COVERAGE, CLAIMS & LITIGATION COMMITTEE

Meeting Minutes

Tuesday, February 14, 2012
IRMA Office – 9:30 a.m.

PRESENT:	Kathleen Gargano, Chair	Colleen Nigg
	Jim Marino	Bridget Wachtel
	Mike Braiman	Julia Cedillo
	Eric Ertmoed	
ALSO PRESENT:	Larry Bush	Susan Garvey
	Mary Henzler	
ABSENT:	Curt Barrett	Keith Sbiral
	Peter Scalera	

I. CALL TO ORDER

Chair Gargano called the meeting to order. Roll was taken and a quorum declared.

II. APPROVAL OF MINUTES – November 3, 2011

A motion was made by Marino and seconded by Wachtel to approve the Coverage, Claims & Litigation Committee meeting minutes of November 3, 2011. A voice vote was taken and the motion carried.

III. WELCOME TO 2012 COVERAGE, CLAIMS & LITIGATION COMMITTEE

Gargano welcomed the committee and thanked everyone for volunteering to serve on the committee. Gargano thanked Nigg for agreeing to serve as the committee Vice-Chair. Gargano noted that the dates for the 2012 CCLC meetings were in the packet and stated that some members had asked if they could call in for the meeting if they were not able to come to the IRMA office. Gargano indicated that this would be acceptable. Gargano stated that the other welcome documents in the packet were for information only.

IV. CLAIMS & LITIGATION REPORTS

Bush stated that he had handed out a five-year history of the claims operational report. Bush explained that in 2009, we had a rather drastic reduction in claims from 2008. At the time, we didn't know whether this was a new trend or just an anomaly. Bush pointed out that at the bottom of the report there is a three-year average of losses and number of claims from 2006 through 2008 and compared that to the last three years, 2009 through 2011. Bush noted that for a number of reasons there has been a shift in a favorable way in both the number of claims and the severity. Over the past three years, claims continue to be down. Bush explained that this was when the recession hit and there was a reduction in members' staff. However, this can work both ways. We anticipated seeing more workers' compensation injuries with few employees working longer hours. Also, in the general economy, we expected more people looking for more dollars any

way they could get them and filing general liability claims. Neither one of these things really happened. Bush commented that there has been a slight increase in frivolous claims, partly because plaintiff attorneys are also hurting.

Bush noted that something else we have done during the past three years is to concentrate on fee shifting cases and analyzing them very quickly. Bush commented that we also started using the Litigation Management software three years ago, which had a little bit of impact on our legal costs. Bush stated that we are starting to do some analysis with the data collected from that system and noted that we would be meeting with one of our legal firms to discuss a consistent pattern of expenses, that seem to be consistently higher than our other firms.

Bush noted that the reduction is the least in workers' compensation. This is due to workers' compensation in Illinois continuing to grow even with the recent reforms. Workers' compensation is based on medical costs and medical costs continue to go up. Also, there hasn't been any change to the definition of causation.

Gargano asked if there were any questions on any of the claims operational reports. Hearing none, she moved to the next agenda item.

V. CLARIFICATION OF STATEMENT OF RESPONSIBILITY

Garvey explained that the Statement of Responsibility contained reference to the Annual Coverage Workshop. However, in the past couple of years, we have not found a need to hold a workshop. This is clarifying that the Coverage, Claims & Litigation Committee will review the necessity for a coverage workshop on an annual basis and will facilitate the workshop if needed.

A motion was made by Wachtel and seconded by Ertmoed to approve the clarification to the CCLC Statement of Responsibility. A voice vote was taken and the motion carried.

V. SELECTION AND ASSIGNMENT OF PANEL COUNSEL

Gargano explained that one of the goals assigned to the Executive Director in 2012 was to work with the Coverage, Claims & Litigation Committee to develop a transparent system for selecting new and assigning existing legal counsel. Gargano advised that a review of the IRMA Panel Counsel had been conducted in late 2008 and subsequent to the meeting packet going out that review summary report had been forwarded to the committee.

Gargano noted that there were some attorneys on the approved counsel listing that were not in the summary and some that are in the summary that aren't on the list. Gargano also noted that the summary contains liability counsel, but not workers' compensation counsel.

