VOLUME III, OCTOBER 2016

EXPECT FOCUS®

LIFE INSURANCE INDUSTRY

LEGAL ISSUES AND DEVELOPMENTS
FROM CARLTON FIELDS JORDEN BURT, P.A.

WHAT'S YOUR GAME PLAN?

Offensive or Defensive: Playing to Your Strengths

Potential Secondary Effects of Regulatory Examinations: Evidentiary Issues and Preclusion in Parallel Litigation

Recent Insurer Victories in Indexed Annuity Class Actions

What You Must Know About New York's Proposed Cybersecurity Regulation for the Banking, Insurance, and Financial Services Sectors

CARLTON FIELDS
JORDEN BURT

TABLE OF CONTENTS

EXPECTFOCUS® LIFE INSURANCE, VOLUME III, OCTOBER 2016

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AXA Prevails at First Post-*Jones v. Harris* Excessive Fee Trial

BY MICHAEL VALERIO

In its 2010 opinion in *Jones v. Harris, L.P.*, the United States Supreme Court embraced the so-called *Gartenberg* standard for assessing an investment adviser's fiduciary liability for excessive mutual fund fees under Section 36(b) of the Investment Company Act of 1940. Under the *Gartenberg* standard, a plaintiff shareholder must establish that the fund adviser's fee "is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arms-length bargaining." In making this assessment, the court must consider several factors, including: the nature and quality of the adviser's services; the profitability of the arrangement to the adviser; the economies of scale achieved by the fund and whether such savings are passed on to shareholders; comparative fee structures for other similar funds; "fall-out" benefits accruing to the adviser; and the independence and conscientiousness of the mutual fund's board of trustees in approving the adviser's fee.

On August 25, Judge Peter Sheridan of the United States District Court for the District of New Jersey issued his eagerly anticipated opinion in *Sivolella v. AXA Equitable Ins. Co.*, the first Section 36(b) case to go to trial since the Supreme Court's decision in *Jones*. The plaintiffs' basic claim in *Sivolella* was that the adviser charged inordinately high fees for investment management and administrative duties while delegating those same duties to sub-advisers and sub-administrators for far lower fees than those passed along to investors. Following a 25-day bench trial, Judge Sheridan handed a total victory to the defendant variable annuity issuer and its affiliated fund manager, finding that the plaintiffs had failed to meet their burden either to demonstrate that the defendants had breached any duty under Section 36(b) or to establish any actual damages. Rather, the court found that the adviser had retained significant investment oversight responsibility, risk, and administrative duties and the fund board had engaged in a robust review of the adviser's compensation.

The 146-page opinion goes through the trial evidence in significant detail, notably calling out the "little weight" accorded to the testimony of the plaintiffs' four experts, while observing that the defendants' three experts were "credible, in that they provided direct answers, and relied on comprehensive and reliable materials in reaching their conclusions." Litigants in other excessive fee cases would be well-advised to review the *Sivolella* decision carefully as they prepare for trial.

Potential Secondary Effects of Regulatory Examinations: Evidentiary Issues and Preclusion in Parallel Litigation

BY STEPHEN JORDEN & MICHAEL WOLGIN

Increasingly aggressive and adversarial examinations by state regulators can expose insurers to troubling evidentiary issues in subsequent individual and class action litigation. Plaintiffs' counsel may seek to admit into evidence documents or communications exchanged with regulators, or the conclusions contained in an examination report. And where an examination leads to administrative hearings, plaintiffs' counsel may argue that findings made in the administrative hearing should be binding in subsequent civil litigation.

When the subject matter of a regulatory examination has the potential to overlap with pending or anticipated class action litigation, insurers should involve litigation counsel early in the process to help prepare responses, present the company's conduct in the best possible light, develop legal arguments, and make tactical decisions that can reduce the risk of adverse consequences in pending or subsequent civil litigation.

Evidence Generated During Regulatory Examinations

The most obvious example of a regulatory document that opposing counsel may seek to use as "evidence" in subsequent litigation is a final examination report. Although an examination report's factual findings and conclusions offered for the truth of the underlying assertions are classic hearsay, plaintiffs' counsel may seek to admit them pursuant to the "public records" hearsay exception set forth in Fed. R. Evid. 803(8). Rule 803(8) provides that a record of a public office may be admitted into evidence as an exception to the rule against hearsay if "(A) it sets out … (iii) in a civil case ... factual findings from a legally authorized investigation; and (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." (Note that the public records exception will not typically apply to preliminary reports and correspondence setting forth allegations or preliminary findings and conclusions that have not been formally adopted by the agency.) Courts do not always construe "factual findings" within the meaning of Rule 803(8) narrowly, and some may admit *conclusions* reached by regulators that are *based on* factual findings if deemed trustworthy.[1] Contrary to what some counsel may believe, the fact of a settlement with regulators will not itself prevent admission of a final examination report in subsequent litigation.

Documents generated or produced by the company during the examination process can also find their way into a private civil lawsuit. For example, if a plaintiff's counsel is successful in obtaining copies of the company's written communications or statements made to regulators in response to allegations, findings, or requests for information, the plaintiff's counsel may attempt to use such communications in litigation. While materials submitted to state insurance departments are typically subject to a confidentiality statute in that state's insurance code, several courts have held that these statutes do not create an evidentiary privilege for the insurer in private civil litigation.[2] Plaintiffs may argue that statements made by the company in communications with regulators are "party admissions," which are not hearsay and are admissible under Fed. R. Evid. 801(d)(2). Plaintiffs also may attempt to obtain copies of productions of records made by the company to insurance departments. These records may be discoverable if plaintiffs can reasonably tailor their requests to their claims.[3]

In addition, plaintiffs often argue that regulatory findings or conclusions can be used for a variety of purported non-hearsay purposes, such as the effect on the recipient or intent. For example, a claimant might argue that a finding that a particular practice or document is misleading is relevant to show intent if the company continued the practice after the finding. Plaintiffs also often argue that regulatory findings and conclusions can be used for impeachment of the insurer's experts testifying about the practice at issue.

Potential Preclusive Effect of Administrative Litigation

Insurers that challenge the findings of an examination report in administrative litigation face another risk— that the hearing will result in decisions that may be binding under principles of collateral estoppel (issue preclusion) in subsequent civil litigation. Although individual state laws vary, a state agency proceeding is usually given the same preclusive effect as a court proceeding if the agency acts in a judicial capacity—affording the parties the minimum protections of due process, including a full and fair opportunity to be heard, the right to representation by counsel, cross-examination of witnesses, the existence of hearing transcripts, a neutral fact finder, and the availability of judicial review.

A more complicated issue concerns the extent to which a plaintiff who was not a party (or privy thereof) to the administrative hearing may preclude a defendant from re-litigating a specific issue that was already decided against the defendant in another proceeding. Issue preclusion laws vary among jurisdictions on the use of such "offensive non-mutual" collateral estoppel. Many states allow at least

limited offensive use of non-mutual collateral estoppel; some states do not; and federal courts have "broad discretion" in applying federal common law to determine when such use should be permitted.[4] Courts in jurisdictions that allow offensive use of non-mutual collateral estoppel typically are guided by principles of efficiency and fairness and are sensitive to the heightened potential for unfairness to the defendant.

