



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

MAR 28 1986

TO : See Attached Distribution List

FROM : Richard K. Willard
RMW Assistant Attorney General
Civil Division

SUBJECT: Personal Liability of Federal Officials
The Bivens Problem

As you may be aware, in recent years there has been an increase in litigation filed personally against federal officials under the authority of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). These suits seek recoveries from the personal resources of individual defendants even though they arise out of the performance of official duties. At this time, there are almost 3,000 Bivens cases pending against federal employees. In the past decade over 12,000 such cases have been filed but recoveries have been few and far between with only 32 known adverse verdicts. Of those, only four have been paid by the individual defendants; the remainder have either resulted in subsequent victories or are presently on appeal. The risk of personal liability, although small, is nevertheless real. This brief memorandum is designed to acquaint you with the situation, describe in general terms the application of various immunity defenses and transmit relevant material for your information.

The Torts Branch of the Civil Division is responsible for processing requests for Department of Justice representation pursuant to 28 C.F.R. § 50.15 and for supervising the defense of most Bivens suits filed against federal officials personally for money damages. The United States Attorneys and client agencies are kept abreast of the developing law in this area through a series of monographs. With the help of this information, department attorneys are able to defeat the vast majority of suits brought against federal officials.

As a general rule, federal officials are absolutely immune from common law tort actions allegedly committed within the outer perimeter of their discretionary functions. The leading case in this area, Barr v. Matteo, 360 U.S. 564 (1959), balanced a number of competing factors and concluded that absolute immunity may not apply in certain circumstances. Thus, while absolute immunity remains a viable defense in most cases, the future is uncertain.

In 1971 the Supreme Court in Bivens held for the first time that federal officials can be personally sued for constitutional violations. With respect to the defense of immunity, the Court has recognized that some governmental functions are so important that they must be protected by absolute immunity for the officials involved. In this evolving area of the law, recent decisions have held that judges, prosecutors, witnesses and the President are protected by absolute immunity, even in the face of constitutional allegations. For federal officials engaged in other functions, the general rule in constitutional tort litigation is that there is no absolute immunity. Qualified immunity is available to the official as an affirmative defense upon proof that there was no violation of a constitutional right which was clearly established at the time the official acted, a right of existence of which the official knew or should have known.

The historical record to date and the current state of the law indicate that an adverse judgment would be a rare event indeed. Nevertheless it is important to note that it is the responsibility of the individual defendant to satisfy an adverse judgment entered solely against him; there is not now a general legal right to indemnification from the employing agency. Nor would there be under the Civil Division's proposal to permit indemnification. Under the proposal indemnification would be discretionary and would be subject to the availability of suitable appropriated funds. For this reason, a number of federal officials have purchased professional liability insurance. One policy presently on the market offers one million dollars in coverage for an annual premium of \$147.00. A decision on professional liability insurance is personal and I am attaching a copy of a brochure and application should you wish to explore the matter further.

Attachments

Distribution List

AG's Office

T. Kenneth Cribb, Jr.
Stephen S. Galebach
Steven G. Calabresi
Becky Norton Dunlop
Judith L. Hammerschmidt
Mark W. Everson
John N. Richardson

DAG's Office

D. Lowell Jensen
Jay Stephens
Bill McGuinness
Rosemary Hart
Charles Blau
Ron Gainer
Mark Levin

Associate AG's Office

Arnold I. Burns
Randy L. Levine
Gregory S. Walden
John C. Harrison
Lee S. Liberman

Solicitor General's Office

Charles Fried
Carolyn B. Kuhl
Lawrence G. Wallace
Carolyn Brammer

Public Affairs Office

Terry H. Eastland
Pat Korten

Office of Legal Counsel

Charles J. Cooper
Allan Gerson
Samuel A. Alito
Doug Kmiec

Office of Administration

W. Lawrence Wallace
Robert N. Ford
John Lane
Jeff Miller

Office of Legal Policy

Stephen J. Markman
J. Michael Shepherd
Kevin R. Jones
Grover T. Rees
Fred Nelson

Office of Legislative Affairs

John R. Bolton

Criminal Division

Stephen S. Trott
John C. Keeney
Mark M. Richard
James I. K. Knapp
Victoria Toensing

Antitrust Division

Douglas Ginsburg
Rick Rule
Mark Leddy
Steve Cannon
Richard Warren-Boulton

Civil Division

James M. Spears
Stuart E. Schiffer
Robert J. Cynkar
Robert L. Willmore

Civil Rights Division

William Bradford Reynolds
James P. Turner
Mark Disler
Michael Carvin
Steve Matthews

Land & Natural Resources Div.

