WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

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FILE NO. S-1443

PUBLIC HEALTH:
Effect of Purchase of Medical
Malpractice Insurance on County's
Board of Health's Liability

Honorable J. Russell McCaskill
State's Attorney of Brown County
118 East Main, Box 102
Mt. Sterling, Illinois 62353

Dear Mr. McCaskill:

I have your letter in which you request an opinion on the effect upon the governmental immunity of a county health department of the purchase by the department of professional liability insurance for physicians employed by the department. It is my opinion that the department waives its immunity only to the extent that it has procured insurance coverage.

The Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat. 1977, ch. 85, par. 1-101 et seq.) sets forth the liability of a local public entity for injuries to persons and damages to property. It is for the most part limited to damage resulting from "willful and

wanton negligence" on the part of the entity or its employees, but liability may be imposed in some cases for simple negligence. A local public entity can choose to remove the risk from itself by purchasing insurance. Under section 9-103, the result of this is that it loses the immunities granted by the Act. (Sullivan v. Midlothian Park District (1972), 281 N.E. 2d 659.) Section 9-103 of the Act states in pertinent part:

> "(a) A local public entity may contract for insurance against any loss or liability which may be imposed upon it under this Act. Such insurance shall be carried with a company authorized by the Department of Insurance to write such coverage in Illinois. The expenditure of funds of the local public entity to purchase such insurance is proper for any local public entity.
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> (c) Every policy for insurance coverage issued to a local public entity shall provide or be endorsed to provide that the company issuing such policy waives any right to refuse payment or to deny liability thereto within the limits of said policy by reason of the non-liability of the insured public entity for the wrongful or negligent acts of itself or its employees and its immunity from suit by reason of the defenses and immunities provided in this Act."

You pose the question of the extent of a local governmental entity's waiver of immunity when it has chosen to purchase insurance on some, but not all, of its operations. In the specific situation about which you inquire, the county health department plans to purchase medical malpractice insurance for the physicians whom it will employ

in a rural medical clinic. The clinic is partially funded by the Federal government and the purchase of the insurance is a condition of the Federal grant. The county will be named as co-insured on the policy and I assume the policy will cover any liability of the clinic administration for a physician's malpractice. Your question can be divided into three parts: the first is concerned with the effect of the insurance on the liability of the department for the malpractice of its physicians; the second, with the effect of the insurance on the extensiveness of the department's liability in terms of cost; and the third, with the effect of the insurance on the department's liability for the improper operation of its clinic and on matters unrelated to the clinic.

First, it is my opinion that the procurement of insurance waives the department's immunity to suit that is granted by the Act. (Rapacz v. Township High School Dist. No. 207 (1971), 2 Ill. App. 3d 1095.) Section 6-102 and section 6-106 of the Act prescribe the standard of care to which medical facilities operated by local governmental entities are held:

> "The failure of a local public entity that operates or maintains any medical facility to provide adequate or sufficient equipment, personnel or facilities required by any statute of this State or by any regulation of the Department of Public Health, or the Department of Mental Health and Developmental Disabilities, or the Dangerous

> Drugs Commission, as the case may be, which prescribes minimum standards for equipment, personnel or facilities applicable to the public entity is prima facie evidence of negligence in a claim or action based on an injury proximately caused thereby."
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> "(a) Neither a local public entity nor a public employee acting within the scope of his employment is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental or physical illness or addiction or from failing to prescribe for mental or physical illness or addiction.
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> (b) Neither a local public entity nor a public employee acting within the scope of his employment is liable for administering with due care the treatment prescribed for mental or physical illness or addiction.
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> (c) Nothing in this section exonerates a public employee who has undertaken to prescribe for mental or physical illness or addiction from liability for injury proximately caused by his negligence or by his wrongful act in so prescribing or exonerates a local public entity whose employee, while acting in the scope of his employment, so causes such an injury.
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> (d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission in administering any treatment prescribed for mental or physical illness or addiction or exonerates a local public entity whose employee, while acting in the scope of his employment, so causes such an injury."

Because subsections (c) and (d) do not create any immunities, the governmental unit's liability is not affected by the purchase of insurance. Subsections (a) and (b), however, do create immunities. Having the insurance will make the department's liability for a physician's malpractice the

same as that of the operators of similar health facilities. Also, you should note that the department's liability may differ from that of another local governmental entity that operates a hospital because the department plans to pay its physicians' salaries. Most municipal and county hospitals do not pay their physicians' salaries but simply have them on their staffs with the patients paying the physicians. These hospitals are not generally liable for a physician's malpractice because the physicians are independent contractors, although the hospitals may be liable if they are negligent themselves. (Hundt v. Proctor Community Hospital (1972), 5 Ill. App. 3d 987.) The fact that the department will pay its physicians' salaries may make the physicians employees rather than independent contractors and thus make the department liable for the physicians' negligence. Haven v. Randolph (D. C. Cir. Ct. 1972), 342 F. Supp. 538.

Second, it is my opinion that the amount of the department's liability in malpractice cases does not extend beyond the amount of the insurance coverage. If the department has purchased malpractice insurance and is successfully sued on a claim that is actionable only because the department is insured (i.e., the department would have been immune had it not been insured), the extent of its liability is limited to the amount of the policy. Although not explicitly stated in the Act, this is apparent from the language of section

9-103. Paragraph (c) provides that the company issuing the policy "waives any right to refuse payment [by reason of immunities provided in the Act] within the limits of said policy." Since the courts have stated that it is by the purchase of insurance that the entity waives its immunity (Housewright v. City of LaHarpe (1972), 51 Ill. 2d 357), it follows that the waiver extends only as far as the purchased coverage. Also supporting this conclusion is the fact that the origin of paragraph (c) has been traced to the ruling in Thomas v. Broadlands Community Consolidated School Dist. (1952), 348 Ill. App. 567. (Sullivan v. Midlothian Park District (1972), 281 N.E. 2d 659.) The court explicitly held in Thomas that a governmental entity's liability extends only to the amount of the insurance coverage. (See also Friederich v. Bd. of Education of Community Unit (1978), 59 Ill. App. 3d 79.) Thus the amount of liability for a claim under subsections 6-106(c) and (d) will be the dollar amount of the policy. If the claim could have been made without the existence of insurance, the statute sets no dollar limit to the amount of recovery.

Third, it is my opinion that the purchase of medical malpractice insurance by the department does not affect its immunity to claims pertaining to the clinic but unrelated to malpractice by physicians and to claims on matters unrelated to the clinic; by the reasoning employed

in the preceding paragraph, the waiver of immunity is limited to the type of accidents covered by the policy. This is true because section 9-103(a) allows the department to insure itself "against _any_ loss or liability" (emphasis added) at its discretion, and does not require it to protect itself against all eventualities. (_Friederich_ v. _Bd. of Education of Community Unit_ (1978), 59 Ill. App. 3d 79.) Further, the decision of how much coverage to obtain is a discretionary one and hence not actionable by reason of section 2-201. (_Friederich_ v. _Bd. of Education of Community Unit_ (1978), 59 Ill. App. 3d 79.) The purchase of insurance to cover medical malpractice by physicians therefore has no effect on liability for the operation of the clinic. For the same reason, it has no effect on the affairs of the department unrelated to the clinic.

Very truly yours,

A T T O R N E Y   G E N E R A L