



December 7, 1994

Mr. Thomas R. Giltner
Cox & Smith Incorporated
112 East Pecan Street, Suite 2000
San Antonio, Texas 78205

94-41A
ERISA SECTION
514(a)

Dear Mr. Giltner:

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 section 514(a) of Title I of ERISA preempts the application of the Texas Unclaimed Property Statutes (Tex. Prop. Code Ann. Title 6 (West 1985)), with the result that the State of Texas may not assume custody over unclaimed benefits of those participants in the Luby's Cafeterias, Inc. Employees Profit-Sharing and Retirement Trust (the Plan) who cannot be located.

You advise that Luby's Cafeterias, Inc. (the Company) sponsors the Plan for its eligible employees. You further advise that, in the normal operation of the Plan, the plan administrator has occasionally been unable to locate a participant or beneficiary entitled to a distribution of retirement benefits. You interpret Section 7.10 of the plan document, which provides a procedure in the event a participant or beneficiary fails to claim a distribution, to permit or require your current practice in such circumstances, which you describe as follows. If a distributee fails to claim a distribution under the plan, the amount of the unclaimed benefit is transferred to an account styled "Terminated Employees' Account," which is an account segregated from the Plan's other bank accounts, but is an account of the Plan. The Plan maintains records to indicate the amount of each "lost" participant's or beneficiary's interest in the account. If a lost participant or beneficiary is later located, his or her benefits are paid from the Plan's main account, which is then reimbursed from the Terminated Employees' Account. If a lost participant or beneficiary is not located within four years, you represent that his or her share in the Terminated Employees' Account is then transferred to the Plan's main account. If the lost participant or beneficiary is located at any time after this transfer occurs, you represent that his or her benefits are reinstated and paid by the Plan.

In your request, you further assert that Section 7.10 of the Plan, as interpreted above, fully complies with Treasury Regulation section 1.411(a)-4(b)(6), which provides:

(b) Special rules. For purposes of paragraph (a) of this section, a right is not treated as forfeitable--

(6) Lost beneficiary: escheat. In the case of a benefit which is payable, merely because the benefit is forfeitable on account of the inability to find the participant or beneficiary to whom payment is due, provided that the plan provides for reinstatement of the benefit if a claim is made by the participant or beneficiary for the forfeited benefit. In addition, a benefit which is lost by reason of escheat under applicable state law is not treated as forfeiture.

You further advise that § 72.101 of the Texas Unclaimed

Property Statutes provides:

§ 72.101. Personal Property Subject to Escheat

Personal property, other than traveler's checks, is presumed abandoned and subject to escheat if, for longer than seven years:

- (1) the existence and location of the owner of the property is unknown to the holder of the property:
- (2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised: and
- (3) a will of the owner of the property has not been recorded or probated in the county in which the property is located.

Section 514(a) of Title I of ERISA provides:

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

Section 514(a) does not merely preempt state laws that conflict with Title I of ERISA, but broadly preempts all state laws related to employee benefit plans. The reasons for the broad preemption of state laws under ERISA were succinctly stated by Senator Javits, a major sponsor and floor manager of the bill that became ERISA, during its final consideration:

Both House and Senate bills provided for preemption of State law but -- with one major exception appearing in the House Bill -- defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension plans not clearly connected to the Federal scheme.

Although the desirability of further regulation -- at either the State or Federal level -- undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required -- but for certain exceptions -- the displacement of State action in the field of private employee benefit programs. (120 Cong. Rec. S15751 (daily ed. Aug 22, 1974)).

It is the view of the Department of Labor (the Department) that, if the above-quoted section of the Texas Unclaimed Property Statutes were applied to require the Plan to pay to the State amounts held in the Terminated Employees' Account, or in other accounts of the Plan, pursuant to the procedures described above, then such application of the section would be preempted under section 514(a) of ERISA.² Such an application of the State escheat law would directly affect the core functions of the Plan by reducing, through the escheat, the amount of plan assets held in trust for the benefit of all participants and beneficiaries of the Plan.³ Moreover, because the statute at issue is not a law regulating insurance, banking or securities, it is not saved from preemption under section 514(b)(2).⁴

This letter 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.

Sincerely,

ROBERT J. DOYLE
Director of Regulations
and Interpretations

¹ You represent that, when a distribution is for benefits valued at less than \$3,500, the plan trustee mails a check to the last known address of the unlocated participant. If the check is not cashed after a reasonable period of time (presumably no more than a few months), the trustee cancels the check and transfers the same amount to the Terminated Employees' Account.

² In Opinion 78-32A (December 22, 1978), the Department concluded that a provision of the Illinois Uniform Disposition of Property Act was preempted as applied to employee benefit plans. In Opinion 79-30A (May 14, 1979) the Department reached the same conclusion with respect to a provision of California's Unclaimed Property Law that expressly referred to employee benefit trust dispositions. In Opinion 83-39A (July 29, 1983), the Department found that a section of the New York Abandoned Property Law, which addressed the escheat of "unclaimed insurance proceeds other than life insurance," was saved from preemption under ERISA § 514(b)(a)(A) as a law regulating insurance.

³ In our view, the decision of the United States Court of Appeals for the Second Circuit in *Aetna Life Ins. v. Borges*, 869 F.2d 142 (2d Cir. 1989), is clearly distinguishable. In that case, the court considered the application of a state escheat law to amounts held in reserve by an insurance company to cover benefit checks issued pursuant to an insurance contract with an employer to provide welfare benefits, which checks were never presented by the participant or beneficiary for payment. The court found that the application of the escheat law in those circumstances would have only an indirect economic and administrative impact on the plan that was too remote and tangential to trigger preemption.

⁴ We note that Treasury Regulation § 1.411 (a)-4(b)(6) provides that a benefit "lost by reason of escheat under applicable state law" will not be treated as an impermissible forfeiture under Internal Revenue Code § 411(a). This regulation, however, provides no guidance as to whether a particular application of state escheat law is preempted under ERISA § 514.