

RISKY BUSINESS

A Publication of the
Miami Valley Risk Management Association

August 2019

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FYI-

2018 Risk Management Performance Awards

By Tom Judy

The June Board meeting each year is a time to celebrate our members' loss control successes. At the June 2019 meeting, awards were presented to members for outstanding achievements in 2018.

The Standard of Excellence Award is earned by member cities who incur claims losses less than \$100 per full-time employee for the year. The 2018 Standard of Excellence Award winners were the cities of Bellbrook, Blue Ash, Englewood, Vandalia and West Carrollton. The cities of Bellbrook and West Carrollton received special recognition as Co-Overall Winners, each with \$0 losses for 2018.

Members' departments with zero losses for the year receive recognition in the form of a breakfast or other celebration. A total of 35 of our members' departments qualified for this award.

Special recognition is given to departments with three or more consecutive years with zero losses. These departments are presented with a plaque commemorating this achievement. Departments so recognized were:

Department	Consecutive Zero Loss Years
Bellbrook Fire	3
Tipp City Fire	3
West Carrollton Fire	3
Madeira Parks / Recreation	3
Bellbrook Police	4
Indian Hill Police	4
Tipp City Streets / Public Works	4
Wilmington Fire	5
Indian Hill Parks/ Recreation	5
Vandalia Parks / Recreation	5
Bellbrook Water / Wastewater	6
Wyoming Parks / Recreation	10

Congratulations to the award winners and their employees for a job well done.

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Standard of Excellence Award Winners Pictured (L-R) Sherry Poppe, Blue Ash; Shannetta Dewberry, Vandalia; and Barb McCormick, Englewood.



Standard of Excellence Overall Award Winners Pictured (L-R) Tom Reilly, West Carrollton; Melissa Dodd, Bellbrook



The Claims File...

Craig Blair

This spring and summer have brought weather with higher than normal temperatures, rain, wind, and unfortunately record setting tornadoes in the Dayton area. Such weather results in a variety of claims to which MVRMA and the city need to respond to determine liability.

Heavy rains can cause storm drains to become surcharged which can lead to sewer backup. As a weather-related storm is a "natural act", the city cannot be held liable for a drainage system being over capacity. Ohio law provides protections for our members while engaged in "governmental functions" such as the design and construction of a storm sewer system. However, maintenance and upkeep of these lines is considered a "proprietary function". In order to avoid liability, the city must have documentation of scheduled inspections and regular cleaning of the lines. Also, debris should be removed from a blocked line or drain in a timely manner.

Repeated backups in an area need to be addressed by "running" the lines to see what is causing the problems such as debris, a grease buildup, roots, and illegal hookups. Also, the city should determine if any recent commercial or residential development has caused the system flow to increase to capacity even in normal rain events. This due diligence needs to be documented by the city as it can provide a defense for future claims.

High winds may lead to limbs or branches being blown down out of city owned trees and cause damages to fences, houses or automobiles. As storms with high winds are considered "natural acts", no negligence can be assessed against the tree's owners. An exception would be if the city was on notice of the tree being in poor condition and did not respond in a timely manner to trim or remove the tree. Another exception would be if an "open and obvious" condition existed, such as the trunk of the tree being in a decayed condition or the limbs not leafing out indicating the branches are dead or rotted. Without conditions such as these the City should not be held liable.

If you have any questions regarding natural acts or any other type of claims, please contact MVRMA staff for assistance.

Loss Control Lowdown...

Allow Alcohol? Get Insurance and Get an Agreement!

Starr Markworth

Local governments inherently have a liability exposure to alcohol-related claims when their facilities are used for events involving the consumption of alcohol. Strong risk management practices are the key to reducing the potential liability. Essentially, the potential liability results from one of two areas:

- A. As a provider of alcohol (i.e. the municipality is involved in the sale of alcohol), or
- B. As an occupier of the premises upon which alcohol is being consumed (i.e. rental function and City controls the premises).

For purposes of this article, I am going to focus on letter B. During many discussions with City employees, this is the area where there tends to be the most confusion and variance of practices.

MVRMA recommends requiring a facility usage agreement with the renter that includes hold harmless (to agree not to hold the other party responsible for loss, liability or damages) and indemnification language (to guarantee against any loss which another might suffer) language which transfers the risk from the City to the renter.

