Municipal Excess Liability Joint Insurance Fund

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Legislative Priorities

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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.

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 A 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

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