OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 96-034

COUNTIES:
Authority to Purchase Insurance
to Cover Liability Arising from
the Entry of a Punitive Damage
Award Against an Officer or Employee

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Honorable Stewart J. Umholtz
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Dear Mr. Umholtz:

I have your letter wherein you inquire whether a non-home-rule county may purchase insurance to cover punitive damage awards that may be entered against its officers or employees in Federal civil rights actions. For the reasons hereinafter stated, it is my opinion that non-home-rule counties possess the general authority to insure against the liability of their officers or employees, including liability arising from the entry of punitive damage awards.

As is noted in the materials you have furnished, since the Supreme Court's decision in Smith v. Wade (1983), 461 U.S. 30, 103 S. Ct. 1625, "* * * a punitive damage claim is routinely

included in almost every civil rights action filed against Illinois public officials and employees." Therefore, in resolving your question, it is helpful to begin with a review of the Court's holding in that case.

In Smith v. Wade, an inmate in a Missouri reformatory for youthful first offenders brought suit under 42 U.S.C. § 1983 against certain reformatory guards and correctional officials alleging that his eighth amendment rights had been violated. In reaching its conclusion that punitive damages may be assessed in proper cases under section 1983, the Court reviewed, inter alia, the various standards which have been used in allowing a punitive damage award (see Philadelphia, Wilmington, and Baltimore R.R. Co. v. Quigley (1859), 62 U.S. 202, 16 L. Ed. 73; Milwaukee & St. Paul R. Co. v. Arms (1876), 91 U.S. 489, 23 L. Ed. 374; Restatement (Second) Torts § 908(2)(1979)) and concluded that:

" * * *

> * * * a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. * * *" (Smith v. Wade (1983), 461 U.S. at 56, 103 S.Ct. at 1640.)

In light of this decision, you have inquired whether a county may insure against liability which arises from the entry of punitive damage awards against its officers or employees.

Initially, I note that although section 2-102 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-102 (West 1994)) prohibits the recovery under State law of punitive damages from local public entities (including counties) and public officials, Federal standards govern the determination of damages under the various civil rights statutes. (Sullivan v. Little Hunting Park, Inc. (1969), 396 U.S. 229, 238-40, 90 S. Ct. 400, 405-06.) Thus, in at least some circumstances, punitive damages have been awarded under Federal law even where they would not ordinarily be recoverable under the law of the State in which the violation occurred. See, e.g., Hampton v. City of Chicago (7th Cir. 1973), 484 F.2d 602, 607, cert. denied, 415 U.S. 917, 94 S. Ct. 1414 (1974).

Further, section 2-302 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-302 (West 1994)) provides that it is against the public policy of the State for local public entities, including counties, to "* * * elect to indemnify an employee for any portion of a judgment representing an award of punitive or exemplary damages." The Illinois courts, however, have indicated that a statement of public policy concerning indemnification "* * * plainly involves very different public policy considerations [than are present in the insurance context]" (University of Illinois v. Continental Casualty Co. (1992), 234 Ill. App. 3d 340, 357-58, appeal denied, 147 Ill. 2d 637 (1992)), and that insuring and indemnifying are two distinct

concepts (Lehman v. IBP, Inc. (1994), 265 Ill. App. 3d 117, 121, appeal denied, 158 Ill. 2d 552 (1994); St. John v. City of Naperville (1987), 155 Ill. App. 3d 919, 922; Zettel v. Paschen Contractors, Inc. (1981), 100 Ill. App. 3d 614, 617.) Thus, the provisions of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 et seq. (West 1994)) prohibiting the indemnification of public employees for punitive damages are not dispositive of this issue, and it is necessary to review the pertinent Illinois statutes to determine the extent of a county's authority in this regard.

It is well established that non-home-rule counties possess only those powers which are expressly granted to them by the constitution or by statute, together with those powers which are necessarily implied therefrom to effectuate the powers which have been expressly granted. (Redmond v. Novak (1981), 86 Ill. 2d 374, 382; Heidenreich v. Ronske (1962), 26 Ill. 2d 360, 362.) Section 5-1079 of the Counties Code (55 ILCS 5/5-1079 (West 1994)) expressly authorizes counties to purchase liability insurance:

> "Liability insurance. A county board may insure against any loss or liability of any officer, employee or agent of the county resulting from the wrongful or negligent act of any such officer, employee or agent while discharging and engaged in his duties and functions and acting within the scope of his duties and functions as an officer, employee or agent of the county. Such insurance shall be carried with a company authorized by the

> Department of Insurance to write such coverage in Illinois." (Emphasis added.)

