



## **LITIGATION, INSURANCE AND TORT LIABILITY (LITL) PROGRAM**

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**SCHOOLS INSURANCE AUTHORITY - SACRAMENTO, CA**

## **BASICS OF INSURANCE AND UNDERSTANDING YOUR MEMORANDUM OF COVERAGE**

**California Association of Joint  
Powers Authorities**

**Understanding Your  
Memorandum of Coverage**

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# **First: the legal source of obligation to pay claims**

## **Third Party Claims**

- Government Code § 815 liability of public entities (Government Claims Act)
- Cal. Constitutions, Article I, § 19, Code of Civil Procedure § - inverse condemnation
- Civil Code § 3479 – nuisance liability
- Vehicle code section n17004 – auto liability

# Third Party Claims

- Government Code section 995 – defense owed “upon request” for any “civil action or proceeding” brought in “official or individual capacity or both” on account of act or omission “in the scope of his employment”
- Government Code section 995.2 – can refuse if (1) not within course/scope, (2) actual fraud, corruption or actual malice, (3) specific conflict of interest, or adverse pecuniary interest; (b) must respond in 20 days with reasons; (c) can later withdraw with reasons.
- Government Code section 996 – agency may use own attorney, hire attorney or provide insurance; no right to reimbursement.
- Government Code section 996.4 – Employee may seek reimbursement of defense costs is course and scope, no fraud/corruption/malice, no other exception. Also, may seek writ of mandate.
- Government Code section 996.4 – Employee may seek reimbursement of defense costs is course and scope, no fraud/corruption/malice, no other exception. Also, may seek writ of mandate.
- Government Code section 825 – if employee requested defense in writing at least 10 days before trial, for occurrence in course and scope, and reasonably cooperates, entity shall pay any judgment. However, if entity reserved rights, required to pay only if course and scope established.
- Government Code section 825.2 – if employee pays judgment, and entity either did not defend or defended under reservation, can seek reimbursement but must show course and scope, absence of fraud/corruption/malice. (Code refers to “agreement” to reservation.) Chang v. County of Los Angeles (2016) 1 Cal.App.5<sup>th</sup> 25, 36 [malice reservation].

# Third Party Claims

- Government Code section 825.4 – except per 825.6, entity no right of reimbursement.
- Government Code section 825.6 – right to reimbursement for payment if reserved rights, no course/scope or fraud/corruption/malice, or (whether or not reservation on this latter point) employee failed to cooperate in good faith in defense.

# Third Party Claims

- **Separately consider – if employee has any rights under MOC as a covered party; though MOC may expressly provide duties are no broader than those of Member.**
- No right to *Cumis* counsel. Laws v. County of San Diego (1990) 219 Cal.App.3d 189, 199–200; City of Huntington Beach v. Petersen Law Firm (2002) 95 Cal.App.4th 562, 568; DeGrassi v. City of Glendora (9th Cir. 2000) 207 F.3d 636, 643.
- Beware of stipulated judgment if deny on course and scope. Johnson v. County of Fresno (2003) 111 Cal.App.4th 1087, 1093–95.

# Enforcement Mechanisms

- Government Code § 970 et seq. - enforcement of judgments against public agencies
- Government Code § 970.2 - local public entity shall pay any judgment, writ of mandate appropriate
- General enforcement not subject to C.C.P. Enforcement of Judgments statutes
- Government Code § 970.4 - shall pay to the extent funds are available in the fiscal year judgment becomes final, from funds that are unappropriated if not restricted by law or contract for other purposes
- Government Code § 970.8 - shall include in each fiscal year in its budget a provision to provide funds sufficient to pay all judgments
- Government Code § 975 - bonds



# Workers Compensation Claims

- **Labor Code § 3602 et seq. – employer liability**

## What are the powers of public entities to protect against claims?

### Government Code § 990 –

- Insure against tort or inverse liability
- Insure employee within scope of employment
- Insure against punitive damage claims
- *But this section does not authorize payment of punitive damages (provided elsewhere)*

## Government Code § 990.4

- (a) “Self-insurance, which may be, but is not required to be, funded by appropriations to establish or maintain reserves for self-insurance purposes.”
- (b) insurance by authorized insurer
- (c) Surplus lines coverage

## Government Code § 990.8

- (a) Two or more local public entities, by a joint powers agreement made pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7, may provide insurance authorized by this part or for any other purpose by any one or more of the methods specified in Section 990.4....
- (c) The pooling of self-insured claims or losses among entities as authorized in subdivision (a) of Section 990.4 shall not be considered insurance nor be subject to regulation under the Insurance Code.
- (d) Any liability or loss under a joint powers agreement for the pooling of self-insured claims or losses authorized by this part and provided pursuant to this section may, notwithstanding Section 620 of the Insurance Code or any other provision of law, be reinsured to the same extent and the same manner as insurance provided by an insurer.

