



**League of Minnesota Cities
Insurance Trust**

145 University Avenue West, St. Paul, MN 55103-2044
(651) 281-1200 • (800) 925-1122
Fax: (651) 281-1298 • TDD: (651) 281-1290
www.lmnc.org

The 2006 joint powers liability legislation What does it mean for cities?

The *Reimer v. City of Crookston* decision in 2005 created a serious liability issue for cities involved in joint powers activities. Briefly, the court ruled that a city involved in a “joint venture” with another political subdivision could be vicariously liable for the other political subdivision’s actions. The Court also said that a claimant could “stack” the liability limits of each of the political subdivisions who were involved in the “joint venture”. Because that effectively multiplied the tort liability exposure in many joint powers situation, it created a substantial disincentive for intergovernmental cooperation. The League in cooperation with other local government organizations made this a legislative priority in 2006 and that effort was ultimately successful with the passage of 2006 Minnesota Session Laws, Chapter 232.

The 2006 legislation.

Chapter 232 addresses both issues raised by the Reimer decision by adding two provisions to the joint powers act, M.S. 471.59, effective May 25, 2006:

- The law now specifies that a governmental unit is not liable for the acts of any other governmental unit in a joint venture or joint enterprise, unless the governmental unit has agreed in writing to be responsible for another unit’s acts or omissions. In other words, vicarious liability is eliminated in joint powers situations.
- The law now specifies that the participating governmental units and any joint board the units have formed are considered to be a single governmental entity for purposes of applying the statutory tort liability limits. In other words, a claimant’s maximum potential recovery is the same, regardless of whether his/her injury was caused by a single governmental unit or by an intergovernmental arrangement. Note though that this would not protect a city from liability from its own independent acts or omissions not directly related to the joint activity.

Besides addressing the limit-stacking problem for joint powers activities, Chapter 232 also provides for future increases in the statutory tort limits. The current limits are \$300,000 per claimant, and \$1,000,000 per occurrence. Those limits will increase to \$400,000 per claimant and \$1.2 million per occurrence effective Jan. 1, 2008; and to \$500,000 per claimant and \$1.5 million per occurrence effective July 1, 2009. These increases will have some effect on liability costs and rates, though the effect should be relatively modest. On the other hand, and arguably more importantly, these adjustments will also be important in assuring that the tort limits will continue to pass constitutional muster. In cases that have challenged the statutory tort limits, the Minnesota Court has specifically said that in order for the limits to continue to be upheld, it’s

important that the legislature periodically review and adjust the limits to assure that they continue to be reasonable.

What does the 2006 legislation mean for cities who are involved in or are considering joint powers agreements?

The 2006 legislation eliminates one disincentive to intergovernmental cooperation: the increased tort exposure that had automatically come with cooperative activities since the *Reimer* decision. But while the risk of excess liability is now no greater for cooperative activities than for individual activities, it's important to keep in mind that that risk still exists because some types of claims aren't covered by the statutory liability limits. With any governmental service, there is always a risk of liability greater than the statutory limits, whether that service is provided cooperatively or individually. And it's still very important to think about liability risks in joint powers activities, and to structure joint powers agreements to minimize conflicts among the parties and to address those liability risks as effectively and efficiently as possible.

In short, the 2006 law helps a great deal but it doesn't mean we don't have to think about risk and liability in joint powers situations. When cities are thinking about joint powers activities, the basic advice is still the same:

- Use a written agreement, not just a handshake.
- Make sure the agreement is as clear and unambiguous as possible as to who is responsible for what;
- Use appropriate defense, indemnification, and waiver provisions to minimize conflicts so the parties can provide a unified defense.
- Make sure liability coverage is in place and appropriately structured.
- Spell out in advance how any excess or uninsured liability would be covered so you don't have to fight about it at the time.
- Make sure you address how the agreement would be terminated, and how any remaining assets or liabilities would be allocated.



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Joint powers agreements – an outline of risk considerations

Cities are always looking for more effective and efficient ways to provide services to citizens. There's increasing political and financial pressure to reduce spending and taxes and at the same time to maintain and increase services. Intergovernmental cooperation can be an effective strategy to accomplish this, but it has to be done right. If it isn't, the result can be conflict among the parties and complicated, contentious, and expensive litigation. Here's an outline of some key considerations that can help avoid some of those problems.

1. What kind of intergovernmental cooperative arrangement are we creating?

Intergovernmental cooperation can take different forms. It's important to be clear what form of cooperation you intend. The most common types of cooperative arrangements are:

- *Joint powers entity.* The joint operation is governed by a joint board, which has the power to receive and expend funds, enter contracts, etc.
- *Service contract.* One governmental unit purchases a service from another.
- *Mutual aid.* Two or more governmental units agree to assist each other when needed.
- *Shared resources.* Two or more governmental units share the use of facilities.

2. Important considerations for any intergovernmental cooperative arrangement.

- *Put it in writing.* In any intergovernmental cooperation situation, there should be a written agreement spelling out what the understanding and agreement is.
- *Be clear and unambiguous as to who is responsible for what.*
- *Address how the arrangement would be terminated and how assets or liabilities would be allocated.*
- *Address risk allocation.* The goal in each case is to minimize costs by minimizing conflicts and litigation among parties and allowing for a common defense. But how you do it varies for different types of agreements.

3. Recommendations for how to address risks in different types of joint powers agreements.

Risk provisions for agreements creating a joint powers entity.

- Joint entity indemnifies the member governmental units for liability claims.
- Joint entity carries liability coverage that protects the joint entity, the member governmental units, and their respective officers, employees, and volunteers.
- Address how the cost of any uninsured or excess liability would be allocated; e.g. equal shares, or in the same proportion as other costs are shared.

Risk provisions for service contracts.

- Service provider indemnifies service purchaser. Use the “limited form” indemnification to avoid creating an uninsured liability; i.e., provider’s indemnification responsibility is limited to the amount of its coverage.
- Service provider carries liability insurance.
- Service purchaser is named as an additional insured.

Risk provisions for mutual aid agreements.

- Spell out procedures for requesting assistance.
 - Who can make the request?
 - To whom is the request addressed?
 - Responder’s discretion to respond.
- Clarify that the requesting party is in charge, and that the assisting party acts under the requesting party’s direction and control.
- Requesting party indemnifies the assisting party. Use the “limited form” indemnification provision to avoid creating an uninsured liability.
- Address work comp and equipment damage.
 - Each party is responsible for work comp benefits for its own employees and for damage to its own equipment, even if arguably caused by the other party’s negligence.
 - Each party waives subrogation against the other.

Risk provisions for shared resource agreements.

- Clarify the parties’ respective responsibilities. Who’s responsible for
 - Maintenance of the facility
 - Supervision of activities in the facility
 - Security
- Mutual indemnification provisions. Each party indemnifies the other for claims arising from the first party’s responsibilities. Use the “limited form” indemnification approach.

4. Other resources for joint powers activities.

If you’re working on or considering an intergovernmental cooperative arrangement, give us a call at LMCIT. We’ll be glad to review and comment on drafts, provide sample or model language for agreements, and help in any way we can. Here are some other resources:

LMCIT memos

- *Liability Coverage for Joint Powers Agreements*
- *Risk Allocation and Coverage Issues for Joint Powers and Mutual Aid Agreements*
- *Combining Governmental Services*
- *Ten Things to Watch For When Entering Into Joint Powers Agreements*

State Auditor’s Best Practices Report – “Cooperative Efforts in Public Service Delivery”