



## Professional Liability Insurance White Paper

Draft

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## **I. INTRODUCTION**

In a general sense, transit agencies are charged with serving the public. In accordance with this duty, they are expected to oversee the design and implementation of new services, as well as the expansion of existing services. Inevitably, performance of these tasks exposes an agency to multiple levels of potential liability, including tort liability, contractual liability, and professional liability. For all transit agencies, continued success requires an understanding of these potential areas of risk, and mandates the use of effective strategies to minimize their impact and maximize the agency's level of protection.

With that in mind, professional liability exposure is likely the least known or understood category of potential risk a transit agency faces. As such, this document is designed to provide a broad overview of professional liability exposure and a general discussion of professional liability coverage afforded in support of indemnification requirements for contractors who perform professional services for transit agencies.

## **II. HISTORICAL PERSPECTIVE**

### **A. Beginnings**

Insurance provides a financial guarantee for contractual or common law indemnities. Modern insurance coverage initially provided protection against fire and related property losses, and eventually afforded liability protection.

Liability insurance initially provided defense and payment for claims related to bodily injury and/or property damage to third parties caused by the Named Insured. Through evolution, the scope of coverage was expanded to include other coverage related to losses, such as personal injury, contractual, products/completed operations and medical payments.

### **B. Development of Coverage**

Over time, the liability policy was amended to clarify the scope of coverage afforded to the Named Insured. Claim payments outside the original intent of liability programs, and rulings against insurance carriers necessitated revisions to the standard policy form, as well as amendatory endorsements to limit and clarify the exposures insurance carriers faced. These form revisions and endorsements helped ensure that the Insured and the carrier understood the protections provided by insurance coverage. Loss history on these initial liability policies identified exposures that were best suited for coverage under a separate program. These included coverage for loss due to failure to perform, as well as coverage for errors and omissions in the provision of professional services.

A distinguishing factor between the professions and other trades was the emphasis on intellectual judgment and expertise which characterized their work. One court, in distinguishing what constitutes a professional service stated:

Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term “professional” in the context used in the policy provision means something more than mere proficiency in the performance of the task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A “professional” act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.<sup>1</sup>

In tort law, a professional possesses a special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning and aptitude developed by special training and experience.<sup>2</sup> These two factors provided the impetus for the segregation of insurance coverage into a separate line specifically developed for the professional.

Professions most closely associated with professional liability, including malpractice claims, are doctors, accountants, lawyers and engineers. The definition of "professional," however, has been expanded to include a host of other services, such as planners and statisticians.

Another factor in the exclusion of coverage for professionals in traditional commercial general liability policies was the dramatic rise in claims related to professional liability exposures. As the number of professionals increased, so did the number of actions instituted against them. Professional liability (or "errors and omissions") claims rose from approximately 160 claims in the 1960's to over 600 in the 1970's. This comparison is even more telling when compared to the 170-year period between 1799 and 1969, when approximately 700 decisions addressing professional liability were reported.<sup>3</sup>

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<sup>1</sup> Marx v. Hartford Accident & Indem. Co., 183 Neb. 12, 13–14 (1968) (holding that the boiling of water for sterilization purposes does not constitute a “professional service” within the coverage of a professional liability policy).

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 299A, comment a (1965).

<sup>3</sup> For additional liability information see generally Comment, *Professional Negligence*, 121 U. PA. L. REV. 627 (1973).

### **C. Historical Perspective**

A recent series of professional liability claims involved the accounting firm of Arthur Anderson. Considered one of the "big five" accounting firms, the company was established in the early 1900's and had garnered a reputation of trust within the business community. Changes in management philosophy and fundamentals, however, created an environment that ultimately led to the downfall of the organization. Illegal accounting practices, document shredding allegations, and obstruction of justice charges were filed against the organization. The actions of Arthur Anderson are forever linked to the Enron scandal and as a result both entities have effectively ceased to exist. The fallout from the scandal continues in that claims for damages in the hundreds of millions of dollars have been filed against both companies because of the improprieties of management.

Clearly, claims for professional negligence can result not only in the destruction of a company, but may ultimately cause an irrevocable break in public trust, personal litigation, and prison time for those entrusted with the task of overseeing the actions of contractors. As such, it is imperative that public transit agencies gain an awareness and understanding of the scope and limits of available professional liability coverage—as a means of protecting themselves and the public should such claims arise.

### **III. STANDARDS FOR PROFESSIONAL CONDUCT**

Time and experience have spurred the establishment of standards of conduct accepted and practiced by professionals. Many subcategories of professionals have established boards and governing bodies created to monitor and regulate activities of their members. These standards of conduct serve several broad purposes, including: (1) the establishment of codes of conduct and ethics; (2) monitoring and review of statutes and regulations; and (3) review and dissemination of customary practices within the profession.

Transit agencies enter into agreements with Architectural and Engineering (A&E) professionals who design transit facilities; rail and bus systems, joint development projects, and other tasks. These dealings entail a certain level of professional liability exposure which requires the professionals to maintain appropriate credentials and training to ensure that the latest techniques are employed in their work. Governing bodies established to oversee the activities of A&E professionals provide guidance and regulatory assistance to ensure the ethical conduct of their members.

Transit agencies, however, also have a responsibility to ensure that contractual relationships adequately address and protect against potential conflicts of interest. A conflict of interest may arise when, for example, a design engineer both designs and reviews plans for a project. Clearly, there is a conflict of interest because the design engineer cannot provide an unbiased assessment of self-created design activities. Most transit agency risk professionals do not have the time or resources to fully investigate the proper practices and procedures of hired professionals. However sound evaluation

techniques—including expertise offered by professionals within the agency—can provide insight that will assist in evaluating exposures associated with the work of professionals.

#### **IV. CONTRACTUAL CAUSES OF ACTIONS AGAINST PROFESSIONALS**

Initially, causes of action against professionals were based on breach of contract. In order to successfully pursue a breach of contract action against the professional, the following elements have to be present:

- A written or oral contract between the party bringing the suit (plaintiff) and the professional
- A breach of contract by the professional
- Damages resulting from the professional's breach of contract

Most transit agencies use contracts to define the scope of services to be performed by professionals. These professionals may be contracted on a stand-alone, advisory basis or as part of a team formed for a specific project. Professions that regularly use contracts to define the work to be performed include: architects, engineers, attorneys, doctors, auditors, and other professions that provide expertise in a given area, and whose services are defined in a scope of work.

A claim for breach of contract will often be combined with a negligence claim. This frequently occurs where there are allegations of negligent performance of a contractual obligation as the basis for a breach of contract. Implied in most professional services contracts is the promise that professional services will be performed in a non-negligent manner. For example, in lawsuits against architects, causes of action for negligent design and/or supervision and breach of contract are both usually asserted.<sup>4</sup> The Contractor also represents that it possesses the requisite professional knowledge, skill, and abilities to perform the work in accordance with the scope of services.

A limiting factor in a breach of contract action against a professional is that, traditionally, these causes of action were restricted to those in privity with the professional.<sup>5</sup> It was this privity limitation that contributed to the rise in claims for negligence against the professional because parties who did not have a direct contractual relationship—yet were harmed due to the action or inaction of the professional—were able to pursue claims. Even with the obstacles associated with privity, there are advantages for the plaintiff who files under a breach of contract theory. Generally, it is easier to prove a breach of contract claim because the contractual relationship should

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<sup>4</sup> INT'L RISK MGMT. INST., PROF'L LIAB. LEGAL ASPECTS III.C.3 (1990).

<sup>5</sup> Privity can be defined as a relation between parties that is held to be sufficiently close and direct so as to support a legal claim on behalf of or against another person with whom this relation exists. For example, in a construction contract, the owner and the general contractor are in privity. A subcontractor who contracts directly with the general contractor is, however, not in privity with the owner.

clearly spell out the responsibilities of the professional, whereas in a negligence claim the plaintiff must demonstrate that the professional deviated from the standard of conduct adhered to by a reasonable member of the class of professionals. One other distinction is that the statute of limitations for a breach claim may, in some states, be significantly longer than the limitation period for an action based on negligence.

## **V. PROFESSIONAL LIABILITY CLAIMS AND THE EFFECT ON TRANSIT AGENCIES**

Elements such as public pressure and political will can cause a public entity to hastily respond to a claim related to professional liability negligence. For purposes of this paper, we will not explore in detail the political and social fallout that can be levied against a public entity as a result of public opinion, but lack of response or perceived lack of response can create a debilitating environment within an organization due to breach or negligence caused by contracted professionals.

Public outcry because of losses associated with the unfulfilled contractual obligations of professionals, especially when combined with the very real concerns of elected or appointed officials of public entities, can create an environment of self-preservation. These sometimes inappropriate responses to breach or negligence may compromise the position of a public entity in the event of a claim. Policy language will often detail the obligations and limitations of the carrier to respond in instances when proper notification, or procedures agreed to at policy placement, are not followed. Careful consideration and policy examination should be conducted prior to any responses by public entities.<sup>6</sup>

### **A. Claims Reporting and Response**

The transit agency should ensure that all key personnel agree upon proper reporting procedures in the event of any claim. This action, reinforced through progress and safety meetings, can help provide appropriate responses in the event of a loss. Key personnel should include construction managers, inspectors, safety personnel, and risk managers. A single point of contact for claims reporting should be agreed upon and if possible specifically endorsed into the policy language. This point of contact should be broad enough to allow for changes, yet specific enough to clearly identify the parties responsible for reporting claims information.

Another area that may be overlooked by public entities is the necessity to establish clear lines of communication with media personnel within the agency. Media personnel within an agency are part of the first response team in the event of major losses. Immediate response by a media professional skilled in responding to public concerns can help diffuse misinformation during times of loss. Lack of an immediate and

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<sup>6</sup> An exception to this standard of practice may include instances where public safety and prudent action are required on the part of the public entity in order to mitigate further losses.

appropriate response by a public agency can lead to a feeding frenzy based on public speculation. The public should be afforded the respect of accurate and timely information, and a quick response by public agencies to negligence cause by professionals will help ensure that the trust of the public remains uncompromised.

Agencies often appoint media or outreach professionals dedicated to a specific project prior to the commencement of work on larger construction projects. Their function is to serve as a liaison between the agency, construction and design professionals, and the public. The services of the outreach professionals are invaluable in that they help to foster relationships with key members of the communities affected by large construction projects. These relationships serve to inform the public of the facts in a timely manner, thus mitigating the ill will that could be created because of failure to inform interested parties of an event that could cause injury, embarrassment or even simple inconvenience to the affected neighborhoods. Having an established agency process that emphasizes roles in providing information is helpful.

## **VI. PROFESSIONAL CATEGORIES**

Public agencies utilize the services of a wide variety of professionals in order to build, monitor, upgrade, and plan for the needs of the communities that they serve. While many transit agencies also have a competent staff of in-house design professionals, tight budgets and lack of specific expertise require that outside professionals are contracted to fulfill the mandate of their specific charters to serve the needs of the public. In many instances the professionals contracted to perform work for public agencies are part of a team contracted to complete a project, such as development of transit ways, completion of feasibility studies designed to evaluate future projects, assessment of resources to determine purpose driven adequacy, and a variety of other purposes ranging from legal, information technology, and labor to political assistance.

Professional services contractors utilized by transit agencies include:

**Architects:** Provide design and construction documents, such as blueprints, schematics, identification of materials, assessment of layout, consultation services, site use consultation, environmental analysis, planning and zoning information, cost and energy analysis, project modeling and presentations and facility operation services after project completion

**Engineers:** Trained professionals who use a variety of methods including creativity, technology, and scientific knowledge to solve practical or construction related challenges. While some functions of engineers may appear similar to the architect, and they do often work in close relationship with one another, the engineer will utilize her or his skill to make the plans and assessments of the architect a reality by utilizing established principals of mathematics to evaluate sound practices in the work to be performed. Engineers invest years of training and study to review technology and fabrication methods used on constructions projects. They also assist in the establishment of

scheduling of projects. Services may range from specific packets or portions of a project to overall supervision of transit projects.

**Contractors:** This wide ranging class of professionals includes individuals or entities responsible for hiring others to perform work or the oversight of many classes of skilled professionals necessary to complete complex operations. Not all contractors have a professional liability exposure. In fact, most of the major exposures contractors bear will be appropriately covered by a commercial general liability form. The professional liability exposure is more apparent when the contractor is actively engaged in design activities related to the project.

Another professional liability exposure of contractors is related to construction management activities. Construction management firms have a professional liability exposure in that they oversee the operations of and serve as advisor to a project. This class of contractor may be closely associated with the general contractor for a project or as an independent entity specifically hired to provide an unbiased view of construction activities.

The contractor hired to complete a job, based on need or a specific expertise required to complete construction projects, may in turn hire other professionals or subcontractors to complete portions of the work.<sup>7</sup> The large or general contractors have the added responsibility of prompt payment of subcontractors, adherence to predetermined scheduling and ensuring that all involved in their work provide appropriate levels of insurance coverage. In most states, contractors must be licensed and demonstrate the mandated levels of insurance coverage.<sup>8</sup>

The above represents a basic and broad overview of professionals that will interact with transit agencies. Many other professionals—such as attorneys—also have clear professional liability exposures that must be appropriately addressed through careful evaluation, indemnification, and insurance in order to ensure the agency is protected.

## **VII. PROFESSIONAL OR COMMERCIAL GENERAL LIABILITY?**

What constitutes a professional exposure must be weighed by individuals responsible for the establishment of indemnification and insurance. While many contractors performing work for transit agencies have a professional exposure, do their activities required under the contract rise to a level requiring professional liability

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<sup>7</sup> Subcontractors may include tradesmen such as, plumbers, electricians, cement contractors, design professionals, landscape architects, and other professionals who contribute specific skill sets to overall project completion. Not all subcontractors rise to the level of requiring professional liability coverage. The general contractor responsible for the project makes a determination of the professional liability exposure of subcontractors and must address appropriately in each situation.

<sup>8</sup> It is important to remember that a license does not ensure competence. Careful evaluation methods must be employed to assess ability.

insurance? Frequently, no professional liability coverage is required due to a limited scope of work. In these instances, the commercial general liability form may be the most appropriate policy to file a claim for damages.<sup>9</sup> Products and completed operations is another area that an agency may seek recourse because of damages caused by the actions of contractors and professionals.

Commercial general liability policies generally exclude activities related to professional work. However, some coverage may be afforded under the commercial general liability policy for incidental professional activities. To determine coverage gaps and overlaps, the exclusions contained in the commercial general liability policy forms should be compared to the insuring agreements of the professional liability policy. Some coverage may be afforded in the contractual or personal injury coverage parts of the commercial general liability policy.

The standard commercial general liability form specifically excludes coverage for professional liability coverage in the following areas:

- Activities of architects and engineers in the preparation or failure to prepare plans, drawings, maps, opinions, surveys, change orders and specifications;
- Failure of architects and engineers to give instructions or directions if such failure is the cause of injury or damage; and
- Liability of architects, engineers or surveyors assumed under contract for rendering or failure to render professional services.

Most commercial general liability policies will also specifically exclude coverage related to professional activities. Professional policies, likewise, typically exclude commercial general liability perils. For example, if a contractor causes an accident or incident not related to their professional services, then the occurrence should be covered by their commercial general liability policy. The Insurance Services Office (ISO) policy forms, various edition dates notwithstanding, are fairly standardized in their approach. Because of the non-standardized nature of professional liability policy, they should be reviewed carefully for any potential gaps or ambiguities in coverage.

Gray areas—where there is no clear professional liability exposure or because the work or expertise is not being provided by a credentialed individual—require a determination that no professional liability exposure exists. A diligent evaluation of the scope of work and the elimination of the rote application of insurance requirements will ensure that the appropriate levels of risk are assessed and addressed.

Commercial general liability policies may also be endorsed to further limit the exposure of carriers to loss. In the broadest sense, commercial general liability policies may afford coverage for claims involving bodily injury and property damage. Purely

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<sup>9</sup> This statement is a broad generalization and is subject to the specific policy exclusions contained in the commercial general liability form for contractual activities of architects and engineering professionals.

financial losses, however, would most likely be excluded under the commercial general liability policy form.

In response to the overlap of loss exposures, insurance carriers have developed, primarily for the artisan contractor and other professionals that have demonstrated acceptable claims experience, policies that afford coverage for both commercial general liability and professional liability exposures. These programs of insurance provide affordable coverage that protects both the contractor and transit agencies in the event of a claim, while simultaneously eliminating potential coverage gaps.

#### **A. Excess Coverage**

Some transit agencies have layered programs of liability insurance that include professional liability coverage. The professional liability coverage contained within these programs usually has sub-limits of coverage subject to separate deductibles. In this structure, the professional liability coverage is included to afford protection for the incidental activities of the transit agency. While, arguably, design construction related activities may not be incidental, when compared to the agency risk in total, premium costs associated with the overall program, loss history, and marketing efforts with insurance carriers, the coverage may be included for a minimal charge.

Pure professional liability exposures are usually afforded coverage through stand-alone programs of insurance. These programs may be structured solely on a primary basis for lower limits of liability or through layered programs of insurance when higher limits of professional coverage are required. Some excess liability programs will provide higher limits of coverage for all activities including professional liability, but this is the exception and not the rule. Contractors and service providers who are primarily engaged in professional activities should establish excess programs of insurance dedicated to the professional liability exposure. Excess professional liability programs of insurance provide contractors a means of securing higher limits of insurance required for large construction projects while allowing for the reduced premiums afforded in the upper tiers of a layered insurance program. In many instances, the same carrier will participate in several layers of the program—ensuring continuity in coverage. Most excess policies are following form policies and will specifically declare the underlying policies afforded coverage, however the policy forms and any endorsements should be reviewed for continuity.

### **VIII. EVALUATION OF PROFESSIONAL CONTRACTORS**

Prior to contracting with professionals, it is vital to clearly identify the work to be performed. Usually, this is accomplished through various forms of needs evaluation including detailed proposed project analysis and a clearly defined scope of services to be performed. Once the objectives are clearly defined and the responsibilities of the professional are established, the project manager begins the task of detailing a scope of work that outlines the role and responsibilities of the professional. The final document

must provide in detail the where, when, what, why and how of the work to be performed. Failure to clearly communicate what is expected will lead to a contentious relationship as the project develops. Most project managers incorporate the expertise of other stakeholders to ensure that all aspects of the project are incorporated in the final documents utilized in the procurement process.

The information provided in the scope of work assists in the development of insurance requirements in support of the contract for services. Insurance requirements are not to be confused with the indemnification provisions of the contract. Indemnification provisions outline the responsibilities of the contractor in the event of a loss, regardless of any insurance provided in support of the work to be performed. Furthermore, insurance and indemnification are to be incorporated in separate provisions of the final agreement to afford dual protection to the transit agency. Should courts cause one of the provisions to be nullified, then the other provision would remain in effect thus allowing the transit agency additional avenues of recourse.<sup>10</sup>

## **IX. INSURANCE REQUIREMENTS FOR PROFESSIONAL CONTRACTORS**

Some transit agencies utilize predetermined or boilerplate insurance requirements in the establishment of insurance requirements for professional contractors. While this method may work in many instances, it will fail to provide needed insurance coverage in support of major construction projects. In these instances, customized insurance requirements—as well as specific policy provisions and endorsements—may be required.

When developing insurance requirements for contracted professionals, it is important to carefully identify the exposures to be addressed. Common coverage in most contracts includes commercial general liability, auto, and workers' compensation. Professional liability exposures can be a bit more challenging as a result of factors such as design flaws or failures that may not materialize for some time after a project is completed. Claims for damage involving commercial general liability, commercial auto and workers' compensation will usually become apparent during the construction process.<sup>11</sup> In addition, these overages are generally provided on an occurrence basis, allowing for discovery after the policy has expired.

### **A. Occurrence Triggers**

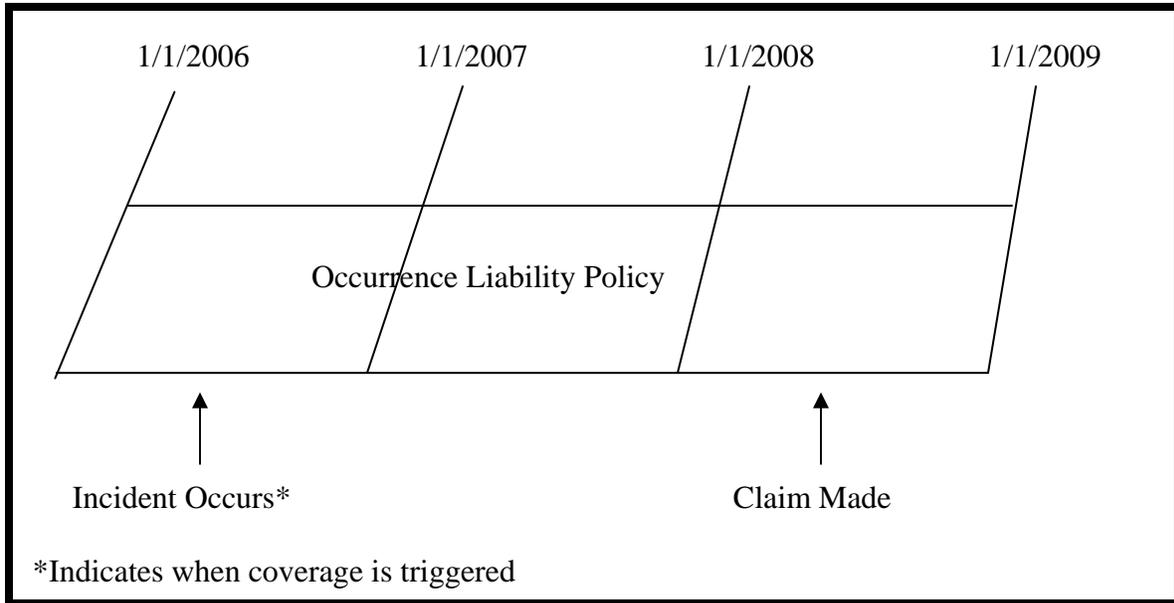
Most commercial general liability policies are written on an occurrence form basis—meaning that the policy will respond to an event that occurred when the policy

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<sup>10</sup> This applies to indemnification or insurance provisions. Generally, the indemnification provisions detail the responsibilities to the transit agency regardless of any insurance coverage provided in support of the contractual relationship. Exhaustion of insurance limits or lack of insurance coverage does not absolve the responsibility of indemnification to the transit agency.

