EXPECTFOCUS®
VOLUME IV AUTUMN 2007

Getting Your House in Order

Managing Exposure and Risk in a Colorful Industry

Jorden Burt LLP

EXPECTFOCUS® Vol. IV Fall 2007

EXPECTFOCUS® is a quarterly review of developments in the insurance and financial services industry, provided on a complimentary basis to clients and friends of Jorden Burt LLP.

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INTHESPOTLIGHT

FINRA Draws Fire

BY TOM LAUERMAN

By naming itself an "authority," the Financial Industry Regulatory Authority risks confusing investors. "Authority" arguably overstates FINRA's governmental aspect. Will required disclosure that a broker-dealer is a member of this "authority" make it seem that the broker-dealer is an arm of a governmental entity? Is FINRA less concerned with the accuracy of its own name than with the accuracy of labels that its members use?

Is FINRA coming on too strong?

Many smaller or specialty broker-dealers have been concerned that FINRA would afford them less voice in how they are regulated, as compared with its NASD predecessor. They see FINRA's use of the term "authority" (rather than the more participatory "association") as validating these fears.

Based on similar concerns, some broker-dealers are opposing nominees that FINRA has proposed to serve as the seven "firm representatives" on FINRA's governing board. For example, the Financial Industry Association, which represents numerous (mostly smaller) broker-dealers, has fielded alternative candidates for several of these positions. As we go to press, the vote for these positions (which will continue until the end of a transitional term in July 2010) is scheduled for October 26.

REFOCUS *10 years ago in our publication*

High Standard for Mandatory Arbitration of Employment Disputes (Autumn 1997)

"Companies Beware! That all-encompassing arbitration agreement you signed with your employee may not be as broad as you think…. The [Ninth Circuit Court of Appeals] stated that '[w]hether an agreement to arbitrate constitutes a knowing waiver of a right is analyzed from the time the agreement is made' and noted there was not an express reference to employment disputes in either the U-4 form or the NASD Code at the time" the arbitration agreement in question was signed in *Renteria v. Prudential Insurance Co. of America.*

Arbitration issues are still making headlines. See *Updates from the World of Arbitration* on page 22 and *Mandatory Arbitration Clauses in Jeopardy* on page 17.

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Annuity Sales Practices Update

BY KRISTIN SHEPARD

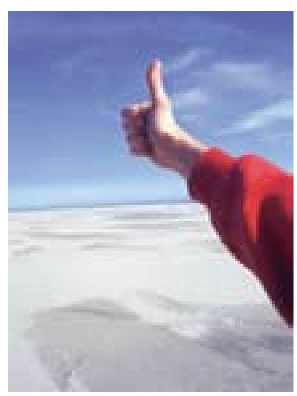
California Court (Again) Declines to Dismiss RICO Claims

The reluctance to dismiss RICO claims is a mystery

As previously reported, California federal district courts are reluctant to dismiss RICO claims in deferred annuity sales practices cases (see, *Expect Focus*, Vol. II, Spring 2007). That trend continues. On August 8, 2007, the Northern District of California ruled on defendant's motion to dismiss the amended complaint in the *In re Conseco* proceeding, involving allegations of agent misrepresentations and challenges to the suitability of deferred annuities sold to persons 65 or older. Although the court granted Conseco's motion to dismiss as to count six, for breach of fiduciary duty, and count seven, for aiding and abetting breach of fiduciary duty (both with leave to plaintiffs to amend), the court denied the motion to dismiss as to all remaining claims. The court's two-page opinion was silent as to its rationale in allowing the RICO claims to proceed.

First-Year Interest Crediting Cases

Insurers have fared better in the so-called "bonus" annuity cases. For instance, in its July 30, 2007 opinion in *Phillips v. American International Group*, the Southern District of New York granted AIG's motion to dismiss a putative class action complaint alleging that the defendants recaptured the entire promised first-year bonus interest rates because of the actuarial design, pricing and structure of the bonus annuity contracts. In so holding, the court rejected plaintiffs' argument that the defendants' failure to disclose that the bonus rate would be recouped over time gave rise to claims for breach of contract, fraudulent and negligent misrepresentations, civil conspiracy, unjust enrichment, and violation of state insurance and consumer protection laws.



Some positive developments

The Eleventh Circuit Court of Appeals also recently affirmed (without opinion) the district court's order granting summary judgment to the defendant in *Sayer v. Lincoln Nat'l Life Ins. Co.*, another putative "bonus" annuity class action alleging claims for misrepresentation, breach of contract, breach of fiduciary duty, civil conspiracy, unjust enrichment, and violation of New York's business and insurance laws. (Both *Phillips* and *Sayer* were previously reported on in *Expect Focus*, Vol. II, Spring 2007.) By contrast, the Western District of Tennesee recently denied a motion to dismiss in *Cirzoveto v. AIG Annuity Insurance Co.*, reasoning that although defendant's arguments for dismissal had "some merit," "dismissal would be premature" at this stage in the litigation. (However, the court granted the parent company's separate motion to dismiss on the grounds that plaintiffs had not alleged any claim as to it.)

Optional Federal Charter Takes Backseat to Terrorism Backstop Bill

BY MARION TURNER

As we approach the end of the Congressional session, efforts to create an optional federal charter for the insurance industry have stalled as Members of Congress focus on legislation to extend the current terrorism backstop for property and casualty insurers.

The *National Insurance Act of 2007* (S. 40), a top priority for the ACLI, AIA and other industry groups, would give life insurers, property/casualty firms, and surplus lines insurers the option of choosing a federal charter. Similar to the dual charter system enjoyed by banks, the legislation would establish a new federal regulator, the Office of National Insurance, which would be funded by assessments on nationally chartered insurance firms should they choose a federal over a state charter.

Although strongly supported by the industry, the legislation has failed to gain traction due to the immediate need to reauthorize the *Terrorism Risk Insurance Act (TRIA)*.

Senior Investment Fraud Claims Receive Federal and State Attention

BY PATRICK LAVELLE

Regulators looking out for abusive sales practices

Allegations of investment fraud against senior citizens are becoming an increasingly hot issue with federal and state legislatures and regulators. In September, both the U.S. Senate and the SEC hosted forums to address allegedly abusive point-of-sale practices involving financial products targeted at seniors. Panelists at both forums were generally critical of the annuity sales practices, identifying the use of free lunch seminars and supposedly misleading senior financial specialist designations as leading causes for unsuitable product sales. Moreover, they cited innovative federal and/or state legislation, aggressive enforcement, and investor education as the most effective means of addressing investment fraud against seniors.

Legislation. The Senate hearing was called to determine what, if any, additional federal legislation is needed to fight senior investment fraud. Congress is currently considering proposing legislation that would provide additional protection in connection with the sale of financial products such as annuities. In addition, state regulators have agreed on the need to enact legislation that sets out the basic criteria for specialist certification. NASAA is currently drafting a model rule to address senior designations. The model will serve as a rulemaking guide for state securities regulators to curtail the use of impressive-sounding but potentially misleading titles and professional designations, and will make the misuse of senior designations a separate violation of law.

Enforcement. State and federal enforcement actions already serve an important role in curbing investment fraud, and the SEC and state regulators have expressed no intention of curbing their aggressive enforcement in this area. The targeted examinations of free lunch seminars conducted by the SEC Office of Compliance, Inspections and Examinations, FINRA, and seven state securities offices will likely result in more enforcement cases. The conclusions of these examinations were released at the SEC's Seniors Summit.

