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Hearing Officer

BEFORE THE DIRECTOR OF THE DEPARTMENT OF INSURANCE

STATE OF IDAHO

In the Matter of:	)	Docket No. 18-2622-10
TIMBER PRODUCTS MANUFACTURERS TRUST	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PRELIMINARY ORDER**

The Timber Products Manufacturers Trust ("the Trust") is a multiple employer welfare arrangement (MEWA), as defined in the Employee Retirement Income Security Act of 1974 ("ERISA"), operated by the Timber Products Manufacturers Association ("the Association"), based in Spokane, Washington. The purpose of the Trust is to provide health care benefits to the employees of businesses that belong to the Association. As a result, the Trust provides benefits to employees in multiple states, including Idaho.

The Trust is also a "self-funded plan" as defined in Idaho Code § 41-4002(9). Title 41, Chapter 40, Idaho Code ("Chapter 40"), regulates self-funded plans through the Idaho Department of Insurance ("Department"). Because the Trust covers beneficiaries that reside in the state of Idaho, it is subject to the provisions of Chapter 40, but only "to the extent that state regulation of the arrangement or plan is not preempted by [ERISA]."[1]

One provision of Chapter 40, section 41-4003, prohibits self-funded plans from operating in the state of Idaho unless they first register with the Director of the Department ("Director"). By registering a plan is "deemed" not to be in the business of insurance, relieving it of compliance with most other provisions of the insurance code outside of Chapter 40.[2] To register, a plan must complete an application and attach, *inter alia*, a copy of the trust agreement, a written statement of benefits, projected income and disbursements, an actuarial study, and copies of all contracts, including a stop-loss insurance agreement.[3]

The Trust had applied for registration, and was a registered plan when, sometime prior to January, 2010, the Department determined that it would be appropriate to review the plan documents of the Trust and other registered plans to determine if they remained in compliance with Chapter 40. A letter was sent to the Trust requesting a copy of plan documents and any amendments thereto. The Trust complied and sent the requested documents.[4] After review, the

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[1] Idaho Code § 41-4001(2).

[2] Idaho Code § 41-4003(3).

[3] Idaho Code § 41-4005.

[4] Although it sent the documents, the Trust initially disputed whether the Director had authority to request them after a plan had been registered, but the Trust apparently chose not to pursue this issue on appeal.

Department sent a letter to the Trust, dated January 27, 2010.[5] The letter set forth a series of items that the Department determined to be deficiencies in the plan documents. Through a series of letters that followed between the Department and the Trust, most of the issues were resolved. However, in its May 14, 2010, letter to the Department, the Trust requested a hearing to address a few remaining issues.

On August 18, 2010, a contested case hearing was held pursuant to Idaho Code § 41-232(2)(b).[6] John C. Keenan, Deputy Attorney General, appeared on behalf of the Department. J. Brian Davis, Health Plan Director for the Association appeared by telephone conference representing the Trust. Both the Department and the Trust subsequently submitted briefs.[7] At the hearing and in their briefs, the Department and the Trust agree that two main issues are before the hearing officer. They are summarized as follows:

1. Are the requirements of Idaho Code § 41-4023(1), relating to pre-existing conditions, and Idaho Code § 41-4023(2) and (3), relating to coverage for newborns and adopted children, applicable to the Trust?
2. Is IDAPA 18.01.74 applicable to the Trust's coordination of benefits provision, and if so, is it inconsistent with IDAPA 18.01.74?

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[5] This is the first of a series of letters back and forth between the Department and the Trust included in Exhibit 3 and admitted by stipulation of the parties at the hearing.

[6] 41-232(2)(b) reads as follows:

HEARINGS IN GENERAL. (1) The director may hold a hearing which he deems necessary for any purpose within the scope of this code.
(2) The director shall hold a hearing:
(a) If required by any provision of this code, or
(b) Upon written demand for a hearing by a person aggrieved by any act, threatened act or failure of the director to act, or by any report, rule, regulation or order of the director (other than an order for the holding of a hearing, or an order on a hearing of which hearing such person had actual notice or pursuant to such order).

