

## UNIVERSITY OF CINCINNATI

CINCINNATI, OHIO 45221

OFFICE OF THE BUSINESS MANAGER

December 3, 1974

TO : Mr. Ralph C. Bursiek

FROM: R. P. Nye

Dear Ralph:

Attached is the Attorney General's opinion concerning H. B. 800, which I discussed with you the other day. When I talked to you, I was quoting from a telephone conversation with Tony Finamore of the State Examiner's Office. He had just received a call from the Columbus office telling him the opinion had been released and he was given a short explanation. When the opinion arrived in the mail, it had no reference to the status of the University as to whether it was included or excluded under H. B. 800 (the one point we wanted to know). It was a mixup in telephone communications when I reported to you that the opinion stated the University did not come under the provision of the bill. The Columbus office was evidently referring to the opinion that the University could purchase liability insurance out of general funds, while the other universities were not permitted to do so.

The only thing that the opinion really does is to further verify what we already know--U. C. can buy liability insurance.

The Auditor's Office has gone back to the Attorney General to obtain an opinion on the only question we had in the first place--Does or does not the University of Cincinnati lose its state immunity under the provisions of H. B. 800.

I'll keep you advised.

R. P. Nye

RPN:ph  
Attachment

cc: R. J. Smith

OFFICE OF THE ATTORNEY GENERAL

STATE OF OHIO

COLUMBUS 43215



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OPINION NO. 74 098

Honorable Joseph T. Ferguson  
Auditor of State  
State House  
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, and a substantially similar one from the Honorable Edward Q. Moulton, Vice President and Secretary of the Board of Trustees of The Ohio State University. Your first question reads as follows:

"The recent passage of Amended Substitute House Bill No. 800, which created the new Court of Claims, brings to my attention the fact that state universities are no longer protected by the doctrine of sovereign immunity. In light of this newly created liability, I respectfully ask your formal opinion on the question whether state universities are now empowered to purchase liability insurance to guard against the cost of injuries arising from the acts of their employees or agents."

In a separate request you have posed the following two questions:

"Both the case law and the Attorney General's opinions of the past have uniformly held that where there is no liability, a political subdivision has no legal authority to purchase liability insurance with public funds. It has been recently suggested, however, that liability insurance might be purchased as compensation for certain public employees. Furthermore, two of your opinions for the year 1973, Numbers 73-018 and 73-020, have indicated that state universities carry broad authority in determining the types of compensation and reimbursements to be allowed their employees. I therefore respectfully request your formal opinion on the following question:

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OFFICE OF BUSINESS MANAGER

"1. Can a state university lawfully purchase liability insurance as compensation to a salaried faculty member pursuant to an employment contract?

"2. Can a state university lawfully purchase professional liability insurance for non-salaried medical students who are receiving on-duty instruction at a university owned hospital? If so may the cost of such insurance be paid out of student fees?"

Section 16, Article I of the Ohio Constitution provides in pertinent part as follows:

"\* \* \* Suits may be brought against the state, in such courts and in such manner as may be provided by law."

It is the foregoing constitutional provision which provides the basis for the doctrine of sovereign immunity in Ohio. The doctrine essentially provides that the state is not subject to suit in its own courts without its express consent.

It is well settled that state universities are mere agents or instrumentalities of the state and, as such, share in the sovereign immunity of the state. Thacker v. Board of Trustees, 35 Ohio St. 2d 49 (1973).

The recent enactment of certain provisions in Amended Substitute House Bill No. 800 (effective January 1, 1975), however, will soon effect a fundamental change in the status of the state and the various instrumentalities thereof with respect to their immunity.

R.C. 2743.02, which waives the state's immunity from liability, provides as follows:

"(A) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between

private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.

"(B) Awards against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery by the claimant."

R.C. 2743.01, which defines terms contained in R.C. Chapter 2743, provides as follows:

"(A) 'State' means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

"(B) 'Political subdivisions' means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches."

Thus, it is clear that state universities, as instrumentalities of the state, may soon be held liable under the same rules of law applicable to suits between private parties.

Prior to the recent enactment of R.C. 2743.01 et seq. the Opinions of this office have uniformly denied the power of an instrumentality of the state to purchase liability insurance for itself or its employees in the absence of express authorization to do so. See, Opinion No. 72-090, Opinions of the Attorney General for 1972; Opinion No. 72-076, Opinions of the Attorney General for 1972; Opinion No. 71-008, Opinions of the Attorney General for 1971; Opinion No. 5949, Opinions of the Attorney General for 1943, p. 181.

It was held that, in the absence of a statute imposing liability, the purchase of liability insurance by an instrumentality of the state is merely a gift of public funds to the insurance company.

