

8/1/62

Memorandum No. 48(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Insurance Coverage for Public Entities and Public Officers and Employees)

Attached is a copy of the tentative recommendation on this subject, dated May 1, 1962.

Also attached are copies of a number of communications we received containing comments on this tentative recommendation:

Exhibit I (gold) (Southern Section of State Bar Committee)
Exhibit II (pink)(Department of Public Works)

In connection with the tentative recommendation, you will also want to refer to page 3 of Exhibit III attached to Memorandum No. 47(1962) containing the comments of the Office of the County Counsel of Los Angeles County.

The following matters are suggested for Commission consideration:

1. Section 990.1. This section should be deleted from the chapter on insurance since general definitions of employee and public entity will be provided for Division 3.5. Note that the Department of Public Works suggests that the definition of "public entity" be revised. (Exhibit II, pink pages.) The general definitions (to be drafted later) will eliminate the problem of inconsistent definitions noted by the Southern Section of the State Bar Committee. (Exhibit I - gold pages - attached.)

Note that, under our general definition of public entity, the State is considered to be a public entity as are local public entities. Does this mean that a particular state agency, such as the Law Revision Commission, may not purchase insurance? Should this be clarified?

2. Section 990.2. (a) The Department of Public Works suggests (Exhibit II - pink pages - attached) that the proposed statute be revised to make clear that public entities are authorized to purchase protection against the expense of litigation, whether or not liability exists. The department notes that existing insurance statutes have been construed to permit the purchase of such protection. The staff believes this would be a desirable clarification and recommends that the following be added at the end of Section 990.2 of the proposed statute (page 6 of the tentative recommendation):

(c) Purchase protection against the expense of defending against claims against the public entity or its employees, whether or not liability exists on such claims.

(b) The Office of the Los Angeles County Counsel (Exhibit III attached to Memorandum No.47(1962)) suggests that the Commission study the feasibility of requiring some deductible feature in cases where the public entity provides its personnel with insurance against their wilful acts. (Exhibit III to Memorandum No. 47(1962), page 3.) Note, however, that a public entity would be authorized to obtain whatever insurance it wishes under the proposed statute. As the Commission's recommendation indicates, the Commission does not recommend that public entities be required to provide insurance covering the personal liability of their officers, agents and employees. Accordingly, the staff recommends that the matter of whether a deductible feature should be included in insurance against intentional acts of public personnel is a matter that should be left to the decision of the public entity involved--to attempt to prescribe a statutory rule would introduce unnecessary complexity into the proposed statute.

(c) The general definition of "employment" as including service, agency or employment" will permit the elimination of the words "service, agency or" in Section 990.2(b).

(d) The Southern Section of the State Bar Committee (Exhibit I - gold pages - attached) suggests that the introductory clause of Section 990.2 be amended to read as follows:

Except for a liability which may be insured against pursuant to Division 4 (commencing with Section 3201) of the Labor Code, and subject to Insurance Code Section 11870, a public entity may:

See Exhibit I (gold sheets) attached for reason for this suggestion. The existing insurance statutes take the same form as the tentative recommendation and do not include any reference to Insurance Code Section 11870. In view of Section 990.6, the proposed change does not appear to be necessary.

(e) The Southern Section of the State Bar Committee (Exhibit I - gold sheets - attached) suggests that after the words "injuries or damages" in Section 990.2(b), there be added the words "to persons or property."

Section 990.3. The Southern Section of the State Bar Committee (Exhibit I - gold sheets - attached) suggests that after the words "injuries or damages" in Section 990.3, there be added the words "to persons or property."

Joint self-insurance. A letter from Lewis Keller, Associate Counsel, League of California Cities, dated August 2, 1962, contains the following suggestion with reference to this recommendation:

With respect to this recommendation, it is believed that the Commission should give consideration to amending the draft to include express provision authorizing public entities to

jointly self-insure the liability of the entities and officers and employees. While this would probably be possible under the language of the tentative draft on the basis of the Joint Exercise of Powers Act, express authorization would make it clear that joint self-insurance programs are authorized. In some cases, joint self-insurance programs would permit economies which could not be attained through individual self-insurance programs conducted by public entities.