Takeaways

- Carriers should ensure that employees handling regulatory examinations update in-house litigation counsel (and if retained, outside counsel) on the scope of the examinations to identify the potential for overlap with pending or subsequent litigation.

- Personnel handling responses to examinations covering areas that overlap with pending or foreseeable litigation should coordinate closely with litigation counsel in dealings with the examiners and with other parties related to the examination. Depending on the importance of the issues, it may be wise to start this coordination early during the state's data-gathering process. And in some circumstances, responses should be handled as if the requests were from a litigation adversary. For example, the failure to correct a regulator on the facts or point out legal arguments regarding why the company believes it has not violated a particular disclosure regulation could lead to adverse preliminary findings. Examiners may be less flexible about accepting information and arguments later in the process after they have reached preliminary conclusions.

- If the company believes an insurance department is determined to make adverse findings, regardless of the facts, it should consider strategies to avoid the admissibility of those findings in related litigation. Official agency reports are not admissible under Federal Rule of Evidence 803(8)(C) if the opponent of the evidence shows they are untrustworthy. The Advisory Committee note accompanying the Rule lays out four, nonexclusive factors for determining trustworthiness: (1) the timeliness of the investigation; (2) the special skill and experience of the official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems. Bias of the examiner or department is one obvious basis for questioning a report's trustworthiness.

  We have seen regulatory investigations and examinations of insurance companies follow closely on the heels of lobbying efforts by lawyers and companies interested in pursuing litigation. And we frequently observe regulators hiring as consultants individuals who make a living testifying against the insurance industry in private civil litigation. Techniques for obtaining evidence of bias include open records requests and discovery requests seeking communications between self-interested third parties and regulators (or higher level government officials) who may have influenced a department's process. While such techniques can be potentially detrimental to the relationship with a department, given the stakes and unfair prejudice that can accompany admission of inappropriate regulatory findings, they may be worth the fight.

- Settlements alone will not impact the admissibility of a final report. However, the circumstances of the settlement, such as a written acknowledgement that a particular finding should be modified, could provide a basis for arguing that the report is untrustworthy or that it should be excluded under Federal Rule of Evidence 403, which allows the court to exclude relevant evidence if "its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." And settlement will eliminate the possibility of a final judgment in an administrative proceeding and the related risk of collateral estoppel.

- If a department has made adverse findings that overlap areas of pending or anticipated litigation, the company should consider whether to challenge those findings in an administrative hearing. The considerations behind that decision are complex and varied, but one factor should be the potential for a decision with binding effect on the company. The basic requirements of collateral estoppel are often difficult to satisfy: the issue in question in the second proceeding must be identical to that litigated in the first proceeding; there must be a final judgment on the merits; the issue must have been actually decided and necessary to the final judgment; and there must have been a full and fair opportunity to litigate the issue in the first forum.

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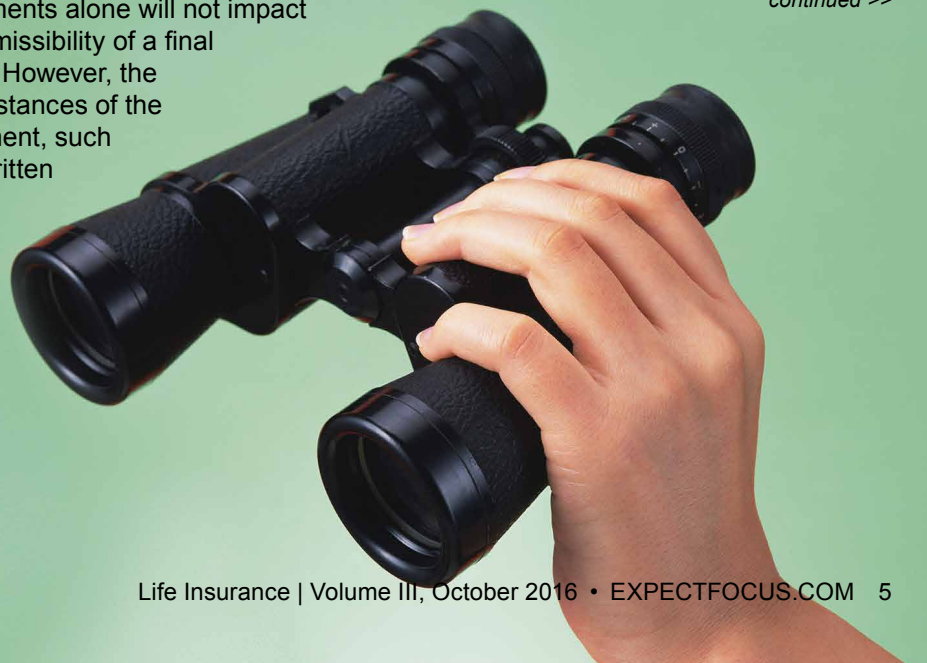


Differences in substantive laws, burdens of proof, and standards of review applicable in administrative proceedings can also undermine the identity of issues required for collateral estoppel. Particularly relevant to the application of offensive non-mutual collateral estoppel, the procedures of the administrative forum may not be sufficiently adjudicative in nature such that resulting decisions should be given binding effect. For example, administrative hearings in many states may be presided over by employees of the commissioner, making the impartiality of the decision maker inherently suspect.

Conclusion

A regulatory examination can have a significant impact on the discovery, evidence, and legal rulings in an overlapping litigation matter and create substantial risks for insurance carriers. An overlapping strategy can help carriers manage these risks.

(Endnotes)

[1] *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) (holding that conclusions or opinions in an investigatory report can be admissible under Rule 803(8) if they are "based on a factual investigation and satisf[y] the Rule's trustworthiness requirement").

[2] *Compare AmTrust N. America v. Safebuilt Ins. Servs.*, No. MC-169 (CM) (JLC), 2016 WL 2858898 (S.D.N.Y. May 16, 2016) (holding that Montana insurance code provision did not create evidentiary privilege) *with Rowe v. Bankers Life & Cas.,* No. 09 C491, 2011 WL 1897181 (C.D. Cal.) (holding that insurer could invoke California Insurance Code provision to withhold market examination report).

[3] *Marion v. State Farm Fire & Cas. Co.*, Civ. No. 1:06CV969, 2008 WL 7908019 (S.D. Miss. Feb. 13, 2008) (denying motion to compel insurer to produce "documents regarding meetings with the Department of Insurance, unless such meetings relate specifically to the [plaintiff's] claim.").

[4] `*Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (affirming district court's decision in stockholder class action to prevent corporate and individual defendants from re-litigating adverse decision in declaratory judgment action brought by the SEC).

On The Horizon: Global Insurance Capital Standards

BY ROBERT B. SHAPIRO

Since 2013, the International Association of Insurance Supervisors (IAIS), an association of insurance supervisors representing more than 200 jurisdictions in approximately 200 countries, has been working on a plan to develop a risk-based global insurance capital standard. The work is in response to a request from the Financial Stability Board (FSB), which coordinates national financial authorities and international standard-setting bodies as they work toward developing strong regulatory, supervisory, and other financial sector policies. The goal of the IAIS is to create "a comprehensive group-wide supervisory and regulatory framework for Internationally Active Insurance Groups (IAIGs).

