LIFE, ANNUITY, AND RETIREMENT SOLUTIONS INDUSTRY

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EXPECTFOCUS®

LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS

NAVIGATING VOLATILE MARKET AND REGULATORY WATERS

CARLTON FIELDS

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SEC Proposes Fund ESG Disclosure Channels

Different ESG Strategies Must Row in Their Lanes

BY TOM LAUERMAN

The SEC has proposed to require that mutual funds — including funds supporting variable insurance products — provide "consistent, comparable, and reliable" disclosure that is meaningful to investors about the role of environmental, social, and governance (ESG) factors as part of their investment program.

The SEC's task is complicated by the absence of any consensus among investors, funds, and advisers about what the meaning of "environmental," "social," or "governance" should be for this purpose and the almost limitless potential elasticity of those terms (which the SEC does not define). The difficulty is compounded by the absence of any consensus about what information on this subject would be most reliable and meaningful to investors.

The SEC's proposals would have the effect of requiring each fund to disclose whether, in connection with its portfolio investment decisions and its relations with portfolio companies, the fund:

- Considers one or more ESG factors, without those factors generally being dispositive (which the SEC calls an "ESG integration" strategy).
- Focuses on one or more ESG factors as a "significant or main consideration" (which the SEC calls an "ESG-focused" strategy).
- Seeks to achieve a specific ESG impact or impacts (which the SEC calls an "ESG impact" strategy).
- Does not consider ESG factors.

The SEC's proposals would require that funds make specified additional disclosures about any ESG integration, focused, or impact strategies that they employ. The specified new disclosures are most extensive in the case of ESG-focused or impact strategies. Among other objectives, the proposed new disclosures would make it more difficult for funds to engage in "greenwashing," i.e., exaggerating the role or relevance of a fund's ESG strategies, which is of especial concern for investors where the ESG strategies are associated with higher fund fees or expenses.

Although the proposals might provide some benefit to some investors, they have garnered much comment from interested parties, including a formal dissent by SEC Commissioner Hester Peirce. Peirce has suggested, among other things, that the proposals might be viewed as a misguided effort to regulate fund operations substantively, under the guise of requiring disclosure.

Certainly, compliance would be costly for some funds that employ ESG-focused or impact strategies. Also, if adopted, the proposed requirements could cause funds to revise their investment programs in ways that may not be in investors' best interest.

For example, the dividing line between an ESG integration strategy and an ESG-focused strategy seems unavoidably blurry. So it is foreseeable that some funds will revise their investment practices to ensure they fall on whichever side of the line they prefer. Similarly, funds that employ ESG-focused or impact strategies may be incentivized to modify their implementation of those strategies in ways that will make the new SEC-required disclosures as flattering to the fund as possible.

There is a danger that any such changes in a fund's investment program may make the program less suited to the adviser's experience and strengths or otherwise less aligned with the investors' best interest. Indeed, by defining several specific categories of ESG strategies and prescribing specific disclosure requirements to achieve consistency and comparability within each category, the SEC may unintentionally cause an undesirable narrowing of the range of variation in the ESG strategies that funds and their advisers will tend to employ.

The proposals also include requirements for other types of funds that are generally similar to the above-discussed proposals discussed for mutual funds. These include many private funds (via requirements imposed on their advisers), SEC-registered closed-end funds, and exchange-traded funds. All of these proposals were published in May 2022, together with proposed revisions to the SEC's rule relating to permitted names of investment companies. That names proposal dovetails with the other fund disclosure proposals in that it is intended in part to address SEC concerns over direct or indirect references to ESG considerations in fund names.

These May proposals followed, and are in important respects integrated with, proposals that the SEC published in March 2022 for the enhancement and standardization of climate-related disclosures by operating companies that are subject to the SEC's jurisdiction.

NAIC Proposes Actuarial Guidelines for Index-Linked Variable Annuities

BY BILL KOTAPISH

On July 25, 2022, the Index-Linked Variable Annuity (A) Subgroup of the NAIC's Life Insurance and Annuities (A) Committee issued for public comment an exposure draft of proposed actuarial guidelines for index-linked variable annuities (ILVAs).

The guidelines are designed to establish standards for the design and operation of ILVAs so that they more clearly constitute "variable annuities" and, as such, are exempt from NAIC Model 805 - Standard Nonforfeiture Law for Individual Deferred Annuities. Such an exemption is useful because ILVAs generally do not comply with Model 805's requirement that an annuity contract provide for the crediting, at a minimum, of nonforfeiture rates of interest.

The guidelines, therefore, aim to clarify uncertainty about whether ILVAs can be treated as variable annuities for this purpose. That uncertainty arises because, unlike most variable annuities, ILVAs do not entail "unitized" interests in a separate account of the issuing insurance company and do not invest directly in the assets (i.e., the index) whose performance forms the basis for surrender values and other contract benefits.

To bridge this gap, the guidelines set forth in the draft focus on the use and valuation of a hypothetical (or "proxy") portfolio of assets established to fund the issuer's obligations under an ILVA, composed of a fixed income asset proxy and a derivative asset proxy. The fixed income portion of the portfolio covers the issuer's obligation to return principal at the end of a crediting period; the derivative portion (typically consisting of so-called flex options) covers the issuer's obligation to pay interest calculated based on index performance over a crediting period. A basic principle of the guidelines is that, to be treated as a variable annuity under Model 805, an ILVA must provide for interim values (e.g., amounts available for surrender before the end of a crediting period) that are consistent with the market value of the hypothetical portfolio over the crediting period.

Industry commenters on earlier drafts of the guidelines had suggested an alternative method for determining interim values, which contemplated a pro rata application of the relevant index performance over the interim period, subject to a pro rata application of the contractual cap, participation rate, spread, or margin, as well as the floor or buffer, applied pro rata to negative index performance. The draft does not codify this suggested alternative approach but does acknowledge that a contract may provide for a different methodology for determining interim values. The draft provides that, in such a case, the company must demonstrate that the contractually defined interim values will be "materially consistent" over the crediting period with the interim values that would be produced using the hypothetical portfolio methodology.

In general, the guidelines set forth in the draft are more flexible and less prescriptive than the guidelines in earlier drafts. For example, an earlier draft had allowed the valuation of the derivative asset proxy to include a provision for the cost of unwinding the derivative asset positions, which could not exceed 10 basis points (0.10%). Instead, the draft allows a provision "for the cost attributable to reasonably expected or actual Trading Costs at the time the Interim Value is calculated," recognizing that the costs of unwinding a derivative position over 10 basis points might be appropriate for some issuers in certain (e.g., volatile) market scenarios.

The guidelines set forth in the draft call for an actuarial memorandum to be provided with the ILVA product filing with the state insurance regulator. Among other things, the memorandum would include certifications that:

- The interim values defined in the contract provide "equity" between the contract holder and the insurance company;
- The assumptions used to value the derivative asset proxy are consistent with the observable market prices of derivative assets, whenever possible (using valuation techniques such as the Black-Scholes model, Monte Carlo simulation techniques, etc.);
- Contractually defined interim values are "materially consistent" with interim values that would be produced using the hypothetical portfolio methodology;
- Trading costs assumed in a valuation represent "reasonably expected" or actual costs; and
- Any market value adjustment applicable to the fixed income asset proxy is expected to produce results "reasonably similar" to changes in the market value of the asset.

