OPINION NO. 79-101

Syllabus:

A board of trustees of a county hospital may not make a contribution to the capital or surplus of an insurance company organized as a corporation for profit in an attempt to secure malpractice insurance at a reduced premium.

To: Gary F. McKinley, Union County Pros. Atty., Marysville, Ohio
By: William J. Brown, Attorney General, December 20, 1979

I have before me your request for an opinion in response to the following question:

May a county hospital, in an attempt to secure malpractice insurance at a reduced premium rate, make a contribution to capital or surplus of an insurance company organized as a corporation for profit?

According to information you have provided, the Ohio Hospital Insurance Company, organized as a corporation for profit and licensed under R.C. Chapter 3925, is proposing to offer malpractice coverage to Ohio hospitals. The premiums

are projected to be less than those currently paid, but in the case of nongovernmental hospitals, an investment in the stock of the company equal to 52% of the first year's premium is a prerequisite to the purchase of coverage. In the case of county and municipal hospitals, a "contribution to capital or surplus" in that amount is imposed by the Ohio Hospital Insurance Company as a prerequisite to the issuance of a policy in order that the insurance company maintain its surplus requirements with the State of Ohio.

A board of trustees of a county hospital is authorized to procure malpractice insurance pursuant to R.C. 339.16, which provides in part:

> A board of trustees of any county hospital, or of any county or district tuberculosis hospital, may contract for, purchase, or otherwise procure insurance contracts which provide protection for the trustees and employees against liability, including professional liability . . . .
>
> All or any portion of the cost, premium, fees, or charges therefor may be paid in such manner or combination of manners as the board of trustees may determine . . . .

This section grants hospital trustees broad discretion in the purchase of insurance. Thus, absent any constitutional prohibition, a county hospital may procure malpractice insurance in the manner you describe.

The "contribution" to capital or surplus of the Ohio Hospital Insurance Company required as a prerequisite to the issuance of a policy of insurance can only be considered a gift or grant, a loan, or an investment. As such, the prohibitions of Ohio Const. art. VIII, §6 become relevant. That section provides, in part, as follows:

> No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation or association: . . . .

The purpose of art. VIII, §6 is to forbid a business partnership between a subdivision of the state and private corporations. It prohibits the "union of public and private capital or credit in any enterprise whatsoever." Walker v. Cincinnati, 21 Ohio St. 14, 54 (1871). Pursuant to R.C. Chapter 339, county hospitals are supported by general fund appropriations and special levies. Accordingly, any contribution to the Ohio Hospital Insurance Company would of necessity be made with public funds, and thereby subject to the prohibitions of art. VIII, §6. Moreover, in view of the fact that the board of trustees of a county hospital is appointed by county commissioners (R.C. 339.02), makes financial reports to the commissioners (R.C. 339.10), and operates the hospital with county funds, I must conclude that it is an agency of the county for the purposes of art. VIII, §6. Cf., Wierzbicki v. Carmichael, 118 Ohio App. 239 (Cuyahoga County 1963) (board of county hospital trustees is an agency of the county for purposes of sovereign immunity).

Certainly, a contribution to a private, for-profit insurance company, if considered to be a loan or an investment, is prohibited by art. VIII, §6. A county, city or township may "neither become [a stockholder] nor furnish money or credit for the benefit of. . ." a private enterprise. Walker, supra, 21 Ohio St. at 54; 1978 Op. Att'y Gen. No. 78-040.

Further, even if the "contribution" could be considered a gift or grant rather than an investment, the transaction is nevertheless prohibited. Although art. VIII, §6 has been held not to prevent grants being made to a corporation or association not for profit and organized for a public purpose, this exception would not be applicable to a private, for-profit business such as the Ohio Hospital Insurance

Company. See, e.g., Bazell v. Cincinnati, 12 Ohio St. 2d 63 (1968); Op. No. 78-040, supra; 1977 Op. Att'y Gen. No. 77-049. Accordingly, Ohio Const. art. VIII, §6 prohibits a construction of R.C. 339.16 which would authorize the purchase of malpractice insurance by county hospital trustees where a contribution to capital or surplus is required as a prerequisite to the issuance of a policy.

Therefore, it is my opinion, and you are advised, that a board of trustees of a county hospital may not make a contribution to the capital or surplus of an insurance company organized as a corporation for profit in an attempt to secure malpractice insurance at a reduced premium.