The following criteria would need to be met for an insurance group to be deemed an IAIG: the group includes at least one insurer that writes premiums in at least three jurisdictions, and at least 10 percent of the group's total gross written premiums comes from outside the domiciliary jurisdiction; and, based on a three-year average, the insurer has total assets of not less than $50 billion or gross written premiums of not less than $10 billion. The supervisory and regulatory framework would also be used to develop basic capital requirements for insurers deemed global systemically important insurers (G-SIIs) by the IAIS. There are currently nine G-SIIs.

Once finalized, the insurance capital standard (ICS) will be considered the minimum standard necessary for IAIGs and G-SIIs, and will be implemented by supervisors represented in the IAIS. The ICS is intended as one component of the "Common Framework" for supervising IAIGs, as well as basic capital requirements and higher loss absorbency requirements for G-SIIs and would be used to assess these companies' financial condition.

The IAIS has committed to developing a first version of the ICS for confidential reporting by mid-2017. The second version is due for IAIS adoption by the end of 2019. Implementation is scheduled to begin in 2020 after testing, reporting, and refinement with supervisors and IAIGs.

U.S. insurance regulators have expressed several concerns through the NAIC regarding development and implementation of the ICS. These include a concern that the IAIS relies on an incorrect assumption that capital can be moved freely within an insurance group, while U.S. insurers are regulated on an entity-by-entity basis. European solvency regulation emphasizes a consolidated capital standard intended to help assure that a financial entity maintains sufficient capital to support its group-wide activities, both insurance and non-insurance.

As such, capital movement out of an insurer should be subject to the approval of the insurer's domiciliary regulator. Accordingly, the NAIC stated that whatever is implemented at the group level should supplement, not replace, the requirements of the insurer's domiciliary jurisdiction.

NAIC Long-Term Care Innovation Subgroup Public Hearing

BY STEVEN KASS

At the NAIC Summer 2016 National Meeting, the Long-Term Care Innovation (B) Subgroup held a public hearing as part of an initiative to address the challenges facing the private LTC market. With baby boomers retiring at a rate of 10,000 per day, and under 10 percent having any form of LTC coverage, the subgroup seeks to develop actionable, realistic policy options to increase take-up rates for private LTC insurance and create a stronger market by examining potential product modifications, reduction of regulatory barriers, and appropriate incentives. An array of insurance industry participants, regulators, consumer representatives offered thoughtful comments, highlighted below.

Product innovations

- Moving from today's level premium construct to an annual re-rating approach, as level premiums have proven incompatible with insurers' 30-plus year risk horizon on interest rate, lapse, morbidity, and mortality assumptions; alternatively, index premiums and benefits to reduce consumers' inflation risk and insurers' required reserves.
- Combination products (such as LTC extension of benefit or accelerated death benefit riders) that reduce insurers' overall risk volatility and provide flexibility to consumers;
- "Lifestage" products that provide life insurance protection through a specified age, with pre-funded LTC benefits thereafter.
- Simpler, lower cost, lower benefit products could be offered at a more attractive price point for consumers, and could also allow wider distribution through direct marketing or exchanges.
- Very low cost, limited benefit "worksite" policies targeted to younger employees, with periodic windows to increase coverage amounts.

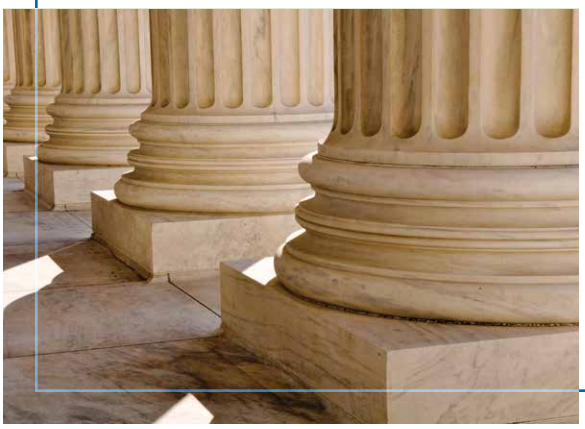
Regulatory innovations

- Increase number of states that allow filings through IIPRC. Clearer regulatory guidelines for rate increases.Eliminate certain required product features, such as mandatory 5 percent inflation offer.
- Re-engineer point-of-sale disclosure requirements.

Appropriate incentives

- Permit payment of LTC premiums from retirement accounts with no early withdrawal penalties.
- Eliminate 7.5 percent of AGI limitation on tax deductibility of premium payments.
- Provide legal incentives to employers that sponsor retirement plans providing LTC insurance on an opt-out basis (such as fiduciary safe harbor).

The NAIC is devoting substantial resources toward this effort, which hopefully will benefit consumers and industry.



D.C. Circuit: SEC's In-House Court is Constitutional

BY NATALIE NAPIERALA & GABRIELLA PAGLIERI

Previously, we advised that the Securities and Exchange Commission's increased preference for bringing enforcement actions in its in-house court had triggered jurisdictional and constitutional challenges to SEC administrative proceedings (APs). *See* "Supreme Court Declines to Review Constitutionality of SEC In-House Court," *Expect Focus* Vol. II 2016. At that time, federal appellate courts had addressed only the pending jurisdictional issues, and declined to reach the merits of the constitutional challenges to the APs.

In July 2016, the D.C. Circuit Court of Appeals became the first federal appellate court to affirmatively rule on such challenges, finding that the appointment of the SEC's administrative law judges (ALJs) is constitutional and upholding the constitutionality of the APs. In *Lucia v. SEC*, the court opined that the issue of whether ALJs are "inferior officers" depends on the officer's final decision-making authority. Relying on precedent, the court held that ALJs lack authority to issue final decisions because the Commission may conduct a review of an ALJ's initial decision, which becomes final only when the Commission issues a finality order. In sum, the D.C. Circuit held that ALJs are SEC employees, not "inferior officers," under Article II.

Given the D.C. Circuit's expertise addressing administrative law issues, *Lucia* may buttress the SEC's use of APs; however, respondents are likely to continue to raise other constitutional challenges to them (e.g., defendants' Seventh Amendment right to a jury trial and deprivation of their constitutional right to due process).

Brexit's Impact on the Insurance Industry

BY BARRY LEIGH WEISSMAN

Following the UK's historic advisory vote to leave the EU, key questions must be answered before any real change occurs. These include: Must the government implement the advisory vote, and if so, how?

Will the UK really leave the EU? Will Scotland and Northern Ireland (both of which voted to remain in the EU) have their own referendums to leave the UK—and will they be granted EU status if they do?

While the answers to these questions will have broad implications for businesses across industries, this article addresses insurance companies, many of which are trying to determine whether to leave the UK or remain until the UK's plans become clearer. At this early stage, insurance companies, regardless of their location or the type of coverage they write (e.g., property and casualty, life, or accident and health), lack the information needed to make decisions. Regardless, they should start weighing potential scenarios. We suggest they evaluate considerations including the following:

Domicile for European Business

Should insurance companies immediately seek another EU country to domicile their European business or take a wait-and-see approach? U.S. companies that use London as their European base may find a move necessary to maintain unfettered access to the EU. As English-speaking countries, Scotland and Ireland (including Northern Ireland) may become attractive options. Additionally, these countries may seek to enact tax and related legislation to entice companies from London. Although some recent EU tax rulings may make this difficult.

