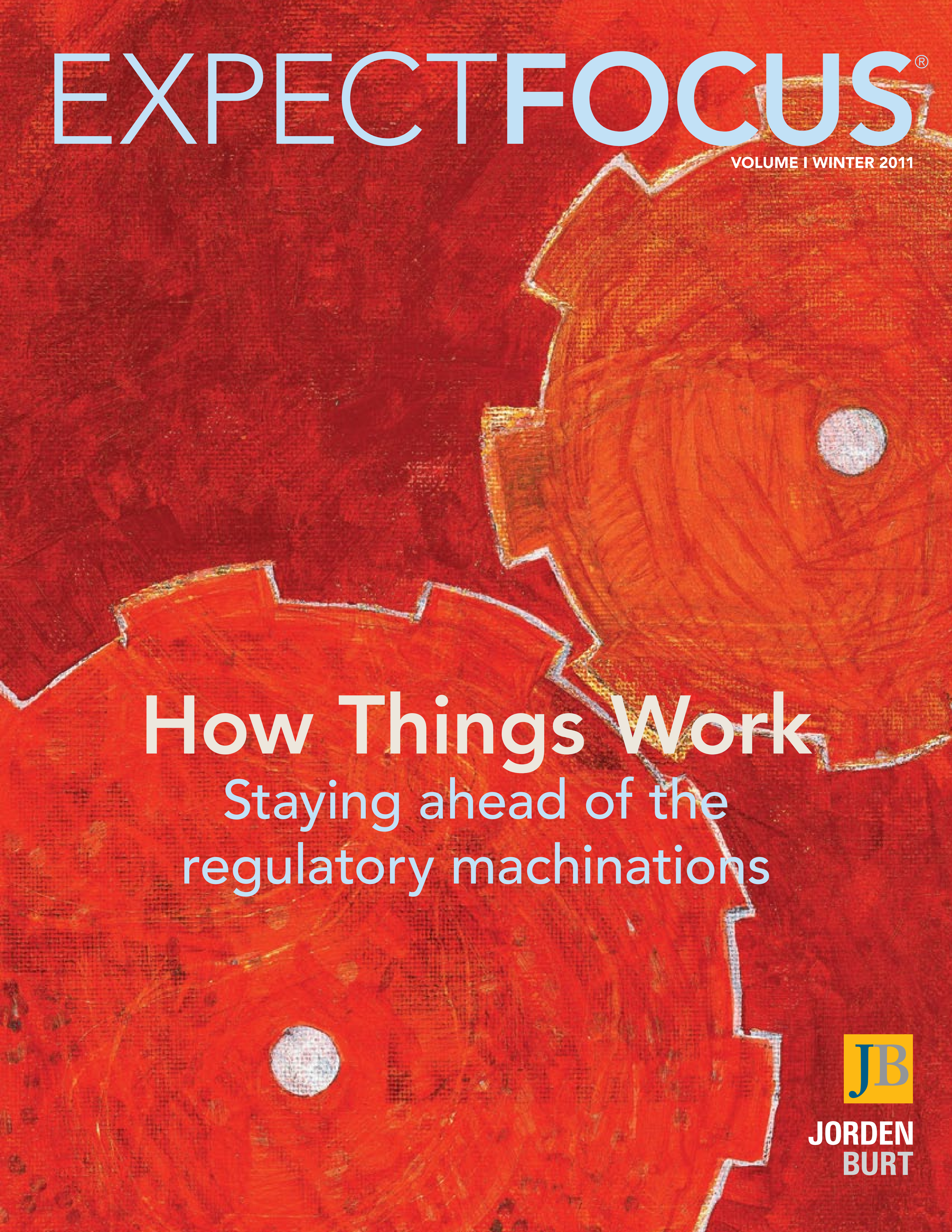

EXPECT FOCUS®

VOLUME I WINTER 2011

How Things Work

Staying ahead of the regulatory machinations

JB
JORDEN BURT

EXPECTFOCUS® Vol. I WINTER 2011

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

Department of Labor Weighs in on Use of Retained Asset Accounts to Pay Benefits Under ERISA Plans

BY KRISTIN SHEPARD & ROBIN SANDERS

In connection with the pending, fully briefed and argued appeal in *Faber v. Metropolitan Life Ins. Co.*, the Second Circuit Court of Appeals requested that the Department of Labor provide answers to three questions related to the use of Retained Asset Accounts (RAAs) to pay insurance benefits under an ERISA-governed plan.

RAAs: Under watchful eyes

The Department of Labor's response, filed February 17, 2011, relied on the fact that ERISA does not place restrictions on the method by which welfare benefit plans provide benefits, so long as the method chosen is set forth and communicated to participants in plan documents. Accordingly, the Department of Labor commented that the "key question" to be addressed in *Faber* is whether the provision of life insurance benefits through RAAs complies with the terms of the relevant Plans.

The Department of Labor opined that, contrary to the facts at issue in the First Circuit's decision in *Mogel v. UNUM Life Ins. Co. of America*, the terms of the Plans at issue in *Faber* specifically provided for the payment of benefits through RAAs. Further, pursuant to the Plans' terms, MetLife's ERISA-governed fiduciary obligations to the Plans, its participants, and beneficiaries cease at the time benefits are paid into RAAs, and the maintenance of the RAAs is controlled by individual accountholder agreements between MetLife and RAA accountholders. Thus, according to the Department of Labor, the District Court appropriately dismissed plaintiffs' putative class action claims because, at the time benefits are paid into RAAs, any fiduciary obligations as to the payment of plan benefits through the RAAs are satisfied and the funds deposited into the RAAs are not Plan assets. For more information on the Department of Labor's response, see the February 22, 2011 client alert at *www.jordenusa.com*.

CONTENTS

IN THE SPOTLIGHT

LIFE INSURANCE

HEALTHCARE

PROPERTY & CASUALTY

REINSURANCE

SECURITIES

CONSUMER FINANCE & BANKING

NOTEWORTHY

Filing Could Force SEC To Take Position on Harkin Amendment

BY GARY COHEN & KRISTIN SHEPARD

The Harkin Amendment requires the SEC to treat indexed products as exempt securities *if* they meet specified conditions. However, the SEC has not stated whether or how it will police satisfaction of the conditions, nor has it announced whether it believes that the status test under the statutory exemption for insurance products remains the same or whether the SEC will continue to view the statutory exemption as an exclusion from all provisions of the federal securities laws.

The SEC's own filing requirements, however, might force its hand. For instance, a life company, filing a registration statement for a new indexed product, seeking to withdraw a current registration statement for an existing indexed product, or amending a registration statement for a variable product to add an unregistered indexed investment option, could require the SEC to take a position as to the applicability of the Amendment and/or the satisfaction of its conditions for each filing.

In such a situation, the SEC could follow one of at least three approaches:

- Conduct its own review of an indexed product's eligibility for exemption under the Amendment, which could entangle the SEC in the interpretation of state insurance law;
- Accept, without further action, the filer's implicit representation that the indexed product satisfies the conditions for reliance on the Amendment's exemption, and, in doing so, yield at least principal jurisdiction over indexed products to state insurance regulators; or
- Adopt a middle stance, such as requiring an opinion of counsel to be filed concluding that the indexed product satisfies the conditions for reliance on the Amendment's exemption. The SEC has followed this last approach in the past regarding the status of fixed benefit investment options where the life insurance company retained the latitude to modify the interest rate in excess of the guaranteed minimum rate.

Questions raised by the Amendment are set out and analyzed at *www.jordenusa.com*, under the Indexed Annuity and Insurance Products Task Force. The background and history are also available there.

California Courts Take A Hard Look At STOLI Transactions

BY DAWN WILLIAMS

A dim view taken of stranger-oriented policies

The Central District of California decided two cases only a few weeks apart that clarify the law applicable to STOLI transactions in California. In the first, *S.E.C. v. Private Equity Mgmt. Grp.*, Principal Life sought to lift a stay of proceedings against Private Equity Management (PEM) so that it could sue PEM to void a life insurance policy sold to a third party investor. The court allowed Principal to bring the action, finding that it had a "colorable claim" that the policy was void for lack of an insurable interest, in part because the beneficiary sold all interest in the policy to PEM less than three weeks after the policy was issued.

