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MUNICIPAL CORPORATIONS—LIABILITY INSURANCE—CLAUSE BY WHICH INSURER WILL NOT INTERPOSE GOVERNMENTAL IMMUNITY UNLESS REQUESTED BY MUNICIPAL OFFICER—NO AUTHORITY TO PURCHASE INSURANCE CONTAINING SUCH A PROVISION.

SYLLABUS:

The officers of a municipality, have no authority to authorize or permit the inclusion in a policy of liability insurance issued to such municipality, a provision to the effect that in the event of a claim for damages covered by the policy, the insurer will not, except upon written request of the insured municipality, by its duly authorized officer, deny liability of the municipality through the use of the defense of immunity because the insured was, at the time of the injury, engaged in a governmental activity.

Columbus, Ohio, December 16, 1958

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have before me your communication in which you request my opinion, your letter reading as follows:

> "Public liability insurance is secured after advertising and competitive bidding. In a number of instances, the specifications have included a provision as follows:
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> "Policy must contain the following endorsement: 'It is agreed and understood that in the event of claim or suit for damages covered by the policy, the company will not, except upon written re-

quest of the named insured by its duly authorized officer, deny liability of the insured through the use of the defense of immunity because the insured is a governmental function.'

"The reason given for the inclusion of such a provision in the specifications and instructions to bidders is a growing tendency on the part of courts to construe the effect of carrying liability insurance as a waiver, to the extent of coverage of the immunity from tort liability otherwise available to them in relation to governmental functions. The inclusion of such a provision results in increasing the cost of the insurance coverage.

"It is recognized, of course, that defense of governmental function is available to the municipality rather than to the company. The language above quoted appears to assume that the insurance company has the right to deny liability in the first instance.

"In view of the foregoing facts, your opinion is requested to the following question:

"May a municipality in the purchase of public liability insurance lawfully pay for such insurance policy where the said policy includes a provision in which the company agrees that it will not deny liability of the insured on the basis of governmental function?"

In 28 Ohio Jurisprudence, 950, it is said:

"In the development of the principles governing municipal tort liability, a distinction has been made with respect to the character of the act in connection with which the injury in question occurs, as governmental or as proprietary; and it is now well established in Ohio, as elsewhere, as a general rule, subject to some exceptions, that, in the absence of statutory provision to the contrary, a municipality is not liable for injuries occurring in connection with matters relating to its governmental functions * * *."

This proposition is supported by a long array of authorities, and is so familiar that I do not deem it necessary to cite many of the decisions in support thereof. However, I will call attention to the case of *Insurance Company* v. *Fremont,* 164 Ohio St., 344, where it was held:

"1. Except as provided by statute, municipal corporations enjoy immunity or freedom from liability for negligence in the performance or non-performnace of their governmental functions."

It is also well settled that a municipal corporation in common with other public corporations, has no power to use its funds for the purchase

of liability insurance where no liability exists. See Opinion No. 787, Opinions of Attorney General for 1937, p. 1451, also Opinion No. 803, Opinions of the Attorney General for 1951, p. 563. In the latter opinion the attorney general quoted with approval, the following from Opinion No. 787, *supra:*

> "As to property damage and public liability insurance, suffice it to say that this office has consistently held that a political subdivision cannot legally enter into a contract and expend public moneys for the payment of premiums on public liability or property damage insurance covering damages to property and injury to persons unless there is a liability created against the political subdivision by statute. Opinions of the Attorney General for 1934, Vol. II, page 1120."

The inclusion in a liability policy of the clause which you quote is manifestly intended to open the way for procuring insurance and paying a premium for insurance against a risk of liability which does not exist.

Manifestly the insurer, because it undertakes this additional risk, must increase its premium to cover the same. Manifestly, in my opinion, this would be a pure waste of public money. It would be on a par with a provision in a liability policy that the insurance company should in no case interpose a defense of contributory negligence.

