The Premium Financing Red Flag: Case Studies & What to Avoid

By Robert Usinger & Iram P. Valentín

Premium financing involves the lending of funds to procure life insurance by individuals (or companies). The practice of premium finance is not new. For example, premium financing and premium financing companies have been regulated in the State of New York as far back as 1960 and in Florida as early as 1963. Although not a new practice, the use of premium financing appears, at least anecdotally, to be on the rise. In certain circumstances, premium financing is entirely appropriate. However, we have noticed an increasing body of claims involving premium financing that illustrate the many potential pitfalls surrounding this practice. This article discusses the expanding role of premium financing and offers guidance to prevent future claims.

What is premium financing?

Premium financing is typically provided by a premium finance company to an individual who seeks to obtain life insurance without the outlay of a large amount of personal funds to pay premiums. Insurance companies also may offer premium finance programs for their own insurance products. Premium finance loans are now always recourse loans. Interest rates are tied to certain indices, such as the 1 year LIBOR, and financing can be used for almost any type of life insurance. Although profiles can vary, premium financing was traditionally suitable for individuals who desired large life insurance policies with death benefits of $5 million or more and either lacked the liquid assets to pay premiums (but had substantial non-liquid assets) or as result of some other estate planning benefit that could be gained by obtaining a large life insurance policy without the out-of-pocket outlay of large premiums.

Most of the time, premium financing was appropriate for individuals with some level of affluence, be it liquid or non-liquid. Anecdotally, we are now seeing a trend of much smaller policies being financed.

Issues with premium financing

Premium financing is currently regulated – and appropriately used – in some capacity in all fifty states. In fact, no state prohibits the use of premium financing for insurance. However, even under ideal circumstances, premium financing presents potential issues. Oftentimes, the premium finance agreement and the insurance contract itself have different terms. An example is where the insurance company has a rating downgraded and the premium finance contract requires a certain rating below which the insurance company has now fallen. This could lead the premium financing company to terminate or alter the contract, forcing the borrower to assume premium payments personally, increase the amount of collateral required by the premium finance company and/or force the client to pay back any outstanding debt on the financing. Premium financing arrangements also run into problems when the life insurance contract is of the accumulating cash value variety and tied to certain sub-accounts that are invested in the market. Often, the policy is sold on the theory that the market gains in the underlying accounts on the policy will serve to cover the cost of the premium.
Can a Claim for Recovery of Legal Fees Really be Covered by a Lawyer’s Professional Liability Policy?

By David A. Grossbaum

There are many reasons that claims for the return of fees paid to lawyers are not covered by a lawyer’s professional liability policy. There are exclusions for such claims, the definition of covered “damages” usually does not include the return of fees, and fee disputes are not typically considered as involving “professional services,” a precondition of coverage. As a public policy matter, insurers do not want to refund to a claimant the legal fees paid to an insured, thereby allowing the insured to retain fees that never should have been paid in the first place. The majority rule across the country is that these claims are outside the scope of coverage.

Surprisingly, cases decided in the last year show that courts will not always act in predictable ways when interpreting insurance policies. Although these decisions can be thought of as limited to their unique facts, what they show is that courts will sometimes find coverage even in the face of seemingly clear policy language and sound public policy to the contrary.

The Role of “Arising out of” Language in the Definition of “Professional Services.


Nonetheless, a recent Texas case held that the inclusion of the phrase “arising out of” meant that the designated services were included, thereby a broad term that extended both these cases contained “arising out of” the rendering or failure to render professional services at issue in the case were not required or involve the application of professional judgment or training. See e.g. Colony Ins. Co. v. Fladeth, 2013 WL 1365988, at *1 (N.D. Cal. Apr. 3, 2013); Pias v. Cont'l Cas. Ins. Co., 2013 WL 4012709, at *1 (W.D. La. Aug. 6, 2013); Clermont v. Cont'l Cas. Co., 778 F. Supp. 2d 133, 136 (D. Mass. 2011); Reliance Nat. Ins. Co. v. Sears, Roebuck & Co., 58 Mass. App. Ct. 645, 646-47, 792 N.E.2d 145, 147 (2003).

Nonetheless, a recent Texas case held that the inclusion of the phrase “arising out of” professional services” extended the policy to a fee dispute that did not itself involve “professional services.” In Shamoun & Norman LLP v. Ironshore Indemnity, Inc., 2014 WL 5460475 (N.D. Tex. October 28, 2014), the insured firm sued its client, Hill, for breaching an incentive bonus fee agreement. Hill countersued the firm for breach of fiduciary duty, alleging that the fee agreement was “an effort by the law firm to increase attorney’s fees when they realized that Hill would win the case.”

At the trial of the underlying case between the law firm and the client, none of the parties recovered against the other, so the coverage issue was only as to defense costs. The insurer disclaimed based on the lack of any “professional services” and coverage litigation ensued. The parties filed cross motions for summary judgment.

In defining “professional services” covered by the policy, the court noted that these are only services requiring professional training and only those services that require the “inherent skills typified by that profession, not all acts associated with the profession.” (citations omitted). As such, billing and fee-setting are not usually characterized as “professional services.” The issue, however, was whether the coverage for all claims “arising out of” the rendering or failure to render professional services altered that general rule. The court considered two prior Texas decisions, one finding no coverage for fee claims, Gregg & Valby LLP v. Great American Insurance Co., 316 F.Supp.2d 505, 513 (S.D. Tex. 2004) and one finding coverage, Shore Chan Bragalone Depumpo LLP v. Greenwich Insurance Co., 856 F. Supp.2d 891 (N.D. Tex. 2012). Although the insurance policies in both these cases contained “arising out of” language, only the Shore Chan case relied on this language to find coverage: the Gregg & Valby case never discussed the “arising out of” language.

The language in the Shamoun policy not only used “arising out of” language, but also defined “professional legal services” as “legal services and activities performed for others as a lawyer,” and “including” various designated services (such as services as arbitrator, mediator, and fiduciary). The court ruled that this “including” language meant that the designated services were not intended to be an exhaustive list and that professional services was thereby a broad term that extended beyond traditional legal services. While the court concluded that the billing services at issue in the case were not “professional legal services,” the court held that the phrase “arising out of the rendering of or failure to render” such services expanded the scope of the policy to any claim that had a “causal connection or relation” to legal services. As the court put it, “[b]ut for the plaintiffs’ attorney-client relationship with Hill, there would be no claim for breach of fiduciary duty.”

The Recasting of Fee Disputes as Legal Malpractice Claims

Another way that this minority of courts have found coverage for fee disputes is to characterize them as involving legal malpractice or the breach of a fiduciary duty. The Alaska Supreme Court found the potential for coverage as to a fee dispute in ALPS Property & Casualty Insurance Company v. Merdes & Merdes, P.C., 2014 WL 7399105 (D. Alaska December 29, 2014) by treating it as a claim against the firm for failing to safeguard the fees until the fee dispute was concluded.

The underlying fee claim stemmed from a contingent fee agreement signed with a client named Lesnoi for a land dispute under an Alaska statute. The case was successfully resolved in 1992, and a fee dispute arose shortly thereafter. In 1995, the Alaska Bar Association decided the firm was entitled to $721,000 in fees under the contract, plus another $55,000
in court-awarded fees, and a court rendered a judgment consistent with that.

