

Legal Opinion: GCH-0057

Index: 2.265

Subject: NC Hsg. Authorities Risk Retention Pool--Workers Comp.

May 22, 1992

MEMORANDUM FOR: Madeline Hastings, Acting Director
Office of Assisted Housing, PH

FROM: Michael Reardon, Assistant General Counsel
Assisted Housing, GCH

SUBJECT: North Carolina Housing Authorities Risk Retention Pool
(NCHARRP) - Workers Compensation Insurance

This responds to your April 13, 1992, memorandum requesting advice as to whether it would be permissible, under the terms of the HUD FY 1992 Appropriations Act, for NCHARRP, which currently provides property and casualty coverage to PHAs in North Carolina, to offer its members workers compensation insurance coverage. Conversely, the North Carolina Interlocal Risk Management Agency, which has been providing workers compensation coverage to its members, would like to offer property and casualty coverage, as outlined in an April 22, 1992, letter from Harvey R. Mathias to Assistant Secretary Schiff.

The question to be addressed is whether approval of these requests would violate the Appropriations Act restriction prohibiting HUD from approving "additional nonprofit insurance entities" until HUD has issued standards for approval and they have become final. HUD is required to establish such standards for approval by regulation adopted after notice and comment pursuant to the Administrative Procedures Act, to become effective not later than one year from October 28, 1991. A proposed rule has received Departmental clearance, but has not yet been forwarded to OMB.

The issue to be resolved is what is a nonprofit insurance entity, for purposes of applying the Appropriations Act restriction. The Conference Report 101-900 at page 28, refers to the formation of "nonprofit insurance pools and risk retention groups under State intergovernmental cooperation laws." The pools here involved were formed under the authority of the Local Government Risk Pool Act, North Carolina General Statutes, Chapter 58, Article 23, and the new pools would be formed under the same authority. The General Counsel for the North Carolina Housing Authorities Risk Retention Pool has cited section 58-23-5 of this statute as the specific authority for the formation and operation of the pools. This section clearly requires that workers compensation coverage be in a separate pool.

You have suggested that the two pools should be considered the same entity for purposes of the Appropriations Act restriction, since they are "governed by the same board of directors, administered by nearly parallel documents, have the same claims management services, and managed as if it were part of the existing pool." Since the pools are organizationally separate under the governing North Carolina statute, having separate organizational documents, and governing bodies, we do not believe they can be considered the same "nonprofit insurance entity." The organizational documents submitted make it clear that the participating PHAs (which are not necessarily the same in both pools) are the members of the pool and elect its board of trustees, similar to a membership nonprofit corporation. An "entity" is generally considered to be a being (other than a natural person) with a separate legal existence which has power to undertake certain transactions. See 20 C.J.S. Entity, p. 722 (1965).

Consequently, we have concluded that the new pools, which would be organized after October 28, 1991, cannot be approved by HUD until after a regulation establishing standards for approval of such entities is in effect. Since the Appropriations Act exception is in the nature of a "grandfather clause" it needs to be construed in this light and not stretched to accommodate certain new entities when others are excluded.