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August 15, 2002

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

Re: Political Subdivision Tort Claims Act – Cap on Liability

Dear Jay:

The Political Subdivision Tort Claims Act, *Neb. Rev. Stat.* §§ 13-901 to 13-926 (the “Act”) imposes a limitation on liability for tort claims arising under the Act. Political subdivisions subject to the act include Public Power Districts. *Neb. Rev. Stat.* § 13-926 provides in part as follows:

“The total amount recoverable under the [Act] for claims arising out of an occurrence . . . shall be limited to:

- (1) One million dollars for any person for any number of claims arising out of a single occurrence; and
- (2) Five million dollars for all claims arising out of a single occurrence. . . .”

The Act defines “tort claim” as

“any claim against a political subdivision for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the political subdivision, while acting with the scope of his or her office or employment, under circumstances in which the political subdivision, if a private person, would be liable to the claimant for such damage, loss, injury, or death . . .”

The Act does not apply and therefore does not limit liability for certain claims specified in § 13-910. Among the claims not covered by the Act 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.

The Act authorizes the purchase of liability insurance insuring against all or any part of the liability that might be incurred under the Act. The Act also authorizes the purchase of liability insurance insuring against claims specifically exempted from the coverage under the Act by § 13-910.

I understand that those Public Power Districts that purchase their liability insurance from Federated Insurance have commercial coverage of \$2,000,000 per occurrence with an umbrella covering additional liability of up to \$3,000,000 per occurrence. I further understand that this coverage operates to provide a maximum coverage of \$5,000,000 per occurrence, regardless of whether one or more injured persons make a claim.

A recent case arising out of the Scotts Bluff District Court raises the question of whether Public Power Districts are over insured in certain instances and therefore paying for a portion of insurance coverage that cannot legally be made available to pay claims under the Act.

The case to which I refer is *Salazar v. Scotts Bluff County, Case No. CI01-137 (May 17, 2002)*. In this case the court found that Scotts Bluff County's share of the liability for negligence causing personal injury to Salazar was \$4,484,018.00. The County was insured for liability through an insurance program developed by the Nebraska Intergovernmental Risk Management Association created by *Neb. Rev. Stat. § 44-4301*, which provided the County with \$5,000,000 coverage per occurrence. Salazar asserted that by procuring liability insurance the County waived both sovereign immunity and statutory limitations on the amount recoverable against the County to the extent of the liability insurance limits, therefore making the entire \$5,000,000 available to pay Salazar's claim.

The District Court disagreed with Salazar's assertion and found that only \$1,000,000 of the \$5,000,000 coverage was available to pay Salazar's claim. The Court's rationale for its decision was that the passage of the Act constituted only a partial waiver of common law sovereign immunity. The Court further found that notwithstanding the language of § 13-916, which authorizes the purchase of insurance, the language of § 13-926 controls. The language of § 13-926 is clear and unambiguous and limits recovery to \$1,000,000 per person, per occurrence. The Court also found that the \$1,000,000 limitation on recovery also applied to insurance purchased for claims listed in 13-910 where immunity had not otherwise been waived by the Act.

In summary, the ruling of the Scotts Bluff County District Court applies the \$1,000,000 per person, per occurrence limitation on recovery to each person even though the County had \$5,000,000 of coverage. Therefore, Salazar could only recover \$1,000,000. In addition, the \$1,000,000 limitation on liability also applies to claims exempted from coverage under the Act pursuant to § 13-910, for which insurance has been purchased pursuant to § 13-916. In other words those claims are also limited to \$1,000,000 per person, per occurrence even though more than \$1,000,000 in coverage may have been purchased.

This case, unless overturned by an appellate court, will similarly apply to Public Power Districts who have purchase their insurance from Federated. Federated coverage is in effect identical to the coverage of Scotts Bluff County. Only \$1,000,000 of the coverage is available to each person until the maximum of \$5,000,000 for all claims has been exhausted.

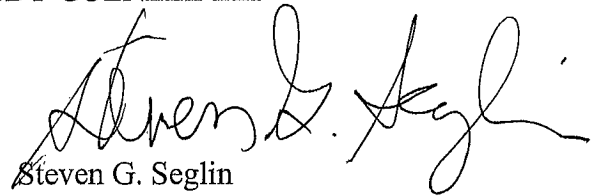
I understand that this ruling has been appealed. As soon as the appellate court has rendered a decision, we will advise you further.

I have discussed the Salazar decision with Susan Olander, General Counsel for Federated Insurance, and attached is her response to the Salazar case.

Very truly yours,

CROSBY GUENZEL LLP

By


Steven G. Seglin

SGS:rrk