[7] The hearing officially closed upon the delivery of the final brief November 4, 2010.

Based on the evidence presented, the hearing officer makes the following Finding of Fact, Conclusions of Law, and Preliminary Order.

FINDINGS OF FACT

1. Sometime prior to January, 2010, the Department initiated a review of self-funded plans governed by Title 41, Chapter 40, Idaho Code, and requested documents from those plans, including the Trust.

2. The Trust complied with the Department's request by sending the documents.

3. After reviewing the documents, the Department sent a letter to the Trust, dated January 27, 2010, which was the first of a series of letters between the Department and the Trust in the administrative review process that is documented in Exhibit 3, admitted at hearing.

4. The January 27, 2010 letter set forth the Department's concerns and problems with the Trust's documents, as they relate to requirements enforced by the Department.

5. At the end of the administrative review process, all but two issues had been resolved. Those two issues were:

   a. Are the requirements of Idaho Code § 41-4023(1), relating to pre-existing conditions, and Idaho Code § 41-4023(2) and (3), relating to coverage for newborns and adopted children, applicable to the Trust?

   b. Is IDAPA 18.01.74 applicable to the Trust's coordination of benefits provision, and if so, is it inconsistent with IDAPA 18.01.74?

6. The Trust requested a hearing pursuant to Idaho Code § 41-232(2)(b) to address these two questions.

CONCLUSIONS OF LAW

1. The Trust is a self-funded plan, as defined in Chapter 40.

2. As a self-funded plan, the Trust is subject to the provisions of Chapter 40, unless exempted.

3. For purposes of this hearing, the Trust is a multiple employer welfare arrangement (MEWA), as defined in the Employee Retirement Income Security Act of 1974 ("ERISA"), and therefore, also as defined in Chapter 40.

4. For purposes of this hearing, the Trust is an ERISA-covered plan.

5. Although the Trust is at least partially self-funded, the Trust is not fully insured.

6. The Trust is subject both to the provisions of Title I of ERISA ("Title I"), and to state insurance law to the extent state law is not inconsistent with Title I.

7. Title 41, Chapter 40, Idaho Code, regulates insurance within the meaning of 29 U.S.C. § 1144(b)(6)(A)(ii).

8. Title 41, Chapter 40, Idaho Code is inconsistent with Title I only if it directly conflicts with Title I.

9. The requirements of Idaho Code § 41-4023 are not inconsistent with Title I.

10. As a result, the requirements of Idaho Code § 41-4023 are applicable to the Trust.

11. IDAPA 18.01.74 ("Rule 74") is applicable to plans regulated under Chapter 40, including MEWAs.

12. Rule 74 does not require the Trust to have a COB provision in its plan, but if the Trust chooses to put a COB provision in its plan, it must be "consistent with [Rule 74]". A COB provision need not be identical or verbatim to be consistent.

13. The Trust's plan contains a COB provision so it must be consistent with Rule 74.

14. The Trust's COB provision is not consistent with Rule 74 because it defines a "plan" contrary to Rule 74 (and the Model Rules) resulting in coordination with plans for which coordination is not permitted (by both Rule 74 and the Model Rules).

15. As a result, the Trust's COB provision is not compliant with Rule 74 as required by law.

PRELIMINARY ORDER

I. APPLICABILITY OF IDAHO CODE § 41-4023 TO THE TRUST

A. History of MEWAs

MEWAs, as they are known today, were created in 1983. Prior to that, the predecessor of MEWAs, multiple employer trusts ("METs") had become prevalent in response to steadily increasing health care costs. They were promoted to small business as a means of lowering costs, and because they were promoted as ERISA-covered employee welfare benefit plans, state regulators could not deem them to be insurance companies due to the ERISA "deemer" clause. As a result, METs operated in a regulatory void, and while many METs were legitimately operated, many were unable to pay their obligations. This ultimately resulted in Congress amending ERISA in 1983, effectively eliminating METs, creating MEWAs, defining them, and clarifying the ability of states to regulate them.

