Municipal Excess Liability Joint Insurance Fund

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Legislative Priorities

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Firefighter Cancer Presumption (S-716):

Research has established that firefighters incur cancer at a rate 9% higher than the general public. Over the last decade, the Municipal Excess Liability Joint Insurance Fund (MEL) has urged amendments to this bill that will balance the needs of both the first responders and the taxpayers. S-716 as currently worded will be prohibitively expensive.

Cost Projections:

- $40 million per year assuming that the bill is adopted as currently written.[1] The cost to New Jersey cities could be considerably higher based on the experience of Los Angeles.

- $13 million per year if S-716 is amended to include the controls adopted by other states with cancer presumptions in workers' compensation. This projection is based on the experience of Pennsylvania.

- $5 million per year if New Jersey enacts a program outside of workers' compensation along the lines recently adopted by New York, Connecticut, Colorado, Michigan, and Georgia

Analysis:

The problem is that S-716 as currently written does not include any of the controls adopted by other states to prevent the costs from becoming unaffordable. (See Exhibit A for a state-by-state comparison).

Types of cancers included in the presumption: Following the example of other states, the presumption should be based on scientific evidence that establishes those cancers that firefighters develop at a higher rate than the general population. According to the National Cancer Society, the US lifetime cancer rate for the general population is 39.6 per 100. The most comprehensive study to date concerning firefighters published by the prestigious National Institute for

[1] If all eligible career and volunteer firefighters with cancer make a claim under S-716 as currently written, the projected cost is $218 million per year. However, the experience in other states is that volunteers rarely file claims under cancer presumption statutes even when eligible. The $40 million per year projection assumes that New Jersey volunteer firefighters file claims at the same rate as Pennsylvania.

Occupational Safety and Health (NIOSH) estimated that the rate for firefighters is 9% higher, or approximately 43 per 100. The NIOSH study focused on 30,000 career firefighters in three major cities who were for the most part exposed before the widespread use of air breathing apparatus. The study concluded that these firefighters had a significantly higher rate of mesothelioma and testicular cancer, as well as elevated rates of respiratory, digestive, and urinary cancers. The potential cost of any presumption legislation is substantially higher unless the presumption is limited to the specific types of cancers linked to firefighting.

Statute of limitations: In the other states, the most common cutoff for the presumption is five years from the date an individual retires from the fire service, or age 65 when the firefighter becomes eligible for Medicare. Under S-716 as currently written, firefighters can claim the presumption at any age.[2] As a result, municipalities will also pay medical bills that will otherwise be paid by Medicare and health insurers. S-716 will prove to be even more expensive during the first few years because there will be a large influx of claims from retired firefighters.

Legal standard to rebut the presumption: S-716 as written will make it almost impossible to question claims. Under current New Jersey law, the standard to rebut a presumption is "preponderance of the evidence". In S-716, the standard is raised to "clear and convincing" evidence that equates to blanket compensability. No expert will be able to say that exposures to dusts, fumes, chemical odors, etc. had de Minimis contributions to a given cancer because there are no scientific studies that focus on "de Minimis" levels of contribution. The studies focus on possible causes or likely causes but not on specific agents that have no effect whatsoever on a given condition. The effect of the legal standard in S-716 is to make all cancers compensable.

Volunteers: Seven of the 24 states with workers' compensation cancer presumptions exclude volunteers from the presumption. Based on the experience in states such as Pennsylvania, the annual cost for volunteers is under $100 per firefighter when the legislation includes a science based definition of the cancers covered, a statute of limitations and a reasonable standard to rebut the presumption. Unfortunately, S-716 currently lacks these controls making the costs difficult to project.

Impact on cities: During a three-year study, Los Angeles with 2,850 career firefighters reported 170 cancer presumption claims, or 56.6 claims per year.[3] If New Jersey's cities incur claims at this rate, New Jersey's 7,287 career firefighters will report 148 claims per year at a projected cost of $66.4 million, not including volunteers. This cost will fall largely on the cities that are almost universally self-insured.

