

LAW OFFICES

CROSBY GUENZEL LLP

FEDERAL TRUST BUILDING
134 SOUTH 13TH STREET, SUITE 400
LINCOLN, NEBRASKA 68508
TELEPHONE: (402) 434-7300
FACSIMILE: (402) 434-7303

WRITER'S E-MAIL: SGS@CROSBYLAWFIRM.COM
WRITER'S DIRECT DIAL NO. (402) 434-7324

THEODORE L. KESSNER
WILLIAM D. KUESTER
STEVEN G. SEGLIN
ROCKY C. WEBER
DAVID A. JARECKE
WILLIAM R. KUTILEK
RICHARD L. RICE
THOMAS E. JEFFERS

ROBERT C. GUENZEL (RETIRED)

ROBERT B. CROSBY (1911-2000)
THOMAS R. PANSING (1917-1973)
DONN E. DAVIS (1929-1998)

August 5, 2003

Jay Holmquist, General Manager
Nebraska Rural Electric Association
800 South 13th Street
P.O. Box 82048
Lincoln, NE 68501

Re: Political Subdivisions Tort Claims Act – Cap on Liability

Dear Jay:

On August 15, 2002, we responded to a question on the liability cap under the Political Subdivisions Tort Claims Act, *Neb. Rev. Stat.* §§ 13-901 to 13-926 (the "Act"). The question was whether public power districts were purchasing more coverage than was necessary. Most power districts purchase insurance from Federated Insurance with coverage in the amount of \$2 million per occurrence with an Umbrella coverage of an additional \$3 million per occurrence. The coverage from Federated places no limit on the amount of payment for a person and covers any claim, no matter how many persons that are injured, up to a maximum of \$5 million per occurrence.

A case entitled *Salazar v. Scotts Bluff County* decided May 17, 2002, brought to the forefront the question of whether public power districts were over insured. The District Court decided that a claim filed pursuant to the Act was limited by statute to \$1 million per person, per occurrence, regardless of the amount of coverage. Mr. Salazar was injured in an automobile accident and had damages in excess of \$5 million and Scotts Bluff County had insurance coverage of \$5 million per occurrence. The District Court limited Salazar's recovery to \$ 1 million. This case was appeal to the Nebraska Supreme Court, which rendered its decision on July 25, 2003.

The Nebraska Supreme Court described:

“[t]he primary issue to be decided is whether a political subdivision waives protection of the statutory limit on recovery pursuant to § 13-922 when the political subdivision procures liability insurance pursuant to § 13-916 in excess of the statutory limit.”

The Court found:

“that the statutory language of §§ 13-922 and 13-926 is plain, direct and unambiguous. We are not called upon, and do not decide, whether §§ 13-922 and 13-926 apply to § 13-910 exemptions. We do, however, determine that the limit of liability for a tort claim not exempted by § 13-910 is \$1 million for any person for one occurrence and \$5 million for all claims arising out of a single occurrence. This language limits Salazar’s claim to \$1 million.”

Accordingly, the \$1million cap is the limit of liability per person per occurrence, unless the exemptions of §13-910 apply. Among the exemptions under §13-910 are claims based upon an act or omission of an employee exercising due care in the execution of a statute, ordinance, or officially adopted resolution, rule or regulation; and any claim based on the exercise or performance of or the failure to exercise or perform a discretionary function or duty. If a public power district were to insure for these exemptions, the question of whether the \$1 million cap would apply or whether the \$2 million per occurrence or additional \$3 million umbrella coverage per occurrence would apply, remains unresolved by the Salazar case.

In our August 15, 2002 letter, we attached a copy of Federated Insurance’s response to the question raised by the Salazar case, which is also attached hereto. According to Federated, because of manner in which commercial insurance is underwritten, public power districts have little chance in obtaining coverage which will match the statutory liability under the Act (\$1 million for any person for any number of claims arising out of a single occurrence, and \$5 million for all claims arising out of a single occurrence). Therefore, it appears that power districts have little choice but to purchase the coverage from Federated in order to have the \$5 million protection to cover the maximum liability under the Act.

Very truly yours,

CROSBY GUENZEL LLP

By


Steven G. Seglin

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