

regulates or affects what the ERISA-qualified plan can do, is preempted. Any state statute that applies to the insurance industry does not reach self-funded plans due to the McCarran-Ferguson Act.

The legislation is comprised of six separate parts, of most interest to employers sponsoring employee benefit plans, are Parts E and F which will now bar any benefit provider, such as an HMO or private health insurer, from seeking any reimbursement or subrogation against any settling party to a personal injury or wrongful death action with respect to benefits it may have paid or is obligated to pay. Part E, limits the impact of the collateral source payments in tort claims for personal injury or wrongful death and Part F amends the general obligations law in relation to protecting parties to the settlement of a tort claim from certain unwarranted lien, reimbursement and subrogation claims. There remain exceptions in this new law for claims for which there is a statutory right of reimbursement (e.g., Medicaid, Medicare, workers' compensation) and subrogation claims to recover excess no-fault benefits.

This new law was written to directly overrule two Court of Appeals decisions that recognized non-statutory rights for reimbursement or subrogation against a settling party. (See *Teichman v. Community Hosp. of Western Suffolk*, 87 N.Y.2d 514 (1996), and *Fasso v. Doerr*, 12 N.Y.3d 80 (2009)).

The change in the statute takes effect immediately and will apply to all actions commenced on or after the date the Governor signed the bill, Nov. 12. In some cases, the new law will also apply to any applicable action or proceeding that was commenced prior to Nov. 12, 2009 if as of that date, either the trial had not yet commenced or the parties had not "entered into" a settlement (in writing or on the record). Trial lawyers will call this law a major victory against the proliferation of unwarranted claims for windfalls by way of subrogation and reimbursement asserted by health insurers.

Property Damage subrogation claims are unaffected. The new law will apply only to and limit non-statutory reimbursement and subrogation claims in personal injury and wrongful death actions. As to such actions, only insurers or entities qualifying as a benefit provider will be affected. The new law defines a "benefit provider" as "any insurer, health maintenance organization, health benefit plan, preferred provider organization, employee benefit plan or other entity which provides for payment or reimbursement of health care expenses, health care services, disability payments, lost wage

payments or any other benefits under a policy of insurance or contract with an individual or group."

SPBA will continue to review the statute as more information develops. If you want to read the New York State Bill, go to: <http://assembly.state.ny.us/leg/?bn=S66002&sh=t>

## **Voluntary Cancer Insurance Policy Endorsed by Employer Declared an ERISA Plan**

A U.S. District Court in Georgia held that an employer that offered a voluntary life insurance plan with payment through the employer's cafeteria plan was an ERISA plan and subject to Federal laws. The case involves an employee's spouse who sued the insurer of her cancer insurance policy in State court after they refused to pay for medical treatment she had received. As is customary, the insurer removed the case to Federal court, arguing that her claim was preempted by ERISA. The claimant maintained that her case belonged in State court because the policy was a voluntary insurance arrangement exempt from ERISA. The court was asked to determine whether the policy, which was offered through a cafeteria plan and had the employer's endorsement, fell outside the voluntary plan safe harbor.

The court examined ERISA's safe harbor, noting that an employer's involvement is restricted to permitting the insurer to publicize the program and collecting premiums without "endorsing" the plan. In this case, the court ruled that the policy was not within the safe harbor because the employer had endorsed the plan and in doing so, failed to "maintain sufficient neutrality" with the insurer. The court held that the employer was barred from using the safe harbor because the employer had endorsed the policy by (1) acting as plan administrator, (2) offering the policy as the only pre-tax benefit through a cafeteria plan, and (3) using plan documents that mentioned ERISA. Furthermore, the court pointed to the fact that the employer chose 32 hours a week as the number of hours employees would need to work to qualify for the insurance and took an active role in deciding key terms, such as the number of hours for eligibility. Having decided that the policy did not fall within the voluntary plan safe harbor, the court then determined that the policy was an ERISA plan established or maintained by an employer when it noted that the employer had taken an active role by naming itself as plan administrator; chose the

number of hours for eligibility; offered the plan on a tax-favored basis, and informed participants of their rights under ERISA. *Lee v. Liberty Nat'l Life Ins. Co.*, 2009 WL 3316371 (S.D. Ga. 2009)

