

Litigation as a Budgetary Constraint: Problem Areas and Costs

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To what extent have litigation costs affected municipal budgets? How often and to what degree does a jurisdiction have to amend its budget due to unanticipated legal costs? What factors and what types of cases have contributed most to rising litigation costs? What functional areas of the budget have been hardest hit? What has been the effect on a jurisdiction's insurance costs and bond ratings? What strategies have local governments adopted to reduce litigation costs? Susan A. MacManus and Patricia A. Turner surveyed attorneys serving as counsels to cities, counties, and special districts and found that litigation costs have indeed escalated significantly in recent years for a variety of reasons. These costs have had major impacts on local government budget outcomes and processes, thereby forcing local governments to search for legal cost containment mechanisms. They also uncovered a vicious cycle of governments settling cases just to save money, which, in turn, increases the number of cases (often frivolous) filed against a jurisdiction.

“Unpredictable,” “uncontrollable,” and “unstoppable”—these are words commonly heard from public sector attorneys and fiscal officers to describe the impact of litigation costs on local government budgets. A 1988 article appearing in *The National Law Journal*, which reflected on rising litigation costs in the 1980s, projected that there would be a “municipal litigation crisis by the 1990s” for both large and small jurisdictions (Blum, 1988 p. 1). We are interested in the degree to which this prediction has already come true and the impact on local government budgetary and financial operations.

The Key Questions

A survey of the membership of the National Institute of Municipal Law Officers (NIMLO), conducted August-October 1992, (see grey box on page 464) is the basis for our answers to these key questions: What has been the percentage increase in litigation costs over the past two fiscal years? To what extent did litigation costs (including damages and awards) affect local government budgets in FY 1991? What was the dollar estimate of total litigation costs (including judgments) in FY 1991? What was the dollar value of the single most expensive case confronting a jurisdiction?

We also respond to these important questions: How often does a jurisdiction have to amend its budget during the fiscal year due to litigation costs? How large are these budgetary amendments? Which factors have contributed most to rising litigation costs? Which types of cases have been most responsible for these rising costs? What has been the impact of litigation costs on a jurisdiction's insurance costs and bond rating? What strategies have local governments adopted to reduce litigation costs?

Increases in Litigation Costs over Past Two Years

To document the extent to which litigation costs have continued to escalate in the early 1990s, we asked each respondent "to estimate the percentage increase in your jurisdiction's litigation costs over the past two years." The results show that the tendency to "sue city hall" continues in the 1990s. In over half of the local governments, litigation costs have increased 10 percent or more over the past two years; for 19.3 percent the increases exceeded 30 percent; and for an unfortunate 6.6 percent, the increases were 50 percent or more. Only 11.8 percent reported no increases. Thus, for most local governments, litigation costs have continued to rise in excess of inflation rates in the 1990s. It is likely that in many jurisdictions, especially in the poorer ones, the rate of increase has also outstripped the rate of increase in revenues.

Increases Sharpest in Poorer Jurisdictions

Among governments experiencing the sharpest litigation cost increases, 40 percent classified their fiscal condition as only "poor or fair" in contrast to only 8 percent of those who reported no increases (Table 1).¹ Of course, it is difficult to say which came first—rapidly rising litigation costs or a weak fiscal environment. But in such an environment, any increase is likely to have a much more damaging effect on the budget.

Population Size Effects

There was a slight tendency for the largest jurisdictions (over 1 million population; budgets in excess of \$250 million) to experience steeper increases in litigation costs. However, the relationship between population size (and budget size) and litigation costs increases is not statistically significant. The sharper rate of increase in litigation-related expenses in the largest jurisdictions was probably a consequence of exponentially more complex (and thus more expensive) cases in such places. On the other hand, they may have been in a better position to handle these costs. Thus, it is also important to look at the impact such costs have had on a jurisdiction's budget.

Impact of Litigation Costs on Last Year's Budget

To determine the budgetary significance of rising litigation costs, we asked our respondents to tell us "To what extent have litigation costs (including damages and awards) affected your local government's budget this past year?" In one-fifth (20.3 percent) of the jurisdictions, litigation costs impacted on their budget *a lot*. In another 66.3 percent, these costs had *some impact*. Only 13.4 percent reported *no* litigation cost budgetary *impact* in FY 1991.

Poorer Jurisdictions Hit Hardest

Hardest hit have been local governments in poor or fair fiscal condition. In fact, three-fourths of those jurisdictions in which litigation costs have impacted *a lot* were in poor or fair fiscal condition compared with only 8.2 percent of those reporting *no* budgetary impact (Table 2).²

Table 1
Increase in Local Government Litigation Costs, 1991-1992

Jurisdiction Characteristic	Percent Increase in Litigation Costs				
	0	1-9	10-29	30-50	50+
All (n = 234)	11.8	33.2	35.8	12.7	6.6
Fiscal Condition* (n = 224)					
Poor	0	1.4	6.2	13.8	6.7
Fair	8.0	18.9	29.6	13.8	33.3
Good	28.0	37.8	39.5	31.0	40.0
Excellent	64.0	41.9	24.7	41.4	20.0
Population Size (n = 224)					
Less than 10,000	19.2	27.0	11.1	21.4	26.7
10,000-24,999	15.4	5.4	7.4	7.1	6.7
25,000-49,999	26.9	20.3	21.0	25.0	26.7
50,000-99,999	26.9	25.7	32.1	14.3	26.7
100,000-499,999	7.7	14.9	24.7	21.4	6.7
500,000-999,999	0	4.1	3.7	3.6	0
1 million or more	3.8	2.7	0	7.1	6.7
1992 Budget (n = 216)					
Less than \$10 million	29.2	18.1	10.3	25.0	14.3
\$10-24 million	12.5	29.2	20.5	21.4	14.3
\$25-40 million	20.8	18.1	24.4	14.3	42.9
\$50-99 million	20.8	16.7	21.8	7.1	14.3
\$100-250 million	12.5	9.7	15.4	28.6	7.1
More than \$250 million	4.2	8.3	7.7	3.6	7.1
Type of Government (n = 221)					
City	96.2	91.8	93.7	96.4	93.3
County	3.8	6.8	6.3	3.6	6.7
Special District	0	1.4	0	0	0

Notes: Respondents were asked, "What is the estimated percent increase in your jurisdiction's litigation costs over the past two years?"

