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LEGAL ISSUES AND DEVELOPMENTS
FROM CARLTON FIELDS JORDEN BURT

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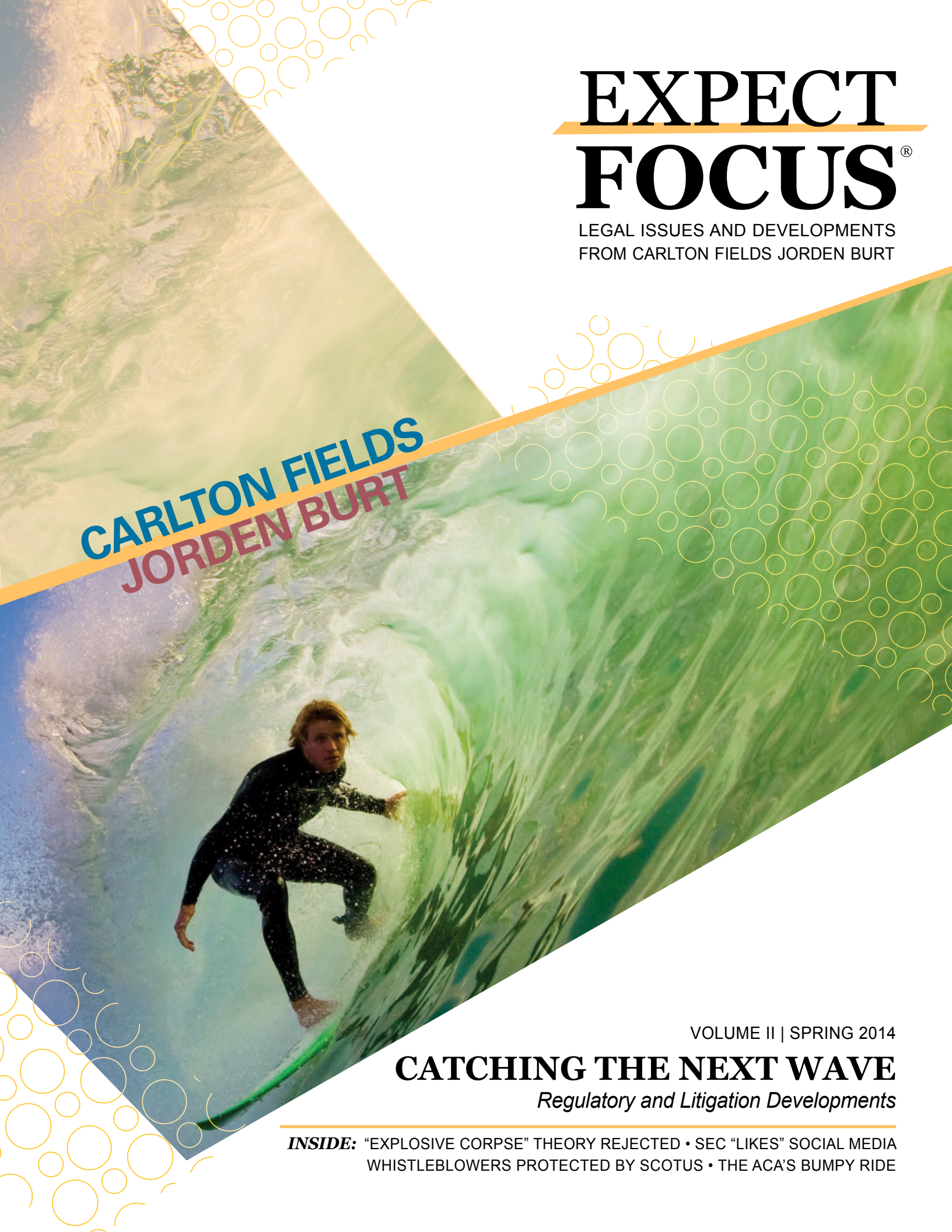
JORDEN BURT



VOLUME II | SPRING 2014

CATCHING THE NEXT WAVE

Regulatory and Litigation Developments

INSIDE: "EXPLOSIVE CORPSE" THEORY REJECTED • SEC "LIKES" SOCIAL MEDIA WHISTLEBLOWERS PROTECTED BY SCOTUS • THE ACA'S BUMPY RIDE

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Private Equity: The Next Wave of SEC Enforcement Actions?

BY MARC DRUCKMAN

Ever since the Dodd-Frank Wall Street Reform and Consumer Protection Act required many investment advisers to private equity funds to register with the SEC for the first time, fund managers knew that additional scrutiny might eventually follow. The SEC then launched the Presence Exams Initiative in October 2012, specifically to examine the operations of private equity investment advisers. Now, the Commission seeks to greatly increase the size of the task force examining the private equity industry. As a result of these developments, much of the private equity industry is now subject to registration, a new compliance infrastructure, and soon, perhaps, the next round of SEC enforcement actions.

Currently, the SEC is most focused on fund manager practices related to disclosure of management fees, valuation of assets, and conflicts of interest. From the Commission's perspective, the discretionary nature of certain undisclosed fund expenses and the potentially inflated valuation of illiquid assets held by private equity funds are of special concern.

MORE THAN HALF OF THE EXAMINATIONS COMPLETED SO FAR REVEAL WHAT THE SEC BELIEVES TO BE VIOLATIONS OF LAW OR MATERIAL WEAKNESSES IN COMPLIANCE CONTROLS.

Given the SEC's mobilization and commitment of resources to the examination of private equity, the scrutiny of investment advisers of privately managed funds will inevitably increase. Recent comments by Andrew Bowden, Director of the Office of Compliance Inspections and Examinations for the SEC, indicated that more than half of the 150 investment fund manager examinations completed so far reveal what the SEC believes to be violations of law or material weaknesses in compliance controls regarding the collection of fees and allocation of expenses imposed by investment advisers against managed funds. Examples included shifting of staff costs onto portfolio companies or to third-party contractors, undisclosed fee arrangements with operating partners, fee-shifting, and the use of accelerated monitoring fees charged to portfolio companies. Enforcement actions have already begun. SEC claims against Clean Energy Capital, LLC and Camelot Acquisitions Secondary Opportunities Management, LLC, alleging misuse of managed investor funds, are likely early examples of the potentially many cases that will define the boundaries of acceptable investment adviser conduct.

Regardless of the extent and scope of the SEC's own enforcement actions, the Dodd-Frank disclosure requirements and the SEC's ongoing investigations may also invite private claims. Actions against the industry are still in their infancy, but now that private equity is less private, some managers may find themselves in the crosshairs of the next wave of regulatory enforcement and claims.

How to Fight a STOLI Scheme: Court Rulings Offer Clues

BY PAUL WILLIAMS

Two recent court decisions provide potential road maps for insurers in the fight against Stranger-Originated Life Insurance (STOLI) schemes. *Ohio Nat'l Life Assurance Corp. v. Davis* involved a STOLI scheme so obvious that four of the five policies at issue were allowed to lapse or were no longer contested. However, the defendant resisted Ohio National's summary judgment claim that the fifth policy was void at inception, arguing that the insured bought the policy at his own behest and could keep the insurance if he desired. In response, Ohio National successfully argued to the Northern District of Illinois that the insured never owned the death benefit because the date of his policy application was later than the date he transferred his interest in his life insurance trust to defendants.

For insurers, timing is a critical clue.

In Vasquez v. ReliaStar Life Insurance Co., ReliaStar, suspecting a STOLI scheme, rescinded a policy based on misrepresentations of fact in the application. The owner-beneficiary trust argued that these misrepresentations were not material because they did not "affect the risk assumed" by the insurer: namely, her health or death. The Texas Court of Appeals disagreed, concluding that **the real risk assumed by an insurer is the risk it will have to pay death benefits, so any information provided in the policy application that impacted whether the insurer decided to provide coverage, and how much, could be material.** ReliaStar **proved that** all information in the policy application fit this description by relying on its financial underwriting guidelines as well as testimony from its underwriters.

These cases suggest that, in the fight against STOLI, insurers should pay careful attention to the timeline of events surrounding the policy application and trust ownership, and that their underwriting guidelines should specify how the policy application information impacts coverage decisions.

STOA Schemes Face Increased Regulatory Scrutiny

BY CHRISTINE STODDARD

Increased SEC and Justice Department prosecution is bad news for stranger-originated annuity (STOA) schemes. The SEC recently announced that enforcement actions were taken against brokers Michael A. Horowitz of California and Moshe Marc Cohen of New York. Both brokers fraudulently obtained confidential health information about terminally-ill patients and used it in a STOA scheme beginning in 2007. After designating the patients as annuitants whose deaths would result in death benefits, the brokers sold the annuity contracts to investors who collected lucrative payouts when the patients died.