Education. The SEC is committed to enhancing investor education, demonstrated by its sponsorship of the Seniors Summit and the expansion of the Office of Investor Education and Advocacy. The SEC has expressed that education should reach not only seniors, but their caregivers as well. Additionally, some state regulators are considering whether financial education should be part of the public school curriculum.

Court Approves Settlement in *Cooper v. Pacific Life*

BY DAWN WILLIAMS

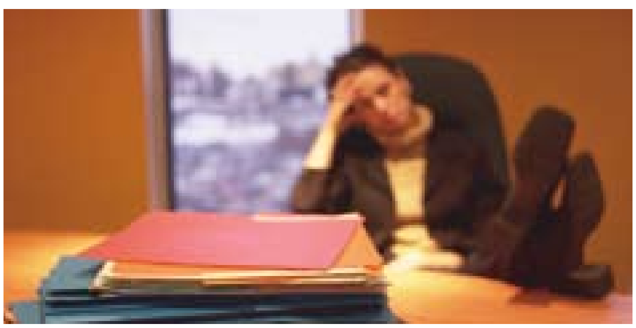
Settlement terms come into focus

Last year, the Southern District of Georgia denied Pacific Life's attempt to decertify a class comprising approximately 120,000 variable annuity purchasers alleging violations of the federal securities laws. (See "Variable Annuity Purchasers Get Certified," *Legal Horizons*, Vol. III, 2005.) On October 3, 2007, the court approved a classwide settlement providing for $60 million in cash and contract credits to the plaintiff class, and nearly $16 million in attorneys' fees and costs. The contract credits account for $20 million, to be paid annually over a period of five years to policyholders who retain their contract, and the average recovery for each class members is approximately $7.23 per $1,000 invested.

Insurer Responsibilities With Respect to Suitability

BY SARAH JARVIS

Recent NAIC proceedings and actions taken by at least one state indicate that insurers will have greater responsibilities with respect to suitability even if they have contracted with third parties to maintain a supervision system. The NAIC Suitability in Annuity Transaction Model requires the insurer to assure that the third party is performing the required function. To do so, insurers must do more than obtain annual certification of performance by the third party. The Suitability Model requires insurers to periodically select third parties to review. In this regard, the Florida Office of Insurance Regulation is requiring insurers to adopt policies and procedures to periodically select and audit third parties to determine if the third party is actually performing the functions required by the Suitability Model.



More reviews for insurers

The Market Regulation Handbook Working Group is also holding insurers responsible for compliance with the Suitability Model even if they rely on a third party. The Working Group expressly rejected a proposal to adopt separate suitability market conduct review standards based upon whether the insurer or third parties are directly supervising producers. They also rejected the notion that there were some instances "where it would be reasonable for a state examiner to expect that an insurer would not be responsible for state suitability requirements when a third party administrator is involved in the placement of annuity products." Moreover, the Working Group stated that it is the "obligation of the insurer to obtain the document[s] from the third party to provide to the state examiner." Thus, during a market conduct examination, regulators are entitled to not only look at the insurer's system, but also third parties' systems, and the insurer must obtain any required documents from third parties for the examination.

New Actions Against Agents Selling Annuities to Seniors

BY TODD WILLIS

In a new twist in the ongoing actions involving the sale of annuities, the SEC filed a securities fraud action against a Honolulu life and health agent alleging that he defrauded senior citizens into selling their securities holdings and purchasing deferred indexed annuities. According to the SEC, the agent fraudulently schemed to entice senior citizens to attend "free lunch" seminars. The agent would then purportedly lure the seniors into meeting individually with him and signing forms granting the agent permission to sell the seniors' existing securities holdings. The SEC alleges that the agent used the proceeds from the sale of the seniors' securities holdings to purchase deferred indexed annuities from which he received substantial commissions totaling almost $2 million.

Regulators take aim against alleged abuses

The SEC's investigation into the Honolulu agent was a joint effort with Hawaii state regulators that was part of a broader statewide examination sweep of financial services firms that sponsor "free lunch" investment seminars for seniors. As a result, Hawaii's Chief Deputy Insurance Commissioner, Gordon Ito, also filed an action at the same time as the SEC seeking permanent revocation of the Honolulu agent's license.

Not to be outdone, Massachusetts' Secretary William Galvin filed two more enforcement actions in August against two annuity agents charging that they used fraudulent sales practices and portrayed themselves as investment advisors with specialized expertise in advising elderly investors without being registered to do so. The Massachusetts Securities Division alleges that the two agents misled seniors through seminars that were supposed to provide non-biased investment advice, but were merely schemes in which to sell "high-commission" annuities. One action also alleges that the annuities were unsuitable for the seniors that purchased them.

Settlement Class Members Denied Second Bite at the Apple

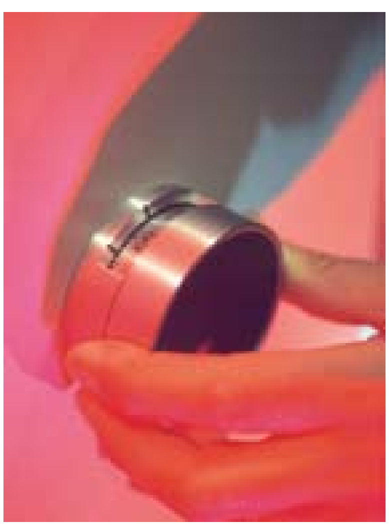
BY JULIANNA THOMAS MCCABE

Settlement notice tied their claims together

On July 25, 2007, the Eleventh Circuit affirmed a Georgia federal district court's order enjoining nine members of a 1999 class action settlement from relitigating their claims in new cases filed in Mississippi state court. *Adams v. Southern Farm Bureau Life Insurance Company* was a multi-state class action originally filed in 1998. The *Adams* complaint alleged class members were fraudulently induced in the mid-1980s to replace whole life insurance policies with flexible premium universal life (UL) policies. The named plaintiff in *Adams* contended, among other things, that UL purchasers did not understand they may have to increase premiums in later years to maintain their flexible premium policies. Six years after the *Adams* case was settled on a class-wide basis, nine *Adams* class members filed two new actions in Mississippi state court. Although each received the *Adams* class notice, these Mississippi class members were encouraged to file new lawsuits upon seeing a law firm's television advertisement showing rolls of cash exchanging hands in the background and promising potential "money damages." In opposing the defendant's federal court motion to enforce the 1999 settlement, the Mississippi plaintiffs alleged that their claims for "increasing premiums" were not released in the *Adams* settlement, and that the settlement notice in *Adams* failed to satisfy due process. The Eleventh Circuit soundly rejected these arguments, holding that the new claims were included in the broad release that was attached to the settlement notice, and that the 48-page class action notice booklet satisfied due process. Jorden Burt represented the prevailing insurer in the original class action and the subsequent litigation.

Are Insurance Policies Protected by U.S. Copyright Law?

BY DIANE DUHAIME



Policy language is safe from would-be looters

Many people who answer "no" to this question believe that once an insurance policy is filed with a state insurance department, the policy language enters the public domain and is free for all to copy. In fact, courts have held that insurance policies consisting of original works of authorship are copyrightable and protected by U.S. copyright law.

