June 27, 2013

The Honorable Anthony E. Kendell
Miami County Prosecuting Attorney
Miami County Safety Building
201 W. Main Street
Troy, Ohio 45373

SYLLABUS: 2013-022

A board of township trustees may reimburse a township officer or employee pursuant to R.C. 505.601 for monthly Medicare Parts A, B, and D premium payments made by the officer or employee, so long as the benefits provided by Medicare Parts A, B, and D are consistent with the benefits identified in the township resolution stating that the township has chosen not to procure a health care plan under R.C. 505.60 and the reimbursement does not exceed the uniform monthly or yearly payment amount set by that resolution.

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OPINION NO. 2013-022

The Honorable Anthony E. Kendell
Miami County Prosecuting Attorney
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201 W. Main Street
Troy, Ohio 45373

Dear Prosecutor Kendell:

Your predecessor requested an opinion whether Medicare Parts A, B, and D are "insurance" for purposes of R.C. 505.60(A) and R.C. 505.601, and if so, whether a township may reimburse a trustee for the monthly Medicare premium payments he makes. Your predecessor explained that the township in question does not provide an insurance policy or group health care services to the officers and employees of the township. Instead, pursuant to R.C. 505.601, the township reimburses its officers and employees for each out-of-pocket premium attributable to the coverage obtained by the officers or employees.

Medicare Parts A, B, and D Generally

We begin with a brief discussion of Medicare Parts A, B, and D. The Medicare program was established as part of Title XVIII of the Social Security Act of 1935, as amended in 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C.S. § 1395 *et seq.*). *Fischer v. U.S.*, 529 U.S. 667, 671, 120 S. Ct. 1780, 146 L. Ed. 2d 707 (2000); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 506, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994). The purpose of the Social Security Amendments of 1965 was, in part, "[t]o provide a hospital insurance program for the aged under the Social Security Act with a supplementary medical benefits program and an expanded program of medical assistance to increase benefits under the Old-Age, Survivors, and Disability Insurance System." Pub. L. No. 89-97, 79 Stat. 286 (1965).

In its current form, Part A of Title XVIII of the Social Security Act ("Medicare Part A") "provides basic protection against the costs of hospital, related post-hospital, home health services, and hospice care" to eligible individuals who are over the age of 65 or disabled. 42 U.S.C.S. § 1395c. Part B of Title XVIII of the Social Security Act ("Medicare Part B") provides supplemental medical insurance benefits to aged and disabled individuals who elect to enroll in the program. 42 U.S.C.S. § 1395j. Part D of Title XVIII of the Social Security Act ("Medicare Part D") is a voluntary prescription drug benefit program. 42 U.S.C.S. § 1395w-101. The scope of benefits that are provided

by Parts A, B, and D is set forth in 42 U.S.C.S. § 1395d (Medicare Part A), 42 U.S.C.S. § 1395k (Medicare Part B), and 42 U.S.C.S. § 1395w-102 (Medicare Part D).

Authority of Township Trustees to Reimburse Township Officers and Employees for Out-of-Pocket Health Care Insurance Premiums

Let us now examine the authority of a board of township trustees to reimburse township officers and employees for their out-of-pocket health care insurance premiums. A board of township trustees is a creature of statute and, therefore, possesses only those powers and duties vested in it, either expressly or impliedly, by the General Assembly. *In re Village of Holiday City*, 70 Ohio St. 3d 365, 369, 639 N.E.2d 42 (1994); 2008 Op. Att'y Gen. No. 2008-018, at 2-199. Accordingly, whether a board of township trustees may reimburse a trustee for the monthly Medicare premiums he pays depends upon whether the General Assembly has authorized the board to make the reimbursement.[1]

R.C. 505.60(A) authorizes a board of township trustees to:

> procure and pay all or any part of the cost of insurance policies that may provide benefits for hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, prescription drugs, or sickness and accident insurance, or a combination of any of the forgoing types of insurance for township officers and employees.

