

CALL IN: 855-201-9213

PASSCODE: 5797667

AGENDA

JPA: MBASIA Board of Directors Teleconference Meeting

DATES/TIMES: July 23, 2012 at 10:00 AM

PRIMARY Alliant Insurance Services, Inc.

LOCATION: 100 Pine Street
11th Floor
San Francisco, Ca 94111
(415) 403-1411

**LOCATIONS
VIA**

TELEPHONE:

- City of Capitola, 420 Capitola Ave., Capitola, CA 95010 (831) 475-7300
- City of Del Rey Oaks, 650 Canyon Del Rey Rd., Del Rey Oaks, CA 93940 (831) 394-8511
- City of Gonzales, 147 Fourth Street, Gonzales, CA 93926 (831) 675-5000
- City of Greenfield, 45 El Camino Real, Greenfield, CA 93927 (831) 974-5591
- City of Hollister, 375 Fifth St., Hollister, CA 95023 (831) 636-4300
- City of King City, 212 So. Vanderhurst Ave., King City, CA 93930 (831) 385-3281
- City of Marina, 211 Hillcrest Ave., Marina, CA 93933 (831) 884-1278
- City of Sand City, 1 Sylvan Park, Sand City, CA 93955 (831) 440-5606
- City of Scotts Valley, One Civic Center Dr., Scotts Valley, CA 95066 (831) 440-5606
- City of Soledad, 248 Main Street, Soledad, CA 93960 (831) 223-5000

LEGEND:

A – Action may be taken

I – Information

1 – Included

2 – Handout

3 – Separate

4 – Verbal

In accordance with the requirements of the Brown Act, notice of this meeting must be posted in publicly accessible places, 72 hours in advance of the meeting, in each of the member agencies involved.

Per Government Code section 54954.2, persons requesting disability-related modifications or accommodations, including auxiliary aids or services in order to participate in the meeting, are requested to contact Alliant Insurance Services at (415) 403-1411, 24 hours in advance of the meeting. Access to some buildings may require routine provision of identification to building security. However, MBASIA does not require any member of the public to register his or her name, or to provide other information, as a condition to attendance at any public meeting and will not inquire of building security concerning information so provided. See Government Code section 54953.3.

PAGE A. CALL TO ORDER

B. CONSENT CALENDAR

- 1-2 1. ERMA Letter to MBASIA – Substantive Change to MOC (A)
- 3 2. MBASIA Response to ERMA – Request for Reconsideration

C. PUBLIC COMMENTS

The public is invited at this point to address the Board on issues of interest to them.

D. COVERAGE AND CLAIMS COMMITTEE

- 4 1. Report from the July 12 & 19, 2012 Coverage and Claims Committee Meeting (I)
The Coverage and Claims Committee Chair will give a verbal recap of the discussion at the July 12 & 19, 2012 Committee Meetings

E. BOARD OF DIRECTORS

Members will review the following items and may take action or give directions.

- 4-27 1. Member Late Reporting – Penalties, Governance and Process (A)
a. Amending the Memorandum of Coverage
b. P&P: Minimum Penalties for Late Reporting through the Appeal Process
- 28-29 2. Appeal of Denied Liability Claim for Late Reporting: Del Rey Oaks

Member Cities

Capitola
Del Rey Oaks
Gonzales
Greenfield
Hollister
King City
Marina
Sand City
Scotts Valley
Soledad

F. CORRESPONDENCE / INFORMATION

(I)

- None

4 G. GENERAL RISK MANAGEMENT ISSUES

(I)

Subjects that of interest to members: please bring 15 copies of any materials.

ADJOURNMENT

Member Cities

Capitola
Del Rey Oaks
Gonzales
Greenfield
Hollister
King City
Marina
Sand City
Scotts Valley
Soledad

June 28, 2012

TO: ERMA Members

FROM: Karen Thesing, Executive Director

SUBJECT: Substantive Change to the 2012-13 MOC, Submittal of Untimely Claims

With the new 2012-13 program year upon us, I wish to first congratulate all members for their diligent efforts in managing and mitigating employment liability risks. As you have heard over the last several months, ERMA has seen a positive impact to its bottom line, and as a result, has experienced a significant growth in membership. Thank you for all your efforts in achieving these goals.

The next item of importance is to alert you to the fact that a substantive change has been made to the 2012-13 Memorandum of Coverage (MOC). A top tier goal last year was to conduct a thorough review of the MOC. This memo is to draw your attention to the MOC, specifically Section VII – Conditions, the submittal of late claims. The changes to the submittal of late claims will become effective July 1, 2012.

The amendments in the MOC reflect that *any claim reported after 30 days, except one which the Litigation Manager has discretion to accept, will be denied as untimely. A member may appeal the denial to the Board, and the Board will consider the following factors when making a determination regarding the appeal:*

- 1. Late reporting is strongly disfavored and claims reported more than 90 days late will not be accepted absent extraordinary circumstances as determined by the Board.*
- 2. An appeal based on the member's lack of familiarity with the definition of a claim or the requirements for reporting a claim will also be strongly disfavored, as it is the member's responsibility to understand the definition of a claim and follow reporting requirements.*
- 3. An appeal based on the person responsible for reporting claims being absent during the time the claim should have been reported will be required to be verified and the employee absent during the entire time the claim was not reported.*
- 4. If the Board determines the late reporting of a claim would result in any financial or other prejudice to ERMA, the claim will be denied.*

Language has also been added stating each appeal will be considered on its own merits, and the Board's decision on an appeal will not establish any precedent for future appeals. Also, if a claim is accepted by the Board, the member's retained limit will be increased by at least 25%, with the actual amount of the increase to be determined at the sole discretion of the Board.

Remember, all claims must be reported to ERMA within 30 days. Please ensure that all staff responsible for reporting employment liability claims to ERMA is keenly aware of this new MOC provision.

For the full text of the MOC, please visit the “Members Only” section of ERMA’s website and register with a username and password if you have not already done so.

If you have additional questions, please do not hesitate to call me. My direct line is 916.244.1181.

2012-017

July 9, 2012

Ms. Karen Thesing
ERMA Program Manager
Bickmore Risk Services
1750 Creekside Oaks Drive, Suite 200
Sacramento, CA 95833

Member Cities

Capitola
Del Rey Oaks
Gonzales
Greenfield
Hollister
King City
Marina
Sand City
Scotts Valley
Soledad

LATE REPORTING PENALTY -- REQUEST FOR RE-CONSIDERATION

Dear Karen,

The memo to ERMA Members dated June 28th outlines the Board action regarding the Late Reporting requirements. At the bottom of the first page it states that the retained limit will be increased by a **minimum** of 25%. When this was decided, was everyone aware that MBASIA attaches to ERMA at \$500,000? MBASIA is unique for two reasons, the first is that we have a much higher retention than the other members, and the second is that we cover EPL losses within our program. We understand that many of the other ERMA members are in pools that exclude EPL, but in our case, this change did not allow sufficient time for the MBASIA Board time to address this before our program renewed July 1st; and as a result, MBASIA is exposed to this penalty.

As I understand, if a claim is reported after 30 days it will automatically cost MBASIA an additional \$165,000 (increasing our SIR by a 25% minimum to a \$625,000 SIR), is this correct? For an ERMA Member at the next lower attachment level of \$250,000 this penalty minimum is just over \$80,000. On the surface, this 25% factor doesn't seem unfair, but when comparing the penalty difference between our attachment point and a member with a \$25,000 or even a \$50,000 SIR, the financial impact strongly favors members with a low attachment.