## Government Code § 990.8

(e) Where a joint powers agreement authorized by this part or authorized pursuant to Section 6516 provides for the pooling of self-insured claims or losses among entities, if any peril insured or covered under contract has existed, and the joint powers authority or other parties to the pool have been liable for any period, however short, the agreement may provide that the party insured or covered under contract is not entitled to the return of premiums, contributions, payments, or advances so far as that particular risk is concerned

## Labor Code § 3700:

*Every employer except the state shall secure the payment of compensation in one or more of the following ways:*

(a) By being insured against liability to pay compensation by one or more insurers duly authorized to write compensation insurance in this state.

(b) By securing from the Director of Industrial Relations a certificate of consent to self-insure either as an individual employer, or as one employer in a group of employers, which may be given upon furnishing proof satisfactory to the Director of Industrial Relations of ability to self-insure and to pay any compensation that may become due to his or her employees.

(c) For any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state, including each member of a pooling arrangement under a joint exercise of powers agreement (but not the state itself), by securing from the Director of Industrial Relations a certificate of consent to self-insure against workers' compensation claims, which certificate may be given upon furnishing proof satisfactory to the director of ability to administer workers' compensation claims properly, and to pay workers' compensation claims that may become due to its employees....

- Member driven
- Members agree which risks to share or not share
- Department of Insurance rules such as capitalization, mandated forms, etc. do not apply
- Rules of insurance policy construction not applicable
- May use common insurance terms anyway, to follow case law and provide similar protection

## **Cases re JPA Memoranda of Coverage**

Members jointly determine the scope and extent of their own coverage. They do so by creating member-written agreements and programs tailored to suit the needs of the participating entities. The governing bodies of these pooling arrangements interpret the agreements and programs to implement the intent of the members. The joint powers agreement, by-laws and the self-insurance program, with related coverage memoranda, provide the framework within which to determine the rights, liabilities, and intentions of the pools and their respective members.



## Cases re JPA Memoranda of Coverage

In our case, an analysis of duty to defend and coverage issues must give full effect to the intent of the member cities of the Authority as reflected in the policies and procedures adopted by the Executive Committee with the approval of the Board of Directors. The Authority, through its members, agreed to adopt the definition of occurrence in the excess insurance policies to decide the issue of what is a covered claim. They did not agree to also incorporate principles governing insurance carriers and insurance law into coverage decisions. It is this Agreement by the member cities that is the crux of the coverage determination.

City of S. El Monte v. S. Cal. Joint Powers Ins. Auth. (1995) 38 Cal. App. 4th 1629, 1639-40

## Cases re JPA Memoranda of Coverage

In this case we are asked to consider whether a public entity self-insurance pool, formed by several water agencies pursuant to a joint exercise of powers agreement, is “insurance” subject to a commercial insurer's policy provision that its coverage will not apply until all “other insurance” is exhausted. Because the statutes authorizing creation of public entity self-insurance pools specifically provide such arrangements *are not* to be considered insurance (Gov.Code, § 990.8, subd. (c)), we conclude the “other insurance” clause is not applicable and affirm the judgment.

Orange Cnty. Water Dist. v. Ass'n of Cal. Water etc. Auth. (1997) 54 Cal. App. 4th 772, 774

## Cases re JPA Memoranda of Coverage

Because joint powers authority risk pools are ultimately member created and directed, they are not considered insurance in a conventional sense; they are an alternative to commercial insurance. (*City of South El Monte v. Southern Cal. Joint Powers Ins. Authority* (1995) 38 Cal.App.4th 1629, 1633–1634, 1639–1640, 45 Cal.Rptr.2d 729 (*South El Monte*); *Orange County, supra*, 54 Cal.App.4th at pp. 774–775, 777–778, 63 Cal.Rptr.2d 182; Gov.Code, § 990.8, subd. (c).) In recognition of this, questions of defense and coverage are answered by relying on rules of contract law that emphasize the parties' intent. (*South El Monte, supra*, 38 Cal.App.4th at pp. 1639, 1640, 45 Cal.Rptr.2d 729.) The basic rule of contract interpretation is to effectuate the parties' intent as expressed in the contract's terms, which are given their common meaning. (*Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 126, 49 Cal.Rptr.2d 567 (*Century Transit*); Civ.Code, §§ 1636, 1638, 1639, 1644.) “Moreover, the *context* in which a term appears is critical.” (*Century Transit, supra*, 42 Cal.App.4th at p. 126, 49 Cal.Rptr.2d 567; see Civ.Code, § 1641.) Contractual language must be construed in the context of the contract as a whole, and in the circumstances of the case. (*Century Transit*, at p. 126, 49 Cal.Rptr.2d 567.)

