RISK MANAGEMENT LIABILITY UPDATE

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PRESENTED BY:
Kenneth M. Florey

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Kenneth M. Florey  
Partner, Chicago  
312-332-7760  
kflorey@rsnltnl.com

Ken Florey concentrates his practice representing public and private clients, including municipalities, school districts, community colleges, private owners, contractors and design professionals regarding land use, municipal law, construction, tax, finance and litigation.

Ken was the Chair of the DuPage County Bar Association’s Local Government Committee for 2001-2002. He served as a Trustee for the Village of Lombard for eight years. He was appointed Special Assistant Attorney General to prosecute and defend construction litigation claims on behalf of the Illinois Capital Development Board (1996-98, 2000 to present).

Awards  
Illinois Institute for Local Government Law, Annual Litigation Award, (February 2009).

Recent Presentations  
School Districts – Risk Management Update, IASBO Risk Management  
Litigation Update, Double Tree Hotel Chicago, Arlington Heights, IL  
(September 2008)

How to Win in Construction Project Disputes, 2008 IASB/IASA/IASBO Joint Annual Conference, Hyatt Regency Chicago, Chicago, IL (November 2008)

Illinois Community College Trustees Association Legal Update, Illinois Community College Trustees Association, Double Tree Hotel Chicago Magnificent Mile, Chicago, IL (November 2008)

The Incorrigible Contractor and Construction Delivery Systems, Wisconsin Association of School Business Officials’ Midwest Facility Masters Conference, Wyndham Milwaukee Airport Hotel & Convention Center, Milwaukee, WI (October 2008)


Practical Guide to Zoning and Land Use Law, National Business Institute, Oak Brook, IL (June 2008)

Urban Development and Redevelopment in Illinois, Lorman Education Services, Chicago, IL (May 2008)

Practice Areas  
Commercial Transactions  
Construction Law  
Education Law  
Finance  
Municipal Law  
Property Tax & Revenue Preservation  
Real Estate Development

Education  
J.D., DePaul University College of Law, 1992; Managing Editor, DePaul Journal of Art and Entertainment Law (1991-92)

B.A., University of Illinois at Urbana-Champaign, 1989

Admitted to Practice  
U.S. District Court for the Northern District of Illinois  
Supreme Court of Illinois
Creating a Legal Risk Management Plan: The Pearl City Appellate Court Decision, Spring 2008 ICCCFO Conference, Utica, IL (April 2008)

Land Use Law: Current Issues in Subdivision, Annexation and Zoning, National Business Institute, Oak Brook, IL (December 2007)


Practical Guide to Zoning and Land Use Law, National Business Institute, Naperville, IL (June 2007)

Ethics and Immunities for Elected Officials, Elected Officials Seminar, Hinsdale, IL (June 2007)


Bidding from the Basics to Advanced Problems and Solutions, Facility Purchasing Seminar, IASBO, Downers Grove, IL (March 2006)

Legal and Legislative Update, Illinois Community College Trustees Association, Rosemont, IL (March 2006)

Primer on Township Government for 2005 Candidates, Deerfield, IL (February 2005)
COMMUNITY COLLEGES – RISK MANAGEMENT PLAN

I. INTRODUCTION

The Tort Immunity Act (745 ILCS 10/9-101 et seq.) authorizes community colleges to levy taxes to fund expenses related to, inter alia, (1) risk management directly attributable to loss prevention and loss reduction, and (2) educational, inspectional, and supervisory services directly relating to loss prevention and loss reduction. The legislature has stated that the purpose of the tort levy is to provide an “extraordinary tax” for a limited purpose, not to fund expenses more properly paid from general operating funds. Relying on this limitation, an Illinois Appellate Court has restricted the expenses that can be funded using the tort levy. In re Objections to Tax Levies of Freeport School District No. 145, 372 Ill. App.3d 562, 865 N.E.2d 361 (2nd Dist. 2007). Community colleges therefore should consider the implications of the legislative limitation and the Appellate Court’s decision when funding expenses under the Tort Immunity Act.

II. THE TORT IMMUNITY ACT

A. Protection Against Liability and Loss

“A local public entity may protect itself against any property damage or against any liability or loss which may be imposed upon it or one of its employees for a tortious act...by means including, but not limited to...claims services and risk management directly attributable to loss prevention and loss reduction...educational, inspectional, and supervisory services directly relating to loss prevention and loss reduction...”

