

meeting

10/8/62

Memorandum No. 58(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Insurance)

Attached is a copy of the revised tentative recommendation relating to Insurance Coverage for Public Entities and Public Officers and Employees.

We propose that this recommendation and proposed legislation be printed as a separate pamphlet. We want to send it to the printer and have it printed as soon as possible. We also need to have the bill preprinted as soon as possible. Accordingly, we need to give final approval to the text of the recommendation and the proposed statute at the October meeting.

A sample of the Cover and Title Page for this publication and of the Letter of Transmittal is also attached.

We propose to make the following changes in the revised tentative recommendation:

(1) We propose that the title be changed to "Insurance Coverage for Public Entities and Public Employees." This would delete the words "Officers and" from the present title. This would shorten the title without any loss of meaning.

(2) The new part added to Division 3.6 would be Part 6 instead of Part 5. See page 15 et seq. of tentative recommendation attached. This change is required in view of the organization of Division 3.6. See Memorandum No. 74(1962) for outline of Division 3.6.

(3) We propose to renumber the sections in the first portion of the statute. Section 990.1 would become 989.1 and the following sections

meeting

[Cover and Title page]

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

R E C O M M E N D A T I O N

relating to

S O V E R E I G N I M M U N I T Y

Insurance Coverage for Public Entities and Public Employees

January 1963

California Law Revision Commission
School of Law
Stanford University
Stanford, California



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[For use in printed pamphlet]

LETTER OF TRANSMITTAL

January 2, 1963

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Office of Commission and Staff
School of Law
Stanford University, California

To His Excellency Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

The Commission herewith submits its recommendation on one portion of this subject--insurance coverage for public entities and public employees. Recommendations covering other aspects of this subject are contained in other reports prepared for the 1963 legislative session. The Commission has also published a research study relating to sovereign immunity prepared by its research consultant, Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles.

Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
James A. Cobey, Member of the Senate
Clark L. Bradley, Member of the Assembly
Joseph A. Ball
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.
Angus C. Morrison, Legislative Counsel,
ex officio

(52)

Revised September 1, 1962
May 1, 1962

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford, California

REVISED

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.

REVISEDTENTATIVE 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 Adv. Ops. Cal. Atty. Gen. 71(1962).
 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. Not only should public entities be authorized to insure against any liability, but they also should be authorized to insure against the expense of defending against claims, whether or not liability exists on such claims.³

4. 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.⁴ Full insurance coverage from a commercial

3. This will codify the holding in *Burns v. American Casualty Co.*, 127 Cal. App.2d 198, 273 P.2d 605 (1954) (county board of supervisors had authority to purchase insurance to cover all risks for which the county and its employees might be liable and also to purchase protection against the expense of litigation on claims against the county where it was protected by sovereign immunity)

4. Section 1045 of the Education Code which limits authority of school districts to self-insure should be retained. As indicated *infra*, the Commission has not had an opportunity to give sufficient study to the insurance problems to determine whether insurance should be required. Accordingly, the Commission has concluded that, until such study is completed, the existing statutes which require school districts to insure and limit their authority to self-insure should be retained.

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.

5. 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.

6. Two or more local public entities should be authorized to provide insurance for the entities and their officers, agents and employees by jointly purchasing commercial insurance or by a joint self-insurance program or by a combination of these methods.⁵ In some cases, joint insurance programs might permit economies which could not be attained through individual insurance programs.

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

5. Although this probably would be possible under the Joint Exercise of Powers Act (Government Code Sections 6500 to 6513), the recommended legislation contains a specific authorization so that there will be no doubt that this authority will exist.

8. 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.

9. Various statutes that now authorize the purchase of insurance by public entities will be superseded by the recommended legislation 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 add Part 5 (commencing with Section 990) to Division 3.6 of Title 1 of the Government Code as enacted by Senate Bill No. *** of the 1963 Regular Session,⁶ and to add Section 11007.4 to, 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

Article 1. Definitions

990.1. Unless the provision or context otherwise requires, the definitions contained in this article govern the construction of this chapter.

990.2. "Employee" includes an officer, agent or employee.

990.3. "Employment" includes office, agency or employment.

990.4. "Enactment" means a constitutional provision, statute, charter provision, ordinance or regulation.

6. Senate Bill No. *** will be the bill introduced to effectuate the Commission's recommendation relating to tort liability of public entities and public officers and employees. See Recommendation of California Law Revision Commission relating to Tort Liability of Public Entities and Public Officers and Employees (September 1, 1962).

990.5. "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, character, feelings or estate of such nature that it would be actionable if negligently or wrongfully inflicted by a private person.

990.6. "Local public entity" includes any county or city and any district, local authority or other political subdivision of the State, but does not include the State or any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller.

Article 2. Insurance for Local Public Entities and Their Personnel

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

(a) Insure itself against liability for any injury or against any part of such liability.