Garvey explained that at the time of the review, only the general liability attorneys were reviewed, not the workers' compensation attorneys. Garvey explained that Ryan, Smollen and Jones are no longer on the approved list, due to aging issues with the main attorney, Ryan. The firm of Norton and Mancini has changed around. Jim DeAno left the firm to open up the firm of DeAno & Scarry and Tom Weiler left the firm and joined the firm of Langhenry, Gillen, Lundquist & Johnson. Since both DeAno and Weiler were

the main attorneys we worked with from Norton and Mancini, we kept them on the approved listing.
Garvey also explained that the firm of Keefe and Campbell is temporary, as we are just really trying them out. Bush explained that we have had some members who have requested that we don't use Power and Cronin, due to some political disputes. Bush explained that Keefe gives a lot of workers' compensation seminars and talks about how successful they have been, so we thought we would try him out, and currently have two cases.

Bush explained that the impact of the attorney in workers' compensation is not similar to the impact of the attorney in liability. The dollar amounts are fairly set by the schedule, so you can't have a case go bad. Bush noted that frankly we have given a lot more attention to the liability firms. Bush stated that most of the firms we use were here when he got here. We have added Querrey and Harrow and took off Ryan, Smollen & Jones.

Gargano asked Bush whether he had some further background or ideas about how to develop a transparent system for selecting new and assigning existing legal counsel. Bush stated that this goal was added and initially said to establish an ad hoc committee. After discussion with the Chair, Past Chair and Chair-Elect, it was suggested that since the CCL Committee had a somewhat light agenda this year, there was really no reason to establish an ad hoc committee, but give the task to the CCL Committee. Bush indicated that procedure we currently have for selection of defense counsel was in the packet and that staff didn't have a problem with it. However, he would answer questions from the committee or take any suggestions they may have.

Gargano stated that, in general, she thought the membership was unaware as to how the lists on the general liability side and the workers' compensation side have been established. There is not an understanding on how these attorneys get the work. There are also other attorneys out there that municipalities use for things that may overlap workers' compensation and it seems like they don't even have an opportunity to get their foot in the door to do any work. Gargano stated that this is what is being communicated to the membership and it's not just one firm; it's multiple firms. Gargano stated that she knew that some of the decision making is done at price points on per hour rates, but you also have the question that it may be cheaper per hour, but it takes more hours.

Gargano stated that she was more concerned on the workers' compensation end than on the general liability end, where it's true that there is huge liability on that end with police officers' liability. However, it was noted at the meeting with corporate counsel that in workers' compensation there is finite dollars awarded in each case, but many times the big thing hanging over the municipality is the PSEBA claim. If it is not handled properly from the day of the incident there is a problem, as some of the times what we have to do from the insurance side versus the PSEBA side are not always in sync with each other. How can we make this better? It's not to say that there is any dissatisfaction with Power and Cronin or any other workers' compensation approved attorney, but it is niche work in workers' compensation and to expect them to be expert in a certain subject matter isn't necessarily realistic.

Bush stated that this has been a major issue for a long time and we have done a lot to coordinate what we are doing to make sure that what we are doing in workers' compensation doesn't impact the PSEBA case. We have done things like having our adjusters ask questions that pertain to the PSEBA case, not just the workers' compensation case.

Garvey commented that this came out of the first corporate counsel meeting in 2010. The workers' compensation attorneys, the adjusters and the labor attorneys handling the PSEBA cases are talking much more than they were and trying to get everyone involved from the beginning. We have asked our workers' compensation attorneys and our adjusters to get the other attorney involved as much as possible early on.

Bush stated that his sense was that on the liability side some of the corporate counsel would like to be doing the work directly. On the workers' compensation side, he doesn't get the sense that the PSEBA attorneys want to get involved in the workers' compensation case. They just want more coordination right from the beginning.

