

Updates . . .

- The Stoll v. Noel, (694 So.2d 701, 22 Florida Law Weekly S177), court decision regarding the “agent relationship” issue has been widely discussed among state agencies. Our division viewed this decision as “case specific”, and not as a change in existing law that the agency issue had to be determined on a case-by-case basis. In March 1999, another court decision, Theodore v. Graham, et al., (1999 WL 123542, Fla. App., 4 Dist, 24 Florida Law Weekly D648), confirmed this view. This case involved a defendant/physician granted summary judgment by the trial court. The summary judgement was granted based on the Stoll decision that the court held made the physician an agent and entitled to sovereign immunity. The appellate court ruled that the facts were not the same as in the Stoll case and stated that the issue of whether or not the physician was an agent of the state was a question of fact. The summary judgement was reversed and the case was remanded for a trial on the facts involving the agency relationship.
- We receive inquiries from agencies concerning indemnification and hold-harmless provisions required by other governmental entities (i.e. county, cities, etc.) when entering into contracts with the state. §768.28(18), Florida Statutes, specifically prohibits the state and subdivisions of the state (i.e. counties) from entering into such agreements with each other. Therefore, this provision would not be appropriate in any such contracts, and would be unenforceable since it is prohibited by law.

CLAIMS COMMUNICATOR

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Division of Risk Management
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Bill Nelson -- Treasurer / Insurance Commissioner / Fire Marshal

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How to Handle Inquires about Liability Claims Against Your Agency

Over the years it has been observed that most state employees are generally helpful and sympathetic when an incident occurs that causes either physical injury or property damage to members of the public. In the heat of a crisis, our personnel may make some statement to the effect that “we’ll take care of everything.” That type of statement can create problems for your agency. In the mind of the claimant, regardless of the facts of the situation, he/she may now believe the state is going to pay for anything arising from that incident. In accordance with Chapter 284, Part II, and §768.28, Florida Statutes, the state insurance fund only pays for the negligent acts of employees while in the course and scope of employment, which may cause injury or property damage to a third party. Compensation is paid only on the basis of legal liability. Therefore, each claim must be investigated before any statement can be made as to possible compensability.

State personnel should neither make any statements as to the liability of the state nor to the effect that the state will take care of or pay any bills. When people ask what they should do, they should give the questioner the name and address of Risk Management and tell them that they should make any

claim in writing to us and to the specific agency (§768.28[6], Florida Statutes). A telephone call to us does not create a claim. Your staff should avoid becoming insurance adjusters. They should not assume any liability for any incident nor make any promises that the State will pay their claim. Any receipts or pictures of damage/injury should also be referred to our office. When people ask what they should do, tell them to do what they would do if the state was not involved in the claim; to mitigate their damages and act prudently in caring for their injury or property. (This does not mean that one needs to appear uncaring.)

Your staff needs to provide complete and accurate accident/incident reports and forward them quickly for our review. Accuracy and timeliness is of utmost importance.

Reports can be faxed to us at (850) 488-6992. Our address is:
Division of Risk Management
Bureau of State Liability Claims
200 E. Gaines St.
Tallahassee, FL 32399-0338

If you have any questions, please call us at (850) 922-3122.▼

Inside This Issue:

How to Handle Inquires about Liability Claims Against Your Agency cover

Use of State Vehicles page 2

Are You Ready? page 3

Updates page 4

Division of Risk Management
R.J. Castellanos, Division Director

State Liability Claims Bureau
Trilly Lester, Chief

Northern Tort Section
Mike Andrews, Administrator

Southern Tort Section
Marc Stemle, Administrator

**Federal Civil Rights/
Employment Section**
Chris Taul, Administrator

Managing Editor
Correena Christian

Layout and Design
DOI Graphics

**Quality Service
in Printing**
DOI Printshop

Use of State Vehicles

We frequently respond to questions regarding employee use of state vehicles and liability claims coverage for such use through the Risk Management Trust Fund.

Coverage is provided by the Fund only when the operator of a state vehicle is acting "in the course and scope of employment." Otherwise, the state has no liability for the actions of the operator, and the Fund has no authority to provide coverage. The issue of whether an employee was in the course and scope of employment can be complicated, particularly when the employee is engaged in activity benefiting both the employer's and the employee's interests.

The facts involving an employee's activities at the time of the accident or event are controlling in determining whether the employee was in the course and scope of employment. Although legal guidelines may not be available to fit every factual situation, general principles have been established by Florida courts reviewing various employment-status issues. The following provides a summary of legal guidelines established by Florida court decisions.

