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# Risk Management and Liability Problems

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Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

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# Risk Management and Liability Problems

Reference Number: CTAS-759

## Risk Management

Reference Number: CTAS-760

Risk management for county governments is essentially the same as it is for business or industry, even though the risks may be different. The purpose of risk management can be simply stated: Planning for the negative consequences of any decision, process or action. An effective risk management program is based on this simple concept. A shorthand way of thinking of these negative consequences is to think of them as losses. Preventing losses should be the concern of everyone in county government, from the highest elected official to every worker earning an hourly wage.

## Preventing Losses Saves Money

Reference Number: CTAS-761

The function of a county government risk management program is two-fold. First, the program organizes the process of preventing losses. Some losses such as tornado damage cannot be prevented. Some losses occur because normal control measures fail. The second part of the risk management function, therefore, is to reduce the severity of losses that do happen. Risk management, as a critical component of any sound organization, can save money so that county commissioners can allow budget adjustments and keep tax increases low. A working program allows county mayors, county commissioners, and other officials, as well as general county employees, to provide better essential services, and to improve the overall performance of county government in the eyes of the public it serves.

## Policy Statement

Reference Number: CTAS-762

The primary role of county mayors and county commissioners in risk management is to develop the county's policy in handling risks. This policy should be stated in a written policy statement which will serve as a guide with clear and unambiguous direction to the persons in charge of implementing the risk management program, which functions under the terms of this written document. An understanding of several factors is necessary in order to formulate this policy statement.

First, county officials must understand the overall goal of a risk management program. As a component of any sound management plan, the goal of risk management is to protect the financial integrity of the county. Officials must understand that eventually, after starting a risk management program, all officials and county employees will have to do things that they haven't done before. They will have to stop doing things that they are accustomed to doing. Funds will be spent and accounted for in different ways, and relationships among local government officials and employees will be altered. They must decide and understand what will be the underlying principles and standards of an operating program in their particular county. Without a strong commitment from top county officials and perhaps from other influential persons in the county, such as long time employees, the program will most likely fail.

With these understandings in mind, county officials should express their support in a written document to be formally adopted by resolution. This document is usually called the risk management policy statement. In the policy statement, any new practices and any changes in lines of authority can be clearly set forth. The policy statement should include all the objectives of the program and the methods to be used in attaining the objectives. Important detailed procedures may be outlined. For example, the way an employee accident is reported and the way a claim against the county is to be handled may be explained. The statement should detail the overall insurance program of the county, including loss control and safety programs to be implemented and the type of records to be kept. Finally, the policy statement should adopt a procedure for reporting on the activities of the program and a way for the program to be assessed.

As an alternative to the development of a formal, detailed policy statement the county commission may formulate and adopt a brief statement and then turn the entire matter over to the county mayor to work

out the details and report back to the commission for final approval. A committee can be formed to draft a policy statement. The county mayor can then appoint an employee to be temporary risk manager with the authority to learn risk management concepts, formulate a policy with localized needs in mind and produce a draft for consideration. A provisional policy statement can be adopted with the understanding it will be modified within a predetermined time limit. The advice of trusted insurance agents and brokers, local government attorneys, private company risk managers and other persons knowledgeable about local conditions and problems can be solicited on the best approach to develop the all-important policy statement.

## Program Administration

Reference Number: CTAS-763

While the county mayor and county commissioners are coming to grips with the problem of establishing a policy and formalizing a statement, they should decide who will administer the program. In larger, well-financed counties, the ideal administrator is an experienced, knowledgeable, and full-time risk manager. For smaller counties, an alternative method may be necessary.

One such alternative consists of formulating a joint powers agreement among the county government and any or all of the small municipalities within the county. Under the agreement, the services of a risk management-consulting firm could be obtained or a single risk manager could be hired for all the jurisdictions. A serious drawback of this method is that a considerable amount of time must be devoted to establishing the scheme. Officials must decide how such a person would be paid and what amount of his or her time would be necessary for each jurisdiction.