Solvency II

The Solvency II Directive ("Solvency II") codifies and harmonizes EU insurance regulation and primarily concerns the amount of capital EU insurance companies must hold to reduce the risk of insolvency. Under Solvency II, the solvency regimes of countries outside the EU are assessed to determine whether they are "equivalent" to those of the EU. If the UK leaves the EU, it would, absent a contrary agreement, no longer be an equivalent country. This would put it on similar footing

with the United States (though not an equivalent nation, certain aspects of equivalency have been offered to the United States by the regulatory authority responsible for Solvency II, the European Insurance and Occupational Pensions Authority).

Since the International Association of Insurance Supervisors has chosen Solvency II as a baseline for development of a global safety-and-soundness standard, the UK would be subject to a similar level of standards from global bodies. However, it has been argued that, if the UK exits the EU, the UK would be free to remove any EU regulations that damage the UK economy. Solvency II drove significant business opportunity in the bulk annuity buy-out market. Insurers are being forced to restructure their balance sheets, prompting the sale of billions of pounds of annuity books. Thus, it is unlikely Brexit will impact the Solvency II regulation since that would require insurance companies to restructure their books of business yet again.

European Economic Area

The European Economic Area (EEA) is the area in which the Agreement on the EEA provides for the free movement of persons, goods, services and capital within the European Single Market. If the UK negotiates some form of agreement allowing it continued access to the EU market, while closing its borders to immigrants, the amount and type of change is still open to question; there may be little or none. However, at this point, it appears EU politicians are adamant that immigration and access to the EEA go hand in hand, i.e., you cannot get one without the other. If that view controls, little would likely change for companies located in the UK.

Reverting to World Trade Organization Rules

Absent a federal trade agreement covering services with the EU, financial services firms, including insurance companies, licensed in the UK will face the same barriers to EU entry as non-EU countries. As a result, the UK's insurance firms will have to establish branches within individual EU member states, and comply with EU regulations, capital requirements, and employment laws.

Companies with UK Parents

With the pound losing strength, the financial stability of the entire business entity could be at risk. Insurance companies should examine and adjust their enterprise risk management systems.

Passporting

Through the practice of "passporting," firms registered in the European Economic Area (EEA) can do business in any other EEA state without obtaining further authorization in each country.

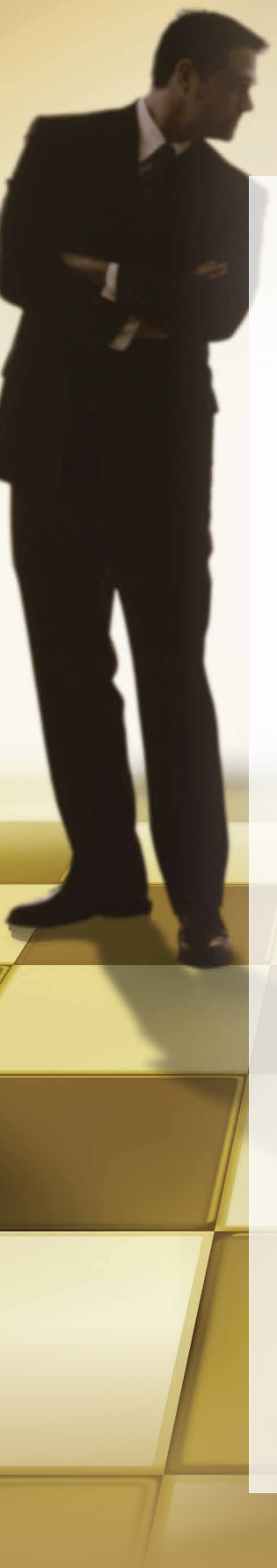
If the UK leaves the EU, insurance companies that use their UK license to write risks in other EU countries will be required to get licenses in the other countries. In addition, companies that use passporting to enter the UK will have similar concerns, and may be required to obtain UK licenses. As London is among the world's largest insurance hubs, this issue may present significant challenges.

Some Additional Considerations

- Cybersecurity
- Data privacy issues (e.g., which standard will be followed the UK, the EU, both, or another country's?)
- Will the UK remain on the National Association of Insurance Commissioners' list of qualified foreign jurisdictions for doing business in the United States?
- Tax implications once the UK is no longer part of the EU VAT system
- Will the UK vary its anti-money laundering directive, and if so how will entities doing business in the UK be impacted?

Conclusion

The only certainty is that the relationship between the UK and the EU will change. We won't have answers to the many questions raised by Brexit until the UK exercises its right to withdraw from the EU pursuant to Article 50 of the Lisbon Treaty, at which point the two-year clock begins to run. For now, the best strategy is to allow the politicians and government entities to determine their strategies.



Recent Insurer Victories in Indexed Annuity Class Actions

BY STEPHEN JORDEN & C. TODD WILLIS

Chambers v. North American Co. for Life & Health

In June, a federal court in Iowa denied *Chambers*' motion to certify two classes of North American annuity purchasers based on claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and for breach of contract. As in most earlier filed class cases against annuity issuers, the RICO claims were premised on alleged misrepresentations about initial sales charges or fees, premium bonuses, and market interest adjustments. The breach of contract claim rested on another familiar allegation in class action annuity litigation: that the insurer violated promises to comply with state standard nonforfeiture laws ("SNF laws") because the annuity contracts were not in fact "fixed-maturity date" annuities as claimed, and should have been treated as optional maturity date annuities under the SNF laws.

The court, assuming without deciding that the plaintiffs could satisfy the requirements of Federal Rule of Civil Procedure 23(a), first analyzed Rule 23(b)(3)'s "predominance" requirement: that "questions of law or fact common to class members predominate over any questions affecting only individual members." Initially, the court addressed plaintiffs' contention that the alleged misrepresentations in promotional material were uniform and that each class member signed a statement evidencing that he or she received and read the allegedly misleading statements. The court observed that the record left "little doubt that the content of the product brochures and disclosure statements" were "varied," pointing out, *inter alia*, that the one plaintiff's disclosure statements affirmed that she read the marketing material while the other plaintiff's certified only that he received the materials. It also remarked that agent presentations differed and that the promotional materials varied depending on product type and date prepared. The court concluded these differences likely would be sufficient to preclude certification but nonetheless, "for purposes of this motion," decided "that Plaintiffs' alleged misrepresentations [we]re not so dissimilar to preclude class certification."

Ultimately, the court's decision rested on plaintiffs' failure to demonstrate that causation could be proved without raising individualized evidentiary issues. The court first noted that causation in this case required a showing of each class member's reliance. It rejected plaintiffs' argument that the court could infer such reliance, refusing to adopt the reasoning of courts holding that payments of fraudulent invoices or charges were sufficient to create an inference of classwide reliance. Moreover, the court found that the record in the case, including one plaintiff's testimony that he did not read the materials and another plaintiff's testimony that she primarily relied on her advisor, "explicitly rebuts any inference of reliance by the named plaintiffs." According to the court: Even assuming that every class member was provided with the same misrepresentations and omissions—which the evidence demonstrates they were not—that fact alone is insufficient to establish causation in the face of evidence that named plaintiffs explicitly failed to rely on the information, if they read the information at all.

