Health care district, creation of insurance company

Number: INFORMAL

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Ms. Helene Cohen Rosen
Attorney for Health Care District of
Palm Beach County
Post Office Box 810037
Boca Raton, Florida 33481-0037

Dear Ms. Rosen:

On behalf of the Health Care District of Palm Beach County (District), you ask whether the District may create an insurance company for the purpose of providing medical malpractice coverage to physicians participating in the county trauma network, and if so whether such company would be covered by sovereign immunity.

You state that the District is responsible for funding and administering the Palm Beach County Trauma System.[1] The goal of the system is to ensure that trauma victims receive definitive treatment at one of the two Level II trauma centers located in the county, St. Mary's Medical Center or Delray Medical Center. The relationship between the District and the trauma centers is governed by a contractual arrangement that essentially requires the facility to provide a certain level of care to trauma victims and to ensure sufficient trauma physician coverage although the District directly contracts with and compensates the trauma physicians for the services they provide. The trauma centers are required to maintain professional liability insurance for the trauma physicians and the District reimburses the trauma centers for this coverage.

You further state that many trauma physicians also maintain separate medical practices and are often called upon to render medical services to non-trauma patients during times when they are also covering trauma services. This dual coverage activity has, according to your letter, had the effect of making it increasingly difficult for trauma physicians to obtain insurance covering their non-trauma system activities. To alleviate this problem, the District is considering forming a captive insurance company which would provide insurance to cover trauma system services. In addition, the captive insurance company would provide overall coverage to the trauma physicians and trauma centers with respect to risks related to non-trauma services. You state that while the company, in providing this type of insurance, "would be engaged in the business of insurance," the customers/insured would be limited to trauma physicians and trauma centers.

You inquire whether the District, under its authority to self-insure, may create this type of captive insurance entity. Section 6(22) of the District's Health Care Act provides that the district board has the authority:

"In its absolute discretion, to establish or become a part of one or more qualified self-insurance trust funds for the purpose of protecting District assets and operations, as well as related health care entities and individuals comprising the health care delivery system established at the

direction or under the authority of the District. The protection from liability losses includes, without limitation, professional medical malpractice, comprehensive general liability, directors and officers' liability, workers' compensation liability, medical and health services, life, property, and such other liability exposures as may be permitted by Florida law. These self-insurance trust funds may be established for the benefit of the officers, directors, employees, and approved agents of the District as well as such other legal entities or individuals as the District may determine, by board resolution, are carrying out the health care purposes and mandates of the District during the period those entities or individuals are acting within the scope of authority and duties devolving upon them through an agreement with or direct mandate from the District."

As an administrative agency created by statute, the District has no inherent or common law powers. Instead, its powers are limited to those expressly granted by statute or necessarily implied therefrom.[2] While an express power duly conferred may include the implied authority to use the means necessary to carry out the express power, this office has stated on numerous occasions that such implied power may not warrant the exercise of a substantive power not conferred.[3] Moreover, any reasonable doubt as to the lawful existence of a particular power sought to be exercised is to be resolved against such an exercise.[4]

While the District has the authority to establish or become a part of a self-insurance trust fund, this office finds no authority for the exercise of a substantive power to create an insurance company that provides medical malpractice insurance coverage to trauma physicians for both trauma and non trauma services.[5] Moreover, you state that the company would be formed in an off-shore jurisdiction and the District would control the company "to the fullest extent permitted by such foreign law." Thus, in addition to the absence of substantive authority to create such an entity, especially one operating outside the territorial jurisdiction of the state, there is no assurance that the District could, in fact, exercise sufficient control and oversight of the captive insurance company.

Accordingly, it does not appear that the District may create an insurance company for the purpose of providing medical malpractice coverage to physicians participating in the county trauma network. In light of this response, it is unnecessary to address the second part of your inquiry.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tfl
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[1] *See* s. 6(2) and (18) of the District's Health Care Act, Ch. 03-326, Laws of Fla.

[2] *See State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So. 2d 628 (Fla. 1st DCA 1974), *cert. dismissed*, 300 So. 2d 900 (Fla. 1974).

[3] *See, e.g.*, Ops. Att'y Gen. Fla. 78-114 (1978), 78-101 (1978), and 78-95 (1978). *See also* Op.

Att'y Gen. Fla. 90-64 (1990), in which this office concluded that a housing authority, created pursuant to Ch. 159, Fla. Stat., was not authorized to establish, wholly own and operate a state-chartered savings bank. *And see Florida State University v. Jenkins*, 323 So. 2d 597 (Fla. 1st DCA 1975) (implied power must be essential in order to carry out the expressly granted power or duty imposed); *Gardinier, Inc. v. Florida Department of Pollution Control*, 300 So. 2d 75 (Fla. 1st DCA 1974) (implied powers accorded administrative agencies must be indispensable to powers expressly granted).

[4] *State ex rel. Greenburg v. Florida State Board of Dentistry, supra*; *City of Cape Coral v. GAC Utilities, Inc., of Florida*, 281 So. 2d 493 (Fla. 1973).

[5] *Cf.*, s. 624.031, Fla. Stat., which defines "self-insurance" as "any plan, fund, or program which is communicated or the benefits of which are described in writing to employees and which has heretofore been or is hereafter established by or on behalf of any individual, partnership, association, corporation, trustee, governmental unit, employer, or employee organization, or any other organized group, for the purpose of providing for employees or their beneficiaries through such individual, partnership, association, corporation, trustee, governmental unit, employer, or employee organization, or any other group, benefits in the event of sickness, accident, disability, or death"; and s. 324.171, Fla. Stat., providing that a person may qualify as a self-insurer by obtaining a certificate of self-insurance from the Department of Highway Safety and Motor Vehicles if such person possesses a net unencumbered worth of at least $40,000 or sufficient net worth, as determined annually by the department. *And see United Services Automobile Association v. Phillips*, 740 So. 2d 1205 (Fla. 2nd DCA 1999) (self-insurance is a planned program of paying from a company's own funds for losses sustained, where it recognizes reasonably the potential losses that might be incurred, does all that it can to avoid or reduce this potential, and then provides a means to process and pay for the losses remaining; a true self-insurance plan contemplates the establishment of a fund based on projections of future losses and the identification and measurement of actual claims against the self-insured entity so that money from the fund may be set aside to pay those claims if and when they come due).