C. Scott Litch
Chief Operating Officer and General Counsel

Demystifying ERISA and its Impact on General Anesthesia Legislation

The AAPD has worked diligently over the past 15 years with state pediatric dental societies and state dental associations to achieve legislation to require general anesthesia coverage under medical insurance plans in 30 states and Puerto Rico. Such coverage is for the anesthesia and hospital/facility costs for dental care that must be provided under general anesthesia in cases of a child with extensive early childhood caries, a disabled child, or an extremely uncooperative or fearful young child. The specific coverage requirements have slight variances under each state's law. Please see the AAPD Web site for a state-by-state map with links to actual legislative language at *http://www.aapd.org/hottopics/advocacy/gamap.asp*. A chart with a brief summary of each law is also available in the members-only section at *http://www.aapd.org/upload/advocacy_doc/2008/99.pdf*.

Several additional states are pursuing efforts in their state legislatures in 2009, including Arizona, Massachusetts, Pennsylvania, Vermont and West Virginia.

However, the scope and impact of such state laws is limited by the Employee Retirement Income Security Act of 1974, otherwise known as ERISA. The vast majority of Americans under age 65 (62 percent in 2007) receive health benefits[1] through their own employers or that of a family member. Many large group health plans (usually several hundred employees or more) may chose to either fully or partially self-insure their group benefit plans. When an employer purchases an insurance policy to provide to employees' health care, the plan is referred to as "fully insured." Alternatively, if the employer pays directly for health care services on behalf of employees, this is known as a "self-insured" plan. This means that instead of paying health insurance premiums to an insurance company, the employer sets a pool of funds in reserve and assumes its own risk for health benefit claims. Companies that self-insure do generally buy what is known as stop-loss insurance policies to protect themselves against losses above a certain threshold. They also contract with either a third-party administrator or a health insurance plan to administer benefits and handle claims.

Because of these nuances, many employees of companies that self-insure coverage do not even realize that their plan is self-insured. Yet, this is a critical distinction for the purposes of regulation. Self-insured plans are regulated federally by the Dept. of Labor and the Internal Revenue Service, and therefore are often called ERISA plans. However, a fully insured plan is regulated by state insurance laws.

The ERISA law essentially supersedes any state laws related to such insurance plans[2], although there has been a large amount of litigation in recent years over the scope of this superseding or preemption clause. The purpose of ERISA was to protect interstate commerce and the interests of participants in employee benefit plans by requiring various disclosures and reporting of financial and other information with respect to such plans. ERISA was also enacted to remedy fraud and mismanagement in private-sector employer pension plans. In fact, it also applies to any employee benefit plans, sponsored by private-sector unions or employers (other than churches). The other main purpose was to free employers subject to ERISA from having to comply with a variety of differing state laws.

Over time the most controversial ERISA provisions is the preemption of many state laws relating to insurance. Court interpretations have held that self-insured benefit plans are preempted from state insurance laws by ERISA. Of course, those who purchase individual health insurance are not covered by ERISA, but this is only a small percentage of Americans with medical insurance. States cannot deem employer-sponsored plans themselves to be insurers. Consequently, states are prohibited from regulating employee health plans directly. They can, however, regulate the insurers with which an employer plan contracts. This creates the distinction between fully insured plans (which states can regulate by regulating insurers) and self-insured plans (which they cannot).

In the last three years, federal courts of appeal have reached different conclusions about whether ERISA preempts employer "pay or play" laws in Maryland and California. In January 2007, the 4th Circuit Court of Appeals held that ERISA preempted the Maryland Fair Share Act.[3] For further details on this case see the article referenced in this footnote.[4]

What options do you have for patients covered under self-insured ERISA plans?

- An appeal to the plan from denial of coverage in a specific case can be considered, focusing on medical necessity. AAPD provides guidance on crafting

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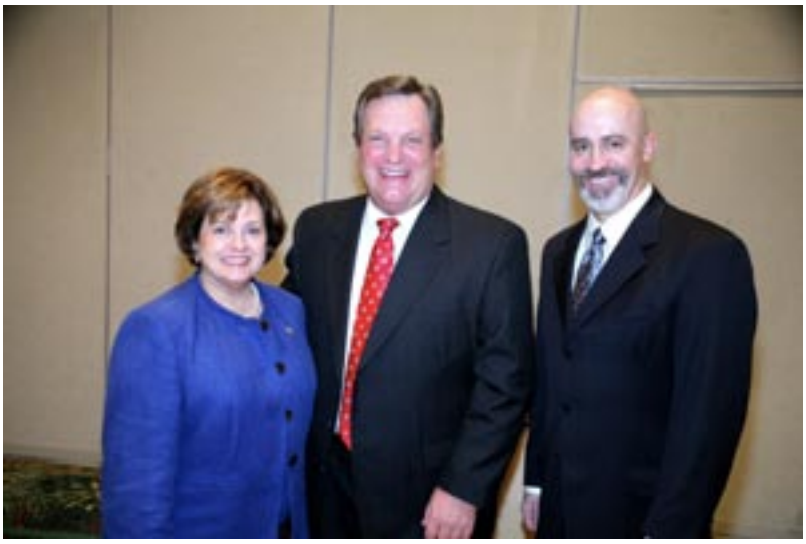
an insurance appeal; please contact Dental Benefits Manager Mary Essling at *messling@aapd.org*.

