:

- The group may conduct some activities in a city park or use city streets.
- City police may be involved in traffic or crowd control.
- The city recreation department might be responsible for organizing some recreational activities as part of a festival organized by a community group.

Where the member has this kind of involvement in a privately sponsored event, LMCIT coverage will apply to suits and claims against the member, the member's officers and employees, and the member's volunteers, if those claims arise out of acts on behalf of the member.

GatherGuard Event Liability Insurance provides access to low-cost liability coverage to private groups and individuals wanting to use member property for an event.

LMCIT would not provide any protection for the organization or the individuals responsible for organizing a privately sponsored event, even if those individuals or organizations were sued because of something the member did. If LMCIT ended up covering some member liability which arose out of some negligent action of the private group, LMCIT would likely try to recover those damages from that group and/or the responsible individuals.

c. Planning considerations

See LMC information memo, *Park and Recreation Loss Control Guide*, Section VIII, for more specific loss control recommendations for special events.

It can be very confusing to try and sort out who is and who is not responsible for an event after an injury has occurred or damage has been done. The time to address these questions is in advance. Here are some things to keep in mind when the event is in the planning stage.

RELEVANT LINKS:

(1) Think about who is running the show

GatherGuard Event Liability Insurance provides access to low-cost liability coverage to private groups and individuals wanting to use member property for an event.

If the event is truly a member-sponsored event, it should be run like an event with the member's governing body ultimately in charge. On the other hand, if a private group is going to organize and run the event, make sure they understand how and where the member's liability coverage does and doesn't apply. If they use member facilities, encourage them to obtain liability insurance of their own and to name the member as an additional insured as a condition of using the member's facilities.

(2) Think about hazardous activities

Major examples of hazardous activities include liquor, beer, and cannabis sales; motor vehicle events; rodeos; rides; and fireworks. If any proposed activity seems to involve any kind of hazard, it's always best to speak with LMCIT or the member's insurance agent about liability coverage in advance. Regardless of who is sponsoring the event, ask these key questions:

- Is there adequate liability coverage for the event?
- Does that liability coverage protect everyone who might get sued because of the event?

(3) Contact LMCIT

Kate Connell, Loss Control Field Services Manager kconnell@lmc.org. 651-281-1254.

LMCIT will help the member and its insurance agent try to identify any potential coverage problems. LMCIT's loss control staff can help review plans for the event and offer suggestions for ways to avoid or minimize risks.

LMCIT Contract Review Service.

Chris Smith, LMCIT Risk Management Attorney: csmith@lmc.org or 651.281.1269.

LMCIT's risk management attorney can review draft contracts or permits and offer suggestions on wording indemnification and hold harmless agreements.

2. Events sponsored by private groups

See LMC information memo, *Park and Recreation Loss Control Guide*, Section VIII, for more specific loss control recommendations for special events.

Many members allow groups to use its facilities for a variety of different purposes such as weddings, meetings, and athletic events. There are a few questions to consider when determining whether the member should require private groups to have insurance for their event.

a. Insurance requirements

There are three different ways to handle insurance requirements for private groups using member facilities.

RELEVANT LINKS:

(1) Don't require anyone to have insurance

If the member doesn't require insurance coverage from private groups using its facilities, the member can still have rules and conditions to reduce risks. For example:

See Section II.L, *Liquor liability*.

- Prohibit riskier activities such as the sale of alcohol.
- Require renter to provide maintenance and security during their event.
- Have individuals sign waivers for particularly dangerous activities such as rock climbing.
- Have organizations sign indemnification agreements to shift the liability to them.

LMCIT Contract Review Service.

Chris Smith, LMCIT Risk Management Attorney: csmith@lmc.org or 651.281.1269.

Members should talk to their attorney when developing written agreements and contracts. LMCIT will review defense and indemnification provisions free of charge to help protect the member's interests.

(2) Require all to have insurance

Private individuals holding a special event on member property can obtain general liability and/or liquor liability coverage through GatherGuard.

If all private groups are required to have insurance, the member should be named as an additional insured on the renter's coverage certificate. In addition, the agreement between the private group and the member should defend and indemnify the member for any third-party claims. This is the best way to transfer risks to the private groups and its insurance company.

(3) Require some to have insurance

GatherGuard Event Liability Insurance provides access to low-cost liability coverage for the member's "tenant users".

When the cost to obtain insurance is too burdensome for the private group renting the member's facility, the member can have pre-established criteria as to the types of organizations or events where insurance will be required.