We are supportive of the penalty concept of the policy, but request that the Executive Committee discuss a recommendation of a limit of some sort, for example, creating a minimum penalty of 25% but not to exceed a maximum of \$75,000. Please note that, unlike a traditional liability policy that has a reporting condition that includes something like "50% of the SIR", this condition is not included in the ERMA MOC; the late reporting involves all claims. MBASIA is a pool for the first \$500,000 so we end up bearing this cost, not our member.

I understand that the next full Board meeting is not scheduled until November, but I am hopeful we can have this issue addressed by then.

Thank you for your consideration,

Sincerely,



Conor Boughey
MBASIA Program Administrator

Cc: Rene Mendez, ERMA representative

**Item No. E.1.a&b
Board of Directors
July 23, 2012**

MEMBER LATE REPORTING – PENALTIES, GOVERNANCE AND PROCESS

- a) Changes Required to Memorandum of Coverage (MOC)**
- b) P&P: Minimum Penalties for Late Reporting of Claims through the Appeal Process**

ISSUE: At the June Board of Directors Meeting, the Board gave direction to the Coverage and Claims Committee to review the Appeal process and propose a Policy and Procedure (P&P) involving this process, and penalties that may be included involving Late Reported Claims.

This request was a result of an Employment Practices Liability claim reported over two years after it occurred and 21 months after it was settled internally at the City. The Coverage and Claims Committee had no authority to accept and paid the claim and the Board Appeal process was triggered. (There have been no other Appeals in recent history of MBASIA).

The MBASIA Memorandum of Coverage, Section VII, says that the failure to comply with any of the reporting CONDITIONS shall void coverage. Prompt reporting of claims allows Members access to qualified claims handling and allows MBASIA to take actions which can minimize litigation and control the overall cost of the claim. Late reporting of claims inhibits the ability of MBASIA to positively impact the outcome of a claim.

Since this meeting, the excess pool that covers MBASIA's Employment Practices Claims, ERMA, also developed a Penalty policy that impacts the MBASIA pool layer, and its Members. This penalty is also addressed as part of this item, with changes included in the MOC to make the Member responsible and not the MBASIA pool layer.

RECOMMENDATION: MBASIA's Coverage and Claims Committee developed the proposed P&P and addressed the proposed changes to the MOC and recommends them to the Board of Directors for adoption.

FINANCIAL IMPACT: No direct financial impact is expected. The precise future impact of the P&P cannot be determined at this time, but we have shown the following examples of how the policy will impact claims:

Example if a Claim is Reporting 31 Days Late			
Ultimate Net Loss:	\$ 50,000	\$ 100,000	\$ 250,000
Retention	\$ 10,000	\$ 10,000	\$ 10,000
Penalty	\$ 10,000	\$ 10,000	\$ 10,000
Member Recovery	\$ 30,000	\$ 80,000	\$ 230,000

Example if a Claim is Reporting 181 Days Late			
Ultimate Net Loss:	\$ 50,000	\$ 100,000	\$ 250,000
Retention	\$ 10,000	\$ 10,000	\$ 10,000
Penalty	\$ 50,000	\$ 50,000	\$ 50,000
Member Recovery	N/A	\$ 40,000	\$ 190,000

Example if a Claim is Reporting 366 Days Late			
Ultimate Net Loss:	\$ 50,000	\$ 100,000	\$ 250,000
Retention	\$ 10,000	\$ 10,000	\$ 10,000
Penalty	\$ 100,000	\$ 100,000	\$ 100,000
Member Recovery	N/A	N/A	\$ 140,000

***NOTES:**

- These are MINIMUM Penalties and, through the Appeal process higher Penalties could be charged, or the claim could still be denied.
- If notice of a claim is later than 365 days the MOC requires a higher standard of acceptance – penalties on an accepted claim could be greater.
- This chart does not represent the additional penalties that a Member will be obligated to pay as a result of late reporting to excess carriers or pools such as ERMA if a claim falls within their limits.

BACKGROUND:

a) Changes Required to Memorandum of Coverage (MOC):

The changes proposed to the Memorandum of Coverage (MOC) are necessary to link the concept of the Appeal process with the Penalty P&P. This MOC is the governing document for liability coverage. This P&P does not modify the Memorandum of Coverage (MOC) – the authority still lays there.

The following sections contain the wording to be added to the MOC:

SECTION II – DEFINITIONS

14. **Notice** of a claim, as respects late reporting, shall mean the formal filing of a government Tort claim, lawsuit, or an administrative action; whichever is known first.

SECTION VII - CONDITIONS

Added to: 1.a.

If, as a result of a **covered party's** failure to provide **notice** of an **occurrence** within 30 days, the **Authority** or **covered party** are subjected to any late reporting penalties, fines or increased retentions from any excess coverage layer, the costs shall be the sole responsibility of the **covered party**, and the **Authority** shall have no obligation to pay said costs or to reimburse the **covered party**.

Added to: 9. Arbitration

When the Board of Directors considers the appeal of a **covered party**, a majority vote is required for approval of a claim in which the **covered party** failed to give notice within three hundred and sixty five (365) days; for **notice** of a claim received after three hundred and sixty five (365) days, then a two-thirds (2/3) majority of the Board of Directors in attendance is required with the appealing **covered party** abstaining.

b) P&P: Minimum Penalties for Late Reporting of Claims through the Appeal Process:

The P&P does not alter the Board appeal process; this is very important to keep in mind as we walk through why the "Penalty P&P" is written a specific way. The P&P is all about the "penalties", and they are MINIMUMS; meaning that, even after an Appeal, they apply and the penalty cannot be modified. (As a result, the P&P cannot say anything like "after xxx a claim will not be paid" that authority needs to stay within current Board Appeal process).

In addition, ERMA has a post 30 day 25% penalty adding to our \$500,000 attachment (SIR). Right now that's \$125,000 to a Member of MBASIA. At the ERMA Board meeting in November this should be capped at \$75,000. This is such an important item we have addressed it in both the MOC and the P&P so it's clear that the Member would be to absorb this penalty and not the MBASIA pool layer.

ATTACHMENT:

1. P&P: Minimum Penalties for Late Reporting of Claims through the Appeal Process
2. Revised/Redline MOC

ADMINISTRATIVE POLICY AND PROCEDURE

SUBJECT: MINIMUM PENALTIES FOR LATE REPORTING OF CLAIMS THROUGH THE APPEAL PROCESS

Policy Statement:

The MBASIA Memorandum of Coverage, Section VII, says that the failure to comply with any of the reporting CONDITIONS shall void coverage. Prompt reporting of claims allows Members access to qualified claims handling and allows MBASIA to take actions which can minimize litigation and control the overall cost of the claim. Late reporting of claims inhibits the ability of MBASIA to positively impact the outcome of a claim. Claims are considered late when notice is given 30 days after the **occurrence**¹, claim, or suit.

Members have the right within the MOC to appeal a denial of coverage in writing within thirty (30) calendar days of the date of the Coverage and Claims Committee written notice of decision. The Board of Directors then considers the appeal at their next regular meeting. The following procedure presents minimum penalties for an appeal of denied claims due to late reporting, but notwithstanding the MBASIA penalties for late reporting addressed below, the MBASIA pool will not be responsible for other penalties, or increase in deductibles, in any excess pool or insurance layers that may reduce coverage as a result of Member late reporting to MBASIA.