The draft contemplates that the guidelines will apply to all contracts issued on or after April 1, 2023. Comments on the draft were due by August 23, 2022.

Private Equity Investments in Insurance Companies

Regulators Approach From All Directions

BY ERIN VANSICKLE AND BOB SHAPIRO

In 2021, as a result of increases in private equity firms' investments in insurers, particularly life and annuity insurers, and growing interest among state insurance regulators about the role of private equity firms in the business of insurance, the NAIC Macroprudential (E) Working Group began studying the issue.

In December 2021, the working group presented to the Financial Stability (E) Task Force its work on a list of regulatory considerations related to insurers owned or controlled by private equity firms. The working group noted that owners of insurers may be focused on short-term results or may have little prior market experience, which could impact governance, market conduct, or operational practices. The regulators also expressed concern over potential conflicts of interest and the possibility of hidden or excessive fees in the portfolio structure of owners of insurance companies. Moreover, regulators have indicated that their concerns are not related only to private equity-controlled insurers.

After comments from other regulators, consumer advocates, and industry stakeholders, the Financial Stability (E) Task Force and the Macroprudential (E) Working Group met jointly on June 27, 2022, to consider the adoption of proposed regulator responses to the regulatory considerations. The regulator responses reiterated that, while state insurance regulators have tools to monitor insurers' solvency, additional required disclosures and stipulations may be needed.

The regulator responses refer many of the considerations to other NAIC working groups, task forces, and committees, as several NAIC groups are already reviewing related issues. For example, the considerations regarding the manner in which holding companies may structure contractual agreements, or affiliated/related party agreements, and the manner in which an insurer may be subject to control were referred to the NAIC Group Solvency Issues (E) Working Group.

On July 21, 2022, the Financial Condition (E) Committee adopted the regulatory considerations and referred them to the NAIC Executive Committee for consideration. Industry stakeholders should continue to monitor regulators' comments and NAIC responses to the role of private equity firms in the business of insurance, especially following the NAIC Summer National Meeting in Portland, Oregon, on August 9–13, 2022.

We will continue to monitor the work of the various committees that are reviewing these issues throughout the coming months and report on any developments that make headway.

Attacks on the SEC Administrative Citadel

BY TOM SJOBLOM

For decades, the SEC Enforcement Division has opted to use the SEC's in-house administrative law judges (ALJs) when the case involved a registered entity, which was the jurisdictional base for in-house administrative proceedings. This in-house ALJ process was instituted in the late 1960s. Arguably, the in-house expertise concerning the securities markets and the securities industry provided a more favorable forum where sophisticated securities law issues could be litigated by those in the know. It was a worthy idea.

The SEC enforcement staff increasingly began to "forum shop" when the case would not warrant or support a federal district court proceding and the staff wanted to ensure a favorable resolution. A former chief ALJ even admonished her fellow ALJs when they failed to support the SEC enforcement staff. And one ALJ has ruled in favor of the enforcement staff 99% of the time.

The first crack in the SEC citadel appeared in 2018 when the U.S. Supreme Court ruled in *Lucia v. SEC* that the ALJ process violated the appointments clause of the U.S. Constitution, which provides that all "inferior" officers must be appointed by the president with the advice and consent of the Senate. Because SEC ALJs essentially function like trial judges, they are "inferior officers" under the appointments clause. Since they were not appointed in the constitutionally required manner, the ALJ process had a structural error. Pending cases had to be reheard. Recent cases have broadened this attack on the ALJ process.

Michelle Cochran fell prey to this system in 2016 when she was charged with aiding and abetting her former employer's alleged failure to complete certain auditing functions under SEC standards. She represented herself pro se, and the ALJ before whom she appeared warned her that he never had ruled against the SEC enforcement staff. In 2017, she lost her case and was banned from practicing as an accountant before the SEC for five years and ordered to pay a civil penalty of $300,000.

After the *Lucia* decision in 2018, which required many then-pending cases to be heard over again, Cochran was assigned another ALJ to rehear her case. Rather than going through such a preordained ALJ rehearing, she filed suit in federal court, seeking an injunction against the SEC. She alleged a violation of the president's removal powers under Article II of the Constitution, due to the multiple layers of tenure protection that the SEC afforded to its ALJs. But the federal district court dismissed her case, citing Section 25(a) of the Securities Exchange Act of 1934. According to the court, Section 25(a) implicitly stripped it of jurisdiction until Cochran had exhausted the SEC's internal appellate review process. On appeal, the Fifth Circuit initially agreed with the district court. But an en banc panel changed its mind and held that she could go directly to federal district court when the in-house ALJ process is structurally unconstitutional. On May 16, 2022, the U.S. Supreme Court granted a petition for certiorari on that point and consolidated it with a similar case brought by the Federal Trade Commission under the FTC Act.

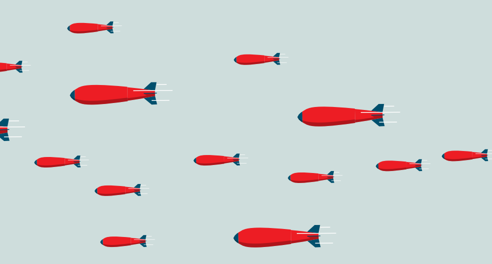
Two days later, on May 18, the Fifth Circuit ruled in *Jarkesy v. SEC* that the SEC in-house ALJ process has three additional constitutional problems. First, it violates the right to a jury trial, which the Seventh Amendment provides for in "all suits at common law." Fraud cases were traditionally handled in the courts of England at common law. Nor can Congress or the SEC circumvent the Seventh Amendment by claiming it is bringing its administrative proceedings to adjudicate so-called public rights (i.e., when the government sues as sovereign under a statute to enforce a public right). Congress cannot assign adjudication of such rights to an administrative agency. Moreover, a jury trial would not dismantle the statutory scheme and would not impede a swift resolution of such claims. Further, when the SEC seeks a civil penalty, which it usually does, the Seventh Amendment right to a jury trial must remain sacrosanct.

Second, the Fifth Circuit found that the statutory scheme provided no "intelligible principle" for determining when the SEC can prefer the ALJ process to federal district court. True, Congress can delegate its power. But there must be an "intelligible principle" by which the delegated entity performs its functions. Accordingly, the court concluded that the unfettered discretion exercised by the SEC constitutes an unconstitutional delegation of authority that provides an opportunity for forum shopping by the SEC.

Third, the statutory restrictions on removing SEC ALJs from their positions violate the take care clause of Article II. The president must "take care" that all laws are faithfully executed and enforced. He cannot fulfill that executive duty if he cannot choose and remove puisne judges if they misbehave. At least two levels of protection against removal are given to the ALJs: they can be removed by the SEC commissioners only if good cause is found by the Merit Systems Protection Board (MSPB), and SEC commissioners and MSPB members can be removed by the president for cause. Therefore, apart from the appointments clause violation found in *Lucia*, the court concluded that these removal restrictions result in a violation of the take care clause of Article II.

