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5 M.R.S.A. § 1736

July 14, 1977

To: H. W. McKowan, Executive Secretary, Insurance Advisory Board
From: S. Kirk Studstrup, Assistant Attorney General
Subject: Payments from the Self-Insurance Fund

I am responding to your memorandum of June 1, 1977, which raises the question of permissible use of payments from the reserve fund created to indemnify the State for self-insured retention losses. 5 M.R.S.A. § 1731. Specifically, you ask whether the provisions of 5 M.R.S.A. § 1736 would allow payments from the fund to be used for the construction of a building other than the building which was destroyed. According to your memorandum, a State-owned dwelling at Peter Dana Point, which was unoccupied and had been subject to considerable vandalism, was totally destroyed by fire. The Department of Indian Affairs has requested whether payments from the fund for the replacement value of the building could be used for construction of a home for the elderly rather than replacing the destroyed building.

Title 5 M.R.S.A. § 1736 reads as follows:

"Pursuant to the recommendation of the board, the Commissioner of Finance and Administration shall cause payments from the fund or proceeds of insurance purchased in accordance with this chapter, or both, to be made available for repair or replacement of insured property and payment of loss adjustment expenses."

Generally speaking, payments by a commercial insurance company pursuant to a property insurance contract are not required to be used by the insured for restoration of the premises, unless the company elects to make the repairs itself. 15 Couch on Insurance 2d § 54:157, p. 412. However, the status of the State as a self-insurer is

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different from that of an insurance company under a commercial insurance contract. In the same manner, State agencies are in a different position, vis-a-vis the self-insurance fund than a home owner/insured vis-a-vis his insurance company. Section 1736 provides that it is the Insurance Advisory Board which shall recommend the use of payments both from the fund and from any proceeds from a commercial insurance policy payable to the State, thereby implying that the Board is to have some discretion in this regard. However, the section goes on to require that the Commissioner of Finance and Administration shall make the recommended payments available for "repair or replacement" of the insured property. It is our opinion that this latter statutory provision acts as a restriction upon the purposes for which proceeds from the fund may be used.

In light of the foregoing, we conclude that the Insurance Advisory Board should not recommend that payments from the fund be made available for any purpose other than repair or replacement of damaged or destroyed property. If it is decided that the property is not to be repaired or replaced, no payment from the fund to the State agency should be made. This interpretation of § 1736 avoids any complaint that payments from the fund would become a "windfall" to the agency, which could be used to fund completely unrelated projects for which the Legislature may not have seen fit to appropriate funding.

S. KIRK STUDSTRUP
Assistant Attorney General

SKS:mfe