

Opinion No. 2013-018

May 24, 2013

The Honorable Jay Bradford  
Commissioner  
Arkansas Insurance Department  
1200 West Third Street  
Little Rock, Arkansas 72201-1904

Dear Commissioner Bradford:

This is my response to your request for an opinion about the Arkansas Self-Insured Fidelity Bond Program. The Program, established by Act 728 of 1987<sup>1</sup> and administered by the Governmental Bonding Board,<sup>2</sup> insures local governmental bodies and the State itself against employee-fraud losses.<sup>3</sup>

The Act requires the Board to determine if the Program covers the claims submitted.<sup>4</sup> You have asked me to “opine as to the deciding factors for an entity to be covered.”

**RESPONSE**

I must decline to answer your question as posed. In rendering official opinions, the Attorney General determines what law applies to given facts, and opines on how

---

<sup>1</sup> Codified as amended at A.C.A. §§ 21-2-701 to -711 (Repl. 2004, Supp. 2011).

<sup>2</sup> See A.C.A. § 21-2-704(a), -705 (Supp. 2011), -706 (Repl. 2004).

<sup>3</sup> More specifically, the Program insures against “actual losses sustained by a participating governmental entity through any fraudulent or dishonest act or acts committed by any official or employee of the participating governmental entity. . . .” A.C.A. § 21-2-704(b)(1).

<sup>4</sup> See A.C.A. § 21-2-709(a)(1)(A) (Supp. 2011).

to apply the law to those facts. But I decline to state an opinion when I do not have enough facts to allow me to say with some certainty how the law should be applied in that instance.<sup>5</sup>

Your request is abstract, referring to no entity at all. I cannot, in my opinions function, supply general rules about how to apply the law in any and all circumstances. The law itself is intended to include those general rules and if the law is unclear, an administrative agency may clarify it formally through rulemaking.<sup>6</sup>

Courts will defer to agency interpretations of law unless they are clearly wrong.<sup>7</sup> Within that limit, the Board may interpret Act 728 as it deems reasonable and consistent with legislative intent.

With respect to the Board's determinations in individual cases, the courts will affirm them if there is any substantial evidence to support the decision, and if the Board has neither acted arbitrarily or capriciously nor abused its discretion.<sup>8</sup>

While I must decline to answer your question as posed, it may be helpful for me to discuss the ways in which an entity might be said to be covered – or not covered – under the Act and the Program. There are at least two such ways.

First, Act 728 identifies governmental entities that are the insureds – the Program's beneficiaries. The Act refers to these as “participating governmental entit[ies]” (“PGE's”) and defines that term – with admirable simplicity – as the State and its counties, municipalities, and school districts.<sup>9</sup> The Program covers

---

<sup>5</sup> See, e.g., Op. Att'y Gen. 2012-061, 2012-052, 2010-005.

<sup>6</sup> See A.C.A. § 21-2-706 (Board to “develop,” as well as administer, Program); see also generally A.C.A. §§ 25-15-201 to -219 (Repl. 2002, Supp. 2011) (Administrative Procedure Act).

<sup>7</sup> See, e.g., *Arkansas Pub. Emp. Ret. Sys. v. Taylor*, 2013 Ark. 37, \_\_\_ S.W.3d \_\_\_, 2013 WL 460425.

<sup>8</sup> See, e.g., *Volunteer Council v. Governmental Bonding Board*, 319 Ark. 716, 894 S.W.2d 580 (1995).

<sup>9</sup> See A.C.A. § 21-2-702(3), (6), (8), (10), and (13) (Repl. 2004).

the losses of PGE's only, and only PGE's may receive Program payments.<sup>10</sup> In a very real sense, then, *no* governmental entity except the State, or a county, municipality, or school district, is "covered."

Second, Act 728 identifies a few governmental bodies whose officials' and employees' fraudulent acts cannot form the basis of a valid claim. That is, the Act provides that the Program will insure PGE's against losses from fraudulent acts of any official or employee *except* an official or employee of a county or municipal hospital, nursing home, or conservation or improvement district.<sup>11</sup> The Act does not use a defined term, but I will refer to these specified local entities as "excluded local bodies" or "ELB's." Because a county hospital, for instance, is an ELB, its administrator's fraud cannot form the basis of a loss that otherwise would be covered by the Program (keeping in mind that such a loss is one "suffered by a PGE" – in my example, a loss suffered by the county itself). In this sense, an ELB is not "covered."<sup>12</sup>

---

<sup>10</sup> *Volunteer Council v. Governmental Bonding Board*, *supra*, note 9 (citing A.C.A. §§ 21-2-704(b) (Program covers "actual losses sustained by a participating governmental entity"), -704(e) (Program "shall not cover a loss sustained by any party other than a participating governmental entity"), -709(a) (payments are made "to the participating governmental entity"))).