To execute their scheme, the two falsified broker-dealer forms, caused insurance companies to issue annuities they otherwise would not have, and ultimately generated more than $1 million in sales commissions for themselves. **While SEC litigation continues against Horowitz and Cohen for violations of the securities laws, several others enlisted to help in the scheme have consented to SEC orders alleging securities law violations, settling for a total of $4.5 million.**

Similarly, the prosecution of two others who conducted a STOA scheme using the identities of terminally-ill patients recently concluded when the District of Rhode Island ordered Joseph Caramadre and Raymour Radhakrishnan to pay a combined $46 million in restitution to the victims of their crimes, including more than $20 million to insurance companies. Both were sentenced to prison in December 2013 for their roles in a conspiracy to fraudulently gain information from terminally ill patients, arrange investments in variable annuities that would pay benefits when the patients died, and defraud insurance companies and bond issuers out of millions of dollars.

The court refused to limit the victims eligible for restitution to those expressly named in the defendants' plea agreement and instead held the defendants liable to approximately 50 insurance companies and bond issuers. The considerable payments being made in these two cases could have a chilling effect on future STOA schemes.

Regulators Target Insurance Company Acquisitions by Private Equity Funds

BY SCOTT SHINE

Private equity firms and hedge funds have stepped up efforts to acquire insurance companies in recent years. This has prompted regulators to increasingly air their own unease with the risks they perceive associated with such funds managing assets backing insurance company reserves.

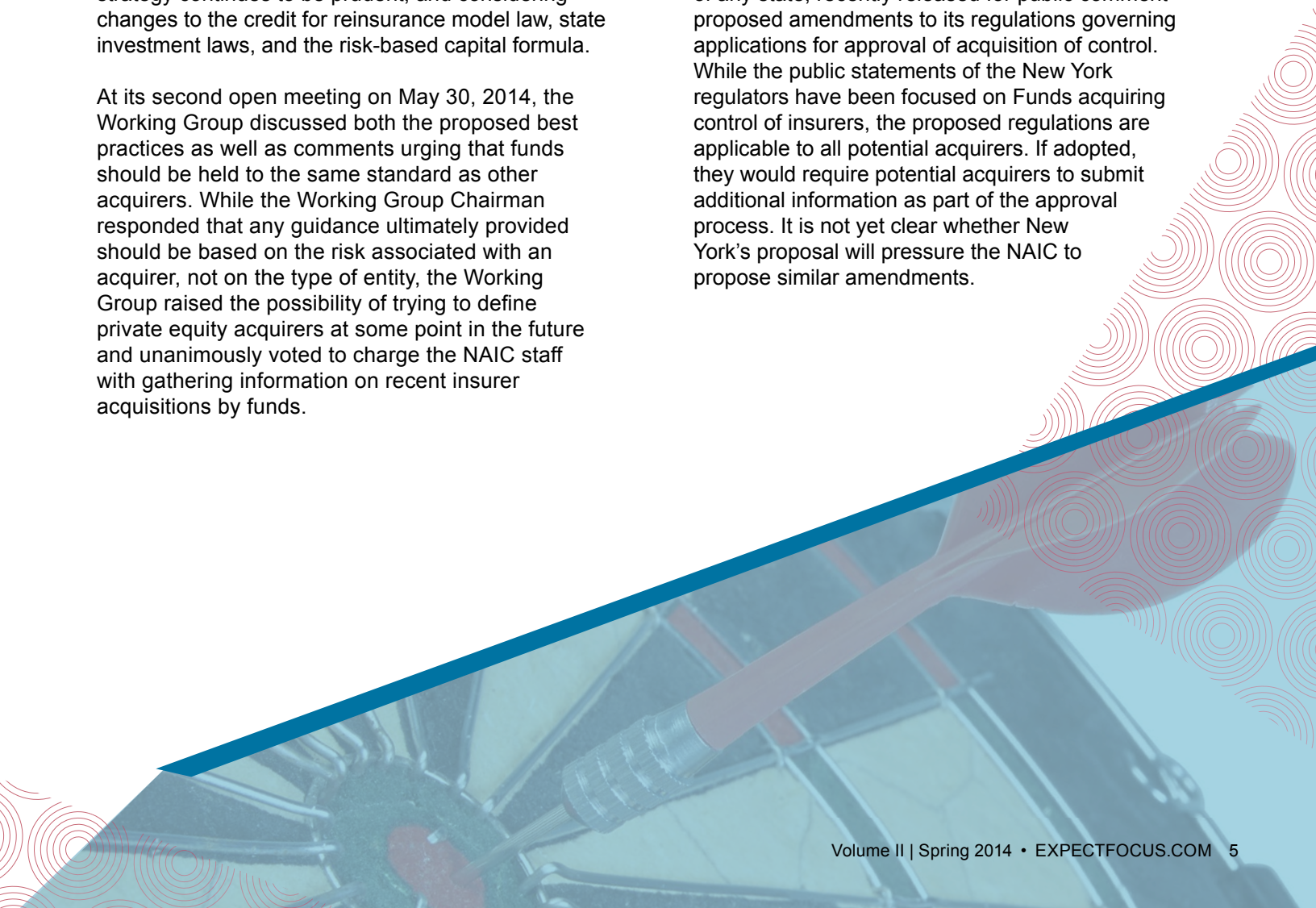
In 2013, in response to vocal concerns expressed by the New York regulator, the NAIC formed a Private Equity Issues Working Group and exposed for comment a paper that set forth procedures regulators can use when considering ways to mitigate or monitor risks associated with fund ownership or control of insurance company assets. The paper addressed development of best practices and considered possible NAIC policy position changes. These best practices included requiring supplemental information for review during change in control filings, performing additional examinations to ensure the investment strategy continues to be prudent, and considering changes to the credit for reinsurance model law, state investment laws, and the risk-based capital formula.

At its second open meeting on May 30, 2014, the Working Group discussed both the proposed best practices as well as comments urging that funds should be held to the same standard as other acquirers. While the Working Group Chairman responded that any guidance ultimately provided should be based on the risk associated with an acquirer, not on the type of entity, the Working Group raised the possibility of trying to define private equity acquirers at some point in the future and unanimously voted to charge the NAIC staff with gathering information on recent insurer acquisitions by funds.

Some regulators present acknowledged that they currently have all the necessary tools to manage any risk posed by a fund acquirer. Curiously absent was any discussion of how the funds or any acquirer could manage an insurer's assets beyond the very stringent requirements set by each state's insurance law investment statute.

THE WORKING GROUP RAISED THE POSSIBILITY OF TRYING TO DEFINE PRIVATE EQUITY ACQUIRERS AT SOME POINT IN THE FUTURE.

The New York Department of Financial Services, which currently regulates New York domiciled insurers with perhaps the most stringent insurer investment laws of any state, recently released for public comment proposed amendments to its regulations governing applications for approval of acquisition of control. While the public statements of the New York regulators have been focused on Funds acquiring control of insurers, the proposed regulations are applicable to all potential acquirers. If adopted, they would require potential acquirers to submit additional information as part of the approval process. It is not yet clear whether New York's proposal will pressure the NAIC to propose similar amendments.



New York Fines Two Major Insurers

BY GARY COHEN

Two recent Consent Orders issued by the New York State Department of Financial Services against major insurers appear to signal the Department's enhanced focus on insurers' detailed compliance with regulatory requirements.

In March, 2014, the Department, led by Superintendent of Financial Services Benjamin Lawsky, tagged MetLife, Inc. with the largest New York state fine ever imposed against an insurer – $50 million – for allegedly selling insurance in New York without a license. Specifically, the Consent Order averred that MetLife representatives "engaged in direct selling in New York to multinational companies" from 2007 to 2012. In addition, MetLife signed a deferred prosecution agreement with the New York County District Attorney wherein it agreed to forfeit $10 million. According to Mr. Lawsky, "[i]nsurers have a responsibility to follow the law, play by the rules, and be honest with their regulators …. MetLife did the right thing by stepping up to resolve this matter."

ACCORDING TO THE NYDFS, "WHEN IT COMES TO RETIREMENT PRODUCTS, INSURERS MUST GO ABOVE AND BEYOND TO EXPLAIN ANY CHANGES THAT WOULD ALTER INVESTOR RETURNS."

The Department's $50 million MetLife fine more than doubled the previous high, established just two weeks earlier, when it fined AXA Equitable Life Insurance Company $20 million for allegedly failing to adequately inform the Department that it was implementing an investment strategy that substantially changed its variable annuity products. According to the Consent Order in that case, AXA allegedly minimized the impact of requested amendments to its Plans of Operations for annuity contracts, and the Department concluded that the amendments "effectively changed the nature of the product that the policyholders purchased." Asserting that "[w]hen it comes to retirement products, insurers must go above and beyond to explain any changes that would alter investor returns," the Department stated that had it been adequately informed of AXA's proposed changes, it would have provided additional consumer protections such as requiring existing annuity holders to affirmatively "opt in" to the altered product rather than remaining in that investment by default.

PBGC Supports Lifetime Income

BY STEVE KRAUS

The Pension Benefit Guaranty Corporation (PBGC) recently issued a proposed regulation designed to encourage participants in defined contribution plans (e.g., 401(k) plans) to roll over their account balances to their employers' existing defined benefit plans upon retirement and elect the plans' lifetime income option. The proposed regulation is consistent with recently issued Internal Revenue Service guidance and Department of Labor initiatives designed to encourage lifetime income options.