This P&P does not modify the MBASIA Memorandum of Coverage's defined Appeal process.

Procedure:

MBASIA agrees that the **Ultimate net loss** reimbursement to the Member shall be reduced by the following amounts as a minimum penalty if notice is given late to MBASIA. The notice of a claim "trigger date" for reporting shall be the formal filing of a government Tort claim, lawsuit, or an administrative action; whichever is known first; claims will be deemed late reported 30 days after this trigger date; notice of a claim reasonably likely to exceed fifty percent of the **retained limit** as defined in the MBASIA MOC.

In addition to the penalty amounts listed below, and at the Member's expense, the Board of Directors may choose to hire an Independent Party to perform a forensic review of the claim details to determine (1) why the claim was reported late, and (2) if the claim was prejudiced as a result of late reporting as part of the Appeal process - *these penalties are not a commitment to approve a late reported claim.*

If, in the opinion of the Board of Directors, there is justification to the appeal a denial of a claim for late reporting and it is determined that MBASIA was not unduly prejudiced by the late reporting, then any agreement for partial payment of a late reported claim will be limited

¹ Terms in **bold** are as defined in the MBASIA MOC.

by the following amount in addition to the Member's deductible. These penalties are in addition to a Member's deductible, and any appeal will include them in the final calculation of payment² - for any Claim reported *anytime after*:

- a) **30 days** past the claim *trigger date*; the reimbursement will be reduced by ten thousand dollars (**\$10,000**);
- b) **180 days** past the claim *trigger date*; the reimbursement will be reduced by fifty thousand dollars (**\$50,000**);
- c) **365 days** past the claim *trigger date*; the reimbursement will be reduced by one hundred thousand dollars (**\$100,000**) and;

as the MINIMUM penalty *after* the Board Appeal process is concluded with higher penalties determined by the Board as appropriate.

² As noted directly above, other adjustments in reimbursements from excess pools or carriers due to late reporting will be the deducted from the Members Ultimate net loss, and not paid by MBASIA.

MONTEREY BAY AREA SELF INSURANCE AUTHORITY (MBASIA)
LIABILITY PROGRAM
MEMORANDUM OF COVERAGE

This Memorandum of Coverage (MOC) sets forth the terms, conditions, and limitations of coverage provided under the Pooled Liability Program. The terms of this MOC may not be changed or waived except by amendment made a part of this MOC.

Throughout this MOC, words and phrases that appear in **bold** have special meaning. They are defined in Section II, “Definitions” or in the Master Program Document.

In consideration of the payment of the deposit premium, the **Authority** agrees with the **covered parties** as follows:

SECTION I - COVERAGE

The **Authority** will pay up to the **limit of coverage** those sums on behalf of the **covered parties** for the **ultimate net loss**, less the **retained limit**, that the **covered parties** become legally obligated to pay as **damages** because of **bodily injury**, **property damage** and **personal injury**, as those terms are defined, caused by an **occurrence** during the coverage period **and public officials errors and omissions**, and **employment practices liability**, as those terms are herein defined and to which this MOC applies, caused by a wrongful act during the coverage period, except as otherwise excluded.

This MOC does not provide insurance, but instead provides for pooled risk sharing. This MOC is a negotiated agreement amongst the members of the **Authority** and none of the parties to the MOC are entitled to rely on any contract interpretation principles which require interpretation of ambiguous language against the drafter of such agreement. This MOC shall be applied according to the principles of contract law, giving full effect to the intent of the members of the **Authority**, acting through the **Board** in adopting this MOC. As the **Authority** is not an insurer, it has no obligation to issue reservation of rights letters, nor does it have an obligation to provide “Cumis” counsel to a **covered party** in disputed coverage situations under Civil Code §2860. Finally, failure to provide such notice to a **covered party** of any coverage dispute shall not operate to waive any of the provisions of this MOC.

SECTION II - DEFINITIONS

1. **Aircraft** means a vehicle designed for the transport of persons or property principally in the air.
2. **Authority** means the Monterey Bay Area Self Insurance **Authority**.
3. **Automobile** means a land motor vehicle, trailer, or semi-trailer.
4. **Bodily injury** means **bodily injury**, sickness, disease, or emotional distress sustained by a person, including death resulting from any of these at any time. **Bodily injury** includes

damages claimed by any person or organization for care, loss of services, or death resulting at any time from the **bodily injury**.

5. **Covered Indemnity Contract** means that part of any contract or agreement pertaining to the **covered party's** routine governmental operations under which the **covered party** assumes the tort liability of another party to pay for **bodily injury** or **property damage** to a third person or organization. This definition applies only to tort liability arising out of an **occurrence** to which this MOC applies. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
6. **Covered party** means:
 - (a) The **Member**, including any and all councils, commissions, agencies, districts, authorities, boards, including the governing board or similar entities coming under such **Member's** direction or control or for which such **Member's** board members sit as the governing body. **Covered party** includes departments and constituent agencies of the **Member**, except an airport or hospital board or commission, regardless of how such body is denominated.
 - (b) Persons who are past or present elected or appointed officials, employees, or volunteers of the **covered party**, whether or not compensated, while acting for or on behalf of the **covered party**, including while acting on outside boards at the direction of the **covered party**, except any airport or hospital board or commission, regardless of how such body is denominated, or any other joint powers **Authority**, or any separate agency or entity, created by a joint powers agreement.
 - (c) Any person or entity identified as a **covered party**, holding a certificate of coverage duly issued by the **Authority**, for **occurrences** during the coverage period identified in the certificate of coverage; if a particular activity is identified in the certificate of coverage, the person or entity is a **covered party** only for **occurrences** arising out of the described activity.
 - (d) Any officer or director of the **Authority** while in the course and scope of their duties for the **Authority**, with respect to **public officials errors and omissions** coverage.
 - (e) With respect to any **automobile** owned by the **covered party** or leased or hired for use by or on behalf of the **covered party**, any person while using such **automobile**, and any person or organization legally responsible for the use thereof, provided its actual use is with the permission of the **Member**, except:
 - (i) Any person or organization, or any agent or employee thereof, operating an **automobile** sales agency, repair shop, service station, storage garage, or public parking place, with respect to an **occurrence** arising out of the operation thereof, including road testing and delivery; or

- (ii) The owner or any lessee, other than the **covered party**, of a leased or hired **automobile**, or any agent or employee of such owner or lessee.
 - (iii) This MOC does not provide uninsured or underinsured motorist coverage.
 - (f) Notwithstanding sections (b) and (f) above, the defense and indemnity coverage afforded by this MOC to a past or present official, employee, or volunteer of a **Member** (including a **Member** of a member joint powers **Authority**) is not broader than the **Member's** duty to defend and indemnify its official, employee, or volunteer pursuant to California Government Code Section §815, 815.3, 825 to 825.6, 995 to 996.6, inclusive, and any amendments thereof. If the **Member** which employs the official, employee, or volunteer is not obligated under the California Government Code to provide a defense, or to provide indemnity for a claim, or if said **Member** refuses to provide such defense and/or indemnity to said official, employee, or volunteer, then this MOC shall not provide any such defense or indemnity coverage to said official, employee, or volunteer. All immunities, defenses, rights and privileges afforded to a **Member** under California Government Code Section §815, 815.3, 825 to 825.6, 995 to 996.6, inclusive, and any amendments thereof, shall be afforded to the **Authority** to bar any defense or indemnity coverage under this MOC to that **Member's** official, employee, or volunteer.
7. **Dam** means any artificial barrier, together with appurtenant works, which does or may impound or divert water, and which either (a) is 25 feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream, channel, or watercourse, to the maximum possible water storage elevation; or (b) has an impounding capacity of 50 acre-feet or more.