Cancer Benefit Programs outside Workers' Compensation: Because of the uncertainty and high cost of workers' compensation based presumptions, the recent trend is to cover firefighters in a program outside of the workers' compensation law. This approach was recently adopted by New

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[2] Under current New Jersey law, workers compensation claimants have two years to file a claim from the date of injury or the date the claimant realizes that a medical condition is work related. Unless S-716 is amended to be consistent with other states, claims will be reported in New Jersey decades after career and volunteer firefighters retire from service.

[3] California's cancer presumption ends 10 years after retirement. S-716 does not have a similar cutoff. Therefore it is reasonable to conclude that New Jersey's costs will be higher than California.

York, Connecticut, Colorado, Michigan, and Georgia and was supported by both firefighters and municipalities. The problem with including the presumption in workers' compensation is that it requires local tax payers to pay medical bills that would otherwise be paid by the federal government or health insurers. This dramatically increases the cost. Therefore, for the last decade we have proposed that New Jersey also create a special firefighter cancer program outside of workers' compensation. If the usual controls are not added to S-716, we strongly urge that volunteers be removed from this legislation and placed in a separate program outside of workers' compensation such as was recently adopted in five states.

To summarize, the bill as currently written would dramatically increase workers' compensation costs for municipalities, especially cities. This projection is driven by the fact that using the workers' compensation system requires local taxpayers to pay for medical expenses that would otherwise be paid by Medicare and health insurers. Unlike almost every other state, the presumption in proposed New Jersey legislation applies to all cancers and retired firefighters at any age. The proposed "clear and convincing" standard for the rebuttable presumption will also make it impossible to contest claims even when it is highly unlikely that firefighting was involved.

We again reiterate our willingness to work with supporters to find a fair balance between the concerns of firefighters as well as local government.

First Responder Heart Attacks (S-1597):

Heart attack is the most common cause of on-duty firefighter fatalities. Yet, existing regulations do not require firefighters to pass periodic medical examinations. This is especially a problem with volunteer firefighters who often tend to be older than their counterparts in career departments. The MEL recommends that S-1597 be amended to require annual reexaminations consistent with NFPA Standard 1582, Chapter 7.4-7.7.

The New Jersey workers' compensation system currently recognizes the serious exposures faced by emergency responders by providing a presumption that on duty heart attacks are compensable. This presumption is rebuttable with evidence that the first responder already had serious heart disease. The MEL is willing to work with representatives of first responders to find a fair balance between their concerns as well as the budget concerns of local government. However, we oppose S-1597 as currently written because it would make it very difficult for municipalities to raise legitimate questions concerning compensability in various situations. Specifically:

- Section 1. a. inserts the word "fully" in front of compensable. This effectively eliminates the use of Section 20 compromise settlements that are usually the best way to resolve cases where there is substantial preexisting heart disease. Under S-1597 as currently written, these cases will now become "all or nothing" which depending on the circumstances, can be unfair to either claimants or municipalities. Claims of this nature are often complex and both parties need to have access to Section 20 settlements to resolve disputed cases.

- Section 1 a. also removes the provision in the current law that the claimant must be responding under the orders from competent authority. It is critical that the chain of

command be maintained within any emergency agency. Under current law, a first responder is covered for workers' compensation (a) while on duty and (b) while off duty if responding to an emergency situation in town even if not specifically told to do so. However, a responder is not covered if responding outside of town unless authorized by a superior officer or the responder comes across the emergency situation and does not have time to secure permission. We believe that this is a fair balance.

- New section 1.b. (5) adds "Any recognized emergency management member doing volunteer duty" to positions eligible for the cardiovascular or cerebrovascular presumption. This is unreasonably broad. Presumptions should be limited to positions or situations where science based evidence establishes a causal link justifying the presumption.