A final Fifth Circuit case to consider is *SEC v. Novinger*. When settling an enforcement action, the SEC requires that respondents agree not to openly contradict any of the SEC's allegations, even if they settled without admitting or denying the charges. It is essentially an administrative "gag order." But that gag order arguably violates the First Amendment for a host of reasons, e.g., it is a forbidden prior restraint, content restriction, and grant of unbridled enforcement discretion to the SEC. Novinger went to federal court to seek relief from such a consent judgment. But this time, the Fifth Circuit ruled in favor of the SEC, finding that the respondent's First Amendment claims did not rise to the level of a due process violation needed to set aside a final judgment under Federal Rule of Civil Procedure 64. In a similar case, the Second Circuit had earlier refused to grant a former Xerox executive similar relief in *SEC v. Romeril*, and the Supreme Court denied Romeril's petition for cert.

We await the Supreme Court's next term to see if other doors to the SEC citadel will be unlocked.



NCOIL Protests Insurers' Offers of Enhanced Cash Surrender Values

BY ANN BLACK AND JORDAN LUCZAJ

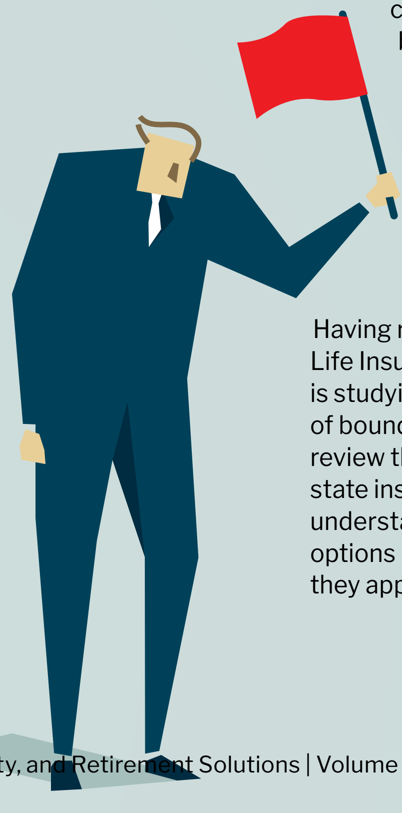
The National Council of Insurance Legislators (NCOIL) unanimously agreed to waive a red flag protesting insurers' offers of enhanced cash surrender values. At its summer meeting, NCOIL adopted a Resolution Identifying Certain Enhanced Cash Surrender Value Endorsements as Violating the Standard Nonforfeiture Law.

The resolution "calls upon state regulators to enforce the same Standard Nonforfeiture Law smoothness requirement that regulators requested legislators to add to the insurance codes, by withholding approval of, and rescinding any previous approval of, any non-compliant 'enhanced cash surrender value' endorsements providing limited time, spiked cash surrender value offers incentivizing consumers to terminate their life insurance protection, and calls upon state legislative committees with oversight of insurance to monitor insurance departments' actions with respect to this matter."

The resolution asserts that insurers are "offering 'enhanced cash surrender value endorsements,' dramatically changing the terms of well-seasoned policies from their issued and approved policy forms, seeking to incentivize consumers to terminate policies and their death benefit protection by means of limited time, enormous increases in cash surrender value, in plain violation of the Standard Nonforfeiture Law standards."

It also claims:

> [L]imited time, spiked cash surrender value offers carry substantial risks of the same sort as the regulated product they mimic, life settlements, and the carriers who offer them do not follow the consumer protection statutes created by legislators to protect policyholders offered limited time, big cash incentives to give up their policies, such as rescission rights, intermediary fiduciary duty, physician certification of (elderly) consumer competence, and disclosure of competing alternatives.



Having received NCOIL's protest, the NAIC Life Insurance and Annuities (A) Committee is studying whether insurers have gone out of bounds. The A Committee intends to review the history of universal life and survey state insurance departments to get a better understanding of these cash surrender value options — i.e., what they look like and to whom they apply.

SEC Files Groundbreaking Reg BI Complaint

BY JUSTIN CHRETIEN

On June 15, 2022, the SEC filed its first complaint alleging violations of the "care obligation" and the "compliance obligation" of Regulation Best Interest, Rule 15l-1(a) under the Securities Exchange Act of 1934 (Reg BI).

In *SEC v. Western International Securities Inc.*, the SEC alleges violations by Western International Securities Inc. and five of its registered representatives of Reg BI in connection with their recommendations to retail customers to purchase unrated debt securities, known as "L Bonds," between July 2020 and April 2021. Unlike prior Reg BI settlements with the SEC involving alleged broker-dealer violations of the "disclosure obligation" associated with the new Form CRS, the *Western* complaint involves the first alleged broker-dealer violations of both the care obligation and the compliance obligation.

Specifically, the SEC alleges that Western and the registered representatives failed to exercise reasonable diligence, care, and skill to understand the risks, rewards, and costs associated with L Bonds. At the time they recommended L Bonds to retail customers, the registered representatives allegedly did not understand key risks associated with the bonds and the bonds' issuer, GWG Holdings Inc. Further, the SEC alleges that Western and the registered representatives recommended L Bonds to at least seven retail customers without a reasonable basis to believe L Bonds were in those customers' best interests. Notably, the SEC *did not allege* that recommendations for L Bonds were not in the best interests of Western's customers.

The SEC also alleges that Western's written policies and procedures were not reasonably designed to achieve compliance with Reg BI's care obligation, i.e., that its written policies and procedures merely recited the objectives of Reg BI without offering registered representatives specific guidance tailored to Western's operations. Western also allegedly had inadequate procedures for enforcing what limited policies it had regarding compliance with the care obligation of Reg BI.

As the regulation makes clear, the standard for evaluating compliance with the care obligation is whether the broker-dealer "exercises reasonable diligence, care, and skill" (as required by Rule 15l-1(a)(2)(ii)) in making a recommendation. As the SEC made clear in its release adopting Reg BI, compliance is evaluated as of the time of the recommendation, not in hindsight. According to the release, it is an objective standard "turning on the facts and circumstances of the particular recommendation and the particular retail customer," and "the factors that a broker-dealer should understand and consider when making a recommendation may vary depending upon the particular product or strategy recommended." The rule and its adopting release are silent, however, on exactly what sources of information a broker-dealer should consider in the exercise of reasonable diligence to understand the risks, rewards, and costs of a product or to establish a reasonable basis for recommending the product.

On the other hand, Rule 15l-1(a)(2)(iv) provides that the standard for evaluating compliance with the compliance obligation is whether the broker-dealer establishes, maintains, and enforces written policies and procedures reasonably designed to achieve compliance with Reg BI. This is similar to language in FINRA's supervision rule, Rule 3110(b).

This case will be instructive as to how future Reg BI cases will be brought and provides some insight into what broker-dealers can do to ensure compliance with Reg BI. See "Takeaways for Broker-Dealers After SEC's Reg BI Action."

FINRA's Expansive View of "Participation" in a Private Securities Transaction

BY ANN FURMAN

Recent settled enforcement actions illustrate FINRA's expansive view of what it means to "participate" in a private securities transaction. Private securities transactions, sometimes characterized as "selling away," involve transactions that are outside the regular scope of a registered representative's employment with his or her FINRA member firm.

Under FINRA Rule 3280, registered representatives may be considered to participate in a private securities transaction even if they do not receive selling compensation for the transaction. Selling away activity typically involves *offering* securities or *effecting* securities transactions for customers without notifying the firm. Recently, however, FINRA also has taken the position that some relatively limited activities — including some that may not involve offering or effecting — constitute participating in a private securities transaction.

