Note from the Attorney General's Office:

1972 Op. Att'y Gen. No. 72-076 was clarified and amplified by 1973 Op. Att'y Gen. No. 73-029.

OPINION NO. 72-076

Syllabus:

1. Public funds may not be used to purchase false arrest liability insurance for State Highway Patrolmen in the absence of specific enabling legislation.

2. When a State Highway Patrolman is sued for false arrest, the Attorney General may defend him if, after careful examination of the facts and circumstances upon which the suit is based, he concludes that the patrolman attempted in good faith to perform his official duties. Opinion No. 71-080, Opinions of the Attorney General for 1971, approved and followed.

To: Robert M. Chiaramonte, Superintendent, State Highway Patrol, Columbus, Ohio

By: William J. Brown, Attorney General, August 25, 1972

I have before me your request for my opinion, which reads as follows:

> "Due to the ever increasing possibility of false arrest suits being filed against officers of the Ohio State Highway Patrol, it is our desire to purchase police liability insurance for the uniformed ranks.
>
> "We have had false arrest charges filed in the past which, although dismissed eventually by the court, necessitated the payment of attorney fees.
>
> "Section 16, Article I of the Ohio Constitution provides that suits may be brought against the State in such courts and in such manner as may be provided by law. It has been held that Section 16 was not self-executing and without enabling legislation so it may not be brought against the State.
>
> "Even though the State does enjoy a substantial amount of immunity from civil suits, it is felt that the government employee does not share in this immunity and is not only responsible for his professional acts but may be held legally liable for them.
>
> "We respectfully request an informal opinion as to whether or not it is permissible for the Ohio State Highway Patrol to purchase insurance covering false arrest for State Highway Patrol officers.
>
> "In the event it is determined that police liability insurance cannot be purchased can we

> expect that the State would provide the legal counsel necessary in having the charges dismissed? If this be the case, would that legal counsel be provided from your office?"

The answer to your first question involves a discussion of express and implied grants of statutory power. The basic principle of law was stated by my predecessor in Opinion No. 2071, Opinions of the Attorney General for 1958, as follows:

> "Few principles of law are better settled than that a public body which is created by statute has only such powers as the statute expressly give[s] it, together with such powers as are necessarily implied from the powers granted. 32 Ohio Jurisprudence, 933."

Section 5503.02, Revised Code, contains the general authorization for the department as a whole. It provides, in part, as follows:

> "The general assembly shall appropriate annually from general revenues to the state highway safety fund created by section 4501.06 of the Revised Code, moneys to reimburse such fund for all expenses of the state highway patrol incident to the performance of duties unrelated to highway purposes as described in section 5a of Article XII, Ohio Constitution."

Section 4501.06, Revised Code, speaks to funds as follows:

> "* * * for the purpose of enforcing and paying the expenses of administering the law relative to the registration and operation of motor vehicles on the public roads or highways * * *."

Article XII, Section 5a, Ohio Constitution, speaks to the use of certain funds for the "expense of state enforcement of traffic laws", inter alia. 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.

The matter was recently considered by this office, in Opinion No. 72-007, Opinions of the Attorney General for 1972, in a case where the Guernsey County Children Services Board wanted to purchase liability insurance to protect itself and volunteer drivers from their negligent operation of vehicles used to transport children under the custody of the board. My conclusion was that the board was immune from suit, and that

public funds could not be expended for liability insurance where no liability exists; but that by virtue of special legislation enacted in 1957, the state and its political subdivisions may procure liability insurance to protect individuals employed by them, or acting for them, while operating motor vehicles. Section 9.83, Revised Code, enacted in 127 Ohio Laws 667, effective September 17, 1957. See, also, Section 307.44, Revised Code.

A predecessor, in Opinion No. 67-001, Opinions of the Attorney General for 1967, came to much the same conclusion. He confirmed the long-standing immunity doctrine, and concluded that since the board of trustees and The Ohio State University are not subject to tort liability, there would be nothing for the board to insure against, and any funds expended for such liability insurance would be a gift of public funds to the insurance company.

He also considered a second question that is almost identical to the question posed in our situation: whether the University could purchase liability insurance to protect its employees against liability for their own negligence. He concluded that it could not, and that any monies used to "underwrite the private responsibility of individual employees, would constitute a diversion of public monies for private purposes." He pointed out that there exists only one exception to this rule, and that exception concerns motor vehicle liability insurance authorized by Section 9.83. He cited an informal opinion in which he specifically stated that motor vehicle insurance was the only exception. Opinion No. 66-168, Opinions of the Attorney General for 1966 (limited circulation opinion, cited in Opinion No. 67-001, supra.) Other Opinions are consistent with those above cited. See Opinion No. 7245, Opinions of the Attorney General for 1956; Opinion No. 2498, Opinions of the Attorney General for 1950; Opinion No. 4122, Opinions of the Attorney General for 1948; Opinion No. 2128, Opinions of the Attorney General for 1947; and Opinion No. 5949, Opinions of the Attorney General for 1943.

Even though it seems clear, as will be explained in my answer to your second question, that these patrolmen might be defended at public expense in certain cases, and that such defense would represent the expenditure of public funds for a public purpose, I must conclude that the purchase of liability insurance to cover the expense of defense plus the potential expense of an adverse judgment is not lawful in the absence of specific statutory authorization. Since statutory authorization to purchase false arrest insurance for State Highway Patrol officers does not exist, the purchase of such liability insurance is not authorized.