Southgate Recreation & Park Dist. v. California Assn. for Park & Recreation Ins.

(2003) 106 Cal. App. 4th 293, 297-98

## Cases re JPA Memoranda of Coverage

We disagree. To the extent that the additional covered party, such as SBT, is performing operations by or on behalf of the member district we see no distinction in the pool's decision to consider that party's conduct as part of the shared risk. The risk of exposure is no different than if the District's own employees had done the driving, and in these times of grave fiscal problems for school districts there may be financial advantages for a district to use contract drivers such as SBT rather than its own drivers. Westchester's counsel agreed with the trial court that SBT was “acting on behalf of the District and ... for the purpose of the District's business.” The pool covered the risk, and the Legislature deemed such joint pool arrangements not to be “insurance.” Thus, Westchester's “other insurance” clause does not apply.

Schools Excess Liability Fund v. Westchester Fire Ins. Co., 117 Cal. App. 4th 1275, 1285-87

## Cases re JPA Memoranda of Coverage

However, AAF cites no authority permitting a public entity operating a self-insured workers' compensation program pursuant to a certificate issued under section 3700, subdivision (c) to unilaterally extend its coverage to private entities. To the contrary, private entities do not qualify for self-insured status under section 3700, subdivision (c).

Huffman v. City of Poway, 84 Cal. App. 4th 975, 986, 101 Cal. Rptr. 2d 325 (2000)

## Cases re JPA Memoranda of Coverage

Nor is a joint powers risk pool “insurance” for purposes of Insurance Code sections 22 and 23. It is *not* a contract by which the joint authority agrees to *indemnify* its members from losses or claims. Here, each member's required contributions to the pool take into account the member's individual loss history, claims experience, and credits for subrogation recoveries. (See *Orange County Water Dist. v. Association of Cal. Water etc. Authority* (1997) 54 Cal.App.4th 772, 777, 63 Cal.Rptr.2d 182 (*Orange County Water Dist.*) [because the self-insured pool member agency ultimately pays back amounts paid out in its behalf, there is no shifting of the risk].)

Fort Bragg Unified Sch. Dist. v. Solano County Roofing, Inc., 194 Cal. App. 4th 891, 906

## What are the requirements to form a Joint Powers Authority?

- Government Code §§ 6500 et seq. Joint Exercise of Powers Act – applies to many types of agreements, not just insurance pooling
- “Public agency” may enter JPA
- Does not include private party (though per SELF case, can extend coverage to private party where sharing member’s power to indemnify incident to agreement)
- Government Code § 6502 – if authorized by governing bodies (contract law incorporated))
- Of two or more agencies
- To jointly exercise a power common to the contracting parties
- Powers: to self-insure for workers compensation, Lab. Code 3700; to self-insure for tort liability or inverse liability, per Gov. Code 990 and 990.4, to defend employees per Gov. Code 995, to indemnify employees per Gov. Code 825, to pay judgments per Gov. Code 970.2

## Contract terms are analyzed under the Civil Code

- The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.
- Cal. Civ. Code § 1644 (West)
- Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.
- Cal. Civ. Code § 1645 (West)
- **Some terms defined in other sources such as GASB, Codes, insurance industry common terms, case law, or defined by usage of the membership**



## **Second: Is it covered?**

### **Analyzing a coverage agreement**

- Is the Defendant a “Covered Party”
- Is there a claim for “Damages” covered by the MOC?
- Is there a claim for Bodily Injury, Property Damage, Personal Injury or Errors and Omissions, as defined?
- Is there an “Occurrence”?
- Is the Occurrence during the Coverage Period?
- Does any Exclusion Apply?
- Are the Conditions of the MOC met?
- Is there a duty of defense?

