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LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS

WHAT'S NEW FOR 2022

CARLTON FIELDS

vIII INSIDE

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Big Changes Ahead for Private Funds?

SEC Chair's Transparent Intent

BY TOM LAUERMAN AND KIRSTEN WOLFFORD

SEC Chair Gary Gensler closed out 2021 with remarks at a recent Institutional Limited Partners Association Summit, focusing on a number of issues facing private equity and hedge funds.

He started with examining why these funds are important: size, complexity, and number. Although he did not specifically mention the numerous funds that support privately offered investment options under variable insurance products, those private funds also present most of the issues that Gensler highlighted. He asked: "Are we protecting investors?" "Are we facilitating capital formation?" "Are we maintaining fair, orderly, and efficient markets in the middle?"

In addressing those questions, the remainder of his speech focused on the following key areas:

- **Fees and Expenses**. Gensler hopes to promote added transparency for fees and expenses.
- **Side Letters**. Gensler believes that limited partners negotiating their own deals within a particular private fund create a potential "uneven playing field." He then emphasized that he hopes to "level the playing field and strengthen transparency," potentially reevaluating whether some types of side letter provisions should be permitted.
- **Performance Metrics**. Next, he discussed performance metrics for private funds, noting that private fund performance information can be relatively opaque. Gensler said, however, that he has asked the SEC staff "to consider what we can do to enhance ... transparency" for such performance metrics.
- **Fiduciary Duties and Conflict of Interest**. He then criticized the practice of having investors waive general partners' performance of their fiduciary duties, stating: "Contract provisions purporting to waive the adviser's federal fiduciary duty are inconsistent with the Advisers Act ... regardless of the sophistication of the client."
- **Form PF**. Lastly, Gensler stated that he seeks to "freshen up" Form PF to create transparency to regulators. He described this form as "critical" to protecting investors and providing oversight of private fund advisers, citing the adoption of Form PF as a large source of information into hedge funds and private equity.

In closing, Gensler expressed his hope of getting things "right" with private funds, which could have big benefits across the market. Although he framed much of his talk in terms of promoting "transparency," this did not obscure his apparent hope that this would also prompt major substantive changes that he would like to see in private fund practices.

New Year, New Index-Linked Variable Annuity Actuarial Guideline?

BY ANN BLACK, ROBERT KIM, AND JORDAN LUCZAJ

On November 29, the NAIC Index-Linked Variable Annuity (A) Subgroup (ILVA Subgroup) issued a proposed 2Model 805, Standard Nonforfeiture Law for Individual Deferred Annuities, to annuity products that periodically credit index-based interest to the annuity value. The index-based interest is based on the performance of one or more indexes or a specified portfolio of assets, and the index-based interest may be negative. Comments on the proposed actuarial guideline are due by January 27, 2022.

The ILVA Subgroup was charged with providing "recommendations and changes, as appropriate, to nonforfeiture, or interim value requirements related to index-linked variable annuities." To address this charge, the ILVA Subgroup took a fresh look at ILVAs and developed the proposed actuarial guideline, which:

- Would allow an index-linked variable annuity (ILVA) to be viewed as a variable annuity even though ILVA's values are not based on separate account unit values if certain conditions are satisfied. Thus, the ILVA would not need to comply with Model 805's minimum guaranteed interest and minimum guaranteed value requirements.
- Sets forth interim value requirements for an ILVA seeking to be viewed as a variable annuity.

The proposed actuarial guideline recognized that fitting ILVAs into Model 250 is not "straightforward" because ILVAs' daily values are not based on the value of units of a separate account. Rather, the daily values are based on formulas set forth in the ILVAs' contract. Currently, an ILVA's formula:

- At the end of the index option term, looks to the performance of one or more indexes.
- During the index option term, may take into account the time remaining until the end of the index option term, the change in market value of the assets used by the insurer to hedge its obligations to pay the index-based interest, the change in a hypothetical asset pool that replicates the insurer's hedges, and/or the actual change in the index to date, including the full loss to date. While similar types of formulas are used in many ILVAs, there is variation on how interim values are determined among the ILVAs.

The proposed actuarial guideline may be viewed as striking midnight for some interim value formulas as it proposes to allow an ILVA to be considered a variable annuity only if the ILVA's interim value is based on the market value of (i) actual separate account assets or (ii) a hypothetical portfolio of assets, each of which supports the guarantees of the contract. If the interim value is based on a hypothetical portfolio of assets, the proposed actuarial guideline imposes the following additional requirements:

- An actuary must describe the hypothetical portfolio and any difference in value between the hypothetical portfolio and the index option value at the beginning of the index term.
- The hypothetical portfolio must be "designed to perfectly hedge the benefit guarantees at the end of the term."
- The market value of the hypothetical portfolio must be determinable daily.
- The hypothetical portfolio must include a "fixed-income asset proxy" and a "derivative asset proxy." The "fixed-income asset proxy" must represent "a zero-coupon bond that accrues interest, simple or compound, over the index term and matures for a value equal to the initial index option value." The "derivative asset proxy" must represent "a package of hypothetical derivative assets designed to hedge the risks associated with guaranteeing the index option value."

During the December 8 Life Actuarial Task Force meeting, the chair of the ILVA Subgroup explained the rationale behind the proposed interim requirements. The proposed requirements seek to ensure if an ILVA contract holder is being subject to the risk of loss, then the contract holder should also benefit from gains, in the actual separate account assets or hypothetical portfolio assets, as may apply.

If these requirements are adopted, insurers may need to revise their ILVAs to comport with the actuarial guideline's interim value requirements. In addition, a number of questions arise with respect to the additional hypothetical portfolio requirements including:

- What is meant by "designed to perfectly hedge the benefit guarantees"?

- By specifying the “fixed-income asset proxy” and the “derivative asset proxy,” does the proposed actuarial guideline limit an ILVA’s design or how an insurer elects to hedge its obligations owed under an ILVA?
- Can an insurer elect not to hedge some portion of the amount allocated to index options to account for amounts taken from the index option before the end of the index term?

While it may be too early to pop the cork yet, the responsiveness of the ILVA Subgroup suggests that ILVA issuers may yet be able to celebrate in 2022.

FINRA Atwitter Over Social Media Influencers

BY ANN FURMAN

Social media influencers are individuals, sometimes celebrities, who help businesses gain customers through social media communications. Influencers may communicate, for example, on TikTok, Facebook, Instagram, YouTube, Twitter, Stocktwits, Reddit, Twitch, and many other platforms, about a business or a product to influence the purchase decisions of potential customers.

In the heavily regulated securities industry, using influencers to acquire customers may raise regulatory issues, including receipt of referral fees and privacy.

On September 16, 2021, FINRA issued a targeted examination letter to member firms asking whether firms use influencers to acquire customers, and if they do, how firms compensate influencers and what firms do with customer data.

FINRA’s letter requested documents, including, among others:

- Engagement letters, contracts, and agreements in which the firm contracted with influencers to provide social media communications for compensation.
- Copies of all social media communications influencers posted about the firm, and whether the social media communications were filed with FINRA’s Advertising Regulation Department.
- Written supervisory procedures, compliance policies, and training materials regarding the use of social media influencers.
- A list of all unaffiliated third parties with whom the firm shared nonpublic personal information about a customer’s usage of the firm’s website or mobile application.

