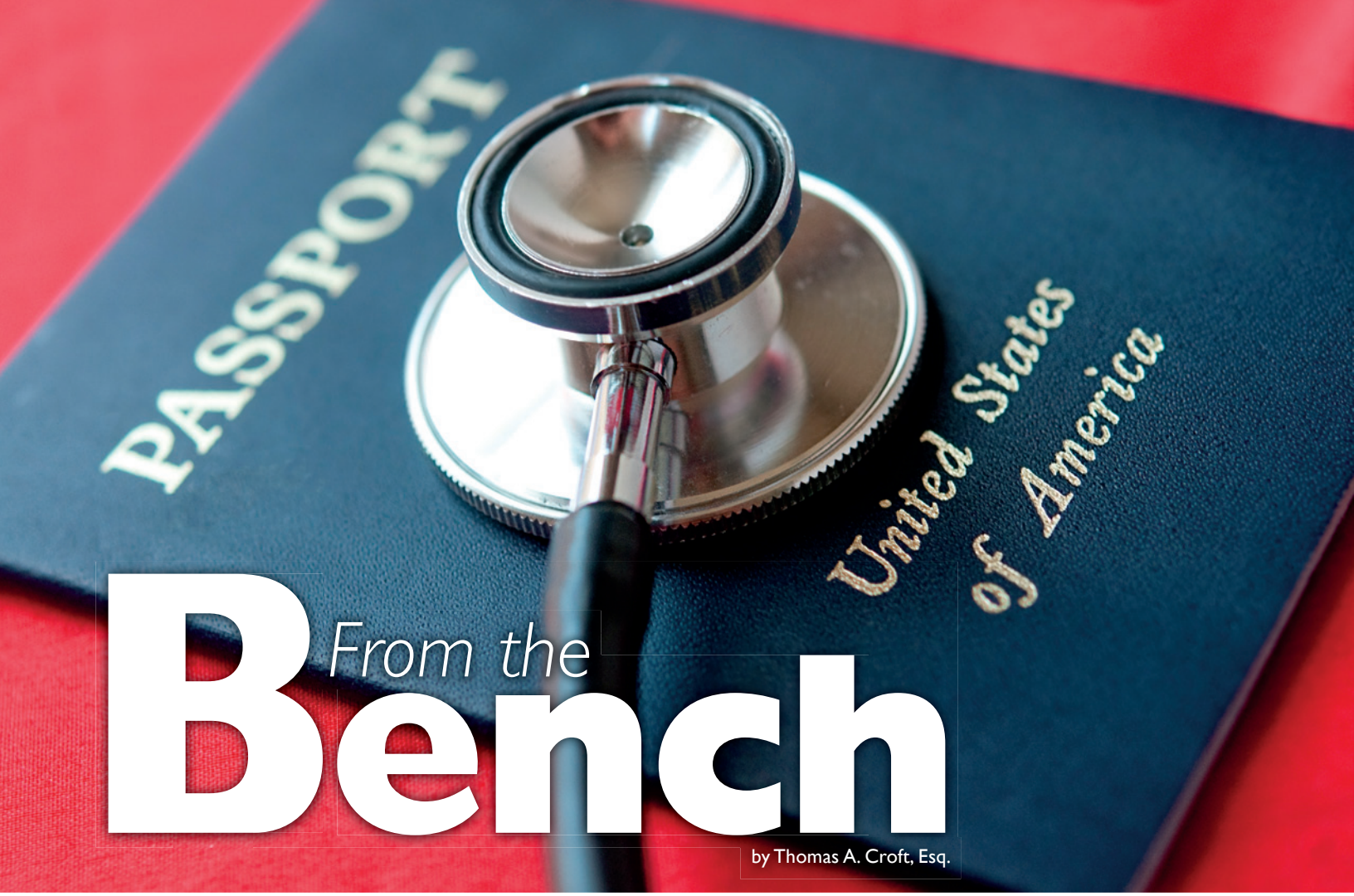

From the Bench

by Thomas A. Croft, Esq.

Are "Unlawfully Employed" Aliens "Covered Persons" Under a Stop Loss Policy?

(*Bay Area Roofers Health & Welfare Trust, et al. v. Sun Life Assurance Co. of Canada*, No. 3:13-cv-04192, in the United States District Court for the Northern District of California, December 2013).

This is a case of first impression in the stop loss arena to my knowledge. No substantive orders have been entered by the Court yet (the case was just filed in September, with a preliminary motions hearing set for December 18) but the parties' filings to date paint an interesting picture, and pose some novel issues.

At issue is a roughly $410,000 stop loss claim for medical expenses paid by the Plan with respect to prematurely born twins. The Trust is a Taft-Hartley trust created to provide health care benefits for employees and their dependents covered by certain collective bargaining agreements in the roofing industry in the San Francisco Bay area. The Trust established a self-funded, multiemployer health and welfare Plan for this purpose.

