LIFE, ANNUITY, AND RETIREMENT SOLUTIONS INDUSTRY

Volume III, December 2020

EXPECTFOCUS®

LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS

2021 AND BEYOND

NEW CHALLENGES FOR A NEW DECADE

CARLTON FIELDS

vIII INSIDE

EXPECTFOCUS®

LIFE, ANNUITY, AND RETIREMENT SOLUTIONS DECEMBER 2020

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EXPECTFOCUS® is a review of developments in the life, annuity, and retirement solutions industry, provided on a complimentary basis to clients and friends of Carlton Fields.

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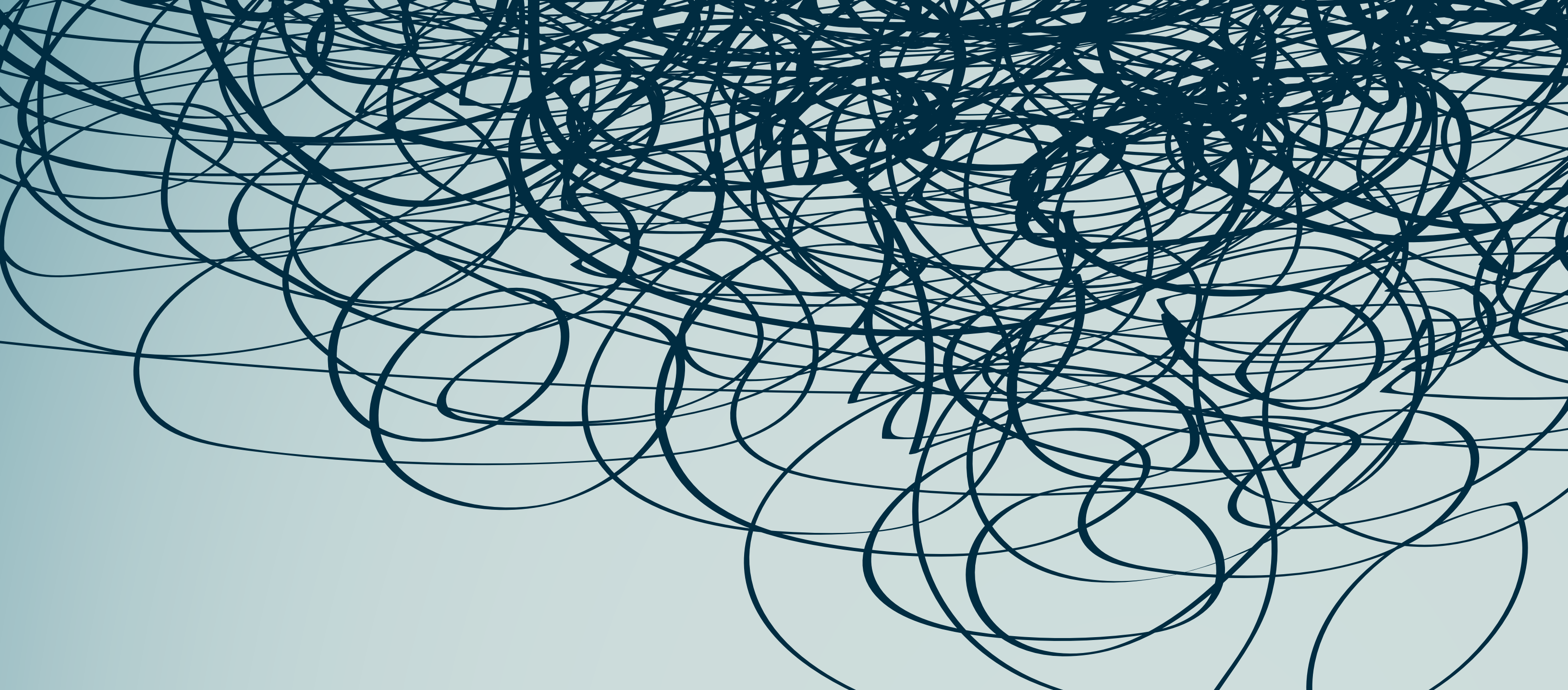


Collective Investment Trust Muddle

SEC Divided on Securities Law Exemptions

BY TOM LAUERMAN

SEC Commissioner Hester Peirce in October published an explanation of her dissent from an SEC enforcement action concerning certain collective investment vehicles established by a banking institution. The SEC alleged, among other things, that collective investment trusts (CITs) in which a large number of pension plans invested were not "maintained by" the bank.

CITs have been gaining in popularity for many years, in large measure because of exemptions that the Securities Act of 1933 and the Investment Company Act of 1940 afford to such entities. Those exemptions, however, are contingent upon the CIT being "maintained by a bank." For decades it has been generally understood that, although this requirement does not preclude a bank from retaining the services of an investment adviser in connection with a CIT's investments, the bank must exercise a substantial degree of responsibility for investment decisions.

The SEC staff in years past has sometimes indicated that it was giving serious consideration to what types of CIT investment adviser arrangements should be regarded as inconsistent with the "maintained by a bank" requirement, and the staff presumably has been aware that banks have implemented a variety of adviser arrangements while relying on those exemptions. Nevertheless, the SEC and its staff have given scant guidance in this regard, and Commissioner Peirce would not have used an enforcement action as the vehicle for establishing policy in this area.

Instead, Peirce wrote that she would have preferred to work with relevant bank regulatory authorities to develop an interpretation that would appropriately delineate when the securities law exemptions would be unavailable and when, rather, the regulation of CITs would be left wholly to the bank regulators. It remains to be seen whether the SEC will pursue any such dialogue with the bank regulators.

In the meantime, banks and plan sponsors should be aware that the SEC may be taking a heightened interest in potentially difficult and fact-intensive questions affecting the securities law exemptions on which their CITs may be relying.

SEC Streamlines Fund of Fund Relief, Requires Life Company 'Certification'

BY GARY COHEN

The SEC has adopted new Rule 12d1-4 under the Investment Company Act and taken other action "to streamline and enhance the regulatory framework applicable to fund of funds (FOF) arrangements." This includes FOFs in which life insurance company separate accounts may invest.

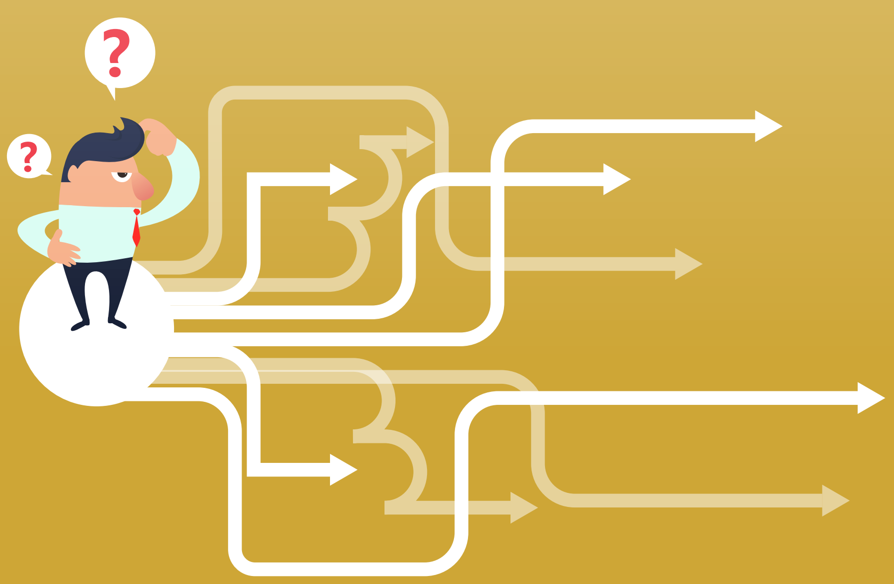
The rule permits certain registered investment companies that satisfy conditions to acquire shares of another fund in excess of the quantitative limits of Section 12(d)(1) of the act without obtaining an exemptive order from the SEC. The conditions include:

- adherence to certain voting restrictions like mirror voting;
- for most funds, entering into a fund of funds investment agreement;
- for management companies, certain evaluations and findings that are reported to a fund's board;
- for unit investment trusts, an evaluation by the principal underwriter or depositor; and
- for separate accounts funding variable insurance contracts, an underlying fund's obtaining a "certification" by the life insurance company sponsoring the separate account regarding the reasonableness of aggregate cost.

The SEC designed the rule to bring order to the current situation where the "combination of statutory exemptions, Commission rules, and exemptive orders has created a regulatory regime where substantially similar fund of funds arrangements are subject to different conditions."

The SEC justified the rule as balancing:

- shareholder benefits of using fund of funds arrangements as "a convenient way to allocate and diversify their investments through a single, professionally managed portfolio" with
- the downside, "potential for undue influence, complex structures, or duplicative fees."