As to referral fees, FINRA asked whether the firm or an affiliate offered a referral program through which individuals received bonuses, rewards, incentives, or other compensation for referring new customers to open accounts at the firm. FINRA requested information on compensation, benefits, or bonuses offered through referral programs, including how such amounts are determined, presumably to evaluate whether influencers receive transaction-based securities compensation.

As to consumer privacy, FINRA requested information on firms’ compliance with SEC Regulation S-P concerning the collection of data generated by a website or mobile application about a user and then saved (known as cookies). Specifically, FINRA sought information on cookies obtained from customers, or individuals who provided nonpublic personal information but were not onboarded as customers, the firm’s privacy policies and opt-out notices, and related compliance procedures.

Time will tell whether FINRA’s targeted examination findings will lead to enforcement action and/or guidance concerning influencers in the securities industry.

SEC Tolling Agreements Upheld

Second Circuit Lifts Tollgate

BY NATALIE NAPIERALA AND KATELYN SANDOVAL

This article supplements our April 2021 *Expect Focus* article, "A Future Without SEC Tolling Agreements? Some Say 'Not So Fast.'" In that article, we addressed a case of first impression, *SEC v. Fowler*, which was pending in the Second Circuit Court of Appeals. Fowler argued that, under federal jurisprudence, 28 U.S.C. § 2462 imposes a five-year statute of limitations on a court's ability to hear cases, including those involving tolling agreements. Thus, he concluded, the SEC should not be able to use tolling agreements to circumvent the statute's plain language and evade the statute's purpose, i.e., to bar courts from "entertaining" claims brought outside a five-year period.

The Second Circuit has now weighed in: tolling agreements, which are generally thought to be beneficial to both the SEC and its targets or subjects, do not violate the five-year statute of limitations and can be enforced in federal courts. The court found that section 2462 is a nonjurisdictional statute of limitations and, as such, the parties can toll it. This first precedential decision is consistent with a few other federal appellate courts that have indirectly addressed this issue.

In its holding, the Second Circuit explained that neither the statutory nor the legislative history of section 2462 showed any congressional intent to substantively change the long-standing precedent that filing deadlines are "quintessential claim-processing rules," which should not be treated as jurisdictional. Thus, a 1948 change to the wording of section 2462 did not transform the statute from nonjurisdictional to jurisdictional. As such, the Second Circuit upheld the enforceability of the parties' tolling agreement and the district court's authority to hear the case.

Fowler has filed for a writ of certiorari from the U.S. Supreme Court. For now, the Second Circuit's precedential ruling on the enforceability of tolling agreements is a big win for the SEC and, perhaps, its targets and subjects. This commonly used and important tool for managing the timeliness of SEC investigations is likely here to stay.

SEC Publishes Fund Compliance Shortfalls

BY GARY COHEN

The SEC's Division of Examinations has released a risk alert warning of compliance "risks and issues" of mutual funds (including ETFs) and their advisers.

The alert derives from exams of 50 fund complexes — covering more than 200 funds and/or series of funds — and nearly 100 advisers. The exams assessed industry practices and regulatory compliance in areas that impact retail investors.

The exams focused on the following funds and advisers:

- Index funds that track custom-built indexes.
- Smaller ETFs and/or ETFs with little secondary market trading volume.
- Funds with higher allocations to certain securitized investments.
- Funds with aberrational underperformance relative to their peer groups.
- Funds managed by advisers that are relatively new to managing such funds.
- Advisers that provide advice to public funds and private funds, both of which have similar strategies and/or are managed by the same portfolio managers.

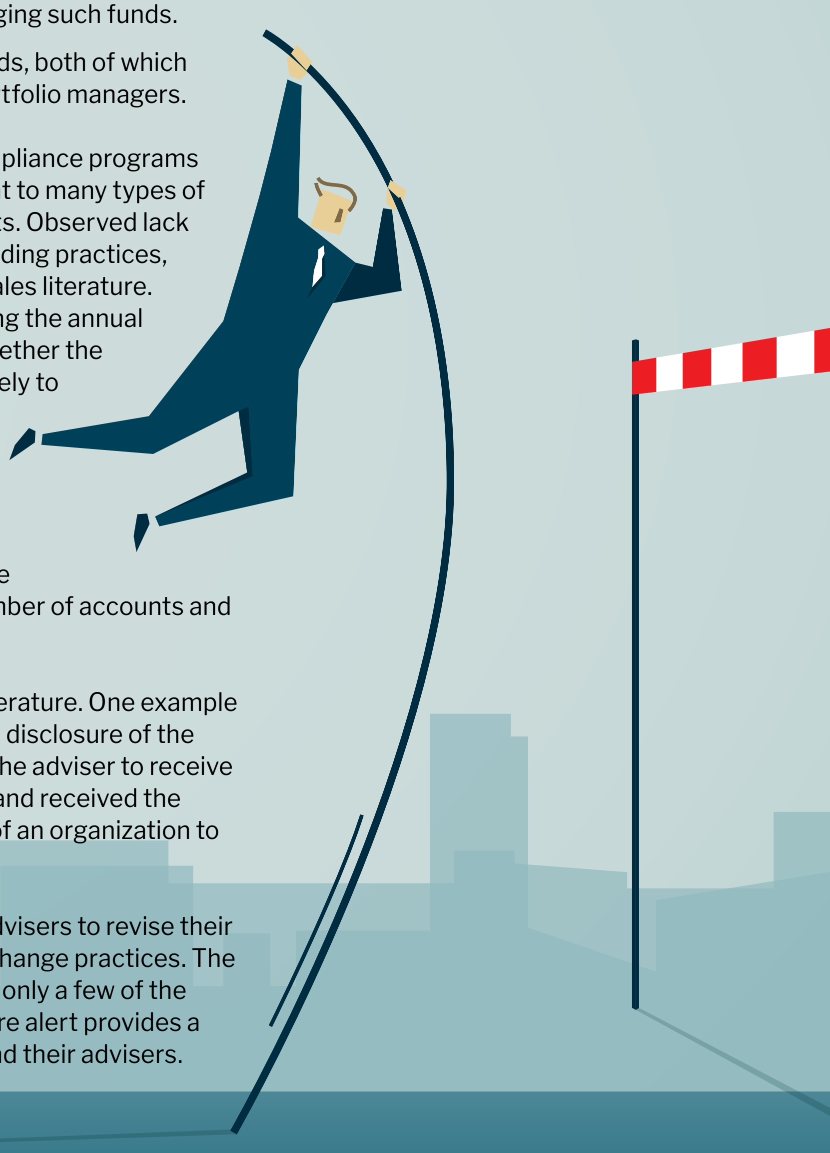
The exams uncovered "weaknesses" and "deficiencies" in compliance programs and board monitoring of compliance programs that are relevant to many types of funds — including funds supporting variable insurance products. Observed lack of oversight involved investments and portfolios, valuation, trading practices, conflicts of interest, fees and expenses, and advertising and sales literature. An example of inadequate board monitoring is the failure, during the annual investment evaluation of advisory agreements, to consider whether the adviser has any financial circumstances that are reasonably likely to impair its ability to meet its contractual commitments to clients.

The exams also found that funds had "inaccurate, incomplete and/or omitted disclosures" in their filings with the SEC. One example is that statements of additional information lacked the required disclosure of board standing committees and the number of accounts and total assets managed by the portfolio managers.