* Relationship is statistically significant at .05 level.

Source: Survey of members of the National Institute of Municipal Law Officers, August-October 1992, designed by Susan A. MacManus, University of South Florida, Tampa.

Very Smallest and Largest Jurisdictions Most Severely Impacted

The very smallest and the very largest jurisdictions have been affected most severely by rising litigation costs. Last fiscal year, 22.2 percent of those with populations below 10,000, and 33.3 percent with populations in excess of 1 million experienced major budgetary impacts. In contrast, among jurisdictions reporting that litigation costs had no budgetary impacts, only 8.9 percent were below 10,000 population and 16.7 percent were over 1 million. A similar, although less striking, pattern appears with regard to budgetary size (Table 2).³

Counties More Negatively Impacted Than Cities

Our survey shows that the budgets of a higher proportion of counties than cities have been hit harder by rising litigation costs (53.8 percent v. 19.0 percent).⁴ Some of this differential is attributable to size effects.⁵

The survey, designed by the authors with the assistance of NIMLO officials, public sector attorneys, and local government budget officers, was mailed to the entire NIMLO membership (1,348, excluding group and institutional members and Canadian members for whom the survey did not appear relevant since only five returned the questionnaire). The mailing was done by NIMLO under a cover letter from the Executive Director. Respondents were instructed to return the survey directly to NIMLO. The response rate (n = 234) was 17.4 percent (17.0 percent excluding the five Canadian responses), just below the 23.8 percent average response rate for mail surveys with no follow-up—and no stamped addressed return envelope—but higher than for most large-scale associational membership mail surveys. (See Nachmias and Nachmias, 1992, for average survey return rates.) The respondents closely mirror the NIMLO membership in terms of local government affiliation. Of the NIMLO members, 95.3 percent are counsel to municipalities, 4.2 percent to counties, and 0.5 percent to special districts (not including school districts). Among our survey respondents, 93.8 percent are counsel to municipalities, 5.8 percent to counties, and 0.4 percent to special districts. Forty-six states are represented among our respondents. It should be made clear that, while our sample is representative of the NIMLO membership at-large, we have no basis on which to make judgments regarding how representative NIMLO's membership is vis-a-vis all cities, counties, and special districts.

In summary, the "biggest budgetary hit" has been taken by financially weaker jurisdictions, usually the very smallest and the very largest ones. Counties were somewhat more likely than cities to have experienced major litigation-related budgetary impacts in FY 1991.

Total Litigation Costs in FY 1991

In an effort to put a dollar figure on litigation-related costs, we asked each respondent to "estimate your jurisdiction's total litigation costs (including judgments) last fiscal year." Obviously, the larger the jurisdiction, the higher the litigation costs whether size is measured in terms of population or budget. For example, over 90 percent of the jurisdictions with populations below 10,000 reported that their litigation costs last year were less than \$500,000. In contrast, all those with populations over 1 million indicated they had litigation costs in the millions of dollars. Again, similar patterns are observable when we break out litigation costs by the size of a jurisdiction's budget.⁶

Rough Estimate: Total Litigation Costs FY 1991

Using such figures, it is possible to calculate a *rough* estimate of the total dollar value of litigation costs to U.S. cities and counties in FY 1991. If we multiply the number of cities (and counties) in each population size group by the midpoint of each litigation cost category, we come up with a figure of \$6.45 billion for 19,252 cities and \$2.1 billion for the nation's 3,042 counties.⁷ In both instances, these figures are probably conservative estimates.

Cost of Single Most Expensive Case

To get a sense of the magnitude of the impact a single lawsuit can have on a jurisdiction's budget, we asked our respondents to estimate the cost of the "type of case that has been your single most costly litigation over the past three years." The average cost was \$939,014, although there was a wide variation.⁸ Once again, it is critical to control for variations in population and budgetary size when analyzing the results—the larger the jurisdiction, the more costly its most expensive case (Table 3).

Table 2
Impact of Litigation Costs (Including Damages and Awards) on Local Government Budgets, FY 1991

Jurisdiction Characteristic	Percent Impact on Budget		
	None	A Little	A Lot
All (n = 234)	13.4	66.4	20.3
Fiscal Condition^a (n = 228)			
Poor (n = 11)	0	45.5	54.5
Fair (n = 49)	8.2	71.4	20.4
Good (n = 84)	11.9	71.4	16.7
Excellent (n = 82)	18.3	61.0	20.7
Population Size (n = 227)			
Less than 10,000 (n = 45)	8.9	68.9	22.2
10,000-24,999 (n = 19)	26.3	57.9	15.8
25,000-49,999 (n = 50)	14.0	62.0	24.0
50,000-99,999 (n = 61)	14.8	70.5	14.8
100,000-499,999 (n = 39)	10.3	66.7	23.1
500,000-999,999 (n = 7)	14.3	57.1	28.6
1 million or more (n = 6)	16.7	50.0	33.3
1992 Budget (n = 219)			
Less than \$10 million (n = 36)	16.7	63.9	19.4
\$10-24 million (n = 49)	12.2	61.2	26.5
\$25-40 million (n = 48)	12.5	70.8	16.7
\$50-99 million (n = 40)	15.0	72.5	12.5
\$100-250 million (n = 31)	16.1	58.1	25.8
More than \$250 million (n = 15)	0	73.3	26.7
Type of Government^b (n = 225)			
City (n = 211)	90.3	97.3	85.1
County (n = 13)	6.5	2.7	14.9
Special District (n = 1)	3.2	0	0

Note: Respondents were asked "To what extent have litigation costs (including damages and awards) affected your local government's budget this past year [FY 1991]?"

^a Relationship is statistically significant at .036 level.

^b Relationship is statistically significant at .003 level.

Source: Survey of members of the National Institute of Municipal Law Officers, August-October 1992, designed by Susan A. MacManus, University of South Florida, Tampa.