The Trust has apparently maintained stop loss coverage through Sun Life of Canada ("Sun Life") for several years. The stop loss policy at issue was effective August 1, 2011 and contained a $150,000 specific deductible. The Plan submitted the $410,000 claim (in excess of the spec.) to Sun Life in November 2011, which Sun Life denied.

A copy of a lengthy appeal denial letter from Sun Life dated December 21, 2012 in the public record discloses that Sun Life initially attempted to verify the social security number given by the roofing company employee and father of the twins to his employer when he was hired through Accurint®, a service of Lexis-Nexis® used by certain insurers and others. Sun Life determined through Accurint® that the social security number provided by the plan participant was not his, but instead belonged to someone else. During the course of the appeal process of the claim denial, Sun Life requested and received a consent form signed by the plan participant authorizing the Social Security Administration to release certain information about him. The plan participant used the same social security number on the consent form

as he had used to obtain employment and enroll for coverage under the Plan.

The Social Security Administration confirmed that the number used by the plan participant did not belong to him. In its appeal denial letter, Sun Life wrote: "The only reasonable conclusion to draw from the fact that [the plan participant] used a SSN that does not belong to him is because he is not authorized to work in the United States, and resorted to using a false SSN for purposes of obtaining employment."

The Trust's filings to date do not specifically allege that the plan participant was, in fact, lawfully employed in the United States; rather, the Trust appears to contend that he was as an "employee" of the roofing company, and was therefore eligible under the terms of the Plan and the stop loss policy, regardless of his immigration status. Apparently, there is no specific requirement in the Plan Document that an "employee" be lawfully employed, and nothing in the stop loss contract specifically imposes such a requirement either.

In its filings, the Trust has asserted that, under the Plan, it has complete discretionary authority to make eligibility determinations, and that Sun Life has no right to substitute its judgment on that score. In response, Sun Life has pointed to language in the stop loss contract stating that "For the purpose of determining Eligible Expenses under the Policy, We have the right to determine whether an Eligible Expense was paid by you in accordance with the terms of your Plan."

Though I do not think it will (or should) matter in this case, I note a very unusual feature of the Sun Life stop loss policy: it does not incorporate the Plan document as a part of the stop loss contract, but instead merely references it throughout the policy. Indeed, the "entire contract" clause in the stop loss policy omits any mention of the Plan. Thus, the usual war between the discretionary language of the Plan document and the stop loss policy should not be present in this case. (In case you're wondering how excluding the Plan document from the "entire contract" can be done without subjecting the carrier to midstream amendments to the Plan document increasing its liability, the Sun Life policy accomplishes this by defining the "Plan" as the plan document, but stating that no changes to the plan document made subsequent to the effective date are binding on the carrier unless approved in writing).

In any event, assuming Sun Life's contractual rights to "second guess" the eligibility determination of the Plan in this instance, the fundamental question is still posed: Must otherwise eligible employees be lawfully employed to be considered eligible under a Plan, and thus be considered "Covered Persons" under a stop loss contract, where there is no such requirement set forth in either the Plan Document or the stop loss policy?

Sun Life, in its appeal denial letter, argues that the Immigration Reform and Control Act of 1986 ("IRCA") makes it a crime for employers to hire or continue to employ undocumented aliens who are not lawfully present in the United States, or not lawfully authorized to work in the United States and likewise makes it a crime to provide fraudulent documents to a potential employer. From this, Sun Life reasons that "illegal employment" is not "employment" for purposes of stop loss reimbursement. In their respective filings to date, both sides seem to agree that this will be the ultimately dispositive issue in this case.

As I noted at the outset, this is the first stop loss case to involve this issue of immigration status. However, in its appeal denial letter, Sun Life points to an ERISA case involving a denial of life insurance benefits to the widow of an illegal alien enrolled under a group policy through his employer decided by a Texas federal court in 2009, and affirmed on appeal in 2011. In that case, the court held that the employee's use of an invalid SSN rendered him "unlawfully employed," and affirmed the denial of benefits.

We will have to await further proceedings in this case to learn how the California federal court will address these issues. The parties promise additional filings in the form of motions for partial summary judgment in the coming months. Of course, there is always the possibility of settlement before any substantive rulings by the Court, in which case we, as interested spectators, will be deprived of the final act in this interesting play. ■

Known for his extensive writing on medical stop loss insurance issues, both in The Self-Insurer and on his comprehensive website, www.stoplosslaw.com, Tom has been practicing law for 34 years. Currently he practices through his own firm, CROFT LAW LLC, in Atlanta, GA. He regularly advises and represents stop loss carriers, MGUs, and occasionally TPAs, brokers, and self-insured groups, in connection with matters relating to stop loss insurance and the disputes that may arise among these entities regarding it. He currently serves on SIIA's Healthcare Committee. He has been honored as a Georgia "Super-Lawyer" for the past six years running, and is listed as "Tier 1" in insurance by Best Lawyers. He is an honors graduate of Duke University and Duke University School of Law, where he formerly served as Senior Lecturer and Associate Dean.