In adopting the rule, the SEC dropped a proposed condition prohibiting an acquiring fund from redeeming, or tendering for repurchase, more than 3% of an acquired fund's total outstanding shares in any 30-day period.

The SEC also amended Rule 12d1-1, rescinded Rule 12d-2, amended Form N-CEN, and withdrew certain SEC exemptive orders.

The rule imposes a requirement for life insurance companies with unit investment trust separate accounts investing in underlying funds that invest in other funds. In these three-tier FOF structures, an underlying acquired fund must obtain a "certification" from the life insurance company determining that:

- the fees and expenses borne by the separate account, acquiring fund, and acquired fund, in the aggregate,
- are reasonable in relation to the services provided, expenses expected to be incurred, and risks assumed by the life insurance company.

The rule requires most funds to enter into a "fund of funds investment agreement." However, the rule does not require that the agreement include the "certification," although the agreement may do so. The SEC explained that its "general approach [is] not to codify in our rule all of the particularized terms that an agreement must include to reflect the fund of funds arrangement."

The SEC disagreed with commenters that the "certification" was unnecessary or duplicative of existing requirements. The SEC said that Sections 15(c) and 36(b) of the Investment Company Act did not apply to unit investment trusts involved in three-tier FOFs and, in any event, did not apply to the three tiers in the aggregate. The SEC also noted that the SEC's FOF exemptive orders had included "a condition similar to the certification requirement."

SEC Reforms Whistleblower Program

Changes Follow 10-Year Check-Up

BY KATELYN SANDOVAL

In the decade's waning months, the Securities and Exchange Commission awarded the largest payout so far — $114 million — under its whistleblower program. This reflects the program's continued growth since Congress established it in 2010.

The SEC also recently adopted reforms to its whistleblower program in an attempt to streamline the award evaluation process. Outgoing SEC Chairman Jay Clayton promised that these "rule amendments will help [the SEC] get more money into the hands of whistleblowers, and at a faster pace." It appears the Commissioner will keep this promise. The SEC's fiscal year that began October 1, 2020, has already seen more than $150 million of whistleblower payouts, which is well on the way to obliterating the previous year's $175 million.

Key changes include:

- Expanding the bases for awards to include deferred prosecution or non-prosecution agreements with the Department of Justice and settlement agreements with the SEC outside of a judicial or administrative proceeding.
- Clarifying that an award can be based on a tipster's "independent analysis" only if it provides "evaluation, assessment, or insight beyond what would be reasonably apparent to the Commission from publicly available information." While the SEC issued this interpretive guidance, this SEC position is not, in fact, new.
- Narrowing the circumstances under which whistleblowers are protected from retaliation. This revision simply brings the SEC rule in line with what the U.S. Supreme Court had already required in *Digital Realty Trust, Inc. v. Somers.*
- Creating a presumption in favor of awarding the statutory maximum 30% award amount for awards under $5 million, subject to possible exclusions. The SEC notes that most of its payouts are for awards at or under this threshold.
- Explaining that the SEC does indeed have discretion to consider the dollar amount (and not merely percentage amount) of the award when applying its award criteria under the rule.

Overall, the SEC's whistleblower reforms may, if anything, somewhat increase the risks to which firms are exposed, and firms should persist in their efforts to ensure securities law compliance and to handle with care any potential or actual whistleblowers.

A New Beginning for Fund Derivative Regulation

SEC Replaces Rather than Revises

BY TOM LAUERMAN

In late October, the SEC approved a wholesale replacement for the patchwork of interpretive and no-action positions it had developed over more than 40 years to regulate fund use of derivatives. The process of developing these derivative reforms has itself taken many years, including a subsequently withdrawn 2015 rule proposal, and a 2019 rule proposal that the SEC has now adopted with modifications.

The nature and approach of these derivative reforms very much echo other major SEC brush-clearing projects that have recently come to fruition. See, for example, the SEC's "fund of fund" reforms, discussed in our article on page 4, and the SEC's reform of fund liquidity regulation, discussed in "SEC Adopts Liquidity Risk Programs for Funds," *Expect Focus – Life, Annuity, and Retirement Solutions* (Dec. 2016). Indeed, the latter reform, requiring that funds have liquidity risk programs, works in tandem with the derivative reforms, as these initiatives address closely intertwined fund liquidity and risk issues.

Applicability of the Reforms

The derivative reforms apply to funds (other than money market funds) that are registered with the SEC as "management-type" investment companies. The reforms will not apply, for example, to insurance company separate accounts, except to those very few separate accounts that are registered as management-type investment companies. Accordingly, the reforms will not have any direct relevance for most insurance company separate accounts, although the reforms will be highly significant for many of the underlying funds in which most such separate accounts invest.

As adopted, the derivative reforms do not provide any exclusion for exchange traded funds, which will impose constraints on certain "inverse" or "leveraged" ETFs (although the reforms do provide "grandfathering" relief in this regard for certain existing ETFs). Subject to the reforms' constraints, however, the reforms include a rule amendment that now will permit such inverse or leveraged ETFs to commence operation without being covered by an exemption order from the SEC.

Funds can now rely on the derivative reforms at any time, but must be in compliance within 18 months after the final rule has been published in the Federal Register (which it has not been at the date hereof). Also as of that same compliance date, most of the prior SEC interpretations and no-action positions that previously have been relevant in this area will be withdrawn.

Nature of the Reforms

The derivative reforms govern funds' use of a wide variety of instruments or transactions under which funds may incur an obligation to make payments at a future time, thus exposing the fund to risk or enabling the fund to "leverage" its investment returns. Although the reforms generally refer to all of these as "derivatives," in other contexts that term is not necessarily commonly applied to some of the instruments or transactions covered by the reforms.

The reforms' main component is a new Investment Company Act Rule 18f-4, which imposes extensive requirements on funds that have "derivative exposure" (calculated as provided in the rule) equal to more than 10% of the fund's net assets. The rule requires that such a fund's "value at risk" (calculated as the rule provides, the "VaR") generally not exceed (a) 200% of the VaR of a reference index that "reflects the

markets or asset classes in which the fund invests" or (b) in the absence of an appropriate reference index meeting the rule's requirements, 20% of the fund's net assets. The fund must determine compliance with the applicable VaR test at least once a day.

Funds are also required to adopt and implement a written derivatives risk management program that must, among other things, provide for:

- Establishment and enforcement of risk guidelines that specify levels of identified criteria, metrics, or thresholds that the fund does not normally expect to exceed, and measures to be taken if those are exceeded.
- Stress testing (at least weekly) to evaluate potential losses to the fund's portfolio in response to extreme but plausible changes in market or risk factors.
- Back testing (at least weekly) of the validity of the model the fund is using to make the above-mentioned VaR computations.

The derivatives management program must be administered by one or more natural persons that the fund board approves as the fund's "derivatives risk manager." Each such natural person must be an officer of the fund's investment adviser (or, in many cases, a sub-adviser) and have "relevant experience regarding the management of derivatives risk." Moreover, the derivatives risk manager cannot be a portfolio manager of the fund (or, where multiple persons serve as derivative risk manager, at least a majority must be persons who are not a portfolio manager of the fund).

The responsibilities that Rule 18f-4 assigns to the derivatives risk manager include:

- Prior to implementation of the derivatives management program, and at least annually thereafter, representing to the board that the program is reasonably designed to comply with all of the rule's requirements applicable to the program, including the appropriateness of any reference index for VaR calculation purposes.
- At least annually reviewing and reporting to the board on those matters, as well as reporting to the board as to other matters and at other times as provided in the rule.

As noted previously, funds having derivative exposure that does not exceed 10% of their net assets generally are not subject to the most of Rule 18f-4's above-summarized requirements. The rule, however, does require funds that have this type of limited derivative exposure to, among other things, adopt and implement written policies and procedures "reasonably designed to manage the fund's derivatives risk."

Rule 18f-4 also requires funds to maintain records relating to their use of derivatives and to file current reports with the SEC of breaches of the above-mentioned VaR limits on Form N-RN. Form N-RN, which formerly was entitled Form N-LIQUID, now also has been amended to add items relating to the VaR limits. Forms N-PORT and N-CEN also have been amended to reflect fund derivative use.

Seniors in the Coming Year

Continued FINRA Focus

BY ANN FURMAN

If regulatory developments in 2020 are any indication, FINRA's efforts to protect senior customers from financial exploitation and vulnerability will continue in 2021 and beyond.

As part of its retrospective review of its rules and administrative process designed to help protect senior customers, in late fall 2020 FINRA proposed amendments to Rule 2165 and revised its Sanction Guidelines in ways designed to further protect senior customers.

