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Modern Mysteries of Municipal Insurance
Thursday, June 20, 10:15-11:30 a.m.
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COLORADO
MUNICIPAL
LEAGUE

*Contents of this presentation reflects
the view of the presenter, not of CML.*

Presentation Summary – Caveats

- General discussion only of some of the questions/issues—some broad, some minutiae—we see at CIRSA in helping members and their counsel with liability insurance questions (session does not focus on property or workers’ compensation coverage).
- The solution to most any insurance mystery is in the details—i.e., the specific language of the policy, endorsement, or contract; the specific details of the coverage question, claim, etc. This presentation is a training resource only.
- Any resemblance to any claim, claimant, insured, etc. is purely coincidental!
- Sample materials/provisions are just that and not a substitute for your own expert analysis and drafting on particular issues.



How are Pools Different?

- Genesis in excessively hard market for public entity insurance in late 1970s & early 1980s.
 - Nationwide aversion to insuring governmental risks.
 - Commercial insurers exiting market.
 - Commercial coverage unavailable, unaffordable and/or severely limited in scope.
- Resulting in efforts by local governments to create self-insurance pools for pooling of resources to cover/manage their own risks.



Pooling in Colorado

- Pools in Colorado are generally organized by broad entity types:
 - Municipalities - Colorado Intergovernmental Risk Sharing Agency (CIRSA) – 1982
 - Counties – Three pools by coverage line (Casualty & Property Pool, Health Pool & Workers Compensation Pool) - 1984
 - Special Districts - Colorado Special Districts Property & Liability Pool (CSDPLP) - 1988
 - School Districts - Colorado School Districts Self Insurance Pool (CSDSIP) - 1981



Pooling in Colorado

- Organizing efforts spearheaded by founding members & local government associations (e.g., CML, SDA, CCI).
- Pool is separate legal entity, established by contract (intergovernmental agreement), bylaws or similar (CIRSA IGA & Bylaws attached).
- Member owned & controlled.
- Governing bodies made up of member representatives.
- Work closely with their related associations.



Pooling in Colorado

- Statutory Authority:
 - C.R.S. 24-10-115.5 – “Public entities may cooperate with one another to form a self-insurance pool” to provide coverages.
- See also following authorities:
 - C.R.S. 24-10-115 (power to insure & self insure against... general liability risks).
 - C.R.S. 29-5-111 (... law enforcement liability).
 - C.R.S. 29-13-102 (... property).
 - C.R.S. 8-44-204 (... workers’ compensation).



Regulatory Treatment of Pools

- Pools are not considered to be or regulated the same as commercial insurers.
 - C.R.S. 24-10-115.5: A public entity self-insurance pool “shall not be construed to be an insurance company” nor subject to regulations governing commercial carriers; *City of Arvada v. CIRSA*, 19 P.3d 10 (Colo. 2001).
- Rather, public entity pools are subject to:
 - Member control.
 - Division of Insurance regulations specific to pools (e.g., 3 CCR 702-2, Regulation 2-2-1).
- Pools are public entities within the meaning of the Colorado Governmental Immunity Act (GIA), and have the same liability protections as other public entities.
 - Immunity - “bad faith breach of insurance contract” - *Jordan v. City of Aurora*, 876 P.2d 38 (Colo. 1993) (public entity immune from tort of “bad faith” under GIA).



Who is Insured?

- The issue of who is insured under the public entity/public officials liability policy is seemingly straight-forward; for example, under the CIRSA’s liability form, a Covered Party includes:
 - The named CIRSA Member (the city or town, etc.).
 - Any board, commission, authority, governing body or similar unit “operated by or under the jurisdiction of” a Member. (Other forms are to similar effect, insuring “your boards.”).
 - Any elected or appointed official, trustee, director, officer, employee, volunteer or judge of a Member or of any unit as described above, while in the performance of his or her duties for the Member and within the scope of his or her employment by the Member.



