

OPINION NO. 78-060**Syllabus:**

A board of county commissioners has the authority to establish a self-insurance trust fund to protect county hospitals from liability under R.C. 2734.02 and 339.06. These statutes in conjunction with R.C. 307.85 provide the authority for a board of county commissioners to enter into a trust agreement whereby legal title to the self-insurance fund is transferred to an independent fiduciary to administer the fund as required by federal medicare and medicaid reimbursement programs.

To: John E. Shoop, Lake County Pros. Atty., Painesville, Ohio
By: William J. Brown, Attorney General, November 16, 1978

I have before me your request for my opinion regarding the following question:

The Lake County Commissioners on behalf of the Lake County Memorial Hospitals would like to establish a self-insurance trust fund to protect against potential hospital liability. Associated with the self-insurance trust fund are Medicare requirements that the trust fund be administered by an independent fiduciary such as a bank or a trust company.

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Therefore, I respectfully request an opinion from your office to the following question:

Can legal title of public funds be turned over to an independent fiduciary (trustee), to be secured in a manner provided by Section 135.18 of the Ohio

Revised Code, to provide a self-insurance trust fund?

In 1976 the Ohio General Assembly passed the Court of Claims Act and thereby waived the state's defense of sovereign immunity. R.C. 2743.02(B) specifically "waives immunity from liability of all hospitals owned or operated by one or more political subdivisions." R.C. 2743.02(C) further provides that "[a]ny hospital . . . may purchase liability insurance covering its operators and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees . . ." The language of the section does not expressly authorize the establishment of a self-insurance trust fund, but R.C. 2743.02(C) does specify procedures and requirements for obtaining insurance coverage in the following language:

Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary in the exercise of sound and prudent actuarial judgment, to cover such potential expense fees, damage, loss, or other liability . . . This authority is in addition to any authorization otherwise provided or permitted by law.

Consequently, the express provision of R.C. 2743.02 authorizes the establishment of a self-insurance fund. There is, however, no express statutory authority to create or enter into a trust agreement, whereby an independent trustee would be needed to manage and have legal title to such funds.

Without express statutory authority to enter into such an agreement county commissioners may do so only if the authority to enter into an insurance trust agreement is necessarily implied from relevant statutory provisions. State, ex rel. Clarke v. Coak, 103 Ohio St. 465 (1921); State ex rel. Locher v. Menning, 95 Ohio St. 97 (1916); Gorman v. Heuck, 41 Ohio App. 453 (1931); 1975 Op. Att'y Gen. No. 75-070.

R.C. Chapter 339 sets forth the statutory foundation for the establishment of hospitals under the direction of boards of county commissioners. Under the provisions of this chapter the actual control and management of these hospitals is given to an appointed board of county hospital trustees. R.C. 339.06 addresses the powers and duties of the board of county trustees and provides in pertinent part that "[t]he board may designate the amounts and forms of insurance protection to be provided, and the board of county commissioners shall secure such protection." This section would certainly provide authority for a board of county commissioners to create a self-insurance trust. The question posed by your request, however, pertains to the authority to transfer legal title to such self-insurance trust funds. R.C. 339.08 provides for the establishment of a hospital trust fund but not for purposes of self-insurance. The county hospital trustees are given the authority to become successor trustees for property given to the county hospital. The authority to transfer funds to an independent fiduciary as trustee could not be necessarily implied from this section. Furthermore, I am unaware of any statutory authorization for a county hospital to transfer legal title to funds to an independent fiduciary for purposes of self-insurance.

The provisions of R.C. 307.85, however, as discussed in 1971 Op. Att'y Gen. No. 71-092 and in 1977 Op. Att'y Gen. No. 77-025 may, under circumstances, provide that authority. R.C. 307.85 permits counties to take actions necessary to qualify for participation in federal programs. The section provides as follows:

(A) The board of county commissioners of any county may participate in, give financial assistance to, and cooperate with other agencies or organizations, either private or governmental, in establishing and operating any federal program enacted by the congress of the United States, and for such purpose may adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state.

