

November 2, 2021

The Honorable Beth A. Tischler  
Sandusky County Prosecuting Attorney  
100 North Park Avenue, Suite 220  
Fremont, Ohio 43420

SYLLABUS:

2021-024

A joint self-insurance pool operating pursuant to R.C. 9.833 may not purchase an ownership interest in a foreign or out-of-state captive-insurance pool in order to obtain stop-loss health insurance.



**DAVE YOST**

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OPINION NO. 2021-024

The Honorable Beth A. Tischler  
Sandusky County Prosecuting Attorney  
100 North Park Avenue, Suite 220  
Fremont, Ohio 43420

Dear Prosecutor Tischler:

The Sandusky County Board of Health participates in a joint self-insurance pool with other Ohio government entities pursuant to R.C. 9.833. As legal counsel for the Sandusky County Board of Health, you have asked for an opinion on two questions related to the purchase of health insurance by the Pool:

1. May a joint self-insurance pool operating pursuant to R.C. 9.833 join a foreign or out-of-state captive-insurance pool to purchase stop-loss insurance?
2. If the answer to the first question is “yes,” are there any licensing requirements the foreign or out-of-state captive-insurance pool must fulfill, or would the fact that the administrator of the pool is currently licensed with the Ohio Department of Insurance be sufficient?

I conclude that the Pool may not purchase an ownership interest in a foreign or out-of-state captive-insurance pool in order to obtain stop-loss insurance. Because the answer to the first question is “no,” I do not reach the second question.

## I

Political subdivisions in Ohio, including county boards of health, may join together to provide healthcare benefits to their employees. R.C. 9.833. The Sandusky County Board of Health has joined with several other political subdivisions to create a joint self-insurance pool.

The Pool has statutory authority to “procure or contract for: ... Policies, contracts, or plans of insurance to provide health care benefits.” R.C. 9.833(B)(5). You have asked whether the Pool, pursuant to this statute, may join what you call a foreign or out-of-state “captive” insurance pool to provide stop-loss insurance. Stop-loss insurance is insurance that pays healthcare claims above a certain dollar amount. *See, e.g., Black’s Law Dictionary* 958 (11<sup>th</sup> Ed.2019) (“Stop-loss insurance essentially provides excess coverage for a self-insured employer. The employer and insurance carrier agree to the amount the employer will cover, and the stop-loss insurance will cover claims exceeding that amount”). Stop-loss insurance allows the Pool to self-insure and directly pay lower-dollar claims, while capping the total amount that the Pool pays out on a claim.

Previous Attorney General opinions have concluded that Ohio government entities may purchase insurance that meets the definition of stop-loss insurance, although the opinions do not call it “stop-loss insurance.” 1981 Op. Att’y Gen. No. 81-069; 1981 Op. Att’y Gen. No. 81-045, at 2-179 (“Although the board of education is obligated under the contract to pay claim costs up to a specified and definite amount... the insurance company promise[s] to pay all claims above the predetermined definite amount”). These opinions based their conclusions on statutory provisions that authorized the government entities to purchase insurance that provides benefits for medical care, hospitalization,

and surgical care—statutes that are similar to the Pool’s authorization to procure insurance to provide health benefits. 1981 Op. Att’y Gen. No. 81-069, at 2-283; 1981 Op. Att’y Gen. No. 81-045, at 2-179. Pursuant to these opinions, the Pool may, as a general matter, purchase stop-loss health insurance.

However, you ask whether the Pool may obtain stop-loss insurance by purchasing *an ownership interest* in a holding company of a “captive” insurer. A captive insurer is an insurance company that only provides insurance to its parent company, or other entities in the same corporate system as its parent. *See* R.C. 3964.01(A) and (B); *see also Black’s Law Dictionary* 8959 (11<sup>th</sup> Ed.2019) (defining a “captive insurance company” as “a company that insures the liabilities of its owner”). Ohio authorizes captive insurance companies to provide some types of insurance. R.C. 3964.02. Ohio captives are not authorized, however, to provide health insurance. *See id.*

It is thus undisputed that the *only* captives the Pool could even arguably join would be created outside of Ohio. Specifically, based upon your request letter and upon conversations with the Pool, I understand that the Pool would like to enter into an arrangement with a captive insurer registered in Tennessee. The captive insurance company is a Tennessee-registered LLC that is wholly owned by another Tennessee-registered LLC. Numerous private and (non-Ohio) government entities in turn have an ownership interest in the holding company. The captive obtains stop-loss insurance for the owners of the holding company. The captive is administered by an insurance company licensed to do business in Ohio.

Ostensibly, this structure allows the owners to obtain stop-loss insurance at cheaper rates. The Pool would like to become a co-owner of the holding company, and asks if it may legally do so.