The PBGC administers the single-employer pension plan termination insurance program under the Employee Retirement Income Security Act (ERISA). Generally, when the PBGC becomes responsible for paying benefits upon a plan termination, each participant's plan benefit is assigned to one or more of six categories specified in ERISA."Mandatory employee contributions" are accorded the second-highest priority. Due to this higher claim on plan assets, an under-funded plan's assets are usually sufficient to pay all accrued benefits derived from such contributions. **The proposed regulation would treat benefits attributable to rollover amounts as an accrued benefit derived from "mandatory employee contributions" thereby assuring, in almost all instances, that the entire accrued benefit will be paid even if the defined benefit plan later terminated and the PBGC became responsible for paying the plan's benefits.**

ERISA also provides that the benefits guaranteed by the PBGC will not be fully paid if a plan has been in effect for less than 60 months or a plan amendment that increased the benefits under the plan became effective within 60 months of a plan's termination. In either situation, the PBGC guarantee is phased in over a five-year period at 20 percent of such benefit per year. The proposed regulation would exempt from this limitation the accrued benefit attributable to the rollover amount derived from "mandatory employee contributions." This proposal is also designed to assure participants who decide to roll over the defined contribution balances to their employers' defined benefit plans that such rollover amounts will largely be protected from the limitations that might otherwise apply if their employers' defined benefit plans later terminated.

Studies show that participants must be encouraged to select a lifetime income option upon retirement. According to a recent Vanguard report, although nearly three-quarters of retirement-age participants kept their retirement savings intact, only about 20 percent of them still had plan account balances five years after termination, and only 20 percent of assets remained in the employer-sponsored plan after five years. The PBGC-proposed regulation mitigates the risk for participants who decide to preserve their defined contribution lump sum distributions by rolling them into their employer's defined benefit pension plan and electing a lifetime retirement income option.

Harsh Justice

BY JASON BROST

Concerned that its own decision might have "the potential to conflict" with that of the Pennsylvania Insurance Department, a Pennsylvania federal court relied on the primary jurisdiction doctrine to dismiss a putative class action complaint in *Harshbarger v. Pennsylvania Mutual Life Insurance Company*. Where regulated entities are concerned, this decision demonstrates the potential persuasive power of arguing that a court should abstain from entertaining the merits of claims encompassed by the "jurisdiction, expertise, and regulatory authority" of the applicable regulatory agency – even if the claim is framed as a breach of contract action.

In *Harshbarger*, plaintiffs, holders of participating whole-life insurance policies, alleged that the insurer failed to pay them the full amount of annual dividends from the divisible surplus due under the terms of their policies. In its primary jurisdiction analysis, the court closely considered whether the question at issue involved "policy considerations within the Department's particular field of expertise … [and] discretion" and posed "substantial danger of inconsistent rulings" if the court attempted to resolve plaintiffs' claim.

First, the court reasoned, plaintiffs' claims relied on the application of Pennsylvania statutes to create an obligation that otherwise did not exist in their contracts. Second, Pennsylvania law "expressly vests the Department with discretion" to determine when exceptions will be granted, including the power to "permit any corporation to accumulate and maintain a surplus or safety fund in excess of the limit" set by law. Third, "the Department's oversight of [defendant's] solvency, financial condition, and surplus levels is an ongoing endeavor," such that "a decision by this Court has the potential to conflict with the Department's … exercise of its authority and discretion."

Seventh Circuit Confirms: In-House Insurance Lawyers Are as Good as the Name-Brand Product

BY BERT HELFAND

In 2012, a plaintiff who challenged State Farm's practice of using in-house attorneys to defend its auto insureds against third-party claims asserted that **in-house lawyers** constitute "**a different … product**" from the type of defense counsel that is promised in State Farm's policies. In March 2014, in *Golden v. State Farm Mut. Auto Ins. Co.*, a unanimous panel of the U.S. Court of Appeals for the Seventh Circuit decisively vindicated the work product of insurers' hardest-working employees.

Cindy Golden insured her Dodge Nitro under a policy that promised to pay "attorney fees for attorneys chosen by [State Farm] to defend an insured who is sued." When she was sued regarding a 2009 collision, she was represented by a lawyer employed in State Farm's corporate law department. The attorney disclosed, in writing, that he was "a full time employee of State Farm," with a duty to disclose any potential conflict. The plaintiff accepted the representation, and State Farm paid the judgment of $3,609 that was entered after trial.

The ensuing action contended that State Farm had a duty to disclose—at the time the policy was issued—that it used in-house lawyers to defend third-party claims. It was based, in part, on assertions that insurers "historically and traditionally" hired private law firms to defend insureds, and that, given this fact, the policy's promise to pay "attorney fees" implied "the use of independent counsel." The plaintiff also asserted a claim for unjust enrichment, on the ground that in-house lawyers are "a different and cheaper product compared with" their law firm counterparts, such that plaintiff and other insureds might have purchased different policies had State Farm's practice been disclosed.

The federal court rejected plaintiff's position that "accurate disclosure" required an express discussion of a policy of using in-house counsel. Furthermore, given plaintiff's failure to allege that her actual defense had been inadequate in any way, the court held, "**[t]here is nothing … to support an inference that State Farm … delivered a product different than that promised in the policy.**"

In other words, the court that sits in America's Second City held that *all* lawyers—both in-house and that other kind—are "attorneys" within the meaning of the policy. Indeed, it speculated that "the public may ultimately reap the benefits of better service at lower cost through the use of house counsel."

Appellate Court Rejects "Explosive Corpse" Theory

BY JOHN PITBLADO

So many perils beset Florida condominium owners—hurricanes, mold, floods—that they can be forgiven for overlooking the possibility that the undiscovered body of a deceased neighbor might pose a hazard to adjacent residents. After all, insurers in the Sunshine State do provide coverage for many uncommon risks, including "explosions."

Recently, an insured sought to deploy that provision by offering the affidavit of a physician expert, stating that decomposition had caused a neighbor's corpse to "explosively expand" and, ultimately, cause damage to the insured's home. In *Rodrigo v. State Farm Florida Ins. Co.*, a Florida appellate court found the expert's account inconsistent with the "plain meaning of the term explosion," and it affirmed a summary judgment award for State Farm.

The insurer denied the plaintiff's claim on two grounds: both lack of coverage specifically addressing the hazard in question and failure to provide a sworn proof of loss. The insured claimed State Farm waived the latter ground by adjusting the claim and offering to pay an appraised amount. The trial court held that, under Florida law, adjusting a loss and negotiating a settlement do not waive the insurer's right to deny a claim. The appellate court agreed, finding that proof of loss is a condition precedent to coverage, that failure of a condition creates a presumption of prejudice under Florida law, and that the insured had failed to proffer sufficient evidence to overcome the presumption.

Even if the insured had provided a sworn proof of loss, however, the court found that her claim would still be barred, because her policy limited personal property coverage to losses caused by named perils. It was to invoke this coverage that plaintiff offered the unwelcome details concerning her neighbor's "advanced decomposition." The court, however, was not persuaded that the gruesome details of this process were "tantamount to an explosion" within the plain meaning of that term.

Denying Coverage Based on Advertising Injury, Court Finds Corporations are Not Persons

BY BERT HELFAND

A New York appellate court recently found that a corporation is not the kind of "person" that can suffer a violation of privacy rights for purposes of advertising injury coverage. In *Sportsfield Specialties, Inc. v. Twin City Fire Ins. Co.*, the plaintiff asked its insurers to defend a judgment based on its alleged use and dissemination of another corporation's proprietary information. Sportsfield argued that the judgment fell within its coverage for suits based on "personal and advertising injury," which included "[o]ral or written publication of material that violates a person's right of privacy." In April 2014, the appellate court affirmed an award of summary judgment to the insurers, citing the "the historically personal nature of privacy rights in general."

Sportsfield, based in Delhi, New York, hired a competitor's employee who had executed both a non-compete and an electronic rights agreement. The competitor sued for tortious interference, unfair and deceptive trade practices and misappropriation of trade secrets; a North Carolina jury awarded it more than $3.2 million. Sportsfield then sought a defense of that judgment from the issuers of its commercial general liability and umbrella policies. Sportsfield argued that the underlying claims arose from "publication … that violates a person's right of privacy," because "the term 'person' connotes both individuals and corporations."

THE COURT APPARENTLY FOUND THAT THE CONNOTATIONS OF THE WORD "PRIVACY" NEVERTHELESS AFFECT THE WORD "PERSON" IN A WAY THAT PRECLUDES ITS APPLICATION TO A CORPORATION.

The appellate court did not need to address that argument, because it separately held that the underlying claims fell within "at least one" of the policies' exclusions for personal and advertising injury arising out of (1) an intentional "offense," (2) a "breach of contract," or (3) infringement of a trademark. Alternatively, the court could have addressed Sportsfield's argument by considering whether disclosure of trade secrets (even those belonging to an individual) can actually violate "privacy rights," as opposed to property rights.

