

Memorandum 70-84

Subject: Study 65 - Inverse Condemnation (Insurance)

In one of his background studies on inverse condemnation, Professor Van Alstyne identifies a possible technical defect in the statute authorizing public entities to obtain insurance against tort (and inverse condemnation) liability. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 494 n.268 (1969).

Professor Van Alstyne notes the defect as follows:

Even if it is assumed that commercial insurance against such [inverse liability] risks is obtainable at reasonable premiums, it is not entirely clear that adequate statutory authority exists for public entities to insure against all inverse liabilities. See Cal. Gov't Code §§ 989-991.2, 11007.4 (authorizing insurance against "any injury"). But see *id.* § 810.8 (defining "injury" to mean losses that would be actionable if inflicted by a private person). Since inverse liability may obtain where private tort liability does not, *Albers v. Los Angeles County*, 62 Cal.2d 250, 298 P.2d 129, 42 Cal. Rptr. 89 (1965), comprehensive tort liability insurance may still be regarded as inapplicable to some inverse claims. Existing statutory authority to fund judgment liabilities with bond issues, Cal. Gov't Code §§ 975-78.8, is, however, clearly broad enough to include inverse liability judgments. A. Van Alstyne, *California Government Tort Liability* § 9.16 (Cal. Cont. Educ. Bar ed. 1964). And although authority for payment of judgments by installments, Cal. Gov't Code § 970.6, is, in terms, limited to "tort" judgments, A. Van Alstyne, *supra*, § 9.15, inverse liabilities may possibly be a form of "tort" for this purpose. See generally *Douglass v. Los Angeles*, 5 Cal.2d 123, 128, 53 P.2d 353, 355 (1935).

In principle, the existing devices for funding tort liabilities appear to provide ample flexibility for administering inverse liabilities of the great majority of public entities. The statutes should, however, be clarified to avoid any doubt as to their applicability to inverse situations. . . .

It would be a fairly simple matter to draft a recommendation to the 1971 Legislature to eliminate this technical defect in the insurance statutes. It should be recognized, however, that insurers are unwilling--

so we have been advised--to insure against inverse liability. If the Commission decides that the statutes should be clarified, the staff will draft a recommendation for consideration at the October meeting.

Respectfully submitted,

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