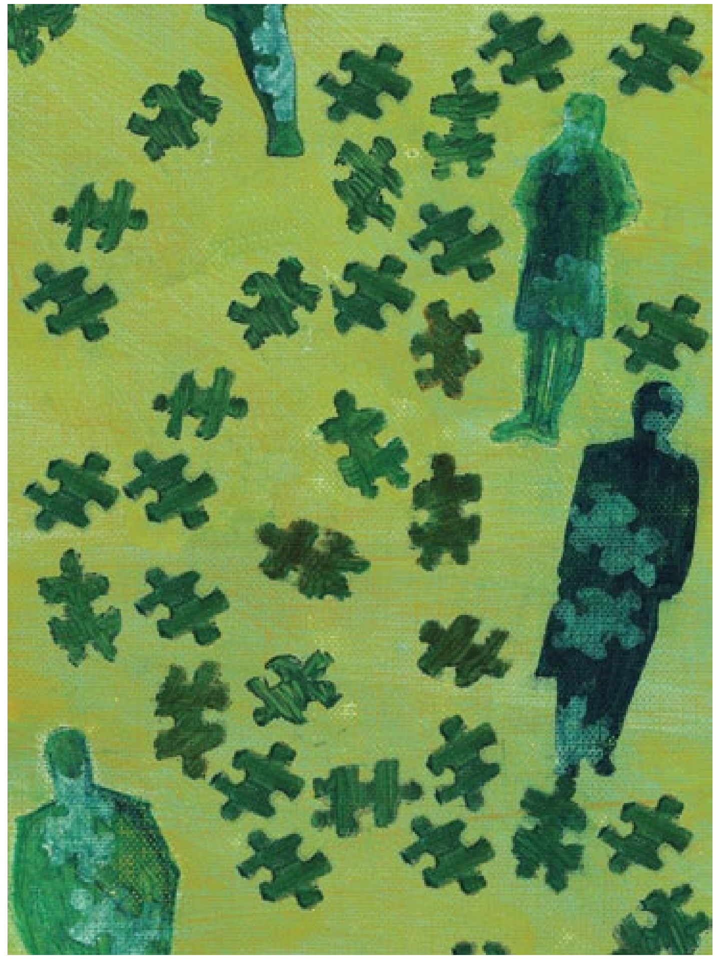
Shortly thereafter, the same court granted an insurer's motion for a preliminary injunction in *Ohio Nat'l Life Assurance Corp. v. Davis.* The insurer brought a declaratory judgment suit seeking to have the policy declared void based on lack of insurable interest, and moved for an order enjoining policy changes during the pendency of the proceeding. The court found that there was a likelihood of success on the merits, as **any life insurance contract in California is void without an insurable interest at the time of policy inception**. Although the beneficiaries at the time of contracting were trusts that included the insured's wives as beneficiaries, a recently amended California statute prohibits any device used to give the appearance of insurable interest where there is none. Consequently, the court found that because the other facts of the case indicated that the trust was a device used to circumvent the insurable interest requirement, the insurer would likely succeed on the merits in voiding this prohibited STOLI transaction.

Class Actions In The Supreme Court:
Important Decisions Imminent

BY BRIAN PERRYMAN

Four cases pending in the United States Supreme Court could change the rules relating to how class actions are treated in federal courts.

- In *AT&T Mobility LLC v. Concepcion*, the Court will decide whether the Federal Arbitration Act preempts state-law unconscionability rules prohibiting "no-class-action" arbitration clauses in standardized consumer contracts. The case was argued on November 9, 2010.
- *Wal-Mart Stores, Inc. v. Dukes* involves a nationwide class of hundreds of thousands of female Wal-Mart employees. The class alleges Wal-Mart engaged in pay and promotion sex discrimination. The Court granted certiorari on the questions of how the class action "commonality" requirement is to be applied, as well as what it means for monetary relief to "predominate" in a mandatory class action. Argument is set for March 29, 2011.
- The Court in *Erica P. John Fund, Inc. v. Halliburton Co.* will address the burden of proof for class certification in a securities fraud case when the plaintiff seeks to prove causation and reliance based on a "fraud on the market" theory. Certiorari was granted on January 7, 2011.
- Finally, in *Smith v. Bayer Corp.*, the Court will decide whether a federal court that has denied class certification may enjoin relitigation of the class certification denial by members of the putative class in subsequent legal proceedings. The case was argued on January 18, 2011.



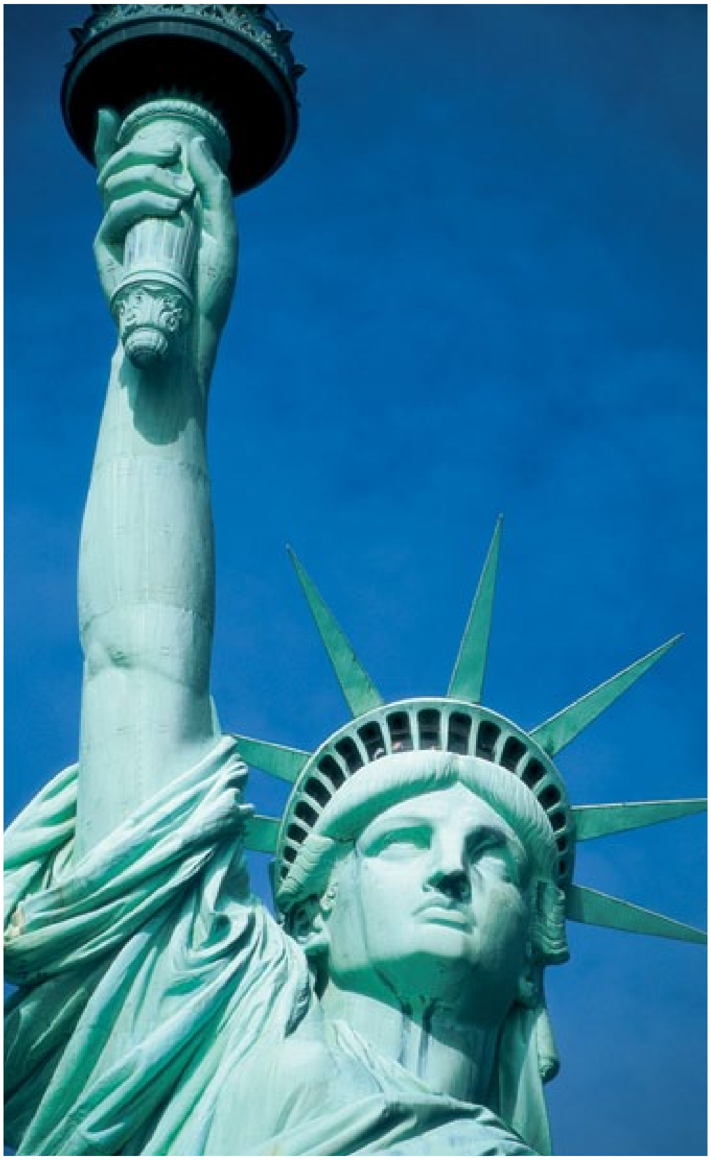
Fitting together the pieces of Rule 23 – the work never stops

Mark Your Calendars

The ALI-ABA Conference on Insurance and Financial Services Litigation will take place May 5 and 6, 2011 in Washington, DC. Managing Partner **Jim Jorden** and DC Partner **Wally Pflepsen** serve as planning chairs for the conference, and **Shaunda Patterson-Strachan**, partner in the DC office, is on the faculty. For more information and to register, visit *www.ali-aba.org*.

Courts On Different Coasts Rule In "No-Injury" Lawsuits

BY EDDIE KIRTLEY



Does "Made in U.S.A." always mean Made in U.S.A?

