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LEGAL ISSUES AND DEVELOPMENTS
FROM CARLTON FIELDS JORDEN BURT

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JORDEN BURT

VOLUME III | SUMMER 2014

REGULATORS ARE WATCHING

New Products, New Opportunities, New Risks

INSIDE: A *NEASHAM* REMIX • BIG PHARMA CHALLENGE REJECTED
2015 SEC PRIORITY PREVIEW • QUESTIONS FOLLOWING *HOBBY LOBBY*

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Standard CGL Policy Form Adds Data Breach Coverage Exclusion

BY DIANE DUHAIME

As of May 1, 2014, Insurance Services Office, Inc. (ISO) requires a data breach liability exclusion endorsement to its standard commercial general liability (CGL) policy form. The endorsement is titled "EXCLUSION - ACCESS OR DISCLOSURE OF CONFIDENTIAL OR PERSONAL INFORMATION AND DATA-RELATED LIABILITY - WITH LIMITED BODILY INJURY EXCEPTION." Insurance regulators in virtually all U.S. states and territories have reportedly approved the endorsement.

NO COMPANY IS IMMUNE FROM A DATA BREACH. THE NUMBER OF DATA BREACHES INCREASED 20.5 PERCENT FROM JANUARY 1, THROUGH JULY 25, 2014, OVER THE SAME TIME PERIOD LAST YEAR.

Under Coverage A - Bodily Injury and Property Damage Liability of the CGL policy form, exclusion "p" is revised to exclude damages arising from any "access to or disclosure of any person's or organization's confidential or personal information, including … trade secrets, … customer lists, … credit card information, health information or any other type of nonpublic information…."

Under Coverage B - Personal and Advertising Injury Liability, coverage is removed for personal and advertising injury liability arising from any access to or disclosure of such non-public information. The exclusion applies to damages claimed for notification costs, credit monitoring expenses, public relations expenses, and other expenses that arise from any access to or disclosure of such non-public information. The exclusion retains a limited exception for damages that arise because of "bodily injury."

It seems that no company is immune from a data breach. According to the Identity Theft Resource Center, the number of data breaches increased 20.5 percent from January 1, through July 25, 2014 over the same time period last year.

Companies may have to incur significant expenses as a result of a data breaches. These can include computer forensic, notification, and public relations expenses. Therefore, this exclusion should provide an incentive for companies to revisit their insurance coverages to determine if they should purchase some form of data breach/data privacy/cyber liability insurance coverage.

For information concerning U.S. data security breach notification laws, please see the at-a-glance chart on pages 25-28.

Class Claims Against Lincoln National Barred in Section 419 Action – Again

BY SHAUNDA PATTERSON-STRACHAN

For the second time this year, a federal district court judge in North Carolina agreed with Lincoln National Life Insurance Company (Lincoln National) that putative class action claims were barred by the Securities Litigation and Uniform Standards Act (SLUSA), because the state law claims alleged untrue statements of a material fact regarding the purchase or sale of a covered security.

In *Reittinger v. The Lincoln Nat'l Life Ins. Co.*, the plaintiffs alleged that the insurer misled employers and employees into adopting welfare benefit plans that purportedly complied with Section 419A(f)(6) of the Internal Revenue Code. They claimed Lincoln National knew that the plans it promoted did not offer the tax advantages described. Plaintiffs' individual and class claims were predicated on North Carolina statutory and common law. While there was never any suggestion that the plan was a "covered security," the parties agreed that life insurance policies purchased to fund the plan were variable life insurance policies.

In March, upon consideration of Lincoln National's motion to dismiss the original complaint, the court agreed "that certain aspects of the plaintiffs' class claims are barred by SLUSA and [granted] the motion as to the putative class action claims." Notably, the court cited as support the U.S. Supreme Court's February 2014 decision in *Chadbourne & Parke LLP v. Troice*, which addressed the scope of SLUSA's phrase "misrepresentation or omission of a material fact in connection with a covered security," and concluded that **its scope extends no "further than misrepresentations that are material to the purchase or sale of a covered security."** *Reittinger* is the first variable insurance-related ruling to extend the scope.

However, because the original complaint did "not clearly explain how [the 419 plan] worked and was funded, delineate between the decision to participate in the Plan and the decision to buy the covered securities, or set forth the specific misrepresentations which allegedly led to the decision to buy the variable life insurance policies," the court concluded that it "is possible that there are aspects of the plaintiffs' class claims which are not barred by SLUSA," and allowed the plaintiffs to file an amended complaint.

The plaintiffs' subsequently-filed amended complaint suffered a similar fate when addressed in the court's June ruling. This time, however, while the plaintiff's individual claims were still permitted to proceed, the class claims were dismissed with prejudice.

32-Year-Old Death Claim Sparks Litigation

BY JOHN HERRINGTON

As the scope of insurers' obligations regarding unclaimed property continues to evolve, even insurers that actively identify deceased policyholders and pay the proceeds of previously unclaimed life insurance policies are not immune from suit. In *Burton v. Prudential Ins. Co. of Am.*, for instance, a California federal court recently granted in part Prudential's motion to dismiss a putative class action challenging the insurer's method of calculating interest rates on death benefits. The named plaintiff was the beneficiary of a $1,000 life insurance policy issued by Prudential on the life of her son who died in 1981.

Thirty-two years after her son's death, plaintiff confirmed the death and that she was the beneficiary. Prudential sent plaintiff a check for $5,040.11— the $1,000 death benefit due under the policy plus interest. In an apparent attempt to capitalize on the high interest rates of the early 1980's, plaintiff sued Prudential, claiming that the applicable California statute, which provides that the interest shall be "at a rate not less than the then current rate of interest" freezes the interest rate applicable to unclaimed policy proceeds on the date of death.

Plaintiff argued the "then current rate" was fixed as the current rate as of the insured's date of death. Prudential countered that the statute merely requires insurers to credit interest at a rate no less than the rate that the insurer credits from the date of death forward on benefits left on deposit, subject to fluctuations over time.

The court adopted Prudential's interpretation, which it found consistent with the underlying purpose of the statute, which is to discourage insurers from delaying payment. As the court reasoned, **under plaintiff's interpretation, "[i]f an insured died in a low interest rate year, insurers could be incentivized to hold onto the settlement through higher interest years to reap the excess interest."**

Although limited to California's statute, this victory may be persuasive in other states with similar statutes.

The NAIC Considers a Stable of Issues at the Summer National Meeting

BY ANN BLACK & JAKE HATHORN

During the 2014 Summer National Meeting, contingent deferred annuities led the way with the most NAIC groups considering the regulation of CDAs.

- At the head of the pack was the CDA (A) Working Group, which received preliminary comments on its *Guidelines for Financial Solvency and Market Conduct Regulation of Insurers Who Offer Contingent Deferred Annuities,* discussed draft revisions to various NAIC models to address CDAs, discussed and agreed to seek comments on whether CDAs should provide nonforfeiture benefits, and if so, what type of benefits, and discussed seeking information on CDA filings to develop best practices.

- The Receivership and Insolvency (E) Task Force exposed for comment its recommendation that CDAs fall within the definition of, and be treated as, annuities under the Life and Health Guaranty Association Model Act (520).

- The Examination Oversight (E) Task Force considered a referral to facilitate the review of an insurer's risk management program when reviewing the insurer's CDA form filing and to address issues of solvency risk, including the development of additional training or procedures to facilitate analysts' and examiners' understanding and assessing the risks of new products.

- The Producer Licensing (EX) Task Force recommended that producers selling CDAs hold a variable lines license.

The XXX/AXXX reinsurance framework was the dark horse issue which was adopted by the NAIC, and was considered by the Principled-Based Reserving Implementation (EX) Task Force, Life Actuarial (A) Task Force, and Capital Adequacy (E) Task Force each of whom addressed next steps issues for implementing the framework. The XXX/AXXX reinsurance framework addresses insurers' use of captives to finance XXX/AXXX reserves by prescribing the types of assets needed to back the reserve liabilities and requiring disclosure of the assets and securities used to support the reserves.

In addition to CDAs, rounding out the field of innovative products being discussed within the NAIC are non-variable products funded by separate accounts and index-linked annuities. The finish line still appears to be a far way off. The Financial Conditions (E) Committee will be working with NAIC staff and legal counsel to address the recommendations made and issues raised by the Separate Account Risk (E) Working Group with respect to non-variable products funded by separate accounts. The Indexed-Linked Variable Annuity (A) Subgroup of the Life Actuarial (A) Task Force continues to consider the appropriate reserve standards for, and whether nonforfeiture standards should apply to, index linked products.

THE FINISH LINE STILL APPEARS TO BE A FAR WAY OFF.

The Golden State Annuity Burglar: A *Neasham* Remix

BY KYLE WHITEHEAD

Alan Lewis, a former California insurance agent who faced criminal charges for annuity "twisting," was released from jail after a Superior Court judge dismissed charges for embezzlement, grand theft, and burglary. The story may sound familiar.

As reported in previous *Expect Focus* issues, *People v. Neasham* involved the conviction of a California insurance agent for grand theft for the sale of an annuity to an elderly woman. That conviction was subsequently reversed, in part because acceptance of the annuity premium could not constitute theft where the premium was given in exchange for an annuity of equal value, and in part because no evidence suggested that the annuity's surrender provisions somehow reduced its value.

The *Lewis* charges stemmed from the same California law that penalizes theft, embezzlement, forgery, or fraud with respect to the property of an elder by any person (not a caretaker) who knows or reasonably should know that the victim is an elder. However, whereas Neasham faced only one felony theft count and 90 days in prison, Lewis originally faced 36 felony counts, mostly for embezzlement, and a potential 40 years in prison based on his dealings with 12 seniors.

The prosecution alleged that Lewis committed "twisting" by twice replacing one annuity for another to generate commissions. Lewis allegedly informed the clients that the surrender charges associated with the first replacement would be covered by a bonus from the new annuity. Effectively, the prosecution argued that the amount of the surrender charges was the amount Lewis embezzled from his clients. And, because his actions occurred inside his clients' homes, they claimed he also committed burglary.

The prosecutorial theory is startling because, as in *Neasham*, it sought to criminalize surrender charges, a vital component of complex insurance products that are both approved and supervised by the states. It also exposes the prosecutor's lack of insurance knowledge because it fails to recognize that insurance agents are compensated for the sale of annuities by insurance companies, not clients.

Fortunately for the industry, the *Lewis* case never made it to trial. The judge dismissed the charges after Lewis spent more than four months in jail.

Insurer Sues Department of Insurance Over Multi-Million Dollar Penalty

BY ANN BLACK

In suing the California Insurance Commissioner on July 10, 2014, PacifiCare Life Insurance Company sought a writ of mandamus ordering the Commissioner to set aside his Decision and Order imposing a record $173 million penalty on PacifiCare (the Order). The Commissioner's Order followed a three-year evidentiary hearing after which the administrative law judge recommended that PacifiCare be assessed a substantially smaller penalty of $11 million.