Regardless of size, the types of cases that are consistently the most expensive are personal injury, police, civil rights, labor, environmental (and, to a lesser extent, land use) cases. Federal and state court rulings in these areas have prompted these patterns (cf. Ullman, 1992; Callahan, 1987; Chavarria, 1992; Daane and Hendricks, 1991; Decker, 1990; Harris, 1992; Heller, 1992; Hopper and Summers, 1989; International City/County Management Association, 1991a, 1991b; Lee, 1987; Olson, 1987, 1991; Owens, 1992; Rapp, 1992; Schnidman, Basile, and Guill, 1977; Sonn, 1992; Straussman and Thurmaier, 1989; Sullivan, 1992; Thomas and Means, 1990; Walter, 1992).

Necessity (and Magnitude) of Budget Amendments Resulting from Litigation Costs

Large, unpredicted costs of any sort can place undue pressure on a jurisdiction's budget thereby necessitating budget amendments. In order to determine the extent to which litigation costs prompted budget amendments, we asked our respondents to tell us "How often there were budget amendments for litigation and judgment purposes during the past fiscal year?" In over one-third (34.1 percent) of our respondents' jurisdictions, unpredicted mid-fiscal year budget adjustments had to be made.

The problem was even more acute among those who reported that their FY 1991 budgets were impacted *a lot* by litigation costs (Table 4). Over half (52.2 percent) of them had to amend their budget at least once last year; 15.2 percent amended it three times or more. In contrast, 93.5 percent of those reporting that litigation costs had no impact on their FY 1991 budgets did not amend their budgets at all.⁹ The same pattern and statistical significance hold for the relationship between the percentage increase in a jurisdiction's litigation costs and the frequency of budget amendments—the greater the increase in litigation costs, the more frequent the budget amendments.

Amendment Magnitude

What about the dollar *magnitude* of the requisite budget amendments? Our survey results show that where litigation

costs had a major impact on a jurisdiction's FY 1991 budget, the dollar magnitude of the amendments was larger than in jurisdictions whose budgets were not impacted.¹⁰ For example, 60.9 percent of the cities experiencing major fiscal impacts from litigation reported moderate mid-fiscal year budget amendments; another 26.1 percent indicated these adjustments were large relative to the original legal budget. The survey also showed that the more frequent the amendments, the larger the amendments relative to the original legal budget.¹¹

These findings empirically demonstrate what budgeters have complained about for quite some time—namely, the chaos that the litigation explosion has caused in their budgeting and fiscal forecasting exercises.

Factors Leading to Rising Litigation Costs

A number of articles have speculated as to what factors have most driven up litigation costs in recent years. Blum (1988) identified these: "an explosion in the non-traditional use of civil rights statutes—most important, Sec. 1983 of the Civil Rights Act of 1871—to include cases involving such areas as zoning and land development"; loss of immunity from civil lawsuits under the doctrine of sovereign immunity resulting from increases in the provision of services resembling those handled by the private sector (e.g., garbage pickup and park management); greater awareness among the population as to their civil rights due to television; the general litigiousness of our society; a rise in police-related cases due to the lack of emphasis on police training; fee incentives to plaintiff attorneys under the Civil Rights Act section 1988 encouraging them to sue public sector entities; the perception that any governmental body is a "deep pocket defendant"; unanticipated changes in tort liability; and the general tendency of people to like to sue the government—and win—an outcome prompted by more governments settling lawsuits just to save money.

A more recent article (Myerson, 1992) added a few more factors to this "causal list": zealous (and sometimes fraudulent) trial lawyers; plaintiff-sympathetic juries ruled more by emotions than facts; and the growing tendency for people (citizens, juries) to use the courts to "get even" with governments that have cut services to them.¹²

Table 3
Cost of Single Most Expensive Case Relative to Population Size

Population Size	Average Cost of Case (\$)	Minimum (\$)	Maximum (\$)	Most Common Type of Case*
Below 10,000	386,296	9,000	2,000,000	Environmental, personal injury, police, civil rights, land use
10,000-24,999	191,667	25,000	850,000	Environmental, personal injury, labor
25,000-49,999	995,333	20,000	25,000,000	Environmental, personal injury, policy, civil rights, labor
50,000-99,999	707,514	35,000	7,100,000	Environmental, personal injury, civil rights labor, land use, construction
100,000-499,999	755,786	25,000	3,000,000	Personal injury, police, civil rights, land use, labor
500,000-999,999	3,166,667	2,500,000	4,500,000	Environmental, personal injury
1 million or more	10,400,000	200,000	30,000,000	Environmental, personal injury, police, civil rights

Note: Respondents were asked, "Which type of case has been your single most costly litigation over the past three years?"

* Modal responses.

Source: Survey of members of the National Institute of Municipal Law Officers, August-October 1992, designed by Susan A. MacManus, University of South Florida, Tampa.

1992 Survey Results: All Jurisdictions

Our 1992 survey asked respondents to identify from a list of 22 factors (including those cited above and others identified by our panel of legal and fiscal practitioners)¹³ those which "most contributed to [their] jurisdiction's rising litigation costs over the past three years." Six factors ranked highest among our respondents: increase in frivolous cases,¹⁴ 48.2 percent; greater need for outside counsel, 48.2 percent; increased caseload, 45.4 percent; increased case complexity, 41.7 percent; a higher incidence of employee suits, 39.0 percent; and a higher incidence of private citizen suits, 34.9 percent (Table 5). Over one-fifth also cited attorney salaries (26.6 percent), state mandates (22.0 percent), and increased reliance on expert witnesses (21.6 percent). With the exception of jury awards (which were cited as a major factor by only 11.5 percent), these results confirm the observations of Blum and Myerson.

Survey Results: Jurisdictions Whose Budgets Have Been Impacted Most by Litigation Costs

A closer look at the jurisdictions where litigation costs have had a lot of impact on the budget reveals a slightly different ranking. The need to turn to outside counsel (63.5 percent), case complexity (61.4 percent), and increased caseloads (56.8 percent) were identified by over half of these heavily impacted governments, followed by an increase in frivolous cases

Table 4
Budget Amendments Necessitated by Litigation and Judgments: Relationship to Litigation Cost Budget Impact

Budget Amendments During Fiscal Year 92	Impact of Litigation Cost on Budget		
	None (n=31)	A Little (n=154)	A Lot (n=46)
0 times	93.5	65.6	47.8
1-2 times	3.2	27.9	37.0
3-4 times	0	4.5	8.7
5-6 times	0	1.3	4.3
7-10 times	0	0.6	2.2

Respondents were asked, "How often were there budget amendments for litigation and judgment purposes during the past fiscal year?"