In *Kwikset Corp. v. Superior Court*, the California Supreme Court sent a message to the business community: "**Labels matter**." The lawsuit stemmed from Kwikset's labeling of locksets it manufactures as "Made in U.S.A." The plaintiffs brought suit under California's Unfair Competition Law (UCL), alleging the labels were false because some lockset components originated abroad. While the case was pending, California voters enacted Proposition 64, which was designed to curtail "shakedown" suits by permitting a UCL plaintiff to sue only if he suffers an injury and loss of money as a result of the alleged misconduct. In response to Proposition 64, the plaintiffs filed an amended pleading alleging they would not have purchased the locksets but for the "Made in U.S.A." representation. Although the lower court deemed the allegations insufficient to establish statutory standing, the California Supreme Court ruled for the plaintiffs. It held that **"plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property' within the meaning of Proposition 64 and have standing to sue."** Otherwise, consumers' ability to rely on labels would be impaired and it would "encourage the marketplace to dispense with accuracy in favor of deceit." The dissenting justice accused the majority of making it easier for plaintiffs to achieve standing under the UCL law, contrary to the electorate's stated intent in passing Proposition 64. The dissent argued the plaintiffs lacked standing to sue over locksets that were neither malfunctioning nor overpriced. Many observers expect the ruling to lead to increased UCL litigation.

On the other side of the country, the District of Columbia Court of Appeals, sitting *en banc*, held that a plaintiff asserting a violation of the District's Consumer Protection and Procedures Act **must have traditional "injury in fact" standing to sue**. In *Grayson v. AT&T Corp.*, the court construed the Act's language to conclude that the District's Council did not intend to eliminate that requirement when it amended the Act in 2000.

Mark Your Calendars

Robin Sanders, associate in the DC office, is presenting "Life Insurance Case Law Update" at the DRI Life, Health, Disability and ERISA Claims Seminar. The seminar will be held April 27-29, 2011 in Boston, MA. For information and to register, visit *www.dri.org*.

California Court Sides With Plaintiff In Cost of Insurance Class Action

BY ERIC COMBS

A California federal court handed a merits victory to the plaintiff in a certified class action alleging that an insurer wrongfully decided to increase the cost of insurance (COI) charges for certain universal life insurance policies. The complaint in *Yue v. Conseco Life Ins. Co.* asserted claims for breach of contract and violations of California Business and Professions Code § 17200, *et seq.*, and sought injunctive, declaratory, and monetary relief. Having moved for partial summary judgment for declaratory relief, the plaintiff argued that the plain language of the policies governed, and the Central District of California recently agreed, holding the insurer could not permissibly increase cost of insurance rates at a time or for reasons other than those stated in the policies. In siding with plaintiff, the court found that the modifier "current" in the phrase "current monthly cost of insurance rates" serves "as a limitation on Conseco's ability to set deferred COI rates." The court went on to state that the policy language's "'expectation as to future mortality experience[]' means expectation of the 'rate of mortality.'" It did not, the court concluded, allow COI to be based on a comparison of the cost of projected death claims against the amount of revenue derived from COI. Conseco has appealed the decision to the Ninth Circuit.

Limits set on COI calculations

Scribner, Hall & Thompson, LLP

I.R.C. § 162(m)(6) Is Clarified for Many Insurance Companies

BY JANEL C. FRANK

This article is a follow-up to one published in the Summer 2010 volume of this newsletter. That article discussed how small amounts of health insurance coverage business might subject some insurance companies to the new $500,000 compensation deduction limitations under I.R.C. § 162(m)(6). A company is subject to the compensation deduction limitations for taxable years beginning after December 31, 2012 (post-2012 years), if at least 25 percent of its gross premiums from health insurance coverage comes from "minimum essential coverage" — that is, coverage for hospital and medical care (but not accident, disability income, and liability insurance or stand-alone policies for dental, vision, and long-term care). A company is subject to the deduction limitations for taxable years beginning after December 31, 2009, and before January 1, 2013 (pre-2013 years) if the company received any amount of premium from health insurance coverage. Based upon ambiguities in the statute, it appeared that the 25%-of-gross-premium test for post-2012 years applied only to health insurance coverage and therefore one old medical policy on the books of an insurance company could subject it to the deduction limitations under I.R.C. § 162(m)(6). In addition, it appeared that any amount of premium, including premium from policies not considered minimum essential coverage, such as long-term care and dental policies, would subject the company to the deduction limitations for pre-2013 years. With the issuance of Notice 2011-2 on December 23, 2010, some insurance companies can breathe easier. Notice 2011-2 makes it clear that the compensation deduction limitations do not apply unless both the pre-2013 and post-2012 definitions are satisfied. Notice 2011-2 also provides a de minimis exception that excludes a company if the company's premiums from health insurance coverage are less than 2 percent of its gross revenues for the taxable year. Essentially, based on this guidance, an insurance company will not be subject to the I.R.C. § 162(m)(6) deduction limitations unless the premiums it receives from policies that provide minimum essential coverage equal or exceed at least 2 percent of the its gross revenues for the taxable year.

Health Plan is Entitled to Reimbursement From Settlement Proceeds Recovered by Employee

BY IRMA SOLARES

The Eleventh Circuit Court of Appeals recently ruled that, where the plain language of an employer sponsored plan so provides, the plan is entitled to full reimbursement for medical benefits that the employer paid on its employee's behalf. In *Johnson Controls, Inc. v. Flaherty*, the employee, Flaherty, was injured in a bicycle accident, and subsequently recovered settlement proceeds for the injury from a third party. While the Johnson Controls, Inc. Welfare Plan requested full reimbursement pursuant to ERISA, 29 U.S.C. § 1132(a)(3), Flaherty insisted that the attorneys' fees and costs incurred in obtaining the settlement, which amounted to $14,467.44, should be deducted from the settlement proceeds before the funds were subject to the Plan's reimbursement claim.

The Eleventh Circuit, affirming a ruling in the District Court, found that **the terms of the Plan, which are clear and unambiguous, expressly provide that when an employee receives benefits under the Plan and thereafter recovers from a third party for his injuries, the Plan "has the right to be reimbursed for such benefits in full,"** and that "no portion of the [Plan]'s recovery shall be reduced by the fees or costs (including attorney's fees) associated with any claim, lawsuit, or settlement agreement in connection with any recovery, without the express written consent of the Plan Administrator." The court also noted that the Summary Plan Description contained very similar express language. Because the Plan and SPD terms were unambiguous, the court was compelled to enforce them as written and required Flaherty to reimburse Johnson Controls for the entire amount the Plan paid in medical expenses on Flaherty's behalf, without deduction for attorneys' fees and costs.

Abuse of Discretion Standard of Review Applied to Plan Amendment Decision

BY ROBIN SANDERS

As a result of a Plan amendment, a participant in a multi-employer employee benefit pension plan issued pursuant to a collective bargaining agreement (CBA), found that occupational disability benefits he had received for fifteen years were terminated. He appealed the termination by arguing that his benefits became vested when he became disabled. The trial court agreed.

Sixth Circuit: No agreement, no inference

In vacating the District Court's summary judgment ruling, the Sixth Circuit Court of Appeals, in *Price v. Board of Trustees of the Indiana Laborer's Pension Fund, et al.*, observed that since the Plan at issue was a welfare benefit plan, ERISA's vesting requirements were inapplicable. The court acknowledged, however, that such welfare benefits **may become vested if the parties expressly or inferentially agree for such vesting to occur**. Since the fact that there was no express agreement to vest plaintiff's benefits was not in dispute, the court's analysis turned to whether there could be an inference of vesting pursuant to the Circuit's "Yard-Man inference," which applies to welfare benefit plans issued pursuant to a CBA. The court held that the Yard-Man inference was inapplicable because plaintiff's benefits were occupational disability benefits, not retiree health benefits. Thus, as a matter of law, it could not infer that plaintiff's benefits were vested.