For example, in cases in which no selling compensation has been or will be received (or FINRA's letter of acceptance, waiver, and consent (AWC) was silent on receipt of compensation), FINRA believed that the following activities constituted participating in a private securities transaction:

- **Introduce Customer to Issuer**: "[Registered representative] introduced Customer A to the president of a company seeking investments in limited partnership units." FINRA AWC (June 21, 2022).
- **Provide Offering Documents to Customer**: "[Registered representative] provided to Customer A the private placement memorandum for the investment and a presentation about the company." FINRA AWC (June 21, 2022).
- **Forward Offering Documents**: "[Registered representative] forwarded offering documents for the LLC to six individuals, none of whom were [broker-dealer firm] customers." FINRA AWC (May 13, 2022).
- **Introduce Customer to Third Party, Phone Calls, Facilitate Wire Transfer**: "[Registered representative] introduced the customer to a third party with experience in [tax-advantaged] investments. ... [Registered representative] also provided information about the customer to the third party, participated in two phone calls with the customer and the third party, and facilitated the wire transfer out of the customer's [brokerage] account used to fund the investment." FINRA AWC (April 20, 2022).

These non-compensation cases confirm that FINRA is interpreting Rule 3280's "participating in any manner" language broadly to include, in some cases, the performance of functions that may not be regarded as offering a security or effecting a securities transaction.

SEC Clobbers Crypto Lending Platform but Allows Some Retooling

BY GARY COHEN

The SEC has settled its first enforcement action against what SEC Chair Gary Gensler calls a "crypto lending platform."

Although the SEC entered into this settlement with BlockFi Lending in February, the matter holds continuing interest. This is because the SEC has been willing to work with the company in retooling its products and structure to comply with the federal securities laws. As stated in a June speech by Commissioner Hester Peirce, "The Commission, in its settlement, set out a path pursuant to which BlockFi could register under the Securities Act and register or take steps to qualify under an Investment Company Act exemption from registration. The specific path laid out in [the] settlement agreement crafted between BlockFi and the SEC, if successful, is likely to become the standard for regulation of crypto lending."

Indeed, it is conceivable that life insurance companies will want to involve crypto in their products. Life insurance companies, for example, may want to give contract owners the option of paying premiums in cryptocurrencies. They also may want to offer investment options in the form of mutual funds investing in crypto assets.

SEC Determination

The SEC determined that BlockFi violated:

- Sections 5(a) and (c) of the Securities Act of 1933 in offering and selling unregistered securities and had to stop offering and selling in the United States and to U.S. persons abroad until the company had an effective Form S-1 registration statement for a new version of the product;
- Section 7(a) of the Investment Company Act of 1940 in operating as an unregistered investment company and had to stop operations until the company had worked out its status with the SEC under that act; and
- Sections 17(a)(2) and (3) of the 1933 Act by making a false or misleading statement in the offer or sale of a security, namely, misrepresenting the company's risk to investors by stating that most of its loans were overcollateralized when only 17% were overcollaterialzied.

The SEC did not allege that BlockFi failed to pay investors any money due to them or seek disgorgement of profits. The SEC fined the company $100 million — half goes to the SEC, and half goes to 32 state regulators.

Peirce dissented, chiefly on the ground that the SEC's approach is not the best way to protect crypto lending customers. She does not believe that the federal securities framework is best suited to provide transparency to customers around the terms and risks of crypto lending products. She also does not believe that the SEC has accommodated innovation through thoughtful use of the SEC's exemptive authority.

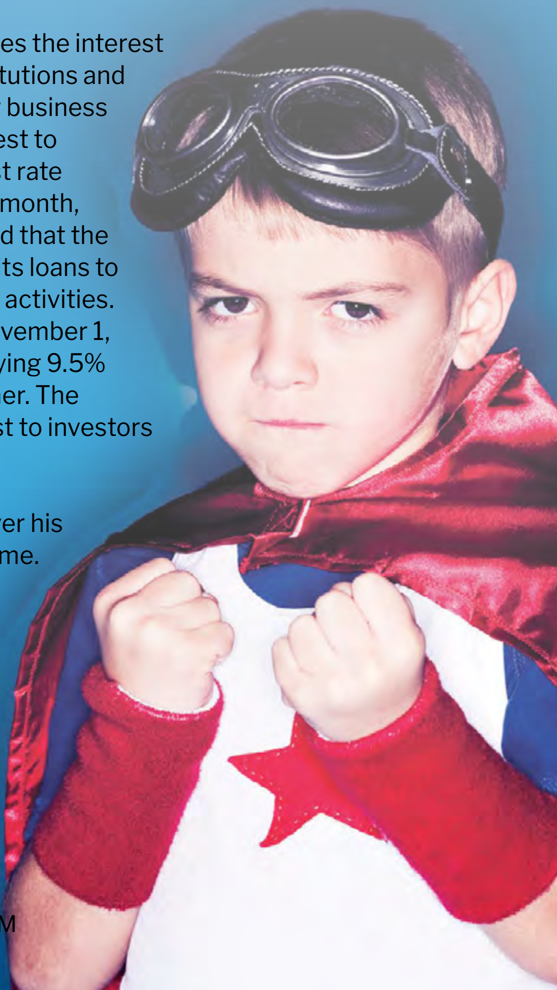
Unregistered Securities

BlockFi, with $14.7 billion in assets, has been operating since March 2018.

The company offered and sold BlockFi interest accounts, under which an investor lends to the company cryptocurrency like Bitcoin or Tether in return for the company's promise to pay the investor interest on the investor's account. The company lends the investor's cryptocurrency to institutions, charging them interest, and conducts other activities involving the cryptocurrencies that realize income.

The company then uses the interest it earns from the institutions and income from its other business activities to pay interest to investors. The interest rate varies from month to month, depending on the yield that the company earns from its loans to institutions and other activities. For example, as of November 1, 2021, BlockFi was paying 9.5% for up to 40,000 Tether. The company pays interest to investors in cryptocurrency.

An investor can recover his or her assets at any time. An investor can also borrow money in U.S. dollars against the amount of crypto assets deposited in the BlockFi interest account.



The SEC found the BlockFi interest accounts to be unregistered securities, based on U.S. Supreme Court precedents, as both notes and investment contracts.

Unregistered Investment Company

BlockFi's various business activities caused it to hold securities assets in the form of loans of crypto assets and U.S. dollars to counterparties, investments in crypto asset trusts and funds, and intercompany receivables, with a particular focus on loans that the company makes to counterparties.

The SEC found BlockFi to be an unregistered investment company as an issuer of securities engaged in the business of investing, reinvesting, owning, holding, or trading in securities that are worth more than 40% of its total assets. The SEC also found that the company does not qualify for the exclusion in Section 3(c)(2) of the 1940 Act for a "market intermediary."

The SEC gave BlockFi 60 days (with the potential for a 30-day extension) to provide the staff "with sufficient credible evidence that it is no longer required to be registered under the Investment Company Act."

Peirce pointed out that BlockFi would have problems fitting under the 1940 Act because it issues debt securities that can violate Section 18 of that act and holds digital assets that raise valuation, liquidity, and custody problems. She called for the SEC staff to work with BlockFi to "craft" a set of conditions under Section 6(c) of the 1940 Act to resolve these legal problems.