<sup>11</sup> With the exception of Products/Completed Operations.

was in force. For example, if a claim for damages was presented several years after an incident occurred, the policy that was in-force at the time of the event would be required to pay claims after policy expiration.



**Figure 1** Example of Occurrence Form Trigger

As shown in **Figure 1** above, even if a claim is made several years after the expiration of an occurrence form policy, the policy that was in-force at the time of the incident is required, or triggered, to respond to the claim for damage.

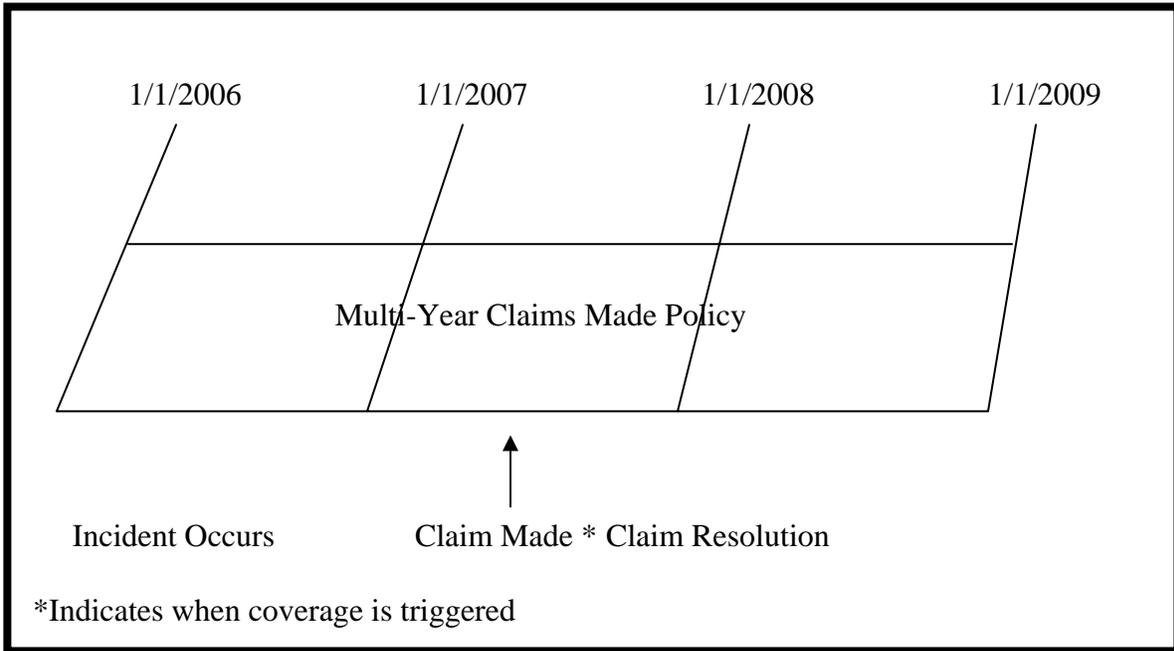
## **B. Claims Made Triggers**

Professional liability policies are written primarily on a claims-made basis, meaning that in order for a policy to respond to a claim, the claim must be filed in the year that the policy is in effect. In addition, the original incident or “act” must have occurred during the period that the policy was in effect. If an incident occurred prior to the defined retroactive period,<sup>12</sup> then the carrier will have no obligation to respond. Also, if a claim for defense or damages occurs after the policy period or the extended reporting period<sup>13</sup> has expired, then no coverage or defense will be afforded to the policy holder. Therefore, it is important that the policy be reviewed to ensure that any work performed by the contract is insured for the work to be performed.

<sup>12</sup> Claims-made policies don’t insure any incidents that occur before the retroactive date, which is usually the inception or start date of the first claims-made policy placed by the professional contractor.

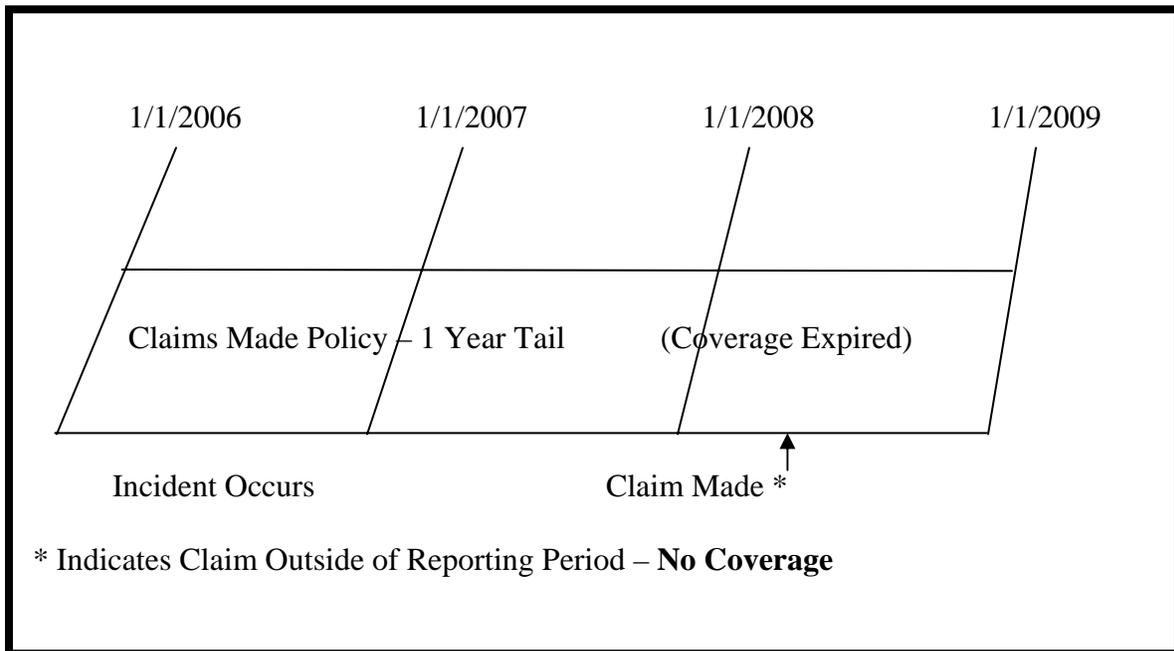
<sup>13</sup> The period allowed under most claims-made policies for coverage of acts, errors or omissions that occurred during the policy period but are not submitted as claims until after the policy is expired

As noted in **Figure 2**, the policy must be in effect prior to the claim or incident in order for the claims-made policies to respond.



**Figure 2** Claims-Made Policy – 1 year term with 2 year tail coverage

As **Figure 2** illustrates, if the claim is made after the retroactive date, which for the purposes of this illustration is January 1, 2006, and prior to the policy expiration, then the policy will respond. Note, however, that the original incident must also occur after the original inception or retroactive date.



**Figure 3** Claims Made Policy with 1 year extended reporting (Tail) coverage.

Figure 3 illustrates that if a claim is made after the policy and extended reporting periods have expired, then that carrier has no obligation to respond to the claim. When establishing coverage terms and extended reporting periods, adequate coverage periods must be incorporated in the contractual language so that insurance is in force to address latent claims that become apparent at a later date.

**C. Establishing Adequate Limits**

Professional liability limits must take into account several factors that, on the surface, may appear unreasonable because of the scope of work. For example:

An architectural and engineering firm designs a transit project that involves tunneling beneath a heavily populated area and the tunnel collapses—causing considerable property damage and bodily injury. If the general contractor followed the specification provided by the design/engineering professional, then the losses are appropriately attributable to the design professional.

In addition, recent events such as the subway tunnel collapse in Brazil which resulted in the deaths of several workers in January 2007, or the failure of support systems on the big dig project in Boston, Massachusetts, further point to the need to establish adequate limits in the event of a loss.

Professional liability limits must be established at a level that ensures adequate protection against negligence. Furthermore, liability limits should reflect potential high-end estimates of loss. During the exposure evaluation, a detailed analysis can reveal the potential dollar value of claims related to the activities of contractors. While many professionals may have exposures in the \$1 million or \$2 million range, major construction liability exposures could amount to several hundred million dollars.

**D. Endorsements**

Endorsements serve to limit, clarify or expand coverage in professional liability policies. The most common among the endorsements define the scope of the project and specify reporting obligations in the event of any material changes. Endorsements further describe the parties that are afforded coverage under the policy, such as additional design firms hired as subcontractors for the project, and other interested parties on an as needed basis. The type of endorsements contained in a professional liability policy can vary from carrier to carrier due to the non-standard nature and ever-changing professional liability marketplace.

## **E. Insured vs. Insured Endorsement**

Claims against other parties included in the same policy coverage (named, joint, and any additional insureds) are generally excluded. Professional liability policies must be endorsed to remove this exclusion if the transit agency is named as an additional insured. Changes in market conditions have made this endorsement commercially unavailable, but how does this impact the transit agency? Professional liability claims are rarely filed by unrelated third-parties such as the general public. The majority of any claims for damages would be submitted by the transit agency. If the policy excludes coverage for any included insureds, and the transit agency is not included as an insured, then coverage would be afforded because the transit agency becomes a third-party that suffered a loss to which the professional policy would have a duty to respond.

## **F. Layered Professional Liability Programs**

Professionals engaged in large-scale projects may provide a layered program of insurance to satisfy contractual requirements. Layered programs of insurance allow for lower costs by developing the majority of the rating for the program in the primary layers of coverage. Most reported claims rise to the level of the primary layer, usually the first \$5 million to \$10 million of coverage, and taper off before this threshold is exhausted. Layering allows separate policies to be purchased that provide additional coverage above the primary layer until the full amount of coverage required by contract is achieved. The amounts could reach \$100 million or more and several carriers could participate at any level. Generally, the higher the attach point, the lesser the amount of premium charged per predetermined rating factors.<sup>14</sup> While this is a common practice for commercial general liability, the transit agency must pay careful attention if professional liability is included in the excess layers. Unlike the commercial general liability forms, professional liability forms vary widely from carrier to carrier. In most instances, the excess policy is written on a following-form basis, and the policy language is generally written to mirror the language contained in the standard commercial liability policy. The resulting incongruity could lead to unintended coverage gaps in the event of a loss, further exacerbated by the differing coverage triggers.<sup>15</sup>

A separate layered program of insurance dedicated to professional liability exposure is the best approach when providing coverage for large scale projects. It is still important to review the language contained in all policies to ensure that the participating carriers agree on the scope of risk to be covered and attach points. Many contractors that establish layered programs of professional liability coverage will place both the primary and excess layers of insurance with the same carrier thus ensuring harmony with the policy form language.

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<sup>14</sup> The point when one policy's limits are exhausted and another policy on the same program continues coverage.

<sup>15</sup> Claims-Made vs. Occurrence

## **G. Statutory Limitations**

When evaluating the appropriate limits of coverage, transit agencies must evaluate the risks associated with project. Risks include statutory limitations, potential loss the agency due to loss of use resulting from negligence, and costs associated with any corrections or reconstruction of failed projects and value of claims levied by affected parties. Even where immunity exists by statute or judicial decision, generally a transit agency is protected in the exercise of planning or other high level decision making. The transit agency is more likely to be held liable for claims arising out of operations or maintenance of bus or rail services and facilities.<sup>16</sup>

One crude method of establishing liability is to perform an analysis of values—both construction values and values of loss that could be suffered by other parties in the event of a claim. While it would be unreasonable to require liability limits equal to the value of a completed project, through various loss analysis techniques, average loss exposure or maximum loss exposure amount could be established and utilized as a benchmark for the establishment of professional liability limits.

## **X. PROFESSIONAL LIABILITY: LARGE CONSTRUCTION TRANSIT PROJECTS**

When establishing insurance requirements for large construction projects, a variety of sources are available to gather information for your specific project. For example, boilerplate language available from the American Institute of Architects covers a variety of relationships. It is important to note, however, that while these documents purport to be fair or neutral, they are designed from the perspective of their constituency. Once insurance requirements have been established for your project, compare your requirements against these boilerplate forms and determine if they meet your needs.

Another approach, and perhaps the most common for large transit projects, is to create customized insurance requirements (*See Figure 4*) that take into account the risk exposures that have been identified for a particular project. This method provides an opportunity to specify any additional requirements, such as extended reporting periods that are to be contained in the coverage to be provided by the professional contractor. While this approach may be tedious, potential contractors will be clear on what insurance and conditions are required in support of the work to be performed. The major difference in the two approaches is that customized insurance requirements can address loss exposures that boilerplate language is not designed to protect against.

The purpose of project-specific insurance language is not to create insurance requirements onerous to the professional contractor, but to address the clearly identified risk exposures to the agency. Changing insurance marketplace conditions may limit the

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<sup>16</sup> Larry W. Thomas, *State Limitations for Tort Liability for Transit Operations*, FED. TRANSIT ADMIN. (Dec. 1994).

availability of certain requirements, but open and honest negotiations can create reasonable and sometimes innovative programs of indemnification and insurance that are acceptable to all parties to the contract.

Transit agencies should conduct internal research; such as past experience with similar projects, including claims history, and also solicit information from external sources such as other transit agencies and insurance professionals. These actions will serve as a means of adequately gauging market conditions and the availability of required insurance coverage. In addition, this due diligence allows the transit agency to be prepared to effectively address the concerns and objections of professionals and provide additional insight into the negotiation tactics of the proposed contractors.

Policy language is constantly evolving, especially in the professional liability marketplace. As stated earlier, the rise in legal action has caused insurance carriers to limit their exposure to losses. Contractors are keenly aware of these changes through higher premiums and coverage limitations. Conversely, transit agencies should strive to remain informed of current market conditions. The coverage afforded professionals on prior projects may no longer be commercially available.

**D. PROFESSIONAL LIABILITY INSURANCE:  
MUST COVER ALL PROFESSIONAL SERVICES**

*The Contractor shall provide professional liability or "errors and omissions" coverage with project specific limits of no less than \$20 million per claim, with a general aggregate limit of no less than \$20 million per claim and aggregate which shall cover claims resulting from professional errors and omissions of the Contractor and any of its Subcontractors/Sub-consultants, the Owner in connection with the Work provided such claims arise during the period commencing upon the preparation of the construction documents and ending ten (10) years from policy inception. Such insurance shall be in form acceptable to the Owner. Such insurance shall be written to cover all costs of correcting defects and deficiencies (including unapproved deviations) arising from the professional liability or errors and omissions of the Contractor and the Subcontractors providing design, engineering or other professional services, at all tiers, shall be written on a project-specific basis. Such insurance shall be excess to liability insurance required hereunder as respects third party bodily injury and property damage claims. The policy shall not contain any provision or exclusion (including any so-called "insured versus insured" exclusions or "cross-liability" exclusion) the effect of which would be to prevent, bar, or otherwise preclude the Owner or the Contractor from making a claim which would otherwise be covered by such policy on the grounds that the claim is brought by an insured or additional insured against an insured or additional insured under the policy. If no single policy can be procured to provide the coverages listed, multiple policies may be procured to satisfy these requirements.*

**Figure 4** Excerpt from insurance language for a light rail project

## **XI. PROFESSIONAL LIABILITY COVERAGE DETAILS**

Unlike the commercial general liability policy form, which is fairly standardized, the professional liability form lacks similar standardization—leading to gaps in coverage and misunderstanding of the coverage afforded by the policy. Lack of standardization affects insurers, professionals and claimants alike. The thorough review of policy provisions helps ensure all contractual obligations are fulfilled.

Confirmation of coverage should occur prior to contract award, especially for large-scale transit projects, and a thorough review of policy language conducted as soon as possible to ensure compliance with the stated contract terms.

### **A. Policy Conditions**

Professionals must understand and adhere to the conditions for reporting stated in the policy form. This requirement is not to be confused with coverage dates and whether a claim is covered by an in-force policy. The issue is the insured's responsibility to report claims in a timely manner and to avoid resolution of claims by the insured. To do so could jeopardize any protections afforded by the carrier. For the contractor to attempt to resolve a claim without proper notification of the insurance carrier could cause much greater harm to the claims process.

### **B. Policy Exclusions**

As with the declarations and policy provisions, the policy provisions must also be carefully reviewed. All policies contain exclusions in order to ensure that the policy affords the protections that the parties intend. The most general exclusions outline the coverage territory limitations, prior acts, and known occurrences. In addition, specific exclusions may be included to minimize claims for incidents that are inherently contained in the project that are not to be covered by the insurance policy, such as coverage for fraud, malicious acts or warranties. Through negotiation with the carrier, broker and contractor, some of these exclusions can be removed or modified.

### **C. Extended Reporting Periods**

Professional liability policies are generally written to correspond with the period of performance of the work to be performed. However, many claims for negligence may not occur until the project is completed. Contractors may secure a multi-year policy with expiration well beyond the completion date of a project, but the majority of professional policies will correspond with project term and provide for an extended reporting period or tail coverage for any claims developed after the period of performance has ended. The timeframe required for discovery could extend for many years after the project is

completed and extended reporting provides for this contingency in that the policy written in support of the project will have a duty to respond to claims made after a project is completed.

For large-scale transit projects the extended reporting period could last for 5 to 10 years after the policy period contained in the declarations expires. The transit agency should retain copies of all policies related to large-scale projects in order to lessen dependence on the contractors to provide required reporting information. Proper record keeping procedures ensure that copies of all policies related to projects are available in the event a claim for damages materializes.

#### **D. Project-Specific Limits**

Contractors can be involved in several large-scale projects simultaneously. This loss exposure, spread among several projects, could diminish the coverage afforded to the transit agency because of the exhaustion of limits due to claims at other projects. Compounding this problem is the claims-made trigger contained in professional liability policies. Claims-made policies contain a retroactive date that requires a carrier to respond to any claims submitted that involve not only the current policy period, but also any incidents that occurred within the retroactive date. The exposure to loss could potentially exhaust any available insurance for the current project—thus leaving the contractor and transit agency exposed to uncovered losses.

In order to eliminate a loss of coverage due to prior or current losses on other projects, the transit agency should require professional liability coverage on a project-specific basis. The professional would then obtain coverage for one project, specifically named in the policy declarations and/or by endorsement. The limits would not be shared with any unrelated projects or activities. This ensures that in the event of claims, the full limits stated in the professional liability policy are available to respond to claims related to the stated project.

## **XII. POLICY RATING INFORMATION**

Rating for professional liability policies is based on several factors. Contractor experience, financial data of the insured, key personnel, and loss history all play a part in the final rating of professional liability policies. Another key factor is the project to be covered in the event of a loss. The carriers require copies of the contractual documents and all costs associated with the project in the development of a rating basis.

Values provided by the contractor are utilized in the development of a rating basis for the policy. The final rates are based on the professional services portion of the total contract value and should be reviewed by the contractor and transit agency to confirm accuracy.

The premiums for professional liability policies, like most insurance policies for large-scale projects, are auditable and the contractor will be required to report to the carrier on a predetermined basis the progress of the project and costs associated with the activities of professional contractors associated with the project.

Transit agencies should be aware of the complete rating basis of professional liability policies. The transit agency should investigate the financial estimates that were included in the final rating basis of the carrier, including any hard and soft costs included in the development of policy premiums.<sup>17</sup>

Also included in the final policy documents are various provisions that allow the carriers to charge additional premiums. Such provisions include change orders that affect the overall professional services fees related to the project. The thresholds that must be reached before additional premiums are charged against the policy vary depending on the language contained in the policy language. Careful attention should be given to these requirements in order to quickly address disputes that could arise because of additional billings submitted by the contractor in an attempt to pass through carrier demands for additional premiums.

If the policy does not contain specific information regarding the requirement of interim billings, the policy should be amended for clarification. Generally, the threshold that must be reached before any interim billings are levied against the contractor would be 5% to 15% of the total value of professional services. While these figures are general estimates, the actual threshold figures may vary wildly. Finally, it is important to note that even if the threshold is reached, this does not mean that the carriers will charge additional premiums on an interim basis. Instead, they may opt to wait until final audit of the policy to determine the extent, if any, of additional premiums.

#### **A. Insurance Carrier Rating**

Insurance carriers are rated based on several factors including; size, solvency, loss history, and reserves. Agencies such as A.M. Best, Standard & Poor's and Moody's evaluate the performance of insurance carriers and rate them based on overall size and strength. Ratings are based on a graded system and can range from A++ (Superior) to F (in Liquidation) and S (Suspended). In addition, a Financial Size Category (FSC) is assigned to each carrier. The FSC is designed to provide a convenient indicator of the size of a company in terms of statutory surplus. An overall rating of A:VII is acceptable, however catastrophic losses such as those levied against carriers in 2005 can effect the insurance industry as a whole resulting in reductions in capacity and solvency. Consultations with trusted insurance advisors, or state insurance bureaus, will provide up-to-date information regarding carrier solvency and claims paying ability.