The objective sought to be accomplished by Mr. Keller could be achieved by adding the following new section to the proposed legislation:

990.7. Two or more public entities, by a joint powers agreement made pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 of Title 1 of the Government Code, may provide insurance as authorized by this chapter by any one or more of the methods specified in Section 990.4.

This would seem to be a desirable clarifying addition to the proposed legislation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

EXTRACT

MINUTES OF JULY 18, 1962, MEETING
OF
STATE BAR COMMITTEE ON SOVEREIGN
IMMUNITY
SOUTHERN SECTION

1. INSURANCE COVERAGE FOR PUBLIC ENTITIES
AND PUBLIC OFFICERS AND EMPLOYEES.

Mr. Heffernan expresses himself as being opposed to the right of a public entity to self-insuring, and gives as an example the exhaustion of the fund insuring titles under the Torrens land registration title system. It is to be noted, however, that substantially all existing statutory authorization permitting public bodies to insure carry the discretionary right to self-insure. The Section feels it desirable to confer this discretionary authority on public entities to establish their own reserve funds in order to self-insure against part or all of the risks to be covered.

It is noted that the definition of "public entity" contained in Section 990.1 differs slightly from the definition of "public entity" contained in the draft statute on Dangerous or Defective Condition of Public Property. The definition contained in the Insurance statute is identical with the definition contained in the other draft statutes now under

consideration, and in the interests of consistency the Section recommends that the definition of "public entity" in the Dangerous and Defective Condition of Public Property be revised to conform with the definition contained in the statutes now under consideration.

Section 990.2 excepts liabilities which may be insured against pursuant to Division 4 of the Labor Code, to-wit, Workmen's Compensation liability. Section 11870 of the Insurance Code requires public entities to insure against Workmen's Compensation liabilities with the State Compensation Insurance Fund and not with any other insurer, unless the Fund refuses to accept the risk.

The Section accordingly recommends that Section 990.2 be amended to read in part as follows:

"Except for a liability which may be insured against pursuant to Division 4 (commencing with Section 3201) of the Labor Code, and subject to Insurance Code Section 11870, a public entity may:"

After the words "injuries or damages" in Sections 990.2 (b) and 990.3, it is recommended there be added the words "to persons or property".

State of California
DEPARTMENT OF PUBLIC WORKS
Division of Contracts and Rights of Way
(Legal)

Public Works Building
1120 N Street
(P.O. Box 1499)
Sacramento 7, California

May 23, 1962

California Law Revision Commission
School of Law
Stanford University, California

Attention: Mr. John H. DeMouilly
Executive Secretary

Gentlemen:

Re: Insurance Coverage for Public Entities

Your letter of May 1, 1962 requested this Department to comment on the tentative recommendation of the California Law Revision Commission relating to Insurance Coverage for Public Entities and Public Officers and Employees.

We have no specific comments to make either on the Commission's tentative recommendation or its proposed statute, except for Government Code Sections 990.1(b) and 990.2.

Section 990.2(a) authorizes a public entity to procure insurance "against any liability". If the Legislature follows the Commission's present policy and re-enacts sovereign immunity with specific waivers of liability, this clause would limit coverage to these specific areas and there would be no statutory authorization for a broader coverage. This same problem of broader coverage may exist in subsection (b) where insurance is procured for officers and employees and official immunity for discretionary acts is applicable. This problem confronted a California court in the recent case of Burns v. American Casualty Co., 127 Cal. App. 2d 198. The question there presented was whether a county board of supervisors had the authority and power to purchase insurance to cover all risks for which the county and its employees might be liable and to purchase protection against the expense of litigation on claims against the county where it was protected by sovereign immunity. The court held, on pages 205 and 206:

"This brings us to the question of whether in view of the fact that the policy could be construed to include the type of malpractice for which the county could not legally be held liable, summary judgment was proper. This question involves two elements: (1) the complaint, and (2) the contractual power of the board of

supervisors. (1) The first cause of action in the complaint was drawn upon the theory that none of the policies covered risks for which the county might legally be liable, and that therefore, the payment of the premiums therefor was an illegal expenditure of county funds. This theory being found incorrect, the court properly granted judgment in favor of defendants on the pleadings on the only issue presented. There was no issue as to whether the premiums charged were greater than warranted for the risks and protection actually covered, or whether the premiums were or were not divisible. (2) There can be no question but that a board of supervisors has the authority and power to purchase insurance to cover all risks for which the county and its employees might be liable, and, moreover, to purchase protection against the expense of litigation upon claims against the county whether proper or improper. Here the defendants in addition to covering the county and its employees against proper liabilities contracted to defend the county against all actions within the stated sphere of risk, and did not limit their responsibility in that behalf to well grounded claims against the county. The fact that included within the coverage was some liability which did not exist, would not affect the validity of the policies as a whole...."