Any such barrier which is not in excess of 6 feet in height, regardless of storage capacity, or which has a storage capacity not in excess of 15 acre-feet, regardless of height, shall not be considered a **dam**.

No obstruction in a canal used to raise or lower water therein or divert water there from, no levee, including but not limited to a levee on the bed of a natural lake the primary purpose of which levee is to control floodwaters, no railroad fill or structure, no road or highway fill or structure, no circular tank constructed of steel or concrete or of a combination thereof, no tank elevated above the ground, no water or waste water treatment facility, and no barrier which is not across a stream channel, watercourse, or natural drainage area and which has the principal purpose of impounding water for agricultural use or storm water detention or water recharging or use as a sewage sludge drying facility shall be considered a **dam**. In addition, no obstruction in the channel of a stream or watercourse which is 15 feet or less in height from the lowest elevation of the obstruction and which has the single purpose of spreading water within the bed of the stream or watercourse upstream from the construction for percolation underground shall be considered a **dam**. Nor shall any impoundment constructed and utilized to hold treated water from a sewage treatment plant be considered a **dam**. Nor shall any waste water

treatment or storage pond exempted from state regulation and supervision by Water Code Section §6025.5 be considered a **dam**.

8. **Damages** means compensation in money recovered by a party for loss or detriment it has suffered through the acts of a **covered party**, or for liability assumed by the **covered party** under a **covered indemnity contract**. **Damages** include (1) attorney fees not based on contract awarded against the **covered party**, (2) interest awarded on money **damages**, or (3) costs for which the **covered party** is liable either by adjudication or by compromise with the written consent of the **Authority**, if the fees, interest, or costs arise from an **occurrence** to which this MOC applies.
9. **Defense costs** means all fees and expenses incurred by any **covered party** caused by and relating to the defense or litigation of a claim including attorney's fees, litigation costs, court costs, and interest on judgments accruing after entry of judgment. **Defense costs** shall also include reasonable attorney fees and necessary litigation expenses incurred by or for a party other than the **covered party**, which are assumed by the **covered party** in a **covered indemnity contract** where such attorney fees or costs are attributable to a claim for **damages** covered by this MOC. **Defense costs** shall not include the office expenses of the **Authority** or the **covered party**, the salaries of employees, contract or elected city attorneys for the **covered party**, or officials of the **Authority** or any **covered party**, or attorney fees or costs awarded to a prevailing plaintiff against the **covered party**, but shall include fees and expenses relating to coverage issues or disputes which arise after a written denial of coverage, between any **Member** and the **Authority**, if the **Member** prevails in such dispute.
10. **Employment Practices Liability** means liability of an **Authority** arising out of an actual or alleged wrongful act in connection with discrimination, sexual harassment, and/or wrongful termination claimed by an employee, former employee or applicant for employment or a person providing services pursuant to a contract as defined in California Government Code section 12940.
11. **Limit of coverage** means the amount of coverage stated in the Declarations or certificate of coverage, or sublimits as stated therein for each **covered party** per **occurrence**, subject to any lower sublimit stated in this MOC. In the event that a structured settlement, whether purchased from or through a third-party, or paid directly by the **covered party** in installments, is utilized in the resolution of a claim or suit, the **Authority** will pay only up to the amount stated in the Declarations or certificate of coverage, in present value of the claim as determined on the date of settlement, regardless of whether the full value of the settlement exceeds the amount stated in the Declarations or certificate of coverage.
12. **Medical malpractice** means the rendering of or failure to render, during the policy period, any of the following services:
 - (a) Medical, surgical, dental, psychiatric, psychological counseling, X-ray or nursing service or treatment or the furnishing of food or beverages in connection therewith, or any services provided by a health care provider as defined in Section §6146 (c), (2) (3) of the California Business and Professions Code.

- (b) Furnishing or dispensing of drugs or medical, dental, or surgical supplies or appliances.

Medical malpractice does not include emergency medical services or first aid administered by employees of a **covered party**, nor does it include advice or services rendered by a 911 emergency dispatcher.

- 13. **Member** shall mean any organization that is a party to the Agreement creating the Monterey Bay Area Self Insurance **Authority**.

14. **Notice of a claim, as respects late reporting, shall mean the formal filing of a government Tort claim, lawsuit, or an administrative action; whichever is known first.**

- 15. **Nuclear material** means source material, special nuclear material, or byproduct material. "Source material," "special nuclear material," and "byproduct material" have the meanings given to them by the Atomic Energy Act of 1954 or in any law amendatory thereof.

- 16. **Occurrence** means:

- (a) With respect to **bodily injury, property damage**, or personal injury: an accident, including continuous or repeated exposure to substantially the same generally harmful conditions, which results in **bodily injury, property damage** or personal injury neither expected nor intended from the standpoint of the **covered party**. **Property damage** that is the loss of use of tangible property not physically injured shall be deemed to occur at the time of the **occurrence** that caused it.
- (b) With respect to **personal injury, public official errors and omissions** liability and **employment practices liability** respectively: an offense described in the definitions of those terms in this coverage agreement.

- 17. **Personal injury** means injury, other than **bodily injury**, arising out of one or more of the following offenses:

- (a) False arrest, detention or imprisonment, abuse of process, or malicious prosecution;
- (b) Wrongful entry into, or eviction of a person from, a room, dwelling, or premises that the person occupies;
- (c) Publication or utterance of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services, or oral or written publication of material that violates a person's right of privacy;
- (d) Discrimination or violation of civil rights; and

- (e) Injury resulting from the use of reasonable force for the purpose of protecting persons or property.
18. **Pollutants** means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, airborne particles or fibers, molds and/or fungus, and waste. Waste includes materials to be discarded or to be recycled, reconditioned, or reclaimed. The term **pollutants**, as used herein, does not mean potable water, agricultural water, water furnished to commercial users, or water used for fire suppression.
19. **Property damage** means:
- (a) Physical injury to tangible property, including all resulting loss of use of that property; or
 - (b) Loss of use of tangible property that is not physically injured or destroyed.
20. **Public officials errors and omissions** means any, actual or alleged misstatement or misleading statement or act or omission by any **covered party**, individually or collectively, arising in the course and scope of their duties with the **covered party** or claimed against them solely by reason of their being or having been public officials or employees, and which results in damage neither expected nor intended from the standpoint of the **covered party**. All claims involving the same misstatement or misleading statement or act or omission or a series of continuous or repeated misstatements or misleading statements or acts or omissions will be considered as arising out of one **occurrence**.
21. **Retained limit** means the amount stated on the applicable Declarations or certificate of coverage, which will be paid by the **covered party** before the **Authority** is obligated to make any payment from the pooled funds. **Retained limit** includes all **defense costs**. **Retained limit** shall be subject to the following:
- (a) For each **occurrence**, there shall be only one **retained limit** regardless of the number of claimants or **covered parties** against whom a claim is made. If the **covered parties** have different **retained limits**, the lowest **retained limit** of any party found liable will apply. Payment of the **retained limit** shall be apportioned amongst the **covered parties** in accordance with their proportionate shares of liability.
 - (b) If the payment is for a settlement, the **retained limit** shall be apportioned amongst the **covered parties**, in accordance with the respective parties' agreed upon or court-determined share of liability. In the event that the apportionment requires court determination, the **covered parties** will pay all costs of the **Authority** in seeking such determination, including its attorney's fees in proportion to the court's determination of liability.

