LeClairRyan Accountant and Attorney Liability Newsbrief

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The Affordable Care Act and CPAs: It Takes a Village

by Elizabeth J. Atkinson, Esq.

The Affordable Care Act ("ACA") is complex legislation still being shaped by legal challenges and ongoing guidance from government agencies. Yet, because of its tax provisions, businesses must navigate the tax reporting and compliance aspects of the ACA. To what extent should CPA's assist clients to navigate these tax reporting and compliance issues and when should they involve other professionals and perhaps even choose not to answer client questions about the ACA?

Legal issues and attorney-client privilege: Many small businesses are seeking advice on how to structure their workforces to navigate around the ACA so they are not required to provide coverage. Small businesses often have a mixture of independent contractors, and part-time and full-time employees. Advice on these matters implicates not only the ACA and tax issues, but also state employment laws. Changes to the workforce to avoid providing benefits, including health care, are potentially a violation of the law under ERISA and potentially discrimination laws. Accordingly, any planning needs to be done in concert with an attorney knowledgeable about state employment laws.

Penalties under the ACA: The ACA provides for a host of penalties if employers fail to offer coverage or offer inadequate coverage. In addition, there are substantial excise taxes for certain violations of the ACA, fees in connection with self-insurance, penalties for incorrect reporting, and the looming "Cadillac tax." CPA's have an important role in helping clients figure out the potential impact of penalties, calculating penalties and mitigating penalties. Because of self-reporting rules and enhanced penalties for failure to self-report, however, an attorney needs to be involved in any discussions seeking to plan around penalties or situations where a violation may have occurred. Given the increasing financial motivation for whistleblowers, this is an important consideration.

Insurance issues: CPA's are often asked to help clients decide what sort of fringe benefits to provide and design fringe benefit plans. Because insurance products are highly regulated, however, there are many issues that need the expertise (and licensing) of an insurance professional. CPA's should ensure that the insurance professionals are involved in any of these discussions so that the CPA does not inadvertently step out of the CPA role and into the insurance agent or broker's role.

Teaming up with other professionals: Putting together a team of professionals can help the CPA meet the client's needs while protecting the client and the CPA. Often a CPA can be engaged by an attorney to shield planning discussions under the umbrella of the attorney-client privilege. Involving other professionals often brings about a "network effect" where cross referrals flourish as each professional learns of the other's valuable expertise.

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U.S. District Court for District of Massachusetts Holds Testator's Attorney Can Be Held Liable to A Beneficiary *by Alberto G. Rossi, Esq.*

In a recent decision, the U.S. District Court for the District of Massachusetts ruled a testator's attorney can be held liable to a prospective beneficiary for fraudulent misrepresentations. In *Spinnato v. Goldman,* 2014 WL 7236343 (D. Mass. Dec. 19, 2014) (Saris, C.J.), applying Massachusetts law, the Court distinguished a fraudulent misrepresentation claim, where the case law is unsettled, from a negligence, negligent misrepresentation, and breach of fiduciary duty claim, where it is well-settled that a testator's attorney cannot be held liable to prospective beneficiaries because the testator's attorney does not owe a duty of care to prospective beneficiaries.

On August 29, 1995, the decedent, a Massachusetts resident, executed a last will and testament prepared by her estate planning attorney. The will listed eight heirs, all of whom were distant relatives and all but one of whom lived in Texas. The decedent had no regular contact with any of these heirs during the last twenty years of her life.

The plaintiff, a New Hampshire resident, met the decedent in 1998. The two established a close friendship which lasted until the decedent's death in 2011. The decedent introduced the plaintiff to her estate planning attorney five or six times. The estate planning attorney believed the plaintiff to be the decedent's best friend and never mentioned he thought their relationship was improper. On one occasion, the estate planing attorney told the plaintiff the decedent wanted to give him the bulk of her assets either upon her death or through the use of joint accounts. The estate planning attorney told the plaintiff he approved of the decedent's plan.

In 2006, the decedent changed her estate plan to reflect her relationship with the plaintiff. She executed a codicil to her will and a durable power of attorney in favor of the plaintiff. The estate planning attorney drafted and notarized both documents. The codicil made the estate planning attorney and the plaintiff co-executors of the decedent's estate and made the plaintiff a major heir of the estate. The estate planning attorney indicated to the plaintiff both documents reflected the decedent's true intent and never suggested that the decedent was incompetent or subject to undue influence. In reliance on these documents and statements by the estate planning attorney, the plaintiff and decedent transferred assets in four of the decedent's accounts outside of probate to the plaintiff.

On January 24, 2008, the decedent executed a second codicil to her will which made the plaintiff the sole beneficiary of her $200,000 deposit on her assisted living facility apartment. The estate planning attorney drafted and notarized the codicil and indicated to the plaintiff there was nothing improper about the change. At the time of the execution of the second codicil, the estate planning attorney was aware of the decedent's transfer of assets out of probate to the plaintiff.