SEC Casts Wider Investment Adviser Net

May Ensnare Index and Other Providers

BY TOM LAUERMAN

A June 15 release published by the SEC has requested public comment relevant to, primarily, the circumstances under which any of the following types of "information providers" should be deemed "investment advisers" for purposes of the Investment Advisers Act of 1940 or the Investment Company Act of 1940:

> **Index providers**, who "compile, create the methodology for, sponsor, administer, and/or license market indexes."
>
> **Model portfolio providers**, including broker-dealers, asset managers, third-party strategists, asset allocators, and advisers. A model portfolio consists of "a diversified group of assets (often mutual funds or exchange-traded funds ('ETFs')) designed to achieve a particular expected return with exposure to corresponding risks."
>
> **Pricing services**, who "provide prices, valuations, and additional data about a particular investment (e.g., a security, a derivative, or another investment), to assist users with determining an appropriate value of the investment."

The large number of specific questions on which the SEC's release requested comments reflects the large number of factors that bear on this subject and the complex analysis that could be applied. The complexity is compounded by the wide variety in (a) the types of information and related services provided by each type of information provider; (b) the users of such information or services; (c) and the uses to which they put such information or services. Moreover, depending on the circumstances, the appropriate result under the Investment Advisers Act may differ from that under the Investment Company Act.

The release does not specifically mention insurance companies or the various types of investment products they issue, including those that have an index-based component or that entail model portfolio use. Nevertheless, in a number of contexts, insurance companies without a doubt use or provide types of information with which the SEC's release is concerned. This SEC initiative, therefore, could potentially be very significant for many insurance companies.

The SEC set August 16, 2022, as the deadline for receiving comments in response to its release. As with many other recent short SEC comment periods, it is questionable whether the SEC could have expected to receive very detailed or definitive comments on this subject. Nevertheless, many very substantive comments have been submitted. It is to be hoped, moreover, that there will be further opportunity for comment if and when the SEC develops a more concrete proposal on this subject, or that the SEC will at least be willing to consider comments received after the above deadline.

To Prevent Algorithms From Heading Off Course, Regulators Consider Testing

BY ANN BLACK

As the various NAIC groups and state regulators continue to ascertain the seaworthiness of insurers' use of consumer data, algorithms, and machine learning, these lookouts have set their sights on unfair discrimination. The Accelerated Underwriting (A) Working Group's educational report states:

- Due to the fact accelerated underwriting relies on non-traditional, nonmedical data and predictive models or machine learning algorithms, it may lead to unexpected or unfairly discriminatory outcomes even though the input data may not be overtly discriminatory. It is critical to test the conclusions up front, on the back end, as well as, randomly, to ensure the machine learning algorithm does not produce unfairly discriminatory ratings or ones that are not actuarially sound.

Testing can also be important in determining if a machine learning algorithm is accurate across demographic categories. Such scrutiny is especially important when behavioral data is utilized. Behavioral data may include gym membership, one's profession, marital status, family size, grocery shopping habits, wearable technology, and credit attributes. Although medical data has a scientific linkage with mortality, behavioral data may lead to questionable conclusions without reasonable explanation.

At the 2022 Summer National Meeting of the Big Data and Artificial Intelligence (H) Working Group (Big Data WG), Superintendent Elizabeth Dwyer confirmed that testing the results of an algorithm is especially important for algorithms that may change and evolve over time. Consumer representative Birny Birnbaum commented that testing consumer outcomes is an "essential component" to addressing bias and that a uniform approach is needed across insurers. Similarly, at the meeting of the Innovation, Cybersecurity, and Technology (H) Committee (H Committee):

- The Society of Actuaries noted that after implementation of an algorithm,

insurers cannot just "set it and forget it" but must continue to evaluate the algorithm performance after deployment to improve the model's performance.

- Google noted that there must be oversight as an algorithm makes decisions and that responsibility needs to be baked in at every stage and suggested that (i) a model's outputs must be reviewed to evaluate whether the performance of the model compares to the model's ground truth and (ii) loss ratios must be tracked over time across communities to understand whether there are any systematic gaps across models or products.
- Professor Daniel Schwarcz commented that in all cases in which a problem with a model was discovered, for example with facial recognition models, it was discovered because the model was tested or audited on the back end.

Schwarcz indicated insurers might have to walk the plank for their reluctance to collect information about statutorily protected groups, which prevents them from determining when an algorithm produces biased results. Dwyer confirmed with the presenters that methods such as the Bayesian Improved Surname and Geocoding (BISG) method for inferring race could be used to attain the same result without the need to collect such consumer data. A similar approach is being considered by the Colorado Insurance Department.

At the Big Data WG summer meeting, Milliman consultants explained four different tacks that can be taken to test an algorithm:

1. **Control Variable Test** – Is the model/variable a proxy?

   The protected class is added as a predictor in a model to account for the predictive effect of the protected class. The results of the model before and after the protected class is added are compared for differences.

2. **Interaction Test** – Is the predictive effect consistent across protected classes?

   The protected class is added as an interaction item in a model to produce model indications for the evaluated variable for each protected class. The results of the model are compared across protected classes for consistency.

3. **Nonparametric Matching (Matched Pairs) Test** – Does the inclusion of the variable disproportionately impact otherwise similar risks?

   Each policyholder of a protected class is matched with a policyholder with similar risk characteristics not of that protected class. The results of the model for each policyholder are compared for consistency.

4. **Double Lift Chart** – Does the variable improve predictions across protected classes?

   The model predictions are compared when the protected class is included and when the protected class is excluded to assess which better predicts the response variable.

No overall compass heading was decided upon during the Summer National Meeting for finding the right means of testing algorithms and machine learning. Although it appears the regulators are still trying to get their bearings, insurers should be prepared to chart a course for testing their algorithms for unfair discrimination.

SLUSA Dismissal Affirmed in Variable Annuity Class Action

Eleventh Circuit Looks Behind Artful Pleading

BY JOHN CLABBY

The Eleventh Circuit Court of Appeals recently affirmed the dismissal of a putative class action against a brokerage firm and its parent company, holding that the Securities Litigation Uniform Standards Act (SLUSA) barred the action. In *Cochran v. Penn Mutual Life Insurance Co.*, the Eleventh Circuit also formally accepted case law from sister circuits that it should look behind "artful" pleading in determining whether SLUSA bars a class action under state law.

The plaintiff had alleged that the brokerage firm had violated Georgia fiduciary duties by recommending that its clients purchase variable annuities in tax-deferred accounts. The plaintiff alleged that a variable annuity was always unsuitable for that type of account, such as a rollover IRA, because the tax benefits of a variable annuity had no value in an account that was already tax-qualified. The plaintiff alleged that the brokerage firm only recommended the annuities because of the higher fees due to the defendants from these annuities versus a more plain-vanilla investment, such as a low-cost index fund.

The defendants moved to dismiss under Rule 12(b)(1), arguing that SLUSA barred a class action, like this one, based on state law claims that allege material misrepresentations or omissions in connection with the purchase or sale of a security. The Northern District of Georgia agreed and granted the motion.

In affirming the dismissal, the Eleventh Circuit focused on the "gravamen" of the complaint and "not on the labels the plaintiff chooses to give his claims, and not on the artful way a plaintiff words his allegations." The Eleventh Circuit acknowledged that it had "not previously articulated all those principles explicitly" and noted that several other circuits had, including the Third, Fifth, Eighth, and Ninth.

The court held that the key allegations were "that through its investment advice and recommendations, [the defendant] affirmatively made false statements, or failed to disclose material facts, about the suitability of the variable annuity investment for the type of account that the plaintiff had."