Over ten years ago, the U.S. District Court for the Western District of Louisiana in *B & S Underwriters, Inc. v. Clarendon Nat. Ins. Co.*, rejected the view that, under the McCarran-Ferguson Act, state filing laws preclude federal copyright protection of insurance policies. McCarran-Ferguson provides that no federal law shall be construed to supersede any state law that has the purpose of regulating the business of insurance unless such federal law specifically relates to the business of insurance. The defendants claimed that McCarran-Ferguson preempts federal copyright law and the state law permitting the approval of insurance policies by the insurance commissioner should apply. The court concluded that even if the state had a policy of allowing duplication of filed insurance policies, such policy is not considered regulating the business of insurance because it does not, directly or indirectly, protect or regulate the relationship between insurers and insureds. Thus, the court held that federal copyright law is not preempted by McCarran-Ferguson and defendants' motion for summary judgment on the copyright infringement claims was denied. In 2006, the U.S. District Court for the Northern District of Georgia issued an order which found copyright protection in certain supplemental insurance policies that required several months for the plaintiff to create.

Closing the Storm Surge Floodgates

Flood Damage Language in Homeowner's Policy Found Not "Ambiguous"

BY ELEANOR MICHAEL

The Fifth Circuit Court of Appeals in New Orleans recently ruled that language in a homeowner's policy that was used to deny coverage for flood damage was not "ambiguous." After Hurricane Katrina ravaged their home in Pascagoula, Mississippi, plaintiffs Paul and Julie Leonard brought suit against Nationwide Mutual Insurance Company to recover for both wind and storm surge damage to their home. In determining how much the Leonards could recover under their homeowner's policy, the court in *Leonard v. Nationwide Mutual Insurance Company* focused on the "anticoncurrent-causation clause," or "ACC clause," in that policy.

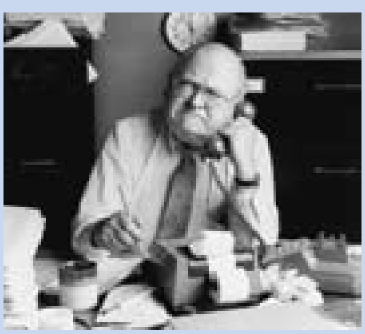
The policy documents aren't ambiguous if you read them

The language of the ACC clause indicates that coverage will be denied whenever an excluded peril and a covered peril combine to cause damage to a home. In this instance, the policy at issue contained a provision for wind damage, but did not include flood insurance. For this reason, Nationwide argued that the company was not responsible for damage resulting from a combination of wind and water.

The District Court initially found that the policy language was ambiguous, and generally, where the language of a policy is ambiguous, the court must construe the ambiguous terms in favor of the policyholder. However, the Appellate Court agreed with the insurer, ultimately holding that the plain language of the policy was unambiguous, and that the policy clearly did not provide coverage for damage caused concurrently by both wind and water, such as that caused by the storm surge. The court reasoned that the policy language left "no interpretive leeway" to conclude otherwise, and found that language such as that in the ACC clause has not been deemed ambiguous in the past.

The Duty to [Promptly] Defend?

BY JAKE HATHORN



Time is money for insurers in Texas

The cost of breaching the duty to defend just went up in Texas. The Texas Supreme Court in *Lamar Homes, Inc. v. Mid-Continent Casualty Company* has concluded that the state prompt-payment statute applies when a liability insurer wrongfully refuses or delays payment of a claim for defense benefits.

The Texas prompt-payment statute, Tex. Ins. Code §§ 542.051-061, provides for additional damages in the form of 18% annual interest on the amount of the claim, together with reasonable attorney's fees, when an insurer wrongfully refuses or delays payment of a claim. However, the statute defines "claim" as "a *first party claim* made by an insured or policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract [that] must be paid by the insurer directly to the insured or beneficiary."

Examining the phrase "first party claim," the court concluded that the Texas legislature did not intend to limit the prompt-payment statute to first-party insurance, but rather intended that the statute apply to claims personal to the insured. The court reasoned that first-party and third-party claims are distinguishable on the basis of the claimant's relationship to the loss: i.e., a first-party claim involves an insured seeking recovery for the insured's own loss, while a third-party claim involves an insured seeking coverage for injuries to a third party. Accordingly, a claim for the defense benefit provided by a liability policy would be a first party claim since, unlike the loss incurred in satisfaction of a judgment or settlement, loss in the form of defense costs belongs only to the insured and is in no way derivative of any loss suffered by a third party. As such, liability insurers doing business in Texas must now consider the requirements of the Texas prompt-payment statute in determining their duty to defend.

Spitzer Vetoes Late Notice Bill

But It Will Be Back

BY BEN SEESSEL

New York Governor Eliot Spitzer vetoed a bill that would have required insurers to demonstrate "material prejudice" before denying a New York policyholder's claim based on late notice. The bill (SB No. 6306) further would have permitted a tort plaintiff to file a declaratory judgment action against a defendant's insurer to determine the existence and extent of insurance coverage during the course of litigation.

Spitzer thinks good legislation needs more time to germinate.

Notwithstanding the veto, Governor Spitzer praised the "dual goals" of the bill -- namely preventing insurers from denying claims based on "a technicality" and streamlining litigation (by allowing claimants to determine the extent of insurance coverage prior to engaging in "protracted litigation"). The governor, however, was troubled by the fact that quick passage of the bill (it was passed in both houses just three days after introduction) did not allow sufficient time for interested parties to weigh-in on its potential effects. The governor, moreover, was concerned that the burden of proof that must be met on the part of an insurer before denying a claim (i.e., material prejudice) was unclear. Spitzer indicated, however, that he would have signed the bill had it permitted late notice where "no prejudice" was sustained by the insurer.

The governor called for studies of the bill's effects on the industry, consumers, and the courts, expressing "hope" that a bill could be passed effectuating the laudable goals of preventing claims denials based on a "technicality" and of streamlining litigation. Legislative watch groups expect the bill to be reintroduced in 2008.

Technology Update

Cybersquatters Eyeing New .Asia Domain Names

BY DIANE DUHAIME & ELEANOR MICHAEL

Companies that own one or more domain name registrations that end in .com will probably want to purchase domain name registrations that end in .asia. This is especially true for financial services companies that are doing business in Asia or are contemplating doing business in Asia.

This fall, the new .asia top-level domain will be launched in several phases and will cover 73 countries in the defined Asia/Australia and Pacific Region. The .asia domain name registrations are basically made available on a first-come, first-served basis. Therefore, in order to avoid the expense of enforcing trademark rights against cybersquatters, companies should apply as early as possible to purchase .asia domain name registrations.

Starting October 9, 2007, companies that own registered trademarks or service marks may apply for .asia domain name registrations for those marks (depending on the mark's application filing date). For example, if a company owns the U.S. service mark registration ABC for banking services, that company may apply early to register ABC.asia. All applicants must provide at least one local contact who meets the .asia Charter Eligibility Declaration requirements. Qualified third parties may serve as such a local contact.

Starting November 13, 2007, owners of registered marks may apply to obtain .asia domain names that contain their registered marks plus significant words that describe the goods or services offered under those marks. Taking the example above, the owner of ABC for banking services may apply to register the abcbank.asia and abcbanking.asia domain names. This is noteworthy because recent research shows that cybersquatters are much more likely to use another's mark plus additional words as opposed to typosquatting on the mark (e.g., ACB.asia).

