

N.D.A.G. Letter to Lips (Aug. 17, 1992)

August 17, 1992

Senator Evan E. Lips
District 47
P.O. Box 775
Bismarck, ND 58501

Dear Senator Lips:

Thank you for your July 9, 1992, letter asking whether current state law allows the State Fire and Tornado Fund to offer insurance covering boilers and machinery, money and securities, glass, and business interruption.

The North Dakota Commissioner of Insurance manages the State Fire and Tornado Fund.

The fund must be maintained as a fund to insure the various state industries, the various political subdivisions, any international peace garden, and any winter show against loss to the public buildings . . . and fixtures and permanent contents therein, and against indirect loss, through fire, lightning, inherent explosion, windstorm, cyclone, tornado and hail, explosion, riot attending a strike, aircraft, smoke, and vehicles. At the option of the insured, the fund may insure against other risks of direct physical loss and indirect loss from those risks. All moneys collected under this chapter must be paid into the fund for use only for the purposes provided for in this chapter.

N.D.C.C. § 26.1-22-02.

Fixtures are defined as follows:

A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

N.D.C.C. § 47-01-05. See also Marsh v. Binstock, 462 N.W.2d 172 (N.D. 1990) (holding in part that in determining whether an item is a fixture under N.D.C.C. § 47-01-05, relevant considerations include the intent of the person making the annexation to the realty, the manner in which it is annexed, and its adoption to the use of the realty).

Permanent contents are defined as:

such public property, either owned or leased, usually kept or used in or about public buildings insured in the fund, and to . . . all public personal property usually kept or used in or about all buildings used for public purposes, or within one hundred feet [30.48 meters] of all such buildings, or while on sidewalks, streets, alleys, yards, detached platforms, and in or on railway cars. . . . The term does not include automobiles, trucks, tractors, road machinery, or similar property used principally outside such buildings.

N.D.C.C. § 26.1-22-01(4).

In 1991, N.D.C.C. ch. 26.1-22 was amended to require the State Fire and Tornado Fund to provide coverage for indirect loss incurred because of a loss arising out of a peril insured against by the fund. N.D.C.C. § 26.1-22-02.1. Indirect loss is defined as "a loss in income or the additional expenses incurred because of a property loss." N.D.C.C. § 26.1-22-01(2).

Testimony at the 1991 legislative session shows that the kind of coverage being discussed under the heading of indirect loss was business interruption insurance and extra expense insurance. Hearing on H.B. 1029 Before Senate Comm. on State and Federal Government, 52nd N.D. Leg (March 14, 1991) (Statement of Bob Olson, North Dakota Insurance Department). See also 1991 Report of the Legislative Council, p. 43. Those coverages were described as payment for a loss of income because of a covered loss and payment for expenses incurred because of a direct loss, such as provision of temporary office space.

In addition to the specifically listed perils in N.D.C.C. § 26.1-22-02, and indirect losses resulting therefrom, the fund, at the option of the insured, "may insure against other risks of direct physical loss and indirect loss from those risks." N.D.C.C. § 26.1-22-02. Loss in the insurance context means "[a] state of fact of being lost or destroyed, ruin or destruction." BLACK'S LAW DICTIONARY, 5th ed. (1979).

Direct loss means "[o]ne resulting immediately and proximately from the occurrence and not remotely from some of the consequences or effects thereof." BLACK'S LAW DICTIONARY, 5th ed. (1979).

Therefore, the State Fire and Tornado Fund insures against direct and indirect loss to the covered buildings, fixtures, and permanent contents caused by the listed perils and other risks at the option of the insured. If an insured entity has a boiler or other machinery in or near an insured building, which boiler or machinery is attached to the building or other realty in such a manner as to become a fixture or is part of the permanent contents of the building, it is my opinion that the State Fire and Tornado Fund may provide insurance on that boiler and machinery against the risks provided by law, and at the option of the insured, for other risks of direct physical loss and indirect losses resulting from those losses.

Money or securities are a form of personal property. If those items are "usually kept or used in or about all buildings used for public purposes, or within one hundred feet of all

such buildings," then it is my opinion that the State Fire and Tornado Fund may insure those items for all risks listed, and at the option of the insured, for other risks of direct physical loss and indirect losses resulting from those losses.

Glass used in the construction of any building is part of the building and it is my opinion that the State Fire and Tornado Fund may provide insurance coverage for the risks provided by law for glass used in the construction of a building and at the option of the insured, for other risks of direct physical loss and indirect losses resulting from those losses.

Business interruption insurance is described as follows:

The idea is to compensate the insured for lost profits or loss of earnings or to cover continuing expenses during the period of repair or restoration of property damaged or destroyed by reason of a covered peril.

10A Couch on Insurance 2d (Revised Edition) Section 42:414 (1982).

This kind of coverage falls within the definition of indirect loss under N.D.C.C. § 26.1-22-01(2) and is one of the specific types of coverage within legislative intent when it required indirect loss coverage in N.D.C.C. § 26.1-22-02.1. It is therefore my opinion that the State Fire and Tornado Fund may provide insurance coverage for business interruption losses and related additional expenses.

In summary, present law authorizes the State Fire and Tornado Fund to provide the coverages as described above.

I trust that this opinion is satisfactory for your needs.

Sincerely,

Nicholas J. Spaeth

krb

cc: Earl R. Pomeroy, Commissioner of Insurance