

**OPINION
79-50**

January 18, 1979 (OPINION)

Mr. Byron Knutson
Commissioner
North Dakota Insurance Department
Capitol Building
Bismarck, North Dakota 58505

Dear Mr. Knutson:

This is in response to your letter of December 1, 1978, wherein you request an opinion relative to Chapter 32-12.1 of the North Dakota Century Code, as amended, concerning LIABILITY OF POLITICAL SUBDIVISIONS. In that connection you submit the following questions:

1. Does N.D.C.C. 32-12.1-08(2) prohibit political subdivisions from purchasing insurance with funds generated either by the reserve fund mill levy or paragraph eleven's judgment tax levy?
2. That is, is not prepaid insurance an advance payment form of "payment of claims?"
3. Does N.D.C.C. 32-12.1-11 provide for the "stacking" of five mills (for example, if five judgments had been obtained would the limit be 25 mills) or restrict the total of all judgments to five mills per year?
4. Does N.D.C.C. 32-12.1-11 authorize the collection of five mills by subdivisions which do not have taxing authority?
5. Is the five mill provision on the property tract or does it follow the subdivision? That is, may overlapping subdivisions each levy five mills or will a given tract of land be subjected only to a five mill levy total for payment of judgments at a given time? For example, could a tract of land be subjected to five mills for the township, another five mills for the county, another five mills for the school district, etc.?
6. The insurance industry currently provides general liability and errors and omissions under separate coverages (copies enclosed). The controlling definitions are: (A) for general liability: "occurrence means an accident, . . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." and (B) for errors and omissions "Wrongful Act means any and all of the following: Actual or alleged errors, misstatement or misleading statements, act or omission or neglect or breach of duty by the Insured, . . ."

N.D.C.C. 32-12.1-03(1) specifies liability "caused by negligence or wrongful act or omission of any employee

acting within the scope of the employee's employment . . . , or . . . where the political subdivision, if a private person, would be liable to the claimant."

Most subdivisions purchase errors and omissions coverage?

7. Assuming that a subdivision did not purchase errors and omissions coverage and a judgment is obtained which a court rules is not within the general liability coverage; must the subdivision under N.D.C.C. 32-12.1-11 provide for a five mill levy?
8. Since N.D.C.C. sections 32-12.1-05, 07, 08, 11, 12, and 13 all provide for "may" instead of "shall," is it the Legislature's intent to mandate insurance coverage or leave discretion with the subdivisions? Or, in the event that coverage is not obtained (either wholly or partially), are all judgments to be paid a minimum of five mills regardless of how much money is generated or how long the levy attaches before paying the total amount of the judgment?

With regard to your first question, whether Section 32-12.1-08(2) prohibits political subdivisions from purchasing insurance with funds generated either by the reserve fund mill levy or paragraph eleven's judgment tax levy, we would note the text of same as follows:

2. The fund established pursuant to this section shall be kept separate and apart from all other funds and shall be used only for the payment of claims against the political subdivision which have been settled or compromised or judgments rendered against the political subdivision for injuries arising out of risks established by this chapter. (Emphasis supplied)

Clearly the expenditures from the reserve fund established pursuant to Section 32-12.1-08 is limited "for the payment of claims". Section 32-12.1-02 defines "claim", as follows:

1. "Claim" means any claim permitted by this chapter brought against a political subdivision for an injury caused by a political subdivision or an employee of the political subdivision acting within the scope of the employee's employment or office. (Emphasis supplied)

The definition is clear and refers to a specific time, i.e. "for an injury". Accordingly, we believe the same to be limited to such specific item and would therefore not include prepaid insurance for such claims as may arise, noting that such payment would necessarily involve contingencies which may or may not arise. Section 32-12.1-11 provides for a tax levy only "if a final judgment is obtained . . .", and therefore cannot be used to purchase prepaid insurance.

Our specific response to your first question must therefore be in the affirmative in that a political subdivision is prohibited from purchasing insurance with funds generated either by the reserve fund created by Section 32-12.1-08 or by Section 32-12.1-11 of the North Dakota Century Code, as amended, noting however, that Section

32-12.1-07(b) of the North Dakota Century Code, as amended, authorizes the purchase of insurance coverage, presumably from the general fund.