X² Significant at .013 level.

Source: Survey of members of the National Institute of Municipal Law Officers, August-October 1992, designed by Susan A. MacManus, University of South Florida, Tampa.

(45.5 percent), and a higher incidence of suits against them by both employees and private citizens (38.6 percent) (Table 5).¹⁵ The same six factors were identified as problematic among jurisdictions experiencing a 30 percent or greater increase in litigation costs over the past two years.

Table 5
Factors Contributing Most to a Jurisdiction's Rising Litigation Costs, 1991-1993 (in percent)

Cost Increase Factor	All	Litigation	Litigation Costs	Litigation Costs
		Impacted a Lot on Local Government Budget	Increased over 10 Percent, 1992-1993	Increased over 30 Percent, 1992-1993
Attorney salaries	26.6	25.0	23.7	16.3
Increased caseload	45.4	56.8	57.9	60.5
Increased case complexity	41.7	61.4	57.9	48.8
Lengthy appeals	13.3	15.9	15.8	16.3
Greater need to rely on outside counsel	48.2	63.6	63.2	55.8
Increase in frivolous cases	48.2	45.5	42.1	46.5
Increased cost of law journals/books	11.5	6.8	2.6	0
Liability insurance for legal personnel	2.3	2.3	0	0
Federal court rulings	19.7	15.9	13.2	16.3
State court rulings	19.7	15.9	13.2	20.9
Federal mandates	18.3	13.6	15.8	11.3
State mandates	22.9	27.3	31.6	20.9
Jury awards	11.5	11.4	7.9	7.0
Court reporting costs (reporter; transcripts)	10.1	9.1	10.5	11.6
Increased reliance on expert witnesses	21.6	29.5	31.6	30.2
Higher incidence of employee suits	39.0	38.6	42.1	44.2
Higher incidence of contractor suits	9.6	9.1	10.5	11.6
Higher incidence of private citizen suits	34.9	38.6	36.8	39.5
Increased in number of attorneys involved in each case	15.2	20.5	21.1	25.6
Increase in number of adverse rulings	7.8	11.4	13.2	11.6
Increase in travel costs	2.8	4.5	5.3	4.7
Increase in number of cases attacking local revenues (taxes, fees)	9.2	11.4	13.2	4.7
Other*	13.3	18.2	18.4	18.6

Notes: Respondents were asked, "Which of the following factors have most contributed to your jurisdiction's rising litigation costs over the past three years?" (Check all applicable)

* Other factors included: increasing insurance rates; increasing deposition costs, witness fees, courtroom exhibits, and attorney fee awards; and other miscellaneous categories.

Source: Survey of members of the National Institute of Municipal Law Officers, August-October 1992, designed by Susan A. MacManus, University of South Florida, Tampa.

The Cycle

In summary, it appears the cycle goes as follows: more cases being brought by employees and citizens alike against public sector entities yield higher caseloads and more complex cases. These phenomena, in turn, necessitate greater reliance on outside counsel. For whatever reason, the whole chain of events yields a greater incidence of frivolous cases. (More will be said about this phenomenon shortly.)

Types of Cases Contributing Most to Rising Public Sector Litigation Costs

In light of the data just presented on the most expensive cases and the recent court rulings involving torts (cf. Ullman, 1992), it is not difficult to predict the types of cases that have driven up litigation costs the most. Looking at litigation patterns a decade ago, Lee's study of civil lawsuits against state and local governments in federal district courts found that the most common were those involving "police, judicial, and regulatory subsystems" (1987, p. 160). Specifically, he found that plaintiffs were most likely to file suits grieving "law enforcement, employment practices, application of due process rights in the conduct of public affairs, and enforcement of allegedly illegal statutes and ordinances" (1987, p. 164).

Civil v. Criminal

Consistent with the research by Blum (1988) and Lee (1987), we found that the overwhelming majority of cases filed against local governments were civil (95.1 percent) rather than criminal (4.0 percent). There were no significant differences in the case profiles between jurisdictions experiencing heavy litigation-related budget impacts and those feeling no such pain.

Case Substance

There were, however, differences across jurisdictions in the subject matter of cases identified by our respondents as "contributing most to their rising litigation costs over the past three years." From a list of 20 types of cases,¹⁶ the major culprits identified were: police liability (62.5 percent); civil rights (59.8 percent); personal injury (50.0 percent); land use/zoning (48.2 percent), labor (35.5 percent), and environmental cases (29.4 percent) (Figure 1). Each of these types of cases is complex, lengthy, and expensive. In addition, each frequently requires the use of outside counsel (with more specialized trial and substantive experience) and greater reliance on expert witnesses. In each instance, federal and state laws were often more the legal basis for the lawsuit than violations of local ordinances and codes.

Among jurisdictions whose budgets have been hit the hardest by rising litigation costs, the rank orderings are the same but the proportion citing environmental cases and labor suits as particularly burdensome (from an expense perspective) was much higher than among all jurisdictions. The proportion citing personal injury was lower.