Bush commented that we did some really horrible things about seven years ago, right when PSEBA first came out, where we settled some workers' compensation claims in a way that really hurt the PSEBA claim. We learned about these very quickly and changed the language in our settlement agreements. What we brought up at the corporate counsel meeting was that the handling of the pension and PSEBA case is sometimes really hurting the workers' compensation case, which now happens more often the other way around. Bush explained that when there is a formal intervention in the pension case by a community and we lose the pension case, then we pretty well at that point lose the workers' compensation case. As bad as the forum is at workers' compensation arbitrators, sometimes the pension forums are even worse. For instance, the Fire Pension Board is all firemen. Maybe this case would be better off with an arbitrator than with them. From a community's perspective, it is really important on the pension or PSEBA, so they feel compelled to intervene. Gargano noted that they have the opposite where a decision at workers' compensation arbitration was used at the pension board as evidence on the village's behalf as to causation. It works both ways.

Bush stated that one thing we are asking counsel is that if they feel strong enough to intervene and there is an adverse decision, then presumably they feel strong enough to appeal. Bush noted that it has happened a few times where there has been intervention and then a bad decision and it is just dropped. Appeal time is past and then we are dead on the workers' compensation case as well.

Wachtel stated that she thought what everyone was getting at was cases where you have a unified defense – covered and non-covered counts – not just PSEBA. Wachtel stated that Flossmoor recently had one of these more complicated cases, and she wouldn't mind if it was discussed as an example. Bush stated that he thought the Flossmoor case was different than what Gargano was talking about. In a liability claim where we are defending part of it, and we feel very strongly that it doesn't matter who is on the list, but either a general counsel or labor counsel whose advice has essentially ended up in a lawsuit has a conflict interest if they defend it. Bush stated that there have been a number of situations where advice from a labor attorney didn't turn out to be good. It is very difficult for that attorney to go to a city counsel and say you followed my advice, now I'm recommending that we settle for $250,000.

Wachtel stated that Flossmoor had a case filed a few months ago that came to IRMA's attention in December and there has been discussion going back and forth. Wachtel stated that it was a unified defense claim that started several years ago as a simple FMLA case. It has now grown from an FMLA case to a medically disabled police officer, so Flossmoor is dealing with the pension claim as well. The police officer has been awarded a non-duty disability on his pension, but he has appealed that, so there is the

exposure of the PSEBA claim out there. He is a forty-something police officer who is trying to protect his future and his family. He has filed a discrimination claim against the village on several counts in Federal court. Wachtel stated that Flossmoor has about three years invested in a labor attorney and the work they have done in dealing with the FMLA case and the pension issues involved. Now we are working with the discrimination case and what is actually covered out of IRMA is a very small portion of the claims. The village is responsible for the really big ticket items, including PSEBA. Wachtel stated that IRMA would step in under unified defense and, while she appreciates this that they will cover all the counts, Flossmoor has a lot invested in what has happened to that point and making sure that once we are past the IRMA coverage, we are still well protected. What ends up happening is that Flossmoor has to make a decision as to whether they retain counsel on their own, at their own cost, in addition to experiencing the claim under IRMA and dealing with an additional attorney through IRMA, and then having that claim sit on our experience modifier for the next five years, when IRMA has only a small part in coverage in that claim. Flossmoor had asked whether they could continue to utilize their labor attorney for the entire defense of the case. What has been offered to us, that we struggle with, is the fact that they essentially buy you out of indemnification. IRMA agrees to contribute toward your defense costs, but then they ask you to waive indemnification, which would be foolish for any community to take. Wachtel stated that she struggles with the fact that an offer like that is even made to a member. When a member pays for insurance through a premium, in exchange for that is not only the defense of the case, but also indemnification.

Bush commented that originally Flossmoor didn't submit the claim to IRMA, so we wrote Flossmoor a letter stating that if you don't submit the claim there is no indemnification. Wachtel stated that IRMA made an offer to cover their hourly rate of attorneys toward Flossmoor's defense costs of the claim. Wachtel stated that she knows this offer has been made to other members.

Bush stated that in this situation, the community took the initiative saying they didn't want the coverage. It wasn't initiated by IRMA. Bush stated that it doesn't make sense to him that any member would waive indemnification. Bush stated that we heard about this claim secondhand. Flossmoor can use any attorney they want. The question IRMA has is IRMA going to use an attorney not familiar with defending federal cases in court to defend the pool's resources. Wachtel stated that she didn't want to discuss the case here, this was just an example. She has heard about other cases with other communities of these unified defense cases where only a small part is captured into IRMA and the case becomes that more expensive for the community and for the membership than it really needs to be. Bush stated that he would like to know of the other cases. Flossmoor is the only community he knows who haven't submitted a claim to IRMA for this reason.