A MEWA is defined by ERISA as any employee welfare benefit plan or other arrangement that is established or maintained by two or more employers to offer or provide welfare benefits to their employees. MEWAs permit small employers to provide welfare benefits by pooling their risks, resources, and employees to achieve group purchasing power. Alternatively, a MEWA may be an association-sponsored plan, as is the Trust, where the employers usually have membership in a trade association representing a common industry.

Benefits are provided either by purchasing insurance at more favorable rates or, as in the case of the Trust, by establishing a joint self-insured plan funded through a tax-exempt trust.

B. 1983 ERISA Amendments

The regulatory scheme enacted by the 1983 amendments essentially created a partial exception to the "deemer" clause for employee welfare benefit plans that are also MEWAs, but the level of permissible state regulation depends on whether a MEWA is insured or uninsured, and whether a MEWA is an ERISA-covered plan. 29 U.S.C. § 1144(b)(6)(A). If a MEWA is not an ERISA-covered plan it is entirely subject to state law and regulation.

If a MEWA is **fully insured** and it is an ERISA-covered plan, all state laws are preempted except those specifying standards requiring the maintenance of reserves and the payment of contributions. A MEWA is considered fully insured only if the Secretary of Labor determines that the amounts of all benefits provided by the MEWA are guaranteed under a contract or policy of insurance issued by a licensed insurance company, insurance service, or insurance organization qualified to do business in a state.

If a MEWA is an ERISA-covered plan which is **not fully insured**, only those state laws which are inconsistent with ERISA are preempted. This category includes self-funded plans or stop-loss plans. Under a stop loss arrangement, an insurance company generally agrees to reimburse a plan when claims exceed a certain amount. The plan itself pays benefits out of its own assets until the stop-loss trigger point is reached. State insurance regulation of these plans is not limited to reserve and contribution requirements, but also encompasses other insurance laws which are not inconsistent with ERISA. Significantly, plans that fall into this category can be regulated by states to a greater extent than other types of ERISA-covered plans.

C. Status of the Trust

While there is no specific evidence in the record establishing that the Trust is a MEWA, it is apparent that both the Department and the Trust consider the Trust to be a MEWA for purposes of this hearing.[8] Likewise, although there is no specific evidence in the record establishing that the Trust is an ERISA-covered plan, it is apparent that both the Department and the Trust consider the Trust to be an ERISA-covered plan.[9] Additionally, since the record reflects that the Trust is at least partially self-funded, it is apparent that the Trust is not fully insured.[10] As a result, the Trust is subject both to the provisions of Title I of ERISA ("Title I"), and to any state insurance law to the extent such state law is not inconsistent with Title I. 29 U.S.C. § 1144(b)(6)(A)(ii). This is significant because it means that the Department can regulate the Trust in ways that it cannot regulate other ERISA-covered plans.

D. Inconsistent with Title I

The meaning of the phrase "to the extent not inconsistent with" Title I of ERISA has not been well developed in case law but cases clearly hold that states can require MEWAs to register, to provide information, and meet requirements designed to assure they are and remain

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[8] The Department of Labor ("DOL") takes the position that whether an arrangement is a MEWA is a question of federal law, and ERISA Section 514 preempts state law to the extent that it purports to govern the determination of whether a particular arrangement is a MEWA. DOL Adv. Op. 2007-05 A (Aug. 15, 2007). While a DOL process to determine whether an arrangement is a MEWA is available, it is not required and state regulation is not dependant on it. *See also Employers Resource Management Co. v. Department of Insurance*, 143 Idaho 179, 141 P.3d 1048 (2006).

[9] The Trust has asserted that it is an ERISA-covered plan and the Department has not argued otherwise.