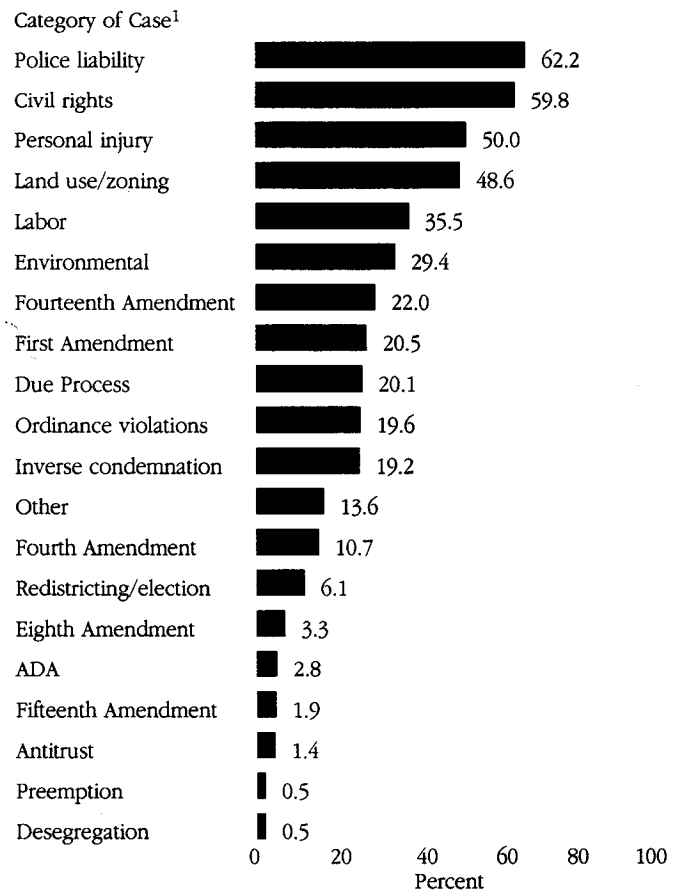
Civil rights, police liability, and land use/zoning suits contributed most to the upward cost curve in jurisdictions where

litigation costs have escalated more rapidly. These results make it fairly easy to predict the functional budget categories most impacted by rising litigation costs.

Budgetary Functional Areas Most Negatively Impacted

Research on the specific functional areas impacted by rising litigation costs has been sparse and mostly of a case-study nature. For example, Olson (1991, p. 6) reported that the New York City functions and departments that have been hardest hit by rising litigation costs are "highways, schools, parks and recreation, hospitals, [and] police." But to our knowledge, prior to our survey there has been no systematic comparative analysis of the functional areas that are the most prone to unanticipated legal expenses.

Figure 1
Types of Cases Contributing Most to Rising Litigation Costs at Local Government Level

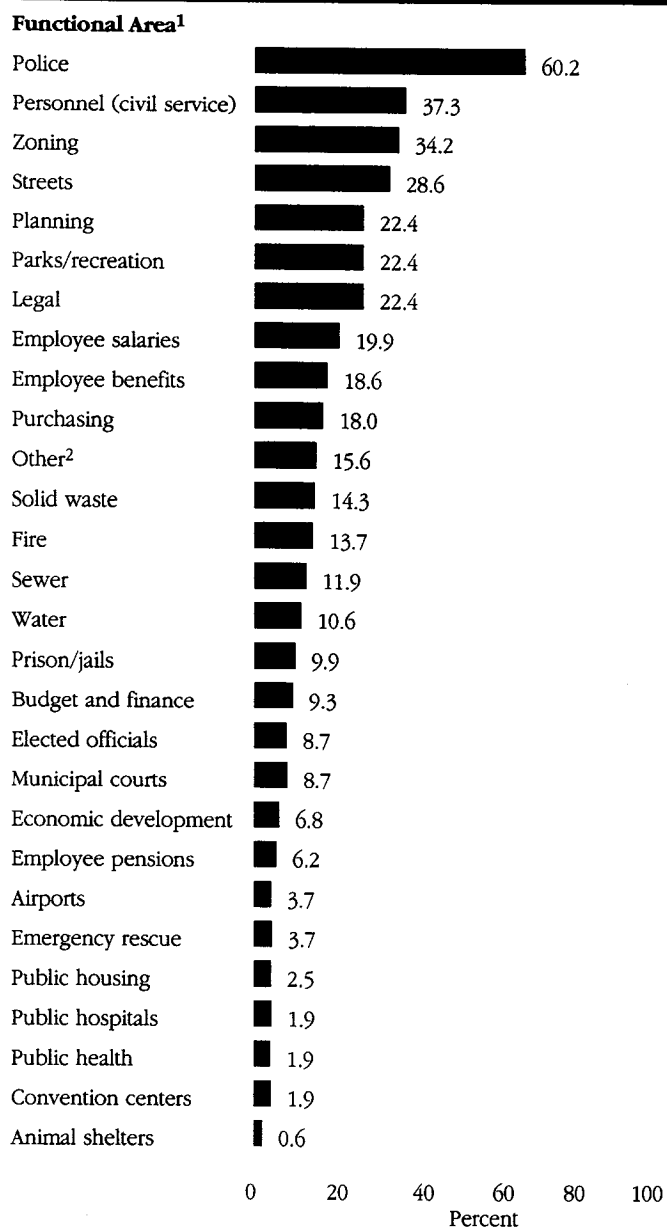


¹ Respondents were asked, "Which of the following types of cases have contributed *most* to your jurisdiction's rising litigation costs over the past three years?" (Check one)

Source: Survey of members of the National Institute of Municipal Law Officers, August-October 1992, designed by Susan A. MacManus, University of South Florida, Tampa.

Using typical budgetary classifications, we asked each respondent to identify "Which of the following [28] functional areas have been most negatively affected (from a budget perspective) by litigation costs increases in your jurisdiction?"¹⁷ One function stood out from the rest—police (identified by over 60 percent of our respondents) (Figure 2).

Figure 2
Functional Areas Most Negatively Impacted by Rising Litigation Costs



¹ Respondents were asked, "Which of the following functional areas have been *most* negatively affected (from a budget perspective) by litigation cost increases in your jurisdiction?"

² "Other" areas included public utilities, public works, public transportation, libraries and miscellaneous services.

Source: Survey of members of the National Institute of Municipal Law Officers, August-October 1992, designed by Susan A. MacManus, University of South Florida, Tampa.

The next most commonly reported were personnel (civil service) and zoning, cited by over one-third of our respondents. These results are consistent with our previous observations that police liability, personal injury, civil rights, labor, and environmentally related cases have dominated the lawsuits filed against most local governmental jurisdictions.

This pattern is even clearer when we look at the functions or budget categories most impacted in city and county governments whose FY 1991 budgets were greatly influenced by litigation costs: police (56.1 percent), personnel or civil service (51.2 percent), zoning (36.6 percent), employee benefits (31.7 percent), and employee salaries (31.7 percent).¹⁸ The labor-intensive nature of most of these functional areas perhaps explains why insurance costs have been affected more than local government bond ratings by escalating litigation costs.