## Is the Defendant a “Covered Party” PRISM:

A. The Member;

B. Those individuals, including volunteers, who were or are now elected or appointed officials of the Member, whether or not compensated, including members of the member's governing body or any other committees, boards, commissions or special districts of the Member, while acting for or on behalf of the Member;

C. All special districts governed directly by the Member’s governing board and other districts or agencies which are named on the Memorandum;

D. Past or present employees of the Member, including volunteers, or other covered entities, whether or not compensated, while acting for or on behalf of the Member or other covered entity;

E. Notwithstanding sub-paragraphs (A) through (D) above, the determination and findings made in good faith by the Member pursuant to California Government Code Section 995.2 or any other similar provision of law shall be conclusive and binding on PRISM and all other persons for the purposes of coverage under the Memorandum....

## Is there a claim for “Damages” covered by the MOC?

- **PRISM:** “Damages” means monetary compensation resulting from: (a) bodily injury or property damage, (b) personal injury, (c) public officials errors and omissions liability, or (d) employment practices liability.
- **CJPRMA:** Damages means compensation in money recovered by a party for loss or detriment it has suffered through the acts of a covered party. Damages include (1) attorney fees not based on contract awarded against the covered party, (2) interest on judgments, or (3) costs, for which the covered party is liable either by adjudication or by compromise with the written consent of the Authority, if the fees, interest or costs arise from an occurrence to which this coverage applies.
- **Case law:** “Whatever their semantic differences, the statutory and dictionary definitions of ‘damages’ share several basic concepts. Each requires there to be ‘compensation,’ in ‘money,’ ‘recovered’ by a party for ‘loss’ or ‘detriment’ it has suffered through the acts of another.” AIU Ins. Co. v. Superior Court (1990) 51 Cal.3d 807, 826.

# **Is there a claim for Bodily Injury, Property Damage, Personal Injury or Errors and Omissions, as defined**

## **PRISM:**

- “Bodily injury” means bodily harm, sickness, disability or disease sustained by a person, including death resulting from any of these at any time. Bodily injury includes mental injury, mental anguish, humiliation, shock or death if resulting directly from bodily injury. Bodily injury shall include care, loss of services, loss of consortium, or death resulting at any time from the bodily injury.
- “Property damage” means (1) physical injury to, or destruction of, tangible property, which occurs during the Memorandum Period, including the loss of use thereof at any time resulting therefrom; or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the Memorandum Period.

## PRISM:

- “Personal injury” means injury, including consequential bodily injury or property damage, arising out of one or more of the following offenses: (a) false arrest, detention or imprisonment or malicious prosecution; (b) the publication or utterance of libel or slander, including disparaging statements concerning the condition, value, quality or use of real or personal property, or publication or utterance in violation of rights of privacy; (c) wrongful entry or eviction, or other invasion of the right of private occupancy; (d) assault and battery, not committed by, at the direction of or with the consent of the covered party, unless committed or directed for the purpose of protecting persons or property from injury or death; (e) discrimination based upon race, religion, nationality, national origin, color, creed, sex, sexual orientation, age, nature of employment, or disability, but excluding unlawful discrimination intentionally committed by, at the direction of, or with consent of the covered party
- “Public officials’ errors and omissions liability” means any actual or alleged error or misstatement or act of omission or neglect or breach of duty including misfeasance, malfeasance, or nonfeasance by the covered parties in the discharge of their duties with the public entity individually or collectively, or any matter claimed against them solely by reason of their being or having been covered parties.

## Is there an “Occurrence?”

### PRISM:

- **“Occurrence”** means an accident, including injurious exposure to conditions, during the Memorandum Period, which results, in bodily injury or property damage, neither expected nor intended from the standpoint of the covered party. All damages arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.
- **Case law:** First, “accident” is not an isolated term in the policies; rather, it is an integral part of the “occurrence” definition. Just before defining “accident,” the trial court told the jury that “occurrence” included “continuous or repeated exposure to conditions” that results in property damage. A covered “occurrence” could include events that are not abrupt because the “occurrence” definitions enlarged the concept of “accident” to encompass events that happen gradually. Considered as a whole, the instructions did not preclude coverage for an “occurrence” that was gradual and not abrupt in nature. Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal.App.4th 715, 751.

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## Is the Occurrence during the Coverage Period?