The court also declined to certify the breach of contract claim. According to the court, determination of whether North American's annuities complied with SNF laws would require individualized evidence and analysis as to the different laws of 50 states over a 14-year period with respect to multiple different products. Because this evidence would vary by, among other things, type of product and the controlling SNF laws at the time of purchase, the plaintiffs failed to establish that common questions would predominate.

The Eighth Circuit denied the plaintiff's petition for interlocutory review of the decision under Rule 23(f).

Recent federal court decisions effectively terminated two class action lawsuits challenging indexed annuity sales, seemingly ending an extended wave of class litigation in the federal courts against multiple insurers predicated on allegations of inferior or misrepresented "value," "illusory" benefits, or "hidden fees" in the form of commissions.

Abbit v. ING USA Annuity and Life Ins. Co.

In *Abbit*, on August 30, a federal court in California granted summary judgment for the insurer on five claims the court had recently certified for classwide resolution. Three claims—for breach of contract and violations of California's Unfair Competition Law (UCL), and Financial Elder Abuse statute—rested on allegations that ING set "the prices of … undisclosed derivative structure so low that the true values of the contracts were below" the minimum guaranteed contract values (MGCV) required under the Insurance Code. The other two claims, both for violation of California's securities laws, were predicated on allegations that indexed annuities were securities under state law because "ING's internal execution of the 'derivatives' and 'options' transfers market risks from ING to" annuity owners.

The court rejected plaintiff's contract-based theories, and thus entered summary judgment as to the breach of contract, UCL, and Elder Abuse statute claims. Plaintiff's first theory was that the insurer had violated a promise that it would maintain "the 'true value' or 'economic value'" of the annuities above the MGCV. According to plaintiff, his expert's calculations showed that the "true value" of the annuities in deferral was actually below the MGCV, and that there was therefore a forfeiture of promised benefits. The court found these arguments unpersuasive because plaintiff could not identify any contract term promising a "true value" or that "ING would maintain a [MGCV] for the contract at any time other than termination."

The court likewise did not accept plaintiff's second theory—based on a new argument not offered in seeking certification—that the insurer's method of index crediting was not consistent with a regulatory definition of "equity–indexed benefit." The court ruled that the provision in question was a definition, not a regulatory requirement, and decided that it would not allow plaintiff to pursue the claim on a theory that had not served as the basis for certification.

The court also found that the insurer was entitled to summary judgment on plaintiff's claims for violation of California's securities laws, agreeing with defendants that it was "illogical to argue that ING FIAs transfer market risk to Plaintiff when the Contract guarantees that Plaintiff will receive at least the amount he invested less the surrender charge." According to the court, "[t]he only market risk Plaintiff bears is ING's insolvency, and the risk of insolvency is insufficient to convert a transaction into sale of a security."

Department of Labor Rule Paves the Way for State-Run Retirement Plans

BY RICHARD D. EULISS

On August 24, the United States Department of Labor (DOL) announced a final rule governing the exemption of state-run retirement plans from the Employee Retirement Income Security Act (ERISA). Over 30 states have either implemented or are considering such plans. One major hurdle to their broader adoption has been uncertainty over whether they would be governed by ERISA, resulting in unwanted preemption of relevant state laws.

The rule adopts a safe harbor exemption reminiscent of, but critically distinguishable from, the one created in 1975 for IRAs. To qualify for exemption, the plan must, among other things, prohibit employer contributions, and require the state to implement and administer the plan and "assume[] responsibility for the security of payroll deductions and employee savings." Perhaps most important, employee participation must be "voluntary," as opposed to the more stringent "completely voluntary" standard used in the traditional

IRA safe harbor. Under the "completely voluntary" standard, IRAs were exempted from ERISA only if employees had to opt in. Because a central attribute of state-run plans is automatic enrollment — which would fail the "completely voluntary" standard — the DOL established a mere "voluntary" standard. Automatic enrollment plans meet this requirement so long as employees are free to opt out. The DOL will next consider extending this rule to plans administered by cities and counties.

Although the DOL is enthusiastic, not everyone is so sanguine. In addition to public cost, critics note potential conflicts of interest by investment managers. And, in the plan currently under consideration in California, an investment board would be allowed to earmark certain investment returns to curb losses in a bear market. Aside from the difficulty of defining the contours of such a program, some wonder whether short term investors might never benefit from such a reserve and might actually lose investment returns otherwise earned.

These concerns are compounded by the fact that participants are likely to be unsophisticated and apathetic investors. Though IRAs have long been widely available, only those who are not otherwise invested in a retirement plan of their own will be automatically enrolled. It is unlikely that such individuals will fully investigate and understand how state-run plans compare to traditional IRAs.

SEC EXHIBIT HYPERLINK PROPOSAL EXCLUDES INVESTMENT COMPANIES

BY GARY COHEN

The Securities and Exchange Commission (SEC) has proposed that filings on Securities Act registration form types beginning with "S-" and "F-", or on the basic Securities Exchange Act reporting forms, provide hyperlinks to exhibits (Securities Act Release No. 10201 (Aug. 31, 2016)).

SEC Chair Mary Jo White stated "[t]he proposed changes should make it significantly easier to locate documents attached to company filings," and "[t]his enhanced capability will benefit both investors and companies."

The SEC's proposal stops short of covering most investment company filings, including mutual fund and insurance company separate accounts filings on form types beginning with "N-".

Filings by life insurance companies on Forms S-1 or S-3, including any insurance product filings on those forms, would be covered, however.

The proposal specifically identifies each SEC form type covered and should be reviewed by individual companies to determine whether and to what extent they would be affected. Registered investment companies could also be made subject to the hyperlink requirement. The SEC release states "[t]he staff will consider whether the proposals discussed in this release should be extended to a broader group of registrants or to additional form types."

The deadline for comments is 45 days after publication of the release in the Federal Register.

Illinois Courts: Fixed Indexed Annuities Are Not Securities

BY JASON BROST

In 2009, the Securities and Exchange Commission (SEC) attempted to regulate fixed indexed annuities (FIAs) as securities by issuing Rule 151A. Previously, FIAs were treated as exempt insurance products. After the D.C. Circuit vacated Rule 151A, the issue was largely resolved, for federal law purposes, by the Dodd-Frank Act, which, generally, clarified that FIAs that comply with certain state insurance law non-forfeiture and suitability requirements are exempt from SEC regulation.

In recent years, however, the Illinois Securities Department, has asserted that FIAs are securities under the Illinois Securities Law. Two recent published opinions by Illinois appellate courts, *Babiarz v. Stearns* (June 2016) and *Van Dyke v. White* (July 2016), rejected that position and confirmed the traditional understanding that FIAs are insurance products, not securities.