Lesnoi appealed to the Alaska Supreme Court, arguing that original fee agreement, the Bar Association finding, and the 1995 judgment all violated the Alaska statute under which the underlying land dispute case was brought. Nonetheless, Lesnoi paid the firm the full balance owed, $643,000, but included a claim for the return of this money in its appeal. There was no record evidence that Lesnoi ever asked the firm to safeguard the fees pending appeal or that Lesnoi attempted to pay the fees into court instead of directly to the law firm.

In 2013, the Alaska Supreme Court found that the fee agreement violated the Alaska statute, and ruled that Lesnoi was entitled to a return of the $643,000 paid in legal fees, but not any other fees previously paid. Lesnoi made a written claim to the law firm demanding the money with interest. The firm tendered the claim to ALPS. Lesnoi filed a complaint based on the firm’s actions in transferring the fees to third parties, and alleged claims based on the failure to safeguard the fees until the dispute was resolved. ALPS denied coverage.

With regard to the requirement that the claim be one that “arises from or in connection with an act, error, or omission in professional services that were rendered or should have been rendered,” the court ruled that Lesnoi was complaining about the firm’s safeguarding the money and that established an adequate “professional services” connection.

The court applied an unjustifiably narrow interpretation of the claim as one involving the safeguarding of money, when Lesnoi’s “safeguarding” claim was really just another way of seeking the return of the fees. Logically, a claim for the return of those fees was a precondition for any safeguarding claim and, if the law firm had safeguarded the fees, Lesnoi would presumably still have been asking for the return of the money. Thus, this case was truly just a claim for the return of fees.

Another court declined to apply the policy language excluding fee disputes by treating the claim as a breach of the insured’s duty to make a complete and fair disclosure of the fee agreement. Edward T. Joyce & Associates, P.C. v. Professional Direct Insurance Company, 2014 WL 4980888 (N.D. Ill. September 30, 2014). Nonetheless, the court granted summary judgment for the insurer because the judgment for the return of fees was for non-covered sanctions.

A class action was filed against the law firm based on the improper collection of legal fees. In essence, the dispute with the class action plaintiffs was over: 1) whether the insured firm could charge the plaintiffs the hourly fees charged by another firm hired by the insured firm to pursue recoveries from the insurer of a defendant in the underlying class action, in addition to its own contingent fee; 2) whether the insured firm was entitled to an additional contingent fee based on the recovery from that insurer; and 3) whether a discount offered by the insured firm to the plaintiffs was honored. An arbitrator ordered the insureds to reduce by 25 percent the hourly fees charged to the plaintiffs in the insurance action as a sanction for failing to timely and properly inform the class action plaintiffs that the contingent fee did not apply to the insurance action. The arbitrator also required the insured to refund all contingent fees it collected on the insurance recovery because the modified fee agreement allowing for this fee was the product of duress.

The coverage issue turned on whether the judgment against the law firm in the arbitration was barred based on an exclusion for “sanctions” and “for legal fees, costs or disbursements paid or owed to you” and whether it arose out of the rendering of “professional services.” The Court acknowledged that a prior Illinois case, Continental Casualty Company v. Donald T. Bertucci Limited, 926 N.E. 2d 833 (Ill. App. Ct. 2010) had found that there was no coverage for fee disputes because these do not involve the rendering of professional services. The court, nonetheless, distinguished the Bertucci case by finding that the present matter involved a breach of fiduciary obligations by a lawyer in failing to advise a client to seek independent representation as to changes in a fee agreement where the possibility for undue influence can arise because of a conflict of interest. Moreover, there was an allegation regarding the lawyer’s agreement to give a discount in fees based on a lower than expected settlement.

Next the court considered the exclusions. The court rejected the “return of legal fees” exclusion because this was “not a run of the mill dispute over legal fees and costs,” but rather involved improper disclosures and legal advice as to accepting a settlement. As to the exclusion for sanctions, the court found that this barred coverage for the contingent fees charged for the recovery in the insurance litigation (that the firm had to disgorged) and the sanction of 25 percent of the hourly fees charged by another firm in the insurance litigation.

Coverage May Exist if the Plaintiff is not Seeking the “Return” of Fees it Paid, but Rather a Disgorgement of Fees Paid by Others

The language in the definition of “damages”, in many policy exclusions, eliminates coverage for claims seeking the “return” of fees. This presumes that the party seeking fees is the same one who paid those fees in the first place. But what if the claim is for the insured lawyers to disgorge fees paid to them by others?

In Hullverson Law Firm P.C. v. Liberty Insurance Underwriters, 25 F.Supp.3d 1185 (E.D. Mo. 2014), a former lawyer for the Hullverson firm, named James Hullverson (James), brought suit against the Hullverson firm for false and misleading advertising suggesting that John Hullverson and Thomas Hullverson were still practicing at the firm when they had left the state years before and were practicing elsewhere. James alleged that no attorney with the last name of Hullverson had practiced at the defendant law firm since at least the year 2000, and his clients were confused by the firm’s use of the name “Hullverson Law Firm, P.C.” and his own law firm name, Hullverson & Hullverson. James demanded, among other relief, that the Hullverson firm disgorge profits it obtained through the misleading advertising. Liberty responded to this disgorgement claim by saying that any profits of the law firm paid to James would be the return of legal fees because legal fees are the source of a law firm’s profits. The definition of “damages” explicitly excluded the restitution of fees, and the policy contained a fee exclusion for such claims. The court rejected this argument because the profits of the firm would not be “returned” to the person who paid them, but were rather compensation to James.

Conclusion

The clear majority rule is that fee disputes are not covered by professional liability policies, and the courts have enforced the clear and unambiguous policy language saying so. Nonetheless, if courts want to find coverage, they may well find a way to do it, even if that means applying an interpretation of the policy that is a departure from precedent and reads the policy in an exceedingly narrow way, and defeats the public policy reasons for barring coverage.

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North Carolina Supreme Court Grants Discretionary Review of Decision Regarding Auditor Liability, Including Whether an Auditor May Owe Fiduciary Duties to its Client.

By Richard A. Simpson & Ashley Eiler

In CommScope Credit Union v. Butler & Burke, LLP, Case No. 5P15, the North Carolina Supreme Court has granted a petition for discretionary review of a decision of the Court of Appeals holding that an independent auditor may owe fiduciary duties to its client. The case also raises significant issues regarding the applicability of the defenses of contributory negligence and in pari delicto in accounting malpractice claims. The case has drawn substantial interest, with five amicus briefs being filed in support of the auditor.

The Court of Appeals’ Decision

CommScope, which is a credit union organized under North Carolina law, failed for over a decade to file mandatory informational tax returns with the Internal Revenue Service (“IRS”). After discovering this failure, the IRS assessed a substantial penalty. Although the breach of fiduciary duty issue is the most significant to the profession nationally, the Court of Appeals’ holdings on the contributory negligence and in pari delicto issues are also important. As to those issues, the auditor, supported by one of the amici, argues that the Court of Appeals’ decision is contrary to well-established North Carolina law that a party cannot recover from others if the party’s own fault, whether negligent or intentional, is a proximate cause of the harm it suffered. Accepting all of the allegations of the complaint as true, which is required at the motion to dismiss stage, CommScope had a legal duty to file informational returns annually; breached that duty; and suffered damages as a result.