FINRA Rule 2165

When a firm reasonably believes that financial exploitation of a "specified adult" has occurred, is occurring, has been attempted, or will be attempted, Rule 2165 permits a firm to place a temporary hold of up to 25 business days on disbursements of funds or securities from the account of a specified adult customer. In addition to seniors, "specified adults" includes other adults who have mental or physical impairments that may render them unable to protect their interests.

Through its examinations of firms and retrospective review of Rule 2165, FINRA discovered that firms often were not able to resolve matters in 25 business days, particularly when a matter was under consideration by a state adult protective services agency or a court. FINRA also observed that Rule 2165 permits holds on disbursements, but not on transactions in securities, when financial exploitation is suspected.

Accordingly, in Regulatory Notice 20-34, FINRA proposed amending Rule 2165 as follows:

- To provide firms more time to resolve matters and for state regulators and law enforcement to conduct thorough investigations, the proposed amended rule would permit a temporary hold for an additional 30 days if the firm has reported the matter to a state agency or a court of competent jurisdiction.
- To address concern over allowing securities transactions, the proposed amended rule would permit firms to place temporary holds on transactions in securities, which is consistent with several state laws that permit temporary holds on transactions.

FINRA considered other possible amendments to Rule 2165 without proposing changes to the rule. For example, it did not propose to extend Rule 2165 to situations where a firm has a reasonable belief that the customer has cognitive decline or diminished capacity but there is no evidence of financial exploitation. Instead, FINRA set forth in Regulatory Notice 20-34 information it learned from firms, including red flags of diminished capacity or cognitive decline.

The comment period ended on December 4, 2020.

Sanction Guidelines

In related changes resulting from FINRA's retrospective review, FINRA's National Adjudicatory Council (NAC) amended the section of FINRA's Sanction Guidelines dealing with Principal Considerations in Determining Sanctions to be consistent with FINRA Rule 2165. Specifically, the NAC:

- Expanded Principal Consideration No. 19 to include whether the customer had a mental or physical impairment that rendered him or her unable to protect his or her own interests, and
- Added new Principal Consideration No. 20 to consider whether the customer was age 65 or older.

Great-West Wins 36(b) Fee Case

BY GARY COHEN

Great-West Life & Annuity Insurance Co. and Great-West Capital Management, LLC (together, "Great-West") have won a judgment that they did not violate their fiduciary duty by receiving excessive investment advisory and administrative fees from Great-West-sponsored funds.

The U.S. District Court in Colorado concluded, after a trial, that fund shareholder plaintiffs failed to prove, under Section 36(b) of the Investment Company Act, that:

- the fees were so disproportionately large that they bore no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining; and
- any actual damages resulted from the alleged breach of fiduciary duty.

The court discussed in detail and dismissed the plaintiffs' assertions of damages as follows:

- The plaintiffs asserted that the amount by which the investment advisory fees of some funds exceeded the average fee of the top 10 "large market" competitors. The court concluded that "a fee that is above the industry average does not violate Section 36(b)" for that reason alone.
- The plaintiffs asserted that certain entire fees were an "overcharge." The court concluded that "total disgorgement of a fee is inappropriate absent evidence the adviser performed no services."
- In challenging the fees paid by certain "funds of funds," the plaintiffs asserted that Great-West earned sufficient profit on the underlying funds. The court concluded that precedent "does not allow a court to assess the fairness or reasonableness of advisers' fees; the goal is to identify the outer bounds of arm's length bargaining and not engage in rate regulation."
- The plaintiffs asserted that they were entitled to recover "lost gains" from investment returns that funds would have earned on amounts they paid out as allegedly excessive fees. The court concluded that "recovery is limited to the 'payment of any excess fee to the company' and legislative history prevents recovery of 'special damages that the excess payments may have caused.'"
- The plaintiffs asserted disgorgement of entire fees on some funds, and then compounding those damages with supposed lost investment returns thereon, resulting in damages that would exceed the amount of the fee paid on those funds. The court concluded that "such an approach violates the prohibition that any recovery under § 36(b) 'shall in no event exceed the amount of compensation or payments received from such investment company.'"

The opinion, dated August 7, 2020, was in a consolidated shareholder derivative action titled *Obeslo v. Great-West Capital Management, LLC*.

NAIC Groups Adopt 2021 Charges

BY ANN BLACK AND STEPHEN CHOI

As the year of COVID-19 closes, NAIC groups are adopting their charges for 2021. Especially notable are the following:

Life Actuarial Task Force (LATF)

LATF's Indexed Universal Life Illustration Subgroup will:

- monitor the results and practices of IUL illustrations following implementation of Actuarial Guideline 49-A; and
- review the current regulatory framework and recommend changes to Life Insurance Illustrations Model Regulation (#582) to LATF, as needed.

Producer Licensing (D) Task Force

This group will finalize its white paper on the role of chatbots and artificial intelligence (AI) in the distribution of insurance and the regulatory supervision of these technologies in time for the NAIC's 2021 Spring National Meeting.

Innovation and Technology (EX) Task Force (Innovation TF)

The Innovation TF combined its Artificial Intelligence (EX) Working Group and Big Data (EX) Working Group to form the Big Data and Artificial Intelligence (EX) Working Group. The two groups were closely related, and their combination seeks to foster coordination. The Big Data and Artificial Intelligence (EX) Working Group will:

- research the insurance industry's use of big data and AI, evaluate the existing regulatory framework, and recommend model governance for the use of big data and AI;
- review current audit and certification programs and/or frameworks that could be used to oversee insurers' use of consumer and non-insurance data and models using intelligent algorithms, including AI, and recommend regulatory developments as necessary; and
- assess the data and tools needed by state insurance regulators to monitor the use of big data and AI in the industry and propose incorporation of those tools into the current regulatory framework.

Market Conduct Examination Guidelines (D) Working Group

This group will work with the Innovation TF to develop market conduct examiner guidance for the oversight of regulated entities' use of insurance and non-insurance consumer data and models using algorithms and AI.

Life Insurance and Annuities (A) Committee (A Committee)

The A Committee opted to look to 2021 for a fresh start. Its 2020 charges will continue and will allow this group to revisit its charges after a permanent A Committee chair is appointed.

New Year, New Duties in the Sale of Annuities

BY ANN BLACK AND JAMIE BIGAYER*

It looks as if 2021 will be a busy year as states move to implement the NAIC 2020 revisions to the Suitability in Annuity Transactions Model Regulation (Model 275), or other duty of care measures. The below chart outlines the actual or proposed state activity, its status, and notable items insurers need to consider. As 2021 continues, more states are expected to revise their standard of conduct requirements.

State	Actual or Proposed Effective Date	Status	Notable Items
Alabama	January 1, 2021	Introduced regulatory proposal	Does not use the term "best interest"
Arizona	January 1, 2021	Adopted	
Arkansas	On date of commissioner's signature	Introduced regulatory proposal	
Delaware	August 1, 2021	Introduced regulatory proposal	
Iowa	January 1, 2021	Adopted	
Kentucky	July 1, 2021	Introduced regulatory proposal	Includes consultants Does not exclude general communications to the public, general information and tools, or other product and sales material from the definition of "recommendation" Eliminates subjective standards such as "reasonable basis" and "reasonably appropriate" Requires insurer to maintain records of the information collected from the consumer
Maine	Not known	Introduced regulatory proposal	Requires consumer signature on each page of disclosure document
Michigan	Six months after enacted into law	Bill in process	
Nevada	Not known	Introduced regulatory proposal in 2018, but refreshed proposal in 2020	Different structure than NAIC Model Includes prudence Slightly different consumer information to be obtained, including whether potential surrender charges, tax implications, and penalties could be incurred in connection with the funds used to purchase the annuity Requires training on financial exploitation of seniors and other vulnerable adults Requires establishment of supervision system by producers Safe Harbor limited to compliance with FINRA
Ohio	Six months after enacted into law	Introduced regulatory proposal	
Rhode Island	April 1, 2021	Adopted	

With assistance from Jordan Luczaj, a student at the University of Miami School of Law.

A New Dawning for Electronic Insurance and Investment Product Transactions and Document Delivery?

BY ANN BLACK AND STEPHEN CHOI

In 2020, the financial services industry and regulators adjusted to new norms of social distancing, electronic document delivery, and electronic transactions. Regulators are recognizing the gap between advancements in technology and customer acceptance on the one hand, and a decades-old regulatory structure on the other. Below are some of the notable shifts under consideration at the federal and state levels.

E-SIGN Modernization Act

In July, three Republican senators introduced a bill to modernize the Electronic Signatures in Global and National Commerce Act (E-SIGN), which became law in 2000. E-SIGN provides a framework for using electronic documents and signatures in transactions involving interstate and foreign commerce.

The new Senate bill seeks to eliminate a provision in E-SIGN that requires consumers to demonstrate their ability to access electronic documents before receiving certain documents electronically. The senators noted in a press release that the provision is an outdated barrier to electronic delivery.