## Your Owners Talk to SPBA

About 1/3 of SPBA President Fred Hunt's time is taken talking to the outside corporate owners, investors, venture capitalists and dozens of consultants hired by those groups, who either own TPA firms now, or are considering buying into "the TPA space", as they call us. Many, even within the corporate management level of mega TPA conglomerates, don't really know what "TPA" means or what you do.

As with all SPBA communications, Fred is absolutely candid about the opportunities and challenges of the business & market. He directs them to the various descriptions on the SPBA public website at <http://users.erols.com/spba>. He also suggests that they carefully read the annual State-of-the-Industry & future forecast reports on the website. The new report is part of this UPDATE. You should read it, because while it is written for you, it also gets wide readership from owners/investors, people considering loans for TPAs, potential clients, etc. So, if you're trying to slide along with a 1990's version TPA, they will know.

The conversations are almost always very upbeat. Fred explains the amazing amount of data and personalization each of you handles + your need & success in cutting-edge government compliance + the ever-widening range of duties & issues. The emphasis is on the unique management talent of experienced TPA staff and how seemingly-unorthodox techniques are the secret to success for the personalization needed to keep clients happy.

The most frequent response I get, especially from current corporate owners and investors, is "We didn't know any of this. Why haven't they (you) been telling us?" They are proud (and relieved that the TPA business is a good investment). However, they are a little miffed not to have been told by you...or they wonder if maybe their particular TPA (or one they are considering buying/investing) is below par.

**So the purpose of this UPDATE article is to tell you:**

(1). Your owners, potential-owners, investors, loan

officers, and clients do call asking if their investment in the TPA industry is wise and has a future.

2). You have not been doing enough education & PR with your outside owners/investors about what you do, the cutting-edge nature of your business, the cost-effective need to belong to SPBA and attend meetings and have enough individuals of the staff in every office & function area designated as "contacts", and the unique (often seemingly-unorthodox) way to deal with clients to give the personalization the clients demand. As items arrive from SPBA, share appropriate ones with your owner/investors, and perhaps have an occasional (financial people think in quarter-year) show-and-tell day where your corporate owners (including green-eyeshade folks in their financial & CFO area) come into the office and get a full tour & explanation. You may think that what you do is mundane, but it is blown-away impressive to anyone else. This kind of education of your outside owners/investors is important, because, otherwise, they may, unknowingly, decide to starve you of the staff, education and support you need to prosper. (Sadly, when such starvation happens, the folks "upstairs" wonder why you go into a downward spiral, and blame you for being incompetent, so this education is not only to save your job, but also your reputation.) Brag!!!

## Red Flag Reminder

This story is mainly to remind you that the SPBA Board has approved SPBA not "doing" this issue (no involvement or expertise). It seems to not apply to 99.9% of TPA situations. (You don't extend "credit".)

However, we never want you to sound uninformed, so this is to give you a thumbnail summary and point you in the direction of good information.

The Federal Trade Commission (FTC) has devised "Red Flag Rules" for prevention and remedy of identity theft risks by credit-granting entities. It was originally assumed that this meant banks, but it has bloomed into applying to any entity that does not get paid on the spot and thus is granting "credit". The heads-up for TPAs is that this includes doctors (because taking assignment or billing later, is giving "credit" to the patient.) Here are good sources of background & answers:

**[www.FTC.gov/bcp/edu/microsites/redflagsrule/faqs.shtm](http://www.FTC.gov/bcp/edu/microsites/redflagsrule/faqs.shtm)**

Also google FTC Red Flags for lots of good insight & legal analysis to make you smart.