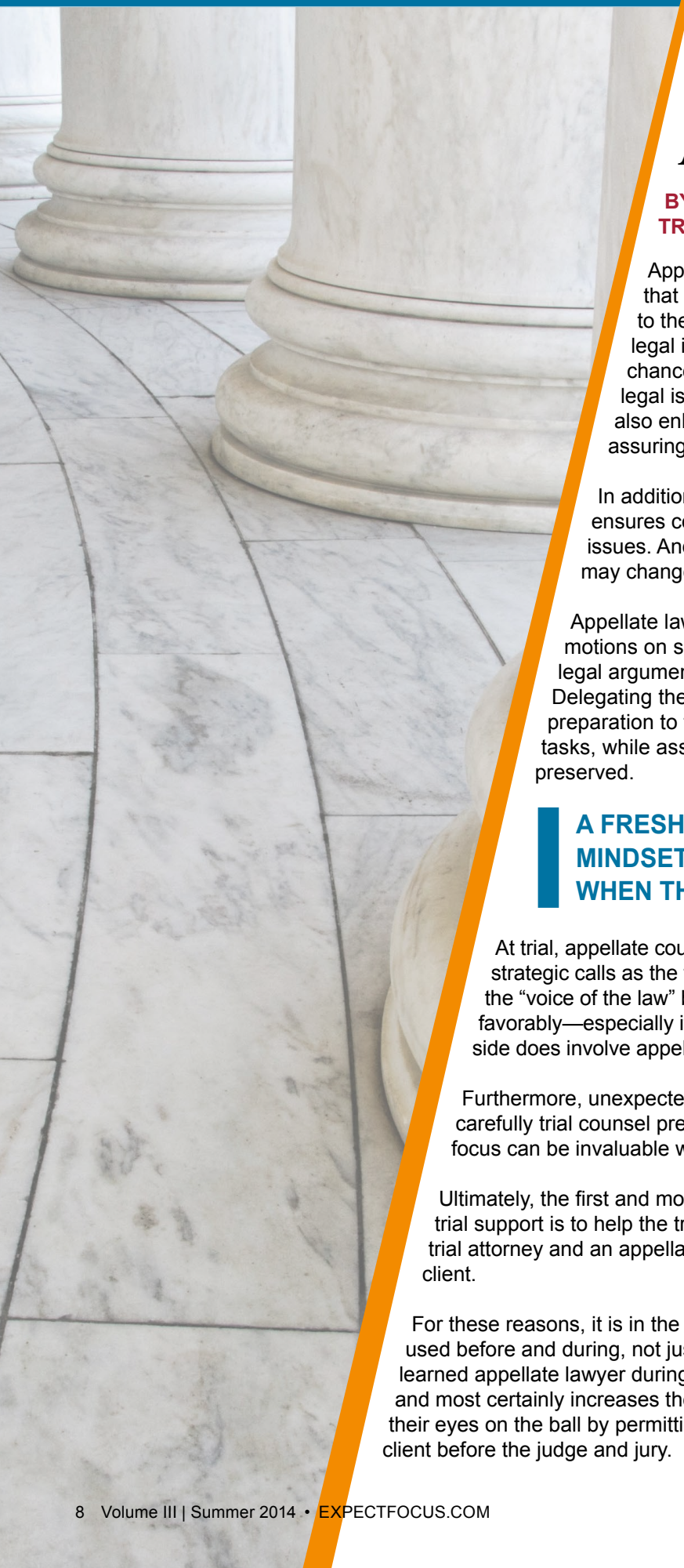
The Order stemmed from a targeted market conduct examination of PacifiCare's claims handling practices that was allegedly initiated in response to the increase in complaints received by the Department following the 2005 merger of PacifiCare and UnitedHealth. The California Department of Insurance (CDI) contended that PacifiCare's push for savings following the merger resulted in a total breakdown in customer service and claims administration.

Disparate interpretations of the law result in a great disparity in penalty amounts.

PacifiCare's suit asserted that the Commissioner and the CDI misinterpreted the Unfair Insurance Practices Act and the Fair Claims Settlement Practice Regulations. PacifiCare contested the Commissioner's assertions that:

- Under California Insurance Code section 790.03(h), "there can be no ambiguity that the Legislature intends to punish single acts knowingly committed or acts performed with such frequency that they demonstrated a general business practice."
- Knowingly committed includes constructive knowledge, not just actual knowledge.
- "[C]ommitting the same violation over and over again indicates a 'general business practice'" and frequency is not established by reference to tolerance thresholds in the National Association of Insurance Commissioners' Market Regulation Handbook.
- A "willful act is one committed or omitted with a purpose or willingness to commit the act, or make the omission … It 'does not require any intent to violate the law, or to injure another, or acquire any advantage.'"
- Section 790.035's exception for "inadvertent" issuance, amendment, or servicing of a policy – under which multiple acts are viewed as a single act for purposes of assessing penalties – does not apply if the violation is repeated after notice, either constructive or actual.
- A licensee would need to adopt "remedial measures to correct its noncompliance, both retrospectively and prospectively," before remedial measures would be a mitigating factor.
- Good faith attempt to comply requires "that the actor have an actual and reasonable belief that it was complying with the law."

The interpretations in the Commissioner's Order set forth the means by which the CDI may assess greater penalties for violations found in market conduct exams for any insurer in California.



Winning at Trial — With Help from an Appellate Attorney

BY APPELLATE PRACTICE & TRIAL SUPPORT TEAM

Appellate lawyers have an entirely different focus from that of trial lawyers, but one that is equally important to the case. They focus on crafting and preserving the legal issues in the case. This focus usually offers the best chance of prevailing as an appellant on appeal because legal issues are reviewed *de novo* by the appellate court. It also enhances the chances of prevailing at the trial level by assuring that key legal points are advanced persuasively.

In addition, involving appellate counsel before and at trial ensures consistency in the approach taken on particular legal issues. And, good appellate lawyers watch for arguments that may change the law or create new law.

Appellate lawyers can assist trial counsel with pre-trial legal motions on substantive and evidentiary issues, and by preparing legal arguments to advance in motions for directed verdict. Delegating the responsibility for jury instruction and verdict form preparation to them can relieve trial counsel of these often onerous tasks, while assuring that the legal issues they involve are fully preserved.

A FRESH SET OF EYES WITH A DIFFERENT MINDSET AND FOCUS CAN BE INVALUABLE WHEN THE UNEXPECTED OCCURS.

At trial, appellate counsel work seamlessly with trial counsel, who make the strategic calls as the trial progresses. Often, the appellate lawyer becomes the "voice of the law" before the trial court, something the court views favorably—especially if the other side lacks similar support. And, if the other side does involve appellate counsel, there is all the more reason to do so.

Furthermore, unexpected issues always arise during trial, no matter how carefully trial counsel prepare. A fresh set of eyes with a different mindset and focus can be invaluable when the unexpected occurs.

Ultimately, the first and most important role of an appellate lawyer who provides trial support is to help the trial lawyer win the case. A good marriage between a trial attorney and an appellate attorney can help create favorable results for the client.

For these reasons, it is in the client's best interests that appellate lawyers be used before and during, not just after, the trial. The presence and involvement of a learned appellate lawyer during trial produces a distinct legal advantage for the client and most certainly increases the likelihood that the trial lawyers will be able to keep their eyes on the ball by permitting them to focus on building a factual case for the client before the judge and jury.

Supreme Court Establishes New Standard for Fiduciaries of ESOP Plans

BY STEPHEN KRAUS

The Supreme Court, in *Fifth Third Bancorp v. John Dudenhoeffer* (*Dudenhoeffer*), recently established new standards for determining when fiduciaries of Employee Stock Ownership Plans (ESOPs) act prudently regarding a company's stock in an ESOP. Specifically, the Court considered whether an ESOP fiduciary's decision to buy or hold stock or not sell stock, when challenged, is entitled to a "presumption of prudence."

ERISA requires fiduciaries to act prudently and solely in the interest of a plan's participants and beneficiaries, and to diversify the plan's investments. With respect to ESOPs, **ERISA specifically provides that the diversification aspect of the prudence requirement is not violated by the purchase and holding of employer securities**.

In connection with so-called "stock drop" cases ESOP plan participants, supported by the Department of Labor's amicus brief, argued that, except for the duty to diversify assets, the ERISA prudence rule applies to ESOPs, and that a plan fiduciary must continually monitor the employer stock to determine that it remains a prudent investment. Despite ERISA's express provision that an ESOP fiduciary does not violate the prudent requirement by not diversifying a plan's investments, the circuit courts of appeals that have considered this issue have gone beyond ERISA's express language and, for almost 20 years, held that ESOP fiduciaries enjoy a "presumption of prudence" regarding employer securities. In rejecting the "presumption of prudence" standard, the Court held:

> … the law does not create a special presumption favoring ESOP fiduciaries. Rather, the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings.

Having rejected the "presumption of prudence" standard, the Court enunciated guidelines for the lower courts to consider when dealing with allegations of fiduciary breach in ESOP plans. First, the Court considered whether a fiduciary acts imprudently when relying on publicly available information in continuing to buy or hold employer securities. The Court held:

> … a fiduciary usually is not imprudent to assume that a major stock market … provides the best estimate of the value of the stocks traded on it that is available to him.

The Court went on to state, however, that it was not considering whether a plaintiff could plausibly allege imprudence

> on the basis of publicly available information by pointing to a special circumstance affecting the reliability of the market price as an unbiased assessment of the security's value in light of all public information.

The Court then considered whether a fiduciary acts imprudently by failing to act on the basis of non-public (insider) information that was available to the fiduciary:

> To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.

In determining when a fiduciary should act on insider information, the Court provided the following guidance:

1. ERISA does not require a fiduciary to break the law.

2. Courts should consider whether a fiduciary's decision to either refrain from making a trade on the basis of insider information or disclose insider information to the public conflicts with the insider trading and corporate disclosure requirements of the securities laws.

3. Courts should consider whether a fiduciary's action based on insider information would do more harm than good to the plan.

Although the decision involved an ESOP, it is much broader and also applies to all other ERISA covered retirement plans that offer company stock as an investment option under the plan. The decision will cause plan fiduciaries of plans with employer stock to increase their level of plan review and monitoring. In addition, given the uncertainty as to how lower courts will interpret the Court's decision, employers who do not currently offer company stock may be reluctant to begin offering that option. Additionally, employers that already offer company stock may decide to eliminate it as an investment option under their plans.