The decedent died on March 26, 2011. Shortly after her death, unbeknown to the plaintiff, the estate planning attorney contacted the decedent's Texas heirs and alleged that plaintiff wrongfully transferred the decedent's assets out of probate when the decedent was either incompetent or under the plaintiff's undue influence. The estate planning attorney also placed the Texas heirs in contact with a Massachusetts attorney and assisted them and their attorneys in preparing a lawsuit against the plaintiff. The plaintiff was unaware of any of these communications until May, 2012, when the Texas heirs filed a lawsuit against the plaintiff in Massachusetts Superior Court.

In that litigation, the estate planning attorney signed an affidavit supporting the Texas heirs' claims against the plaintiff. He also testified at deposition that he believed the decedent was under the plaintiff's undue influence from the day he met the plaintiff. His deposition testimony also suggested the decedent was not competent to execute the legal documents transferring her assets out of probate to the plaintiff. Based on the estate planning attorney's affidavit and deposition testimony, the plaintiff agreed to settle the lawsuit and pay a portion of the non-probate assets to the Texas heirs.

Thereafter, the plaintiff sued the testator's attorney for: (i) breach of fiduciary duty; (ii) fraudulent misrepresentation; and, (iii) tortious interference with the expectancy of a gift. The testator's attorney moved to dismiss the suit.

Relying on the seminal case in Massachusetts, *Miller v. Mooney*, 431 Mass. 57 (2000), the Court held the testator's attorney did not owe a fiduciary duty to the plaintiff as a beneficiary because, "[i]n preparing an estate plan and distributing property, either through a will or through inter vivos trusts, attorneys can only have one client to whom they owe a duty of undivided loyalty." It is "[b]ecause of the potential for conflicting interests [that] testators' attorneys do not owe a duty to prospective beneficiaries when drafting a will." In rejecting the plaintiff's argument that no conflict existed because both he and the decedent wanted her will effectuated, the Court explained: "[I]t is the potential for conflict that prevents the imposition of a duty . . .. [A]n isolated instance [of] identity of interests between [the attorney's client and the nonclients] would not support the imposition of a duty."

The Court, however, held that in his capacity as co-executor of the decedent's estate, the testator's attorney did owe the plaintiff, a beneficiary of the estate, a fiduciary duty, which required the testator's attorney to fully disclose to the plaintiff all "information which is relevant to affairs entrusted to him and which . . . the [plaintiff] would desire to have." The Court found the plaintiff would have wanted to know that the co-executor of the decedent's estate, i.e., the testator's attorney: (i) believed the estate planning documents making the plaintiff an heir were invalid; (ii) told the Texas heirs he believed the decedent was under the plaintiff's undue influence when she transferred assets out of probate to the plaintiff; and, (iii) was providing assistance to the Texas heirs in preparing the lawsuit against him. Accordingly, the Court denied dismissal of the breach of fiduciary duty claim insofar as was it asserted against the testator's attorney in his capacity as co-executor of the estate. (cont. page 3)

Liable to a Beneficiary cont.

The Court also denied dismissal of the fraudulent misrepresentation claim. This claim was based on the plaintiff's detrimental reliance on the testator's attorney's prior misrepresentations to him regarding the validity of: (i) the estate planning documents which made him an heir; and, (ii) the decedent's transfer of assets out of probate to him. The testator's attorney argued, under Massachusetts law, a testator's attorney owes no duty of care to prospective beneficiaries. Although the Court agreed that this is the rule for negligence, negligent misrepresentation, and breach of fiduciary duty claims, it found no Massachusetts case law indicating a prospective beneficiary cannot prevail on a fraudulent misrepresentation claim against a testator's attorney.

The Court also denied dismissal of the plaintiff's claim for tortious interference with expectancy of a gift, finding the allegations in the Complaint set forth a plausible claim. To set forth a claim for tortious interference with expectancy of a gift, a plaintiff must plead the following three elements: (i) the defendant intentionally interfered with the plaintiff's expectancy in an unlawful way; (ii) the plaintiff has a legally protected interest; and, (iii) the defendant's interference acted continuously on the donor until the time the expectancy would have been realized. The plaintiff's Complaint alleged, during the decedent's life, the testator's attorney interfered with the decedent's intent to include the plaintiff in her will by fraudulently executing changes to her estate plan that were favorable to the plaintiff despite having concerns about the plaintiff's undue influence over her which only surfaced after her death. Accordingly, the Court found the Complaint set forth a plausible claim for tortious interference with expectancy of a gift.

The *Spinnato* decision illustrates one of the many hazards an attorney faces when making statements to non-clients and, in particular, when a non-client, as alleged in this case, detrimentally relies on the statements. The *Spinnato* decision also serves as a forewarning to estate planning attorneys to "speak up now or forever hold your peace," as waiting until after the testator's death to assert the testator was incompetent or under the undue influence of another when the testator executed or changed an estate planning document may give rise to an actionable claim by a beneficiary.