The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. (People v. Tucker (1995), 167 Ill. 2d 431, 435.) Legislative intent is best evidenced by the language used in the statute. (Bubb v. Springfield School Dist. (1995), 167 Ill. 2d 372, 381.) Where the language of a statute is clear and unambiguous, it must be given effect as written. (People v. Sheehan (1995), 168 Ill. 2d 298, 305.) Moreover, undefined statutory terms must be given their ordinary and popularly understood meaning. People v. Bailey (1995), 167 Ill. 2d 210, 229.

Under the language of section 5-1079 of the Counties Code, it is clear that counties are authorized to procure insurance to protect against "* * * any liability of any officer, employee or agent of the county resulting from the wrongful or negligent act of any such officer, employee or agent * * *." Although the term "wrongful" is not defined in the Counties Code (55 ILCS 5/1-1001 et seq. (West 1994)), "* * * [it] generally has been considered a more comprehensive term [than the term "negligent"], including * * * willful, wanton, reckless, and all other acts which in ordinary course will infringe upon [the] rights of another to his damage." County of DuPage v. Kussel (1973), 12 Ill. App. 3d 272, 277, aff'd. 57 Ill. 2d 190 (1974).

As noted above, the Supreme Court has determined that a jury may assess punitive damages under section 42 U.S.C. § 1983 when a defendant's conduct is "* * * shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. * * *" (Smith v. Wade, 461 U.S. at 56, 103 S. Ct. at 1640.) Because the standard of conduct which gives rise to an award of punitive damages in a section 1983 case falls within the commonly understood meaning of the phrase "wrongful act", and because section 5-1079 of the Counties Code authorizes counties to insure against any liability arising from the wrongful acts of its officers or employees, it is my opinion that counties have been granted sufficient authority under section 5-1079 to insure against a punitive damage award which may be entered against one of its officers or employees pursuant to a cause of action under 42 U.S.C. § 1983.

Notwithstanding the language in section 5-1079 of the Counties Code, the issue of whether Illinois' public policy prohibits insuring against liability for punitive damages must also be addressed. In Beaver v. Country Mutual Insurance Co. (1981), 95 Ill. App. 3d 1122, 1125 the court concluded "* * * that public policy prohibits insurance against liability for punitive damages that arise out of one's own misconduct." The court cautioned, however, that nothing in its ruling should be construed to "* * * affect the rule established in Illinois in

Scott v. Instant Parking, Inc. (1969), 105 Ill. App. 2d 133, * * * that an employer may insure himself against vicarious liability for punitive damages assessed against him in consequence of the wrongful conduct of his employee. * * *" (95 Ill. App. 3d at 1125.) Thus, although Illinois' public policy may prohibit insurance contracts from covering punitive damages assessed as a result of the insured's own misconduct, it is clear that there is no per se prohibition in this State on the purchase of insurance against punitive damage awards.

As set out in section 2-302 of the Local Governmental and Governmental Tort Immunity Act, it is against public policy for local public entities to indemnify their officers or employees for punitive damage awards. Should a local public entity therefore be precluded from insuring against a civil rights punitive damage award entered against one of its officers or employees? Although it appears that no reported Illinois case has addressed this issue, the courts in several other jurisdictions have considered the applicability of a public policy generally disfavoring insuring against punitive damages to cases involving public officers and employees.

For example, in Harris v. County of Racine (E.D. Wis. 1981), 512 F. Supp. 1273, the plaintiff brought suit to recover from the county and its insurer the amount owing on a judgement obtained against a county judge in a civil rights action. The insurer argued that despite the language of its contract with the

county, public policy in Wisconsin forbade the enforcement of a contract which insured against liability for punitive damages. In reaching its conclusion that public entities should be permitted to insure themselves against all types of liability to which they, their officers or employees may be exposed in a civil rights action, the court noted:

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> * * * [I]n this case it is the public and not a class of tortfeasors similarly situated to Judge Harvey who will suffer the burden of higher insurance premiums if insurance coverage is allowed, since Judge Harvey is a governmental employee and his employer's insurance is paid for with public tax money. The burden imposed on the public by way of higher insurance premiums may, however, be counterbalanced by the greater freedom of action which the public's employees will have if they are not inhibited from acting by the fear of resultant personal liability. The threat of a noninsured punitive damages award may be a deterrent to individual misconduct, but it may also interfere with the legitimate exercise of discretion by governmental officials.
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> It has been my observation that many of the public officials who are sued under the civil rights laws are persons who have performed their 'duty' as they have seen it, but long after doing so and much to their surprise have subsequently been found by a court or a jury to have committed a violation of civil rights for which they are liable in punitive damages. * * *
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> * * * As with all people, [public officials] may err, and even err substantially,