[10] The Trust does not assert that it is fully-insured, and one court has held that a plan cannot be considered fully-insured unless certified as such by the DOL. *Custom Rail Employer Welfare Trust Fund v. Geeslin*, 491 F.3d 233, 41 EB Cases 1023 (5th Cir. 2007). There is no such certification in the record here.

fiscally sound.[11] The Department of Labor ("DOL"), on the other hand, has clearly taken the view that, unless ERISA provides a specific rule, the states may supply one to any MEWA that is not fully insured. According to an *Information Letter* issued by DOL, DOL has expressed the view that: (1) a state insurance law would not be inconsistent with Title I if it requires a MEWA to meet more stringent standards of conduct or to provide greater protection to plan participants and beneficiaries than required by ERISA; and (2) a state law regulating insurance would not, in and of itself, be inconsistent with the provisions of Title I if it requires a license or certificate of authority as a condition to transacting business, requires maintenance of specific reserves or contributions designed to ensure that the MEWA is able to satisfy its benefit obligations in a timely fashion, requires financial reporting, examination or audit, or subjects persons who fail to comply with such requirements to taxation, fines, civil penalties and injunctive relief. *DOL Information Letter to John W. Oxendine, Insurance and Safety Fire [sic] Commissioner, Georgia Department of Insurance (8/23/02).*

Two cases are particularly instructive on this issue. First, the Court of Appeals for the Tenth Circuit has ruled that ERISA does not bar Colorado from regulating partially insured MEWAs as insurance entities, citing with approval the DOL position (as set forth in DOL Adv. Op. 90-18A) for the rule that state law is not inconsistent with ERISA if it does not conflict with

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[11] See, e.g., *MDPhysicians & Assoc., Inc. v. Wrotenbery*, 762 F. Supp. 695, 699 (N.D. Tex. 1991), aff'd sub nom. *MDPhysicians & Assoc., Inc. v. Texas State Bd. of Ins.*, 957 F.2d 178 (5th Cir.) (partially self-funded MEWA not immune from Texas insurance regulation to extent not inconsistent with ERISA; state could require MEWA to apply for certificate of authority to transact insurance and could regulate "substantive content" of MEWA), cert. denied, 506 U.S. 861, 113 S. Ct. 179 (1992); *Atlantic Health Care Benefits Trust v. Foster*, 809 F. Supp. 365, 374 (M.D. Pa. 1992) (state licensure requirements not preempted); *National Bus. Ass'n Trust v. Morgan*, 770 F. Supp. 1169, 1177 (W.D. Ky. 1991) (ERISA did not preempt Kentucky regulation of multistate self-funded MEWA and its administrator to extent not inconsistent with Title I); *Jouza v. Currency Exch. Health Plan*, 1986 WL 436, at 3 (N.D. Ill. Oct. 29, 1986) (Illinois requirements for registration, administrative solvency determination, minimum reserve levels, and reinsurance not preempted as to MEWA because not inconsistent with Title I).

ERISA. *Fuller v. Norton*, 86 F.3d 1016, 1026 (10th Cir. 1996). The second case is *Harvey v. Members Employees Trust for Retail Outlets*, 96 N.Y.2d 99, 748 N.E.2d 1061 (N.Y. 2001). This case is particularly instructive because the court considered whether a New York state requirement that plans provide coverage for "alcohol related illnesses" applied to MEWAs. The court methodically navigated through the ERISA preemption analysis and found:

1. That the requirement did "relate to" and have a "connection with" the plan because it provided a basic benefit structure by dictating that the plan provide for coverage of alcohol related illnesses;
2. As a result, the requirement would typically not be protected by ERISA's savings clause (i.e., it would be preempted); but
3. By virtue of ERISA's "deemer clause" (as amended in 1983 to address MEWAs), such requirements could be imposed on self-funded MEWAs to the extent that they are not inconsistent with ERISA; and
4. That the requirements did not directly conflict with a specific provision of ERISA, and therefore were not inconsistent with ERISA.

Harvey not only sets forth the law applicable to this matter, but also the analysis that should apply.

E. Coverage Requirements of Idaho Code § 41-4023

In summary, Idaho Code § 41-4023 requires the following:

1. Immediate coverage for newborns and infants, including adopted newborns (subsection 1);
2. Coverage of adoptive children without regard to pre-existing conditions (subsection 2); and

3. Coverage of involuntary complications related to pregnancy if the plan provides maternity benefits (subsection 3).

The Trust objects to the Department's application of these requirements to the Trust, claiming that these requirements are preempted by ERISA.