Instead, without stating that "privacy rights" involve different interests from those a business claims in its trade secrets, the court apparently found that the **connotations** of the word "privacy" affect the word "person" in a way that precludes its application to a corporation. A federal court in Indiana took a similar approach in *Heritage Mut. Ins. Co. v. Advanced Polymer Technology, Inc.*, decided in 2000, after an insurer had refused to defend a patent infringement claim. But the Sportsfield court also cited *FCC v. AT&T Inc.*, a 2011 Supreme Court case that involved the "personal privacy" exemption to the Freedom of Information Act. In that case, Justice Roberts reasoned in precisely the opposite direction—finding that, in the phrase "personal privacy," the use of **the word "'personal'** … suggests **a type of privacy evocative of human concerns**."

It is possible that this New York decision will support coverage denials in cases that more closely resemble traditional privacy claims—including suits based on dissemination of embarrassing (but accurate) information.

Title Insurers Face a Decade of New Challenges

BY MARTY SOLOMON

Title insurers have emerged from a tumultuous decade. In 2004, amid a record housing boom and unprecedented wave of refinancing, insurers could barely keep up with intense pressure to sign up more issuing agents to close more deals and issue more policies. By 2009, the bubble had burst, deals had dried up, and title agent defalcations rocked title insurers' ledgers. But by 2014, title insurers had shaken the bad apples from their issuing agent rosters, digested most of the title claim glut that emerged from the foreclosure crisis, and began to see deal volume resume.

Similarly, in 2005, title insurers became a top target for plaintiffs' class action lawyers, who alleged overcharging for title insurance premiums in "reissue rate" cases filed in New York, Pennsylvania, and Florida. These cases swept the nation. Dozens of classes were certified by state and federal courts from Arizona to Maine. Initially, title insurers tried to buy peace, settling many claims of dubious merit. But the settlements served as mere chum in the water, attracting more and bigger lawsuits. Insurers changed tack, vigorously contested the cases, and by 2014 had turned the tide, scoring a string of critical victories that cut off new filings.

Strength and resilience gained from a volatile decade in the housing market should prove useful.

With these challenges behind them, title insurers must be vigilant and proactive, particularly regarding the following trouble spots likely to flare up in the next decade:

1. **Oil and gas claims.** The fracking boom drove a wave of acquisition and mineral rights trading, much of it with no production and on land that wouldn't normally raise severance questions. Unfortunately, many of these interests have been missed and insured over. Owners of these interests can often "hold up" the insured surface owner's development plans, just as the prospective profit in development begins to return. This means tricky and expensive title claims.

2. **Title agent defalcations.** As new deals pump funds through title agents' escrow accounts, the temptation to divert them may recur. Detecting defalcations in progress, and before market interruptions bring them disastrously to light, should be a key goal for title insurers.

SETTLEMENTS SERVED AS MERE CHUM IN THE WATER, ATTRACTING MORE AND BIGGER LAWSUITS.

3. **"Regulator chaser" class actions.** As the CFPB rolls out massively complex new rules, effectively reconfiguring the entire settlement service industry, and as state and federal regulators continue to fund their own enforcement efforts with fines, settlements, and insurer-paid audits, plaintiffs will be right behind them. Copycat class actions can linger for years at staggering expense, even when their merits seem far-fetched.

From 2004 to 2014, title insurers proved strong through unprecedented crisis. From 2014 to 2024, they may find themselves fighting again on new fronts.

Eleventh Circuit Maps a Route Around Four Corners

BY JEFFREY MICHAEL COHEN

Florida adheres to the "four corners rule," under which a liability insurer's duty to defend an insured is determined solely from the allegations of the underlying complaint. In *Composite Structures, Inc. v. The Continental Ins. Co.*, the plaintiff asserted that the rule requires insurers to defend, even where the underlying claim clearly falls within a policy exclusion, *if* the complaint fails to allege additional facts that might establish an exception to the exclusion. In March 2014, the Court of Appeals for the Eleventh Circuit disagreed.

In *Composite*, two employees were allegedly injured by exposure to carbon monoxide on a "pleasure vessel" that Composite Structures designed, built, and sold. Composite was insured under two marine services commercial general liability policies, each of which excluded coverage for any damage caused by the "discharge" or "release" of "pollutants." The policies also provided, however, that the pollution exclusion would not apply where the insured could establish that five conditions had been met, including that the insured learned of the "occurrence" within 72 hours after it commenced, and that it was reported to the insurer within 30 days thereafter. Because the underlying complaint was filed three years after the alleged injury, and because the insured gave no notice of the claim before filing the complaint, it was undisputed that these conditions had not been satisfied.

Noting that the sailors' complaint was silent about such matters as timely notice under Composite's insurance policy, Composite nevertheless argued that the four corners rule prohibited application of the pollution exclusion, because its operation could not be established solely on the basis of the allegations of the underlying complaint. The Eleventh Circuit Court of Appeals found, however, that Florida's courts recognize "some natural exceptions" to the rule, including one for cases in which the insurer refuses to defend based on "factual issues that would not normally be alleged in the complaint." The court held that "whether the insured provided sufficient notice of the claim" is one such issue.

Future disputes about what would "normally be alleged" are likely to be decided on a case-by-case basis. **The insurer's position will be strongest where the extrinsic information is not required to establish the underlying plaintiff's legal claims, where it relates only to the relationship between the policyholder and the insurer, and especially where (as in *Composite*) it is uncontested as a matter of fact.**

In what might be an even more significant ruling, the court also rejected the theory that an insurer is "required" to file a declaratory judgment action before relying on extrinsic facts to deny a defense. As the New York Court of Appeals did just a month earlier, in *K2 Investment Group v. American Guarantee & Liability Ins. Co.*, the Eleventh Circuit suggested that such a suit is still "the preferable means for determining [a] duty to defend." But especially where, as in *Composite*, there is no factual dispute for the suit to resolve, or where filing a suit might harm the insured, seeking declaratory judgment might actually be ill-advised.

Supreme Court Protects Whistleblowing Employees of Mutual Fund Adviser

BY GARY COHEN

Whistleblowing law continues to develop, with a recent U.S. Supreme Court decision holding that, despite ambiguous statutory language, the Sarbanes-Oxley Act of 2002 protects employees of private companies serving as contractors to public companies.

In *Lawson v. FMR LLC*, a divided (6-3) Court found that SOX whistleblower protections applied to employees of a privately-held Fidelity investment adviser serving public mutual funds. Two such employees separately reported first to Fidelity—not the SEC—what they believed to be incorrect fund prospectus and shareholder report disclosure, and claimed retaliation by Fidelity. The statutory language referred expressly to public companies, but Justice Ginsburg's majority opinion pointed out that a narrow reading of the language "would leave [SOX] with no application to mutual funds."

SOX'S WHISTLEBLOWER PROVISIONS ARE IN MANY RESPECTS BROADER THAN THOSE ADOPTED BY THE SEC UNDER DODD-FRANK.

Subsequent to the conduct at issue in this decision, however, the SEC adopted rules pursuant to the Dodd-Frank Act that may limit the decision's practical significance for whistleblowing about federal securities law violations. These SEC rules, which unambiguously apply to employees of both private and public companies, establish incentives and protections for whistleblowers who provide information regarding securities law violations.

Nevertheless, the Supreme Court's decision will have considerable importance going forward because SOX's whistleblower provisions are in many respects broader than those adopted by the SEC under Dodd-Frank. For example, unlike the SEC rules, SOX covers whistleblower communications to federal agencies other than the SEC. Furthermore, as Justice Ginsburg noted, SOX provides protection for whistleblowing related to, among other things, mail, wire, and bank fraud, in addition to certain federal securities law violations. As a result, many cases could arise where SOX provides a whistleblower's only protection.

Small SEC Steps Toward a Uniform Fiduciary Standard?

BY KYLE WHITEHEAD

Securities and Exchange Commission Chair Mary Jo White has directed the Commission's staff to prepare a document that outlines all alternative approaches the SEC could take to proposing fiduciary rules applicable to broker-dealers that provide retail investment advice. These range from a full-blown uniform fiduciary standard applicable to broker-dealers and investment advisers alike, to measures that may be, in Chair White's words, "more targeted and achievable in the shorter term." This call to action is notable for what it may signify.

For one thing, it reaffirms that Chair White places a high priority on at least making progress on the issue of "harmonizing" the different standards of conduct applicable to broker-dealers and investment advisers. However, it is also a reminder that, despite Chair White's enthusiasm, the SEC staff has yet to present to the Commission any proposals related to harmonization. Indeed, according to reported remarks of Commissioner Daniel Gallagher, **the commissioners have yet to formally discuss whether the SEC should proceed with any rulemaking** in this area—despite the SEC's March 2013 request for cost-benefit data regarding the different standards.

Chair White's directive seems to confirm other indications that no consensus has developed among the Commission's staff or among the commissioners themselves. Has the available cost-benefit data so far proved inconclusive, thus precluding any obvious solution? Is a uniform fiduciary standard now unlikely? Or, will "targeted and achievable" measures simply be steps down a longer road toward a uniform standard?

Clear answers to these questions have not yet emerged. But Chair White's request for alternatives seems to increase the likelihood that a comprehensive resolution of the issue may be remote, even if the Commission does take some action in the not too distant future.

