

MUTUAL AID AND MUTUAL AID AGREEMENTS

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I. **INTRODUCTION**

A. **Municipal Cooperation is an Important Mechanism for Providing Public Services:**

1. **Many Forms:** Police, fire, dispatch and EMS services are perhaps the most common type of local government service that is delivered in collaboration with other units of government, yet mutual cooperation includes many facets of public services, including: libraries, data and public records, snow plowing, public health, emergency communications, waste, water and sewer, and nursing home services.
2. **Many Labels and Definitions:** Such arrangements referred to as “intermunicipal cooperation,” “shared services,” “mutual aid,” etc. One State agency provided a general definition: “In general terms, intergovernmental cooperation is any arrangement by which officials of two or more jurisdictions communicate visions and coordinate plans, policies, and programs to address and resolve issues of mutual interest. It can be as simple as communicating and sharing information, or it can involve entering into formal intergovernmental agreements and sharing resources such as equipment, buildings, staff, and revenue. It can even involve consolidating services, jurisdictions, or transferring territory.”

See “Intergovernmental Cooperation: A Guide to Preparing the Intergovernmental Cooperation Element of a Local Comprehensive Plan.” Wisconsin DOA (2002) (https://doa.wi.gov/DIR/Comp_Planning_Intergovernmental-Cooperation.pdf).

3. **Several Reasons Generate Interest in and Agreements For Municipal Cooperation:**

- a. Most generally, demographic, social, economic, and fiscal needs continue to create a trend for innovative and cost-effective cooperation between local governments and other public entities to provide services and to avoid duplication. There are also state and federal mandates that can require or encourage cooperation.
- b. Wisconsin’s Smart Growth Law, created in 1999, includes, among its elements for comprehensive planning, intergovernmental cooperation. See Wis. Stat. § 66.1001(2)(g) (“A compilation of objectives, policies, goals, maps, and programs for joint planning and decision making with other jurisdictions, including school districts, drainage districts, and adjacent local governmental units, for siting and building public facilities and sharing public services. The element shall analyze the relationship of the local governmental unit to school districts, drainage districts, and adjacent local governmental units, and to the region, the state and other governmental units.”).
- c. Beginning in January 2003, Wis. Stat. §§ 66.0316 & 66.0317 require that all municipalities within the federal “Metropolitan Statistical Area” (MSA) must sign at least two compacts with neighboring municipalities or counties for provision of joint services. Under these laws, municipalities adjacent to at least two other

municipalities in the same “cooperation region” must enter into an “area cooperation compact” with at least two municipalities or counties located in the same cooperation region in order to provide at least two governmental services on a collaborative basis. “Cooperation region” is defined as a federal MSA and “governmental service” is defined as a service related to any of 13 different areas, including law enforcement, fire protection, emergency services, public health, public transportation, libraries, and human services. The area cooperation compact must provide a plan, benchmarks to measure the plan’s progress, and outcome-based performance measures to evaluate the plan’s success.

See also <https://www.census.gov/population/estimates/metro-city/0312msa.txt> & https://factfinder.census.gov/help/en/metropolitan_statistical_area_msa.htm (identifying Wisconsin’s MSA’s and defining MSA as follows: “A geographic entity defined by the federal Office of Management and Budget for use by federal statistical agencies, based on the concept of a core area with a large population nucleus, plus adjacent communities having a high degree of economic and social integration with that core. Qualification of a metropolitan statistical area requires the presence of an Urbanized Area (UA) with a total population of at least 50,000.”)

- d. In 2006, the state enacted Mutual Aid Box Alarm System (MABAS) legislation. MABAS is a mutual aid measure that may be used for deploying fire, rescue and emergency medical services personnel in a multi-jurisdictional and/or multi-agency response. Participation in the mutual aid program is voluntary. Equipment, personnel or services provided under MABAS are at no charge between municipalities. Expenses recovered from the responsible parties are equitably distributed. In addition, emergency personnel that respond to the emergency remain employees of their initial department or agency. MABAS is broken into divisions rather than regions.
- e. For a prime example at the national level, federal departments and agencies are required to make adoption of NIMS by local, state, territorial, and tribal nation jurisdictions a condition to receive Federal Preparedness grants and awards. The National Incident Management System (NIMS) Implementation Objectives were developed to guide jurisdictions in their implementation of NIMS. NIMS implementation is assessed through the direct reporting of data to FEMA.

4. State Statutory Authority for Local Government Cooperation Are Varied:

- a. **Specific Statutes** for specific services, sometimes aimed at specific levels of government in direct and mandatory ways. In addition to the required cooperation of MSA’s, other common examples can be found in Wis. Stat. § 51.42(3)(a) (providing statutory scheme for multi-county basis to administer a community mental health, developmental disabilities, alcoholism and drug abuse program, and to make appropriations to operate the program); Wis. Stat. § 59.03(2) (consolidation of services between county and local municipality); Wis. Stat § 66.0312 (health departments), Wis. Stat § 66.03125 (fire departments), Wis.

