

U.S. Department of Labor

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



Jan 7 1991

Mr. Malcom C. Wells
Policy and Rate Analyst
West Virginia Insurance Commission
2019 Washington Street, East
Charleston, West Virginia 25305

91-02A

ERISA SEC.
3(40), 514(b)(6)

Dear Mr. Wells:

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 Stop Loss Concepts Employee Benefit Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of title 1 of ERISA and whether the Trust is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of that title and therefore subject to applicable state insurance commission regulation.

The information you submitted indicates that the trust was created pursuant to a trust agreement dated December 1, 1985, between various employers, as Trustors, and Mr. Robert Markwith, as Trustee. The trust agreement provides that the purpose of the Trust is to provide health insurance, health care service, life insurance, death benefits, disability insurance, disability benefits, indemnity for legal services, legal care and services, and/or other benefits for "Participating Employers" (the Trustors), their employees, and the beneficiaries of Participating Employers and their employees. Article II, Section 2.01(g) of the trust agreement defines the term "Participating Employer" to include, "Any individual employer, whether a corporation, partnership, sole proprietorship, an association, or otherwise,..." Which meets the requirements for participation set by the Benefit Committee of the Trust and which adopts the trust agreement and agrees to be bound by it.

In a telephone conversation with a representative of the office you stated that, to your knowledge, the Trust is not maintained under or pursuant to any collective bargaining agreement, the Participating Employers are not a "control group" within the meaning of section 3(40)(B), and there is no rural electric cooperative in any way involved with the Trust.

Section 3(40)(A) of title I of ERISA defines the term "MEWA" to include:

. . .an employee welfare benefit plan of 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) provide 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 submitting, 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 two or more 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 states law or regulation which relates to an employee benefit plan covered by ERISA is preempted, section 514(b) of title 1 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 for which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law or any State which regulate insurance may apply to such arrangement to the extent that such law provides--

(I) standards, requiring the mainstreamed 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), individuals 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 such regulations. The Department, at this time, has not changed its position. Accordingly, the Department is not exempting MEWAs from state regulation.

It is, therefore, the Department's position that the preemption provisions of ERISA do not preclude state regulation of the plan 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.

Enclosed for your information is a copy of Opinion 90-18A (issued July 2, 1990) which discusses the scope of the states' authority to regulate pursuant to section 515(b)(6)(A).

Because your request for an opinion was concerned primarily with the issue of whether or not the plan is subject to the applicable regulatory authority of the State of Texas's insurance laws or is saved from such authority under the general preempted 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 Plan is an employee welfare benefit plan within the meaning of section 3(1) 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 offset of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

Enclosures