22. **Sudden and accidental pollution** means the sudden and accidental discharge, dispersal, release, or escape of **pollutants**, resulting in **property damage** or **bodily injury** neither expected nor intended from the standpoint of the **covered party**, onto or upon the land, into the atmosphere, into or under the ground, or into any watercourse, whether natural or man-made, or body of water or aquifer, but does not include any discharge, dispersal, release, or escape of **pollutants**, whether sudden or accidental or gradual or intentional from any fixed or stationary container, vessel, or tank of any description whatever, whether located above ground or underground.
23. **Ultimate net loss** means the total of all defense costs incurred by the **covered parties** and all damages for which the **covered parties** are liable either by adjudication or by compromise with the written consent of the **Authority** arising from an occurrence to which this coverage applies. However, **ultimate net loss** does not include defense expenses incurred by the **Authority** after the **Authority** assumes control of the negotiation, investigation, defense, appeal or settlement of any claim or proceeding. **Ultimate net loss** also does not include attorneys' fees or costs awarded to the prevailing party in a suit except where such attorney's fees or costs are attributable to a claim for compensatory damages covered by this Memorandum.
24. **Wrongful act** means any actual or alleged negligent act, error or omission arising out of conduct or performance of the **covered party** in the performance of his or her or their duties or any actual or alleged act in connection with any person's prospective employment, actual employment or termination of employment by a **covered party**. All **damages** arising out of a single act, error or omission or a series of related acts, errors or omissions shall be treated as arising from a single **wrongful act**. As respects coverages C and D, **wrongful act** shall apply separately to each Member of the **Authority** named in this Memorandum.

SECTION III - DEFENSE AND SETTLEMENT

The **Authority** shall have no duty to assume charge of investigation or defense of any claim. However, the **Authority**, at its own expense, shall have the right to assume control of the negotiation, investigation, defense, appeal, or settlement of any claim, which the **Authority** determines, in its sole discretion, to have a reasonable probability of resulting in an **ultimate net loss** in excess of the **covered party's retained limit**. No claim shall be settled for an amount in excess of the **covered party's retained limit** without the prior written consent of the **Authority** or its designated representative.

If the **Authority** assumes control of the handling of a claim, the **covered party** shall be obligated to pay at the direction of the **Authority** any sum necessary for the settlement of the claim, or to satisfy liability imposed by law, up to its applicable **retained limit**.

The **covered party** shall fully cooperate in all matters pertaining to the investigation, settlement, or adjudication of such claim. The **Authority** shall not be obligated to pay any award, judgment, or settlement in excess of the **limit of coverage** afforded to the **covered party**.

SECTION IV - THE AUTHORITY'S LIMIT OF COVERAGE

Regardless of the number of (1) persons or entities covered under this MOC, (2) persons or organizations making claims or bringing suits, or (3) claims made or suits brought, the **limit of coverage** stated on the Declarations, less the **retained limit**, or any sub-limit contained in this MOC, is the most the **Authority** will pay for an **ultimate net loss** arising out of any one **occurrence**. In the event that a structured settlement, whether purchased from or through a third party or paid directly by the **covered party** in installments, is utilized in the resolution of a claim or suit, only the present value of the agreed-upon payments (the present value “cost” of the structured settlement) shall be considered in satisfaction of the **covered party's retained limit**. The **limit of coverage** for an additional **covered party**, including its officials, employees, and volunteers, shall be the limit stated in its additional **covered party** certificate, regardless of the limit which applies to the **Member**.

In the event that a structured settlement, whether purchased from or through a third-party, or paid directly by the **covered party** in installments, is utilized in the resolution of a claim or suit, the **Authority** will pay only up to the amount stated in the Declarations or certificate of coverage, in present value of the claim as determined on the date of settlement, regardless of whether the full value of the settlement exceeds the amount stated in the Declarations or certificate of coverage.

SECTION V - COVERAGE PERIOD AND TERRITORY

This MOC applies to **bodily injury, personal injury, property damage, public official's errors and omissions, or employment practices liability** which occur anywhere in the world during the coverage period identified in the applicable Declaration or certificate of coverage.

SECTION VI - EXCLUSIONS

This MOC does not apply to:

- (1) Claims which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of **pollutants** at any time.
 - a. This exclusion does not apply to fire fighting activities, including training burns, or intentional demolition or burns for the purpose of limiting a fire, or the discharge of **pollutants** for the purpose of controlling a fire; or to police use of mace, oleoresin capsicum (O.C.), pepper gas or tear gas; or to weed abatement or tree spraying.
 - b. This exclusion does not apply to claims arising from sudden and accidental sewer backups.
 - c. This exclusion does not apply to claims arising from the sudden and accidental discharge, dispersal, release, or escape & chlorine and other chemicals (gas, liquid or solid) which are being used or being prepared for use in fresh or

wastewater treatment or in water used in swimming pools, wading pools or decorative fountains.

- d. This exclusion does not apply to claims arising from materials being collected as part of any drop-off or curbside recycling program implemented and operated by the **covered party**; if the materials have not been stored by the **covered party** for a continuous period exceeding ninety (90) days.
- e. This exclusion does not apply to sudden and accidental discharges of **pollutants** occurring during the transportation or deposit of materials as part of garbage collection activities. However, the exclusion does apply after **pollutants** have been deposited at a landfill or garbage dump.
- f. This exclusion does not apply to bodily injury or property damage arising from activities of the **covered party** to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **pollutants**, but this exception will not apply to bodily injury or property damage caused by **pollutants** on or arising from premises, equipment or locations under the control of the **covered party**.

As used in paragraphs (b) (c) and (e) above, “sudden” means abrupt or immediate, and occurring within a period not exceeding twenty-four (24) hours; “accidental” means causing harm neither expected nor intended by a **Authority**.

- (2) Any loss, cost or expense, including defense costs, arising out of any:
 - a. request, demand or order that any **covered party** or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects & **pollutants**; or
 - b. claim or suit by or on behalf of a governmental **Authority** for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of **pollutants**.
- (3) Claims arising out of radon, asbestos, asbestos fibers, asbestos products or by-products, or any asbestos-containing material, including any supervision, instructions, recommendations, notices, warnings, or advice given or which should have been given in connection therewith or,
 - (a) Any obligation of the **covered party** to indemnify or to contribute with another because of such claims; or,
 - (b) Any obligation to defend any suit or claims against the **covered party** because of any such claim.

(4) **Bodily injury** to:

- (a) An employee of the **covered party** arising out of and in the course of:
 - (i) Employment by the **covered party**; or
 - (ii) Performing duties related to the conduct of the **covered party's** business; or
- (b) the spouse, child, including unborn child or fetus, parent, brother, or sister of the employee as a consequence of paragraph (a) above.