<sup>11</sup> See A.C.A. § 21-2-702(4), (7).

<sup>12</sup> One could argue that Act 728 identifies yet another group or class of governmental bodies. The Act requires an annual audit of the books of each PGE, "including each segment or component of the [PGE] for which coverage is available under the program . . ." A.C.A. § 21-2-704(g)(1). By referring to a class of "segments" and "components" for which coverage is available, the Act implies a class for which coverage is not available. But it does not define "segment" or "component," and says nothing about how to determine whether "coverage is available" for a given segment or component. How should one interpret the Act in this instance? I cannot answer that question definitively. But a statute's meaning is determined by reading it as a whole, not by examining only some part in isolation. *E.g.*, *Fiser v. Clayton*, 221 Ark. 528, 254 S.W.2d 315 (1953). So it would not be unreasonable, in my view, to look for guidance to the only other part of Act 728 that identifies what might be called segments or components and excludes them in some way from the Program: the provisions, discussed in the text accompanying this footnote, that identify ELB's.

One might conclude in that case that the legislature's implied reference to segments and components for which coverage is *not* available is merely a reference to the ELB's. Under such a construction, the Act would excuse from the audit requirement only county and municipal hospitals, nursing homes, and conservation and improvement districts. All other segments and components of PGE's, not being ELB's, would be segments and components "for which coverage is available," and all of them – or at least those having books and records separate from those of the PGE's themselves – would be required to have audits.

One other aspect of Act 728 that might be regarded as distinguishing among governmental bodies seems worth mentioning in this context. The Program insures against losses suffered by a PGE through certain acts committed by an official or employee “of” the PGE.<sup>13</sup> One might read that word strictly, and conclude that a person is not an employee “of” a PGE unless she works directly for and is paid directly by a PGE, not some segment or component or other creature of the PGE.

In my view, however, such an interpretation may not be consistent with the legislative intent underlying Act 728. A primary aim of the Act was to “effectuate substantial savings” in the cost of otherwise-required fidelity bonds for state, local, and school officials and employees.<sup>14</sup> It would seem consistent with the legislative intent for Program coverage to extend to any non-ELB segment or component, if a loss caused by an official or employee thereof would constitute an “actual loss[] sustained by [a PGE].”<sup>15</sup> If, in other words, an official or employee of a non-ELB segment or component causes a PGE to suffer an actual loss, he or she is necessarily, in my estimation, “of” the PGE itself for purposes of the provision at issue.

---

Such a construction seems to make sense: if the fraudulent acts of a segment’s officials or employees cannot cause a loss that is covered under the Program, there is no reason for the Program to require the segment’s books to be audited. Conversely, if a segment employee’s fraud can cause a covered loss, and the segment’s financial affairs are accounted for separately from the related PGE’s, the Program is materially interested in the segment’s financial results and position, internal controls, and other matters examined in an audit.

<sup>13</sup> A.C.A. § 21-2-704(b)(1). Act 728 originally insured against losses arising from acts “committed by any of the officials or employees, acting alone or in collusion with others . . .” A.C.A. § 21-2-704(b)(1) (Repl. 2004). The Act was amended in 2005 to refer to losses arising from acts “committed by any official or employee of the [PGE] acting alone or in collusion with another . . .” A.C.A. § 21-2-704(b)(1) (Supp. 2011) (emphasis added). The change was part of an omnibus act containing technical corrections among other things. *See* Act 506 of 2005. The amendment appears to me to have been merely a clarification that the Program was always intended to, and actually did, cover only losses arising from the acts of PGE officials and employees, and not losses arising from the acts of just any “official” or “employee,” regardless of his or her relationship to a PGE. The amendment does not appear to me to have been intended to reduce the universe of persons whose fraud may cause a covered loss.

<sup>14</sup> A.C.A. § 21-2-701 (Repl. 2004).

<sup>15</sup> A.C.A. § 21-2-704(b)(1).

The Honorable Jay Bradford  
Arkansas Insurance Commissioner  
Opinion No. 2013-018  
Page 5

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM:JMB/cyh