It can also be argued that specific legislation has already been enacted defining the extent of allowable state expenditure in this situation. Section 5503.01, Revised Code, provides that each patrolman must execute a bond in the amount of twenty-five hundred dollars on taking office. This is to provide for the compensation of parties who may have a cause of action against any patrolman for misconduct while in the performance of his duties. Section 3929.17, Revised Code, provides that the premiums on this bond are to be paid out of public funds. Since the legislature has specified the maximum amount of public funds that may properly be expended to protect the citizenry from misconduct by a patrolman, it can be argued that any further expenditures of public funds for liability insurance would be in direct contradiction to these two statutes.

However, it can also be argued that an official bond is fundamentally different from liability insurance, and hence that a limit on the amount of the bond does not impliedly limit liability insurance. The reason is that the bond does not provide as extensive a coverage for the patrolman as does liability insurance. It does not provide for the payment of attorneys fees in case a false arrest action is brought against him; nor can it be used to satisfy any judgment rendered against him if he has the ability to satisfy it himself from his own private assets. Hence, it can be argued, there is no convincing analogy between official bond and liability insurance. Be that as it may, the lack of specific statutory authority for the purchase of false arrest liability insurance compels me to conclude that no such authority exists.

The answer to your second question has been suggested by my Opinion No. 71-080, Opinions of the Attorney General for 1971, whose syllabus reads as follows:

> "When city police officers have been indicted by a federal grand jury for violation of 18 U.S.C. 242, it is the duty of the city solicitor to examine carefully all the facts and circumstances on which the charge is based and to determine whether such facts and circumstances indicate a good faith attempt on the part of the officers to perform the duties of their official position. If the solicitor, following such evaluation, concludes that there was a good faith attempt by the officers to perform their official duties, he is then authorized to undertake their defense." (Emphasis added.)

Section 705.11, Revised Code, which outlines the duties of the city solicitor, provides, in part, as follows:

> "The solicitor shall act as the legal adviser to and attorney for the municipal corporation, and for all officers of the municipal corporation in matters relating to their official duties * * *."
> (Emphasis added.)

Section 309.09, Revised Code, contains similar language listing the duties of the county prosecutor:

> "The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, * * *. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.
>
> "* * * * * * * * *"
> (Emphasis added.)

Their counterpart, Section 109.02, Revised Code, which lists the duties of the Attorney General, reads differently:

> "The attorney general is the chief law officer for the state and all its departments and shall be provided with adequate office space in Columbus. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime."

The cases and Opinions which have interpreted these Sections are compiled in Opinion No. 71-080, supra. They all concern matters which arose at the city level under Section 705.11 or at the county level under Section 309.09, Revised Code. Opinion No. 40, Opinions of the Attorney General for 1912, does mention that a similar duty to defend state officers falls on the Attorney General as well as the city solicitor and county prosecutor, but I can find no further mention of such a duty being imposed on or accepted by the Attorney General.

It might also be said that we use "duty" concerning this problem in a rather unusual way. As stated in Opinion No. 4567, Opinions of the Attorney General for 1954:

> "It cannot be said, therefore, that there is ever found, in a case of this sort, a duty to defend as we normally understand that term. It would be more appropriate to say that the prosecuting attorney in such a case is under a duty to make a careful evaluation of such facts and circumstances and is then authorized to defend the officer concerned if such evaluation indicates that there is involved a well intentioned attempt to perform an official duty on the part of the defendant."

Thus, the duty to defend is discretionary, and amounts to little more than an authorization to defend if and when an evaluation indicates its desirability. The decision to defend involves some risk for the city, county or state attorney involved. If the evidence at trial shows a clear lack of good faith, the attorney might run some risk of a civil action to recover public funds expended for a private purpose. As explained in Opinion No. 71-080, supra, the risk is not as great now as it has been in the past:

> "It is, of course, true that 'public money may be used only for public purposes', Kohler v. Powell, 115 Ohio St. 418, 425 (1926), and it may be argued that the defense of a criminal charge brought against a public officer is always a purely private affair. This view seems to have been prevalent some years ago.

> See Lunkenheimer v. Hewitt, 10 Ohio Dec. Reprint 798, 23 W.L.B. 433 (1890); Annotation, 130 A.L.R. 736, 739-740; 42 Am. Jur. 765-766; 43 Am. Jur. 100. However, these same citations indicate that the climate has changed and that the expenditure of public funds in defense of a public officer is justified if his superiors are convinced that the alleged act was committed in the course of good faith performances of official duties. Recent Supreme Court decisions have indicated a broadening of the concept of 'public purpose.' See State ex rel., v. Rich, 159 Ohio St. 13, 26-27 (1953)."

It may well be that the only method currently available to a State Highway Patrolman to recover costs of litigation in cases of this nature would be Section 127.11, Revised Code, which concerns Sundry Claims.

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

1. Public funds may not be used to purchase false arrest liability insurance for State Highway Patrolmen in the absence of specific enabling legislation.

2. When a State Highway Patrolman is sued for false arrest, the Attorney General may defend him if, after careful examination of the facts and circumstances upon which the suit is based, he concludes that the patrolman attempted in good faith to perform his official duties. Opinion No. 71-080, Opinions of the Attorney General for 1971, approved and followed.