Electronic Delivery Under the Federal Securities Laws

In recent months, various industry groups have submitted letters urging the SEC to make electronic delivery the default method for communicating with investors. A letter submitted by the American Council of Life Insurers (ACLI) noted that the outdated patchwork of SEC requirements and guidance governing electronic delivery is confusing for consumers and burdensome to firms. The ACLI urged promulgation of “a comprehensive framework where e-delivery, not paper, is the default.”

Some key SEC officials’ recent remarks indicate that modernization of securities laws governing electronic transactions is not on just the industry’s wish list. For example, Dalia Blass, the director of Division of Investment Management, noted in July that “the Commission’s most recent comprehensive guidance on e-delivery is now 20 years old” and that “it is time to reconsider [the SEC’s] approach to shareholder and client communication.” Similarly, during an SEC open meeting in November, Chairman Jay Clayton stated that the challenges posed by COVID-19 demonstrated that the SEC regulations “should not cling to the mails and paper as the default or preferred paradigm for communications.”

Electronic Insurance Transactions and Delivery

Electronic transactions and electronic delivery in the context of insurance are governed by each state’s laws. While many states have adopted the Uniform Electronic Transactions Act (UETA), which permits the use of electronic means to satisfy various records and signature requirements, there are variations among the states. Moreover, separate state insurance laws governing electronic transactions may supersede a state’s adoption of UETA. For example, state insurance laws may differ as to:

- disclosures required when obtaining an insurance purchaser’s consent to engage in an electronic transaction or to receive documents and other records electronically;
- required methods of obtaining such consents;
- demonstrating delivery or receipt of documents or other records, with some states requiring that the insurer demonstrate actual receipt.

On September 28, the NAIC Innovation and Technology Task Force (Innovation TF) requested industry comments on regulatory relief or accommodations relating to COVID-19, including whether there are any laws or regulations that limit the use of newer technologies. In a similar effort, the New York Department of Financial Services launched its “FastForward” program, soliciting comments and

questions about regulatory obstacles in implementing innovations aimed at facilitating recovery from the pandemic's impact.

In response to the Innovation TF request, various interested parties submitted comments urging state insurance regulators to further accommodate electronic transactions in the marketplace. Notably, the ACLI suggested adoption of a state insurance department bulletin to clarify that any "written/tangible form" and "in-person" requirements in state insurance laws may be satisfied by electronic means. Recognizing the need for modernization and the regulatory obstacles, on December 4, the Innovation TF decided to draft a model bulletin that addresses such obstacles and asked its members to provide suggestions for the bulletin.

NAIC Rings in a New Year for Addressing Racial Inequities

BY ANN BLACK

In 2020, the NAIC formed the Special (EX) Committee on Race and Insurance to consider what measures insurance regulators and the industry can take to increase diversity and inclusion within the insurance industry and to address practices that potentially disadvantage people of color and/or historically underrepresented groups. The Committee divided its work into five "workstreams."

Notably, Workstream Four is examining and determining which practices or barriers exist that potentially disadvantage people of color and/or historically underrepresented groups in the life insurance and annuities lines of business. On December 10, Workstream Four members discussed that the group would be addressing these issues and heard from interested parties.

Workstream Four currently intends to address the following three issues:

- Access to life insurance products, focusing on education and distribution/marketing.
- Disparities in underwriting/rating, focusing on what the disparities are and what factors cause the disparities.
- Disparities in cancellations/rescissions, focusing on what the disparities are and what factors cause the disparities.

During the meeting, Christopher L. Gandy, speaking for the National Association of Insurance and Financial Advisors and Skip Edmonds, Chief Compliance Officer, Life Insurance and Marketing and Research Association (LIMRA), spoke about:

- The wealth gap that is in part due to lack of access to financial advice and products because of the absence of diverse individuals in leadership or mentorship roles.
- Those who are underserved by the life insurance industry often lack financial education, are not having the needed conversations at the right time, and lack someone who can speak in a manner to help them. These issues may also lead to higher lapse rates for the underserved markets.
- The health and work disparity of diverse and underserved individuals and how the life insurance industry takes this into account in life underwriting.

Paul S. Graham of the American Council of Life Insurers discussed ACLI member companies' initiatives. This included increasing underserved communities' access to life insurance using accelerated underwriting. He also explained the members' commitment to address "proxy" discrimination.

Birny Birnbaum of the Center for Economic Justice believes that education will not overcome systemic historical racism and inherent biases in insurance. Rather, Birnbaum believes it is necessary to require insurers to test for, and minimize, disparate impact. He also warned that underwriting algorithms are based on data that reflects inherent biases.

NAIC Task Force Gives Insurers a Holiday Rebating Gift

BY ANN BLACK AND JAMIE BIGAYER*

Just in time for the holidays, the Innovation and Technology Task Force (Innovation TF) and the NAIC Executive (EX) Committee adopted revisions to Section 4(H) of the NAIC Unfair Trade Practices Act (Model 880). The long-awaited revisions to the rebating section of Model 880 come on the heels of lengthy discussions between regulators on how to protect consumers while fostering innovation in the insurance industry by allowing insurers and producers to provide consumers with value-added products and services that are not specified in the policy. In an effort to rein in the wide-spread variations among states' rebating restrictions, the Innovation TF decided to amend Model 880 instead of just providing guidance.Insurers or producers whose wish list includes offering value-added products or services should note the following six compliance implications of the revisions to Section 4(H):

1. Permissible Benefits for Value-Added Products or Services

Insurers or producers who intend to gift a value-added product or service to a consumer must ensure the product or service (a) relates to the insurance coverage and (b) is primarily designed to satisfy one or more of the following goals:

- Provide loss mitigation or control, post-loss services, or education about liability risks or about risk of loss to persons or property;
- Reduce claim costs or claim settlement costs;
- Monitor or assess risk, identify sources of risk, or develop strategies for eliminating or reducing risk;
- Enhance health;
- Enhance financial wellness through items such as education or financial planning services;
- Incent behavioral changes to improve the health or reduce the risk of death or disability of a policy owner or insured; or
- Assist in the administration of employee or retiree benefit insurance coverage.

Commissioner Elizabeth Kelleher Dwyer explained that "primarily designed" means that the insurer or producer has a good-faith belief that the value-added product or service is related to the insurance and satisfies one of the enumerated goals, and the insurer or producer should be able to demonstrate its basis for such belief.

2. Availability of Pilot Programs

The Innovation TF gave the insurance industry a present by permitting insurers or producers, on a pilot basis, to provide value-added products or services before having sufficient evidence that they satisfy any of the goals summarized above. However, the following conditions apply:

- The insurer or producer must have a good-faith belief that the product or service relates to the insurance coverage and satisfies one of the above enumerated goals.
- The product or service must be offered for no more than one year and in a manner that is not unfairly discriminatory.
- The insurer must notify the applicable state insurance department about the pilot program and may launch the program after 21 days if the department does not object.

Insurers and producers interested in establishing a pilot program should engage with the applicable state insurance departments as early as possible, as requirements will vary by state.

3. Scope of Offers

If a value-added product or service is not offered to all insureds, it must be offered (a) based on documented objective criteria and (b) in a manner that is not unfairly discriminatory.

The Innovation TF acknowledged that such "objective criteria" may include an analysis of the risk characteristics of a potential client. Additionally, insurers and producers must document and maintain records of any such objective criteria on which they rely.

4. Impermissible Terminology

In response to a comment from New York, the Innovation TF added a subsection prohibiting insurers and producers from inducing the purchase of another policy by providing insurance. Insurers and producers also may not "use the words 'free,' 'no-cost' or words of similar import, in an advertisement."

5. Limits on the Value of the Value-Added Products or Services

Under the revised Section 4(H), "the cost to the insurer or producer offering the product or service must be reasonable in comparison to the client's premium or insurance coverage for the policy class." Insurers and producers should look to the applicable state for its interpretation of the reasonable limit.

6. Use of Third-Party Vendors

The Innovation TF made clear that insurers and producers offering value-added products and services through a third party are ultimately responsible for the actions of the third party. Insurers and producers, therefore, should establish policies and procedures to monitor the activities of any such third parties. Additionally, the customer must be provided contact information for assistance resolving issues with a third party's product or service.

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

DOL to Plan Sponsors: “It’s All About the Benjamins!”

BY LOWELL WALTERS

Dear Department of Labor: The fiduciary role of selecting 401(k) and 403(b) plan investment options based on diversification and projected risk and return is too easy. Can we sacrifice some returns in order to promote social responsibility?

After answering this question consistently in several prior bulletins, the DOL updated Regulation § 2550.404a-1 on October 30, 2020, to restate and reinforce its position, which remains, in essence:

Dear Plan Fiduciary: You can be socially conscientious with your own money, but base the selection of your plan’s designated investment alternatives on economic grounds.