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New Jersey Tightens Requirements for an Affidavit of Merit *by John D. Coyle, Esq. and Thomas C. Regan, Esq.*

The New Jersey Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29, requires a plaintiff in a professional negligence action to file an affidavit from an "appropriate licensed person" attesting that the defendant deviated from the acceptable standards for the profession, or the matter will be dismissed. The 2004 amendments to the Affidavit of Merit ("AOM") statute were designed to tighten the requirements for the AOM in medical malpractice cases, requiring that experts practice in the "same specialty" within medical fields. The latest appellate decision addressing this statute, *Hill International, Inc. v. Atlantic City Board of Education*, A-4139-13T3 (December 30, 2014), moves in the same direction and tightens the AOM requirements in a way that should allow other professional malpractice defendants, including architects, attorneys, and engineers, to obtain early dismissal of some actions.

The AOM statute requires the plaintiff to file the AOM within 60 days after the first answer is filed, with one 60-day extension available. Before this 120-day period expires, the trial court is required to hold a *Ferreira* case management conference[1] to determine if an AOM has been filed and whether there are any objections to it.

The plaintiff in *Hill* was a General Contractor retained by the School Board to construct a school (the "Project"). The Project experienced significant delays and the General Contractor was fired from the Project. After being fired, the General Contractor brought an action against the Architect the School Board retained to provide design and contract administration services on the Project. The General Contractor asserted professional negligence claims against, among others, the Architect. In support of these professional negligence claims, the General Contractor filed an AOM prepared by a licensed professional *engineer*, attessting the Architect was negligent with respect to "certain design issues" and "contract administration." The trial court did not hold a *Ferreira* conference and, after 120 days, the Architect moved to dismiss the complaint. The trial court denied the motion, holding that there is significant overlap in the areas of expertise and training between engineers and architects that allowed the affiant engineer to submit an AOM with respect to the alleged professional negligence of the architect. The Architect was granted leave for an interlocutory appeal.

The Appellate Division held that this case presented a novel question as to the definition of an "appropriately licensed person." The Court noted, while this term is not defined within Section 27 of the Act, Section 26 enumerates in sub-parts the various professions covered by the Act, identifying architects and engineers separately. Further, engineers and architects are licensed and regulated by separate professional boards and are subject to different statutory provisions. While there is some overlap between the professions (and there are statutory provisions allowing for engineers to be licensed as architects and vice versa), they remain separate professions. The Court compared it to a nurse opining on a doctor's failure to take blood pressure properly -- both are trained to do it, but a nurse is not an "appropriately licensed" person to opine on a doctor's negligence.

(cont. page 4)

NJ Tightens Affidavit of Merit Requirements cont.

Accordingly, the Court held the AOM statute requires that the AOM be provided by a person who holds the same license as the defendant. The Court also held that an AOM is not required for other discrete claims committed by a professional, such as non-negligence based tort or vicarious liability claims that do not implicate the standards for the profession. Because the trial court did not hold a *Ferreira* conference, the matter was remanded to allow the court to hold the conference after providing the General Contractor with time to submit a new AOM.

We recommend that all licensed professionals defending against negligence claims request a *Ferreira* conference as soon as possible. Additionally, counsel should focus on the AOM and determine if the affiant and the allegedly negligent professionals operate within separately regulated professions. We have found, for example, that it is common practice for an AOM issued by a nurse in a nursing home malpractice action to opine on various issues beyond simply nursing functions, such as staffing, or policy and procedure issues. Nurses and nursing home administrators, however, are separately licensed (and also separately identified in Section 26 of the Act). In light of the *Hill* decision, a motion to dismiss might be appropriate in these cases except for the most directly connected; at a minimum, you might be able to eliminate some claims or defendants.

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[1] In practice, however, some trial courts do not schedule a *Ferreira* conference either before or after the AOM period.

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Massachusetts Appeals Court Holds Condominium Dispute Not Actionable Under Chapter 93A *by Chris C. Han, Esq.*

In a recent appeal of one of the largest verdicts returned in a condominium dispute, notwithstanding the egregious conduct of the defendants, in *Wodinsky v. Kettenbach*, 86 Mass. App. Ct. 825 (2015), the Massachusetts Appeals Court vacated the damages awarded to the plaintiffs pursuant to Chapter 93A, as the underlying unfair or deceptive acts or practices complained about were motivated by personal, rather than business, reasons.

Beginning in 2009, the defendants – individuals and their real estate management company which together owned four out of five condominium units in a building located in Boston -- attempted a series of imposturous schemes to force the plaintiffs out of their unit after they declined to sell it to the defendants. After the jury returned a verdict for the plaintiffs on most of their claims, the trial judge granted the defendants' motion for judgment notwithstanding the verdict with respect to the damages awarded to the plaintiffs under Chapter 93A, as the complained about acts did not occur within a "trade or commerce." The plaintiffs appealed, claiming the defendants, as principals of the real estate management company, were acting within the scope of the real estate management company's stated business purpose when they engaged in their unfair or deceptive acts.