The plaintiff argued that the conflict of interest was the heart of his claim and that "no amount of disclosure can ever cure the breach of the duty caused by the conflict." The court cited Georgia case law, though, in which a plaintiff arguing breach of fiduciary duty must show "both a conflict of interest and a material misrepresentation or omission."

Also worth noting is that, in a footnote, the Eleventh Circuit aligned itself with the Ninth Circuit and explained that it would refer to SLUSA as "barring" a class action to vindicate certain state law claims rather than "preempting" any cause of action.

Learn From Lemonade's Privacy Lemon

Sweeten Compliance to Lessen Litigation Bitterness

BY PATRICIA CARREIRO

Lemonade Inc.'s recently proposed settlement of class action claims alleging that it failed to sufficiently disclose, and secure necessary consent for, its collection and use of biometric information is a prime example of the privacy risks facing insurers. Here are some tips for keeping the seeds out of your privacy program.

1. More is not always better.

Data is essential to all parts of an insurer's operation, including underwriting and claims. Collecting more data, however, may come with increased compliance obligations and resulting costs. Just like lemons in lemonade, data is essential but should be limited.

2. Don't underestimate how sour privacy lemons can be.

a. **Don't over-rely on a Gramm-Leach-Bliley Act exemption**. Financial services companies often place great reliance on entity-level GLBA exemptions. Illinois' Biometric Information Privacy Act (BIPA) provides a private right of action and includes a GLBA entity-level exemption. While BIPA's GLBA exemption has helped insurers face less BIPA litigation than many other industries, bitterness remains. Lemonade recently agreed to pay $3 million of a $4 million settlement to a subclass of 5,000 Illinois consumers, leaving the other $1 million to be split between 110,000 consumers in other states; that is $600 per Illinois consumer versus $9.09 per consumer in other states, even with BIPA's GLBA exemption.

b. **Don't forget common law claims.** In New York, for instance, consumers claimed that Lemonade's alleged actions violating BIPA were breaches of express and implied contract and GLBA notice requirements, as well as instances of unjust enrichment and unfair trade practices. While the court recently dismissed the unjust enrichment claims because the parties did not dispute having a valid contract, it denied Lemonade's attempts to dismiss the other counts.

3. Stir well.

Consider clarifying and coordinating existing privacy notices. Insurers often use a multitude of privacy notices to meet the requirements of the various privacy laws to which they are subject (e.g., a Notice of Health Information Policies, Standards, and Procedures to address NAIC Model 55, a Notice of Insurance Information Practices to address NAIC Model 670, a GLBA notice, a California Consumer Privacy Act notice, etc.). The risk highlighted by the pleadings against Lemonade is that consumers may argue that any one of those notices misled or confused them because they thought that the particular notice was comprehensive or because of any inconsistency across notices. To lessen risk, consider reviewing privacy notices to ensure consistency and clarity, for example:

a. Building into privacy notices a statement that the notice is "in addition" to other privacy notices that may be provided to the consumer; and/or

b. Ensuring that an overarching comprehensive privacy notice exists that explains how various privacy notices come together into a cohesive whole.

Care is particularly needed if these steps are taking place when process considerations or marketing partnerships are in flux.

4. Adjust to taste.

Privacy notices require frequent adjustment as insurers' data practices change, new distribution channels or data partners are added, laws develop, or marketing techniques are expanded, and insurers have varying risk tolerances and consumer experience goals. To avoid surprise lip-puckering, **ensure your privacy approach is consistent with the amount and type of data you use and your company's taste for risk**.

What's Up With WhatsApp and Text Messaging?

SEC and FINRA Weigh In

BY NATALIE NAPIERALA AND DAVID WRIGHT

The SEC requires broker-dealers to maintain originals of all communications received and copies of all communications sent by the broker-dealer relating to its business for three years. The SEC has explained that Rule 17a-4 "serves the important governmental interest of assisting adequate supervision of broker-dealers by the Commission and the SROs" and forms the basis for effective investor protection. *See* Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media under the Electronic Signatures in Global and National Commerce Act of 2000 With Respect to Rule 17a-4(f), Release No. 34-44238, § III.D.1. It should come as no surprise that the SEC and FINRA recently have focused on the use of unapproved messaging channels ranging from the use of WhatsApp to simple texting on a personal device.

For example, Credit Suisse Group AG disclosed in March 2022 that the SEC was investigating a U.S. subsidiary's alleged use of unapproved messaging channels. HSBC and Goldman Sachs are also being investigated by the SEC for using personal messaging apps to conduct business. And Morgan Stanley recently disclosed that it is expecting to pay $200 million related to a broad investigation into the use of unapproved personal devices.

In addition, the SEC has already imposed fines against two other broker-dealers in the amounts of $100,000 and $125 million, respectively, related to the use of unapproved messaging channels to conduct business.

FINRA has also brought enforcement actions and imposed sanctions in the form of suspensions and fines against registered representatives, personally, for using WhatsApp to conduct securities-related business.

The question does not seem to be *whether* any particular firm or its members will be investigated for compliance with SEC Rule 17a-4 or FINRA Rule 4511 and the use of messaging platforms such as WhatsApp, Signal, or texts, but *when*. The question of how to harmonize modern communication practices with record-keeping requirements also comes to the fore. While many broker-dealers have written supervisory procedures prohibiting the use of WhatsApp or personal devices to conduct business, the investigations and enforcement actions mentioned above — as well as everyday life experience — teach that such prohibitions may be unworkable in the long run. Instead, broker-dealers may wish to consider using technology to bridge the gap between the instant-message-centric modes of communication that permeate life in both personal and business contexts and Rule 17a-4 or FINRA Rule 4511.

Terminal Funding Annuities Smooth Rough Seas for Defined-Benefit Plans

BY LOWELL WALTERS

Current volatile market conditions and increasing interest rates are causing defined-benefit plan administrators and sponsors to consider purchasing annuity contracts (often called "terminal funding annuities") to fund retiree benefits. Since defined-benefit plans (including cash balance plans) guarantee benefits to employees without regard to actual market returns, plan sponsor financial burdens increase when investments lose value. In addition, increasing interest rates generally make annuities more affordable and attractive. Thus, annuity providers are now reaching out to defined-benefit plans and vice versa.

Defined-benefit plan administrators and sponsors can shift (i.e., eliminate) the risk for providing benefits onto an annuity provider for defined-benefit plan participants whose benefits are certain. In addition to former employees, this includes active employees in terminating and frozen plans that intend to terminate.

Defined-benefit plan administrators and sponsors will provide benefits data to potential annuity providers who will calculate the cost to purchase terminal funding annuities. Defined-benefit plan sponsors will largely base decisions on a comparison of the lump-sum cost to purchase the annuity to eliminate future financial risk with the likely or projected cost of continuing to make defined-benefit plan contributions.

Defined-benefit plan advisers and ERISA attorneys can help sponsors and administrators satisfy fiduciary obligations in selecting annuity providers and negotiating the final terms of the agreement between the parties. For example, the plan administrator should approve the use of defined-benefit plan assets to purchase an annuity, and since certain ERISA liabilities are shifting to the annuity provider, selecting an annuity provider is a fiduciary decision. The Department of Labor issued guidance on the proper selection of annuity providers to mitigate the risk that a provider may default on its commitments under the terminal funding annuity.