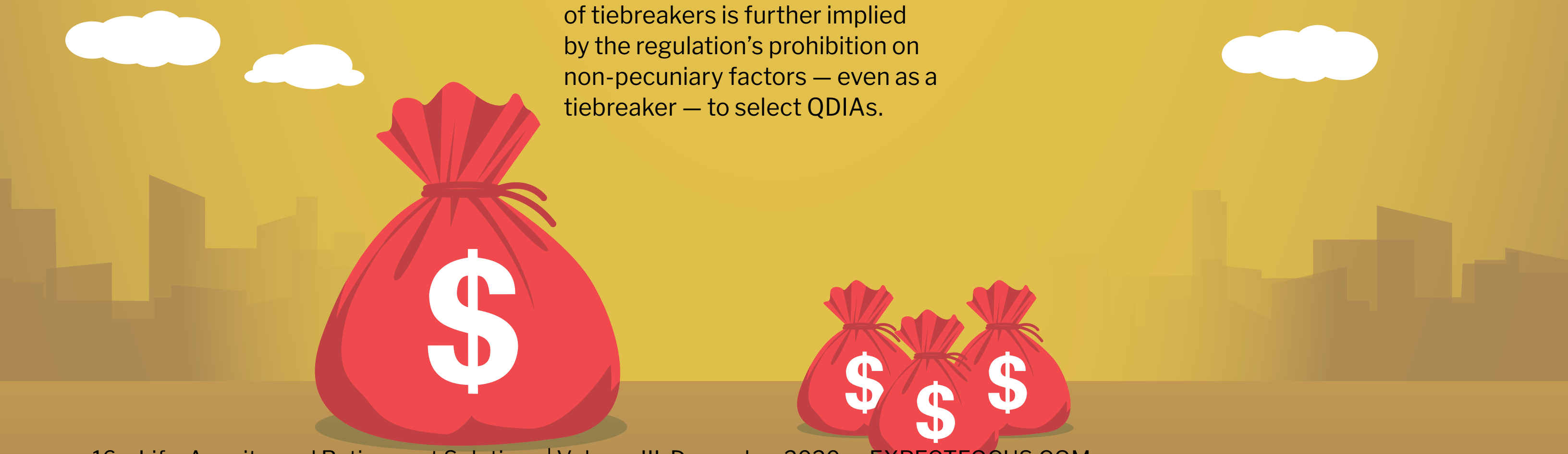
While that paraphrase is more economical than the DOL’s approximately 140-page explanation, it does not fully convey the DOL’s thinking. The DOL expressed concern with investments promoting themselves on non-economic grounds through terminology that is not clearly defined, monitored, or fact-checked. These terms include “socially responsible,” “socially conscientious,” and “environmental, social, and (corporate) governance” (ESG). The agency sidestepped the struggle to define these terms by updating the regulation to classify all investment considerations as “pecuniary” or “non-pecuniary,” and making it clear that pecuniary issues are primary. This may relieve fiduciaries from pressure to balance economic performance with ESG factors. Furthermore, this classification system implies that ESG factors do not deserve greater consideration than other non-pecuniary considerations that arise. In acknowledging occasions when the social conscience of a fund is expected to positively affect returns, the DOL noted that this would make that factor a “pecuniary” consideration that should not involve any sacrifice through lower returns or higher fees.

The regulation is stricter with investments used for participants who fail to make investment elections (i.e., QDIAs). Not only is reliance on non-pecuniary factors prohibited; but, moreover, fiduciaries are expected to confirm that the underlying fund managers are pursuing pecuniary (and not non-pecuniary) goals.

Without completely abandoning its prior position that ESG characteristics can be “tiebreakers” between otherwise equal funds, the DOL warned that tiebreakers would be subject to scrutiny. Ties decided by non-pecuniary considerations must be documented with findings that (i) investments are indistinguishable on a pecuniary basis and (ii) the “non-pecuniary factor or factors are consistent with the interests of participants and beneficiaries in their retirement income or financial benefits under the plan.” Skepticism of tiebreakers is further implied by the regulation’s prohibition on non-pecuniary factors — even as a tiebreaker — to select QDIAs.

Although this documentation requirement focuses on the selection of designated investment alternatives, documenting other, non-investment-related decisions made on a non-pecuniary basis is a logical practice to consider. For example, the fiduciary practice of selecting investment advisers and other plan service providers does not demand the selection of the lowest-cost provider, even though the failure to select the lowest-cost provider could negatively affect retirement account balances. The updated regulation does not change this understanding, but since pecuniary considerations are often easier to understand, it may be wise for fiduciaries to document decisions based on non-pecuniary factors that could affect account balances.

In other words, when selecting investment providers, it is not always “all about the Benjamins,” but fiduciaries basing decisions on non-pecuniary considerations should be prepared to defend those decisions.



California Privacy Rights Act: Compliance Objectives for 2021

BY CHRISTINA GAGNIER AND JOE SWANSON

While California has been characterized by some of the nation's most long-standing and aggressive privacy laws, businesses operating in the state have faced uncertainty over the last three years as to what a final omnibus privacy regulation would look like. While the California Consumer Privacy Act (CCPA) passed in 2018, several modifications from the California state legislature, a lengthy rulemaking process undertaken by the Office of the Attorney General, and a looming proposition – Proposition 24, the California Privacy Rights Act (CPRA) – created an environment of reticence on the part of businesses to go "all in" on compliance.

Now, the CPRA has passed, and its heightened requirements, in conjunction with the CCPA, set forth a trajectory of steps that must be taken as businesses contemplate compliance for 2021. While the effective date of CPRA's requirements is January 1, 2023, the groundwork for compliance should begin in 2021.

A Few Compliance Objectives for 2021

Invest in data mapping now

Cursory data mapping will no longer be sufficient. The CPRA requires cybersecurity audits and risk assessments, which are the necessary predicate to compliance with the law's other requirements, such as updates to privacy notices. Notices will need to include:

- Whether the business sells or discloses the specific categories of personal information it collects;
- What "sensitive personal information" the business collects, processes, and discloses; and
- How long the business intends to retain each specific category of personal information and the criteria that the business will use to determine the retention period.

Check human and technical ability to honor consumer rights requests

If a business' approach to complying with the CCPA was to make only a cosmetic policy update to its public-facing website, that will not pass muster with the CPRA. In addition to the existing rights given to consumers under the CCPA, the CPRA has added a new right and expanded others, as described below. In practice, this means that a business must have the workflows, scripts, procedures, and requisite employee training in place to accept and honor a verifiable consumer request, plus the technical means to effectuate the request should it be necessary.

- **Right to correct**: Consumers will now have the right to make requests to have a business correct inaccurate personal information.
- **Right to delete**: Contractors, service providers, and other third parties must cooperate with a business to delete information related to a consumer request. In addition to the business' internal processes and procedures, they will need to verify these third parties' ability to honor consumer requests from a customer support and technical perspective. Contracts with third parties will need to be revised and updated.

Review and revise your existing agreements

Existing agreements should be reviewed and revised in light of the totality of the CPRA's requirements. Given the CPRA's additional responsibility for third parties to effectuate consumer requests, and the explicit requirement under the CPRA to amend agreements to reflect its requirements, this is a necessary compliance measure.

Prioritize security. Under the CCPA, "reasonable security" could have solely been tied to the act's private right of action, but under the CPRA, businesses must identify and implement practices and procedures tied directly to the risk posed by collecting a specific category of personal information. This process includes conducting security audits of businesses.