The Appeals Court disagreed. The Appeals Court held, although the real estate management company was organized to "develop, own, construct, operate, finance and manage real property," the underlying unfair and deceptive acts -- coercion, intimidation, threats, demands for excessive payments for the repair of the building's roof, skylights, and heating systems, and replacing the entire elevator system thereby depriving the elderly plaintiffs from using it for over 10 months -- committed by its principals all sprang from the defendants' desire to acquire all five of the units in the condominium building and turn the building into a private residence for themselves. Indeed, at trial the plaintiffs sought to prove the principals acted out of their own personal, self-interest. The plaintiffs introduced no evidence that the defendants planned to sell or rent any of the condominium units or that showed there was a commercial character to any of the complained about unfair or deceptive acts. Accordingly, the Court found the defendants' actions were "primarily private in nature." Thus, the plaintiffs were not entitled to relief under Chapter 93A.

This decision reaffirms, no matter how egregious the misconduct of a defendant, unfair or deceptive acts or practices which are private in nature will not find fertile ground under Chapter 93A.

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FINRA Issues Regulatory and Examination Priorities for 2015

by William A. Despo, Esq.

On January 6, 2015, FINRA set forth its regulatory and examination priorities (the "Priorities Letter") for 2015, providing insight into FINRA's concerns about the operation of the securities industry and markets.[1] The Priorities Letter presents an agenda of important regulatory matters that FINRA believes need to be addressed by the securities industry. Of utmost importance is the industry's relationship with the customer.

The Priorities Letter introduction is most telling in that it is vastly different from years past. In 2015, it identifies five recurring challenges facing FINRA and the industry. The challenges are:

- Placing the "best interests" of clients first, although there is no industry rule;
- Creating a culture within firms that values ethics and compliance;
- Developing and maintaining robust supervision and risk management systems and internal controls that act as critical safeguards to protect clients and encourage ethical conduct;
- Improving product development, sales training, and supervision. FINRA expects firms to establish reasonable basis and customer -specific suitability standards prior to offering a new product. Wealth Management divisions must act independently in order to safeguard their determination about the suitability of the product; and
- Developing and implementing programs to address enterprise conflicts of interest, which is a combination of ethics, cultural and organizational structure, policies, processes and incentives that in totality shape the firm's management of conflicts.[2]

Along with a focus on the customer relationship, sales practices, financial and operational activities, and market integrity remain FINRA's focal points for 2015.[3] In the sales practice area, FINRA highlighted eight new product types of concern, while restating two previous products. FINRA's concern with all products deals with the complexity of product features and sales practices. Appropriate product risk reviews need to concentrate on due diligence, suitability, disclosure, and supervision and training of sales personnel. Furthermore, changing circumstances, such as economic events, require firms to reevaluate products.

Sales Practices. Variable annuities have attracted FINRA's attention in regard to IRC Section 1035 exchanges and new purchases. FINRA intends to examine firms' compensation structures to determine if they may incentivize variable annuity sales and suitability recommendations, product feature disclosures, and training and testing of broker's and supervisor's product knowledge. It is suggested that a firm's product committee analysis, training programs and testing of brokers' knowledge will be paramount for satisfying a FINRA inquiry.[4]

The explosion in the marketplace of exchange traded products ("ETPs") has attracted FINRA's attention as well. Products that track indices such as equally weighted, fundamentally weighted and volatility weighted indices are viewed as complex products for the individual investor. Risks associated with ETPs remain questionable to FINRA, even when the ETP has been back tested.

Structured Retail Products ("SRPs") are complex products that may fall within a derivative classification. FINRA will focus its examinations on broker understanding of SRPs and investor knowledge. Retail communications related to the sale of SRP must be filed with FINRA within 10 days of first use.

Floating Rate Bank Loan Funds ("Funds") are typically marketed to institutional investors. FINRA, however, has observed that retail investors have increased their exposure to these Funds. Although the Funds are said to be a hedge to interest rate fluctuations, these Funds carry significant credit and call risk. FINRA viewed these Funds as difficult to value, have longer terms than other investments, and to be relatively illiquid. The suitability of Funds will be a key focus of FINRA, along with determining the potential for a conflict of interest between the firm and the retail investor.

Securities-backed lines of credits ("SBLOC") are another product that concerns FINRA. SBLOCs are revolving loans that allow a customer to borrow from a lending institution using securities in their brokerage account as collateral. FINRA stressed that firms need to have proper controls in place regarding SBLOCs. Customers need to understand SBLOC program features and how market conditions may affect their brokerage account.

Noted in the 2014 Priority Letter, interest rate sensitive fixed income securities make a repeat appearance in 2015. The risks identified for this product last year remain applicable in 2015. Some of the risks include lack of liquidity, high fees and valuation difficulty. Valuation of these products remains a notable concern to FINRA.[5] As with other products identified in the Priority Letter, firms need to be vigilant and conduct on-going due diligence of these products. FINRA reminded firms that suggesting to a retiree that his/her only choice is to roll over retirement plan assets to a firm-sponsored IRA is false and misleading.