Thus, my predecessor, in concluding that the Board of Trustees of the Ohio State University may not purchase liability insurance for itself or its employees other than to cover liability arising from the use of motor vehicles, stated, in Opinion No. 67-001, Opinions of the Attorney General for 1967, as follows:

"It is self-evident that where there is immunity from suit, the question of tort liability cannot arise, for the question of liability only arises when the state has consented to be sued. Thus, since the board of trustees and the University are not subject to tort liability, there is nothing in this respect for the board to insure against. The payment of a premium on account of such insurance, if procured by the board, would be tantamount to a gift of public funds to the insurance company."

Clearly, this reasoning no longer applies, because the University will no longer be immune from suit when Am. Sub. H.B. 800 takes effect. However, this reasoning is not the only basis upon which the purchase of such insurance has been prohibited.

It has been held that departments or instrumentalities of the state may not purchase liability insurance unless there is a statute specifically authorizing such a purchase. In concluding that public funds may not be used to purchase false arrest liability insurance for State Highway Patrolmen in the absence of specific enabling legislation, I stated in Opinion No. 72-076, supra, as follows:

"\* \* \* No statute specifically authorizes the use of public funds to purchase insurance protecting the individual State Highway Patrol officer from liability for any false arrest he may make. An argument can be made that an expenditure for insurance of this type is an expense incident to law enforcement under Section 5503.02. It can enable patrolmen to enforce the law without fear of exposing their private resources to charges for attorneys' fees and possible judgments or settlement in false arrest actions. It would logically follow that this Section authorizes the use of public funds to purchase such insurance. But, when the question of

expending public funds to purchase liability insurance arises, the precedent is uniform in opposition thereto in the absence of specific statutory authorization."

Although the boards of trustees are vested with broad powers in governing state supported universities, it is nevertheless firmly established that public funds can be disbursed only by clear authority of law and upon compliance with statutory provisions relating thereto. Moreover, if there is any doubt as to the right to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power. State ex rel. A. Bentley & Sons v. Pierce, 96 Ohio St. 44 (1917).

The authority to purchase liability insurance for itself or its employees is nowhere expressly conferred upon the board of trustees of a state university. I am aware that in certain instances the power to purchase such insurance has been implied. In Opinion No. 1214, Opinions of the Attorney General for 1952, page 187, for instance, my predecessor concluded that where a board of education has prescribed a course of instruction in motor vehicle driving, and where such equipment is provided through a rental agreement, the rental price to be paid by the board from public funds may lawfully include an item to cover the cost of such liability insurance on the equipment as the owner may insist upon as a condition of the agreement.

Similarly, in Opinion No. 2498, Opinions of the Attorney General for 1950, page 730, it was held that a board of township trustees which, pursuant to R.C. 5571.10, is liable to any person, firm or corporation for damages incurred by reason of its negligence or carelessness in the discharge of its official duties, may lawfully protect themselves by procuring liability insurance. See also, Opinion No. 2995, Opinions of the Attorney General for 1931, page 303.

Thus, the power to purchase liability insurance is sometimes implied. (Note that all state agencies and employees now have authority to purchase automobile liability insurance to protect their officers and employees, under R.C. 9.83.) However, the General Assembly has considered the question of authority of state university boards of trustees to purchase insurance for their employees. R.C. 9.90 provides such authority for many types of insurance. It reads as follows:

"The governing board of any public institution of higher education, including without limitation state universities and colleges, community college districts, university branch districts, technical college districts, and municipal universities, or the board of education of any school district, may, in addition to all other powers provided in the Revised Code, contract for, purchase, or otherwise procure from an insurer or insurers licensed to do business by the state of Ohio for or on behalf of such of its employees as it may determine, life insurance, or sickness, accident, annuity, endowment, health, medical, hospital, dental, or surgical coverage and benefits, or any combination thereof, by means of insurance plans or other types of coverage, family, group or otherwise, and may pay from funds under its control and available for such purpose all or any portion of the cost, premium, or charge therefor. All or any portion of the cost, premium, or charge therefor may be paid in such other manner or combination of manners as the governing board or the school board may determine, including direct payment by the employee, and, if authorized in writing by the employee, by such governing board or school board with moneys made available by deduction from or reduction in salary or wages by the foregoing of a salary or wage increase. Division (B) (7) of section 3917.01 and the last paragraph of section 3917.06 of the Revised Code shall not prohibit the issuance or purchase of group life insurance authorized by this section by reason of payment of premiums therefor by the governing board or the school board from its funds, and such group life insurance may be so issued and purchased if otherwise consistent with the provisions of sections 3917.01 to 3917.06, inclusive, of the Revised Code."

