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Memorandum 68-111

Subject: Study 52 - Sovereign Immunity (Relative Liability of Two Insurance Carriers Providing Duplicate Coverage for Same Risk)

Attached as Exhibit I (pink) is a letter from Wayne C. Holle, Assistant General Counsel, Pacific Indemnity Group. He suggests that the Commission study the problem that he believes exists under the governmental liability act where two insurance carriers have duplicate coverage for the same risk.

The problem of duplicate coverage is one that the Executive Secretary has several times called to your attention. In the past, the Commission has indicated that it did not wish to study the problem.

The problem is frequently presented in motor vehicle accident cases. For example, a state employee driving a state vehicle (or his private vehicle) on state business is involved in an accident. Under the existing law, if the employee is in the scope of his employment at the time of the accident, the state is primarily liable. In other words, the state's insurance carrier, not the insurance carrier of the state employee, must pay the cost of the defense of the action and must pay any judgment against the employee arising out of the accident.

Exhibit I points out that the same problem arises in suits against doctors employed by public entities for alleged medical malpractice. In such case, the public entity is liable for the cost of the defense and must pay the judgment against the doctor.

The staff believes that in both cases it is clear under existing law that the insurance of the public entity is primary and that the insurance purchased by the driver or doctor is excess. The policy question is whether--where the driver or doctor is found to be negligent in the scope of his employment--insurance obtained by the driver or doctor should (1) be primarily liable, (2) be prorated, or (3) be excess. As far as vehicle insurance is concerned, when the Commission last considered this matter, the view was expressed (we have not checked this out) that the cost of the insurance purchased by the employee would be higher if it covers accidents arising out of his employment and he drives to any extent in the course of his employment. The same would appear to be true in the case of the doctor. Thus, resolution of the policy question appears to turn on whether it is desirable to make a change in the existing law that would merely shift a present expense item from the public entity to the employee.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 68-111

EXHIBIT I

PACIFIC INDEMNITY GROUP

PACIFIC INDEMNITY COMPANY | TEXAS PACIFIC INDEMNITY COMPANY
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3200 WILSHIRE BOULEVARD · LOS ANGELES, CALIFORNIA 90054

WAYNE C. HOLLE
ASSISTANT GENERAL COUNSEL

October 23, 1968

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California

Dear Mr. DeMoully:

As the insurer of a number of public entities and their employees, including the University of California, we have encountered a situation which we do not feel was contemplated by the Commission in its recommendations for the 1963 Tort Liability Act. The purpose of this letter is to inquire as to whether there is a procedure available through which a possible revision of the existing law can be considered by the Commission and possibly receive its recommendation.

The problem to which we refer relates to the relative liability of insurance carriers where there may be two policies applicable to the same loss. The problem is most clearly manifest in suits against doctors involving medical malpractice but can also arise in other situations. The following example may serve as an illustration.

If a suit is filed against a doctor for a claim allegedly occurring within the scope of his employment as an employee of a public entity, the entity has the obligations of defense and indemnity contained in Section 825 et seq. However, if the entity has purchased insurance as authorized by Section 990, the obligations of the entity are assumed by the insurer; and in the case of our example they would be obligated to afford a defense and satisfy any judgment rendered against the doctor. Frequently, however, the doctor also carries his own policy of malpractice liability insurance which would likewise be applicable to the claim.

In normal situations where there is duplicate coverage for a loss, the position of the respective insurers is determined by the type of "other insurance" provisions contained in their policies. The policies may prorate or one may be deemed primary and the other excess. In any event, both policies would be effective to afford protection to the insured.

It would not be unreasonable to expect a similar result where one insurance policy covered a public entity and its employees. However, we are increasingly experiencing the situation where the insurer--which has the policy covering the individual doctor--requires him as an employee to demand a defense and indemnity from the employing entity under Section 825. That insurer thereafter adopts the position that their policy is not required to be involved in any manner and that the public entity (or its insurer), must assume the entire liability for the claim.

There is some basis for such a contention for the reason that there are no code provisions giving public entities the benefit of any other insurance applicable to a loss. Likewise, while Section 990 authorizes a public entity to purchase insurance, there are no provisions in the Government Code which provide that Section 825 et seq. shall have no application when the obligations of defense and indemnity are afforded by means of an insurance policy.

Accordingly, even though the insurer for the public entity is obligated under its policy, it seems to be denied the benefits of the provisions in its policy covering the situations where there may be more than one policy applicable to a claim. Such a denial is detrimental not only to the insurer but ultimately to the public entity itself, and we plan to challenge the position of such insurers by appropriate legal proceedings. However, it would be more desirable to solve the problem by corrective legislation.

It would seem proper to amend the law in some manner to provide that when a public entity obtains liability insurance protection for itself and its employees, the public entity should be entitled to the benefits available to an insurer as in the situations involving "other insurance."

While my original intent was merely to inquire with respect to availability of a procedure for presenting a problem to the Commission, the problem has been substantially set forth in this letter. Any comments which you may have with respect to either the procedure or the problem will be very much appreciated.

Very truly yours,

Wayne C. Holle

Wayne C. Holle

WCH:rcs