



9319/9869

ALAN WILSON
ATTORNEY GENERAL

December 17, 2014

The Honorable Rebecca Vance
City Manager
Town of Cayce
1800 Twelfth Street
Cayce, SC 29171

Dear Ms. Vance:

You have requested an opinion concerning the applicability of the South Carolina Tort Claims Act to tort claims brought against the South Carolina Municipal Insurance and Risk Financing Fund, also known as SCMIRF. By way of background, you state that “Cayce as a municipality is a participating member of the pooled fund known as SCMIRF.” You further note that while your inquiry does not involve an issue being actually litigated in ongoing litigation, “this issue could become the subject of litigation in the future.” Specifically, you seek advice as to whether SCMIRF is a “governmental entity,” as defined in the Tort Claims Act, such that tort claims brought against SCMIRF are subject to the Act. It is our opinion that it is.

Law/Analysis

The South Carolina Tort Claims Act is codified at S.C. Code Ann. § 15-78-10 et seq. Pursuant to § 15-78-20, the General Assembly found that

... the State, and its political subdivision are only liable for torts within the limitations of this chapter and in accordance with the principles established herein.

More specifically, § 15-78-200 provides that

[n]otwithstanding any provision of law, this chapter, the “South Carolina Tort Claims Act”, is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee’s official duty. The provisions of this chapter establishes limitations on and exceptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity.

See also, Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 463 S.C. 623, 635, 743 S.E.2d 808, 814 (2013) [Tort Claims Act is “the exclusive civil remedy available for any tort

committed by a government entity, its employees, or its agents except as provided in § 15-78-70(b).” (quoting Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1978))].

Section 15-78-40 states that

[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

Section 15-78-120 defines the limits for liability and damages under the Act.

In addition, Section 15-78-30(d) of the Act defines “government entity” as “the State and its political subdivisions.” Pursuant to § 15-78-40(h) a “political subdivision” is defined as follows:

The counties, municipalities, school districts, a regional transportation authority established pursuant to Chapter 25 of Title 58, and an operator as defined in item (8) of Section 58-25-20 which provides public transportation on behalf of the regional transportation authority, and special purpose districts of the State, and any agency, governmental health care facility, department, or subdivision thereof.

(emphasis added).

With respect to the emphasized phrase in the definition of “political subdivision,” we have previously construed that phrase as not modifying the word “State.” In S.C. Op. Att’y Gen., July 25, 1990, 1990 WL 599264, we concluded that

[t]he final phrase amplifies the term “political subdivision” and cannot be reasonably read to modify the term “State” since that term, as used in this paragraph, exists only to further describe special purpose districts.

Elaborating thereupon, we stated:

[a] reading of the statutory language when reduced to its simplest terms provides that a political subdivision means or includes the following:

1. counties;
2. municipalities;
3. school districts;
4. regional transportation authorities established pursuant to Chapter 25 of Title 58;
5. An operator as defined in item (8) of Section 58-25-20;

6. special purpose districts; and
7. any agency, governmental health care facility, department or subdivision of any of the aforementioned political subdivisions.

Id. (emphasis added).

Thus, it can be seen that included within the definition of “political subdivision” is any agency or department of one or more municipalities.

We turn now to application of the Act to SCMIRF. SCMIRF is an unincorporated, voluntary, self-insurance pool created solely by municipalities in the State. SCMIRF was established pursuant to Art. VIII, § 13 of the State Constitution, which authorizes any two government entities to enter into interlocal contracts or agreements with each other to undertake collectively matters which each entity could undertake alone. The purpose of SCMIRF is to establish “a Fund created by and comprised of South Carolina municipalities and their agencies which are parties to an Intergovernmental Agreement which establishes a pool for the payment of property losses and liability claims on behalf of its members pursuant to the provisions of the Code of Laws of South Carolina, 1976. Section 15-78-140.” S.C. Municipal Insurance and Risk Financing Fund, Bylaws, p. 1. Section 15-78-140(h) provides that “political subdivisions of this State . . . shall procure insurance to cover these risks for which immunity has been waived by . . . (4) establishing pooled self-insurance liability funds by intergovernmental agreement. . . .”

Incorporated municipalities or other political subdivisions of the State are members of SCMIRF. The pooling of liability risk by SCMIRF’s members allows members to reduce individual loss exposure and to achieve economies of scale in administration.

Based upon the foregoing, we believe a court would likely conclude that SCMIRF is a “government entity” for purposes of the Tort Claims Act. Because SCMIRF clearly serves as an agency or department of its municipality members, it therefore falls within the foregoing definition and is subject to tort suits only pursuant to the terms of the Act.

Indeed, the very purpose and structure of SCMIRF is contemplated in and authorized by the Act. See, § 15-78-140(b) [“The political subdivisions of this State, in regard to tort and automobile liability, property and casualty insurance shall procure insurance to cover these risks for which immunity has been waived by, . . . (4) establishing pooled self-insurance liability funds, by intergovernmental agreement, which may not be construed as transacting the business of insurance or otherwise subject to State laws regulating insurance.”] (emphasis added). That SCMIRF is comprised of municipalities – i.e. “political subdivisions” under the Act – as well as the fact that the Act expressly authorizes such a structure for pooling insurance liability risk, further supports our opinion that SCMIRF is subject to suit only pursuant to the Act. In other words, here, the municipalities creating SCMIRF have done precisely what the Act contemplated. Thus, to conclude that a court would find that SCMIRF’s liability is not governed by the Act is unwarranted.

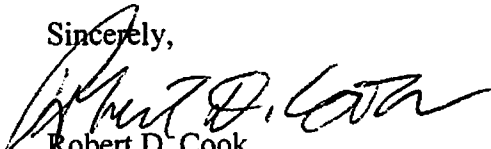
In addition, we note that other courts have concluded that such pooling arrangements among political subdivisions for the purpose of insurance coverage, as SCMIRF has done, constitutes a governmental entity for purposes of that jurisdiction's Tort Claims Act. See Shapiro v. Middlesex County Municipal Joint Ins. Fund, 704 A.2d 1316, 1320 (N.J. 1998) ["JIF, formed to act on behalf of a group of municipalities, is also immune as a public entity under the Tort Claims Act. . . ."]; Colorado Special Districts Property and Liability Pool, 277 W.3d 874 (Colo. 2012) [self-insurance pool for special districts is a "public entity entitled to immunity under Colorado Governmental Immunity Act]. While certainly each of these jurisdictions possesses its own unique and distinctive law, nevertheless, it is instructive to our analysis that other courts have reached the same conclusion as we do.

Conclusion

Based upon the information provided to us, it is our opinion that a court would likely conclude that SCMIRF is subject to tort suits only pursuant to the Tort Claims Act. The members' participation in SCMIRF is an exercise of an essential governmental function. It is certainly reasonable for municipalities to ensure financial security and provide a collective source for paying liability from tort suits, as authorized and limited by the Tort Claims Act, in as efficient and cost-effective manner as possible. SCMIRF serves as an agency or department of its municipality members, and thus falls within the Act's definition of a political subdivision. While not binding, decisions from other jurisdictions reach a similar conclusion as we do here, and are instructive. Thus, we believe a court would likely find that any liability of SCMIRF is governed by the Tort Claims Act. Indeed, the Tort Claims Act itself expressly contemplates the approach taken by SCMIRF.

I trust this advice is helpful to you. Please let us know if you have additional questions.

Sincerely,



Robert D. Cook
Solicitor General