FINRA will examine a firm's procedures and controls for preventing excessive trading and product concentration issues.

Due diligence and suitability analysis concerning private placements is another supervisory area discussed by FINRA in the Priority Letter. Some issues associated with contingent offerings and escrow provisions relating to private offerings noted by FINRA include[6] amending offering terms without a proper rescission offer being made to investors, and failure by a firm to establish escrow procedures.

Supervision. FINRA's new supervision rules (3110, 3120, 3150 and 3170) became effective on December 1, 2014. The new rules modified requirements pertaining to the supervision of offices of supervisory jurisdiction, (cont. page 6)

inspections of non-branch offices, conflicts of interests, performing risk-based reviews of correspondence and investment banking activities, monitoring of inside trading, conducting internal investigations, reporting of selected information to FINRA, and testing and verifying supervisory control procedures.

Instances of customers not receiving volume discounts (breakpoints) and sales charge waivers to which they were entitled when purchasing products like REITS, Unit Investment Trusts, and mutual funds were observed by FINRA. Thus, it is imperative that firms focus on their internal controls regarding the handling of wealth events, such as IRA rollovers, to assure their customers receive sales charge discounts and waivers when appropriate.

In 2014, increases in microcap activity and foreign currency conversions in delivery versus payment/receipt versus payment (DVP/RVP) accounts occurred. Some firms were not monitoring activity in these accounts due to improper procedures and controls, and may have failed to report suspicious activity pursuant to the Anti-Money Laundering rule. For purposes of compliance with the Anti-Money Laundering rules, FINRA will examine cash management accounts and DVP/RVP accounts.

Financial and Operational Priorities. Valuation of securities remains a priority for FINRA. A firm's program for monitoring its funding and liquidity risks will be examined by FINRA. Mark-to-market processes and supervisory controls, especially with non-high grade, illiquid assets, are key areas of concern to FINRA.

A firm's cybersecurity system is of critical importance to risk management as a cybersecurity issue could ultimately impact the accuracy of a firm's books and records. Accordingly, FINRA will review a firm's approach to compliance with SEC Rule 17a-4(f) in the event of cyber attack. This rule, in part, permits a firm to store its records electronically, in a non-rewriteable, non-erasable format.

Market Integrity. One of FINRA's goals is to maintain fair and orderly markets. In this regard, a broker-dealer must have supervisory controls and proper governance. A firm's trading technology is critical in the satisfaction of its obligation to supervise trading activities. Algorithms used in trading continue to raise FINRA's interest. Trading activities implicate the firm's risk management and financial operational control, and may adversely affect a firm's net capital. Moreover, abusive algorithms pose a significant risk to market integrity. Cross-market and cross-product manipulation continue to be an issue for FINRA. It intends to enhance both its equities and options cross-market surveillance activities.

Firms should also examine their best execution procedures in routing customer option orders. An active best execution committee is a necessity in order for a firm to meet its regulatory obligation.

Summary. FINRA's Priority Letter lays out FINRA's view of issues challenging the securities industry. One issue, however, impacts all of their concerns - firm ethics. Putting the interest of the client over that of the broker is a key priority for FINRA, which appears to be moving ahead of the SEC in addressing a fiduciary standard for brokers. Brokers need to examine, and continue to reexamine, their conflict of interest policies and procedures. In part, the firm's culture for ethical practices and compliance must originate from its highest levels in order to filter down within the organization. Sales practices, supervision and market integrity will all benefit positively.

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[1] See http://www.finra.org.

[2] See FINRA press release, FINRA Fines 10 Firms a Total of $43.5 Million for Allowing Equity Research Analysts to Solicit Investment Banking Business and for Offering Favorable Research Coverage in Connection with Toys "R" Us IPO, Dec. 11, 2014.

[3] But FINRA raised an unrelated problem that it is experiencing where firms fail to respond in a timely matter to information requested in connection with examinations and investigations.

[4] The sale of "L" share annuities is of particular concern to FINRA.

[5] See FINRA Notice to Members 15-02.

[6] Pursuant to FINRA Rules 5122 and 5123 firms are to file offering documents with FINRA.

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Property Possessor May Have a Duty to Warn of Hazardous Conditions on Adjacent Property *by David A. Slocum, Esq.*

In *Cohen v. Elephant Rock Beach Club, Inc.*, 2014 WL 6792106 (D. Mass. Dec. 3, 2014), the United States District Court for the District of Massachusetts ruled that a possessor of property may have a duty under Massachusetts law to warn guests of dangerous conditions located on adjacent property owned by another. The Court held, exerting a degree of "control o[ver] adjacent property, even absent a legal right, can in some circumstances confer a duty of care." Under the circumstances presented in Elephant Rock, the Court held it was for the jury to determine whether the defendant private beach club exercised sufficient control over a natural rock formation located outside its property limits known as "Elephant Rock", and thereby owed a duty of care to its members and their guests to adequately warn them of the dangers associated with jumping off of Elephant Rock into the water.