Gargano stated that it's not a matter of submitting the claim and tried to recall the discussion at the Executive Board when this came up. When you are paying a labor attorney for three years and incurring all of the expense, you have someone who is the subject matter expert. Gargano stated that she understood what Bush was saying in that the opinion of that attorney could be the reason a member is being sued – conflict of interest. However, the member has invested this money and will continue to pay this attorney simultaneously with the attorney that the membership is paying for, so the membership is actually paying twice for the same outcome.

Garvey stated that what you have to keep in mind is that your labor attorney is very good at labor employment law, but not necessary a trial attorney. This is sometimes where it gets lost in the translation. Your corporate counsel may have all the knowledge about municipal law, but they are not trial attorneys, which is what we need to bring in. If the case goes to trial, we need an experience trial attorney who knows how to work in the federal system. This is where things separate.

Garvey commented that if we said, yes, every time a member asked for their counsel to represent them, we could possibly have 71 counsels working for us and us trying to monitor 71 different counsels. Garvey stated that she did understand the members' concern, but from IRMA's perspective, we are trying to protect the pool's resources and trying to defend our members as well as possible. Garvey explained that where indemnification comes in is from the IRMA Bylaws. You are required for IRMA to assign one of their panel counsel; and, if you don't, then you potentially waive indemnification.

Wachtel stated that her comments were relative to what she calls "the buyout," where IRMA will contribute to a member's defense costs, but they would be waiving indemnification in exchange.

Garvey stated that she did not remember that offer being made, but stated that on very specific occasions, IRMA has agreed to have counsel that has been working on a claim handle a portion of the claim, such as Motion to Dismiss. We agree to pay our fees towards their fees. For instance, we pay $185 per hour toward their fees of $365 an hour. We are not waiving indemnification at that point because we are still involved. We generally have a defense counsel shadowing what is going on. Garvey stated that difference in the Flossmoor case is that it was never actually submitted to IRMA.

Wachtel stated that she would like to discuss her case after the meeting and she had the letter submitted by IRMA. The bigger issue is the unified defense where you have this small amount of coverage that IRMA is going to assume responsibility of and yet they come in and, even if there are other attorneys that are qualified to be able to handle some of these cases, they are not even given the opportunity to "play in the sandbox." What ends up happening is the communities bear that additional costs, there is additional costs through IRMA, your experience modifier goes up and you have an additional claim on the books for what becomes a small part of your coverage and you have all this other exposure out there. Punitive damages and PSEBA are the big ticket items. Rarely do compensatory damages go ahead and overshadow that. Bush commented that as far as settlements made, there has never been a settlement or verdict where a member has paid anywhere close to what IRMA has paid.

Gargano commented that what Wachtel also pointed out and other members have pointed out is the issue of not being able to "play in the sandbox." There are a handful of labor attorneys out there – let's say five big players in the market – and the membership doesn't understand IRMA's selection process and why those attorneys aren't involved. Why isn't a Holland and Knight and Clark, Baird Smith chosen for the panel? These are the people that the members call when an employment issue comes up – not IRMA. If they were already on your group of panel counsel and have the experience you are looking for, why aren't they allowed?

Bush stated it is not that they are not allowed. One thing is that we want to have enough volume for each of attorneys to mean something to them. We do have very favorable rates and it only makes sense that they have a certain amount of volume. Bush noted

that our volume has gone down and the more it goes down the pressure is on to raise rates. If we had sixty attorneys each handling a case, they would have no reason to give us a favorable rate. It's also about getting the best attorneys from a firm assigned. We have had problems in the past with that issue. Bush noted that we use primarily smaller firms where we can give them a lot of work and we will be very important to them.

Garvey stated that it not a conscious decision for us to say, no, we are not going to let this firm on the panel. We have had our current panel counsel that has done excellent work for us over the years, and we don't need anymore counsel on the panel for the volume issue.

Bush noted that it is really the individual attorneys and not necessarily the firms that we use. For instance, when we used Norton & Mancini, it was mainly Jim DeAno and Tom Weiler that we used. We have continued to use them after they left Norton & Mancini, since we really like their work. There can be a problem with the larger firms giving us a lower rate, but then assigning their newest attorney.