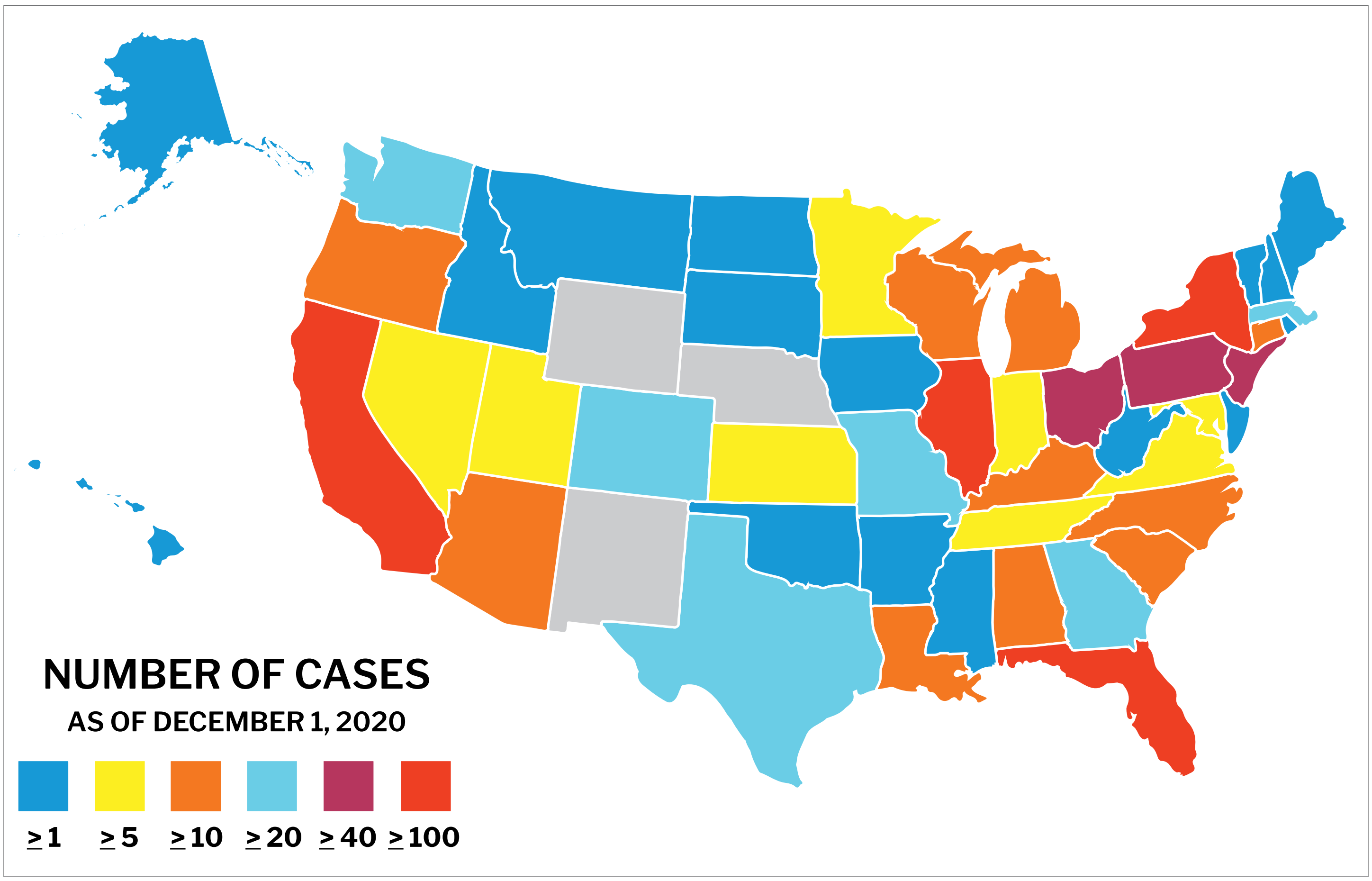
With the dedication of a new, specific enforcement agency, the California Privacy Protection Agency, the CPRA has teeth and resources behind its enforcement. Playing a "wait and see" game for rulemaking will leave businesses too short a time period to ensure full compliance, and risk an audit of their compliance practices.

COVID-19 Class Actions Update

BY JULIANNA MCCABE

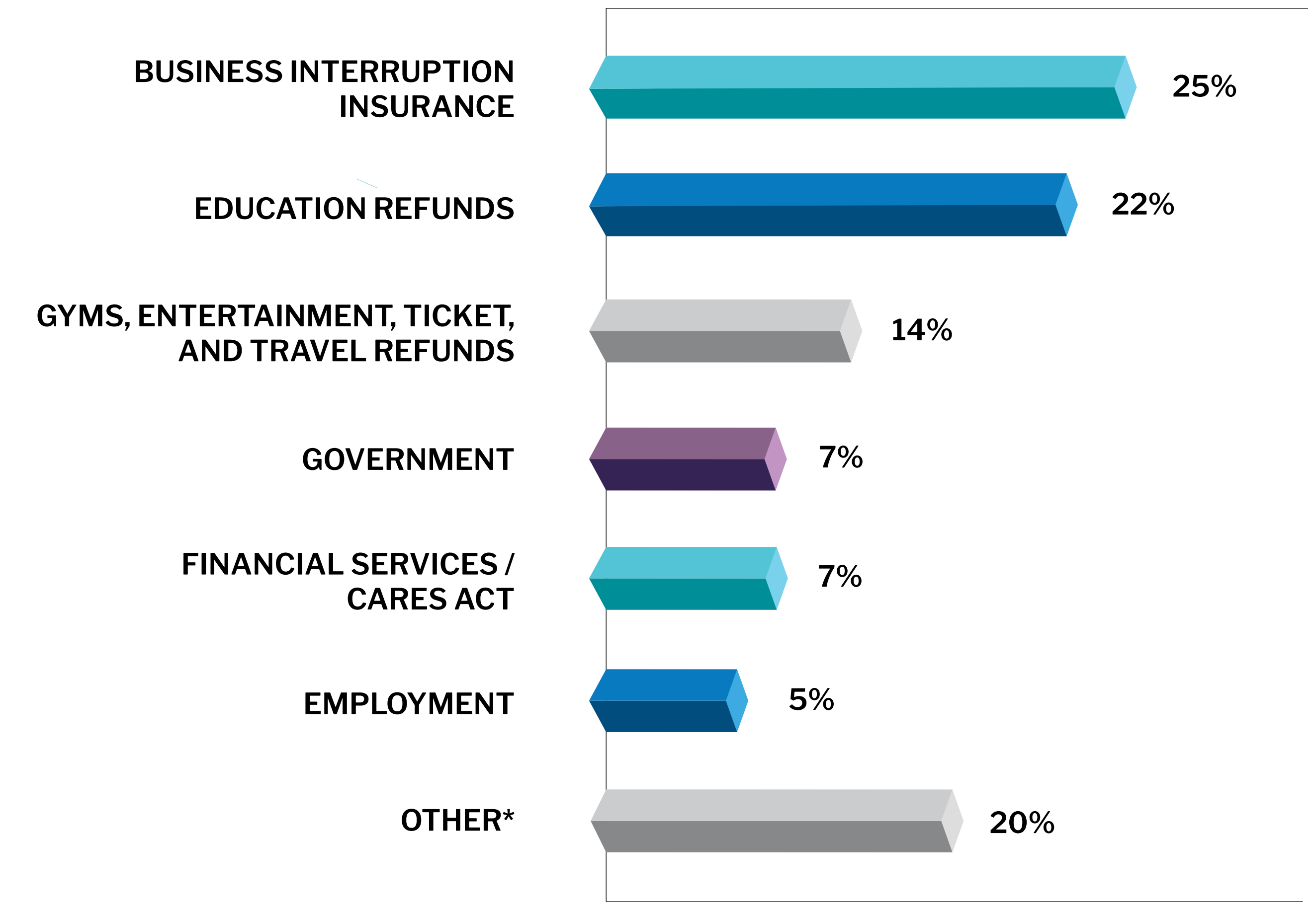
In the early days of the COVID-19 pandemic, dozens of class action lawsuits were filed across a variety of industries in the United States – with theories of liability ranging from hand sanitizer false-labeling allegations, cruise-line negligence claims, and airline ticket refund demands, to complaints about prisoner safety and alleged government takings. By mid-April 2020, we reported 72 such class actions had been filed nationwide. Eight months have since passed, and like the staggering rate of infection caused by the novel coronavirus, the early wave of related litigation has skyrocketed to upwards of 1,400 COVID-19 class actions. Cases span the country but are concentrated on the coasts and in big cities, as indicated below:

COVID-19 Class Actions By State



The primary targets of this widespread litigation included property insurers who issued business interruption coverage to businesses impacted by coronavirus lockdowns; colleges and universities whose students are seeking refunds of tuition and fees related to campus closures; travel and entertainment industries (including the travel insurance industry), whose customers want refunds; and others as indicated on page 19.

COVID-19 Class Actions By Category



*Includes, among others, cruise line negligence, product labeling, and securities/stock drop actions

To date, life insurers have not seen a significant influx of this litigation. Risks may emerge in the future, however, given the national scope and wide-ranging theories asserted thus far and an anticipated evolution of the litigation as it matures. Labor and employment collective actions present one area of risk, with employees in many locations working exclusively from home, others returning to offices as the pandemic lingers, and still others engaged in hybrid working environments. Overtime practices, reductions in force, and the like may present enhanced risk as a result of COVID-19. Insurers should also be vigilant about consumer data security, policy lapses and related notices, and underwriting practices for new business.

Best practices must be updated as necessary across business units and departments to account for the extremely active COVID-19 class action environment. With vaccines on the horizon, the end of the pandemic may be within sight, but the end of related litigation is much further in the future.

Carlton Fields Class Action Survey

The ninth annual *Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* tracks trends identified by in-house counsel and best practices in class action management and cost reduction. The survey draws on interviews of general and senior in-house counsel at more than 400 companies with median annual revenues of $6.7 billion across a wide range of industries. The data collected presents a snapshot of the ways in which leading corporate legal departments identify, measure, and manage class action risk.