Although this question was properly answered by the court in that case, we believe that a comprehensive statute on the subject of insurance should authorize insurance to cover protection against expense of litigation whether or not liability exists. Such a provision could also be, in effect, a hedge in situations where the case law changes (as in the first Muskopf decision) or statutes are amended.

In proposed Section 990.1(b) the words "or subdivision thereof" should be added at the end of the definition of "public entity". This is necessary to include all forms of governmental boards, bureaus and commissions. This same wording is used in other statutes defining a "public agency" and "public entity".

If any other comments come to our attention on this subject we will write to you further.

Sincerely,

S/ Robert E. Reed
ROBERT E. REED
Chief of Division

May 1, 1962

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford, California

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

Insurance Coverage for Public Entities and Public Officers and Employees

NOTE: This is a tentative recommendation prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

4/9/62

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

Insurance Coverage for Public Entities and Public Officers and Employees

A number of California statutes either authorize or require public entities to insure against their own tort liability and against the personal tort liability of their officers and employees.

The principal statute authorizing local public entities to purchase insurance against their own tort liability is Section 1956.5 of the Government Code. This section provides local public entities with ample statutory authority to insure against both negligent and intentional torts. There is no similar general provision expressly authorizing the State to insure against tort liability; but such authority may exist, by implication, under Government Code Section 624. Other statutes that apply to particular types of local public entities or to particular kinds of activities are inconsistent with these general provisions and provide for a more limited authority to insure. For example, Vehicle Code Section 17003 authorizes public entities to insure themselves against liability arising out of the negligent--but not the intentionally tortious--operation of motor vehicles. It is not clear whether the authority to insure against all forms of tort liability given by Section 1956.5 is limited by special insurance statutes like Section 17003.

The principal statute authorizing public entities to insure their officers and employees against personal liability is Section 1956 of the Government Code. This section authorizes any public entity to insure its personnel against liability for negligence, false arrest and false imprisonment, but does not authorize insuring public personnel against other intentional torts. Thus, for example, a city park director who is required by the terms of his employment to maintain order in a city park, and who acts in good faith but with excessive force in removing a rowdy from the park area, would not be protected by the insurance authorized by Section 1956.¹ On the other hand, Education Code Section 1044, which applies only to school districts, makes it mandatory for every school district governing board to insure its officers and employees against personal liability for negligence and makes it permissive for the board to insure them against personal liability for intentional torts.² There are a number of other statutory provisions relating to insurance for public personnel: Some of these permit extremely broad insurance coverage; others are limited to relatively narrow types of personal liability.

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1. Although not authorized to insure him against personal liability, the city apparently would be required by Section 2001 of the Government Code to provide counsel and pay the other costs of defending the action brought against him. Section 2001 requires the public entity to provide for the defense of an action against an employee for "any damages caused by any act or failure to act by such employee occurring during the course of his service or employment." The cost of the defense can be recovered from the employee only if he "acted or failed to act because of bad faith or malice." See 39 Ops. Cal. Atty. Gen. 71 (1962), No. 61-246.
 2. Insurance may be provided under Section 1044 to cover personal liability "for any act or omission performed in the line of official duty."

Some statutes that authorize or require insurance to be purchased out of public funds explicitly provide that such protection may be in the form of a self-insurance system. But most of the statutes do not mention self-insurance, thereby possibly implying that self-insurance is not permissible.