Rakoff Rebuffed on Rejection of SEC Settlement

BY MICHAEL VALERIO

A three-judge panel of the U.S. Court of Appeals for the Second Circuit has vacated a provocative order by Southern District of New York Judge Jed Rakoff. In the November 2011 order, Rakoff rejected a proposed "no-admit, no-deny" consent decree to resolve an SEC enforcement action against Citigroup. See "Judges Refuse to Rubber Stamp SEC Settlements" and "SEC Enforcement Evolves," *Expect Focus*, Vol. I, Winter 2012. In vacating the order, **the Second Circuit found it "an abuse of discretion to require, as the district court did here, that the [SEC] establish the 'truth' of the allegations against a settling party."**

The Second Circuit explained: "Trials are primarily about truth. Consent decrees are primarily about pragmatism [and] provide parties with a means to manage risk." Thus, while the reviewing court must assess whether the proposed consent decree is fair and reasonable, and whether the public interest would be disserved by any requested injunctive relief, "[t]he job of determining whether the proposed [SEC] consent decree best serves the public interest...rests squarely with the [SEC]."

Moreover, the appellate court held that the district court could not second guess the nature of the charges the SEC brought (or failed to bring) against Citigroup. The Second Circuit also admonished, "Nor can the district court reject a consent decree on the ground that it fails to provide collateral estoppel assistance to private litigants – that simply is not the job of the courts."

Not surprisingly, the SEC has publicly hailed the Second Circuit's ruling as a reaffirmation of "the significant deference accorded to the SEC in determining whether to settle with parties and on what terms." On remand, Judge Rakoff approved the Citigroup settlement, although he expressed concern that, under the Second Circuit's decision, regulators' settlements "will in practice be subject to no meaningful oversight whatsoever."

Early Preview of 2015 SEC Exam Priorities

BY BILL CHENG

The SEC continues to set its sights on certain types of funds that it believes may present a higher risk of conflict of interest and confusion in the way they are designed and marketed. After signaling earlier this year that it would increase its scrutiny of private equity and other private funds, Kevin Goodman, the National Associate Director of the Broker-Dealer Examination Program in the Office of Compliance Inspections and Examinations, recently indicated that sales of class L share variable annuities will also be on its radar of priorities for next year's compliance examinations.

Of course, close regulatory scrutiny of variable annuities is nothing new. But what has now caught the SEC's attention is "an explosion" of "L share" annuities, a class that generally has higher front end loads than most other share classes in exchange for a shorter surrender charge period. Goodman said, "We want to make sure these share classes aren't being chosen or marketed based on the higher commissions they generate." The SEC will focus on the disclosure of the fees and costs associated with such shares, and whether they are appropriate for the investors purchasing them.

> **WHAT HAS NOW CAUGHT THE SEC'S ATTENTION IS "AN EXPLOSION" OF "L SHARE" ANNUITIES.**

The SEC will also turn its attention on the operations of broker-dealer branch offices on a stand-alone basis and not just review whether they are being adequately supervised by the firm. Additionally, broker-dealers with a history of disciplinary problems will likely see an increase in examination activity. The official list of SEC examination priorities will be published in January 2015.

SEC Issues Guidance on Accredited Investor Status

BY JASON JONES

On July 3, 2014, the SEC's Division of Corporation Finance issued six new compliance and disclosure interpretations (C&DIs) regarding determination of accredited investor status for purposes of Rule 506(c).

C&DI 255.48 provides that, for purposes of determining whether the investor meets the income threshold, where annual income is not reported in U.S. dollars, the issuer may use either (a) the exchange rate in effect on the last day of the year or (b) the average exchange rate for that year. C&DI 255.49 clarifies that, for determination of whether the investor meets the net worth threshold, assets held jointly with a non-spouse may be included in the calculation to the extent of the investor's percentage ownership of the assets.

The remaining C&DIs clarify two issuer safe harbors for taking reasonable steps to verify an investor's status as an accredited investor. **The C&DIs make clear that the safe harbors' requirements for specified documentation are to be narrowly construed. Nevertheless, they also state that issuers may still be able to rely on the alternative documentation described therein to conclude that a purchaser is an accredited investor, using a principles-based approach to verification.**

Rule 506(c)(2)(ii)(A) provides a safe harbor for an issuer to verify that an individual investor is an accredited investor on the basis of annual income by reviewing any IRS form that reports the investor's income for the "two most recent years." C&DI 260.35 clarifies that an issuer cannot rely on this safe harbor if the IRS form for the most recently ended year is unavailable. Further, C&DI 260.36 explains that comparable foreign tax forms for the required years do not satisfy the safe harbor's requirements.

Rule 506(c)(2)(ii)(B) provides a safe harbor for an issuer to verify that an investor is an accredited investor on the basis of net worth by reviewing specified documentation of the investor's assets and liabilities, including property tax assessments dated "within the prior three months." C&DI 260.37 clarifies that, for purposes of the safe harbor, an issuer would be unable to rely on a tax assessment that is dated more than three months earlier. Rule 506(c)(2)(ii)(B) also permits an issuer to rely on a consumer report from one of the "nationwide consumer reporting agencies" to verify a potential investor's liabilities. Pursuant to C&DI 260.38, however, an issuer could not rely on a consumer report from a non-U.S. consumer reporting agency for purposes of this safe harbor.

SEC Again Delays Variable Annuity Summary Prospectus

BY GARY COHEN

Once again, the SEC has delayed action on the variable annuity summary prospectus—this time, until March 2015. The SEC revealed the news, rather surreptitiously, in a submission to the Office of Management and Budget regarding the SEC's regulatory agenda.

In a speech last March, Norm Champ, director of the SEC's Division of Investment Management, cheered the industry when he announced that the variable annuity summary was number four of eight Division priorities. The SEC then reported to Congress that it expected the Division to recommend rules to the Commission by October 1, 2013. Thereafter, the SEC delayed action for a year, reporting to Congress that it expected the staff's recommendation by October 1 of this year. So, the new March 2015 date is the second delay by the SEC.

Neither the SEC nor the staff has explained the delays. However, when Champ made his announcement last March, he said the priorities had been created "in close consultation with the Chairman and the Commissioners." One month later, Mary Jo White replaced Elisse B. Walter as SEC Chairman, and, five months later, Kara M. Stein and Michael S. Piwowar joined the Commission. So, **of the five Commissioners who could have blessed Champ's priorities last March, three have left the Commission.**

In addition, the Commission is still struggling to meet mandates set by the Dodd-Frank and JOBS Acts. Congress has signaled the Commission that it should complete those mandates before addressing discretionary rules.

Mutual funds have been able to use summary prospectuses since January 1, 2010. It took more than two years from the date of proposal to the date when funds could use them. At that rate, if the SEC proposes variable annuity summaries in March 2015, it would be April 2017 before insurers could use them.

State Regulators Eye Complex Products Marketing

BY KELLY CRUZ-BROWN

Joseph P. Borg, Director of the Alabama Securities Commission, and James R. Mumford, First Deputy Insurance Commissioner in Iowa, raised state securities and insurance regulatory concerns at this summer's Insured Retirement Institute Government, Legal and Regulatory conference in Washington, D.C.

According to Mr. Borg, structured products, non-traded REITs, and private placements can be problematic without adequate disclosures regarding how the investments work, a problem that may worsen as the number of insurance agents, particularly independent ones, selling unregistered securities products increases. He attributed the problem partly to agents' inadequate training and lack of experience with these products, but noted that, in some cases, agents are engaging in fraudulent activity and mentioned that promissory notes and self-directed IRAs may raise similar concerns due to the lack of reliable valuations.

Mr. Borg commented that a 2014 change to Alabama's statute of limitations will facilitate prosecution of securities fraud cases, particularly those involving long-term investments, because the limitations period for securities fraud and other thefts involving deception is now five years after discovery of the deception, not three years from the transaction date.

Mr. Mumford reiterated the importance of training to ensure that insurance agents can competently explain the complex products they sell. He stated that, **if the Iowa Insurance Division does not understand how a proposed new insurance product is intended to function, it will require the insurer to explain how agents will be trained to sell the product.** He noted that sales activity without proper license(s) remains a concern, and stressed that Iowa Bulletins 11-4 and 11-S-1 provide guidance to those licensed to sell only insurance, or only securities, regarding the limits on their consumer interactions related to products they are not licensed to sell.

SEC Takes Action for Retaliation Against Whistleblower

BY MARISSEL DESCALZO

The SEC has brought its first enforcement action for alleged retaliation against a whistleblower under the SEC's Dodd-Frank whistleblower rules. The case demonstrates the Hobson's choice companies face when they become aware of a whistleblower's identity.

In *In the Matter of Paradigm Capital Management, Inc.,* the company's head trader informed Paradigm that he had secretly disclosed improprieties at the company to the SEC, some which related to trades he had effected. Paradigm immediately retained outside counsel to provide advice. Stating that it needed to investigate, the company thereafter relieved the whistleblower of his day-to-day trading and supervisory responsibilities, tasked him with drafting a report on the improprieties he alleged, and denied him access to the company's network. When the whistleblower requested to return to work, the company resisted and determined the relationship was "irreparably damaged." Attempts to agree on severance terms failed.

IF THE COMPANY DOES NOT ALLOW THE WHISTLEBLOWER TO CONTINUE TO PERFORM HIS OR HER REGULAR JOB RESPONSIBILITIES, RETALIATION CHARGES MAY FIND A SYMPATHETIC EAR AT THE SEC.

The case illustrates the dilemmas a company can encounter when faced with a whistleblower. The company may have legitimate interests in understanding the whistleblower's accusations and conduct, limiting its exposure to any further improper conduct, and, in some cases, preserving any cause of action it has against a whistleblower who acted improperly. On the other hand, if the company does not allow the whistleblower to continue to perform his or her regular job responsibilities, retaliation charges may find a sympathetic ear at the SEC.

Paradigm also presents a reminder that there is no surefire way to escape retaliation claims. The best strategy a company can use to protect itself is to institute a compliance program that is enforced and establish a monitored compliance hotline. Finally, the company should consistently encourage and reward internal reporting of any wrongdoing.

Registration Relief for Some Delegating CPOs

BY ED ZAHAREWICZ

In May, the Commodity Futures Trading Commission (CFTC) staff announced a streamlined process that allows persons seeking no-action relief to avoid registering as commodity pool operators (CPOs). They must, however, designate another person to serve as the registered CPO of the commodity pool at issue.

Staff Letter 14-69 sets forth the criteria that must be satisfied to use the streamlined approach, as well as the form of no-action request that must be submitted by the requesting CPO. While Letter 14-69 does not, by itself, provide no-action relief, the staff intends to issue responses to each request for relief made in compliance with that letter.

The applicable criteria are based on numerous requests the staff has received over the past several years. Generally, those requests have sought relief for a CPO that delegates its investment management authority over a commodity pool to another person (registered as a CPO) and does not solicit participants for, or manage property of, the applicable commodity pool. Under these circumstances, the staff has issued no-action relief, for example, regarding pools organized as limited partnerships or limited liability companies, such that an affiliated investment manager could serve as the registered CPO instead of the general partner or managing member.