It is important to establish the criteria ahead of time and to treat the organizations fairly and consistently based upon those criteria. If the member doesn't do that, there could be allegations of unequal or discriminatory treatment. Questions to ask when establishing criteria include:

See LMC information memo, *Park and Recreation Loss Control Guide*, Section VIII, for more specific loss control recommendations for special events.

- What type of organization is holding the event? For example, require insurance for public or for-profit organizations.
- What type of event is being held? For example, require insurance for riskier activities such as street fairs, casino shows, or karate meets.
- Is there an admission charge for the event?
- Will children be participating in the event?
- Is the event open or not open to the public?
- How many people are participating in the event? For example, require insurance if there are more than 50 people.

RELEVANT LINKS:

See LMC information memo, *Park and Recreation Loss Control Guide*, Section VIII, for more specific loss control recommendations for special events.

- When will the event be held? For example, require insurance for Friday and Saturday night events.
- What is the length of the event?
- What types of risks are involved? Are there any security issues?
- Are there any risks not covered by the member's liability insurance? For example, rodeos and motor vehicle races are not covered by the member's LMCIT coverage. Require insurance for these types of activities.
- Will there be alcohol at the event? For example, require liquor liability insurance if alcohol will be sold or require general liability insurance if alcohol will be served.
- Are there any vehicles involved? Will parking be an issue?
- Will there be any valuable materials left on member property for an extended period?

3. Coverage limits

See Section II.L, *Liquor liability*.

It is common for members to require one set amount of general liability insurance for all special events, such as $1 million. Regarding liquor liability, LMCIT recommends a minimum of $500,000, but $1 million is even better. Members can vary the amount required depending upon the type of organization, event, or the criteria established.

Private individuals holding a special event on member property can obtain general liability and/or liquor liability coverage through GatherGuard.

Private groups can purchase insurance through their homeowner's insurance (although the policy may be limited and not all claims may be covered), a private insurance carrier, or GatherGuard. GatherGuard provides private individuals and groups with access to low-cost liability coverage, including liquor liability coverage, of up to $5 million for special events held at a member's facilities. The coverage automatically lists the member as an additional insured.

4. Rental agreements for use of member facilities

See LMC information memo, *Park and Recreation Loss Control Guide*, Section VIII, for more specific loss control recommendations for special events.

It is important members have application procedures established so they know what type of events will be taking place. If the member has criteria for insurance requirements, they'll need to know whether the group meets the criteria. The member also may have restrictions against events that are excluded from their liability coverage, such as rodeos. Having forms and procedures supports consistent and fair treatment of all groups that apply.

See LMC information memo, *Park and Recreation Loss Control Guide*, Section VIII.C.1, *Community center programs, use by outside groups*, for model community center rental documents.

It is common in rental agreements to have indemnification agreements where the organization agrees to "hold the member harmless and defend and indemnify the member against any claims related to its use of the member's facilities." These can be used to reinforce insurance requirements but also used when a member does not require insurance

RELEVANT LINKS:

It is important to note that formal organizations will be able to hold the member harmless for damage to the organization's property, but they do not have the ability to waive claims from individual members of their group. The defense and indemnification provision mean the organization will handle any third-party claims. Organizations that have insurance and assets are going to be able to cover this indemnification agreement.

LMCIT Contract Review Service.

Chris Smith, LMCIT Risk Management Attorney: csmith@lmc.org or 651.281.1269.

Members should talk to their attorney when developing written agreements and contracts. LMCIT will review defense and indemnification provisions at no additional charge to help protect the member's interests.

V. Volunteers

Minn. Stat. § 466.

City volunteers are protected against tort liability in the same manner as the member's officers and paid employees. The tort liability act protects member volunteers in two important ways:

- The statute limits the volunteer's maximum liability to $500,000 per claimant and $1.5 million per occurrence.
- The statute requires the member to defend and indemnify volunteers against claims for damages when the volunteer was acting in the performance of their duties as a volunteer for the member.

The second provision provides an important protection for volunteers. It essentially means that when a person is performing duties as a volunteer, the risk of tort liability rests with the member, not the volunteer. The only exception is if the volunteer's actions constituted malfeasance, willful neglect of duty, or bad faith. The statutes don't require a member to protect an individual from consequences of their own intentional wrongdoing.

Volunteers and volunteer organizations are covered parties under the member's liability coverage if they are acting on behalf of the member and volunteering under the member's direction and control. LMCIT coverage responds to claims whether brought against the member, the volunteer, or both.

