



STATE OF IDAHO

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ATTORNEY GENERAL OPINION NO. 86-2

TO: Wayne Mittleider, Administrator
Division of Insurance Management
Department of Administration

Per Request for Attorney General's Opinion

Re: Personal liability of State Employees,
Board Members and Elected Officials

ISSUE PRESENTED:

Your agency has requested an opinion from this Office on the following issue:

Public officials serving on state-appointed boards have become increasingly concerned about their personal liability arising out of lawsuits which may exceed the ability of the Bureau of Risk Management to pay. This has all occurred as a result of the state's loss of liability insurance beyond the self-insured retention.

DISCUSSION:

It is our understanding that, as of September 30, 1985, the State of Idaho does not have any liability insurance or reinsurance but is self-insured through the Retained Risks Account in the state treasury.

The Risk Manager has the authority to self-insure liability claims through the state comprehensive liability plan. The Idaho Tort Claims Act provides:

[The Risk Manager] shall provide a comprehensive liability plan which will cover and protect the state and its employees from claims and civil lawsuits. He shall be responsible for the acquisition and administration of all liability insurance of the state or for the use of the retained risk fund provided in section 67-5757, Idaho Code, to meet the obligations of the comprehensive liability plan.

Idaho Code § 6-919.

The definition of "employee" in the Tort Claims Act includes all regular employees of the state, board members, elected officials, and any authorized volunteer. Idaho Code § 6-902(4). Under the Idaho Tort Claims Act, no employee of the government may be held personally liable for a judgment or any other cost or expense unless the employee was acting outside the course and scope of employment or with malice or criminal intent. Idaho Code § 6-903(a), (c) and (e).

The Idaho Tort Claims Act requires the "governmental entity" to defend and indemnify the employee if the claim is brought in the Idaho District Court under Idaho law or is brought in the United States Court under federal law. Idaho Code § 6-903(c). A "governmental entity," for this purpose, is both the state and its political subdivisions. The "state" is broadly defined to mean "the state of Idaho or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof." Idaho Code § 6-902(1). A "political subdivision" is also very broadly defined as "any county, city, municipal corporation, school district, irrigation district, special improvement or taxing district, or any other political subdivision or public corporation." Idaho Code § 6-902(2).

It is important to note that the governmental entity, not the Division of Insurance Management, has the duty to defend and indemnify its employees. Thus, the question of whether or not the state or other governmental entity has liability insurance has no bearing on the question of whether or not a government employee could be held personally liable for a money claim. The Idaho Tort Claims Act provides that, if a judgment is rendered in excess of the state's insurance limits or the comprehensive liability plan, then the "judgment shall be paid from the next appropriation of the state instrumentality whose tortious conduct gave rise to the claim." Idaho Code § 6-922. Political subdivisions likewise have authority to "levy and collect property tax, at the earliest time possible, in an amount necessary to pay a claim or judgment arising under the provisions of this act where the political subdivision has failed to purchase insurance or otherwise provide a comprehensive liability plan to cover a risk" under the Tort Claims Act. These property tax levies are expressly exempted from the limits of the one percent property tax law. Idaho Code § 6-928.

The governmental entity, in providing a defense for its employee, is also responsible for all attorney fees, court costs, judgments or settlements.

There are two narrow exceptions to the rules stated above. The first concerns an employee who is driving his or her own vehicle on state business. In that case, the employee's personal

insurance would be primary, and the state's duty to defend and indemnify would be secondary. In no event would the employee be held personally responsible for the excess judgment.

The second concerns an employee acting outside the course and scope of his or her employment or with malice or criminal intent. Such an employee can be held personally liable for money damage claims as well as for the costs associated with litigating such claims. There is a rebuttable presumption that if the employee is within the time and at the place of employment, then any act or omission made by the employee is within the course and scope of employment and without malice or criminal intent. Idaho Code § 6-903(e).

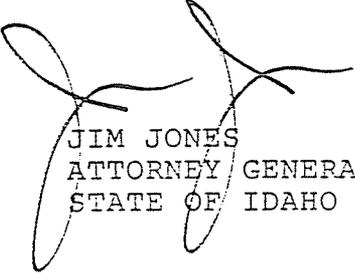
If the governmental entity intends to argue that the employee should be held personally responsible for any money damage claim, the employee must be notified in writing prior to the time any government attorney enters an appearance in the action. If a government attorney enters a defense for an employee, absent extraordinary circumstances (e.g., subsequent felony indictment), the governmental entity is barred from trying to recoup legal fees or any part of the judgment back against the employee.

AUTHORITIES CONSIDERED:

Idaho Code §§ 6-901 et seq.

Idaho Code § 67-5757

DATED this 12th day of March, 1986.



JIM JONES
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