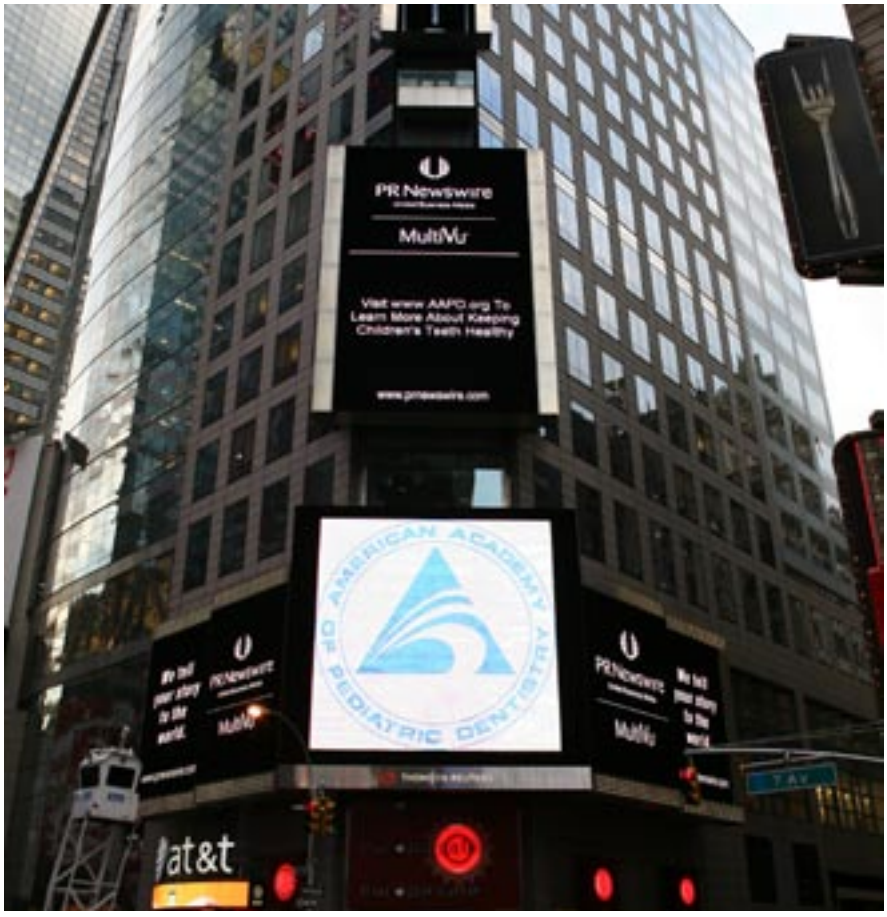
- Discussions with your state insurance commissioner might lead to a compromise or understanding between carriers and practitioners to offer such coverage, even if not required under the ERISA preemption of the state's general anesthesia law.
- Negotiate coverage with insurers under a binding agreement. For example, Michigan negotiated general anesthesia coverage by all insurers in 2001 under a written agreement, and further expanded such coverage in 2006. See *http://www.aapd.org/upload/advocacy_res/2007/54.pdf.*

For further information contact Chief Operating Officer and General Counsel C. Scott Litch at (312) 337-2169 ext. 29 or *slitch@aapd.org*.

1 Whenever referenced in this article, "health benefits" means medical insurance.
2 29 US. Sec. 1144 (a).
3 44 Retail Industry Leaders Association v. Fielder, 475 F. 3d. 180 (4th Cir. 2007).
4 State Coverage Initiatives: Including Employer Financing in State Health Reform Initiatives: Implications of Recent Court Decisions by Patricia A. Butler, J.D., Dr.P.H. Prepared for the Robert Wood Johnson Foundation's State Coverage Initiatives and the National Academy for State Health Policy. See full article at: http://www.statecoverage.org/files/Jan%202009%20ERISA%20Update%20FINAL.pdf



(l-r) AAPD President Beverly A. Largent, Congressman Mike Simpson (R-2nd Idaho), and Chief Operating Officer and General Counsel C. Scott Litch at a fund-raising breakfast hosted by the ADA during their 2008 annual session. The AAPD PAC generously supported Mr. Simpson in the 2008 election cycle. He is a dentist and member of the House Appropriations Committee.



As part of AAPD's growing media campaigns, the AAPD logo appeared in Time Square on Feb. 2, 2009, in honor of National Children's Dental Health Month.