If a board of township trustees does not procure an insurance policy or group health care services pursuant to R.C. 505.60 for its officers and employees, the board may "reimburse any township officer or employee for each out-of-pocket premium attributable to the coverage provided for that officer or employee for insurance benefits described in [R.C. 505.60(A)] that the officer or employee otherwise obtains." R.C. 505.601. In order to reimburse township officers and employees, the board of township trustees must satisfy all of the following conditions:

> (A) The board of township trustees adopts a resolution that states that the township has chosen not to procure a health care plan under [R.C. 505.60] and has chosen instead to reimburse its officers and employees for each out-of-pocket premium attributable to the coverage provided for them for insurance benefits described in [R.C. 505.60(A)] that they otherwise obtain.
>
> (B) That resolution provides for a uniform maximum monthly or yearly payment amount for each officer or employee to cover themselves and their

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[1] Your opinion request does not ask about the authority of a township that exercises limited home rule powers under R.C. Chapter 504 to reimburse a township trustee for Medicare premium payments he makes. Thus, this opinion addresses only the authority of townships that do not exercise limited home rule powers. *See generally* 2008 Op. Att'y Gen. No. 2008-018, at 2-199, n.1.

> immediate dependents, beyond which the township will not reimburse the officer or employee.
>
> (C) That resolution states the specific benefits listed in [R.C. 505.60(A)] for which the township will reimburse all officers and employees of the township. The township may not reimburse officers and employees for benefits other than those listed in [R.C. 505.60(A)].

Id.[2] The language of R.C. 505.60 and that of related statutory provisions, including R.C. 505.601, demonstrates "a clear intent by the General Assembly to grant townships a broad, flexible range of options under which to provide health care coverage for their officers and employees." 2001 Op. Att'y Gen. No. 2001-025, at 2-141; *see, e.g.*, 2008 Op. Att'y Gen. No. 2008-018, at 2-200 ("R.C. 505.60(A) authorizes a board of township trustees to procure and pay all or a portion of the cost of a high-deductible health care insurance policy that provides any of the benefits listed in R.C. 505.60(A)"); 2005 Op. Att'y Gen. No. 2005-038, at 2-401 to 2-402 (pursuant to R.C. 505.601, a board of township trustees may reimburse township officers or employees for out-of-pocket premiums paid for health care coverage obtained by the officer or employee and provided through his spouse's employer).

With this authority in mind, we turn to the first part of the question, whether Medicare Parts A, B, and D are "insurance" for purposes of R.C. 505.60(A) and R.C. 505.601. The Revised Code does not define "insurance" for purposes of R.C. 505.60 and R.C. 505.601. In the absence of a statutory definition, words and phrases should be given their ordinary meaning. R.C. 1.42; 1985 Op. Att'y Gen. No. 85-062, at 2-230. *Black's Law Dictionary*, 870 (9th ed. 2009) defines "insurance" as:

> 1. A contract by which one party (the *insurer*) undertakes to indemnify another party (the *insured*) against risk of loss, damage, or liability arising from the occurrence of some specified contingency …. An insured party usu. pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk.

Similarly, *Merriam-Webster's Collegiate Dictionary*, 649 (11th ed. 2005) defines "insurance" as "**b**: coverage by contract whereby one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril." In *State ex rel. Duffy v. Western Auto Supply Co.*, 134 Ohio St. 163, 168, 16 N.E.2d 256 (1938), the Ohio Supreme Court broadly defined "insurance" as "a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified

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[2] With respect to the township in question, it is our understanding that in not procuring an insurance policy or group health care services for township officers and employees as provided in R.C. 505.60, the board of township trustees has satisfied all of the conditions listed in R.C. 505.601.

contingency." *See also* 1981 Op. Att'y Gen. No. 81-069, at 2-283; 1981 Op. Att'y Gen. No. 81-045, at 2-179.