While this agreement is a strong legal document, the City is not protected financially unless you require the renter to carry general liability insurance, including host liquor liability coverage, of at least \$1 million per occurrence. The policy(ies) should name the City as an additional insured with the renter's insurance being primary coverage as respects to the additional insureds. The renter should provide the City with a certificate of insurance that evidences compliance with these requirements.

This process can become very cumbersome and frustrating as the renter is unsure how to secure this coverage at an economical rate. To make this process more efficient and to ensure that the City is properly protected, MVRMA can obtain special event/liquor liability insurance at an economical rate and then the City can provide the insurance to the renter as part of the rental package. The renter is the primary insured and the City is an additional insured under this coverage.

Many of the MVRMA cities are building the cost of the special events insurance into their rental fees so that there is no question of proper financial protection of the City as a result of an incident or accident that developed out of the facility rental and involving the use of alcohol.

If you have any questions or would like MVRMA to help you develop and implement any of the practices above, please contact our office and the MVRMA staff will be happy to work through this with you.



Broker's Beat

Ransomware Attacks

Across the country, we continue to see more and more ransomware attacks on local US governments. The threat of these attacks is growing rapidly, and hackers do not appear to be letting up any time soon. According to the Ponemon Institute, a research company focused on information security, 38% of public entities they sampled were expected to experience a ransomware attack, which is up from 31% in 2017, and 13% in 2016. With the number of these events climbing rapidly, it is now more important than ever for local governments to protect themselves from the significant financial impact.

Although there are many ways that hackers are able to impact the operations of municipalities, ransomware seems to be the most prevalent. Ransomware attacks are often triggered by an employee opening a link or an attachment from a phishing email sent to them. Oftentimes, these emails will appear to be from a credible source, or from a person that the employee knows or is aware of internally. Once opened, the ransomware blocks files that the cyber attackers claim they will unlock in return for payment. Municipalities are prime targets for these types of attacks, as they are typically less prepared than private companies due to limited resources and difficulty competing for cybersecurity talent according to a June 7, 2019 article from the Wall Street Journal (Hackers Won't Let Up in Their Attacks on U.S. Cities).

When faced with a ransomware attack, local governments must make the difficult decision of whether to pay these hackers or not. According to the Wall Street Journal, governments are less likely than private firms to pay, as local officials want the public to see them taking FBI advice, which is not to pay criminals. The article lists several examples of responses municipalities have taken, including the city of Atlanta, GA, who refused to pay a ransom of \$51,000 in bitcoin, ultimately resulting in millions of dollars in losses. Alternatively, Jackson County, GA was also hit with a ransomware attack, in which they paid around \$400,000 in bitcoin. After the county paid the hackers, they were able to regain all of their data and largely return to normal operations within a matter of about five weeks. Although in these examples it appears to be more advantageous to pay the hackers, paying often leads to a perception of vulnerability in which criminals will either attempt to hack again, or other hackers will be encouraged to try and duplicate the attack.

Attorneys Sean Hoar and Frank Gillman at Lewis Brisbois Bisgaard & Smith LLP recently published an article on July 3, 2019 on the best practices regarding the response to a ransomware attack titled Ransomware Reminders: Implementing Best Practices & Avoiding the Biggest Mistakes. In the article, they highlight five best practices for ransomware defense, which include the following: deploying a system for creating backups, checking backups, and restoring backups of all vital applications and data in a separate and secure location; implement cybersecurity tools such as an anti-malware solution that has endpoint or heuristic monitoring; report relevant information about cyberattacks to cywatch@fbi.gov; do not open any attachment or download anything from sources you do not completely trust; and enable automatic patching for updates on your operating system and web browser.

Participants in the APIP Cyber program through Beazley have a number of resources at their fingertips. The program offers coverage for breach response, including legal services, forensics, credit monitoring, and public relations/crisis management. Coverage extends to both first-party losses, including business interruption, extortion, data restoration, eCrime, criminal reward, and bricking; as well as third-party coverage such as data and network liability, regulatory, payments cards, and media liability. Beazley also offers a number of optional enhancements, such as increased breach response sub-limits and Technology Errors & Omissions. It is imperative that you contact your insurance broker or carrier immediately following a ransomware incident, as they will have access to resources such as breach response counsel that can help guide you through the process.

