



FEB 9 1990

ERISA OPINION 90-02A  
Sec. 3(40), 514

Mr. L. J. Darter, III  
Georgia Insurance Commission  
Seventh Floor, West Tower  
Floyd Building  
2 Martin Luther King, Jr., Drive  
Atlanta, Georgia 30334

Dear Mr. Darter:

This is in reply to your request for an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Physicians and Hospitals Benefits Trust (PHBT) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and whether PHBT is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of that title.

You advise that PHBT was created pursuant to an undated trust agreement. The trust agreement states that the PHBT is authorized to adopt health care and welfare plans for the benefit of employees of its members. Benefit plans may be offered directly from the Trust or by the Trust through contracts with providers. The trust agreement provides that PHBT be administered by a Benefit Committee of three individuals. Each participating employer grants the Benefit Committee the right to exercise trustor powers on its behalf. The Benefit Committee selects the trustees. Vacancies on the Benefit Committee are filled by election of the participating employers. The term "Participating Employer" is defined in Article XV, Section 15.01 as follows:

(j) "Participating Employer" - Any individual employer, whether a corporation, partnership, or sole proprietorship; an association of employees; another trust fund established to provide benefits similar to those of this trust, doing business or organized within the Automotive, Communication, Machinists, Manufacturing, Wholesale, Retail, Distribution, Construction, Finance, Insurance, Real Estate, Cosmetology, Medical Service, Professional Service, Public Service, Personal Services, Repair Service, Legal Services, Education Service, and Business Services Industry which satisfies such requirements for participation as may be established by the Benefit Committee and which adopts, in writing, this Agreement and agrees to be bound by the terms and conditions thereof as the same may from time to time be amended and modified; provided, however, that an employer shall only be eligible for participation if it has common law employees as required by Section 15.01(e) of this Agreement.

There are approximately 10 employers utilizing PHBT in the Atlanta area to provide medical coverage to their employees. In a telephone conversation with a member of the staff of this Office, you also stated that the employers utilizing PHBT to provide benefits to their employees do not constitute a controlled group and that PHBT is not maintained pursuant to any collectively bargained agreement.

Section 3(40)(A) of title I of ERISA defines the term "MEWA" to include:

...an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed

individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained-

- (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
- (ii) by a rural electric cooperative.

PHBT was established and is maintained for the purpose of providing benefits described in ERISA section 3(1); covers the employees of more than two separate, independent employers; is not maintained by a rural electric cooperative; and is not maintained under or pursuant to any collective bargaining agreement. Thus, based upon the information you submitted, it is the position of the Department of Labor (the Department) that PHBT is a MEWA within the meaning of section 3(40).

Although section 514(a) of ERISA provides that any state law or regulation which relates to an employee benefit plan covered by ERISA is preempted, P.L. 97-473 amended section 514(b) of title I of ERISA to provide:

(6)(A) Notwithstanding any other provision of this section-- (i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

Although section 514(b)(6)(B) provides that the Secretary of Labor may prescribe regulations under which the Department may exempt MEWAs which are not fully insured but are employee welfare benefit plans from state regulation under section 514(b)(6)(A)(ii), the Department has previously stated that it did not see the need to prescribe regulations under section 514(b)(6)(B) to exempt MEWAs from state regulation. The Department, at this time, has not changed its position. Accordingly, the Department is not providing MEWAs exemptions under section 514(b)(6)(B) from state regulation.

It is, therefore, the Department's position that PHBT is subject to state regulation at least to the extent provided in section 514(b)(6)(A), regardless of whether it is an employee benefit plan covered by title I of ERISA, because it is a MEWA within the meaning of section 3(40) of that title.

Because your request for an advisory opinion was concerned primarily with the issue of whether or not PHBT is subject to the applicable regulatory authority of the State of Georgia's insurance laws or is saved from such authority under the general preemption provision of section 514(a) of title I of ERISA, and because of the opinion above, we have determined it is not necessary at this time to render an opinion as to whether PHBT is an employee welfare benefit plan within the meaning of section 3(1) of that title.

The preceding constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle  
Director of Regulations and Interpretations