The Court of Appeals, however, reversed the trial court and remanded the case for proceedings on the merits. That court first held that the allegations of the complaint, if true, established a fiduciary relationship between CommScope and the auditor. The Court of Appeals also held that neither contributory negligence nor in pari delicto supported dismissal of CommScope’s complaint.

Proceedings in the North Carolina Supreme Court

CommScope filed a petition for discretionary review with the North Carolina Supreme Court. On March 5, 2015, the Supreme Court granted the petition.

In the Supreme Court, the auditor and all of the amici argue that the Court of Appeals’ holding that an independent auditor may owe fiduciary duties to its client sets a dangerous precedent that, if upheld by the Supreme Court, would make North Carolina an outlier nationally and would interfere with auditors’ ability to perform their job properly.

In particular, by allowing a breach of fiduciary duty claim to proceed on the facts alleged in CommScope’s complaint, the Court of Appeals held, in effect, that every standard audit engagement in North Carolina may give rise to a fiduciary relationship. Critically, however, imposing fiduciary duties on an auditor cannot be reconciled with the independence and impartiality that are required of auditors under professional auditing standards and governing law.

The trial court granted the auditor’s motion to dismiss, holding that CommScope’s complaint failed to state a claim on which relief could be granted.
Travelers Insurance VP and PLUS Trustee Pete Herron recently chatted with the editors of PLUS Journal about the professional liability insurance industry, his involvement with PLUS and PLUS Foundation, and much more. We appreciate Pete taking the time to complete this profile, and hope you enjoy it.

PLUS: How did you get started in the professional liability insurance industry, and which coverage lines do you presently work in?

Pete: I started in upstate NY with a predecessor of Travelers Insurance right out of college. It was a field underwriting and sales position for both surety as well as professional liability business. It led to a move to the Home Office in Hartford and many different positions over the years, all involved with professional liability. I presently run the Management Liability Group for Travelers for Private and Non-Profit customers.

PLUS: What do you like about working in professional liability?

Pete: While I have built up a knowledge base in regards professional liability over almost three decades, every day something is new and challenging. I’m not sure you can find that in most other industries/positions. As the cliché goes (but is very true), I truly enjoy working with the team at Travelers as well as many others in the industry. There are some very talented and charitable people in the industry.

PLUS: How do you see the industry evolving in the coming decade?

Pete: Analytics and technology will continue to change the industry. They are presently and will continue to have a profound effect on how we manage this business, particularly the type of business I manage; Private and Non-Profit companies.

PLUS: How did you become involved with PLUS?

Pete: Jeff Klenk got me involved. He truly believes in the value of the organization and has been very active with PLUS. He encouraged me to get involved, as well.

PLUS: In what ways has your involvement with PLUS positively influenced your career?

Pete: It has given me perspective on how other professional liability leaders think and manage their business. I have more of an appreciation for how those leaders manage their teams, business, and relationships with others. This unique insight has broadened my viewpoint, which helps me run my business better. Also, the relationships that I have developed are invaluable.

PLUS: Do you have a favorite PLUS memory or story?

Pete: I was going to say not one in particular but many altogether, however, there is one that stands out for me and it is on a more personal note. In Orlando in 2013, the Conference Cause Charity was “Give Kids the World”, a tremendous charitable organization that provide week long “care free”, forget your illness, all expenses paid vacations for children and their families that are chronically ill or have potentially life threatening ailments. As I often do, I volunteered to help along with dozens of others without really knowing what I was signing up for. Upon arriving, I was asked to help families navigate and participate in a life size “Game of Life” game. My role was to pretend and act out being an animal of the children’s choice to go from one position on the “game board” to the next. So there I was; way out of my comfort zone, acting like a lion, like a rabbit, like an elephant, or frankly anything else the child wanted me to do in front of complete strangers. My sense of foolishness and embarrassment quickly faded as I saw the face of these children light up if for only a few minutes and they completely forgot about their illness. Probably one of the most powerful and life impacting moment of my professional career and it had nothing to do with insurance. I strongly encourage everyone to get involved with Conference Causes!

PLUS: What advice would you give to new entrants to the professional liability industry?

Pete: Get involved. Participate at a local level on a chapter event or networking function. Who knows where that can lead?

PLUS: What do you do for fun or when you aren’t working?

Pete: Travel with my family and kids, golf, skiing.

Thanks to Pete Herron for sharing his story with PLUS Journal readers.
The Importance of Full Disclosure for Alternative Asset Advisers: Lessons Learned from the SEC’s Recent Cautionary Advice

By Elan Kandel & Dennis T. Krause

On May 6, 2014, Andrew J. Bowden, the former director of the United States Securities and Exchange Commission’s (“SEC”) Office of Compliance Inspections and Examinations (“OCIE”) provided an overview of OCIE’s initiatives focused on private equity fund advisers in his speech “Spreading Sunshine in Private Equity.” In the speech, Bowden warned traditional private equity fund advisers that his office was closely scrutinizing certain perceived industry-wide deficiencies when conducting presence exams of registered advisers. Bowden noted that the most widespread deficiency—occurring over 50% of the time in the advisers examined—involved violations of law or material weaknesses in controls relating to treatment of fees and expenses. Bowden’s speech and the over 50% deficiency rate alarmed the private equity industry.

One year later, Bowden is no longer OCIE director. Marc Wyatt is now OCIE’s acting director and many in the alternative asset adviser space anxiously awaited his May 13th speech in New York City at the same conference at which Bowden spoke last year. Although Wyatt reiterated the SEC’s treatment of fees and expenses, violations of law or material weaknesses in controls relating to treatment of fees and expenses) identified by Bowden, Wyatt also identified new areas of SEC scrutiny. Specifically, Wyatt highlighted two additional areas of OCIE scrutiny: (1) the shifting of expenses away from parallel funds created for insiders, friends, family, and preferred investors to the main co-mingled, flagship vehicles; and (2) the extent of co-investment allocation disclosure to investors. According to Wyatt, disclosure of co-investment allocation to all investors is important because, in addition to their economic value, co-investment opportunities can be a source of various conflicts of interest.

In addition to highlighting deficiencies in the traditional private equity buyout space, Wyatt also stressed the deficiencies unique to private equity real estate advisers. Specifically, Wyatt noted OCIE’s concern that some real estate advisers and their affiliates claim they provide property management, construction management, and leasing services for additional fees that are “at market or lower,” without substantiating their claims.