This exclusion applies:

- (a) Whether the **covered party** may be liable as an employer or in any other capacity; and
- (b) To any obligation to share **damages** with or repay someone else who must pay **damages** because of the injury.

This exclusion does not apply to **employment-related injury** or liability assumed by the **covered party** under any written contract

- (5) Any obligation for which the **covered party** or any insurance company as the **covered party's** insurer may be held liable under any workers' compensation, unemployment compensation, or disability benefits law or any similar law.

This exclusion applies whether the **covered party** may be liable as an employer or in any other capacity.

- (6) Claims arising out of ownership, maintenance, management, supervision, or the condition or operation of any hospital, airport, marina, or community correctional facility, except that liability for a marina will be covered if it is added to this MOC by endorsement upon approval by the **Board**, but only to the extent that the **occurrence** does not apply to any coverage normally afforded by Marina Operators' Protection and Indemnity Coverage or any similar coverage.
- (7) To **bodily injury, property damage** or **personal injury** arising out of the ownership or maintenance or use or operation of any airfield or similar aviation facility.

This exclusion shall not apply, however, to **public officials errors and omissions** or employment practices liability coverage arising from the ownership, maintenance, management, supervision or the condition of any airport.

This exclusion shall not apply, however, to liability arising out of the ownership, operation, rental, or loan of vehicles licensed for highway use while being operated away from the premises of any airfield owned, or operated by the covered party.

- (8) Claims arising out of any air show sponsored or controlled by the **covered party**.
- (9) Claims arising out of any professional **medical malpractice**:
 - (a) committed by a doctor, osteopath, chiropractor, dentist, or veterinarian; or
 - (b) committed by any health care provider, as defined in Business & Professions Code Section 6146(c)(2), working for any hospital or hospital operated out-patient, in-patient, or other clinic at the time of the **occurrence** giving rise to the loss.
- (10) Claims arising out of partial or complete structural failure of a **dam**.
- (11) Fines, assessments, penalties, restitution, disgorgement, exemplary, or punitive **damages**. This exclusion applies whether the fine, assessment, disgorgement, exemplary, or punitive damage is awarded by a court or by an administrative or regulatory agency. “Restitution” and “disgorgement” as used herein refer to the order of a court or administrative agency for the return of a specific item of property or a specific sum of money, because such item of property or sum of money was not lawfully or rightfully acquired by the **covered party**.
- (12) Claims for injury or **damages** caused by intentional conduct done with willful and conscious disregard of the rights or safety of others, or with malice. However, where the **covered party** did not authorize, ratify, participate in, consent to, or have knowledge of such conduct by its past or present employee, elected or appointed official, or volunteer, and the claim against the **covered party** is based solely on its vicarious liability arising from its relationship with such employee, official, or volunteer, this exclusion does not apply to said **covered party**.
- (13) Claims arising out of the hazardous properties of **nuclear material**.
- (14) Claims arising out of or in connection with land use regulation, land use planning, the principles of eminent domain, condemnation proceedings or inverse condemnation by whatever name called, and whether or not liability accrues directly against any **Authority** by virtue of any agreement entered into by or on behalf of any **Authority**.
- (15) **Property damage** to:
 - (a) Property owned by the **covered party**.
 - (b) Property rented to or leased to the **covered party** where it has assumed liability for damage to or destruction of such property, unless the **covered**

party would have been liable in the absence of such assumption of liability.

(c) **Aircraft** or watercraft in the **covered party's** care, custody, or control.

- (16) Claims arising out of ownership, operation, use, maintenance, or entrustment to others of: (a) any **aircraft** or (b) any watercraft being used for commercial purposes. Ownership, operation, use, or maintenance as used herein does not include static displays of **aircraft** or watercraft in a park or museum setting.
- (17) Claims arising out of the failure to supply or provide an adequate supply of gas, water, electricity, storm drainage capacity or sewage capacity, when such failure is a result of the inadequacy of the **covered party's** facilities to supply or produce sufficient gas, water, electricity, storm drainage capacity, or sewage capacity to meet the demand.

This exclusion does not apply if the failure to supply results from direct and immediate accidental damage to tangible property owned or used by any **covered party** to procure, produce, process, or transmit the gas, water, electricity, storm drainage or sewage.

- (18) Claims arising out of ownership, operation, maintenance, or use of any trampoline or other rebound tumbling device, other than bounce houses.
- (19) Claims arising out of bungee jumping or propelling activities sponsored, controlled, or authorized by a **covered party**.
- (20) Claims arising out of the ownership, operation, maintenance, or use on any land, other than highways, of any off-highway motor vehicle, including but not limited to any motorcycle or motor-driven cycle or bicycle, snowmobile, or other vehicle specifically designed to travel over snow or ice, or any vehicle commonly referred to as a sand buggy, dune buggy, or all-terrain vehicle. This exclusion shall not apply to the operation of any such vehicle if operated by an employee, agent, or volunteer of the **covered party** while acting for or on behalf of the **covered party**.
- (21) Claims arising out of the private use of a firing range owned, operated or maintained by a **covered party** where such private use is sanctioned by the **Authority**, except where such use is by a **covered party's** employee or a covered individual as defined in definition (6).

This exclusion does not apply to such private use where all of the following conditions are met:

- a. A qualified range master is present at all times while the firing range is being utilized;

- b. The firing range is only provided for the additional use of law enforcement divisions of other public agencies;
 - c. Any agency using the firing range has provided an indemnification agreement which assumes full responsibility by the user agency for all liability arising out of their activities; and
 - d. The user agency has provided liability coverage in an amount of not less than \$1,000,000 and has also provided a certificate of coverage which names the **covered party** as an additional covered party.
- (22) Refund of, or restitution for, taxes, fees, service charges, or assessments.
- (23) Claims in whole or in part arising out of the **covered party's** obtaining remuneration or financial gain to which the **covered party** was not legally entitled.
- (24) Claims arising in whole or in part out of the violation of a statute, ordinance, order or decree of any court or other judicial or administrative body, or rule of law, committed by or with the knowledge or consent of the **covered party**.
- (25) Claims against a **covered party** for **damages** other than **property damage** arising out of:
- (a) estimates of probable cost or cost estimates being exceeded, or
 - (b) faulty preparation of bid specifications or plans, including architectural plans, unless prepared by a qualified licensed and/or registered engineer or architect who is the appointed City Engineer or an employee of the **covered party**.
- (26) Claims arising out of:
- a. a failure to perform or breach of a contractual obligation; or
 - b. **bodily injury or property damage** for which the **Authority** is obligated to pay **damages** by reason of the assumption of liability in a contract or agreement This exclusion does not apply to liability for **damages**:
 - i. assumed in a contract or agreement that is a covered indemnity contract, provided the bodily injury or property **damage** occurs subsequent to the execution of the contract or agreement; or
 - ii. that the **Authority** would have in the absence of the contract or agreement.

This exclusion applies whether the **covered party** may be liable as an employer or in any other capacity.

Notwithstanding this exclusion, the **Authority** may, but is not obligated to approve settlements involving promises to indemnify a co-defendant as part of the

settlement. Any funds recovered from a co-defendant under such an agreement must be applied to ultimate net loss in addition to the retained limited before MBASIA coverage is triggered.

Exclusions (26)(a) and (26)(b) are not applicable to mutual aid agreements.