Next, the court turned to whether the Board of Trustees's decision to terminate plaintiff's benefits was improper pursuant to the terms of the Plan. The court held that **because the Plan gives the Board of Trustees discretion** to interpret the Plan's terms and to make benefit determinations, **the applicable standard of review for the Board's decision** that plaintiff's benefits were not vested and terminable due to the relevant Plan amendment **was the abuse of discretion standard of review**, not the de novo standard of review applied by the District Court. As a result, the court remanded the case for further briefing before the District Court on the reasonableness of the Trustees' decision to terminate plaintiff's benefits. The Sixth Court's recognition that, under certain circumstances, the abuse of discretion standard of review could apply to benefit decisions related to Plan amendments is critical, particularly as economic conditions continue to affect whether and how employers and welfare benefit plan providers offer future welfare benefits to former active employees.

Lack of Fund Distribution Procedure Dooms Class Settlement

BY JOHN HERRINGTON

The Fifth Circuit Court of Appeals recently reversed a district court's approval of a class settlement involving a mandatory Rule 23(b)(1)(B) limited fund class after finding that the $21 million settlement was not fair, reasonable or adequate. In its analysis, the court focused on the lack of procedure for distributing the settlement fund among class members, and the failure to show that the settlement would benefit class members.

In *In re Katrina Canal Breaches Litig.*, objectors of a proposed settlement class appealed the district court's settlement approval and certification of a class consisting of plaintiffs in numerous lawsuits filed in the wake of the levee breaches during hurricanes Katrina and Rita. Relying on the Supreme Court's opinion in *Ortiz v. Fireboard Corp.*, the court held that the proposed settlement's reliance on a special master rather than a specific set of procedures to resolve the difficult equitable distribution issues among the class members **fell short of satisfying the essential element of a limited-fund settlement that class members be "treated equitably among themselves."**

The court also held that the district court abused its discretion because the proposed settlement provided no assurance that there would be any money left after the payment of attorneys' fees, a possibility the notice to class members failed to disclose.

Insurer Properly Calculated Roof Damage Loss

BY JONATHAN STERLING

In *O'Neal v. State Farm Fire & Casualty*, the Eighth Circuit Court of Appeals affirmed the District Court's dismissal of a putative class action by homeowners claiming that their insurer improperly calculated repair costs due to them. The plaintiffs had purchased a homeowner's policy from State Farm that included coverage for damage to wood shingles caused by wind or hail. After a storm, State Farm inspected the damage to plaintiffs' home and approved a claim to replace a number of damaged shingles.

The homeowner sued, asserting that not only the damaged shingles, but the entire portion of the roof above those shingles should be replaced. The International Residential Code (IRC), which the parties agreed applied, requires that shingles be attached to the roof with two nails per shingle. The plaintiffs argued that the IRC imposes an unstated requirement that four nails be used to secure each shingle, as the two nails penetrating each shingle through the overlapping row above should also be counted, and therefore requires removal and replacement of all shingles at or above the point of the damaged shingle. **State Farm argued that the IRC's two nail requirement meant exactly what it said**. The Eighth Circuit agreed with State Farm and found that **the plain text of the IRC governed**, and State Farm owed only the cost of the damaged shingles.

Fifth Circuit: CGL Policies Are Not Performance Bonds

BY JAMES GOODFELLOW

VRV Development, a general contractor hired to develop residential lots in Dallas, TX, purchased commercial general liability (CGL) coverage from Mid-Continent Casualty in May 2004, during the development process. The coverage was renewed in May 2005 but not in May 2006. In early 2007, heavy rains caused retaining walls on four lots to collapse after cracks were discovered in one of the walls the prior July; the resulting property damage led to a lawsuit. VRV tendered the suit to Mid-Continental, which refused to defend or indemnify and VRV sued.

The Fifth Circuit Court of Appeals, in *VRV Development LP v. Mid-Continental Casualty Co.*, affirmed the lower court's entry of summary judgment in favor of the insurer, concluding that while the damage to the walls occurred during the effective period, such damage was subject to an exclusion. The court stated that **CGL policies generally "do not serve as a performance bond covering an insured's own work."** Moreover, the court observed that the property damage was caused by the collapse of the walls, not exposure to the cracks, explaining that "**property damage does not necessarily occur at the first link in the causal chain of events**," thus the focus must be on "the time of the actual physical damage…not the time of the negligent conduct."

Seventh Circuit Validates "Repeat" Arbitrator

BY JOHN PITBLADO

John Hancock Life and Trustmark arbitrated to a panel consisting of two party-appointed arbitrators and a neutral umpire. The panel found in favor of Hancock, and the award was confirmed in court. When Trustmark refused to pay the award on the basis that it should be subject to offsets for other items that were in dispute, Hancock initiated a new arbitration over this refusal, naming the same arbitrator it had appointed in the first arbitration.

Fact: Tripartite panels contain partial arbitrators

Addressing a threshold issue, the new panel held 2-1 that a confidentiality agreement executed in the first arbitration, which prohibited disclosure of the evidence, proceedings, and award therein, did not preclude Hancock's arbitrator from revealing information from the first proceeding to the new panel. Trustmark then filed in Federal District Court to enjoin Hancock's arbitrator from participating in the second arbitration, contending that the arbitrator was not "disinterested" because he knew what happened in the first arbitration. The District Court agreed with Trustmark and issued the injunction, which Hancock appealed.

The Seventh Circuit Court of Appeals reversed, holding that **the nature of tripartite panels entails that party-appointed arbitrators will typically be partial to the parties who selected them**. The court explained, however, that this does not mean such arbitrators are not "disinterested," unless they have some financial or other personal stake in the outcome. The court rejected the district court's conclusion that the arbitrator's purported violation of the confidentiality agreement demonstrated partiality, pointing out that the arbitrator would be just as "disinterested" as the district court judge himself, who had also participated in adjudicating both sets of proceedings. In-depth discussion of this decision, captioned *Trustmark Insurance Company v. John Hancock Life Insurance Company (U.S.A.)*, appears in a Special Focus feature on Jorden Burt's reinsurance blog at *www.ReinsuranceFocus.com.*

State Reinsurance Collateral Reform Initiatives Pick Up Steam

BY ANTHONY CICCHETTI

With its Tenth Amendment to 11 NYCRR 125 (Regulation 20), New York became the second U.S. state to enact a reinsurer ratings-based framework to allow ceding insurers to take **full statutory financial statement credit for reinsurance ceded to certain unauthorized reinsurers without the reinsurers posting commensurate collateral**. The amended regulation became effective January 1, 2011. A discussion of key provisions therein is available in a Special Focus feature on Jorden Burt's reinsurance blog at *www.ReinsuranceFocus.com*.

Can a ratings-based framework raise capacity and lower costs?

Florida was the first state to adopt a reinsurer ratings-based framework for reinsurance collateral, applicable to property and casualty reinsurers. (New York's regulation applies to reinsurance of risks relating to life, annuities, and accident and health, as well as property and casualty.) Florida has recently expanded the ranks of reinsurers authorized for reduced collateral; as of February 1, 2011, Florida had so authorized seven property and casualty reinsurers, indicating some success in its aim to attract additional capacity.

Other states reportedly are considering reinsurer ratings-based frameworks. Indeed, the NAIC's latest activity in this regard appears to anticipate similar state initiatives on a widespread basis (see accompanying article regarding the NAIC's Reinsurance Task Force recommendations). In the end, market realities may dictate the pace at which more states adopt reinsurance collateral reforms. If moves like those in New York and Florida prove to increase capacity and decrease costs of reinsurance for domestic cedents, other states may be forced to follow in order to keep "level" yet another "playing field" – that on which their own domestic insurers compete with insurers domiciled in other states.