R.C. 3345.20 authorizes the board of trustees of a state university to purchase liability insurance for student teachers and supervisors, as follows:

"The board of trustees of a state college, university, or state affiliated college or university may procure a policy or policies of insurance insuring its supervisors of student teachers and its student teachers against liability on account of damages or injury to persons or property, in respect to the acts of such supervisors of student teachers and student teachers occasioned by any incident occurring in the course of the performance of their duties during the period of their assignment to any school."

Thus, the General Assembly has spoken to the question of authority to purchase insurance, but has not mentioned liability insurance except for those limited types covered by R.C. 9.83 and 3345.20. A maxim of statutory construction, expressio unius est exclusio alterius, states that the mention of one thing implies the exclusion of all others. See Opinion No. 74-022, Opinions of the Attorney General for 1974. If the General Assembly had intended to authorize the purchase of liability insurance, it could easily have so specified in R.C. 9.90.

The fact that there are countless statutes scattered throughout the Ohio Revised Code expressly authorizing the purchase of liability insurance by instrumentalities of the state, makes the inference even more compelling. See, e.g., R.C. 152.08(A)(6)(12); R.C. 165.02(I); R.C. 306.04(K); R.C. 306.35(T); R.C. 339.16; R.C. 349.06; R.C. 5507.03. Thus, it is apparent that the General Assembly was apprised of the situations in which the state or its instrumentalities might require liability insurance.

It is clear, of course, that if there is some special reason for mentioning the thing expressly mentioned by the statute and none for mentioning the thing under consideration, the doctrine of expressio unius est exclusio alterius should not be applied. Columbus v. Spielman, 19 Ohio N.P. (n.s.) 257 (1916). With respect to the type of insurance that a state university is authorized to purchase for itself, therefore, the inference against the purchase of liability insurance is seriously weakened. Prior to the recent waiver of the state's sovereign immunity, there was no reason for a state university to purchase liability insurance for itself.



The strongest reason for lack of authority of a state university to purchase liability insurance for itself or its employees, however, appears in the text of Am. Sub. House Bill No. 800, itself. In enacting this Bill the General Assembly did more than merely eliminate the defense of sovereign immunity, rather, it set forth a comprehensive procedural scheme regulating every aspect of suits brought against the state. R.C. 2743.19, which provides for the payment of judgments against the state, reads as follows:

"(A) In rendering a judgment against the state, the court of claims shall determine and specify in the judgment the department, office, bureau, commission, board, agency, institution, or other instrumentality of the state against which a determination of liability has been made.

"(B) No execution shall issue against the state, or any department, board, office, commission, agency, institution, or other instrumentality upon any judgment for the payment of money.

"(C) Judgments shall be accomplished only through the following procedure, which may be enforced by writ of mandamus directed to the appropriate official:

"(1) The clerk of the court of claims shall forward a certified copy of the judgment to the auditor of state and the office of budget and management.

"(2) The auditor of state shall draw a warrant of the treasurer of state payable to the judgment creditor in the amount certified, increased by interest between the date of the judgment and the date of the warrant, or sixty days after the receipt of the judgment, whichever first occurs, at the rate applicable to judgments rendered against private parties.

"(3) The expense shall be charged against available unencumbered moneys in the appropriations to whichever state departments, boards, offices, commissions, agencies, institutions, or other instrumentalities are named in the judgment.

"(4) The identity of the appropriations and the availability of unencumbered moneys shall be certified to the auditor of state by the office of budget and management prior to drawing of the warrant. The office of budget and management shall have sole discretion to determine whether or not unencumbered moneys in a particular appropriation are available for satisfaction of a judgment.

"(5) If the office of budget and management determines that sufficient unencumbered moneys do not exist in the particular appropriations to pay the judgment, it shall make application for payment of the judgment owed out of the emergency purposes fund or any other appropriation for emergencies or contingencies and payment out of this fund or other appropriation shall be authorized if there are sufficient moneys greater than the sum total of then pending emergency purposes fund requests or requests for releases from the other appropriations.

"(6) If sufficient moneys do not exist in the emergency purposes fund or any other appropriation for emergencies or contingencies to pay the judgment, the state department, board, office, commission, agency, institution, or other instrumentality named in the judgment shall request the general assembly to make an appropriation sufficient to pay the judgment, and no warrant shall be drawn until the office of budget and management certifies to the auditor of state that such an appropriation has been made. The appropriate state department, board, office, commission, agency, institution, or other instrumentality shall make this appropriation request during the current biennium and during each succeeding biennium until a sufficient appropriation is made.

"(D) No judgment may be forwarded by the clerk of the court of claims to the auditor of state or office of budget and management until all appeals have been determined and all rights to appeal exhausted, except as otherwise provided in this section. In the event that any party to a claim against the state appeals from only a portion of a judgment, and a remaining portion provides for the payment of money by the state, a certified copy of the judgment, together with a copy of the notice of appeal shall be forwarded to the auditor of state and office of budget and management, and that part of the judgment calling for the payment of money by the state and not a subject of the appeal shall be processed for payment as described in this section."