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<sup>17</sup> Hard costs are generally associated with materials and time related to professional services. Soft costs include, among other things, fees, administrative costs, and office overhead.

### **XIII. PROFESSIONAL LIABILITY EXPOSURES: NON-CONSTRUCTION RELATED ACTIVITIES**

Budgetary constraints and limited expertise require that transit agencies secure the services of outside professionals in order to secure properties required for the expansion of operations, to purchase additional vehicles, including busses, as older equipment is retired, as well as a variety of other services to help supplement the tight staffing at most agencies.

However, unnecessary insurance requirements greatly affect the public entity procurement process. Vendors and contractors who are qualified to perform the services or work may become discouraged because of excessive insurance requirements—effectively reducing the pool of perspective service providers. Furthermore, agencies that have programs to encourage participation by minority, women and other disadvantaged business owners may see a precipitous drop in proposals by disadvantaged and other professionals. Continued exigent insurance requirements imposed by transit agencies may cause unnecessary challenges during the proposal process that could also create additional problems during the insurance monitoring process after contract award.

The following are various non-construction activities that may not rise to the level of risk exposure that would require professional liability coverage:

#### **A. Bus Purchases**

Most large transit agencies do not use brokers to procure buses, but some smaller entities will secure the services of brokers who will purchase busses and equipment for several agencies in order to realize the discounting to available to larger agencies that would otherwise be unavailable due to limited purchasing power. Agencies should carefully examine the role of the broker in the bus procurement process. Many times, the exposure of the broker is only to facilitate the delivery of vehicles. Other times, the broker may be more involved in that they will conduct negotiations for purchase on behalf of several transit agencies. A thorough examination of the activities contained in the scope of work can help to identify the role of the broker and then indemnification and insurance requirements may be appropriately established. If the relationship is more of a contractual one, the commercial general liability policy may provide the appropriate levels of insurance. Claims related to inferior equipment upon delivery would probably be best levied against the products and completed operations coverage of the standard commercial general liability policy because the broker did not actually manufacture the equipment, but only served to facilitate delivery to the transit agency. As such, in the event of faulty equipment delivered to the agency, the products and completed operations coverage part would perhaps be the best source of recovery. A professional liability exposure exists, however, when contracting with a company that provides a prototype or performs extensive modifications.

## **B. Property Acquisition**

As transit agencies expand, vacant land and real property are acquired to allow for continued growth or more efficient transit operations. Some of these acquisitions are purchased on an as-is basis with no intent of constructing additional properties. When an agency secures the services of outside real estate professionals, it is important to require professional liability appropriate to their activities. Most insurance carriers that cater to this profession will include professional overages as part of their overall liability insurance program.

Conversely, many transit agencies have excess property that is made available to the general public for sale or lease. While it is vital that any liability exposures related to the lease agreement impact the landlord agency are addressed, it may be unreasonable to impose a professional liability requirement for operations that are not directly related to or required by the agency.

## **C. Information Technology Professionals**

Information Technology ("IT") professionals and the services they provide for transit agencies are among the growing number of "gray area" professions that may or may not require professional liability coverage. Formally, the criterion for determining if professional liability coverage is required for a project is the status of the contractor performing the work. The term "credential professional," meaning a certificate or license to perform a certain task, was used as an indicator of the requirement for professional liability. Doctors, engineers, architects, and insurance brokers all fall under this broad category. However, the IT professional may have a college degree but no official certification.<sup>18</sup> When evaluating the services performed by this class of professionals, the link between the final product, the program, and the potential effect to the agency, must be evaluated to determine if the exposure is products/completed operations, contractual, or professional.

## **D. Advisory Services**

Another broad class of contractors is those men, women, and firms that provide expertise to the agency in a variety of capacities. These include labor negotiators, temporary contract personnel, firms that specialize in transit impact studies, and others that provide a level of knowledge and insight that is either unavailable or requires a level of confirmation from an external source. These contractors may have professional liability coverage available as part of some small insurance program, or business owner policy ("BOP"), but others may not have nor require the coverage. The question to consider when evaluating the professional liability exposure for this class of contractors

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<sup>18</sup> IT professionals do obtain certifications for various programs in which they have become proficient. These certifications are used to purport a level of expertise within their areas of specialization. However, many of these professionals secured these seeming credentials through internet courses or open book tests that do not rise to the level of committed studied by engineers, architects, brokers and doctors.

is the actual impact that their work will have on the agency. Many times, the study is a very small part of the finished report and will have no impact. Other times, the expertise provided by the contractor is so specialized and political pressure so great that the professional liability exposure will be ignored for expediency. Lastly, if the information is only a part of an overall project that is controlled by the transit agency, then in the event of a loss, the professional liability responsibility may be difficult to determine.

#### **E. Other Related Professionals**

Many transit agencies will employ the services of other professionals such as; appraisers, environmental engineers, surveyors, third party administrators, and outreach professionals. When evaluating the need for professional liability coverage, several factors should be taken into consideration, such as: (1) exclusions in the commercial general liability policy form as they relate to the work to be performed; (2) the actual potential risk exposure caused by the activities of the contractor; and (3) the political will and risk tolerance of the transit agency.

### **XIV. SUMMARY**

Professional liability exposures and the insurance coverage designed to address those exposures are constantly evolving. The non-standardized nature of professional liability policies require that transit agencies carefully review and select the policy language to ensure that all loss exposures related to the project are appropriately addressed. The declarations page should not only list the contractor who entered into the agreement with the agency, but all of the various subcontractors who will participate in the project. While insurance may serve to protect the agency in the event of a loss, the actual loss control begins with a clearly defined scope of work and clear indemnification language.

Transit agencies should establish appropriate levels of coverage for professionals so that the agency is protected, yet not so excessive that the pool of available contractors becomes diminished to the point that the competitive bid process is compromised.

It is also as important that risk professionals within transit agencies remain current with trends and changes within the insurance marketplace. Relationships with skilled insurance professionals can help ensure that your organization remains current with the availability of coverage and specific endorsements that help to close gaps in coverage.

When establishing a relationship with professional contractors, it is vital that clear lines of communication are created prior to the commencement of any work so that in the event of a loss, proper procedures will be followed to ensure timely reporting to carriers. It is during this stage that key contacts should be identified so that regular meetings can occur to monitor progress on projects and also address concerns as they arise.

Lastly, not all contracts that involve professionals require professional liability coverage. Through careful assessment of the risk exposures, the agency can identify whether the potential for losses due to contractor activities can be addressed by professional or commercial general liability coverage. Sound methods of risk evaluation employed by transit agencies will help ensure that the balance of insurance required by contractors and oversight required by transit agencies remains in check.

## **XV. GLOSSARY**

**Additional Insured** - a person or entity, other than the named insured, protected by the policy, often in regard to a specific interest, usually added by specific endorsement.

**Claims Made Coverage** - liability insurance that applies only to a claim that is made during the policy period. Opposed to "occurrence" policy

**Endorsement** - a provision added to an insurance policy to modify it. An endorsement supersedes the printed policy text. If two endorsements contradict each other, the one with the latest date prevails

**Errors & Omissions** - term often used interchangeably to describe a professional liability exposure. While there are similarities, non-professionals may also have an E&O exposure. One distinction between the two exposures is that a professional is usually a credentialed firm or individual that through action or inaction has caused a loss based on their failure to perform as agreed. An E&O claim can be caused by both professionals and non professionals due to mistakes caused in their reporting or failure to include information required to make informed decisions. Careful attention should be given to what coverage is required of contractors and what policies are provided to transit agencies.

**Excess Insurance** - insurance in excess of a certain amount. There may or may not be underlying insurance for losses less than this amount. Usually structured to allow for higher limits of coverage at lower premiums. Most claims do not pierce through the excess layers of coverage thus allowing for the savings in premiums.

**Extended Reporting Period** - a provision of some claims made policies to allow coverage for claims made after policy expiration. It may call for additional premium.

**Following Form Excess Insurance** - an excess liability policy which extends an additional limit of insurance above the primary policy and provides exactly the same coverage as the underlying primary liability policy

**Indemnity** - compensation for damage or loss sustained

**Insurance** - a contract whereby the insurer, for a consideration (the premium), agrees to indemnify the insured for loss from specified perils and under certain conditions

**Insured vs. Insured Exclusion** - exclusion designed to eliminate carrier response and payment of claims arising from in-fighting between parties to the same insurance policy.

**Named Insured** - the entity specifically designated by name as an insured in an insurance policy. In addition the First Named Insured has additional rights and responsibilities not afforded to other insureds such as; claims reporting and premium payment responsibilities, and the right to make changes to the coverage afforded under the insurance contract.

**Occurrence** - an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. The definition may vary from policy to policy.

**Privity** - a relation between parties that is held to be sufficiently close and direct to support a legal claim on behalf of or against another person with whom this relation exists.

**Tail Coverage** - another term for an extended reporting period under a claims-made liability policy.

## **XVI. APPENDIX**

- A. Sample Professional Liability Declarations Page**
- B. Sample ISO COMMERCIAL GENERAL LIABILITY Endt. CG  
22 43 Professional Exclusion**
- C. Policy Analysis – Professional Liability<sup>19</sup>**
- D. State Limitations on Tort Liability for Transit Agencies**
- E. Professional Liability Brief Summary (White Paper)**
- F. Sample Insurance Requirements – Professional Services**

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<sup>19</sup> [Roughnotes.com/pfm/300/382\\_0300.HTM](http://Roughnotes.com/pfm/300/382_0300.HTM)

**LEXINGTON INSURANCE COMPANY**  
Wilmington, Delaware  
(A Stock Insurance Company)  
Administrative Offices: 200 State Street, Boston, Massachusetts 02109  
(hereinafter called the Company)

**DESIGNERS & AGENCY CONSTRUCTION MANAGERS PROJECT SPECIFIC – PROTECH  
PROFESSIONAL LIABILITY INSURANCE FOR A SPECIFIED PROJECT**

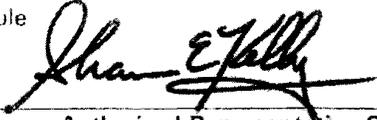
Policy No.: 1234567

NOTICE: This is a CLAIMS-MADE POLICY. Subject to the terms and conditions of the Policy, this insurance applies to only those CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD AND DISCOVERY PERIOD. By acceptance of this Policy the insured agrees that the statements in the Declarations, the Application and any attachments are the Insured's agreements and material representations. The Insured also agrees that this Policy embodies all agreements existing between the Insured and the Company. Please read and review the Policy carefully and discuss the coverage with your insurance representative.

**DECLARATIONS**

- ITEM 1. First Named Insured:** XYZ Company  
**Address:** 444 Any Street  
Anytown, USA 12121
- ITEM 2. Named Insureds:** Per the Named Insured Endorsement #002
- ITEM 3. Project**  
a. **Project Name:** New town Light Rail Project  
b. **Contract Designation:** Contract No. 1-06  
c. **Location:** Anytown, USA  
d. **Owner of Project:** New City Light Rail Authority  
e. **Type of Project:** Light Rail Transit System
- ITEM 4. Policy Period:**  
From: 04/18/2006 to: 03/01/2016  
at 12:01 A.M. standard time at the address of the insured stated above.
- ITEM 5. Limits of Liability:** \$20,000,000 Each Claim  
\$20,000,000 Policy Term Aggregate
- ITEM 6. Self-Insured Retention:** \$500,000 Each Claim , or  
\$750,000 Each Claim that is subject to the "Derivative Claim Endorsement"
- ITEM 7. Retroactive Date:** 03/17/2006 or the Date of the first contract for **Professional Services**,  
which ever comes first
- ITEM 8. Extended Reporting Period:** None
- ITEM 9. Policy Term Premium:**
- ITEM 10. Audit Rate:** \$16.44/\$100 of Professional Fees in excess of \$26,000,000
- ITEM 11. Endorsements made a part of this policy:**  
1. Application (attached)  
2. Endorsements listed on the attached Form Schedule

CM-PL8  
LX9696 (Ed. 02/04)

  
\_\_\_\_\_  
Authorized Representative OR  
Countersignature (In states where applicable)

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EXCLUSION – ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY**

This endorsement modifies insurance provided under the following:

### COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph 2., **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability**:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
2. Supervisory, inspection, architectural or engineering activities.

## 382.3

# ARCHITECTS OR ENGINEERS PROFESSIONAL LIABILITY INSURANCE

This product is designed to protect the individual or firm of architects or engineers against certain claims which the insured may be legally obligated to pay as damages related to providing professional services as architects or engineers. The eligible event must be caused by an error, omission or negligent act.

## ANALYSIS OF POLICY

### COVERAGE

Architects or Engineers Professional Liability insurance is a non-standard form, with proprietary policies offered by various specialty insurers as well as Lloyd's of London. Originally the coverage arose from studies made by the American Institute of Architects and the National Society of Professional Engineers in 1957.

Insurance coverage for architects and engineers pays on behalf of the insured all sums which the insured becomes legally obligated to pay as a result of a wrongful act occurring anywhere in the world. A wrongful act refers to any negligent act, error or omission, by the insured or any entity for which the insured is legally liable, arising out of the performance of or failure to perform professional services.

Professional services are referred to in the coverage agreement of most architects and engineers policies and, typically, the declarations page describes the nature of the services performed by the insured. This description must be broad enough to encompass all of the services that might be provided by the insured.

**Professional services** refer to services the insured performs as an architect (including those specializing in landscaping), engineer; land surveyor; construction manager; or as specifically defined by any policy endorsement.

In addition to legal liability protection for damages due to professional errors, omissions or negligent acts, the policy also contains the Defense, Settlement and Supplementary Payments provisions common to all liability policies. The importance of the defense provision is critical. In various jurisdictions, courts have ruled that the architect or engineer who drew up the construction plans may be brought into a suit by a contractor whether there was privity of contract or not.

Most professional liability policies for architects and engineers give the insured the right to approve an insurer's attempt at a settlement. However, if the insured refuses to settle at the amount the insurer has offered and the claimant has accepted, that offer becomes the maximum amount the insurer will pay. If the insured continues to contest the claim on his or her own, the insurer is not liable for any further defense costs.

### EXCLUSIONS

Proprietary policies written for architects and engineers are worded differently, as there is no standard form. Policy exclusions are a very important means to making form comparisons that will assist an insured in choosing the one that best fit his particular practice.

The policy does not apply to claims and claims expenses arising out of:

- The infringement of a copyright, trade mark or patent
- An insured's insolvency/bankruptcy
- The advising or requiring of, or failure to advise or require, any form of insurance, suretyship or bond
- Failing to complete drawings, specifications or schedules on time, or the failure to act upon shop drawings

on time. Note: The exclusion does not apply if such failures are the result of an error, omission or negligent act in the drawings, plans, specifications, schedules of specifications or shop drawings

- Liability assumed by any insured under a contract or agreement (unless specifically endorsed)

Coverage for Contractual Liability should be added separately, particularly when the insured has been a party to specific "hold harmless" agreements exposing himself to their consequences.

- Professional services performed by or on behalf of a joint venture of which the insured is a member.

The exclusion is not applicable to joint ventures formed prior to a specified date in the declarations. The usual method of insuring joint ventures is by special endorsement for each separate joint venture project.

Express warranties or guarantees; estimates of probable construction cost or cost estimates being exceeded

- Dishonest, fraudulent, criminal acts or omissions, or those of a knowingly wrongful nature committed intentionally by, or at the direction of, any insured; libel or slander.

Coverage for dishonesty, etc. should be insured under a crime coverage or similar form. Libel or slander may be covered under a Personal Injury endorsement under either a CGL or Umbrella policy.

- Personal injury to, sickness, disease or death of any employee of any insured while engaged in the employment of any insured or to any obligation for which any insured or any carrier as his insurer may be held liable under any Workers Compensation or disability benefits law or any similar law.

(Protection should be covered under the Workers Compensation and Employers Liability insurance policy).

- Nuclear liability.

#### Other Excluded Situations

The policy also does not apply to claims made against the insured:

- By a business enterprise (or its assignees) that is wholly or partly owned, operated or managed by the insured; by an employee (or his assignees) of said business enterprise; or by an employer (or his assignees) of a contractor or subcontractor of said business enterprise.
- That involves actual or alleged discrimination because of race, religion, color, sex, national origin, age or handicap against a past or present employee or officer of, or applicant for employment.

Note; This exclusion clarifies that, though the policy insures against personal injury claims, it does not pay for claims of discrimination, etc, made by employees. Broader discrimination exclusions in architects or engineers professional liability policies excluding all discrimination to employees and others would be undesirable and should be avoided.

- Alleging plagiarism, industrial piracy, unfair business practices, or unauthorized activities in connection with client's trade secrets
- Regarding projects (including any construction, erection, fabrication, installation, assembly, manufacture, or supplying of equipment or materials incorporated therein) that are wholly or partly performed by the insured, a subsidiary, or a related entity

Note: "Faulty workmanship" is excluded in the professional liability policy since it is normally covered under

a CGL.

The design or manufacture of any goods or products sold or supplied by the insured or others under license from the insured (another exposure which would normally be covered under the insured's products liability policy).

- Punitive or exemplary damages, except those rising solely out of a claim for libel or slander
- Fines or penalties assessed against the insured or refusal by a client to pay all or part of the insured's fee
- Claims for which the insured is covered under any other professional liability policy for a specific project.

There may be other exclusions not listed here contained on some Architects or Engineers Professional Liability policies. It is best to obtain a specimen copy of the policy contract from any one or all of the list of insurers writing this insurance in *The Insurance Marketplace*, a publication of The Rough Notes Company Inc.

### **DEFINITION OF INSURED**

The unqualified word "insured" includes the named insured, any past or present partner, executive officer, director, stockholder or employee of the named insured while acting within the scope of their duties as such.

### **POLICY PERIOD; TERRITORY**

Insurance afforded by the Architects and Engineers Professional Liability policy applies only to errors, omissions or negligent acts which occur within the United States of America, its territories or possessions or Canada, except when provided otherwise by endorsement.

For claims outside of the U.S. or Canada the defense and settlement costs are paid on an indemnification basis rather than on a pay on behalf of basis. The company does not reserve the right to investigate, defend or settle the claim, but leaves these matters to the insured.

Other insurers writing this coverage may defend and pay all claims on a worldwide basis without restrictions, or limit coverage only to U.S. and Canada.

Most professional liability policies insuring architects and engineers are written on a claims-made basis.

Claims must be first made and reported to the company during the policy period. In this way prior acts are normally covered.

### **LIMIT OF LIABILITY**

There are two types of limits of liability provisions found in the various architects and engineers professional liability policies. The first provides a per claim limit and an aggregate limit. The other policies provide only an annual aggregate limit, with no limitation on any single claim.

If the error, omission or negligent act occurred while a prior policy was in effect, the limit of liability for a claim for that act made under the current policy is the limit of liability for a claim stated in the declarations of the prior policy (if such limit of liability was less than the current policy). The deductible amount of the current policy is applicable to coverage for a prior act, regardless of what the deductible was under the prior policy.

Any claim or aggregation of claims resulting from an error, omission or negligent act is considered a single claim.

Minimum limits of liability usually are \$500,000/\$500,000 or \$1,000,000/\$1,000,000. Maximum limits can be arranged to \$25 million or higher.

### **DEDUCTIBLE**

Every Architects and Engineers Professional Liability policy is subject to a deductible clause, which applies to the total amount of claim and claims expenses, including attorney's fees, other fees, costs and expenses resulting from investigation, adjustment, defense and related appeals. The insured must make payment of the required deductible amount upon demand from the company.

An analysis of the architect's or engineer's loss experience would indicate that a firm's deductible should be directly related to its volume of work. Before requesting a specific deductible, an architect or engineer should carefully review the firm's complete financial picture with special emphasis on cash flow.

Deductibles on most architects and engineers policies range from \$5,000 to \$25,000 and higher.

### **IMPORTANT CONDITIONS**

As soon as practicable after receiving information about an alleged error, omission or negligent act, written notice

should be given to the company. The notice should contain full details of any claim arising from the negligent act, error or omission. If suit is brought, the insured must immediately forward to the company every summons or other process received.

The insured shall cooperate with the company and, upon the company's request, attend hearings and trials and assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. Except at his own cost, the insured may not voluntarily make any payment, assume any obligation or incur any expense, unless incurred with the company's consent.

The policy is in excess of all other valid and collectible insurance and may not be called on to contribute with other policies.

### **CANCELLATION**

The policy may be cancelled by the insured and earned premium is computed on a short-rate basis. The company may cancel on a pro-rata basis with not less than 30 days' written notice to the insured (or less than 10 days' notice if cancelled for non-payment of premium).

### **UNDERWRITING**

#### **ACCEPTABILITY**

Market placement problems are acute for this category of Professional Liability coverage.

No single type or group of losses has adversely affected the Architects or Engineers Professional Liability experience. The problem has been the increasing severity and frequency of all types of claims. Add to this the increasing complexity of the practice of architecture. The architect's importance has increased in designing our physical environment. He is dealing with new materials and new structural and mechanical systems. As an architect or engineer's influence and responsibility increase, so does his or her potential liability.