As there is no statutory definition of "insurance" for purposes of R.C. 505.60 and R.C. 505.601, we must consider the characteristics of Medicare Parts A, B, and D in light of the ordinary meaning of the term "insurance." Consequently, we now consider the statutes establishing Medicare Parts A, B, and D and case law addressing whether Medicare Parts A, B, and D are insurance. The statutory language establishing Medicare Parts A, B, and D indicates that they are health insurance programs. Medicare Parts A and B are described as insurance programs in 42 U.S.C.S. §§ 1395c-1395d (Medicare Part A) and 42 U.S.C.S. § 1395j (Medicare Part B). Medicare Part D is described as a plan for "prescription drug coverage." 42 U.S.C.S. § 1395w-101. Furthermore, the benefits provided under all three parts are the result of the payment of premiums by beneficiaries in return for the government's payment of health care-related expenses. 42 U.S.C.S. §§ 1395d, 1395f-1395h (Medicare Part A); 42 U.S.C.S. §§1395j-1395k (Medicare Part B); 42 U.S.C.S. § 1395w-113(a) (Medicare Part D).

Various courts have described Medicare Parts A, B, and D as insurance. *Fischer v. U.S.*, 529 U.S. 667, 671, 120 S. Ct. 1780, 146 L. Ed. 2d 707 (2000) ("Medicare is a federally funded medical insurance program for the elderly and disabled"); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 506, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994) ("Medicare is a federally funded health insurance program for the elderly and disabled"); *Martinez v. Richardson*, 472 F.2d 1121, 1123 (10th Cir. 1973) ("[Medicare] Part A is a program of hospital insurance…. [Medicare] Part B creates a supplementary medical insurance for the aged"); *U.S. ex rel. Gale v. Omnicare, Inc.*, No. 1:10CV127, 2012 U.S. Dist. LEXIS 138150, at *2 (N.D. Ohio Sept. 26, 2012) ("Medicare is a federal health insurance program that covers people over 65 or with certain disabilities, and that has four parts: Part A (Hospital); Part B (Medical); Part C (HMO and PPO Plans); and Part D (Prescription Drug Coverage)").

In 1991, the Ohio Supreme Court addressed whether Medicare Part A constituted "insurance" as that term was used in R.C. 2305.27, a statute prohibiting the reduction of a malpractice damage award based upon the receipt of insurance proceeds, payments, or benefits. *Hodge v. Middletown Hospital Assoc.*, 62 Ohio St. 3d 236, 238, 581 N.E.2d 529 (1991). The court concluded that a party's receipt of Medicare Part A benefits may not reduce a medical malpractice damage award to that party because the benefits come within the meaning of "insurance" for the purpose of R.C. 2305.27. *Id.* at 241. The court stated, "[i]n the broadest sense … Medicare Part A is insurance paid for by the employer and employee, for the benefit of the employee." *Id.* at 240. In reaching that conclusion, the court emphasized two characteristics of the Medicare Part A program. *Id.* at 241.

First, the court recognized that Medicare Part A is statutorily described as an "insurance program." *Id.* at 239; 42 U.S.C.S. § 1395c (the statute describes Medicare Part A as "[t]he insurance program"). Second, the court emphasized that Medicare Part A, like other health insurance, is funded by payments made by beneficiaries and their employers and is actuarially determined. *Hodge v. Middletown Hospital Assoc.*, 62 Ohio St. 3d at 240-241. In addition, the taxes withheld from the paychecks of employees are paid into the Federal Hospital Insurance Trust Fund. *Id.*; 42 U.S.C.S. § 1395i. The court, therefore, concluded, "[p]ayment into the trust fund, though involuntary, is in

exchange for health care coverage, and gives rise to a duty on the part of the government to pay benefits when required." *Hodge v. Middletown Hospital Assoc.*, 62 Ohio St. 3d at 240-241. These characteristics led the court to conclude that Medicare Part A is insurance.[3]

Even though *Hodge* discussed Medicare Part A only, the court did not expressly restrict its holding to Medicare Part A to the exclusion of Parts B and D. In light of the similarity in form and function of Parts A, B, and D, we discern no basis for deeming the *Hodge* analysis and conclusion inapplicable to Medicare Parts B and D as well. In addition, Medicare Parts A, B, and D are individual parts of the overall Medicare program, the purpose of which at the time of enactment was to provide a "hospital insurance" program for the aged and disabled. The Social Security Act of 1935, as amended in 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965). As there is no reason to distinguish between Parts A, B, and D in this situation, we find the reasoning of *Hodge* sound and applicable to the question of whether Medicare Parts A, B, and D are insurance for purposes of R.C. 505.60(A) and R.C. 505.601. Upon consideration of the factors and the definitions of insurance set forth above, we conclude that Medicare Parts A, B, and D constitute "insurance" for purposes of R.C. 505.60(A) and R.C. 505.601.

