

**OPINION NO. 79-025****Syllabus:**

1. Township trustees may use township funds to purchase liability insurance to protect both the township itself and township officials and employees sued in their official capacities under 42 U.S.C. §1983.
2. Township trustees may not use township funds to purchase liability insurance to protect themselves or other township officials from personal liability under 42 U.S.C. §1983.

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**To: John F. Norton, Geauga County Pros. Atty., Chardon, Ohio**  
**By: William J. Brown, Attorney General, May 24, 1979**

I have before me your request for my opinion which concerns the recent decision of the United States Supreme Court in Monell v. Department of Social Services, \_\_\_ U.S. \_\_\_, 98 S. Ct. 2018 (1978). In Monell, the Court held that a municipal corporation was a "person" for purposes of 42 U.S.C. §1983. That section provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In so holding, the Court specifically overruled Monroe v. Pape, 365 U.S. 167 (1961). The majority opinion in Monell, per Justice Brennan, stated:

We conclude, therefore, that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983. Monell v. Dep't of Social Services, *supra* at 2038.

While the full import of Monell is not yet clear, it is fairly certain that not only municipal corporations, but other "local government units," may now be liable under 42 U.S.C. §1983. Monell v. Dep't of Social Services, *supra* at 2035.<sup>1</sup>

In light of Monell, you have asked several questions relating to the authority of a board of township trustees to purchase liability insurance to protect against 42 U.S.C. §1983 actions. Specifically, you have asked the following questions:

1. May a Board of Township Trustees expend public funds to purchase a policy insuring the township against liability for damages in civil rights action[s]?
2. May a Board of Township Trustees expend public funds to purchase a policy insuring the township and its public officials and employees in their official capacities against liability for damages in civil rights action[s]?
3. May a Board of Township Trustees expend public funds to purchase a policy insuring the township and its public officials and employees in their official [capacities] and in their individual [capacities] against liability for damage[s] in [civil rights actions]?

Before specifically addressing your question, it is once again necessary to point out the time-honored position of this office, and of the courts of Ohio, that townships are creatures of statute and, accordingly, possess only such powers as are specifically conferred by statute, or necessarily implied therefrom. Yorkavitz v. Board of Township Trustees, 166 Ohio St. 349 (1957); Hopple v. Trustees of Brown Township, 13 Ohio St. 311 (1862). As is the case with county commissioners, the authority of township trustees is to be very narrowly construed with respect to spending powers. State ex rel. Clarke v. Cook, 103 Ohio St. 465 (1921); State ex rel. Locher v. Menning, 95 Ohio St. 97 (1916).

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<sup>1</sup>There is a potentially problematical footnote in Monell (n. 54) which states in part that "[o]ur holding today is, of course, limited to local governments which are not considered part of the State for Eleventh Amendment purposes." There is little question, however, that townships, and other "political subdivisions" of the state, do not come within the purview of the Eleventh Amendment. Lincoln County v. Luning, 133 U.S. 529 (1890).

In 1950 Op. Att'y Gen. No. 2498, p. 730, one of my predecessors confronted the issue of the trustees' authority to purchase liability insurance generally. Part of the syllabus to that opinion expressed the following conclusion:

Liability insurance may be purchased by the township trustees only where there is a statutory liability to be insured against.

This conclusion was founded upon the premise that, since townships are immune from tort liability as political subdivisions of the state, liability insurance is unnecessary. That premise holds true even now, at least with respect to tort claims based upon state law. See R.C. 2743.01, et seq. Monell, however, alters the scheme with respect to federally based liability, since sovereign immunity is no longer available as an absolute defense to a §1983 action.

By way of analogy, it is significant that previous opinions of this office have concluded that the statutory imposition of liability in R.C. 5571.10 implicitly authorizes township trustees to purchase liability insurance. 1950 Op. Att'y Gen. No. 2498, p. 730; 1931 Op. Att'y Gen. No. 2995, p. 303. R.C. 5571.10 provides, in pertinent part, as follows:

[E]ach board of township trustees shall be liable, in its official capacity, for damages received by any person, firm, or corporation, by reason of the negligence or carelessness of such board in the discharge of its official duties.

Since this section appears in the "Roads-Highways-Bridges" title of the Revised Code, it has properly been limited to liability arising out of the construction, maintenance, and repair of township roads. 1962 Op. Att'y Gen. No. 3200, p. 633. Even though there is no statutory reference to liability insurance, my predecessors have consistently found that the statutory imposition of liability implies the authority to protect the public treasury via insurance. That the General Assembly has not overridden this position for a number of years is some indication of acceptance. Since Monell has effectively expanded the statutory liability of townships under §1983, it would seem that similar reasoning applies. Accordingly, it is my opinion that township trustees may procure liability insurance to protect the township against suits for money damages under 42 U.S.C. §1983. This includes policies which protect the township itself and policies which protect trustees and other officials who are sued in their official capacities, since in either of such cases the recovery would necessarily be paid out of the public treasury. Whether the trustees may protect themselves and other employees in their individual capacities requires further analysis.

In deciding your remaining question, I am struck by several factors which seem to indicate that individual coverage may not be purchased with public funds. First, such "individual" coverage would not protect the public treasury, and would, in essence, amount to a form of compensation to these officials which is not provided by statute. Second, since "good faith" is available as a defense to a §1983 action, Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975), the purchase of such insurance with public funds would, in effect, safeguard a township trustee's personal assets from liability occasioned by his own wrongdoings. Such is hardly sound policy. Third, in R.C. 307.441 the General Assembly has specifically allowed counties to procure liability insurance protecting various county officers from "liability arising from performance of their official duties." Under the familiar doctrine of statutory construction, expressio unius est exclusio alterius, it would seem that the legislature's failure to make a similar provision for township officers indicates a decision not to allow such a purchase. Fourth, the trustees and other officials have always been subject to personal liability. Monell has not affected the law in that respect, and the prolonged silence of the General Assembly on the matter further indicates that no authority exists for such a purchase. Accordingly, as there is no statutory authorization allowing the township trustees to use township funds to procure insurance protecting themselves and other officials personally against §1983 liability, I am of the opinion that the trustees lack such authority.

To summarize, then, it is my opinion, and you are advised, that:

1. Township trustees may use township funds to purchase liability insurance to protect both the township itself and township officials and employees sued in their official capacities under 42 U.S.C. §1983.
2. Township trustees may not use township funds to purchase liability insurance to protect themselves or other township officials from personal liability under 42 U.S.C. §1983.