F. Henry Habicht II
Myles E. Flint
Roger Marzulla
Thomas Hookano

Tax Division

Roger M. Olsen
John F. Murray
Seth Heald

INS - Alan C. Nelson

FBI - William H. Webster

U.S. Marshals - Stanley E. Morris

Prisons - Norman A. Carlson

OPR - Michael E. Shaheen, Jr.

Exec. Ofc. U.S. Attys

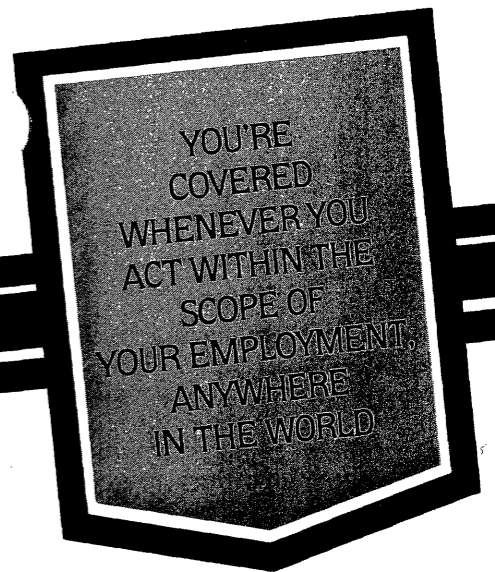
William P. Tyson

OJJDP - Alfred S. Regnery

Just doing your job puts you at special risk. Shield yourself from costly lawsuits with

Professional Liability Insurance for Federal Employees

- ✓ Legal Costs
- ✓ Damages Against You
- ✓ Suits by Other Employees
- ✓ Suits by Members of the Public



Summary of Professional Liability Insurance Plan

Covers You for Money Damages

Pays sums for which the insured is legally liable because of acts, errors, or omissions which constitute common law, statutory or constitutional torts. Pays damages for:

- Personal Injury—injury resulting from any claim arising from violation of property rights or deprivation of any rights, privileges, or immunities secured by the common law, the Constitution or the laws of the United States of America for which Federal Government employees acting in the performance of their official duties may be held liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
- Bodily Injury—bodily injury, sickness or disease or death resulting therefrom sustained by any person or persons caused by an act, error or omission of the insured while acting in the performance of his or her Federal duties.
- Property Damage—damage to or destruction of property including loss thereof sustained by any person caused by an act, error or omission of the insured while acting in the performance of his or her official Federal duties.

Covers Your Legal Defense Costs Without Limit

If the Department of Justice refuses to provide defense for an insured, the insured may, with approval of the Company, select private counsel to defend him.

Even if the defense is provided by the Department of Justice the insured may nevertheless, with the consent of the Company, appoint their own counsel to monitor or oversee the defense provided by the United States.

Defense costs are treated as a supplementary payment. They are in addition to the limit of liability and are without limitation.

Key Benefits

1. The definition includes punitive damages where allowed by state law.
2. Coverage includes claims brought by fellow employees. This is especially important for supervisors and administrators.
3. Coverage includes prior acts, but only if the insured had no knowledge of any claim or suit or any act, error or omission which might be expected to result in a claim or suit at the time the application was signed. Regardless of when an insured enrolls, coverage applies from the first day of service in the Federal government.
4. The Company agrees not to make settlement of a suit without prior notice to the insured.
5. In addition to the limit of liability the policy provides for:
 - all costs taxed against the insured in any suit defended by the Company.
 - premiums on appeal bonds including supercedas bonds.
6. The policy applies anywhere in the world where the insured is acting in the performance of his or her official Federal duties.
7. The policy extends after cancellation or non-renewal for 36 months for acts committed or alleged to have been committed prior to cancellation or non-renewal. This extension does not apply if the policy is cancelled for non-payment.

