

OPINION NO. 89-085**Syllabus:**

1. The Ohio Commercial Market Assistance Plan is an instrumentality of the state as that term is defined in R.C. 109.36(B).
2. Members of the executive committee of the Ohio Commercial Market Assistance Plan are "officers or employees" as that term is defined in R.C. 109.36(A).
3. The Ohio Commercial Market Assistance Plan is the employer, as that term is defined in R.C. 109.36(D), of the members of the executive committee of the Ohio Commercial Market Assistance Plan.
4. Members of the executive committee of the Ohio Commercial Market Assistance Plan are entitled to representation and defense by the Attorney General in accordance with R.C. 109.361.
5. Although the Superintendent of Insurance is not authorized to approve a plan of operation, pursuant to R.C. 3930.02(E), which provides for the indemnification of members of the executive committee of the Ohio Commercial Market Assistance Plan, such members are entitled to the indemnification privileges set forth in R.C. 9.87.

To: George Fabe, Director, Department of Insurance, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 3, 1989

I have before me your request for my opinion with respect to several questions concerning the Ohio Commercial Market Assistance Plan which assists Ohio commercial insurance buyers in obtaining difficult-to-place commercial insurance coverage. Your questions are as follows:

1. Is the Ohio Commercial Market Assistance Plan an entity within the meaning of "state" in R.C. 109.36(B)?
2. Are members of the executive committee of the Ohio Commercial Market Assistance Plan "officers or employees" within the meaning of R.C. 109.36(A)?
3. As to the Ohio Commercial Market Assistance Plan, is either the department of insurance or the superintendent of insurance an employer within the meaning of R.C. 109.36(D)?
4. In the event a member of the executive committee of the Ohio Commercial Market Assistance Plan is sued, under what conditions will the Attorney General represent and defend the executive committee member?
5. Can the superintendent of insurance approve a "plan of operation" for the Ohio Commercial Market Assistance Plan that provides for the indemnification of the members of the executive committee?
6. Would such an indemnification provision constitute an insurance policy within the meaning of R.C. 109.363?

The first question asks whether the Ohio Commercial Market Assistance Plan (hereinafter "the Plan") is an entity within the meaning of "state" in R.C. 109.36(B). In order to answer this question, I must examine the nature of the Plan.

The Plan was established by R.C. 3930.02 to assist in the placement of commercial insurance¹ risks in the state. The Plan is described by R.C. 3930.01(D) as "the mechanism created to respond to assist commercial insurance buyers in Ohio in obtaining difficult-to-place commercial insurance coverages." Applicants for assistance under the Plan must make written requests for assistance. R.C. 3930.02(B). Requests for assistance must be submitted by a licensed Ohio agent or broker and must be accompanied by a fee which is to be paid by the applicant for assistance to the Plan. R.C. 3930.02(C). The Plan is administered by an executive committee appointed by the Superintendent of Insurance. R.C. 3930.02(E).² The executive committee is responsible for developing a "detailed written plan of operation" which must be submitted to the Superintendent of Insurance for approval. R.C. 3930.02(E). The Plan is not "a party to the relationship among insured, agent, and insurer." R.C. 3930.02(D)(2). Thus, the Plan is the mechanism by which the state assists applicants for difficult to place commercial insurance risks. The Plan itself is not an insurer, but merely an intermediary through which such insurance coverage is obtained. R.C. 3930.02(A).

Returning to your first question, I note that R.C. 109.36(B) defines "state" as follows:

"State" means the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions. (Emphasis added.)

The Plan fits none of the specific categories listed in the statute. However, for the following reasons, I find that the Plan is an "instrumentality of the state" and thus must be considered the "state" for purposes of R.C. 109.36(B).

Although "instrumentality of the state" is not defined in R.C. Chapter 109, it is clear from the language of the statute that the term is used as an expansive phrase to assure that "state" is not narrowly construed to include only those public bodies specifically named. The meaning to be placed on the term "other instrumentalities of the state" can, however, be ascertained by reference to the entities which are specifically named in the statute:

For it is a settled rule of construction that, in accordance with the maxim *noscitur a sociis*, the meaning of a word may be ascertained by reference to the meaning of words associated with it; and again, according to a similar rule, the coupling of words together shows that they are to be understood in the same sense.

Myers v. Seaberger, 45 Ohio St. 232, 236, 12 N.E. 796, 798 (1887). Therefore, the term "instrumentality of the state" should be understood in the same sense as "departments, boards, offices, commissions, agencies, [and] institutions." R.C. 109.36(B).

"Instrumentality" is defined, in part, as "something by which an end is achieved...something that serves as an intermediary or agent through which one or

¹ R.C. 3930.01(B) defines commercial insurance "as any line of commercial casualty, commercial property, or commercial liability insurance except workers' compensation, medical malpractice, pollution liability, environmental impairment liability, fidelity and surety, sickness and accident, or coverage available through involuntary market mechanisms. 'Commercial insurance' does not include farmowners insurance policies."

