LIFE, ANNUITY, AND RETIREMENT SOLUTIONS INDUSTRY

Volume I, April 2020

EXPECTFOCUS®

LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS

SPRING SURPRISES

BUDDING INDUSTRY ISSUES

CARLTON FIELDS

Visit the Carlton Fields COVID-19 Resource Page

COVID-19 continues to give rise to numerous issues affecting many aspects of virtually all types of businesses — including the issuance, distribution, and administration of life insurance, securities, and other retirement products and services.

Our lawyers have been focusing on COVID-19 issues arising in their areas of practice, and we are continually posting useful information about these issues on a dedicated resource page that is available at https://www.carltonfields.com/services/practices/coronavirus.

The materials on the resource page are conveniently organized according to the types of business activity in connection with which the issues arise.

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LIFE, ANNUITY, AND RETIREMENT SOLUTIONS APRIL 2020

EXPECTFOCUS® is a review of developments in the insurance and financial services industry, provided on a complimentary basis to clients and friends of Carlton Fields.

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A Spring Into Chaos

Massachusetts Adopts Fiduciary Rule

BY ANN FURMAN

The standard of conduct for broker-dealers is quickly becoming a crazy quilt of securities regulation. Apparently unsatisfied with the standard established under SEC Regulation Best Interest (Reg BI), some state securities regulators have proposed — and, in the case of Massachusetts, adopted — a fiduciary duty even before the June 30, 2020, Reg BI compliance date.

The new Massachusetts fiduciary regulation amends the Massachusetts Uniform Securities Act to impose a fiduciary duty on broker-dealers and their agents when providing investment advice or recommending investment strategies to customers. The Massachusetts regulation requires each broker-dealer and agent registered and transacting business in Massachusetts to adhere to duties of utmost care and loyalty to the customer. The duty of care requires a broker-dealer or agent to use the care, skill, prudence, and diligence that a person acting in a like capacity and familiar with such matters would use.

Disclosure of conflicts of interest alone does not satisfy the duty of loyalty. Instead, the Massachusetts regulation requires broker-dealers and agents to "[m]ake all reasonably practicable efforts to avoid conflicts of interest, eliminate conflicts that cannot reasonably be avoided, and mitigate conflicts that cannot reasonably be avoided or eliminated." The Massachusetts regulation also creates a presumption that a recommendation made in connection with any sales contest is a breach of the duty of loyalty.

The fiduciary duty runs "during the period in which incidental advice is made in connection with the recommendation of a security to the customer." Under certain circumstances, however, the fiduciary duty extends beyond the recommendation, such as when a broker-dealer has discretionary authority over a customer's account or an agreement with a customer calls for ongoing monitoring.

As adopted, the Massachusetts regulation applies to securities but not to insurance products. Based on enforcement history in Massachusetts, however, there was a question about whether the Massachusetts regulation would apply to the sale of variable annuities. Variable annuities are not securities under Massachusetts law. The financial press reports that, according to Securities Division personnel, the Massachusetts regulation does not apply to variable annuities.

As proposed, the Massachusetts regulation would have applied to investment advisers and their investment adviser representatives registered in Massachusetts. Commenters voiced opposition, including that advisers are already subject to a fiduciary duty under securities law. Accordingly, Massachusetts securities regulators removed investment advisers and their investment adviser representatives from the final regulation.

The Massachusetts regulation went into effect on March 6, 2020. The Massachusetts Securities Division will begin enforcing the rule on September 1, 2020.

New Enforcement Powers for NYDFS?

More Sanctions and More Defendants

BY TOM LAUERMAN

Legislation proposed as part of Gov. Andrew Cuomo's executive budget for 2021 would substantially expand the enforcement powers of the superintendent of the New York State Department of Financial Services, as well as the categories of firms and individuals against whom those powers may be leveled.

If enacted, this legislation could seriously impact many types of life insurance, annuity, and securities products and services that are offered or sold in New York.

Broader Penalties for Unlicensed Persons

The proposed legislation would dramatically increase the potential consequences for any individual or entity (each a "person") that fails to comply with any requirement to obtain a license (including any registration, accreditation, authority, charter, etc.) that is imposed by the New York financial services, banking, or insurance laws. Specifically, all conduct of such unlicensed persons would be subject to any penalties those laws provide for properly licensed persons engaging in the same conduct. (This would be in addition to the sanctions for being unlicensed.)

This amendment to the New York financial services law would greatly increase the risks attendant to, for example, failing to obtain any required licenses under the New York insurance law (but not such failures under New York securities law). The impact of this would be further magnified by the below-mentioned ten-fold increase proposed for penalties under the insurance law.

Ten-Fold Increase in Insurance Law Penalties

The administrative penalty that section 109 of the New York insurance law authorizes the DFS superintendent to impose for willful violations of the insurance law or regulations would be increased from $1,000 to $10,000 per offense.

Expanded Financial Services Law Civil Penalties

The proposed legislation would in several ways broaden section 408(a) of the New York financial services law, which currently authorizes the superintendent to levy a civil penalty of (i) up to $5,000 per offense for fraud (including intentional material misrepresentations) involving a "financial product or service"; or (ii) up to $1,000 for certain other violations of the financial services law or regulations thereunder. Specifically:

- The foregoing fraud component of current section 408(a) would be greatly broadened to cover "any fraud, misrepresentation [which no longer need be intentional or material], or unfair, deceptive, or abusive act or practice." This language theoretically could authorize administrative penalties for almost any conduct of which the superintendent disapproves.

- The current reference to $1,000 would be eliminated, and the maximum sanction would be expanded so as to be, for the whole of section 408(b), the greater of (i) $5,000 "for each offense"; (ii) twice the damages attributable to the offense; or (iii) twice the economic gain attributable to the offense. Accordingly, the penalty for each type of offense covered by section 408(b) would be potentially much increased.

- Language would be added that could make it easier for the superintendent to (i) sanction persons who offer financial products and services based on misconduct by their service providers; or (ii) sanction such service providers directly.

Nevertheless, immediately following its authorization of these penalties, section 408(b) would continue to provide that "penalties for regulated persons under the insurance law shall be as provided for under the insurance law" and that the superintendent shall not impose "any penalty under this section in addition to any penalty or fine for the same act or omission that is imposed under the insurance law."

This proviso, and similar language that appears for persons regulated under the banking law, could in many cases limit the impact of the proposed changes to section 408(b) for persons regulated under the insurance or banking laws. Nevertheless, persons regulated under the insurance laws would in any event potentially be subject to the above-mentioned proposed increase in the authorized penalties under section 109 of the insurance law.

Sweeping New Restitution Remedy

The proposed legislation would add a provision to the New York financial services law that would authorize the superintendent "[i]n any administrative proceeding or judicial action" under the financial services, banking, or insurance laws to "order the individual or entity subject to such proceeding or action to make restitution to all consumers harmed by such individual or entity's conduct." The language of this new provision, which is stated to be "in addition to any other penalty or sanction imposed by law," does not prescribe any limits on the types of conduct or misconduct that may give rise to such restitution or any limits on the categories of persons that the superintendent may require to make such restitution.

Adding Securities to "Financial Product or Service"

Currently, the New York financial services law's definition of "financial product or service" excludes, among other things, financial products or services "regulated for the purpose of consumer or investor protection by any other state agency, state department or state public authority." The proposed legislation would remove this exclusion and would include within the definition "the sale or provision to a consumer or small business of any security, investment advice, or money management device."