Developments in Reinsurance and Surplus Lines Regulation

BY ROLLIE GOSS

Regulators have been hard at work creating rules to implement the Dodd-Frank Act (DFA). **Much of the activity of interest to the reinsurance industry concerns the surplus lines provisions of the DFA**, which focus on the collection and allocation of premium tax revenues and other regulatory issues. On December 16, 2010, the NAIC adopted a suggested model act limited in scope, for the most part, to the premium tax issues. The National Conference of Insurance Legislators, however, has adopted and advocates a broader proposal covering premium taxes, eligibility, and streamlined regulation of brokers and placement activities. The Council of State Governments has endorsed NCOIL's proposal. Some are beginning to question whether the July 2011 effective date for the DFA's reinsurance and surplus lines subtitle is realistic.

Among other notable events, the Financial Stability Oversight Council initiated rulemaking to determine the process and factors to be used to determine which nonbank financial companies may be designated for enhanced prudential supervision by the Federal Reserve. The Council also issued a report on the implementation of the Volcker Rule relating to investments in hedge funds and private equity funds. The report suggests some "accommodations" for insurance companies to permit them to hedge risks without excessive regulation. In addition, just prior to his retirement from the House, Rep. Dennis Moore introduced in December 2010 a bill providing for a federal licensing scheme for national reinsurers. This bill is supported by the Reinsurance Association of America, but its prospects are unknown.

These matters are tracked on Jorden Burt's reinsurance blog at *www.ReinsuranceFocus.com*.

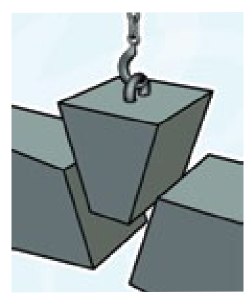
NAIC Task Force Addresses State Reinsurance Collateral Reforms

BY ANTHONY CICCHETTI

The NAIC's 2008 Reinsurance Regulatory Modernization Framework Proposal contemplated, among other things, a reinsurer ratings-based framework for reinsurance collateral requirements. In response to an informal request by the Financial Regulation Standards and Accreditation (F) Committee for identification of the key elements of the NAIC's Framework Proposal that should be considered in reviewing individual state initiatives, the **NAIC's Reinsurance (E) Task Force in October 2010 adopted Reinsurance Collateral Reduction & Accreditation Recommendations**. These recommendations identified two principal steps with respect to state-based reinsurance regulatory modernization efforts. The first is amendment of the Credit for Reinsurance Model Law and Regulation to incorporate key elements of the 2008 Framework Proposal. The second involves submission of such key elements to the F Committee to serve as guidance for use when reviewing any state reforms to reduce reinsurance collateral.

Treaty Tips: Avoiding Gaps in Reinsurance Cover

BY ANTHONY CICCHETTI



Modifications to underlying policies can create reinsurance coverage gaps. In *Arrowood Surplus Lines Insurance Co. v. Westport Insurance Co.*, a reinsured unsuccessfully sought to close such a gap by resorting to a "follow the fortunes" provision in the reinsurance agreement. That agreement circumscribed the reinsurer's exposure to underlying policies that became effective after the inception date of the agreement (February 1, 1999) and with respect to occurrences thereunder before the agreement's termination date (August 18, 2000). The agreement gave the reinsured a "run-off" option. If exercised for an eligible policy, that option extended coverage to occurrences through the anniversary of the policy's inception date. The reinsured exercised the option for the underlying policy at issue, but the policy was modified to provide for coverage beyond one year. The Second Circuit concluded that the reinsurance agreement's express terms covered only occurrences in the initial one-year period of the policy. Moreover, the "follow the fortunes" provision was inapposite because it "cannot expand the express limits of coverage imposed by a reinsurance agreement." **The reinsured's failure to align its underlying exposure with its reinsurance when the policy was modified apparently resulted in no reinsurance cover for the claim at issue.**

SECURITIES

Studies Fail to Clarify Regulatory Future for Investment Advisers and Broker-Dealers

BY TOM LAUERMAN

Several key studies that have now been delivered to Congress leave important aspects of the future regulation of investment advisers and broker-dealers shrouded in mist. The tight timetables under which the Dodd-Frank reform legislation required these studies to be prepared may have limited their value as indicators of future policy.

SEC, call me when you have something definitive

The SEC staff authored two such studies, discussed in "SEC Demurs on SRO Examinations of Investment Advisers" (the "Adviser Examination Study") and in "Unclear Whether Customers Could Recover for Breach of New Uniform Fiduciary Standard" (the "Harmonization Study") on page 13. The credibility of these SEC staff studies is somewhat undermined, however, by the fact that (1) the SEC itself has specifically declined to express agreement or disagreement with the substance of the studies and (2) certain SEC Commissioners have released separate statements criticizing some aspects of the studies.

Moreover, in these studies, the staff often calls for further consideration of a given proposal or question. For example, rather than advocating a specific regulatory approach, the Adviser Examination Study's principal "recommendation" is that Congress "consider" three alternative reform proposals that are discussed in the study. Thus, this study largely puts the ball back in Congress' court.

With additional time, the SEC and its staff might have been able to reach more definite conclusions, and the SEC Commissioners might have been able to speak with a more unified voice. Indeed, in their separate statement concerning the Harmonization Study, SEC Commissioners Casey and Paredes specifically make the point that they might ultimately agree with the staff's recommendations in the study, if further supporting research and analysis is undertaken.

Similarly, the Government Accountability Office's report on the regulation of financial planners concludes that additional information should be gathered concerning certain possible deficiencies in regulation (summarized in "GAO Makes Limited Recommendations for Financial Planners" on page 14). Such deficiencies may justify enhancements to the investment adviser or broker-dealer regulation to which financial planners are commonly subject.

It remains to be seen to what extent any changes in regulation of investment advisers and broker-dealers will be supported by facts and analyses in addition to those contained in the studies to date. If not, the public record supporting some changes might be sub-optimal. Such things have happened before.

Mark Your Calendars

Ann Furman, partner in the DC office, will be addressing suitability issues on the "Harkin Amendment Aftermath" panel at the Association of Life Insurance Counsel Annual Meeting. The meeting will be held May 14-17, 2011 in Tucson, AZ. For more information, visit *www.alic.cc*.

SEC Demurs on SRO Examinations for Investment Advisers

BY SCOTT SHINE

A recent study conducted by the staff of the SEC's Division of Investment Management recommends that Congress consider the following three alternatives to strengthen the SEC's investment adviser examination program:

- impose user fees on SEC-registered investment advisers that could be retained by the SEC to enhance its examination program;
- authorize one or more self regulatory organizations (SROs) to examine all SEC-registered investment advisers; or
- authorize FINRA, where a registered broker-dealer firm is also a registered investment adviser, to examine that firm for compliance with the Investment Advisers Act.

The study, mandated by the Dodd-Frank reform legislation, does not state a preference as among these alternatives. The study, however, does discuss the advantages and disadvantages of each.

The study reflects only the views of the Division staff, although the SEC (with SEC Chairman Mary Schapiro not voting) voted to approve delivery of the study to Congress in satisfaction of Dodd-Frank's mandate. The SEC made clear, however, that its approval expresses no view regarding the substance of the study.

SEC Commissioner Elisse Walter published a separate statement expressing a strong preference for the SRO alternative. In so doing, she expressed a belief that the Division staff's discussion of advantages and disadvantages paints too flattering a picture of the user fee alternative, and too unflattering a picture of the SRO alternative.

A recent GAO report (discussed in "GAO Makes Limited Recommendations for Financial Planners" on page 14) also considers the advisability of SRO examinations for investment advisers, including those who are financial planners. In its conclusions, the GAO report does not make any specific recommendation as to an SRO. It is not entirely clear, however, to what extent the GAO would disfavor SRO examinations of investment advisers or, rather, is merely according some deference to the SEC's consideration of this issue.

Unclear Whether Customers Could Recover for Breach of New Uniform Fiduciary Standard

BY TOM LAUERMAN

Although the SEC staff has recommended that investment advisers and broker-dealers be subject to a uniform fiduciary standard of conduct, the staff did not specifically state whether customers could claim damages for breach of the new standard.

