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OPINION COMMITTEE

FILE #

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VIA HAND DELIVERY

The Honorable Greg Abbott, Attorney General
Office of the Attorney General
Opinion Committee
209 W. 14th Street, 6th Floor
Austin, Texas 78701

Re: Texas Health Insurance Risk Pool
Request for Opinion

Dear General Abbott:

On behalf of the Texas Health Insurance Risk Pool (the "Pool"), I hereby request an opinion regarding the applicability of the doctrine of sovereign immunity to acts of the Pool and/or its officers, directors, and employees. Simply put, the question is this: Under Texas law, is the Pool entitled to immunity from tort liability under the doctrine of sovereign immunity?

Since it began operations in 1997, the Pool has purchased liability insurance for its officers, directors, and employees. This insurance covers "all sums which the Insured shall become legally obligated to pay as Damages resulting from any Claim first made against the Insured...in the performance of duties for the Public Entity." Because this insurance is expensive, the Pool would like to either stop buying it or at least reduce the amount of coverage it buys. Purchasing a policy with a higher deductible amount would serve this purpose.

The type of claim most likely to be brought against the officers, directors, and employees of the Pool would be one based on an alleged failure to abide by the contractual terms of the policy or policies issued by the Pool, with possible tort allegations of bad faith and/or violations of the Texas Deceptive Trade Practices Act. The Pool might also be subjected to suit by Texas insurers for alleged improper assessments. The impetus for this request for an opinion is the increasing cost of directors and officers' liability insurance, but please note that the Pool is currently a co-defendant with the Commissioner of Insurance in a lawsuit brought by an insurance carrier related to an assessment.

About the Pool

In formulating your opinion on this matter, it may be helpful for you to review the Pool's origin and operations. The Texas Legislature created the Pool in 1989 to provide health insurance coverage to Texans who are uninsurable in the standard market. *See, generally*, TEX. INS. CODE ANN. Art. 3.77. Eight years later, the Pool was funded by the Legislature and commenced operations. Initial "seed money" from the Legislature notwithstanding, the Pool operates by collecting premiums for health insurance policies it issues to Texas residents who cannot obtain insurance from private carriers and by "assessing" Texas health insurance carriers for the net losses of the Pool over the premium received. TEX. INS. CODE ANN. Art. 3.77 §§10 and 13. The Pool is governed by a nine-member board of directors appointed by the Commissioner of the Texas Department of Insurance. TEX. INS. CODE ANN. Art. 3.77 §4. The Pool is required to make an annual report of its operations to the Governor, the Lieutenant Governor, the Speaker of the House of Representatives, and the Commissioner of Insurance. TEX. INS. CODE ANN. Art. 3.77 §6(d). Furthermore, the Pool is subject to an annual audit by the State Comptroller. TEX. INS. CODE ANN. Art. 3.77 §15. As of December 31, 2003, the Pool had 24,675 enrollees.

Sovereign Immunity

Our research indicates that the Pool is entitled to the protections of the sovereign immunity doctrine. As you are no doubt aware, sovereign immunity derives from the principle that the sovereign (in Texas, the "executive") may not be sued in its courts without its consent. Unless waived, sovereign immunity protects the State of Texas and its political subdivisions from lawsuits for damages not authorized by statute or consented to by means of legislative resolution. *Gen. Servs Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001).

As has been frequently noted, sovereign immunity encompasses two principles: immunity from suit and immunity from liability. Immunity from liability protects the State from judgments even where there is an express consent on the part of the Legislature to permit a suit. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). The Legislature clearly intended that the Pool should not be immune from suit. Article 3.77 §6(b)(3) of the Texas Insurance Code states that the Pool may "sue or be sued, including taking any legal actions necessary or proper to recover or collect assessments due...." As *Federal Sign* indicates, however, immunity from suit and immunity from liability are two different matters. *See also State v. Brannan et ux.*, 111 S.W.2d 347, 349 (Tex.Civ.App.—Waco 1941, no writ) ("The Legislature, by granting permission to be sued, did not thereby admit liability nor create any liability in favor of the plaintiff, but merely granted permission to test the matter of liability through the courts.").

