



# PUBLIC OFFICIALS' LIABILITY



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# Indemnification



All town or city councils or any fire district shall, by ordinance or otherwise, indemnify any and all police officers, firefighters, elected or appointed fire district officials, public employees, fire district employees, officials, members of boards, agencies and commissions appointed by town councils or any fire district or by any other person exercising appointing authority delegated to them by the town council; whether or not the police officers, firefighters, elected or appointed fire district officials, employees, officials, or members are paid, from all loss, cost, expense, and damage, including legal fees and court costs, if any, arising out of any claim, action, compromise, settlement, or judgment by reason of any intentional tort or by reason of any alleged error or misstatement or action or omission, or neglect or violation of the rights of any person under any federal or state law, including misfeasance, malfeasance, or nonfeasance or any act, omission, or neglect contrary to any federal or state law which imposes personal liability on any police officers, firefighters, elected or appointed fire district official, employee, official, or member, if the elected or appointed fire district official, employee, official, or member, at the time of the intentional tort or act, omission or neglect, was acting within the scope of his or her official duties or employment.

R.I. Gen Laws § 45-15-16

# However, there are limits...



The municipality may decline to indemnify the elected or appointed official, employee, or member for any misstatement, error, act, omission, or neglect if it resulted from **willful, wanton, or malicious conduct** on the part of the person in question.

# Official vs Individual Capacity



Defendants are often named in both capacities for a variety of reasons.

- ❑ Avoiding the Tort Cap
- ❑ Avoiding Certain Defenses
- ❑ Asserting Pressure

# What Protections are Available?



- ❑ Legislative Immunity
- ❑ Qualified Immunity
- ❑ Public Duty Doctrine

# Legislative Immunity

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- Legislative Immunity is an “absolute” immunity.
- It is not reserved solely for legislators, but applies to all municipal officials, elected and appointed, when they perform legislative functions.
- Legislative functions include enactment of ordinances, regulations, and the like.

# Legislative Immunity (cont'd)



- Legislative Immunity applies to defendants even when they are named in their individual capacities. The Court looks at the nature of the allegation, and not how the defendant is named in the Complaint.
- The test used by the Court is whether the “challenged actions, stripped of all considerations of intent and motive, were legislative in character.”

# Qualified Immunity

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As the United States Supreme Court has stated,

“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”



# Qualified Immunity (cont'd)



Qualified immunity protects government officials from lawsuits alleging that they violated plaintiffs' rights, only allowing suits where officials violated a "clearly established" statutory or constitutional right.

When determining whether or not a right was "clearly established," courts consider whether a hypothetical reasonable official would have known that the defendant's conduct violated the plaintiff's rights.

# A Benefit of the Qualified Immunity Defense



- Qualified immunity is not just immunity from having to pay money damages. It is also intended to avoid a defendant having to go through the costs of a trial at all.
- Courts are supposed to resolve qualified immunity issues as early in a case as possible, preferably before discovery, but that rarely happens.

# A Qualified Immunity Caveat



Qualified immunity only applies to suits against government officials as individuals, not suits against the government for damages caused by the officials' actions.

# Public Duty Doctrine

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The public duty doctrine shields the State and its political subdivisions from tort liability arising out of discretionary governmental actions that are not normally activities performed by private persons.

# But, there are exceptions



- The first exception exists when the allegedly negligent activities are normally performed by private citizens.
- The second exception exists when the defendant owes a special duty to an identifiable plaintiff.
- The third exception exists when the defendant participates in “egregious conduct.”

# Insurance Considerations



The Trust's Liability Insurance Policy is created, essentially, by the membership, and is uniquely tailored to public sector risks.

