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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-201394 DATE: April 23, 1981

MATTER OF: Indemnification of agents and brokers under the National Flood Insurance Act

DIGEST: Indemnity clause obligating U.S. to reimburse agents under the National Flood Insurance Act for damages caused by acts or omissions of U.S. employees, where the agent did not contribute to the injury, is void under 31 U.S.C. § 665(a) and 41 U.S.C. § 11, since no appropriation is available for payments under the indemnity clause. In any event, the provision provides little protection to agents since it is unlikely that any judgment meeting those criteria would ever be entered. Any other indemnity agreement which purported to broaden the United States' liability similarly would be void for lack of appropriated funds. However, the agency may request specific authorization from Congress to enter into indemnity agreements, similar to that contained in the Federal Crop Insurance Act.

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The General Counsel of the Federal Emergency Management Agency (FEMA) requests our opinion on FEMA's authority to provide indemnification ~~to agents and brokers~~ under ~~the~~ National Flood Insurance Act of 1968 (Pub. L. No. 90-448, 82 Stat. 572, 42 U.S.C. § 4001 et seq.). For the reasons indicated below, we conclude that both the indemnity clause now in use and any expanded versions are unauthorized under 31 U.S.C. § 665(a) (1976) and 41 U.S.C. § 11 (1976).

A national flood insurance program was authorized as part of the National Flood Insurance Act of 1968. That Act establishes two alternate means of administering the program. Section 1331 of the Act, 42 U.S.C. § 4051, authorizes use of a pool of private insurance companies which would provide the insurance coverage. In the alternative, section 1340, 42 U.S.C. § 4071, vests discretion in the Secretary of Housing and Urban Development (HUD) to assume administration of the insurance program.

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Until 1977, the program was operated by the National Flood Insurers Association (NFIA), in accordance with 42 U.S.C. § 4051. Administration of the program was assumed by HUD in 1977, and then was transferred to FEMA. (Reorganization Plan No. 3 of 1978.)

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NFIA, the pool of insurance companies, operated under a hold harmless agreement in which it agreed to indemnify its agents and brokers for all liability they incurred to policyholders and applicants as a result of acts or omissions by NFIA. In 1978, HUD, through the Federal Insurance Agency (FIA), accepted a similar, but more limited, indemnity agreement, which FEMA assumed and reissued, effective April 1, 1979. That agreement provides:

> "The Department of Housing and Urban Development (HUD) will hold agents selling or undertaking to sell flood insurance harmless from all judgments for damages as a result of any court action by policyholders or applicants arising out of or caused by the acts or omissions of HUD in carrying out the direct billing or policy issuance procedures controlled by HUD to the extent that HUD is legally responsible and provided further that the agent has not caused or contributed to the liability by his own acts or omissions."

FEMA's question is really two-fold. First, is the indemnity agreement currently in use a valid agreement; and, second, could that agreement be expanded to resemble the indemnification authorized by section 104 of the Federal Crop Insurance Act of 1980 (Pub. L. No. 96-365, 94 Stat. 1312)?

Our Office has consistently held that, absent specific statutory authority, indemnity provisions which subject the United States to contingent and undetermined liability contravene 31 U.S.C. § 665(a) (1976) and 41 U.S.C. § 11 (1976). B-198206, April 4, 1980; 35 Comp. Gen. 85 (1955); 16 id. 803 (1937). With regard to the instant case, therefore, unless a specific statute authorizes the obligation of an indefinite amount of appropriated funds for indemnification of agents under the flood insurance program, that agreement is void.

The indemnity provision as currently written is of limited scope. It purports to obligate the United States to reimburse insurance agents only for any judgment for damages entered against an agent, where the United States is legally responsible for the injury and where the agent's conduct did not contribute to the injury. The effect of the provision is to bind the United States to reimburse agents only in those cases where it would have been liable in any event had the policyholder or applicant chosen to act against it directly.

While the provision thus creates no new liability of the United States, it is nevertheless void since no appropriation is available

for payments under the provision. The permanent indefinite appropriation for the payment of judgments, 31 U.S.C. § 724a (1976), is available only for judgments entered directly against the United States; it may not be used to satisfy a judgment for which the Government is liable only by reason of an indemnity agreement with the agent. See 28 U.S.C. §§ 2414, 2517 (1976). Moreover, there is no provision in the 1980 appropriation for FEMA (Department of Housing and Urban Development - Independent Agencies Appropriation Act, 1980, Pub. L. No. 96-103, 93 Stat. 771 (1979)), which specifically provides for expenditures under an indemnity agreement. Further, even if the indemnity agreement was considered reasonably related to the National Flood Insurance Act, so that use of funds appropriated under that Act might be justified, the agreement would fail because the amount of liability necessarily would be indefinite and potentially could exceed the available funds, in contravention of 31 U.S.C. § 665(a).

In any event, the current provision provides little protection to the insurance agents. The United States is obligated under the provision to reimburse an agent only for judgments entered against him for injury caused by acts of United States employees; however, since an agent is liable to either the insured or the insurer only where he is negligent or has committed a breach of contract (see 16 J. Appleman, Insurance Law and Practice, §§ 8781, 8832 (1968 and Supp. 1980)), there is no basis for entry of judgment against an agent for an injury to which he did not contribute. Since it is unlikely that a judgment satisfying the criteria of the indemnity clause would ever be entered, it appears that the United States would never be required to actually reimburse any agent.

Apparently FEMA is contemplating a broader indemnity clause modeled after section 104 of the Federal Crop Insurance Act of 1980, Pub. L. No. 96-365, 94 Stat. 1312 (1980). That provision reads in relevant part:

> "The Board [of Directors, Federal Crop Insurance Corporation] shall provide such agents and brokers with indemnification, including costs and reasonable attorney fees, from the Corporation for errors or omissions on the part of the Corporation or its contractors for which the agent or broker is sued or held liable, except to the extent the agent or broker has caused the error or omission."

The most significant change resulting from adoption of such a clause would be that the United States' liability would not be limited to judgments entered against the insurance agents. Under the broader indemnity clause, the United States would be obligated to reimburse an

agent for the cost of defending even an unsuccessful suit brought by a claimant, when the claimed injury was the result of actions by United States employees. Such a provision is objectionable for the same reasons as noted above in regard to the more limited indemnity provision. That is, no specific appropriation is available to pay such costs, and the amount of potential liability is indefinite.

We conclude that both the existing indemnity provision and any broader version are prohibited under 31 U.S.C. § 665(a) and 41 U.S.C. § 11. If an indemnity agreement is considered necessary to success of the flood insurance program, FEMA may request that Congress grant it specific authority similar to that contained in section 104 of the Federal Crop Insurance Act of 1980. Alternatively, a clause could be added to the indemnity agreement limiting the United States' liability to the amount of appropriations available for the program, with no implication that the Congress will appropriate funds to make up any deficiency. 59 Comp. Gen. ____ (B-194983, September 3, 1980); 54 Comp. Gen. 824 (1975).

Milton J. Socolar

Acting Comptroller General
of the United States