The staff's recommendation appears in an SEC staff study released in January, in response to a mandate in the Dodd-Frank reform legislation. Specifically, the study recommends that the SEC adopt a rule requiring that, when providing retail customers with personalized investment advice about securities, both investment advisers and broker-dealers must act in the customers' best interest.

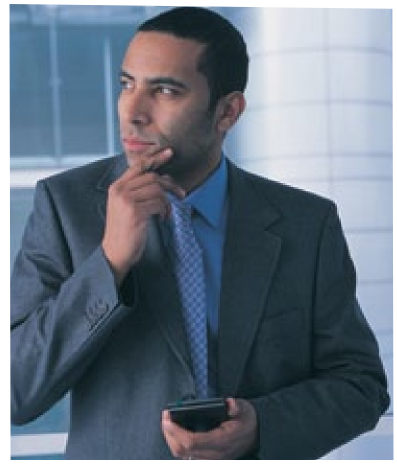
The study recommends that the new uniform standard be essentially the same as the current fiduciary duty that the federal Investment Advisers Act is construed to impose on investment advisers. A breach of this current fiduciary duty does not give rise to a private claim for damages by customers under the Investment Advisers Act. Likewise, the SEC staff may contemplate that its recommended uniform fiduciary standard not subject investment advisers or broker-dealers to private claims for damages.

Even so, under the staff's recommendation, the uniform fiduciary standard would merely supplement (rather than supplant) "the existing investment adviser and broker-dealer regimes." The study seems to contemplate that customers would still have any claim for damages that may exist under current law with respect to the conduct in question. For example, conduct by an investment adviser that would violate the uniform fiduciary standard of conduct may under current law give rise to private damage claims for, among other things, state law breach of fiduciary duty, negligence, or fraud. Likewise, such conduct by a broker-dealer may under current law give rise to private damage claims on various theories that would be independent of the uniform fiduciary standard of conduct.

GAO Makes Limited Recommendations for Financial Planners

BY SCOTT SHINE

In January 2011, the Government Accountability Office (GAO) released a report concerning regulation of financial planners. The report, which was mandated by the Dodd-Frank reform legislation, makes the following recommendations:



Will financial planners have to figure it out on their own?

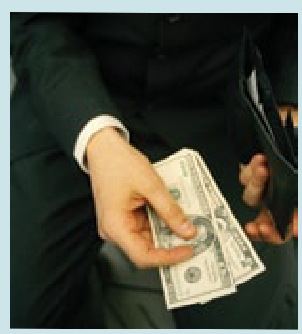
- The Chairman of the SEC should direct the SEC's Office of Investor Education and Advocacy, Office of Compliance Inspections and Examinations, Division of Enforcement, and other offices, as appropriate, to do the following:
    - Incorporate into the SEC's ongoing review of the financial literacy of investors an assessment of (i) the extent to which investors understand the titles and designations used by financial planners and (ii) the implications any lack of such understanding may have for consumers' investment decisions; and
    - Collaborate with state securities regulators in identifying methods to better understand the extent of problems specifically involving financial planners and financial planning services and take actions to address any problems that are identified.
- The National Association of Insurance Commissioners, in concert with other state insurance regulatory entities, should (i) assess consumers' understanding of the standards of care that apply to persons who sell insurance products and (ii) take appropriate actions to address any problems in this regard. **The GAO recognized the SEC's ongoing efforts to address the standards of care that apply to investment advisers and broker-dealers**, which would include financial planners acting in those capacities (*see* "Unclear Whether Customers Could Recover for Breach of New Fiduciary Standard" on page 13). The GAO, however, perceived that, even if that question is resolved, a similar question would exist to the extent that a financial planner acts in the capacity of an insurance agent.

The GAO considered but declined to recommend more sweeping changes, such as establishing a standards-setting oversight board or designating a self-regulatory organization for financial planners.

SEC Pays Paul, Robs Peter

BY TOM LAUERMAN

SEC Chairperson Mary Schapiro testified at a February 17, 2011 hearing that the SEC has sufficient resources and time to write the rules and conduct the studies required of it by the Dodd-Frank reform legislation. During her testimony, before the Senate Committee on Banking, Housing and Urban Affairs, Schapiro explained that the SEC has been able to assign experienced staff members to work on these Dodd-Frank projects.



SEC: Lack of funds impedes DFA enforcement

Nevertheless, Schapiro apprised the Committee that current budgetary constraints are compromising the SEC's current performance of certain of its core functions. For example, the SEC cannot hire adequate numbers of examiners and cannot pay travel expenses necessary for SEC enforcement attorneys to function most effectively. Schapiro stated that lack of funding also has curtailed SEC investments in technology, to the detriment of the agency's effectiveness in many important areas.

Chairperson Shapiro warned the Committee that, although the SEC is coping well with its Dodd-Frank responsibilities so far, increased funding will be necessary for the SEC to meet some of its future obligations under that legislation. These include Dodd-Frank requirements that the SEC examine hedge funds, municipal advisers, and various regulated entities involved in the swaps markets.

Broker-Dealer Retail Disclosure Proposal Faces Industry Resistance

BY ED ZAHAREWICZ & KAREN BENSON

In response to Regulatory Notice 10-54, FINRA received over 300 comment letters regarding its concept proposal to require broker-dealers to provide a disclosure statement to retail investors at or before the commencement of a business relationship. The proposed disclosure statement would be similar to the Form ADV disclosures required of investment advisers.and evaluating the merit of these tips.

FINRA receiving lots of feedback

Although the general spirit of the proposal garnered some support, industry groups and representatives raised concerns about, among other things, the timing of the proposal, the content of the disclosure statement, and its application to non-retail broker-dealers. Many noted the proposal's premature timing in light of multiple disclosure proposals and studies currently under consideration by the SEC and Department of Labor. Commenters emphasized that regulators need to coordinate their actions to avoid the risk of inconsistency and duplicating regulatory requirements.

Commenters also questioned the breadth of disclosures contemplated by the proposal, cautioning FINRA to be mindful that "more" disclosure does not necessarily mean "better" disclosure. Some commenters believed that the disclosures would merely add to the overload of information provided to investors rather than increase their ability to make informed investment decisions.

Some in the industry suggested FINRA should survey investors on disclosure needs while others recommended a layered approach to disclosure in which high level information is given upfront and more detailed information is available on the broker-dealer's website. Still other commenters advocated exempting or excluding from the scope of the proposal principal underwriters of mutual funds and wholesalers distributing variable insurance products because they generally do not deal directly with retail investors.

At this time, FINRA has not taken any action to issue a formal rule proposal.

FinCEN Clarifies SAR Confidentiality Requirements

BY KAREN BENSON

Suspicious Activity Reports (SARs) are confidential documents, prepared after careful analysis, to alert the government to transactions that might indicate money laundering or financial support for terrorist groups.

Serious concerns have arisen about unauthorized disclosure of SARs. In response, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) recently amended the SAR rules to, among other things, clarify the scope of the statutory prohibition against disclosure by a financial institution or a government agency of a SAR, including any information that would reveal the existence of a SAR.

Simultaneously, FinCEN issued an advisory to government agencies and financial institutions that reiterated the importance of protecting SAR confidentiality and emphasized the civil and criminal penalties for SAR disclosure violations. The advisory suggests measures that a financial institution or government agency may take to help ensure SAR confidentiality.

Additionally, FinCEN published guidance that, among other things, augments guidance it issued in 2006 permitting broker-dealers and mutual funds to share SAR information with a corporate parent or with an investment adviser that controls the fund, whether domestic or foreign. Under the new guidance, broker-dealers and mutual funds may also share SAR information with a domestic affiliate, if that affiliate is subject to a SAR rule. SAR information may not, however, be shared with foreign affiliates. Moreover, as a general matter, an affiliate that receives SAR information from a broker-dealer or mutual fund cannot, in turn, share that information with any of its own affiliates, even if they are subject to a SAR rule. The guidance also provides that broker-dealers and mutual funds should have policies and procedures to ensure that their affiliates preserve SAR confidentiality.

