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April 7, 2011

Regina Moore, President
Cost Recovery Corporation
8 N. Limestone St. Suite E
Springfield OH 45502-1132

RE: Recovery of Municipal Safety Force Services

Dear Ms. Moore:

I have been provided several letters from insurance companies and/or their legal representatives, objecting to their clients' obligations to reimburse municipalities for the costs related to their safety force services in responding to situations that are the direct and proximate result of the negligence of their insured or client. I have researched each of their arguments and find them to be totally without merit. In fact, refusal to honor your claims on behalf of the public entities could be interpreted as "bad faith" and subject them to payment of all attorney's fees.

I will address each of their arguments with accurate legal authority applicable to each and same is set forth as follows:

I: Case law and statutory law indicates that negligent individuals are responsible for reimbursement of damages caused to others as a direct and proximate cause of their negligence

In *Mudrich v. Standard Oil Co*., the Ohio Supreme Court held that a defendant who negligently spilled gasoline and left it in pools on the ground, "would be liable for any damages which were the proximate result of such negligence." *Mudrich v. Standard Oil Co*. (1950), 153 Ohio St. 31, 36. Likewise, in *Strother v. Hutchinson*, the Ohio Supreme Court stated that:

> [T]he rule is elementary, that a defendant in an action for negligence can be held to respond in damages only for the immediate and proximate result of the negligent act complained of, and in determining what is direct and proximate cause, the rule requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act.

Strother v. Hutchinson (1981), 67 Ohio St. 2d 282, 287.

A negligent tortfeasor should foresee and anticipate that emergency response services will be required following his negligent act. A reasonable person should anticipate that police and/or EMS will be required as a "natural and probable consequence" of a car accident or other negligent act.

Additionally, the United States Supreme Court has noted that "[i]t is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts: assuming the existence of a threshold tort ...whatever damages flow from it are recoverable." *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 120 (1963).

Additionally, R.C. § 2307.22 makes defendants who are found jointly liable for tortuous conduct liable for their proportionate share of the compensatory damages that represent the plaintiff's economic loss.

II: There is no support for insurance companies' contentions that RC 737.11 requires Fire Departments to protect life and property without being reimbursed, and that free public service is mandated

In State Farm's letter of December 20, 2010, they cite to the *City of Cincinnati v. Beretta* (2002), 95 Ohio St.3d 416, an Ohio Supreme Court case which quotes another court's statement that: "[T]he cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. Where such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement."

City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322, 323 (9th Cir. 1983) (citation omitted). However, immediately following this citation to *Flagstaff*, the Ohio Supreme Court held that "[a]lthough a municipality cannot reasonably expect to recover the costs of city services whenever a tortfeasor causes harm to the public," the government may recoup costs where the tortfeasor's conduct is continuing in nature. *Beretta*, 95 Ohio St.3d 416, 428. Additionally, it is important to note that the court in *Flagstaff* stated that **a governmental entity is not always prohibited from recovering the cost of its services.** *Flagstaff*, 719 F.2d 322, 324. **The court recognized specific exceptions where a governmental entity could recover response costs, including: (1) where recovery is authorized by statute or regulation;** (2) where the acts of a private party create a public nuisance which the government seeks to abate; and (3) where the government incurs expenses to protect its own property. *Id.*

In 2000, the U.S District Court for the Northern District of Ohio held that the city of Cleveland could potentially recover from a firearms manufacturer for police, medical, fire, and emergency services that the city provided as a result of the manufacturer's negligence. *White v. Smith & Wesson*, 97 F. Supp.2d 816 (N.D. Ohio 2000). In *Smith & Wesson*, the court explicitly **rejected** the defendant's argument that municipalities should be prohibited from recovering for response costs "because these are 'the kinds of traditional services and functions that a

municipality is expected to provide' and which 'are most efficiently and fairly spread among the public.'" *Id.* at 822. The court rejected defendant's reliance on the *Flagstaff* case, stating "[n]ot only is this broad rule [of tortfeasor non-liability for response costs] not the law in Ohio, the *Flagstaff* court noted an exception from their rule, applicable to the matter at hand . . . ." *Id.* at n.9. This decision, although pre-dating *Beretta*, is still the applicable law on this issue.