Funds also had defective disclosure in advertising and sales literature. One example is that touting of awards received for fund performance lacked disclosure of the selection criteria for the award, the amount of any fee paid by the adviser to receive or promote the award, the number of other funds that applied and received the award, and whether the adviser was required to be a member of an organization to receive the award.

The division issued deficiency letters that caused funds and advisers to revise their compliance policies and procedures, amend disclosures, and change practices. The alert does not mention any enforcement action. Nevertheless, only a few of the problems cited in the alert are summarized above, and the entire alert provides a useful checklist of potential areas of improvement for funds and their advisers.

Regarding deficiency letters, the Division of Examinations has announced that it intends to be more precise in specifying the statutory section or SEC rule, form, or pronouncement that it believes has been violated. The alert bears this out with multiple footnote references to specific sections of the federal securities laws and rules, and forms thereunder.



What Will the SEC Do About the "Gamification" of Trading in 2022?

BY JUSTIN CHRETIEN

The SEC recently solicited comments regarding broker-dealer and investment adviser "digital engagement practices" (DEPs), features commonly referred to as the "gamification" of trading. The request follows the GameStop trading event in January 2021, where the gamelike features on certain trading apps came under scrutiny following a surge in trading alleged to have ultimately prompted a trading halt.

According to the SEC's request, DEPs include "behavioral prompts, differential marketing, game-like features … and other design elements or features designed to engage with retail investors on digital platforms (e.g., websites, portals, and applications), as well as the analytical and technological tools and methods." The request cites the concerns of SEC Chair Gary Gensler:

> [T]hese features may encourage investors to trade more often, invest in different products, or change their investment strategy. Predictive analytics and other DEPs often are designed with an optimization function to increase revenues, data collection, or customer time spent on the platform. This may lead to conflicts between the platform and investors. I'm interested in the varied questions included in the Request for Comment, and I'm particularly focused on how we protect investors engaging with technologies that use DEPs.

The public comment period is now over, and the SEC received hundreds of comments. Comments from retail investors are the most numerous and appear to fall into three groups. The first group rails against DEPs (e.g., "I feel like all of those gimmicks are designed to lure in younger naive investors who don't know any better"). The second approves of their use (e.g., "[e]asily accessible settings/instructions … adds another way for users to feel more in control of their investing"). The third, and largest by number, focuses on other aspects of our markets (e.g., dark pools, hedge funds, payment for order flow, etc.).

Comments from the industry and associations regarding DEPs fall into two major groups. The largest group of comments is from brokerage firms that employ DEPs and from trade associations that represent the interests of industry professionals. These comments generally take the view that no additional rulemaking is necessary and that the existing regulatory regime adequately addresses firms' use of DEPs, preserving the benefits of DEPs while appropriately managing potential risks and conflicts. The Securities Industry and Financial Markets Association (SIFMA) submitted a comment reflecting this view:

> FINRA's communications (and related) rules and guidance cover [communications to retail investors], and the SEC's Regulation Best Interest ("Reg BI") covers [potential recommendations to retail investors]. Accordingly, new rules, guidance, or interpretations are not necessary or appropriate to address DEP use in our industry today. In fact, such additional regulation may well have the effect of undermining its very purpose by limiting information and access to investment opportunities and educational tools by under-represented, less financially educated, and/or less affluent retail investors — the presumed beneficiaries of such prospective regulation.

The second, smaller group of comments is from investor-oriented trade associations that generally hold that the existing regulatory regime adequately addresses most issues arising from DEPs but that there may be a need for some gap filling to address particular issues. The North American Securities Administrators Association (NASAA) submitted a comment reflecting this view:

> [E]xisting rules, regulations, and principles are broad enough to address *most* DEP

> tools and market practices. For example, the principles behind what constitutes a recommendation and the standards of conduct for broker-dealers and investment advisers are already developed. In our view, these principles apply regardless of whether a recommendation comes from a person, an algorithm, or some other technology. ... To the extent gaps are identified, the Commission should act to curtail practices that allow registrants to interact with investors without applying and observing appropriate standards of care.

To address such gaps, the NASAA advocates for:

- More investor education for firms that intend to use DEPs.
- Special considerations to ensure that customers are trading of their own accord, as opposed to responding to psychological or behavioral prompts.
- More guidance as to when DEP-based communications constitute recommendations subject to Reg BI.

Further, the NASAA sets forth specific concerns regarding:

- "[I]deas presented at order placement and other curated lists or features" that constitute advice or recommendations.
- Copy-trading practices that include suggestions to copy the trading activity of particular traders or "finfluencers."
- Features that encourage investors to make trades that may not be in their best interest (such as confetti, scratch-off style graphics, and award systems).

Finally, the NASAA advocates for the prohibition of "dark patterns" (i.e., user interface design choices knowingly designed to confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions) and limitations on the use of "chatbots" to provide only simply factual information (prices, account values, etc.) and not to communicate or formulate advice or recommendations.

The American Securities Association (ASA), a trade association that represents the retail and institutional capital markets interests of regional financial services firms, adds a few nuanced concerns in its comment:

> [I]s it a trading recommendation when a firm uses an interactive artificial intelligence algorithm to target the behavioral characteristics of its customers to induce them to execute a trade on the app? Does the answer to that question change if the firm has a business model that depends on its customers executing orders on the app so it can receive payment for selling those orders to a third party?
>
> The use of predictive data analytics to increase the revenue of a digital application must be regulated when that application's profitability is solely dependent upon frequent trading by its customers.

In addition to the above, a handful of commenters — viewing DEPs as harmful to investors — urge broad reforms, more aggressive enforcement of Reg BI and FINRA's communication rule (Rule 2210), or more discussion.

Given the above — and Gensler's stated concerns — it appears that some rulemaking may be proposed in 2022. Stay tuned!

Admissions of Wrongdoing Back in Vogue

SEC Enforcement Pendulum Swings

BY MICHAEL YAEGER

The Securities and Exchange Commission (SEC) recently announced its intention to avoid “neither admit nor deny” settlements in some cases and instead return to an Obama-era policy requiring more individuals and companies to admit wrongdoing when settling civil enforcement actions.

That policy was something of an innovation. Previously, the SEC had a general practice of allowing settlements without admissions of wrongdoing, and under the Trump administration, the SEC had reverted to that past practice. The *Wall Street Journal* has now reported that, at a prominent SEC conference, Sanjay Wadhwa, the deputy director of enforcement at the SEC, stated that the SEC would seek admissions “in cases involving egregious misconduct” and where “a large number of investors were harmed or where defendants obstructed the SEC’s investigation.” At the same conference, the SEC’s enforcement chief, Gurbir Grewal, stated that the SEC would also use other remedial tools as appropriate, including officer and director bars, conduct-based injunctions, and undertakings such as a company’s agreement to hire an independent compliance consultant. Grewal framed the Commission’s goal as improving deterrence and boosting public trust in financial and government institutions.

The new policy brings with it new risks for companies, as admitting wrongdoing could have consequences in separate, private civil suits, such as class action lawsuits by shareholders or third parties. Admissions might also trigger “conduct” exclusions in D&O insurance policies that bar coverage for fraudulent conduct or intentional violations of the law. More dramatic still, admissions of wrongdoing could be used in parallel criminal proceedings.

For those reasons, a policy requiring admissions could increase the number of SEC cases that go to trial; litigants may be less willing to settle. If they do settle, they will have to focus on the precise language of the admissions.