> and cause them to act in a manner outside the scope of their duties and contrary to the best interests of the public. As in Judge Harvey's case, they may as a consequence lose the protection of their official immunity. The public interest is not served if they are in addition prohibited from insuring themselves against the possibility of personal liability. Fear of the consequences of acting can prohibit more than impermissible conduct. It can also have a substantially inhibiting effect on the exercise of reasonable discretion. Avoidance of that effect, which is in turn caused by fear of 'the devastating impact on particular individuals' of a punitive damages award, is, * * * 'the very essence of the public policy which encourages and accepts insurance.' A judge-made rule that public policy prohibits a municipality from insuring its employees against such catastrophic risks as they are now exposed to would be ludicrous in that it could destroy the effectiveness of the municipalities.
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> * * * "

(Harris v. County of Racine (E.D. Wis. 1981), 512 F. Supp. 1273, 1282-83)

The court then concluded that:

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> * * * Civil rights litigation has become almost an occupational hazard of public life. Public officials cannot be expected to perform their duties effectively if they cannot protect themselves against the risks of taking action. To rule otherwise would be to accept the fact that as a matter of public policy we prefer that our public officials do nothing effective, take no risks, and thus avoid litigation." (Harris v. County of Racine, 512 F. Supp. at 1284.)

Similarly, in Colson v. Lloyd's of London (Mo. Ct. App. 1968), 435 S.W.2d 42, the court was asked to determine whether a

public policy which prohibited insurance for punitive damages in private tort cases extended to punitive damages assessed against law enforcement officials in a false arrest case. In reaching its conclusion that allowing an association of public officers to insure against liability for willful and intentional acts did not violate the State's public policy, the court stated:

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> * * * Here we are faced with the problem of whether it would be against public policy to permit an association of law enforcement officers to insure themselves against alleged wilful and intentional acts. In our opinion, it would not. It would be extremely rare, particularly in a suit for false imprisonment where the insured participates in the restraining or manhandling of the plaintiff, for there not to be an assertion that this was ground for the assessment of punitive damages. During the year we have seen violence stalk the streets of our cities. And it is common knowledge that the rate of crime throughout the country is on the increase. This has brought about great public demand for more and better trained law enforcement officers. What effect, it may well be asked, would it have upon qualified persons giving heed to that demand if they were told by the courts that they could not enter into a contract which would afford them protection against financial loss arising from claims for punitive damages? That it would tend to discourage them from entering into that public service goes without saying." (Colson v. Lloyd's of London 435 S.W.2d at 47.)

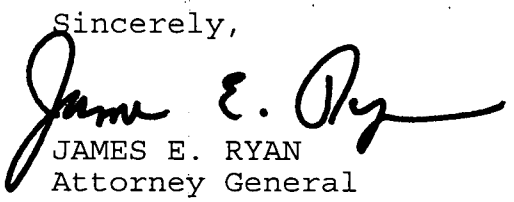
Therefore, it is clear that the recognition of a public policy prohibiting an individual from insuring against his or her own liability for common law punitive damages does not necessarily proscribe insuring against punitive damages per se. Thus, the

rationale for the public policy prohibiting insurance for common law punitive damages (i.e. that such damages have a beneficial effect on individual conduct since they serve to punish the tortfeasor and to deter others from committing intentional torts) must be weighed against the chilling effect which the threat of a civil rights action may have on public officials who, through fear of the consequences, may choose not to act rather than to act in a manner which is potentially controversial.

Clearly, public service creates an exposure to civil liability which is unrivaled in the private sector. In carrying out their official duties, public officers and employees, particularly law enforcement officials, routinely encounter potentially explosive situations any of which is capable of spawning a civil rights suit. By seeking to defuse domestic disputes, fighting crime, enforcing compliance with governmental standards in building and construction and otherwise attempting to ensure an orderly society, public officers and employees are frequently faced with controversial situations. The constant fear that an error in judgment could result in legal action with the possibility of significant personal financial loss is enough to constrain the acts of the State's public servants. The public interest is not served if public officers and employees fail to take necessary action out of the fear of the potential legal and financial consequences. Therefore, in the absence of a declaration by the General Assembly otherwise providing, it is my opinion that the

public policy of this State does not prohibit a county from insuring against liability for a punitive damage award entered against one of its officers or employees in a civil rights action.

Sincerely,



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