Both the Department and the Trust have exhaustively argued whether these requirements are "related to" ERISA plans by having a "connection with" or making "reference to" such plans, applying the tests set forth in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 115 S.Ct 1671 (1995) ("*Travelers*"), and applied in other cases. In examining these cases, it is clear that the requirements of Idaho Code § 41-4023 fall within the type of regulation that was considered to "relate to" ERISA plans in *Harvey* and other cases.[12] The requirements are counter to the uniform objectives of ERISA and directly affect ERISA plans. As such, the requirements are preempted by ERISA unless protected by ERISA's savings clause.

F. Savings Clause as Applied to MEWAs

As acknowledged by both the Trust and the Department in their arguments, areas of traditional insurance regulation are "saved" from preemption, allowing states to continue to regulate insurance companies. However, states were prohibited from "deeming" an entity an insurance company to subject them to regulation. That is how METs managed to operate without regulation until the 1983 amendments to ERISA. As explained above, those amendments changed everything for METs (and consequently for MEWAs), by essentially

[12] See e.g. *Childrens Hosp v. Whitcomb*, 778 F.2d 239 (5th Cir. 1985) (finding a Louisiana statute requiring coverage for mental and nervous disorders the same as other diagnoses to be preempted); *Insurance Bd v. Muir*, 819 F.2d 408 (3rd Cir. 1987) (finding a Pennsylvania statute requiring coverage for psychological testing and maternity to be preempted); and *Shaw v. Delta Airlines*, 463 U.S. 85, 103 S.Ct. 2890 (1983) (finding a state law that required certain services to be covered to be preempted).

allowing states to "deem" MEWAs as insurance companies, so long as they did not impose requirements (with respect to ERISA-covered self-funded plans) that conflicted with ERISA.[13] As a result, the requirements of Idaho Code § 41-4023 are "saved" from preemption if they are not inconsistent with ERISA.

G. Similar ERISA Provisions

The Trust argues that ERISA already has standards related to newborn coverage, pre-existing conditions, and the like, citing 29 U.S.C. § 1181. While it is true that ERISA does contain requirements related to the same areas of concern covered in Idaho Code § 41-4023, that is not enough to preempt the state requirement. As explained in *Harvey*, the state requirement must directly conflict with a specific ERISA requirement. *Harvey*, 96 N.Y.2d at 109. The Trust has not identified a specific requirement of ERISA that conflicts with the requirements of Idaho Code § 41-4023, and a cursory review of 29 U.S.C. § 1181 reveals none. There is nothing to indicate that the Trust cannot comply with the requirements of both Idaho Code § 41-4023 and ERISA.

H. Conclusion

[13] A draft of this Preliminary Order was issued for comment to both the Trust and the Department as a Proposed Order, pursuant to IDAPA 04.11.01.564, on December 6, 2010. The Trust submitted comments and argued that Idaho has not "deemed" MEWAs to be insurance companies – that it has in fact done the opposite – that is, deemed them not to be insurance companies, citing Idaho Code § 41-4003(3). Therefore, it argues, Idaho's regulation does not fall into the category of insurance regulation permitted by ERISA under 29 U.S.C. § 1144(b)(6)(A)(ii), and that distinguishes Idaho from other states and makes the cases of *Harvey* and *Fuller* inapplicable in this matter. Ironically, essentially the same argument made by the Trust was made and rejected in *Fuller*. *See Fuller*, 86 F.3d at 1024 - 1025. Idaho Code § 41-4003(3) provides that registered MEWAs "shall not be deemed to be engaged in the business of insurance and shall not be subject to provisions of the Idaho insurance code **except as expressly provided in this chapter**." It follows from that statement that MEWAs are deemed to be engaged in the business of insurance to the extent that they are regulated by Title 41, Chapter 40, Idaho Code.