Stat § 66.0314 (governor declaration of “state of emergency”); and Wis. Stat § 66.0313 (law enforcement); Wis. Stat. § 66.0303(2) (subject to approval by the Attorney General, “[a] municipality may contract with municipalities of another state or with federally recognized American Indian tribes or bands located in another state for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by statute to the extent that laws of the other state or of the United States permit the joint exercise.”).

- b. **Generally, pursuant to Section 66.0301(2):** Since 1939, under **Wis. Stat. § 66.0301** (formerly **§ 66.30**), the Legislature authorizes broad discretion and flexibility to municipalities (and many other entities) to reach cooperation agreements subject only to the lawful powers and duties of the contracting municipalities. Section 66.0301 “shall be interpreted liberally in favor of cooperative action between municipalities and between municipalities and Indian tribes and bands in this state.” § 66.0301(2).

Section 66.0301(2) states:

Subject to s. 59.794 (2), and in addition to the provisions of any other statutes specifically authorizing cooperation between municipalities, unless those statutes specifically exclude action under this section, *any municipality may contract* with other municipalities and with federally recognized Indian tribes and bands in this state, *for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law*. If municipal or tribal parties to a contract have varying powers or duties under the law, each may act under the contract to the extent of its lawful powers and duties. A contract under this subsection may bind the contracting parties for the length of time specified in the contract. This section shall be interpreted liberally in favor of cooperative action between municipalities and between municipalities and Indian tribes and bands in this state. If a municipality is required to establish or maintain an agency, department, commission, or any other office or position to carry out a municipal responsibility, and the municipality joins with another municipality by entering into an intergovernmental cooperation contract under this subsection to jointly carry out the responsibility, the jointly established or maintained agency, department, commission, or any other office or position to which the contract applies fulfills, subject to sub. (7), the municipality's obligation to establish or maintain such entities or positions until the contract entered into under this subsection expires or is terminated by the parties. In addition, if 2 or more municipalities enter into an intergovernmental cooperation contract and create a commission under this section to jointly or regionally administer a function or project, the commission shall be considered, subject to sub. (7), to be a single entity that represents, and may act on behalf of, the joint interests of the signatories to the contract entered into under this section.

Section 66.0301(3) provides that any agreement may provide a plan for administration of the function or project. The plan for administration may include provisions regarding proration of expenses, deposit and disbursement of funds, submission and approval of budgets, creation of a commission, selection and removal of commissioners, and formation and letting of contracts. In addition, any agreement may bind the parties to the contract for the length of time specified in the contract.

Moreover, Section 66.0301(4) expressly allows cooperation to finance the acquisition, development, remodeling, construction, and equipment of land, buildings, and facilities for regional projects (under Wis. Stat. § 66.0621).

- c. Agreements under Section 66.0301(2) essentially operate as contracts. *See, e.g., Racine v. Town of Mt. Pleasant*, 61 Wis. 2d 495, 213 N.W.2d 60 (1973) (“Any municipality may contract with another municipality for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by statute.” The relationship of the town and the city under such an arrangement is strictly that of contracting parties); *Village of McFarland v. Town of Dunn*, 82 Wis.2d 469, 263 N.W.2d 167 (1978) (extending to contracts to provide law enforcement services under Wis. Stat. § 66.0301).
- d. Unless specifically provided otherwise by statute to some other unit of government, the power to contract is vested with a municipality’s governing body. Wis. Stats. §§ 62.11(5), 61.34(1), 61.50. Those acting on behalf of the municipality must have authority to bind the municipality to the contract. *Hocking v. City of Dodgeville*, 2010 WI 59, 326 Wis. 2d 155, 785 N.W.2d 298 (2010). Power to bind may be delegated to a subunit of the governing body, or an official or employee of the governing body. *See Ellerbe v. City of Hudson*, 1 Wis. 2d 148, 83 N.W.2d 70 (1957). *See also Town of Brockway v. City of Black River Falls*, 2005 WI App 174, 285 Wis. 2d 708, 702 N.W.2d 418 (City attorney was without power to bind municipality without authority from the governing body); *Kocinski v. Home Insurance Company*, 154 Wis.2d 621, 452 N.W.2d 360 (1990) (city attorney cannot make valid contract on behalf of city unless he has prior authority from the common council to do so); *Probst v. City of Menasha*, 245 Wis. 90, 95, 13 N.W.2d 504 (1944) (city engineer lacked authority to modify city construction contract).
- e. These rules exist because contractually binding the municipality ultimately obligates the taxpayer. *Holzbauer v. Safway Steel Products, Inc.*, 2005 WI App 240, ¶ 19, 288 Wis. 2d 250, 708 N.W.2d 36.

II. LAW ENFORCEMENT ACTIVITIES OUTSIDE GEOGRAPHICAL BOUNDARY

- A. **General Rule:** The general rule is that officers of particular counties or municipalities have no authority to arrest, as officers, outside of the geographical or political subdivision in which they are officers. *See Brodhead, D & Lafave, W, Arrest Without Warrant in Wisconsin*, 1959 Wis. L. Rev. 489.