More information concerning .asia domain names can be found at *www.dotasia.org.*

Congress Considers TRIA Extension

BY BOB SHAPIRO

With the Terrorism Risk Insurance Act (TRIA) set to expire at the end of the year, Congress has begun to seriously consider the act's extension. On August 1, 2007, the House Financial Services Committee passed H.R. 2761, which extends and revises TRIA. On September 19, 2007, the House approved the bill by a vote of 312-110. According to the Congressional Budget Office, the bill would cost approximately $10 billion. Some key features of the bill include extending its provisions for 15 years; adding group life insurance policies, including group universal life insurance and group variable life insurance, as a line covered by TRIA but excluding COLI/BOLI coverages; covering domestic terrorism acts; and setting the trigger at $50 million of aggregate industry insured losses for when this program begins compensating insurers. Among other major changes imposed on insurers seeking to participate in this program, insurers would have to begin making available coverage for losses from nuclear, biological, chemical, or radiological events beginning after January 1, 2009. The bill would also prohibit life insurers from denying or reducing coverage based on future foreign travel except under specified conditions and prohibits any underwriting based on past travel.

Looming threats help move TRIA extension

No parallel measure has yet been introduced in the Senate, but it is expected that any such bill will be significantly different than the House legislation. For example, it is unlikely that the Senate would go along with a 15-year extension, and although coverage for group life insurance may be in the Senate bill, it is likely to have different language regarding prohibiting life insurers from discriminating based on foreign travel.

States Modify Captive Laws To Attract Insurers

BY PATRICK LAVELLE

Many state legislatures are trying to capture the growing rate of U.S.-domiciled captive insurers with new laws and amendments that provide increased investment flexibility, less regulation and lower taxes for these companies. Competition to attract and retain captive businesses is increasingly fierce, and states hope that removing cumbersome regulations will help lure captive insurance companies to more favorable regulatory domiciles. Some notable state laws and amendments coming from the most recent legislative sessions include:

- Hawaii – A new law places a modest $200,000 cap on premium taxes paid by captive insurers; permits licensing of captives as limited liability companies; creates flexibility for the investment of captive assets; and clarifies capital and surplus requirements.
- Vermont – The amendment facilitates the use of captives in securitized financing transactions by establishing parameters for forming special purpose entities.
- Maine – A new law removes outmoded restrictions that served as a barrier for Maine's domestic insurers to establish special purpose vehicles and enter into sophisticated financing transactions.
- Missouri – A new law allows the formation of captive insurance companies to provide insurance and annuity contracts to its parent, affiliated, or controlled affiliated companies.
- Delaware – The amendment permits the formation of special purpose financial captives with new minimum capital requirements.

Treaty Tips: "Follow The Fortunes" Not Implied

BY LYNN HAWKINS

One of the fundamental doctrines in reinsurance is the concept of "follow the fortunes." This doctrine provides generally that a reinsurer must follow the underwriting fortunes of its reinsured and, therefore, is bound by the claims-handling decisions of its reinsured so long as there is no evidence of fraud, collusion with the insured, or bad faith. In *Employer Reinsurance Corporation v. Laureir Indemnity Company*, a Florida district court addressed whether this doctrine could be implied into a reinsurance contract where the contract did not expressly provide. The defendant, an insurer incorporated in Bermuda, argued that the absence of the clause constituted an ambiguity in the contract and that the court should allow custom to imply the clause into the reinsurance contract. The court disagreed, and after acknowledging that the parties negotiating a reinsurance contract are both sophisticated parties that could negotiate "an express" follow the fortunes clause into the agreement, concluded that it could not "go outside the laws of contract construction and outside the four corners of an unambiguous contract to add a clause that was not bargained for." As such, the court granted partial summary judgment for the plaintiff/reinsurer on the issue of the "follow the fortunes" clause.

Reinsurers bound to the underwriting fortunes of their reinsured

Putative Class Action Filed Against Lloyd's Syndicates and Brokers

BY ROLLIE GOSS

A putative class action case has been filed in the U.S. District Court in Miami against a number of Lloyd's syndicates, three Marsh entities, two Aon entities and two Willis entities, alleging wrongful conduct in the payment of undisclosed contingent commissions and undisclosed conflicts of interest in the placement of insurance. The complaint alleges federal and state antitrust, federal RICO, fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract, civil conspiracy, and unjust enrichment claims. The allegations are similar to other class action cases filed against other companies with respect to undisclosed commissions, "pay to play" allegations and allegations of charges to steer business to particular companies. The case was filed by a group of law firms, some of which have significant experience as class counsel in insurance sales practice cases. Although reinsurance is not specifically mentioned, and the coverages at issue are direct writings, this is of interest since it challenges practices in placements with Lloyd's syndicates.

Reinsurers: Limit Your OFAC Exposure

BY KAREN BENSON

While U.S. reinsurers are not subject to AML regulations, they must comply with regulations of the Office of Foreign Assets Control (OFAC). U.S. reinsurers could be at risk for potential exposure to OFAC violations if they enter into reinsurance arrangements without understanding the underlying OFAC risk level of the pool of reinsured contracts. OFAC violations can result in serious penalties and reputational damage. Accordingly, U.S. reinsurers need to understand their OFAC responsibilities and consider taking action to lessen their exposure to potential OFAC violations.

Understand the underlying risk

Reinsurance Extra

Connecticut Attorney General Alleges Antitrust Violations

BY BOB SHAPIRO

Alleged antitrust violations investigated in CT

On October 8, Connecticut Attorney General Richard Blumenthal filed a lawsuit against Guy Carpenter, a subsidiary of Marsh & McLennan Companies, Inc., and Excess Reinsurance Company alleging price fixing and other antitrust violations in Connecticut. According to Blumenthal, through a series of conspiracies led by Guy Carpenter and joined by Excess Reinsurance Company, a reinsurer partly owned and managed by Carpenter, as well as nine other co-conspirators not named as defendants, Carpenter sought to fix prices for reinsurance paid by insurers writing business in Connecticut.

The alleged conspiracy involved groups of reinsurers willing to participate in the creation of facilities to provide reinsurance at prices and contract terms fixed in advance. The result, according to the complaint, was participating reinsurers ceasing to compete with each other on price and contract terms, "thereby reducing the variety of reinsurance services offered to primary insurance companies in Connecticut and elsewhere." In addition to increasing reinsurance prices, the complaint alleges that these actions directly caused an increase in the insurance prices paid by consumers in Connecticut and elsewhere.

The complaint seeks an injunction and monetary penalties, including treble damages for violations of the Connecticut Antitrust Act and additional monetary penalties for violations of the Connecticut Unfair Trade Practices Act. Blumenthal made clear that his investigation regarding the alleged conspiracy and the nine unnamed co-conspirators is continuing.

Firm Accolades

Jorden Burt a "Recommended Law Firm"

In the 2007 BTI Power Rankings, Jorden Burt was named a **"Recommended Law Firm"** in the "Client Advocates: Law Firms that Clients Recommend" category noted for making an exceptional impression on clients. This is Jorden Burt's third year in a row as a Recommended Law Firm. BTI Power Rankings are compiled from a survey of General Counsel at Fortune 100 companies and published by the BTI Consulting Group.

WASHINGTON MONITOR—An inside look at key regulatory agencies

SEC in Transition

BY GARY COHEN

The SEC is entering a period of transition that could affect the current SEC agenda for life insurance companies and mutual funds. A shuffling of Commissioners has begun.

