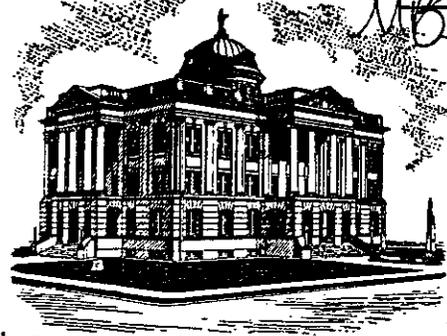


# Williamson County

Georgetown, Texas



ID# 16274  
MBS

DAVID U. FLORES  
COUNTY AUDITOR

ID# 19295  
File # RQ-508-DM

May 26, 1992

Honorable Dan Morales  
Attorney General of Texas  
P. O. Box 12548  
Austin, Texas 78711

**RQ-508**

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Re: Williamson County Medical Benefit Plan

Opinion Committee

Dear Attorney General Morales:

I write requesting clarification of certain issues impacting the medical benefit plan Williamson County provides to its employees. The County currently provides medical coverage to its employees through a single-employer, self-funded plan. The County has approximately 400 covered employees. The County has purchased stop-loss insurance to reimburse it in the event claims exceed a certain attachment point. In an effort to control its costs while complying with applicable law, the County is trying to determine what it is or is not required to cover under its medical plan. The County is also considering contracting with an entity which is more than 50 percent controlled by employer representatives and which has contracted with a select group of providers to provide services to contracting employers at preferred rates.

We would like clarification on the following issues:

1. Is our single-employer, self-funded plan subject to the Texas Insurance Code provisions which arguably apply to such plans, or are these provisions only intended to apply to multiple employer welfare arrangements, which are commonly known as MEWA's<sup>1</sup>? Even if these provisions apply by their terms to our plan, are these provisions preempted by the Employee Retirement Income Security Act of 1974, as amended ("ERISA")? It is my understanding that the arguably applicable provisions are: (1) Article 1.24C, which authorizes the State Board of Insurance to require reporting from "any self-insurance trust or mechanism providing health care benefits;" (2) Article 3.51-9, which applies to "employer or

<sup>1</sup>The Employee Retirement Income Security Act of 1974, as amended ("ERISA") defines a multiple employer welfare arrangement as an arrangement to provide medical or other welfare benefits to the employees of two or more employers, unless the arrangement is made pursuant to a collective bargaining agreement, a rural electric cooperative, or a rural telephone cooperative, or the employers are 25 percent or more commonly controlled. ERISA § 3(40)(A); 29 U.S.C. § 1002(40)(A).

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other self-funded or self-insured plans...providing...health coverage" (among other things) and requires chemical dependency to be covered as any other illness, subject to certain specified conditions; and (3) Article 21.53, which applies to, among other things, "employee benefit plans," and prohibits certain interference with an employee's selection of a dentist where dental coverage is provided, and requires certain information to be included in any description of dental coverage.

2. Please confirm that the County is not required to report to the Texas Department of Insurance with respect to its medical benefit plan.

3. Please confirm our understanding that the County is not required to report to the U.S. Department of Labor as required under ERISA for plans other than governmental, certain church, and workers' compensation plans.

4. Please confirm our understanding that the other two Articles of the Texas Insurance Code which arguably apply to single-employer, self-funded plans do not require employers to provide certain benefits, but rather require insurers, MEWA's, and other seller's of employee benefit plans to offer to provide certain coverage, and the employer may or may not elect to provide this coverage to its employees. These Articles are : (1) Article 3.51-4, which deals with coverage for serious mental illness; and (2) Article 3.51-6, §3A, which deals with coverage of in vitro fertilization procedures.

5. Please confirm our understanding that no other Articles of the Texas Insurance Code, other than those dealing with workers' compensation, apply to single-employer, self-funded medical benefit plans.

6. Please confirm our understanding that the County may contract with an employer-controlled entity which has arranged for a select group of providers at preferred rates to be available to contracting employers, and such arrangement will not be subject to State Board of Insurance Regulations 28 TAC 3.3701 - .3705, the requirements of Article 20.12, the prohibitions of § 161.091 of the Health and Safety Code, or any other restrictions under Texas insurance laws or laws impacting providers.

1. Texas Insurance Code Requirements

Articles 1.24C, 3.51-9, and 21.53 of the Texas Insurance Code all arguably apply to single-employer, self-funded plans, as well as to insured plans, as indicated in 1 above. However, the references to

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a "mechanism providing health care benefits, "employer or other self-funded plans providing health coverage," and "employee benefit plans," may only be designed to apply to MEWA's, which, while being a collection of employee benefit plans, are insurance in the sense that risk is spread over several unrelated entities.