Insurance permits the risks of tort liability to be spread over a broad base, thus relieving the individual insured of the possibility of a ruinous judgment. Moreover, insurance mitigates the fiscal consequences of tort liability, for it permits the insured to plan an orderly financial program that converts potential tort liabilities into predictable payments budgeted on a current basis. The Law Revision Commission has concluded, therefore, that public entities should be given broad general authority to purchase insurance at public expense and to self-insure. Accordingly, the Commission recommends that legislation be enacted to achieve the following specific objectives:

1. All types of public entities should be expressly authorized to insure themselves against any liability which may be imposed upon them by law. All public entities may have this authority now, but an express statutory provision is desirable to make clear that a public entity's authority to insure is as broad as its potential liability.

2. All types of public entities should be expressly authorized to purchase insurance to cover the personal liability of their officers, agents and employees for all types of torts committed in the scope of their public employment. All public entities now have authority to insure public personnel against personal liability for negligent acts and omissions and for false arrest and false imprisonment. But authority to provide public personnel with insurance protection against

their personal liability for other intentional torts is presently enjoyed only by school districts and a few other public entities. Giving all public entities authority to provide their officers, agents and employees with adequate insurance coverage will enable a public entity, if it so chooses, to encourage its personnel to perform their duties diligently without fear of personal liability. Moreover, the distinction between an intentional tort and a negligent one is not always a clear one; it sometimes depends on how the plaintiff phrases his complaint. Coverage of all tort liability would provide protection without regard to how the complaint is phrased.

3. All public entities should be expressly authorized to insure either by purchasing commercial liability insurance or by adopting a program of self-insurance through the establishment of financial reserves, or by any combination of the two methods. Full insurance coverage from a commercial insurer may be deemed practically indispensable by many entities. Others, however, may determine that adequate protection at the lowest possible cost can be provided through a program of self-insurance, or a combination of self-insurance plus an excess coverage policy purchased from a commercial underwriter.

4. Public entities should be authorized to purchase insurance from a fiscally sound nonadmitted insurer when insurance cannot be obtained from an admitted insurer. School districts already have this authority.

5. The new insurance statute should not limit or restrict, nor should it be limited or restricted by, other statutes authorizing or requiring public entities to insure against their liability or the liability of their personnel. The recommended legislation contains a provision to make this clear. Thus, special statutes which now authorize

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purchase of only limited coverage insurance will not be construed to prevent a public entity from securing full insurance coverage pursuant to the new statute. Nor will the new statute limit or restrict existing statutes that require insurance.

6. The Commission does not recommend at this time that all public entities be required to provide insurance covering their own liability or the personal liability of their officers, agents and employees. The Commission has not had an opportunity to give this matter sufficient study to be prepared to make a recommendation concerning it. The Commission plans to continue its study of the public entity insurance statutes and may submit a recommendation relating to this matter to a later session of the Legislature.

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7. Various statutes that now authorize the purchase of insurance by public entities will be superseded by the new general insurance statute and should be repealed.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to add Chapter 5 (commencing with Section 990.1) to Division 3.5 of Title 1 of the Government Code, and to repeal Sections 1231, 1956, 1956.5, 1959 and 53056 of the Government Code, and to repeal Section 17003 of the Vehicle Code, and to repeal Sections 22732 and 35757 of the Water Code, relating to insurance for public entities and public officers, agents and employees.

The people of the State of California do enact as follows:

SECTION 1. Chapter 5 (commencing with Section 990.1) is added to Division 3.5 of Title 1 of the Government Code, to read:

CHAPTER 5. INSURANCE

990.1. As used in this chapter:

- (a) "Employee" includes an officer, agent or employee.
- (b) "Public entity" includes the State, a county, city, district or other public agency or public corporation.

990.2. Except for a liability which may be insured against pursuant to Division 4 (commencing with Section 3201) of the Labor Code, a public entity may:

- (a) Insure itself against any liability.
- (b) Insure its employees against personal liability for death, injuries or damages resulting from any negligent or wrongful act or omission in the scope of their service, agency or employment or against any part of such liability.

990.3. A county may insure the officers and attaches of its superior, municipal and justice courts against personal liability for death, injuries or damages resulting from any negligent or wrongful act or omission in the scope of their service or employment or against any part of such liability.

990.4. The insurance authorized by this chapter may be provided by:

(a) Self-insurance, which may be, but is not required to be, funded by appropriations to establish or maintain reserves for self-insurance purposes.