In prior no-action positions for natural persons serving as members of the governing body of a commodity pool (mostly involving pools domiciled and located outside the United States), the staff generally has required the delegating and designated CPOs to agree to be jointly and severally liable for any commodity law violation that either commits regarding the pool. **Letter 14-69 notably clarifies that the staff intends to provide relief for such members without requiring them to agree to joint and several liability if they are not affiliated with the designated CPO.**

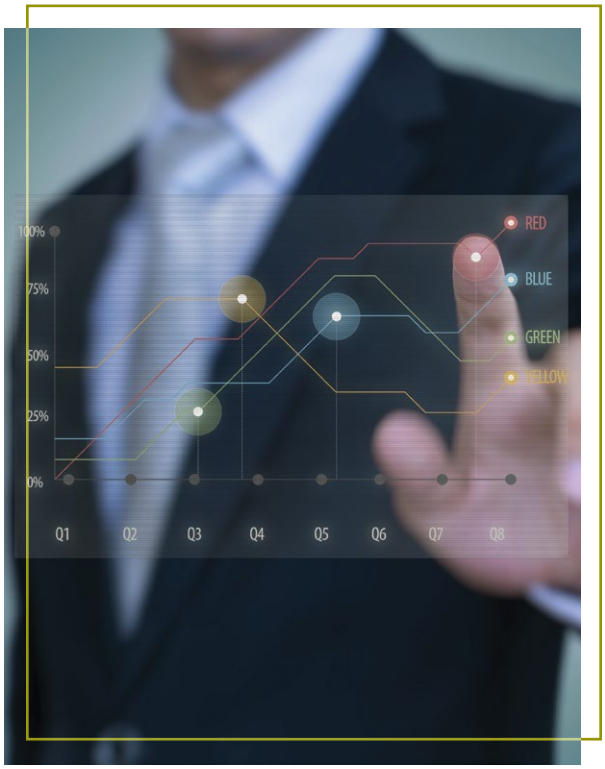
"Fraud on the Market" Theory Basically Survives

BY SAMUEL SALARIO

On June 23, 2014, the U.S. Supreme Court decided *Halliburton Co. v. Erica P. John Fund, Inc.*, which addressed whether the "fraud on the market" doctrine established in the 1988 decision in *Basic, Inc. v. Levinson* should be overruled or modified. Relying on the "efficient capital markets hypothesis," *Basic* held that reliance can be presumed in federal securities fraud actions where material misrepresentations are disseminated to an efficient market. The doctrine facilitates class certification in cases involving publicly-traded securities by providing class-wide proof of reliance.

The *Halliburton* defendants argued that subsequent economic research has undermined *Basic's* "robust" view of market efficiency and its assumption that investors uniformly trade in reliance on the integrity of a security's market price. The Court, however, concluded that those concerns were known and addressed by its opinion in *Basic*. The Court thus declined to overrule *Basic* or to adopt the "radical" modification of requiring a plaintiff to prove that an alleged misstatement actually affected the market price – so-called "price impact" – as a prerequisite to invoking the *Basic* presumption.

The Court did, however, agree that defendants can rebut the presumption *at class certification* with evidence showing *the absence* of price impact. **This gives defendants a new weapon in cases where certification might otherwise be considered a given.** Indeed, the decision might reclaim some of the ground lost by defendants in *Amgen v. Connecticut Retirement Plans and Trust Funds* and an earlier opinion in *Halliburton* holding, respectively, that materiality and loss causation are not proper class certification arguments. Because a lack of price impact frequently means a lack of materiality or causation, *Halliburton* may enable defendants to attack these kinds of issues under another theory. How the lower courts will harmonize these decisions remains to be seen.



Defendants may rebut *Basic* presumption by showing absence of price impacted.

Immigrant Investor Program Raises SEC Broker Registration Issues

BY SCOTT SHINE

The Immigrant Investor Program (also known as EB-5) was created in 1990 to stimulate the U.S. economy by allowing foreign investors to qualify for U.S. residency by investing in new commercial enterprises that create jobs for U.S. workers. Because of the recent growth in the program and the fact that offers to invest in such enterprises are likely securities offerings, the SEC has taken an interest in the application of the Federal securities laws to the EB-5 program.

One such area receiving SEC attention is whether a "finder," who is typically used to help facilitate the foreign investment, is required to be registered as a broker under the securities laws. A broker is defined as

someone engaged in the business of effecting securities transactions for the accounts of others. The Exchange Act of 1934 requires a person acting as a broker to register with the SEC. **Although there is not a precise litmus test for the exact activities that qualify as a broker, a finder who solicits investors or receives transaction-based compensation, among other activities, would likely be required to register with the SEC.**

An individual may be exempt from broker registration depending on, for example, where the activity necessitating registration takes place and the individual's compensation arrangements. The SEC does not have jurisdiction over any activity occurring exclusively outside of the U.S. Moreover, certain employees of the commercial enterprise who do not receive transaction-based compensation may be able to avoid registration. Finally, some courts have carved out a limited exception for individuals whose only activity is to pass along contact information of potential purchasers of securities.

A finder engaging in broker activity without first registering with the SEC could lead to rescission rights of the foreign investor, including damages under state and federal law, as well as the loss of the securities exemption needed to engage in the initial offering without registering the securities. For these reasons, the SEC has publicly urged EB-5 participants engaging finders to seek counsel on how the broker registration requirements and other securities laws and exemptions apply to the EB-5 program.

Guidance for Investment Advisers Using Proxy Advisory Firms

BY TOM LAUERMAN

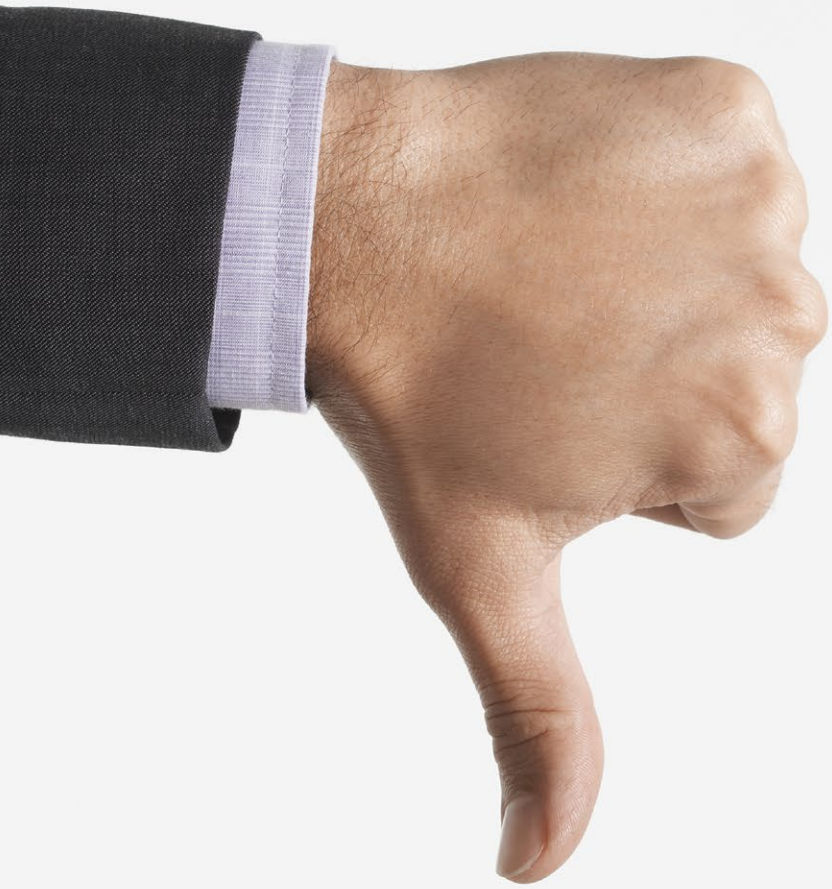
A recent SEC Staff Legal Bulletin provides important guidance for investment advisers that use proxy advisory firms in voting clients' securities. Nevertheless, the Bulletin (dated June 30, 2014) leaves much unresolved.

For years, critics have argued that proxy advisory firms have too much influence and raise conflict of interest and other regulatory issues that have been inadequately addressed (see "SEC Radar Targets Proxy Voting Advice," *Expect Focus,* Vol. I, Winter 2012). **Although some have envisioned that the SEC would take formal action to impose significant additional regulatory requirements, the Bulletin merely expresses current views of the SEC staff and is not binding on the Commission.**

While the Bulletin, dated June 30, 2014, sets forth numerous practices that investment advisers may wish to follow, the practices would generally involve refinements rather than marked changes in investment advisers' current operations. Moreover, the staff frames most of these practices as suggestions for consideration, not things investment advisers "must" or even "should" do.

The staff's stronger statements in the Bulletin include guidance that investment advisers "should":

- review at least annually the adequacy of their proxy voting policies and procedures;
- ascertain that proxy advisory firms that they retain have the capacity (a) to adequately analyze proxy issues and, (b) to make any voting recommendations on the basis of accurate information;
- reasonably assure themselves that any proxy advisory firms that they determine to have based recommendations on inaccurate information take responsive actions that are reasonably designed to prevent recurrences; and
- implement measures reasonably designed (a) to provide sufficient oversight of proxy advisory firms to ensure that the investment advisers meet their proxy voting obligations to clients and (b) to identify and address the relevant conflicts of interest to which the proxy advisory firms can be subject.



CFPB Wants to Publish Detailed Consumer Complaints

BY ELIZABETH BOHN

The Consumer Financial Protection Bureau (CFPB) has proposed to publicly disclose details of consumer complaints filed through its web-based public consumer complaint database by including a consumer narrative of events that led to the complaint.

The current online database contains basic, anonymous, information about the complaints, including the company, product type, and a general term describing the issue, such as “billing dispute,” “loan modification/foreclosure,” or “transaction issue.” The database is searchable by any of these variables. According to the CFPB, adding detailed consumer narratives would provide consumers and companies with information about how customers feel they have been harmed, identify whether a practice complained of is localized to a geographic area or used across the market by companies, and give companies incentives to address issues.

TO DATE, THE CFPB HAS PROCESSED MORE THAN 400,000 COMPLAINTS. ADDITIONALLY, MORE THAN $1 BILLION IN REIMBURSEMENTS AND FINES HAVE BEEN IMPOSED AGAINST COMPANIES IN ENFORCEMENT ORDERS ISSUED.

The CFPB accepts complaints about credit cards, mortgages, and other consumer financial products, including bank accounts, credit reporting, student loans, debt collection, vehicle and other consumer loans, and money transfers. To date, the CFPB has processed more than 400,000 complaints. Additionally, more than $1 billion in reimbursements and fines have been imposed against companies in enforcement orders issued. Frequently, investigations leading to enforcement orders against entities have been triggered by a volume of consumer complaints.