Eleventh Circuit Decisions May Chill Future Data Breach Class Actions

BY JOE SWANSON AND TRISH CARREIRO

The holidays came early for class action defendants in the Eleventh Circuit. Within just over a month, that court issued two decisions with potentially large consequences for data breach litigation in the Eleventh Circuit: *Johnson v. NPAS Solutions, LLC* and *Muransky v. Godiva Chocolatier, Inc.*

With *Johnson*, the Eleventh Circuit effectively forbade service awards to named plaintiffs in class action lawsuits, finding such payments contrary to two separate Supreme Court decisions. These service awards, typically between $1,000 and $7,500 per named plaintiff, were an incentive for named plaintiffs to bring suit on behalf of a class, and without them, plaintiffs' firms may have more trouble finding willing class representatives.

In *Muransky*, the Eleventh Circuit weighed heavily in opposition to finding standing in class actions based solely on the occurrence of a data breach. Although the decision was made in a Fair and Accurate Credit Transactions Act case, its language and reasoning extends deeply into the concept of Article III standing in data breach class actions. As explained in *Muransky*, allegations of a mere "elevated risk of identity theft" is insufficient for standing purposes. Plaintiffs hoping to survive motions to dismiss must show actual identity theft or other concrete harm, and cannot simply rely on the occurrence of a breach and prophylactic measures to establish their ability to sue in federal court.

Together, the decisions serve as a one-two punch to data breach plaintiffs in the Eleventh Circuit. These decisions, a likely reflection of an increasingly skeptical court when it comes to data breach cases, could be only the beginning. We will continue to monitor this activity and evaluate what it means for future data breach class actions.

New Jersey Enacts Anti-STOLI Law

BY ELISE HAVERMAN

We have previously reported on New Jersey's effort to enact legislation prohibiting stranger-originated life insurance (STOLI) and the New Jersey case law leading up to that legislation. See June 2019, December 2019, and April 2020 editions of *Expect Focus – Life, Annuity, and Retirement Solutions.* On October 19, 2020, New Jersey's governor signed the legislation into law. This law reflects an intent to codify the New Jersey Supreme Court ruling in *Sun Life Assurance Company v. Wells Fargo Bank, N.A.* There, the court concluded that a life insurance policy taken out with an investor trust as the policyholder violated New Jersey's statutory insurable interest requirement. The court concluded that STOLI policies were against public policy and void ab initio in New Jersey.

STOLI practices, under this new law, include "cases in which (a) a policy is purchased with resources or guarantees from or through a person or entity who, at the time of policy inception, could not lawfully initiate or procure the policy himself, herself, or itself; and (b) at the time of policy inception, there exists an arrangement or agreement, to transfer, directly or indirectly, the ownership of that policy or the policy benefits to a third party."

This law (i) prohibits anyone from engaging in any "act, practice or arrangement that constitutes" STOLI; (ii) renders "void and unenforceable" any "contract, agreement, arrangement, or transaction" including a "financing agreement" in "furtherance" or "aid" of STOLI; and (iii) provides that a "trust that is created to give the appearance of an insurable interest and that is used to initiate or procure policies for investors shall be in violation of the insurable interest laws of this State and the prohibition against wagering on life."

The law provides a private right of action against persons who engage in acts in violation of the law. Additionally, an insurer can contest the validity of STOLI policies. A civil penalty of up to $10,000 per violation may be imposed, and the law authorizes the Commissioner of Banking and Insurance to enforce the anti-STOLI provisions, such as seeking injunctive relief to restrain violations, issuing cease and desist orders, and ordering restitution to aggrieved persons.

A New Era for Insurtech in Latin America

BY TOM MORANTE AND YANI CONTRERAS

Lured by the prospect of exploring attractive markets, Latin American insurtech companies are leveraging new digital tools to optimize and modernize many aspects of insurance. These include new distribution channels and systems to facilitate insurance product comparison-shopping and new means of underwriting and claims management.

In years past, the absence of a regulatory framework specific to insurtech may have impeded its expansion, as insurtech companies represent only about 6% of all startup fintech companies in Latin America. Increasingly, however, insurance regulators in the region are recognizing and exploring ways to realize insurtech's enormous potential. To facilitate insurance sector modernization, regulators are exploring, among other things, adoption of fintech regulatory "sandboxes" to enable new digital technologies while preserving consumer protection.

- **Brazil**, the leading insurtech market in Latin America, recently offered a regulatory sandbox to a limited number of insurance companies under the supervision of the Brazil Insurance Superintendent (SUSEP). The sandbox is designed to facilitate testing of new products and services and to encourage development of creative ways to provide traditional insurance services. Also, SUSEP's Circular No. 592, dated August 26, 2019, authorized certain types of "on demand" insurance policies sold through digital means with flexible terms. These regulatory developments reflect SUSEP's desire to adapt to the increasing use of smartphones by consumers, ushering in the digital insurance era, and hopefully leading to more affordable insurance products.
- **Mexico's** Financial Technology Companies law (Fintech Law), adopted on March 9, 2018, while not specific to insurtech, signals that legislators likely will be flexible in crafting future regulations to address insurtech in a similar way. Until then, insurtech companies are relying on the Mexican Law of Insurance Companies and Bonds, which specifically permits insurance operations and brokerage activities to be provided via electronic means.
- **Peru** has not adopted a law specific to insurtech companies, but the Banking and Insurance Superintendent (SBS) has promulgated Insurance Products Marketing Regulations that allow insurance companies to promote, offer, and sell products by phone, internet, or other distance systems, including digital marketing through social media. The SBS Supervision and Control of Insurance Intermediaries Regulations also allow insurance brokers to use phone and internet applications to market insurance products, subject to certain conditions.
- **Colombia** already has the highest financial technology adoption rate in Latin America, with 76 percent of the population using fintech services. This year, Colombia adopted a decree establishing a regulatory sandbox – the Control Trial Environment (CTE) – for use by companies dedicated to implementing financial and insurance technology innovation. The decree permits interested participants to request an expedited temporary license from the Finance Superintendent to test products subject to lighter requirements for up to two years.

Other countries in Latin America with increasing insurance penetration — such as Argentina, Ecuador, Panama, Costa Rica, and Chile — have been slower to adopt or enact specific provisions promoting insurtech. Companies in these countries, however, have not been deterred and are venturing into a wide variety of innovative insurtech initiatives. It certainly looks like additional enabling legislative or regulatory action in those countries will not be far behind.

Arbitration Provision Survives Agent Termination

A Canon of Construction for Workplace Agreements?

BY QUINCY BIRD

Has the judicial preference for presuming the survivability of arbitration clauses governing workplace disputes reached canonical status? According to the U.S. District Court for the Eastern District of Arkansas, the answer may be yes.

In *Patterson v. American Income Life Ins. Co.,* a former insurance agent for American Income Life Insurance Company (AILIC) sued AILIC and the individual owner/operator of her AILIC branch for minimum wage violations under both the Fair Labor Standards Act and Arkansas state law. The plaintiff was party to an agent contract that included a broad arbitration clause requiring the individual arbitration of "all disputes ... of any kind or nature arising out of or relating to [the agent contract]." The defendants moved to compel individual arbitration of wage and hour claims based on this language.

The plaintiff's sole argument opposing the defendants' motion was that the arbitration clause did not survive the undisputed termination of the agent contract. This argument was based on the "espressio unius" canon of construction, which provides that the express designation of one thing may be construed to the mean the exclusion of another. The plaintiff noted four different clauses in the agent contract that expressly referenced survivability, whereas the arbitration clause was silent.

However, the court found this argument "insufficient to overcome the presumption in favor of post-expiration arbitration of disputes 'unless negated expressly or by clear implication,'" in the agreement (quoting the U.S. Supreme Court in *Litton Fin Printing Div. v. N.L.R.B.).* And while the court might have been persuaded if *every* contractual provision except for the arbitration clause had included survival language, the plaintiff's four examples could not overcome the "strong presumption in favor of arbitration."

So, having overcome the expressio unius canon, the presumption of survivability for arbitration clauses may itself be approaching canonical status.

Revived Prospects for Patenting Financial Product Inventions

BY ELEANOR YOST AND GAIL PODOLSKY

Since the Supreme Court's 2014 decision in *Alice Corp. v. CLS Bank Int'l*, trying to patent a business method — such as a method for calculating premiums or underwriting for insurance policies — has generally been a fool's errand. But, as we have written previously, insurance and other financial companies are starting to see significantly more success patenting features that support processes, rather than patenting the processes themselves. See "Changes in Patent Landscape for Insurance and Financial Industries," *Expect Focus – Life, Annuity, and Retirement Solutions* (July 2019).

