

MAINE STATE LEGISLATURE

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L.D. 2443
(Filing No. S-433)

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STATE OF MAINE
SENATE
113TH LEGISLATURE
SECOND REGULAR SESSION

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COMMITTEE AMENDMENT " A " to S.P. 932, L.D. 2443,
Bill, "AN ACT to Amend the Maine Tort Claims Act."

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Amend the Bill in section 4 in that part
designated "§8104-A." in subsection 4 in the last line
(page 4, line 14 in L.D.) by inserting after the
underlined word "appurtenance" the underlined word
'thereto'

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Further amend the Bill in section 4 in that part
designated "§8104-B." in subsection 5 in the last line
(page 5, line 6 in L.D.) by striking out the
following: "and"

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Further amend the Bill in section 4 in that part
designated "§8104-B." by striking out all of
subsection 6 and inserting in its place the following:

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22
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'6. Leasing of governmental property. The
leasing of governmental property, including buildings,
to other organizations; and

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7. Certain services. A decision not to provide
communications, heat, light, water, electricity or
solid or liquid waste collection, disposal or
treatment services.'

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29

Further amend the Bill by striking out all of
section 7.

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1 Further amend the Bill in section 9 in subsection
2 1 in paragraph D in the last line (page 8, line 15 in
3 L.D.) by striking out the underlined punctuation "._"
4 and inserting in its place the following: '; or'

5 Further amend the Bill in section 9 in subsection
6 1, in paragraph E in the 3rd line (page 8, line 18 in
7 L.D.) by inserting before the underlined word
8 "immunity" the following: 'such' and in the last line
9 (page 8, line 20 in L.D.) by striking out the
10 underlined punctuation and word "; or" and inserting
11 in their place the following: '._'

12 Further amend the Bill by striking out all of
13 sections 1, 12 and 13 and inserting in their place
14 the following:

15 'Sec. 11. 14 MRSA §8112, sub-§1, as repealed
16 and replaced by PL 1987, c. 427, §3, is repealed and
17 the following enacted in its place:

18 1. When a governmental entity is not liable. A
19 governmental entity, with the consent of the employee,
20 shall assume the defense of and, in its discretion,
21 may indemnify any employee against a claim which
22 arises out of an act or omission occurring within the
23 course and scope of employment and for which the
24 governmental entity is not liable. Except as
25 otherwise provided herein, in lieu of assuming the
26 defense of an employee, a governmental entity may pay
27 the reasonable attorneys' fees and court costs of the
28 employee. If the defense of its employee creates a
29 conflict of interest between the governmental entity
30 and the employee, the governmental entity shall pay
31 the reasonable attorneys' fees and court costs of the
32 employee.

33 A governmental entity is not liable for the attorneys'
34 fees and defense costs of its employee under this
35 subsection in the event that the employee is
36 determined to be criminally liable for the acts or
37 omissions in question. In addition, after the
38 litigation against the employee is concluded, a
39 governmental entity may recoup any attorneys' fees and
40 costs paid to outside counsel on behalf of the

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1 employee if the governmental entity proves that the
2 employee acted in bad faith.

3 This subsection does not apply if the employee settles
4 the claim without the consent of the governmental
5 entity.

6 This subsection does not apply if notice is not
7 required to have been filed as provided in section
8 8107 or if the employee does not notify the
9 governmental entity within 30 days after receiving
10 actual written notice of the claim or within 15 days
11 after the service of a summons and complaint, if the
12 governmental entity is prejudiced by the lack of such
13 notice.

14 Sec. 12. 14 MRSA §8112, sub-§2, as repealed and
15 replaced by PL 1977, c. 578, §4, is repealed and the
16 following enacted in its place:

17 2. When the governmental entity is liable. A
18 governmental entity shall, with the consent of the
19 employee, assume the defense of and shall indemnify
20 any employee against a claim which arises out of an
21 act or omission occurring within the course and scope
22 of employment and for which sovereign immunity has
23 been waived under section 8104-A, under another law or
24 by legislative authorization. Except as otherwise
25 provided herein, in lieu of assuming the defense of an
26 employee, the governmental entity may pay the
27 reasonable attorneys' fees and court costs of the
28 employee. If the defense of its employee creates a
29 conflict of interest between the governmental entity
30 and the employee, the governmental entity shall pay
31 the reasonable attorneys' fees and court costs of the
32 employee.

33 A governmental entity shall not be required to
34 indemnify its employee and is not liable for the
35 attorneys' fees and court costs of its employee under
36 this subsection in the event that the employee is
37 determined to be criminally liable for the acts or

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1 omissions in question. In addition, after the
2 litigation against the employee is concluded, a
3 governmental entity shall be relieved of any
4 obligation to indemnify the employee for punitive
5 damages and may recoup any attorneys' fees and costs
6 paid to outside counsel if the governmental entity
7 proves that the employee acted in bad faith.