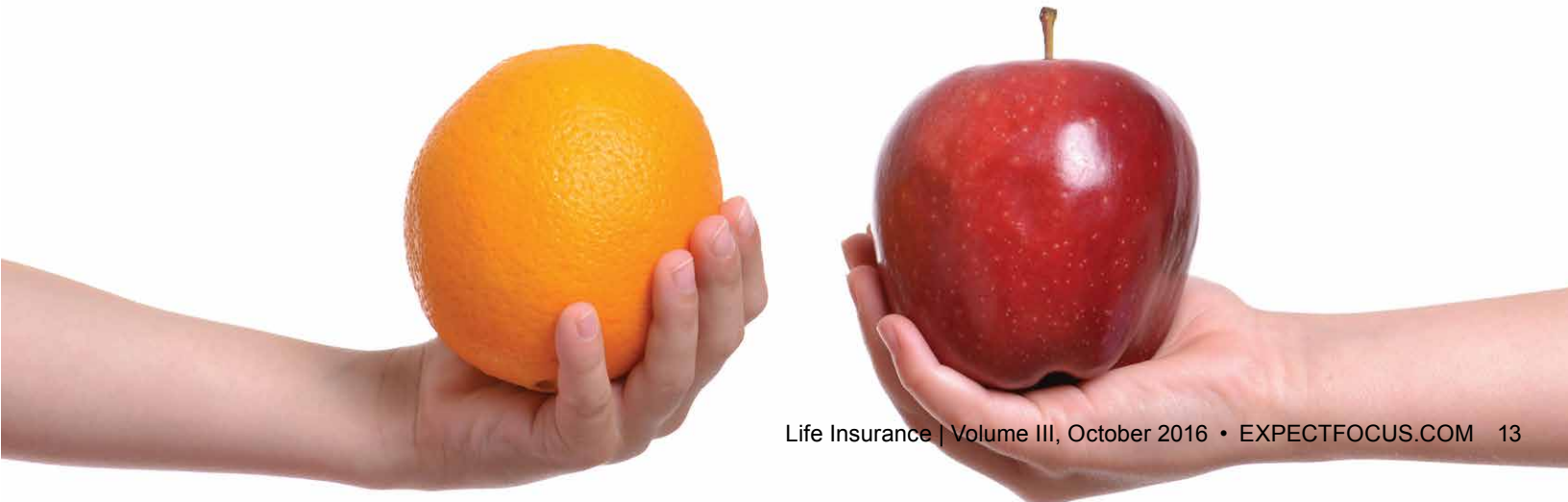
Van Dyke was an administrative review action involving a Securities Department decision that found Van Dyke, an Illinois-licensed insurance producer and investment advisor, made fraudulent recommendations to his clients concerning FIAs, which the Securities Department deemed securities. While the Securities Department did not explain this finding, in an earlier administrative proceeding, it found that an FIA was a security on the grounds that it was an "investment contract" as that term is used in the Illinois Securities Law. The trial court affirmed the decision, and Van Dyke appealed.

The Appellate Court for the Fourth District reversed the trial court, focusing on the fact that the Illinois Securities Law defines securities to include a "face amount certificate" and defines "face amount certificate" to include "any form of annuity contract (*other than* an annuity contract issued by a life insurance company authorized to transact business in this State)" (emphasis supplied). Finding that the FIAs in question were annuities issued by insurance companies authorized to transact business in Illinois, the appellate court held they were not securities. The court noted that this result was reinforced by the fact that the Illinois Insurance Code specifically grants the Illinois Insurance Department sole authority to regulate the issuance and sale of variable annuities and stated that "[i]t would make little sense for the legislature to place variable annuities out of the reach of the Securities Department but then subject [FIAs] to securities regulation."

The plaintiff in *Babiarz* sued the insurer and insurance producer who sold FIAs to her, alleging that the producer misrepresented and omitted material terms of the FIAs and asserting multiple causes of action, including violation of the Illinois Securities Law. The trial court granted defendants' summary judgment on the securities law claim on the basis that the FIAs were not securities.

On appeal, citing the not-yet rejected Securities Department's decisions in *Van Dyke* and an earlier administrative proceeding, plaintiff argued that summary judgment was inappropriate because the FIAs were investment contracts and thus securities under the Illinois Securities Law. The Appellate Court for the First District disagreed, but based on somewhat different reasoning than that later used in *Van Dyke*. The court focused on the fact that the FIAs were issued by a licensed insurance company, sold by a licensed insurance producer, and filed with and otherwise regulated by the Illinois Insurance Department, which took the position that FIAs are insurance products. Further, the court found that an Illinois Securities Law exemption for "[a]ny security issued by and representing an interest in or a debt of, or guaranteed by, an insurance company" applied.

A plaintiff's attempt to characterize FIAs as securities under California state law was also recently rejected. *See* "Recent Insurer Victories in Indexed Annuity Class Actions" regarding *Abbit v. ING USA Annuity and Life* on page 11.



What You Must Know About New York's Proposed Cybersecurity Regulation for the Banking, Insurance, and Financial Services Sectors

BY JOSEPHINE CICCHETTI, JOSEPH SWANSON, STEVEN BLICKENSDERFER, & NORA VALENZA-FROST

On September 15, New York's Department of Financial Services released its long-awaited proposed cybersecurity regulation, which promises to deliver sweeping protections to consumers and financial institutions alike. The proposed regulation, titled "Cybersecurity Requirements for Financial Services Companies" (23 NYCRR Part 500), if implemented, would be a first-of-its-kind state provision that creates mandatory cybersecurity and risk management regulations for companies in the banking, insurance, and financial services industries licensed in New York. The proposed regulation would take effect January 1, 2017, and will be open for public comment for 45 days beginning September 28, 2016. Given New York's prominence in the financial services sector, other states are likely to follow its lead in promulgating similarly sweeping regulations.

Background. The proposed regulation arose out of surveys of regulated banking institutions and insurance companies the Department conducted in recent years.

Based on those surveys' findings, the Department identified five key elements of cybersecurity programs, all of which can be seen in the proposed regulation: (1) a written information security policy; (2) security awareness and education and training for employees; (3) information security audits; (4) risk management of cyber risk (including the identification of key risks and trends); and (5) incident monitoring and reporting.

Here's what you need to know about New York's proposed cyber regulation.

Scope. The proposed regulation is broad in scope. It applies to any individual or entity operating under or required to operate under a license, registration, charter, certificate, permit, accreditation or similar authorization under New York banking, insurance, or financial services laws, subject to certain limited exemptions for smaller entities. Smaller entities – which the regulation defines as having (1) fewer than 1,000 customers in each of the last three calendar years; (2) less than $5 million in gross annual revenue in each of the last three fiscal years; and (3) less than $10 million in year-end total assets as calculated by GAAP – are still expected to comply with many of the regulation's requirements.

The broad scope of the proposed regulation continues with its definition of "nonpublic information," which is defined to include any information that an individual provides to a covered entity in connection with seeking or obtaining a financial product or service.

Cybersecurity Program. The proposed regulation's primary purpose is to ensure that all companies, large and small, in the banking, insurance, and financial services industries have a cybersecurity program in place. While an increasing number of companies already do, the proposed regulation makes this mandatory across-the-board and requires it to be in writing. Among the requirements, the proposed regulation requires companies to have a program that achieves the following:

- identifies internal/external cybersecurity risks;
- uses defensive infrastructure to protect covered information;
- detects "cybersecurity events" such as a breach; and
- fulfills regulatory reporting obligations.

Third Parties. If a company uses a third party to handle its information systems or retain its data, the proposed regulation further obligates the third party to ensure that certain minimum cybersecurity practices are being met. This includes mandatory periodic assessments and requiring third parties to have written policies that, in some instances, may include warranties that the entity is free from viruses and other security vulnerabilities.

Chief Information Security Officer. For larger companies, the proposed regulation will require the designation of a chief information security officer (CISO), who will be tasked with implementing, overseeing, and enforcing the cybersecurity program. In particular, the CISO will review the cybersecurity policy annually and bi-annually report on the program to the company's governing body. Again, while such reporting mechanisms may already be in place at some companies, the proposed regulation will make this standard.

