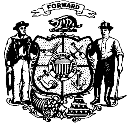

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OAG–03–17

The Honorable Scott Walker
Governor
State of Wisconsin
115 East, State Capitol
Madison, WI 53702

Dear Governor Walker:

¶ 1. You ask whether chapter 40 of the Wisconsin Statutes authorizes the State of Wisconsin Group Insurance Board (the "Board") to establish a self-insured group insurance plan open to municipal employers. If so, you ask whether article VIII, section 3 of the Wisconsin Constitution, which prevents extending "the credit of the state," would prohibit municipal participation in those plans. As described on the Board's website, self-insurance means that, "instead of paying health plans a monthly premium for coverage, the State will pay medical claims directly through third-party administrators."[1]

¶ 2. Under chapter 40, the Board is authorized to offer group health insurance plans that public employers, including the State and other public employers, may offer to their employees. *See* Wis. Stat. §§ 40.03(6), 40.51(6)–(8m). The Board is authorized to contract with insurers for those plans or may offer any plan on a self-insured basis. Wis. Stat. § 40.03(6)(a)1.–2. In turn, municipal employers may offer their employees a plan through "a program offered by" the Board. Wis. Stat. § 40.51(7)(a). I conclude that the plain language of these statutes allows municipalities to offer a self-insured plan if offered by the Board. Further, article VIII, section 3 of the Wisconsin Constitution poses no bar. That section forbids legally binding the State as a guarantor of a private corporation's debt. Because offering municipalities self-insured plans does not involve that kind of relationship, the constitutional provision does not bar it.

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[1] http://www.etf.wi.gov/faq/gib_self_ins.htm#self-insurance (last visited Aug. 8, 2017).

¶ 3. The meaning of provisions in chapter 40 presents a question of statutory interpretation. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.* (citation omitted).

¶ 4. Wisconsin Stat. § 40.03(6) grants the Board authority to offer group insurance plans. The Board may either contract with an insurer or may provide any plan on a self-insured basis:

> The group insurance board:
>
> (a) 1. Shall, on behalf of the state, enter into a contract or contracts with one or more insurers authorized to transact insurance business in this state for the purpose of providing the group insurance plans provided for by this chapter; or
>
> 2. May, wholly or partially in lieu of subd. 1, on behalf of the state, provide *any group insurance plan on a self-insured basis* in which case the group insurance board shall approve a written description setting forth the terms and conditions of the plan, and may contract directly with providers of hospital, medical or ancillary services to provide insured employees with the benefits provided under this chapter.

Wis. Stat. § 40.03(6)(a) (emphasis added).[2]

[2] The Legislature created Wis. Stat. § 40.03(6)(a) with 1981 Wis. Laws, ch. 96, § 24, and Wis. Stat. § 40.51(7) with 1985 Wis. Act 29, § 741.

¶ 5. Chapter 40 specifically allows municipal employers to provide Board plans to their employees. Wisconsin Stat. § 40.51, titled "Health care coverage," provides that "[a]ny employer, other than the state, . . ., may offer to all of its employees a health care coverage plan through a program offered by the group insurance board." Wis. Stat. § 40.51(7)(a).[3] "[E]mployer" includes "any county, city, village, town, school district, other governmental unit or instrumentality of 2 or more units of government." Wis. Stat. § 40.02(28).[4] An "employee" is "any person who receives earnings as payment for personal services rendered for the benefit of any employer." Wis. Stat. § 40.02(26).

¶ 6. Thus, the Board may offer "any group insurance plan on a self–insured basis," and a municipal employer may "offer . . . a health care coverage plan through a program offered by the group insurance board." Wis. Stat. §§ 40.03(6)(a)2., 40.51(7)(a). Applying these sections as written, a municipal employer may offer a self-insured plan if offered by the Board.[5]

¶ 7. An Attorney General opinion from 1987 reached a contrary conclusion, but it contains no significant analysis. 76 Op. Att'y Gen. 311 (1987), 1987 WL 341185. Rather, the opinion largely discusses other topics. Only the final statements summarily address whether the Board may establish a "self-funded" plan available to municipal employers. The opinion states that the words "on behalf of the state" in the self-insurance subsection, Wis. Stat. § 40.03(6)(a)2., should be dispositive because the clause references only "the state," as opposed to other public employers. 76 Op. Att'y Gen. at 315. However, that conclusion incorrectly conflates the duties delegated to the Board to establish plans with the State's separate role as an employer.