Mutual Funds Get Congressional Help Against FSOC

BY TOM LAUERMAN

Some members of Congress have come to the aid of the investment management industry in its battle to avoid determinations by the Financial Stability Oversight Council (FSOC) that any mutual funds or investment advisers present risks to the financial system that warrant additional regulation pursuant to the Dodd-Frank Act.

Criticism of study coming from every direction.

The controversy ignited last fall with the release of a study by the Treasury Department's Office of Financial Research, as part of the groundwork for such systemic risk determinations by the FSOC. **Although the study suggests numerous risks that may justify additional regulation, criticism of the study's methodology, thoroughness, and reasoning has flowed from many directions**, including from representatives of the investment management industry, some academics, and SEC commissioners from both political parties.

The flames were fanned by reports earlier this year that the FSOC was already focusing specifically on Fidelity and Blackrock as potential candidates for additional regulation, which many regarded as precipitous.

Members of Congress have expressed a variety of concerns, including in recent letters to Treasury Secretary Jacob Lew (who chairs the FSOC) emphasizing that the systemic risk evaluation and regulatory process must be thorough, transparent, and otherwise conducive to producing sound results. The signatories to such letters mainly have been Republicans, although one letter included some Democrats, as well. Some of the letters also requested that Congress be provided with extensive additional information about the FSOC's process in making systemic risk determinations.

Although the FSOC at its May 7, 2014 meeting adopted some enhancements to the transparency of its decision-making, those changes probably are not sufficient to quell much of the criticism. Legislation also has been introduced to address some of the remaining concerns with the process for identifying systemically risky firms. There is no prospect, however, for enactment of such legislation in the near future.

FINRA Continues Investor-Friendly Arbitration Reforms

BY MICHAEL WOLGIN

The Financial Industry Regulatory Authority (FINRA) is submitting rule amendments for SEC approval that would generally make individuals with any past ties to the financial industry ineligible to be considered "public" FINRA arbitrators. Currently, an individual with past ties to the industry, but no current ties, can be considered a public arbitrator under certain conditions.

A FINRA panel typically includes three arbitrators, who can be public arbitrators, nonpublic (industry insider) arbitrators, or both. Several years ago, FINRA made rule changes that gave investors the power to demand panels comprised entirely of public arbitrators. *See also* "FINRA Favors an Easier Choice [of Public Arbitrators]" in *Expect Focus*, Volume III, Summer 2013.

FINRA critics have argued that nonpublic arbitrators can exhibit bias in favor of the industry. **FINRA's tolerance for customer agreement provisions whereby broker-dealers require arbitration of disputes has also been criticized as unfriendly to investors.** *See*, *e.g.*, "Blue-Sky Regulators Attack Pre-Dispute Arbitration Agreements" in *Expect Focus*, Volume II, Spring 2013.

FINRA'S TOLERANCE FOR CUSTOMER AGREEMENT PROVISIONS WHEREBY BROKER-DEALERS REQUIRE ARBITRATION OF DISPUTES HAS ALSO BEEN CRITICIZED AS UNFRIENDLY TO INVESTORS.

The amendments FINRA submitted may help quell critics' frustration regarding mandatory arbitration provisions. If not, the SEC or Congress could act to prohibit these provisions. This could substantially reduce the volume of FINRA arbitrations, perhaps to the detriment of FINRA's arbitration program.

New FINRA Supervision Rules May Require Immediate Action

BY TOM LAUERMAN

The SEC approved FINRA's major reworking of its rules governing broker-dealers firms' supervision of their offices and associated persons. Firms must comply with the new rules by December 1, 2014. This may require some firms to make substantial changes.

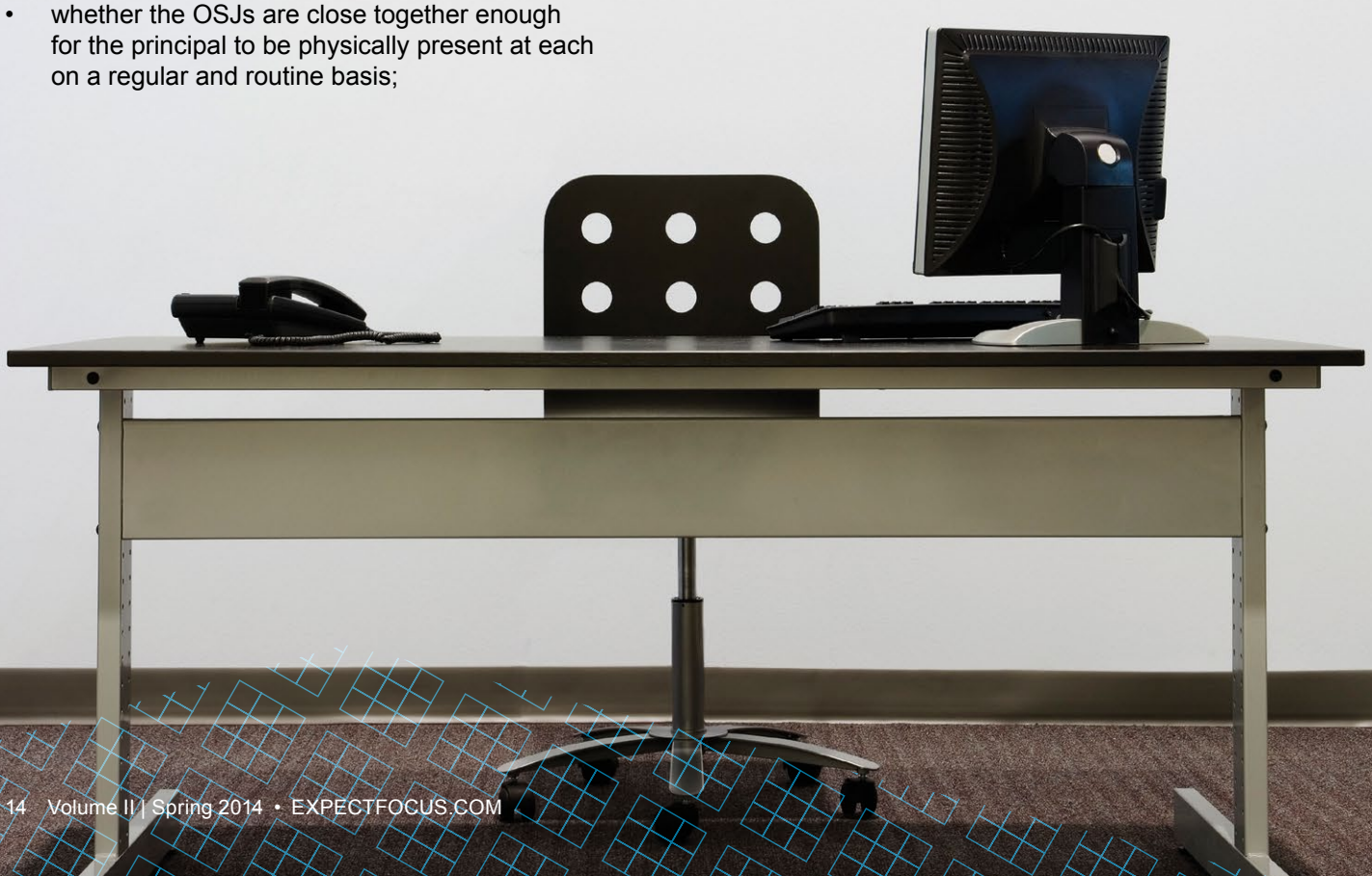
For example, the rules' Supplementary Material makes clear that the principals designated by broker-dealers to perform supervisory responsibilities at offices of supervisory jurisdiction (OSJs) must have a physical presence on a regular and routine basis at each OSJ for which the principal has supervisory responsibilities.

It is evident that this requirement for "regular and routine" physical presence will have teeth because the Supplementary Material also presumes that no person may serve as a designated onsite supervising principal for more than one OSJ at a time. According to FINRA, when evaluating whether an OSJ supervising principal can overcome this presumption, firms should consider factors such as:

- the principal's level of experience and training;
- the amount of time the principal can devote to supervisory responsibilities at each OSJ;
- whether the OSJs are close together enough for the principal to be physically present at each on a regular and routine basis;
- the number and disciplinary history of the firms' personnel assigned to each OSJ and any other indicators of irregularities or misconduct; and
- the volume and complexity of the activities the principal will supervise at each OSJ.

IT IS EVIDENT THAT THIS REQUIREMENT FOR "REGULAR AND ROUTINE" PHYSICAL PRESENCE WILL HAVE TEETH.

FINRA will probably use similar factors, as appropriate, to determine whether even a principal whose supervisory responsibilities extend to but a single OSJ has a sufficiently "regular and routine" physical presence there. In any event, because of the lead time that these and many other required changes may entail, firms should thoroughly familiarize themselves with the new rules right away.



Certain Merger and Acquisition Brokers Escape SEC Registration

BY SUSAN SPENCER

The SEC recently issued a no-action letter that allows private company M&A brokers who satisfy specific criteria to avoid registering as broker-dealers with the SEC.