Counselor's Comments

By Surdyk, Dowd and Turner

Real Property Claims

In Ohio, a party who alleged a physical or regulatory taking of real property was first required to file a mandamus action in state court to compel the public authorities involved to institute appropriation proceedings before filing in federal court. Known as "*Williamson County*" after the 1085 U.S. Supreme Court case in *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3018 (1985), the law was that a takings claim was not ripe in federal court until mandamus was finalized and the property owner had been denied just compensation. That was until June 21, 2019, when the U.S. Supreme Court directly overturned *Williamson* in *Knick v. Township of Scott Pennsylvania*, 139 S.Ct. 2162 (2019).

Knick v. Township of Scott Pennsylvania

In *Knick*, the petitioner owned 90 acres of land in Scott Township, Pennsylvania. Her property included a "backyard burial" graveyard, which are fairly common in Pennsylvania and had long been permitted in Scott Township. In 2012, the Township passed an ordinance requiring "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours." In 2013, a Township officer notified the petitioner that she was violating the ordinance by failing to keep her cemetery open. The petitioner first filed suit in Pennsylvania state court for declaratory and injunctive relief. However, because the Township stayed enforcement of its ordinance, the state court dismissed the petitioner's claims since she could not demonstrate the irreparable harm required for her claims. The petitioner then filed a 42 U.S.C. § 1983 action in district court and alleged that the ordinance violated the Takings Clause of the

Fifth Amendment. The district court dismissed the petitioner's claim under *Williamson County* because she had not first pursued appropriation proceedings in state court. The Third Circuit Court of Appeals affirmed on appeal, from which the U.S. Supreme Court granted certiorari.

In its 5-4 opinion, on behalf of the majority, Chief Justice Roberts recognized the "unanticipated consequences" of *Williamson County*. The majority reviewed "repeated holdings" handed down prior to and years after *Williamson County* to demonstrate the inconsistency in *Williamson County* and its "neglect" toward "Fifth Amendment precedents." In doing so, the majority found that the U.S. Supreme Court in those cases "was simply confused" and relied on "unnecessary language" from which it drew "poor reasoning." In disregarding *stare decisis*, and further relying on the intent of the Framers and its brief history of takings litigation, the majority concluded that a government violates the Takings Clause at the moment it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under 42 U.S.C. § 1983 at that time, without delay, regardless of post-taking remedies that may be available to the property owner. Still, the majority attempted to sooth anticipated concerns, stating that "[o]ur holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits [mandamus in Ohio] in state court."

The dissent unequivocally disagreed. Justice Kagan on behalf of the dissent stated the majority's decision "smashes a hundred-plus years of legal rulings to smithereens." The dissent noted that

overruling *Williamson County* will have two damaging consequences. First, it will turn even well-meaning government officials into lawbreakers since it regularly is not known in advance whether applying a regulation will effect a taking of property. And second, it undermines important principles of judicial federalism and will channel to federal courts a massive set of cases that appropriately belong in the first instance in state court.

Effect of Knick v. Township of Scott Pennsylvania

The decision in *Knick* bolsters the rights for property developers and owners and opens the floodgates to federal takings claims against Ohio state and local governments that are being pursued in the first instance at the federal court level. A party may now bring local property-related claims into federal court in the first instance when they believe the effect of a local government's regulations, ordinances, or actions constitute a taking of their property without just compensation. Although *Knick* does not alter the standards in which a federal court reviews such claims, a review of local government regulations and ordinances will now become an everyday practice at the federal court level. The additional benefits, if any, for property owners having a federal court review an alleged taking in the first instance are unknown. However, it is without question that Ohio local governments and the federal courts will see a marked increase in the number of takings cases being filed in the first instance in federal court and bypassing the appropriation proceedings at the state court level.