However, it remains to be seen how the SEC will actually implement these policies, and how many cases those policies will actually affect.

A Cold Blast From the Index Universal Life Illustration (A) Subgroup

BY ANN BLACK AND JORDAN LUCZAJ

During the December 8 Life Actuarial Task Force meeting, the Index Universal Life Illustration (A) Subgroup reported on its findings regarding IUL illustrations following the implementation of Actuarial Guideline 49-A. The chair of the subgroup, Fred Andersen, stated that while the illustration rates being used since the effectiveness of AG 49A are lower, they are not as low as previously anticipated. Andersen explained that this is the result of insurers implementing volatility-controlled indexes for which the option costs are lower. As a result of the lower option costs, insurers are using the savings to fund guaranteed fixed bonuses, which then results in increased illustrated rates.

The subgroup seeks to discuss in early 2022 whether it should address the use of volatility-controlled indexes and the associated guaranteed fixed bonuses, and if so, then how. On December 9, LATF with a February 4, 2022, timeline, sought comments on whether to address illustrations of volatility-controlled index account and guaranteed fixed bonuses, and if so, how? In seemingly wanting to freeze the use of such illustrations, the exposure states that “[i]n some insurers’ minds [they are allowed to] illustrate volatility-controlled funds plus the fixed bonus more favorably than a traditional, capped S&P 500 index.”

Based on comments made during the December 8 meeting, Birny Birnbaum is seeking to ice the use of volatility-controlled index accounts as he believes them to be opaque to consumers and requires consumers to trust insurers.

Hopefully, as spring rolls around, regulators will warm up to volatility-controlled index accounts.

Gag Orders, Part II: When the SEC Silences Critics

BY NATALIE NAPIERALA AND KATELYN SANDOVAL

This article supplements our article titled "Gag Orders: Stifling Effect on SEC Critics" in the September 2020 edition of this publication.

Any consent judgment with the SEC includes what is often called a "gag clause." These clauses prohibit the defendant from challenging the truth of any allegation in the SEC's complaint or making any statement that might be construed as saying that the complaint lacked a factual basis. This prevents defendants and their counsel from informing the public — including the press and Congress — about what they perceive to be unfair SEC tactics or factual assertions in the proceeding.

The lawfulness of the SEC's power to shield itself from review and criticism in this way was recently addressed by the Second Circuit Court of Appeals in *SEC v. Romeril*.

By way of background, the SEC filed a civil enforcement action against Barry Romeril and certain other parties. Without admitting or denying the allegations, the parties, including Romeril, settled the litigation and entered into the consent judgment that included the gag clause.

Many years later, Romeril asked the federal district court to remove the gag clause to allow him to make "truthful public statements" concerning the SEC's case against him. Following the district judge's denial of his request, Romeril argued on appeal that the gag clause is void ab initio as an unconstitutional prior restraint on truthful speech. Carlton Fields was counsel for amicus curiae Americans for Prosperity Foundation in a brief in support of Romeril.

However, the Second Circuit Court of Appeals recently affirmed the district court's decision. In sum, the appeals court stated that Romeril had "failed to show either a jurisdictional error or a due process violation within the meaning of the rule."

For example, in rejecting Romeril's argument that his First Amendment rights had been violated, the court opined that "[t]o the extent Romeril had the right to publicly deny the SEC's allegations against him, he waived that right" by agreeing to the gag clause. The court further noted that individuals, in the course of resolving legal proceedings, can and do waive certain constitutional rights in exchange for "some perceived benefit" and that the "First Amendment is no exception."

Rejecting Romeril's arguments on due process grounds, the Second Circuit opined that Romeril had "actual notice of the proceedings as well as a full and fair opportunity to litigate on the merits," further noting that Romeril had participated in the proceedings with his "capable and experienced counsel." Additionally, the court noted, Romeril had "willingly" agreed to the gag clause and, by waiving certain rights, had avoided the expense of further litigation and the risk of an adverse judgment.

Romeril has filed a petition for rehearing en banc to the Second Circuit Court of Appeals. The New Civil Liberties Alliance, which is representing Romeril, may argue that the federal appeals court had failed to address certain of his arguments on appeal, including that the gag clause violated the Administrative Procedure Act and that it denies due process by prohibiting an individual who settles with the SEC from speaking about the underlying matter.

Scrutiny of Algorithms and Consumer Data

BY ANN BLACK AND JAMIE BIGAYER

With the growing use of algorithms and external consumer data, several national and international bodies have recently drafted work product or proposed regulations as follows:

- The NAIC Accelerated Underwriting Working Group (AU WG) – which released a November 11, 2021, draft of its educational report for regulators to facilitate "understand[ing] the current state of the [insurance] industry and its use of accelerated underwriting."
- The NAIC Special (EX) Committee on Race and Insurance (Special Committee) – whose 2021/2022 charges include considering "the impact of traditional life insurance underwriting on traditionally underserved populations, considering the relationship between mortality risk and disparate impact."
- Colorado Division of Insurance (CO DOI) – which is developing regulations to implement new section 10-3-1104.9's prohibition of the use of external consumer data and information sources (external data), as well as algorithms and predictive models using external data (technology) in a way that unfairly discriminates based on race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression (protected status), which became effective on September 7, 2021.
- The White House Office of Science and Technology Policy (White House OSTP) – which is assessing "exhibited and potential harms of a particular biometric technology" as part of its October 8, 2021, information request.
- The European Parliament and the Council of the European Union (EU Parliament) – which proposed "laying down harmonised rules on artificial intelligence" (EU AI Regulation) on April 4, 2021, that recognize "the right to dignity and non-discrimination and the values of equality and justice."
- The Cyberspace Administration of China (China Cyber Admin) – which on August 27, 2021, issued a 30-point proposal regarding "algorithm recommendation management regulations."

These bodies' work includes the following themes: (i) prohibiting unfair discrimination; (ii) promoting fairness and transparency; and (iii) requiring governance programs.

Unfair Discrimination

The various bodies are addressing the potential for unfair discrimination in the use of algorithms and external consumer data, as follows:

What May Be Unfair Discrimination

- Colorado section 10-3-1104.9 imposes a three-prong test to determine whether unfair discrimination exists:

1. The use of external data or technology has a correlation to a protected status;
2. The correlation results in a disproportionately negative outcome for such protected status; and
3. The negative outcome exceeds the reasonable correlation to the underlying insurance practice, including losses or costs for underwriting.

The Colorado commissioner is required to make rules implementing section 10-3-1104.9 and to hold stakeholder meetings, which are expected in January 2022. In addition, perhaps providing more guidance on unfair discrimination, the required rules must (i) provide a reasonable time for insurers to remedy any unfair discrimination impact of any employed technology and (ii) allow for the use of external data and technology that has been found not to be unfairly discriminatory.

- The AU WG's draft educational report (i) warns that due "to the fact accelerated underwriting relies on 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" and (ii) expresses concern with the use of a consumer's behavioral data, including "gym membership, one's profession, marital status, family size, grocery shopping habits, wearable technology, and credit attributes" because "[a]lthough medical data has a scientific linkage with mortality, behavioral data may lead to questionable conclusions as correlation may be confused with causation."
- The EU AI Regulation specifically notes that AI systems "used to evaluate the credit score or creditworthiness of natural persons should be classified as high-risk AI systems" because they "may lead to discrimination of persons or groups and perpetuate historical patterns of discrimination, for example based on racial or ethnic origins, disabilities, age, sexual orientation, or create new forms of discriminatory impacts."