Certain factors have contributed to the increasing claim activity against architects and engineers. They are:

- The growing sophistication of the plaintiff's bar and their ability to successfully try complex claims against architects and engineers
- The use of more complex and novel building and structural designs (including sustainable [eco-friendly] structures)
- The development of turnkey construction and project management concepts

- The use of modular designs, prefabricated components

## PROPOSAL

The proposal or application for Architects and Engineers Professional Liability insurance must be filled out and signed by the prospect and submitted to the underwriters. The questions asked in the proposal supply the necessary information for the underwriting and rating of the risk. It is a formidable amount of information with the following typically requested:

- Name and address of the insured firm; date established or incorporated
- Full names of all principals, partners or officers and their professional qualifications
- Aggregate limits of insurance and deductible desired
- Total number of principals, architects, engineers, inspectors, surveyors, draftsmen and office employees. . . .
- Claim information, whether the insured has any knowledge of prior acts that might give rise to a claim, and if insured has been cancelled or refused coverage by any insurer
- Whether similar insurance has been previously carried by any firm principals
- Professional society memberships and states in which principals are registered as architects or engineers
- Nature of operations (it is often desirable to attach a brochure that the prospect uses to describe his firm)
- A listing of the ten largest projects worked on during the past ten years
- Extent of participation in joint ventures
- Whether the firm or any parent or subsidiary is engaged in actual construction, manufacturing, fabrication or real estate development operations
- Professional services for projects for owners acting as their own contractors, or for package or "turnkey" contractors
- Billings for feasibility studies, master planning, reports or opinions
- Percentage of work devoted to: boundary surveys, surveys of subsurface conditions, ground testing, contractual liability and foreign projects
- Are professional services performed for the following: bridges, tunnels, dams, or fairs and exhibitions
- Total construction values of projects for which professional services were rendered during past 12 months, and also for the next 12 months
- Total billings for professional services rendered during past 12 months, and estimated billings for next 12 months.

The insured's signature on the proposal form does not bind him to complete the insurance. He does certify, however, that the statements and particulars set forth in the proposal form are true and agrees that the

declaration is the basis of the contract, if issued. He also declares that no material facts have been suppressed or misstated.

Soil engineers, testing laboratories, fire and safety engineers and turnkey operations are very difficult classes of business to write, but subject to complete information some such risks are written. Other classes that are difficult to place are marine architects and engineers and petroleum natural gas engineers, due to the extremely high cost and complexity of the work they perform.

### **RATE AND PREMIUM**

Rates are based entirely on the type of work done by the insured. All of the questions in the application are carefully evaluated in ratemaking. In the event the insured desires coverage for such activities as construction of bridges, tunnels and dams, the preparing of boundary surveys, soil testing or ground testing, such exclusions in the policy may be deleted for the payment of additional premium charges. Total construction values, the insured's annual billings, aggregate limit of liability and amount of deductible also have a bearing on the premium calculation.

### **ARCHITECTS AND ENGINEERS DISTINGUISHED**

Studying lawsuits filed against architects and engineers indicate that the distinguishing characteristics of the two professions have had no effect on liability. Both the architect and engineer face claims brought by both direct action and by third party action. However, architects are usually named in more direct suits and they have become primary targets in construction cases. The engineer, whose field particularly is that of structures, usually acts as a consultant and still remains in the less direct area of liability, once removed from the primary plaintiff. Structural foundations, simple or extremely complicated, are within his realm. He designs and supervises the construction of bridges and huge buildings, tunnels, dams, reservoirs and aqueducts.

### **INCREASE IN CLAIMS**

The historical immunity of architects and engineers from liability for errors in their work has long been shattered. For the most part judgments have involved liability to the person hiring the professional service, but privity of contract is no longer an absolute defense. Instead, the law has been broadened to extend the duty owed by an architect or engineer beyond the client and to third parties who might foreseeably be affected by the architect's or engineer's professional acts. These third parties might be contractors, subcontractors, construction workers, adjoining landowners or pedestrians walking by a construction site.

In broadening the scope of responsibility, the courts have not only increased the group of persons to whom duty is owed but also have changed the concept of foreseeability. This change is based (at least in part) upon a recognition of the technological advances in the field of architecture and engineering and the increasing social awareness given architects and engineers. The American courts have also expanded the concept of supervision beyond the scope originally contemplated by the architect.

### **LEADING COURT DECISIONS**

Among important negligence rulings against architects and engineers are the following:

**Privity, Less Relevant** - The architect's defense of lack of privity of contract was rejected in a suit by a third person injured as a result of an architect's careless design of a building. (*Inman v. Binghamton Housing Authority*, 3 N.Y. 2d 137, 164 N.Y.S. 2d 699, 143 N.E. 2d 895, 1957).

**Meeting Professional Expectations** - "An architect implicitly warrants not only that he has the skill, knowledge and judgment required to produce a result that will meet the needs of his employer, but that in the preparation of plans and specifications and in the supervision of the work he will employ that skill, knowledge and judgment without negligence. For negligence in the performance of his work he is liable to his employer if damage results." (*Drexel Institute of Technology v. Boulware*, No. 1611 Court of Common Pleas, First Judicial District, Pennsylvania, 1954).

## Project Supervision

- An architect must use reasonable care to prevent material deviations from the plans and specifications and to prevent substandard workmanship. If he fails to use reasonable care, he is liable to the owner for the defects which could have been eliminated if he had properly performed his obligations. (Palmer v. Brown, 127 Cal. App. 2d 44, 273 P 2d 306, 1954).
- An architect was found liable when sued by a contractor for negligence in supervision in that the architect negligently construed and interpreted reports of tests on concrete and he then negligently approved structures made of that concrete when he should have known that the specifications were not being met. The court further stated that, "...the position and authority of the supervising architect are such that he ought to labor under the duty to the prime contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owners..." (United States v. Rogers & Rogers, 161 F. Supp. 132 S.D. Cal. 1958).
- In another high-stakes case, an architect was held liable in damages for the fatal injury of a workman who was killed as a result of a boiler explosion. It was alleged that the explosion occurred because the architect had improperly and negligently supervised the job. Although the subcontractor also was found guilty of gross negligence in installation of the heating system, the architect was found liable because he had not noted the improper connection during his supervisory inspections. (Day v. National- U.S. Radiator Corporation, Affirmed, 117 So. 2d 104, La. Ct. App. 1959).
- An Illinois case illustrates the extent that courts have gone in construing the architect's duty to supervise. The court concluded that where an architect undertakes (by contract) supervisory responsibilities, has free access to the construction site and has the authority to stop operations, he owes a duty to those working on a job site to see to their safety. The architect defendant contended that he undertook only a duty to see that a building is constructed to meet the plans and specifications and is the building for which the owner contracted. This decision is also an extension of the "foreseeability" concept. (Miller v. DeWitt, 208 N.E. 2d 249, Ill. App. 1965.)

## Financial Oversight

- Careless certification on the part of an architect may be sufficient to support a cause of action by the surety. When an architect was careless in accepting the contractor's word on unpaid claims and released money to him that was used for personal reasons, he violated a duty not only to the owner but also to the surety. (State of Mississippi for the use of National Surety Corp. v. Malvaney, 221 Miss. 190, 72 So. 2d 424, 1954).
- An architect was liable for a negligent disregard of his duty in the preparation of plans and specifications where actual cost exceeded the estimate by \$125,000. (41 S.W. 2d 697 Tex. Civ. App., 1931).
- A designer cannot hold up construction by late completion of plans without subjecting himself to a claim for damages for delay. An exactness of performance in this regard is required from architects and engineers. (Edwards v. Hall, 293 Pa. 97, 141 Atl. 638, 1928).

## DESIGN/BUILD CONSTRUCTION OR PROJECT MANAGEMENT CONCEPTS

Particularly in the U.S., architects are now being challenged in their traditional role of independent parties providing the design function to the owner of a building. The concept of Turnkey Construction or Design/Build Construction and Project Management teams has been gaining much favor with owners who want a building project completed quickly and with a close control over cost and quality of construction. The team is usually under the supervision of a general contractor, who is responsible for the project from its inception, through the design and construction stages, to completion.

The design/build construction firm may have its own in-house design capability, may own a subsidiary design firm, or may use an independent architecture or engineering firm. The team architect or engineer is general manager of design, with authority and control to exercise his professional capabilities. He and his project staff engage in creative design and the production of the construction documents. The construction portion is handled by another

member of the team.

Several markets are available to handle the professional liability insurance protecting both the general contractor and the architect or engineer member of the team for their involvement in the design functions, either directly or indirectly, as in the case of the general contractor.

One such policy protects the insured contractor against claims arising out of negligent acts, errors or omissions committed by the insured solely with respect to plans, drawings, designs, or specifications prepared by the insured solely in performance of professional services. There is no coverage for outside architects or engineers, nor is their full Architects and Engineers Professional Liability coverage under the policy. The policy excludes liability arising out of supervision.

## **PROJECT LIABILITY INSURANCE**

Under this program, available to firms insured in the professional liability programs recommended by the American Institute of Architects and the Professional Engineers in Private Practice Division of the National Society of Professional Engineers, coverage is designed to provide protection only for a specific project.

Since the larger and more serious claims generally occur during or just after construction, the policy is issued to cover claims made during the construction phase of the project, and within a one year period after the project is completed.

The Project policy is not intended to replace a firm's professional liability coverage to protect the practice. However, the Project policy is important in that it identifies professional liability costs for the project itself. Premium for the practice policy will reflect a credit that considers the work covered by Project policies. Generally, basic limits for the Project policy are \$500,000. Most coverage is subject to a minimum deductible of \$5,000. Limits of liability and deductibles increase in accordance with the value of the project.

**Transit Cooperative Research Program**  
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**State Limitations on Tort Liability of Public Transit Operations**

*A report prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Larry W. Thomas. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator and content editor.*

**THE PROBLEM AND ITS SOLUTION**

In reauthorizing federal assistance for surface transportation programs through the 1990s, the Intermodal Surface Transportation Efficiency Act calls for the adaptation of new concepts and techniques in planning, funding, constructing, and operating these programs. These changes will affect the institutional framework--laws and administrative processes--as well as engineering and operational elements of these programs. The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limitedscope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and highways, and in some instances, waterways. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they share common interests (and responsibilities) with highway and water transport agencies in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private sector programs, and labor or environmental standards relating to transit operations. Emphasis would be on research of current importance and applicability to transit and intermodal operations and programs.

**APPLICATIONS**

This publication should be useful to attorneys, transit administrators, risk management officials, and other transit officials interested in equitably distributing financial responsibility for injuries caused by transit operations.

Transit providers have historically been held to a high duty of care to provide safe transportation to their passengers. Such a high duty invariably leads to higher tort liability. Presently, the number and amount of personal injury recoveries against public transit operators continue to run higher than can be accommodated within the confines of public budgets and rider fees.

In an ideal model, state tort laws would balance the rider's right to be made whole for the negligence of a public transit operation against the limited resources of public transit systems, and the fiscal concern of taxpayers. In an effort to assist in reaching that objective, this report examines 1) governmental immunity for actions that are discretionary in nature; 2) immunity for governmental functions; 3) expanded duties of transit operators; 4) other limitations on awards; and 5) alternative approaches to remedying the problem of excessive tort liability.

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## State Limitations on Tort Liability for Public Transit Operations

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### I. INTRODUCTION

#### A. Overview of Transit Agency Tort Liability

This article discusses the principles applicable to negligence or tort actions against public transit agencies that provide bus or rail service.<sup>1</sup> Public transit operations or systems are owned or subsidized by municipalities, counties, regional authorities, states, or other government agencies that may be sued for negligence, just as other government agencies, authorities, or units. For convenience, they are hereinafter referred to as "transit agencies." Because of their unique nature, public transit agencies are not liable to the same extent as are private corporations providing transportation services.

In recent years, the United States has spent over \$15 billion annually to provide public transit services.<sup>2</sup> Studies indicate, however, that on the average only about a third of transit operations are financed out of passenger fares.<sup>3</sup> State and local governments provide about 60 percent of funding, and the federal government contributes about 5 percent.<sup>4</sup> Public transit agencies do not operate at a profit; they strive to meet customers' needs and seek new patrons, while working within limited budgets.<sup>5</sup>

It is difficult to obtain any precise data on the number of cases brought annually against public transit agencies nationwide. Containing costs is an important goal of transit agencies, and risk management and tort liability limitations are means to that end.

Settlements and judgments arising out of actions against transit agencies may represent a significant part of agencies' budgets, resulting in agencies having less funds to allocate to providing transit services or upgrading facilities. The problem is exacerbated when a transit agency becomes subject to an unreasonably large tort verdict in jurisdictions where there is no limit on the amount recoverable against the agency.

Some jurisdictions have enacted limits on a claimant's recovery in tort actions against public agencies. As the court held in *Lienhard v. State*,<sup>6</sup> laws limiting state liability on tort claims are rationally related to the legitimate government objective of ensuring fiscal stability to meet and carry out the manifold responsibilities of government: "[I]t is incumbent upon the legislature to balance myriad competing interests and to allocate the State's resources for the performance of those services important to the health, safety, and welfare of the public."<sup>7</sup>

The substantive and procedural limitations on the tort liability of public transit agencies are discussed in this article, including how statutory laws could be changed to balance a claimant's right to seek damages for negligence with the need to conserve resources so that transit agencies will be able to continue serving the public.

#### B. Survey Results--Agency Tort Liability

In June 1994, more than 40 transit agencies responded to a questionnaire that sought information on transit agency tort liability, including any specific limitations

or caps on recoveries, prohibitions on punitive damages, and other limitations. Transit agencies from 20 states and the District of Columbia responded, including agencies from California, Illinois, Indiana, Iowa, Ohio, Pennsylvania, Washington, and Wisconsin.

Many of the agencies that responded provided data on the rider fees collected and tort liability claims paid for each of the past 3 years. Although the survey was not a scientific sampling, the responses were fairly consistent, as shown in the accompanying tables. Table 1, for example, lists the average annual rider fees and average tort liability payments for the past 3 years for the 30 agencies providing such data, as well as the relative size of the tort liability payments versus annual rider fees. Most tort liability payments, on an annual basis, ranged from 2 to 8 percent of the rider fees collected. The highest percentage reported was 22.37 percent and the lowest was 1.13 percent; the tort liability average was 5.67 percent.

Seventeen respondents indicated that their agency was subject to a state or local tort liability statute or partial governmental immunity statute.<sup>8</sup> The highest percentage of tort liability payments, when compared with rider fees, was 12.14 percent, the lowest was 1.45 percent, and the average was 4.65 percent. The results for this group were not very different from those reported for all agencies.

Thirteen agencies stated that, pursuant to statute or judicial decision, they are not liable for tort actions arising out of the exercise of their duties or functions that were discretionary in nature.<sup>9</sup> A few responded that, in their jurisdictions, a specific or special statutory provision protects the transit agency from tort actions arising out of the plan or design of a public improvement.<sup>10</sup>

Thirteen agencies reported they are not subject to a tort liability or partial governmental immunity statute. Table 2 illustrates the average tort liability for agencies reporting that they are not subject to a tort liability or governmental immunity statute. The survey did not consider the differences among the jurisdictions' substantive law applicable to transit agencies. The average tort liability payment for those agencies (Table 2) constitutes 7.01 percent of the rider fees collected--2.36 percent higher than those agencies subject to tort limitations. The range of percentages is more disparate, from a low of 1.13 percent to a high of 22.37 percent of rider fees for tort liability payments.

Eleven agencies from eight states stated that there were statutory maximums or caps applicable in their jurisdictions to tort claims against the transit agency.<sup>11</sup> Table 3 illustrates the average tort liability of agencies reporting that they have statutory maximum or caps. The highest percentage reported was 12.14 percent, the lowest was 1.13 percent, and the average was 4.19 percent. Besides statutory caps, 17 agencies, representing 14 states, reported that there were other statutory limitations on damages applicable to tort actions, such as restrictions on the recovery of noneconomic damages or prohibitions on the recovery of punitive damages.<sup>12</sup>

For those agencies with bus-only operations, over the past 3 years, the average percentage of tort liability in relation to rider fees was 5.26 percent, with a high of 17.29 percent and a low of 1.13 percent.

Ten agencies operating in California, Illinois, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, and Washington, D.C. had both bus and rail operations; one Indiana agency reported having only a commuter rail operation. The average tort liability for these agencies with bus and/or rail operations for the same period was 6.85 percent of rider fees; the high was 22.37 percent, and the low was 1.45 percent.

**TABLE 1. SURVEY RESPONSES—RIDER FEES AND TORT LIABILITY PAYMENTS**

Responding Agency <sup>a</sup>	Rider Fees <sup>b</sup> (\$)	Tort Liability Payments	
		(\$) <sup>c</sup>	% of Rider Fees
2	22,279,961	1,152,377	5.17
3	9,003,184	320,257	3.55
4	1,122,988	32,500	2.89
5	50,983,583	574,516	1.13
6	130,087,487	12,000,000	9.22
7	5,062,494	281,725	5.56
8	353,333	61,100	17.29
9	289,000,000	6,666,666	2.31
10	1,615,786	88,160	5.46
11	3,130,132	100,000	3.19
12	13,701,244	276,742	2.02
13	168,343,391	2,438,702	1.45
14	340,935,650	9,168,690	2.69
15	1,697,435	29,560	1.74
16	475,000	16,440	3.46
20	782,072	35,307	4.51
21	732,000,000	30,519,809	4.17
26	10,778,762	377,941	3.50
27	1,068,184	96,478	9.03
28	323,866,666	39,333,333	12.14
29	64,424,333	3,463,521	5.38
30	2,488,713	53,235	2.14
32	12,491,434	351,849	2.82
33	10,467,018	701,408	6.70
35	6,553,374	530,715	8.10
36	27,757,595	1,215,851	4.38
37	2,352,062	151,526	6.44
38	26,498,204	954,761	3.60
39	236,890,783	52,995,666	22.37
41	800,000	62,452	7.81

<sup>a</sup>Keyed to survey response form.

<sup>b</sup>Figures are based on average rider fees collected over the past 3 years.

<sup>c</sup>Figures are based on average tort liability claims paid over the past 3 years.

NOTE: Highest percentage of tort liability—22.37%; average percentage of tort liability—5.67%; lowest percentage of tort liability—1.13%.

Although the preceding information is based solely on a limited number of survey responses, the data are fairly consistent. Jurisdictions with statutory maximums on tort recoveries or partial governmental immunity appear to have a one-third lower percentage of tort liability, relative to rider fees, than transit agencies that have no such limitations.

## II. STATE AND LOCAL IMMUNITY STATUTES IN RELATION TO PUBLIC TRANSIT AGENCIES

About 3 decades ago, the doctrine of sovereign immunity was an insurmountable defense to an injured plaintiffs tort action against a government agency or

**TABLE 2. TORT LIABILITY FOR AGENCIES REPORTING THAT THEY ARE NOT SUBJECT TO TORT LIABILITY OR PARTIAL GOVERNMENTAL IMMUNITY STATUTE**

Responding Agency <sup>a</sup>	Rider Fees <sup>b</sup> (\$)	Tort Liability Payments	
		(\$) <sup>c</sup>	% of Rider Fees
2	22,279,961	1,152,377	5.17
3	9,003,184	320,257	3.56
4	1,122,988	32,500	2.89
5	50,983,583	574,516	1.13
6	130,087,487	12,000,000	9.22
7	5,062,494	281,725	5.56
8	353,333	61,100	17.29
10	1,615,786	88,160	5.46
11	3,130,132	100,000	3.19
29	64,424,333	3,463,521	5.38
30	2,488,713	53,235	2.14
39	236,890,783	52,995,666	22.37
41	800,000	62,452	7.81

<sup>a</sup>Keyed to survey response form.

<sup>b</sup>Figures are based on average rider fees collected over the past 3 years.

<sup>c</sup>Figures are based on average tort liability claims paid over the past 3 years.

NOTE: Highest percentage of tort liability—22.37%; average percentage of tort liability—7.01%; lowest percentage of tort liability—1.13%.

its public employees. Before an injured person could seek redress in the courts, the agency had to consent to being sued. The courts also accorded sovereign immunity to municipal corporations and units of local government.<sup>13</sup>

The doctrine of sovereign immunity originated in English common law as an adaptation of the Roman maxim "the King can do no wrong."<sup>14</sup> In recent decades, state supreme courts began to overturn the doctrine entirely.<sup>15</sup> Judicial abrogation of the doctrine was followed in many states by legislative enactments.<sup>16</sup> In general, however, when legislatures reinstated immunity, they did not make immunity absolute.

In the survey cited earlier, 17 transit agencies reported they are subject to a state or local tort liability or partial governmental immunity statute. However, the survey does not reveal the differences among the statutes that may apply to those transit agencies. Indeed, state and local tort claims or immunity statutes vary from jurisdiction to jurisdiction. Moreover, it may be necessary to consult a transit agency's enabling legislation to determine whether the state or local tort claims or immunity statute applies to the transit agency's operations.<sup>17</sup> In general, tort claims acts embrace state-owned-and-operated transit operations. For example, claims against the Rhode Island Public Transit Agency, a state-operated public transportation agency, must be brought in accordance with the Governmental Tort Liability Statute of Rhode Island.<sup>18</sup> Plaintiffs may also sue regional public transit authorities under the aegis of a state tort claims act. In other states, a local governmental immunity statute may apply. In Illinois, for example, actions against mass transit districts are governed by the Illinois Local Governmental and Governmental Employee Tort Immunity Act.<sup>19</sup> The statute does not, however, apply to the Chicago Transit Authority.

Some mass transit agencies serve more than one jurisdiction. For instance, pursuant to an interstate compact, the Washington Metropolitan Area Transit

**TABLE 3. TORT LIABILITY FOR AGENCIES REPORTING THAT THEY HAD STATUTORY MAXIMUMS OR CAPS**

Responding Agency <sup>a</sup>	Rider Fees <sup>b</sup> (\$)	Tort Liability Payments	
		\$ <sup>c</sup>	% of Rider Fees
3	9,003,184	320,257	3.56
5	50,983,583	574,516	1.13
12	13,701,244	276,742	2.02
13	168,343,391	2,438,702	1.44
15	1,697,435	29,560	1.74
16	475,000	16,440	3.46
20	782,072	35,307	4.51
26	10,778,762	377,941	3.50
27	1,068,184	96,478	9.03
28	323,866,666	39,333,333	12.14
38	26,498,204	954,761	3.60

<sup>a</sup>Keyed to survey response form.

