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STATE OF NEBRASKA
OFFICIAL
MAY 31 1991
DEPT. OF JUSTICE

DATE: May 31, 1991

SUBJECT: Constitutionality of Bill Appropriating Funds to Pay Commonwealth Depositors After Legally Amending the State Tort Claims Act to Permit Large Tort Claims to be Heard by the Legislature Rather than the State Claims Board.

REQUESTED BY: Senator Loran Schmit
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
John R. Thompson, Deputy Attorney General

In your May 21, 1991 letter you asked for clarification of certain aspects of Opinion No. 91042 to Senator Coordsen dated May 20, 1991. More specifically, you asked whether the Legislature could constitutionally appropriate money to pay certain large tort claims after finding that the State of Nebraska was liable for damages incurred by the claimants. Your question assumes that tort claims of $5 million or more could constitutionally be heard directly by the Legislature and that a process was enacted to do so.

We believe the answer to your question is yes. However, we also believe we should offer some further comments for your consideration.

If a majority of the Legislature wishes to pay additional funds to Commonwealth Depositors to reimburse them for their losses, it should do so in a manner that will be sustained by the courts. Otherwise the result will be additional unsuccessful litigation and disappointment. As we have previously stated, a constitutional amendment would be one way to constitutionally authorize additional payment.

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If the Legislature pursues the tort claim process as you have proposed, you should be aware of the following legal issues which you will need to deal with concerning Tort Claim No. 91-310, which is the apparent subject of your proposed appropriation.

1. Under current state law, payment as you suggest in your question would be legal only to the extent that there is tort liability of the State of Nebraska which is not barred by the two-year statute of limitations, Neb.Rev.Stat. §81-8,227 (1990 Cum. Supp.). It would be important that the Legislature in its findings and deliberations make an adequate record to show the specific acts of negligence of the State of Nebraska employees, when these acts occurred, how these acts caused the loss, and a detailed computation of the damages caused by such negligence since the District Court of Lancaster County would still be required to review the legislative appropriation under Neb.Rev.Stat. §81-8,211 (1990 Cum. Supp.) and since a court challenge similar to the one in Haman v. Marsh, 237 Neb. 699, ___ N.W.2nd ___ (1991), might also be initiated.

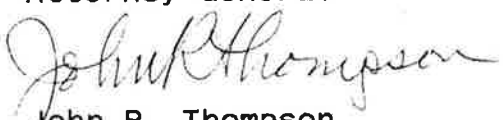
2. State liability for tort claims is limited to negligent or wrongful acts or omissions by employees of the state, Neb.Rev.Stat. §81-8,210(4) (1990 Cum. Supp.). Tort Claim No. 91-310 primarily alleges negligent acts or omissions of the Commonwealth receiver, who for the past four years has been Mr. Badami. Mr. Badami is not and has not been an employee of the state. If the Legislature is of the opinion that the state is liable for Mr. Badami's acts, it should make a factual record to support that determination.

We raise these issues not to stand in the way of any payments to Commonwealth depositors, but to suggest that if a majority of the Legislature sincerely wants to reimburse Commonwealth depositors in some additional amount, it is in the best interests of everyone concerned to find legal and constitutional procedures for doing so. In that context, we would again refer you to Opinion No. 91036 dated May 6, 1991 to Senator Chris Beutler with respect to amendments to LR 24CA which discusses some legal ways for accomplishing that purpose. We also suggest that should any such payment be made, there should be detailed procedures for payment and releases to insure that the interests of the depositors and the State of Nebraska are both adequately protected.

In conclusion, we express no legal opinion regarding the tort liability of the state in this case. That is a decision in the first instance for the State Claims Board, or under your proposal, for the Legislature to make. The Attorney General's office will legally defend such action (or nonaction) as the Board or the Legislature may take concerning this claim.

Sincerely,

DON STENBERG
Attorney General



John R. Thompson
Deputy Attorney General

cc: Patrick O'Donnell
Clerk of the Legislature

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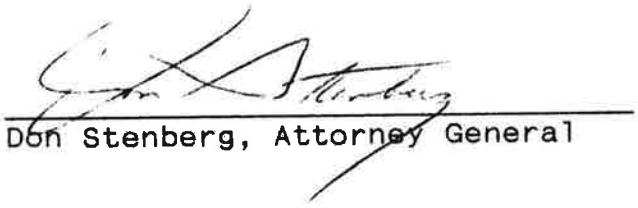

Don Stenberg, Attorney General