The EU AI Regulation also includes "specific requirements that aim to minimise the risk of algorithmic discrimination, in particular in relation to the design and the quality of data sets used for the development of AI systems complemented with obligations for testing, risk management, documentation and human oversight throughout the AI systems' lifecycle."

Additional Study

- Workstream 4 of the Special Committee will address unfair discrimination, disparate treatment, proxy, and disparate impact in insurance underwriting in a proposed white paper.
- The White House OSTP is seeking information to assess "exhibited and potential harms of a particular biometric technology," including "harms due to disparities in effectiveness of the system for different demographic groups."

Fairness and Transparency

The AU WG, the EU AI Regulation, and the China Cyber Admin seek to ensure the use of algorithms and consumer data is fair and transparent.

Additional Guidance

- AU WG's Educational Report offers the following measures that can be taken: (i) ensure data inputs are transparent, accurate, reliable, and the data itself does not have any unfair bias; (ii) ensure that the external data sources, algorithms, or predictive models are based on sound actuarial principles with a valid explanation or rationale for any claimed correlation or causal connection; (iii) be able to provide the reason(s) for an adverse underwriting decision to the consumer and all information upon which the insurer based its adverse underwriting decision; (iv) be able to produce information upon request as part of regular rate and policy reviews or market conduct examinations.
- EU AI Regulation notes that "[h]igh-risk AI systems should ... be accompanied by relevant documentation and instructions of use and include concise and clear information, including in relation to possible risks to fundamental rights and discrimination, where appropriate."
- China Cyber Admin seeks to require that "[c]ompanies must disclose the basic principles of any algorithm recommendation service, explaining the purpose and mechanisms for recommendations in a 'conspicuous' manner."

Governance Program

The various bodies believe those using algorithms and consumer data must design and implement governance programs to properly monitor and evaluate such use.

- AU WG's Educational Report recommends that a governance program should (i) ensure that the predictive models or machine learning algorithm within accelerated underwriting has an intended outcome and that outcome is being achieved; (ii) ensure that the predictive models or machine learning algorithm achieve an outcome that is not unfairly discriminatory; and (iii) have a mechanism to correct mistakes if found.
- Colorado section 10-3-1104.9 requires insurers to (i) establish and maintain a risk management framework reasonably designed to determine, to the extent practicable, whether the insurer's use of external data and technology unfairly discriminates against a protected status; (ii) assess the risk management framework; and (iii) obtain officer attestations as to the implementation of the risk management framework. At the NAIC Fall National Meeting, Commissioner Conway explained that Colorado intentionally places the burden of monitoring and testing on insurers because Colorado does not have the resources or expertise to do so.
- EU AI Regulation requires "appropriate human oversight measures" and specifies that "such measures should guarantee that the system is subject to in-built operational constraints that cannot be overridden by the system itself and is responsive to the human operator, and that the natural persons to whom human oversight has been assigned have the necessary competence, training and authority to carry out that role."
- China Cyber Admin's proposal will require providers to "regularly assess and test their algorithms and data to avoid models that will induce users' obsessive behaviors, excessive spending or other behaviors that violate public order and morality."

Insurers need to consider what consumer data and algorithms are being used throughout all areas of the company, including marketing, product design, underwriting, administrative services, claims, and fraud units, and what measures are in place to address unfair discrimination and fairness and transparency. This also includes considering what governance is in place or may need to be enhanced.

DOL to Plan Sponsors: "It's Mostly All About the Benjamins!"

BY LOWELL WALTERS AND STEPHEN KRAUS

Almost one year from the date it updated its investment duties regulation (29 C.F.R. § 2550.404a-1), triggering our previous article "DOL to Plan Sponsors: 'It's All About the Benjamins!,'" the Department of Labor (DOL) issued proposed changes to temper that regulation's strong implication that environmental, social, and governance (ESG) factors should not be considered when selecting investment options for retirement plan participants and beneficiaries.

The new proposal was issued in response to President Biden's executive order asking the DOL and other federal agencies to review regulations issued between January 20, 2017, and January 20, 2021, with a focus on furthering protections to improve public health, protect the environment, and minimize climate change. The DOL also announced that, pending its review of the current regulation, it "will not enforce the current regulation … [and intends] to determine how to craft rules that better recognize the role that ESG integration can play in the evaluation and management of plan investments, while continuing to uphold fundamental fiduciary obligations."

The proposed changes clarify that, where a fiduciary prudently believes that ESG considerations are likely to affect investment returns or risks, it is prudent to consider those factors when making investment decisions. As is expressed in the proposed regulation's preamble, "under ERISA, if a fiduciary prudently concludes that a climate change or other ESG factor is material to an investment or investment course of action under consideration, the fiduciary can and should consider it and act accordingly, as would be the case with respect to any material risk-return factor." The proposed regulation would also permit the use of an investment that considered ESG factors as a qualified default investment alternative (used when participants fail to direct the investment of their account) so long as the same fiduciary standards were used in selecting that QDIA that applied to the selection of other investment alternatives.

How Broad Is a Fiduciary's Authority to Consider ESG Factors?

The regulation does not restrict or strictly define the factors that may be treated as "ESG factors," but in light of the restrictions on considerations in general, a definition is probably unnecessary. The prime directive of the regulation at issue will remain the selection of investments that are in the best interests of a particular plan's participants and beneficiaries. Subsection (b)(4) of the investment duties regulation allows consideration of *any factor* that is relevant to determining whether a particular investment option has the right balance between risk and return for the retirement plan and its participants and beneficiaries. Even if the earth, our children, and our children's children would be better off with the promotion of ESG funds (a position we are neither supporting nor opposing), ESG considerations are only relevant as they relate to the projected risk and return of investments. In this way, the proposed changes are not earth shattering (or "earth saving") — they reinforce that fiduciaries should use all information available to determine the best investments or investment options for plan participants and beneficiaries.

In our last article, we offered the following facetious summary of the current rule: "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." We might summarize the current rule as: "Dear Plan Fiduciary: You should base the selection of your plan's designated investment alternatives on economic grounds, and if those economic grounds include ESG factors, so be it." We concluded our last article with the following recommendation: "[F]iduciaries basing decisions on non-pecuniary considerations should be prepared to defend those decisions." That recommendation will still apply if the proposed regulations are finalized because, although the proposed rule eliminates the requirement that fiduciaries document decisions based on ESG factors, fiduciary decisions can still be questioned, and fiduciaries will still need to prove that their primary considerations were financial considerations.

Parting Thoughts

Retirement plan investments are generally selected and monitored based on past performance (even though past performance may not be indicative of future returns). ESG factors currently tend to be forward-looking. Will investments in mutual funds made up of businesses with a diverse workforce outperform investment in businesses whose employees are more homogeneous? Will investments in mutual funds made up of businesses reliant on oil suffer as government programs continue to promote alternative fuels? Will investments in mutual funds made up of businesses reliant on clean water suffer as that scarce, valuable resource becomes more expensive or less available? Perhaps a positive side effect of this regulation will be to promote fiduciary defenses based on prudent future expectations in addition to past performance.