With regard to your second question as to whether or not prepaid insurance is an advance payment form of "payment of claims", it appears that the definition of "claim" as afforded by Section 32-12.1-02(1) and relevant to Chapter 32-12.1, would preclude such an interpretation and that prepaid insurance is not a form of "payment of claims", as contemplated by the statute.

With regard to your third through fifth questions, concerning the five mill levy and limitations inherent in Section 32-12.1-11 of the North Dakota Century Code, as amended, we note the text of the statute as follows:

32-12.1-11. JUDGMENT AGAINST POLITICAL SUBDIVISION - ADDITIONAL TAX LEVY. - If a final judgment is obtained against any political subdivision, the governing body of the political subdivision may by resolution provide for the levy and collection of an annual tax upon all the taxable property within the political subdivision for the payment of such judgment. The amount levied under this section for the payment of a judgment against a political subdivision shall not exceed five mills in any one year. (Emphasis supplied)

We note that the statute uses the singular form in reference to "judgment" for which reason we can only conclude that the authority to levy and collect the annual tax applies to "a judgment" rather than to "judgments". For this reason it would appear that each time a judgment is obtained, up to another five mills may be levied against all of the taxable property within the political subdivision. The statute also provides that each subdivision may levy up to five mills, for which reason a particular tract of land could potentially be burdened by overlapping subdivisions. Further, since there exists no specification or differential treatment in the grant of authority than generally to "any political subdivision", it would appear that nontaxing subdivisions would also be allowed to levy the annual tax as specified by the statute.

Your sixth question relates to whether subdivisions must purchase errors and omissions coverage. With regard to same, we note that Section 32-12.1-03(3) provides that a subdivision shall not be liable for any claim based upon an act or omission "of an employee, * * * exercising due care" or for discretionary functions. This question then is quite contingent upon questions of fact involving degree of care required and a determination of whether a particular act or omission is a discretionary function. Obviously it is possible that a contingent liability may arise under such definition, for which reason it would appear that the ultimate determination of whether a subdivision must, or should, purchase errors and omissions coverage, would be a matter of discretion of the governing body thereof.

With regard to your seventh question, based upon the assumption that a subdivision did not purchase errors and omissions coverage and a judgment is obtained which is not within the general liability coverage, whether the subdivision must provide for a five mill levy

under the provisions of Section 32-12.1-11 of the North Dakota Century Code, as amended, we would note that the statute provides for a "fall back" option. The levy is not, however, by the terms of the statute, mandatory. The same provides that "the governing body of the political subdivision may by resolution provide for the levy and collection of an annual tax * * *".

While the assumption is that a minimum of five mills is to be paid on an outstanding judgment, this factor becomes relevant both in regard to the paying of "a judgment", and in those cases as contemplated by your question three involving multiple judgments. We believe that the nonmandatory nature of this particular provision is, however, based upon the options which the political subdivision has, as inherent in Chapter 32-12.1 of the North Dakota Century Code, as amended, and that the basic assumption is that whether the judgment or judgments are to be paid by insurance coverage, self insurance, or by means of the "fall back" provisions of Section 32-12.1-11, i.e. the five mill levy, the same must be paid, hence, it would appear that the subdivision's discretion is limited to the options prescribed.

With regard to your eighth question, also concerning the discretionary coverage or authority to levy an annual tax for the payment of such judgments as may be rendered against the political subdivision, it would appear that it was the Legislature's intent to mandate the political subdivisions to make provision, within the discretionary options afforded by Chapter 32-12.1 of the North Dakota Century Code, as amended for the payment of such judgments which may become a liability of the particular political subdivision. This is also within the essence of your seventh question which is limited to only the levy of a five mill tax as referred to in Section 32-12.1-11 of the North Dakota Century Code, as amended.

We trust that the foregoing observations, comments, information and expressions will adequately set forth the opinion of this office upon the questions submitted.

Sincerely,

ALLEN I. OLSON

Attorney General