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Opinion No.
86-311

September 23, 1986

Robert M. Eubanks, III
Insurance Commissioner
Arkansas Insurance Department
400 University Tower Building
Little Rock, AR 72204

Dear Commissioner Eubanks:

This letter is in response to your request for an official opinion involving the doctrine of sovereign immunity.

The policy of this office prevents me from addressing your threshold inquiry regarding the definition of "political subdivisions" within the meaning of Ark. Stat. Ann. §12-2901 (Repl. 1979). An opinion on this issue may have implications for pending litigation. While I am therefore unable to respond to those inquiries that would of necessity touch upon the definition of a "political subdivision," I can address a few of your specific questions.

There is authority for the proposition that a municipal utility is immune from tort liability. See City of Little Rock v. Holland, 42 S.W.2d 383 (1931); Patterson v. City of Little Rock, 149 S.W.2d 562 (1941). These cases, however, primarily establish the municipal corporation's immunity from liability for the negligence of its officers and agents. See also Ark. Stat. Ann. §12-2901. One might argue, therefore, that neither these cases nor §12-2901 extend this immunity beyond the municipal corporation itself.

Although there are no Arkansas cases on point, a potential counterargument is premised upon the theory that a tort action nominally against a municipal utility must fail when a judgment would subject the municipal corporation to liability. The Arkansas Supreme Court has denied suits against the State based upon this theory. See, e.g. Pope v. McKinley, 118 S.W.2d 235 (1938). And §12-2901's policy statement precluding tort actions against municipal corporations may also support such a theory.

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This theory would also be applicable to the question of a county nursing home's immunity from tort liability. With respect to your inquiry involving the "profit" of a municipal utility, the scenario presented would not appear to be a determining factor, since the immunity is premised, under this theory, upon the fact that a tort action cannot be maintained against the municipality.

You have also asked whether improvement districts, soil conservation districts, economic development districts and volunteer fire departments are to be considered "political subdivisions" under §12-2901. §12-2901 reads as follows:

It is hereby declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the State shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees. (Emphasis added.)

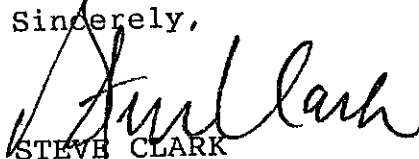
The phrase "all other political subdivisions" following the specific reference to special improvement districts is a clear indication that these entities are considered to be political subdivisions. I cannot consider the other entities referenced in your letter due to the policy referenced above, nor can I address the scope of Ark. Stat. Ann. §12-3705 as it pertains to volunteer fire departments.

Finally, in response to the question of liability in federal court, it has been held that state-law immunities do not override a cause of action under 42 U.S.C.S. §1983 which imposes civil liability on any person who deprives another of his federally protected rights. See Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). Thus, local governments, municipal corporations, and school boards are subject to suit under §1983. Id. It should be noted, however, that liability will result only if action pursuant to official policy of some nature caused a constitutional tort. Id. at 691. And depending upon available State remedies, a federal court may determine that State procedures provide adequate protection of federally protected rights. See, e.g., Collier v. City of Springdale, 733 F.2d 1311 (8th Cir. 1984). The results will therefore vary depending upon the relief sought and available State remedies.

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The foregoing opinion, which I hereby approve, was prepared
by Assistant Attorney General Elisabeth A. Walker.

Sincerely,


STEVE CLARK
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