1979 WL 42809 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 14, 1979

***1** The Honorable Robert N. McLellan
Box 794
Seneca, South Carolina 29678

Dear Mr. McLellan:
Your request for an Opinion of this Office regarding the amendments to South Carolina Code of Laws, 1976, Section 1-11-140, has been referred to me for reply.

The General Assembly, in Act 182 of 1978, amended South Carolina Code of Laws, 1976, Section 1-11-140. The amendment provides in part that the South Carolina Budget and Control Board may, through the Division of General Services, provide insurance coverage to 'governmental hospitals and chartered, nonprofit, eleemosynary hospitals in this State so as to protect such hospitals against tort liability.'

Prior to the amendment of Section 1-11-140, the Insurance Reserve Fund constituted a pool of funds derived from premium payments from which payment could be made to insured state agencies, counties, political subdivisions, state employees, state hospitals, state doctors and dentists for losses, such as fire and flood, medical malpractice and other occurrences insured against. It is our understanding that premium payments from all policies issued by the Reserve Fund are and have been treated as a common fund. Subsequently, the fund is divided into categories and a specified amount of the Reserve placed into each category of potential liability such as difference in conditions and fire and extended coverage. One of the funded categories is for hospital professional liability. The coverage for private, eleemosynary hospitals may come from this portion of the fund. Two facts must be noted: first, potential liability of the Fund is not limited by the amount in the Fund; and second, amounts paid into the Fund by governmental entities are available for coverage of liability of private eleemosynary hospitals.

1. You have asked two related questions: first, whether the statute is an unconstitutional subsidy to a private corporation and whether it constitutes unfair competition with what has in the past been considered to be the private business sector.

Article X, Section 11 of the Constitution of South Carolina provides in relevant part that:
'The credit of neither the State nor any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association (or) corporation . . .'

Articles similar to South Carolina Constitution, Article X, Section 11, have been interpreted to prohibit the state from engaging in private business. 63 Am. Jur. 2D, Public Funds, Section 75. See McCullough v. Brown, 41 S.C. 220, 19 S.E. 458 (1893). A number of cases throughout the country have dealt with the question of whether a particular undertaking constitutes engaging in a private business or serves a public purpose. There appear to be no clear rules by which such a distinction may be drawn and the determination is made by the courts on a case-by-case basis.

There are no decisions of the South Carolina Supreme Court which would indicate whether the insurance plan would violate the Constitutional provision. The Attorney General responded to an inquiry regarding the use of funds derived from a county bond issue for the benefit of a private, non-sectarian, eleemosynary hospital by pointing out that, while persuasive arguments could be made on either side of the question and such an issue should be answered by the courts, in his view, the use of public funds in such a manner would not be permitted. 1969 OPS. ATTY. GEN. 2763. While in the instant situation, the funds would

be used for the benefit of an indeterminate class of private, eleemosynary institutions rather than directly applied for the benefit of a single institution, the same principles bear upon the resolution of this issue. This situation is, however, to some degree distinguishable from those cases such as Bolt v. Cobb, 225 S.C. 408 (1954), cited in the Attorney General's opinion. Bolt and the other cited cases dealt with the power to use public funds in order to contract with a private institution for the provision of health care to the public or the lease of public lands to a private eleemosynary corporation for the construction of a hospital. Gilbert v. Bath, 267 S.C. 171 (1976). In such cases, the public funds or lands were given under contractual provisions which 'assure that the constitutional purposes in the authorizing legislation would be preserved'. Id. at 181. Such restrictions are not, of course, present in the legislation in question here.

***2** Also pertinent is the decision of the Montana Supreme Court in the case of State ex rel. Missoula v. Holmes, 47 P.2d 624 (Mont. 1935). In that case, the Court held that a state fund designed to substitute for private insurance on public property was not an unconstitutional entry by the state in the realm of private business.
'. . . We are committed to a holding that the state may engage in business within the limits amounting to a valid exercise of the police power . . .

The act under consideration only applies to the state and its political subdivisions, and only amounts to the creation of a fund in place of insurance, and does not amount to the state's going into business . . . Let it be understood that we are not in any way passing upon the right of the state to enter into the business of trade and commerce, as that question will receive consideration when a case presenting the question is before us.'

(emphasis added, citations omitted). In this case, of course, the Fund provides coverage not only to public property, officers and employees but also to private eleemosynary institutions.

It must be concluded, then, that arrangements between the State and private organizations in which the State retains some control of the institution and insurance funds which insure only state agencies, personnel and property are clearly constitutional. Neither factor is present in the Insurance Reserve Fund's provision of coverage to private, nonprofit, eleemosynary hospitals and some doubt must therefore exist as to the constitutionality of providing such coverage. The question can not be definitively ruled upon in the absence of clear precedent on the issue by the courts of South Carolina.

2. You have asked whether, assuming that it is constitutionally permissible for such insurance coverage to be provided to a private chartered, eleemosynary hospital, it violates the Constitution to select only such hospitals and not other chartered, eleemosynary organizations. I assume from your question that you refer to the due process and equal protection clauses. It is the opinion of this office that, assuming that the provision is otherwise constitutionally valid, the due process and equal protection clauses would not be violated by offering coverage to such hospitals and not to other eleemosynary organizations. It is axiomatic in the law that ordinarily legislation must only have a reasonable basis for distinguishing between groups. If such a reasonable basis exists, then the Constitution is not violated. The legislature could determine that insurance coverage of this sort is necessary in order to encourage the continued existence of eleemosynary hospitals and assure that their services would continue to be available to the public. There is no constitutional requirement that legislation must reach every class to which it might also be applied. 16A CJS, Constitutional Law, Sec. 490(504).

3. You have also asked whether the Insurance Roserve Fund is subject to the laws which regulate insurance, which are found in South Carolina Code of Laws, 1976, Title 38. Unquestionably the legislature could, if it wished, subject the Fund to the regulatory power of the Insurance Commission. It must be determined by reference to the particular statute whether it intended to do so. In making this determination, it is necessary to bear in mind that it is a general rule of statutory construction that the state is not presumed to have intended to subject itself to the provisions of a statute in the absence of an express intention to that effect unless the statute is intended to protect the public. 72 Am. Jur. 2D, States, Territories and Dependencies, Section 9. Further, it should be noted that the Department of Insurance has never in the past sought to regulate the Insurance Reserve Fund. When a statute is ambiguous in its terms and it is necessary to determine the intent of the statute, the long continued and uniform practice of nonenforcement is a significant consideration in interpretation under the principle that contemporaneous

and practical interpretation by authorities charged with the administration of a law is entitled to be given great weight. See Stephenson Finance Company v. South Carolina Tax Commission, 244 S.C. 45 (1963); State v. National Postal Transport Association, 234 S.C. 260 (1959). Sutherland Statutory Construction (4th Ed.) Vol. 2A Section 49.03, et seq. There is some authority for the proposition that legislative inaction following agency interpretation is entitled to some weight in determining whether the legislature intended to adopt the interpretation. Sutherland supra, Section 49.10.

***3** I hope this has been of some assistance to you. If you have any further questions, please do not hesitate to contact me.
Very truly yours,

Katherine W. Hill
Assistant Attorney General

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