The plaintiff, a thirty-nine year old woman who was a guest of a member of the beach club, suffered a broken leg when she jumped off of Elephant Rock and smashed her foot into a portion of the rock below the surface of the water. The plaintiff alleges she decided to jump off Elephant Rock only after having observed many adults and children swim to, climb on, run and jump off of the rock. Before she jumped, the plaintiff claims she could see the top of the water surface but not the conditions that existed below the water surface. (cont. page 7)

Hazardous Conditions cont.

The plaintiff brought suit against the beach club alleging negligent failure to warn of the dangers associated with jumping off of Elephant Rock.

Title to Elephant Rock is vested in the Commonwealth. It is located on public waters approximately 250 feet off shore from the club's private beach. Club members and their guests often swim to and around Elephant Rock, and at times climb onto the rock and jump off of it into the water. Although boaters also visit Elephant Rock, the club's private beach provides the primary or main access to it. The club maintains a number of safety ropes and buoys in the waters between its private beach and Elephant Rock, and employs lifeguards who monitor the waters including those around the rock. The club's lifeguards on occasion whistle in swimmers who are on or near the rock during hazardous swimming conditions. The club also maintains a flag system signalling water safety conditions, and posts signage on its property warning: "use of the rock is at one's own risk," "children under the age of eight are not allowed on the rock," and "children eight to nine years old must be accompanied by an adult."

The beach club moved for summary judgment on the grounds: (i) it had no duty to warn because it lacked a legal right of control over the rock; (ii) the rock posed an open and obvious danger; and, (iii) it was protected from liability under the Massachusetts recreational use statute (M.G.L. c. 21, §17C), which provides a person with interest in land who permits the public free of charge to use the land for recreational purpose shall not be liable for personal injuries or property damage sustained by members of the public in the absence of willful, wanton, or reckless conduct.

In denying the club's summary judgment motion, the Court explained the guiding principle for determining whether the club had a duty to warn is the exercise of control over property, not the legal right to do so. Citing multiple compendia of nationwide case law, the Court held that a "property possessor can assume a duty of care as to adjacent property where the property possessor has agreed to make safe a dangerous condition, . . . or has assumed actual control over a portion of the adjacent property despite lacking a legal right to [do so]." Thus, "one who assumes the control and management of property cannot escape liability for injuries by showing a want of title." The Court found that "Massachusetts has adopted this understanding, at least to some extent."

For example, in *Gage v. City of Westfield*, 26 Mass. App. Ct. 681 (1998), the Massachusetts Appeals Court explained, without elaboration, that "in some situations a landowner's duty to exercise reasonable care does not terminate abruptly at the borders of his property, but may extend to include a duty to take safety measures related to known dangers on adjacent property." The decision in *Gage*, however, did not elaborate on this point and did not clearly identify the extent of that duty. In the present case, the Court explained:

Here, there are facts supporting the conclusion that the Beach Club voluntarily assumed some precautionary duties as to the rock, including hiring lifeguards whose responsibilities may have extended to the area surrounding the rock, implementing roping and a flag system indicating when it was unsafe . . . to use the rock, and posting warning signage regarding use of the rock. . . . A duty voluntarily assumed, like one imposed by law, must be executed with reasonable care.

Thus, the Court held the plaintiff was entitled to have a jury resolve the disputed issues of fact as to what precautionary measures the club had voluntarily assumed concerning the rock, and whether it had discharged those duties, including the duty to warn, with reasonable care. The Court also held whether the rock posed an open and obvious danger to a reasonable person of ordinary intelligence in the plaintiff's position was a disputed factual issue for the jury to determine. Finally, the Court held, as a matter of law, the club could not claim protection under the Massachusetts recreational statute, as it neither had a legal interest in Elephant Rock, nor invited the public to use it free of charge.

Property owners should take note of the *Elephant Rock* decision, which reinforces the principle previously recognized in Massachusetts, as well as in many jurisdictions around the country, that by exercising control over property belonging to another, one may voluntarily assume a duty of reasonable care as to the dangerous conditions which exist on that property. Although the *Elephant Rock* decision is limited to some degree by its unique set of facts, it nonetheless serves as an important reminder that when a known dangerous condition is located on adjacent property, one should not rely on the absence of legal title as a shield against liability. This is especially true where the property owner's land serves as the main or primary portal to the adjacent property on which the dangerous condition is located.

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Caution: Big Penalties for Reimbursing Health Care Premiums *by Elizabeth J. Atkinson, Esq.*

Even if you are a small employer who is not required to provide your employees with health insurance under the Affordable Care Act (ACA), if you reimburse your employees for health insurance premiums, you run the risk of being hit with severe excise tax penalties. These penalties can run up to $36,500 per year, per employee, based on the excise tax penalty in place under the ACA of $100/day/impacted employee. It does not matter whether you do this on a pre-tax or after-tax basis—both types of reimbursements are subject to penalties.