Commissioner Roel L. Campos, a Democrat, recently left the Commission. The term of Commissioner Annette L. Nazareth, also a Democrat, expired last June. She reportedly has said that she would like to leave by the end of the year. The term of Commissioner Paul S. Atkins, a Republican, expires next year. And there is a general expectation that Chairman Christopher Cox will leave sometime after the Presidential elections in November 2008.

SEC commissioners begin moving out

The SEC has said that it is currently addressing a number of matters of great interest to life insurance companies and mutual funds, such as:

- The status of indexed insurance products as insurance or securities;
- The independence of mutual fund boards and their chairpersons;
- The revision or rescission of Rule 12b-l authorizing distribution plans; and
- Disclosure reform, including electronic delivery of prospectuses.

Very generally speaking, the Commission has been split along party lines. Democratic Commissioners have favored rules promoting fund governance reforms. Republican Commissioners have insisted on rigorous cost-benefit analyses to justify new rules. Chairman William H. Donaldson and Chairman Cox, both Republicans, have voted with the Democratic Commissioners on key issues. The courts have supported the approach taken by the Republican Commissioners.

Looking ahead, the matter of independence of fund boards and chairpersons probably will be voted up or down. The status of indexed products and the revisiting of Rule 12b-1 could be tabled or addressed otherwise than by new rules.

Disclosure reform for funds is likely to be implemented. It is of personal interest to Chairman Cox, and all of the Commissioners appear to support it. However, the Commission historically has dragged its feet in implementing for separate accounts what it has implemented for funds.

SEC Adopts XBRL for Mutual Fund Risk/ Return Summaries

BY CHIP LUNDE

The SEC has adopted rule amendments to expand its voluntary XBRL program, effective August 20, 2007. The amendments allow mutual funds to submit the risk/return summary section of their prospectuses using the data tagging taxonomy developed by the Investment Company Institute. The amendments are intended, in part, to allow the SEC to test the viability of tagging narrative information in filings.

Checking up on new XBRL amendments

The amendments were adopted largely as proposed, subject to a few modifications. First, mutual funds with multiple series are not required to tag all series. However, if any information for a series is tagged, all the risk/return summary information for that series (including each class) must be tagged. Second, while all class-specific information must be separately identified by class, information that is not class-specific, such as investment objectives, is not be required to be identified by class. Third, any Form N-1A with a tagged exhibit must disclose, in the exhibit index and in the tagged exhibit itself, that the purpose of submitting the tagged exhibit is to test the format and technology, and that investors should not rely on the exhibit.

To address liability concerns, the SEC extended the liability protections under the existing voluntary program to the tagged risk/return summary information. The SEC also adopted new rule amendments that provide that tagged exhibits are not deemed filed for purposes of Section 11, and that tagged exhibits are not deemed part of the registration statement to which they relate.

Mutual funds that participate in the program are required to file the tagged risk/return summary as an exhibit to a currently effective registration statement. Participants continue to be required to file their complete official registration statements in HTML or ASCII format. Participation in the program does not create a continuing obligation to submit tagged data for subsequent filings.

SEC Finalizes Adviser Anti-Fraud Rule

BY JOEL SMITH

The SEC took final action in August to adopt new Rule 206(4)-8 under the Investment Advisers Act, which prohibits the investment advisers of "pooled investment vehicles" from making false or misleading statements to, or otherwise defrauding, investors in those vehicles. The effective date for the new rule was September 10, 2007.

Rule 206(4)-8 was proposed in response to *Goldstein v. SEC*, where the court opined that, for purposes of the general antifraud provisions under sections 206(1) and 206(2) of the Advisers Act, the "client" of an investment pool was the pool itself, not the individual investors. As a result, the SEC believed it was "unclear whether the [SEC] could continue to rely on sections 206(1) and (2) of the Advisers Act to bring enforcement actions … where investors in a pool are defrauded by an investment adviser to that pool."

The new rule applies to both registered and unregistered investment advisers and to both registered investment companies or any privately-offered pooled investment vehicle excluded from the definition of "investment company" by reason of sections 3(c)(1) or 3(c)(7) of the Investment Company Act. Notably, unlike violations of Rule 10b-5, the SEC need not demonstrate that an adviser violating Rule 206(4)-8 acted with scienter.

No cheating!

SEC Sanctions Pension Consultant

BY KAREN BENSON

Document potential conflicts of interest to avoid SEC sanctions.

In a recent enforcement action, the SEC sanctioned a Pittsburgh-based pension consultant, Yanni Partners (Yanni), and its president for misleading pension plans about conflicts of interest.

According to the SEC's findings, Yanni had business arrangements with some of the same money managers that it evaluated or recommended to clients. The SEC said that these arrangements created conflicts of interest that were not adequately disclosed in responses Yanni and its president prepared in connection with client requests for information regarding particular money managers. The SEC also found that certain responses contained materially misleading statements giving the false impression that Yanni had no potential conflicts of interest and received compensation only from its clients.

The SEC concluded that Yanni and its president violated the anti-fraud provisions of the Advisers Act. Without admitting or denying the SEC's findings, Yanni and its president agreed to settle the action and pay civil penalties of $175,000 and $40,000, respectively.

In May 2005, the SEC Office of Compliance Inspections and Examinations issued a report concerning examinations of select pension consultants that revealed concerns about the independence of advice provided by pension consultants who offer services both to pension plans and money managers and the extent to which consultants disclose potential such conflicts to clients. It might, therefore, come as no surprise if the SEC now has its sights set on pension consultants who have not heeded those concerns.

Know Your Compliance Obligations

BY ED ZAHAREWICZ

The SEC recently sanctioned a hedge fund manager for failing to file any Form 13Fs for over three years. Quattro Global Capital, LLC, a registered investment adviser, agreed to settle the charges, without admitting or denying the SEC's findings, by agreeing to, among other things, the payment of a $100,000 civil penalty.

Section 13(f) of the Exchange Act requires certain institutional money managers to file a Form 13F quarterly with the SEC disclosing their "13(f) securities." The SEC alleged Quattro continued to fail to file its 13Fs even after it had notice of the filing requirement. For example, the SEC found that Quattro's compliance manual and earlier drafts thereof described the Form 13F requirements, as did a client memo from Quattro's outside counsel.

Don't skip those deadlines for filing SEC forms.

Quattro allegedly filed its first 13F only after the SEC inspection staff questioned its failure to make the required filings, and only filed retrospective 13Fs after further inquiry from the SEC enforcement staff. The SEC action against Quattro provides some obvious reminders: read your compliance manual, understand your obligations, and take prompt corrective action to address any compliance deficiencies.

SEC E-Proxy Rules Mandate Shareholder Choices

BY PETER PANARITES

Shareholders can read proxy materials anywhere

The SEC has adopted amendments to its privacy rules that give shareholders a choice in the way they receive proxy materials and vote at meetings. The amendments also mandate Internet postings of proxy materials, including the notice of meeting, proxy statement and proxy card. The new "E-Proxy" rules phase in over the next two proxy seasons and apply to all proxy solicitations by SEC reporting companies, including investment company issuers registered under the Investment Company Act of 1940.

A "notice and access" model requires issuers to provide a "Notice" of the availability of the proxy materials. Shareholders then may select either a "notice only option" or a "full set delivery option." Under the notice only option, issuers are required to send the Notice to shareholders at least 40 days before the meeting. The Notice must state that the proxy materials are posted on an Internet website, other than the SEC's EDGAR site, and advise shareholders of the Internet availability of proxy materials. The Notice must explain that shareholders have a choice as to how they may receive proxy soliciting materials, which can be in paper form or through the Internet.