Defined-benefit plan advisers, including the investment adviser and actuary, also can assist by, at a minimum, offering recommendations about fair investment earnings assumptions to use for the actuarial assessment of the likely cost to continue to fund defined-benefit plan liabilities. While defined-benefit plans already set forth assumptions as to returns, those plan assumptions are for different purposes and should not be used for this calculation without additional scrutiny.

Recent Developments in Life Insurance Litigation

BY STEPHANIE FICHERA AND KIRSTEN WOLFFORD

STOLI

We reported in detail on developments in the case law and legislation addressing stranger-originated life insurance (**STOLI**) policies in past issues of *Expect Focus – Life, Annuity, and Retirement Solutions*. *See* "New Jersey Springs Into Action: New Bill to Ban STOLI Policies," "New Jersey Enacts Anti-STOLI Law," and "State Law Steers STOLI Cases, Drives Federal Court Outcomes." A June 23, 2022, decision by the **Eleventh Circuit Court of Appeals** gets to the bottom of the STOLI debate in *Estate of Malkin v. Wells Fargo Bank*.

Phyllis Malkin purchased $13 million worth of life insurance as part of a STOLI scheme. Berkshire Hathaway acquired one of the policies in 2013 and, after Malkin died in September 2014, received $4 million in death benefits. Malkin's estate sued Berkshire to recover the death benefits under section 2704(b) of Delaware's Insurance Code, which allows an insured to sue "to recover such benefits from the person so receiving them" if a policy is made in violation of the insurable interest requirement. Berkshire countered that it was a bona fide purchaser under Delaware's version of the Uniform Commercial Code and asserted a claim for unjust enrichment.

The district court ruled that the policy was void ab initio under section 2704(b) and that Malkin's estate was entitled to recover the policy's proceeds, reasoning that UCC-based defenses would gut the purpose and effectiveness of the insurable interest provision of Delaware's Insurance Code. On appeal, the Eleventh Circuit held that the district court properly found the insurance policy void as an illegal STOLI policy. But, given the presence of novel issues of Delaware law, the circuit court certified two questions to the Delaware Supreme Court.

The Delaware Supreme Court ultimately advised (a) that UCC defenses were not available to a third-party purchaser of a contract deemed void under section 2704(a); and (b) that a party to an action under section 2704(b) could recover premiums that it paid on a void policy contract if it could prove entitlement under a viable legal theory. Applying the Delaware Supreme Court's answers, the Eleventh Circuit affirmed the district court's decision rejecting the UCC defenses but concluded that the district court erred by dismissing Berkshire's unjust enrichment counterclaim, remanding the claim for consideration of whether Berkshire could establish the elements of unjust enrichment.

Interpleader

In a July 1, 2022, decision in *Primerica Life Insurance Co. v. Woodall*, the **Eighth Circuit Court of Appeals** held that a life insurer's alleged "unclean hands" did not prevent it from using **interpleader** as a shield against liability. Before his death, the insured attempted to change the beneficiary on his life insurance policy to his new wife via a "multipurpose change form." The insured mistakenly filled out the wrong portion of the form, prompting the insurer to request further information. The insured never responded, and after his death, the insurer mailed claim forms to both his new wife and the previously named beneficiary, resulting in the submission of competing claims for the policy's proceeds. When the insurer sought to interplead the proceeds, the new wife counterclaimed for breach of contract, alleging the insurer had failed to timely pay the proceeds or to perform its obligations in good faith. The court concluded that, while both the insurer and insured "shared fault," the insurer's "missteps" did not rise to the level of unclean hands that would prevent it from taking advantage of interpleader.

Class Certification

On July 14, 2022, a Texas state appellate court reversed an order certifying a class action involving two equitable claims for relief, one for money had and received and the other for unjust enrichment.

In *American General Life Insurance Co. v. Dickson*, the insured purchased the life insurance policy on which the claims were based in 1985. For reasons not clear from the record, the insured named a bank as the policy's beneficiary and assigned the policy to the bank; he did not name a contingent beneficiary. The insured died in 1996, but neither the bank nor any of his successors filed claims for the policy's proceeds. Years later, the insurance company discovered the insured's name in the Social Security Death Master File and sent correspondence to his last-known address to locate beneficiaries before escheating the policy's proceeds to the state. The insurance company ultimately paid the policy's proceeds, plus statutory interest, to the insured's heirs, Anna Dickson and her sister, after they submitted claims and proof of death and the bank's successor assigned any interest it had in the policy to the insured's heirs. Dickson subsequently sued the insurance company, individually and on behalf of a putative class, claiming the company owed her interest from the date the insured's death was entered in the Death Master File, as opposed to the date she submitted her claim.

Dickson moved the court to certify a class of Texas residents to whom the company had paid death benefits during the class period based on the unjust enrichment and money had and received claims asserted. After a hearing, the trial court granted the motion. The appellate court reversed, concluding that the trial court abused its discretion in granting class certification because Dickson failed to satisfy the predominance requirement. Noting that it had an obligation to perform a rigorous analysis and that the predominance requirement is a "particularly difficult" "hurdle to clear" when equitable claims are asserted, the appellate court concluded that the putative class's equitable claims raised the question "whether equity and good conscience allowed [the insurer] to retain the earnings for its own account before beneficiaries of policyowners who purchased ... policies filed proofs of loss." That question "in many cases could turn on individualized circumstances surrounding the reasons the individuals who had the right to pursue claims ... did not promptly file a claim after a policyowner's death." The appellate court also noted that the insurer's equitable defenses — such as laches and unclean hands — would similarly turn on individualized inquiries into each class member's knowledge, conduct, and experience.

Circuit Courts Continue to Navigate ERISA's Murky Waters

BY IRMA SOLARES

The Sixth Circuit Court of Appeals ruled in *Fulkerson v. Unum Life Insurance Company of America* that the beneficiary of an ERISA-covered life insurance policy was not entitled to accidental death and dismemberment (AD&D) benefits because such benefits were precluded by the crime exclusion in the policy. Daniel Tymoc had group life insurance through his employer that provided basic life insurance coverage as well as an additional AD&D benefit. The insured died in a single-car accident while speeding 20-40 miles above the posted speed limit and driving recklessly. The insurance company paid his mother, the beneficiary of the policy, basic life insurance benefits of $100,000 but denied the AD&D benefit because the insured's conduct at the time of the accident that caused his death — speeding and reckless driving — fell within the policy's crime exclusion. The district court granted the mother's motion for judgment on the pleadings and awarded her the AD&D benefits. The Sixth Circuit reversed, holding that the plain and ordinary meaning of the crime exclusion that precludes AD&D benefits for "any accidental losses caused by, contributed to by, or resulting from … an attempt to commit or commission of a crime" includes reckless driving because it is a punishable offense "in every state in the Union." The court declined to consider whether speeding would similarly trigger the crime exclusion.