Impact of Rising Litigation Costs on Insurance Costs and Bond Ratings

Anecdotal accounts of the impacts of litigation costs on city and county finances have hypothesized that steep increases result in higher insurance costs and downgraded bond ratings.

The Impact on Insurance Costs

To test the first hypothesis, we asked our respondents to indicate whether "litigation costs have affected [your] jurisdiction's insurance costs over the past three years." The results generally confirm our expectation.¹⁹ Of the 73.8 percent who were not self-insured, 28.4 percent reported that their insurance costs have been affected by rising litigation costs. For most, insurance costs went up (in only two jurisdictions did the costs go down). Another 24 percent said that although their insurance costs had not yet gone up, they expected them to do so shortly due to rising litigation costs.

Where insurance costs went up, the most common approach was to move to self-insurance.²⁰ Sixty-four percent of those whose costs went up moved to self-insurance as a way to address the issue. The other 36 percent changed carriers.

Impact on Bond Ratings

Respondents were asked: "Have litigation costs affected your jurisdiction's bond rating over the past three years?" In light of the claims by some plaintiff lawyers that deteriorating infrastructure has been a major source of lawsuits against local governments (Myerson, 1992), it was surprising that *none* of our respondents said that litigation costs had any impact on their bond ratings. However, 7 percent expected this to happen shortly and anticipated that their bond ratings would be downgraded.

Insurance Impacted More than Bond Ratings

In summary, litigation costs have influenced insurance costs in a number of local governmental entities. The predominant response has been to move to self-insurance. Such a move often places an immediate stress on the operating budget when such a system is first put in place but may very quickly save money.



Bond ratings, on the other hand, have not been as negatively impacted by rising litigation costs, probably due to the labor intensive nature of the most costly lawsuits and the tendency to rely more on revenue bonds than on general obligation bonds to fund public infrastructure when possible. (Reliance on revenue bonds relieves the local government from any tax obligation to fund the project.)

Litigation Cost-Containment Techniques Used by Local Governments

A recent issue of *Fortune* magazine (Tully, 1992) outlined a number of cost-containment techniques currently being utilized by the private sector to control rising legal costs. Some of the most popular approaches have been: sharing legal services such as taking depositions and writing briefs; greater reliance on in-house counsel; or in certain instances, greater reliance on outside counsel located in low-cost cities. Although there was no mention of settling cases just to save money, such a strategy has been mentioned by those studying public sector legal costs (cf. Blum, 1988). The legal and fiscal experts who helped design our survey instrument also identified several other plausible legal cost-containment techniques: reducing the purchases of law books/journals; reducing training/continuing education for the legal staff; increasing fees (reproduction costs); and relying more on part-time support staff. To our knowledge, this survey is the first to systematically survey local governments to determine which of these techniques they have relied upon most to stabilize or reduce litigation costs.

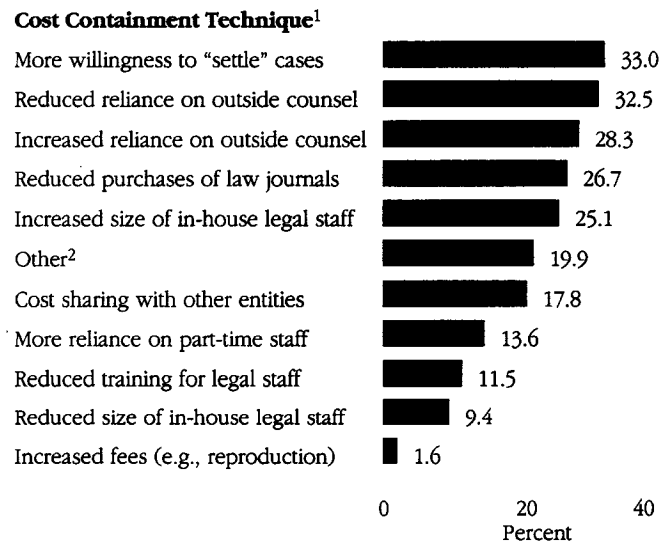
The most common cost-containment approach across all types of jurisdictions appears to be more willingness to settle cases (cited by one-third of our respondents). Increasing reliance on in-house counsel was the second most common approach (identified by 32.5 percent), followed by greater reliance on outside counsel (28.3 percent), reducing the purchase of law books/journals (26.7 percent), and increasing the size of the in-house legal staff (25.1 percent) (Figure 3). Jurisdictions whose budgets were most heavily impacted by litigation costs appeared to rely a little more heavily on settling cases (38.6 percent) and cutting back on the purchase of law books/journals (36.4 percent).

The seeming conflict over whether it is more cost-effective to increase reliance on outside counsel or in-house counsel appears to be jurisdiction-specific. Nearly equal percentages of the jurisdictions, regardless of how classified, have used each cost-containment approach.

When we look at the factors associated with greater reliance on in-house counsel, the most significant one appears to be the incidence of frivolous lawsuits. For jurisdictions experiencing an increase in such cases, it probably makes more fiscal sense to rely more on the less-expensive in-house counsel to handle them.

For jurisdictions turning more to outside counsel to save money, the most significant factor is the incidence of state court rulings. This suggests that it may make more fiscal sense to turn to outside counsel when cases are filed against a

Figure 3
Litigation Cost Containment Techniques Used by Local Governments, 1991-1993



- 1 Respondents were asked, "Which of the following litigation cost containment techniques has your jurisdiction used over the past three years?" (Check all applicable)
 - 2 "Other" included increasing insurance rates, increasing deposition costs, witness fees, courtroom exhibits, and attorney fee awards.
- Source: Survey of members of the National Institute of Municipal Law Officers, August-October 1992, designed by Susan A. MacManus, University of South Florida, Tampa.