Wyatt was not the only high-ranking SEC official to address a conference of alternative asset advisers on May 13, 2015. Igor Rozenblit, co-chairman of the private fund unit within the OCIE, addressed a private equity conference in Washington, D.C. In his remarks, Rozenblit disclosed that his unit is focused on stapled secondary transactions and the lack of disclosure provided by some private equity advisers to investors involved in such transactions. Rozenblit stated that the unit is now “thinking about” scrutinizing how much information is provided to investors in secondary transactions, “particularly if there is a decline in the economy.” In secondary stapled transactions, a fund’s investors are provided with an option to sell their interests in the fund, at a discount, to a third party or roll their interest into a new fund. In addition to purchasing the old investors’ interests, the third party also agrees to provide capital for the new fund. Rozenblit stated that “[y]ou have to wonder if the manager is fulfilling its fiduciary duty when the options offered to investors are often two bad options” because old investors are offered to sell at a price they may not be happy with or roll into the new deal and extend their investment life (often begrudgingly) with the firm for another ten years.

There are several important takeaways from the SEC’s May 13th cautionary advice as conveyed by Wyatt and Rozenblit, the most significant of which being the importance of robust and detailed disclosures to all investors. Alternative asset advisers are therefore strongly advised to review their existing disclosure policies relating to co-investment allocation, fees and expenses, and all aspects of stapled transactions, to ensure that their disclosure is sufficiently robust (including their response to Part 2A of Form ADV) and is consistent with their fiduciary obligations to their investors.

Lastly, alternative asset advisers and their insurers should also not lose sight of the fact that as Wyatt noted, there “is a natural lag between examination and enforcement activity.” According to Wyatt, there is a lag of “two years or longer between the time an examination uncovers problematic conduct and the public announcement of an enforcement action or settlement.” The lag time between examination and enforcement (or settlement) can be problematic for alternative asset advisers and their sponsored funds for myriad reasons. In an effort to minimize at least some of the attendant risks associated with this lengthy lag time, alternative asset advisers and their insurers are strongly advised to review their management liability and professional liability insurance policies to determine the scope of coverage provided under such policies for SEC inquiries or investigations.

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Who’s in Charge Around Here: The Changing Nature of Joint Employer Relationships

By Richard M. Mitchell, Esq., CPCU

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In December 2014, the National Labor Relations Board (“NLRB”) rocked the employment world when it charged McDonald’s USA, LLC, as a joint employer along with its franchisees in allegations of unfair labor practices. The relationship between franchisors and franchisees had been on the NLRB’s radar for some time when it came to organizing activities. Other employment relationships have joined it there, particularly that of professional staffing agencies and their clients.

While the NLRB focus is on union and related activities, the evolving status of joint employers has significant potential impact on other types of litigation. The U.S. Equal Employment Opportunity Commission (“EEOC”) has long had its own standard for considering joint employer status. Employers, insurers and their counsel should note the evolution of the NLRB’s view and consider how it may affect other federal agencies and laws as the employment landscape continues to change.

Traditional Joint Employer Status

The current National Labor Relations Act (“NLRA”) standard has existed since the early 1980’s. Prior to 1984, joint employer status existed where both employees had indirect control over matters relating to individual employment. In 1984, however, the NLRB adopted a test that examined whether two separate business entities share an ability to “meaningfully affect” the employment relationship “such as hiring, firing, discipline, supervision and direction.”

In CNN America, Inc.; the NLRB determined that CNN violated certain provisions of the NLRA when it replaced a subcontractor whose employees were unionized with its own non-union workers. It was alleged that CNN committed these violations by refusing to bargain with the union representing the subcontractor and terminating the subcontracts. The NLRB noted the contractual nature of the relationship between the two entities. That relationship included the ability of CNN to hire, terminate and supervise the employees, three critical factors in determining CNN’s status with respect to the subcontractor’s employees. The NLRB also noted that other factors have typically been considered in making this determination. These factors include wages and compensation, the number of job vacancies to be filled, and work hours.

It should be noted that the EEOC, generally, takes a more expansive approach to determining joint employer status in claims brought pursuant to Title VII and other federal statutes. It considers a number of factors, including hiring and firing, assignment of work, control of daily activities, furnishing of equipment to perform job duties, where

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PLUS Welcomes Robbie Thompson as New Executive Director

By PLUS Team

On June 26, 2015 the PLUS Board of Trustees announced Robbie Thompson as the new executive director of PLUS. Thompson brings eighteen years of management experience to PLUS, most recently as president & CEO of the Credit Union Association of the Dakotas in Bismarck, North Dakota. Under his leadership the association saw significant membership growth, very high membership satisfaction levels, increased revenue, and improved organizational efficiency. Additionally, the organization was recognized for its creativity and innovation, and its effectiveness as an industry advocate. Prior to his involvement with CUAD, Thompson served as vice president & general counsel for the Members Cooperative Credit Union and senior vice president & general counsel for the New Jersey Credit Union League.

“I am incredibly excited to be joining PLUS as executive director,” said Robbie Thompson. “PLUS is a strong and unique organization with an impressive history of leading with education and putting on world-class events, a committed and growing member base, and exceptional support from the industry it serves. It is a perfect fit for me professionally, and I look forward to working with PLUS’ experienced staff, hundreds of volunteer leaders and myriad of corporate and industry partners to bring innovation and continued growth and success to the organization.”

“Robbie Thompson is a committed and innovative association leader, and will be a tremendous asset to PLUS,” said Jim Skarzynski, 2015 PLUS President. “As our Society enters its third decade we need someone with vision, experience, and a passion for member engagement to guide us. Robbie Thompson is that leader.”

Thompson holds a Juris Doctor from William Mitchell College of Law in St. Paul, Minnesota and Bachelor of Arts degrees in business and economics from the University of Minnesota Morris. He sits on the Board of Directors for the Midwest Society of Association Executives and is presently working toward his Certified Association Executive (CAE) designation.
The 2010 Dodd-Frank Act brought about huge changes to the American financial regulatory environment, particularly through expansion of the breadth of the SEC's authority over financial institutions such as private equity (“PE”) and hedge funds. Under Dodd-Frank, PE advisors and PE firms with over $150 million assets under management are now required to register with the SEC as investment advisors and fully comply with the Investment Advisers Act (“IA Act”).

With so many new entities from the PE industry now subject to SEC regulation, the SEC in October 2012 launched an initiative to examine and assess the issues and risks presented in the PE industry, and in January 2013 announced that it expected to bring more enforcement actions involving PE. In May 2014 the SEC announced that its initiative was "nearly complete" and that it had determined that private equity funds and hedge funds present “unique risks” to investors that are not present in the public investment sphere as PE advisers typically use clients’ funds to obtain controlling interests in non-public companies not subject to rigorous disclosure requirements, and are therefore faced with “temptations and conflicts with which most other advisers do not contend.”

Given the SEC’s recent remarks in other contexts that it expects to bring more administrative proceedings (“APs”) due to Dodd-Frank, private fund managers should expect the SEC to bring more enforcement actions through APs before administrative law judges (“ALJs”) than in federal court before Article III judges. In fact, the number of APs initiated by the SEC in the 12 months prior to March 31, 2015 is nearly 50% higher than the number of administrative proceedings initiated in the 12 months prior to March 31, 2010. A number of these high-profile proceedings involve PE and hedge funds.