When Congress Freezes Up, the NAIC's Privacy Protections Working Group Lights a Fire

BY ANN BLACK AND PATRICIA CARREIRO

On November 18, calling frozen federal legislative efforts "an opportunity" for state insurance regulators to "update state privacy protections … and potentially forestall or mitigate the impacts of any preemptive federal legislation," the NAIC's Privacy Protections (D) Working Group lit a fire by issuing an exposure draft of its report on consumer data privacy protections. The draft report, in addition to summarizing existing privacy protections and the Working Group's discussions, recommends that the NAIC:

1. Further consider ways in which the NAIC's existing privacy models (models 55, 670, and 672) could be amended, or a new model added, "to meet the consumer data privacy challenges presented by the public use of technology and data by insurers in today's business environment"; and

2. Update the NAIC's Market Regulation Handbook and IT Examiners' Handbook "to provide guidance to state insurance regulators so they can verify insurers' compliance" with privacy protections.

The Working Group envisions using existing privacy laws as kindling for its fire, relying on laws such as the European Union's General Data Protection Regulation and recently enacted comprehensive state privacy laws as potential templates for its work. The Working Group will emphasize "data transparency, customer control, customer access, data accuracy, and data ownership and portability."

The Working Group's initial draft report culminated in a policy statement describing "what the NAIC currently supports as the minimum consumer data privacy protections that are appropriate for the business of insurance." And while some of the policy statement's provisions were industry standard privacy practices, others seemed like rogue sparks. For example, one provision undercut state Fact Act relief efforts by requiring redelivery of a privacy notice at least annually.

In response to comments, the Working Group reconstructed its draft policy statement with a more controlled "Report on Consumer Data Privacy Protections." The report is "designed to address improvements needed for data privacy protections and to highlight issues needing further discussion." It removes more controversial provisions and simply summarizes the Working Group's "recommendations" based on existing NAIC privacy models. These recommendations include providing consumers with:

- A clear privacy notice, including periodic notice of any substantive changes during the relationship;
- Specific reasons for adverse decisions based on data gathered from sources other than the consumer;
- The ability to limit personal information sharing with third parties, "except for specific purposes required or specifically permitted by law";
- The right to have their health information shared (whether with affiliates or others) only if they provide affirmative opt-in consent for such sharing; and
- The right to request:
  - A copy of their personal information, how that information is used, and the sources from which that information is collected; and
  - Correction, amendment, or deletion of their personal information.

Although the change in tone from the Working Group's policy statement to its report turned a potential wildfire into a controlled burn, there remains no doubt that this blaze needs close supervision to avoid charring.

Regulators Forecast Storm of Cybersecurity Activity

BY ANN BLACK AND PATRICIA CARREIRO

In September and October 2021 alone, the Federal Trade Commission, the New York State Department of Financial Services, and the Securities and Exchange Commission all signaled their plans for a cybersecurity squall.

FTC

On September 13, 2021, the Federal Trade Commission (FTC) submitted a report to Congress identifying four priority areas for its ongoing data privacy and security work. Most significant for life insurers is the agency's plan to expand its understanding and guidance regarding the use of algorithms, which could impact life insurers' underwriting processes. The FTC also requested that Congress "enact privacy and data security legislation, enforceable by the FTC," for which the FTC sought expanded "civil penalty authority [and] APA rulemaking authority." The FTC followed up the report by releasing revisions to its Safeguards Rule and a supplemental notice of proposed rulemaking to require reporting to the FTC within 30 days of security incidents reasonably likely to impact 1,000 or more consumers.

DFS

On October 22, 2021, the New York State Department of Financial Services (DFS) issued a letter clarifying that covered entities remain responsible for their cybersecurity obligations, irrespective of reliance on an affiliate's cyber program. When a covered entity adopts some or all of an affiliate's cybersecurity program, the entity must "make available to DFS, upon request, all 'documentation and information' relevant to their cybersecurity programs ... includ[ing] ... programs adopted from an affiliate." For covered entities relying on affiliates not otherwise regulated by DFS, this will require contractual provisions:

- Requiring the affiliate to comply with the requirements of the cybersecurity regulation with respect to any of the affiliate's information systems that are shared with the covered entity; and
- Providing the covered entity with access, "at a minimum," to the affiliate's cybersecurity policies and procedures, risk assessments, penetration testing, and vulnerability assessment results, and any third-party audits that relate to the adopted portions of the cybersecurity program of the affiliate.

SEC

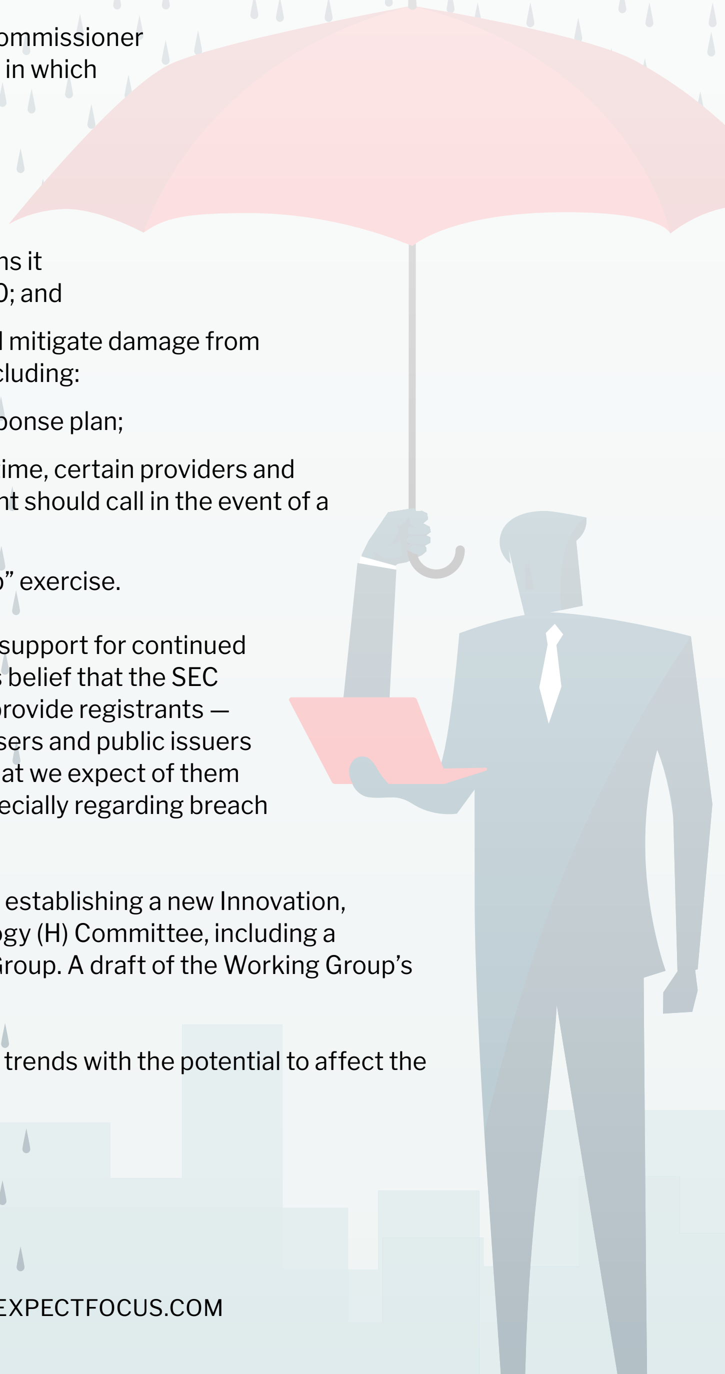
On October 29, 2021, SEC Commissioner Elad Roisman gave a speech in which he encouraged entities to:

- Learn from the SEC's cybersecurity guidance, especially cybersecurity and resiliency observations it published in January 2020; and
- Take steps to prevent and mitigate damage from cybersecurity attacks, including:
  - Having an incident response plan;
  - "Identifying, ahead of time, certain providers and experts that a registrant should call in the event of a cyber-incident"; and
  - Performing a "tabletop" exercise.