Historically, an intermediary in a private M&A transaction where securities change hands would generally be considered a broker-dealer required to register. But for some brokers, registration is no longer required if 10 criteria are satisfied. These include that the broker not be authorized to bind a party to the deal; not provide financing for the deal; not obtain possession of customer funds or securities; and not have been barred or suspended from association with a registered broker-dealer. Additionally, the deal must involve a public offering.

Brokers who satisfy all required criteria can facilitate due diligence, negotiate deal terms (including those concerning securities issuance), advertise companies for sale, provide valuation advice on securities being sold, and receive transaction-based consideration – conduct that in many cases would have forced them to register in the past.

Being registered with the SEC is cumbersome and costly, and subjects parties to significant regulatory burdens. Brokers who facilitate only private company M&A deals and who satisfy all 10 criteria can now decide if SEC registration is worth the burden and expense. In addition, private companies entertaining M&A transactions can now obtain advice from a larger number of advisors.

IN A MAJOR DEPARTURE FROM PRIOR POSITIONS, THE SEC STAFF IS TAKING THE POSITION THAT BROKER-DEALER REGISTRATION IS NOT REQUIRED FOR PERSONS WHO BRING M&A PARTIES TOGETHER, SUBJECT TO CERTAIN CONDITIONS.

However, the relief granted by the SEC does not mean that brokers don't have to comply with other federal laws, including anti-fraud laws. Nor does it mean they don't have to comply with any registration or other requirements imposed under the laws of any states where they conduct business. Many states exempt from registration out-of-state brokers who are registered with the SEC, so brokers engaged in multi-state operations may want to continue being registered with the SEC.

Clearly, any decisions to de-register or remain unregistered should be carefully made.

SEC "Likes" Social Media for Investment Advisers

BY SCOTT SHINE

The SEC staff views social media as a useful tool that helps consumers conduct their own due diligence on investment advisers. In a recent Investment Management Guidance Update, the staff stated that, under certain circumstances, registered investment advisers' publication of public comments from social media sites would not violate the Investment Advisers Act rule prohibiting testimonials in advertisements.

Rule 206(4)-1(a)(1), which prohibits an investment adviser from publishing any statement of a client's experience with a registered adviser, was adopted to address the concern that such advertisements of client testimonials tend to emphasize only favorable comments and may thus be misleading. However, under the SEC staff's Update, an adviser's social media or other real-time website may include testimonials consisting of public comments from **a real-time site that is independent of the adviser** without violating the rule, if a number of conditions are met.

The conditions are designed to ensure that, among other things:

- all comments, good and bad, are posted on the independent site and repeated on the adviser's site, and
- neither the independent site nor the adviser influences the substance or manner of presenting the comments or editorializes in any way that might cause the viewer to think better or worse of the adviser.

Pursuant to the staff's Update, an adviser can use any medium to advertise the fact that public comments about the adviser may be found on the independent site (and include the logo of that site). But the adviser may only actually *publish* those comments via a real-time website. This allows readers to instantaneously view the most recently posted comments, which they cannot do in more static media such as print, television, or radio.

The ACA's Bumpy Ride

BY LINDA L. FLEMING

From the monumental failure of the initial government website for the federal health insurance marketplace (healthcare.gov) to the looming employer mandate, the Affordable Care Act has garnered its fair share of criticism. Yet, the ACA has withstood numerous legal challenges and changed the face of health care in the United States.

The most important change is perhaps the number of Americans who have enrolled to receive health insurance in the federal and state marketplaces, currently estimated at more than 8 million, along with millions more who are eligible for the expanded Medicaid program enacted by 27 states. These individuals now have the ability to seek medical care at negotiated rates, reducing the likelihood that they will seek health care through a hospital's emergency department or require charity care.

Further, the rules for health insurers have changed dramatically. Individuals cannot be denied coverage because of a preexisting condition. Policies cannot impose annual or lifetime limits and are more comprehensive, with most offering minimum essential health benefits.

FEE FOR SERVICE IS MAKING WAY FOR BUNDLED PAYMENTS, REQUIRING PROVIDERS TO ADAPT TO NEW PAYMENT METHODOLOGIES.

Health care delivery and payment models are also changing. The advent of Accountable Care Organizations and the proliferation of "narrow" insurance networks are results of the ACA. Fee for service is making way for bundled payments, requiring providers to adapt to new payment methodologies.

All of this comes at a cost. High wage earners now pay more in Medicare employment taxes. Certain individuals who elect not to buy health insurance will pay penalties next year. Soon, employers of 50 or more will be mandated to offer employees health coverage.

We have witnessed monumental changes since the ACA was enacted four years ago. The next few years promise further evolution for the entire health care industry, from patients to providers, and from private payers to government programs. Hold on, we are only halfway through the ride.

Congress Sends Mixed Messages to Health Care Providers

BY LINDA L. FLEMING & RYAN WIERENGA

Recent federal health care legislation sent mixed signals to health care providers. Pursuant to HR 4302, signed by President Obama on April 2, planned Medicare reimbursement cuts of 24 percent and the implementation of a complex set of billing codes were delayed, measures likely to mollify physicians. However, through the same legislation, Congress accelerated a moratorium on long-term care hospitals.

While the delay of the planned Medicare reimbursement cuts no doubt brought physicians relief, Congress missed an opportunity to provide a permanent solution. Rather, it continued its annual tradition of extensions. Republicans proposed a bill that would have provided permanent relief, but Democrats found it unpalatable because it also proposed a delay of the Affordable Care Act's individual mandate.

Additionally, in reliance on statements made by the Centers for Medicare and Medicaid on February 28, 2014, providers had been actively planning to implement the International Classification of Diseases version 10, a new billing code system. But HR 4302 now blocks its implementation until October 2015.

Delays are not universal under HR 4302. The legislation accelerates the moratorium on long-term care hospitals (LTCH) from January 2015, to April 2014. The moratorium affects new LTCHs and new beds in existing LTCHs. The blow of this abrupt freeze is softened by three exceptions, that provide relief if, on or before April 1, 2014, the LTCH had: 1) begun its qualifying period for payment under federal law; 2) a binding written agreement with an unrelated party for construction, renovation, lease, or demolition of an LTCH, and had expended at least 10 percent of the estimated cost; or 3) obtained a certificate of need.

The High Costs and Consequences of a CFPB CID

ELIZABETH BOHN

Dodd-Frank gives the Consumer Financial Protection Bureau (CFPB) the power to enforce and implement federal consumer financial protection laws, including home mortgage and other consumer credit regulations, plus powerful tools to investigate potential violations of those laws. These tools include informal requests for information as part of its examination and supervisory functions, subpoenas for testimony or documents, and the civil investigative demand (CID).

Before initiating any proceeding under a federal consumer financial law, Dodd-Frank authorizes the CFPB to serve a written CID whenever it has "reason to believe" that "any person may be in possession of information relevant to a violation." The CID, which may require the person to produce documents, file written reports, answer questions, furnish materials, or provide testimony, must identify the conduct constituting the alleged violation and applicable law, describe the information requested in sufficient detail to allow it to be fairly identified, and provide a reasonable period of time for the information to be submitted. Within 10 days of receipt, CID recipients are required to meet and confer with the Bureau investigator to discuss and try to resolve any compliance issues.

Documents and information produced in response to a CID must be accompanied by a statement swearing that everything responsive is being produced. Answers to written questions, as well as oral testimony, must be given under oath. The only objections permitted for refusing to provide information are those based on "constitutional or other legal rights or privileges," such as the privilege against self-incrimination. If an entity refuses to provide information, the Bureau can petition the district court for an order compelling the information to be provided. On the other hand, a party who receives a CID only has 20 days to petition the CFPB director, in writing, seeking to modify the demand for information, and the reasons for such request. While such a petition is pending, the recipient is expected to comply with those portions of the request that the party does not seek to modify. The director is under no obligation to grant such petitions.

CIDs are sent out by the CFPB's enforcement division, and not until the Bureau believes there may have been a violation of consumer law. The CFPB's enforcement division is more aggressive than its regulatory division, and CIDs issued have been detailed and comprehensive. Indeed, the CFPB's enforcement orders issued to date typically refer to information obtained through investigations that led to the order.

Unlike discovery requests in litigation, where the requesting party may be required to foot the production bill, there is no provision for reimbursement of costs associated with complying with a CID. Costs include, but are not limited to, those of performing electronic and other searches for information (which may require outside vendors), interviewing employees, attorneys' fees, and the business costs of lost employee and management time in complying with the CID. Where violations of law have been found, the Bureau has not hesitated to issue administrative orders requiring hundreds of millions of dollars in consumer refunds and penalties.

Given the high cost and potential consequences of responding to a CID, the only effective strategy is to avoid receiving one. Most CFPB investigations have been triggered by a number of consumer complaints against an entity. Entities should focus on establishing adequate systems to assure compliance with consumer financial law, resolve consumer complaints, and closely monitor complaints on the Bureau's complaint database. Entities better at resolving and/or avoiding consumer complaints are less likely to become targets of a CID.