## II

## A

Joint self-insurance pools created under R.C. 9.833 are created pursuant to statute. As creatures of statute, their powers are limited to those provided by statute. *See, e.g.*, 2021 Op. Att’y Gen. No. 2021-08, Slip. Op. at 2; 2-33; 2017 Op. Att’y Gen. No. 2017-44, Slip. Op. at 2; 2-421. Therefore, if the Pool may legally join the captive, the authority to do so must come from statute. No statute explicitly allows the pool to purchase ownership in a captive structure. Only one statute arguably provides such authority: R.C. 9.833(B)(5) which allows the Pool to “procure or contract for: (a) Providers of medical or health services; (b) Policies, contracts, or plans of insurance to provide health care benefits, which may include a health savings account program for their officers and employees subject the agreement.”

I do not view the Pool’s *purchasing an ownership interest* in an out-of-state LLC that in turn owns a second out-of-state LLC as procuring a plan of insurance within the meaning of R.C. 9.833. Creating or investing in a corporate entity is not “contracting” for insurance. If this practice is allowed under the provision, it must be because purchasing the ownership interests constitutes “procuring” insurance. In its broadest meaning, “procure” could encompass any effort that resulted in the Pool obtaining insurance. *See, e.g., Webster’s New World College Dictionary* 1145 (4<sup>th</sup> Ed.2001) (defining “procure” as “to get or bring about by some effort; obtain; secure”); *see also Black’s Law Dictionary* 1460 (11<sup>th</sup> Ed.2019) (defining “procure” as “to obtain (something), esp. by special effort or means”). However, “procure,” as used in R.C. 9.833, is more naturally read to entail *directly* purchasing or obtaining a policy, contract, or plan of insurance. Purchasing an ownership interest in an entity that then in turn creates a second entity that

provides insurance is a step removed—it entails *doing something else* unauthorized by the statute (investing in a captive entity) *and then* procuring insurance. The statute may authorize the second step. It does not authorize the first. And indeed, reading “procure” so broadly that it encompasses every manner of obtaining insurance, no matter how many intervening steps or transactions are required, would make some language in the statute superfluous. *See E. Ohio Gas Co. v. Pub. Util. Comm. of Ohio*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (1988) (“words in statutes should not be construed to be redundant, nor should any words be ignored”). The statute empowers local government entities to “contract for” insurance.”

Supporting this interpretation is the fact that captives created in Ohio are not allowed to provide health insurance. *See* R.C. 3964.02 (listing types of insurance that captives created in Ohio may provide, and not including health insurance). It is unlikely that the legislature intended to allow the Pool to obtain insurance through an out-of-state entity, when an Ohio entity would be prohibited from providing the insurance. *See* 1987 Op. Att’y Gen No. 87-058, at 2-356 to 2-357 (“it is unlikely that the General Assembly would authorize interstate risk pool arrangements without express provision therefor”) (interpreting R.C. 2744.081 relating to liability insurance).

## B

At the very least, I can safely say that R.C. 9.833 is ambiguous as to whether it allows the Pool to enter into the captive arrangement. *See Family Medicine Found. Inc. v. Bright*, 96 Ohio St.3d 183, 2002-Ohio-4034, 772 N.E.2d 1177, ¶8 (“a statute is ambiguous when its language is subject to more than one reasonable interpretation”). And because the statute is ambiguous, another factor leads me to construe the statute as to not allow the captive arrangement: specifically, I have grave doubts that a statute that

allows a political subdivision to purchase an ownership interest in an out-of-state LLC would be constitutional.

All statutes are presumed to be constitutional, R.C. 1.47(A), and the constitutional-doubt canon compels me to, if at all possible, construe a statute in such a way that the statute is constitutional. *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338, 345-346, 673 N.E.2d 1351 (1997); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, Section 38, at 247 (2012). Under that inoperative canon, when a statute is susceptible of two readings, one that creates grave constitutional concerns and one that does not, the statute should be given the latter reading. *See State ex rel. Crawford v. Indus. Comm. of Ohio*, 110 Ohio St. 271, 280, 143 N.E. 574 (1924); *accord Gonzalez v. United States*, 553 U.S. 242, 251, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008).

Article VIII, Section 6 of the Ohio Constitution states that “[n]o 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;... provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies.” *See also* Article VIII, Section 4, Ohio Constitution (similar prohibition applying directly to the State). These provisions prohibit joint ownership and joint ventures between public and private entities. *State ex rel. Ryan v. City Council of Gahanna*, 9 Ohio St.3d 126, 127-128, 459 N.E.2d 208 (1984); *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 457-458, 159 N.E.2d 741 (1959).

On its face, the Pool purchasing an ownership interest in the captive would potentially violate Article VIII, Section 6—the Pool is made up of various county and municipal entities, and it would be purchasing an ownership interest in a limited liability company that has private co-owners. Given that concerns of constitutionality may be avoided by interpreting R.C.

9.833 as not allowing the Pool to enter into the captive, I deem that construction the proper one. Therefore, I conclude that the Pool may not join a foreign or out-of-state captive-insurance pool to purchase stop-loss health insurance.

Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

A joint self-insurance pool operating pursuant to R.C. 9.833 may not purchase an ownership interest in a foreign or out-of-state captive-insurance pool in order to obtain stop-loss health insurance.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping "D" and "Y".

DAVE YOST  
Ohio Attorney General