² The executive committee consists of nine members: five representatives of commercial insurers and four insurance agents, two of whom are representatives of excess surplus lines brokers. The Superintendent of Insurance serves as an ex-officio member of the executive committee. R.C. 3930.02(E).

more functions of a controlling force are carried out." *Webster's Third New International Dictionary* 1172 (1971). Departments, boards, offices, commissions, agencies and institutions serve as "intermediaries" through which the functions of a "controlling force," to wit, the state, are carried out. The Plan fits this definition of "instrumentality" in the same way: it is the intermediary through which the state assists commercial insurance buyers in Ohio in obtaining difficult-to-place commercial insurance coverage. Thus, I find that the Ohio Commercial Market Assistance Plan is an instrumentality of the state and that the definition of "state" in R.C. 109.36(B) includes the Ohio Commercial Market Assistance Plan.

Your second question asks whether the members of the executive committee of the Plan are "officers or employees" within the meaning of R.C. 109.36(A). R.C. 109.36(A) defines "officer or employee," in part, as "any person who...is serving in an elected or *appointed* office or *position with the state*." (Emphasis added.) Having already determined above that the Plan falls within the definition of the "state" in R.C. 109.36(B), I conclude that an executive committee member of the Plan serves in a "position with the state." R.C. 109.36(A). Further, R.C. 3930.02 provides that the position of executive committee member is an *appointed* position. R.C. 3930.02(E). Accordingly, I find that the executive committee members of the Ohio Commercial Market Assistance Plan are "officers or employees" within the meaning of R.C. 109.36.³

Your third question asks whether, with respect to the Plan, either the Department of Insurance or the Superintendent of Insurance is an "employer" within the meaning of R.C. 109.36(D). A member of your staff has indicated that you are specifically concerned whether either the Department of Insurance or the Superintendent of Insurance is an "employer" with respect to the executive committee members of the Plan. "Employer" is defined for purposes of R.C. 109.36 to R.C. 109.366, as:

the general assembly, the supreme court, any office of an elected state officer, or any department, board, office, commission, agency, institution, or other *instrumentality of the state of Ohio* that employs or contracts with an officer or employee or *to which an officer or employee is elected or appointed*. (Emphasis added.)

R.C. 109.36(D).

The Plan is associated with the Department of Insurance and the Superintendent of Insurance in several respects. For example, the Plan operates "under the auspices of the department of insurance...." R.C. 3930.02(A). Although the Plan shall attempt to be self-supporting, if it is unable to support itself through the fees that it collects, the Department of Insurance shall bear the cost of operating the Plan. *Id.* The Superintendent of Insurance appoints the executive committee members of the Plan. R.C. 3930.02(E). Despite these interrelationships, none of the statutes which create and govern the Plan refer to the executive committee members as employees of either the Department of Insurance or the Superintendent of Insurance.

The question now becomes whether the Plan is an employer pursuant to R.C. 109.36(D) with respect to the executive committee members. I have already determined above that the Ohio Commercial Market Assistance Plan is an instrumentality of the state and that its executive committee members are "officers or employees" pursuant to R.C. 109.36(A). Given those determinations, I easily conclude that the Plan is, for purposes of R.C. 109.36(D), the employer of the executive committee members as it is an "instrumentality of the state of Ohio...to which an officer or employee is...appointed." R.C. 109.36(D). This conclusion is further supported by R.C. 3930.02(G)(6) which refers to an "employee or executive committee member

³ For the purposes of this opinion, I need not determine whether the executive committee members are "officers" or whether they are "employees."

of the Ohio commercial market assistance plan." (Emphasis added.) I therefore find that neither the Department of Insurance nor the Superintendent of Insurance is the employer within the meaning of R.C. 109.36(D) of the executive committee members of the Plan.

The fourth question asks under what conditions the Attorney General will represent and defend the executive committee members in the event they are sued. R.C. 109.361 states in pertinent part:

Upon the receipt of a written request by any officer or employee, *the attorney general shall*, except as provided in [R.C. 109.362]⁴ and except for civil actions in which the state is the plaintiff, *represent and defend the officer or employee* in any civil action instituted against the officer or employee. (Emphasis and footnote added.)

Having already concluded that members of the executive committee of the Plan are "officers or employees" for purposes of R.C. 109.361, they are entitled to representation by the Attorney General as set forth in R.C. 109.361.

Your fifth question concerns the "plan of operation" for the Ohio Commercial Market Assistance Plan. Pursuant to R.C. 3930.02(E), the "executive committee shall develop a detailed written plan of operation... [to] be submitted to the superintendent [of insurance] for approval." The "plan of operation" determines the methods by which the Plan will function in order to carry out its purpose of assisting Ohio commercial insurance buyers in obtaining difficult-to-place commercial insurance. R.C. 3930.02. You specifically ask whether the Superintendent of Insurance can approve a plan of operation which provides for indemnification of members of the executive committee.