(745 ILCS 10/9-103(a) (emphasis added))

B. Authority to Levy for and to Pay Costs

“A local public entity may annually levy...a sum that will be sufficient to: (i) pay the cost of...claims services and risk management directly attributable to loss prevention and loss reduction, ... educational, inspectional, and supervisory services directly relating to loss prevention and loss reduction...and (iv)...and to pay the cost of risk management programs.”

(745 ILCS 10/9-107(b) (emphasis added))

C. Legislative Limitation – “Extraordinary Tax” for Limited Purpose

“The General Assembly finds that the purpose of this Section is to provide an extraordinary tax...it has become apparent that some units of local government are using the tax revenue to fund

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expenses more properly paid from general operating funds. These uses of the revenue are inconsistent with the limited purpose of the tax authorization.

(745 ILCS 10/9-107(a) (emphasis added))

III. APPELLATE COURT DECISION

The Illinois Appellate Court for the Second District recently limited the expenses that can be funded by the tort levy when it considered the levies made by four taxing districts in light of the legislative limitation. In re Objections to Tax Levies of Freeport School District No. 145, 372 Ill. App. 3d 562, 865 N.E.2d 361 (2nd Dist. 2007).

A. Risk Management

1. Definition of "Risk Management"

The Appellate Court found that the term "risk management" in the Tort Immunity Act is ambiguous, and therefore considered the definitions offered by the parties' experts. The Appellate Court held that the four-step definition put forth by the tax objectors' expert was more in keeping with the legislative limitation:

"[R]isk management is a process that consists of: [1] identifying and analyzing loss exposures; [2] selecting a technique or combination thereof to be used to handle each exposure; [3] implementing the chosen techniques; and [4] monitoring the decisions made and implementing appropriate changes."

The Appellate Court rejected a broader definition offered by the taxing districts' expert that the performance of any one of the four elements constitutes risk management. The Appellate Court held that such a definition would allow a taxing district to levy for nearly every employee's salary, which the Court deemed contrary to the legislative limitation.

2. Import of the Court's Definition of "Risk Management"

The Appellate Court then considered the use of the levies made by each of the taxing districts. The imports of the Appellate Court's findings are:

- Risk Management Requires a Formal Process – The Appellate Court rejected the practice of two taxing districts to pay a portion of employees' salaries with the tort levy based upon a review of their job descriptions because the alleged
risk management responsibilities were merely responsibilities to perform their respective job duties with due care, which alone does not constitute risk management.

- **Risk Management Must Include All Four Steps** – The Appellate Court upheld one taxing district’s funding of a superintendent’s salary with the tort levy because the superintendent’s written responsibilities incorporated all four steps of risk management. However, the Appellate Court found that another taxing district’s “safety policy manual” was not a valid risk management program because it did not incorporate all four steps.

- **Ordinary Safety Tasks Are Not Risk Management** – The Appellate Court found that the salaries of all employees of one taxing district who performed a specific risk management task pursuant to a risk management program could not be partially funded by the tort levy because their responsibilities did not include all four elements of risk management, but instead only included tasks that were already part of their job description. Moreover, mere reference to risk management responsibilities in a risk management program does not automatically render the salary funding permissible. Responsibilities to perform respective job duties with due care alone that are not above and beyond the ordinary safety tasks associated with a respective job is not risk management.

- **Risk Management Plan Must be Implemented** – The Appellate Court found that one taxing district’s use of the tort levy to partially fund employee salaries was not authorized by the Tort Immunity Act because there was no proof that the district actually implemented the risk management program.

**B. Educational, Inspectional and Supervisory Services**

The Appellate Court found that the phrase “educational, inspectional, and supervisory services directly relating to loss prevention and loss reduction” in the Tort Immunity Act is not ambiguous. Thus, the common meaning of the term was used. As a result, the Appellate Court held:

- A risk management program is not necessary in order to spend tort levy revenue on educational, inspectional, and supervisory services. The Appellate Court upheld one taxing district’s expenditures for OSHA and ergonomics training, despite not having a valid risk management plan.
Salaries for ordinary education, inspectional and supervisory duties performed by the regular staff cannot be paid with by the tort levy. The Appellate Court denied one taxing district's expenditures for salaries for its employees to perform their ordinary duties.

The expenses can only be for "services." The Appellate Court found that expenditures for computer software were not authorized under the Tort Immunity Act because it is a good, not a service.

IV. RISK MANAGEMENT PLANS

Community Colleges should consider the implications of the legislative limitation on the tort levy and the Appellate Court's decision when funding expenses under the Tort Immunity Act.

A. Risk Management is a Formal Process with Four Steps

Risk management should be a formal process which entails all four steps of the risk management process. The following figure illustrates in general terms the overall risk management process adopted by the Appellate Court. As seen, the risk management process is an iterative process, with each step in the process building on the results of the previous step. Each of the risk management steps shown in the figure below is described more fully in the following paragraphs.