The proposed legislation would, nevertheless, exclude from the definition "financial products or services where the rules or regulations promulgated by the superintendent on such financial products or services would be preempted by federal law." Subject to such federal preemption, therefore, securities sales and advice provided, for example, by broker-dealers or investment advisers would fall within the definition, notwithstanding that those securities activities may also be subject to regulation for the protection of consumers and investors by the New York attorney general pursuant to New York securities law.

This means that such securities-related activities could be in jeopardy, among other things, to the above-discussed expanded penalties under section 408(a) and the new restitution remedy.

Fidelity Beats Back ERISA Challenge

Infrastructure Fee Complaint Dismissed

BY STEPHEN KRAUS

The U.S. District Court for the District of Massachusetts recently granted Fidelity's motion to dismiss a lawsuit alleging that Fidelity and its affiliates violated ERISA's fiduciary duties by receiving "infrastructure fees" from mutual fund companies. Such fees have been the subject of significant regulatory scrutiny, as well as private litigation, for more than a year.

Fidelity charges infrastructure fees for making certain funds available through its FundsNetwork, including as investment options under 401(k) plans for which Fidelity provides services. The "infrastructure fees" are negotiated directly with the fund companies and are calculated based on plan assets invested in a fund. The fund companies allegedly passed on the infrastructure fees to the plans, and thus to plan participants and beneficiaries, through increases in their investment management fees.

The plaintiffs argued that Fidelity was a fiduciary because its decisions over the past several years to charge — and increase — the infrastructure fees showed that Fidelity had discretion over its own compensation. The court rejected this theory on the grounds that Fidelity negotiated the fees with the mutual funds and that the funds were not required to pass the fees on to the plans or participants.

The plaintiffs also argued that Fidelity was a fiduciary because it controlled the menu of investment options available to the plans. The court rejected this argument because having control over a broad menu of investment options from which plan sponsors may choose their plan's investment options does not transform a platform provider into a fiduciary. In support of their argument, the plaintiffs alleged that Fidelity "maintains complete discretion to substitute, eliminate and add mutual funds offered through its FundsNetwork" and that Fidelity exercised that discretion. The plaintiffs pointed to contractual language empowering Fidelity to unilaterally implement amendments "with prior written notice ... to comply with then current law, or to update services and procedures." The court concluded, however, that this language "on its own, without any specific factual allegations," did not plausibly suggest Fidelity's authority to alter specific investment options under the plans. Accordingly, the court also rejected this theory of fiduciary status.

Supreme Court Won't Review Key ERISA Case

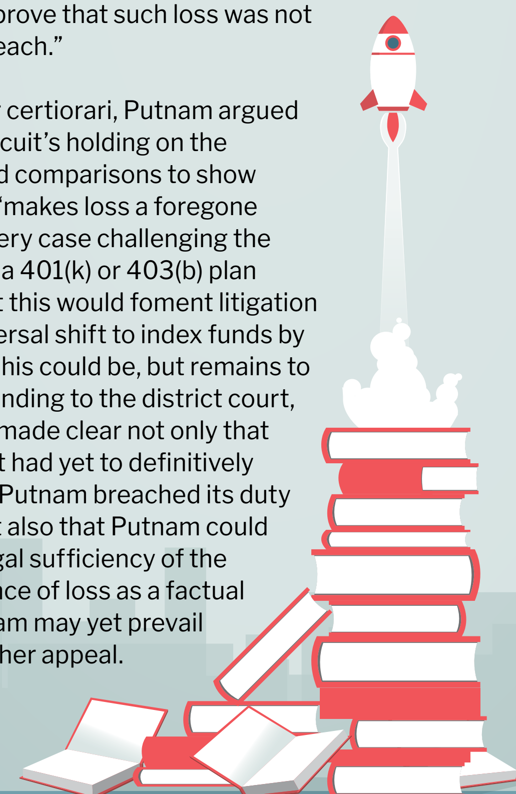
A Boost for Index Funds?

BY EDMUND ZAHAREWICZ

In January, the U.S. Supreme Court denied review of a case in which Putnam Investments is alleged by plan participants to have breached its fiduciary duty under ERISA by automatically including higher-cost, actively managed Putnam mutual funds as investment options for the company's 401(k) plan and then not monitoring the performance of those funds.

This leaves intact the First Circuit's holding in *Brotherston v. Putnam Investments LLC* that comparisons of investment performance against low-cost, passively managed benchmark or index funds can support a finding of loss in cases alleging the imprudent selection of actively managed mutual funds as plan investment options. It also lets stand the Fifth Circuit's ruling on which party bears the burden of proof on causation, notwithstanding a split of authority in the circuit courts. In *Brotherston*, the First Circuit had joined the Fourth, Fifth, and Eighth Circuits in holding that "once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach."

In its petition for certiorari, Putnam argued that the First Circuit's holding on the use of index fund comparisons to show loss effectively "makes loss a foregone conclusion in every case challenging the funds offered in a 401(k) or 403(b) plan line-up" and that this would foment litigation and force a universal shift to index funds by plan sponsors. This could be, but remains to be seen. In remanding to the district court, the First Circuit made clear not only that the district court had yet to definitively decide whether Putnam breached its duty of prudence, but also that Putnam could still rebut the legal sufficiency of the plaintiffs' evidence of loss as a factual matter. So Putnam may yet prevail at trial or on further appeal.



