

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date August 7, 1975

To James B. Longley, Governor

Dept. Executive

From Joseph E. Brennan, Attorney General

Dept. Attorney General

Subject Continued listing of the Governor as an insurance agent

The following is a reply to a memorandum of June 17, 1975, to me from Joseph M. Hochadel of your staff and Theodore T. Briggs of the Bureau of Insurance on the subject noted above. A copy of the memorandum is attached. The short answer to the question is that the legality of your continued listing as an agent on the appointment list of an insurance company which you previously represented would depend upon the terms of your appointment and the business of the company.

In the absence of any specific constitutional or statutory prohibition, the real question is whether your listing as an agent would conflict with your obligations as a trustee for the public, which is a matter of common law. Tuscan v. Smith, 130 Me. 36, 153 A. 289 (1931). As the Tuscan case suggests, there is no definitive test for determining when such conflict exists. However, the decision does suggest one consideration as being whether the public official in question would be placed in a position where there is a temptation to serve personal interests in conflict with the interests of the State.

The possibility for such temptation and, therefore, a conflict of interests would exist if an unlimited listing as an agent was continued and if the insurance company/principal is conducting or plans to conduct business with the State.

The list of insurance agents mentioned in the memorandum is the biennial listing by insurance companies of those agents whose appointments are to remain in effect, as required by 24-A M.R.S.A. § 1534. Listing of an agent in this manner continues the agent/principal relationship established by the initial filing under 24-A M.R.S.A. § 1533, and has the ancillary effect of continuing the agent's license under 24-A M.R.S.A. § 1532,3. The key point is that there is an agent/principal relationship present with each agent designation. Leading commentators on insurance law note that in such relationship the general principles of the law of agency would apply. 16 John A. Appleman and Jean Appleman, Insurance Law and Practice, § 8672, p. 137 (1968). The statement is also made that "... the officers and agents of an insurance company are bound to act unselfishly and in good faith toward the said company, and are strictly accountable for any action where their private and trust interests conflict." 16 Appleman § 8781. Confirmation of this statement is found in the general principle of agency law that "unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Restatement (Second) of Agency, § 387, p. 201 (1957). Thus the potential for a conflict between your position as a trustee for the public and your private position as an agent for an insurance company is possible, depending upon your possible role in State insurance matters.

The State is a regulator of the insurance industry, as witnessed by the Maine Insurance Code, 24-A M.R.S.A. § 1, et seq. This regulatory function is performed through the Bureau of Insurance, within the Department of Business Regulation, an arm of the Executive Branch. Ordinarily the gubernatorial oversight of insurance regulation would create a potential conflict of interest. However, since the Superintendent of Insurance is insulated from such oversight of his discretionary actions by 10 M.R.S.A. § 8002,4, the potential conflict is eliminated in this area.

The State is also a consumer of insurance, and it is in this field that the potential for conflict of interests appears. Another office of the Executive Branch, the Department of Finance and Administration, is required to give insurance advice to the State, in conjunction with the Insurance Advisory Board, 5 M.R.S.A. § 281. In turn, the Insurance Advisory Board has the duty, among others, to "Pursuant to programs approved by the Governor, provide insurance protection for state property by self-insured retention as provided or purchase of insurance from companies or agents licensed to do business in the State of Maine, or by both. . . ." 5 M.R.S.A. § 1728,3 (Emphasis provided). Also, this same statutory section requires that in the case of a purchase of insurance upon competitive bidding, announcement of the low bid shall be an award of the contract, but only upon approval by the Governor.

Therefore, the potential for conflict between your interests as public trustee and overseer of State insurance purchases, and your fiduciary duties as an insurance agent would be clear. This same conflict exists as to members of the Insurance Advisory Board, but it is resolved by the requirement that "no insurance policy or bond issued to the State shall be placed through any member of the board, his firm or employer during his membership on the board." 5 M.R.S.A. § 1725. The potential conflict as to your position would be partially resolved by similar treatment. The answer to the question, then, is that your continued listing as an agent by an insurance company would create a conflict of interest unless two conditions were met. First, the scope of the agency appointment would have to be limited to those types of insurance which are not purchased by the State, thereby limiting your fiduciary duties to the insurance company to these areas. Second, the insurance company in question would have to refrain from bidding for or writing any future insurance for the State, while you are in office.

This memorandum does not consider or extend to the question of your continued licensure as an insurance agent. Continuance of such license is a discretionary act of the Superintendent of Insurance and may depend upon factors outside of those considered in this opinion.

Joseph E. Brennan, Attorney General

JB:KS:jg

Attachment:

cc: Joseph M. Hochadel, Executive
Theodore T. Briggs, Bureau of Insurance