

MEMORANDUM

March 28, 1986

TO: Governor
FROM: Gerry Thompson *Gerry*
RE: Tort Liability and Excess Coverage Umbrella Policy

APR 01 1986
Governor Attyah

HISTORY

Gene Snyder of General Services contracted with Century Indemnity for a blanket umbrella policy for two policy years July 1982 through August 1983 and August 1983 through July 1984. Anytime the state reaches an accumulative liability loss of \$3 million, this policy becomes effective to pick up any defense cost and damages beyond the 3 million dollars. At the time that Snyder entered into the contract, the question of authority was raised to the AG's office. The AG's office advised Snyder he was going beyond General Service's jurisdiction of risk management as it would relate to tort cases, i.e., Title VII and employee discrimination. However, Snyder was advised it was okay to enter into the contract. The cost of the contract is \$262,000 for the two years.

About one year ago the carrier notified General Services that they were rescinding the policy because of GS's failure to disclose certain risks (the Penk case) and sent the \$262,000 check back to the State. Upon the advice of the AG, General Services is still holding the check.

At the time the agreement was being negotiated with the carrier, Snyder worked with the AG's office to include language in the policy which essentially allowed for coverage of any legal defense or damages incurred in the policy year and after. The company returned with revised language that included events that happened prior to the policy year with coverage for any portion of a tort claim that occurred during the policy year. The Penk case would qualify under this new wording.

Upon the return of the premium and request for rescission, Snyder consulted with the AG's office who clearly believes that the language puts the carrier on the hook for the Penk case. For the policy year 82-83, even with the Penk expenses, the \$3 million accumulation tort loss will not be exceeded. For the policy year 83-84 two things must happen in order for us to exceed the \$3 million. The Penk case has accumulated \$1.24 million in defense costs. To that must be added other losses already incurred for other cases plus the OSU wrestling case. It is possible the cap could be exceeded by \$700,000, although this is only an estimated figure and may never come to be. Added to the concern is that some of the wrestling cases have been filed in Washington, as well as those already filed in Oregon. Those cases filed in Washington are filed under statutes that are much looser than in Oregon.

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PROBLEM

Negotiations have been underway with the carrier to settle the argument. The company has made a settlement offer to continue the umbrella policy if we agree to reform retroactively the policy to exclude all Title VII cases and employment discrimination related cases. If we agree to this, they would accept back the \$262,000, continue the policy with the new exclusions and return to the state \$25,000 for the reduction in policy coverage.

OPTIONS

The AG outlines the following options available to us:

1. Accept the carrier's offer which would preserve the wrestling cases, but would eliminate any excess coverage for discrimination cases and would eliminate any excess coverage for the Penk case.
2. The state send a demand letter to the carrier advising that the claim for rescission of the policy is bogus, the carrier delayed too long waiting to ascertain risks, demand continuation of the coverage as originally contracted for and preserve the right for possibility of a \$700,000 excess recovery.
3. Cash the \$262,000 refund check and rescind the policy. This would give us an additional \$262,000 in the bank, would not effect any potential risks from 82-83, but could give up the potential risk for policy year 83-84 and could negatively effect the wrestling case.
4. The state counteroffer with an agreement that the Penk case and any similar cases would not be covered, but demand assurance that the wrestling cases would be covered.
5. The state make a counteroffer (AG office admits this may be devious) demanding that the carrier accept the Penk case, the state take the wrestling case, the state adjust the policy as requested and accept the \$25,000 from the carrier.
6. A counteroffer from the state with all or a combination of items 4 and 5.

RECOMMENDATION

The state file a counteroffer utilizing the combination of items 4 and 5.

You and I discussed this late last evening and it was your request that in no way the wrestling cases be jeopardized. I have discussed this with Dave Aamodt who is handling the case. He will abide with your request and understands it fully. From that point forward I make it clear they should make the best offer possible and keep us advised along the way.

RISKS

With the counteroffer it is possible the carrier will file a

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lawsuit against the state. The AG believes we have a strong argument based on the contract wording developed by the company itself which is much broader than that we originally offered. There should be no jeopardy of anything currently being written for the state -- in fact, we had the same exact policy for 84-85, but the company has never questioned it. We were unable to get an umbrella policy for 85-86 because it would have cost \$2 million for the contract and we have gone without one. This is a common experience of all states simply because of the liability coverage problems we are all experiencing. The state of Wisconsin recently contracted for a similar umbrella policy and had to pay \$1.7 million.

I have asked Dave Aamodt to research further risks and he totally agrees with my suspicions as I related them to him.

Off the record and confidentially, I suggested to Aamodt that I have some suspicions. We know that Snyder, for some reason, wants us to accept the offer made by the carrier. He can give no reasons other than his integrity in the insurance community could be negatively affected which would then, he says, translate into the integrity of the state in contracting with insurance companies. He admitted he did not disclose the Penk case or any other similar case. This can be excused in that the printout he provided the carrier would not normally have included discrimination cases simply because General Services does not have authority over those cases. However, anyone who has been reading newspapers or listening to the news broadcasts should have been aware of the Penk case. For some reason, Snyder wants this whole thing closed off without any further discussion. He states that he never intended to cover the Penk case, which is confirmed by the Original wording that he and the AG's office submitted to the insurance carrier.

It is our view that the insurance carrier, although we are unable to prove it, obviously changed the wording so that there were no red flags raised when they were ready to market the umbrella policy to an excess carrier. Snyder agrees that:

1. He knew the insurance company's policy wording was broader than that we had suggested.
2. When asked if he was aware of any other claims, his answer was no. But he verbally agreed he would not file any claim with the carrier if the claim was initially incurred prior to the effective date of the policy.
3. He gave the underwriter the wording as developed by him and the AG's office.
4. The underwriter got nervous about the wording and changed it. Snyder further states the company did not negotiate any further on the wording and it was clear they wanted to include any portion of any claims, although it may have occurred prior to the policy date.

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The fact remains we are still suspicious of Snyder. We cannot get hard answers from him. Aamodt shares those suspicions. I suggested that the application for coverage be carefully reviewed to make sure we are not accepting any litigation risks unnecessarily. He will do so.

Aamodt further states he is nervous that should we have to put Snyder on the stand he would end up being a witness for the carrier and not for the state. The AG's office will think this one through and have assured me that in no way the wrestler case will be jeopardized in any further negotiations or counteroffers.