<sup>b</sup>Figures are based on average rider fees collected over the past 3 years.

<sup>c</sup>Figures are based on average tort liability claims paid over the past 3 years.

NOTE: Highest percentage of tort liability—12.14%; average percentage of tort liability—4.19%; lowest percentage of tort liability—1.13%.

Authority (WMATA) serves Washington, D.C., Maryland, and Virginia.<sup>20</sup> A similar arrangement exists for Kansas and Missouri in the Kansas City Area Transportation District Agency compact.<sup>21</sup> In such situations, the jurisdictions being served may confer some degree of immunity from tort suits on the agency.

State and local tort claims acts vary from jurisdiction to jurisdiction. Some statutes provide greater protection for the transit agency. Even where statutes have identical or very similar provisions, judicial interpretation may emphasize their differences. Nevertheless, because the statutes and decisions have similarities, there is a general body of law that applies to tort actions against transit agencies. The applicable statutes differ initially in their approach to the question of governmental immunity.

Where immunity is the rule and liability the exception, courts usually hold that the waivers are to be construed narrowly, thereby making it more difficult for a plaintiff to hold an agency liable for negligence. For example, the courts have held that the "dangerous condition" exception encompasses only natural, not artificial, conditions. Thus, a transit agency is not liable for injuries sustained because of the presence of a paper bag or ice on a station platform.<sup>22</sup>

The more prevalent form of tort claims statute waives immunity, but contains exceptions to the general waiver of immunity. California and New Jersey have comprehensive statutes containing exceptions for an exercise of discretion in general,<sup>23</sup> for the failure to provide traffic control signals or signs,<sup>24</sup> or for approval of a plan or design for an improvement to public property.<sup>25</sup>

### III. SUBSTANTIVE LIMITATIONS ON TORT ACTIONS AGAINST PUBLIC TRANSIT AGENCIES

#### A. Immunity for Actions Discretionary in Nature

The exception in state and local governmental immunity or tort claims statutes that provides for immunity for actions that are discretionary in nature (i.e.,

the "discretionary function exemption") is particularly important. It appears in the Federal Tort Claims Act<sup>26</sup> and in many state tort claims acts. Even prior to tort claims acts in jurisdictions where foreign sovereign immunity did not exist, courts recognized that government agencies should not be held liable for their exercise of discretion, which gave rise to tort claims. The tort claims acts incorporate similar law in exempting the exercise of discretionary functions.

Because transit agencies must exercise high-level discretion in fulfilling their mission and operations, the extent to which the discretionary function exemption is applied to their activities is quite important.<sup>27</sup> If an agency sued for negligence in the performance of its duties can demonstrate that its action was imbued with sufficient high-level discretion, its alleged negligence is immune from liability. Thus, the exception from immunity for acts that are discretionary in nature is an important substantive limitation on the potential tort liability of the transit agency. It is often difficult to predict where the line will be drawn between actions that are discretionary and those that are not.

The exemption for discretionary actions generally protects agencies from negligence arising out of decisions and activities that involve balancing social, economic, and political policies and objectives.<sup>28</sup> Today, immunity is generally not accorded to duties that merely implement policies or to discretion involved in the performance of low-level or ministerial actions. It is generally held that when an agency's employees perform ministerial tasks at the operational level, those undertaking such tasks may exercise very little discretion or judgment. A distinction thus developed early in case law between the exercise of discretion at the planning or policy level of the agency versus the exercise of discretion at the "operational" level of the agency. It does not appear that the courts have applied this planning-level/operational-level test or dichotomy uniformly in construing the discretionary function exemption.

Does the discretionary function exemption apply when an agent or employee of the government agency acts in contravention of a clear directive? In *Berkovitz v. United States*,<sup>29</sup> the U.S. Supreme Court held that the discretionary function exemption did not apply where (1) the federal statute, regulation, rule, or policy prescribes a particular course of action for the employee;<sup>30</sup> (2) the act or conduct involves no element of judgment; and (3) the employee has no other choice but to comply with the directive.<sup>31</sup>

In 1991, in *United States v. Gaubert*,<sup>32</sup> the U.S. Supreme Court held that "if a regulation mandates a particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation."<sup>33</sup> Furthermore, "[i]f the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy."<sup>34</sup>

#### B. The Discretionary Function Exemption in State Statutes

Wherever possible, a transit agency will argue that an allegedly negligent activity is protected by the applicable discretionary function exemption and that discretion is involved because the decision involved the careful weighing of political, economic, or social objectives. Examples of such high-level or policy-type discretion are decisions concerning the design, planning, and construction of transit facilities.<sup>35</sup> The cases noted in the later discussion of the governmental-proprietary test of immunity (Section IV) are relevant here also to immunity for claims arising out of the plan or design of transit facilities. The decisions are examples

of the type of policy or planning decisions that would be protected under the discretionary function exemption. For example, in *McKethean v. WMATA*,<sup>36</sup> the court held that Section 80 of the WMATA compact establishes a governmental-proprietary test for deciding which of WMATA's activities may subject it to tort liability.

While the provision of mass transportation by WMATA is in itself a proprietary activity,...we hold that the design and planning of a transportation system are governmental activities because they involve quasi-legislative policy decisions which are discretionary in nature and should not be second-guessed by a jury.<sup>37</sup> (citations omitted)

In *Simpson v. Washington Metropolitan Area Transit Authority*,<sup>38</sup> the court held that planning decisions are immune from liability. In *Dant v. District of Columbia*,<sup>39</sup> the court dismissed a count of the complaint alleging that WMATA negligently designed its farecard system on the ground that the design decision fell within the governmental function exception. In *Nathan v. Washington Metropolitan Area Transit Authority*,<sup>40</sup> the court stated that planning decisions regarding design, location, and construction of a stairwell at a station involved the exercise of governmental functions and were therefore immune.

On the other hand, in cases involving the discretionary function exemption, it has been held that driving or operating a bus is the exercise of a ministerial function, which is not immunized by the exception.<sup>41</sup> Because every act can be said to involve some degree of "discretion,"<sup>42</sup> a purely semantic approach may not be used to determine whether an act is discretionary or ministerial. Phrases such as "professional" or "occupational" judgment will not suffice.<sup>43</sup>

As seen in *Varig*<sup>44</sup> and other cases, the level where the agent or employee is acting may be probative, but it is not dispositive under the planning-level/operational-level test. For example, in *Lopez v. Southern California Rapid Transit District*,<sup>45</sup> prior to the actual outbreak of a fight, the bus driver, who had been informed of an escalating situation, failed to take any precautionary measures and continued to operate the bus as before.<sup>46</sup> The Southern California Rapid Transit District argued that the bus driver's decision whether and in what way to intervene in an altercation involved the exercise of discretion under the discretionary function exemption.<sup>47</sup> However, the California court held that "§ 820.2 confers immunity only with respect to those basic policy decisions which have been committed to coordinate branches of government, and does not immunize government entities from liability for subsequent ministerial actions taken in the implementation of those basic policy decisions."<sup>48</sup> Because the legislature had made a basic policy decision through its enactment of Civil Code Section 2100, which imposes upon common carriers a duty of utmost care and diligence to protect passengers from assaults by fellow passengers,<sup>49</sup> there was no discretion left to the bus driver within the meaning of the statute.

As in the *Berkovitz*<sup>50</sup> case, the bus driver in *Lopez* had a statutory duty. Nevertheless, although the court considered whether a decision on the form or manner of protection came within the discretionary immunity exception, it held that such action did not involve policy weighing and was not immune. Policy making did not involve decisions on ejecting unruly passengers, issuing warnings, or summoning the police.<sup>51</sup> These were not the kinds of discretionary actions the legislature intended to protect from possible liability for failure to provide for a passenger's safety. As in other cases, the court noted the reliance factor--the public's dependency on the public agency:

[B]us passengers are "sealed in a moving steel cocoon." Large numbers of strangers are forced into very close physical contact with one another under conditions that often are crowded, noisy, and overheated. At the same time, the means of entering and exiting the bus are limited and under the control of the bus driver. Thus, passengers have no control over who is admitted on the bus and, if trouble arises, are *wholly dependent upon the bus driver* to summon help or provide a means of escape.<sup>52</sup> (emphasis added)

Although the following cases do not necessarily involve a transit agency as a defendant, the kinds of decisions that were at issue in the cases are illustrative and helpful in appreciating the scope of the protection afforded by an exemption for discretionary duties exercised by a transit or other government agency subject to a state or local tort claims or immunity act:

- *Baum v. United States*<sup>53</sup> held that the decision concerning the materials to be used in guardrails for a parkway was a planning-level decision relating to the allocation of resources.
- *Dept. of Transp. v. Neilson*<sup>54</sup> ruled that the decision to change or build a road was a judgmental, planning-level discretion that was immune from suit.
- In *Mayse v. Coos County*,<sup>55</sup> the court held that the county's failure to post warning signs was an immune discretionary action, as was its failure to eliminate an unsafe feature that was a design component of the road.
- *Bowers by Bowers v. City of Chattanooga*<sup>56</sup> held that the decision to change a bus route was a planning-level decision.
- In *Jenson v. Scribner*,<sup>57</sup> the court held that installation of a highway barrier is a planning function, which is immune.
- In *Miller v. United States*,<sup>58</sup> the court held that where it was alleged that the Department of Transportation was negligent in inspecting, repairing, and maintaining a road, because the statute and regulations at issue provided no fixed or readily ascertainable standards, the department's decisions were protected by the discretionary function exception and were immune.
- In *Flynn v. United States*,<sup>59</sup> the plaintiff alleged that National Park Service supervisors had been negligent in failing to train employees with regard to certain emergency procedures.<sup>60</sup> However, the court could find no "fixed or readily ascertainable standards" in the National Park Service's policy manual requiring employees to position their vehicles in a particular manner while at the scene of an accident.<sup>61</sup> Nor did the manual require that the emergency vehicle be operated by a sufficiently trained park ranger.<sup>62</sup> The court held that 28 U.S.C. Section 2680(a) barred plaintiff's claim as a matter of law.<sup>63</sup>
- *Nusbaum v. County of Blue Earth*<sup>64</sup> held, where plaintiff challenged the speed established for a speed zone, that the discretionary function exemption did not extend to professional or scientific judgment where such judgment does not involve a balancing of policy objectives.<sup>65</sup> The plaintiff was not challenging a policy decision, but the professional judgment of state traffic engineers, who had determined the speed for that area by applying six factors set forth in their policy manual.<sup>66</sup>
- In *Butler v. State*,<sup>67</sup> the plaintiff challenged the decisions concerning the design and placement of a guardrail and the decision not to update the rail after a number of years.<sup>68</sup> The court held that such decisions were made at the operational level because they were merely the implementation of a policy decision to construct that portion of the highway.<sup>69</sup>

- In *Morris v. United States*,<sup>70</sup> the court held that the decisions on the use and placement of earthen berms and the marking of a closed road involved routine operational-level decisions.

- *Dept. of Transp. v. Neilson*<sup>71</sup> held that failure to warn of a known danger was a negligent omission made at the operational level of government and was not immune.

- In *Bowers by Bowers v. City of Chattanooga*,<sup>72</sup> a bus driver's decision where to stop at a particular intersection was held to be an operational act not protected by the discretionary function exemption.

These cases indicate that a transit agency is less likely to be held liable for negligence when it is engaged in making design and construction decisions; deciding to build or update a structure; changing a route; collecting data; engaged in certain, but not all, inspection and maintenance activities; or, in some situations, providing training for personnel. The agency is more likely to be held liable when it engages in non-policy-level planning or merely implements a previously approved plan, fails to give an adequate warning under the circumstances of a dangerous condition, negligently conducts an inspection, or negligently repairs or maintains property.

In sum, an important substantive legal principle possibly present in an action against a transit agency is whether the alleged negligent action is one that is protected by the discretionary function exemption. Although it may be argued that the planning-level/operational-level test is more of a conclusion than a test, it is, nonetheless, an extremely important limitation of any defense against tort actions against public transit agencies.

### C. Special Provisions Relating to Plan or Design Immunity

In addition to the discretionary function exemption in state and local tort claims legislation, some legislatures have enacted design immunity statutes to ensure that the design of public facilities is immune from liability.<sup>73</sup> A few transit agencies responding to the questionnaire noted that their jurisdictions had a special statute protecting them from liability for alleged negligent plan or design. The New Jersey plan or design immunity statute provides for seemingly perpetual protection for design decisions.<sup>74</sup> California's governmental immunity act also has a provision for design immunity, which nonetheless allows for some inquiry into the reasonableness of the approval of a plan or design.<sup>75</sup>

In the area of plan or design immunity, cases and statutes have addressed the issue of what happens when the circumstances upon which the plan or design was approved have changed. Presumably, when a public transit agency develops a plan or design, constructs a transit station, or even locates a bus stop, the agency attempts to comply with prevailing regulations or standards governing the design, specification, and type or nature of construction materials required. However, circumstances may change, such as increased use beyond the intended limits of the plan or design, resulting in a dangerous condition. *Technology* may change, or there may be physical changes at the site. The plan or design may no longer satisfy the most recent standards. Is the initial immunity for an original plan or design perpetual, or may the immunity dissipate over time?

In *Weiss v. Fote*,<sup>76</sup> which involved the clearance interval at a signalized intersection, the court ruled that after the state has planned an intersection, it is under a continuing duty to review the plan in light of its actual operation.<sup>77</sup> In such

a situation, the court may consider evidence of the physical change in conditions or frequency of accidents at the location after the change in conditions.

The California Supreme Court followed the *Weiss* case in the leading case of *Baldwin v. State*.<sup>78</sup> *Baldwin* contended that the intersection where the accident occurred had become dangerous because of an increase in the volume of traffic since the intersection's construction in 1942 and that the state should have constructed a special turning lane. The state argued that the design was based on traffic conditions prevailing at the time the design was prepared and that the conditions then did not require the construction of a special lane. The court held, regardless of the fact that initial immunity had attached to the design, that design immunity continues only if conditions have not changed:

[H]aving approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard.<sup>79</sup>

The court held that allowing a jury to decide whether the design immunity was perpetual would not infringe governmental discretionary decision making. The jury would not be reweighing the same technical data and policy criteria that a jury would have if it had been allowed to consider the reasonableness of the original plan or design.<sup>80</sup>

Some jurisdictions hold that the issue of changed circumstances is beyond the court's province. In its statute, New Jersey specifically rejected the *Baldwin* approach to design immunity: "[i]t is intended that the plan or design immunity provided in this section be perpetual. That is, once the immunity attaches no subsequent event or change of condition shall render a public entity liable on the theory that the existing plan or design of public property constitutes a dangerous condition."<sup>81</sup>

Where design immunity is not perpetual, suits may challenge a wide variety of decisions involving public facilities. For example, changed circumstances resulting from the passage of time occur not only after implementation of the plan, but also between the time of the plan's approval and its implementation.

In *Weiss v. New Jersey Transit*, the plaintiffs decedent was killed when her car was struck by a train as she crossed the railroad tracks.<sup>82</sup> Although a plan for the installation of a traffic signal had been approved nearly 8 years prior to the accident, there was still no signal where the accident occurred.<sup>83</sup> The defendants, however, maintained that there was a specific statutory immunity for failure to provide traffic signals. *Weiss* did not challenge the decisions of whether and what type of signal to install; rather, the plaintiff argued that "delay in implementing the policy-level decision of the commissioner erases immunization for failure to post a traffic signal."<sup>84</sup> Nevertheless, the court rejected the attempt to separate the policy-level decision from its implementation. Stating that the statute may protect even low-level administrative decisions, the court, relying on the drafter's comment to the immunity design statute, rejected the reasoning in *Baldwin* and held that there was immunity.<sup>85</sup>

There are other cases dealing with the issue of design immunity and whether it is lost as a result of changed circumstances. In *Leliefeld v. Johnson*,<sup>86</sup> which involved a collision on a bridge built in 1937, the plaintiff challenged the design of the bridge by arguing that it was too narrow for modern-day use. The court held that design immunity was perpetual and evidence concerning subsequent design standards was therefore inadmissible at trial.<sup>87</sup> The court did, however, note that

the state was not immune from liability with respect to failure to warn properly of a known, dangerous condition on a public highway that it maintains.<sup>88</sup>

In *Manna v. State*,<sup>89</sup> the plaintiff argued that the state should have installed some device, such as metal studs, on the bridge where the accident occurred, because the installation of such studs is a maintenance activity that would have recreated the traction lost over the years.<sup>90</sup> Disagreeing, the court decided that any installment of such devices would be a fundamental change in the design of the bridge and would thus constitute a new and improved design. Such decisions were protected by the immunity statute.<sup>91</sup> In *Compton v. City of Santee*,<sup>92</sup> the court noted that although design immunity is not perpetual because of the rule in *Baldwin*, certain predicates must be present before immunity may be lost: changed conditions and notice to the governmental entity thereof.<sup>93</sup> Because both of these predicates were not met, the city was still protected by the design immunity statute.

Design immunity is a subset of the broader immunity for the general exercise of discretionary functions. It appears, moreover, that at least one legislature has chosen to designate the approval of plans or designs as one area where there is no doubt that immunity attaches to the agency's decision. However, a transit agency must be particularly vigilant in a jurisdiction lacking a statute or judicial decision, providing that plan or design immunity is perpetual. Moreover, if the statutory or decisional law adopts the "changed conditions" approach to plan or design immunity, the transit or other agency must be cognizant that the number of situations that could give rise to tort liability may increase substantially. Particular care must be taken if the transit agency has notice of a dangerous condition.

#### IV. DISCUSSION OF THE GOVERNMENTAL-PROPRIETARY TEST OF IMMUNITY

##### A. Origin of the Doctrine in the Law of Municipal Corporations

Another basis for immunity from tort liability is the governmental-proprietary test or dichotomy, which still exists today in some jurisdictions. The governmental-proprietary doctrine originated in the law of municipal corporations, which have many of the rights and responsibilities of any unit of government.<sup>94</sup> However, in some ways, municipal corporations operate no differently from private corporations.<sup>95</sup> Because of these similarities, the courts developed the governmental-proprietary test of immunity to tort actions against municipal corporations, which were held liable for their actions that were "proprietary" in nature but were insulated from liability for activities "governmental" in nature.<sup>96</sup> Although it is a simple doctrine, judges and commentators have sometimes said that the test defies easy application:<sup>97</sup>

[P]owers and functions considered governmental or public in one jurisdiction are often viewed as proprietary or private in another, making it impossible to state a rule sufficiently exact to be of much practical value in applying the test, as courts have noted frequently in their decisions abandoning, or abrogating the governmental/proprietary test as a measure of state or local tort immunity or liability....<sup>98</sup>

Although the governmental-proprietary rule may be difficult to articulate or apply, the distinction has survived in some jurisdictions. Thus, it is necessary to consider it in relation to the tort liability of transit agencies.

##### B. Applying the Governmental-Proprietary Test to Transit Agencies

As common carriers, public transit agencies exercise both governmental and proprietary functions. Providing mass transportation has been labeled proprietary.<sup>99</sup> Thus, in *Dant v. District of Columbia*, the court held that sovereign immunity would not protect a transit agency for negligently operating and maintaining its farecard system.<sup>100</sup> Similarly, the maintenance of traffic controls is a proprietary function generally precluding a transit agency from claiming immunity.<sup>101</sup>

Policy decisions made at a high level concerning the design of equipment and facilities generally appear to be protected from liability. Such decisions, which involve legislative, administrative, or regulatory decisions, are purely governmental in nature. For example, where a commuter fell because the heel of her shoe lodged in the tread of an escalator at a Metro station,<sup>102</sup> the court held that the design of the escalator and the decision determining the width of the slots in the escalator treads were governmental functions cloaked with sovereign immunity.<sup>103</sup> Similarly, the distance of the gap between a train and a subway platform is a "discretionary decision" immune from suit by a passenger who is injured after falling into the gap.<sup>104</sup>

As seen in the discussion on plan or design immunity, one court has held that a transit agency does not lose its immunity under the governmental-proprietary test where there have been changed conditions. In *McKethean v. Washington Metropolitan Area Transit Agency*,<sup>105</sup> prospective passengers who were struck by an automobile while waiting at a bus stop brought suit against the transit agency for, *inter alia*, failing to relocate the bus stop following the widening of the street fronting it. In holding that sovereign immunity applied, the court stated: "[a] decision to relocate or not to relocate the bus stop after 1967 would involve safety planning, not implementation or operation of a safety plan."<sup>106</sup> Thus, even where changed circumstances arguably created a greater risk to the traveling public, the court held that a design decision not to remedy the condition was a quasilegislative decision that a jury should not be allowed to second guess.