Limits of Liability

Each insured is covered for the selected amount up to a maximum of \$1 million for damages sustained by any one person or persons as a result of any one incident. The limit of liability selected is the maximum available in the policy period.

This Plan was developed with the advice and consultation of Federal Government officials to provide the fullest protection possible for Federal employees.

Reproduced from the Holdings of the National Archives and Records Administration Record Group 60, Department of Justice Files of Richard Willard, 1985-1988
Accession 060-90-220, Box 12
Folder: Correspondence to Other Divisions and DOJ Components

More Benefits Inside . . .

**Protect
Yourself,
Your Home
and Your
Savings**

Why You Need Professional Liability Insurance

Lawsuits against Federal employees are increasing at an alarming rate. Members of the public, even fellow workers, can bring personal lawsuits against you.

Being the subject of such a suit puts your life in turmoil for years. While the suit is pending, your credit rating drops. You may not be able to borrow money for a house, for a car or for a college education. If you lose the suit, damages brought against you could wipe out your savings and your property.

You're at Risk— Every Minute You're on the Job

You're at risk whenever you're acting within the scope of your job. Working at your desk . . . talking on the phone . . . or meeting the public. You are in jeopardy when you make assignments, evaluate, promote and manage others. Away from your desk, you may be in more danger. On assignment you may be exposed to even greater risk of lawsuits from private citizens.

Professional Liability Insurance Provides Needed Protection

Legal battles and settlements cost thousands of dollars. Reasonably priced Professional Liability Insurance protects you against loss from suits involving personal injury, bodily injury and property damage for which you are legally liable arising from acts . . . errors . . . or omissions in the performance of your official Federal duties.

Say, for example, a coworker sues you for libel alleging you intentionally gave inaccurate information on a performance rating. Defending against this lawsuit whittles your

bank account down to zero. If the judge decides against you and awards damages, you may have to sell your home to settle.

Liability Insurance Covers You Up to \$1 Million

When you are insured, this plan pays your defense costs. Plus it pays damages—up to \$1,000,000—for which you are legally obligated. Even when allegations of the suit are groundless, false or fraudulent, the insurance pays for your defense. And where allowed by state law, this Professional Liability Plan pays punitive damages.

When you enroll, you're covered for past acts as long as on the date of signing the application you know of no claim or suit or any act, error or omission which might be expected to result in a claim or suit.

Even if you work part-time you're eligible for coverage. For convenience, you can choose to pay by payroll allotment. And, if you notify the administrator that you have resigned, retired and wish to cancel in mid-term, your *pro-rata premium will be refunded.*

Federal Tort Claims Act Leaves You Vulnerable

The Federal government can choose whether or not to defend you. It *cannot cover money damages* awarded against you personally. Without Professional Liability Insurance you could lose your home . . . money saved for your children's education . . . everything you have worked for.

When you're covered by this plan, you are fully protected. If the Justice Department refuses to defend you, the plan picks up the full cost of your legal defense—and pays covered damages awarded against you, up to the policy limit you have selected.

Justice Department Consulted in Broadening Your Protection

New provisions were recently added to the Professional Liability Plan after consultation with the attorneys in the Tort Claims Division of the Justice Department. They work in this field every day and are more acutely aware of your needs than anyone else. You should feel confident knowing this is the only Professional Liability policy developed with the help of the Department of Justice.

Protection Worldwide

No matter where your work takes you, you are covered while you are acting within the scope of your employment.

Take advantage of this opportunity to protect your savings and other assets. Choose coverage to meet your needs from the chart on the enclosed application card. Then complete and return it today.



WRIGHT & CO.
1400 Eye Street, N.W.
Washington, D.C. 20005

Telephone: 289-0200—outside Washington area,
call toll-free: 800-424-9801