Spring Cleaning on the NAIC Model Privacy Laws

BY ANN BLACK, JAMIE BIGAYER, AND PATRICIA CARREIRO

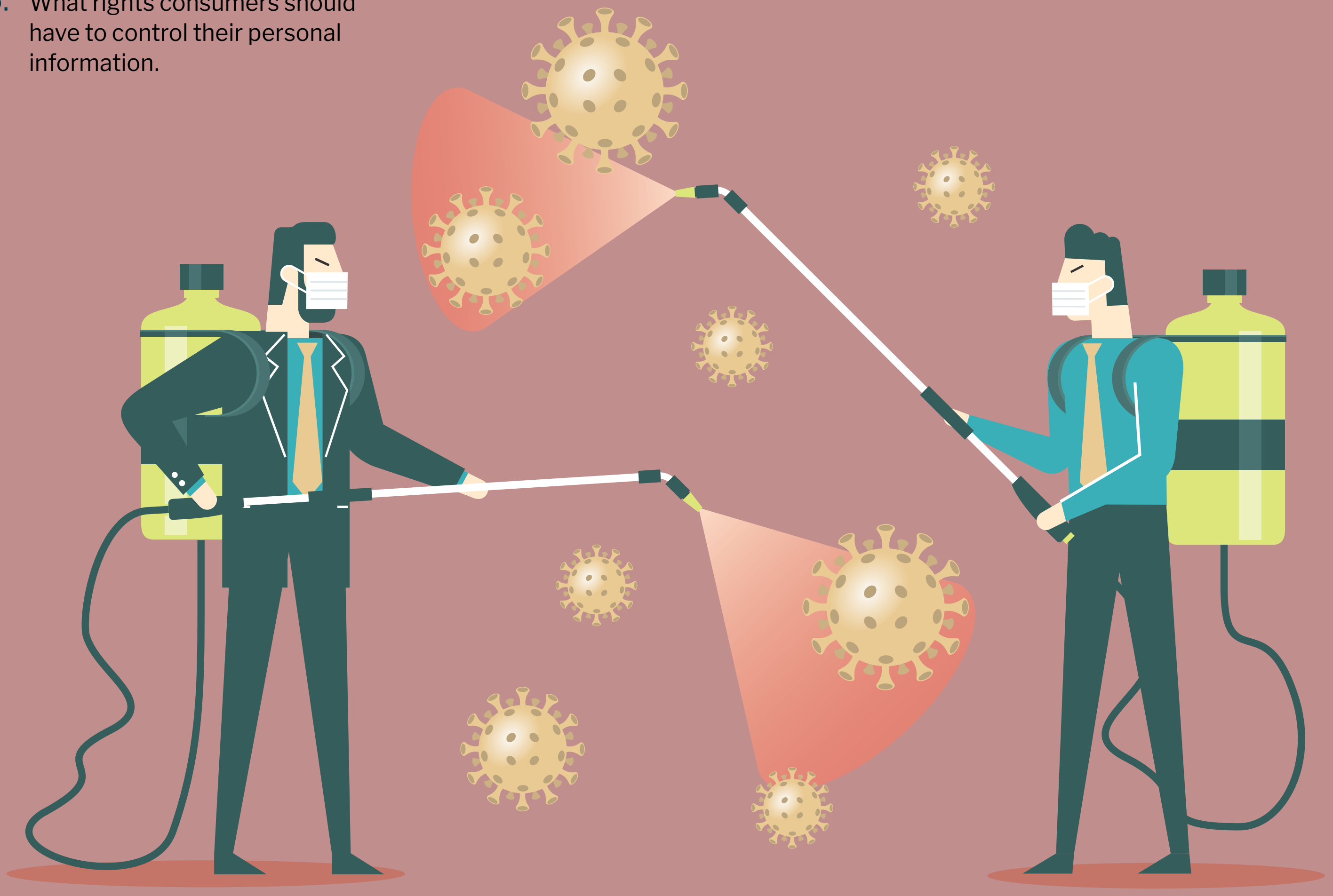
Recognizing that the NAIC's model consumer data privacy laws have not been revised since 2017, the NAIC Privacy Protections Working Group (Privacy WG) is dusting off the NAIC Insurance Information and Privacy Protection Model Act (Model 670) and the Privacy of Consumer Financial and Health Information Regulation (Model 672). The Privacy WG is charged with recommending whether, and to what extent, freshening up is needed to these models. The Privacy WG will turn to health care privacy later.

Because there have been many technological developments since 2017, a regulator-only work group was formed to identify key issues across five subjects for comment, including:

1. Types of data collection, sharing, and usage specific to insurers;
2. How privacy risk affects insurance consumers;
3. Gaps in federal and state law;
4. Obligations insurers should have to consumers; and
5. What rights consumers should have to control their personal information.

The regulator-only work group will consider Model 670 and Model 672 alongside proposed federal legislation, the European Union's General Data Protection Regulation, the California Consumer Privacy Act, and the NAIC's data security model law. It will also work closely with the NAIC's Artificial Intelligence and Accelerated Underwriting working groups.

Insurers using consumer information should be aware that the inevitable revisions to Model 670 and Model 672 could require them to freshen up their policies and procedures.



Sprouting: Modernized Variable Product Disclosures

SEC Approves Summary Prospectuses

BY TOM LAUERMAN

As spring begins, and after many years of fertilizing and watering by industry representatives, the SEC has adopted comprehensive reforms to its disclosure requirements for variable annuities (VAs) and variable life insurance (VLI).

The centerpiece is new Rule 498A under the Securities Act, which authorizes the use of summary prospectuses for both VAs and VLI. These, like the similar summary prospectuses that mutual funds have used for more than 10 years, will be much shorter and consumer-friendly than the full statutory prospectuses that otherwise would be required to be delivered.

Rule 498A prescribes the content — and much of the format — of the summary prospectuses, and registrants will have only limited flexibility to include information that is not specifically prescribed. As discussed below, the requirements differ somewhat for "initial summary prospectuses" that can be used in connection with initial sales of variable contracts and "updating summary prospectuses" that can be used to satisfy ongoing prospectus delivery requirements over the life of an outstanding contract.

Initial Summary Prospectuses for Variable Products

The required content of the initial summary prospectuses includes:

- A "Key Information Table" setting forth limited information about fees and expenses, risks, certain restrictions under the contract, tax treatment, and conflicts of interest.
- A narrative overview of the contract's purpose, benefits, and other features and characteristics.
- A table setting forth the same "fee table" information for the contract as appears in the statutory prospectus.
- An Appendix with a table setting forth information about each underlying fund portfolio and fixed account investment option available under the contract. For each underlying portfolio, for example, this would include (i) the portfolio's investment objective, adviser (or, as relevant, subadviser), expense ratio, and performance information; and (ii) disclosure of any investment restrictions resulting from a "hard" or "soft" close of a portfolio or based on what features or benefits a contract owner has selected.

A separate initial summary prospectus will be required for each VA and VLI contract, although contracts that vary principally as to their distribution fees and expenses can be considered "classes" of the same contract for this purpose. Each initial summary prospectus must be filed as an exhibit to a contract's initial registration statement (and/or any material amendments thereto) under the Securities Act.

If a summary prospectus is provided to customers together with other materials, the rule requires the summary prospectus to have greater prominence and cannot be bound together with any materials other than statutory or summary prospectuses for underlying portfolios that are available to the customer.

Updating Summary Prospectuses for Variable Products

A registrant may use an updating summary prospectus for an outstanding contract if an initial summary prospectus is being used for all new sales of contracts covered by the same statutory prospectus. Unlike the initial summary prospectus, however, the updating summary prospectus is not limited to a single contract, but may include any or all outstanding contracts covered by the statutory prospectus.

With respect to the contracts it covers, an updating summary prospectus must include:

- A concise description of several specified types of changes, if any, that have occurred since the most recent summary or statutory prospectus provided to the customer.
- A current Key Information Table and a current underlying portfolio/ investment option Appendix, in each case comparable to that described above for initial summary prospectuses.

The conditions for use of an updating summary prospectus are generally similar to those for initial summary prospectuses, except that an updating summary prospectus need not be filed as an exhibit to the registration statement. Rather, updating summary prospectuses will be filed pursuant to Securities Act Rule 497.

Electronic Underlying Portfolio Summary Prospectuses

If initial summary prospectuses are used for each contract that is still being offered pursuant to a registration statement, Rule 498A permits the related underlying portfolio summary prospectuses to be made available electronically. This has the potential for great cost-savings because currently applicable preconditions for electronic delivery make hard copy delivery of underlying portfolio statutory or summary prospectuses necessary in many cases.

Under Rule 498A, if specified conditions are satisfied, underlying portfolio summary prospectuses will be considered delivered if the variable product initial or updating summary prospectus refers the investor to a website where the underlying portfolio prospectuses are available. In this regard, it is not required that all underlying portfolios available under a contract use this new method of satisfying their prospectus delivery obligations. Thus, the new method could be used for some underlying portfolios while continuing to deliver hard copy statutory or summary underlying portfolio prospectuses for other portfolios available under the same contract.

Amendments to Variable Contract Registration Forms

The SEC also adopted significant amendments to the registration forms for VAs (Forms N-3 and N-4) and VLI (Form N-6). Under these amendments, essentially all the substantive disclosures required in variable product initial and updating summary prospectuses also will be disclosed in the statutory variable product prospectuses for the related Forms N-3, N-4, or N-6.

Other highlights of the amendments to these forms include:

- Providing for the body of the fee table to include a line item that reflects any underlying portfolio fee waivers and expense caps, rather than permitting such information only in a footnote to the table.
- No longer requiring unit value tables — which have grown exceedingly voluminous over the years — in VA prospectuses or statements of additional information (or anywhere else).
- Withdrawing the "Guidelines" to the preparation of Forms N-3 and N-4.