The notice only option requires issuers to send a paper or email copy of the proxy materials in response to a shareholder's request. The Notice must include a required legend and an overview of the complete proxy materials, and note the availability of proxy materials, including paper copies without charge.

Under the full set delivery option, issuers would mail paper copies of the proxy materials at least 40 days before the shareholder's meeting. Intermediaries, such as brokers, must follow similar procedures.

Registered investment companies may comply with the amended rules for proxy solicitations commencing in 2008, and must comply with the amended rules commencing January 1, 2009.

SEC Grants Temporary Principal Trading Relief

BY ED ZAHAREWICZ & SARAH JARVIS

On September 19, 2007, the SEC voted to adopt a temporary rule that establishes an alternative means for firms that are registered both as broker-dealers and investment advisers to comply with the principal trading restrictions under Section 206(3) of the Advisers Act. Temporary Rule 206(3)-3T was adopted as part of the SEC's response to a recent court decision that invalidated Rule 202(a)(11)-1, which provided that fee-based brokerage accounts were not advisory accounts and were, therefore, not subject to the Advisers Act.

Firms that are registered both as broker-dealers and investment advisers generally do not offer principal trading to advisory clients, as most firms find it impracticable to comply with the written disclosure and client consent requirements of Section 206(3). By allowing broker-dealers to offer fee-based accounts without complying with Section 206(3), Rule 202(a)(11)-1 had enabled dual-registered firms to make available to clients certain securities held in the firm's principal accounts, such as municipal securities.

As a result of the court's decision, fee-based brokerage customers had until October 1 to convert to fee-based advisory accounts or to commission-based brokerage accounts. Rule 206(3)-3T, which became effective on September 30, 2007, and expires on December 31, 2009, is intended to enable customers with fee-based advisory accounts to continue to have access to municipal securities and other types of dealer instruments.

SEC Approves New Requirements for Sales of Deferred Variable Annuities

BY RICHARD CHOI

The SEC approved FINRA Rule 2821 on September 7, 2007, imposing new requirements on member firms who sell deferred variable annuities (VAs). The new requirements relate to recommendations, principal review and approval, supervisory procedures and training.

FINRA and Deferred Variable Annuities: It's a question of fit

First, to recommend the purchase or exchange of a deferred VA, a member must have a reasonable basis to believe that the transaction is suitable in accordance with FINRA's general suitability rule (Rule 2310). This includes, among other things, having a reasonable basis to believe that the customer would benefit from certain features of the VA, such as living benefits.

Second, before transmitting a deferred VA application to the issuing insurer for processing, but not later than seven business days after the customer signs the application, a registered principal must review and determine whether to approve the transaction. (To address concerns regarding net capital requirements and the requirements for the safeguarding of customer funds, the SEC granted conditional exemptions to enable broker-dealers to hold customer funds while making the determinations required by Rule 2821.)

Third, the Rule requires members to develop and maintain supervisory procedures reasonably designed to achieve compliance with the Rule. Finally, the Rule requires members to develop and implement training programs tailored to educate registered representatives and principals on the material features of the deferred VAs and the Rule's requirements.

In general, the foregoing requirements apply to purchases and exchanges of deferred VAs, and to initial subaccount allocations, but not to subsequent transfers among subaccounts or to subsequent premium payments.

FINRA is expected to publish a Notice to Members on or about November 6, 2007, and the Rule is expected to become effective not later than March 5, 2008 (120 days after publication of the Notice to Members).

Mandatory Arbitration Clauses in Jeopardy

BY MARION TURNER

Legislation has been introduced in both the House and Senate that could make it impossible for broker-dealers to continue their practice of routinely binding customers in advance to mandatory arbitration.

The proposed legislation (S. 1782/H.R. 3010) would cover agreements to arbitrate, among other things, consumer or employment disputes, or disputes arising under any statute intended to regulate contracts or transactions between parties of unequal bargaining power. The legislation would invalidate an agreement to arbitrate any of these types of disputes if the agreement is entered into prior to the time the dispute arises. Furthermore, questions as to whether any such pre-dispute arbitration agreement is valid would be resolved in court, instead of through arbitration.

At press time, the House and Senate Judiciary Committees, where the bills were referred, have scheduled no additional action on this legislation.

Congratulations!

Benson Named to ACAMS Executive Board: Jorden Burt associate **Karen Benson** was named as Co-Secretary of the South Florida Chapter of the Association of Certified Anti-Money Laundering Specialists (ACAMS). The new chapter should build a strong local coalition of AML professionals and enlighten members with shared experiences, tips and strategies on regional, national and international AML issues.

FINRA Moves With Respect to Seniors and Near Seniors

BY TOM LAUERMAN

Several ongoing FINRA regulatory "sweeps" have broker-dealers on edge concerning their sales to customers who are near or past retirement age. Among other things, the sweeps are looking for broker-dealers and registered reps who:

- Use so-called "professional" designations that allegedly mislead or defraud investors (including seniors, particularly);
- Encourage customers to move assets from their existing retirement plans into other investment vehicles that are not in the customer's best interest. This can also include ill-advised recommendations that customers retire early and/or take advantage of tax law provisions that that permit certain penalty-free withdrawals from retirement plans before age 59-1/2. FINRA is also launching a new campaign to assist unions and employer human resource officers in combating improper practices of this type;
- Make inappropriate sales of collateralized mortgage obligations to seniors; or
- Fail to meet their legal obligations in connection with sales of life settlements of insurance policies (which most frequently involve seniors).

Broker-dealers worn out from FINRA sweeps

In addition to these sweeps that are still ongoing, FINRA has recently completed a sweep (conducted jointly with other regulators) concerning sales tactics used at "free lunch" seminars, which often involve seniors.

FINRA has also issued Regulatory Notice 07-43 to remind broker-dealers of their obligations in connection with sales of products to seniors and others approaching retirement. The Regulatory Notice contains extensive guidance, including examples of "best practices" that have been adopted by many firms.

Broker-Dealers: Are Your Business Entertainment Policies Up To Date?

BY MARILYN SPONZO

To prevent improprieties that may arise when a registered representative gives gifts to employees of a customer, FINRA has proposed interpretive material for its Rule 3060 (Influencing or Rewarding Employees of Others). The interpretation is pending at the SEC.

Using a principle-based approach rather than quantitative standards, the interpretation requires that broker-dealers have written policies and procedures addressing business entertainment provided to representatives of customers. The policies and procedures must:

- Define appropriate forms of business entertainment and specify how their value is calculated;
- Impose specific dollar limits on business entertainment or require advance written supervisory approval beyond specified thresholds;
- Establish qualification requirements for supervisors;
- Require training for all personnel; and
- Include maintenance of detailed records of business entertainment expenses.

The interpretation generally exempts broker-dealers whose business entertainment expenses are below $7,500 annually. The interpretation does not supersede the variable contract/investment company non-cash compensation provisions of Rules 2820 and 2830.

Registered Reps Fear Defamation

BY MICHAEL VALERIO

Reps fear besmirched reputations

Registered reps are apprehensive about a judicial trend to limit redress for any defamatory statements about them that may be contained in Form U-5 termination notices. Not surprisingly, broker-dealer firms, who must file these notices with FINRA after a registered rep leaves the firm, are delighted by this trend to limit their potential liability.