SAR rule amendments, advisory, and guidance became effective on January 3, 2011.

Failure To Demonstrate "Materiality" Sinks TILA Rescission Claim

BY CLIFTON GRUHN

In *Bonte v. U.S. Bank*, the Seventh Circuit Court of Appeals affirmed dismissal of TILA claims for mortgage rescission because the plaintiffs failed to demonstrate how the allegedly misstated charges constituted "material" disclosures. The complaint alleged that inconsistencies between the plaintiffs' TILA and HUD-1 statements regarding the annual percentage rate, the amount financed and the finance charge resulted in ten material misstatements, entitling them to rescind their mortgage after the ordinary three-day rescission period. U.S. Bank moved to dismiss for failure to state a claim, arguing that none of the alleged misstatements related to the APR, the amount financed, or the finance charge. In affirming the dismissal, the Seventh Circuit noted that disclosures regarding the APR, the amount financed, and the finance charge are "material" under TILA and will "support rescission for up to three years."

Not all alleged misstatements lead to trouble under TILA

However, the court found persuasive U.S. Bank's arguments that: (1) four of the alleged misstated charges related to loan disbursements, which are unrelated to the APR, the amount financed, or the finance charge; (2) the alleged discrepancy in property taxes is excluded from the finance charge; (3) the alleged misstatements regarding title insurance, the ARM endorsement, recording service fees, and courier fees are exempt under TILA and excluded from the finance charge; and (4) the alleged misstatement of settlement fees was exempt under TILA, excluded from the finance charge and that plaintiffs alleged an overstatement, but TILA only prohibits understatements. Consequently, the court held that, even assuming the truth of the allegations and that plaintiffs pled a plausible theory, U.S. Bank had shown that the plaintiffs were not entitled to rescission. The court also noted that by failing to file a reply, the plaintiffs waived their argument that the alleged misstatements were material.

The Lesson from *U.S. Bank v. Ibanez*:
Own the Mortgage Sought to be Foreclosed

BY ELIZABETH BOHN

Last month, in *U.S. Bank National Association v. Ibanez*, the Massachusetts Supreme Court voided foreclosure judgments obtained by U.S. Bank and Wells Fargo (the Banks) because the Banks failed to show that they were holders of the mortgages at the time of the foreclosure. *Ibanez* created a stir in securitized-mortgage industry circles. Although some commentators have correctly suggested it has applicability only to Massachusetts, **the decision reflects a broader state court trend of requiring that foreclosing mortgagees prove ownership of notes and mortgages sought to be foreclosed**.

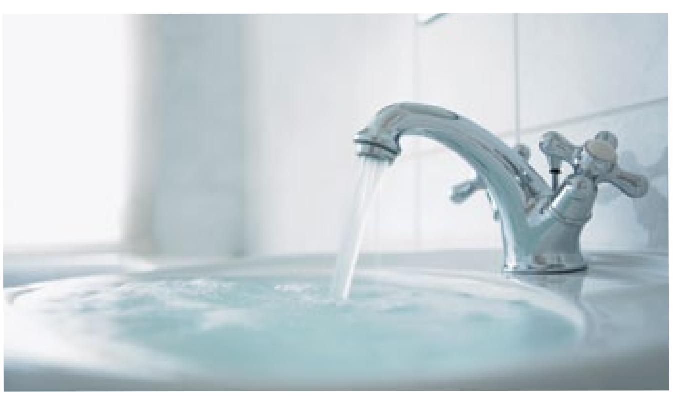
Mortgage foreclosures: not so fast!

The Banks in *Ibanez* were not the original mortgagees, but were foreclosing as trustees for structured pools of mortgage-backed securities held in trust. Title to each mortgage had passed from the originator, through several intermediaries into the trusts, which actually held title at the time of the foreclosure. As hundreds of thousands of mortgages have been bundled into securities, proof of ownership of each chain in the link is sometimes not recorded. And the mortgages in *Ibanez* had not been assigned to the Banks at the time of entry of the foreclosure judgments. Rather, they produced assignments executed after the foreclosure sales. Therefore, the Massachusetts Court held that they "failed to make the required showing that they were the holders of the mortgages at the time of foreclosure." As a result, foreclosure sale to the Banks was not effective to pass clear title. The *Ibanez* court was not the first to so rule. Florida Courts, among the busiest, uniformly require proof of ownership of a mortgage before entry of foreclosure judgment.

Extortionate Class Litigation Enjoined

BY JONATHAN HART

Striking a blow against "extortionate" class action practices, the Seventh Circuit Court of Appeals enjoined class members and counsel from filing "copycat" class actions in alternate jurisdictions after losing on class certification. In *Thorogood v. Sears, Roebuck & Co.*, the Seventh Circuit had previously decertified a multi-state class finding that individual issues precluded certification. Undeterred, Thorogood's counsel subsequently filed a virtually identical class action, *Murray v. Sears, Roebuck & Co.*, in California. Counsel, however, successfully amended the *Murray* complaint to avoid Sears' collateral estoppel defense, and the California court permitted *Murray* to proceed with class discovery. Sears sought to enjoin the *Murray* action in the *Thorogood* district court, but the court denied relief, finding that Sears' affirmative defenses afforded an adequate remedy at law. The Seventh Circuit reversed. Discussing at length the potential for "abuse" and "settlement extortion" in class litigation, **Judge Posner explained that affirmative defenses do not always provide "adequate relief against vexatious litigation."** The court concluded that the *Murray* court erroneously denied Sears' collateral estoppel defense, and because of the excessive cost of class discovery and the unavailability of immediate appeal, Sears had no adequate remedy at law against class counsel's coercive litigation tactics. The court explained that "without an injunction a defendant might have to plead the defense of res judicata or collateral estoppel in a myriad of jurisdictions in order to ward off a judgment, and would be helpless against settlement extortion if a valid such defense were mistakenly rejected by a trial court."

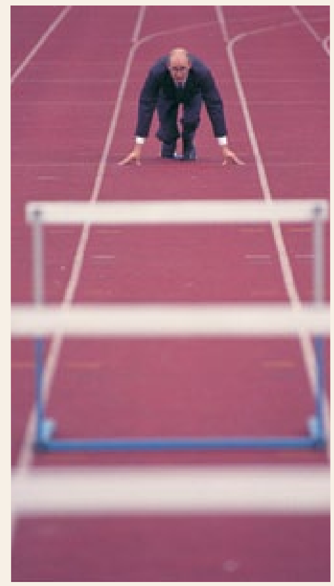


Disaster narrowly averted

Fairness Considerations Trump Relation-Back in CAFA Removal

BY MICHAEL WOLGIN

Joining the Sixth, Seventh, Eighth, and Tenth Circuits, the Third Circuit Court of Appeals in *Farina v. Nokia Inc.* applied relation-back analysis to determine that an amended pleading was a "new action" that was removable under CAFA. CAFA expressly applies only to civil actions "commenced on or after the date of enactment," February 18, 2005. This action was first brought in 2001. Removal was attempted under federal question jurisdiction, but the case was subsequently remanded to state court after appeal. In December 2005 (after CAFA's enactment), plaintiff filed a Second Amended Complaint that added a new defendant. Removal was not sought. Plaintiff then filed a Third Amended Complaint in February 2006 to substitute the proper entity for the previously added defendant. The newly substituted defendant then removed the action in February 2006 under CAFA. After plaintiff's untimely motion to remand was denied by the district court, the Third Circuit affirmed, holding that the **Second Amended Complaint commenced a "new action" removable under CAFA because it added a "new and distinct" defendant that "placed new assets at risk of liability."** The court followed the "general approach" of the Sixth, Seventh, Eighth, and Tenth Circuits and applied state law principles governing the relation-back of pleadings. The court expressly rejected the Ninth Circuit's approach of considering only the filing of the original complaint, relying on fairness considerations and on the presumption that when Congress enacted CAFA, it was "aware of the general principles of relation-back analysis." The court further held that plaintiff waived the objection that defendants' removal was untimely because plaintiff's motion to remand was not filed within 30 days of removal.