We now turn to the second part of the question, whether a township officer or employee may be reimbursed by the township for out-of-pocket Medicare Part A, B, and D premiums. As Medicare Parts A, B, and D are insurance, the benefits provided thereunder constitute insurance benefits as that term is used in R.C. 505.601. R.C. 505.601 authorizes a board of township trustees to reimburse township officers and employees for out-of-pocket premiums paid by the officer or employee to obtain health care insurance coverage that provides the insurance benefits specified in R.C. 505.60(A) and the township resolution. As discussed above, R.C. 505.60 and R.C. 505.601 afford a broad range of options to townships in order to provide health care insurance coverage to township officers and

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[3] In 2003, R.C. 2305.27 was repealed and R.C. 2323.41 was enacted in its place. R.C. 2305.27 prohibited the reduction of a medical malpractice damage award by insurance proceeds, payments, or other benefits paid under an insurance policy or contract where the premium was paid by the employee or the employer. R.C. 2323.41(A), on the other hand, authorizes a defendant in civil actions upon medical, dental, optometric, or chiropractic claims to

> introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation.

Although the statute at issue in *Hodge* is no longer in effect, the court's analysis of Medicare Part A benefits remains relevant and applicable to the issues involved in this opinion request. The characteristics of Medicare Part A that the *Hodge* court considered determinative are the same characteristics that will determine whether Medicare Parts A, B, and D are insurance for purposes of R.C. 505.60 and R.C. 505.601.

employees. R.C. 505.601 does not restrict the form or type of insurance coverage that may be obtained by the officer or employee to private insurance policies. The only limitation is that the benefits provided by the coverage are consistent with those listed in R.C. 505.60(A) and in the township resolution declaring that the township has chosen not to procure a health care plan under R.C. 505.60. Accordingly, so long as the benefits provided under Medicare Parts A, B, and D are consistent with the benefits identified in R.C. 505.60(A) and the township resolution stating that the township has chosen not to procure a health care plan under R.C. 505.60 and the reimbursement does not exceed the uniform monthly or yearly payment amount set by that resolution, the out-of-pocket Medicare premiums paid by township officers and employees may be reimbursed by the township.[4]

Your predecessor referenced an informal opinion issued by the Auditor of State in 2001. The informal opinion addressed whether R.C. 505.60 authorized a board of township trustees to reimburse the township clerk for the clerk's out-of-pocket Medicare premiums when the township procured a group health care insurance plan for township officers and employees. The informal opinion concluded that a board of township trustees had the authority to make the reimbursement, as long as

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[4] In determining whether to reimburse an individual township officer for out-of-pocket Medicare premiums, a board of township trustees should consider the application of Ohio Const. art. II, § 20, which prohibits a change in the compensation of officers during an existing term of office. Health care insurance benefits are a form of compensation for township officers. *See* 2005 Op. Att'y Gen. No. 2005-031, at 2-330. Accordingly, a change in the provision of health care insurance benefits may constitute an in-term change in compensation depending upon the particular facts involved. *Schulte v. Steingraber*, 136 Ohio App. 3d 624, 629-630, 737 N.E.2d 569 (Wood County 2000); *see also* 2005 Op. Att'y Gen. No. 2005-031 at 2-321 and 2-329 to 2-330; 2004 Op. Att'y Gen. No. 2004-004, at 2-38. This same principle may also apply to a reimbursement for health care insurance premiums that was not provided to township officers prior to the start of their terms of office. *See* 2005 Op. Att'y Gen. No. 2005-031, at 2-333 ("[i]n order for a cash payment option offered under RC. 305.171(G) to be available to a county officer for purposes of Ohio Const. art. II, § 20, not only must R.C. 305.171(G) have been enacted prior to the commencement of the officer's term, but the county commissioners' adoption of a policy authorizing county appointing authorities to make such payments, and the decision of the appointing authority to offer such payments, as legislative or quasi-legislative actions, must have occurred prior to the commencement of the officer's term"); 2004 Op. Att'y Gen. No. 2004-004, at 2-40 ("'by assuming and paying a greater portion of an officer's health insurance premiums than that paid when the officer commenced his term, the county is extending a more valuable fringe benefit to the officer and is thus increasing the officer's compensation'").

