

**U.S. Department of Labor**

Pension and Welfare Benefits Administration  
Washington, D.C. 20210



JUN 15 1990

ERISA OPINION 90-22A  
Sec. 3(40), 514(b)

Maxine Manor, CPIW  
Senior Investigator  
Oregon Department of Insurance and Finance  
21 Labor and Industries Building  
Salem, Oregon 97310

Dear Ms. Manor:

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 Derby Association Trust, Inc. (the Trust) is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of title I of ERISA.

You advise that the Trust was incorporated on March 1, 1989 by Mr. Garald W. Derby and Mr. Mark G. Derby. The Articles of Incorporation authorize 500 shares of stock to be issued. You advise that Mr. Garald W. Derby owns 60 shares and Mr. Mark G. Derby owns 40 shares of the stock. Employers wishing to provide group health insurance benefits to their employees through the Trust apply to purchase shares of stock in the Trust on their application for the group health coverage. There is no limitation in the Trust's Articles of Incorporation or By-Laws which limits who may become a stockholder in the Trust. You stated in a telephone conversation with a representative of this Office that there is no indication that the Trust is maintained pursuant to one or more collectively bargained agreements and that there is no indication that the participating employers/stockholders of the Trust constitute a "control group" within the meaning of section 3(40)(B).

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.

Section 3(40)(B) provides in pertinent part:

For purposes of this paragraph --

- (i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,
- (ii) the term "control group" means a group of trades or businesses under common control, . . .

Based upon the information you submitted, it is the position of the Department of Labor (the Department) that the Trust is a MEWA within the meaning of section 3(40). The Trust 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.

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, section 514(b) of title I of ERISA provides:

(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.

Although section 514(b)(6)(B) provides that the Secretary of Labor may prescribe regulations under which the Department may exempt MEWAs 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 the Trust 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.

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.

Because your request for an opinion was concerned primarily with the issue of whether or not the Trust is subject to the applicable regulatory authority of the State of Oregon'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 the Trust is an employee welfare benefit plan within the meaning of section 3(1) of that title.

Sincerely,

Robert J. Doyle  
Director of Regulations and Interpretations