Who is Insured – Affiliated Board/Entities

- But what boards or other entities are “your boards” or ones “operated by or under the jurisdiction” of the city or town:
 - Library board, senior board, cultural board, or similar board to which your governing body appoints directors?
 - Urban Renewal Authority? Housing Authority?
 - Separate entity created by IGA?
 - What about nonprofits—e.g., animal shelter, food bank, etc.—to which your governing body appoints directors, and/or provides staff support, accounting services, office space, etc.



Who is Insured – Affiliated Boards/Entities

- The answer depends on who control the funds and/or the board or governing body of the other entity.
- For example, CIRSA’s “jurisdictional test” provides that in order for a board/commission or affiliated legal entity to qualify under the Member’s coverage:
 - 51% of the board/commission or board of the affiliated legal entity must be made up of the Member’s officials, employees or appointees, or the Member must have 51% control of the funds; or
 - And, in addition, the member must include all of the exposures of the board/commission or affiliated legal entity in the coverage application (property, vehicles, expenditures, etc.).



Who is Insured – Affiliated Boards/Entities

- Other forms are similar effect; e.g.:

“Your boards”:

a. Means any board other government ment that:

- Under these tests, it may be possible for a nonprofit to qualify for coverage, but not if the city/town does not control its board/funds.
- Also note, while the tests may lead to analogous conclusions, coverage tests are not identical to “instrumentality” tests developed under case law for determining application of open meetings/open records laws, governmental immunity, or other laws. See, e.g., *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998 (Colo. 2008); *Colo. Special Districts Property & Liability Pool v. Lyons*, 277 P.3d 874 (Colo. App. 2012).



Additional Insureds

- Let’s start with a hypo: Your city/town is hiring an independent contractor to perform landscape and irrigation system maintenance and repairs in the public parks, rights-of-way and other public spaces, and they send over their requested form of contract, which states:

“Throughout the term of this Agreement, the city/town agrees to maintain, at its own expense, liability insurance coverage. The Contractor and its principals shall be added as additional insureds on the city/town’s coverage.”

- Can/should your client agree to this?
- If your client agrees, what has it agreed to?



Additional Insureds

- Or, before answering those, consider this mystery: “Why isn’t the contractor **instead** agreeing to name my client city/town as an additional insured on its coverage?”
- This seems an appropriate point to start the discussion:
 - In engaging an independent contractor for services, the city/town seeks protection from suits/liabilities it may face which “arise out of” or are “caused in whole or part by” by the acts or omissions of the contractor.
 - If the purpose/scope of the contract is to hire and pay the contractor to do the work and be responsible for associated risks, why is it requesting protection under the city/town’s coverage—is there a good reason, or is it a “Never hurts to ask” scenario?
 - Instead, your city/town should seek to obtain protections under the contractor’s coverage.
- **Mystery solved:** Whenever possible, get your client protection from the independent contractor’s coverage, not the other way around!



Additional Insureds

- Well, maybe before moving on, we should break down the concept of additional insured in relation the whole program of risk management:
- How do clients seek to transfer risk:
 - Indemnification or hold harmless agreements;
 - Waivers;
 - Enter into an “Insured/Covered Contract”;
 - Be listed as an “Additional Insured” on other party’s coverage.



Indemnification and Insurance

Sample (By Contractor to city/town). To the fullest extent permitted by law, the Contractor agrees to indemnify and hold harmless the city/town, and its officers and its employees, from and against all liability, claims, and demands, on account of any injury, loss, or damage, which arise out of or are connected with the Work, if such injury, loss, or damage, or any portion thereof, is caused by, or claimed to be caused by, the act, omission, or other fault of the Contractor or any subcontractor of the Contractor, or any officer, employee, or agent of the Contractor or any subcontractor, or any other person for whom Contractor is responsible. The Contractor shall investigate, handle, respond to, and provide defense for and defend against any such liability, claims, and demands, and to bear all other costs and expenses related thereto, including court costs and attorneys' fees. The Contractor's indemnification obligation shall not be construed to extend to any injury, loss, or damage which is caused by the act, omission, or other fault of the city/town.



