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9/18/70

Memorandum 70-103

Subject: Study 65 - Inverse Condemnation (Insurance)

At the September meeting, the Commission directed the staff to prepare a tentative recommendation to make clear that a public entity has authority to insure against inverse condemnation liability. Two copies of the tentative recommendation are attached. Mark your suggested editorial revisions on one copy to turn in to the staff at the October meeting.

The staff recommends that the recommendation be approved for printing for submission to the 1971 legislative session and that it be distributed for comment immediately after the October meeting. The Comments can be reviewed at the January 1971 meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

September 21, 1970

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

INVERSE CONDEMNATION

Number 1--Insurance

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN NOVEMBER 15, 1970.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305

September 21, 1970

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To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study inverse condemnation. See also Cal. Stats. 1970, Res. Ch. 45.

The Commission submits herewith its recommendation on one aspect of this subject--insurance against inverse condemnation liability.

Respectfully submitted,

Thomas E. Stanton, Jr.
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

relating to

INVERSE CONDEMNATION

Number 1--Insurance

In 1963, upon recommendation of the Law Revision Commission, the Legislature enacted comprehensive legislation dealing with liability of public entities and public employees. The comprehensive legislation included provisions recommended by the Commission to "make clear that a public entity's authority to insure is as broad as its potential liability."¹ In the course of its study of inverse condemnation law, the Commission has reviewed the insurance statutes and discovered that it is not entirely clear that a public entity has adequate statutory authority to insure against all types of liability based on a theory of inverse condemnation.² Accordingly, the Commission recommends that Sections 990

1. Recommendation Relating to Sovereign Immunity: Number 3--Insurance Coverage for Public Entities and Public Employees, 4 Cal. L. Revision Comm'n Reports 1201, 1206 (1963).

2. Professor Van Alstyne, the Commission's research consultant, points out:

Even if it is assumed that commercial insurance against [inverse condemnation liability] 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. Govt. 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. [Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 494 n.268 (1969).]

and 11007.4 of the Government Code be amended to make clear that public entities are authorized to insure against inverse condemnation liability.

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

An act to amend Sections 990 and 11007.4 of the Government Code,
relating to insurance.

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

Section 1. Section 990 of the Government Code is amended to read:

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 all or any part of any tort or inverse condemnation liability ~~for-any-injury~~ .

(b) Insure any employee of the local public entity against all or any part of his liability for injury resulting from an act or omission in the scope of his employment.

(c) Insure, contract or provide against the expense of defending a claim against the local public entity or its employee, whether or not liability exists on such claim, including a claim for damages under Section 3294 of the Civil Code or otherwise for the sake of example or by way of punishment, where such liability arose from an act or omission in the scope of his employment, and an insurance contract for

such purpose is valid and binding notwithstanding Section 1668 of the Civil Code, Section 533 of the Insurance Code, or any other provision of law.

Nothing in this section shall be construed to authorize a local public entity to pay for, or to insure, contract, or provide for payment for, such part of a claim or judgment against an employee of the local entity as is for punitive or exemplary damages.

Comment. Section 990 is amended to make clear that a local public entity has authority to insure against all inverse condemnation liabilities. See Recommendation Relating to Inverse Condemnation: Number 1--Insurance, 10 Cal. L. Revision Comm'n Reports 000 (1971). This makes clear the original intent of Section 990 that "a public entity's authority to insure is as broad as its potential liability." See Recommendation Relating to Sovereign Immunity: Number 3--Insurance Coverage for Public Entities and Public Employees, 4 Cal. L. Revision Comm'n Reports 1201, 1206 (1963).

Sec. 2. Section 11007.4 of the Government Code is amended to read:

11007.4 (a) As used in this section:

(1) "Employee" includes an officer, employee, or servant, whether or not compensated, but does not include an independent contractor.

(2) "Employment" includes office 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, reputation, character, feelings or estate, of such a nature that it would be actionable if 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 all or any part of any tort or inverse condemnation liability ~~for any injury~~ .

(2) Insure any employee of the State against all or any part of his liability for injury resulting from an act or omission in the scope of his employment.

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

(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 otherwise may have.

Comment. Section 11007.4 is amended to make clear that the state has authority to insure against all inverse condemnation liabilities.

See Recommendation Relating to Inverse Condemnation: Number 1--Insurance,

10 Cal. L. Revision Comm'n Reports 000 (1971). This makes clear the original intent of Section 11007.4 that "a public entity's authority to insure is as broad as its potential liability." See Recommendation Relating to Sovereign Immunity: Number 3--Insurance Coverage for Public Entities and Public Employees, 4 Cal. L. Revision Comm'n Reports 1201, 1206 (1963).