- (27) Claims arising out of the Employee Retirement Income Security Act of 1974 or any law amendatory thereof, or any similar law, or arising out of fiduciary activities with respect to employee benefit plans.
- (28) Claims arising out of the ownership, operation, maintenance, or control of any permanent landfill site or facility. Landfill includes any site for permanent storage, accumulation, burial, compost, sludge, or any other process for reducing or disposing of waste.
- (29) **Ultimate net loss** arising out of relief or redress, in any form other than **damages**.
- (30) Claims by any **covered party** against its own past or present elected or appointed officials, employees, volunteers, or additional covered parties where such claim seeks **damages** payable to the **covered party**.
- (31) Claims arising out of oral or written publication of material, if done by or at the direction of the **covered party** with knowledge of its falsity.
- (32) The cost of providing reasonable accommodation pursuant to the Americans with Disabilities Act, Fair Employment and Housing Act, or similar law.
- (33) Claims arising out of the ownership, operation, maintenance or use of any vehicle (1) with over 30 passengers seats or carrying over 30 passengers and (2) Which is Owned, operated, maintained or used by any transit **Authority**, transit **Authority**, transit system or public transportation system owned or operated by or on behalf of the **covered party**.
- (34) Claims arising out of liability imposed on any **Covered Party** under any uninsured/underinsured motorist law or **Automobile** no-fault law.
- (35) Claims arising out of automobile or motorcycle drag racing, speed racing, or similar speed contests sponsored, controlled or participated in by a **covered party**.
- (36) Claims arising out of the ownership, maintenance or use of any trampoline or any other rebound tumbling device.
- (37) Under **Public Officials Errors and Omissions coverage** to:
 - (1) **Bodily Injury, Personal Injury or Employment Practices Liability;**

- (2) physical injury to tangible property, including all resulting loss of use of that property; or
 - (3) benefits payable under any employee benefit plan, whether the plan is voluntarily established by the **covered party** or mandated by statute, because of unlawful discrimination.
- (38) Under Employment Practices Liability coverage;
- 1. Strikes and lockouts. This Memorandum does not apply to any claim or claims for loss arising out of a lockout, strike, picket line, replacement or similar actions in connection with labor disputes or labor negotiations
 - 2. W.A.R.N. Act. This Memorandum does not apply to any claim or claims for loss arising out of the Workers Adjustment and Retraining Notification Act, Public Law 100-379 (1988), or any amendment thereto, or any similar federal, state or local law
 - 3. Any cost incurred by the **covered party** to modify or purchase building or property in order to make said building or property more accessible or accommodating to any disabled person
 - 4. **Personal injury, property damage, and public officials errors and Omissions**
 - 5.
 - a.) Liability of a **covered party** arising in whole or in part, out of any **covered party** obtaining remuneration or financial gain to which the **covered party** was not legally entitled
 - b.) Liability arising out of the willful violation of a penal statute, code or ordinance committed by or with the knowledge or consent of any **covered party**; except that any act for which a **covered party** is responsible shall not be imputed to any other **covered party** for purposes of this subpart (T)(5)

SECTION VII - CONDITIONS

- 1. The **covered party's** duties in the event of **occurrence**, claim, or suit reasonably likely to involve the **Authority** are as follows. These provisions are conditions precedent to coverage afforded under this MOC. The **covered party's** failure to comply with any of these provisions shall void coverage herein.
 - (a) The **covered party** shall notify the **Authority** within 30 days upon receipt of notice of a claim reasonably likely to exceed fifty percent of the **retained limit** or any **occurrence** involving:
 - (i) One or more fatalities;

- (ii) Loss of limb or amputation;
- (iii) Loss of use of any sensory organ;
- (iv) Spinal cord injuries (quadriplegia or paraplegia);
- (v) Third degree burns involving 10% or more of the body;
- (vi) Serious facial disfigurement;
- (vii) Paralysis;
- (viii) Closed head injuries;
- (ix) Serious loss of use of any body functions;
- (x) Long-term hospitalization; or
- (xi) Title 42 U.S.C. §1983 claims or other claims involving civil rights violations.

Written notice containing particulars sufficient to identify the **covered party** and also reasonably obtainable information with respect to the time, place, and circumstances of the **occurrence**, and the names and addresses of the **covered party** and of available witnesses shall be given to the **Authority** or any of its agents as soon as possible after notice of the claim is given to the **Authority**, if such information is not available prior to giving notice to the **Authority**.

If, as a result of a **covered party**'s failure to provide **notice of an occurrence within 30 days**, the **Authority** or **covered party** are subjected to any late reporting penalties, fines or increased retentions from any excess coverage layer, the costs shall be the sole responsibility of the **covered party**, and the **Authority** shall have no obligation to pay said costs or to reimburse the **covered party**.

- (b) If claim is made or suit is brought against the **covered party**, the **covered party** shall be obligated to promptly forward to the **Authority's** designated claims adjustor every demand, notice, summons, or process received by it or its representative.
- (c) The **covered party** shall cooperate with the **Authority** and upon its request assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the **covered party** because of **bodily injury, personal injury, property damage, public officials errors and omissions, or sudden and accidental pollution** with respect to which coverage is afforded under this MOC; and the **covered party** shall attend hearings and trials and assist in securing and giving evidence and

obtaining the attendance of witnesses. The **covered party** shall not, except at its own cost, voluntarily make any payment, assume any obligation, or incur any expense toward the settlement of any claim for which the **Authority** has accepted responsibility and has so notified the **covered party**.

- (d) Any payments made, or arrangements to make payments, or expenses incurred by the **covered party** in relation to the claim, prior to giving notice of the claim to the **Authority**, shall be the sole responsibility of the **covered party**, and the **Authority** shall have no obligation to pay said costs or to reimburse the **covered party** ~~therefor~~therefore.
- (e) As to any claim for which the **Authority** has accepted responsibility and has so notified the **covered party**, if the **covered party's** refusal to change its position prevents settlement of the claim for a reasonable amount, defined as the amount the **Authority** is willing to pay and the claimant is willing to accept, and increases the **covered party's** potential liability for **damages** and continued **defense costs**, the **covered party** shall pay or shall reimburse the **Authority** for those **defense costs** incurred after the claim could have been settled, and for any **damages** awarded or settlement agreed upon in excess of the amount for which the claim could have been previously settled.

2. Subrogation

The **Authority** shall be subrogated to the extent of any payment hereunder to all the **covered parties'** rights of recovery thereof and the **covered parties** shall do nothing after loss to prejudice such right and shall do everything necessary to secure such right. Any amounts so recovered shall be apportioned as follows:

- (a) The highest layer of coverage shall be reimbursed first and if there are sufficient recoveries then the next highest layer until all recoveries are used up.
- (b) The expenses of all such recovery proceedings shall be paid before any reimbursements are made. If there is no recovery in the proceedings conducted by the **Authority**, it shall bear the expenses thereof.

3. Bankruptcy or Insolvency

Bankruptcy or insolvency of the **covered party** shall not relieve the **Authority** of any of its obligations hereunder.

4. Other Coverage

If collectible insurance or any other coverage with any insurer, joint powers insurance **Authority**, or other source respectively is available to the **covered party** covering a loss also covered hereunder (whether on primary, excess or contingent basis), the coverage hereunder shall be in excess of, and shall not contribute with, such other insurance or coverage, provided that this clause does not apply with respect to insurance purchased or

coverage obtained specifically to be in excess of this MOC. If the other collectible insurance or other coverage exceeds the **covered party's retained limit** and the loss is in excess of the amount of other collectible insurance or other coverage, the coverage provided hereunder will apply over the other collectible insurance or other coverage up to the limits of the **Authority's** liability.