(b) Insure its employees against personal liability for injury resulting from any negligent or wrongful act or omission in the scope of their employment or against any part of such liability.

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

991.2. A county may insure the officers and attaches of its superior, municipal and justice courts against personal liability for injury resulting from any negligent or wrongful act or omission in the scope of their employment or against any part of such liability and also may insure against the expense

of defending claims against such officers and attaches, whether or not liability exists on such claims.

991.3. 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 subdivisions (a), (b) and (c).

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

991.5. Two or more local 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 authorized by this chapter by any one or more of the methods specified in Section 991.3.

991.6. Where an enactment, other than this chapter, authorizes or requires a local public entity to insure against its liability or the liability of its employees:

(a) The authority provided by this chapter to insure does not affect such other enactment.

(b) Such other enactment does not limit or restrict the authority to insure under this chapter, but nothing in this chapter permits a school district to self-insure in any case where the school district is required to insure except to the extent authorized by Section 1045 of the Education Code.

991.7. Neither the authority provided by this chapter to insure, nor the exercise of such authority, shall:

(a) Impose any liability upon the local public entity or its employee unless such liability otherwise exists.

(b) Impair any defense the local public entity or its employee may otherwise have.

SEC. 2. Section 11007.4 is added to the Government Code, to read:

(a) As used in this section:

(1) "Employee" includes an officer, agent or employee.

(2) "Employment" includes office, agency or employment.

(3) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, character, feelings or estate of such a nature that it would be actionable if negligently or wrongfully inflicted by a private person.

(b) Except for a liability which may be insured against pursuant to Division 4 (commencing with Section 3201) of the Labor Code, any state agency may, subject to Section 11007.7:

(1) Insure itself against liability for any injury or against any part of such liability.

(2) Insure its employees against personal liability for injury resulting from any negligent or wrongful act or omission in the scope of their employment or against any part of such liability.

(3) Insure against the expense of defending against claims against the state agency or its employees, whether or not liability exists on such claims.

(c) The insurance authorized by this section may be provided by:

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

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

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

(4) Any combination of insurance authorized by paragraphs (1), (2) and (3).

(d) The authority provided by this section to insure does not affect any other statute that authorizes or requires any state agency to insure against its liability or the liability of its employees. Except as otherwise provided in Section 11007.7, no other statute limits or restricts the authority to insure under this section.

(e) Neither the authority provided by this section to insure, nor the exercise of such authority, shall:

(1) Impose any liability on the State or an employee thereof unless such liability otherwise exists.

(2) Impair any defense the State or an employee thereof may otherwise have.

SEC. 3. 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. 4. 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 15302 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. 5. 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. 6. Section 1959 of the Government Code is repealed.

[1959--Each-county-may-insure-the-officers-and-attachés 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

er-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. 7. 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. 8. 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. 9. 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. 10. 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.]~~

SEC. 11. Part 5 (commencing with Section 990) is added to Division 3.6 of Title 1 of the Government Code as enacted by Senate Bill No. *** of the 1963 Regular Session, to read:

PART 5. INSURANCE

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

(a) Insure itself against liability for any injury or against any part of such liability.

(b) Insure its employees against personal liability for injury resulting from any negligent or wrongful act or omission in the scope of their employment or against any part of such liability.

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

990.2. A county may insure the officers and attaches of its superior, municipal and justice courts against personal liability for injury resulting from any negligent or wrongful act or omission in the scope of their employment or against any part of such liability and also may insure against the expense of defending against claims against such officers and attaches, whether or not liability exists on such claims.

990.4. The insurance authorized by this part 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 business 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 subdivisions (a), (b) and (c).

990.6. The cost of the insurance authorized by this part is a proper charge against the local public entity.

990.8. Two or more local 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 authorized by this part by any one or more of the methods specified in Section 990.4.

991. Where an enactment, other than this part, authorizes or requires a local public entity to insure against its liability or the liability of its employees:

(a) The authority provided by this part to insure does not affect such other enactment.

(b) Such other enactment does not limit or restrict the authority to insure under this part, but nothing in this part permits a school district to self-insure in any case where the school district is required to insure except to the extent authorized by Section 1045 of the Education Code.

991.2. Neither the authority provided by this part to insure, nor the exercise of such authority, shall:

(a) Impose any liability upon the local public entity or its employee unless such liability otherwise exists.

(b) Impair any defense the local public entity or its employee may otherwise have.

SEC. 12. The addition of Part 5 to Division 3.6 of Title 1 of the Government Code as enacted by Senate Bill No. *** of the 1963 Regular Session by Section 11 of this act, shall become effective only if Senate Bill No. *** is enacted into law at the 1963 Regular Session, in which case it shall take effect at the same time as Senate Bill No. ***, and the addition, by Section 1 of this act, of Chapter 5 to Division 3.5 of Title 1 of the Government Code, shall be of no force or effect.