8 This subsection does not apply if the employee settles
9 the claim without the consent of the governmental
10 entity.

11 This subsection does not apply if notice is not
12 required to have been filed as provided in section
13 8107 or if the employee does not notify the
14 governmental entity within 30 days after receiving
15 actual written notice of the claim or within 15 days
16 after the service of a summons and complaint if the
17 governmental entity is prejudiced by the lack of such
18 notice.

19 Sec. 13. 14 MRSA §8112, sub-§2-A, is enacted to
20 read:

21 2-A. Suits against employees under federal law.
22 A governmental entity, with the consent of the
23 employee, shall assume the defense of and, in its
24 discretion, may indemnify any employee against any
25 claim that is brought against the employee under any
26 federal law and that arises out of an act or omission
27 occurring within the course and scope of employment.
28 Except as otherwise provided herein, in lieu of
29 assuming the defense of an employee, the governmental
30 entity may pay the reasonable attorneys' fees and
31 court costs of the employee. If the defense of its
32 employee creates a conflict of interest between the
33 governmental entity and the employee, the governmental
34 entity shall pay the reasonable attorneys' fees and
35 court costs of the employee.

36 A governmental entity is not liable for the attorneys'
37 fees and court costs of its employee under this
38 subsection in the event that the employee is
39 determined to be criminally liable for the acts or
40 omission in question. In addition, after the
41 litigation against the employee is concluded, a

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1 governmental entity may recoup any attorneys' fees and
2 costs paid to outside counsel if the governmental
3 entity proves the employee acted in bad faith.

4 This subsection does not apply if the employee settles
5 the claim without the consent of the governmental
6 entity.

7 This subsection does not apply if the employee does
8 not notify the governmental entity within 15 days
9 after the service of a summons and complaint if the
10 governmental entity is prejudiced by the lack of such
11 notice.'

12 Further amend the bill in section 16 in the 6th
13 and 7th lines from the end (page 11, lines 36 and 37
14 in L.D.) by striking out the stricken out punctuation
15 and words "~~7~~ excess insurance" and inserting in
16 their place the following: ', excess insurance'

17 Further amend the bill in section 17 in the last
18 line (page 12, line 10 in L.D.) by inserting after the
19 underlined word "provide" the following: 'defense or'

20 Further amend the bill by renumbering the sections
21 to read consecutively.

22 STATEMENT OF FACT

23 This amendment primarily makes technical
24 corrections to the bill. Certain substantive changes
25 are also made.

26 1. The Maine Revised Statutes, Title 14, section
27 8103, subsection 2, paragraph D of the existing law is
28 added to Title 14, section 8104-B as subsection 7.
29 This addition makes it clear that immunity is not
30 waived for decisions not to provide certain services.

31 2. Section 7 of the bill is deleted. This leaves
32 Title 14, section 8107, subsection 4, concerning
33 substantial compliance with notice requirements, as it
34 is in current law.

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1 3. Sections 11, 12 and 13 in the bill are
2 revised. This revision has 2 primary purposes:

3 A. To require a governmental entity to retain
4 outside counsel for an employee, rather than
5 assume the employee's defense, when assuming the
6 defense would create a conflict of interest
7 between the entity and employee; and

8 B. To provide that a governmental entity may
9 recoup attorneys' fees and defense costs paid to
10 outside counsel for the defense of an employee if
11 the entity proves that the employee acted in bad
12 faith. Where applicable, the governmental entity
13 is also relieved of the obligation to indemnify an
14 employee for punitive damages.

15 4. Finally, because the statement of fact on the
16 bill may be used as legislative history in
17 interpreting this revision of the Maine Tort Claims
18 Act, it is important to note here a few inaccuracies
19 in the bill's statement of fact.

20 A. The bill's statement of fact states that
21 existing Title 14, section 8103, subsection 2,
22 paragraphs A, B and C are restated as Title 14,
23 section 8104-C, subsections 1, 2 and 3. The
24 reference to section 8104-C should be corrected to
25 read section 8104-B.

26 B. It states that existing Title 14, section
27 8103, subsection 2, paragraphs F, H and I in the
28 existing law have been recodified in Title 14,
29 section 8104-A, subsection 1. This should refer
30 also to section 8104-A, subsection 2.

31 C. It states that a change in Title 14, section
32 8116 permits a governmental entity to purchase
33 insurance or self-insure for any liability for
34 which it is obligated or entitled to provide under
35 Title 14, section 8112. The word "liability" used
36 here is incorrect; the word used should be
37 "indemnity."

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