Proposed CFPB Rule Would Allow Online Posting of GLBA Privacy Notices

BY ELIZABETH BOHN

The Gramm-Leach-Bliley Act (GLBA) requires financial institutions to provide customers with initial and annual notices of their privacy policies, including whether they share consumers' non-public information with third parties, and an opportunity to opt out of such information sharing. Many financial institutions mail printed copies of their annual GLBA privacy notices. In response to industry concerns about consumer "information overload," the CFPB issued a proposed new rule in May, which would permit CFPB-supervised entities that do not share certain types of consumer information to post annual privacy notices on their websites instead of mailing them.

Financial institutions covered by the proposed CFPB rule include depositary and non-depositary institutions and other entities that provide consumer financial products or services subject to CFPB regulation, such as mortgage brokers, loan servicers, and debt collectors. The Bureau also coordinated with the SEC, CFTC, and the National Association of Insurance Commissioners, in developing the proposed alternative method for delivering the notices.

The proposed regulation provides that a financial institution may reasonably expect a consumer to receive actual notice of its annual privacy notices published online if the customer uses the institution's website to access financial products and services, agrees to receive notices at the website, and the notice is continuously posted in a clear and conspicuous manner on the website, or, if the customer has requested that the institution not send information regarding the customer relationship, but the current privacy notice remains available to the customer on request.

IN RESPONSE TO INDUSTRY CONCERNS ABOUT CONSUMER "INFORMATION OVERLOAD," THE PROPOSED CFPB RULE WOULD PERMIT CFPB-SUPERVISED ENTITIES THAT DO NOT SHARE CERTAIN TYPES OF CONSUMER INFORMATION TO POST ANNUAL PRIVACY NOTICES ON THEIR WEBSITES INSTEAD OF MAILING THEM.

In addition, to be permitted to deliver the notice online, the financial institution must not share non-public consumer personal information with non-affiliated third parties in a manner that triggers GLBA opt-out rights, or share information with affiliates in a manner that triggers affiliate information sharing opt-out rights under Sec. 603(d)(2)(A)(iii) of the Fair Credit Report Act ("FCRA"). Further, if an opt-out notice for sharing of information among affiliates for solicitation and marketing purposes is required under Sec 624 of the FCRA, the online notice must not be the only method for providing such notice. The institution must also use the model form provided in the GLBA's implementing Regulation P.

For the full text of the CFPB's Advanced Notice of Proposed Rulemaking, see: http://files.consumerfinance.gov/f/201405_cfpb_annual-privacy-notice-proposal.pdf.

Exposing Individual Issues Regarding Consent Can Help Defeat Class Certification

BY FENTRICE DRISKELL

Recent decisions suggest it may be tougher for plaintiffs to obtain class certification in Telephone Consumer Protection Act (TCPA) matters where individual issues regarding consent predominate. The TCPA imposes $500 statutory damages per call (including text messages) where the recipient did not provide the requisite consent to the communication, and up to $1,500 per knowing and willful violation. Because the risks associated with protracted class action litigation are compounded by the TCPA's generous damages scheme, the best chance for minimizing exposure in such matters is at the certification stage.

THE BEST CHANCE FOR MINIMIZING EXPOSURE IN TCPA MATTERS IS AT THE CERTIFICATION STAGE.

One strategy for defending against certification is to exploit individualized issues related to consent. Recently, a California federal district court ruled that predominance was not demonstrated under Rule 23(b) where issues of consent could not be established with class-wide proof. In *Fields v. Mobile Messengers Am., Inc.*, the consumer plaintiffs claimed to be victims of "cramming," a purported scam that results in the placement of "unauthorized, misleading, or deceptive charges on a consumer's cell phone bill." The plaintiffs complained of receiving monthly charges for the periodic receipt of unsolicited text messages containing trivia or horoscope information.

The defendants produced evidence indicating that consent was obtained from more than 1.5 million potential class members when they entered their information into one of the defendants' websites, which detailed available text message subscription plans. The plaintiffs' contradictory evidence showed that at least some of the putative class members had not responded to the defendants' confirmation text messages, and that it may have been possible for the defendants to manipulate the data regarding subscription confirmations. Because there was insufficient class-wide evidence regarding consent, the court denied certification.

Exploiting individualized consent issues may not work where other factors supersede those related to consent. For example, in C-*Mart, Inc. v. Metro. Life Ins. Co.*, a Florida federal district court determined that, because a defendant's fax solicitations failed to include necessary opt-out language, the communications would have violated the TCPA even if valid consent was obtained. Still, companies should focus on individualized issues including those related to consent where appropriate, as doing so could help defeat certification.

Servicers Face New Requirements for Responding to Consumer Error Claims

BY: MICHAEL WINSTON & KRISTEN GORE

The CFPB amendments to Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA) that took effect January 10, impose onerous new requirements on servicers to correct errors and provide information that borrowers request. Under the new rules, consumers who notify servicers of claimed errors in loan servicing trigger new servicer obligations to act. The new regulation applies to "any written notice from the borrower that asserts an error and that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred."

First, servicers must provide written acknowledgement of the notice of error within five days. If the claimed error relates to failure to provide an accurate payoff balance, the servicer has only seven days from receipt of the notice to investigate and provide a response that either confirms the error and states that it has been corrected, or states that the servicer has determined that no error occurred, the basis for that determination, and the borrower's right to request documents supporting it. If the asserted error claims improper pursuit of foreclosure, the servicer must respond in the same manner within 30 days, or before the foreclosure sale, whichever is earlier.

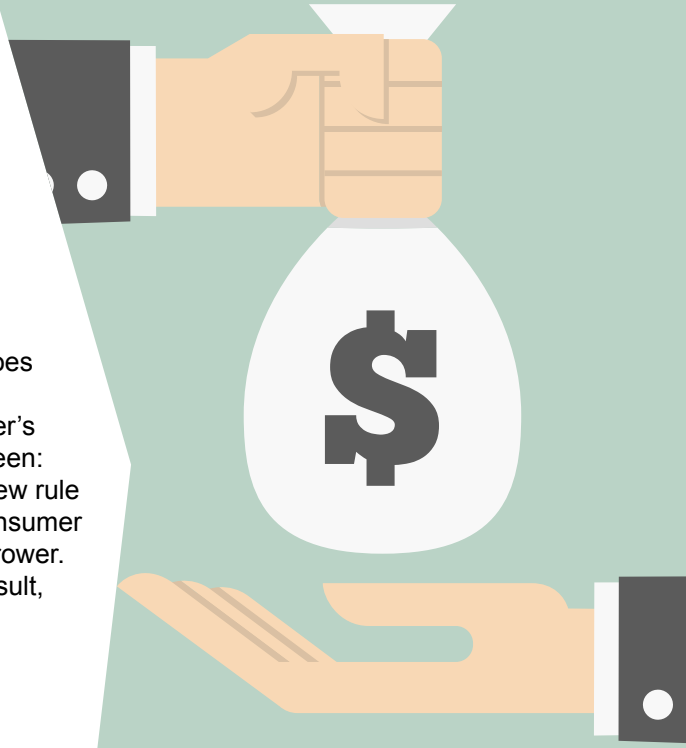
Consumers' notification of claimed errors triggers obligation to act.

Servicers must generally respond to all other types of asserted errors within 30 days, although an additional 15-day extension may be obtained for errors other than those regarding the payoff balance and foreclosure proceedings. When requested, servicers must also provide documentation relied on in responding to error requests within 15 days, unless the documents include confidential, proprietary, or privileged information, and providing the servicer notifies the borrower of such a determination within 15 days of the request.

The CFPB expects servicers to have compliance management systems in place to assure compliance with all of its new regulations, these included.

Mortgage Servicers Face Consumer Lawsuits Under CFPB "Periodic Statement" Final Rule

BY DAVID ESAU



The CFPB's final rule amending Regulation Z, which implements the Truth in Lending Act (TILA) as amended by Dodd-Frank, became effective January 10. Among other things, the new rule requires mortgage servicers to provide borrowers with periodic statements that meet very specific content, form, and timing requirements. This rule does not exempt servicers from the periodic statement requirement even if the servicer receives a "cease communication" request from a borrower's attorney. So, servicers who receive these requests must choose between: (a) not sending the borrower a statement and risking violation of the new rule and TILA, or (b) sending a statement and potentially violating state consumer collection statutes that prohibit communication with a represented borrower. For the most part, mortgage servicers have chosen option (b). As a result, they may face a rash of lawsuits.

THE CFPB EXPRESSLY EXEMPTED SERVICERS FROM LIABILITY UNDER THE FDCPA, INDICATING THAT THEY ARE REQUIRED TO SEND PERIODIC STATEMENTS IRRESPECTIVE OF WHETHER THEY RECEIVE A "CEASE COMMUNICATION" REQUEST.

While there are no reported decisions yet, the CFPB issued a helpful Advisory Opinion addressing whether a servicer would be liable under the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(e), for sending periodic statements despite a borrower's "cease communication" request. In its Advisory Opinion, the CFPB expressly exempted servicers from liability under the FDCPA, indicating that they are required to send periodic statements irrespective of whether they receive a "cease communication" request. The CFPB made clear that it "believes that these [periodic statements] provide useful information to consumers regardless of their collections status."