As a "creature of statute", the Ohio Commercial Market Assistance Plan has only those powers expressly granted by statute and such powers as are necessarily implied therefrom. *Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975). A review of R.C. Chapter 3930 reveals no express statutory authority for the Plan to incorporate an indemnification provision into the plan of operation. Furthermore, pursuant to R.C. 3930.02(G)(6):

There shall be *no liability on the part of and no cause of action of any nature shall arise against any insurer, broker, agent, or any employee of the foregoing, employee or executive committee member* of the Ohio commercial market assistance plan, or the superintendent of insurance or his representatives for any action taken by them in the performance of their powers and duties under sections 3930.01 to 3930.18 of the Revised Code. (Emphasis added.)

Thus, the executive committee members of the Plan are immune from liability under state law for any action taken by them in performing their duties under R.C. 3930.01

⁴ R.C. 109.362 states, in pertinent part:

(A) ... If the attorney general determines that any officer who holds an elective state office was acting manifestly outside the scope of his official responsibilities or that any other officer or employee was acting manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner, the attorney general shall not represent and defend the officer or employee....

(B) The attorney general shall also deny a request for representation upon a determination that the requesting officer or employee is covered by a policy of insurance purchased by the state requiring the insurer to provide counsel in the action and that the amount of the claim against the officer or employee is not in excess of the amount of coverage under the policy of insurance....

to 3930.18. In light of this specific grant of immunity, there can be no implied power to provide indemnification of executive committee members from state law claims in the plan of operation.⁵ See generally 1981 Op. Att'y Gen. No. 81-060 (where there is a statutory imposition of liability, the purchase of liability is implicitly authorized).

Indemnification of state officers and employees, with certain exceptions and limitations, however, is authorized by R.C. 9.87(A), which states in pertinent part:

[t]he state shall, except as provided in division (B) of this section,⁶ indemnify an officer or employee from liability incurred in the performance of his duties by paying any judgment in, or amount negotiated in settlement of, any civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction. (Footnote added.)

Thus, R.C. 9.87(A), promulgates the general rule providing for indemnification by the state of officers or employees from liability stemming from performance of their duties in a civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction. The statute further provides for the procedure to be followed in such indemnification. For purposes of this statute, "officer or employee" and "state" have the same meaning as those terms are defined in R.C. 109.36. R.C. 9.85. I already have determined that executive committee members are "officers or employees" of the state. As such, they are entitled to the indemnification provisions of R.C. 9.87. In light of the foregoing, I conclude that the Superintendent of Insurance is not authorized to approve a plan of operation which provides for the indemnification of members of the executive committee of the Plan. Such members, however, are entitled to the indemnification privileges set forth in R.C. 9.87.

As I have answered your fifth question in the negative, it is unnecessary to answer your last question.

⁵ I note, however, that pursuant to R.C. 340.03(D), board members and employees of boards of alcohol, drug addiction, and mental health services are not liable "for injury or damages caused by any action or inaction taken within the scope of [their] official duties or employment, whether or not such action or inaction is expressly authorized by this section, section 340.033, or any other section of the Revised Code, unless such action or inaction constitutes willful or wanton misconduct." Yet R.C. 340.11 expressly authorizes a board of alcohol, drug addiction, and mental health services to insure board members or employees of such board "against liability arising from the performance of their official duties" and, in the event that such liability insurance is unavailable or insufficient to cover the amount of a claim, to indemnify a board member or employee under certain circumstances.

⁶ R.C. 9.87(B) provides that:

The state shall not indemnify an officer or employee under any of the following circumstances:

- (1) To the extent the officer or employee is covered by a policy of insurance for civil liability purchased by the state;
- (2) When the officer or employee acts manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner;
- (3) For any portion of a judgment that represents punitive or exemplary damages;
- (4) For any portion of a consent judgment or settlement that is unreasonable.

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. The Ohio Commercial Market Assistance Plan is an instrumentality of the state as that term is defined in R.C. 109.36(B).
2. Members of the executive committee of the Ohio Commercial Market Assistance Plan are "officers or employees" as that term is defined in R.C. 109.36(A).
3. The Ohio Commercial Market Assistance Plan is the employer, as that term is defined in R.C. 109.36(D), of the members of the executive committee of the Ohio Commercial Market Assistance Plan.
4. Members of the executive committee of the Ohio Commercial Market Assistance Plan are entitled to representation and defense by the Attorney General in accordance with R.C. 109.361.
5. Although the Superintendent of Insurance is not authorized to approve a plan of operation, pursuant to R.C. 3930.02(E), which provides for the indemnification of members of the executive committee of the Ohio Commercial Market Assistance Plan, such members are entitled to the indemnification privileges set forth in R.C. 9.87.