

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date January 19, 1977

To Donald Bisset, State Fire Marshal

Dept. Public Safety

From Joseph E. Brennan, Attorney General

Dept. Attorney General

Subject Legality of Proposed Change to the Standard 165-Line Statutory Policy

FACTS:

The Legislature has established a standard form for fire insurance policies which must be followed by insurance companies unless a waiver is obtained. The State Fire Marshal is concerned with the high incidence of suspicious fires involving possible insurance fraud. In order to facilitate arson investigation in this area, he is interested in legislatively expanding the Standard Fire Insurance Policy (24-A M.R.S.A. §3002) to include a provision requiring the insured to submit to polygraph or truth verification examinations as a condition to recovery. The State Fire Marshal would decide whether or not such examinations would be required in any given case.

QUESTION:

Would amending the statutory fire insurance policy to include the requirement of polygraph or truth verification examinations at the discretion of the State Fire Marshal conflict with the requirements of the Fifth Amendment?

ANSWER:

An amendment to the statutory fire insurance policy (24-A M.R.S.A. §3002) which would require, at the direction of the State Fire Marshal, a polygraph or other truth verification examination of an insured as a condition of recovery of insurance proceeds, to the extent that it would compel incriminating statements absent a grant of immunity, would violate the insured's Fifth Amendment protection against self-incrimination.

REASONS:

Pursuant to the existing 24-A M.R.S.A. §3002, the holder of an insurance policy covering loss due to fire must presently "submit to examinations under oath by any person named by [the insurance] Company. . ." This submission constitutes a condition precedent to recovery, the propriety of which is unquestioned:

"The right to require the insured to submit to an examination under oath concerning all proper subjects of inquiry is clearly stipulated for in the form of policies now in general use. The intent of this provision is to prevent fraudulent concealment, and to enable the insurer to obtain material information in regard to the origin and circumstances of the fire, the value of the property, and the claimant's interest therein. The requirement is a reasonable one, and will often, no doubt, be useful in securing important and truthful disclosures that would otherwise be withheld, to the injury of the insurer. When the assured refused to be examined under oath, he will forfeit all right to recover." Ostrander on Fire Insurance §172.

Such a statutory provision has been held not to constitute state compulsion of the insured's testimony within the purview of the Fifth Amendment. United States v. Moeller, 402 F. Supp. 49 (D. Conn. 1975). The rationale for the court's decision in Moeller was that mere statutory authorization of questioning of the insured by the insurance company did not constitute sufficient state involvement in the questioning of the insured, or sufficient assistance in criminal investigation, to give rise to Fifth Amendment protection.

However, the proposed amendment extends well beyond mere authorization of questioning by the insurance company. The amendment would require the insured, as a condition of recovery, to submit to a polygraph or other type of truth verification examination at the direction of one of the state's chief law enforcement officers, the State Fire Marshal. The interjection of the State Fire Marshal into the contract between the insurer and the insured and his role in compelling statements would provide sufficient state involvement to invoke the Fifth Amendment. See United States v. Moeller, supra at 56 .

In Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed. 2d 274 (1973), the United States Supreme Court held that a state may not involve itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement. Moreover, it is clear that economically coerced interrogation is prohibited whether the interrogation is conducted by a public employee or by a member of the private sector who is acting as an agent for the state. United States ex rel. Sanney v. Montayne, 500 F.2d 411 (2d Cir.), cert. denied, 419 U.S. 1027, 95 S.Ct. 506, 42 L.Ed. 2d 302 (1974).

Under the proposed amendment numerous situations would arise in which individuals who had experienced substantial economic loss due to fire would be compelled to submit to a polygraph examination at the direction of the State Fire Marshal or forfeit recovery of insurance proceeds. Under these circumstances, statements made by the insured during the examination would be protected by the Fifth Amendment privilege against compelled self-incrimination. See Lefkowitz v. Turley, supra; Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed. 2d 562 (1967).

It is the opinion of this office, therefore, that the use of the proposed amendment to compel a polygraph examination of an insured at the direction of the State Fire Marshal as a condition of recovery of insurance proceeds, to the extent that it would compel incriminating statements absent any grant of immunity, would violate the insured's Fifth Amendment privilege against self-incrimination.

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