Marino noted that Homewood had a case involving an employee pulled over for a DUI while driving a village vehicle. Marino stated that their labor attorney firm is Laner Muchin and he immediately spoke with Jill O'Brien to talk about terminating the employee. We decided that was the way to go, so Homewood did that. The employee started to challenge the village and they tried to work out a settlement. Then the employee decided to get an attorney, at which point Marino told O'Brien that they had to turn the case over to IRMA and the case was assigned to Molly O'Reilly. Marino indicated that they ended up settling the case. Marino asked whether because Laner Muchin is on the approved counsel panel list, could they have just continued to represent Homewood on this claim. Bush stated that they could have continued to use Laner Muchin on the labor side, but not use them to defend the case because there is a conflict.

Wachtel asked why there assumed to be a conflict before the case has even been evaluated. Shouldn't we be making an assumption that everything has been handled properly? Wachtel commented that Marino's case was better than Flossmoor's because everyone is an IRMA player. In the Homewood case, the cost of the claim would have gotten more expensive for IRMA and for the membership because you switched to another attorney. There would have been some hand-off and discussion between attorneys and IRMA was paying for O'Brien. Wachtel stated that it didn't make much business sense to her.

Garvey stated that where the conflict comes in and it doesn't happen all the time, the concern of IRMA is that you have an attorney who has given advice and now you are going to say, you have to defend your own advice. They may not be as objective as somebody else coming in. There is always a way to make a claim, and you may have a labor counsel say they will defend this to the absolute end because it is their advice and they are not going to admit that there could be this one little thing that could hurt us. So you bring in someone else who can be more objective.

Bush stated that there is no way to know ahead of time what it is going to be. You could say it's fine for Laner Muchin, but another member could come and want their own attorney who they have the same relationship with as the member with Laner Muchin. We can't say we like Laner Muchin but we don't like your attorney. It puts IRMA in the

position of prejudging attorneys. Wachtel questioned whether IRMA does that already by putting an attorney on the panel listing.

Bush stated by agreeing to a member's request for their own attorney is putting the pool's resources in the hands of that member. Bush stated that all of these procedures have come out of the membership.

Gargano stated that, procedurally, Bush may be correct that this is how the pool wants it because it came out of the pool, but it seems like the pool also wants to understand how the attorneys are being selected on both the general liability side (labor attorneys/employment attorneys) and the workers' compensation side. They want to understand what the selection process is. With the materials handed out at the meeting, Gargano stated that from her standpoint, there should be more quantifiable. What was handed out was a nice bio, but didn't really tell her anything, as to how they truly helped IRMA.

Bush stated that he was glad this was coming up, because this selection process was established over ten years ago. The current membership should go through this process. The question is whether it is the process or specific attorneys. There have been some changes, and we are basically happy with our panel of attorneys. However, we start over and do something like a Request for Proposal (RFP) and allow our current attorneys to participate, but also allow others to participate. Bush did state that he thought we should limit it, and it is in our interest to have a significant number of cases to each attorney.

Gargano stated that the RFP should be drafted to mention specific deal breakers, i.e., they have to have trial experience. We don't want the most junior associate just because the IRMA rate is the rate.

Gargano stated that she felt it was time to look at this, citing that in Wilmette, they have had auditors who have done a very good job for a few years, but still go out for another one because sometimes it is good to have just for change, because they may have a different set of eyes. If you write the RFP the right way you are certainly going to get volumes of responses; but if the qualifications are so defined you will be able to put people into two lists. This is really what the members wanted.

Bush stated that although we are happy with the current panel, he came from the public sector and was used to going out for various RFPs every five years. It is a lot of work, but if the membership would like to see us go out with an RFP for panel counsel every five years, he was okay with that process.

Ertmoed commented that he agreed with the process, but would suggest we limit it to an RFP at first. Narrow it down and hold a couple of interviews and then ask for fees and different proposals. Make them qualify through an RFQ process first and then have them submit proposals. We may find that these firms sharpen their pencils and offer lower rates.