- B. As a Private Citizen:** In the absence of statutory or common law authority, arrests made outside the boundaries of the political subdivision would be as a private citizen subjecting the officers to liability imposed on any person who acts without the protection of official capacity. See *Otis, Municipal Corporations, Powers of Town Officers*, 1947 Wis. L. Rev. 401; *City of Waukesha v. Gorz*, 166 Wis.2d 243, 479 N.W.2d 221 (App. 1991) (an officer traveling outside his or her jurisdiction may have the authority to stop and detain as a private citizen for crimes committed in the officer's presence).
- C. Arrests Outside of Requests for or Agreements for Assistance:**
1. Arrests under Fresh Pursuit
 - a. For purposes of civil and criminal liability, any peace officer outside his or her territorial jurisdiction is considered to be acting in an official capacity, while in fresh pursuit, making the arrest or transporting. Wis. Stat. §175.40(3).
 - b. Officer may follow and arrest when in "fresh pursuit" if he or she has acted:
 - i. without unnecessary delay;
 - ii. where pursuit is continuous and uninterrupted; and
 - iii. where time from commission of offense and commencement of pursuit is reasonable. See *City of Brookfield v. Collar*, 148 Wis.2d 839, 843, 436 N.W.2d 911 (Ct. App. 1989) (third factor was "very short, spanning several minutes at most.") See also *State v. Haynes*, 2001 WI App 266, 248 Wis. 2d 724, 638 N.W.2d 82 (In addition to issuing a citation for an observed violation, an officer, after observing a traffic violation and pursuing the defendant into another jurisdiction where the stop was made, was entitled to question the defendant beyond the purpose for which the stop was made and to issue citations for other violations when additional suspicious factors came to the officer's attention during the stop.)
 2. Officers whose jurisdiction may have a boundary highway are authorized to enforce the law on the entire width or intersection of the highway. Wis. Stat. § 175.40(4); *City of Brookfield v. Berghauer*, 170 Wis. 2d 603, 489 N.W. 2d 695 (App. 1992) (this subsection permits enforcement of one municipality's ordinance on the entire width of a boundary highway).
 3. Emergencies/Felonies
 - a. Officers may arrest or provide aid and assistance anywhere in the state if on duty and on official business, if taking action that would be authorized in their territorial jurisdiction and when responding to an emergency situation that poses a significant threat to life or bodily harm or acts that the officer believes, on reasonable grounds, constitute a felony. Wis. Stat. § 175.40(6)(a).

- b. The employing agency must adopt policies and the officer must comply with those policies, including an agency policy on notification to and cooperation with the law enforcement agency of another jurisdiction regarding arrests made and other actions taken in the other jurisdiction. Wis. Stat. §175.40(6)(b) & (d).
- c. For purposes of civil and criminal liability such officers are considered to be acting in an official capacity. §175.40(6)(c).

4. Milwaukee County

- a. Officers in a jurisdiction within Milwaukee County may arrest anywhere within the county. Wis. Stat. §175.40(5)(a).
- b. The officer's employing agency must adopt policies and the officer must have complied with those policies, including an agency policy on notification to and cooperation with the law enforcement agency of another jurisdiction regarding arrests made and other actions taken in the other jurisdiction. Wis. Stat. §175.40(5)(b) & (d).
- c. The law enforcement agency in the jurisdiction where the person is arrested is immune. Wis. Stat. §175.40(5)(c).

III. LAW ENFORCEMENT MUTUAL ASSISTANCE STATUTES

A. History of Wis. Stat. § 66.0313 and 66.0513:

1. Chapter 380 of Laws of 1947 created **Wis. Stat. § 66.0513** to assure officers acting outside their authorized jurisdiction would be paid wages and benefits. The request for the legislation came from the Milwaukee Policeman's Association. The bill was to "provide that peace officers who are required to serve outside the city, village or town limits shall be fully protected as to wage salary, pension and service rights...."
2. Chapter 105 of Laws of 1967 created current **Wis. Stat. § 66.0313** to encourage mutual "law enforcement cooperation." The bill "allows law enforcement officers to aid other law enforcement agencies."
 - a. Original draftsman's language stating "liability for any action taken by such officers will attach to the requesting agency" was stricken. Instead, alternative language suggested such responding law enforcement officers "shall be deemed employees of the requesting agency."
 - b. Draftsman added, by incorporation, the provisions of current Wis. Stat. § 66.0513 assuring wages and benefits.
 - c. In addition, specific reference was made to Wis. Stat. § 895.46.