Another area possibly immune from tort liability under the governmental-proprietary test involves the maintenance and operation of a police force.<sup>107</sup> It has been held that a public transit agency, alleged to have negligently and intentionally failed to supervise its police force, was protected under the governmental-proprietary test and hence was immune.<sup>108</sup> Where a commuter stepped from a crowded subway car into a gap between the car and the platform, a transit agency was not liable for its alleged failure to control crowds adequately at the subway station. Crowd control is a police function and governmental in nature.<sup>109</sup>

Although a transit agency may be immune in connection with providing and operating its police force, it still has a duty to take reasonable precautions for the safety and protection of its passengers. In its role as a common carrier and in the exercise of its proprietary functions, the transit agency may have some duty. In *Crosland v. New York City Transit Authority*,<sup>110</sup> a passenger who was assaulted on a subway station platform alleged that transit employees had seen the assault, yet failed to summon the police. The court held that plaintiffs' allegations did not involve solely the agency's allocation of police resources or action taken in its capacity of providing police protection. Moreover, the failure to summon the police was related to the agency's ownership and operation of the station and was not the exercise of immune policy-level activity.<sup>111</sup> Issues that touch upon the security of patrons may be considered proprietary. For example, a cause of action alleging inadequate lighting, poor placement of an exit gate, and failure to eliminate

hiding places for criminals in the operation of a parking lot has been held to involve the unprotected exercise of proprietary functions.<sup>112</sup> A New York case, however, illustrates the difficulty of articulating a clear rule. The New York City Transit Authority was held not liable for its failure to lock a subway platform gate, a governmental function, thereby allowing the plaintiffs assailant to enter a secluded area and rape her.<sup>113</sup>

Although the discretionary function exemption and the governmental-proprietary tests are supposedly conceptually distinct,<sup>114</sup> high-level policy decisions are protected under either approach. If so, a transit agency does not necessarily benefit any more from one approach than the other.<sup>115</sup>

## V. DUTY AND DEGREE OF CARE OWED TO THE TRAVELING PUBLIC

### A. Duties of the Transit Agency

The absence of sovereign immunity does not mean a public transit agency is automatically liable for an alleged injury. As in any other negligence case, the plaintiff must establish the agency's liability, which means that the plaintiff must show that the agency had a duty to the plaintiff under the circumstances. Once the duty is established, the agency is responsible, as would be any other common carrier, business invitor, or landlord, depending on the capacity in which it is acting at the time of the alleged injury.

There are situations in which the agency has no duty to the plaintiff, even if there is an injury caused by the agency's alleged negligence. In the design and construction of support facilities, such as stations, platforms, and parking lots, a transit agency has no duty to design and build facilities that are accident-proof, nor is the agency required to improve its systems by incorporating every new safety device that might become available.<sup>116</sup> It is sufficient that the property comply with the prevailing applicable safety standards. If there is a defect in the property, the agency has no duty to provide a warning, unless the condition is unreasonably dangerous or the nature of the danger is not sufficiently apparent or obvious. Even then, if the agency does not have actual or constructive notice of the dangerous condition and a reasonable time within which to correct or give warning of the condition, then it will not be held liable.<sup>117</sup>

An exhaustive review of the fairly well-developed law of common carriers is beyond the scope of this article. It should be noted, however, that during its operation of a conveyance, a transit agency must fulfill the same duties imposed on other common carriers. Although a transit agency has a duty as a common carrier, its duty does not relieve a passenger of his or her duty of exercising ordinary care.<sup>118</sup> Passengers have to observe their surroundings and take reasonable precautions to protect themselves from risks and hazards that ordinarily accompany the conveyance being used.<sup>119</sup> Passengers know that conveyances may begin with a sudden jerk or lunge. A bus driver may start the bus without waiting for everyone to be seated. There are, however, exceptions for those with disabilities and others requiring assistance.<sup>120</sup>

Crimes can occur in the vicinity of public transit facilities. Most courts agree that a transit agency owes some duty to protect passengers from assaults by fellow passengers while aboard the conveyance.<sup>121</sup> How far a transit agency must go to fulfill its duty depends on the degree of care owed to the passenger under the circumstances. If the courts imposed the highest degree of care, which courts are reluctant to do,<sup>122</sup> the agency would have to do everything reasonable to protect a passenger's safety.

It is very difficult to state a rule on how much a transit agency must do to protect a passenger. A transit agency generally does not have to provide police or security protection, unless required by statute,<sup>123</sup> but other protective or precautionary measures may have to be taken depending on the facts. A California Supreme Court decision enumerated several actions a carrier could take, both before and during a hostile situation. A transit agency could warn and, if necessary, eject unruly passengers<sup>124</sup> or summon police.<sup>125</sup> The agency could provide radio communication between the driver and the local police, or vehicles, particularly buses, could be equipped with alarm lights.<sup>126</sup> The agency could provide adequate training to enable employees to handle volatile situations, especially along routes with a history of violent incidents.<sup>127</sup>

Although this article generally concerns the duty owed to the traveling public, on some occasions an injury will occur to someone not lawfully on the agency's property (e.g., a trespasser). The general rule is that a landowner owes only the duty to refrain from willfully or wantonly injuring a trespasser. In *Lee v. Chicago Transit Authority*, plaintiffs decedent was electrocuted while attempting to urinate near the Chicago Transit Authority's (CTA's) railroad tracks.<sup>128</sup> The decedent was a Korean immigrant, who was unable to read English and whose blood alcohol level was three times the legal limit for intoxication under the motor vehicle code. The decedent was electrocuted by a third rail, which supplies power to the electric trains.<sup>129</sup> The third rail was situated approximately 6.5 feet from the sidewalk. At the point of entry to the tracks, signs reading "DANGER," "KEEP OUT," and "ELECTRIC CURRENT" were posted on a utility shed and sawhorses.<sup>130</sup> In addition, CTA had laid sharp, triangular boards called "jaws" or "cattle boards" along the tracks, making it difficult for anyone to walk up to the railroad tracks. Nevertheless, plaintiffs decedent maneuvered his way to the tracks.

The court held that CTA owed a duty of ordinary care to the decedent in this instance,<sup>131</sup> that CTA had reason to believe that "a trespasser would not discover the third rail," and that the posted signs were insufficient. The court stressed that nothing indicated the location of the electric rail or that the rail was electrified.<sup>132</sup> In warning of hidden, artificial dangers, the transit agency should specifically mark the dangerous condition, indicating both the nature of the danger and the consequences of ignoring the warnings. As the *Lee* case demonstrates, warnings that are too general may not suffice: although CTA had erected numerous signs and installed cattle boards, the signs and other precautions were still insufficient. If there are dangerous conditions, transit agencies have a duty to give adequate warning, which includes clearly and specifically communicating the location and nature of the condition.

### B. Degree of Care Owed to the Traveling Public

A common carrier is not an insurer of a passenger's safety; however, it owes a duty of reasonable care to its passengers.<sup>133</sup> Moreover, because passengers have very little control over the operation of the conveyance and must rely on the reason, judgment, and skill of the operator, some decisions state that a common carrier is held to a higher degree of care than the "reasonably prudent person."<sup>134</sup> In general, a common carrier must accord passengers on a conveyance a higher standard of care than nonpassengers.

Generally, once a passenger is afforded the opportunity to alight from the transportation unit in a reasonably safe manner and in a reasonably safe place, the passenger-carrier relationship is terminated. The relationship may terminate

even when the passenger (now pedestrian) is merely transferring from one form of conveyance to another (e.g., from one bus to another or from a bus to a train), when the passenger's journey is a continuous one. Although the passenger may believe that an immediate transfer from one form of conveyance to another is an inseparable part of the journey, the law does not and hence does not impose upon the agency the same high degree of care at the intermediate points of the journey. As the court stated in *Mitchell v. City of Chicago*.<sup>135</sup>

[W]hen the carrier discharges the passenger at an intermediate point or at the end of the journey, be it in a public place or otherwise, the duty to exercise the highest degree of care is suspended and... is resumed when the passenger presents himself to the conveyance of the carrier within the time and at the place fixed by the contract.<sup>136</sup>

Thus, the duty imposed on the carrier was only that of ordinary care under the circumstances. The Authority had not violated its standard of care, because it had no duty to protect its passengers from obvious street dangers.<sup>137</sup>

The passenger-carrier relationship is much more likely to exist when the traveler is waiting on the transit agency's property to board the conveyance. Facilities, such as escalators, elevators,<sup>138</sup> terminals, platforms, and stations, are common areas where a traveler may be injured while waiting to board a train or bus. At stations maintained for the use of passengers, the transit agency as a common carrier must exercise the highest degree of care in relation to those passengers.<sup>139</sup>

The high degree of care required of carriers applies only to transportation of people. A lesser standard applies to approaches, station platforms, or halls and stairways under the agency's control.<sup>140</sup> In those instances, the transit agency must exercise ordinary care under the circumstances to make the property reasonably safe for its intended use.<sup>141</sup>

The existence of "transition areas," such as stations, terminals, and galleries, raises further questions concerning the standard of care applicable to injuries sustained on the premises. For example, there may be an issue of whether a transit agency is required to exercise the highest degree of care when acting as a connecting carrier, even one owned and operated by the agency. Another issue that may arise is whether the agency is acting as a landlord or business inviter in such instances. Although such structures may serve as integral parts of the transit system, they have unique qualities that distinguish them from other transit facilities.

An example of such a multifunctional facility is the Port Authority of New York and New Jersey bus terminal in New York City. When a traveler in the Port Authority bus terminal was assaulted and robbed, the applicable duty of care was not the highest one that arises out of the passenger-carrier relationship, even though the train system controlled by the Authority was a common carrier.<sup>142</sup>

In *Lieberman*, the plaintiff attempted to extend the Authority's duty of care by arguing that "even if the Port Authority itself is not a common carrier, it performs the role of connecting carrier and thus should be subject to the same high duty of care in protecting its passengers."<sup>143</sup> Nevertheless, the court focused on whether the Port Authority was a common carrier.<sup>144</sup> Although the Port Authority Trans-Hudson train system, which was controlled by the Authority, was a common carrier, the Port Authority bus terminal did not meet the definition of a common carrier.<sup>145</sup> Therefore, the higher duty of care was not applicable to plaintiffs situation.

In sum, the reason a transit agency has a higher standard of care when acting as a common carrier is that the passenger must rely on the professional skill and

judgment of the carrier. On the other hand, when a prospective passenger is walking in a terminal or even on a subway platform and slips and falls, there is no reason for holding the public transit agency to a standard of the highest degree of care. The reliance factor is not nearly as significant, because the traveler has to exercise responsibility and common sense in the situation. On the platform, the agency's degree of care is that of a business inviter to an invitee.

There have been numerous attempts to expand the transit agency's duties in the areas of security and police protection. Plaintiffs frequently seek, usually unsuccessfully, to expand the agency's duty in protecting against criminal and tortious acts by third parties.<sup>146</sup> In some jurisdictions, providing or not providing police services is covered by statute.<sup>147</sup> In jurisdictions where the courts continue to apply the governmental-proprietary test of immunity, the decision whether to provide police protection is held to be the exercise of a governmental function and immune from liability.<sup>148</sup>

Nevertheless, plaintiffs continually seek compensation for attacks by third parties. One strategy plaintiffs often employ is to label the cause of action as something other than a suit for failure to provide police protection. The reason is that some courts have recognized an exception to immunity under general negligence principles for injuries caused by foreseeable acts of third persons and have held agencies liable.<sup>149</sup>

In *Lieberman*, the plaintiff was attacked on the Port Authority's premises by a third party. In considering whether the plaintiff could bring suit, the New Jersey Supreme Court discussed the Authority's dual character. In operating a bus depot and facilitating travel between the two states, the Authority performs a governmental function. On the other hand, in leasing space to stores, businesses, restaurants, and private transportation companies, the Authority operates as a landlord.<sup>150</sup>

Because the issue of whether the plaintiff has a cause of action depends on the activity in question,<sup>151</sup> the court must examine at a minimum "the injury alleged, the remedy requested, and the role (either governmental or as a landlord) that the Port Authority played at the time of the alleged injury."<sup>152</sup> The court indicated that providing better lighting and signs is closer to a landlord's responsibility and hence is proprietary. Providing security cameras, closing off deserted areas, and providing measures for crowd control are closer to traditional governmental functions, which are immune from liability.<sup>153</sup>

## VI. PROCEDURAL LIMITATIONS ON ACTIONS OR RECOVERIES IN TORT AGAINST PUBLIC TRANSIT AGENCIES

### A. Procedural Requirements

If a potential plaintiff has an action, there may be conditions for the plaintiff to satisfy prior to filing the claim against the transit agency. For reasons of public policy and because of limited resources, the transit agency must have sufficient opportunity to conduct an investigation of the alleged claim. A common requirement or condition prior to a suit is providing written notice to the transit agency within a specified time.<sup>154</sup> If this is not done, the right of action will be lost. There also may be a special statute of limitations applicable to claims against the transit agency.<sup>155</sup>

## B. Limitations on Monetary Recoveries

If the transit agency is subject to a suit, it may not necessarily be liable for damages to the same extent as would a private entity. This is because some legislatures have enacted statutory maximums or caps on the amount and/or type of damages that may be recoverable against a governmental defendant. Although the statutes vary from state to state, they reflect public concerns about the effect of recoveries in tort against transit and other public agencies that may seriously deplete public resources.

The type and scope of statutory caps may vary. In some instances, the jurisdiction may only enact a cap on recovery for each plaintiff. In others, a cap on damages per plaintiff arising from the same cause of action or occurrence may be combined with an aggregate limit.<sup>156</sup> Sometimes, the statutes provide that the court may not award prejudgment interest.<sup>157</sup>

However, in *Griffin v. Tri-County Metropolitan Transp. Dist. of Oregon*,<sup>158</sup> the court held that attorney's fees were recoverable because Oregon Revised Statutes Section 30.260(8) does not include attorneys fees and costs within the definition of a tort claim. Thus, attorney's fees and costs were not intended to be included within the liability limit in the Oregon Tort Claims Act. The court held that the evidence supported an award of attorney's fees at the rate of \$270 per hour.

The constitutionality of statutory maximums, provisions for requiring notice, and statutes of limitations have been challenged in several jurisdictions. Their constitutionality generally has been upheld, usually for the same reasons. In Minnesota, the court held that, because the \$100,000 statutory cap on tort judgments against the state agency did not unfairly discriminate between governmental tortfeasors and private tortfeasors, the statute did not violate the Equal Protection Clause. The court held that the state's classification was rationally related to its legitimate governmental interest in protecting public funds and aiding budgetary planning.<sup>159</sup>

A different result was reached in *Gladon v. Greater Cleveland Regional Transit Authority*.<sup>160</sup> In this case, the issues were whether Ohio Rev. Code Section 2744.05(c)(1) eliminated the jury's authority to decide the value of plaintiffs noneconomic harm and whether the statute was constitutional because Section 5, Article I, of the Ohio Constitution guaranteed the right to a jury trial. The Regional Transit Authority (RTA) challenged a jury verdict in favor of plaintiff Gladon and, more specifically, the court's failure to reduce the pain and suffering award to \$250,000 pursuant to Ohio Rev. Code Section 2744.05(c)(1).

The plaintiff had been attacked by two pickpockets and left on the train tracks; plaintiffs legs were severely injured when an RTA train was unable to stop and ran over him. The jury rendered a verdict for Gladon of over \$2.7 million, which was reduced for other reasons to \$2.5 million. RTA moved the trial court to reduce the \$2.5 million award to the legislative predetermined limit of \$250,000. The appeals court noted that "[t]he trial court refused to reduce the jury's finding of non-economic damages from \$2.5 million to \$250,000 and held as a matter of law that § 2744.059(c)(1) (the \$250,000 cap on recovery statute) was unconstitutional."<sup>161</sup> The court affirmed:

In view of the court's holding and the arguments of both parties, this court, too, finds that R.C. 2744.05(c)(1) is constitutionally invalid. It is invalid because it violates Section 5, Article I of the Ohio Constitution's mandate that the jury trial right shall be inviolate. It impairs the fundamental jury trial right and as such it fails because there is no showing that its legislative objective cannot be achieved in a less burdensome way and that its legislative objectives are compelling. Finally, it fails because it is unreasonable

and arbitrary, and under *Morris v. Savoy*, a statute is unreasonable and arbitrary if there is no real and substantial reason for the statute, which in this case is the restriction to \$250,000 for non-economic damages.<sup>162</sup>

Besides finding that the statute "chillingly" impaired the plaintiffs right to a jury trial, the appeals court held that the statute was unconstitutional because it created an improper classification between "non-wrongful death tort sufferers and wrongful death tort sufferers," thus violating "the equal protection standard."<sup>163</sup>

In the second assignment of error, RTA argued that the trial court erred in instructing the jury that Gladon was an invitee and was owed a duty of ordinary care. RTA reasoned that Gladon was a trespasser, and its duty was limited to refraining from willful and wanton activity.<sup>164</sup> The court disagreed with RTA, holding that "once the owner of the premises discovers a trespasser or a licensee in a perilous situation, he owes a duty to exercise ordinary care."<sup>165</sup>

The court held that it was for the jury to decide whether the agency had used reasonable or ordinary care, because the "evidence reveals that RTA's operator did not attempt to stop the train until she confirmed that there was a person on the tracks, rather than when she first saw a tennis shoe in the middle of the track."<sup>166</sup>

Even where the maximum on damages is held to be constitutional, it may be difficult to apply the statutory limit in specific situations. For example, in *Tulewicz v. Southeastern Pennsylvania Transportation Authority (SEPTA)*,<sup>167</sup> the Pennsylvania Supreme Court narrowly interpreted that state's statutory cap on damages. In *Tulewicz*, multiple claims for damages resulted after a SEPTA bus killed plaintiffs decedent.<sup>168</sup> After the actions were consolidated for trial, a jury awarded plaintiff as a relative and as decedent's personal representative \$2.5 million under the Wrongful Death Act and \$250,000 under the Survival Act.<sup>169</sup> SEPTA argued that the two claims and verdicts arose out of the same occurrence and, therefore, had to be aggregated to avoid exceeding the statutory limitation of \$250,000 per plaintiff.<sup>170</sup>

The court rejected the agency's argument and reasoned that the two actions were designed to compensate two different categories of plaintiffs: on one hand, the spouse and members of the family for their loss, and on the other, the decedent through her legal representative.<sup>171</sup> Even though there was only one plaintiff, the case was brought on behalf of two distinct plaintiffs.<sup>172</sup> Thus, the statutory \$250,000 limitation applied to the respective claims, but not in the aggregate.

## C. Limitations Applicable to Punitive Damages

As seen, the dual nature of the transit agency, having both business and governmental characteristics, has led, in some jurisdictions, to the agency's immunity for the performance of some activities altogether. Insofar as punitive damages are concerned, statutes in some jurisdictions may exempt transit agencies from such damages.<sup>173</sup> In fact, numerous agencies responding to the survey mentioned earlier stated that the agency was not subject to punitive damage awards. If such legislation does not exist, then the courts must decide the issue. The trend seems to favor denying punitive damages in successful suits against transit agencies.<sup>174</sup>

The issue of whether punitive damages should be allowed depends on considerations of public policy. In *MARTA v. Boswell*, a passenger who was injured

during a criminal attack at a transit agency's station sued for compensatory and punitive damages.<sup>175</sup> The court disallowed punitive damages.

In general, courts [have] viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised... [A]n award of punitive damages against a [governmental entity] "punishes" only the taxpayers, who took no part in the commission of the tort.<sup>176</sup>

In the spectrum of transit functions, the courts often rule that the functions involved are governmental in nature and immune. Where the issue is the availability of punitive damages, governmental or public interest predominates over any private party characteristics of the transit agency. A further reason for denying punitive damages in the transit case, as opposed to a case against a privately owned corporation, is the taxpayers' inability to remove the management of a transit agency.<sup>177</sup> In contrast to taxpayers, shareholders in a private corporation have a certain degree of direct control because of their power to vote their shares.<sup>178</sup>

In any event, many hold to the view that the financial and other costs to society outweigh whatever benefits that may follow from unlimited governmental liability in tort. The issue is whether a transit agency that provides service free from competition will be more efficient or careful as a result of exposure to unlimited tort liability and punitive damages. In the *Boswell* case, the sole dissenting justice wrote: "[T]he public scrutinizes MARTA just as shareholders scrutinize a corporation. An award of punitive damages deters MARTA officers in the same way as such an award deters corporate officers."

The issue of whether a transit agency is liable for punitive damages may be a matter of interpretation of the agency's enabling legislation, the relationship of such legislation and any governmental immunity or tort liability statutes, and any public policy concerns, such as are articulated in the *Boswell* and *George* cases.<sup>179</sup>

## VII. OTHER MATTERS OF INTEREST TO PUBLIC TRANSIT AGENCIES

### A. Transit Agency's Compliance with Federal and State Laws and Regulations

If there is a mandatory duty imposed on transit agency employees, then there is usually no room to exercise discretion protected by that exemption. The same holds true at the policy-making level: Where there is a preexisting legal duty, then there is no discretion to exercise. For example, where federal or state law requires a certain course of action, then a transit agency cannot claim immunity when it fails to abide by that mandate.

In *Nola v. New York City Transit Agency*, the agency could not claim that its decision not to install safety glass on a bus was a governmental decision. The duty to install safety glass was already established by existing federal and state law.<sup>180</sup> Clearly, it is important for any transit or other public agency to comply with applicable federal and state laws, including but not limited to those laws mandating standards or requirements in the design, construction, or maintenance of facilities and equipment.

### B. Significance of Insurance Coverage in Tort Actions

A transit agency may be self-insured or it may purchase private insurance covering claims to persons or property.<sup>181</sup> In some states, obtaining insurance

coverage does not result in any waiver by the agency of its defense of sovereign immunity or of any statutory cap that may apply.<sup>182</sup> Courts have held that the legislature does not abrogate a monetary limitation in a tort claims act when it authorizes government entities to purchase insurance.<sup>183</sup> Some courts have reached the opposite conclusion, holding that the procurement of insurance coverage amounts to a waiver of immunity.<sup>184</sup> In general, it is a matter of statutory interpretation, which may differ from state to state.