The increase in APs has raised a lot of concerns. APs differ from civil actions in that (1) there is no right to a jury, even when significant financial penalties and forfeitures are demanded, (2) even the most complex cases must be decided within 300 days of filing, which arguably only limits a respondent’s ability to defend itself given that the SEC may spend years investigating a case before initiating proceedings, (3) there is no meaningful pre-trial discovery because SEC rules do not allow for interrogatories, requests for admission, or depositions, and (4) the evidence rules are more lenient. For example ALJs are allowed to consider any “relevant” evidence they deem appropriate, even evidence that would be considered inadmissible "hearsay" in an Article III court. In addition, an appeal of an ALJ's decision is heard by the SEC itself—the very body which, prior to the AP, determined that an enforcement action was warranted.

Perhaps most concerning is that an AP initiated and prosecuted by the SEC is decided by an ALJ that is hired and paid by the SEC. Indeed, one former SEC ALJ has publicly stated that during her tenure at the SEC, she came “under fire” for finding too often in favor of defendants.

The SEC’s use of APs has been highly criticized as the empirical evidence suggests that the SEC has an unfair advantage over respondents in APs that it does not have when bringing enforcement actions in federal court. According to an analysis conducted by the Wall Street Journal, the SEC won against 90% of defendants before ALJs in contested cases from October 2010 through March of 2015, compared to a 69% success rate in federal court during the same time period. The Journal analysis also found that the SEC has a 95% success rate in appeals of ALJ rulings—the appeals its own commissioners hear. Judge Jed Rakoff of the United States District Court for the Southern District of New York, has described the impressive success rate of the SEC in APs as “hardly surprising” given the “informality and arguably unfairness” of these proceedings.

A number of AP respondents have brought constitutional challenges to the SEC’s use of administrative proceedings and, until very recently, these challenges have been largely unsuccessful. Federal courts have rejected arguments that AP procedural rules violate due process and equal protection, that the SEC’s unfettered discretion to choose between APs and federal court violates due process and equal protection, and that the dual layer of tenure protection provided to ALJs violates the separation of powers doctrine, holding that they lack subject matter jurisdiction to hear such complaints given that the appeal process provided for by Dodd-Frank (whereby the ALJ's decision is reviewed by the SEC) is “entirely adequate.” ALJs on the other hand have (of course) found that the statutory scheme governing the ALJ removal structure is constitutionally sound and that they do not have the authority to decide whether the SEC's use of APs is unconstitutional.

A recent decision issued, however, may finally provide AP respondents some avenue to challenge the use of APs in the Appointments Clause of Article II. In Hill v. SEC, Case No. 15-01801, a federal judge in the Northern District of Georgia granted a preliminary injunction enjoining an AP, holding that the hiring process for ALJs violates the Appointments Clause, which requires that “inferior officers” of the executive branch be appointed by the President, Article III courts, or Department Heads. Because the ALJ in Hill was found to be an “inferior officer” and, like all SEC ALJs, was hired by the SEC’s Office of Administrative Law Judges through a bureaucratic hiring process (and not “appointed” by the President, an Article III court, or a Department Head), the AP was found unconstitutional.
Several complaints making the same challenges remain pending around the country, including one by private equity queen Lynn Tilton and her firm Patriarch Partners, who is the subject of an AP alleging violations of the IA Act (Case No. 15-02472, S.D.N.Y.). However, whether they succeed will depend on whether the respective courts find that (1) there is subject matter jurisdiction to hear the constitutional challenges and (2) SEC ALJs are “inferior officers.” Court decisions on whether there is subject matter jurisdiction to hear constitutional challenges to APs have varied. In Bebo v. SEC, Case No. 15-0003 (Mar. 3, 2015) for example, a federal court in Wisconsin dismissed the plaintiff’s claims that Dodd-Frank’s grant upon the SEC of unfettered discretion to forum select violates equal protection and due process rights, holding that such claims were “subject to the exclusive remedial scheme set forth in the Securities Exchange Act.” However in Duka v. SEC, Case No. 15-00357 (Apr. 15, 2015) a federal court in New York held that there was subject matter jurisdiction to hear the plaintiff’s claims that the dual for-cause protections afforded to ALJs violates the separation of powers doctrine (and instead denied the plaintiff’s motion for an injunction on its merits). Notwithstanding the Duka decision, the SEC in Tilton continues to argue that the court does not have jurisdiction to hear Tilton’s constitutional claims.

Recent cases out of New York suggest that the main obstacle faced by plaintiffs will be whether SEC ALJs are considered “inferior officers” as the Hill court in Georgia held. In both Duka and Tilton the SEC has filed a statement challenging the Hill decision that SEC ALJs are inferior officers, arguing that an ALJ is a “mere employee.” Notably, the SEC in Duka has also stated, in response to the court’s questions concerning whether the appointments clause violation could “easily be cured,” has stated that it has no intention of changing the ALJ hiring process.

The criticisms, however, may not have fallen on deaf ears. On June 4, 2015, ALJ James Grimes found that investment advisor The Robare Group and two of its principals did not violate the IA Act by failing to disclose a compensation arrangement tied to investments in certain mutual funds, holding that the SEC’s disclosure requirements were difficult to interpret and that the respondents’ good faith reliance on their compliance experts relieved them of liability.16 That same day, the SEC, in response to complaints made in a separate proceeding involving a private equity firm Timbervest, LLC, that the ALJ was unfairly biased towards the SEC, invited the ALJ to submit an affidavit addressing whether he has experienced any pressure to rule in the commission’s favor. Timbervest is currently appealing the ALJ’s $1.9 million judgment against it and, in addition to challenging the ALJ’s impartiality, has argued that the AP against it is unconstitutional.

Perhaps in response to complaints that the SEC has unfettered discretion to choose between an AP and federal court, the SEC in May 2015 issued its first formal guidance on the factors determining whether contested actions will be brought before administrative law judges or in federal district court. This guidance acknowledges the differences between the procedural and evidence rules applicable to APs and those applicable in the federal courts, and arguably encourages the Enforcement Division to consider whether the facts and circumstances of the particular case suggest that fair resolution of the case requires the use of one set of rules over the other—e.g., whether witness testimony that is critical to fair resolution of the matter may be compelled in one forum but not another.17 As recently as May 2015 the SEC issued warnings to the private equity industry to expect more fines and enforcement actions coming from the SEC in the next year, particularly involving undisclosed and misallocated fees and expenses as well as conflicts of interest.18 The past year has seen a number of these types of enforcement actions via APs, with varying results.

For example, in early 2014 the SEC commenced an AP involving Clean Energy Capital, LLC for, among other things, allocating certain expenses to the PE funds it sold and managed without adequate disclosure to investors, issuing loans to those funds on terms beneficial to itself without notice to investors, and changing distribution calculations without notice to investors. The respondents ultimately paid $2.1 million in disgorgement and civil penalties to conclude the proceedings. In a separate matter, PE fund adviser Lincolnshire Management, Inc. agreed to pay $2 million in disgorgement and penalties to avoid an AP arising from its alleged misallocation of expenses between two portfolio companies owned by separate funds. And, investment advisory firm WestEnd Capital Management, LLC paid $150,000 to prevent the SEC from bringing an AP involving its collection of excessive fees from a hedge fund it managed.