Quiet recently, New York's highest court held that a broker-dealer firm has absolute immunity under New York law from liability for any defamatory statements in a Form U-5. Among other things, the court noted that broker-dealer firms are required to provide a reason for the registered rep's departure in the Form U-5, which furthers the public interest by facilitating FINRA's ability to investigate and punish potential misconduct.

Cases of this type have spawned public outcry from at least one trade organization whose members include registered reps who could be the victims of any inaccurate reports on Forms U-5. This organization seeks to focus attention on the need it sees for Form U-5 reporting reforms in order to protect registered reps from potential firm reporting abuse, and inaccurate filings that can irreparably harm registered reps' reputations and careers.

To date, FINRA has expressed little interest in pursuing reforms in this area. Whether registered reps continue to press the issue remains to be seen.

FINRA Endorses Multiple CCOs/CEOs

BY MARILYN SPONZO

Recognizing that compliance expertise exists in various business units of a broker-dealer, FINRA now allows broker-dealers to designate multiple Chief Compliance Officers (CCOs) to discharge the requirements of Rule 3013 (Annual Certification of Compliance and Supervisory Processes). A firm may designate multiple CCOs as long as:

1) Each is identified on Form BD;
2) Each is a registered principal;
3) The firm precisely defines and documents the primary compliance areas assigned to each CCO and specifically addresses areas that may overlap;
4) Each CCO satisfies all the requirements of FINRA Rule 3013 and IM-3013 with respect to assigned responsibilities; and
5) Collectively the CCOs have responsibility for, and expertise in, the complete range of activities in which the firm engages.

A related rule amendment permits designation of co-chief executive officers solely for purposes of Rule 3013 and IM-3013, as long as each CEO individually discharges all requirements under the Rule, and is responsible for and signs the annual compliance certification.

FINRA allows for more suits in the compliance office

Court Clarifies Class Certification Standard

BY FARROKH JHABVALA

The Fifth Circuit recently ordered a nationwide class to be decertified because the plaintiffs failed to provide the district court with "an 'extensive analysis' of state law variations to reveal whether these pose 'insuperable obstacles'" to certification. *Cole v. General Motors Corp.* concerned breach of warranty claims relating to certain Cadillac Devilles. The district court certified a nationwide class under Federal Rule 23(b)(3). The Court of Appeals reversed, explaining that "[t]he Rule 23(b)(3) certification inquiry must . . . consider how 'variations in state law affect predominance.'" The plaintiffs sought to meet their burden by providing the court with "an extensive catalog" of state warranty laws, an "overview" of textual variations among the various states' laws, and the report of an expert on contract law who opined that the "few variations" in state law were such as would not "affect the result." The Fifth Circuit found that "plaintiffs did not sufficiently demonstrate the predominance requirement because they failed both to undertake the required 'extensive analysis' of variations in state law concerning their claims and to consider how those variations impact predominance." It added that "Plaintiffs' largely textual presentation of legal authority oversimplified the required analysis and glossed over the glaring substantive legal conflicts among the applicable laws of each jurisdiction." Clarifying the applicable standard, the court held that the "district court was not in a position to determine that 'questions of law and fact common to the members of the class predominate' in the vacuum created by plaintiffs' omission."

Class decertified for not extensively analyzing state variations

Court Imposes Conditions to Prevent Plaintiffs' End-Run of CAFA

BY LARA GRILLO

The New Jersey district court rejected plaintiffs' attempt to circumvent federal jurisdiction under the Class Action Fairness Act (CAFA) in *Shappell v. PPL Corp.* by voluntarily dismissing class allegations in order to litigate smaller classes in state court. Plaintiffs had filed a class action in state court alleging several state law claims, and the defendants had removed the case to federal court pursuant to

Court checks plaintiffs' attempts to circumvent CAFA

CAFA. Unwilling to litigate their claims in federal court, plaintiffs sought voluntary dismissal of the class allegations and requested remand of the case to state court. Defendants opposed dismissal on the grounds that they would be prejudiced by plaintiffs' likely attempt to avoid federal litigation by dismissing the class allegations and subsequently "gerrymandering" smaller classes in state court. These smaller classes would be unlikely to meet CAFA's $5 million threshold for removal, thereby foreclosing removal of the successor cases. Although the court ultimately granted dismissal of the entire case under the third circuit's liberal standard for voluntary dismissals, it did so on the condition that none of the plaintiffs would use dismissal as a tactic to circumvent CAFA. Because such strategic use of the federal rules would undermine the legislative intent behind CAFA, the court prohibited the named plaintiffs from filing or entering a class action in any court in the United States on the basis of any theory of recovery stemming from the facts of the complaint.

Interlocutory Class Appeals

Ten Days Means Ten Days

BY MICHAEL SHUE

The Eleventh Circuit blocked an Alabama district court's attempt at circumventing Rule 23(f)'s ten-day deadline for interlocutory appeals of class certification orders in *Jenkins v. BellSouth Corp.* Plaintiffs had previously appealed the denial of their class certification motion, and the Eleventh Circuit had denied their petition for interlocutory appeal because it was filed after Rule 23(f)'s 10-day time limit had run. In an attempt to revive the interlocutory appeal period, plaintiffs moved the district court to vacate and reenter identical class certification orders, arguing that a courier service mishap on the eve of Thanksgiving Day prevented a timely appeal and constituted excusable neglect. The district court granted plaintiffs' motion, and vacated and reentered an identical order denying class certification. Plaintiffs then again petitioned the Eleventh Circuit for interlocutory appeal. The Eleventh Circuit held that the district court lacked the authority to circumvent Rule 23(f)'s ten-day deadline by vacating and reentering an earlier order, and that the appeal petition was therefore untimely. The Court relied heavily on the Advisory Committee Notes following Rule 23, which explain that the district courts are to play no formal role in the interlocutory appeal process. Moreover, the Court stated that the Committee Notes explain that "the ten-day deadline provides a single window of opportunity to seek interlocutory review, and that window closes quickly to promote judicial economy." The Eleventh Circuit's opinion is consistent with previous decisions in the Fifth, Seventh and Tenth Circuits which have also rejected district court attempts at circumventing Rule 23(f)'s ten-day deadline.

Filed-Rate Doctrine Applies In Class Actions

BY JULIANNA THOMAS MCCABE

The Ninth Circuit recently applied the filed-rate doctrine in an appeal arising out of Multidistrict Litigation. In *In re NOS Communications*, the plaintiffs asserted federal and state-law claims against two telecommunications providers for alleged violations of the Federal Communications Act (FCA), fraud, breach of contract, intentional infliction of emotional distress, and other claims, such as violation of state consumer fraud statutes. The district court dismissed all claims on the ground that they were barred by the filed-rate doctrine. The Ninth Circuit affirmed the dismissal of all claims under the FCA and all state-law claims which sought to impose rate obligations on the providers other than the filed rates, explaining that customers are "charged with notice of the terms and rates set out in th[e] filed tariff and may not bring an action against a carrier that would invalidate, alter or add to the terms of the filed tariff." The court also agreed with the Second Circuit that the filed-rate doctrine applies in class actions. The court reversed the dismissal of several state law claims to the extent those claims "neither attack the rates nor require reference to the filed-rate for a calculation of damages."

Updates from the World of Arbitration

BY LANDON CLAYMAN

The Eleventh Circuit recently handed down two noteworthy decisions that are related to earlier rulings it has made on important arbitration issues.