B. Wis. Stat. § 66.0313 – “Law Enforcement; Mutual Assistance”:

1. “Law enforcement agency” has the meaning given in § 165.83(1)(b) and includes tribal law enforcement agency. Under § 165.83(1)(b), “law enforcement agency” means a governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which unit are authorized to make arrests for crimes while acting within the scope of their authority.”
2. The operative language is under § 66.0313(2): “Except as provided in sub. (4), upon the request of any law enforcement agency, including county law enforcement agencies as provided in s. 59.28 (2), the law enforcement personnel of any other law enforcement agency may assist the requesting agency within the latter's jurisdiction, notwithstanding any other jurisdictional provision. For purposes of ss. 895.35 and 895.46, law enforcement personnel, while acting in response to a request for assistance, shall be deemed employees of the requesting agency and, to the extent that those sections apply to law enforcement personnel and a law enforcement agency acting under or affected by this section, ss. 895.35 and 895.46 shall apply to tribal law enforcement personnel and a tribal law enforcement agency acting under or affected by this section.”
 - a. Thus, under the mutual aid statute, the requesting agency is responsible for defending a responding officer in a civil action arising out of the officer's response and for indemnifying the officer for the amount of any civil penalties imposed or damages awarded in such an action. The responding agency is responsible for personnel costs (such as the salary and benefits of the responding officer) and other costs (such as damage to equipment), but may bill the requesting agency for these costs.
 - b. In 2009, by way of 2009 Wisconsin Act 264, authorized tribal law enforcement agencies to both request assistance from state, county, or municipal law enforcement agencies and to respond to requests for assistance from such agencies. The operable terms are similar, yet the statute contains threshold requirements for mutual aid involving tribes which must be met. Such terms include waiving tribal immunity to the extent necessary to allow such mutual aid, procuring insurance or having in place an agreement for costs, as well as submission of one or more of these terms to the DOJ for posting on its website.
 - c. Section 895.35(1) covers reimbursement for expenses, to wit: “Whenever in any city, town, village, school district, technical college district or county charges of any kind are filed or an action is brought against any officer thereof in the officer's official capacity, or to subject any such officer, whether or not the officer is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action is discontinued or dismissed or such matter is determined favorably to such officer, or such officer is reinstated, or in case such officer, without fault on the officer's part, is subjected to a personal liability as aforesaid, such city, town, village, school district, technical

college district or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even though decided adversely to such officer, where it appears from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer.”

- d. Formerly, Wis. Stat. § 895.35 allowed that a municipality “may pay all reasonable expenses” associated with the defense of criminal charges pursued against the officer for actions taken in his or her official capacity.
 - i. Through 2005 Wis. Act 73 (effective 1/7/2006) the municipality now “shall reimburse” a “protective services officer” for reasonable attorney fees for criminal proceedings “arising from the officer’s conduct in the performance of official duties.” Such officers include emergency medical services practitioner, an emergency medical responder, a fire fighter, or a law enforcement or correctional officer.
 - ii. Exceptions: The mandatory payment does not apply if the officer is (1) convicted of a crime; (2) terminated for cause; (3) resigns for reasons other than retirement before the expenses are incurred; (4) demoted or reduced in rank; or (5) suspended without pay for 10 or more working days. Finally, if a collective bargaining agreement covering the officer defines reasonable attorney fees for the purpose of reimbursement, that definition will apply.
3. The provisions of § 66.0513 apply to this section.
4. A collective bargaining agreement will not override a sheriff’s right to request mutual assistance under Wis. Stat. § 66.0313. *See Washington County v. Washington County Deputy Sheriff’s Assn.*, 192 Wis.2d 728, 531 N.W.2d 468 (Ct. App. 1994)
5. The statutes do not permit the creation of a separate regional law enforcement agency; neither the sheriff nor the county board has power to delegate supervisory or law enforcement powers to such an agency. *See* 63 Atty. Gen. 596.

C. Wis. Stat. § 66.0513 – “Police Pay When Acting Outside County or Municipality”:

1. Subsection 1 states: “Any chief of police, sheriff, deputy sheriff, county traffic officer or other peace officer of any city, county, village or town, who is required by command of the governor, sheriff or other superior authority to maintain the peace, or who responds to the request of the authorities of another municipality, to perform police or peace duties outside territorial limits of the city, county, village or town where the officer is employed, is entitled to the same wage, salary, pension, worker’s compensation, and all other service rights for this service as for service rendered within the limits of the city, county, village or town where regularly employed.”
2. Subsection 2 states: “All wage and disability payments, pension and worker’s

compensation claims, damage to equipment and clothing, and medical expense arising under sub. (1) shall be paid by the city, county, village or town regularly employing the officer. Upon making the payment the city, county, village or town shall be reimbursed by the state, county or other political subdivision whose officer or agent commanded the services out of which the payments arose.”

D. Wis. Stat. § 895.46(1)(a) – “State and Political Subdivisions Thereof To Pay Judgments Taken Against Officers”:

1. Subsection (1)(a) states in part: “ ...the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee...The duty of a governmental unit to provide or pay the provision of legal representation does not apply to the extent that applicable insurance provides that representation.”

E. Wis. Stat. § 175.46 – “Mutual Aid Agreements” for Border Counties to Physically Adjacent States:

The statute governing mutual aid between states, enacted in 1993, for law enforcement agencies within 5 miles from any land of the other state, contains the following pertinent subsections:

(2) ...a Wisconsin law enforcement agency may enter into a mutual aid agreement with a law enforcement agency of a physically adjacent state authorizing one or more of the following:

(a) Law enforcement officers of the law enforcement agency of the physically adjacent state to act with some or all of the arrest and other police authority of a law enforcement officer of the Wisconsin law enforcement agency while within the Wisconsin law enforcement agency's territorial jurisdiction and within a border county.

(b) Law enforcement officers of the Wisconsin law enforcement agency to act with some or all of the arrest and other police authority of a law enforcement officer of the law enforcement agency of the physically adjacent state while within that agency's territorial jurisdiction and within a border county.

