U.S. Department of Labor Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210

OPINION NO. 84-41A
Sec. 3(1), 3(4), 3(5), 3(40), 514(b)(6)

OCT 26 1984

Mr. Craig A. Smith
Hershner, Hunter, Miller, Moulton & Andrews
P.O. Box 763
Springfield, Oregon 97477

Dear Mr. Smith:

This is in reply to your letters of November 30, 1983, and March 6, 1984, requesting an advisory opinion regarding applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically you ask whether an insurance program offered by the California Autobody Association (CAA) for the benefit of its members' qualified employees is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

You advise that CAA is a trade association organized in California as a nonprofit corporation. CAA members are in the autobody repair industry throughout California. The By-Laws of CAA provide in Article III for four classes of membership:

a. Regular Members - Any person, firm or corporation engaged in the business of autobody repair and reconstruction within the State of California.

b. Associate Members - Any person, firm or corporation engaged in the manufacturing or supplying of goods or services to the autobody industry, or any person, firm or corporation engaged in the business of autobody repair and reconstruction outside the State of California excluding insurance company employees and their agents.

c. Affiliate Members - Any person who is employed by a Regular Member.

d. Honorary Members - An individual approved by the CAA Board of Directors.

Only Regular Members are entitled to vote.

CAA adopted a partially self-funded, partially insured, third party administered health and accident insurance program for the benefit of employees of CAA members. The program may be adopted by any CAA member which applies to CAA and is approved by the insurer, American National Insurance Company. The program is administered by Stewart & Murphy, Inc. (d.b.a. SM Administrators) under an agreement with CAA.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to include:

> … any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Although the CAA insurance program provides benefits among those identified in section 3(1), to be an employee welfare benefit plan, that program must also, among other criteria, be established or maintained by an employer, an employee organization, or both. The terms "employee organization" and "employer" are defined by sections 3(4) and 3(5) of ERISA respectively as follows:

> (4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.
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> (5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

CAA is not an employee organization within the meaning of section 3(4) of ERISA. If membership in CAA by employees is limited to membership as Affiliate Members, employees cannot be said to participate in CAA since such membership carries no voting rights. If, on the other hand, employees are eligible for membership as Regular Members, the membership would not be conditioned upon employment status but would be open to both employees and employers.

With regard to whether CAA is an employer within the meaning of section 3(5) of ERISA, the Department of Labor (the Department) has taken the view, on the basis of the definitional provisions of ERISA as well as the overall statutory scheme, that, in the absence of the involvement of an employee organization, a "multiple employer" plan (i.e., a plan to which more than one employer contributes) may, nevertheless, exist where a cognizable, bona fide group or association of employers establishes a benefit program for the employees of member employers and exercises control of the amendment process, plan termination, and other similar functions on behalf of these members with respect to a trust established under the program. We have included, for your information, a number of recent letters in this area issued by the Department.

Whether a bona fide employer association exists is generally a factual question. Among the factors considered include: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was

formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the association and the benefit program.

The Department ordinarily will not issue an advisory opinion when the nature of the question is factual in nature. See ERISA Procedure 76-1 (Advisory Opinion Procedure), section 5.01 (41 FR 36282, August 27, 1976).

Because of the limited information you have supplied concerning the nature, history, functions, and purposes of CAA, we decline to express an opinion as to the status, under ERISA title I, of the CAA insurance program and the CAA insurance program vis a vis Regular Members of CAA.

However, employer Associate Members of CAA, although their employees would appear to be eligible to participate in the CAA insurance program, have no voting rights with respect to CAA matters. The Department believes that the concept of an association acting for an employer with respect to an employee benefit plan embodies a requirement, as a minimum, that such employer have a voice in the management of the association. For that reason, the Department concludes that, in making benefits under the CAA insurance program available to employees of Associate Members of CAA by establishing the CAA insurance program, CAA has not acted (in relation to the CAA insurance program) for its Associate Member employers within the meaning of section 3(5) of ERISA. Accordingly, it is our view that the CAA insurance program was not established by CAA acting as a group or association of its Associate Member employers; rather, each Associate Member employer of CAA who has elected to provide, for its employees, benefits through the CAA insurance program has established its own separate plan subject to title I of ERISA.

We would point out, moreover, that the CAA insurance program appears to be a multiple employer welfare arrangement (MEWA) under section 3(40) of ERISA, as amended by the Act of January 14, 1983 (Pub. L. 97-473). Section 514(b)(6) of ERISA as amended, provides an exception to the general preemption provisions of section 514(a) of ERISA so that it is clear that a MEWA, whether it is an employee benefit plan covered under title I of ERISA or not, may, to some extent, be covered by state insurance laws.

Accordingly, even if the CAA insurance program were an employee welfare benefit plan, or a trust established under such a plan, within the meaning of title I of ERISA, state insurance law would apply to it to some extent because it appears that the CAA insurance program would be a MEWA.

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

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator for Regulations and Interpretations

Enclosures