Permitting consumers to describe their experiences in their own words in an unstructured and potentially unlimited fashion creates substantial risk that the narratives may contain factually incorrect information due to a consumer’s misunderstanding or mis-recollection of the events. Publication of any misinformation could cause companies significant reputational risk, both among potential consumers and other market participants. These risks may not be adequately mitigated by permitting companies to publish their responses to the narratives, also part of the proposal. The CFPB (www.regulations.gov) has extended the time to submit comments on the proposal to September 22, 2014.

Ahead: CFPB Regulations of Creditors Collecting Own Consumer Debts?

BY ELIZABETH BOHN

The Federal Fair Debt Collection Practices Act (FDCPA or the Act) was enacted in 1977 to end abusive consumer debt collection practices by debt collectors, while insuring that collectors who don't engage in such practices were not competitively disadvantaged. The Act prohibits debt collectors from engaging in abusive, deceptive, or unfair practices and regulates their communications with consumers and others. Creditors that collect their own debts (excluding debt purchased after default) have always enjoyed a statutory exclusion from the FDCPA's restrictions. But the Consumer Financial Protection Bureau (CFPB or the Bureau) has indicated it may introduce new consumer debt collection regulations applicable to creditors that collect their own debts.

Dodd-Frank empowered the CFPB to issue substantive rules under the FDCPA and to supervise larger participants in the debt collection market. It also authorized the CFPB to issue regulations intended to identify and prevent unlawful, unfair, deceptive, or abusive acts or practices in any transactions with consumers involving consumer financial products or services. Although the CFPB only began accepting consumers' debt collection complaints in 2013, it reports that debt collection complaints have quickly grown to make up the largest percentage of complaints that it, or any other federal agency, receives. (The FTC also receives complaints on, and enforces, the FDCPA). In late 2013, the CFPB issued an Advanced Notice of Proposed Rulemaking (ANPR) seeking information on a wide range of debt collection practices and issues in order to explore potential debt collection rulemaking.

In the ANPR, the CFPB stated that significant problems regarding debt collection persist despite vigorous government enforcement supervision and educational efforts, making it appropriate for the Bureau to explore whether it can use its rulemaking authority to address some longstanding problems, including the need to examine rules covering creditors that collect consumer debt in their own names.

According to the CFPB, creditors were excluded from the FDCPA because Congress believed the risk of reputational harm would sufficiently deter them from engaging in harmful debt collection practices. However, since its enactment, first-party debt collectors have themselves been the subject of tens of thousands of complaints to the FTC and the CFPB. In addition, the Bureau noted that many states (including Florida) have consumer collection practice statutes that apply to creditors, many of which were enacted after Congress excluded creditors in the FDCPA, indicating a recognition that the FDCPA alone may not sufficiently address debt collection practice abuses.

SINCE THE FDCPA'S ENACTMENT, FIRST-PARTY DEBT COLLECTORS HAVE BEEN THE SUBJECT OF THOUSANDS OF COMPLAINTS.

Florida: Note and Mortgage Still Enforceable After Dismissal of Foreclosure Action

BY MICHAEL WINSTON & KRISTIN GORE

Unsuccessful mortgage foreclosure actions have resulted in a new wave of "quiet title" lawsuits brought by borrowers attempting to have their notes and mortgages deemed void and unenforceable. However, the federal district and state appellate courts of Florida considering the issue have uniformly rejected the theory that a failed foreclosure attempt allows mortgagors to obtain their property free and clear of the lien where the mortgage and note have not been paid in full.

In recent cases such as *Matos v. Bank of New York* and *Dorta v. Wilmington Trust Nat. Ass'n*, both the Middle District and Southern District of Florida have held that the involuntary dismissal of a foreclosure action does not affect the enforceability of the note and mortgage, and that subsequent foreclosure and acceleration actions could be brought for any payment default less than five years old – the statute of limitations for breach of contract actions in Florida.

Likewise, in *U.S. Bank Nat. Ass'n v. Bartram*, the Fifth District Court of Appeals explained, "… a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, **even where acceleration had been triggered and the first case was dismissed on its merits** … provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period."

While the current decisions seem to favor lenders, the existing state of the law should not be a basis to cease acting diligently as things could change. In *Bartam*, the Fifth District certified to the Florida Supreme Court the question of whether acceleration after involuntary dismissal of a foreclosure action would trigger application of the statute of limitations to prevent a subsequent foreclosure action based on subsequent payment defaults. The Florida Supreme Court has not yet decided whether to take jurisdiction.

Collection Practices Plaintiffs Try End Run Around Florida Punitive Damages Laws

BY ELLEN KOEHLER LYONS

In Florida, debtor-side attorneys are asserting a novel legal argument to bring punitive damages claims at an earlier stage, pursuant to the civil remedies section of Florida's Consumer Collection Practices Act, Section 559.77, *Florida Statutes* (the Act). These debtor-side attorneys claim that a reference to the availability of punitive damages in the Act allows plaintiffs to seek these damages in their initial complaint.

However, Florida has a statute that prevents plaintiffs from claiming punitive damages prior to a judicial determination that there is a basis for them. The statute creates a substantive right to litigants to be protected from baseless punitive damages, which, without the statute, could be asserted in any case. The plain language of Florida's Punitive Damages Statute, Section 768.72, *Florida Statutes*, indicates that a litigant in "any civil action" has the right to adjudication prior to the presentation of a claim for punitive damages to the trier of fact. The Punitive Damages Statute applies to both statutory and common law claims. Indeed, as a matter of policy the right to be free from baseless claims for punitive damages is so essential that a court's failure to follow Florida's Punitive Damages Statute is subject to immediate *certiorari* review.

Though novel, **the debtor-side argument ultimately fails because the simple reference to a plaintiff's potential recovery of punitive damages in the Act does not obviate the broad substantive and procedural protections available under Florida's Punitive Damages Statute.** However, this argument is likely to reappear until tested at the appeallate level. Florida courts have a long tradition of enforcing

the State's Punitive Damages Statute, so it will take more than a reference to a plaintiff's potential to recover punitive damages at the end of a collection practices act case to cause the courts to bypass the punitive damages protections afforded all litigants.

Using Information from Data Brokers? Beware the FCRA and the FTC ...

BY ELIZABETH BOHN

As sellers and Internet service providers gather increasing amounts of consumer information, the data broker industry has expanded. Identifying themselves as "market research" firms, data brokers buy, analyze, sort, aggregate, and resell public and non-public information and analytics about consumers to companies that use the data to target their marketing efforts.

But the Federal Trade Commission (FTC), which enforces the Fair Credit Reporting Act (FCRA), takes the position that these data brokers are consumer reporting agencies (CRAs) regulated by the FCRA. The FCRA defines a CRA to include anyone who "regularly engages in assembling or evaluating credit or other consumer information" for the purpose of furnishing "consumer reports" to third parties, by means of interstate commerce. "Consumer reports" are broadly defined to include "any information" "communicated by" a CRA relating to "general reputation, personal characteristics, or mode of living" that may serve "as a factor" in establishing the consumer's eligibility for credit, insurance, or employment.

The FTC aggressively pursues enforcement against key players in the credit reporting system: CRAs, furnishers of information, and consumer report users. In recent years it has sued and assessed millions of dollars in penalties against data brokers that sell information about consumers, including Instant Checkmate, InfoTrack, and Choice Point. According to FTC complaints, these companies operated as CRAs but violated the FCRA by, among other things, providing inaccurate information about consumers, and failing to screen prospective subscribers before selling them sensitive consumer information.

The FCRA also requires users of consumer reports to provide the consumer with notice of any "adverse action" taken on the basis of information contained in the report, including denial of credit or eligibility for insurance. **Companies that use information purchased from data brokers or "market research" companies as "a factor in determining eligibility" for extension of credit or insurance should be aware that they may be subject to adverse action notice requirements under the FCRA.**

The FTC has called for more transparency and accountability on the part of data brokers, and recently recommended to Congress that it consider legislation requiring data brokers to provide consumers information about the data they collect, access to their data, and the ability to opt out of having it shared for marketing purposes: http://www.ftc.gov/news-events/press-releases/2014/05/ftc-recommends-congress-require-data-broker-industry-be-more.

Ninth Circuit Affirms Summary Judgment for Defendant Taco Bell in Putative TCPA Text Message Class Action

BY ALINA ALONSO RODRIGUEZ

The recipient of a text message advertising Taco Bell products sued the company, alleging that the message violated the Telephone Consumer Protection Act's (TCPA) prohibition on calls to cell phones using an auto-dialer or artificial or prerecorded voice, without the recipient's prior express consent. However, the message was not sent by Taco Bell, but by a text-messaging service retained by an advertising agency hired by the Chicago Area Taco Bell Local Owners Advertising Association. The Association is comprised of Chicago area store owners and Taco Bell.

In affirming the district court's decision in favor of Taco Bell, the Ninth Circuit Court of Appeals, in *Thomas v. Taco Bell Corp.,* cited a recent FCC ruling, noting that the TCPA contemplates vicarious liability. **Specifically, to establish vicarious liability, plaintiff had to establish that the Association, advertising agency and text-messaging service acted as agents of Taco Bell, *i.e.*, that Taco Bell *controlled or had the right to control the manner and means of the text message campaign.***

The court agreed that Taco Bell did not control the actions of these entities with respect to the text-messaging campaign. It added that the FCC ruling also contemplates vicarious liability through theories of apparent authority and ratification but concluded that an apparent authority theory failed because the plaintiff could not establish that she reasonably relied to her detriment on any apparent authority between Taco Bell and these entities. The court similarly discarded the ratification theory because it, too, requires a principal-agent relationship which it had already concluded did not exist.

Federal Courts Help Define the Borders of "Professional Services"

BY BERT HELFAND

Underwriting professional risks can be tricky—especially if the nature of those risks is uncertain. In July 2014, two federal courts addressed this problem and offered some promising clarity.

Wisznia Company is an architectural firm that designed a performing arts center for Jefferson Parish, Louisiana. The parish sued the firm, alleging that it produced a "defective set of plans and specifications," failed to coordinate effectively with its consultants and also committed "**[a]ny and all negligent acts … to be proven at trial**." Wisznia tendered the suit to its general liability insurer, which declined coverage on the basis of a policy exclusion for claims arising out of "**professional services**."

In the ensuing coverage action, Wisznia argued that the parish asserted claims "for **both** professional liability **and** ordinary negligence." In *Wisznia Company v. General Star Indemnity Co.*, the U.S. Court of Appeals for the Fifth Circuit disagreed. Applying Louisiana law, the court acknowledged that the "eight corners rule" required it to read both the underlying petition and Wisznia's policy in a "liberal" fashion favoring the insured. But the court found that the factual allegations in the parish's petition established only "that it hired Wisznia to use its professional skills to design a building and coordinate its construction, and the building … did not pass muster."