(4) an agreement under this section may grant authority to an officer only to enforce laws and make arrests for violations of laws that are similar to the regarding violations of in his or her home state.

(5)(a) Except as provided in par. (b), any agreement under this section shall provide that any Wisconsin law enforcement officer, acting under the agreement in another state, shall continue to be covered by his or her employing agency for purposes of worker’s compensation, unemployment insurance, and benefits under ch. 40 and civil liability and any officer of another state acting in Wisconsin under the agreement shall continue to be types of laws that he or she is authorized to

enforce or make arrests for covered for worker's compensation, unemployment insurance, disability and other employee benefits and civil liability purposes by his or her employing agency in his or her home state. Any Wisconsin officer acting within an adjoining state, under the agreement, is considered while so acting to be in the ordinary course of his or her employment with his or her employing Wisconsin law enforcement agency.

(b) An agreement under this section shall provide that any Wisconsin law enforcement officer, acting under the agreement in another state, is subject to any immunity from liability or limit on liability to the same extent as any officer of the other state. An agreement under this section shall provide that any law enforcement officer of another state, acting under the agreement in Wisconsin, is subject to any immunity from liability or limit on liability to the same extent as a Wisconsin law enforcement officer.

(6) No law enforcement officer of a physically adjacent state, acting under an agreement under this section, may be considered, for liability purposes, as an employee or agent of this state or any Wisconsin law enforcement agency for his or her actions within this state regardless of the supervision or control of the officer's actions while within this state. The officer of the physically adjacent state is considered as continuing to be an employee of the agency employing him or her in the officer's home state.

(7) Any agreement under this section entered into by a Wisconsin law enforcement agency may include any terms and conditions considered appropriate by that agency, except the agreement shall comply with this section.

IV. CASE LAW

A. *Liebenstein v. Crowe*, 826 F.Supp. 1174 (E.D. Wis. 1992):

1. Port Washington City Police requested Ozaukee County SWAT to assist in apprehending a man later shot in the altercation.
2. SWAT Officers, the county and its insurer were found entitled to indemnity from city and its insurer.
 - a. Court refused to enforce mutual aid contract which stated that the employees of each participating agency "shall continue to be employees of their employing municipality for all purposes..." and that "none of the municipalities shall have a claim against any other municipality" as being contrary to the statutes.
3. Is the case persuasive?
 - a. Through **1993 Wis. Act 238** (effective 04/24/94), **§ 895.46(1)(a)** was modified. The defense required to employees of a municipality was limited so that it "... does not apply to the extent that applicable insurance provides that representation".

- b. Moreover, League Opinion # 877 concludes that home rule municipalities contracting for mutual aid can vary from sec. 66.305(1) by agreeing that law enforcement officers responding to a request for assistance in another jurisdiction will continue to be employees of their employing municipality for all purposes at all times while within the municipality requesting assistance.

B. *Schaeffer v. Marathon County*, Case No. 97-C-394 (W.D. Wis. 11/13/97):

1. Basic facts are published in *Schaeffer v. Marathon County*, 145 F.3d 793 (7th Cir. 1998). Family sought to recover for fatal shooting which occurred during request for assistance to Marathon's SRT.
2. Court noted requesting agency (City of Schofield) and the responding agency (Marathon County) had concurrent jurisdiction and thus employee of Marathon County did not become an employee of Schofield despite **Wis. Stat. §66.0313** since these sections address officers performing outside their jurisdiction.

C. *Milwaukee County v. Juneau County*, 2004 WI App 23, 269 Wis. 2d 730, 676 N.W.2d 513:

1. Law enforcement officers pursued a murder suspect from Sauk County into Juneau County. Juneau County officers established a command post to coordinate search efforts by law enforcement personnel from multiple jurisdictions, including Sauk and Juneau Counties. At the request of a Juneau County officer, the Sauk County Sheriff used his agency to contact Milwaukee County officials and request the use of a helicopter to assist in the search. A helicopter, manned by two Milwaukee County deputy sheriffs, was sent to Juneau County and participated in the search. On its return trip to Milwaukee County, the helicopter crashed in Dodge County, killing both deputies aboard.
2. Milwaukee County paid workers compensation to the families, and Juneau County was required to reimburse Milwaukee per **Wis. Stat. § 66.0513**.
 - a. Although it was the Sauk County Sheriff who made contact with Milwaukee County, the sheriff was acting at the request of a Juneau County officer in charge of the command center in Juneau County. It is true that the Sauk County Sheriff suggested that Milwaukee County be contacted, but he nonetheless contacted Milwaukee County at the request of the Juneau County officer. The fact that Sauk County identified itself as the requesting agency on paperwork is immaterial.
 - b. The most reasonable interpretation of "commanded" in § 66.0513(2) is that it encompasses "ordered," "directed," and "requested." As a result, court rejected the argument that § 66.0513 distinguishes between compulsory police services required by command and voluntary police services rendered in response to a request.