Another option is to use an existing employee to perform this function. The job of an employee already performing one or two risk management tasks can be expanded to include the full range of risk management functions, or an employee with the necessary skills and understanding may be trained for the position. For example, the county executive can identify an employee exceptionally good at purchasing insurance or in handling insurance claims. With some additional training, that person's duties can be expanded to include safety programs, then department inspection, then loss analysis, and so on. Through a well-planned course of study and self-training, in conjunction with salary increases and other incentives, such an employee can do well. Any person trained on-the-job must be carefully evaluated, and this type of risk manager would be no exception.

Officials must remember that an employee who gains a position of expanded responsibility or who is upgraded to the role of risk manager needs the requisite complementary increase in authority, in addition to salary boosts. The salary increase is necessary because this type of employee is more likely than most to leave employment once experience is obtained in the risk management field.

Successful risk management consultants generally disapprove of the committee approach to risk management. This approach involves imposing additional burdens on such officials as the county attorney, county executive, administrative heads and major staff employees as a group. They act as a committee, meeting and working out the details of program administration. Usually, each committee person assumes the responsibility for a single part of the program. These officials and employees normally are associated with any risk management program, but their working as a committee unfortunately results in a disjointed and unfocused effort. Although in the end the committee approach may be the only feasible one for a county, it should be avoided if possible. If not possible, then it should be temporary.

## Elements of Risk Management

Reference Number: CTAS-764

The general responsibilities of a county risk manager include identifying and evaluating loss exposures, developing risk control programs, and deciding how best to fund risks. Risk management experts think of a full-scale risk management system as a system with four elements:

1. Risk identification
2. Risk evaluation
3. Risk control, and
4. Risk financing

Using the four-element approach is a step-by-step process. The risk manager first must Identify a Potential Loss before it can be evaluated.

Evaluation, the second step, is necessary to know how to control the expected loss. To evaluate a potential loss, the risk manager must know what the loss is, determine its severity, and calculate its probable frequency of occurrence.

The third element, Risk Control, is the one most often recognized by county officials. It is subdivided into "loss prevention" and "loss reduction." County officials will avoid much disappointment by admitting in advance and declaring in the policy statement that a risk manager rarely can completely prevent a loss in a given area. A sound risk management program of loss prevention can, however, decrease the frequency of loss in that area. When a loss does occur, the measures taken under the program will reduce the cost or severity of the loss.

The two-fold goal of the Risk Control element of a program is to-

- decrease the frequency of losses and
- reduce their severity once they occur.

Finally, to finance the loss in the proper manner -- after identifying it, evaluating it, and using such control measures as safety programs, inspections, and disaster training -- the risk manager must cover the risk with insurance or with a combination of insurance and risk retention methods.

Of the four elements of a risk management program, the policy-making role of county mayors and county commissioners is greatest in Risk Financing, which is simply arranging a method of paying for losses. No matter how successfully a manager handles loss exposures, the county will always need some type of risk financing program. No loss prevention program is 100% effective so when losses occur, they need to be paid. On the other hand, risk financing can only be effective if efforts have been made to identify, evaluate, and control losses.

The two major categories of risk financing are *retention* and *transfer*. All risk financing techniques are one or a combination of both. Risk retention includes-

- all self-insurance programs
- deductibles
- uninsured losses

and any other method in which the county assumes all or part of a loss.

Risk is transferred through a contract in which one organization agrees to pay for the losses of another organization in exchange for a premium. Insurance is the most common form of risk transfer. County executives and county commissioners must make the final determination of what forms of Risk Financing to use.

## Liability Problems

Reference Number: CTAS-765

Liability exposure, particularly personal liability exposure, and also (because of the rapid rise in the cost of insurance) county liability exposure, is one of the most important subjects for county executives and county commissioners to understand. Tort reform has been a popular topic in recent years, but non-tort liability can in many instances be more costly to counties. This Section will discuss both tort and non-tort liability, including certain immunity provisions of law. Liability associated with personnel, one of the fastest growing areas of the law, will be mentioned only briefly in this section.

What is a tort? A tort is a civil action based on a violation of a duty imposed by law. A tort can be the result of an intentional act or a negligent act. An action can be both a tort and a crime, for instance, an assault could result in both criminal liability and civil liability. The plaintiff who claims to have suffered a tort must show an act, intentional or negligent, which violates a duty imposed by law, generally the standard of care an ordinary person would exercise in the circumstances, and damages resulting from the breach of duty. The violation of duty can be through misfeasance (the improper doing of an act), or by nonfeasance (omitting to do an act).