In Texas, a governmental unit is immune from tort *liability* unless the Legislature has waived this immunity. *Dallas County Mental Health and Mental Retardation v. Bossley*, 968

S.W.2d 339, 341 (Tex. 1998). Furthermore, for the legislature to waive a governmental unit's sovereign immunity, it must do so by clear and unambiguous language. *Kerrville State Hospital v. Fernandez*, 28 S.W.3d 1, 3 (Tex. 2000). But what is a "governmental unit"? The Texas Tort Claims Act, Chapter 101 *et seq.* of the Texas Civil Practice & Remedies Code, provides a useful definition. In waiving the state's general sovereign immunity protection for certain narrowly defined types of torts, the Act states as follows:

- (3) "Governmental unit" means:
 - (A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts...and...
 - (D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the Constitution.

TEX. CIV. PRAC. & REMS. CODE §101.001(3).

Under this definition, the Pool clearly qualifies for sovereign immunity, since it is an "organ of government the status and authority of which are derived from...laws passed by the Legislature"—namely, article 3.77 of the Texas Insurance Code. Texas courts have found that sovereign immunity protects various sorts of such governmental units. *See, for example. Mendez v. San Benito/Cameron County Drainage District No. 3*, 45 S.W.3d 746 (Tex. App.—Corpus Christi 2001, pet. denied) (county drainage district immune from liability for property damage caused by alleged negligence); *Texas Workers' Compensation Commission and Subsequent Injury Fund v. Tex. Builders Ins. Co.*, 994 S.W.2d 902 (Tex. App.—Austin 1999, pet. denied) (Commission and Fund generally entitled to protections of sovereign immunity); *and Texas Workers Compensation Commission v. City of Eagle Pass/Texas Municipal League Workers' Compensation Joint Insurance Fund*, 14 S.W.3d 801 (Tex.App.—Austin 2000, pet. denied) (municipal league's joint insurance fund had no sovereign immunity as against suit by another state entity, though court suggests that such immunity does exist in connection with suits brought by non-governmental third parties).

Who is Covered by Immunity?

From what sorts of claims would the Pool be “immune”? And which employees, officers, and/or directors of the Pool would share in the Pool’s immunity? Referring again back to the terms of the Texas Tort Claims Act, immunity would seem to be enjoyed by officers and employees, defined as:

A person, including an officer or agent, who is in the paid service of a governmental unit by competent authority....

TEX. CIV. PRAC. & REMS. CODE §101.001(2). This definition might not include the directors of the Pool appointed by the Commissioner of Insurance, because the directors are not compensated for their service except by means of expense allowances and per diem payments. TEX. INS. CODE ANN. §3.77§4(f). However, the Code itself provides a sort of immunity for directors of the entity:

A member of the board of directors is not liable for an action or omission performed in good faith in the performance of powers and duties under this article, and [a] cause of action does not arise against a member for the action or omission.

TEX. INS. CODE ANN. Art. 3.77 §4(h). It might be argued that if the Pool were entitled to sovereign immunity, there would be no need for the Legislature to have enacted this protective provision. On the other hand, the provision addresses directors only, who are arguably not in the “paid service” of this governmental unit. Seen this way, the grant of immunity to the directors of the Pool would dovetail logically with the general sovereign immunity protection afforded to officers and paid employees of the Pool.

Scope of Immunity

Because Texas law starts with the assumption that sovereign immunity applies to any act taken by a governmental unit within the scope of its authority, the question is not really from what sort of liability is the unit immune, but from what sort of liability *isn't it* immune? Generally speaking, the governmental unit—here, the Pool—is immune from liability for all torts other than those defined in the Texas Tort Claims Act. Even in cases where a governmental unit is liable for certain acts of negligence or deprivations of rights, the State is obligated to indemnify the governmental unit and its employees, officers, and directors for liability arising out of such acts (up to certain monetary limits). See TEX. GOV'T CODE ANN. Art. 104.001 *et seq.*

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We hope that the statutory and case law cited above is of some assistance to you and your attorneys in your consideration of the question we have posed. To sum up, we believe that the Texas Health Insurance Risk Pool is a "governmental unit" of the State of Texas and as such is entitled to sovereign immunity from tort liability for its official actions except in those cases that allege torts that fall within the narrow ambit of the Texas Tort Claims Act or some other statutory waiver of tort immunity. If the Attorney General concurs, the Pool should be able to reduce substantially the amount of directors and officers liability coverage it purchases, relying instead on its sovereign immunity and on the financial backing of the state in those cases in which liability is alleged to have incurred as a result of commission of a tort covered by the Texas Tort Claims Act.

General Abbott, we appreciate your consideration of this request for an opinion, and stand ready to provide you with any additional information you may need.

Sincerely,



Bruce McCandless III
Counsel for the Texas
Health Insurance Risk Pool

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cc; Steve Browning, Executive Director, (by fax)
Texas Health Insurance Risk Pool