D. *United States v. Mattes*, 687 F.2d 1039 (7th Cir. 1982):

1. Case involved a City of Milwaukee officer's investigation of a member of the Milwaukee Outlaws Motorcycle Club. His investigation began at a Milwaukee tavern and later in the day he arrested the suspect at a South Milwaukee tavern. A South Milwaukee police sergeant met with the Milwaukee officers in South Milwaukee, helped plan the strategy for entering the bar, and accompanied the Milwaukee officers into the bar when they arrested the suspect.
2. Court rejected the argument that the City of Milwaukee officer lacked authority to make an arrest in South Milwaukee (the argument was based on the general rule in Wisconsin that police officers have no authority outside of the political subdivision in which they are officers).
3. Court held that "implicit" requests satisfy Wis. Stat. § 66.0313 because the South Milwaukee officer's involvement was "certainly an implicit request for assistance." *See also State v. McNutt*, Wis. App. #85-2010, 04/15/1986 (unpublished) (Officer in one county could radio a request to a neighboring county deputy to stop suspected drunk driver; court found request for assistance was "implicit."); *State v. Liesner*, 131 Wis.2d 592, 393 N.W.2d 799 (App. 1986) (unpublished) (same).

V. MUTUAL ASSISTANCE AGREEMENTS AND SUGGESTIONS

- A. Remember:** the statutes establish terms where there is no agreement or may require certain terms.
- B. Freeburg's List:** Philip Freeburg, of the UW Extension – Local Government Law, has developed the following "Checklist" for § 66.0301 agreements:
 1. Parties (who);
 2. Purpose (why);
 3. Authorities (statutes, other agreements);
 4. Mutual consideration (both/all benefit);
 5. Duties and obligations described (what);
 6. Term (how long);
 7. Liability (assumed, recognized, insured);
 8. Integration (contract controls);
 9. Notices (to whom);

10. Amendments (how done);
11. Severability (contract remains);
12. Termination or withdrawal;
13. Default (why, how, cure); and
14. Execution (authority to sign).

C. NIMS Guidelines: FEMA’s “National Incident Management System Guideline for Mutual Aid” (2017) (<https://www.fema.gov/media-library/assets/documents/151799>) contains many suggestions for standard terms, such as:

- governance structure and oversight;
- protocols for communication;
- insurance;
- reimbursement;
- deployment;
- dispute resolution;
- amendments; and
- operational plans, among many others.

D. Common Pitfalls, Issues and Other Suggestions:

1. **Indemnification, Liability/Benefits and Insurance:** Does the agreement’s terms relating to indemnification contain ambiguity? Who is providing the indemnification? Should each be responsible “for their own” or agree to waive reimbursement for wages, benefits and the like? And, should each procure their own insurance policies for people and equipment? Or, is the “receiving” member indemnifying? Should each party be responsible for their own tortious acts of negligence or intentional conduct? Is it fair, such as a small town being obligated to indemnify a larger city or county? Often, there can be internal inconsistency and confusion among terms for indemnification, liability, worker’s compensation, wages, benefits, other cost recovery, and responsibility of insurers. Further, are the indemnifying insurer’s aware of the agreement? Full transfer of control of employees and the possibility of third-party liability and workers compensation can create uncontrolled exposure and unidentified limits to that insurer.
2. **Reconciliation with Other Related Agreements:** Where there are various agreements that overlap (such as NIMS, MABAS or some other local intergovernmental agreements) has there been reconciliation between these agreements? Are some outdated? Is more than one operable? Which agreement controls, especially if there are contradictory terms?
3. **Party Issues:** Who are the other signatory parties? Is there a governing body or executive board overseeing the mutual collaboration, and are appointed or elected

individuals actually and presently serving that body or board?

4. **Triggering Events and Control Decisions:** Especially for law enforcement, EMS, fire and the like, what triggers the sending of aid? Is it a dispatcher request? Is the agreement automatically triggered if a sending party makes a unilateral decision to send aid to the receiving party? Or, a request from command staff of the receiving party? Can a sending party refuse to send aid? Can a requesting party request a particular member or particular equipment/vehicles? Who is in control for the sending/receiving parties? Who are the decision-makers for the receiving jurisdictions, such as at the scene of the event/incident/issue? Does the agreement define and the circumstances under which he or she may exercise control and to what extent? Will request for additional personnel be treated the same as a request to mobilize a specialized unit (SWAT, HAZMAT, K-9)?
5. **Modifications:** How easy will it be to modify the agreement when the passage of time and evolving circumstances require adjustments in the relationships and scope, nature and level of cooperation?
6. **Keep it Simple:** Should detailed operational aspects of the cooperation agreement be incorporated directly into the agreement, or should they simply be incorporated by reference to a separate manual, policy or the like? Similarly, are bylaws necessary, are they in effect and should they be contained in separate documents?
7. **Maintain Discretion, Immunities and Caps:** Does the agreement contain any mandatory and ministerial terms that may create grounds for loss of immunity? Does the agreement preserve discretion on the part of all participants and decision-makers to the agreement? Does it specifically enumerate that the agreement preserves, and does not waive, all immunities, financial caps and other limitations and prerequisites of Wis. Stat. § 893.80 or any other statute protecting the municipality.