Use of state equipment or vehicles does not necessarily vest an employee's activity as being in the course and scope of employment. The courts focus on the primary purpose of the employee's activity, and whether it was intended to carry out the employer's business or the personal interests of the employee. An employer is not liable for negligence its employees committed while either going to work or returning home, since this activity is generally not within the scope of employment. This holds true even if the car driven by the employee in going to and coming home from

work is used in his work and partly maintained by the employer. An employee who deviates or departs from his work on a mission of his own also is not within the course and scope of employment. Florida court decisions provide that an employee whose work entails travel away from the employer's offices is within the scope of employment at all times during the trip unless when there is a "distinct departure for a non-essential personal errand."

The following court decisions provide a discussion of these general guidelines: Drinneberg vs Department of Transportation, 481 So.2nd 51, (Fla. App. 2 Dist. 1985); Rabideau vs State of Florida, 391 So.2nd 283 (Fla. App. 1st Dist. 1980), decision affirmed, 409 So.2nd 1045 (Fla. 1982); Gilbert vs Publix, Opinion filed December 28, 1998, 24 FLW D80; and Swartz vs McDonald's, Opinion filed November 12, 1998, 23 FLW D2521.

Use of state vehicles is governed by Chapter 60B-1 of the Florida Department of Management Services' Rules. These rules place specific limits on the use of state vehicles and do not authorize use of state vehicles for personal purposes.

The following are provided as guidelines on specific issues, based upon the legal standards previously discussed:

1. Is coverage in effect for use of a state vehicle by an employee during meal breaks when the employee's normal duties require regular travel away from the office, or while the employee is in a "travel status"?

Yes. Florida court decisions provide that an employee is in the course and scope of employment when sent on travel locations outside the office. A stop for a meal break to or from a designated field location would be



covered. An employee in "travel status" would also be covered. Meal breaks are not considered to be a "distinct departure for a non-essential personal errand."

2. Is coverage in effect for a sworn law enforcement officer solely as a consequence of his being subject to responding to emergency calls during meal breaks?

No. Being "on-call" does not constitute being in the course and scope of employment until actually called to an emergency.

3. Is coverage in effect for an employee using a state vehicle for local meal breaks?

No. The employee is using the vehicle for personal purposes (possibly even as a convenience to both the employer and employee) and is not performing activities in the course and scope of employment.

4. Is coverage in effect for an employee who voluntarily takes a vehicle home because of a security risk to parking the vehicle at the office?

No. State rules on use of vehicles do not authorize taking a vehicle for this purpose. While this may be a mutually convenient arrangement, the employee is not in the course and

See State Vehicles, page 3

State Vehicles, from page 2

scope of employment since his primary purpose is to get to his home or work.

5. Is coverage in effect when commuting to and from work for an employee whose regular work time requires him to work away from the office (in the "field")?

Yes, if employee's home is his office because it is designated as his base of operation, and the employee is driving directly from home. "Commuting" is not really involved since employee's home is his or her office.

6. Is coverage in effect for a driver of a state vehicle to and from work who is subject to emergency calls from his residence?

Yes, assuming no deviations from travel occur directly to and from

work, and the emergency calls fall within state rule requirements (law enforcement or protection of life or property).

State employees should be properly advised with regard to the liability issues involved with the use of state vehicles. Your agency should explain to employees that personal errands or other personal use of state vehicles removes them from being in the "course and scope" of employment so that state coverage does not apply. This does not necessarily mean they lack insurance coverage, only that the state coverage is not available. If for some reason the state vehicle is used repeatedly for personal use, then the employee should contact his or her personal insurance agent. ▼

Our First Issue!

Welcome to your first issue of the *Claims Communicator*, a quarterly newsletter designed to enhance communication between our agencies and convey important information relating to negligence, federal civil rights and employment liability claims and coverages. We plan to share recent legislation, court decisions and general information about state liability issues. We encourage input from your agency, as our customer, concerning issues that you feel need to be addressed or questions that need to be answered. We hope this newsletter will be beneficial to your agency and look forward to hearing from you.

Are You Ready?

Legislation entitled "Commerce Protection Act" (SB 80) was passed this last legislative session, and addressed the state agencies' responsibilities for Y2K failures. This legislation provides "limits" on damages and "preventative" measures which can relieve a state agency from liability in such instances. The following are the provisions which appear to impact state agencies with regard to Y2K compliance and possible liability;

- 1) limits damages to only direct economic compensatory damages resulting from a failure,
- 2) limits liability of state agencies to the requirements of Florida Statutes Section 768.28,
- 3) allows liability to be avoided by proving by a preponderance of evidence that;
 - a) before December 1, 1999, an expert assessed the system to be Y2K compliant and such assessment was based on "reasonable good faith belief," or
 - b) the system was tested before December 1, 1999, and based on such testing, the state agency has a reasonable good faith belief that it is Y2K compliant.

Of course, this legislation contains many other details important to Y2K compliance and the state's responsibilities and the above is merely a summary of the liability portion. ▼