Risk Management Process

- Identify and Analyze Loss Exposures
- Select Techniques for Treating Loss Exposures
- Implement Selected Techniques
- Monitor and Modify Risk Management Program
Each employee that is having a portion of his/her salary paid by the tort levy should be required to perform all four steps of the risk management process.

1. Identify and Analyze Loss Exposures

The first step in the risk management process is to identify and analyze loss exposures. These steps include: (1) identifying persons that are exposed to loss and the perils that can cause the loss; and (2) measuring the potential frequency and severity of the loss exposures. Identification should be both a systematic and a continuing process to review all property, activities, and personnel to determine what loss exposures are faced by the district. Measurement should review the number of accidents that are likely to occur, how severe the dollar losses are likely to be, and the variation in the potential losses in order to prioritize the exposures according to their importance.

2. Select Techniques for Treating Loss Exposures

After the loss exposures have been identified and analyzed, the second step in the risk management process is to develop techniques to handle those exposures that are significant by analyzing various techniques and selecting those best fitted for each exposure. There are essentially four risk-handling techniques:

a. **Loss Exposure Avoidance** - which eliminates the sources of loss exposures and replaces them with lower risk solutions;

b. **Loss Exposure Transfer** - which is the reallocation of the exposure to others, such as the purchase of insurance;

c. **Loss Exposure Control** - which manages the loss in a manner that reduces the likelihood of its occurrence and/or minimizes the effect on the district; and

d. **Loss Exposures Assumption** - which is the acknowledgment of the existence of a particular loss exposure and a conscious decision to accept the associated level of loss exposure without engaging any special efforts to control it.

In determining the "best" overall techniques for treating loss exposures, the following general procedures should be applied. For each loss exposure, all potentially applicable techniques should be identified and evaluated, using the following criteria:

- Feasibility of the technique;
- Expected effectiveness of the technique;
• Cost implications of the technique; and
• Effect on the district's performance.

3. Implement Selected Techniques

The third step in the risk management process is to implement the selected techniques using the district's physical and human resources. This step entails determining how to implement the selected techniques and identifying what person(s) will install and monitor the techniques. The components of implementation include but are not limited to educating the person(s) identified, and then supervising and inspecting the implementation of the technique to ensure that the technique is properly implemented.

4. Monitor and Modify the Risk Management Program

The fourth step in the risk management process is to monitor the implementation of the techniques to determine whether they should be modified. Key components of this step in the risk management process is the supervision and inspection of the implementation of the technique, which will reveal if the technique is successful to address the loss exposures identified in step one. If a technique is not working and a correction is warranted, the first three steps in the risk management process should be repeated.

B. Risk Management Should Include New Responsibilities

The Risk Management Plan should reflect new responsibilities for employees because ordinary tasks cannot be funded with the tort levy. The new responsibilities should be centered around and incorporate the four steps of risk management.

C. Risk Management Plans Must be Implemented

The Risk Management Plan should not be on paper only, but there should be some proof that the Plan was actually implemented. Moreover, implementation should not be limited to just implementation of safety-related tasks, but should include all four steps of the risk management process. The Appellate Court repeatedly cited with disfavor to the fact that only some of the four steps were being implemented. The fourth step of monitoring and revising is often the most overlooked, but the Court cited to the lack of implementing this step as grounds for denying use of the tort levy to fund employee salaries.
D. Educational, Inspectional and Supervisory Services

A Risk Management Plan is not necessary to fund educational, inspectional and supervisory services directly relating to loss prevention and loss reduction, such as training. However, the expenses can only be for services, not for any goods.

E. Allocation of Salaries to Tort Levy Funds

For purposes of properly levying for the expenses of a Risk Management Plan pursuant to the Tort Immunity Act and In re Objections to Tax Levies of Freeport School Dist. No. 145, it is necessary to determine what portion of each district’s employee’s salary is attributed to his/her responsibilities under the Risk Management Plan. The district should therefore interview the employees and perform a simple time allocation study to determine the portion of each employee’s time spent on the Risk Management Plan. Deliberate actions taken in the ordinary care for the safety of others and intended to reduce risk or the performance of duties with care shall not be allocated and chargeable to the Tort Immunity levy. Notwithstanding the foregoing, it should be the policy of the district that all safety related expenditures shall be paid first out of taxes collected pursuant to the Tort Immunity levy, and that the salaries allocated for risk management purposes shall only be paid from taxes remaining after such safety related expenditures.