

Paul Maggie

From: Weinert, Debora A [Debora.Weinert@edwardjones.com]
Sent: Wednesday, March 26, 2008 3:04 PM
To: undisclosed.for.privacy@edwardjones.com
Subject: FW: indemnification statutes

Jason/Maggie:

Following is an e-mail I received from Randy Moses, Assistant Director of the SD Division of Insurance. This should clarify the question about municipalities granting indemnification via indemnification clauses in contracts.

Debora Weinert, Financial Advisor
Edward Jones
Autumn Hills Plaza
5312 Sheridan Lake Road, Suite 106
Rapid City, SD 57702

Phone: 605-341-3359
Toll-free: 888-341-3359
Fax: 866-445-0423

Subject: RE: indemnification statutes

The existence of an indemnification clause is commonplace in a wide variety of contracts entered into in this state and elsewhere. This type of clause does not make the contract in question a contract of insurance or mean that the parties are engaged in the business of insurance pursuant to SDCL 58-1-2. We do not believe that SDCL 58-6-10 is applicable to the situation at hand.

That being said the Division takes no position as to whether the indemnification clause is appropriate for the parties to this proposed contractual arrangement. Please let me know if you need anything further.

R. J. Moses
Assistant Director
SD Division of Insurance
445 E. Capitol
Pierre, SD 57501
phone: (605)773-3563
fax: (605)773-5369

-----Original Message-----

Subject: FW: indemnification statutes

Randy,

Thank you for your call today and your offer to clarify this issue of municipalities granting indemnification. I have included the text, inset and in quotes, of the relevant items on which Mr. Green has commented. Please call me if you have any questions or need further information. I look forward to receiving your response.

Debora Weinert, Financial Advisor
Edward Jones
Autumn Hills Plaza
5312 Sheridan Lake Road, Suite 106
Rapid City, SD 57702

3/26/2008

Phone: 605-341-3359
Toll-free: 888-341-3359
Fax: 866-445-0423

Subject: RE: indemnification statutes

Hi Deb:

I have finished my review of the MG Trust agreement. My comments (and the indemnification statutes are below.) I will be out of town until Monday, March 31st. If you want to get the agreement on the next Legal and Finance Agenda, the deadline is Wednesday, March 26th at 4:00pm. Please contact Maggie in my office to have the item placed on the agenda. At this time, I can not recommend approval of the agreement.

6.06 Indemnification, liability limitation – gross negligence or willful and wanton conduct is too broad.

"6.06 Indemnification. The Company hereby agrees to indemnify, defend and hold the Trustee and its affiliates, and their respective directors, manager, officers, employees, agents and other representatives (the "Indemnified Parties") harmless from any and all losses, costs, excise taxes, expenses, fees, liabilities, damages, claims of any nature whatsoever, including but not limited to legal expenses, court costs, legal fees, costs of or associated with enforcement actions, investigations, suits, and regulatory or other actions and appeals thereof resulting from their reliance upon any certificate, notice, confirmation, or Instruction, purporting to have been delivered by the Plan Administrator, a Named Fiduciary, an Investment Manager, or a Designated Representative hereunder ("Plan Representative(s)"). The Company waives any and all claims of any nature it now has or may have against the Indemnified Parties, which arise, directly or indirectly, from any action that the Trustee takes in good faith in accordance with any certificate, notice, confirmation, or Instruction from a Plan Representative. The Company and the Plan Administrator also hereby agree to indemnify, defend and hold the Indemnified Parties harmless from and against any and all losses, costs, excise taxes, expenses, fees, liabilities, damages, claims of any nature whatsoever, including but not limited to legal expenses, court costs, legal fees, costs of or associated with enforcement actions, investigations, suits, and regulatory or other actions and appeals thereof, arising, directly or indirectly, out of any loss or diminution of the Trust Fund resulting from changes in the market value of the Trust Fund assets; reliance, or action taken in reliance, on Instructions from Company or one or more Plan Representatives; any exercise or failure to exercise investment direction authority by the Company or by a Plan Representative; the Trustee's refusal on advice of counsel to act in accordance with any investment direction provided by Company or a Plan Representative; any other act or failure to act by Company or a Plan Representative; any prohibited transaction or disqualification of a Plan due to any actions taken or not taken by the Trustee in reliance on Instructions from the Company or a Plan Representative; or any other act the Trustee takes in good faith hereunder that arises under this Trust Agreement or the administration of the Trust Fund.

The Trustee shall not be liable to Company for any act, omission, or determination made in connection with this Trust Agreement except for its gross negligence or willful misconduct. Without limiting the generality of the foregoing, the Trustee shall not be liable for any losses arising from its compliance with Instructions from the Company or a Plan Representative; or executing, failing to execute, failing to timely execute or for any mistake

in the execution of any Instructions, unless such action or inaction is by reason of the gross negligence or willful misconduct of the Trustee.