## VIII. CHANGES IN THE LAW THAT WOULD REDUCE TORT LIABILITY

### A. Procedural Amendments or Enactments

The preceding sections are based on a survey of current federal, state, and local statutory and decisional law from all jurisdictions relevant to the principles of tort liability of transit agencies. This section will assess some of the possible strategies from a statutory viewpoint for limiting an agency's exposure to tort liability. Unless the agency has an opportunity to remodel or completely revamp the existing tort law in its jurisdiction, it may need to seek reasonable statutory amendments to existing law. The following are suggestions these agencies may consider:

- In the procedural area, there clearly are methods that have passed constitutional muster for limiting exposure to claims or reducing ultimate tort liability of the agency. These approaches may include requiring claimants to give written notice to the agency. Notice may be required to be given by certified mail as proof of receipt of notice by the agency. Notice may be required to be given within a certain period of time after the accident; otherwise, the claimant would be unable to bring a legal action later. If notice is not given in accordance with the statute, the claim is lost because the giving of the notice is a jurisdictional requirement. The notice requirement is reasonable because it allows the agency an opportunity to investigate and possibly settle the claim. In addition, a specific statute of limitations may be added, possibly one of a shorter duration than the usual limitations period for negligence claims.

- Another approach may be to establish statutory maximums on recoveries, possibly setting an aggregate limit for claims arising out of one accident or incident. A rule prohibiting punitive damages could be added to an existing statute. Although it may be challenged on constitutional or other grounds, a statute might be added or amended to exclude certain noneconomic damages, such as pain and suffering, loss of consortium, or loss of society.

- Other procedures worth considering are the inclusion of pretrial mediation or arbitration of certain claims, for example, claims involving sums below a certain dollar amount. Administratively, the agency may establish an internal review board to hear claims with the authority to recommend awards and to compromise and settle claims. Such an approach may appeal to claimants as well, because a fairly administered, appropriate procedure could result in a system providing more expeditious and less costly disposition of claims for injured riders or other claimants. For purposes of the review board's procedures, strict legal rules on evidence or procedure might be relaxed as a further means of encouraging the prompt resolution of claims instead of resorting to judicial proceedings. A statute permitting the establishment of a review board or panel could also include a provision requiring that the agency's administrative remedies, such as the review board's initial determination of the claim, had to be exhausted before a judicial proceeding against the agency could be initiated. In other words, the

requirement of proceeding first before the review board would be jurisdictional; failure to follow or exhaust that remedy would preclude a judicial action.

- As seen, there are many activities that are immune because they come within the meaning of the discretionary function exemption of a tort claims statute. However, once the involved decision that gives rise to a claim is determined to be below the planning level of the agency, there may be difficulty in showing that the action involved required the kind of planning or policy-level discretion needed for immunity to attach. Immunity does not usually attach to negligence in the implementation of the high-level decision. To reverse this trend, a legislative enactment, perhaps along the lines of the specific plan or design immunity statutes, probably would be required. There are actions involving discretion (e.g., deciding whether to modify a facility, the training of personnel, the placement of signs, signals, or structures) that are not necessarily committed to the "cabinet" level of the agency; however, to broaden the scope of the discretionary duties of the agency, it would be necessary to add specific provisions to the statute designating areas that are to be regarded as discretionary functions. At the moment, the courts are left to determine whether the action alleged to have been negligent is one that is discretionary. It may be prudent to define discretion to include also actions implementing the decision. More statutory definition may be helpful in delineating more clearly the areas that are considered to be the exercise of discretionary and, therefore, immune governmental actions.

- If the jurisdiction does not have plan or design immunity, either by statute or judicial decision, this is another area the agency may wish to pursue. Only a few transit agencies reported that they had a specific statute covering plan or design immunity. There is precedent in New Jersey, California, and elsewhere for such a specific exemption; moreover, to alleviate any doubt, the provision should indicate whether the immunity is perpetual. Including a specific provision on plan or design immunity as a complement to an existing statute may be less difficult than redefining the discretionary function exemption, because a few states have a provision for plan or design immunity, and the provision is a subset of the existing exemption for the exercise of discretionary duties.

- If there is any doubt, in the particular jurisdiction or jurisdictions where the transit agency operates, about the agency's duty in regard to providing police protection, this is an area that might benefit from statutory clarification. Furthermore, if a statute imposes certain duties on the agency (e.g., to conduct a study, to make designations, to follow certain standards), the statute should also state whether the transit agency may be held liable for any deviation from the statutory mandates. As seen, a discretionary function exemption, even if the negligence occurs at a high level, may not necessarily protect the agency if there is a violation of a specific statutory mandate or policy. Although not a legislative matter, if the transit agency adopts a policy or manual governing procedures, it may want to consider including provisions indicating that the agency has the discretion not to adhere strictly to the policy or manual in every situation, that the policy or manual is not intended to apply to every conceivable situation that may arise.

- Although it may be difficult or controversial to alter the general duty of the agency as a common carrier, during any statutory revision, drafters should consider addressing the issues of liability to trespassers, liability to passengers by virtue of incidents caused by third parties in or near a transit facility, the standards applicable to giving notice of a dangerous condition either to users or to

others, and the standard of care owed to persons who are using transit facilities but who are not actually passengers on a conveyance at the time of an injury.

Based on the foregoing research, although there appears to be some recent authority to the contrary, the procedural approaches mentioned here are likely to be upheld if challenged on constitutional grounds.

## IX. CONCLUSION

Transit operations have not escaped the trend toward expanded governmental responsibility for the negligence of public agencies. Even where immunity exists by statute or judicial decision, generally a transit agency is protected in the exercise of planning or other high-level decision making. The transit agency is more likely to be held liable for claims arising out of the operation and maintenance of bus or rail services or facilities.

The transit agency has the utmost standard of care to meet when it is acting in the capacity of common carrier. Usually, the agency only has to act with ordinary care in areas where the passenger-carrier relationship has not yet formed, has been interrupted, or has terminated, such as at transit stations or on platforms.

Statutes may require that notice of a claim be given within a certain period of time after the accident or incident. It is possible that a special statute of limitations may apply to a negligence action against a transit agency. Statutes may protect transit agencies to some extent by imposing statutory maximums on tort recoveries against agencies when sued for negligence. Either statutes or judicial decisions may protect agencies from punitive damage awards. In all cases, the applicable law of the particular jurisdiction must be consulted.

The literature does not seem to address whether the public is willing to accept certain trade-offs, such as limits on tort recoveries, because of budgetary constraints on transit or other public agencies. However, the law as it exists today certainly recognizes that there are both substantive and procedural limitations, most arising out of the interpretation of application of tort claims or related legislation, including statutory caps on damages or limits on other damages, such as punitive damages.

There are important areas of decision making vested in transit agencies for which they are not liable. In defending legal actions it is important to stress the discretion vested in the agency and that the discretion is exercised at a high level and in the performance of traditional government functions.

## ENDNOTES

<sup>1</sup>Federal subsidies to the transit industry have increased over the past 20 years. See Neil W. Hamilton, *The Governance of Publicly Owned Mass Transit-A Proposed Model Act and Comments*, 32 WASH. U. J. URB. & CONTEMP. L. 3 (Summer 1987) (stating that federal spending was \$34 billion per year between 1980 and 1986).

<sup>2</sup>AMERICAN PUBLIC TRANSIT ASSOCIATION, TRANSIT FACT BOOK 1622 (1992).

<sup>3</sup>*Id.* at 15.

<sup>4</sup>*Id.* There has been a steady increase in services provided since 1987. See Federal TRANSIT ADMINISTRATION, U.S. DOT, NATIONAL TRANSIT SUMMARIES AND TRENDS FOR THE 1990 SECTION 15 REPORT YEAR 20, 21 (1992) (indicating that the services provided since 1987 have increased steadily with total miles traveled in 1990 approximately 7 percent higher than in 1987).

<sup>5</sup>*Id.* at 38.

<sup>6</sup>431 N.W.2d 861 (Minn. 1988). In *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 437 N.E.2d 1104 (N.Y. 1982), which held that the waiver of sovereign immunity effected by § 8 of the N.Y. Court of Claims Act did not permit punitive damages to be assessed against the state or its political subdivisions, the court stated that the state's "policy [was] that public funds not be available, directly or indirectly, for the payment of damages beyond those actually suffered...." *Id.* at 1107.

<sup>7</sup>*Lienhard*, 431 N.W.2d at 867.

<sup>8</sup>See, e.g., CAL. GOVT CODE § 810 *et seq.* (Deering 1982); 745 ILL. ANN. STAT. 10/2-101(b) (Smith-Hurd 1993); IOWA CODE ANN. § 670.1 *et seq.* (West Supp. 1994); NEB. REV. STAT. § 13-901 *et seq.* (1991 & Supp. 1993); N.J. STAT. ANN. § 59:1-1 *et seq.* (West 1992 & Supp. 1994); OHIO REV. CODE ANN. §

2744.01 *et seq.* (Anderson 1992 & Supp. 1993); OKLA. STAT. ANN. 51, § 151 *et seq.* (West 1988 & Supp. 1994); OR. REV. STAT. §§ 30.260-30.300 (1993); WIS. STAT. ANN. § 893.80 (4) (West 1983).

<sup>9</sup>See, e.g., N.J. STAT. ANN. § 59:23(a) (West 1992); OR. REV. STAT. § 30.265(3)(c)(1993); and 745 ILL. ANN. STAT. 10/2-102 and 10/2-201 (Smith-Hurd 1993).

<sup>10</sup>See, e.g., N.J. STAT. ANN. § 59:4-6 (West 1992); 745 ILL. ANN. STAT. 10/3103 (Smith-Hurd 1993).

<sup>11</sup>See, e.g., NEB. REV. STAT. § 13926 (\$1 million per person; \$5 million for all claims arising out of a single occurrence); OR. REV. STAT. § 30.270 (\$50,000 to any claimant for property damage, \$200,000 maximum on general and special damages for any claimant for all claims, and \$500,000 for any number of claims arising out of a single accident or occurrence); OKLA. STAT. ANN. 51, § 154A (\$100,000 per person, \$25,000 for property damage, and \$1 million for any number of claims arising out of a single occurrence or accident); WIS. STAT. ANN. §§ 893.80 (3) and 345.05 (\$250,000 for vehicle accidents and \$50,000 per claim for all other tort actions other than civil rights actions). *But see* Gladon v. Greater Cleveland Regional Transit Auth., No. 64029, 1994 Ohio Ct. App. LEXIS 902 (Mar. 10, 1994) (ruling that the cap in § 2744.05(c)(1) was unconstitutional).

<sup>12</sup>A limitation most often reported was that because of a statute or judicial decision, the agency was not subject to punitive damages. See, e.g., N.J. STAT. ANN. § 59:9-2(c) (West 1992); OKLA. STAT. ANN. 51, § 154B; OR. REV. STAT. § 30.270(2) (West 1988 & Supp. 1994). Also, in Oregon, attorney's fees and cost may not be awarded to the extent the total judgment would exceed the statutory cap. *Griffin v. Tri-County Metropolitan*

Transportation Dist. of Oregon, 870 P.2d 808 (Or. 1994).

<sup>13</sup>Sovereign immunity was first applied to a local government in the United States in *Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812), cited in 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.02.10 (3d ed. rev. vol. 1993) [hereinafter MCQUILLIN].

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* (citing *Stone v. State Highway Comm'n*, 381 P.2d 107 (Ariz. 1963); *Parish v. Pitts*, 429 S.W.2d 45 (Ark. 1968); *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Cal. 1961); *Hargrove v. Town of Cocoa Beach*, 96, So.2d 130 (Fla. 1957); *Molitor v. Kaneland Community Unit Dist. No. 302*, 163 N.E.2d 89 (Ill. 1959); *Campbell v. State*, 284 N.E.2d 733 (Ind. 1972); *Haney v. Lexington*, 386 S.W.2d 738 (Ky. 1964); *Williams v. Detroit*, 111 N.W.2d 1 (Mich. 1961); *Spanel v. Mounds View School Dist.*, 118 N.W.2d 795 (Minn. 1962); *Pruett v. Rosedale*, 421 So.2d 1046 (Miss. 1982); *Hicks v. State*, 544 P.2d 1153 (N.M. 1976); *Haverlack v. Portage Homes, Inc.*, 442 N.E.2d 749 (Ohio 1982); *Vanderpool v. State*, 672 P.2d 1153 (Okla. 1983); *Ayala v. Philadelphia Bd. of Pub. Educ.*, 305 A.2d 877 (Pa. 1973); *Taylor v. Murphy*, 360 S.E.2d 314 (S.C. 1987); *Long v. Weirton*, 214 S.E.2d 832 (W.Va. 1975); *Holytz v. Milwaukee*, 115 N.W.2d 618 (1962).

<sup>16</sup>These states include Alaska, California, Illinois, New Jersey, Minnesota, Tennessee, and Texas.

<sup>17</sup>See, e.g., *Transport of New Jersey v. Matos*, 495 A.2d 503 (N.J. Super Law Div. 1985), which held that a public transit corporation was a "public entity" for purposes of the Public Transportation Act, N.J. STAT. ANN. § 27:25-4(a) (West Supp. 1994) and, thus, was subject to the Tort Claims Act, N.J. STAT. ANN. § 59:1-1, *et seq.*

<sup>18</sup>See R.I. GEN. LAWS § 9-31-1 *et seq.* (Michie 1985). Note that Rhode Island has waived immunity for tort suits and places limits on damage recoveries for liability arising from the performance of governmental functions. *Id.* at § 9-31-2.

<sup>19</sup>See *LeSanche v. North Suburban Mass Transit District*, 491 N.E.2d 1170, 1171 (Ill. App. Ct. 1986).

<sup>20</sup>D.C. CODE ANN. § 1-2411 *et seq.* (1981 ed.)

<sup>21</sup>See KAN. STAT. ANN. § 12-2524 (1991) and MO. ANN. STAT. § 238.010 (Vernon 1990). The Kansas City Area Transportation Authority is considered a subdivision of the states who are parties to the compact. See Div. 1287, Amalgamated Transit Union v. Kansas City Area Transp. Auth., 485 F. Supp. 856 (W.D. Mo. 1980).

<sup>22</sup>See *Wellons v. SEPTA*, 596 A.2d 1169 (Pa. Commw. Ct. 1991) (paper bag); *Bowles v. SEPTA*, 581 A.2d 700 (Pa. Commw. Ct. 1990) (ice and frost).

<sup>23</sup>CAL. GOVT CODE § 820.2 (Deering 1982); N.J. STAT. ANN. § 59:2-3 (West 1992).

<sup>24</sup>CAL. GOVT CODE § 830.4; N.J. STAT. ANN. § 59:4-5

<sup>25</sup>CAL. GOVT CODE § 830.6; N.J. STAT. ANN. § 59:4-6.

<sup>26</sup>According to the Federal Tort Claims Act, the government may not be held liable for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1988).

<sup>27</sup>In *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953), the Court held that "determinations made by executives or administrators in establishing

plans, specifications or schedules of operations" were discretionary and that "where there is room for policy judgment and decision there is discretion." The Supreme Court's decision in *Dalehite* established the policy versus operational-level test of evaluating discretion exercised by a government agency. The broad area of protected discretion established in the *Dalehite* case has been narrowed by later decisions. The Court's decision in *Indian Towing Co., Inc. v. United States*, 350 U.S. 61 (1955) limited the potential area of discretion existing in the planning versus operational test established in the *Dalehite* case. In *Indian Towing*, the Court stated that when the government decides to undertake a public service or project, it is not exercising protected discretion when it is negligent in implementing the decision to provide the service or operate and maintain the project. Once a service or program is in operation, the public is entitled to rely on its safe operation. In *United States v. S.A. Empresa De Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797 (1984) [hereinafter *Varig*], the court held that agencies and their employees exercising discretion are protected under the discretionary function exemption. The Supreme Court held, first, that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case"; "[t]he basic inquiry...is whether the challenged acts of a government employee--whatever his or her rank--are of the nature and quality that Congress intended to shield from tort liability." *Varig*, 467 U.S. at 813--14.

<sup>28</sup>*See, e.g., Wainscott v. State*, 642 P.2d 1355 (Alaska 1982) (stating that immunity exception to state liability attaches when a decision entails governmental planning or policy formulation); *Lopez v. Southern California*

*Rapid Transit Dist.*, 710 P.2d 907 (Cal. 1985) (describing such immunity as attaching to basic policy decisions committed to coordinate branches of government); *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713 (Minn. 1988) (describing the critical inquiry as involving the balancing of policy objectives).

<sup>29</sup>486 U.S. 531 (1988).

<sup>30</sup>*Id.* at 536.

<sup>31</sup>*Id.*

<sup>32</sup>499 U.S. 315 (1991).

<sup>33</sup>*Id.* at 324.

<sup>34</sup>*Id.*

<sup>35</sup>See discussion, *infra*, in part IV of this article.

<sup>36</sup>588 A.2d 708, 712 (D.C. 1991).

<sup>37</sup>*Id.* at 713-14.

<sup>38</sup>688 F. Supp. 765, 767 (D.D.C. 1988).

<sup>39</sup>829 F.2d 69, 74 (D.C. Cir. 1987).

<sup>40</sup>653 F. Supp. 247, 249 (D.D.C. 1986).

<sup>41</sup>*See, e.g., Garza v. Salvatierra*, 846 S.W.2d 17, 22 (Tex. Ct. App. 1992).

<sup>42</sup>*See Lopez*, 710 P.2d 907 (Cal. 1985)

<sup>43</sup>*Garza*, 846 S.W.2d 17, 22 (Tex. Ct. App. 1992).

<sup>44</sup>*Varig*, 467 U.S. 797.

<sup>45</sup>710 P.2d at 908.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.* at 915 (discussing the discretionary function exception to immunity contained in CAL. GOVT CODE § 820.2 (Deering 1994)).

<sup>48</sup>*Lopez*, 710 P.2d at 915.

<sup>49</sup>*Id.*

<sup>50</sup>*Berkovitz*, 486 U.S. 531.

<sup>51</sup>*Lopez*, 710 P.2d at 915.

<sup>52</sup>*Id.* at 912.

<sup>53</sup>986 F.2d 722 (4th Cir. 1993).

<sup>54</sup>419 So.2d 1071, 1077 (Fla. 1982).

<sup>55</sup>583 P.2d 7 (Or. Ct. App. 1978).

<sup>56</sup>826 S.W.2d 427, 429 (Tenn. 1992).

<sup>57</sup>789 P.2d 306, 307-308 (Wash. Ct. App. 1990).

<sup>58</sup>710 F.2d 656, 657 (10th Cir. 1983), *cert. denied*, 464 U.S. 939 (1983).

<sup>59</sup>681 F. Supp. 1500, 1502-1503 (D. Utah 1988), *modified on other grounds*, 902 F.2d 1524 (10th Cir. 1990).

<sup>60</sup>*Id.* at 1508.

<sup>61</sup>*Id.* at 1509.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

<sup>64</sup>422 N.W.2d 713 (Minn. 1988).

<sup>65</sup>*Id.* at 722.

<sup>66</sup>*Id.* at 723.

<sup>67</sup>336 N.W.2d 416 (Iowa 1983).

<sup>68</sup>*Id.* at 418.

<sup>69</sup>*Id.* at 420.

<sup>70</sup>585 F. Supp. 1543 (W.D. Mo. 1984).

<sup>71</sup>*Neilson*, 419 So.2d 1071 (Fla. 1982).

<sup>72</sup>*Bowers*, 826 S.W.2d 427, 432 (Tenn. 1992).

<sup>73</sup>*See also, Japan Air Lines Co., Ltd. v. State*, 628 P.2d 934, 936 (Alaska 1981) (When an airplane slid off a runway, which had been covered with frozen rain, the court held that the design of the taxiway was not within the discretionary function exception).

<sup>74</sup>N.J. STAT. ANN. § 59:4-6.

<sup>75</sup>CAL. GOVT CODE § 830.6. Illinois also invites liability after adoption of a plan or design where it appears from its use that the plan or design has created a condition that is unreasonably unsafe. 745 ILL. ANN. STAT. 10/3-103 (West 1993).

<sup>76</sup>167 N.E.2d, 63, 64 (N.Y. App. Div. 1960).

<sup>77</sup>*Id.* at 67 (citing *Eastman v. State of New York*, 103 N.E.2d 56 (N.Y. 1951)).

<sup>78</sup>491 P.2d 1121. (Cal. 1972).

<sup>79</sup>*Id.* at 1127.

<sup>80</sup>*Id.* at 1128.

<sup>81</sup>N.J. STAT. ANN. § 59:4-6 Task Force Comt.

<sup>82</sup>608 A.2d 254 (N.J. 1992).

<sup>83</sup>*Id.* at 256.

<sup>84</sup>*Id.* at 258.

<sup>85</sup>*Id.* at 258-59.

<sup>86</sup>659 P.2d 111 (Idaho 1983).

<sup>87</sup>*Id.* at 123.

<sup>88</sup>*Id.* at 116.

<sup>89</sup>609 A.2d 757 (N.J. 1992).

<sup>90</sup>*Id.* at 765.

<sup>91</sup>*Id.* at 764.

<sup>92</sup>15 CAL. RPTR. 2d 660 (Cal. Ct. App. 1993).

<sup>93</sup>*Id.* at 663.

<sup>94</sup>McQUILLIN, *supra* note 13.

<sup>95</sup>*See id.*

<sup>96</sup>1A CHESTER JAMES ANTIEAU, MUNICIPAL CORPORATION LAW § 11.40 (1993).

<sup>97</sup>*Id.* and cases cited therein.

<sup>98</sup>57 AM. JUR. 2d., *Municipal County, School and State Tort Liability*, § 94, p. 112 (1988).