MUTUAL AID AND MUTUAL AID AGREEMENTS

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The Meaning of Insured Contract

By Marianne Bonner

Updated October 30, 2017

Insured contract is a defined term under the standard ISO general liability policy. Its meaning is important because it determines the types of contracts that are covered under contractual liability coverage. The term *insured contract* includes the six categories of contracts described below.

Lease of Premises

A lease gives you the right, in exchange for a fee, to use certain premises for the purposes outlined in the lease.

A lease of premises qualifies as an *insured contract*. However, the definition of this term specifically excludes that portion of any lease in which you agree to compensate a landlord for fire damage to the building.

For example, suppose that you lease a building from Tom. The lease requires you (the tenant) to indemnify Tom for any damage that occurs to the building during the term of the lease. Late one night, vagrants start a fire that causes damage to the building. The fire didn't result from your negligence. Nevertheless, you are obligated under the lease to reimburse the landlord for the damage. If Tom files a lawsuit against you demanding payment for the damage, your liability policy won't cover the loss. An agreement to indemnify the premises owner for damage by fire is not an *insured contract*.

In the previous example, suppose the fire broke out after an employee of yours disposed of a lit cigarette in a trash can.

In this case, the fire resulted from your firm's negligence (your company is liable for negligence committed by employees). Fire damage to rented premises for which you are legally liable under *common law* (not because of a contract) is covered under Bodily Injury and Property Damage Liability. This coverage is separate from contractual liability.

Sidetrack Agreement

A *sidetrack* is a short section of railroad that connects to the main track. It provides a business convenient access to a railroad. A *sidetrack agreement* is a contract in which a railroad allows a business entity to use the sidetrack. In exchange, the business promises to indemnify the railroad for any lawsuits that arise from the business' negligent use of the sidetrack. That is, if someone is injured on the sidetrack due to the business' negligence and sues the railroad, the business will pay the cost of the lawsuit.

Easement or License Agreement

An *easement* allows someone to use property that is owned by someone else. For instance, Bill has no direct access to his business property from the main road. Jeff owns commercial property adjacent to Bill's. The two sign an easement agreement in which Jeff allows Bill to use Jeff's driveway as a means of accessing Bill's property. Bill cannot use the driveway for any other purpose.

A *license* gives someone permission to use property for a specific purpose. For instance, a city gives a person a license to operate a barber shop at a specific location as long as certain requirements are met.

Obligations Required by Ordinance to Indemnify a Municipality

When a business engages in a hazardous activity inside a city, and the activity injures someone, the injured party may sue both the business and the city.

To protect themselves, cities often pass ordinances requiring businesses to indemnify them against third-party lawsuits that arise from the businesses' negligence.

For example, window washing is potentially hazardous, especially on tall buildings. Thus, a city might enact an ordinance that imposes an indemnification obligation on all window washers. If a window washer accidentally injures someone or damages someone's property while performing his work and the city is sued as a result, the window washer must pay the costs related to the suit. Because of the ordinance, the window washer must indemnify the city even though he or she has no specific contract with the city.

Elevator Maintenance Agreement

Building owners often hire elevator servicing contractors to maintain the elevators in their buildings.

In a typical elevator maintenance agreement, the contractor agrees to indemnify the building owner in the event the contractor accidentally injures someone or causes property damage, and the injured party sues the owner.

Blanket Assumption of Tort Liability

This is a catch-all category that includes all contracts in which you (the named insured) assume the tort liability of someone else. That is, it includes any contract in which you agree to indemnify another party for the cost of a claim or suit against that party by someone who has suffered bodily injury or property damage due to your negligence.

For example, suppose that Larry's Landscaping rents a lawn mower from Edwards Equipment. Edwards requires Larry to sign a contract containing an indemnity agreement. In the agreement, Larry promises to indemnify Edwards if Larry's Landscaping accidentally causes bodily injury or property damage to a third party while using the lawnmower, and the injured party seeks

restitution from Edwards Equipment. The contract meets the requirements for coverage under the landscaping firm's contractual liability insurance.

The coverage afforded for the last group of covered contracts is often called *blanket contractual liability* coverage. It is called *blanket* coverage because it includes all contracts that meet the description outlined above. These contracts are covered automatically and need not be listed on the policy.

The catch-all category of contracts includes virtually any agreement to indemnify another party except for the following:

1. An **agreement to indemnify a railroad** for bodily injury or property damage arising out of construction or demolition operations, within 50 feet of any railroad property. For example, suppose you are a paving contractor. Your firm has been hired by a city to repave a road that crosses a railroad track. Before you can proceed with the work, the railroad requires you sign an indemnity agreement protecting it from lawsuits. By signing the contract, you promise to indemnify the railroad for the cost of any lawsuits by third parties who have been injured as a result of your work. The indemnity agreement is not an *insured contract* under your liability policy.
2. An **agreement to indemnify an architect, engineer or surveyor** for injury arising out of his or her professional acts. Professional liability is not covered under your general liability policy.
3. **Agreements to indemnify someone else for injury arising out of your professional acts** as an architect, engineer or surveyor. Professional acts are not covered by your general liability policy, whether they are committed by you or someone else.