FYI – July 1, 2019 Property Insurance Renewal

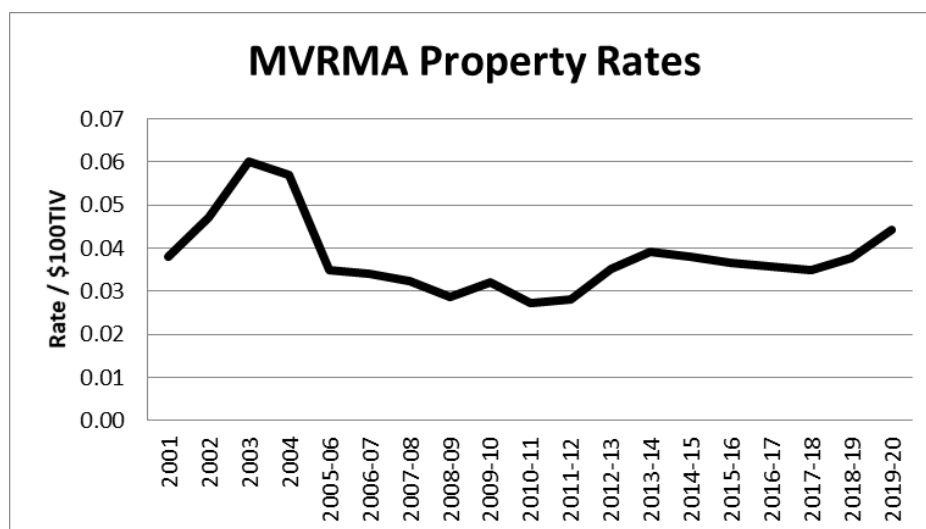
Tom Judy

The MVRMA Board recently approved the renewal of the property insurance program for July 1, 2019 to July 1, 2020. We were expecting a sizable increase due to a hardening of the property market, but the 17% rate increase was greater than originally expected as the market experienced a significant downturn in the weeks leading up to the renewal. USI Insurance Services' 2019 Commercial Property & Casualty Market Outlook Mid-Year Market Forecast noted the downturn "surprised many given the more gradual change anticipated."

MVRMA's 17% rate increase was consistent with the results of our informal poll of other pools with mid-year renewals. Surprisingly, this increase was on the low end of the spectrum nationwide. The USI report indicated they are now seeing 10% to 40%+ rate increases. An article in The Insurance Insider noted the London property market is seeing renewals up by 20% to 25% with some severely distressed accounts experiencing increases in excess of 100%. There is reported to be a "landslide" of US business coming into the London insurance market due to US insurers losing some of their appetite to write property business.

The initial catalyst of the hardening of the property market was consecutive years of historically high losses. Due to large weather-related claims, 2017 had the highest property losses ever recorded. To make matters worse, 2018 was the third-worst loss year on record as a result of more weather events. Closer to home, the problem is exacerbated by the property insurance industry's concern with "convective storms" such as tornados. This concern was surely only heightened by the tornados we experienced on Memorial Day.

The 17% rate increase this year follows an 8.5% property insurance rate increase in 2018; however, the current property rates are far from the highest MVRMA has experienced. Current property rates are 4.4 cents per \$100 of insured values. The graph below illustrates that the current rate is a far cry from the high-water mark of 6.0 cents per \$100 of insured values experienced by the pool in 2003. In recent years, the pool has benefitted from a sustained "soft" property market; however, history tells us that such favorable market conditions last only for so long.



Industry experts say the unsettled property market – and increasing rates – will likely continue for a while yet. It is our hope that the market will have calmed by our next property renewal in 2020.

Calendar of Events

Upcoming Training Events

Workplace Diversity - October 23rd, Home2 Suites, Centerville

Fall Driver Training—To be Announced

Upcoming Board Events

Committee Meetings (at MVRMA Office, 3085 Woodman Drive, Kettering)

Risk Management - September 3rd 10:00 AM

Finance - September 3rd 1:30 PM

Board Meeting

September 16th- 9:30 AM at Home2 Suites, Centerville

From The Board Room

Actions taken at the June 17th Board meeting included:

- * Approved 2018 Annual Report
- * Accepted Pinnacle's 12/31/18 Actuarial Report
- * Approved 7/1/19 Property Renewal
- * Approved 2019-2020 Property Coverage Document
- * Approved 7/1/19 Deadly Weapon Coverage Renewal
- * Approved Personnel & Compensation Policy Revisions