These and the many other form amendments adopted by the Commission will require very substantial rewriting and reorganizing of the affected registration statements.

Compliance with the new requirements is not mandatory for initial or amendment filings on Forms N-3, N-4, and N-6 that are made before January 1, 2022. Nevertheless, earlier compliance is advantageous because the new initial and updating summary prospectuses for variable contracts and the new electronic delivery procedure of underlying portfolio prospectuses will be available only if the applicable Forms N-3, N-4, and N-6 have been brought into compliance with the new requirements.

Electronic Access and Formatting Requirements

The amendments to these forms, as well as the preconditions for using summary prospectuses in the manner discussed above, also require documents to be available online and impose electronic formatting requirements. For example:

- Variable product summary prospectuses (whether initial or updating), statutory prospectuses, and SAIs must be easily and publicly available at a website in easily readable and retainable form.
- Persons accessing these documents must be able to move directly and electronically between documents and portions of documents in specified ways that, for example: (i) link material in a summary prospectus with portions of the statutory prospectus or SAI that provide further explanation; (ii) link defined terms in summary prospectuses to the definitions of those terms; and (iii) link tables of contents in statutory prospectuses and SAIs with the discussions of the items referenced in those tables.
- If the new procedure is relied upon for electronic delivery of underlying portfolio summary prospectuses, those summary prospectuses, together with

the related underlying portfolio statutory prospectuses, SAIs, and most recent annual and semiannual reports to shareholders, also must be among the documents available at the above-mentioned website.

Inline XBRL format will be required to be used for the submission of specified disclosures in variable product statutory prospectuses contained in certain filings made on or after January 1, 2023. Accordingly, registrants have an additional year to comply with the XBRL requirement, as compared to the other form amendments.

Compliance with these new electronic access and formatting requirements may require significant investments of time and resources for some registrants, depending on what practices or capabilities they already have in place.

Discontinued Variable Contracts

Many VA and VLI issuers rely on a line of SEC staff no-action letters (the "Staff Letters") that provide an alternative to updating their variable product registration statements and delivering current prospectuses every year for certain of these products. The Staff Letters are limited to circumstances in which sales of the VA or VLI contract have been discontinued and, in most cases, fewer than 5,000 of the contracts are outstanding. In these cases, and subject to certain conditions, the Staff Letters have permitted insurers generally to satisfy their updating obligations by providing contract owners each year (i) the audited financial statements of the separate account that supports the contract (plus, in the case of VLI, financial statements of the insurer); and (ii) the underlying portfolio documents that contract owners otherwise would usually receive (e.g., underlying portfolio statutory or summary prospectuses (and supplements thereto), proxy statements, and annual and semiannual shareholder reports).

In its release adopting the reforms, the Commission announced an "Alternative Disclosure" procedure that will be available for certain VA or VLI contracts that, by July 1, 2020, have ceased to be offered for new sales. Although there were some inconsistencies among the Staff Letters, the terms and conditions of this new Alternative Disclosure procedure are generally the same as the terms and conditions as those letters. The new procedure does make some changes, however, including:

- Subject to certain conditions, the new Alternative Disclosure procedure offers insurers the option of providing investors with an annual "Notice Document" instead of (i) the underlying portfolio statutory or summary prospectus; and (ii) any separate account or insurance company financial statements. Insurers, however, would have to continue to deliver those items if they decide to follow the new Alternative Disclosure procedure, but not use Notice Documents.
    - Any such Notice Document and the related financial statements will be filed with the SEC as new EDGAR submission types that the SEC will create.
    - The Notice Document would be required to (i) include the information that an updating summary prospectus would contain; and (ii) identify a website that makes publicly available the underlying portfolio's summary and statutory prospectuses, SAI, and most recent shareholder reports, and the separate account's and insurer's financial statements.
- The new Alternative Disclosure option is strictly limited to registration statements with no more than 5,000 current investors, whereas several of the Staff Letters covered more than 5,000 outstanding contracts.
- As to VA contracts relying on the new Alternative Disclosure procedure, the insurer's financial statements must be made available, whereas only a few of the Staff Letters required this for VA contracts.

Although the SEC staff is withdrawing the Staff Letters, the new Alternative Disclosure procedures will be available commencing July 1, 2020, for contracts that satisfy the new procedures' eligibility requirements.

Issuers of discontinued contracts who have relied on Staff Letters and who choose not to rely on, or do not qualify for, the new Alternative Disclosure procedures may be required to update the registration statements for those contracts, which could be costly.

The Commission did not grant any relief whatsoever for contracts whose sales continue beyond July 1, 2020, although the Commission is open to further consideration of that subject. Accordingly, the registration statements for such contracts may need to continue to be updated unless and until additional investments are no longer being accepted into any separate account option.

OCIE Continues Relentless Cybersecurity Focus

BY PATRICIA CARREIRO

The level of attention that the SEC's Office of Compliance Inspections and Examinations has been giving to cybersecurity issues can hardly be overstated.

For many years, OCIE has highlighted cybersecurity in its annual list of examination priorities, and the list for 2020, released on January 7, is no exception. Building on that, OCIE on January 27 released detailed examination observations regarding securities industry cybersecurity and operational resiliency practices. This follows no fewer than eight cybersecurity risk alerts issued by OCIE within the past eight years.

The examination observations summarize cybersecurity risk management practices observed by OCIE during thousands of examinations and are offered "to assist market participants in their consideration of how to enhance cybersecurity preparedness and operational resiliency."

The observations are organized under seven broad headings and highlight many practices and procedures that most firms, in our experience, probably already have in place. This includes basics like performing risk assessments; having written cybersecurity policies and procedures; properly using encryption, network segmentation, and access controls; training employees; and having, practicing, and reassessing incident response plans.

The examination observations also highlight standard cybersecurity measures whose omission or missteps have been responsible for some of the most headline-grabbing breaches: detecting endpoint threats, having a patch management program, and properly managing vendor relationships and contracts. Ultimately, however, **the observations do not move the needle much on cybersecurity**. And although OCIE rightly points out the importance of certain measures, like controls to prevent and monitor for unauthorized access and "build[ing] a culture of cybersecurity readiness and operational resiliency," **it has little to say about** the **"how" and "how much"** that are essential to almost any cybersecurity determination.

The examination observations do, however, offer **insight** into **what cybersecurity practices OCIE is likely to expect and ask about** during an examination and areas in which the SEC, or if breaches occur, private litigants, might allege deficiencies. Accordingly, firms should review their cybersecurity programs in light of the examination observations and consider documenting their reasons for variances.

NAIC Tills the Accelerated Underwriting Garden

BY ANN BLACK AND JAMIE BIGAYER

The Accelerated Underwriting (A) Working Group (AU WG) sprang into action during the first part of the year learning about the landscape of insurers' use of algorithms in underwriting and potential issues of such use, holding calls on:

- January 23, during which Deloitte provided an overview of the insurance industry and accelerated underwriting.
- February 20, during which Birny Birnbaum of the Center for Economic Justice discussed the types of consumer data used by insurers in big data analytics, perceived issues in big data, and the regulatory modernization needed to address insurers' use of big data analytics.
- March 12, during which how consumer data is collected and consumers' online activity is tracked and individual privacy rights and privacy laws were discussed.