## Tennessee Governmental Tort Liability Act

Reference Number: CTAS-766

Prior to 1973, Tennessee counties were subject to the state's sovereign immunity for governmental acts, but were liable for damages resulting from proprietary activities. Governmental acts were those activities that were peculiar to governments, or activities only governments could provide, such as police protection,

fire protection, education or tax collection. Proprietary activities were those that could be provided by private as well as governmental entities, such as water and sewer service, electrical services and mass transit.

In 1973, the Tennessee General Assembly enacted the Tennessee Governmental Tort Liability Act (T.C.A. § 29-20-101 et seq.), which provides that counties are immune under state law from all suits arising out of their activities, either governmental or proprietary, unless immunity is specifically removed by the law. It is important to remember that this immunity does not extend to liability under federal law.

In cases where the county is immune, county officials and employees may be individually liable, but only up to the liability limits established in the Tennessee Governmental Tort Liability Act. T.C.A. § 29-20-310(c). When the case is one where the county can be liable, the official or employee is immune. T.C.A. § 29-20-310(b). Willful, malicious or criminal acts, or acts committed for personal gain, do not fall under the personal liability protective provisions of the Tennessee Governmental Tort Liability Act (nor do medical malpractice actions brought against a health care provider).

Members of all county boards, commissions, agencies, authorities and other governing bodies created by public or private act, whether compensated or not, are absolutely immune from suit under state law arising from the conduct of the entity's affairs. This immunity is removed when the conduct is willful, wanton or grossly negligent. T.C.A. § 29-20-201.

Areas in which the Tennessee Governmental Tort Liability Act removes governmental immunity (i.e., kinds of actions for which the county can be sued) are:

1. Claims arising from the negligent operation of motor vehicles;
2. Claims arising from negligently constructing or maintaining streets, alleys or sidewalks;
3. Claims arising from the negligent construction or maintenance of public improvements; and
4. Claims arising from the negligence of county employees. T.C.A. §§ 29-20-202 through 29-20-205).

In 2022, the Tennessee Supreme Court held that the waiver of immunity in T.C.A. § 29-20-205 for "negligent" acts includes only ordinary negligence, not gross negligence or recklessness. *Lawson v. Hawkins County*, --- S.W.3d ---- 2023 WL 2033336 (Tenn. May 25, 2022).

There are exceptions to these areas where immunity is removed. These activities, for which the county is immune under state law, but for which an officer or employee may be liable, include claims arising from:

1. The exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
2. False imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of privacy or civil rights;
3. Issuing, denying, suspending, or revoking, or the failure to refuse to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;
4. Failing to inspect or negligently inspecting any property;
5. Instituting or prosecuting any judicial or administrative proceeding;
6. Negligent or intentional misrepresentation;
7. Riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances; or
8. Assessing, levying or collecting taxes. T.C.A. § 29-20-205.

Persons other than elected or appointed officials and members of boards, agencies and commissions are not considered county employees for purposes of the Governmental Tort Liability Act unless the court specifically finds that all of the following elements exist:

1. The county selected and engaged the person in question to perform services;
2. The county is liable for the compensation for the performance of such services and the person receives all compensation directly from the county's payroll department;
3. The person receives the same benefits as all other county employees, including retirement benefits and eligibility to participate in insurance programs;
4. The person acts under the control and direction of the county not only as to the result to be accomplished but as to the means and details by which the result is accomplished; and
5. The person is entitled to the same job protection system and rules, such as civil service or

grievance procedures, as other county employees. T.C.A. § 29-20-107.

A regular member of the county voluntary or auxiliary fire fighting, police or emergency assistance organization is considered to be a county employee without regard to the elements listed above. 29-20-107(d). The county cannot extend immunity to independent contractors or other persons or entities by contract. T.C.A. § 29-20-107(c).

The county may now insure, either by self-insurance or purchasing insurance, or indemnify (up to the new limits set in the Tennessee Governmental Tort Liability Act) its employees and officials for their liability exposure under the Tennessee Governmental Tort Liability Act. T.C.A. § 29-20-310(c).