Indemnification and Insurance

Sample (By city/town to State; from DOLA grant). Grantee shall, to the extent permitted by law, indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees and related costs, incurred as a result of any act or omission by Grantee, or its employees, agents, Subgrantees, or assignees pursuant to the terms of this Grant; however, the provisions hereof shall not be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions, of the GIA, or the Federal Tort Claims Act, 28 U.S.C. 2671 et seq., as applicable, as now or hereafter amended.



Additional Insureds

- If city/town agrees to indemnification/hold harmless agreement, what does the liability policy already say?
- Under CIRSA liability coverage (General Liability, Auto Liability, Law Enforcement Liability) - Exclusion for contractual liability except for a “Covered Contract” which means:
 - “any agreement, except one pertaining to aircraft, under which the “Member” assumes liability of other for “bodily injury,” “property damage,” “personal injury”, or “advertising injury.”
- Under CIRSA Public Officials Liability - Exclusion for Contractual Liability.



Additional Insureds

- Under traditional (ISO) Coverage Form – Exclusion for Contractual Liability except for an “Insured Contract” which means, e.g.:
 - “that part of any contract or agreement pertaining to your business under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization.”
- Such provisions operate as blanket, or automatic additional insured.
- If a contract falls outside definition of an “Covered/Insured Contract” the parties to the contract must specifically be added to coverage as an additional insured.



Additional Insureds

- Sample policy provision (CIRSA):

GENERAL P

I. WHO IS A COVERED PARTY

It is agreed that the term covered party, as used in this

A. CIRSA and the "Members" of CIRSA designated in

B. Any elected or appointed official, trustee, director,
any unit as described in (C) below, while in the po



Additional Insureds

- Sample policy provision (ISO) - insured includes a person or organization who by written contract is included as AI but only for tort liability caused in whole/part by named insured's acts/omissions in the performance of its ongoing operations.

WHO IS AN INSURED:

Any person or orga
otherwise an insured
Part and that you ha
ten contract or agre
an additional insure
Part is an insured, b
to liability for "bod
damage" "personal

b. Is caused, in wl
your acts or on
formance of you
to which that co
applies or the ac
any person or org



Additional Insureds

- Obtaining additional insured status:
 - Reinforces the contract indemnity.
 - Serves as a backup to the contract indemnity if the indemnity agreement proves unenforceable.
 - Gives the AI direct protections under the named insured's liability policy; typically including:
 - Right to immediate defense (as compared with later reimbursement).
 - Rights to indemnity for liabilities within the scope of coverage.
 - Generally, the AI becomes covered, and can look to the named insured's insurer for defense/indemnity in matters that involves "the premises or operations" of the named insured...with coverage limited to that scope.



Additional Insureds - Tips

- Therefore, if requesting additional insured status for the city/town:
 - Confirm their coverage allows it—read their insurance policy (in your spare time 😊) & check requirements & limitations of that policy; e.g.:
 - Covers only written contracts and agreements.
 - Covers only if so endorsed onto the policy.
 - Covers additional insureds only to lesser of minimum amount required by contract or policy limits.
 - Obtain certificates of insurance.
 - Check limits of coverage.
 - Obtain endorsements if indicated.



Additional Insureds - Tips

- And, if your city/town is asked to named another party as additional insured:
 - Consider, is it necessary; is the negotiation strength such that the city/town can reject the request?
 - Recognize, that in adding a party as AI:
 - You are agreeing to share coverage limits with them.
 - That party may not be subject to governmental immunity or the liability limits or other protections of GIA.
 - Loss history related to AI is included.



Additional Insureds

- Where does this leave us on our original questions:
- Yes, your client can agree to overly broad indemnity and insurance provisions, but don't! Broad or inartful language will likely create confusion, disputes, new uncovered contract liabilities, and even default for failure to satisfy insurance requirements.
- Thus, if giving additional insured status, tie contract language to coverage—limit to damage and injury arising out of the named insured premises and operations.
- If getting additional insured status, consider when you need/want contractual indemnities for certain matters irrespective of coverage.
- For construction agreements, be aware of Colorado's anti-indemnity statute, C.R.S. 13-21-111.5, providing that provisions in a construction contract requiring the indemnitor to provide indemnity, insurance or defense against the indemnitee's negligence or fault are void as against public policy and unenforceable.