The 1983 amendments to ERISA were designed to, and did, change the field of play for self-funded MEWAs. No longer were they exempt from state regulation. If a MEWA is not ERISA-covered, it is subject only to state regulation. If it is an ERISA-covered plan, like the Trust, it is subject to both state and federal regulation, and state regulation is limited only to the extent that it directly conflicts with ERISA. As stated by the court in *Harvey*:

> Congress itself made the policy determination that the objective of national uniformity in the administration of employee benefit plans must yield to its concomitant "decision to 'save' local [substantive content-based as well as procedural] insurance regulation," knowing full well that it would perpetuate "disuniformities" (*Metropolitan Life Ins. Co., supra*, 471 US, at 747). In the same vein, as indicated in the previously cited legislative history of the MEWA amendment, Congress made a second policy decision in 1983 to permit further disuniformity by, in effect, extending the Insurance Savings Clause to this type of content-based health benefit regulation of self-insured MEWA employee health benefit plans.

Harvey, 96 N.Y.2d at 109.[14] The Trust has not shown any conflict between Idaho Code § 41-4023 and any specific provision of ERISA, so Idaho Code § 41-4023 is applicable to the Trust.[15] As a result, IT IS HEREBY ORDERED that the Department's determination that Idaho Code § 41-4023 is applicable to the Trust be UPHELD AND AFFIRMED.

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[14] The Patient Protection and Affordable Care Act (PPACA), P.L. 111-148, added several ERISA provisions, effective March 23, 2010, that are intended to help identify or prevent fraud and abuse in the use of MEWAs. ERISA §520, added by P.L. 111-148, §6604(a), authorizes the Labor Secretary to adopt regulatory standards (or issue an order regarding a specific person) establishing that a person engaged in the business of providing insurance through a MEWA under ERISA §3(40) is subject to the insurance laws of the states in which the person operates, notwithstanding ERISA §514(b)(6) or the Liability Risk Retention Act of 1986, and regardless of whether the state's law is otherwise preempted under these provisions, further extending the ability of states to regulate in the MEWA arena.

[15] It should be noted that Title 41, Chapter 40, Idaho Code, ("Chapter 40") applies not only to MEWAs but also individual self-funded plans. So, it is possible that one of its provisions could be preempted by ERISA and therefore not applicable to some plans and yet applicable to other plans. This was apparently envisioned and addressed by the language in Idaho Code § 41-4001(2) making the provisions of Chapter 40 inapplicable when preempted by ERISA. However, as explained above, they are not preempted in these circumstances.

II. COORDINATION OF BENEFITS PROVISION

In its review of the Trust, the Department has asserted that the plan's coordination of benefits ("COB") provision is not consistent with IDAPA 18.01.74 ("Rule 74"). The Trust has asserted that Rule 74 is not applicable to the Trust, and even if is applicable, its COB provision adequately complies with Rule 74.

Subsection 02 of Rule 74 does not require the Trust to have a COB provision in its plan, but if the Trust chooses to put a COB provision in its plan, it must be "consistent with [Rule 74]".[16] The Trust argues that there is nothing in Title 41, Chapter 40, Idaho Code ("Chapter 40"), that makes Rule 74 applicable to MEWA's in general and the Trust in particular. The "Authority" subsection of Rule 74 (subsection 000) states that the legal authority for Rule 74 is "Chapters 2, 21, 22 and 34" of Title 41. While it is true that Chapter 40 is not specifically identified as a chapter providing legal authority for Rule 74, either all or part of Chapters 2, 21 and 22 are specifically made applicable to Chapter 40, including sections 41-2141 and 41-2216, Idaho Code, related to COB provisions.[17] Furthermore, Idaho Code § 41-211 provides broad authority to the director to make rules to carry out the purposes of Title 41. Additionally, ERISA § 514(b)(6) would permit a state to impose COB requirements on MEWAs, as many states have. The Department has apparently chosen to impose COB requirements only when a plan chooses

[16] IDAPA 18.01.74.02 reads as follows:

> Scope. The purpose of this rule is to permit, but not require, plans to include a coordination of benefits (COB) provision unless prohibited by federal law; establish a uniform order of benefit determination under which plans pay claims; provide authority for the orderly transfer of necessary information and funds between plans; reduce duplication of benefits by permitting a reduction of the benefits to be paid by plans that, pursuant to these rules, do not pay their benefits first; reduce claims payment delays; and require that COB provisions be consistent with this rule; and provide greater efficiency in the processing of claims when a person is covered under more than one (1) plan.