Most importantly, the court found that the parish's factual allegations **did not** give rise to "an **ordinary** claim for negligence"—such as one that Wisznia had created an unreasonably dangerous condition. Absent allegations that the defendant breached the "**general duty of reasonable care**," the court held, the claims implicate **only** "professional services."

The following day, in *John M O'Quinn P.C. v. National Union Fire Ins. Co. of Pittsburgh*, the U.S. District Court for the Southern District of Texas addressed this issue from the opposite perspective. The plaintiff in that case, a law firm, was insured under a lawyer's professional liability policy, which offered coverage for claims arising out of "**professional legal services**." The firm sought coverage for two class actions alleging it had improperly withheld certain settlement proceeds as a deduction for "general expenses."

THE DISTRICT COURT HELD THAT THE DISTINCTION BETWEEN BILLING AND PROFESSIONAL SERVICES IS CLEAR-CUT.

In awarding summary judgment to the insurers, the court cited several earlier cases to the effect that "**billing and/or fee-setting practices do not constitute 'professional services.'**" In this case, however, the attorneys argued that their billing practice overlapped with their **fiduciary responsibilities**. In the early 1990s, the law firm represented plaintiffs in suits against breast-implant manufacturers. Because of the large number of implant cases in Texas, the local courts consolidated many of them for pretrial matters, directing that certain witnesses be deposed only once, for use in all cases. The law firm therefore had to find a way to allocate expenses common to all its clients. Rather than seek the court's assistance, it unilaterally imposed a 1.5 percent deduction from each client's settlement, which it referred to as "BI General Expenses."

The district court was unmoved. It held that the distinction between billing and professional services is clear-cut: "**There are elements of experience and judgment in billing for legal services, but the same goes for pricing shoes**." As in *Wisznia*, the court simply refused to blur the distinction between professional and non-professional claims.

Washington Supreme Court Narrows Efficacy of Late Notice Defense

BY JOHN PITBLADO

Even when the claims in a lawsuit arguably fall within the coverage terms of the defendant's liability insurance policy, the circumstances might suggest facts that would establish a defense to coverage. In that case, the insurer might be permitted to explore those facts in discovery. But in *Expedia Inc. v. Steadfast Ins. Co.*, the Supreme Court of Washington held that the insurer nevertheless has a duty to provide a defense, at least until that discovery bears fruit. The court further suggested that the discovery might have to wait until resolution of the underlying action.

Expedia, Inc., a popular travel website operator, sued its insurers for breach of contract and bad faith, based on their refusal to defend cases brought by various states, municipalities, and other taxing authorities. The underlying cases generally alleged that Expedia improperly calculated the sales tax charged to consumers who reserved hotel rooms using the site. Expedia calculated the taxes based on the *reduced* rates Expedia obtains for its customers, not on the rooms' full retail value.

THE WASHINGTON SUPREME COURT EMPHASIZED THAT THE DUTY TO DEFEND IS "DETERMINED FROM THE 'EIGHT CORNERS' OF THE" POLICY AND THE UNDERLYING COMPLAINT.

Expedia's 10-K filings with the SEC show that it learned of its problem with taxing authorities not later than 2002. The first lawsuit against it was filed in December 2004. Expedia did not notify its insurers or tender defense of the suit until June 2005. The insurers denied the claim and refused to defend, based on certain exclusions for alleged "willful and knowing" violations, and also on the ground of late notice. In 2010 and 2011, Expedia tendered another 62 suits, for which defense was also denied.

Expedia moved for summary judgment on the duty to defend, and the insurers moved for a continuance, pursuant to Washington's procedural rules, to pursue discovery regarding late notice. The trial court granted the motion and allowed the discovery, effectively staying adjudication of the duty to defend. Expedia's motion for discretionary appellate review was denied by the Court of Appeals, but the Washington Supreme Court granted a petition for review.

Reversing the trial court, the Supreme Court emphasized that the duty to defend is "determined from the 'eight corners' of the" policy and the underlying complaint. Therefore, "[d]etermining **whether the duty to defend has been triggered is a *separate inquiry* from whether an insurer may be *relieved of its duty … due to a defense*** such as a claim of late tender."

The Supreme Court also directed the trial court to *stay* the insurers' discovery, pending a determination of *whether any part of it might prejudice Expedia* in the underlying suits. That issue is likely to arise in many cases in which there is evidence of the insured's knowledge about acts or conditions for which it has been sued. But the ruling was especially harsh because it followed a statement that an insurer which ultimately establishes a late notice defense will be relieved *only* "of the duty to pay the cost of defense *incurred after* the insurer obtains a … declaration that it owes no duty to defend."

Court Rejects Workers Comp Insurer's Challenge to Big Pharma

BY BERT HELFAND

Pharmaceutical manufacturers that promote off-label uses for prescription drugs have become litigation targets for third-party payors—especially after Kaiser received a nine-figure RICO award last year against the manufacturer of Neurontin. Health care insurers have filed most of these cases; in May 2014, Humana joined the crowd, suing a manufacturer over off-label use of a device designed for spinal fusion surgeries.

But workers compensation carriers—and even automobile insurers—can also spend large amounts on the same medications. Their claims face substantial obstacles, as shown by the recent decision dismissing the complaint in *The Travelers Indemnity Co. v. Cephalon, Inc.*

Cephalon manufactures two opioid pain relievers, Actiq and Fentora, which were approved by the FDA only for the management of "breakthrough" pain in cancer patients already receiving opioid therapy. In September 2008, Cephalon settled with the federal government and several states over its alleged promotion of Actiq for use by non-cancer patients. Follow-on suits included an action by a union health plan and, in June, a suit by the City of Chicago. The *Travelers* suit alleged that Cephalon's marketing misleadingly understated the risks of its products for non-cancer patients, and specially targeted doctors who treat injured workers, because workers compensation laws limit insurers' ability to restrict coverage for particular drugs. As a result, Travelers paid nearly $20 million for the two products. It asserted claims for fraud, negligent misrepresentation, violation of consumer protection statutes, and unjust enrichment.

TRAVELERS ALLEGED THAT CEPHALON'S MARKETING MISLEADINGLY UNDERSTATED CERTAIN RISKS.

The court dismissed the complaint on several grounds, beginning with lack of standing. Travelers claimed it was injured when it paid for Cephalon's drugs, because (1) they were ineffective in off-label uses, and (2) they were prescribed in place of cheaper alternatives. On the first point, the court held that the absence of data proving a drug's effectiveness for off-label use "does not support the conclusion that the drug is actually ineffective," and that "[t]he fact that a drug poses … a significant possibility of harm does not … establish injury-in-fact to the party paying for the drug." These findings also doomed the insurer's second theory because the court further held that "[a] plaintiff is not injured simply because it paid for a more expensive drug." It chided Travelers for failing to name "an equally effective, safer, less expensive drug" that could have been prescribed in lieu of Cephalon's products. It found the failure to allege an injury fatal to the state statutory claims, as well.

The court also dismissed Travelers's claims for intentional and negligent misrepresentation, as well as for unjust enrichment, on the ground that "off-label promotion is not inherently deceptive," and that the insurer had failed to specifically allege an instance of false or misleading claims. The court expressly refused to infer the use of false statements from the fact that doctors prescribed the drug for off-label uses.

As Kaiser proved, it is possible to overcome all of these positions—in some cases. But even substantial evidence of improper marketing will not, without more, get a third-party payor before a jury.

In for One, and *Only* One – Title Insurers' Limited Duty to Defend

BY MARTY SOLOMON & SCOTT FEATHER

If you've read an insurance coverage case, you've probably heard the phrase "in for one, in for all." Sometimes referred to as the "complete defense rule," this old saw is used to force liability insurers to defend their insureds against every count in a complaint, even when only one count even arguably contains a covered claim, or could conceivably trigger the duty to indemnify. Courts tell liability insurers that the duty to defend is simply broader than the duty to indemnify. They usually undertake an "eight corners" analysis: do any of the allegations within the four corners of the complaint fall within the four additional corners of the policy? If so, then the insurer is "in for one, in for all. Courts say that this is a practical approach, since it's tough to divide a complaint neatly into covered and non-covered claims, and awkward to ask one lawyer to defend just one count while another lawyer defends all the rest.

But, as with so many generally applicable rules of insurance law, title insurance is different. And for good reason. The unique and narrow purpose of the title policy is not to protect an insured from suits brought on by the insured's future conduct, but to cover actual losses caused by defects in, or encumbrances on, title – and only if those defects existed at the time the policy issued, not defects that arose afterward. Title insurance is backward-looking, not forward-looking. The risk is primarily limited by title curative activity before closing. Its core purpose is not to defend insureds against future litigation. Instead, litigation is just as often brought *by the insurer* as a way to avoid actual loss as a result of a question about title. By contrast, the liability insurer limits risk by defending the insured against claims that arise from the insured's post-policy conduct, no matter what that might be. The litigation defense is a much more substantial part of the underwritten risk.

TITLE INSURANCE IS BACKWARD-LOOKING, NOT FORWARD-LOOKING.

Just as important, the pragmatic rationale for the complete defense rule often doesn't apply to title claims. The types of claims brought against a title policy holder actually *are* often neatly distinct from the other, uncovered issues that arise in those cases. For example, a lender forecloses because the borrower doesn't pay her mortgage. Both the lender and the owner have title policies. The borrower raises a slew of defenses against the lender like fraudulent inducement, TILA violations, and the like, but also throws in a claim that the mortgage lien is defective. The insured owner probably isn't covered under her title policy for this alleged defect, because she's the only one asserting that the defect exists.But the insured lender makes a title claim, and the title insurer exercises its right to defend and try to prove the mortgage lien is enforceable. It's quite easy for the title insurer to retain counsel for the insured to appear in the case and handle that one discrete issue. It makes no sense for that lawyer to also be forced to defend the uncovered TILA and fraud claims, which are most often based on totally different allegations from the covered claim. Nor does it make sense, once the validity of the lien is established, to force retained counsel to finish the foreclosure that the insured lender would otherwise have paid for on its own.

This is why the language of most standard American Land Title Association title insurance forms says that a title insurer need defend only covered claims. Some courts have honored that language, and recognized that title insurers shouldn't be bound by the complete defense rule. Others, however, have simply failed to understand this key distinction, and have wrongly (in our view) applied the rule to title insurers. Even though title insurers have long understood that their duty to defend is narrow and limited, cases like these should remind the industry to take such coverage disputes seriously. Title insurers shouldn't lightly assume that the court in which they find themselves will be familiar with the good reasons why title insurers can and should be treated differently when it comes to the duty to defend.