These penalties are the result of the IRS (in Notice 2013-54) and the DOL (in Part XXII of its FAQs, dated November 6, 2014) classifying reimbursement arrangements as "group health plans" (cont. page 8)

Big Penalties cont.

that must comply with all the requirements of the ACA. Because a premium reimbursement limits coverage to the amount of the premium—even if the premium reimbursed is for coverage that is qualifying—it still falls short of meeting ACA requirements.

You can increase employee wages to make up for the lack of reimbursement, but you cannot require employees to use the extra wages to get health insurance. Any wage increase is simply that—a wage increase. Please be aware that this prohibition also extends to reimbursement arrangements within S corporations where the corporation pays for an owner-employee's coverage and then shows the payment as a flow through item on its K-1.

Employers who are not required to offer coverage under the ACA can: (1) choose to offer a qualifying group health insurance plan; or (2) review the Small Business Health Options Program via Healthcare.gov.

This excise tax penalty can be imposed for all of 2014. However, given the fact that the DOL's guidance was not released until November 2014, many practitioners believe that the IRS will exercise leniency for 2014. Any reimbursements made in 2014 should be treated as taxable income in 2014 to comply with IRS Notice 2013-54.

We recommend that companies carefully examine their actions regarding this issue and determine if any violation has occurred. With excise taxes, there is a requirement to report failures. Mitigation provisions apply when there is self-reporting, including an overall cap on penalties. There are, however, harsher penalties if there was a requirement to report that was not met. The form for self-reporting is Form 8928. Given the complexity of the reporting and mitigation requirements and the many new excise taxes under the ACA, we recommend consulting with tax professionals to determine the appropriate treatment and reporting of transactions based on specific facts and circumstances.

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Through Litigation Conduct, Party May Waive Contractual Right to Arbitrate a Dispute

by Patrick E. McDonough, Esq.

In *Shalaby v. Arctic Sand Technologies, Inc.*, 2014 WL 7235830 (Dec. 15, 2014), the Massachusetts Superior Court ruled the defendant lost its right to arbitrate claims asserted by a former employer by filing a motion to dismiss the plaintiff's complaint and engaging in discovery.

On April 8, 2014, the plaintiff filed suit against her former employer and a current and former officer of the employer, seeking declaratory relief pursuant to an existing stock repurchase agreement and alleging violations of Chapter 93A and various torts and contract claims. All of plaintiff's claims arose out of her termination, which she alleged was without factual or legal basis and in violation of her employment agreement. On September 19, 2014, the defendants filed a motion to dismiss the plaintiff's complaint. The Court partially granted defendants' motion to dismiss, dismissing all claims against the individual defendants and five of the nine claims against the defendant company.

On October 2, 2014, approximately six months after the suit was filed and after having engaged in discovery, including motions to compel, the plaintiff's former employer moved to compel binding arbitration pursuant to the terms of the employment agreement. The terms of the plaintiff's employment agreement explicitly stated that disputes arising from her employment shall be resolved by binding arbitration conducted by JAMS under its then-applicable rules. The defendant asserted the Court lacked jurisdiction over the plaintiff's remaining claims, as each of them fell within the scope of the employment agreement's mandatory arbitration clause. The Court disagreed, holding the defendant's litigation conduct waived its right to arbitrate the dispute.

The first question before the Court was whether it or an arbitrator was to decide whether the defendant's litigation conduct waived its right to arbitrate the dispute. Under Massachusetts law, there is a presumption that all questions regarding the waiver of arbitration are to be determined by a court as opposed to an arbitrator. Citing both the Federal Arbitration Act and Massachusetts law, the Court found an arbitration agreement cannot purport to delegate the issue of waiver by litigation conduct to an arbitrator. And, even if it could, the Court found the defendant failed to show there was "clear and unmistakable evidence of such an intent" in either the employment agreement or the then-applicable JAMS rules adopted by the employment agreement.

The second question before the Court was whether defendant did in fact waive its contractual right to arbitrate the dispute by its litigation conduct. Under Massachusetts law, a party may waive its contractual right to arbitrate a dispute by failing to "properly and timely" assert this right. When "dealing with a forfeiture by inaction (as opposed to an explicit waiver), the components of waiver of an arbitration clause are undue delay and a modicum of prejudice to the other side." There is no bright-line rule and each case is to be judged on its particular facts.

The Court found the defendant had waived its contractual right to arbitrate the plaintiff's claims by "deliberately waiting six months before seeking to compel arbitration, and by actively litigating the case in Superior Court in the meantime." The Court explained, choosing to pursue a motion to dismiss, rather than invoking its right to arbitrate, constituted a "deliberate choice [by the defendant] to seek an immediate and (cont. page 9)

total victory in the parties' dispute," and showed the defendant preferred to litigate the plaintiff's claims in court because the defendant hoped to obtain a swift judgment on the merits. The Court found this deliberate choice constituted waiver of the defendant's contractual right to arbitrate the dispute.