Investment advisor Paradigm Capital Management, Inc., paid $2 million in

continued on page 11
financing, resulting in the misleading sales pitch of "free insurance."

In reality, there is no guarantee that the accounts in the policy will perform optimally and when they do not, the above will fail to happen, leading to the borrower having to make up the difference or lose the policy. In the current environment, where premium financing rates are relatively low, we do not see this type of claim very often. However, if and when interest rates increase, we believe many new premium finance cases will emerge as the generally variable rates on the financing increases, making it more of a challenge for the sub-accounts to keep pace.

Also, there is a strong incentive for agents or brokers to sell premium-financed life insurance. Higher-limit life insurance policies carry large commissions and premium financing makes the purchase of those life insurance policies possible for many more people or, in the alternative, it facilitates the purchase of insurance that the buyer may not have pursued absent the availability of premium financing. It should be noted that in certain places where rebating is legal, like California, future claimants are induced into a premium financed arrangement by receiving a small rebate on the commission the agent or broker received for the sale of the policy.

Claims trends

One of the most common claims is for the agent (or broker) to be accused of misleading the claimant into financed insurance by promising that after two years (the contestability period of life insurance) the policy can be easily sold in the secondary market for profit.

Insurance companies are not particularly fond of what is referred to as Strange-Owned Life Insurance ("STOLI") because, in concept, a certain proportion of life insurance policies will naturally lapse for the failure to pay premiums and this is factored into the overall business model.

When outside investors purchase a life insurance policy, however, they tend to pay the premiums and keep policies in-force, including those that would have otherwise lapsed, as they have invested in the future but not immediate death of the insured individual. In other words, they are betting on the life of the insured, but expect to make it past the contestability period in order to then alienate themselves from the policy. Nonetheless, the secondary insurance market is extremely volatile and the value of the policy will vary based on the health of the borrower at the time of sale.

This is a guarantee that no agent (or broker) should ever make and financed insurance should never be sold on the speculation that the opportunity will exist for a secondary market sale in the future. Further, such arrangements, whether or not known by the agent (or broker), may be called into question for various reasons, as illustrated in the following cases.

Case studies

STOLI Premium financing fits very neatly with the concept of STOLI and this has not gone unnoticed by insurance companies who have initiated litigation alleging the lack of insurable interest. In many states, such as New Jersey, the timing of the idea of STOLI is critical. If the policy was sold originally with the goal of immediately selling it, the insurance carrier will be allowed to maintain an action based on lack of insurable interest.

In Lincoln Nat. Life Ins. Co. v. Calbourn, a New Jersey federal district court denied defendant’s motion to dismiss where it was apparent to the court that defendants only procured the policy to sell it to a stranger in the future. In Sun Life Assur. Co. v. Berck, a Delaware federal district court, interpreting Delaware law on an issue of first impression, allowed plaintiffs to survive a motion to dismiss even though the two year contestability period had expired.

Of interest in the Lincoln Nat. Life Ins. Co. case is the fact that the plaintiff did not even know the source of the financing for the initial premium or the intended buyer, but the court felt confident it would find this in discovery. In Sun Life Assurance Co. of Canada v. Paulson, a Minnesota federal district court held that the defendant’s intent to transfer the policy at purchase time was “irrelevant” without identifying the third party buyer who lacked insurable interest.

Fiduciary and “Special Relationship” Considerations

In many jurisdictions an insurance agent or broker is not considered a fiduciary. In New Jersey, an insurance professional is said to owe a fiduciary duty. This is a significant distinction to isolate for the defense of insurance agents or brokers when they are sued in connection with the sale of policies.

However, even the non-fiduciary distinction can be overcome by a showing that the agent or broker “assumed” a special duty by his actions. In a case not involving a breach of fiduciary duty, the concept of special relationship may haunt the agent or broker. For example, in Triarsi v. BSC Grp. Ser., LLC, the New Jersey Appellate Division recognized that a special relationship may arise between an insurer and an insurance agent (or broker) which imposes greater duties upon the agent or broker. The Court in Triarsi recognized that the alleged breach of fiduciary duty claim was actually one asserting a claim for professional negligence. Nevertheless, it recognized the existence of a “special relationship” on the part of the agent due to the alleged course of conduct. When insurance agents or brokers promote premium financing and hold themselves out as “experts” in premium financing, they open the door to assuming a special relationship and duties beyond that of a mere insurance policy salesperson.

In Helton v. American General Life Ins. Co., for example, the court found that an agent or broker who had arranged for the purchase of premium-financed insurance by a group of plaintiffs had assumed a “duty to advise” plaintiffs and was, therefore, held to a higher, more difficult to defend, standard of care. As the court characterized the facts in Helton, “this was more than a simple purchase of life insurance….”
What to avoid

Premium financing insurance claims tend to be large because the policies typically have high limits, the premiums are large and often collateral is lost or is being pursued with vigor by the premium financing company.

Often, claimants are unsophisticated, presenting as land rich and cash poor. Because of the potential exposure of a high-limit policy, one claim can have a very detrimental effect on an insurance company's agent or broker's errors and omissions program, especially if the program is small.

We advise caution when dealing with premium financed insurance. It is imperative that the borrower use an attorney experienced in premium financed transactions. The attorney will assist the borrower and an attorney's mere involvement in the transaction presents a future defense for the insurance agent or broker. Agents or brokers also need to acquaint themselves with the borrower's investment profile.

Defenses based on the notion that the agent or broker was merely a conduit for the policy and nothing more have proven unconvincing where the agent or broker had even the slightest notion that the borrower could not afford the policy without financing or that the borrower was seeking financing.

It appears that once an agent or broker promotes the idea of premium financing, he or she may propel him or herself into a fiduciary standard or special relationship. Therefore, it is imperative that the agent or broker is cognizant of the implications.

Conclusion

As interest rates rise in conjunction with the use of premium financing, we are poised for a concomitant increase in these types of claims.

If companies are going to allow their agents to deal in premium financed insurance sales, then they will likely have to enhance their risk management program. In addition, we suggest certain smaller sub-limits connected to premium financing claims in the companies' errors and omissions policies.

In sum, the use of premium financing should raise a red flag.

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Endnotes

7 ld. 8 ld.
16 In re Timbervest, LLC, Admin. Proc. No. 3-15519 (June 4, 2015).
Expansion Urged

The consolidated complaints issued against McDonald’s USA, LLC, as well as several of its franchisees have raised concern in a number of corners. Specifically, the complaints charge that McDonald’s retaliated against employees of multiple franchisees who participated in demonstrations protesting working conditions and demanding a higher minimum wage. McDonald’s opposed the position that it was a joint employer along with its franchisees. It argued that the franchisees, not the franchisor, controlled the essential elements of the working relationship. McDonald’s, however, retained certain elements of control over its franchisees. Of particular note, it provided software to its franchisees to be used in daily operations, such as scheduling and staffing levels. The extent to which the use of this technology contributed to the issuance of the complaints is unclear. As technology advances, however, its mandatory use will likely become a more significant factor in considering the nature of the relationship between two otherwise distinct business entities.