This coverage shall be in excess of, and shall not contribute with, any insurance or coverage which names a **covered party** herein as an additional covered party or additional insured party, where coverage is extended to a loss also covered hereunder. In order for the coverage herein to apply, the **covered party** must pay the full amount of its **retained limit**. Payment of the **retained limit** by the **covered party** is required in addition to and regardless of any payments from any other source for or on behalf of that **covered party**, with the exception that commercial coverage purchased directly by a **covered party** for the sole purpose of insuring all or a portion of its **retained limit** may be utilized to pay all, or a portion of, a **covered party's retained limit**.

5. Severability of Interests

The term **covered party** and its sub-terms including entity, covered individual, and additional covered party are used severally and not collectively, but the inclusion herein of more than one **covered party** shall not operate to increase the limits of the **Authority's** liability or the **retained limit** applicable per **occurrence**.

6. Accumulation of Limits

A claim which contains allegations extending to a duration of more than one coverage period shall be treated as a single **occurrence** arising during the first coverage period when the **occurrence** begins.

7. Termination

This MOC may be terminated at any time in accordance with the Bylaws of the **Authority**.

8. Changes

Notice to any agent or knowledge possessed by any agent of the **Authority** or by any other person shall not effect a waiver or a change in any part of this MOC, nor shall the terms of this MOC be waived or changed except by endorsement issued to form a part of this MOC.

9. Arbitration

The Coverage and Claims Committee shall make the initial determination whether to deny coverage on all or part of a claim, or to reserve the **Authority's** right to deny coverage on all or part of a claim if a loss subsequently exceeds the retained limit.

A decision by the Coverage and Claims Committee to deny coverage can be appealed to the Board of Directors. Notice of such appeal shall be submitted in writing within thirty (30) calendar days of the date of the Coverage and Claims Committees written notice of decision.

Following receipt of the written appeal, ~~The-the~~ appeal ~~will than-then~~ be considered by the Board of Directors at the next regular or special meeting ~~following receipt of the written appeal~~; ~~like-if the~~ appeal is received too late for inclusion in the agenda packet, it can be postponed to the next following Board meeting. The Coverage and Claims Committee and the **covered party** will have the right to submit written materials and present oral argument to the Board; subject to reasonable time constraints.

When the Board of Directors considers the appeal of a **covered party**, a majority vote is required for approval of a claim in which the **covered party** failed to give notice within three hundred and sixty five (365) days; for **notice** of a claim received after three hundred and sixty five (365) days, then a two- thirds (2/3) majority of the Board of Directors in attendance is required with the appealing **covered party** abstaining.

Within sixty (60) days following any denial of coverage by the Board, the Member or **covered party** may request, in writing, that the **Authority** initiate a declaratory relief action in Superior Court for a determination of the coverage matter. The declaratory relief action shall be initiated in Santa Cruz County, California, unless the **Authority** and **covered party** agree on a different venue.

Any determination by the Executive Committee, and by the Board of Directors if the matter is appealed to the Board of Directors, whether a **covered party** has breached the Conditions concerning notice of a claim, and any determination whether the **Authority** has been prejudiced by that breach, so that this coverage does not apply, comes within the sole discretion of the Board of Directors; ~~Such determinations shall be conclusive, final and binding and shall not be the subject of any further review, whether by declaratory relief action or otherwise.~~

**Item No. E.2
Board of Directors
July 23, 2012**

**APPEAL OF DENIED LIABILITY CLAIM FOR LATE REPORTING:
DEL REY OAKS**

ISSUE: The City of Del Rey Oaks would like to appeal the Claims Committee decision to deny coverage for late reporting of an employment claim. The City presented their case for why coverage should be granted at the June Board Meeting, the Board did not reach a decision at that time. The Coverage and Claims Committee has since reviewed the issue further and the decision is in front of the Board with the proceeding Policy and Procedure and MOC amendment for the Board's consideration.

RECOMMENDATION: It is recommended that the Board review the letter submitted by the City of Del Rey Oaks, hear the City's presentation, and take action or give direction.

FINANCIAL IMPACT: The Claims Committee denied coverage due to late reporting, however the claim is valued at \$177,208. If the City's standard deductible applied to this claim, MBASIA would have paid \$167,208.

BACKGROUND: The background of the claim is summarized below:

- Claim occurred in November 2009
- Claim settled in March 2010
- Claim first reported to RMS on December 12, 2011
- Claim reported to the Board by RMS on April 16, 2012
- Claims Committee denied claim for late reporting on May 22, 2012
- Del Rey Oaks appealed the coverage decision on May 23, 2012

ATTACHMENT: Del Rey Oaks Appeal Letter



CITY OF DEL REY OAKS

650 CANYON DEL REY RD. • DEL REY OAKS, CALIFORNIA 93940
PHONE (831) 394-8511 • FAX (831) 394-6421

Office of the City Manager – Daniel J. Dawson

May 23, 2012

Conor Boughey, ARM
Michael Simmons, LEG
Alliant Insurance Services, Inc.
100 Pine Street, 11th Floor
San Francisco, CA 94111

Gentlemen;

I would like to exercise my appeal rights as a member of MBASIA in regards to the Policy language of the MOC Section VII – Conditions. I believe that the lack of clear policy in regards to timing of claims, or potential claims, needs clarification by the Board. The current situation does not give the Claims Review Committee the ability to clearly make decisions based on timing of claims submission.

I came to the City of Del Rey Oaks as the City Manager in August of 2009 under less than ideal circumstances. The Mayor of 35 years had a "Vote of no confidence" signed by 100% of the employees as well as harassment claims against him. Additionally there were a few employees who were contributing to the hostile work environment, one of which was the Police Sergeant of 22 years, Mr. Villareal. I was quite literally managing in a state of chaos and triage and quite frankly holding the lid on a very volatile situation. After convincing the Mayor to resign I was verbally assaulted by the Sergeant and immediately placed him on leave pending disciplinary action. The Sergeant threatened lawsuits and claims against the City and me personally, claiming he was being discriminated against based on his Hispanic heritage, his overweight condition, and a litany of issues. He had 22 years service at that time and was 18 months from retirement eligibility.

I made the decision to negotiate with his attorney rather than face costly and lengthy litigation which resulted in the settlement that eventually totaled \$177,000 with final payment in October 2011. I had no idea what MBASIA was, and certainly was completely unaware that as a member we were entitled to Employment Practices coverage. As I became involved in the MBASIA Board I realized that I had a valid claim that potentially saved MBASIA substantial litigation and settlement expenses and discussed the matter with Mr. Maolini who encouraged me to submit the claim.

The language in Section VII – Conditions of the Memorandum of Coverage (MOC) states that a covered party's duty is to notify the Authority "in the event of occurrence, claim or suit reasonably likely to involve the Authority". The language is vague at best and begs several questions; What does "reasonably likely" mean? What is an "occurrence"? If I was unaware that the Authority existed how could I have been aware that an "occurrence" that would "reasonably be likely" to involve the Authority had, in fact occurred?

I look forward to a healthy policy discussion regarding this appeal at a full Board meeting and thank you for agendizing this item.

Daniel Dawson