The unmistakable thrust of the foregoing statute is that the state is to be a self-insurer. In setting forth alternate sources for the satisfaction of judgments against the state, it is clear that the General Assembly did not envision the purchase of liability insurance by the state or its instrumentalities.

Therefore, except in those instances when the purchase of liability insurance is expressly authorized, the board of trustees of a state university may not purchase liability insurance for the university or its employees.

Although the foregoing conclusion applies to all state universities, it does not apply to those universities which are essentially municipal universities receiving substantial state aid. Because of the special status of municipal universities, they possess certain powers which are not available to other publicly supported universities. R.C. 3349.02, which specifically authorizes the board of trustees of a municipal university to purchase liability insurance, provides as follows:

"Such board of directors and the university as a public body, both politic and corporate, is performing essential governmental functions and serving public purposes in all matters authorized under the constitutional laws of this State, and is capable of owning, holding, and transferring property, contracting and being contracted with,

suing, being sued on its contracts, and insuring property owned by it under its control, its activities, and its employees and their activities, as it may determine, all in the name of such university."

(Emphasis added.)

It should be noted, however, that the foregoing statute is extremely limited in its application. Currently, the University of Cincinnati is the only municipal university in Ohio. It is clear, therefore, that the University of Cincinnati may purchase liability insurance for itself and its employees.

You further inquire as to whether or not a state university can purchase liability insurance for a salaried faculty member pursuant to an employment contract with such faculty member. Although your request letter does not elaborate upon the proposed plan, I assume you are referring to a procedure whereby an increase in salary would be granted to faculty members followed by the implementation of payroll deductions for the purpose of paying the premiums on liability insurance.

It is clear that the board of trustees of a state supported university has broad powers in fixing the compensation of its teaching employees. See, e.g., R.C. 3335.09; R.C. 3341.04; R.C. 3343.06; R.C. 3344.03; Opinions Nos. 73-018 and 73-020, Opinions of the Attorney General for 1973. This power, however, is not unfettered, and the purchase of liability insurance generally requires specific legislative authorization. See Opinion No. 72-076, supra.

As previously mentioned, R.C. 9.90 authorizes the board of trustees of any state university to procure, on behalf of its employees, various types of insurance. The purchase of such insurance may be effected through various means including direct payment by the employee and by deduction from the employees' salary or wages. The statute further provides that the type of coverage may be family, group or otherwise. Moreover, R.C. 3917.04 authorizes a deduction from the wages of government employees for the purchase of various types of group policies. In short these two statutes provide for the purchase of several types of insurance utilizing almost every conceivable method of payment. Although the issuance of group liability insurance is not authorized by Ohio law, thereby minimizing the importance of its exclusion from R.C. 3917.04, it is significant that the General Assembly, in compiling an extensive list of permissible

types of insurance, failed to include liability insurance.

Here, as in the broader issue discussed earlier in the opinion, the exclusion of liability insurance compels the inference that the General Assembly did not intend to authorize the purchase of such insurance.

Finally, you inquire as to whether or not a state university can lawfully purchase professional liability insurance for non-salaried medical students who are receiving on-duty instruction at a university hospital. Once again, for reasons discussed earlier in this Opinion, I must conclude that a board of trustees of a state university is not authorized to purchase such insurance. In enacting R.C. 3345.20, which authorizes the purchase of insurance in order to protect student teachers and their supervisors in the course of the performance of their duties, the General Assembly presumably was aware of the various situations in which students may incur liability for their negligent acts. There is, however, no statute expressly authorizing the purchase of insurance in the type of situation you described.

I conclude, therefore, that the board of trustees of a state university would not be authorized to purchase professional liability insurance for medical students. This is not to say, however, that the board of trustees may not require medical students receiving on-duty instruction at a university owned hospital to obtain professional liability insurance as a prerequisite to such instruction for their own protection as well as that of the patients.

It should be noted that the foregoing discussion does not apply to donated funds, such as those contained in university development funds. Such monies may be used for any proper university purpose, regardless of any express statutory authority. See Opinion No. 74-074, Opinions of the Attorney General for 1974.

In specific answer to your questions, therefore, it is my opinion and you are so advised that:

1. In the absence of statutory authorization to do so, the board of trustees of a state university may not purchase liability insurance for the university or its officers or its employees.

Honorable Joseph T. Ferguson

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2. In the absence of statutory authorization to do so, the board of trustees of a state university may not purchase liability insurance for its employees through its power to fix the compensation of salaried faculty members.

3. The board of trustees of a state university may not purchase professional liability insurance for medical students receiving on-duty instruction at a university owned hospital.

Respectfully,

*William J. Brown*

WILLIAM J. BROWN  
Attorney General