Additionally, a survey of case law in other jurisdictions indicates that courts recognize that the issue is one that is properly governed by local law. For example, the U.S. Court of Appeals for the District of Columbia has stated that:

> "The question of whether a municipality may recover the cost of police and other emergency services from a tortfeasor is governed by local law . . . [It] is within the power of the government to protect itself from extraordinary emergency expenses by passing statutes or regulations that permit recovery from negligent parties."

District of Columbia v. Air Florida, 750 F.2d 1077, 1079-80 (D.C. Cir. 1984). In *Air Florida*, the court denied recovery to the municipality because recovery was not specifically authorized by statute or regulation. *Id.* at 1080. The court noted that "the city clearly has recourse to legislative initiative to eliminate or reduce the economic burdens of accidents . . . ." *Id.* Furthermore, a California court of appeals has held that "recovery for fire suppression expenses by a state or other public agency is a creature of statute." *People v. Wilson*, 240 Cal. App.2d 574, 576-77 (Ct. Apps. 1966). Additionally, as stated above, the *Flagstaff* court noted that an exception to tortfeasor non-liability would apply where recovery is authorized by statute or regulation. *Flagstaff,* 719 F.2d 322, 324.

The State Farm letter also states that Ohio has adopted the "Free Public Service Doctrine." While I assume that State Farm is referring to the Court's decision in *Beretta*, the *Beretta* court actually provided that the city of Cincinnati could recover response costs under the circumstances of that case. Furthermore, the *Beretta* Court does not once use the phrase "Free Public Service Doctrine," and a search of all Ohio law reveals that there is no Ohio case that refers to the "Free Public Service Doctrine."

III: Cost Recovery Corporation's authority to collect reimbursement for Municipalities is not an illegal tax

According to the Ohio Supreme Court, "[a] fee is a charge imposed by a government in return for a service it provides; a fee is not a tax." *State ex. rel. Petroleum Underground Storage Tank Release Compensation Bd. v. Withrow* (1991), 62 Ohio St.3d 111, 113 (quoting *Cincinnati v. Roettinger* (1922), 105 Ohio St. 145, 153). Under the Court's definition of a fee, the charge that Cost Recovery Corp. collects on behalf of municipalities constitutes a fee because it is a charge for the response services that the municipality has provided and for the expenses that the city has incurred in providing those services. While the Court has stated that "[i]t is not possible to come up with a single test that will correctly distinguish a tax from a fee in all situations where the words 'tax' and 'fee' arise," when distinguishing between a tax and a fee, the Court

has considered "whether the assessment generates excess funds which are to be placed in the General Fund." *Id.* at 117, 115. In *Withrow,* the Court held that assessments collected by the Petroleum Underground Storage Tank Release Compensation Board as part of its Assurance Fund for the issuance of revenue bonds were fees rather than taxes. *Id.* at 113, 117. In making this determination, the Court noted that "[t]hese assessments are never placed in the General Fund . . . and they are to be used only for narrow and specific purposes . . . ." *Id.* at 116-17. Furthermore, the Court noted that "the assessment appears to function more as a fee than as a tax, because a specific charge for a service is involved." *Id.* at 117. Additionally, in *Roettinger*, the Ohio Supreme Court stated that "it is quite well settled that charges for services and conveniences rendered and furnished by a municipality to its inhabitants are not taxes . . ." *Roettinger*, 105 Ohio St. 145, 153. However, the Court has held that a fee is actually a tax "if it exceeds the 'cost and expense' to government of providing the service in question.'" *Granzow v. Bureau of Spport of Montgomery Cnty.* (1990), 54 Ohio St.3d 35, 38 (citing *State ex. rel. Gordon v. Rhodes* (1952), 158 Ohio St. 129).

Like the assessments in *Withrow*, the charges collected by Cost Recovery Corp. are never placed in the General Fund, but rather go directly to reimburse the safety forces for the services they provided and any expenses they incurred in providing those services. As such, the charges collected by Cost Recovery Corp. are "to be used only for narrow and specific purposes . . .," like the assessments collected by the Assurance Fund in *Withrow. See Withrow*, 62 Ohio St.3d at 116-17. Like the assessments in *Withrow*, the charges collected by Cost Recovery Corp. "appear[] to function more as a fee than as a tax, because a specific charge for a service is involved." *Id.* at 117. Additionally, the charges collected by Cost Recovery Corp. do not exceed the cost that the municipality has incurred in providing the response services. Because the fee does not "exceed[] the 'cost and expense' to government of providing the service in question,'" the fee is not actually a tax disguised as a fee. *See Granzow*, 54 Ohio St.3d at 38.