The regulators' questions and comments, and the statements made by consumer advocates, suggest future regulatory fences may address:

1. Data Points
2. Algorithms
3. Transparency to Consumers

Data Points

Regulators learned about the blossoming variety of available consumer data, including data that is not subject to the protections of the Fair Credit Reporting Act (FCRA), and that there are many unregulated data brokers sprouting up. Concerns were raised about the:

- Use of criminal records regardless of the disposition and the discriminatory impact.
- Use of genetic information.
- Accuracy of data used and the ability of consumers to correct inaccurate data if consumers are unaware that particular data points are being used.
- Use of data that is merely correlated to risk versus reflecting causation.
- Use of data that is a proxy for discriminatory data points.

Consumer advocates urged regulators to prune consumer data used in algorithms to:

- Data that is subject to the FCRA.
- Data that is "cost-based" — i.e., for which it can be demonstrated that the data reflects an increased cost to the insurer, such as smoking.

Consumer advocates also planted the ideas that:

- Insurers should be required to report to regulators the types, sources, and manner of their use of data.
- Data brokers should be subject to the FCRA or other regulations.

Algorithms

The presenters explained how insurers are using algorithms in underwriting and the types of algorithms being used. Regulators and consumer advocates raised concerns as to algorithms:

- Being used to make actual rate class decisions versus just being used to determine if fluids, a paramedical exam, or both are required as part of the underwriting decision.
- Based on correlation versus causation.
- Based on complex models, including models that use a multitude of data points. Consumer advocates asserted that these models deviate from the traditional actuarial concept of reliability and are unexplainable because there is no clear reason for assigning an insured to a particular rate class once the various variables are raked together.
- Being layered upon one another to determine the rate class.
- Using machine learning as it might mutate the algorithms, and unintended decisions may occur or the risk models may morph without the insurer's understanding or capability of explanation.
- Being cultivated by third parties that are not regulated. Birnbaum suggested that these third parties be regulated as "advisory organizations" as the models they provide impact the rate class and pricing of the life product. He also noted that he reviewed public data as to certain vendors' "risk score" products that use various consumer data to give a score immediately.

In addition, consumer advocates suggested that the algorithms may have a disparate impact and urged that they be tested against race and ethnicity to determine if the models are discriminatory. Some regulators acknowledged that insurance by its nature involves discrimination and that unfair discrimination is hard to separate from actuarial considerations.

Transparency to Consumers

Consumer advocates urged that consumers needed more transparency as to:

- What data is being collected about them and how that data is being used. This includes consideration of the scope of consumers' consent to collect and use the data and the consumers' ability to eradicate the use of incorrect data.
- How the data impacts the decisions made by the insurer. This includes revising the definition of “adverse action” to mean "failure to receive the best."

One consumer advocate noted that users of consumer data believe they are privacy compliant because they de-identify data by clipping the personally identifiable attributes, although the data maintains a unique identifier. The advocate asserted that de-identified data can be re-identified (i) in 87% of cases if the date of birth, gender, and zip code of the consumer are known; and (ii) in 90% of cases if four purchases of the consumer are known.

Next Steps

The AU WG will continue to harvest information about insurers' use of accelerated underwriting and is seeking presentations on:

- Data, including the sources of data, the legitimacy of the data, and embedded biases of the data.
- Transparency and development of algorithms.
- Controls and governance over data.

The chair is asking for guidance as to whether the AU WG's work product should be a white paper with best practices, identification of issues, and recommendations, or a new model law.

Securities Regulators' Rx for COVID-19

BY STEPHEN CHOI

In response to the national outbreak of coronavirus disease 2019 (COVID-19), federal securities regulators have provided guidance and relief to the industry. Listed below are some of these actions that are most relevant to insurers and investment firms that provide securities-based products and services.

The listed regulatory actions are generally subject to terms and conditions that are in addition to any mentioned below and that should be reviewed for a complete understanding. For example, the relief from a legal or regulatory requirement is frequently subject to such conditions as providing some form of notice and explanation to the regulator and thereafter coming into compliance within some finite time frame.

Securities and Exchange Commission

Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns

https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns

This guidance from the staff of the SEC's Division of Corporation Finance and the Division of Investment Management is being updated periodically and will be useful for registrants that are considering such things as the need to change the timing or manner of holding shareholder meetings or delivering related proxy materials.

Securities Exchange Act Release No. 88465, March 25, 2020

https://www.sec.gov/rules/exorders/2020/34-88465.pdf

- Exempts a registrant subject to the **reporting requirements of Exchange Act** section 13(a) or 15(d) from filing certain periodic disclosure materials if the due dates for such filings fall on or before July 1, 2020, and the registrant is unable to meet the due dates because of COVID-19.
- Exemption from the requirements under the Exchange Act to furnish **proxy statements, information statements, annual reports, and other soliciting materials** if the registrant's security holder has a mailing address where, as a result of COVID-19, the common carrier has suspended delivery service.

Division of Investment Management Staff Statement on Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019, March 4, 2020

https://www.sec.gov/investment/staff-statement-im-covid-19

- Division staff won't recommend enforcement action if mutual fund boards do not adhere to certain **in-person voting** requirements in the event of unforeseen or emergency circumstances, including current or potential consequences of COVID-19, affecting some or all of the directors in connection with board meetings held not later than June 15, 2020.

Investment Company Act Release No. 33824, March 25, 2020

https://www.sec.gov/rules/other/2020/ic-33824.pdf

- Exempts a mutual fund and any investment adviser or principal underwriter from certain **in-person voting** requirements at board meetings held not later than August 15, 2020. This is similar to the relief in the above-mentioned March 4 SEC staff statement, except that this is (a) exemptive (rather than merely no-action) relief and (b) subject to different conditions, including that any reliance on the exemption must be related to COVID-19 (and not any other unforeseen or emergency circumstances).
- Exempts a "registered fund" (which includes mutual funds and most SEC-registered insurance company separate accounts) from **Form N-CEN or Form N-PORT filing requirements** if the original due date is on or before June 30, 2020, and reliance on the exemption is related to COVID-19.
- Exempts a registered fund from the **requirements to transmit annual or semiannual reports** to security holders if the original due date is on or before June 30, 2020, and the inability to transmit the report is related to COVID-19.
- States that it would not be a basis for an enforcement action if the **current prospectus of a registered fund is not timely delivered** to existing investors in a registered fund due to COVID-19 if the original due date for delivery is on or before June 30, 2020. (This relief does not apply to delivery of prospectuses to new investors.)

Investment Advisers Act Release No. 5469, March 25, 2020

https://www.sec.gov/rules/other/2020/ia-5469.pdf

- Exempts a registered investment adviser from the **requirements to file an amendment to Form ADV or to deliver Form ADV Part 2 to existing clients, to file reports on Form ADV, and to file Form PF** if the original due date for filing/delivery is on or before June 30, 2020, and the inability to meet the deadline is related to COVID-19.

A more complete presentation of the SEC's responses to COVID-19 can be found at https://www.sec.gov/seccoronavirus-covid-19-response.

Financial Industry Regulatory Authority

Pandemic-Related Business Continuity Planning, Guidance and Regulatory Relief, Regulatory Notice 20-08, March 9, 2020

https://www.finra.org/rules-guidance/notices/20-08

- Encourages FINRA member firms to review their **business continuity plans** in light of COVID-19 and sets forth related guidance on topics such as remote offices or telework arrangements, cybersecurity, emergency office relocations, and communicating with customers and with FINRA.

- Encourages member firms experiencing **difficulties in making timely regulatory filings** such as FOCUS filings and "form of custody" filings to contact FINRA to seek extensions.