The NLRB recently signaled that not all franchisor or franchisee relationships will be treated as co-employment situations. An advice memorandum dated April 28, 2015 examined the relationship between Freshii Development, LLC, and Nutritionality, Inc., which operated a single Freshii store in Chicago. That relationship demonstrates some significant differences from the McDonald’s claims. In 2014, Nutritionality, Inc., terminated two employees for attempting to unionize. The Freshii franchisee agreement granted the franchisee the right to use Freshii’s business system, formats, methods, procedures, trade dress and standards. Freshii also provided an operations manual that contained mandatory specifications over certain aspects of the employment relationship. The manual also contained guidance on human resources matters, including hiring and firing, scheduling, and interview questions. Freshii did not, however, require its franchisees to comply with these latter standards. Freshii also provided a sample employee handbook, but again did not require the franchisee to utilize that particular handbook. The memorandum noted that individual franchisees were exclusively responsible for hiring their staffs, although individuals could apply on the Freshii web site. Franchisees also had discretion for setting wages and benefits without requiring the consent of Freshii. It was also noted that no evidence existed that Freshii or its development agents were involved in Nutritionality’s labor relations or provided guidance on how to deal with a possible union organizing campaign.

The franchisor/franchisee relationship is not the only one that has been in the spotlight. Since the infancy of economic recovery in late 2009, the temporary staffing industry has grown by approximately 45%. Generally, these relationships are governed by a contract between the agency and its client. The staffing agency will often retain control over payroll processing, benefits, and related administrative functions. The client may choose to directly hire the employee after a specified period of time. Until then, however, the staffing agency remains the actual employer.

Often, the staffing agency does not receive notice of employee complaints of harassment or discrimination. A primary defense to employment discrimination claims is that the employee never complained or provided notice, thus depriving the employer of the opportunity to take remedial action and resolve the problem. Furthermore, even if the client wishes to end the assignment and no longer have the employee work at the facility, employment with the staffing agency is not necessarily terminated. The staffing agency will attempt to find alternative employment with a new client, meaning the employee has not been fired. Plaintiff attorneys have attacked these lines of distinction in an effort to impose liability on both the staffing agency. Given the changing nature of joint employer status, employers must exercise caution to ensure they are not unwittingly putting themselves in compromising positions.

In Browning-Ferris Industries of CA., Inc., NLRB Case. 32-RC-109684, the NLRB considered whether employees of a staffing agency, Leadpoint, Inc., were jointly employed by BFI. In doing so, the NLRB issued an invitation to file briefs in consideration of whether it should adopt a new standard of what constitutes a joint employer. Interestingly, the EEOC filed an amicus brief in the case.

In October 2009, BFI and Leadpoint entered a contract pursuant to which Leadpoint would provide approximately 240 full and part time employees at BFI’s recycling facility in California. Sanitary Truck Drivers & Helpers, Teamsters Local 350, attempted to organize the facility. In doing so, it sought a determination that BFI and Leadpoint were joint employers. The contract between the parties specified that Leadpoint was the “sole employer.” The agreement also explicitly stated that it should not be construed as creating an “employment relationship” between BFI and Leadpoint’s employees. Leadpoint maintained supervisory staff on BFI’s grounds, but they were located in a building separate from the client’s operations. Leadpoint also established wages and provided insurance.

BFI was not regularly involved in hiring or training Leadpoint employees. It did, however, control the number of employees working at any given time. It also reserved the right to establish employee qualifications, including application of drug testing. Furthermore, BFI had the right to reject or discontinue the use of any personnel at its discretion. It also controlled the hours worked, and maintained certain supervisory control.

The general counsel has urged the NLRB to establish a new joint employer standard that considers “the totality of the circumstances,” including the manner in which the parties have structured their commercial relationship and the ability one entity has to affect the conditions of employment for the other entities workers. Thus, a joint employer relationship may exist where the focus is on the “industrial realities” of the business relationship.

The EEOC has urged the NLRB to broaden its standard to more closely match the test used in cases brought under Title VII, which standard it has called “intentionally flexible.” That standard was recently applied in determining whether two entities are joint employers when “they share or co-determine those matters governing the essential terms and conditions of employment.” Both entities may be employers if they each exercise significant control over the same employees.

The most important factors include the ability to terminate employment or end an assignment. Other factors include the ability to assign work, set conditions of employment, and maintain supervision of employees, including employee discipline.

Similar factors are relevant with respect to enforcement of other laws. Examination of joint employer status in Fair Labor Standard Act claims (“FLSA”) include the same direct control applicable under the NLRA analysis. They also, however, include additional factors.
New Financial Aid College Scholarships Awarded for 2015

Consistent with our mission of philanthropy and the advancement of education, the PLUS Foundation aims to assist families and students in affording higher education. This step expands on our record of service to and on behalf of the professional liability community.

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• Constantine “Dinos” Iordanou Scholarship
• Christopher & Mildred Livaccari Scholarship
• H. Seymour Weinstein Scholarship

Four Financial Aid Scholarships have been awarded for 2015:

Emma Goetcheous: Constantine “Dinos” Iordanou Scholarship

From Grand Rapids, MI, Ms. Goetcheous was a member of the National Honor Society. She volunteered as a youth track coach, at the local Humane Society and as a leader in Students Against Destructive Decisions. She was also a versatile athlete, earning varsity letters in swimming, diving, track and skiing. Emma will be studying medicine at Michigan State University.

Brett Levine: Christopher & Mildred Livaccari Scholarship

From Teaneck, NJ, Mr. Levine was a member of the National Honor Society and National Forensics League Honor Society. He also served as Captain of the Debate Team and earned a varsity letter in baseball. His volunteer work took him to Costa Rica to help rebuild parks and to absorption centers in Israel. Bret will study the hospitality industry at Cornell University.

Katherine Stoll: H. Seymour Weinstein Scholarship

From Avon, CT, Ms. Stoll was Treasurer of the National Honor Society and an AP Scholar with distinction. She was captain of the field hockey team and was awarded the state Scholar Athlete Award. Her volunteer work focused on helping younger students, serving as a tutor in science, robotics, math and writing. Katherine will be studying chemical engineering at Massachusetts Institute of Technology.

Matthew Wade: PLUS Foundation Financial Aid Scholarship

From Cary, IL, Mr. Wade will be studying wildlife and fish management at Northern Michigan University.

Each of these students represents the strong level of academic and community achievement that the Foundation looks for when awarding scholarships. We wish them the best in their future endeavors. ✨
Joint Employer Relationships continued from page 12

that take into account the “economic reality” of the business relationship between the two potential co-employers.8

**Implications For Future Claims And Protective Measures**

As the landscape of the American economy continues to shift, claims against multiple employers will likely increase. The NLRB interpretation of joint employer status will likely impact how other federal agencies and courts treat the relationship. Litigants will claim the term should be read broadly in claims of discrimination arising under Title VII and other federal statutes.

Perhaps the most important tool the parties have at their disposal is the ability to negotiate the terms of their relationship and incorporate them into a contract. That contract should be specific as to the rights and duties of either party. It should also be clear and unambiguous.