IV: The Reimbursement by Insurance Companies is not "Double Taxation"

In its December 20, 2010 letter, State Farm makes the argument that Cost Recovery's charges constitute a double tax on State Farm because the company already pays a franchise tax to the State of Ohio pursuant to R.C. Chapter 5279. Revised Code § 5729.02-.03 provides the state with authority to tax the gross amount of premiums collected by foreign insurance companies. Revised Code § 5729.03 provides that this tax is meant to be "a tax upon the business done by it [the insurance company] in the state." There is nothing in R.C. § 5729.03, or the case law interpreting it, which indicates that the franchise tax is intended to cover police and fire service that is provided to the company's clients. The franchise tax is a tax upon the insurance company for the privilege of doing business in the State of Ohio.

Additionally, the insurance companies make the argument that Cost Recovery Corp.'s charges constitute a double tax because police and fire services are already funded by tax dollars. However, in a somewhat similar factual scenario, a Warren County court of appeals recently held that Hamilton Township was not prohibited from imposing "impact fees" upon anyone who applies for a zoning certificate for new construction or redevelopment within its unincorporated areas. *Drees Co. v. Hamilton Twp.* (App. 12 Dist. 2010), 2010 Ohio 3473. The impact fees

where charged by the township before a zoning certificate would be issued and were intended to "'offset increased services and improvements needed because of the development.'" *Id.* at ¶ 5. The fees were intended to support road, fire, police, and park services. *Id.* at ¶ 4. The court held that the charge was a fee and not a tax, taking into consideration the fact the charges were never placed in the general fund and were to be used for narrow and specific purposes related to services provided by the township. *Id.* at ¶¶ 14-20. The plaintiffs argued that the charges attempted to raise revenues by means other than those authorized by statute as the sole means to fund zoning, roads, police, fire, and parks systems. *Id.* at ¶ 21. Specifically, the plaintiffs cited, among other provisions, R.C. §505.39, which provides townships with authority to levy taxes to provide fire protection, and R.C. § 511.27, which provides townships with authority to levy taxes to defray expenses related to park districts. *Id.* at n. 3. However, the court rejected the plaintiffs' argument that townships could only fund fire and park services through tax dollars raised pursuant to these provisions. *Id.* at ¶ 21. The court stated, "none of these provisions expressly prohibit townships from charging impact fees to fund these services, nor do they provide for the exclusive means by which these services must be funded." *Id.* Therefore, while fire and police services were already being partially funded through taxes, the court held that the township could also impose impact fees to cover the increased cost of these services caused by new development. The *Drees* case is good law, but it is currently being appealed.

V: Arguments that Cost Recovery Charges Violate Due Process

A Columbus law firm on December 27, 2010 argued that Cost Recovery Corporation's charges violate due process because they assess liability without a hearing and "usurp[] the role of the judicial process."

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." The Columbus firm is making a procedural due process argument because "[w]hen the claim of denial of due process rests on the deprivation of a property interest alone, the constitutional right invoked is the procedural due process right to notice and a hearing." *Cahill v. Vill. of Lewisburg* (App. 12th Dist. 1992), 79 Ohio App.3d 109, 118 (*citing Shirokey v. Marth* (1992), 63 Ohio St.3d 113, 118). In *Peoples Rights Org. v. Montgomery*, plaintiffs contended that the imposition of a "Brady fee" by the state to recover costs to conduct background searches for the purchase of handguns violated their procedural due process rights. *Peoples Rights Org. v. Montgomery* (App. 12th Dist. 2001), 142 Ohio App.3d 443. In considering whether plaintiffs had been denied procedural due process, the court noted that "'where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.'" *Id.* at 498 (*quoting Parratt v. Taylor* (1981), 451 U.S. 527 at 539-40). The court noted that the Supreme Court has rejected the idea that due process always requires a predeprivation hearing because of "'the impracticability in some cases of providing any pre-seizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.'" *Id.* (*quoting Parratt*, 451 U.S. at 540-41). While the court in *Montgomery* found that plaintiffs were not provided a predeprivation remedy to object to the Brady fee, the court held that plaintiffs' due process rights were not violated because they

had been provided an adequate postdeprivation remedy. *Id.* at 503. The court held that the state had provided plaintiffs with adequate statutory postdeprivation remedy.

