

MAINE STATE LEGISLATURE

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*By Tort Claims Act Insurance Purchase Requirements
Appropriations Programs where funds not provided
5 M.R.S.A. § 15-33
14 M.R.S.A. § 8116*

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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

July 15, 1977

John P. O'Sullivan, Commissioner
Department of Finance and Administration

H. W. MacKowen, Executive Secretary
Maine Insurance Advisory Board
State House
Augusta, Maine

Re: Maine Tort Claims Act, Insurance Provision.

This responds to your request for an opinion as to whether, if the provisions of L.D. 1874 are enacted into law, the State will be absolutely required to purchase insurance regardless of cost or quality of coverage.

L.D. 1874 amends the Maine Tort Claims Act, P.L. 1977, c. 2, to provide that State employees are personally liable for negligent acts or omissions within the scope of their employment in areas where the State is immune, but only to a limit of \$10,000, 14 M.R.S.A. § 8103-3 (as proposed to be amended). Further, Section 5-A of L.D. 1874 requires the State to purchase insurance for this risk:

The State shall purchase insurance on behalf of its employees to insure them against their personal liability to the limit of their liability under section 8103, subsection 3 and, to the extent that such insurance coverage is not available, shall assume the defense of and indemnify such employees to the limit of their liability under section 8103, subsection 3."

Your question basically is to what extent does this provision impose an absolute and unavoidable obligation on the State to purchase insurance.

Based on our reading of the law, we believe that the law, if finally approved, would impose an obligation on the State to purchase insurance subject to the following conditions:

1. The State would only be obliged to purchase insurance if adequate coverage is available to insure the risk established by § 8103, sub-§ 3. Accordingly, if the quality of coverage was not such as to adequately cover this risk, the insurance called for by the statute would be unavailable, and the State would only be obligated to assume the defense and indemnity of employees.

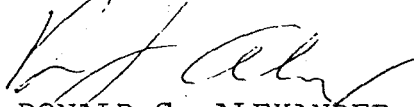
2. Further, even if such insurance were available, the State could only purchase such insurance if there is an appropriation to support the State entering into contracts for such insurance.

As a general doctrine of law, the State may not commit funds to projects for which there is no appropriation. In Maine this doctrine is confirmed by the explicit provisions of Title 5 M.R.S.A. § 1583 which prohibit contracting of obligations in excess of appropriations. Accordingly, if the costs of insurance exceeded the available appropriations for such insurance, the State would likewise be under no obligation to purchase the insurance and again would simply assume the responsibility of defense and indemnity. Our review of the appropriations legislation in the Part I and Part II budgets discloses no specific appropriation for this purpose. However, we recognize that appropriations for purchase of insurance may be provided for within other more general budgetary figures.

Accordingly, the Commissioner of Finance and Administration should determine what funds are available for purchase of insurance and then seek to determine if insurance coverage can be provided with the funds made available by legislative appropriation. However, if either the insurance is not available, or the funds appropriated to purchase such insurance are inadequate, the State is under no obligation to purchase insurance and may exercise the option to defend and indemnify. It should be emphasized, however, that the defense and indemnity option is not without its costs as it could involve commitment of considerable attorney time and expenditure of funds for defense costs and for indemnity in cases of unsuccessful defense.

This opinion is issued with the caveat that because of delays in printing the Legislative Record, we have not been able to review the legislative history of the debates regarding the mandatory insurance provision. Our opinion has been developed based on the wording of the statute and our general understanding of the laws of the State relating to availability of funding as a necessary pre-condition for implementing a statutory mandate.

Sincerely,



DONALD G. ALEXANDER
Deputy Attorney General

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