

COLORADO INTERGOVERNMENTAL RISK SHARING AGENCY COVERAGE LINE

ELECTED OFFICIALS LIABILITY BULLETIN SPECIAL INSERT



LIABILITY PROTECTIONS AND YOU

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We've talked about elected officials' liability issues over the course of this year, but not about the protections you have through your entity's membership in the CIRSA property/casualty pool. So this month, we provide you with a brief introduction to the two key coverage parts of the liability policy that apply to you as elected officials of CIRSA member entities.¹

WHAT LIABILITY COVERAGES DO WE HAVE?

General Liability and Auto Liability Coverage applies to claims for bodily injury, property damage, and auto liability, among others. This is the coverage part that pertains to most allegations of "hard" injuries, such as an allegation of physical injury to a person or to tangible property. Thus, for instance, this coverage part would respond for an auto accident while you're driving your entity's vehicle on public entity business. This coverage part also includes law enforcement liability coverage.

Public Officials Liability Coverage applies to "wrongful acts" you are alleged to have committed. This coverage part applies to allegations of civil rights violations, improper activities concerning employment practices, and violations of federal and state law. Thus, for instance, this coverage part would respond when someone claims that he or she has suffered employment-related discrimination, harassment, or a violation of constitutional rights.

WHO'S COVERED?

Covered Parties under the policy include, of course, your entity as a member of CIRSA. Any elected or appointed official, trustee, director, officer, employee, volunteer, or judge of a CIRSA member is also considered a covered party. So is each governing body, board, commission, authority, or similar unit operated "by or under the jurisdiction of" a member entity. Thus, elected officials, board and commission members, appointed officials, employees, and even authorized volunteers of your entity are all considered covered parties.



WHAT LIMITS OF COVERAGE DO WE HAVE?²

- For general liability and law enforcement liability, the coverage limit is \$5,000,000 per claim/occurrence.
- For auto liability, the coverage limit is \$1.5 million per claim/occurrence.
- For public officials' liability, the coverage limit is \$5,000,000 per claim/occurrence, subject to an annual per-member aggregate of \$10,000,000.

Defense costs are included in these limits. There is also a member-selected deductible that applies to each claim/occurrence. Members have chosen deductibles that vary from \$500 to as much as \$250,000 per claim/occurrence, so you should check with your own CIRSA contact to find out what your entity's deductibles are.

WHAT KEY EXCLUSIONS DO WE NEED TO BE CONCERNED ABOUT?

There are several exclusions of concern, and a few are highlighted here. These exclusions are universal in most liability policies.

The “outside the scope” exclusion is probably the exclusion of greatest concern to elected and other public officials. This exclusion applies to both coverage parts of the liability policy, and states that coverage does not apply to any loss arising out of the actions of any elected or appointed official, trustee, director, officer, employee, volunteer or judge of a member entity “while acting outside the scope and performance of their official duties” for the member entity.

As you probably know, the Governmental Immunity Act's protections are lost when you are determined to have been acting outside the “scope of employment,” that is, outside the course and scope of your authorized duties as an elected official. But such conduct has a double consequence: the loss of your liability coverages through CIRSA. This is the reason that our public officials liability training places a heavy emphasis on the need to understand your “job description” as an elected official, and

THE “OUTSIDE THE SCOPE” EXCLUSION IS PROBABLY THE EXCLUSION OF GREATEST CONCERN TO ELECTED AND PUBLIC OFFICIALS

the need to stay within the parameters of that “job description.”

Even more alarming is the impact of the “outside the scope” exclusion where federal civil rights claims are concerned. You probably know that, under 42 U.S.C. Section 1983, you can be sued for a civil rights violation in your individual or official capacity. An individual capacity suit is one that alleges that you violated someone's constitutional or other federally protected right while acting under the auspices of your public office. (An official capacity suit, on the other hand, is a suit against the entity, rather than you individually.) A finding of individual liability in a Section 1983 suit essentially means that you've violated a clearly established constitutional or statutory right of which a reasonable person should have been aware, and that your conduct was unreasonable. Such conduct falls within the “outside the scope” exclusion, because the violation of civil rights is never within any public official's “job description”! Thus, elected officials need to be especially cautious

about conduct that could be actionable under Section 1983, because the liability coverage would *not apply* to an award of damages based upon a finding of individual liability.