[17] Idaho Code § 41-4021.

to coordinate. Since the plan has chosen to coordinate, Rule 74 is applicable. The remaining question is whether the Trust's COB provision is consistent with Rule 74.

The Trust has claimed that the Department has failed to point out how the Trust's COB provision is inconsistent with Rule 74. It further claims that its COB provision is "patterned identically after the current NAIC model COB rules ("Model Rules)."[18] However, in the exchange of letters between the Department and the Trust, the Department identifies two deficiencies – one related to coordination with Medicare, and other related to the definition of "plan." The issue related to coordination with Medicare was apparently resolved, leaving only the issue related to definition of "plan."[19]

Neither the Model Rules nor Rule 74 permits coordination of benefits with certain plans, including school accident-type coverage, hospital indemnity coverage, long-term care indemnity policies, Medicare supplement policies, or government plans that by law provide benefits that in excess of those any private insurance plan or other non-governmental plan. While the Trust's COB provision is not required to be verbatim with Rule 74, a review of the Trust's COB provision reveals that it is clearly inconsistent with not only Rule 74 but also the Model Rule, because its definition of "plan" results in coordination, or the attempt to coordinate, with plans for which coordination is not permitted. For example, the Trust's definition of plan results in coordination with a "hospital indemnity benefit" – something not permitted by either Rule 74 or the Model Rules. In another example, the Trust's definition of plan does not distinguish between medical coverage under an automobile policy which is subject to coordination, and other coverage in automobile policies which are not subject to coordination. In other examples, the

[18] Trust's Brief in Support of its Position on the Issues in Controversy – Page 15.

[19] See Exhibit 3, p. 28 (Item 7).

language used is either directly in conflict with Rule 74 and the Model Rules, or so vague as to, at a minimum, be susceptible to misinterpretation as to whether certain plans, not subject to coordination, are nevertheless included, such as paragraph 6, related to governmental plans. The Trust's COB provision is clearly not consistent with Rule 74, and it is vague and ambiguous. As a result, IT IS HEREBY ORDERED that the Department's determination finding the Trust's COB provisions deficient be UPHELD AND AFFIRMED.

DATED this 20 day of December, 2010.

Brad D. Goodsell
Hearing Officer

IMPORTANT NOTICE CONCERNING PRELIMINARY ORDERS
(Idaho Rules of Administrative Procedure 04.11.01.730.02)

a. This is a preliminary order of the hearing officer. It can and will become final without further action of the agency unless any party petitions for reconsideration before the hearing officer issuing it or appeals to the hearing officer's superiors in the agency. Any party may file a motion for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code. (7-1-93)

b. Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this preliminary order will become a final order of the agency. (7-1-93)

c. If any party appeals or takes exceptions to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the agency head (or designee). The agency head (or designee) may review the preliminary order on its own motion. (7-1-93)

d. If the agency head (or designee) grants a petition to review the preliminary order, the agency head (or designee) shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The agency head (or designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. (7-1-93)

e. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: (7-1-93)

i. A hearing was held, (7-1-93)

ii. The final agency action was taken, (7-1-93)

iii. The party seeking review of the order resides, or operates its principal place of

business in Idaho, or (7-1-97)

iv. The real property or personal property that was the subject of the agency action is located. (7-1-93)

f. This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. (7-1-93)

[End of Notice]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of December, 2010, I served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PRELIMINARY ORDER by upon the following in the manner indicated:

RECIPIENT(S)

John C. Keenan
Deputy Attorney General
Idaho Department of Insurance
700 W. State St., 3rd Floor
Boise, ID 83720-0043

- ✓ U.S. Mail, Postage Prepaid
- ____ Overnight Courier
- ____ Hand Delivered
- ____ Via Facsimile
- ____ CM/ECF Notice of Electronic Filing

J. Brian Davis
Health Plan Director
Timber Products Manufacturers Assoc.
951 East Third Avenue
Spokane, WA 99202

- ✓ U.S. Mail, Postage Prepaid
- ____ Overnight Courier
- ____ Hand Delivered
- ____ Via Facsimile
- ____ CM/ECF Notice of Electronic Filing

Brad D. Goodsell