Multi-Factor Authentication & Encryption. Until now, multi-factor authentication has been a best-practice, not a requirement. The proposed regulation would require large companies to use multi-factor authentication for access to internal systems or data from an external network or to servers that contain nonpublic information, as well as risk-based authentication for individuals accessing web applications that contain the same. The proposed regulation likewise requires encryption for all nonpublic information, with limited exceptions.

Limits on Data. Another key provision of the proposal is its limit on data retention. Companies subject to the regulation will be required to destroy all nonpublic information that is no longer necessary for the provision of products and services for which the information was originally provided.

App Development. The proposed regulation also encompasses app security, requiring companies to ensure the use of secure development practices for in-house developed apps.

Reporting & Certification Requirement. When a "cybersecurity event" such as a breach occurs, the proposed regulation requires companies to notify the Department within 72 hours. The regulation further requires companies certify to the Department annually that their cybersecurity programs are in compliance and maintain all supporting documentation for a five-year period.

Staff & Training. The proposed regulation further requires companies to employ cybersecurity personnel to manage the program, as well as to provide for mandatory and regular cybersecurity education and training.

The Takeaway. New York's proposed cybersecurity regulation is consistent with the shift toward greater regulation in the cybersecurity space, particularly for the financial services sector. As previously discussed in "FFIEC Issues New Cybersecurity and Data PRivacy Guidelines for Mobile Banking," *Expect Focus*, Volume II, June 2016, the Federal Financial Institutions Examination Council recently issued similar-sounding guidelines to help examiners evaluate the risk management and mitigation processes of financial institutions and third-party service providers. New York's proposed regulation, however, would be different because it is mandatory.

For some ahead-of-the-curve companies, this "new" cybersecurity regulation may not seem all that new. But for most, the imposition of its mandatory cybersecurity standards, including the designation of a CISO and ongoing staff training and education, may have significant cost implications that may require advanced discussion and planning.

Indeed, the regulation's biggest impact may be on smaller entities that, unlike their larger counterparts, have not already extablished many of these policies and procedures. Under the new regulation, smaller entitles will still be required to have a cybersecurity program and written policy, limit access privileges to nonpublic information, conduct annual risk assessments, and comply with the notices and certification requirements.

Further, the broad definitions of nonpublic information, data limit regulation, and mandatory multi-factor authentication may require some companies to reassess their existing data storage and retention policies. What's more, because New York is considered a financial services industry leader, this regulation may be a harbinger of things to come for other states.

SEC Issues Guidance on Business Continuity Planning for Registered Investment Companies

BY JOSHUA WIRTH

The Securities and Exchange Committee (SEC) staff published Guidance Update 2016-04, concerning business continuity plans regarding companies within a "fund complex." By "fund complex" the staff means an affiliated group of registered investment companies, which includes mutual funds or registered insurance company separate accounts – together with their affiliated key service providers.

Fund complexes may face business disruption risks from myriad sources, including cyberattacks, technology failures, departure of key personnel, and natural disasters. SEC rules specifically require registered investment companies and certain of their key service providers to adopt and implement written compliance policies and procedures reasonably designed to prevent securities laws violations. Moreover, according to the Guidance Update, the SEC staff believes that:

> [f]und complexes should consider how to mitigate exposures through compliance policies and procedures that address business continuity planning and potential disruptions in services (whether provided internally at the fund complex or externally by a critical third-party service provider) that could affect a fund's ability to continue operations, such as processing shareholder transactions.

The Guidance Update emphasizes, however, that fund complexes' compliance policies and procedures and business continuity plans should be tailored to the particular nature and scope of the complex's operations. The Guidance Update therefore generally does not specify measures that fund complexes must adopt to ameliorate exposure to business disruptions. It does, however, set forth a large number of such measures that the staff believes fund complexes should consider, particularly as relevant to any critical services for which a registered investment company expects to rely on a service provider unaffiliated with the fund complex.

The SEC released the Guidance Update on the same day it proposed a new rule specifically requiring registered investment advisers to implement business continuity plans that incorporate certain features, including performing reviews of certain service providers on which such advisers may rely. Although that rule is not yet final, the Guidance Update is operative now.

CFPB Grabs for SEC/ CFTC Turf

BY SARAH AUCHTERLONIE

In May, the Consumer Financial Protection Bureau (CFPB) proposed a ban on "mandatory arbitration" contract clauses that make financial products consumers waive their right to join class actions.

Broker-dealers, commodities firms, and investment advisers that lend for margin trading, remit funds, or use credit reports could fall under the ban, although the proposal contains a specific exemption for SEC-registered broker-dealers that already observe a Financial Industry Regulatory Authority (FINRA) ban on class action waivers.

Many of these firms and their regulators—the Securities and Exchange Commission (SEC), the Commodities and Futures Trading Commission (CFTC), and the states—are watching this rule closely, both for its impact on specific firms, and for what future CFPB actions it may portend.

The CFPB's arbitration rule would require investment advisers and CFTC-regulated entities to litigate against class action attorneys if a dispute arose regarding finance-like activities. Careful contract wording might carve out other securities and commodities services from class action exposure. But that could be awkward and confusing for firms and consumers alike, and would invite litigation over the carve-outs.

In any event, the CFPB's turf grab seems like the tip of the spear. The SEC and CFTC have rulemaking and enforcement authority over broker-dealers, large investment advisers, and commodities firms. This authority extends to regulating agreements with consumers, as reflected in the current FINRA rule and in a current CFTC rule about arbitration waivers. And both the SEC and CFTC also extensively regulate extension of credit to consumers who trade on margin. Nevertheless, the CFPB seeks to impose its judgment on its sister agencies.

This rule is a strategic move. The CFPB's arbitration proposal explains that products or services that are subject to both that proposal and the CFTC's arbitration rule must meet both agencies' requirements. With this explanation, the CFPB shows that it aims for concurrent authority, notwithstanding the Dodd-Frank Act's apparent directions to avoid such overlap.

FINRA to Overhaul Gifts, Non-Cash Compensation, and Business Entertainment Rules

BY ANN FURMAN

On August 5, FINRA proposed amendments to its gifts rule (Rule 3220) along with new rules to replace the current provisions governing non-cash compensation (new Rule 3221) and business entertainment (new Rule 3222). These proposals arise from FINRA's 2014 retrospective review and related report, which assessed the current rules' effectiveness and efficiency.

FINRA proposes to increase the gift limit in Rule 3220 from $100 to $175 per person per year and include a de minimis $50 threshold below which firms need not keep records of gifts given or received.

Proposed Rule 3221 would consolidate current non-cash compensation provisions into one rule, and cover any security. The current rules cover only variable insurance products, investment company securities, direct participation programs, and public offerings of securities.

This proposal would forbid product-specific internal sales contests, based on FINRA's position that contests that favor one security, or type of security, "potentially create an incentive to engage in sales conduct contrary to the best interest of customers." Proposed Rule 3221 would also forbid payment or reimbursement for outings (e.g., golf outings), tours, or other forms of entertainment at training and education meetings. Nevertheless, FINRA specifically requested comment on whether the training and education meeting requirements should allow entertainment. FINRA would also increase the threshold of the non-cash compensation rule gifts exception from $100 to $175 per person, per year, so long as the gift is not preconditioned on the achievement of a "sales target," as defined in the proposed rule.