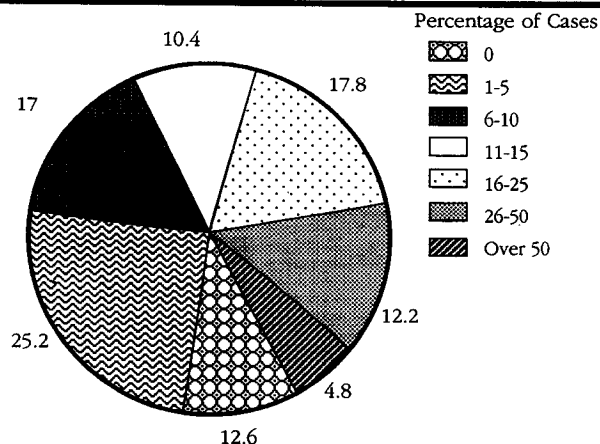
jurisdiction in higher courts. Outside counsel is often likely to have more experience and expertise in dealing with the state (and federal) judiciary.

Settling to Save Money: What Relationship to Increases in Frivolous Cases?

In an effort to determine the extent to which local governments are using case settlement as a cost-containment technique, we asked the question: "What percentage of the cases does your jurisdiction settle just to 'save money' when you believe it could have prevailed if costs were not a factor?" As shown in Figure 4, 81.4 percent acknowledged they settled at least some of their "winnable" cases just to save money; 45.2 percent said they settled over 10 percent; and almost one-fifth (17 percent) settled over one-fourth of their cases for this purpose. A closer look at who settles to save shows it is a more common approach among smaller jurisdictions (below 100,000 population) that have experienced at least some budgetary impact from litigation costs.

Perhaps more significant is the relationship between the propensity to settle cases to save money and the reported increase in frivolous lawsuits.²¹ Our survey found that of the jurisdictions settling over half of their cases to save money, nearly two-thirds (63.6 percent) reported increases in frivolous cases as a major cost-contributing factor. In contrast, among those reporting that they settled less than 15 percent of their cases to cut litigation costs, only 38.4 percent said their jurisdiction had experienced an increase in frivolous suits. The

Figure 4
Settling Just to Save Money



Note: Respondents were asked, "What percent of the cases does your jurisdiction settle just to save money when you believe it could have prevailed if costs were not a factor?" (Check one)
Source: Survey of members of the National Institute of Municipal Law Officers, August-October 1992, designed by Susan A. MacManus, University of South Florida, Tampa.

danger in settling cases just to save money may be that it will cost more in the long term if settling increases the likelihood of frivolous suits being filed. Without question, frivolous lawsuits are perceived by public sector attorneys as having had a major impact on local government budgets.

Conclusion

Apparently litigation costs are having an impact on city and county budgets in the 1990s—the tendency to "sue city hall and the county courthouse too" is alive and well. Over 80 percent of our respondents' jurisdictions have experienced at least some increase in litigation costs over the past two years; for nearly one-fifth, the rate of increase exceeded 30 percent. Over 85 percent reported litigation costs directly affected their FY 1991 budget; for over 20 percent, their budgets were impacted a lot. Whether rate of increase or actual budget impact is the measure used, litigation cost increases were sharpest among the poorest jurisdictions, often the very smallest and the very largest. A greater proportion of counties than cities seemed to be harder hit.

Our best estimate, undoubtedly conservative, is that litigation costs (including damages and awards) amounted to \$6.45 billion for U.S. cities and \$2.1 billion for U.S. counties (a total of over \$8 billion) in FY 1991. The single most expensive case in a jurisdiction averaged \$939,014 (varying significantly with the size of the jurisdiction). Personal injury, police liability, civil rights, labor, environmental, and land use cases drove up costs the most. Each frequently requires use of outside counsel (with more specialized trial and substantive experience) and greater reliance on expert witnesses. These are also the areas more broadly dictated by federal and state laws. Consequently, among governments experiencing the most budgetary impact, the functional categories of the budget most

negatively impacted by escalating lawsuit costs are police (identified by 56.1 percent of our respondents), personnel (51.2 percent), zoning (36.6 percent), employee benefits (31.7 percent), and employee salaries (31.7 percent).

From a budgetary perspective, the worst nightmare is having to make major budget amendments in the middle of the fiscal year. We found a clear linkage between rising litigation costs and the need to make frequent, and significant, budget amendments. In over one-third of our respondents' jurisdictions, unpredicted litigation-related costs necessitated midbudget year adjustments. The problem was even more acute among those who reported that their FY 1991 budgets were impacted a lot by litigation costs; 52.2 percent of them had to amend their budget at least once; 26.1 percent indicated their budget amendment dollars were large relative to the original legal budget.

The major factors that have driven up litigation costs over the past three years are: the increase in frivolous cases (identified by 48.2 percent of the respondents), the greater need for outside counsel (48.2 percent), increased caseloads (45.4 percent), increased case complexity (41.7 percent), a higher incidence of employee suits (39.0 percent), and a higher incidence of private citizen suits (34.9 percent). The whole process appears to be somewhat cyclical. More cases are being brought by employees and citizens alike against public sector entities, which results in higher caseloads and more complex cases, which, in turn, require greater reliance on outside counsel.

Predictably, insurance costs rose in response to rising litigation costs (in 28.4 percent of the non-self-insured jurisdictions), prompting the move to self-insurance (24 percent) or to another insurance carrier (36 percent). Not impacted were bond ratings. However, 7 percent expected their jurisdiction's bond ratings to be downgraded shortly as a consequence of rising litigation costs.

Like their counterparts in the private sector, many public entities have been more willing to settle cases (33 percent), increase reliance on in-house counsel (32.5 percent), expand the size of the in-house legal staff (25.1 percent), and cut back on their purchases of law books/journals (26.7 percent) as ways to contain litigation costs. Perhaps the most unsettling finding from a budgetary perspective is the higher incidence of frivolous lawsuits filed against cities and counties which use the "settling-to-save" approach most often. In such cases, it is difficult to determine which causes the other.

In summary, litigation costs are as unpredictable and uncontrollable in the 1990s as they were in the 1980s. They continue to put undue pressure on many jurisdictions' budgets and overall fiscal condition.