Garvey stated she would make one suggestion. We don't object if the membership wants us to go out for an RFP, but when we put out the RFP we have to put out our set fees. Bush agreed with this. Wachtel suggested that we use the RFQ process first and evaluate on qualifications – then negotiate fees. If the concern is to have the best trial attorney, then wouldn't you go after the qualifications first? Garvey commented that we

do look at qualifications, but also the dollar amounts, because right now we control the fees – our attorneys have agreed to the rate. If we open up, we may get 2-3 firms that have rates 2-3 times more than what our rate is now. Then legal fees will go up.
What it comes down to is that we put this out with our rates and those firms willing to work at our rates will respond. Bush stated that we also have to indicate the volume of claims, because no one is going to come in at our rates for one case.

Braiman agreed that we need to put our rates in with the qualifications because otherwise you are wasting everyone's time. Wachtel noted that we also have to know the amount of time (number of hours) they spend on things like Motion to Dismiss. What benchmarks do we use to evaluate at attorney?

Bush stated that there are some other things we can look, such as alternative fee arrangements. A lot of insurance companies are going this way. It only works for certain types of cases. It would work for sidewalk slip, trip and fall cases because there is enough similarity in these types of cases. We may be able to work something out. The one question is whether our volume is enough. We need to explore this further. Maybe we give all of these types of cases to two firms for a set fee. Or, we could do this with one firm.

Gargano agreed that our rates need to be put out there somewhere, but in the background. She also agreed that the time benchmark should also be included.

Bush stated that staff would bring a draft RFP back to the next CCLC meeting.

Wachtel asked whether we want to explore the procedural question of when a community has an IRMA attorney and there is an assumption of immediate conflict of interest, and it is decided to give the case is given to another IRMA attorney. Marino stated that this is a threshold issue. A member has invested quite a bit, but now has to turn it over to IRMA. What's the threshold where it has to be turned over to IRMA? Marino gave the example of a situation ten years ago where it was an EEOC claim and they got quite far in the process with their labor attorney and then realized they had to turn it over to IRMA.

Bush stated that if we go through this process, and we have a new list of attorneys for the next five years, the suggestion is if that attorney is on the list, they can keep it and if they are not, they can't. This would be a lot more pliable to IRMA, rather than putting us in the position of every single member asking for someone not on the list and making IRMA be the judge.

Marino questioned when an attorney is not on the list, how does the member minimize their investment of investing in their labor counsel before turning it over to IRMA? Bush stated that they don't – there will be a little extra expense.

Marino asked whether there is a standard as to when the trigger point is when the case should be turned over to another attorney. Bush stated that our early intervention procedure should help with this. Cedillo stated that she really likes the early intervention process and why don't we make it a standard. Bush agreed that maybe we need to make the early intervention process a little more formal.

Gargano suggested that in a case where an attorney is not on the list, IRMA has a review done by another attorney who can see if anything has been missed. If not, okay.

If they see something, they should bring it to the attention of the attorney handling the case. Either way, the case can remain with the original attorney.

Bush thanked everyone for their input and said that staff will work with all of these things and an RFP would be brought back to the committee.

VII. REPORT OF NOVEMBER 2011 CORPORATE COUNSEL MEETING

Gargano stated that a summary of the discussion at the Corporate Counsel meeting began on page 28 of the packet. Garvey indicated that staff did not have anything to add, but commented that she thought it was a very good meeting and a lot of the corporate counsels found it a very good meeting as well.

Bush stated that we definitely plan to hold another meeting during 2012. Marino asked if there was a list of attendees. Garvey stated that staff had the listing. Garvey mentioned that she had heard from one member who didn't know their attorney attended the meeting. Bush explained that this year, the invitation went directly to the corporate counsel and asked if it would be helpful to copy the Delegate on that invitation. It was the consensus of the committee that the Delegate should be copied on the invitation.

VIII. ADDITIONS TO AGENDA

Bush gave a quick update on some of the current cases.

IX. CONFIRMATION OF NEXT MEETING

Gargano reported that the next meeting of the committee would be held on Thursday, May 17, 2012, at 9:30 a.m. at the IRMA office.

X. ADJOURNMENT

A motion was made by Braiman and seconded by Cedillo to adjourn the meeting. A voice vote was taken and the motion carried.

Submitted by:

_____
Susan Garvey
Director of Legal Services

Approved by:

_____
Kathleen Gargano, Chair
Coverage, Claims & Litigation Committee