In *Bunner v. Dearborn National Life Insurance Co.*, the Fifth Circuit Court of Appeals affirmed summary judgment for the insurer following the denial of long-term disability (LTD) benefits under an employer-sponsored disability plan due to a preexisting condition exclusion in the disability policy. The plaintiff had a brain tumor removed in 2015 and received postoperative radiation therapy and chemotherapy. In December 2015 and October 2016, a physician evaluated the plaintiff and noted impairments in learning and memory, and a decline in attention, working memory, and left-hand dexterity, but she "maintained adequate daily functional capacities." The week following her second (October 2016) evaluation, the plaintiff commenced work with a commercial real estate company and claimed that she was assured that her preexisting condition would not preclude coverage despite contrary language in the materials provided to her during enrollment. The plaintiff requested and was granted short-term disability benefits commencing in March 2017. Several months later, she applied for LTD benefits claiming that her disability arose from cognitive impairments rather than the treatment for her brain cancer. After de novo review of the administrative record, the court found that the medical evaluation conducted just days before the plaintiff's start date revealed the very cognitive decline that continued its advance and further disabled her some months later. To hold otherwise, the court noted, would require a finding that "two separate events of cognitive decline occurred," which the record did not support.

The Eleventh Circuit Court of Appeals recently addressed two issues of first impression before the court. In *Gimeno v. NCHMD Inc.*, the panel considered whether ERISA Section 1132(a)(3) creates a cause of action for an ERISA beneficiary to recover monetary benefits lost due to a breach of fiduciary duty in the plan enrollment process. The court answered the question in the affirmative. Justin Polga was a medical doctor employed by NCHMD. When he was hired, NCHMD's human resources staff helped Polga complete enrollment paperwork for life insurance benefits through an ERISA plan. Polga's spouse was the primary beneficiary under the plan. Polga received $150,000 in employer-paid life insurance coverage and elected to pay for $350,000 in supplemental coverage. To receive supplemental coverage, Polga needed to complete an insurability form but the form was not provided with his enrollment paperwork, nor was he notified that the form was necessary or missing. Yet, for three years, NCHMD deducted premiums for the life insurance from Polga's paychecks and provided him with a benefits summary stating he had $500,000 in coverage. Following Polga's death, NCHMD refused to pay any supplemental benefits because it never received the insurability form. Although Section 1132(a)(3) authorizes a beneficiary of an employment benefit plan to sue for "appropriate equitable relief" for violations of ERISA or the terms of the plan, the court held that the principle of equitable surcharge, an equitable remedy between beneficiaries and fiduciaries, should be construed to allow a claim for monetary compensation resulting from a fiduciary's breach of duty. In so doing, the Eleventh Circuit now follows the Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits in recognizing that Section 1132(a)(3) creates a cause of action for monetary relief for breach of fiduciary duty.

The Eleventh Circuit also addressed whether a district court has the discretion to consider information outside the administrative record on de novo review. In *Harris v. Lincoln National Life Insurance Co.*, the court looked to sister circuits to determine the appropriate scope of review and joined with the Third and D.C. Circuits in holding that de novo review requires district courts to consider all relevant evidence, irrespective of whether it was presented to the plan administrator or post-dates the benefit determination. The rationale is that in conducting de novo review, the district court must put itself in the administrator's place. In contrast, when conducting a review of an ERISA benefits denial under an arbitrary and capricious standard, the Eleventh Circuit holds that the role of the district court is to determine whether there was a reasonable basis for the decision based on facts known to the administrator at the time the decision was made.

US-Mexico Presidents Shake Hands on Cross-Border Trade Talks

BY TOM MORANTE

On July 12, 2022, President Biden and President Lopez Obrador issued a joint statement following their historic meeting in Washington, D.C. While much of the discussion at the meeting focused on migration, environment, labor relations, and supply chains, a significant effort was made to address the economic opportunities through enhanced cooperation among the United States, Mexico, and Canada. While this economic cooperation will primarily focus on trade in goods, it is likely that the countries will also address services trade, including with respect to insurance, to better align the regulatory environment, both in the investment and cross-border context.

The second paragraph of the joint statement sets the tone for possible significant accomplishment in the economic context:

> The foundation of North American competitiveness is the United States-Mexico-Canada Agreement and we reaffirm our commitment to its full implementation … including by … actively collaborating with stakeholders in the private sector and civil society. … We look forward to working on this … at the 10th North American Leaders Summit (NALS), which will take place in Mexico at the end of the year.

The framework for ongoing negotiations reflected in the joint statement suggests that the upcoming North American Leaders' Summit, at some level, will focus on enhancing the United States-Mexico-Canada Agreement (USMCA), particularly in the context of goods trade, while also potentially expanding the services trade provisions originally addressed in NAFTA. This could result in modification of the annexes to the USMCA dealing with insurance, possibly in the cross-border context, and the revision of the USMCA to foster the development of financial services.

In addition, the joint statement discussed the next U.S.-Mexico High-Level Economic Dialogue (HLED) to be held in September, with the objective to support trade and commerce, and create an environment to encourage investment. One of the key objectives of the upcoming HLED, consistent with its work plan, will be to promote competitiveness and encourage the integration of the two countries' economies. The work plan reflects as a goal:

> Developing effective approaches to deepening regulatory cooperation, to remove unnecessary regulatory barriers to trade, reduce costs to business … and improving the coherence of their overlapping authorities.

While it is unclear how the framework for these upcoming negotiations will be structured, and the private sector's role, a possible reduction in barriers to trade in insurance resulting from these meetings inevitably would be a welcome development for U.S. life and health insurance companies, particularly if advances can be made in the cross-border insurance regulatory scheme.

NEWS & NOTES

The firm is pleased to participate in the NALC Fall Conference on September 14–16, 2022, in Sunriver, Oregon. The conference will cover the latest legislative and regulatory issues impacting the life and health insurance industry. Shareholder **Markham Leventhal** will speak on hot topics and recent developments in life insurance litigation.

Carlton Fields is a sponsor of the ACLI Annual Conference on September 28–30, 2022, in Washington, D.C. The conference will feature sessions addressing legal, investment/financial, reinsurance, compliance, retirement security, advocacy, and legislative and regulatory issues.

Carlton Fields is pleased to participate in the ALI CLE Conference on Life Insurance Company Products on November 3–4, 2022, in Washington, D.C. Shareholder **Richard Choi** is again the co-chair of the conference and attorneys **Ann Black** and **Gary Cohen** will serve as speakers.

Carlton Fields ranks among Vault's 2023 Best Law Firms for Diversity. The firm ranked in the top 10 firms for Racial and Ethnic Diversity and the top 20 firms for Overall Diversity and Diversity for LGBTQ+ Individuals. According to this year's survey, Carlton Fields "is also a standout in the diversity space, ranking among all of Vault's diversity categories."

Carlton Fields is pleased to announce that 11 of the firm's practices and 24 of its attorneys earned top rankings in *Chambers USA 2022*. The firm ranked in the top bands in Florida for insurance.

Carlton Fields welcomes the following attorneys to the firm: Of Counsel **Benjamin Stoll** (business litigation, Washington, D.C.), Senior Counsel **William Gruitza** (health care, Tampa), and Associates **Jimmy Camilus** (real estate and commercial finance, Orlando), **Fiona Foley** (construction, Tampa), **Luis Gómez Borrero** (real estate and commercial finance, Los Angeles), **Chandler Harris** (business transactions, Tampa), **Katherine Teal Leonard** (intellectual property, Tampa), **Steffen LoCascio** (construction, Tampa), **Rontavian Mack** (real property litigation, Tampa), **Justin Peters** (labor and employment, Los Angeles), **Lauren Silk** (property and casualty insurance, Miami), and **Elizabeth Stell** (property and casualty insurance, Atlanta).

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