



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 88-160

Constance M. Achterberg
Saline County Counselor
118 S. 7th St.
P.O. Box 1697
Salina, Kansas 67402-1697

Re: State Departments; Public Officers and Employees --
Kansas Tort Claims Act -- Purchase of Insurance

Synopsis: Claims against a county, based upon federal civil rights law, are not subject to the damage limitation provisions set forth in the Kansas tort claims act. K.S.A. 1987 Supp. 75-6105 sets a damage limitation and K.S.A. 1987 Supp. 75-6111 creates an exception to that limitation when an insurance policy is purchased that has policy limits in excess of the limitation. If such a policy is purchased, the damage limitation becomes the limitation of the policy. If a policy does not cover liability for certain claims, the damage limitation contained in K.S.A. 1987 Supp. 75-6105 remains applicable. Cited herein: K.S.A. 1987 Supp. 75-6105; 75-6111.

* * *

Dear Ms. Achterberg:

On behalf of Saline county, our opinion is requested on several issues concerning the Kansas tort claims act: (1) Whether claims against the county, based on federal or civil

rights statutes or case law, are subject to the damage limitations set forth in the Kansas tort claims act; (2) whether the purchase of liability insurance in excess of \$500,000 waives the damage caps set forth in the tort claims act for areas where no insurance is carried, and (3) whether the purchase of coverage in excess of the caps set forth in the Kansas tort claims act operates to waive the limitation of damages beyond the amount of coverage purchased.

The applicability of the Kansas tort claims act to a federal cause of action was discussed in Lee v. Wyandotte County, 586 F. Supp. 236 (Kan. 1984). In that case lawsuits were brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, and the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution. The court held that plaintiffs' federal civil rights claims were not subject to the damage limitations contained in the Kansas tort claims act. Id. at 239. Thus, it is our opinion that, pursuant to this case, claims against the county based upon federal law are not subject to the damage limitation provisions set forth in the Kansas tort claims act.

K.S.A. 1987 Supp. 75-6105 limits the maximum liability that a claimant may recover from public entities. See Lantz v. City of Lawrence, 232 Kan. 492 (1983); Jackson v. City of Kansas City, 235 Kan. 278, 307 (1984). K.S.A. 1987 Supp. 75-6111 provides an exception to that limit and discusses the impact that occurs when an entity provides insurance in excess of the limitations contained in K.S.A. 1987 Supp. 75-6105. K.S.A. 1987 Supp. 75-6111 provides that

"the limitation on liability provided by subsection (a) of K.S.A. 75-6105 and amendments thereto shall not be applicable where the contract of insurance provides for coverage in excess of such limitation in which case the limitation on liability shall be fixed at the amount for which insurance coverage has been purchased or, where the governmental entity has entered into a pooling arrangement or agreement pursuant to subsection (b)(2) and has provided for coverage in excess of such limitation by ordinance or resolution of its governing body, in which case the limitation on liability shall be fixed at

the amount specified in such ordinance or resolution." (Emphasis added).

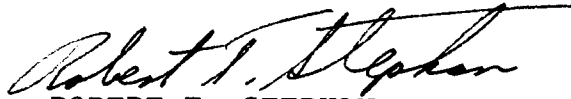
Thus, if insurance has been purchased in excess of the limitation contained in K.S.A. 1987 Supp. 75-6105, limitation upon the liability "shall be fixed at the amount for which insurance coverage has been purchased." The statute does not say that liability shall be fixed in excess of the amount for which insurance coverage has been purchased. Nor does it dictate that a limited waiver of the damage limitations contained in K.S.A. 75-6105 operates to waive damage limitations for all liability. This provision, which to our knowledge has not as yet been judicially discussed in this context, only allows recovery for liability up to the limits of insurance coverage purchased in excess of the limitations contained in K.S.A. 1987 Supp. 75-6105. If a county purchases a general blanket insurance policy in excess of the limits in K.S.A. 1987 Supp. 75-6105 and that policy covers all tort claim liability, K.S.A. 1987 Supp. 75-6111 allows a court to award damages up to the limits of that particular policy.

A difficult question becomes what impact might result from the purchase of one or more different policies drafted or designed so as to provide coverage for specific types of liability, but which is unclear as to the types of liability that are to be excluded. An example could be the purchase of a one million dollar policy in order to cover damages based upon federal civil rights claims and another policy to cover tort liability. The matter is further complicated if there is only one policy with different coverage amounts for different types of liability. The legislature clearly intended to allow governmental immunity to be waived up to the policy limits purchased. However, if the policy has not been purchased or written to cover a particular type of liability, it is our opinion that immunity has not been further waived as to that liability and thus the limitations contained in K.S.A. 1987 Supp. 75-6105 remain applicable. It is therefore our opinion that if the policy clearly excludes coverage of a specific type of liability, the damage limitations contained in K.S.A. 1987 Supp. 75-6105 remain applicable for the type of liability excluded from coverage. It therefore becomes essential that great care be taken in drafting insurance agreements so as to clarify what types of liability the excess insurance covers.

In summary, damage limitations contained in 1987 Supp. 75-6105 may be exceeded, pursuant to K.S.A. 1987 Supp. 75-6111, when

insurance is purchased in excess of those limitations. However, if the policy purchased does not cover liability for certain claims, the limitations contained in K.S.A. 1987 Supp. 75-6105 remain applicable.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General

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