

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

May 15, 1987

John R. Atwood
Commissioner of Public Safety
State House Station #42
Augusta, Maine 04333

Dear Commissioner Atwood:

I am writing in response to a request from Fire Marshal Donald M. Bisset of your Department for an Opinion of this Department as to his authority to inquire into the financial stability of an insurance company which proposes to sell liability insurance to a so-called "purchasing group," one of whose members is a corporation which operates amusement devices in Maine for which a permit from the Commissioner of Public Safety is required. For the reasons which follow, it is the Opinion of this Department that so long as the "purchasing group" has filed a notice of its intention to do business in the State of Maine with the Superintendent of Insurance, the State is preempted, under the terms of the Federal Liability Risk Retention Act of 1986, Pub.L. 99-563, from denying an amusement device permit because the purchasing group's insurance company has not met Maine's licensure requirements.^{1/}

^{1/} As the discussion in this Opinion will make clear, this is not to say that the State is prohibited from legislating in the general area of the regulation of purchasing groups in general or of the insurance aspects of amusement park operators in particular. For example, the State may be able to impose minimum insurance requirements on the operators of amusement devices. For the purposes of this Opinion, however, the precise limits of the State's authority need not be determined. Should the Fire Marshal, the Superintendent or the Banking and Insurance Committee wish to develop further legislation in this area, this Department would be happy to assist by providing further advice as to the permissible constitutional parameters.

The Commissioner of Public Safety is authorized by 8 M.R.S.A. § 502 to issue licenses to persons operating, inter alia, amusement devices in Maine. One of the requirements for obtaining such a license is that the amusement device operator furnish the Commissioner with a certificate of public liability insurance in an amount to be determined by the Commissioner. Upon the receipt of such a certificate, it has been the practice of the Fire Marshal, acting on behalf of the Commissioner, to inquire with the Superintendent of Insurance as to the financial stability of the insurance company supplying the certificate. Upon receipt of such a request, it has been the practice of the Superintendent to determine whether the company in question is licensed to do business in Maine pursuant to 24-A M.R.S.A. § 414 or, in the case of surplus lines coverages, whether the company is on the list of approved surplus lines companies pursuant to 24-A M.R.S.A. § 2007. Upon receipt of that advice, the Fire Marshal would then, assuming the applicant met all other regulatory requirements, issue the license.

In 1986, the United States Congress passed the Liability Risk Retention Act of 1986, Pub. L. 99-563, amending 15 U.S.C. § 3901 et seq., which altered substantially the power of the states to regulate the risk distribution activities of certain corporations. Generally, the Act addresses two risk distribution phenomena: "risk retention groups," in which groups of persons engaged in similar activities are formed for the essential purpose of spreading the liability exposure of group members; and "purchasing groups," whereby groups of persons engaged in similar activities are formed for the purpose of purchasing insurance as a group from a single insurer or risk retention group. With regard to a risk retention group, the Act generally provides that such an entity is exempt from state regulation except for the state in which it is chartered. 15 U.S.C. § 3902. With regard to a purchasing group, the Act provides that, so long as such an entity files a notice of intention to do business in a particular state, it shall be generally exempt from regulation by that state. 15 U.S.C. § 3903. In the latter case, the theory of the statute appears to be that since the group is purchasing insurance from a company which is licensed in some state, there is no need for further state regulation of the financial stability of the insurance company in question.

As this office understands it, a particular operator of amusement devices in Maine, Maine Play Amusement, Inc., has joined the Association of Water Park Owners and Operators, a purchasing group composed of other amusement park operators in the country and chartered in the State of Utah. This group in

turn has purchased liability insurance for the operation of amusement devices from the Golden Eagle Insurance Company, a California corporation not licensed to do business in Maine. Maine Play Amusement has applied to the Fire Marshal for a license to operate its amusement devices, and has supported that application by a certificate of insurance from Golden Eagle. The Fire Marshal has inquired with the Superintendent of Insurance as to whether Golden Eagle is licensed to do business in Maine, and has been advised that it is not. Consequently, the Fire Marshal has asked whether he may deny the permit for this reason, or whether he is preempted from doing so by the Liability Risk Retention Act.

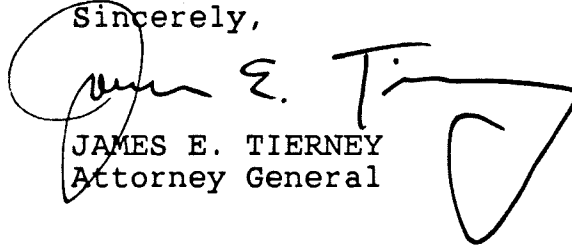
In the view of this Department, the State of Maine is preempted from refusing to issue its license in this situation. Section 4(a) of the Act, 15 U.S.C. § 3903(a), provides that "a purchasing group is exempt from state . . . regulation . . . to the extent that such . . . regulation . . . would . . . (1) prohibit the establishment of a purchasing group" This prohibition of state action is subject to an exemption, contained in Section 6(d) of the Act, 15 U.S.C. § 3905(d), which provides that "nothing in this Act shall be construed to preempt the authority of a state to specify acceptable means of demonstrating financial responsibility . . . as a condition for obtaining a license or permit to undertake specified activities." The State of Maine is therefore not preempted from requiring a showing of financial responsibility as a condition of obtaining a license to operate an amusement device. It is, however, preempted from requiring that the company providing insurance to a purchasing group meet the financial requirements of Maine law, since to do so could result in the prohibition of the establishment of the group in Maine. Thus, if an amusement device operator has joined a purchasing group which has given notice of its intention to do business in Maine, the State may not decline to issue its license because the purchasing group's insurance company does not meet the State's financial requirements for licensure.

This is not to say, of course, that the state is preempted from making sure that the amusement devices which are the subject of the license are safe, and from denying a license on that basis. It is only to say that an amusement device operator who is a member of a purchasing group may not be denied a license because the group's insurance company does not comply with Maine licensure requirements, so long as the purchasing group has filed its notice of intention to do business in Maine and the insurance company has been licensed by the state in which the purchasing group is located. If there is a question as to whether this statutory scheme

provides adequate financial protection for the members of the public who use the amusement devices in question, that is a question which should be directed to the United States Congress.

I hope the foregoing satisfactorily answers the Fire Marshal's question.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Tierney". The signature is stylized and includes a large, sweeping flourish that extends to the right and then loops back down.

JAMES E. TIERNEY
Attorney General

JET/ec

cc: Donald M. Bisset, Fire Marshal
Susan Collins, Comm'r. Professional and Financial Regulation
Everard B. Stevens, Acting Superintendent of Insurance
Senator Raynold Theriault
Representative Charlene B. Rydell
Chairpersons, Joint Standing Committee on Banking and
Insurance