A "new and distinct" defendant creates a new starting line

Reliance on Treasury Department's Report
No Defense To FCRA Violation

BY LARA GRILLO

Cases of mistaken identity can wreak credit report havoc

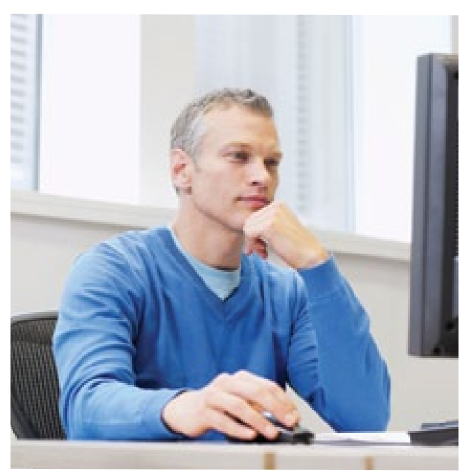
In a case of first impression, the Third Circuit Court of Appeals affirmed a decision holding a credit reporting agency liable for violations of the Fair Credit Reporting Act (FCRA). In *Cortez v. Trans Union, LLC*, the reporting agency, Trans Union, provided a product which generates a list compiled by the Treasury Department's Office of Foreign Assets Control (OFAC) of persons thought to be terrorists, international narcotics traffickers, or involved in the proliferation of weapons of mass destruction. The plaintiff's identity was apparently mistaken for another person's, causing Trans Union to report an OFAC "advisor alert" on the plaintiff's credit report. The Third Circuit rejected Trans Union's argument that the OFAC alert was not subject to FCRA because it was not part of a consumer report, finding that the argument ignored "the breadth of the language that Congress used in drafting that statute."

The court upheld the determination that Trans Union negligently failed to assure maximum possible accuracy of its credit report, as required by FCRA, stating that the agency could not simply rely on the Treasury Department's reporting of information. The court also rejected Trans Union's contention that the OFAC information was not part of the consumer's "file" under FCRA, noting that **FCRA's protections apply to all information furnished, or that might be furnished**, in a consumer report. It also found that Trans Union failed to carry out its duty to promptly investigate the disputed information, modify or delete information that was inaccurate, incomplete, or that could not be verified, and failed to provide notice of the dispute, continuing to send reports with the misleading information although it knew a dispute was pending. The court said it did not reach its decision lightly, but it could not give "'a company that traffics in the reputations of ordinary people' a free pass to ignore the requirements of FCRA each time it creatively incorporates a new piece of personal consumer information in its reports."

Consumer Financial Protection Bureau Website Launched

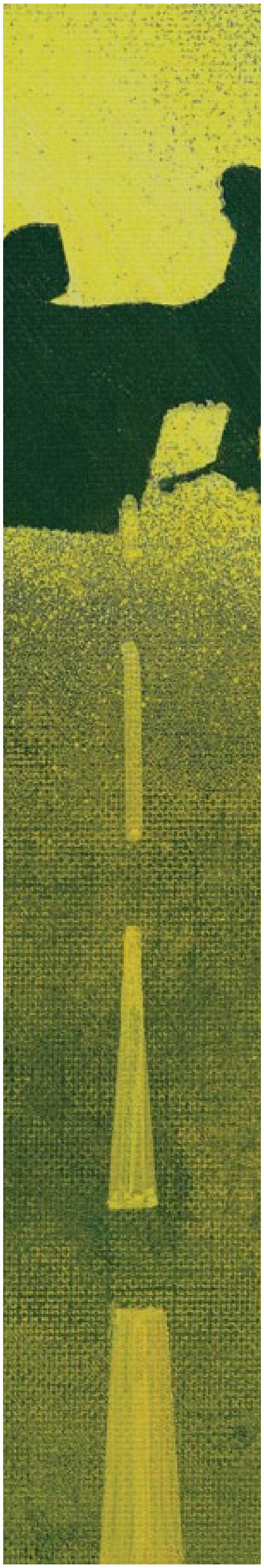
BY ELIZABETH BOHN

On February 3, the Department of the Treasury launched a website for the Consumer Financial Protection Bureau (CFPB) established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The website, which can be found at *www.consumerfinance.gov*, describes the CFPB's mission, core functions, and structure, stating that the Bureau's goal is to ensure that "prices are clear up front, that risks are visible, that nothing is buried in fine print," and that "financial service providers should be not be able to build business models around unfair, deceptive, or abusive practices." Core functions include rule making, supervision and enforcement of federal consumer financial protection law, the restriction of unfair, deceptive or abusive acts or practices, and enforcing laws against discrimination in consumer finance.



Will new CFPB website help consumers?

Many of Dodd-Frank's provisions relating to the CFPB will go into effect on July 21, 2011, the designated transfer date to the CFPB of rule-making and enforcement authority for a number of consumer financial protection laws. These include, among others, the Truth in Lending Act, Fair Credit Reporting Act, Equal Credit Opportunity Act, and the Fair Debt Collection Practices Act.



FTC and FDIC:
Remember to Secure Digital Copiers

BY JASON MORRIS

Both the FTC and the FDIC have published guidance on safeguarding sensitive data stored on electronic devices. Some financial institutions may not be aware that devices like photocopiers, fax machines, scanners, or printers may contain hard drives or flash memories, which, can be hacked by electronic data thieves.

The FTC's advice that organizations should treat a digital copier like any other computing device contains, among other things, the following recommendations:

- Before acquiring a copier, ensure that the device will be included in any information security policy.
- In acquiring a copier, consider investing in various security options, such as encryption or overwriting.
- While using the copier, use all available security features.
- When ready to dispose of a copier, ensure that any information on the hard drive cannot be accessed by any other entity.

Similarly, the FDIC suggests, "[f]inancial institutions should implement written policies and procedures to identify devices that store digital images of business documents and ensure their hard drive or flash memory is erased, encrypted or destroyed prior" to disposing photocopiers, fax machines and printers.

The FTC has also released a publication that provides advice concerning protection of information when using public wireless networks (e.g., Wi-Fi hotspots in airports, hotels, coffee shops).

The FDIC guidelines, "Guidance on Mitigating Risk Posed By Information Stored on Photocopiers, Fax Machines, and Printers," were published in September 2010, and the FTC's guidelines, "Copier Data Security: A Guide for Businesses," in November 2010, and the FTC's guidelines "Wise Up about Wi-Fi: Tips for Using Public Wireless Networks" in February 2011.

Firings and Facebook
When Are An Employer's Internet Policies Unlawful?

BY JAMES GOODFELLOW

In *American Medical Response of Connecticut, Inc. and International Brotherhood of Teamsters, Local 443* (October 27, 2010), an employer's blogging and social networking policy, which prohibited employees from posting disparaging comments about co-workers or the employer online, was deemed unlawful by the National Labor Relations Board (NLRB). This administrative action was commenced by the Hartford, Connecticut office of the NLRB on behalf of Dawnmarie Souza, a former employee of the respondent, AMR. Ms. Souza requested union representation when AMR asked that she participate in an internal investigation concerning a customer complaint that was made about her work. AMR reportedly refused this request, after which Ms. Souza posted allegedly disparaging comments about her supervisor on her Facebook page. Soon thereafter, AMR terminated Ms. Souza.

The NLRB conducted an investigation and concluded that this termination unlawfully was based on her Facebook postings. In addition, the NLRB alleged that AMR's policies and actions unlawfully hinder employees' right to engage in concerted activities, which is protected under the auspices of the National Labor Relations Act (NLRA). AMR argued that Ms. Souza would have been terminated regardless of her Facebook posts.

Though the parties have settled, this case reflects the NLRB's position that employers' social networking, blogging and internet use policies must be tailored so as not to violate the NLRA. Indeed, AMR agreed to revise its policies and to not discipline employees for engaging in discussions about wages and other work issues when not on the job.

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