Regarding business entertainment, proposed Rule 3222 would require each member to adopt written policies and supervisory procedures tailored to their business needs. Among other things, written policies would need to define forms of permissible and impermissible business entertainment based on location, nature, frequency, and dollar amount.

SEC Probes Share Class Recommendations

BY TOM LAUERMAN

In July, the Securities and Exchange Commission's Office of Compliance Inspections and Examinations (OCIE) announced an initiative to identify instances where registered investment advisers may be improperly influenced by conflicts of interests when they decide what class of mutual fund or Section 529 plan shares to recommend to their retail clients.

OCIE is focused particularly on conflicts that may exist when an adviser recommends a share class that has "substantial" loads or distribution fees, and

- undisclosed compensation or incentives are being paid to the adviser or its associated person or affiliate. For example, if the adviser (or its affiliate) is a registered broker-dealer, they may be receiving compensation in that capacity; or

- a less costly share class is available that would have provided less compensation/incentives to the adviser or to its associated person or other affiliate.

Accordingly, OCIE says its initiative will focus on questions such as:

- whether the adviser's share class recommendations comply with the adviser's duty to seek "best execution" and otherwise act in the clients' best interest;
- whether the adviser (a) has satisfied all of Form ADV's disclosure requirements relating to compensation and (b) more generally, has made "full and fair disclosure of all material facts, including all material conflicts of interest that could affect the advisory relationship"; and
- whether the adviser's written compliance policies and procedures are adequate and effective, as relevant to share class recommendations.

Some variable annuity contracts make available more than one "share class." Although OCIE's announcement did not address the question, it is prudent to assume that SEC staff would find recommendations concerning such variable annuity share classes present issues similar to those outlined above.

SEC CURIOUS ABOUT MUTUAL FUND UNICORNS

BY TOM LAUERMAN

The Securities and Exchange Commission (SEC) staff has reportedly been asking mutual funds how they value their investments in "unicorns" – i.e., dynamic pre-IPO companies with market capitalization exceeding $1 billion, and shares that are not publicly traded. (Once market cap goes above $10 billion, the term "decacorns" is also used.)

Liquidity and other considerations can limit the amount of a unicorn's shares in which any one mutual fund can invest. Nevertheless, unicorn share prices can be volatile and can have a significant impact on a fund's performance, particularly relative to its "benchmark" index (which generally would not include unicorn shares).

Recently, the performance of unicorn shares, and their popularity among mutual funds, has varied with circumstances. Some analysts, however, have observed that the share prices of unicorns in which mutual funds invest have at times seemed to increase significantly faster than shares of unicorns that receive financing from other sources. This might reflect, among other things, superior investment acumen on the part of the mutual funds, or the increased "demand" that mutual funds create for the shares of those unicorns they find attractive.

Also, for several reasons, a mutual fund's valuation of its investment in unicorn shares generally requires the exercise of considerable judgment, particularly to the extent that such shares do not have active secondary markets. Accordingly, the SEC staff may be seeking to satisfy themselves that mutual funds are ascribing appropriate values to their unicorn investments and are not seeking to make such investments' performance appear more favorable by inflating those values.

Given the SEC staff's apparent interest, now is an opportune time for mutual fund advisers, boards, and valuation committees to carefully review the pricing methodology and practices for the funds' unicorn-type investments, if they have not recently done so.

NEWS AND NOTES

In the *BTI Litigation Outlook 2017* report, corporate counsel ranked **Carlton Fields** in the top 15 percent of all law firms for products liability litigation and securities and finance litigation.

Carlton Fields was chosen as a top law firm, ranked 5th in the country, by the *Vault Guide* to the *Top 100 Law Firms* for "Overall Diversity." The firm was also ranked 3rd and 4th for "Diversity for Disabilities" and "Diversity for Minorities," respectively. *Vault*, a career network, provides information on careers with thousands of companies in dozens of industries.

Carlton Fields was named a top U.S. law firm in *The American Lawyer*'s 2016 survey, "The Best Firms in Big Law for Women." This annual survey of the number of women in large law firms ranks firms by a score that totals the percentage of women lawyers, and the percentage of women partners at each firm.

Washington, D.C., shareholder **Josephine Cicchetti** co-moderated the IRI Cybersecurity Forum on July 19 at the J.W. Marriott in Washington, D.C. **Kristin Shepard** (shareholder, Washington, D.C.) and **Joseph Swanson** (of counsel, Tampa) were panelists for the forum's "Enforcement and Litigation Update," and Hartford shareholders **John Pitblado** and **Robert Helfand** were panelists for its "Latest Developments in Cyber Risk Insurance." The forum offered the latest information and best practice guidance for cybersecurity threats.

On September 22, several Carlton Fields attorneys participated in the Association of Life Insurance Counsel's (ALIC) Regional Insurance Counsel Roundtable in Washington, D.C. Washington, D.C., shareholder **Richard Choi** moderated and Miami shareholder **Ed Zaharewicz** spoke on the panel, "DOL/SEC Fiduciary Rules – Conflict or Harmonization?", which addressed the current status of the DOL Fiduciary Rule and legal challenges to it, and future regulatory and litigation issues impacting financial advisers. Washington, D.C., shareholder **Wally Pflepsen** spoke on the panel, "Hot Topics in Litigation," which covered insurers' attempts to defend their business practices, including class action challenges to the cost of insurance on life insurance policies, and claims challenging advisory fees charged by investment advisers to mutual funds.

In August, Hartford shareholders **Robert Helfand** and **John Pitblado** led a panel on "Cybersecurity Issues for the Contract Examiner and Market Conduct Examiner" at the Insurance Regulatory Examiners Society (IRES) Career Development Seminar & Regulatory Skills Workshop in Scottsdale, Arizona. The presentation focused on navigating coverage considerations for cyber-exposure and pre-application through coverage claims.

Miami associate **Stephanie Fichera** is the new Chair of the Life Insurance Law Committee of the ABA's Tort Trial and Insurance Practice Section. Her one-year term commenced at the close of the ABA Annual Meeting in August 2016.

Hartford associate **John W. Herrington** was reappointed to the Connecticut State Advisory Committee (CSAC) by the U.S. Commission on Civil Rights. He was initially appointed to the committee in 2011. His term will last four years. The CSAC 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. The committee's past reports addressed closing the achievement gap, and racial profiling.

Tampa shareholder and co-chair of the firm's national appellate practice and trial support practice group **Sylvia H. Walbolt** received the 2016 John Paul Stevens Guiding Hand of Counsel Award from the American Bar Association's (ABA) Death Penalty Representation Project on September 15, 2016 in Washington, D.C. First presented to U.S. Supreme Court Justice John Paul Stevens in 2011, the award is given annually to a lawyer who demonstrates exceptional commitment to providing pro bono counsel for individuals facing death sentences. During a career that spans more than 50 years, Walbolt has exemplified this commitment.

Miami shareholder **Andrew J. Markus** was elected to the ABA's Board of Governors, and will represent Florida and Texas (District 8) during a three-year term. The ABA's Board of Governors comprises 42 members who oversee the general operation of the ABA and develop specific action plans.

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