- New Section 1.d. could be interpreted to limit the grounds to contest the presumption to "horseplay, skylarking, self-infliction, voluntary intoxication and illicit drug use." We request that this section be redrafted to provide that "the presumption of compensability to subsection a. of this section may be rebutted by the preponderance of the evidence of casual factors including but not limited to horseplay, skylarking, self-infliction, voluntary intoxication and illicit drug use."

- New Section 1.e. provides that "a dispute as to compensability shall be decided coincidentally with the United States Department of Justice Public Safety Officers' Benefits Programs findings." We are strongly opposed to this provision because it effectively moots the proceedings in New Jersey Workers' Compensation Courts. Workers' Compensation has been and must remain the exclusive remedy for work-related injuries in New Jersey. To have an alternative judicial track would subject both first responders and employers to unpredictable outcomes.

If the legislature believes that all first responders should receive compensation for heart attacks without exception, then we propose that New Jersey adopt a program outside of workers' compensation along the lines just enacted in Colorado with the strong support of both first responders and municipalities. Placing the benefit in an alternative program eliminates the arguments and substantially reduces the cost because municipalities will not be required to cover expenses that otherwise would be paid by health insurers and Medicare.

The current New Jersey workers' compensation law has also proven to be troublesome when applied to passive or "life" volunteers. In its 2003 decision in Capano v. Bound Brook, the New Jersey Supreme Court ruled that the law even extends to a 93 year-old member who slipped while putting a log into a wood burning stove in the fire house. The court held that under the current law, Capano was in the "line of duty", but asked the legislature to reexamine this question. The MEL agrees with the New Jersey Supreme Court that the legislature should take up this issue and limit workers' compensation to work related injuries as opposed to injuries incurred in social situations.

We again reiterate our willingness to work with supporters of S-1597 to find a fair balance between the concerns of first responders and the budgetary issues of local government.

Statute of Limitations in Civil actions for Sexual Abuse (S-477)

Sexual abuse of a child is a terrible crime that can have repercussions for years. We agree that the current statute of limitations of 2 years on all claims is too short. The MEL supports extending the statute of limitations from 2 to 7 years for suits against public bodies, and removing the statute of limitations entirely on the actual perpetrators.

However, we oppose S-477 as currently drafted. Under this legislation, any claim of sexual abuse, no matter how far in the past, can proceed. The bill exposes public officials, employees and volunteers to personal liability for the actions committed by other employees or volunteers. Under the act, both officials and volunteers can be sued personally by someone claiming that they failed to exercise oversight of an employee or volunteer who allegedly committed sexual abuse. As a result, officials and volunteers will be faced with the near impossible task of defending a claim of sexual abuse that is decades old.

In fact, the bill is designed to encourage such lawsuits by including the same attorney fee shifting provision that was a significant factor in the increase of employee practices lawsuits against municipalities over the last decade.

Wrongful Death Liability (S-1766):

The MEL opposes this bill which allows juries to award juries to award substantial compensation for "emotional distress." Under the current New Jersey law, family members can already collect substantial compensation for actual losses such as medical bills and lost income as well as loss of companionship. The MEL's actuary estimates that S-1766 as currently written will result in an increase of 6% to 10% in liability claim costs for municipalities, counties, Boards of Education, authorities and the state itself.

Further, S-1766 is inconsistent with the Tort Claims Act. Public entities are often forced into tough decisions and therefore should be held to a standard that recognizes this reality. As our courts wrote in Lopez v Elizabeth:

> "While a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. N.J.S.A. 59:2-3 particularly recognizes that government has no choice but to govern. A private person or firm that cannot afford the people and equipment to do a good job can withdraw rather than perform in a dangerous way. Government rarely has that option. It cannot withdraw from law enforcement if its police force is too small, from fire protection if its trucks are in poor repair, or from maintaining streets if it cannot afford to keep them in perfect condition. That is why high level discretionary policy decisions whether to burden the taxpayers to furnish equipment, material, facilities, personnel or services are absolutely immune."

Therefore, we urge that this legislation be amended so that it is not applicable to Title 59 entities.