# General Liability Policy



**AGREEMENT A - GENERAL LIABILITY:** The Trust hereby agrees, subject to the limitations, terms and conditions hereunder mentioned, to pay on behalf of the "Insured Member" for all sums which the "Insured Member" shall be obligated to pay by reason of the liability imposed upon the "Insured Member" by law or assumed by the "Insured Member" under contract or agreement or pursuant to the "Products Completed Operations Hazard", for damages direct or consequential, and expenses, all as more fully defined by the term "Ultimate Net Loss", on account of "bodily injury", including death at any time resulting therefrom, suffered or alleged to have been suffered by any person or persons and/or "property damage" arising out of any "occurrence" happening during the period of Insurance

# Agreement E – Public Officials’/School Board Liability

**AGREEMENT E - PUBLIC OFFICIALS'/SCHOOL BOARD LEGAL LIABILITY:** The Trust hereby agrees, subject to the limitations, terms and conditions hereunder mentioned, to pay on behalf of the "Insured Member" for all sums which the "Insured Member" shall be obligated to pay, all as more fully defined by the term "Ultimate Net Loss", as the result of damages alleged in any claim or claims first made during the period of insurance against them individually or collectively during the period of this Insurance arising out of a "wrongful act"



# Key Definitions



**INSURED MEMBER** - The term "Insured Member" includes all persons who were, now or shall be lawfully elected or lawfully appointed officials, trustees, directors, employees, volunteers or council members of the "Insured Member" in the regular service of the "Insured Member" during the existence of this Insurance, and any heir, executor, administrator, assign or legal representative of said persons in the event of their death or incapacity.

Volunteers mean all persons acting on or behalf of the "Insured Member" with the specific prior approval or knowledge of a responsible official of the "Insured Member".

"Insured Member" does not include independent contractors. The term "Insured Member" also does not include firms which, or individuals who, provide legal services, engineering services, or architectural professional advice or services to the "Insured Member" unless the individual in question is an employee of the "Insured Member" . . .

# Key Definitions

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**RELATED ENTITIES** - The term "Related Entities" shall mean units of the municipality which are not regarded by law as corporate bodies separate and distinct from the municipality, but which may nonetheless retain authority pursuant to Federal, State or local law to manage their own affairs independent of the municipality's governing authority.

# Key Definitions

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**WRONGFUL ACT** - The term "Wrongful Act" wherever used herein shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by an "Insured Member" as a public official or employee of the public entity.

# Key Definitions

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- **PERSONAL INJURY** - The term "Personal Injury" wherever used herein shall mean injury, other than "bodily injury," including but not limited to mental injury, mental anguish, shock, sickness, disease, or disability.

The term "personal injury" shall not include injury that would otherwise be covered herein under the definitions of "bodily injury" or "property damage".

# Commonly Encountered Exclusions



Although there are a number of Exclusions set forth in the Liability Policy, The Trust generally errs on the side of finding coverage for the Members as long as it does not unfairly and adversely impact the rest of the membership. Following are examples of the most common exclusions that we see.

# Exclusion 1

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WITH REGARD TO ALL FIRST AND THIRD PARTY LIABILITY OF THE INSURED MEMBER, THIS INSURANCE DOES NOT APPLY:

1. to “bodily injury”, “personal injury” or “property damage” **expected or intended** from the standpoint of the Insured Member.

(emphasis added)

# Exclusion 8

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[liability]

for loss or damage or any liability of the Insured Member arising out of or in any way connected with a road abandonment, whether or not effectuated pursuant to R.I. Gen. Laws §24-6-1, the operation of the principles of eminent domain, condemnation proceedings, or inverse condemnation proceedings or inverse condemnation by whatever name called regardless of whether such claims are made directly against the Insured Member or by virtue of any agreement entered into by or on behalf of the Insured Member.

# Exclusion 17

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[liability]

for back wages, overtime, contractually-based pecuniary damages or similar claims of an Insured Member's employees, even if designated as liquidated damages under any federal, state or local statutes, rules, ordinances, regulations, or contractual obligations, or for claims arising from collective bargaining agreements.