Additional Named Insureds

- **Mystery:** What's the difference in being an "additional named insured?"
- Though not uniformly defined, additional named insured is generally distinct from additional insured, as the former gives the entity named the same rights and obligations as the first named insured on the policy, which may include such things as:
 - Responsibility for premium payment if first named insured doesn't pay.
 - The right or ability to make changes.
 - Separate and distinct coverage to the limits of coverage (as compared to sharing in the limits).
- Many carriers, including CIRSA, may not grant additional named insured status to third parties.
- **Mystery solved:** Don't grant additional named insured status to other parties, and absent special circumstances, don't request it.



What's Up With The Certificate of Insurance?

Your city/town contract template states as follows:

“Prior to the commencement of the Services, the contractor shall forward certificates of insurance to the city/town for all required insurances, which certificates shall name the city/town of _____ as the certificate holder. Certificates of insurance on all policies to the city/town shall provide written notice of not less than 30 days prior to cancellation or change in coverage.”

- What's the point of requiring certificates?
- Client sends over the certificate for review; what are you looking for?



The Certificate of Insurance

The Certificate of Insurance:

- Is not a policy or contract of insurance; it is rather “a document acknowledging that an insurance policy has been written.” *Pinnacol Assurance v. Hoff*, 375 P.3d 1214 (Colo. 2016)(internal cite omitted).
- Is a document used to provide information on a party’s insurance coverage, usually on types and limits of coverage, insurance company, policy number, named insured, and the policies’ effective periods.
- But, it is purely informational, confers no rights on the “certificate holder”—although it may include information on “additional insured” status—and may not provide a basis for claims against the issuing insurer. *Id.*



The Certificate of Insurance



CERTIFICATE OF LIABILITY

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY
CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND.

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE
INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION



The Certificate of Insurance

- What to look for—common issues with respect to contract provisions and certificates:
 - Proper alignment with insurance requirements of the contract:
 - Types
 - Limits
 - Other technical details
- Cancellation-Notice Provision.
- Additional insured language and other special provisions.



The Certificate of Insurance

- Types/Limits:

INSR LTR	TYPE OF INSU	
A	X	COMMERCIAL GENE
	X	CLAIMS-MADE
X		\$10m POL E&O

- Often overlooked is whether the coverage applies per-policy or per project. If dealing with a contractor with lower limits and/or multiple known pending projects, consider requiring the aggregate limits of coverage apply on a per-project basis. This is in turn reflected on the certificate.



The Certificate of Insurance

- Notice of cancellation or changes.
- Older Accord form: insurer will “endeavor to” mail notice:

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES EXPIRE ON THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL MAIL NOTICE TO THE CERTIFICATE HOLDER NAMED

- Thus, the contact negotiation over the “endeavor to” language.



The Certificate of Insurance

- Newer Accord form:

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES EXPIRE ON THE EXPIRATION DATE THEREOF, ACCORDANCE WITH THE POLICY PROVISIONS

- No express statement of notice to the holder. This language does not “duplicate” for benefit of certificate holder the language in the policy, and thus, in the absence of other contract or policy provisions, parties will be deemed to have “consigned the entire question of notice, including to whom it must be given, to the provisions of the policy being cancelled.” *Pinnacol Assurance v. Hoff*, 375 P.3d 1214 (Colo. 2016).



The Certificate of Insurance

- The “special provisions” box is used to describe AI status, locations, etc. For AI, the description should mirror what AI status concerns; e.g.:

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule 1)
Certificate Holder is Additional Insured on Liability Policy
As respects to the use of land owned by the Certificate Holder

But, contract and policies control.



What is the Adjuster's Role?