Attorney Fee Shifting in Liability Cases:

In most liability cases, the claimant's attorney is paid from the award and the fee is capped at between 25% and 33%, depending on the size of the judgment. However, in employment liability cases, the defendant must pay the prevailing plaintiff's fees as determined by the court, and there is no cap. In other states and in Federal Court, the fee runs between $300 and $350 per hour. New Jersey goes a step further and awards an "enhancement", ordinarily up to an additional 50% to compensate the claimant's attorney for the risk that the case is unsuccessful. Further, while in the other 49 states and in Federal Court, judges take into consideration the relationship between the requested fee and the award to the plaintiff, not in New Jersey. In one New Jersey lawsuit, a retired police officer rejected a settlement offer of $75,000 and was subsequently awarded only $20,000 by the jury. However, the judge awarded the plaintiff's attorney a fee of $450,000!

This system encourages attorneys to waste time in endless depositions and to make unreasonable demands to stretch out the proceedings and build up legal fees, especially if the case has any merit. This is taxpayer's money.

The MEL proposes legislation to cap fee applications as follows:

- For awards (damages and punitive awards) of $50,000 or less, the maximum award shall be $50,000 subject to considerations of reasonableness (i.e. Rendinev. Pantzer)

- For awards over $50,000, the fee cap shall equal the award, again subject to considerations of reasonableness.

Offers against Judgement

The MEL also proposes that New Jersey's rule on Offers of Judgment be conformed to Federal Practice. Under the U.S. Supreme Court's ruling in Marek v. Chesney, when a defendant in a fee shifting case offers a sum certain plus fees and costs to date and the award to the plaintiff is ultimately lower than the amount offered, the plaintiff's counsel's fees are frozen as of the date of the offer. New Jersey adopted a convoluted rule that is more difficult to use.

Direct Right of Appeal

The MEL supports adding provisions that would grant public entities a "direct right of appeal" on all lower court rulings involving immunities and notice provisions. Currently, a public entity may only apply to the appellate court through an interlocutory appeal which is seldom granted. As a result, public entities are forced to either try the case or settle without the benefit of an appellate ruling with respect to immunities and other protections under Title 59.

Catastrophic Claims:

Every year, New Jersey governmental entities spend tens of millions for excess liability and workers' compensation insurance coverage, but most governmental units, including the state itself still lack sufficient limits to address truly catastrophic claims. One approach is to follow the practice in half of the states by enacting provisions in their public entity tort liability statutes that cap jury awards. (See Exhibit B for a comparison of liability caps) These caps range from $100,000 per occurrence in Illinois and Rhode Island to Georgia's $3 million per occurrence. While a number this low would not be acceptable in New Jersey, some reasonable cap should be enacted with a provision that the legislature can increase the award if the facts warrant.

Sick Leave Injury Reform (SLI):

The MEL urges the legislature to reform sick leave injury programs so that the rules that currently apply to state employees also apply to local unit and school employees. Currently under NJSA 18A:30-2.1 and NJSA 11A:6-8, local units and BOEs are permitted to extend for a period up to one year full pay for workers injured in the course of their employment. In 2010, the similar provision for state workers was repealed.

The New Jersey legislature determined that Sick Leave Injury programs are unnecessary because state workers are also covered by workers' compensation and the retirement disability programs. Municipal, county and BOE employees are covered by these same programs. The problem with SLI programs is that the employer must continue to pay the employer portion of payroll taxes etc. while the employer is not responsible for these extra costs if the employee is paid through workers' compensation. SLI also acts as a disincentive to return to work because even though the employee is being paid full salary, the employee pays taxes on only a small part of the income. This disincentive increases the total amount of the claim.

The State currently saves $10s of millions each year because it eliminated its SLI program. The MEL contends that state, county, municipal and BOE employees should be treated the same with respect to these benefits. Since SLI was eliminated for state workers, it should be eliminated for workers at the other levels of government as well.

Exhibit A

Comparison of State Fire Fighter Cancer Presumption Laws

- **Alabama:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption. The firefighter must establish exposure to a carcinogen linked to the type of cancer. The presumption can be rebutted by the "preponderance of the evidence."