The Court also found that compelling the plaintiff to submit to arbitration at this juncture in the litigation would result in "far more than a modicum of prejudice" to her. The defendant's deliberate choice to invoke the court's jurisdiction caused the plaintiff to not only expend significant resources litigating the matter, but also "caused the opportunity for an expeditious alternative to litigation to be lost."

The *Shalaby* decision illustrates the risk a party takes when deciding to move to dismiss a complaint notwithstanding a contractual right to compel arbitration. Although a motion to dismiss always is tempting for both counsel and client, before taking this risk, counsel should forewarn a client that if the motion is denied, any chance of arbitrating the dispute may be forever lost.

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Massachusetts Court Rules Insurance Agency Not Liable for Employee Who Unlawfully Obtained, Used and Disclosed Personal Information *by Alberto G. Rossi, Esq. and Elitza V. Miteva, Esq.*

In *Adams v. Congress Auto Insurance Agency, Inc.,* 32 Mass. L. Rptr. 372 (Oct. 8, 2014), the Massachusetts Superior Court ruled an insurance agency was not liable for the actions of its employee, who allegedly obtained the plaintiff's contact information from the insurance agency's database, and passed the information on to her boyfriend, the driver of a motor vehicle who hit the plaintiff's vehicle. The employee's boyfriend then allegedly called the plaintiff, impersonating a state police officer, and threatened him in an effort to get the plaintiff to drop the insurance claim. The plaintiff claims these threats caused him significant emotional distress. He sued the insurance agency for: (i) negligent safeguarding of confidential personal information; (ii) negligent hiring, supervision, and retention; and, (iii) violation of G.L. c. 93A.

The insurance agency moved to dismiss the plaintiff's Complaint. The Court dismissed all of the claims except for the negligent safeguarding of confidential information claim. After discovery, the plaintiff moved to amend the Complaint to re-assert the previously dismissed claims and added a claim for violation of 18 U.S.C. §2724, which provides: "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under [18 U.S.C. §§ 2721, et seq.] shall be liable to the individual to whom the information pertains." The insurance agency opposed the motion to amend the Complaint and moved for summary judgment on the negligent safeguarding of confidential information claim. The Court denied the plaintiff's motion to amend and granted the insurance agency's summary judgment motion.

With respect to the plaintiff's proposed negligent hiring, supervision, and retention claim, the Court held, the insurance agency's knowledge that its employee was arrested for a federal weapons charge during her employment without more does not support plaintiff's claim that the employee was unfit to handle sensitive, confidential information in her day-to-day job responsibilities. Nor did it support the plaintiff's claim that after the employee's arrest, the insurance agency had a duty to take additional steps to supervise or restrict the employee's use and access to confidential information. As the Court explained, "[t]he suggestion that 'an employer can never hire a person with a criminal record or retain such a person as its employee at the risk of being held liable for [the employee's torts] flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray.'"

With respect to the plaintiff's proposed G.L. c. 93A claim, the Court held, the plaintiff's allegation that the insurance agency "fail [ed] to meet the Commonwealth's standards regarding the protection of confidential personal information" sets forth nothing more than a negligence claim and "does not allege how, if at all, Chapter 93A or any regulation applies," and fails to allege how the insurance agency breached any specific "standard[] regarding the protection of confidential personal information applicable in the Commonwealth". Accordingly, the Court found the proposed G.L. c. 93A claim futile.

The Court also held the plaintiff's proposed 18 U.S.C. §2724 claim was futile because no plausible set of facts could establish the insurance agency was vicariously liable for its employee's criminal misconduct. In other words, the plaintiff could not establish that the insurance agency's employee was acting within the scope of her employment when she unlawfully obtained, used, and disseminated the plaintiff's information to her boyfriend for the unlawful purpose of threatening the plaintiff to drop the insurance claim against him.

Finally, the Court held the insurance agency was entitled to summary judgment on the plaintiff's negligent safeguarding of confidential information claim on at least two independent grounds. First, whether the insurance agency acted negligently in failing to protect the plaintiff's confidential information required expert testimony to explain to the jury what the standard of care was in the industry at the time, and whether the insurance agency breached that standard of care, as the "[p]ractices and policies for maintaining, and governing access to, confidential information in the insurance business are not matters of common knowledge or experience." (cont. page 10)

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The plaintiff failed to offer any expert testimony on this subject matter. Second, as a matter of law, the intervening criminal acts of the insurance agency's employee and her boyfriend severed any causal nexus between any alleged negligence on the part of the insurance agency and the plaintiff's injury.

The Court's decision reinforces the public policy against holding a company liable for an employee's unlawful conduct based solely on the fact the employee has a criminal record. It also serves as an important reminder to companies that they, at least annually, should review their practices and policies for maintaining, and governing access to, confidential information to ensure that these practices and policies comport with federal and state laws, statutes, and regulations, as well as those set forth in the industry or profession. In the event of an inadvertent or intentional data breach, these practices and polices will be scrutinized by a plaintiff's expert.

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