Like the plaintiffs in *Montgomery*, tortfeasors affected by the charges collected by Cost Recovery Corp. can seek to challenge the validity of the ordinance authorizing these charges pursuant to R.C. §§ 2721.03 and 2723.01. Therefore, tortfeasors are provided adequate postdeprivation remedies and are not denied procedural due process.

VI: The argument that emergency response is a governmental function supported by taxes and, therefore, not recoverable, is NOT the law

The same Columbus firm argues that responding to motor vehicle accidents is a governmental function and that charging for such services constitutes "double taxation". (See Response No. IV). Additionally, the firm argues that if responding to motor vehicle accidents is a proprietary function, police would lose their governmental immunity when responding to such calls. **This is simply an inaccurate statement of the law**. The Ohio Supreme Court has stated, "the general rule [is] that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function." *Colbert v. City of Cleveland* (2003), 99 Ohio St.3d 215, 216. R.C. § 2744.02 provides that, absent certain exceptions, political subdivisions are:

> Not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

Regardless of the Columbus firm's misstatement of the law, responding to emergencies is in fact a governmental function under R.C. § 2744.01. Revised Code § 2744.01(C)(2)(A) provides that a "governmental function" includes "the provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection." However, the firm appears to be arguing that since police response is a governmental function, fees cannot be imposed for such services. The firm appears to be arguing that charging fees for a governmental function transforms the governmental function into a proprietary function. The firm cites no statutory or case law to support such an argument. We have found several cases that refute such an argument.

For example, in *Doyle v. City of Akron*, a wrongful death action against the city of Akron, the plaintiff argued that the city's activities in operating a camping facility constituted a proprietary function rather than a governmental function. *Doyle v. City of Akron* (App. 11 Dist. 1995), 104 Ohio App.3d 479, 481. The court noted that the plaintiff based that argument "solely upon the collection of a fee from the campers who use the park." *Id.* The court rejected this argument, stating that the issue of the fee was "not dispositive of the question" of whether the government was performing a governmental or proprietary function. *Id.* Likewise, in *Siebenaler v. Vill. Of Montpelier*, the court held that administration of swimming lessons, "irrespective of whether a fee is charged," constitutes a governmental function. *Siebenaler v. Vill. Of Montpelier* (App. 6th Dist. 1996), 113 Ohio App.3d 120, 124. Furthermore, in *Drees*, discussed

above, the court held that the township could collect "impact fees" to offset the costs of fire, police, park, zoning, and road services, all of which are expressly designated as governmental functions by R.C. § 2744.01((C)(2).

VII: The argument that Party cannot be charged for municipal services because the party did not call for assistance

The Columbus firm also argues that their client should not be charged for response services because their client never requested such services. However, based upon restitution principles, this is clearly an absurd argument. The municipality has conferred a benefit on the tortfeasor, regardless of whether or not such a benefit was requested. Furthermore, police and fire departments have a statutory duty under R.C. § 737.11 to protect life and property. Therefore, the police and fire responding to an accident are performing their statutory duty, regardless of whether they received a call about the accident or showed up on the scene voluntarily.

Furthermore, statutes such as R.C. §§ 1503.24 and 3737.89 impose liability for expenses incurred by fire departments in responding to fires cause by railroad companies or petroleum spills. Neither statute contains a requirement that the responsible party have called the fire department for assistance before liability can be imposed. Clearly, such a requirement would be absurd due to the statutory duty of fire departments to protect life and property. The wrongdoer should not be given the power to determine if and when emergency response services are needed. This responsibility rests in the police and fire departments.

VIII: Argument that municipal reimbursement charges violate equal protection

State Auto Insurance Company's attorney in a letter dated July 13, 2009 argues that the charges imposed by Cost Recovery Corp. violate equal protection by requiring individuals involved in an accident to "pay again for usual and necessary governmental services already funded by tax revenue."