The following liability limits under the Tennessee Governmental Tort Liability Act (T.C.A. § 29-20-403) are for occurrences or accidents occurring on or after July 1, 2007 and are as follows:

Type of Claim	Limit
Bodily injury or death of any one person in any one accident, occurrence or act	\$300,000
Bodily injury or death of all persons in any one accident, occurrence or act	\$700,000
Injury to or destruction of property of others in any one accident	\$100,000

It is very important to know that these limits do not apply to federal civil rights actions in state or federal courts.

Actions under the Governmental Tort Liability Act must be commenced within 12 months after the cause of action arises (T.C.A. § 29-20-305), like other tort claims. This one-year statute of limitations can be extended when claims involve persons under legal disabilities (incompetents, minors, etc.) or when the injured party has reasonably failed to discover the existence of his or her cause of action against the county, county officials or employees

## Liability for Personnel Matters

Reference Number: CTAS-767

Important employment law considerations include hiring, compensation, benefits, termination, retirement, the federal Fair Labor Standards Act ("FLSA"), right-to-know statutes, military and reserve service, jury service, the Occupational Safety and Health Act, the Equal Pay Act, the Immigration Control Act, the insurance provisions of the Consolidated Omnibus Budget Reduction Act ("COBRA"), FICA and FIT withholdings and the Family and Medical Leave Act ("FMLA").

As employers, county officials must refrain from retaliating or firing based on the employee's exercise of a protected constitutional right (e.g., freedom of speech), or a statutory right (e.g., filing a workers' compensation claim). Discrimination must be avoided in every aspect of employment. Under state and federal law, an employer cannot discriminate against an employee or a potential employee based upon race, color, sex, religion, national origin, age or disability (including infectious, contagious or similarly transmittable diseases). Further, any form of sexual harassment is illegal. An individual may file a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") or the Tennessee Human Rights Commission ("THRC").

An employer cannot fire an employee solely for: (1) refusing to participate or remain silent about illegal activities; or (2) using an agricultural product not regulated by the alcoholic beverage commission that is not otherwise prohibited by law (i.e., smoking) if the employee follows the employer's guidelines regarding the use of the product while at work. T.C.A. § 50-1-304).

Finally, the First Amendment to the United States Constitution applied to the states through the Fourteenth Amendment prohibits patronage dismissals of certain types of governmental employees. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64 (1990). Patronage dismissals are those based upon political activity or affiliation.

## Other Non-Tort Liability

Reference Number: CTAS-768

The Tennessee Governmental Tort Liability Act does not apply to many types of actions filed in both state and federal courts. In state court, for example, compensation, breach of contract, inverse condemnation and many other types of common law and statutory causes of action can be the basis of a non-tort action. The limits of the Tennessee Governmental Tort Liability Act do not apply to these non-tort actions.

## Breach of Contract

## Reference Number: CTAS-769

Counties are responsible for the breach of a contract entered into by the county. The extent of liability in such a contract action depends upon the terms of the contract and the damages suffered by the parties. The county could be required by the courts to perform a contract according to its terms in an action for specific performance.

When an official attempts to enter into a contract on behalf of the county without actual authority to enter into such a contract, the official may then be held personally liable for the performance of the contract.

## Other Actions

### Reference Number: CTAS-770

There are numerous areas, including search and seizure, voting rights, improper arrest, discriminatory enforcement of statutes and the use of unlawful force, which may result in lawsuits against the county based on the actions of law enforcement and other court personnel. These claims can result in lawsuits in federal court under the federal civil rights act (42 U.S.C. § 1983) or in state court under the same federal statutes or as common law actions. *Poling v. Goins*, 713 S.W.2d 305 (Tenn.1986). A negligent action, unless it rises to the level of gross negligence, will not give rise to an action under (42 U.S.C. § 1983). *Daniels v. Williams*, 106 S.Ct.662 (1986); *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277 (6th Cir. 1987).

The federal antitrust laws (15 U.S.C. § 1 et seq.) provide that counties will not be held responsible for damages in antitrust actions, but the county can still be enjoined from doing, or mandated to do, certain acts. In general, county officials must take care in actions which restrict competition, such as granting of exclusive franchises, referring the public to particular attorneys or lending institutions, or giving different persons different access to records.

There is an extensive framework of other laws, both state and federal, applicable to counties. Consult your county attorney when you are uncertain about the legal implications of any action you are preparing to take.

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