In 18 McQuillin on Municipal Corporations, Section 53.28, I find the following:

> "A municipality's right to immunity from liability with respect to the performance of governmental functions cannot be waived by any of its officers. It has been held that a city has no power to make an agreement, contained in an insurance policy protecting the city and its employees from liability, that neither the insurer nor the city will interpose, in an action to recover for negligence of employees of the city, the defense that the injuries involved were sustained while the city was in the performance of a governmental function.
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> "Waiver or estoppel generally cannot be pleaded against a municipality for failing to exercise, or for exercising improperly, its governmental powers."

In the case of *Lambert* v. *New Haven,* 129 Conn. 647, 30 A. 2d 923, it was held:

> "2. For a municipal corporation to compensate one injured by the negligence of a municipal corporation in the per-

formance of a governmental function, might, under ordinary circumstances be to use public funds and impose a burden on taxpayers for an unlawful purpose.

"3. The officers of a municipal corporation do not have the power to waive the right of a municipality to any immunity which the law gives the municipality, in the absence of special authority given by the city."

That case was approved and followed in *Adams* v. *New Haven,* 131 Conn. 552, 41 A. 2d 111.

In this case the court found that the injury was incurred by reason of negligence in the performance by the city of a governmental duty, but it appeared that in the trial no defense of governmental immunity had been raised. The court held that "city officers' conduct in waiving the city's immunity of liability for personal injury because city was insured against injury was unauthorized in absence of special authority."

In *Pohland* v. *Sheboygan,* 251 Wis. 20, 27 N.W., 2d 736, it appeared that a liability policy taken by the city contained a provision that in case of an action for personal injuries neither the insurer nor the city would assert the defense of governmental immunity. The court pointed out that a city could only insure itself against liability which under the law could exist, which would be limited to the negligence of its employees while operating in a proprietary capacity. I quote the following from the syllabus:

"4. The fact that policy procured by city contained agreement that neither insurer nor city would assert defense, in action to recover for negligence of employees of city, that injuries involved were sustained while city was engaged in performance of governmental function did not in estop city and insurer from asserting such defense, since agreement was unauthorized."

"6. Statute authorizing city to procure insurance to protect city and its officers and employees from liability did not confer power to make agreement, contained in policy, that neither city nor insurer would assert defense in action to recover for negligence of employees of city, that injuries involved were sustained while city was engaged in performance of governmental function."

It might be claimed that under the broad powers granted by Article XVIII Section 3, Ohio Constitution to-wit, "all powers of local self-government," a municipality may do as it pleases with its moneys, and may

waive its defenses as it pleases. I do not consider that such a claim could have any sound basis. A municipality is just what it was before home rule, an agency of the state, the only difference being that it now gets powers *from the state by the will of the citizens* of the state, where previously it got them by the *will of the general assembly.*

The character of the purposes for which a municipality may expend its funds has not been extended by the grant of powers of home rule. In the first case which arose under the home rule amendment to the constitution, *State ex rel. Toledo* v. *Lynch,* 88 Ohio St., 71, the question before the court was whether an expenditure of municipal funds for establishment of a municipal moving picture theater was permissible as an exercise of the home rule power. The court held that "the powers to be exercised, being governmental, do not authorize taxation to establish and maintain moving picture theaters," and that such expenditure would be illegal, concluding with the following words:

> "The conclusion that this would be an unauthorized use of public money results from these considerations."

The *Lynch* case, *supra,* through overruled on other grounds, has never been challenged as to the above quoted holding.

Furthermore, I may call attention to the provision of Article XII Section 5, Ohio Constitution to the effect that:

> "No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, *to which only, it shall be applied.*" (Emphasis added)

In the light of the foregoing, it is my opinion and you are advised that the officers of a municipality, have no authority to authorize or permit the inclusion in a policy of liability insurance issued to such municipality, a provision to the effect that in the event of a claim for damages covered by the policy, the insurer will not, except upon written request of the insured municipality, by its duly authorized officer, deny liability of the municipality through the use of the defense of immunity because the insured was, at the time of the injury, engaged in a governmental activity.

Respectfully,
WILLIAM SAXBE
Attorney General