### **PRISM:**

- This Memorandum applies to bodily injury, property damage, personal injury, public officials errors and omissions liability, or employment practices liability, which occur anywhere in the world during the Memorandum Period.
- For the purpose of determining the limit of PRISM's liability, as respects Coverages A and B, all damages arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence under Coverage A or one offense under Coverage B. For the purpose of determining the limit of PRISM's liability, as respects Coverages C and D, all damages arising out of a single act, error or omission or a series of related acts, errors or omissions shall be treated as arising from a single wrongful act.
- An occurrence, offense, or wrongful act taking place over more than one Memorandum Period shall be deemed to have taken place during the last Memorandum Period, but no later than the Memorandum Period in effect at the filing of the claim or suit, whichever filing occurs first, and only that limit shall apply.

## Does any Exclusion Apply?

- **Risk covered elsewhere**
  - Covered under workers compensation
  - Bodily injury to employee, other than Employment Practices
  - Owned property or in care, custody and control unless otherwise liable
- **Breach of contract**
  - Except assumption in lease, sidetrack agreement, or arising from routine governmental operations
- **Aircraft, Airports, Watercraft**
  - Should have separate policies; normally does not include drones, small watercraft
- **Medical malpractice**
  - Typically, does not extend to EMTs, nurses, etc.



## Does any Exclusion Apply?

- **Inverse condemnation**
  - Often excepts physical injury to tangible property, but may exclude attorney fees and expert costs available only under inverse. See *Stonewall Ins. Co. v. Palos Verdes Estates* (1996) 46 Cal.App.4<sup>th</sup> 1810, 1842.
- **Failure to supply gas, water, electricity**
  - Sometimes limited to decision or governing body, or failure of overall capacity; sometimes inapplicable where sudden and accidental injury to infrastructure or software. Sometimes extends to storm drainage.
- **Subsidence of land**
  - Some pools cover, others exclude, still others sub-limit depending on reinsurers.
- **Transit**
  - Fixed route only, not dial-a-ride.

## Does any Exclusion Apply?

- **Transit**
  - Fixed route only, not dial-a-ride.
- **Nuclear**
- **ERISA, FLSA, employee benefits**
- **Dams**
- **Asbestos, mold, lead**
- **Pollution**
  - May have “time element” sudden and accidental
- **Equitable relief, writs, injunctions (including ADA fixes)**
- **Refund of taxes, fees or assessments**
- **Remuneration or financial gain**

## Does any Exclusion Apply?

- **Willful violation of statute or Penal Code**
- **Cost estimates being exceeded**
- **Punitive damages, multipliers**
- **Racing contests**
- **Benefit plan administration**
  - Some pools cover “Employee Benefit Plan Administration Liability”
- **Land use planning and regulation**
  - May be considered excluded by lack of Occurrence, or “intended or expected” Exclusion, or inverse condemnation Exclusion.
  - May be defined to reach permit denials, zoning decisions, adult bookstore ordinances, taxi ordinances, marijuana dispensary ordinances, etc.
  - May be more broadly defined to include administrative enforcement of ordinances.

## Are the Conditions of the MOC met?

- **Claims reporting**
  - Automatic reporting for death, paralysis, etc.
  - Reporting based upon reserve levels
- **Cooperation in defense**
- **Settlement authority; power to control or cap exposure**
- **No action clauses**
- **Other coverage clauses**
- **Subrogation**
  - Subrogation waivers
- **No waiver of coverage terms**
- **Severability of interests**
- **Arbitration clauses**
- Optional, many different approaches. Binding vs. non-binding. Panel vs. individual. Panel of other member representatives. Suit in court. Appeal

## Is there a duty of defense?

- **Right to associate**
- **Duty of defense**
  - May have qualifying language “which in the opinion of the Authority may result in liability under this Memorandum”
  - Likely depends on allegations in Complaint and whether some or all Damages sought fall within Exclusions.
  - Poll may provide “banking layer” coverage even if Damages excluded.

# Is there a duty of defense?

## Case law re insurers:

- Determination of the duty to defend depends, in the first instance, on a comparison between the allegations of the complaint and the terms of the policy. (Citation.) But the duty also exists where extrinsic facts known to the insurer suggest that the claim may be covered. (*Ibid.*) Moreover, that the precise causes of action pled by the third-party complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered liability. (Citations.)
- The defense duty arises upon tender of a potentially covered claim and lasts until the underlying lawsuit is concluded, or until it has been shown that there is no potential for coverage. (Citation.) When the duty, having arisen, is extinguished by a showing that no claim can in fact be covered, “it is extinguished only prospectively and not retroactively.” (Citations.)

# Is there a duty of defense?

## Case law re insurers:

From these premises, the following may be stated: If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance.

Scottsdale Ins. Co. v. MV Transportation (2005) 36 Cal.4th 643, 654–655

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