It's important to keep in mind not every volunteer who performs a community service is one. Individuals often volunteer for a project sponsored by a private organization or other governmental unit. One example is the Minnesota Department of Transportation's Adopt a Highway Program. These individuals perform a community service on their own, without city sponsorship or request.

LMCIT coverage also includes the cost to defend a claim against a volunteer, even if the claim accuses the volunteer of an action that would constitute malfeasance, willful neglect of duty, or bad faith.

RELEVANT LINKS:

LMCIT would not cover the damages awarded against the volunteer, however, if it is determined the volunteer's action did constitute malfeasance, neglect of duty, or bad faith.

W. Work within railroad crossings

For guidance when contracting with railroads, contact Chris Smith, LMCIT Risk Management Attorney
651.281.1269
800.925.1122
csmith@lmc.org

For members doing work within a railroad crossing, the best practice is for the member to contact the railroad and find out what it will require for the project well before the construction contract is let and before the member releases the bid specifications for the project. The member will then know what the railroad requires and can include the insurance requirements in the specifications and the contract.

Specific insurance requirements may differ depending on the railroad and the type and scope of project. In most cases though, the railroad will be looking for the following:

1. Member's coverage

In most cases, the railroad will require the member to meet insurance requirements as a condition of allowing the member to work within the right-of-way. The member will also need to provide a certificate of insurance to the railroad, showing the required coverages are in place.

2. Limits

Railroads often require liability limits more than a member's liability coverage, but most railroads will agree to reduce the liability limits to match member coverages. If higher limits are required, contact LMCIT and it can generally provide an endorsement that increases the member's liability coverage limits only for claims arising under a specific contract.

3. Additional insured

The railroad will usually require it be named as an additional insured on the member's liability coverage.

4. Primary coverage

The railroad may require the member's coverage be "primary and non-contributory." LMCIT's liability coverage is automatically primary for any party that has been added as an additional insured, so no endorsement is needed to meet this requirement.

RELEVANT LINKS:

LMCIT Underwriting Department
651.281.1200

800.925.1122

5. Waiver of subrogation

The railroad may require a "waiver of subrogation" endorsement on the member's liability coverage. LMCIT can endorse the member's coverage to waive subrogation for an additional insured.

6. Railroad contractual liability

The railroad's insurance requirements may include a requirement that the railroad exclusion (ISO endorsement CG 24 17) be deleted. Standard CGL policies exclude coverage for construction or demolition operations within 50 feet of a railroad. Unlike standard CGL policies, LMCIT's liability coverage does not exclude work near railroad rights-of-way, so no special endorsement is needed for railroad projects. Since LMCIT coverage is unusual in this respect and to avoid any confusion, LMCIT will note on the certificate of insurance it does not have this exclusion.

7. Workers' compensation

Workers' Compensation Reinsurance Association.

The railroad will often require the member to have workers' compensation coverage and may require the member to endorse that coverage to waive subrogation against the railroad. LMCIT's workers' compensation reinsurer, the Workers' Compensation Reinsurance Association (WCRA), requires LMCIT to get its prior approval on a case-by-case basis before issuing a waiver of subrogation endorsement.

8. Railroad protective insurance

The railroad may require purchase of a "railroad protective" insurance policy. As the name suggests, "railroad protective" insurance is a liability policy purchased by the member or by the contractor to protect the railroad from liability claims arising from the project. The railroad protective policy provides coverage for general liability, injuries to railroad employees, and damage to the railroad's rolling stock and other real and personal property. Some railroads have standard arrangements in place under which the member or contractor can simply purchase the railroad protective insurance. If so, it can be an attractive option for the member or contractor because the railroad will have already been pre-approved on the coverage form, and the cost is typically modest.

9. Contractor insurance

The railroad may require the contractor performing the work to have liability insurance that meets the railroad's specifications.

RELEVANT LINKS:

LMCIT claim forms, information sheets, and other resources.

Submit a claim online.

Email: claims@lmc.org.

Fax: 651.281.1297 or 888.234.7839.

Mail: 145 University Ave W, St. Paul MN 55103-2044.

Phone: 651.281.1200 or 800.925.1122.

Even if the railroad doesn't require this, it's in the member's interest to require the contractor to have the appropriate insurance. This should be reflected in the project bid specifications and contract.

III. Filing a liability claim

Claims can be submitted to LMCIT using any of the following methods.

- Online
- Email
- Fax
- Mail
- Phone