The Advisory Opinion does not address servicers' liability under parallel state consumer collection statutes, but it provides powerful ammunition to defeat such claims because most state statutes substantively track the FDCPA, and often defer to FDCPA case law. Servicers may also have a "conflict preemption" argument against state law claims. By its terms, TILA preempts any application of state law that is inconsistent with TILA's mandates. Since TILA now requires servicers to send periodic statements irrespective of whether they receive a "cease communication" request from the borrower, state consumer collection statutes that prohibit periodic statements under those circumstances seem inconsistent with TILA's mandates, and may be preempted.

Start-Up Tech Company Will Not Change the Future of Television

BY GAIL PODOLSKY

On June 25, 2014, the United States Supreme Court issued a decision in a highly controversial tech case involving cable broadcasters. With cable pricing increasing astronomically over the years, start-up Aereo Inc. created a solution: tiny antennas. Aereo uses these antennas to capture TV signals out of the air, and then places the broadcast into a DVR. The DVR then plays the program through a PC, tablet, or phone. Aereo's service costs substantially less than those of other cable companies, partly because it does not pay retransmission fees to cable broadcasters.

Broadcasters dislike Aereo's business model because retransmission fees are a huge source of revenue. Last year, they totaled $3.3 billion. Several major television broadcasters filed suit against Aereo alleging copyright infringement, and moved for a preliminary injunction. A district court in New York denied the preliminary injunction and the Second Circuit affirmed. The Supreme Court reversed and remanded.

The debate centers around whether Aereo is offering a "public" or "private" performance. Public performances require the payment of retransmissions fees, and private performances do not. Aereo argued that it offers antenna rental services that assist in the broadcasting of a particular show to one subscriber, much as a VCR or DVR does. In addition, Aereo argued that the transmission includes the broadcasters' advertisements, so their main source of revenue remains intact. The broadcasters argued that Aereo is stealing their work and infringing their copyright because rebroadcasting to thousands of subscribers renders performances public.

In a 6-3 vote, the Supreme Court sided with the broadcasters and found that Aereo transmits a performance of copyrighted works to the public. The Court defined the public as a large group of people who are unrelated and unknown to each other, namely, a large group outside of family and friends. The case will be sent back to the district court to reconsider the request for preliminary injunctive relief.

PUBLIC PERFORMANCES REQUIRE THE PAYMENT OF RETRANSMISSION FEES, AND PRIVATE PERFORMANCES DO NOT.

While the case is not over, this is a huge victory for broadcasters. The impact of this decision is far reaching. Copyright owners may use this decision to challenge other cloud-based tech solutions, such as Dropbox and Google Drive, that store their copyrighted materials without permission.

Carlton Fields Jorden Burt was recognized as a leading law firm in The BTI Brand-Elite 2014: Client Perceptions of the Best-Branded Law Firm report. The report is based solely on corporate counsel feedback at more than 300 companies. Corporate counsel ranked Carlton Fields Jorden Burt in the top 25 percent of bet-the-company firms out of the 650 law firms serving large clients for the most complex and high-risk work. Additionally, corporate counsel named the firm as a leader in brand differentiation.

Equality Florida honored Chief Operating Officer, **Anastasia C. Hiotis** and the firm at-large May 3, 2014 with the Voice for Equality award and Equality Means Business award. Hiotis received the Voice of Equality award in recognition of her years of dedication to securing equality for the LGBT community. Carlton Fields Jorden Burt was honored with the Equality Means Business Award for its role as a longstanding partner of Equality Florida, contributing thousands of hours of legal service to assisting in efforts to achieve LGBT equality.

Carlton Fields Jorden Burt will sponsor the Welcome Reception at the ACLI Compliance & Legal Sections Annual Meeting, which will take place July 28-30, 2014 in Fort Lauderdale, FL. **Gary Cohen**, of counsel in the Washington, D.C. office will present "Where is the SEC Going?" during a concurrent session on Tuesday, July 29. For more information and to register, visit www.acli.com/events.

Carlton Fields Jorden Burt welcomes the following new attorneys to the firm: Shareholder **Mark Neubauer** (Business Litigation, Los Angeles), Shareholder **Meredith Moss** (Business Litigation, Los Angeles), Senior Counsel **Sarai Bryant Stewart** (Business Transactions, Miami), Associate **Stephen Bagge** (Business Litigation, Tampa), and **Cristina Sanchez** (Real Estate and Commercial Finance, Miami).

Carlton Fields Jorden Burt is pleased to welcome its 2014 Summer Associate Class. Thirteen law students from eight different law schools will focus on providing top notch legal service to clients, developing their legal skills, and fostering a sense of teamwork. Additionally, two of the summer associates are recipients of the Carlton Fields Jorden Burt annual Wm. Reece Smith Jr. Diversity Scholarship award program.

Miami Shareholder **Steven J. Brodie** was recently re-appointed to the United Way of Miami-Dade's Executive Committee and Board of Directors. He will serve a one-year term. In these roles, Brodie will help direct the business affairs of United Way and will be responsible for making sure the organization is meeting its mission, which includes helping children reach their potential and achieve in school, empowering families and individuals to become financially stable and economically independent, and improving people's health.

Tampa Shareholder **Fentrice Driskell** was elected president of the George Edgecomb Bar Association (GEBA) for a one-year term. GEBA is a voluntary bar association in Hillsborough County, Florida that was established in 1982. It is dedicated to the advancement of African Americans in the legal profession. As president, Driskell will be responsible for setting the strategic vision of the organization, which has more than 100 members, a 10-member board, and 10 standing committees.

Miami Shareholder **Jay A. Steinman** has been named one of the Ronald McDonald House Charities' 2014 Twelve Good Men of South Florida. He was honored April 29 at a charity luncheon held at Jungle Island. The Twelve Good Men of South Florida honors leading men with a history of outstanding community involvement, civic service, and involvement in one or more of South Florida's charity organizations.

Hartford Associate **John W. Herrington** was reappointed to the Connecticut State Advisory Committee by the U.S. Commission on Civil Rights. Herrington was initially appointed to this committee in 2011. His new term will last two years. The Connecticut State Advisory Committee comprises 15 members — all charged with the task of evaluating and reporting on civil rights concerns in the state, including justice, voting, discrimination, housing, and education.

On the Move

In April, the firm's Connecticut office moved from Simsbury to Hartford. The move repositions the firm at the center of the Hartford business district and underscores its commitment to service for insurance and financial services clients in the region. Our office is located at One State Street, Suite 1800.

The firm also opened an office in Los Angeles. This expansion is a natural evolution of the firm, as many clients are based in or near the city. The Los Angeles office is located in the Century Plaza Towers, 2029 Century Park East, Suite 2000.

CARLTON FIELDS JORDEN BURT

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

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- Health Care
- Technology
- Consumer Finance
- Construction
- Telecommunications
- Securities
- Real Estate
- Manufacturing and Raw Materials

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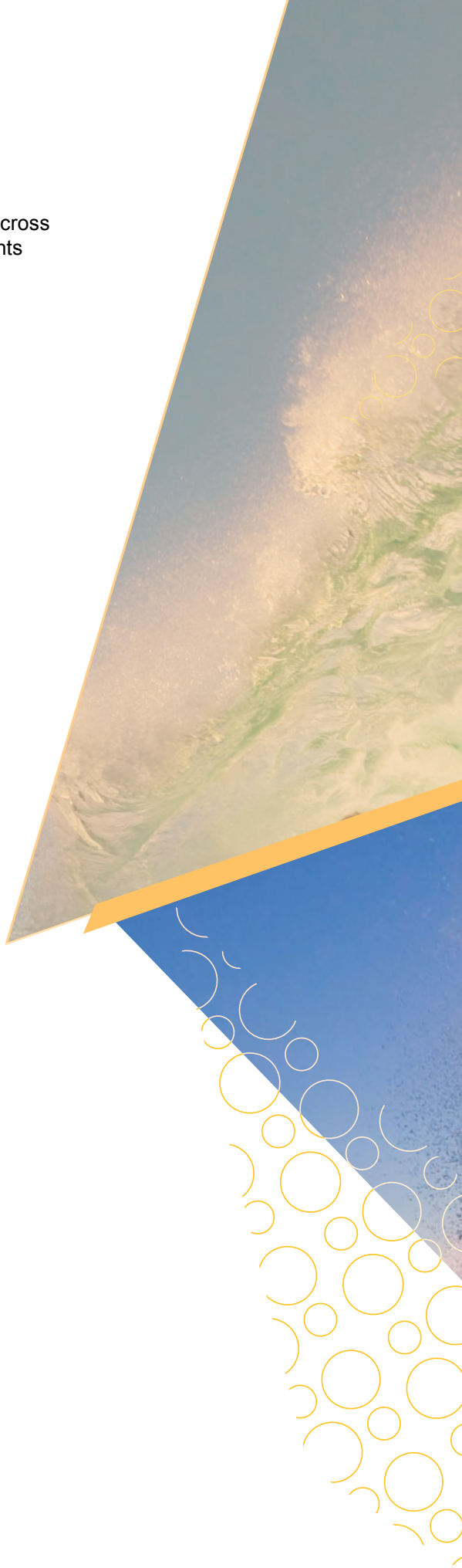

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