The sexual harassment exclusion is another exclusion that has impacts on claims based on an individual official's conduct. This exclusion to the Public Officials Liability coverage part applies to sexual harassment claims. Let's say that a sexual harassment claim is made both against the entity, for failure to deal effectively with sexual harassment in the workplace, and against the harassing employee or volunteer. Under this exclusion, the entity will probably be covered. However, with respect to the individual employee or volunteer, the entity will have the option to direct CIRSA to defend *or* not defend the individual. Thus, if the entity so directs, the individual will be left out in the cold as to any defense of a sexual harassment claim against him or her! And in any event, even if the entity directs CIRSA to provide a defense, any liability imposed on the individual based upon a finding that harassment occurred would not be covered through CIRSA. **The sexual abuse exclusion** operates in a similar fashion.

The punitive or exemplary damages exclusion is also pertinent in the context of an individual official's conduct. Punitive or exemplary damages can be awarded in circumstances where an individual's conduct is willful and wanton in the disregard of someone's rights, or callously indifferent or motivated by evil intent. The purpose of punitive damages is, as the term suggests, to punish a wrongdoer for such egregious conduct. Because the punitive effect would be considerably blunted if an insurer were available to cover a punitive damages award, punitive

damages are deemed uninsurable by the appellate courts of many jurisdictions, including Colorado. Consistently with this judicial position, the CIRSA liability policy contains an expressed exclusion for punitive or exemplary damages.

The breach of contract exclusion can be pertinent to the activities of governing bodies. Governing bodies approve a wide variety of contracts, and sometimes are alleged to have dishonored them. It is not the intent of a liability policy to cover the kinds of liability that can arise when someone alleges a breach of contract, so there is an exclusion for the breach of an express or implied contract. This exclusion does not apply when a claim is based upon an allegation by an official or employee of wrongful termination of employment.

The condemnation/inverse condemnation exclusion can be relevant to a land use action taken by a governing body.

A landowner may claim that all or a portion of his or her property was “taken” by governmental action, or that vested property rights were impaired by governmental action. These types of claims, involving the value of private property, are not covered. As you can imagine, liability policies aren’t suited to cover these types of claims, because they would require insurers to try to underwrite the risk of having to pay for the property values of privately owned real estate throughout the state!

The bonds or taxes exclusion applies to any liability based upon or arising out of the issuance of bonds, securities, or other financial obligations, or taxes, fees, or assessments, or the collection, retention, or expenditure of funds. Thus, when a claim is made of an improperly levied tax, or retention of funds in violation of the Taxpayer’s Bill of Rights, or impropriety in the issuance of bonds or other financial

obligations, this exclusion would apply.

WHAT ELSE SHOULD YOU KNOW ABOUT COVERAGE ISSUES?

A lawsuit against you may involve one of several responses from CIRSA. We may determine, based on the allegations, that we owe you an unconditional duty of defense (i.e., the assignment of a defense attorney) and indemnity (i.e., covering any judgment or settlement). Or we may determine that none of the allegations invoke any duty of defense or indemnity, and send you a denial letter. Sometimes, though, a suit will contain a mixture of covered claims and uncovered/potentially uncovered claims and, in this case, we will defend you under a “reservation of rights.” A “reservation of rights” letter will be sent telling you of the areas where there may



be no coverage, and reserving our right not to indemnify you, and our right to terminate your defense (and potentially seek reimbursement of legal fees paid on your behalf) should circumstances warrant.

One or more CIRSA defense counsel will be assigned in circumstances where we find that there is a duty to defend. In some cases, a single attorney can represent multiple defendants; however, in cases where defenses may be inconsistent

between or among the covered parties, or other circumstances for a conflict of interest may exist in representation, we will assign multiple counsel. CIRSA-assigned defense attorneys, although paid by CIRSA, owe their duty of loyalty to you, their client.

We hope that you never have to delve into the details of these coverages in the context of an actual claim against you, but it's a good idea to be familiar with the broad outlines of those coverages.

As always, if you have questions, please contact CIRSA.

¹ This is only a summary of certain provisions of the CIRSA liability coverage documents. The language of the applicable coverage document must be reviewed for a complete and accurate understanding of the applicable coverages, and the application of the coverage document to any specific situation will require the advice of your entity's attorney.

² Please refer to the Declarations pages of the Liability Coverage form for more specific information on the limits and sublimits for all coverages.