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Re: **Interpretive Opinion No. 07-15, Applicability of the Tenn. Code Ann. § 56-7-101(b)(2) Contract of Insurance Exemption for Medical School Liability Self-Insurance Trusts**

Dear Ms. Bledsoe,

This letter is written in response to your inquiry submitted on or about May 11, 2015, to Mark Jaquish, the Financial Affairs Director of the Insurance Division ("Division") of the Tennessee Department of Commerce and Insurance. Your inquiry requested clarification as to whether a particular self-insurance trust is permissible under Tennessee Insurance Law. Specifically, you asked whether it would be permissible for a self-insurance trust to cover professional liabilities arising out of healthcare activities occurring at multiple, unrelated entities and still maintain exemption from insurance regulation under Tennessee Insurance Law.

The facts as understood by the Division are as follows: there is to become a new affiliation arrangement concerning Vanderbilt University ("Vanderbilt") and the Vanderbilt University Medical Center ("VUMC"). Under this new arrangement, Vanderbilt and VUMC shall become entirely separate legal entities. Vanderbilt shall, going forward, retain legal responsibility for the Vanderbilt University Schools of Medicine and Nursing, some unspecified faculty of the School of Nursing, and the students of the Schools of Medicine and Nursing. The Vanderbilt students will have clinical rotations at VUMC, as well as other medical facilities; thus responsibility for their professional liabilities shall remain with Vanderbilt. VUMC shall retain legal responsibility for the physicians, house staff, and other individuals who provide clinical care to patients at VUMC and additionally hold faculty appointments with Vanderbilt.

Despite this new business structure, for the purposes of facilitating training of medical and nursing students, Vanderbilt and VUMC intend to maintain an academic affiliation.[1] However, from a corporate perspective, Vanderbilt and VUMC are separate legal entities with no affiliation whatsoever. Irrespective of this new business arrangement, Vanderbilt and VUMC would like to use a joint self-insurance trust to insure the professional liability exposure arising out of activities at both Vanderbilt and VUMC.

A provision in the Tennessee Insurance Law exists allowing for universities or hospitals facilitating medical education to provide coverage for professional liability of individuals so affiliated with a medical school. This provision provides, in pertinent part, that:

> Agreements made by colleges or universities operating accredited medical schools, *or* by hospitals or clinics operated by or affiliated with the college or university under which the college or university, hospital, *or* clinic binds itself to indemnify physicians, nurses, other professional employees or faculty, or medical, nursing or allied health students of the college or university for the legal liability of the physician, nurse, or other professional health care employee, or student for loss, damage, or expense incident to a claim arising out of the death or injury of any person as the result of negligence or health care liability in rendering professional service by the employee or student shall not be deemed to be contracts of insurance within the meaning of this title.

Tenn. Code Ann. § 56-7-101(b)(2) (2012) (emphasis added). This section enables universities operating medical schools or medical facilities affiliated with a medical school to establish a self-insurance trust to cover professional liabilities without designating such coverage as insurance within Tenn. Code Ann. § 56-7-101(a). Notwithstanding this exemption, this provision does not provide that such entities may jointly establish such a trust. The presence of the word "or" in reference to which entities may establish such coverage dictates this is an exclusive provision. The university may establish a self-insurance trust to insure the professional liabilities incurred by its students or its medical employees *or* a medical school affiliated hospital may establish such a trust. However, separate entities may not create a self-insurance trust to jointly cover the professional liabilities arising out of each.

The legislative intent in enacting Tenn. Code Ann. § 56-7-101(b)(2) was to assist in the rising costs of medical education. 1976 Tenn. Pub. Acts, c. 769. Specifically, a substantial escalating factor in the cost of medical education was costs associated with university exposure to malpractice liability. *Id.* To combat these rising costs, Tennessee's Eighty-Ninth General Assembly added this exemption to the definition of contracts for insurance to afford universities

[1] As understood by the Division, such an academic affiliation includes an affiliation agreement permitting collaboration between Vanderbilt medical students and outside physicians and other medical professionals employed by VUMC who are not full time faculty at Vanderbilt, for the purposes of enhancing medical education. It is further understood that such academic affiliations exist between Vanderbilt and other outside medical facilities. As such, this academic affiliation has creates no legal relationship between Vanderbilt and VUMC outside of the contractual agreement to so academically collaborate.

medical malpractice protection on a more flexible basis. *Id.* Simply stated, this provision's purpose is to enable universities to affordably protect against professional liability associated with the provision of medical education. Neither the professional liability of a medical facility which allows medical student training nor the creation of joint agreements between medical schools and medical facilities is contemplated therein.