In *Becker v. Davis,* the court reinforced earlier rulings relating to parties that are not signatories to written contracts containing arbitration agreements. First, the court reaffirmed that under principles of equitable estoppel a nonsignatory plaintiff cannot avoid arbitration if its claims rely on the terms of such written contracts. The court further held that when a claim of the nonsignatory plaintiff contains both arbitrable disputes (ones that rely on the terms of the written contract), and non-arbitrable disputes (ones that do not), the arbitrable disputes must be sent to arbitration, while the other aspects of the claim will not be subject to arbitration. Finally, the Eleventh Circuit reaffirmed that nonsignatory defendants may invoke the arbitration clause of the written contract. Specifically, the court held that a nonsignatory plaintiff may be estopped from avoiding arbitration against nonsignatory defendants to the extent the plaintiff's claims involve disputes that rely on the terms of a written contract containing an arbitration clause.

In *Dale v. Comcast Corp.*, the court revisited a developing area of the law of arbitration, and held that a class action waiver contained in the arbitration clause of a consumer contract was unconscionable and unenforceable. Recognizing that in earlier decisions it had upheld and enforced arbitration agreements precluding class action relief, the court ruled that class action waivers must be evaluated on a case-by-case basis, considering the totality of the circumstances. Relevant considerations, it said, include the fairness of the arbitration provisions, the cost of vindicating individual claims compared to the potential recovery, the ability to recover attorneys' fees and thus to obtain representation to prosecute an individual claim, and the practical effect the class action waiver will have on the defendant's ability to engage in potentially unlawful behavior.

Looking at all arbitration issues

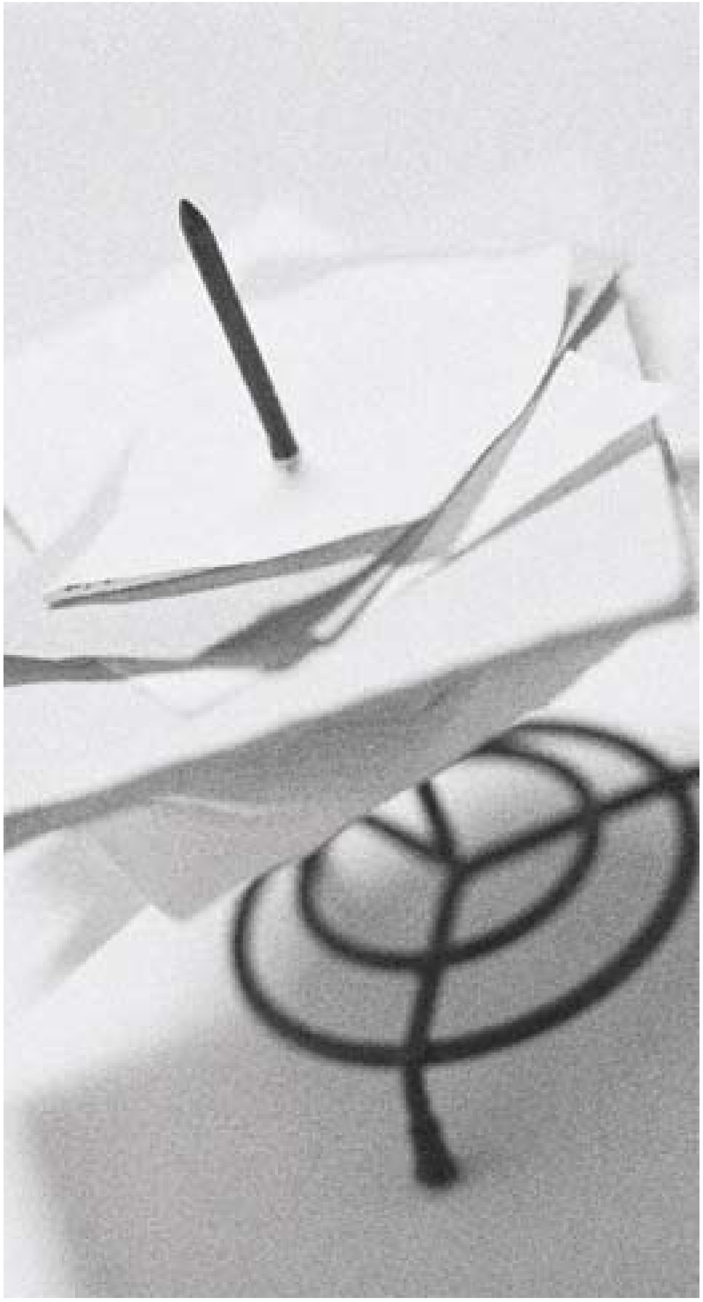
Announcing

Jorden Burt is pleased to welcome two associates, Lynda Chang in our DC office and Michael Wolgin in our Miami Office. Both Ms. Chang and Mr. Wolgin were summer associates with the firm in 2006.

Ms. Chang received her J.D. from The George Washington University Law School. While at GWU, she was a semi-finalist in the Moot Court Competition, participated in the Alternative Dispute Resolution Negotiations Competition and was Vice President of the Asian-Pacific American Law Student Association. She holds a B.A., with distinction, from Cornell University

Mr. Wolgin received his J.D. from the University of Miami School of Law. While at UM, he was a quarterfinalist in the Moot Court Competition, a staff editor for the Inter-American Law Review, a member of the International Moot Court Board, and a participant in the NITA Litigation Skills program. He holds a B.S., with distinction, from Yeshiva University.

NEWS & NOTES



Publications

Elizabeth Bohn wrote “Faster, But not Cheaper: Trends and Decisions in Business Bankruptcies after BAPCPA,” in the September – October 2007 issue of *Business Law Today*.

Rollie Goss authored “Hot Issues in Electronic Discovery: Information Retention Programs and Preservation” in the Spring 2007 issue of *Tort Trial & Insurance Practice Law Journal*.

Paul Fischer and **Robin Sanders** wrote “How Changes to the NASD Code of Arbitration Procedure May Affect Customer Arbitrations” in the August 2007 issue of *The Metropolitan Corporate Counsel*.

Speeches and Presentations

On August 12, 2007, **Elizabeth Bohn** spoke on the Supreme Court’s decision in *Safeco Ins. v Burr* at the ABA Banking Law Committee Forum at the ABA Annual Meeting in San Francisco.

Ann Young Black and **Jason Gould** presented “What Not to Do When Developing Your Sales Program” at the American Bankers’ Insurance Association Annual Conference. Jorden Burt was also a sponsor for the conference, September 16-17 in Washington, DC.

Steve Kass spoke on “Life Insurance Fundamentals” at the PLI Insurance Law 2007 Conference, July 26-27, 2007 in New York, NY.

Diane Duhaime moderated a Jorden Burt sponsored roundtable discussion on “Business Method Patents and Other Types of IP Protection for Financial Services Products,” August 2, 2007 in Hartford, CT.

Mark your Calendars

The 25th annual ALI-ABA conference, “Life Insurance Company Products: Current Securities, Tax, ERISA and State Regulatory and Compliance Issues,” will be held November 8-9, 2007 in Washington, DC. Jorden Burt partner Richard Choi co-chairs the program; the faculty includes partners Gary Cohen and Shaunda Patterson-Strachan.

Jorden Burt is co-sponsoring a dinner in honor of the 25th anniversary of this conference, which was co-founded by our partner, James Jorden.

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