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[3] The provision governs procedures only for employers "other than the state," as the preceding subsection governs plans offered by the State as an employer. Wis. Stat. § 40.51(6).

[4] For the sake of brevity, this opinion refers to these employers as "municipal" employers.

[5] Although the statutes do not prevent municipalities' participation, the Department of Employee Trust Funds "may by rule establish different eligibility standards or contribution requirements for [municipal] employees and employers." Wis. Stat. § 40.51(7)(a).

¶ 8. In the present context, "on behalf of the state" means that the Board—which is a part of the State of Wisconsin's Department of Employee Trust Funds—may act *for* the State by offering plans that are made available to public employers. A common meaning of "on behalf of" is as to act "in place of" or as an "agent" of another entity. *See*, *e.g.*, Wis. Stat. § 49.454(1)(a)3. (discussing actions of "[a] person . . . to act in place of or on behalf of the individual" whose assets are used to form a trust); *Green v. Heritage Mut. Ins. Co.*, 2002 WI App 297, ¶ 17, 258 Wis. 2d 843, 655 N.W.2d 147 ("[A]gent merely contracts on behalf of a disclosed principal . . . ." (citation omitted)). The Board acts "on behalf of the state" when it contracts for, approves of, and otherwise makes available insurance plans. *See* Wis. Stat. § 40.01 (creating ETF, including the Board, to benefit public employee participants).

¶ 9. In reaching a contrary conclusion, the 1987 opinion appears to conflate the Board's plan-establishment role with the State's separate role as an *employer* that offers plans to state employees. Wisconsin Stat. § 40.51(6) addresses the latter role, providing that the State offers plans "approved by the group insurance board" to "all of its employees." The State thus acts in two capacities: (1) it delegates its power to the Board to establish group insurance plans for public employees and (2) it selects plans and offers them to state employees. Wis. Stat. §§ 40.03(6), 40.51(6). Paralleling that second role, Wis. Stat. § 40.51(7) allows municipal employers to offer a "plan through a program offered by the group insurance board." The State's first role—the delegation of authority to the Board to establish plans—is not limited by the second role as an employer offering plans.[6]

¶ 10. That plain reading is further supported by the surrounding statutory text. The insurance-contract subsection uses the same phrase as the self-insurance subsection to describe the Board's authority: the Board "[s]hall, on behalf of the state, enter into a contract or contracts with one or more insurers . . . for the purpose of providing the group insurance plans provided for by this chapter [i.e., chapter 40]." Wis. Stat. § 40.03(6)(a)1. If it were true that "on behalf of the state" excludes municipalities from self-insured plans under subsection (6)(a)2., the same language

[6] Wisconsin Stat. § 40.03(6)(L) states that the Board must notify the joint committee on finance that it intends to execute a contract for self-insurance plans for state employees, and provides that the committee may decide whether to authorize it. That section does not state a separate procedure if a municipal employer elects to offer self-insured plans under Wis. Stat. § 40.51(7)(a). It may be that the Legislature only requires review of state employee self-insurance because of the State's role as employer and its possible effect on State budgeting.

would exclude municipalities from insurer-based plans under subsection (6)(a)1. That result would be contrary to express language in Wis. Stat. §§ 40.03(6)(a) and 40.51(7)(a).

¶ 11. To illustrate, the Board's powers stated in Wis. Stat. § 40.03(6)(a)1.–2. apply to "any" plans under "this chapter," which is a reference to chapter 40. The municipal plan provision is part of chapter 40. Under the plain language, it is therefore encompassed by the authority granted to the Board. Further, the statutes broadly allow municipal employers to offer plans "through a program offered by" the Board, without relevant limitation. Wis. Stat. § 40.51(7)(a). The 1987 opinion does not give effect to that express language, in conflict with the principles of statutory interpretation. *State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 12. The second question posed is whether the statutes allowing the Board to offer self-insured plans to municipalities would violate article VIII, section 3 of the Wisconsin Constitution. That section states, as relevant here: "the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation." Wis. Const. art. VIII, § 3.

¶ 13. The Wisconsin Legislature "has plenary power except where forbidden to act by the Wisconsin Constitution." *Libertarian Party v. State*, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996). Statutes are presumed constitutional. *Id.* When determining constitutionality, the Wisconsin Supreme Court is the final arbiter of the meaning of provisions in Wisconsin's Constitution. *State v. Beno*, 116 Wis. 2d 122, 134–36, 341 N.W.2d 668 (1984).