Post-*Hobby Lobby* Questions Remain About the Scope of Corporate Religious Freedom

BY RICHARD OLIVER

The U.S. Supreme Court upheld a challenge to regulations mandating that employers provide contraceptive coverage for their employees. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court found the regulations promulgated by the Department of Health and Human Services violated the Religious Freedom Restoration Act, which prohibits laws burdening the free exercise of religion unless they further a compelling governmental interest and are the least restrictive means available. In so doing, the Court for the first time expressly recognized that for-profit corporations have standing to raise free exercise claims.

The challenged regulations mandated that employers' health plans include coverage for 20 FDA approved contraceptives. Hobby Lobby, Inc. and two other companies objected to this requirement as it related to four contraceptive methods that function by preventing development of an already fertilized ovum. They argued that this requirement substantially burdened their right to exercise their religion because it conflicted with their moral convictions concerning abortion. The Court agreed. While the Court presumed that the mandate served a compelling governmental interest, it held that it was not the least restrictive means of serving that interest. In reaching this conclusion, the Court relied on regulations making contraceptive coverage available for employees of religious organizations and not-for-profit corporations exempted from the mandate.

Practically, the decision may have little impact on the availability of contraceptive coverage. As the Court noted, HHS can ensure availability of contraceptive benefits by expanding regulatory accommodations made for religious organizations and not-for-profits. However, the decision raises questions about the scope of employers' rights to protection of their free exercise rights.

These questions are particularly relevant to LGBT interests. **An anticipated executive order prohibiting discrimination by federal contractors against LGBT employees seems certain to face a *Hobby Lobby* challenge.** Likewise, the breadth of *Hobby Lobby* will be tested as courts determine whether employers can be compelled to provide benefits to same sex spouses.

Circuit Courts Provide Preview of Coming ACA Confrontations

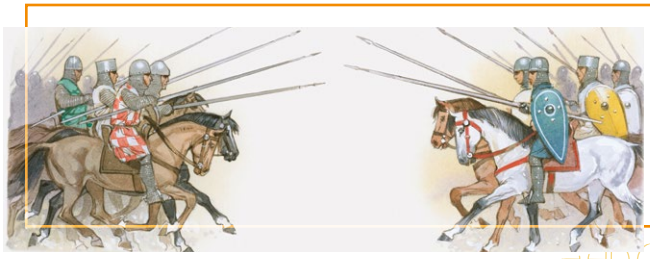
BY JON GATTO

The next Supreme Court battle over the Affordable Care Act is likely brewing in the circuit courts. On July 22, 2014, in *Halbig v. Burwell*, a divided D.C. Circuit held that the ACA does not allow the federal government to issue tax credits to those who purchase health insurance on federally-operated exchanges in 36 states. The court reasoned that the ACA makes the credits available only for plans "enrolled through an Exchange established by the State," not through an exchange established by the federal government.

Soon after, the Fourth Circuit reached the opposite conclusion in *King v. Burwell*. It held that the ACA is ambiguous and deferred to the Internal Revenue Service's administrative interpretation. In holding the statute ambiguous, the court reasoned that, while limiting the tax credits to state-operated exchanges had a "literal" appeal, the ACA also offered support for the opposite proposition.

For example, the ACA defines an "Exchange" as one established by the state, and then provides that the federal government will establish "such Exchange" if the state does not. This creates reasonable grounds to argue that the federal government merely "acts on behalf of the state when it establishes its own Exchange." Additionally, the ACA requires both federally-operated and state-operated exchanges to report on tax credits, which arguably would not make sense unless both had tax credits on which to report. Given the ambiguity, the court deferred to the IRS's interpretation, which it held consistent with Congress's intent of "ensuring the credits' broad availability."

The losing party in either case may seek *en banc* review, and similar cases are pending in federal trial courts in Indiana and Oklahoma. The Supreme Court is more likely to review the matter if there are conflicting decisions.



Laws Governing Data Security and Privacy – U.S. Jurisdictions at a Glance

UPDATED JULY 29, 2014

BY JENNIFER CHRISTIANSON & GAVRILA BROTZ

State	Statute	Year Statute Adopted or Significantly Revised	Upon Discovery of Breach, is Notice to State Attorney General Required?	Is Breach Notification to Affected Individuals Required if There is a Low Risk of Harm?	Does Statute Cover Electronic Data, Paper Records, or Both?	Maximum Fine	Does Statute Provide for a Private Cause of Action?
Alabama*	Ala. Information Technology Policy 685-00 (Applicable To Certain Executive Branch Agencies Only)	2012	No	No	Both	--	No
Alaska	Alaska Stat. §§ 45.48.010 – .090	2008	Yes	No	Both	$50,000	Yes
Arizona	Ariz. Rev. Stat. Ann. § 44-7501	2007	No	No	Electronic Data	$10,000	No
Arkansas	Ark. Code Ann. §§ 4-110-101 – -108	2005	No	No	Electronic Data	$10,000	No
California	Cal. Civ. Code §§ 1798.29, 1798.80 – .84	2013, 2009	Yes	Yes	Both	$3,000	Yes
Colorado	Colo. Rev. Stat. §§ 6-1-713, 6-1-716	2004, 2010	No	No	Both	--	Yes
Connecticut	Conn. Gen. Stat. § 36A-701b	2005	Yes	No	Electronic Data	$5,000	No
Delaware	Del. Code Ann. tit. 6, §§ 12B-101 – -104	2005	No	No	Electronic Data	$10,000	Yes
District of Columbia	D.C. Code §§ 28-3851 – -3853	2007	No	Yes	Electronic Data	$100	Yes
Florida	Fla. Stat. § 501.171	2014	Yes	Yes	Both	$500,000	No
Georgia	Ga. Code Ann. §§ 10-1-910 – -915, 46-5-214	2007, 2006	No	Yes	Electronic Data and Telephone Records	$0 for a data breach; $100 for a failure of a credit reporting agency to implement a consumer-requested security freeze	Yes
Guam	Guam Code Ann. tit. 9, §§ 48.10 – .80	2009	No	No	Electronic Data	$150,000	No
Hawaii	Haw. Rev. Stat. §§ 487N-1 – -7	2008	Yes, to the Office of Consumer Protection	No	Both	$2,500	Yes
Idaho	Idaho Code Ann. §§ 28-51-104 – -107	2006	Yes (for covered government agencies)	No	Electronic Data	$25,000	No
Illinois	815 Ill. Comp. Stat. 530/1 - /40	2006	No	Yes	Both	$50,000 (plus an additional $10,000 if victim is 65 years of age or older)	Yes

State	Statute	Year Statute Adopted or Significantly Revised	Upon Discovery of Breach, is Notice to State Attorney General Required?	Is Breach Notification to Affected Individuals Required if There is a Low Risk of Harm?	Does Statute Cover Electronic Data, Paper Records, or Both?	Maximum Fine	Does Statute Provide for a Private Cause of Action?
Indiana	Ind. Code §§ 4-1-11-1 – -10, 24-4.9-1-1 – -5-1	2006	Yes (No, if covered entity is a state agency)	No (Yes, if covered entity is a state agency)	Both	$150,000	No
Iowa	Iowa Code §§ 715C.1 – .2	2014	Yes	No	Both	$40,000	No
Kansas	Kan. Stat. Ann. §§ 50-7A01 – 04	2006	No	No	Both	--	Yes
Kentucky	Ky. Rev. Stat. Ann. §§ 365.720 – .734	2014	No	No	Both	--	Yes
Louisiana	La. Rev. Stat. Ann. §§ 51:3071 – 3077, La. Admin. Code tit. 16, Pt. III, § 701	2005	Yes	No	Electronic Data	--	Yes
Maine	Me. Rev. Stat. Ann. tit. 10, § 1346 – 1350-B	2009	Yes (or to the Department of Professional and Financial Regulation if the covered entity is regulated by that department)	No	Electronic Data	$2,500	No
Maryland	Md. Code Ann. Com. Law §§ 14-3501 – 3508, Md. Code Ann. State Gov't §§ 10-1301 – 1308	2013	Yes	No	Both	$1,000 for first violation, $5,000 for any subsequent violation by a covered merchant	Yes
Massachusetts	Mass. Gen. Laws ch. 93H, §§ 1 – 6	2007	Yes	No	Both	$5,000, or $10,000 for violating an injunction entered pursuant to an enforcement action	No
Michigan	Mich. Comp. Laws §§ 445.61 – .79C	2010	No	No	Electronic Data	$750,000	Yes
Minnesota	Minn. Stat. §§ 13.055, 325e.61, 325e.64	2006, 2007	No	Yes	Electronic Data	$25,000	Yes
Mississippi	Miss. Code Ann. § 75-24-29	2010	No	No	Both	$10,000	No
Missouri	Mo. Rev. Stat. § 407.1500	2009	Yes	No	Electronic Data	$150,000	No
Montana	Mont. Code Ann. §§ 2-6-504, 30-14-1701 – 1736	2009, 2007	No	No	Both	$10,000	No
Nebraska	Neb. Rev. Stat. §§ 87-801 – 807	2006	No	No	Electronic Data	--	No
Nevada	Nev. Rev. Stat. §§ 603A.010 – .920, 242.183	2011	No	Yes	Both	--	No

State	Statute	Year Statute Adopted or Significantly Revised	Upon Discovery of Breach, is Notice to State Attorney General Required?	Is Breach Notification to Affected Individuals Required if There is a Low Risk of Harm?	Does Statute Cover Electronic Data, Paper Records, or Both?	Maximum Fine	Does Statute Provide for a Private Cause of Action?
New Hampshire	N.H. Rev. Stat. Ann. § 359-C:19 - :21	2006	Yes	No	Electronic Data	$10,000, and no less than double and no more than treble damages in private actions upon finding of willful violation	Yes
New Jersey	N.J. Stat. Ann. §§ 56:8-161 - 166	2005	Yes, to the Division of State Police in the Department of Law and Public Safety	No	Both	--	No
New Mexico*	H.B. 224 (Proposed Legislation Status: Legislature Adjourned)	2014	Yes	Yes	Both	$150,000	Yes
New York	N.Y. Gen. Bus. Law § 899-aa, N.Y. State Tech. Law §§ 201 – 208	2013	Yes, along with the Department of State and the Division of State Police	Yes	Electronic Data	$150,000	Yes
North Carolina	N.C. Gen. Stat. §§ 75-60 – 66	2009	Yes	No	Both	$5,000	Yes, if an individual has been injured
North Dakota	N.D. Cent. Code §§ 51-30-01 – 07	2013	No	Yes	Electronic Data	$1,000	Yes
Ohio	Ohio Rev. Code Ann. §§ 1347.12, 1349.19, 1349.191, 1349.192	2007	No	No	Electronic Data	No cap; penalties can be as high as $10,000 per day of noncompliance	No
Oklahoma	Okla. Stat. tit. 74, § 3113.1, tit. 24, §§ 161 – 166	2006, 2008	No	Yes, if a state agency identifies a breach; No, if an individual or business identifies a breach	Electronic Data	$150,000	No
Oregon	Or. Rev. Stat. § 646A.600 – .628	2013	No	No	Both	$500,000	No
Pennsylvania	73 Pa. Cons. Stat. Ann. §§ 2301 – 2329	2005	No	No	Electronic Data	$5,000	No
Puerto Rico	P.R. Laws Ann. tit. 10, §§ 4051 – 4055	2008	Yes, to the Department of Consumer Affairs (or to the Citizen's Advocate Office if the covered entity is a government agency or public corporation)	Yes	Both	$5,000	Yes
Rhode Island	R.I. Gen. Laws §§ 11-49.2-1 – 11-49.2-7	2005	No	No	Electronic Data	$25,000	No