- **Alaska**: 7 years minimum employment required for a workers' compensation presumption that expires 5 years after retirement from the fire service. The presumption only applies to certain types of cancer and is rebuttable by "the preponderance of the evidence". The presumption does not apply to smokers.

- **Arizona:** 5 years minimum employment required for a workers' compensation presumption that expires at age of 65. The presumption only applies to certain types of cancer and does not apply to volunteers and smokers.

- **Arkansas:** No workers' compensation cancer presumption. Firefighters who are diagnosed with cancer before age 68 may receive a special $150,000 benefit from the Arkansas State Claims Commission.

- **California:** The presumption in workers' compensation expires 10 years after retirement. Claims may be rebutted by evidence that the type of cancer is not reasonably related to the fire fighter's exposure.

- **Colorado:** 5 years minimum employment required for a workers' compensation presumption. The presumption is limited to certain types of cancer and may be rebutted by the preponderance of the evidence. In 2016, a Colorado Supreme Court decision (Zukowski v Castle Rock) made it substantially more difficult to establish a claim under the presumption. As a result, a 2017 amendment to the statute permits departments to opt out of the workers' compensation cancer presumption by joining a special heart and cancer benefits trust.

- **Connecticut:** No workers' compensation cancer presumption. In 2016, the state established a firefighters' cancer relief fund.

- **Delaware:** No workers' compensation cancer presumption.

- **Florida:** No workers' compensation cancer presumption.

- **Georgia:** No workers' compensation cancer presumption. Under legislation adopted in 2016, Fire Departments are required purchase a special policy that provides a lump sum benefit when a firefighter is diagnosed with cancer.

- **Hawaii:** No workers' compensation cancer presumption.

- **Idaho:** No workers' compensation cancer presumption

- **Illinois:** 5 years minimum employment required for a workers' compensation presumption. The claimant must be an "active" firefighter when diagnosed. To rebut the presumption, the employer only must offer some evidence to support a finding that something other than the claimant's occupation as a fire fighter caused the condition.

- **Indiana:** Presumption in workers' compensation expires 5 years after retiring from the fire service and only applies to certain types of cancer. The presumption does not apply to volunteers and recent smokers (in the last 5 years).

- **Iowa:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption.

- **Kansas:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption that requires 5 years minimum employment.

- **Kentucky:** No workers' compensation cancer presumption.

- **Louisiana:** 10 years minimum employment required for a workers' compensation presumption and the presumption expires 5 years after retiring from the fire service. The presumption is limited to certain types of cancer and is rebuttable by "evidence meeting judicial standards." The presumption does not apply to volunteers.

- **Maine:** 5 years minimum employment required for a workers' compensation presumption that expires 10 years after leaving the fire service or at age 70. The presumption is limited to certain types of cancer.

- **Maryland**: 5 years minimum employment required in the department "where the individual is currently employed or serves."

- **Massachusetts**: No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption that requires 5 years minimum employment and expires 5 years after retirement.

- **Michigan:** No workers' compensation cancer presumption. In 2016, Michigan established a special "First Responders Fund". Coverage requires 5 years minimum employment and limited to full-time firefighters. The cancer must manifest while the firefighter is employed.

- **Minnesota:** To be eligible for a presumption in workers' compensation, the claimant must be an active fire fighter *immediately* prior to reporting the claim. The presumption is limited to certain cancers and may be rebutted by "substantial factors."

- **Mississippi:** No workers' compensation cancer presumption.

- **Missouri:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption.

- **Montana:** No workers' compensation cancer presumption.

- **Nebraska:** The workers' compensation presumption expires 3 months after retirement and is limited to certain cancers.

- **Nevada:** 5 years minimum employment required and the presumption expires 5 years after leaving the fire service. The presumption is rebuttable.

- **New Hampshire:** The workers' compensation presumption expires 20 years after leaving the fire service or age 65. The presumption is limited to certain cancers.