- States that FINRA has temporarily suspended the **requirements to update Form U4** regarding the office of employment address and to **submit branch office applications** on Form BR in light of COVID-19.

Frequently Asked Questions Related to Regulatory Relief Due to the Coronavirus Pandemic

https://www.finra.org/rules-guidance/guidance/faqs/coronavirus

These FAQ, which FINRA is continuing to update, provide extensive additional **guidance and numerous types of relief** for member firms that qualify. The following are a few examples:

- A 30-day extension for member firms to file their **annual reports** related to fiscal years ending in January 2020 through March 2020.

- A 10-day extension for filing any **FOCUS report** related to a period ending in February 2020 through April 2020.

- An extended **examination window,** such that individuals who were designated to function as principals before February 2, 2020, now have until May 31, 2020, to pass the appropriate examination.

- An exemption from the requirement of obtaining an individual applicant's **manual signature on an initial or transfer Form U4**.

A more complete presentation of FINRA's responses to COVID-19 can be found at https://www.finra.org/rules-guidance/key-topics/covid-19.

Cases of Purloined Company Documents

When Terminated Employees Steal

BY BRIAN ROSNER AND NATALIE NAPIERALA

The employee is terminated, and her laptop and phone seized. On being escorted from the premises, human resources admonishes that all internal company email and other business documents belong to the company, not her, to which she indignantly insists that she does not possess any such documents. When the former employee files suit against the company two months later, the allegations of corporate misconduct are supported by exact quotes from multiple company documents, including both those on which she has been copied and others to which she has no legitimate access, such as privileged communications between the company and counsel.

Such scenarios have been commonplace, including for insurance companies and securities firms. The company has been the victim of what the literature on attorney misconduct politely references as "purloined documents" — confidential documents that are provided to the terminated employee's lawyer outside "normal channels" of discovery or investigation by persons who are not authorized to turn over the documents.

What Is the Company's Relief?

The authorities are split as to whether there is a black letter rule of professional conduct that designates an attorney's possession or review of purloined documents as unethical. Courts, however, are generally less equivocal. In New York, for example, the possession or use of purloined documents in general, and attorney-client privileged documents in particular, has repeatedly been held to be unprofessional behavior that warrants a sanction.

The sanction, however, is not necessarily dismissal of the complaint. Not all thefts are equal. Dismissal is less likely if the stolen documents, though "confidential" (as most businesses claim their documents to be), would certainly have been subject to disclosure during the normal course of discovery. It is a different situation to steal documents that were protected from disclosure by the attorney-client privilege or the work product doctrine and that therefore provided the employee with information that she would not have otherwise obtained and could not be "unlearned."

Such privileged document theft poses a greater danger to the integrity of the courts and the litigation system, and complaints in these cases often are dismissed. However, there is limited prejudice to the truth-finding function if the purloined documents would have been disclosed anyway. Accordingly, with admonishments, and perhaps financial sanctions, courts have often permitted the use of purloined but discoverable documents or admitted them with restrictions.

To some degree, therefore, theft pays (or, at least, is not seriously sanctioned) if limited to non-privileged material. The moral for companies is to redouble their efforts to keep departing personnel from absconding with confidential information rather than relying on courts to protect confidentiality.

Intel's Intel Doesn't Prove Actual Knowledge

Court Rejects Short ERISA Statute of Limitations

BY LOWELL WALTERS

On February 26, the U.S. Supreme Court in *Intel Corporation Investment Policy Committee v. Sulyma* unanimously held that participants are not presumed to read retirement plan investment information.

Background

The statute of limitations to bring ERISA fiduciary actions is the shorter of six years from the date of the improper action or three years from the claimant's actual knowledge of the violation. Claims brought after the statute of limitations expires are time-barred.

Sulyma was a retirement plan participant who received information beginning in 2010 about retirement plan fiduciary investment decisions. His claim, filed five years later, would be time-barred if Sulyma knew of the fiduciary decisions in 2010.

Prior court hearings in this case revealed that Sulyma received mailings and accessed webpages with pertinent information, and Sulyma claimed he never read the materials or saw the pertinent information online. Many believe that few participants review plan materials provided to them, and some webpages are structured to have a lot of information that can be confusing or require participants to scroll to view information they might not realize is there.

Ruling that Sulyma's receipt of information and web access did not equate to actual knowledge of the information, the Supreme Court noted ERISA's use of the phrase "actual knowledge" in triggering the three-year limitations period. Dictionaries express that "actual knowledge" requires true knowledge, and not mere possession or access to information that could lead to actual knowledge. Hence, the evidence was insufficient to prove actual knowledge and the longer statute of limitations applied.

Practical Implications

This ruling may significantly reduce the application of the three-year statute of limitations. The Supreme Court reasoned that Congress must have intended this, while reminding that actual knowledge can be proved through circumstantial evidence. However, if Sulyma's accessing webpages and receiving documentation was insufficient, then proving actual knowledge through circumstantial evidence is clearly a high threshold.

This ruling may frustrate plan administrators and service providers, who spend a lot of time and money developing and delivering materials, but it should not affect how fiduciaries fulfill their obligations. Still, since plan sponsors and administrators have an interest in participants making knowledgeable decisions, they may want to increase the likelihood that participants review the information that is available to them by providing information as concisely and clearly as possible. Proving that materials are read probably requires, in most cases, the use of electronic distribution methods so that data can be gathered and preserved as evidence. Fiduciaries also may want to structure webpages so that a single topic is addressed on a single page, which might make it easier to prove that a participant knew certain specific details.

Long Jail Term for Crooked Insurance Agent

Claimed Comp for Phony Policy Sales

BY ELISE HAVERMAN

In February 2020, the Ninth Circuit Court of Appeals in *United States v. Gagarin* affirmed the conviction of Karen Gagarin for her role in a conspiracy to commit wire fraud and aggravated identity theft relating to fraudulent life insurance applications. The not-so-clever scheme took advantage of American Income Life Insurance Co.'s system for compensating agents for insurance policy sales.

American Income Life allowed its agents, including Gagarin, to receive an advanced commission and bonus for each policy sold, based on a percentage of the premiums that the policy would be expected to generate during the year. Gagarin and her co-conspirator agents paid premiums out of pocket from different bank accounts opened specifically to pay into the policies for about four months. By waiting four months before defaulting on a policy, the conspirators intentionally avoided being charged back their unearned advances. Gagarin and the other agents pocketed the difference between their advanced compensation and the premium payments.

The court found that Gagarin and her conspirators went to extra lengths to convince American Income Life that the fraudulent policies were legitimate. Their tactics included: (1) forging electronic signatures on applications; (2) misrepresenting applicant information to increase the likelihood of policy issuance; (3) impersonating applicants from cellphones to verify the applicants' identities to American Income Life; (4) impersonating applicants in medical exams through the creation of fake driver's licenses; and (5) encouraging friends and family to sign up for fraudulent policies in return for free medical exams.

In upholding Gagarin's 36-month prison sentence, the Ninth Circuit affirmed the application of a "manager or supervisor" sentencing enhancement and the imposition of a restitution order requiring Gagarin and her co-conspirators to repay the full loss suffered by American Income Life.

Peering Into Regulators' Views on Artificial Intelligence

BY ANN BLACK*

The comments by regulators during the NAIC Artificial Intelligence (EX) Working Group (AI WG) calls provide insight into regulators' views on insurers' use of artificial intelligence and may foretell areas for future regulation. The AI WG is drafting "Principles on Artificial Intelligence" that define "AI actors" who are subject to the following five principles:

- Fair and Ethical
- Accountable
- Compliant
- Transparent
- Secure, Safe, and Robust

The principles are to be used by other NAIC committees, task forces, and/or working groups as they gaze into the issues related to AI in their respective areas.

