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Municipal Corporations--Insurance and Immunity

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Both courts are seeking to establish smooth, harmonious relationships between management and labor, but the conflict in the law governing the employee-union-employer relationship has shown a distinct need for a new form of fiduciary-agency concept. This conflict has not been reconciled by the growing expanse of federal law applicable to collective bargaining contracts, which binds state court adjudications. *Lucas Flour v. Teamsters Union,* 369 U.S. 95 (1962). It is encouraging to note that elimination of confusion in the field of collective bargaining will not be affected by the concurrent jurisdiction now permitted because of the *Lucas Flour* case. The Supreme Court recently stated that although diversities and conflicts might arise from concurrent jurisdiction, this is not necessarily unhealthy for one of the traditional functions of the Court has been to resolve and accommodate such diversities and conflicts. *Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962).

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P was injured as a result of alleged negligence of the city in the operation of a governmental function. The city was covered by a liability policy whereby the insurer agreed not to raise the defense of governmental immunity. *D*-city demurred to the complaint and the trial court sustained the demurrer. *Held,* order reversed. The city waived its immunity for such of its acts and those of its servants as were covered by the insurance policy to the extent of the policy limits. *Marshall v. City of Green Bay,* 118 N.W.2d 715 (Wis. 1963).

The principal case followed a precedent-breaking Wisconsin decision which abolished governmental immunity for torts from July 15, 1962. *Holytz v. City of Milwaukee,* 17 Wis.2d 26, 115 N.W.2d 618 (1962). As a result of the *Holytz* case, the *Marshall* case would seem to have limited effect in Wisconsin. There are, however, other states which may accept the Wisconsin court's interpretation of the effect of like insurance policies. The opinion in the instant case states that a growing minority of jurisdictions are relaxing their views of the waiver of governmental immunity to the extent that an insurance policy protects a municipality against tort liability which previously did not exist. Annot. 68 A.L.R.2d

1437 (1959), lists three states, prior to Wisconsin, that accept this view. Twenty states have held to the contrary.

Regardless of jurisdiction, focus should be directed to two prime factors. Is a municipality authorized to expend public funds to purchase liability insurance? If an expenditure is authorized, is the governmental immunity waived to the extent of the coverage if a clause in the policy precludes the insurer from raising the defense of governmental immunity?

West Virginia, by statute, authorizes the governing body of a municipal corporation to expend public funds for the purchase of public liability, bodily injury liability, and property damage liability insurance policies for the protection of such municipalities against the negligent operation of motor vehicles owned by the municipalities. Purchase of insurance against negligence in the operation of any proprietary or commercial function of the municipality is also authorized. W. VA. CODE ch. 8, art. 4, § 10f (Michie 1961).

The extent of this statute has never been determined by the court. It is the opinion of the Attorney General that the statute is to permit the municipalities to protect themselves against those possibilities where they are not protected by common law or statute. 1952-1954 W. VA. ATT'Y GEN. BIENNIAL REP. AND OPS. 141.

The application of the statute can be more readily ascertained once it is determined when the municipality is protected against tort liability. West Virginia is one of the few states that has a constitutional provision granting absolute immunity to the state. W. VA. CONST. art. VI, § 35, provides that the state shall never be made a defendant in a court of law or equity.

By judicial interpretation, the municipalities, when engaged in a governmental function, have been clothed with the same immunity as the state. Accepting common law principles, however, the courts withdraw this immunity when the municipalities are performing proprietary functions. *Hope Natural Gas Co. v. West Virginia Turnpike Comm'n,* 143 W. Va. 913, 105 S.E.2d 630 (1958); *Van Gilder v. City of Morgantown,* 136 W. Va. 831, 68 S.E.2d 746 (1949); *Hayes v. Town of Cedar Grove,* 126 W. Va. 828, 30 S.E.2d 740 (1944).

