

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Sovereign Immunity

**Number 3—Insurance Coverage for Public
Entities and Public Employees**

January 1963

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

NOTE

This pamphlet begins on page 1201. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

Number 3—Insurance Coverage for Public Entities and Public Employees

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

The principal statute authorizing local public entities to purchase insurance against their own tort liabilities 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 tort 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 liability for negligence and makes it permissive for the

¹ Although not authorized to insure him against 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).

board to insure them against their 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.

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.

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 liability. 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 liability for negligent acts and omissions and for false arrest and false imprisonment. But authority to provide public personnel with insurance protection against their 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 liability. Moreover, the distinction between an intentional tort and a negligent one is not always clear; 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 claims, whether or not liability exists on such claims.³

² Insurance may be provided under Section 1044 to cover personal liability "for any act or omission performed in the line of official duty."

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. 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 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.

8. The Commission does not recommend at this time that all public entities be *required* to provide insurance covering their own liability or the 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.

⁴Section 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.

⁵Although 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.

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

An act to add Chapter 5 (commencing with Section 989.1) to Division 3.5 of Title 1 of the Government Code, and to add Part 6 (commencing with Section 989) to Division 3.6 of Title 1 of the Government Code as enacted by Senate Bill No. --- of the 1963 Regular Session, 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 989.1) is added to Division 3.5 of Title 1 of the Government Code, to read:

CHAPTER 5. INSURANCE

Article 1. Definitions

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

989.2. "Employee" includes an officer, agent or employee, but does not include an independent contractor.

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

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

989.5. "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, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person.

989.6. "Local public entity" means any public entity except a state agency covered by Section 11007.4 of the Government Code.

989.7. "Public entity" includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.

989.8. "Regulation" means a rule, regulation, order or standard, having the force of law, adopted by an employee or agency of the United States or of a public entity pursuant to authority vested by constitution, statute, charter or ordinance in such employee or agency to implement, interpret or make specific the law enforced or administered by the employee or agency.

Article 2. Insurance for Local Public Entities and Their Personnel

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 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 against the expense of defending a claim against the local public entity or its employee, whether or not liability exists on such claim.

990.2. A county may insure any officer or attaché of its superior, municipal and justice courts against all or any part of his liability for injury resulting from any act or omission in the scope of his employment, and also may insure against the expense of defending any claim against such officer or attaché, whether or not liability exists on such claim.

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

990.6. The cost of the insurance authorized by this chapter 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 chapter by any one or more of the methods specified in Section 990.4.

991. 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, except to the extent authorized by Section 1045 of the Education Code, nothing in this chapter permits a school district to self-insure in any case where the school district is required to insure.

991.2. 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 otherwise may have.

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

11007.4. (a) As used in this section:

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

(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, 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 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.

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 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. 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 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. 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 6 (commencing with Section 989) 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 6. INSURANCE

989. As used in this part, "local public entity" means any public entity except a state agency covered by Section 11007.4 of the Government Code.

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 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 against the expense of defending a claim against the local public entity or its employee, whether or not liability exists on such claim.

990.2. A county may insure any officer or attaché of its superior, municipal and justice courts against all or any part

of his liability for injury resulting from any act or omission in the scope of his employment, and also may insure against the expense of defending any claim against such officer or attaché, whether or not liability exists on such claim.

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 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).

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, except to the extent authorized by Section 1045 of the Education Code, nothing in this part permits a school district to self-insure in any case where the school district is required to insure.

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 otherwise may have.

SEC. 12. The addition of Part 6 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.

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