In order for a self-insurance trust to cover both Vanderbilt and VUMC, there must be common ownership or some other legal affiliation between the two, which is lacking in the instant matter. In other words, for a joint self-insurance trust to properly cover Vanderbilt and VUMC, there must be a common ownership nexus between the two; essentially rendering them the same legal entity. It is deficient to claim VUMC is sufficiently affiliated with Vanderbilt through their academic affiliation agreement so as to rise to the level of legal affiliation for the purposes of a self-insurance trust. Under such a scheme, Vanderbilt would be able to cover any facility at which its students performed clinical rotations, including hospitals other than VUMC. Ultimately, for a self-insurance trust to jointly cover both Vanderbilt and VUMC, Tenn. Code Ann. § 56-7-101(b)(2) requires something greater than an academic affiliation; the Division takes the position that this necessitates a legal affiliation. As such, an academic affiliation is not enough to be considered a legal affiliation, but rather simply a contract between the university and the medical facilities, and destroys the contract of insurance exemption.

Conversely, VUMC may establish its own self-insurance trust. That Tenn. Code Ann. § 56-7-101(b)(2) deems the aforementioned joint self-insurance trust impermissible does not preclude a medical facility academically affiliated with a medical school from creating its own self-insurance trust for its own protection. Rather, Tenn. Code Ann. § 56-7-101(b)(2)'s exclusive wording permits a medical facility with a medical school academic affiliation, such as exists here, to create its own self-insurance trust to protect its employees. Essentially, since VUMC does have an academic affiliation with a medical school, should VUMC decide to establish its own, separate self-insurance trust to cover professional liability, this trust would satisfy Tenn. Code Ann. § 56-7-101(b)(2) and thus qualify for the exemption thereunder.

Concisely, Vanderbilt may create a self-insurance trust to cover its medical students and employed medical staff. VUMC, as a hospital with an academic affiliation with a medical school, may also create such a self-insurance trust. Nevertheless, absent a legal affiliation, a joint self-insurance trust between academically affiliated entities destroys the insurance exception found in Tenn. Code Ann. § 56-7-101(b)(2) and is accordingly prohibited.[2]

Please note that the Division has not made an independent investigation of the facts to determine the accuracy or completeness of the information supplied, but has instead relied solely upon the information you have provided. If such information is incorrect or changes substantially, it would be necessary for the Division to reconsider the matter and the position stated herein would be void. This letter expresses the Division's position on enforcement action only and does not purport to express legal conclusions on the issues presented. This position is furnished solely for the benefit and use of the entities described herein. Please be advised that further publication or use of this position may only be made with the Division's prior written consent.

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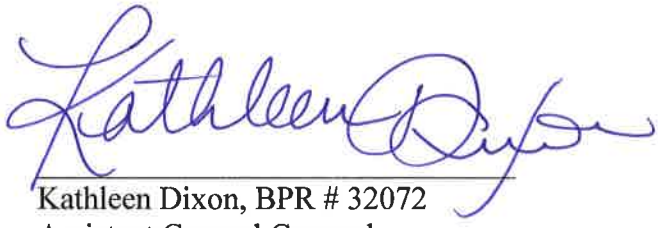
[2] However, the Tennessee Captive Insurance Company Act, found in Tenn. Code Ann. §§ 56-13-101 *et seq.*, may allow for such a pooling of medical malpractice liability between controlled unaffiliated businesses.

This response by the Division is to a specific fact situation relating to self-insurance trust exemption pursuant to Tenn. Code Ann. § 56-7-101(b)(2) of the Tennessee Insurance Laws and should not be construed as a legal position or opinion of the Commissioner of the Tennessee Department of Commerce and Insurance or of any other official in the Department. Please note that the conclusions contained herein are based upon the representations that have been made to the Division, and any different facts or conditions might require a different response. As each inquiry is reviewed on the specific facts presented, this response is based only on such facts and may not be used as precedent by any person or entity. Any variation in the facts presented to the Division by Ms. Sandy Bledsoe could result in a different conclusion than asserted herein.

If you have further questions or concerns regarding this letter, please feel free to contact me.



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