The provisions of this Section 6.06 shall survive the termination, amendment or expiration of this Trust Agreement."

9.02 Another Indemnification provision

"9.02 Authorization with Respect to Taxes. The Trustee shall notify the Plan Administrator and/or the Designated Representative of any tax levied upon or assessed against the Trust Fund of which the Trustee has knowledge. If the Trustee receives no instructions from the Plan Administrator and/or the Designated Representative, the Trustee may pay the tax from the Trust Fund. If the Plan Administrator and/or the Designated Representative wish(es) to contest the tax assessment, it shall give appropriate and timely instructions to the Trustee. The Trustee shall not be required to bring any legal actions or proceedings to contest the validity of any tax assessments unless the Trustee has been indemnified to its satisfaction against loss or expense related to such actions or proceedings, including reasonable attorney's fees. The Trustee shall have no liability for making any distribution or transfer pursuant to the Instruction of the Plan Administrator and/or the Designated Representative (including amounts withheld pursuant to the previous sentence) and shall be under no duty to make inquiry whether any distribution or transfer directed by the Plan Administrator and/or the Designated Representative is made pursuant to the provisions of the Plan. The Plan Administrator and/or the Designated Representative shall furnish to the Trustee all information necessary to carry out such withholding in a timely fashion or, if such information is not so provided to the Trustee, the Plan Administrator and/or the Designated Representative and the Company shall hold the Trustee harmless from and indemnify it for any liability and related expenses that arise in connection with improper withholding."

South Dakota Indemnification Statutes

SDCL 58-1-2(8) "Insurance," a contract whereby one undertakes to indemnify another or to pay or provide a specified or determinable amount or benefit upon determinable contingencies;

SDCL 58-6-10. Governmentally owned insurers prohibited--Exceptions. Except for instrumentalities of the United States government, no insurer, the voting control or ownership of which is held in whole or substantial part by any government or governmental agency, or which is operated for or by any such government or agency, may transact insurance in this state, unless, upon verified application by the insurer, the director finds that:

(1) The insurer is not subject to any form of subsidy that would enable it to compete unfairly with domestic insurers;

(2) The insurer is not subject to governmental practices that discriminate on the basis of race, color, creed, or national origin;

(3) The ownership or financial control does not create the presence of any sovereign immunity in the insurer;

(4) The insurer has agreed to waive sovereign immunity as a defense should it exist for any action by or against the director pursuant to the director's regulatory authority under Title 58;

(5) The insurer has agreed that it will exhaust all administrative remedies and will neither commence in, nor remove to, federal court any action by or against the director pursuant to the director's regulatory authority under Title 58;

(6) Appropriate measures and controls exist to avoid security problems resulting from an insurer's access to confidential information and data of its insured; and

(7) The ownership or financial control does not result in substantial or undue influence being asserted over the insurer.

Membership in a mutual insurer, or subscribership in a reciprocal insurer, or ownership of stock of an insurer by the alien property custodian or similar official of the United States, or supervision of an insurer by public insurance supervisory authority does not constitute ownership, control, or operation of the insurer for the purposes of this section. Nothing contained in this section prohibits or affects self insurance by school districts as provided in § 13-10-3, or by municipalities as provided in § 9-14-30. The failure of any applicant under this section to submit all information requested by the director pursuant to this section and the director's regulatory authority under Title 58 relevant to any finding to be made under this section is sufficient to deny the application.

Jason E. Green
City Attorney
City of Rapid City
300 Sixth Street
Rapid City, SD 57701
Phone (605) 394-4140
Fax (605) 394-6633

This message contains confidential information intended only for the use of the addressee(s) named above and may contain information that is legally privileged. If you are not the addressee, or the person responsible for delivering it to the addressee, you are hereby notified that reading, disseminating, distributing or copying this message is strictly prohibited. If you have received this message by mistake, please immediately notify us by replying to the message and delete the original message immediately thereafter. Thank you.

-----Original Message-----

Subject: indemnification statutes

Would you mind sending me a copy of, or a link to, the statutes you were referring to regarding indemnification and municipalities. Thanks!

Debora Weinert, Financial Advisor
Edward Jones
Autumn Hills Plaza
5312 Sheridan Lake Road, Suite 106
Rapid City, SD 57702

Phone: 605-341-3359
Toll-free: 888-341-3359
Fax: 866-445-0423

Debora Weinert
Financial Advisor
Edward Jones
Autumn Hills Plaza
5312 Sheridan Lake Rd Ste 106
Rapid City, SD 57702
(605) 341-3359
www.edwardjones.com

If you are not the intended recipient of this message (including attachments), or if you have received this message in error, immediately notify us and delete it and any attachments. If you no longer wish to receive e-mail from Edward Jones, please send this request to messages@edwardjones.com. You must include the e-mail address that you wish not to receive e-mail communications. For important additional information related to this e-mail, visit www.edwardjones.com/US_email_disclosure