It is critical to keep in mind that the words in the contract have meaning. Simply writing them down will not be adequate protection for either party. The “economic realities” of the relationship will always be relevant. Courts will examine the conduct of the parties to determine whether they are implementing the contract as written, or have abandoned its intent through their actions.

The parties must make a careful, objective analysis of their own risks throughout the business relationship. They must ensure that they have realistically evaluated the risks and marshalled the resources to address them. Careful attention to these details is the best sword—and shield—a necessity to all prudent employers. ☞

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**Endnotes**

3. See, e.g., *Berger v. Mead*, 127 Mich. App. 209; 338 N.W.2d 919 (1983), which the court considered whether employers were engaged in a “joint enterprise” relative to which they shared a “community of interest” for purposes of applying the State’s Workers’ Disability Compensation Act.
4. Advice Memorandum No. 177-1650-0100, April 28, 2015
6. Id.; see, also, Advice Memorandum No. 177-1650-0100, April 28, 2015, p. 9.

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**George W. Bush** served as the 43rd President of the United States from 2001 to 2009. After the Presidency, George and Laura Bush founded the George W. Bush Presidential Center in Dallas, Texas. President Bush is also the author of a bestselling memoir, *Decision Points*, and recently authored a book about his father, President George H.W. Bush, titled *41: A Portrait of My Father*.

**Daymond John** is the CEO and Founder of FUBU, a much-celebrated global lifestyle brand. In 2009 he joined the cast of ABC’s entrepreneurial business show, *Shark Tank*, by acclaimed producer Mark Burnett.

**Diana Nyad** is a world-record-holding long-distance swimmer, author, and public speaker. At the age of 64, Diana successfully fulfilled her lifelong dream of completing the 110-mile swim from Cuba to Florida.

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preclude (in a contributory negligence state, such as North Carolina) recovery unless the client’s negligence interfered with the auditor’s ability to conduct the audit. The North Carolina Supreme Court may weigh in on this important issue, as well.

Conclusion

The North Carolina Supreme Court’s decision in this case could set an important precedent for accountants who perform independent audits, and therefore bears watching. Briefing is expected to be completed by the end of June 2015, with argument likely in the Fall of 2015 and a decision at some point thereafter.

Endnotes

2 The following organizations filed amicus briefs in the North Carolina Supreme Court: (1) the Chamber of Commerce of the United States; (2) the North Carolina Chamber; (3) the National Association of State Boards of Accountancy; (4) the North Carolina Association of Certified Public Accountants, American Institute of Certified Public Accountants, and Center for Audit Quality; and (5) Cherry Bekaert, LLP, CliftonLarsonAllen, LLP and Dixon Hughes Goodman, LLP.
3 CommScope, 764 S.E.2d at 647-52.
4 CommScope Credit Union v. Butler & Burke, LLP, 768 S.E.2d 560 (N.C. 2015).
5 See, e.g., Stewart v. Wilmington Trust SP Servs., Inc., No. CV 9306-VC, --- A.3d ---, 2015 WL 1396382, at *16 (Del. Ch. Mar. 26, 2015) (“[I]n order properly to discharge its ‘watchdog’ function, the auditor must maintain total independence from the client at all times,” such that “[t]he mere provision of audit services does not of itself convert an auditor into a fiduciary of the corporation.” (internal quotation marks omitted)); Wright v. Sutton, No. 1:08-cv-1431, 2011 WL 1232607, at *5 (S.D.W.Va. Mar. 29, 2011) (“In general, ‘an accountant hired to audit the financial statements of a client is not a fiduciary of the client, but rather is required to be independent of the client’” (quoting Strategic Capital Res., Inc. v. Citin Cooperman & Co., LLP, 213 F.App’x 842, 2007 WL 30836, at *1 (11th Cir. 2007))); Resolution Trust Corp. v. KPMG Peat Marwick, 844 F. Supp. 431, 436 (N.D. Ill. 1994) (in general, “the nature of the independent auditor precludes a finding of fiduciary duty”); FDIC v. Schoenberger, 781 F. Supp. 1155, 1157-58 (E.D. La. 1992) (“[A]ccountants do not owe a fiduciary duty to their clients when providing services as auditor; rather the nature of an independent auditor is that it will perform the services objectively and impartially.”).
6 The amicus brief of Cherry Bekaert, LLP, CliftonLarsonAllen, LLP and Dixon Hughes Goodman, LLP addressed both the fiduciary duty issue and the contributory negligence/issue and the contributory negligence/...
Calendar of Events

Chapter Events*

Canada Chapter
- September 16, 2015 • Networking Reception • Montreal, QC
- November 19, 2015 • Networking Reception • Toronto, ON

Eastern Chapter
- September 21, 2015 • Educational Seminar • New York, NY
- December 2015 • Winter Social • New York, NY

Hartford Chapter
- September 8, 2015 • PLUS Foundation Golf Outing • Hartford, CT

Mid-Atlantic Chapter
- September 2015 • Networking Reception • Wayne, PA
- September 24, 2015 • 3-on-3 Basketball & Networking Reception • Philadelphia, PA
- December 2015 • Educational Seminar and Holiday Party • Philadelphia, PA

Midwest Chapter
- September 29, 2015 • Educational Seminar • Chicago, IL
- December 8, 2015 • Holiday Party • Chicago, IL

New England Chapter
- September 17, 2015 • Educational Seminar • Boston, MA
- December 2015 • Holiday Party • Boston, MA

North Central Chapter
- Summer 2015 • Educational Seminar • Minneapolis, MN
- Summer 2015 • Future PLUS • Minneapolis, MN
- November 2015 • Holiday Party • Minneapolis, MN

Northern California Chapter
- September 24, 2015 • Educational Seminar • San Francisco, CA
- October 15, 2015 • PLUS Foundation Golf Outing • San Francisco, CA
- December 2015 • Holiday Party • San Francisco, CA

Northwest Chapter
- December 2, 2015 • Educational Seminar w/ IIABKC • Seattle, WA

Southeast Chapter
- September 10, 2015 • Educational Seminar • Richmond, VA
- October 8, 2015 • Networking Reception • Nashville, TN
- October 19, 2015 • PLUS Foundation Golf Outing • Milton, GA
- November 2015 • Sponsor Appreciation and Networking Reception • Atlanta, GA
- December 2015 • Sponsor Appreciation and Networking Reception • Birmingham, AL

Southwestern Chapter
- Fall 2015 • Educational Seminar • Las Vegas, NV
- October 1, 2015 • Educational Seminar • Scottsdale, AZ
- November 2015 • Networking Reception • Scottsdale, AZ
- December 2015 • Networking Reception • Denver, CO

Texas Chapter
- September 24, 2015 • Educational Seminar • Los Angeles, CA
- December 10, 2015 • Educational Seminar • Los Angeles, CA

International Events

2015 Singapore Symposium
- September 3, 2015 • Maxwell Chambers • Singapore

2015 Hong Kong Symposium
- September 8, 2015 • Hong Kong Football Club • Hong Kong, China

2015 Cyber Liability Symposium
- September 17, 2015 • Sheraton Chicago Hotel & Towers • Chicago, IL

2015 PLUS Conference
- November 11-13, 2015 • Hilton Anatole • Dallas, TX

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