<sup>99</sup>*See McKethean v. Washington Metropolitan Area Transit Authority*, 588 A.2d 708, 713 (D.C. 1991); *Lepore v. Rhode Island Public Transit Authority*, 524 A.2d 574, 575 (R.I. 1987).

<sup>100</sup>829 F.2d 69, 75 (D.C. Cir. 1987).

<sup>101</sup>*Nathan v. Washington Metropolitan Area Transit Authority*, 653 F. Supp. 247, 248 (D.D.C. 1986).

<sup>102</sup>*Jones v. Washington Metropolitan Area Transit Authority*, 742 F. Supp. 24 (D.D.C. 1990).

<sup>103</sup>*Id.* at 25.

<sup>104</sup>*Simpson*, 688 F. Supp. 765, 767 (D.D.C. 1988). The D.C. courts have consistently found such planning decisions immune from liability. *See Dant*, 829 F.2d 69, 74 (D.C. Cir. 1987) (dismissing count alleging that WMATA negligently designed its farecard system on the grounds that design decision fell within governmental function exception); *Nathan*, 653 F. Supp. 247, 249 (D.D.C. 1986) (stating that planning decisions regarding design, location, and construction of stairwell at metropolitan station implicated transit authority's governmental function and were, therefore, subject to sovereign immunity).

<sup>105</sup>*McKethan*, 588 A.2d 708, 711 (D.C. 1991).

<sup>106</sup>*Id.* at 714.

<sup>107</sup>*Heffez v. Washington Metropolitan Area Transit Authority*, 569 F. Supp. 1551 (D.D.C. 1983), *aff'd*, 786 F.2d 431 (D.C. Cir. 1986).

<sup>108</sup>*Strange v. Chumas*, 580 F. Supp. 160 (D.D.C. 1983).

<sup>109</sup>*Simpson*, 688 F. Supp. at 765. *See also* *Keenan v. Washington Metropolitan Area Transit Authority*, 643 F. Supp. 324 (D.D.C. 1986) (explaining that action by a transit officer taken to collect a fare is governmental rather than proprietary because the officer is performing the governmental function of enforcing the law).

<sup>110</sup>493 N.Y.S.2d 474, 476, 480 (N.Y. App. Div. 1985), *aff'd per curiam*, 498 N.E.2d 143 (N.Y. 1986).

<sup>111</sup>*Id.*

<sup>112</sup>*Gillot v. Washington Metropolitan Area Transit Authority*, 507 F. Supp. 454 (D.D.C. 1981).

<sup>113</sup>*Calero v. New York City Transit Authority*, 563 N.Y.S.2d 109, 110 (App. Div. 1990). *See also* *Estate of Crichlow v. New York City Transit Authority*, 585 N.Y.S. 2d 371 (App. Div. 1992) (holding that failure to lock control tower implicates a governmental function).

<sup>114</sup>*Sanders v. Washington Metropolitan Area Transit Authority*, 819 F.2d 1151, 1155 n.9 (D.C. Cir. 1987), *cited in McKethan*, 588 A.2d 708, 713 n.4 (D.C. 1991).

<sup>115</sup>*See, e.g., Lieberman v. Port Authority of New York and New Jersey*, 622 A.2d 1295, 1300 (N.J. 1993).

<sup>116</sup>*Jones*, 742 F. Supp. 24, 26 (D.D.C. 1990) (citing lack of such duties within the context of a subway system).

<sup>117</sup>*Id.* at 27; *Lewis v. Metropolitan Transportation Authority*, 472 N.Y.S.2d 368, 371 (App. Div. 1984).

<sup>118</sup>*E.g., White v. Metropolitan Gov't of Nashville and Davidson County*, 860 S.W.2d 49 (Tenn. Ct. App. 1993).

<sup>119</sup>*Id.* at 52.

<sup>120</sup>*E.g., Alexander v. New Orleans Public Service*, 411 So.2d 641, 643 (La. Ct. App. 1982); *White*, 860 S.W.2d at 52.

<sup>121</sup>*See Lopez*, 710 P.2d 907, 910 (Cal. 1985); *McCoy v. Chicago Transit Authority*, 371 N.E.2d 625, 627-28 (Ill. 1977); *Rodriguez v. New Orleans Public Service, Inc.*, 400 So.2d 884 (La. 1981); *Mangini v. Southeastern Pennsylvania Transportation Authority*, 344 A.2d 621 (Pa. Super. Ct. 1975).

<sup>122</sup>*E.g., Lopez*, 710 P.2d, at 911; *McCoy, id.* at 628; *Mangini, id.* at 624. *But see Rodriguez, id.* at 887 (holding that the hazards generally associated with transportation do not implicate the high degree of care).

<sup>123</sup>In *Eagan v. Chicago Transit Authority*, No. 75176, 1994 Ill. LEXIS 60 (Apr. 21 1994), Eagan was a passenger on a Chicago Transit Authority (CTA) train, observed a pickpocket in action, and attempted to intervene. The pickpocket attacked Eagan and cut him with a razor. Eagan sued CTA for damages, alleging that CTA knew of prior incidents of pickpocketing and of attacks on passengers and that the agency had a duty to provide some form of preventive measures for its passengers. The court agreed with CTA that Eagan's claims were barred by the immunity granted to CTA in § 27 of the Metropolitan Transit Authority Act. 70 ILL. ANN. STAT. 3605/27 (West 1993).

<sup>124</sup>*Lopez*, 710 P.2d at 911.

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

<sup>127</sup>*Id.*

<sup>128</sup>605 N.E.2d 493, 497 (Ill. 1992).

<sup>129</sup>*Id.* at 512 (Heiple, J., dissenting).

<sup>130</sup>*Id.* at 497.

<sup>131</sup>*Id.* at 498.

<sup>132</sup>*Id.* at 501.

<sup>133</sup>*E.g., McKethan*, 588 A.2d 708, 712 (D.C. 1991).

<sup>134</sup>*Rodriguez*, 400 So.2d 884 (La. 1981). ("One who is in the business of providing transportation for a fee should be a more professional transporter than the 'reasonably prudent' driver with respect to hazards associated with the transportation of passengers."); *White v. Metropolitan Government of Nashville and Davidson County*, 860 S.W. 2d 49, 52 (Tenn. Ct. App. 1993).

<sup>135</sup>583 N.E.2d 60 (Ill. App. Ct. 1991).

<sup>136</sup>*Id.* at 62 (quoting *Rotheli v. Chicago Transit Authority*, 130 N.E.2d 172, 175 (1955)).

<sup>137</sup>*Id.* at 62.

<sup>138</sup>A transit authority likely assumes the role of carrier in an authority-controlled station in relation to people riding on escalators or elevators. Such conveyances have also long been considered as sufficient to create a carrier-passenger relationship and its concomitant heightened standard of care due. *See Smith v. Munger*, 532 P.2d 1202, 1205 (Okla. Ct. App. 1974) (holding that owner of passenger elevator owed highest degree of care for the inspection, maintenance, and repair of elevator).

<sup>139</sup>*See Sexton v. Key System Transit Lines*, 301 P.2d 612 (Cal. Dist. Ct. App. 1956) (discussing injury sustained by plaintiff at interurban electric train station).

<sup>140</sup>*Lewis v. Metropolitan Transit Authority*, 472 N.Y.S.2d 368, 370 (App. Div. 1984).

<sup>141</sup>*Id.*

<sup>142</sup>*Lieberman*, 622 A.2d 1295 (N.J. 1993).

<sup>143</sup>*Id.* at 1300.

<sup>144</sup>*Id.*

<sup>145</sup>*Id.*

<sup>146</sup>*E.g., Lieberman*, 622 A.2d 1295 (N.J. 1993); *Crosland v. New York City Transit Authority*, 493 N.Y.S.2d 474, *aff'd*, 498 N.E.2d 143 (N.Y. 1986); *Drexler v. Greater Cleveland Regional Transit Authority*, 609 N.E.2d 231

(Ohio Ct. App. 1992); *Shelton v. Greater Cleveland Regional Transit Authority*, 584 N.E.2d 1323 (Ohio Ct. App. 1989).

<sup>147</sup>*E.g., 70 ILL. ANN. STAT. 3605/27* (Smith-Hurd 1993); OHIO REV. CODE ANN. § 2744.01(C)(2)(a) (Anderson 1992) (stating that the provision or nonprovision of police services is a governmental function).

<sup>148</sup>*See, e.g., Simpson*, 688 F. Supp. 765 (D.D.C. 1988) (holding that crowd control falls squarely within the functions of the WMATA police force and therefore is a governmental function exempt from liability).

<sup>149</sup>*E.g., cases cited at 622 A.2d at 1302.*

<sup>150</sup>*Id.* at 1303-4.

<sup>151</sup>*Id.* at 1304.

<sup>152</sup>*Id.*

<sup>153</sup>*Id.* To illustrate the lack of predictability in this area of the law, the New York Supreme Court, Appellate Division, has held that lack of illumination at a subway exit was not an issue of proprietary maintenance, but one that involved passenger security and, consequently, invoked the authority's governmental functions. *Rivera v. New York City Transit Authority*, 585 N.Y.S.2d 367 (N.Y. App. Div. 1992).

<sup>154</sup>*E.g., 70 ILL. ANN. STAT. 3605/41* (Smith-Hurd 1993) (6-month notice provision); KAN. STAT. ANN. § 12-2836 (1991) (1-year notice provision); *cf. FLA. STAT. ANN. § 768.28(6)(a)* (1986) (requiring that claim be submitted in writing to the Dept. of Insurance within 3 years after claim arises).

<sup>155</sup>*E.g., 70 ILL. ANN. STAT. 3605/41* (1 year); KAN. STAT. ANN. § 12-2836 (2 years from date of injury or accrual of cause of action for actions against the Metropolitan Transit Authority).

<sup>156</sup>FLA. STAT. ANN. § 768.28 (1986 & Supp. 1993) (\$100,000 limit per person and \$200,000 limit for claims in the aggregate); 42 PA. CONS. STAT. ANN. § 8528(b) (limiting damages

arising from a single or related cause of action to \$250,000 per plaintiff and \$1 million in the aggregate); TEX. CIV. PRAC. & REM. CODE ANN. § 101.023(a) (for state entities, \$250,000 per person and \$500,000 per occurrence).

<sup>157</sup>FLA. STAT. ANN. § 768.28 (5) (West 1986 & Supp. 1993).

<sup>158</sup>12 Or. App. 575, 831 P.2d 42 (1992).

<sup>159</sup>Lienhard v. State, 417 N.W.2d 119 (Minn. Ct. App. 1987); cf. Lyles v. Commonwealth, Dept. of Transp., 516 A.2d 701 (Pa. 1986) (holding that provision of Pennsylvania Sovereign Immunity Act limiting tort liability of Commonwealth party to \$250,000 did not violate the equal protection provisions of the federal or Pennsylvania constitutions); cf. Schuman v. Chicago Transit Authority, 95 N.E.2d 447 (Ill. 1950) (rejecting a constitutional challenge to the notice of claim requirement and the reduced statute of limitations for personal injury suits against CTA).

<sup>160</sup>No. 64029, Ohio Ct. App., LEXIS 902 (Mar. 10, 1994). See note 11.

<sup>161</sup>*Id.*, slip op. at 5

<sup>162</sup>*Id.*, slip op. at 6-7.

<sup>163</sup>*Id.*, slip op. at 11-12.

<sup>164</sup>*Id.*, slip op. at 13.

<sup>165</sup>*Id.*, slip op. at 14.

<sup>166</sup>*Id.*, slip op. at 16.

<sup>167</sup>606 A.2d 427 (Pa. 1992).

<sup>168</sup>*Id.* at 428.

<sup>169</sup>*Id.*

<sup>170</sup>*Id.* at 430.

<sup>171</sup>*Id.* at 431.

<sup>172</sup>*Id.*

<sup>173</sup>*E.g.*, CAL. GOVT CODE § 818 (West 1980) (no exemplary damages); FLA. STAT. ANN. § 768.28 (5) (West 1986) (no punitive damages); TEX. GOVT CODE ANN. § 101.024 (West 1986) (same); 42 PA. CONS. STAT. § 8521(c) (West 1982) (omitting punitive damages from categories of recoverable damages).

<sup>174</sup>*E.g.*, Teart v. Washington Metropolitan Area Transit Authority, 686

F. Supp. 12, 14 (D.D.C. 1988) (refusing to grant punitive damages in the absence of an express statutory grant); Metropolitan Atlanta Rapid Transit Authority v. Boswell, 405 S.E.2d 869 (Ga. 1991); George v. Chicago Transit Authority, 374 N.E.2d 679 (Ill. App. Ct. 1978). *But see* Magaw v Massachusetts Bay Transp. Auth., 485 N.E.2d 695 (Mass. Ct. App. 1985) (stating that any limitation on the transportation authority's tort liability is for the legislature). *See also* Boyles v. Greater Peoria Mass Transit District, 113 Ill.2d 545, 101 Ill. Dec. 847, 499 N.E.2d 435 (1986) (former employee of mass transit district was precluded from recovering punitive damages under local governmental and Governmental Employee Tort Immunity Act. *But see* Rogers v. Saylor, 306 Or. 267, 760 P.2d 232 (1988) (limitation on compensatory damages and the prohibition against recovery of punitive damages in the Oregon Tort Claims Act did not apply to an action under the federal civil rights act, 42 U.S.C. § 1983).

<sup>175</sup>*Boswell*, 405 S.E.2d at 869.

<sup>176</sup>*Id.* at 870 (citations omitted) (brackets in original) (emphasis in original) (*quoting* City of Newport v. Fact Concerts, 453 U.S. 247 (1981)); *accord*: George, 374 N.E.2d at 680 (reasoning that punitive damages assessed against the Chicago Transit Authority would be borne by the taxpayers and fare-paying passengers).

<sup>177</sup>George, 374 N.E.2d at 680. <sup>178</sup>*Id.* at 680.

<sup>179</sup>Although the majority in *Boswell* viewed the question as one of pure public policy, the dissent was not so inclined. In examining the "express language and the policy of the Legislature as plainly stated in the MARTA Act," the dissent argued that punitive damages were allowed. *See Boswell*, 405 S.E.2d 870-73 (Smith, P. J., dissenting).

<sup>180</sup>495 N.Y.S.2d 697 (N.Y. App. Div. 1985).

<sup>181</sup>*E.g.*, D.C. CODE ANN. § 1-2431, § 72 (1992).

<sup>182</sup>FLA. STAT. ANN. § 768.28 (5) (West 1986 & Supp. 1993).

<sup>183</sup>*See* Espinosa v. Southern Pacific Transp. Co., 624 P.2d 162 (Or. Ct. App. 1981) (*en banc*).

<sup>184</sup>*See, e.g.*, Corbin v. City and County of Denver, 735 P.2d 214 (Colo. 1987); Brockman v. Burnette, 360 S.E.2d 655 (Ga. 1987); Gonzales v. City of Franklin, 403 N.W.2d 747 (Wis. 1987).

## **ACKNOWLEDGMENTS**

This legal study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by RICHARD J. BACIGALUPO, N.E. Illinois Regional Transit Authority. Members are ARTHUR P. BERG, Port Authority of New York and New Jersey; RICHARD W. BOWER, California Department of Transportation; SHELLY R. BROWN, Federal Transit Administration--Region 10; DORVAL RONALD CARTER, JR., Federal Transit Administration--Region 5; PAUL STEPHEN DEMPSEY, University of Denver; DENNIS C. GARDNER, Metropolitan Transit Authority of Harris County, Texas; EDWARD J. GILL, JR., American Public Transit Association; BRIGID HYNES-CHERIN, San Francisco County Transportation Authority; and CLARK JORDANHOLMES of Stewart, Joyner, Jordan-Holmes, Holmes, P.A. DAN DUFF provides liaison with the Federal Transit Administration, and GWEN CHISHOLM SMITH represents the TCRP staff.

## Professional Liability (Errors & Omissions)

Professional Liability coverage protects transit agencies from claims that arise out of the purported professional expertise or activities of others. The coverage was designed to bridge the gap in insurance caused by the exclusion in the standard commercial general liability policy for coverage related to professional activities. In insurance there is a clear distinction drawn between the activities related to liability caused because of slip and fall liability and liability that arises because of advice or expertise. In some instances the line between the two can be a bit blurry, however there are some simple tests that may be performed in order to determine if professional liability is required.

- Is the liability coverage designed to provide protection in the event of slip and fall, quality of product or installation claims? (Commercial General Liability)
- Is the liability policy designed to provide protection for professional expertise related to drawings, plans, writings or professionals who are credentialed or hired to provide expertise in one of a variety of disciplines? (Professional Liability)

The examples cited above are broad in nature, but can provide a simplified means of determining the requirement for professional liability. The act of providing expertise in a given area in and of itself is not always a clear indicator of the need for professional liability coverage, but effect and subsequent claims caused by bad advice, or expertise can be a clear indicator of the need to provide the coverage.

The following examples will further demonstrate the exposures that may require professional liability (E&O) coverage:

### *Example #1*

A doctor examines patients and fill prescriptions. (Professional Liability)

### *Example #2*

The doctor is required to provide liability insurance for renting a building (Commercial General Liability – Premises)

### *Example #3*

An engineering firm draws plans for a construction project (Professional Liability)

### *Example #4*

A woodworker builds furniture for a housing contractor

(Commercial General Liability - Products)

*Example #5*

An insurance agency sells policies (Professional Liability)

*Example #6*

A media firm creates an ad campaign for a client (Professional Liability)

*Example #7*

A glazier has been hired to replace broken windows in a structure  
(Commercial General Liability – Completed Operations)

When contractors seek to do business with transit agencies careful consideration should be given to exactly what kinds of insurance are appropriate for the work called for in the contractual agreement. A transit agency may contract work with doctors who do not see patients, or have contracts with engineers that do not actually draw plans. The best source to use in the final determination of the need for professional liability, and all other lines of insurance coverage should be the scope of work and discussions with project managers, contract administrators and Risk Management prior to submitting the request for proposals.

## **INSURANCE REQUIREMENTS FOR CONSULTING AND PROFESSIONAL SERVICES CONTRACTS**

Consultant shall procure and maintain for the duration of the contract insurance against claims for injuries to persons, or damages in property which may arise from or in connection with the performance of the work hereunder by the Consultant, his agents, representatives, or employees. As respects Professional Liability, coverage must be maintained, and evidence provided, for two years following the expiration of this contract.

### **MINIMUM SCOPE OF INSURANCE**

Coverage shall be at least as broad as:

1. Insurance Services Office Commercial General Liability coverage (occurrence form CG0001)
2. Insurance Services Office form number CA0001 covering Automobile Liability.
3. Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance.
4. Professional Liability (Errors and Omissions) insurance.

### **MINIMUM LIMITS OF INSURANCE**

Consultant shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, the general aggregate limit shall be twice the required occurrence limit or \$2,000,000. Products/Completed Operations aggregate shall apply separately to this contract/agreement or the aggregate limit shall be twice the required per occurrence limit.
2. Commercial Automobile Liability: \$1,000,000 per accident for bodily injury and property damage.
3. Workers' Compensation to comply with California's statutory requirements.
4. Professional Liability: \$1,000,000 per occurrence.

### **OTHER INSURANCE PROVISIONS**

The insurance policies required per the terms of the contract are to contain, or be endorsed to contain, the following provisions:

1. The Transit Agency, its subsidiaries, officials and employees are to be covered as additional insureds as respects liability arising out of the activities performed by or on behalf of the Consultant; products and completed operations of the Consultant; premises owned, occupied or used by the Consultant; or automobiles owned, leased, hired or borrowed by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to The Transit Agency, its subsidiaries, officials and employees.
2. For any claims related to this project, the Consultant's insurance coverage shall be primary insurance as respects The Transit Agency, its subsidiaries, officials and employees. Any insurance or self-insurance maintained by The Transit Agency shall be excess of the Consultant's insurance and shall not contribute with it.

3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to The Transit Agency, its subsidiaries, officials and employees.
4. The Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
5. Each Acord Certificate of insurance required by this contract shall be worded to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written has been given to The Transit Agency. Cancellation provision should also delete the words, "endeavor to".
6. Workers' Compensation and Employer's Liability policies shall provide a waiver of subrogation in favor of The Transit Agency.
7. Professional Liability insurance shall be continued, and evidence provided to The Transit Agency, for two years following the expiration of the contract or, tail coverage provided for two years in the event of cancellation or non-renewal.

#### **DEDUCTIBLES AND SELF-INSURED RETENTIONS**

Any deductibles or self-insured retentions must be declared to, and amounts over \$25,000 approved by The Transit Agency.

#### **ACCEPTABILITY OF INSURERS**

Insurance is to be placed with California admitted insurers with a current A.M. Best's rating of no less than A-VII, unless otherwise approved by The Transit Agency or non-admitted carriers on the California Department of Insurance's approved list.

#### **VERIFICATION OF COVERAGE**

Consultant shall furnish The Transit Agency with original endorsements and certificates of insurance evidencing coverage required by this clause. All documents are to be signed by a person authorized by that insurer. All documents are to be received and approved by The Transit Agency before work commences. If requested by The Transit Agency, the Contractor shall submit copies of all required insurance policies, including endorsements affecting the coverage required by these specifications.

#### **SUBCONSULTANTS**

Consultant shall include all subconsultants as insured under its policies or shall furnish separate certificates and endorsement for each subconsultant. All coverages for subconsultants shall be subject to all of the requirements stated herein. If requested by The Transit Agency, the Contractor shall submit copies of all required insurance policies, including endorsements affecting the coverage required by these specifications.