- **New Jersey:** The workers' compensation presumption was established by the NJ Supreme Court in the 2003 decision in Lindquest v Jersey City.

- **New Mexico**: The minimum period of employment for the workers' compensation presumption varies by disease. Volunteers are excluded from the presumption.

- **New York:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption. In 2017, New York adopted legislation that requires Fire Departments to purchase cancer disability insurance for volunteers.

- **North Carolina:** No workers' compensation cancer presumption.

- **North Dakota:** 5 years minimum employment required and the presumption expires 5 years after retirement from the fire service. Volunteers excluded from the presumption.

- **Ohio:** 6 years minimum employment required and the presumption expires 20 years after retirement or at age 70. The presumption may be rebutted by "competence evidence to the contrary" or that the use of tobacco was a significant factor.

- **Oklahoma:** The workers' compensation presumption is limited to firefighters while they are employed and the benefit is limited to medical treatment. Eligibility for a disability pension also includes a cancer presumption.

- **Oregon:** 5 years minimum employment required and the presumption expires 84 months after retirement from the fire service. Volunteers are excluded from the presumption. The presumption is limited to certain cancers and the claim may be rebutted by "clear and convincing evidence" that the condition is not work related or that the use of tobacco was a major contributing cause.

- **Pennsylvania:** 4 years minimum employment required and presumption expires 300 weeks after retirement.

- **Rhode Island:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption.

- **South Carolina:** No workers' compensation cancer presumption.

- **South Dakota:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption.

- **Tennessee:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption.

- **Texas:** 5 years minimum employment required and the presumption expires when the fire fighter retires. Texas excludes smokers from the presumption.

- **Utah:** No workers' compensation cancer presumption.

- **Vermont:** 5 years minimum employment required and the presumption expires 10 years after retirement. Claims must also be reported before age 65 and can be rebutted by "the preponderance of the evidence." The presumption does not apply to fire fighters who used tobacco products within 10 years of the date of diagnosis.

- **Virginia:** 12 years minimum employment required and the claim must be reported within 5 years of leaving the fire service. The presumption can be rebutted by the "preponderance of the evidence." The presumption is limited to certain cancers.

- **Washington:** 10 years minimum employment required and the presumption expires 5 years after retirement. The presumption can be rebutted by the "preponderance of the evidence". Washington excludes volunteers and smokers from the presumption.

- **West Virginia:** No workers' compensation cancer presumption.

- **Wisconsin:** 10 years minimum employment required and the presumption excludes volunteers and smokers.

- **Wyoming:** No workers' compensation cancer presumption.

Exhibit B

Public Entity Tort Liability Cap by State:

Delaware: $300,000 per occurrence
Florida: $100,000 per claimant, $200,000 per occurrence
Georgia: $1 million per claimant, $3 million per occurrence
Illinois: $100,000 per occurrence
Kansas: $500,000 per occurrence
Kentucky: $100,000 per claimant, $250,000 per occurrence
Louisiana: $500,000 per claimant
Maine: $400,000 per occurrence
Maryland: $200,000 per claimant
Massachusetts: $100,000 per claimant
Minnesota: $300,000 per claimant, $1 million per occurrence
Montana: $750,000 per claimant, $1.5 million per occurrence
New Hampshire: $250,000 per claimant, $2 million per occurrence
New Mexico: $400,000 per claimant, $750,000 per occurrence
North Carolina: $500,000 per occurrence
Oklahoma: $125,000 per claimant
Oregon: $100,000 per claimant, $500,000 per occurrence
Pennsylvania: $250,000 per claimant, $1 million per occurrence
Rhode Island $100,000 per tort action
South Carolina: $300,000 per claimant, $600,000 per occurrence
Texas: $250,000 per claimant, $500,000 per occurrence
Utah: $500,000 per claimant, $1 million per occurrence
Vermont: $250,000 per claimant, $500,000 per occurrence
Virginia $100,000 per occurrence
Wyoming: $250,000 per claimant, $500,000 per occurrence