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Notes

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- The relationship between percentage increase in litigation costs and fiscal condition is statistically significant at the .05 level (chi square); gamma = -.25.
- The relationship between budget impact and fiscal condition is statistically significant at the .04 level (chi square); gamma = -.20.
- The relationship between population size and budget size is statistically significant at the .001 level (chi square); gamma = .76.
- The relationship between type of jurisdiction and the budgetary impact of litigation costs is statistically significant at the .003 level (chi square); lambda = .04.
- Among counties, 30.8 percent have populations in excess of 500,000 compared to only 4.2 percent of the municipalities in our sample. Likewise, among the counties, 30.8 percent have budgets in excess of \$250 million compared with only 5.4 percent of the municipalities.
- The relationship between population size and litigation costs in FY 1991 is statistically significant at the .000 level (chi square); gamma = .66. The relationship between budget size and litigation costs in FY 1991 is statistically significant at the .000 level (chi square); gamma = .53.
- The number of cities in each size classification was obtained from the 1991 U.S. Statistical Abstract (1988 data, p. 34). The number of counties in each size category was obtained from the *Finances of County Governments 1986-87* (1986 data, Table 12). It is likely that these figures are somewhat conservative in light of population growth since these figures were collected, making our cost estimates somewhat conservative as well. Another factor making these figures somewhat conservative is the fact that our sample, while closely mirroring the U.S. proportional breakdown for cities and counties for the very smallest jurisdictions (below 10,000 population), somewhat over represents the midsized jurisdictions and underrepresents the very largest jurisdictions.
- The range was from \$9,000 to \$30 million.
- The relationship between the frequency of budget amendments due to litigation costs and the impact of litigation costs on the FY 1991 budget was statistically significant at the .013 level (chi square); gamma = .52.
- The relationship between the magnitude of litigation-driven budget amendments and the impact of litigation costs on a jurisdiction's budget was statistically significant at the .005 level (chi square); gamma = .69. In contrast, the relationship between the rate of increase in litigation costs and the magnitude of litigation-driven amendments was not statistically significant.
- The relationship between the frequency of mid-fiscal year budget amendments and the magnitude of the amendments was statistically significant at the .028 level (chi square); gamma = .57.
- Plaintiff attorneys, on the other hand, blame the growing number of lawsuits on the erosion of public structures and services—crumbling roads, sidewalks and bridges; chaotic hospitals (Myerson, 1992).
- The list of factors presented to the respondents included: attorney salaries; increased caseload; increased case complexity; lengthy appeals; greater need to rely on outside counsel; increase in frivolous cases; increased cost of law journals/books; liability insurance for legal personnel; federal court rulings; state court rulings; federal mandates; state mandates; jury awards; court reporting costs (reporter; transcripts); increased reliance on expert witnesses; higher incidence of employee suits; higher incidence of contractor suits; higher incidence of private citizen suits; increase in number of attorneys involved in each case; increase in number of adverse rulings; increase in travel costs; increase in number of cases attacking local revenues (taxes, fees); and other (respondent was asked to identify).
- According to *Black's Law Dictionary*, "A pleading is 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense" (Black, 1990, p. 668). A frivolous appeal is "one in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect it can ever succeed" (Black, 1990, p. 668).
- Of these, only the relationship between case complexity and litigation cost budget impact is statistically significant—at the .008 level (chi square); lambda = .06.
- These were: First Amendment; Fourth Amendment; Eighth Amendment; Fourteenth Amendment; Fifteenth Amendment; redistricting/elections; environment; inverse condemnations; police liability; labor; due process; civil rights; antitrust; preemption; desegregation; land use/zoning; Americans with Disabilities Act; personal injury; prosecution of ordinance violations; and other (respondents were asked to identify).
- These 28 categories were: police; fire; prisons/jails; streets; solid waste; parks/recreation; public housing; economic development; airport; animal shelters; purchasing (contracting/procurement); public hospitals; public health; personnel (civil service); municipal courts; budget and finance; zoning; legal; emergency rescue; planning; employee benefits; employee pensions; employee salaries; water; sewer; elected officials; convention center/stadiums; other (respondents were asked to identify).
- Of these factors, the only statistically significant, but weak, relationships are between litigation budget impact and personnel (chi square significant at the .03 level; lambda = .01), and employee benefits (chi square significant at the .02 level; lambda = .00).
- We did not ask our respondents what type of self-insurance they chose. Typically government insurance "is at below market cost, or else, occurs when no private sector insurance is available" (Whicker, 1988, p. 3). Self-insurance can take several forms. The three most common financing options are pure self-insurance, structured self-insurance, and limited self-insurance (Public Risk and Insurance Management Association (PRIMA), 1987). Pure self-insurance (also often referred to as "going bare") avoids shifting risk from the pool to an insurance carrier via a reinsurance policy. "In pure self-insurance, annual contributions from members are collected to meet the projected loss liability for the program's coming year. This involves not only cash payments for losses incurred for the year, but also the creation of a reserve fund to pay for losses incurred but not reported, for losses which require more than one year to resolve, and expenses for program administration and contracted services" (PRIMA, 1987, p. 25).

Structured self-insurance "combines elements of pure self-insurance and components of the traditional insurance market. A significant portion of the contributions received from members is assigned to a loss fund from which claims are paid. In addition, reinsurance may be purchased to protect against single large claims (per-risk excess), catastrophic events (per-occurrence excess), and the cumulative dollar amount for which the loss fund bears exposure (aggregate excess)" (PRIMA, 1987, pp. 25-26). "Under a limited self-insurance program, the contribution paid by each member is directed largely at the purchase of commercial insurance with the remaining contributions directed to a loss-fund in order to pay claims within the commercial insurance deductible" (PRIMA, 1987, p. 26). An increasingly common approach, especially for smaller jurisdictions, is to join an inter-

governmental insurance pool. Pools have the potential to save a jurisdiction money for several reasons. According to Kutska (1993, p. 16) "A pool's administrative cost tends to be less than that of a commercial insurance company. Unlike publicly held insurance companies, pools don't have to generate a profit. Salaries and overhead costs also tend to be less for pools than for commercial insurance companies."

20. The relationship between the litigation cost impact on insurance costs and litigation cost impact on the budget was statistically significant at only the .051 level (chi square); lambda = .01.
21. The relationship is not statistically significant although the relationship is in the expected direction.

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