

**U.S. Department of Labor**

Labor-Management Services Administration  
Washington, D.C. 20216



Reply to the Attention of:

OPINION NO. 84-19A  
Sec. 107

APR 26 1984

Mr. Jeffrey J. Leech  
Tucker Arensberg, P.C.  
1200 Pittsburgh National Building  
Pittsburgh, Pennsylvania 15222

Dear Mr. Leech:

This is in reply to your correspondence of September 19, 1983, and earlier letters submitted on behalf of the Asbestos Workers, Local 2 Welfare Fund (the Fund), requesting an advisory opinion concerning the application of the retention of records requirement under section 107 of the Employee Retirement Income Security Act of 1974 (ERISA). We regret that the volume of correspondence concerning ERISA has resulted in a delay in responding to you.

Correspondence sent to the Department on behalf of the Fund contained the following facts and representations. The Fund had employed an outside professional administrator to handle hospitalization and other welfare claims for the Fund's Trustees. These claims were paid by the CNA Insurance Company (CNA). In the course of pursuing a demand to audit the claim files of CNA, the Fund's Trustees were informed by CNA that an audit would not be possible because the contract administrator had destroyed the files. In this regard, it was indicated that the Trustees believe that the destruction of the claim files by the contract administrator was accidental and that there was no intentional or improper motive involved in their destruction. Nevertheless, according to submissions received by the Department, the Trustees no longer have available to them the claim files which they were required to maintain under ERISA. In pursuing this matter, CNA indicated in a letter dated June 14, 1983 (a copy of which was enclosed with a June 16, 1983 submission), that a policyholder does not have a contractual right to audit CNA's claim files. Further, CNA indicated that it did not believe that reconstruction of medical care claim files is mandatory. With regard to this matter, you have inquired whether the Fund Trustees at their own expense must attempt to reconstruct the claim files of the Fund.

Section 107 of ERISA provides, in relevant part, that:

"[e]very person subject to a requirement to file any description or report or to certify any information therefor under this title ... shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain ...."

Because claim records are necessary to the verification, explanation or clarification, and the checking for accuracy and completeness, of information contained in the annual report (Form 5500

series) which is or may be required to be filed by an employee benefit plan, claim records are records required to be retained under section 107 for the requisite six year period. Records required to be retained under section 107 also include, where appropriate, any information required to be certified to the administrator under title I of ERISA (e.g., information required to be certified to the administrator under ERISA section 103(a)(2)<sup>1</sup> by an insurance carrier or other organization or institution described in that section).

Persons required to retain records for purposes of section 107 include any person who is or may be required under title I to file any description or report (e.g., the plan "administrator"<sup>2</sup>) or to certify any information (e.g., any insurance carrier or other organization or institution described in section 103(a)(2) of ERISA). Accordingly, if the Fund Trustees are the "administrator", within the meaning of ERISA section 3(16), and if CNA is required to certify information to the administrator under title I of ERISA, both the Fund Trustees and CNA would be "persons" required to maintain records for purposes of section 107.

The statutory duty on persons required to retain records in accordance with section 107 cannot, in the view of the Department, be avoided by contract, delegation or otherwise.<sup>3</sup> Thus, if the administrator of a plan arranges with an independent contractor (such as a third-party "contract administrator") to perform functions with respect to the plan and, pursuant to the arrangement, such independent contractor prepares or receives the type of records contemplated to be retained by section 107 and keeps physical custody of such records, the statutory requirement to see that such records are retained for the required period remains with the administrator, and the administrator must make such agreements and arrangements with the independent contractor as are necessary to ensure that the records are so retained.

Where records required to be retained under section 107 are lost or destroyed prior to the expiration of the six year period prescribed in that section, it is the view of the Department that such loss or destruction does not discharge the persons required to retain records from their statutory duty under section 107 with regard to the purposes for which such records are required to be retained under

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<sup>1</sup> Section 103(a)(2) provides, in relevant part, that "If some or all the information necessary to enable the administrator to comply with the requirements of this title is maintained by - (A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account ... such carrier, organization ... shall transmit and certify the accuracy of such information to the administrator within 120 days after the end of the plan year (or such other date as may be prescribed under regulations of the Secretary)."

<sup>2</sup> Section 3(16) provides, in relevant part, that: (A) The term "administrator" means - (i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) .... (B) The term "plan sponsor" means ... (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

<sup>3</sup> The Department indicated in Advisory Opinion No. 79-71A that, when the administration of a plan is transferred, an accompanying transfer of claims records is consistent with the purposes and overall statutory scheme of ERISA, provided (1) that the successor plan administrator agrees to maintain those records in a manner and for at least the same period of time as would have been required of the predecessor plan administrator in complying with his responsibilities under section 107 of ERISA, and (2) that the predecessor administrator retains a listing of the records transferred.

that section. However, the nature of the remedy for a breach of such duty -- that is, whether lost or destroyed records can or should be reconstructed and whether the persons responsible for the retention of records are or should be personally liable for the cost incurred in connection with the reconstruction of records -- is necessarily dependent on the facts and circumstances of each case.

For example, the ability to reconstruct lost or destroyed records is contingent on the existence of other records or documentation from which the lost or destroyed records can be reconstructed. Therefore, it would appear that where records or documents do not exist from which lost or destroyed records could be reconstructed, the reconstruction of the lost or destroyed records would be impossible in fact. Where the persons required to retain records know or should know that such reconstruction is impossible or possible only at an excessive or unreasonable cost, such persons would not be under a duty to reconstruct or attempt to reconstruct the lost or destroyed records.

Similarly, where the persons required to retain records have access to records or documentation from which the lost or destroyed records could be reconstructed, it is the view of the Department that the reconstruction of such records would be required to the extent necessary for the persons required to retain records to discharge their statutory duty under section 107. In this regard, however, it should be noted that where the persons required to retain records have access to records or documentation from which the lost or destroyed records could be reconstructed and such records would be available to the persons required to retain records for the remainder of the requisite six year record retention period, the reconstruction of the lost or destroyed records would not be required to discharge such persons' duty under section 107, provided that the persons required to retain records make such agreements and arrangements necessary to ensure that such other records and documents are so retained and available for the remainder of the requisite six year period.

Finally, as to whether the persons responsible for the retention of records are or should be liable for any costs incurred in connection with the reconstruction of records, it is the view of the Department that, as indicated above, such a determination can only be made on the basis of all the facts and circumstances. Considerations relative to such a determination would include, among other things, the circumstances of the loss or destruction and the extent to which the persons required to retain records under section 107 entered into agreements and arrangements to ensure that required records would be retained in accordance with the provisions of the statute.

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

Sincerely,

Morton Klevan  
Deputy Administrator  
Office of Pension and Welfare Benefit Programs