State	Statute	Year Statute Adopted or Significantly Revised	Upon Discovery of Breach, is Notice to State Attorney General Required?	Is Breach Notification to Affected Individuals Required if There is a Low Risk of Harm?	Does Statute Cover Electronic Data, Paper Records, or Both?	Maximum Fine	Does Statute Provide for a Private Cause of Action?
South Carolina	S.C. Code Ann. § 39-1-90	2013	Yes, to the Consumer Protection Division of the Department of Consumer Affairs	No	Electronic Data	$1,000 per resident whose information was accessible if violation was knowing and willful	Yes
South Dakota*							
Tennessee	Tenn. Code Ann. §§ 47-18-2101 – 2110	2005	No	Yes	Electronic Data	The greater of $10,000; $5,000 per day of an assumed identity theft; or 10 times the amount obtained or assumed to have been obtained using the identity theft	Yes
Texas	Tex. Bus. & Com. Code Ann. §§ 521.001 – .152, Tex. Educ. Code Ann. § 37.007(B)(5)	2013, 2011	No	Yes	Both	$50,000, plus $250,000 for failure to take reasonable action to comply with notice requirements	Yes, to declare an individual a victim of identity theft
Utah	Utah Code Ann. §§ 13-44-101 – 13-44-301	2013	No	No	Both	$100,000	No
Vermont	Vt. Stat. Ann. tit. 9, §§ 2430 – 2445	2013	Yes (or to the Department of Financial Regulation if the covered entity is regulated by that department)	No	Both	$10,000	No
Virginia	Va. Code Ann. § 18.2-186.6	2008	Yes	No	Electronic Data	$150,000	Yes
Virgin Islands	V.I Code Ann. tit. 14, §§ 2200 – 2212	2005	No	Yes	Electronic Data	--	Yes
Washington	Wash. Rev. Code §§ 19.255.010 – .020, 42.56.590	2010, 2007	No	No	Electronic Data	--	Yes
West Virginia	W. Va. Code §§ 46A-2A-101 – 46A-2A-105	2008	No	No	Electronic Data	$150,000	No
Wisconsin	Wis. Stat. §§ 134.97 – .98	2007	No	No	Both	$1,000	Yes
Wyoming	Wyo. Stat. Ann. §§ 40-12-501 – 40-12-509	2007	No	No	Electronic Data	--	Yes, to declare an individual a victim of identity theft

* State does not have a statute governing data breach

This table constitutes a summary of the laws of various jurisdictions that govern data breach notifications, does not purport to represent a detailed or complete analysis of current U.S. law, and is not offered as, nor should it be relied upon, as a legal opinion of Carlton Fields Jorden Burt.

Hallmark Cards Awarded $47 Million for Misappropriation of Four-Year-Old Market Research

BY THOMAS A. DYE

The number of data theft/trade secret cases that go to trial is growing, as are the size of the verdicts. For example, the Eighth Circuit Court of Appeals recently upheld a $47 million total recovery for Hallmark Cards for the misappropriation of the greeting card manufacturer's four-year-old market research. In *Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, Hallmark brought an action against private equity firm Monitor Clipper Partners, LLC. (Clipper) alleging that Clipper obtained Hallmark's confidential information from Hallmark's research consultant, Monitor Company Group, L.P. (Monitor), to facilitate Clipper's acquisition of greeting card competitor RPG.

Prior to trial, Hallmark won a $3.2 million arbitration claim against Monitor based on breach of contract confidentiality requirements. Monitor had disclosed Hallmark's proprietary market research to Clipper. A final portion of the arbitration award against Monitor required additional electronic discovery searches. After e-mails revealed the intentional disclosure of information by Monitor to Clipper and the destruction of evidence by Clipper and Monitor, the arbitration was reopened. Hallmark eventually settled with Monitor for $16.6 million on the arbitration claims. Hallmark was later awarded $21.3 million in compensatory damages and $10 million in punitive damages in a jury trial against Clipper.

On appeal, Clipper argued 1) the information disclosed did not qualify as a trade secret, 2) the award against Clipper constituted a "double recovery" for Hallmark, and 3) punitive damages were unwarranted. The appellate court affirmed, finding the market research qualified as trade secrets. It concluded there was no double recovery because Monitor's disclosure of the information constituted a breach of contract and a separate "misappropriation" from Clipper's subsequent "use" of the trade secrets. The court characterized the acts of Monitor and Clipper as two distinct injuries, and found Hallmark was entitled to compensation for each. The appellate court also concluded that the e-discovery destruction provided evidence of "reprehensible" conduct by Clipper warranting the finding of punitive damages.

THE EIGHTH CIRCUIT FOUND E-DISCOVERY DESTRUCTION EVIDENCE OF "REPREHENSIBLE" CONDUCT.

Patent Eligibility of Software

Last year, a deeply divided set of opinions in an en banc Federal Circuit decision left doubt as to whether software programs would remain eligible for patent protection. Recently, the U.S. Supreme Court brought closure by passing on the opportunity to declare software *per se* unpatentable.

In *Alice Corp. Pty. Ltd. v. CLS Bank Int'l.*, the Court unanimously held that the computer-implemented inventions recited in the patent claims at issue were drawn to an abstract idea. The Court reasoned that merely requiring a generic computer implementation fails to transform that abstract idea into a patent-eligible invention. The patents at issue disclosed a computer-implemented scheme for mitigating "settlement risk" (*i.e.*, the risk that only one party to a financial transaction will pay what it owes) by using a third-party intermediary. The question presented was whether such claims are patent-eligible under 35 U.S.C. §101, or are instead drawn to a patent-ineligible abstract idea.

THE COURT REASONED THAT MERELY REQUIRING A GENERIC COMPUTER IMPLEMENTATION FAILS TO TRANSFORM THAT ABSTRACT IDEA INTO A PATENT-ELIGIBLE INVENTION.

Following issuance of this opinion, the U.S. Patent and Trademark Office (USPTO) Deputy Commissioner for Patent Examination Policy clarified that software is still patent-eligible, advising USPTO patent examiners by memo that, "*Alice Corp.* neither creates a per se excluded category of subject matter, such as software or business methods, nor imposes any special requirements for eligibility of software or business methods." According to this memorandum, the basic inquiries to determine subject matter eligibility remain unchanged. It remains to be seen how patent examiners will implement these guidelines, and how the courts and the Patent Trial and Appeal Board will interpret *Alice*.

Did We Designate a DMCA Agent for Our Website Yet?

BY DIANE DUHAIME

Under the Digital Millennium Copyright Act (DMCA), a "service provider" (as defined by the DMCA) has a safe harbor against liability for copyright infringement if, *inter alia*, the service provider has designated a DMCA agent to receive notifications of claimed infringements. The DMCA describes how a service provider designates the DMCA agent with the U.S. Copyright Office, and requires that the service provider post the contact information for the agent on its website.

In the case of *Oppenheimer v. Allvoices, Inc.*, the plaintiff, a professional photographer, alleged copyright infringement by the defendant. The defendant is an online service provider that publishes various audiovisual content. Certain of the infringement claims were based on publications by the defendant in February 2011. The defendant did not complete its DMCA agent registration until March 15, 2011. Nonetheless, the defendant asserted that the safe harbor applied to all of the alleged infringements. The United States District Court for the Northern District of California held that the defendant "may not invoke the safe harbor … with respect to infringing conduct that occurred prior to Allvoices designating a DMCA-related agent with the Copyright Office."

There is no question that **service providers should promptly designate their DMCA agents** and take all other steps to fall within the applicable DMCA safe harbors, to the extent they have not done so already.

Reflective of the firm's commitment to creating an inclusive and diverse workplace, Carlton Fields Jorden Burt was recognized as a top law firm in the nation for Diversity according to the latest annual *Vault* survey of associates. Carlton Fields Jorden Burt ranked third among U.S. firms as the Best Law Firm for "Overall Diversity," second in the category "Diversity-Disabilities," and in the Top Ten for the categories: "Diversity- Minorities," "Diversity-LGBT," "Diversity-Women," "Diversity for Veterans," and "Career Outlook." *Vault* is an insider career network providing detailed information on careers with thousands of companies and dozens of industries, and is known as the definitive career guide for today's generation of law students and lawyers.

For the past four years, Carlton Fields Jorden Burt has worked with the Equality Florida Institute on a pro bono project to publish a legal handbook for LGBT families. Now in its 3rd edition, *The Legal Handbook for LGBT Floridians and Their Families* is a 76-page resource full of helpful information and pointers on the very best ways lesbian, gay, bisexual and transgender (LGBT) individuals can legally protect themselves and their families.

Carlton Fields Jorden Burt is pleased to announce that *PropertyCasualtyFocus.com*, a blog analyzing legal and regulatory developments and coverage decisions in the property and casualty insurance industry, is once again accessible to insurance professionals. "PropertyCasualtyFocus" is written and edited by attorneys from Carlton Fields Jorden Burt's Financial Services and Insurance Litigation practice group.

Carlton Fields Jorden Burt's Chief Diversity Officer, **Nancy J. Faggianelli**, received the LGBT-Allies Leader Award from The Florida Diversity Council. Faggianelli was selected as the recipient of this award based on her visibility in the LGBT community; ability to create awareness and increase communication and understanding of the LGBT community; ability to make significant contributions to the promotion of broadening civil adoption and/or acceptance of LGBT equality in the workplace and the community; support of the LGBT community in shaping a future where everyone can live authentically and completely; and reputation with colleagues and superiors.

Carlton Fields Jorden Burt welcomes the following new attorneys to the firm: New York Shareholders **Ethan Horwitz** (Intellectual Property and Technology) and **Michael Pettingill** (Real Estate and Commercial Finance), Of Counsel **Robert Schmidlin** (Real Property Litigation, Orlando), and Associates **Jordan August** (Business Transactions, Tampa), **Meredith Whigham Caiafa** (Financial Services & Insurance Litigation, Atlanta), **Ashley Drumm** (Products and Toxic Tort Liability, West Palm Beach), **Caycee Hampton** (Health Care, Tampa), **Jorge Perez Santiago** (Appellate Practice and Trial Support, Miami), and **Jennifer Yasko** (Business Litigation, West Palm Beach).

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