As is common knowledge, the difficulty lies in the determination of what is a proprietary versus a governmental function. The Attorney General, on the basis of court decisions up to the date of

the opinion, emphasized pecuniary profit or special corporate benefit as opposed to the exercise of the acts of a sovereignty. For the reason that the government's usual function is to act in the interest of the public as a whole, any doubt as to whether the function is proprietary or governmental should be resolved in favor of the latter. *Hayes v. Town of Cedar Grove, supra.*

Once it is accepted that a municipality can protect itself against negligence in the operation of proprietary or commercial functions, the factor of waiver is raised. It is necessary to review West Virginia law regarding waiver of governmental immunity.

The court in *Hope Natural Gas Co. v. West Virginia Turnpike Comm'n, supra,* citing *Ward v. County Court,* 141 W. Va. 730, 93 S.E.2d 44 (1956), said that in states without the constitutional prohibition the legislature may waive the state's immunity. In West Virginia, however, the constitutional provision cannot be disregarded. No agency, representative or department of the State can consent to be sued or waive its constitutional immunity. *Hamill v. Koontz, Tax Comm'r* 134 W. Va. 439, 59 S.E.2d 879 (1950).

With *Bradfield v. Board of Education,* 128 W. Va. 228, 36 S.E.2d 512 (1945); *Utz v. Board of Education,* 126 W. Va. 823, 30 S.E.2d 342 (1944); *Boice v. Board of Education,* 111 W. Va. 95, 160 S.E. 566 (1931), cited as supporting the conclusion, West Virginia has been placed with those states where a governmental unit's immunity from suit is unaffected by its purchase of insurance. Annot. 68 A.L.R.2d 1437 (1959). The *Utz* case is also cited for the proposition that a governmental unit lacks the power to waive its immunity or estop itself by procuring insurance.

In *Boice v. Board of Education, supra, P* was injured through the alleged negligence of a school bus driver. The board, without statutory authorization, carried indemnity insurance against loss from claims arising from the operation of its buses. It was contended by *P* that the board stepped down from its pedestal of immunity by paying the premiums for the insurance out of a school fund. The court held that the board was powerless to waive its immunity. The court seemed to imply that the Legislature could affect the governmental immunity, but a contra view appears to have been taken in *Hope Natural Gas Co. v. West Virginia Turnpike Comm'n, supra;* and *Hamill v. Koontz, Tax Comm'r, supra.*

Subsequent to the *Boice* case, W. VA. CODE ch. 18, art. 5, § 13 (Michie 1961) was enacted giving a board of education the au-

thority to purchase liability insurance against the negligence of the drivers of the board's vehicles.

The *Utz* case, *supra,* interpreted this statute. *P* sought to recover for injuries allegedly caused by the negligent operation of a school bus owned and controlled by the board of education. The board failed to notify the insurer within the required time after the accident. As a result, the policy became ineffective. *P* contended that his right of recovery would have been fully guarded had it not been for the board's negligent delay. It was argued that the board should be estopped to defend on the ground of its governmental immunity. The court noted that the indemnity was not for the board but the driver. It held, "the board cannot by its intentional affirmative action, remove itself from the category of governmental instrumentalities while performing governmental functions." The statute, construed liberally, does not constitute legislative abolition of immunity. In addition, the court did not decide whether the Legislature has the power to offset a right given the State Government by the constitution.

W. VA. CODE ch. 17, art. 10, § 17 (Michie 1961), places liability on the municipalities for streets and sidewalks being out of repair. For many, it may be difficult to reconcile the doctrine of sovereign immunity with liability under this statute. The general rule is that a municipality "holds its public ways not in its governmental, but in its proprietary or corporate capacity." 3 YOKLEY, MUNICIPAL CORPORATIONS § 461 (1958).

The Wisconsin court in the principal case restricted the holding to those cases where the insurer agrees not to raise the defense of governmental immunity. It would appear that West Virginia law is: 1. If the presence of such a clause raises the premiums, and no doubt it would, a municipality is without authority to expend public funds for insurance with the provision, at least as to the increased cost of premiums. 2. Regardless of such a clause, a municipality is powerless to waive its governmental immunity. 3. There is some question as to whether the Legislature can affect the municipalities' governmental immunity.

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