League of Wisconsin Municipalities Mutual Insurance

SPECIAL COVERAGE FORM

COVERAGE A — BODILY INJURY AND PROPERTY DAMAGE LIABILITY

2. Exclusions

b. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of employment by the insured;
 - I. However, "Employee," for purposes of this exclusion does not include a "leased employee" or a "temporary worker."
- (2) Any volunteer for whom you are legally required to provide insurance under any workers compensation or disability benefits law or similar laws, arising out of and in the course of their duties for any insured; or
- (3) The spouse, child, parent, brother or sister of that "employee" or volunteer as a consequence of paragraphs (1) and (2) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) 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 liability assumed by the insured under an "insured contract".

SECTION II — GENERAL EXCLUSIONS

3. **Contractual Liability** Liability for payment of contractual obligation for goods and services which the insured is obligated to pay by reason of contract or agreement. **This exclusion does not apply to liability for damages:**
 - a. That the insured would have in the absence of the contract or agreement;
 - b. Assumed in a contract or agreement that is an "insured contract", provided the liability or damage occurs subsequent to the execution of the contract or agreement; or
 - c. **Assumed in any joint powers or mutual aid agreements for tort damages**

SECTION VI — DEFINITIONS

1. "Insured contract" means:
 - a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises

while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

- b. A sidetrack agreement; An easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- c. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- d. An elevator maintenance agreement;
- e. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury", "property damage" or "personal and advertising injury" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
 - (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
 - (2) Under which the insured, if an architect, engineer or surveyor, assumes liability for any injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.
- g. That part of any contract or agreement entered into, as part of your business, pertaining to the rental or lease, by you or any of your "employees", of any "auto".
- However, such contract or agreement shall not be considered an "insured contract" to the extent that it obligates you or any of your "employees" to pay for "property damage" to any "auto" rented or leased by you or any of your "employees."

Recommended Language

SECTION SEVEN

Liability and Risk Allocation

Immunity

All members are governmental entities entitled to governmental immunities under law, including but not limited to Section 893.80, Wis. Stats. Nothing contained herein shall waive the rights of defenses to which each Member may be entitled under law, including but not limited to all immunities, limitations, and defense under section 893.80, Wis. Status. Or any subsequent amendments thereof.

Member Responsible for Own Actions.

Each member shall bear the risk of its own actions, as it does with its day-to-day operations

Old Language:

**ARTICLE VIII
RISK ALLOCATION**

8.1 **Immunity.** All Members are governmental entitie entitled to governmental immunity under common law and under Section 893.80, Wis. Stats. Nothing contained herein shall waive the rights and defenses to which each Member may otherwise be entitled, including all of the immunities, limitations, and defenses under Section 893.80, Wis. Stats.(2005-2006), or any subsequent amendments thereof.

8.2 **Indemnification.** The Receiving Member agrees to protect, defend, indemnify, and hold harmless the Responding Member, and its officials, officers, employees, agents, authorized representatives or volunteers, from and against any and all claims, demands, losses, damages, costs and liabilities of every kind, including, but not limited to, attorney's fees and costs of litigation, directly or indirectly arising from the Responding Member's provision of aid or assistance to the Receiving Member during a Period of Assistance. The scope of the Receiving Member's duty to indemnify includes, but is not limited to, suits arising from, or related to, negligent or wrongful use of equipment or supplies on loan to the Receiving Member, or faulty workmanship or other negligent acts, errors, or omissions by the Responding Member's personnel. The Receiving Member shall not be required to defend and indemnify the Responding Member for any willful or wanton misconduct of the Responding Member or its officers, employees, agents, authorized representatives or volunteers. In addition, the Receiving Member shall, under no circumstances, be required to pay on behalf of itself and other parties, any amounts in excess of the limits of liability established in §893.80(3), Wis. Stats., applicable to any one party. The purpose of creating this duty to defend and indemnify is to simplify the defense of claims by eliminating conflicts among defendants and to permit liability claims against multiple defendants from a single occurrence to be defended by a single attorney. The Receiving Member's duty to indemnify is subject to, and shall be applied consistent with, the conditions set forth in Sections 8.3 and 8.4.

8.3 **Damage to Equipment.** Each Member shall be responsible for damages to or loss of its own equipment. Each Member waives the right to sue any other Member for any damages to or loss of its equipment, even if the damages or losses were caused wholly or partially by the negligence of any other Member or its officers, employees, or volunteers.

8.4 **Worker's Compensation Claims.** Each Member shall be responsible for injuries or death of its own personnel. Each Member will maintain workers' compensation insurance covering its personnel while they are providing assistance pursuant to this Agreement. Each Member waives the right to sue another Member for any workers' compensation benefits paid to its own personnel while they are providing assistance pursuant to this Agreement. Each Member also waives the right to sue another Member for any workers' compensation benefits paid to its own employee or volunteer or their dependents, even if the injuries were caused wholly or partially by the negligence of another Member or its officers, employees or volunteers.

8.5 **Insurance.** Members shall maintain an insurance policy or maintain a self insurance program that covers activities that it may undertake by virtue of membership in WisWARN.

8.6 Survival of Obligations. The obligations set forth in this Article VIII shall survive the termination or expiration of this Agreement.