Roisman also expressed his support for continued enforcement actions and his belief that the SEC should "consider rules that provide registrants — particularly investment advisers and public issuers — with more of an idea of what we expect of them in today's marketplace," especially regarding breach notification.

On top of all this, the NAIC is establishing a new Innovation, Cybersecurity, and Technology (H) Committee, including a Cybersecurity (H) Working Group. A draft of the Working Group's charges includes:

- Monitoring cybersecurity trends with the potential to affect the insurance industry;



- Advising on the development of cybersecurity training for state insurance regulators;
- Promoting communication across state insurance departments regarding cybersecurity risks and events;
- Overseeing the development of a regulatory cybersecurity response guidance document to assist state insurance regulators investigating insurance cyber events;
- Coordinating NAIC committee cybersecurity work across working groups;
- Working with the Center for Insurance Policy and Research to analyze cybersecurity-related information;
- Supporting state implementation efforts related to adopting the Insurance Data Security Model Law (#668); and
- Engaging with federal and international supervisors and agencies on managing and evaluating cybersecurity risk.

Ready your shovels and salt, the forecast is looking icy.

AI Insurance Company Faces Class Action for Use of Biometric Data

BY MICHAEL YAEGER AND KATELYN SANDOVAL

After a tweeting mishap, Lemonade Inc., an AI-based insurance company, faces a class action for allegedly violating New York laws against the use of biometric data without consent by using facial recognition technology to analyze videos submitted in the claims process.

Artificial intelligence and big data are key parts of Lemonade's appeal to consumers and investors, but those same tools provoked concern on social media when Lemonade mentioned its use of facial recognition to analyze videos. In a series of now-deleted tweets, Lemonade stated that it gathers more than 1,600 "data points" about its customers, which is "100x more data than traditional insurance carriers," to be analyzed by a "charming artificial intelligence bot" that then crafts and quotes insurance. The data points include videos made and submitted by customers. Lemonade's AI bot analyzes the videos for fraud and supposedly can detect "non-verbal cues" that traditional insurers cannot. According to the class action complaint, Lemonade also tweeted that this process "ultimately helps ... lower [its] loss ratios" and its "overall operating costs."

These tweets raised concerns with Twitter users regarding the collection of facial biometric data, including the possibility for discrimination based on race and other traits. In response, Lemonade tweeted that it did not use and is not "trying to build AI that uses physical or personal features to deny claims." Rather, Lemonade explained that it asks for a video during the claims process because "it's better for [its] customers" and that the "term non-verbal cues was a bad choice of words to describe the facial recognition technology [it] us[es] to flag claims submitted by the same person under different identities."

In August 2021, plaintiff Mark Pruden filed a putative class action in the Southern District of New York alleging that Lemonade violated New York statutory and common law by "collecting, storing, analyzing, or otherwise using biometric data of thousands of its customers without their authorization or consent," and contrary to its privacy policy. The claims include violation of New York's Uniform Deceptive Trade Practices Act, breach of contract, breach of implied contract, and unjust enrichment.

As of December 2021, the case is stayed while the parties explore settlement negotiations.

Biometric data continues to be a hot topic among consumers, regulators, and plaintiffs' lawyers, especially amid growing concern by consumers about how and why their biometric data is collected. Companies should be careful to make clear what they do, obtain unambiguous consent from their customers, and take caution when posting on social media.

California Decisions Kick Off Parade of Life Insurance Lapse Notice Cases

BY MICHAEL WOLGIN AND DIMITRIJE CANIC

In our May 2021 issue, we discussed the rise in life insurance policy lapse notice cases in California following the state's 2013 enactment of California Insurance Code sections 10113.71 and 10113.72. These statutes establish a 60-day grace period after a missed premium and require insurers to notify policyowners, as well as persons designated by the policyowners to receive notice, at least 30 days before terminating a policy due to a payment lapse. The laws prevent an insurer from terminating a policy for an unpaid premium absent the requisite 30 days' notice. Whether the laws applied to existing policies was a question that was before the California Supreme Court and the Ninth Circuit Court of Appeals. Both courts have ruled in favor of the policyowner plaintiffs.

In *McHugh v. Protective Life Insurance Co.*, the California Supreme Court reviewed the Court of Appeal's decision that the 2013 lapse laws should apply only to new policies issued after the laws went into effect. The Court of Appeal deferred to interpretations of California state regulators to the effect that the laws applied only to new policies issued after 2013, thereby avoiding retroactive application of law prohibited by California jurisprudence. The California Supreme Court reversed the Court of Appeal's decision, explaining that "[a]pplying the provisions to policies already in effect on [January 1, 2013] does not appear to impose new or different liabilities based on earlier conduct." The court viewed the 2013 lapse laws as not having a "substantial change in the contracting parties' rights or obligations" and thus not entailing retroactive enforcement.

In the wake of *McHugh*, the Ninth Circuit Court of Appeals, in *Thomas v. State Farm Life Insurance Co.*, affirmed a decision by the Southern District of California that had rejected the lapse of two policies and entered summary judgment in favor of the beneficiary. The district court had based its ruling on the fact that the policies had been renewed after the 2013 lapse laws went into effect (avoiding retroactivity). On appeal, however, the Ninth Circuit affirmed the district court on other grounds based on *McHugh*. The court held that under *McHugh*, an insurer's failure to comply with the 2013 lapse laws precluded the policies' lapse. In so doing, the court rejected the insurer's argument that *McHugh* should not apply absent evidence that the noncompliance with the lapse laws had caused the lapses.

Given these recent decisions, the California 2013 lapse laws de facto apply retroactively. Not surprisingly, three new lawsuits have now been filed in the Northern, Southern, and Central Districts of California, and we expect significant additional litigation to come.

Universal Life Policyowner Not Entitled to Pro Rata Premium Refund Following Insured's Death

BY TODD FULLER AND KIRSTEN WOLFFORD

Insured's annual planned premium did not implicate New York statute requiring refund of premium "actually paid for any period" beyond an insured's death.

Lincoln Life & Annuity Company of New York recently secured a significant victory in a putative class action pending in the U.S. District Court for the Southern District of New York in *Nitkewicz v. Lincoln Life & Annuity Company of New York*.

The plaintiff, a trustee for the Joan C. Lupe Family Trust, sued Lincoln alleging that it breached its universal life insurance policy by failing to refund a pro rata portion of the annual planned premium to the plaintiff following the insured's death, as required by New York Insurance Law section 3203(a). Lincoln moved to dismiss, arguing that the plaintiff was not entitled to a refund because the planned premium was not "actually paid" for "any period" as statutorily required.