# Exclusion 28



**The following additional exclusions are applicable to Insuring Agreements A (General Liability), C (Police Professional Liability) and E (Public Officials'/School Board Legal Liability) -**

This coverage does not apply to liability:

# What is excluded...



- (a) [liability] brought about or contributed to by fraud, dishonesty or bad faith by an Insured Member, or arising from the willful and knowing violation of any statute, ordinance, regulation, or any state or federal guaranteed right committed by or with the knowledge or consent of any Insured Member; notwithstanding this exclusion of liability, The Trust will defend an Insured Member against such claims which seek money damages, subject to all other limitations of this policy, until and unless a judgment or final adjudication is entered either in a civil case against the Insured Member or in a criminal proceeding against the Insured Member; which judgment or final adjudication establishes the Insured Member's fraud, dishonesty or bad faith or which establishes that the Insured Member either committed or had knowledge of or consented to the willful and knowing violation of any statute, ordinance, regulation, or any state or federal guaranteed right.

The conduct, actions or knowledge of any Insured Member shall not be imputed to any other Insured Member for purposes of applying this Exclusion 28(a).

# What is excluded...

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[liability]

(e) for any loss, costs, civil fine, penalty or expense against any Insured Member arising from any complaint or enforcement action from or before any federal, state or local governmental regulatory agency; notwithstanding this exclusion of liability, The Trust will defend, subject to all other limitations of this policy, an Insured Member for alleged "wrongful act"s of discrimination which are brought against the Insured Member at the State of Rhode Island Commission for Human Rights.

# What is excluded...



[liability]

(f) for damages or settlements of whatever type or financial obligations arising out of a claim of breach of contract; notwithstanding this exclusion of liability, except for claims arising from a collective bargaining agreement, The Trust will defend an Insured Member against such claims, subject to all other limitations of this Policy, until and unless a judgment, agreement, settlement or final adjudication establishes that such breach occurred, provided that the Insured Member, at its own expense, first exhausts, without any Trust involvement whatsoever, all dispute resolution remedies, if any, which may be specified in the contract allegedly breached to resolve said claim of breach

# What is excluded...

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[liability]

(g) for any loss, cost or expenses relating to claims, demands or actions seeking relief in any form other than money damages;

# What is excluded...



[liability]

(h) for any claim, action or petition to reduce or to recover back a tax; for any claim, action or petition for relief from a tax assessment; for any claim, action or petition contesting, in whole or in part, the legality of the assessment of a tax; for any claim, action or petition alleging damages for, or equitable relief from, the assessment of a tax, or the illegality of a tax.

The Trust shall have no duty or obligation to defend any aforementioned claim, action or petition, notwithstanding the provisions of paragraph (d).

# Who is My Lawyer?

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If a portion of the claim is covered, counsel is appointed to represent the City or Town, as well as the officials and/or employees named in their official capacities for the covered counts only. The City or Town Solicitor will generally represent the entity and officials and/or employees relative to the remaining uncovered counts.

# Who is My Lawyer?

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If an official and/or an employee is named in his or her official and individual capacity, defense counsel may be provided by the city or town. The attorney appointed by The Trust to represent those persons in their official capacities does not necessarily represent them in their individual capacities.



# Who is My Lawyer?

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If there is the potential for a conflict of interest between the city or town and the official and/or employee in a covered matter, The Trust will appoint separate counsel to ensure that the interests of all “Insured Members” are protected

# Who is My Lawyer?



**NAMING OF COUNSEL:** In the event that an obligation to provide an “Insured Member” with a defense arises under the terms of this Policy of Insurance, The Trust shall have sole discretion over the appointment of counsel to represent the “Insured Member” in the defense of any litigation between the “Insured Member” and any third parties concerning any claim based upon a liability or an alleged liability covered by the Policy of Insurance. In the event that an actual and cognizable conflict of interest arises between the interests of The Trust and the “Insured Member” relative to any such claim or claims, The Trust shall, as soon as reasonably practicable, notify the “Insured Member” of the conflict and allow the “Insured Member” to either waive the conflict, and accept counsel appointed by The Trust, or request the appointment of independent counsel at The Trust’s expense which such counsel will be mutually acceptable to The Trust and the “Insured Member”. Acceptance of such counsel shall not be unreasonably withheld by either The Trust or the “Insured Member”.

# Your Work is Important!



Public officials' liability coverage is intended, at its heart, to make sure that good people continue to undertake the important public sector service.

Don't let the threat of unwarranted liability deter you from continuing to do the good work that you do!

# QUESTIONS