The Fourteenth Amendment requires states to afford "to any person within its jurisdiction the equal protection of the laws." The Ohio Supreme Court has noted that the Fourteenth Amendment does not prohibit states from drawing classifications among citizens and that "[c]ities and states are free to draw distinctions in how they treat certain citizens." *Park Corp. v. City of Brook Park* (2004), 102 Ohio St.3d 166, 2004-Ohio-2237 ¶ 19. The U.S. Supreme Court has noted that the Fourteenth Amendment does not forbid classifications, but rather "keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *Id.* (*quoting Nordlingler v. Hahn* (1992), 505 U.S. 1, 10). The Ohio Supreme Court has noted that in most cases courts give a large amount of deference to legislatures when reviewing a statute under an equal protection claim. *Id.* at ¶ 20. If a statute does not jeopardize a fundamental right or categorize on the basis of an inherently suspect characteristic, "'the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.* (*quoting Nordlingler v. Hahn* (1992), 505 U.S. 1, 10). According to the U.S. Supreme Court, the Equal Protection Clause is satisfied:

> [S]o long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger, 505 U.S. 1, 11-12.

Under the discretionary standard set forth by the Supreme Court, the charges imposed by Cost Recovery Corp. clearly do not violate the Equal Protection Clause. Municipalities are not prohibited from drawing distinctions among citizens as long as the distinctions are not based on "an inherently suspect characteristic" and "further a legitimate state interest." Here, the charges recovered by Cost Recovery Corp. clearly are not based on an inherently suspect characteristic such as race, gender, religion, or national origin. The distinction imposed by the ordinance is based on whether one negligently causes an automobile accident. Furthermore, the distinction furthers a legitimate state interest in obtaining restitution for the expenses that the municipality incurs in responding to accidents. Given the economic challenges faced by municipalities, they have a legitimate interest in recovering such costs so that they can continue to provide ordinary police and fire protection to their citizens, and to gather reports and investigatory materials used by the parties and their insurance carriers.

IX: Attorney's fees may be awarded in cases of insurance company bad faith refusal to pay Cost Recovery invoices

In *Zoppo v. Homestead Ins. Co,* the Ohio Supreme Court stated that "'an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor.'" *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 554 (citing *Staff Builders, Inc. v. Armstrong* (1988), 37 Ohio St.3d 298, 303). The Court went on to state that "[a]ttorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted." Citing *Zoppo*, the 6th District Court of Appeals affirmed an award of $71,075 in attorney fees in an insurance bad faith action against State Farm. *Furr v. State Farm Mut. Auto. Ins. Co.* (App. 6 Dist. 1998), 128 Ohio App.3d 607, 627-28. The court noted that "an insurer that acts in bad faith is liable for those compensatory damages, including attorney fees, flowing from the bad faith conduct of the insurer and caused by the insurer's breach of contract." *Id.* at 627.

Furthermore, in *Motorists Mut. Ins. Co. v. Brandenburg*, the Ohio Supreme Court stated that "[i]t is beyond dispute that questions concerning insurance policies are within the purview of R.C. Chapter 2721 [covering declaratory judgments]." *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157, 159. The Court went on to explain that "R.C. 2721.09 plainly permits a trial court, following a binding judicial interpretation of an insurance policy based upon a declaratory judgment action, to provide relief which the court deems 'necessary or proper.'" *Id.* Based upon R.C. § 2721.09's "necessary or proper" language, the Court held that a trial court has authority to asses attorney fees based on a declaratory judgment issued by the court. *Id.* at 160. The Court noted that in cases of insurance bad faith, plaintiffs often have to

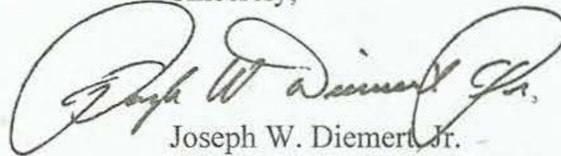
retain counsel and expend a great deal of money to affect recovery, placing them in a position where they "would have been far better off if they had been without insurance." *Id.*

X: Conclusion

The numerous other rejection letters from insurance companies have all used similar arguments to those refuted above. In addition, the goal of insurance companies to avoid the obligation of their negligent insured is clearly a breach of their contract to the insured, and a bad faith attempt to make the taxpayers as a whole pick up the tab for obligations the insurance companies have been paid significant premiums to cover. These same companies demand and receive the results of these services which mitigate the charges incurred by them for injuries to persons and property. They also demand and receive the results of professional investigations, reports and documentary evidence used by the companies to determine respective liabilities of competing companies. It is outrageous for them to suggest that others pay their bills.

In this time of municipal fiscal constraint, the ability to provide adequate protection to citizens from crime and Acts of God is being threatened. Insurance companies should not be demanding a free ride for the negligence of their insureds that they contracted to cover, and for which public entities are third party beneficiaries.

Sincerely,



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