To avoid a violation of Ohio Const. art. II, § 20, the township resolution authorizing reimbursement for health care insurance premiums must have been adopted prior to the beginning of the eligible officer's term of office. *See Schulte v. Steingraber*, 136 Ohio App. 3d at 629-630.

the township health care resolution authorizing the reimbursement was consistent with the mandates of R.C. 505.60[5] and Auditor of State Bulletin 96-002.[6]

Under former R.C. 505.60(C) and currently under R.C. 505.60(D), a board of township trustees may reimburse officers' or employees' out-of-pocket premiums attributable to obtaining coverage providing the benefits described in R.C. 505.60(A). The benefits described in the version of R.C. 505.60(A) that was in effect at the time of the Auditor of State's informal opinion, 148 Ohio Laws, Part I, 1236 (Am. Sub. H.B. 187, eff. Sept. 20, 1999), are the same as those identified in the current version of R.C. 505.60(A): "hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, prescription drugs, or sickness and accident insurance[.]" R.C. 505.601, the statute authorizing the reimbursement of out-of-pocket premiums attributable to health care coverage otherwise obtained by a township officer or employee in a

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[5] When the informal Auditor of State opinion was issued in 2001, authority for the reimbursement of out-of-pocket premiums paid by township officers or employees who elected not to participate in the township's health care plan appeared in R.C. 505.60(C), which provided:

> (C) If any township officer or employee is denied coverage under a health care plan procured under [R.C. 505.60(B)] or if any township officer or employee elects not to participate in the township's health care plan, the township may reimburse the officer or employee for each out-of-pocket premium that the officer or employee incurs for insurance policies described in [R.C. 505.60(A)] that the officer or employee otherwise obtains, but not to exceed an amount equal to the average premium paid by the township for its officers and employees under policies it procures under [R.C. 505.60(B)].

148 Ohio Laws, Part I, 1236 (Am. Sub. H.B. 187, eff. Sept. 20, 1999). The same reimbursement authority now appears in division (D) of R.C. 505.60:

> (D) If any township officer or employee is denied coverage under a health care plan procured under [R.C. 505.60] or if any township officer or employee elects not to participate in the township's health care plan, the township may reimburse the officer or employee for each out-of-pocket premium attributable to the coverage provided for the officer or employee and their immediate dependents for insurance benefits described in [R.C. 505.60(A)] that the officer or employee otherwise obtains, but not to exceed an amount equal to the average premium paid by the township for its officers and employees under any health care plan it procures under [R.C. 505.60].

[6] Auditor of State Bulletin 96-002 concluded that the reimbursement of out-of-pocket premiums paid by a township officer or employee who elects not to participate in or who has been denied coverage under the township's health care plan "will be allowed up to the average premium the township is paying for all trustees, the clerk, and employees in the group plan."

township that does not procure health care insurance, also limits the reimbursable premiums to coverage providing the insurance benefits described in R.C. 505.60(A). As the reimbursable premiums in both situations (reimbursement under R.C. 505.60(D) and R.C. 505.601) are limited to the premiums attributable to the insurance benefits described in R.C. 505.60(A), it is reasonable to conclude that out-of-pocket Medicare premiums are reimbursable under R.C. 505.601 as well.

Conclusion

It is, therefore, my opinion, and you are hereby advised that a board of township trustees may reimburse a township officer or employee pursuant to R.C. 505.601 for monthly Medicare Parts A, B, and D premium payments made by the officer or employee, so long as the benefits provided by Medicare Parts A, B, and D are consistent with the benefits identified in the township resolution stating that the township has chosen not to procure a health care plan under R.C. 505.60 and the reimbursement does not exceed the uniform monthly or yearly payment amount set by that resolution.

Very respectfully yours,

MICHAEL DEWINE
MICHAEL DEWINE
Ohio Attorney General