Reynolds Porter Chamberlain reports that the number of insurtech patents filed worldwide has increased significantly in recent years, on innovations as diverse as a behavior analytics system to evaluate risk based upon social media posts to a mobile app to speed up the claims process for people affected by natural disasters. Other granted patents include improvements in telematics systems, Internet of Things devices to monitor homes, and artificial intelligence-based applications. Several patent applications have also been filed in connection with smart contracting platforms and cybersecurity and encryption inventions.

So how can one determine whether an insurance or other financial product feature is patentable? One key is whether the feature can be achieved using a pencil and paper. Automating what used to be a manual process is less likely to be patentable. But creating a technological solution to a problem that could not otherwise be done manually should be considered for patent protection.

For example, one recently granted patent is directed to a "highly intuitive" user interface that dynamically adjusts a proposed retirement plan depending upon a user's real-time input of financial goals. Although tracking changes in a spreadsheet has been held in the past to be "mere automation" of a manual process and therefore not patentable, these particular claims were directed to a specific method of interacting with a user-friendly interface and therefore were found patentable. The difference is that the solution helped a user navigate through a complex system that was dynamically updating in real time and could not be done manually.

So, in the coming decade, look beyond new products to the processes that enable users to interact with them. A patentable invention just might be waiting.

Not If, But When: Applying the ADA's Accessibility Requirements to Mobile Apps

BY IRMA SOLARES AND STEVE BLICKENSDERFER

Americans with Disabilities Act (ADA) accessibility suits continue to flood federal court dockets in New York, California, and Florida. Neither Title III of the ADA nor the implementing regulations mention websites. Yet, plaintiffs with disabilities have been increasingly successful in bringing lawsuits against companies under the ADA and comparable state accessibility laws for alleged unequal access to their websites under Title III's "public accommodation" clause. As courts have increasingly allowed these cases to proceed, many companies have come to accept that their websites must be accessible and have engaged with vendors to come into compliance. But the risk of exposure to suit under the ADA does not end at websites. What about other digital offerings, such as a company's mobile apps?

In the financial services arena, consumers rely on mobile apps more and more each day to check their retirement and investment accounts, access insurance account information, view the status of claims, find insurance providers, and track health and wellness information. As more and more businesses are learning, the rationale for applying the ADA to websites applies equally to mobile apps. The following arguments related to website accessibility, accepted by many courts, make this possible.

Title III applies to both tangible and intangible barriers to accessing a place of public accommodation. Discrimination occurs when a person is denied the opportunity to participate in programs or services of a place of public accommodation, or is provided separate, but unequal, goods or services. "Public accommodation" is defined as a privately operated facility or location whose operations affect commerce and fall within at least one of 12 specified categories, including the sale of goods and services generally. A business is said to discriminate against an individual if it provides unequal access to its goods and services through its digital offerings, including websites. This is either because the offering itself is a place of public accommodation, or because the website has some connection to a physical place of public accommodation where goods or services are traditionally offered and the discrimination impedes or denies access to it.

Applying this logic, an increasing number of courts are holding that the ADA applies to mobile applications too. Some courts hold that the ADA applies to mobile apps upon a showing that goods and services can be accessed by the public and affect commerce. Others require a nexus between the goods or services sold on the mobile application and a physical place to conclude that the ADA's accessibility standards are triggered. Regardless, just as with websites, courts are concluding with increased frequency that the ADA applies to mobile apps.

Accordingly, businesses should be mindful of the accessibility of all of their digital offerings, including business-to-consumer mobile apps, especially those that connect users to physical places of public accommodation (i.e., provide office or branch locations, or connect to users through location-based data). The same can be said for apps intended for use by a distinct group of users, such as customers. While such apps are designed for a smaller pool of users, and not every member of the public will be able to bring suit against a company for non-compliance, the risk of non-compliance still exists. Business-to-business apps may also be subject to the ADA. While a business is not an "individual" under Title III, the user of the application on behalf of the business could bring a claim as an individual under Title III.

As apps are becoming more ubiquitous and the pandemic forces companies to conduct more business through mobile apps, it has become increasingly important to keep compliance with statutes such as the ADA in mind.

Carlton Fields Ushers in New Human Resource Consulting Company

BY RAE VANN AND ALLISON KAHN

Carlton Fields is pleased to announce the launch of Core Triangle Consulting LLC, a human resources risk management consultancy. Core Triangle's mission is to help organizations of all sizes — from every sector and industry — to minimize workplace risk and develop and advance world-class programs and strategies that attract, retain, and support a talented, diverse, and productive workforce.

Core Triangle offers an array of services that help employers to satisfy their HR compliance obligations, such as annual sexual harassment and other EEO training mandates and recordkeeping and reporting requirements. In addition, Core Triangle is available to consult on developing, implementing, and refining organizational diversity, equity, and inclusion initiatives and other proactive workplace programs. At a more complex level, Core Triangle can monitor settlements of class and collective actions, as well as help government contractors comply with their affirmative action obligations.

Some of Core Triangle's other principal offerings include:

- Conducting workplace misconduct investigations of individual and group discrimination, harassment, and retaliation complaints, as well as those stemming from formal bias charges filed with state and federal regulators and the courts;
- Providing remedial and proactive EEO compliance coaching and training that can be adapted to a variety of delivery formats, such as classroom, web-based, or online/on-demand;
- Developing COVID-19 and other pandemic-related workplace policies, protocols and communications; and
- Helping employers to evaluate and refine their talent acquisition and retention strategies through a variety of means, including via qualitative and quantitative review of data, policies, programs, and practices affecting talent acquisition and management.

Core Triangle's team includes experienced labor and employment attorneys as well as human resources professionals and other specialists and consultants who guide clients to becoming best-in-class employers.

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/coronavirus.

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

NEWS & NOTES

Corporate counsel named Shareholder **Markham Leventhal** a “Client Service All-Star” in BTI Consulting Group’s 2020 *BTI Client Service All-Star* list. All-Stars are identified solely through unprompted client feedback that recognizes them for delivering the absolute best client service.

Carlton Fields was a sponsor of the IRI Supply Chain Summit on September 9, 16, 23, and 30. The summit was a series of virtual sessions presented through the lens of the retirement income space supply chain and focused on how to develop and market products in this new environment.

The firm sponsored the ACLI Annual Conference on October 12-13 and the ACLI Compliance & Legal Sections Annual Meeting on December 8-9. Both events brought together senior executives from life and financial services companies to examine today’s business, compliance, legal, and political issues. Shareholder **Joe Swanson** spoke on the topic of cybersecurity, and Shareholder **Ann Furman** spoke about compliance mistakes, including lessons learned from enforcement actions against CCOs, managing a compliance team in a work-from-home environment, and identifying possible steps to avoid mistakes in the future.

Carlton Fields was pleased to participate in the ALI CLE Conference on Life Insurance Company Products on November 5, 6, and 10. Shareholders **Ann Black** and **Richard Choi** spoke at the conference.

Carlton Fields Shareholder **Richard Choi** participated as a panelist on the IRI’s Variable Annuity & Variable Life (Rule 498A & Rule 30e-3) webinar on December 16. The webinar discussed the new summary prospectus rule (Rule 498A), and highlighted how to comply with its technology requirements.

The firm earned national rankings for several of its practices in the *U.S. News and World Report* and *Best Lawyers®* Best Law Firms 2021 guide, including insurance law, securities/capital markets law, and securities litigation. The firm also received high rankings for a multitude of its practices in several metropolitan areas.

The Leadership Council on Legal Diversity (LCLD) named Carlton Fields a 2020 Top Performer. Carlton Fields is one of only 75 members acknowledged for their continued commitment to building more diverse organizations and a more inclusive legal profession.

Carlton Fields ranks as one of the top law firms in the nation for female attorneys, according to *Law360*’s 2020 Glass Ceiling Report. The rankings are based on the combined percentages of female attorneys and female equity partners at the firm.

Carlton Fields ranked in the top 10 firms in *Vault*’s 2021 Best Law Firms for Diversity report for diversity for racial and ethnic minorities, individuals with disabilities, LGBTQ+ individuals, and women. The firm also ranked in the top 25 “Best Law Firms for Technology and Innovation.”

Carlton Fields is recognized among the most diverse law firms in the country, ranking No. 4 nationally among firms of its size (firms with 251-600 attorneys) in *Law360*’s 2020 Diversity Snapshot list of firms with the highest percentage of minority equity partners. Carlton Fields also ranked in the Top 30 for minority attorneys.

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CARLTON FIELDS serves business clients in key industries across the country and around the globe. Through our core practices, we help our clients grow their businesses and protect their vital interests. The firm serves clients in eight key industries:

- Life, Annuity, and Retirement Solutions
- Banking, Commercial, and Consumer Finance
- Construction
- Health Care
- Property and Casualty Insurance
- Real Estate
- Securities & Investment Companies
- Technology & Telecommunications

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