The court agreed and granted Lincoln's motion to dismiss. The court noted that a "close reading of the statutory text and the Policy reveal that, for a universal life insurance policy crafted like the one at issue here," any "planned premium" is not paid for any specific period of coverage, but instead refers to how often the policy owner intends to pay. The court explained that "[w]hen read in conjunction with the term 'for any period,' the phrase 'actually paid' serves to further distinguish between payments promised and payments that have actually paid for a period of coverage." The court held that planned premiums are simply a statement of intent regarding the anticipated frequency of payments and function to increase the policy's account value; the funds do not actually "pay" for any insurance until they are taken from the policy account through the monthly deduction to satisfy the policy's cost of insurance charges.

The court noted that while the plaintiff could have chosen a death benefit option that would have paid the death benefit, plus the account value, upon the insured's death, the plaintiff chose not to do so. Instead, the plaintiff elected the death benefit option that provided only the stated death benefit amount — and any planned premium deposited into the policy account would not be refunded. Accordingly, the court stated it would not "invalidate Plaintiff's [death benefit] election" to trigger a refund.

The plaintiff has appealed the decision to the Second Circuit Court of Appeals. Stay tuned for updates.

Insurance Industry Leads on DEI Initiatives

BY IRMA REBOSO SOLARES

The 2020 racial and social justice movements across the country were a call to action for businesses nationwide to adopt (or dust off) diversity, equity, and inclusion (DEI) initiatives. But the insurance industry has been at the forefront of DEI for many years and is actively committed to moving the DEI needle. Both insurance companies and regulatory leaders have implemented programs to identify and address institutional barriers to equal opportunity and nondiscrimination, advancement, and lack of diversity in the insurance industry.

The American Council of Life Insurers (ACLI) developed its Economic Empowerment & Racial Equity Initiative, which encourages member companies to make diversity and inclusion a priority and to create and share strategic inclusion and diversity plans with their boards of directors. This was a topic at the recent ACLI Annual Conference where several life insurance company leaders explained the top-down commitment by their respective boards to effectuate cultural change within their organizations. Speakers emphasized the need to focus on diverse recruitment, improved communication, mentoring, and retention at all levels of the company. DEI initiatives cannot succeed unless diversity and inclusion is part of the company culture.

The National Association of Insurance Commissioners (NAIC) also recognized the need to address DEI within the industry. The NAIC created a Special (EX) Committee on Race and Insurance, which serves as the NAIC's coordinating body on the significant issues of identifying issues related to race, diversity, and inclusion within the insurance sector, and addressing race, diversity, and inclusion in access to the insurance sector and insurance products (among others).

And while the insurance industry, when compared with other business sectors, appears to be forging ahead in terms of diversity, much remains to be done to achieve greater representation at the executive levels. Within the insurance industry as a whole, people of color comprised approximately 24% of the entry-level workforce and only 8% of the senior and executive management. Women comprised approximately 57% of the insurance industry's entry-level workforce (45% white women and 12% women of color) but only 18% at the senior and executive management levels. Only 3% of executives reporting to CEOs are women of color.

The insurance industry has a sincere desire to operationalize and implement DEI in a way that produces achievable and sustained results. And studies suggest a direct corollary between diverse teams and greater innovation. So by increasing the representation of women and people of color in the insurance industry, companies will not only diversify their workforce, improve business objectives, innovation, and profitability, but the shift will also serve to facilitate the development of products, business strategies, and underwriting practices to minimize the disparate impact on disadvantaged individuals and reach underserved markets.

Private Equity in 401(k) Plans: A Holiday Sequel

BY LOWELL WALTERS

If you thought the "Matrix" and "Spider-Man" sequels were impressive, you will be delighted to know that in a matter of weeks after revisiting its guidance on ESG retirement plan investments (see page 14), the Department of Labor also issued a sequel to its 2020 information letter about the use of private equity (PE) investments in retirement plans.

In this 2021 supplementary statement, the DOL clarifies that its 2020 letter provides that 401(k) plan fiduciaries *can* permit investment in PE funds without automatically violating fiduciary duties to provide proper investment opportunities to participants, without saying that such fiduciaries *should* permit PE investment. The 2021 supplement, issued December 21, highlights that the 2020 letter considered 401(k) plan fiduciaries *with experience analyzing PE investments* from also serving as fiduciaries over defined-benefit plans *already using PE investments*. These experienced fiduciaries may be able to prudently analyze the relevant PE investment issues while, according to the sequel, "plan-level fiduciaries of small, individual account plans are not likely suited to evaluate the use of PE investments." This prompts our recollection of ERISA section 404(a)(1)(B), requiring judgments that would be considered reasonable *by those familiar with the subject matter.*

The DOL's holiday season sequel also noted that its 2020 letter may have assumed unrealistically favorable facts that were provided by the requester of that letter. Still, the 2020 letter outlined myriad issues to be addressed with PE investment, which are still relevant and important. For more information, including a summary of 13 considerations for fiduciaries considering PE investment, see our previous article "DOL Warms Up to Private Equity in 401(k) Plans," *Expect Focus – Life, Annuity, and Retirement Solutions* (September 2020).

NEWS & NOTES

Carlton Fields earned national rankings for several of its practices in the *U.S. News & World Report* and *Best Lawyers®* Best Law Firms 2022 guide, including insurance law, securities/capital markets law, and securities regulation. The firm also received high rankings for a multitude of its practices in several metropolitan areas.

The firm was recognized by corporate counsel as a "Litigation Leader" in class actions, complex employment litigation, and product liability litigation, as well as an overall top firm in complex commercial litigation in *BTI Litigation Outlook 2022: Post-Pandemic and Beyond*.

Carlton Fields was named a top-ranked firm for diversity among firms of its size by the Minority Corporate Counsel Association (MCCA). The inaugural MCCA Diversity Scorecard evaluates law firm diversity based on demographics, leadership composition, and the hiring, retention, and promotion of diverse lawyers. Carlton Fields is one of only 10 firms to receive the MCCA ranking among firms with 251 to 500 lawyers.

The firm sponsored the IRI Annual Conference on September 21–22 and 28–29, 2021. Shareholder **Justin Chretien** spoke on the session "Reg BI – Lessons Learned From Year One."

Carlton Fields sponsored the ACLI Annual Conference on October 12–13, 2021. Shareholders **Irma Solares** and **Rae Vann** spearheaded a panel on "Advancing Fairness at Work Through Robust — and EEO-Compliant — Diversity, Equity, and Inclusion Efforts."

The firm was pleased to participate in the ALI CLE Conference on Life Insurance Company Products on November 4–5, 2021. Shareholder **Richard Choi** served as the conference's co-chair, and Shareholders **Ann Black** and **Ann Furman** and Of Counsel **Bill Kotapish** participated as panel speakers.

Carlton Fields sponsored the ACLI Compliance & Legal Sections Annual Meeting on December 8–9, 2021. Shareholder **Markham Leventhal** moderated the "Litigation Update" panel.

Carlton Fields welcomes the following attorneys to the firm: Shareholder **Ellyn Garofalo** (business litigation, Los Angeles) and Associates **Nader Amer** (business litigation, Miami), **Daniel Badovinac** (business transactions, Miami), **Chad Dunham** (property and casualty insurance, Orlando), **Makana Ellis** (mass tort and product liability, Hartford), **Troy Mainzer** (real property litigation, Tampa), **James Mitchell** (business litigation, Atlanta), **Sheldon Poole** (mass tort and product liability, Hartford), **Kyle Soch** (mass tort and product liability, West Palm Beach), and **Holly Weaver** (mass tort and product liability, Miami).

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