(b) Insurance in any insurer authorized to transact such insurance in this State.

(c) Insurance secured in accordance with Chapter 6 (commencing with Section 1760) of Part 2 of Division 1 of the Insurance Code.

(d) Any combination of insurance authorized by subdivision (a), (b) and (c).

990.5. The cost of the insurance authorized by this chapter is a proper charge against the public entity.

990.6. The authority provided by this chapter to insure does not limit or restrict, nor is it limited or restricted by, any other law that authorizes or requires a public entity to insure against its liability or the liability of public personnel.

SEC. 2. Section 1231 of the Government Code is repealed.

~~[1231.---Each-county,-city,-district,-or-other-political~~

subdivision of the State may purchase and maintain in force and pay the premiums for malpractice insurance policies to protect all of its medical and dental personnel employees against liability for any claims or actions for malpractice that may be filed or brought against such employees.]

SEC. 3. Section 1956 of the Government Code is repealed.

[1956--(a)--The State, a county, city, district, or any other public agency or public corporation may insure its officers, deputies, assistants, agents, and employees against any liability, other than a liability which may be insured against under the provisions of Division 4 (commencing with Section 3201) of the Labor Code, for injuries or damages resulting from their negligence or carelessness during the course of their service or employment and for the injuries or damages resulting from the dangerous or defective condition of public property, including public property as defined in subdivision (b) of this section, and due to their alleged negligence or carelessness, and for injuries or damages resulting from false arrest or false imprisonment, either by self insurance, or in any insurer authorized to transact such insurance in the State (except in the case of school district governing boards to the extent they are authorized to place insurance in nonadmitted insurers by Sections 1044 and 15802 of the Education Code).--The premium for the insurance is a proper charge against the Treasury of the State, county, city, district, public agency or public corporation.]

(b) -- In addition to the definition of public property as contained in Section 1951, "public property" includes any vehicle, implement or machinery whether owned by the State, a county, city, district, or any other public agency or public corporation, or operated by or under the direction, authority or at the request of any public officer.]

(c) -- "Officers" includes any deputy, assistant, agent or employee of the State, a county, city, district, or any other public agency or public corporation acting within the scope of his office, agency or employment.]

SEC. 4. Section 1956.5 of the Government Code is repealed.

[1956.5. -- A county, city, district, or any other public agency or public corporation may insure itself against any liability, other than a liability which may be insured against pursuant to Division 4 of the Labor Code, either by self-insurance or in any insurer authorized to transact such insurance in the State. -- The premium for such insurance is a proper charge against such county, city, district or other public agency or public corporation.]

SEC. 5. Section 1959 of the Government Code is repealed.

[1959. -- Each county may insure the officers and attaches of its superior, municipal, and justice courts against any liability, other than a liability which may be insured against under the provisions of Division 4 of the Labor Code, for injuries

~~or damages resulting from their negligence or carelessness during the course of their service or employment. -- The premium for the insurance is a proper charge against the treasury of the county.]~~

SEC. 6. Section 53056 of the Government Code is repealed.

~~[53056. -- A local agency may insure against liability, except a liability which may be insured against pursuant to Division 4 of the Labor Code, for injuries or damages resulting from the dangerous or defective condition of public property by self-insurance, or insurance in an admitted insurer (except in the case of school district governing boards to the extent they are authorized to place insurance in nonadmitted insurers by Sections 1044 and 15802 of the Education Code). -- The premium for the insurance is a charge against the local agency.]~~

SEC. 7. Section 17003 of the Vehicle Code is repealed.

~~[17003. -- Any public agency may insure against liability under this chapter in any insurance company authorized to transact the business of such insurance in the State of California, and the premium for the insurance shall be a proper charge against the general fund of the public agency.]~~

SEC. 8. Section 22732 of the Water Code is repealed.

~~[22732. -- Any district may carry and pay for insurance to cover any liability of the district, its officers, employees, or any of them.]~~

SEC. 9. Section 35757 of the Water Code is repealed.

[35757--Any-district-may-carry-and-pay-for-insurance
to-cover-any-liability-of-the-district,-its-officers,-employees,
or-any-of-them.]