Below summarizes some of the key discussions from the February 4 and February 19 calls, reflects on how those discussions are consistent with statements of the International Association of Insurance Supervisors (IAIS), and are consistent with other countries' positions on AI-related issues.

AI Actors

Commissioner Jon Godfread explained that the term “AI actors” should be "broad but related to the business of insurance" and "broad to ensure that no one is left out that is participating [and that regulators expect] to consider these principles." Reflecting this broad applicability, the draft principles exposed after the February 19 call modified the term AI actors to include "third parties such as rating and advisory organizations." This change comports with consumer advocates' comments during the Accelerated Underwriting Working Group that third parties that provide algorithms to insurers for pricing and marketing should be regulated.

Accountable

AI WG members discussed that AI actors should be accountable:

- For compliance with existing laws – While some regulators questioned whether existing laws are adequate, Commissioner Godfread countered that regulators do not have the ability to "go beyond the existing laws," to the relief of commentators who sought confirmation that the principles are not intended to create a higher burden for AI.
- For data supporting of outcomes – AI WG members discussed the need for AI actors to be able to produce the "[d]ata supporting the final outcome of an AI application" to "address data privacy concerns and establish the expectation that the industry be able to readily produce the data that they are using."
- For the unintended impact of AI – While a commentator suggested changing the language to "even if certain impacts are not foreseen," none of the AI WG members spoke in favor of such change.
- To stakeholders – AI WG members discussed the need for regulators and consumers to inquire about, review, or seek recourse for AI-driven insurance decisions. This means that the information AI actors provide should be easy to understand, and AI actors must be able to describe the factors that resulted in the decision.

Compliant

Commissioner Godfread illuminated that the intent of the compliance principle is to place a burden on AI actors who are working in the insurance space to have "knowledge and resources in place to ensure compliance." One AI WG member recounted discussions with third parties whose lack of clairvoyance indicated that they had not considered whether their activities ran afoul of state law. Ultimately, Commissioner Godfread noted that the "buck will stop with the insurer." Moreover, the principles require compliance whether "the violation is intentional or unintentional." This approach follows the IAIS' recommendations that supervisors consider "the appropriateness of requiring insurers to extend their policies and procedures on the use of [big data analytics] to third-party providers." The approach is also similar to other countries that place the burden on the firm that uses the AI.

Transparent

While all AI WG members and commentators agreed that AI actors must be transparent, commentators were concerned that the principle of transparency would require robust disclosure that would be more detailed than a consumer would want or could understand. AI WG members stressed that the manner in which AI reaches its conclusions must be transparent to regulators, and AI actors must "proactive[ly] disclose ... the kind of data being used, the purpose of the data in the AI systems and consequences for all stakeholders." Notably, other countries agree that insurers must be transparent about how and why they are using data. At least one also requires insurers to disclose what the possible consequences could be for the customer.

Secure, Safe, and Robust

AI WG members discussed that AI should be:

- Secure and safe in normal use, reasonably foreseeable use, or adverse conditions – AI WG members discussed that the principles should include that AI should be protected from hackers.

- Reasonably traceable – While commentators asserted that "traceability" was "transparency," AI WG members disagreed and stated that traceability is needed to ensure that every step of the process is captured as opposed to merely the outcome. The approach by the AI WG is consistent with the AI ethics guidelines promulgated by the European Union.

Following the February 19 call, the AI WG posted the third draft of the principles for comment. The goal of the AI WG has been to adopt the principles at the Summer National Meeting.

** With assistance from Facundo Scialpi, a student at the University of Miami School of Law.*

New Jersey Springs Into Action

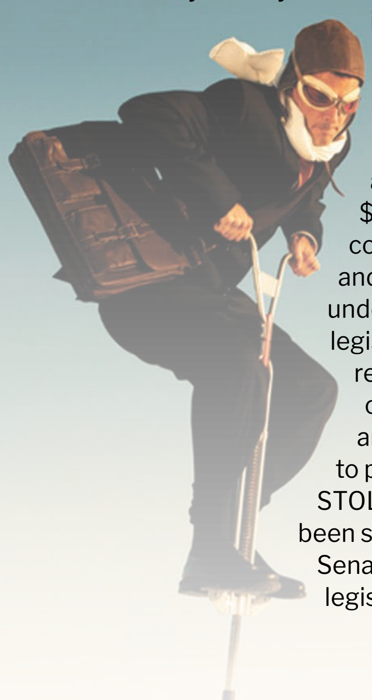
New Bill to Ban STOLI Policies

BY BROOKE PATTERSON

We previously reported in detail on New Jersey's recent case law addressing the validity of stranger-originated life insurance (STOLI) policies in the June 2019 and December 2019 issues of *Expect Focus – Life, Annuity, and Retirement Solutions*. Briefly, in *Sun Life Assurance Company of Canada v. Wells Fargo Bank, N.A.*, the courts concluded that a life insurance policy taken out with an investor trust as the policyholder violated New Jersey's statutory requirement of an insurable interest on the part of the policyholder.

In reaction to the *Sun Life* case, the New Jersey Assembly recently passed A.B. 1236 in a 78–0 vote, which prohibits STOLI policies that benefit a third-party investor who does not have an insurable interest in the life of the insured when the policy is issued.

The bill bars anyone from engaging in any act, practice, or arrangement that constitutes a STOLI arrangement and renders any such agreement void and unenforceable. The proposed legislation authorizes civil actions by any person damaged by a violation and provides an express exemption to New Jersey's two-year contestability statute so that insurers could contest the validity of these policies beyond the two-year contestability period. The legislation also imposes a civil penalty of up to $10,000 per violation. The commissioner of banking and insurance is authorized under the proposed legislation to seek injunctive relief for any violation, issue cease-and-desist orders, and order restitution to persons damaged by STOLI violations. The bill has been sent to the New Jersey Senate, which introduced the legislation as S.B. 1914.



Did Your Text Message or Phone Call Campaign Use an Illegal "Autodialer"?

TCPA Compliance May Depend on Your "Circuit"

BY MICHAEL WOLGIN

Like companies in other industries, life, annuity, and securities companies and their affiliates have faced class actions asserting claims under the Telephone Consumer Protection Act. These claims have arisen in connection with promotional campaigns using communications technology that can contact lists of prospects or customers by text message or phone call. At $500 per communication (or $1,500 in some cases), exposure for violations of the TCPA can be enormous.

A key litigation issue has been whether communications technology qualifies as an "automatic telephone dialing system" ("autodialer" for short) that violates the TCPA. The TCPA defines an autodialer as equipment that "has the capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers." But the grammar is unclear. For example, is "using a random or sequential number generator" a requirement for devices that have the capacity to "store" numbers and devices that have the capacity to "produce" numbers (the "narrow approach")? Or is the number generator clause applicable only to devices that "produce" numbers, such that devices that "store" numbers need not randomly or sequentially generate numbers to violate the TCPA (the "broad approach")?

From 2003 to 2015, Federal Communications Commission rulings purported to interpret the law. Then, in 2018, the supervisory D.C. Circuit vacated the FCC's interpretation, leaving the autodialer definition open for judicial interpretation. In *Marks v. Crunch San Diego LLC*, the Ninth Circuit took the broad approach and deemed devices simply "with the capacity to dial stored numbers automatically" to be autodialers.