¶ 14. The Wisconsin Supreme Court has interpreted article VIII, section 3 on multiple occasions. The court has explained that "[t]his section prohibits the state from granting its credit in aid of a private business." *Libertarian Party*, 199 Wis. 2d at 821. However, "this section says nothing about grants of cash or subsidies, or the provision of services." *Id.* Thus, it does not prohibit programs such as "unemployment compensation, welfare, and tuition grants." *Id.* at 822.

¶ 15. The court has explained that "the only purpose of this provision is to prohibit the state from acting as a surety or guarantor of the collateral obligation of another party. It is the promise by the state as a guarantor to answer for the debt of another that is proscribed by the state constitution." *State ex rel. Thomson v. Giessel*, 271 Wis. 15, 29, 72 N.W.2d 577 (1955). The section forbids creating an "enforceable legal obligation on the part of the state to pay the obligations of [corporations]," where, in the event of default, the State would be legally obligated "to pay all or any

portion of the sums that are borrowed by the . . . corporations for use by those corporations." *Thomson*, 271 Wis. at 31–32. Thus, the constitutional provision was violated where state funds were advanced to the national American Legion corporation as "security" for "performance of [a local American Legion corporation's] obligation under a contract made between it" and the national entity. *State ex rel. Am. Legion 1941 Convention Corp. of Milwaukee v. Smith*, 235 Wis. 443, 461, 293 N.W. 161 (1940). Those concerns about extending the State's credit to guarantee debts of a corporation are absent here.[7]

¶ 16. Self-insurance offered to municipal employers thus would not violate article VIII, section 3 of the Wisconsin Constitution, as interpreted by the Wisconsin Supreme Court, because it does not extend "credit" in the sense that the State acts as a guarantor of a private entity's debt. Rather, administering a self-insurance program for public employees, like other programs the State administers, is akin to the "provision of services" that does not implicate the constitutional provision. *See Libertarian Party*, 199 Wis. 2d at 821.[8]

¶ 17. That conclusion is especially appropriate because the group health plans are designed to be self-funded. The programs authorized by chapter 40 are funded through premiums from public employers and employees that, in turn, are used to pay for healthcare. The Board may either contract with an insurance company to provide that service or may offer a self-insured plan where it collects premiums and pays medical claims directly. In either case, the statutes contemplate that "[r]evenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan." Wis. Stat. § 40.01(2). The statutes further provide for "[s]eparate group health . . . accounts" and that "any insurance benefit to be paid directly by the fund and reimbursements of 3rd parties for benefits paid on behalf of an insurance plan shall be charged to the corresponding account established for that benefit plan." Wis. Stat. § 40.04(9). When "excess moneys" are collected, they may be used "to establish reserves to stabilize costs in subsequent years" and, if a

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[7] The analysis here is based on the understanding that, for purposes of the insurance plans, the State's relationship with the municipal employees would mirror its relationship with State employees, in that the State would not be a third-party guarantor of an insurance program run by a municipality but rather would directly administer the plan.

[8] The same 1987 Attorney General opinion discussed above states in passing that barring municipalities from self-insured plans "avoids the potential of creating an obligation on the part of the state to pay the debt of another, which is prohibited by article VIII, section 3 of the Wisconsin Constitution." 76 Op. Att'y Gen. at 315. That assertion is unsupported by any reasoning or discussion of the Wisconsin Supreme Court precedent.

deficit were to occur, it is eliminated by "increasing the premiums, contributions or other charges applicable to that benefit plan." Wis. Stat. §§ 40.03(6)(e), 40.04(1). In one model, payments are made to an insurance company that then pays claims and, in the other, claims are paid directly, but the underlying funding relationship with municipalities is, for present purposes, essentially the same. Both models are funded through premiums, and neither is the giving of State "credit" as the Wisconsin Supreme Court has interpreted the term.

¶ 18. I conclude that, because the Board may offer any group health insurance plan on a self-insured basis, and municipalities are authorized to offer Board plans, a municipality may offer a self-insured plan if offered by the Board. Further, under the precedent, article VIII, section 3 of the Wisconsin Constitution poses no bar because offering self-insured plans does not extend the State's "credit."

Very truly yours,

BRAD D. SCHIMEL
Wisconsin Attorney General

BDS:ADR:mlk