This section, as construed by the above cited Opinions of this office, authorizes a board of county commissioners to perform acts not otherwise statutorily authorized where the performance of the act is reasonably related to the establishment and operation of a program created by federal law.

In your request letter you indicate that the Medicare program has several requirements for administration of a self-insurance program. The Medicare program is designated to give reimbursement to hospitals for costs necessarily incurred to provide protection against malpractice and comprehensive general liability. The Medicare and Medicaid Guide (CCH) sets forth the types of self-insurance coverage which may be reimbursed under the plan.

The conditions for Medicare reimbursement stated below are exclusively for provider malpractice liability and comprehensive general liability coverage in conjunction with malpractice coverage or for malpractice liability coverage only and not for liability coverage costs such as automobile liability, fire, theft, workmen's compensation, or general liability only. (1974) 1 Medicare and Medicaid Guide (CCH) Prov. Reimb. Man., Part 1, §2162 (¶5999X-25)

The conditions applicable to a reimbursible self-insurance plan read, in pertinent part as follows:

- A. Self-Insurance Fund. - The provider or pool establishes a fund with a recognized independent fiduciary such as a bank or a trust company. The provider or pool and fiduciary enter into a written agreement which includes all of the following elements:
 1. General Legal Responsibility. - The fiduciary agreement must include the appropriate legal responsibilities

and obligations required by State laws.

2. Control of Fund. - The fiduciary must have legal title to the fund and be responsible for proper administration and control. The fiduciary cannot be related to the provider either through ownership or control as defined in Chapter 10 [¶5679 et seq.] of this manual. Thus, the home office of a chain organization or religious order of which the provider is an affiliate cannot be the fiduciary. In addition, investments which may be made by the fiduciary from the fund are limited to those approved under State law governing the use of such fund; notwithstanding this, loans by the fiduciary from the fund to the provider or persons related to the provider are not permitted [1974] 1 Medicare and Medicaid Guide (CCH) Prov. Reimb. Man., Part I §2162.7, (¶5999X-32).

Pursuant to these requirements, the establishment of a self-insurance trust fund requiring the transfer of legal title of such funds to the trustee is a requirement reasonably related to participation in the federal program. I am, therefore, of the opinion that the provisions of R.C. 307.85 in conjunction with R.C. 339.06 provides the requisite authority to the board of county commissioners to enter into a self-insurance trust agreement with an appropriate bank or trust company.

It must be noted, however, that the grant of authority under R.C. 307.85 is made contingent on the fact that the act contemplated not be "prohibited by the Constitution of Ohio nor in conflict with the laws of this state." I am unaware of any provisions of the Ohio Constitution or laws of this state which would be in conflict with the establishment of a self-insurance trust fund or the transfer of legal title to such a fund to an appropriate bank or trust company.

At this point reference must be made to R.C. 339.06 where it is stated that:

[t]he board may deposit funds not needed for immediate expenses in interest bearing or noninterest bearing accounts. Such banks or trust companies shall furnish security for all such deposits, whether interest bearing or noninterest bearing, to the extent and in the manner provided in section 135.18 of the Revised Code, but no such deposit shall otherwise be subject to the provisions of section 135.01 to 135.21, inclusive, of the Revised Code. (Emphasis added.)

Implicit in your question is the assumption that the transfer of funds to an independent fiduciary falls under the category

of a deposit of funds "not needed for immediate expenses," thereby requiring security for the repayment of such deposits as set forth in R.C. 135.18. It could be argued that insurance costs, either in the form of premium payments on a commercial policy or a lump sum transfer to a self-insurance fund trustee, represent an operating expense of the institution thus eliminating the requirement of compliance with R.C. 135.18. As this issue is not raised in your opinion request, however, further discussion is unnecessary.

Accordingly, it is my opinion and you are so advised that a board of county commissioners has the authority to establish a self-insurance trust fund to protect county hospitals from liability under R.C. 2734.02 and 339.06. These statutes in conjunction with R.C. 307.85 provide the authority for a board of county commissioners to enter into a trust agreement whereby legal title to the self-insurance fund is transferred to an independent fiduciary to administer the fund as required by federal medicare and medicaid reimbursement programs.