It is our understanding that ERISA preempts the provisions of the Texas Insurance Code as they apply to most single-employer, self-funded plans. 29 U.S.C. § 1144; ERISA § 514. ERISA does not preempt state law with respect to MEWA's since, even though ERISA applies to MEWA's, it specifically provides for state regulation of these entities. 29 U.S.C. § 1144(b)(6)(a); ERISA § 514(b)(6)(A).

ERISA does not apply to governmental entities, certain nonelecting churches and church-related organizations, and plans maintained solely to comply with workers' compensation and similar laws. 29 U.S.C. § 1003; ERISA § 4. Therefore, it is unlikely that ERISA preempts state law with respect to these entities. However, the Texas Legislature, in view of the overall purpose of the Texas Insurance Code to regulate insurance and the general preemption by ERISA of single-employer, self-funded plans, may not have intended to regulate any single-employer, self-funded plans.

Please clarify whether Articles 1.24C, 3.51-9, and 21.53 of the Texas Insurance Code apply by their terms to single-employer, self-funded plans, and if so, whether these provisions are preempted by ERISA for all such plans, or only for such plans to which ERISA applies. The Department of Insurance has informed us on the phone that none of the Insurance Code applies to single-employer, self-funded plans.

2. The County is not required to report under ERISA.

The County has not complied with ERISA's requirement that employee benefit plan's report to the Department of Labor because ERISA does not apply to governmental entities. ERISA § 4; 29 U.S.C. § 1003.

3. The County is not required to report to the Insurance Board.

Even if your conclusion to the issue in 1. above is that Article 1.24C, which authorizes the State Board of Insurance to require reporting, applies to the County's medical benefit plan, it is our understanding that the Board is not now requiring single-employer, self-funded plans to report information to the Board.

4. Nonbinding Provisions

Under Articles 3.51-6 §3A and 3.51-14 of the Texas Insurance Code,

each insurer, "employer," and "self-funded or self-insured welfare benefit plan" (among others) is required to make available to "each group policyholder, contract holder, employer, multiple employer, union, association, or trustee" certain coverage for in vitro fertilization and treatment of serious mental illness, respectively. Thus, these provisions require that certain entities offer to provide to the employer or other purchaser of the coverage certain coverage. There is no requirement that the employer provide such coverage to employees.

If the legislature had wished to require the employer to provide certain coverage to its employees, it could have used language similar to that requiring coverage of chemical dependency as any other illness under Article 3.51-9 of the Texas Insurance Code. Under the chemical dependency provision, impacted entities "shall provide benefits for the necessary care and treatment of chemical dependency...."

The in vitro fertilization and mental illness provisions appear to apply to "employers" and "self-funded plans" in order to require trade associations and other MEWA's to include this coverage as an option in the benefit plans which they offer their constituent employers.

5. Code Provisions Applicable to Insurers do not Apply to the County.

A single employer such as the County is clearly not an insurer. Moreover, the County's purchase of stop-loss insurance with respect to its medical benefit plan does not make its plan subject to the Insurance Code's requirements applicable to group accident and health insurance. See Brown v. Granatelli, 897 F.2d 1351 (5th Cir. 1990). Therefore, the Code's provisions applicable to accident and health insurers should not apply to the County.

6. The County's use of an employer-controlled preferred provider panel is not restricted.

Under 28 TAC § 3.3701 - .3705, insurers are authorized to design policies for use with preferred provider panels if certain requirements are met. Under Article 20.12 of the Texas Insurance Code, preferred provider organizations are restricted for nonprofit corporations for group hospital services, a majority of whose superintendents are hospitals or physicians. Under § 161.091 of the Health and Safety Code, hospitals and physicians who pay or accept remuneration for securing or soliciting patients commit an offense, subject to certain exceptions such as governmental entities and actions not prohibited under Medicare's fraud and abuse

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prohibitions. We could find no other restrictions on use of preferred provider panels under Texas law.

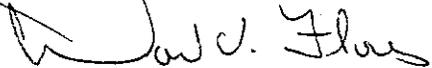
These requirements respecting preferred provider panels do not appear to apply to the County's proposed contract with an employer-controlled organization which has contracted with providers for preferred rates. The County's medical benefit plan is not insurance such that 28 TAC § 3.3701 - .3705 does not apply. Moreover, the organization which has contracted with providers for preferred rates, which the County proposes to contract with to obtain these preferred rates, is controlled by employers rather than hospitals and physicians, such that Article 20.12 does not apply. Further, the prohibition on illegal remuneration under § 161.091 should not apply because payments to the preferred provider panel are reduced, rather than increased payments, the County is not a health care provider, and governmental entities are excepted.

Conclusion

We respectfully request that you consider our reasoning outlined above and respond to the six issues outlined. Please let me know if you need any further information in considering these issues.

Thank you for your assistance.

Sincerely,



David U. Flores  
County Auditor