Recently, however, the Eleventh and Seventh Circuits took the narrow approach. In *Glasser v. Hilton Grand Vacations Co.* and *Gadelhak v. AT&T Services Inc.*, these two circuits concluded that systems that automatically dial preprogrammed numbers, but that do not dial randomly or sequentially generated numbers, are not autodialers. Additionally, the Eleventh Circuit held that a system that needs "meaningful human interaction" to implement, such as technology that requires an "employee's choice" to initiate every call, is not an autodialer since it is not "automatic." In sum, currently, whether a text or call campaign violates the TCPA may depend on the location of the court considering the question.

Policy Lapse Notice Claims on the Rise in California

BY IRMA SOLARES AND JULIANNA MCCABE

Two companion amendments to the California insurance law have received increased attention from the plaintiffs' bar recently. On January 1, 2013, sections 10113.71 and 10113.72 were enacted to amend the California Insurance Code requiring life insurance policies to provide for a 60-day grace period before any lapse for nonpayment and to require insurers to provide notice of lapse or termination of a life insurance policy for nonpayment of premium to policy owners and their designees at least 30 days before the termination's effective date.

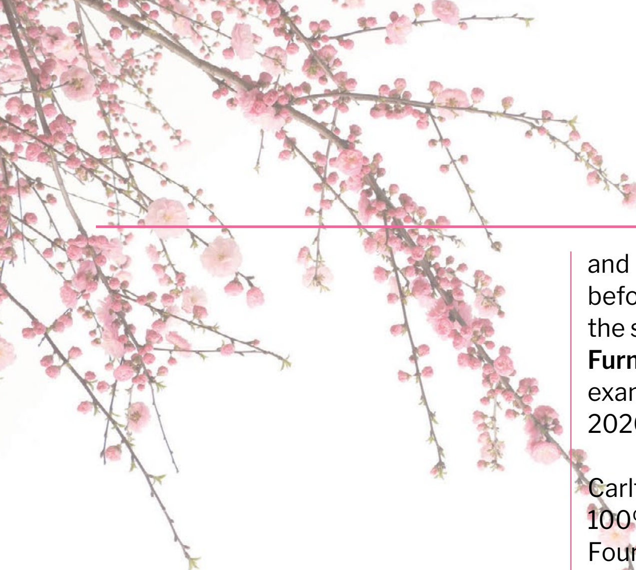
The statutory amendments generally garnered little attention until last year. In February 2019, following certification of a class of beneficiaries who did not receive notice of lapse or termination of a life insurance policy, a California district court granted summary judgment to the class in *Bentley v. United Omaha Life Insurance Co.* and held that the statutes apply to preexisting policies upon their first periodic renewal date after the new legislation's effective date. The court stated that it was not applying the statutory provisions retroactively but rather that the statutes apply prospectively to policies upon renewal. As a practical matter, however, the court's ruling did have retroactive force in that it applied the new notice and lapse requirements to policies that were issued long before the statutory provisions were passed or even contemplated. In May 2019, the parties in *Bentley* stipulated to a judgment for the class of approximately $3 million. In December 2019, another California district court issued a similar summary judgment order in an individual action, *Thomas v. State Farm*, rejecting the defendant's attempt to distinguish *Bentley* based on different renewal language in the plaintiffs' term life policies.

In the California state court system, interpretation of the legislation has differed. In October 2019, an intermediate state appellate court in *McHugh v. Protective Life* deferred to the interpretation of the California regulators, who concluded that the statutes should only apply to new contracts issued after January 1, 2013. The appellate court affirmed a trial court's special verdict in favor of the insurance company. The California Supreme Court accepted review and will now decide whether the statutes apply to all policies, or only those first issued in 2013 or later.

Like bees drawn to a flower, plaintiffs' counsel have filed **three new class actions** since February of this year — all in the Central District of California — claiming that the insurance companies violated the Insurance Code by failing to provide annual notices to policyholders or their designees, which resulted in lapses in benefits. The actions allege varying claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unfair competition, and declaratory relief for alleged violations of California Insurance Code sections 10113.71 and 10113.72. One action also seeks certification of an elder abuse subclass.

We can expect to see additional class action filings this year unless and until the California Supreme Court affirms *McHugh* and effectively overrules *Bentley* and *Thomas*. Stay tuned.

In a separate but related development, as a result of the COVID-19 pandemic, on March 18, 2020, the California insurance commissioner sent a notice requesting that all insurance companies provide their policyholders with at least a 60-day grace period to pay insurance premiums.



NEWS & NOTES

Carlton Fields is a sponsor of the ACLI Compliance & Legal Sections Annual Meeting on July 13–15 in Las Vegas, Nevada. The conference allows insurance and financial services executives to discover cutting-edge technologies impacting the industry, network with regulators and leaders in the field, and gain valuable knowledge. Shareholder **Ann Furman** will speak on the subject of common insurance company compliance mistakes and lessons learned.

Carlton Fields is pleased to participate in the NAFA Annuity Leadership Forum on June 8–10 in Washington, D.C. The forum allows attendees to discuss the regulation, legislation, and other important issues facing organizations in the annuity industry. Shareholder **Richard Choi** will be a panelist on the forum's legal firm program.

Carlton Fields sponsored the third annual American Bar Association Current Issues in FINRA Arbitration and Enforcement Regional CLE program on February 20 in Fort Lauderdale, Florida. The three-panel program covered topics of interest to attorneys and regulatory professionals practicing before FINRA or otherwise working in the securities industry. Shareholder **Ann Furman** moderated a panel on FINRA's examination findings and priorities for 2020.

Carlton Fields earned a perfect score of 100% on the Human Rights Campaign Foundation's 2020 Corporate Equality Index, designating the firm as one of the "Best Places to Work for LGBTQ Equality" for the 11th year in a row. The rating recognizes the firm's LGBTQ-friendly policies and practices and its devotion to workplace equality.

Carlton Fields Shareholder **Yolanda Strader** was named a 2020 Leadership Council on Legal Diversity (LCLD) Fellow, and Associate **Brian Porter** was named a 2020 LCLD Pathfinder. LCLD is a premier national organization that provides opportunities for women and minority in-house counsel to connect with women and minority law firm partners and senior associates through its Fellows and Pathfinder programs.

Carlton Fields welcomes **Huhnsik Chung** as a shareholder in the firm's New York office. Chung will serve as co-chair of Carlton Fields' Fintech and Property and Casualty Insurance Regulatory and Transactional Practice, which directly addresses the gamut of clients' legal, financial, and technology needs. With more than 30 years of experience in the regulated financial and insurance sectors, Chung has led multidisciplinary client teams handling complex and diverse matters on behalf of international and local insurers and reinsurers, captives, insurance intermediaries, insurance technology companies, risk purchasing groups and risk retention groups, investors, and regulators.

Carlton Fields welcomes the following attorneys to the firm: Shareholder **Leslie King** (construction, Hartford); Of Counsel **Federico Maciá** (labor and employment, Miami) and **Paul Kisselburg** (real estate and commercial finance, Washington, D.C.); and Associates **Amy Bowers** (business litigation, Miami), **Patricia Carreiro** (cybersecurity and privacy, Miami), **Ryan Class** (mass tort and product liability, Hartford), **J. Kent Crocker** (property and casualty insurance, Miami), and **Johanna Talcott** (business litigation, Miami).

The firm is pleased to announce the hiring of **Frederick O'Malley** as chief operating officer. With more than 25 years of executive law firm management experience, O'Malley will oversee the core business functions of the firm, including financial management and administrative operations.

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