- Or perhaps more pointedly, you may have thought during a strategy call on a litigated claim—where there are plenty of folks on the phone already, including the city/town attorney, city/town manager, department head, defense counsel, defendants, maybe an expert witness, etc.—What’s the adjuster doing on this call?
- In a word—well, three words—attending to key responsibilities of:
 - Reserving;
 - Reporting, and
 - Documentation.
- See attached CIRSA *CoverageLine* article.



Adjuster's Role - Reserving

- Reserving is largely out of sight to insured but is key component of fiscal health and accountability of pool.
- Is an art and science of “not too little” and “not too much” as under- and over-reserving have consequences throughout.
- Reserves typically set within 30 days; initial reserves heavily based on defense counsel’s initial evaluation, litigation plan, and budget, as well as adjuster’s experience and expertise in sound reserving practices.
- Reserves must be continually reviewed/revise as needed, and monitored and updated as appropriate—the adjuster’s eyes and ears need to be on the claim at all times to ensure accurate reserving.



Adjuster's Role - Reporting

- Every claim involves reporting requirements, including to:
 - Insured; e.g., with respect to billings to deductible.
 - Within organization, for funding, payment and financials.
 - To excess insurer/reinsurer depending on type or amount of claim. This crucial reporting is behind the scenes but critical to maintaining the relationship; e.g.:
 - Certain claims—death, civil rights, others—are always required to be reported up.
 - Also required when claim is reserved at 50 percent SIR.
 - Late reporting can have serious consequences.
- Adjuster performs critical role of reporting out, up and throughout with respect to pending claims.



Adjuster's Role – Documentation

- There's a saying in the adjuster world: If it wasn't documented, it didn't happen.
- With all of the eyes involved in scrutinizing a claim, it's critical that each aspect, each bit of thinking, on the reserving process, as well as for each expenditure, be well-documented.
- The adjuster's critical role is documenting the happenings in the life of the claim, so that others—supervisors, excess insurer/reinsurers, auditors, others—are able to look at documentation, understand the adjuster's thinking, and have information for agreeing on appropriateness of expenditures.
- If the adjuster makes it difficult for an auditor to understand what's happening in the life of a claim, and what may be driving a reserve amount, then the adjuster – and the organization – will be called out for a standards/practices fail.



What the Purpose of the Reservation of Rights?

- You city/town and some of its employees are named, individually, in a civil rights lawsuit. The insurer assigns one or more defense attorneys and you get a lengthy “reservation of rights” (ROR) letter from the insurer. What does it mean?
- The ROR is based on underlying legal concepts:
 - Insurers are required to let you know, at the inception of a suit, which claims are or are not covered.
 - If all claims are covered, you'll get an unconditional defense.
 - If no claims are covered, you'll get a denial letter and you'll be on your own.



Reservation of Rights

- Many lawsuits include a combination of covered and uncovered claims. And, the duty to defend is broader than the duty to indemnify. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991).
- Thus, if some claims in a suit are covered, insurer typically will provide a defense as to all claims in the suit, until or unless only uncovered claims are left.
- The ROR serves as notice of limitations, exclusions and other provisions of policy, and for insurer to “reserve its rights” as to uncovered claims.
- Insurers handle differently disagreements flowing from RORs, but typically will further evaluate an insured’s position and/or elevate consideration to “further ups” and/or obtain additional coverage opinions.



Concluding Thoughts

- Mysteries of municipal insurance are often best-resolved early, through partnership and on a “going in” basis; e.g.:
 - Complete full, upfront review of contract indemnity and insurance provisions; ensure provisions reflect what is needed/appropriate. Partner with insurer or broker as needed.
 - See attached “sample only” services contract with indemnity & insurance requirements.
 - Seek clarity with respect to “affiliated entities” and AIs.
 - Have appropriate systems for insurance details - certificates, notices, renewals, etc.
 - In the event of claims, maintain communications with adjuster and seek clarification for any areas of questions/concerns.



Modern Mysteries of Municipal Insurance

Questions

Thank you for your public service!

