delaware banker

Spring 2022
Vol. 18 No. 2

Preserving Attorney-Client Privilege

Practical Advice to Shift the Balance in Your Favor

Wilmington Trust understands that complex needs often require sophisticated solutions from an experienced team. That's why we view our relationship as unique, developing customized strategies that seek to preserve wealth, execute transactions, and help work toward success.

To learn more about how we can put our expertise to work for you, call:

Tony Lunger
Wealth Management
302.651.8743
alunger@wilmingtontrust.com

Nick Adams
Global Capital Markets
302.636.6103
nadams@wilmingtontrust.com

WILMINGTON TRUST
MEMBER OF THE M&T FAMILY

WEALTH MANAGEMENT | GLOBAL CAPITAL MARKETS | RETIREMENT PLAN SERVICES

wilmingtontrust.com

Delaware Bankers Association

P.O. Box 781
Dover, DE 19903-0781
Phone: (302) 678-8600 Fax: (302) 678-5511
www.debankers.com

Delaware Banker
Editing & Design
Greg Koseluk

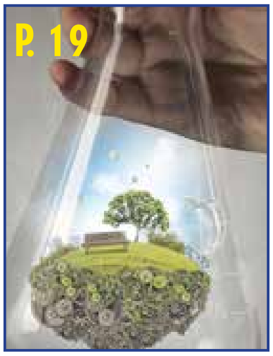
Editorial Disclaimer:
The opinions expressed in articles by authors other than the Association staff and officers are the responsibility of the authors only and not necessarily those of the Delaware Bankers Association. Questions and comments should be addressed to the Editors. No part of this publication may be reproduced without the written permission of the Editors.

Delaware Banker seeks to provide banking updates and other news of interest to the members of the Delaware Bankers Association. With the exception of official announcements, the Delaware Bankers Association disclaims responsibility for opinion and statements contained in Delaware Banker, and does not endorse any product or service. Delaware Banker is designed to provide accurate information on the subject matter covered. It is presented with the understanding the publisher is not engaged in rendering legal, accounting, or other professional services or advice.

delaware banker

Spring 2022
Vol. 18, No. 2

The Quarterly Publication of the Delaware Bankers Association



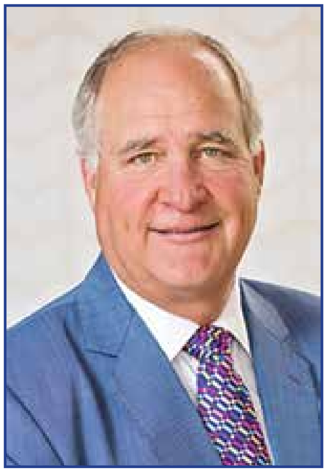
Contents

SUBMISSIONS
Delaware Banker welcomes news items from members of the Delaware Bankers Association. The Editors reserve the right to refuse any advertising or editorial copy deemed unsuitable for publication. The Editors reserve the right to set the publication date in accordance with the Association's needs. Direct submissions to Greg Koseluk at greg.koseluk@debankers.com

SUBSCRIPTIONS
Delaware Banker is available free of charge to all officers, executives, management, and key personnel of DBA members. Paid subscriptions to Delaware Banker are available to all others at a rate of $20 per year. To be placed on the subscriber list, please email Greg Koseluk at greg.koseluk@debankers.com.

ADVERTISING
Advertising inquiries should be directed to Greg Koseluk at (302) 382-6467 or greg.koseluk@debankers.com. Rates will be furnished upon request.

View from the Chair



by
Thomas M. Forrest
President & CEO
U.S. Trust Company of Delaware

Chair
Delaware Bankers Association

"Stay consistent my friends!"

This is my final column as your chair and my last official communication after six years as a DBA board member. So, I thought it was the perfect opportunity to look back and reflect on the changes in Delaware banks during that time. I analyzed several variables: the number of banks and trust companies between 2015 and today: significant changes in legislation, dramatic shifts in employment, charitable giving, volunteerism, etc.

After studying all that, I came to the following conclusion: not a whole lot has changed. The banking industry in the First State is strong, steady, and, at a cursory glance, rather boring. But I can't end my term that way: "My dull fellow bankers..." There must be a more positive way to put it. Ah, yes... consistency!

In a world that is always chasing after the newest fad, consistency can seem pretty old-fashioned. And traditionally, bankers are portrayed as an unexciting group. Really, name the last exciting action movie where the hero was a banker. That aside, there's a lot to be said for the diligent plodder. Famous examples abound! There's the story of the grasshopper and the ants, the fable about the tortoise and the hare, or the tale of the dull Hall of Fame pitcher. You don't recall that last one? Let me tell you about him.

Most of us would imagine a baseball Hall of Famer having a career filled with extraordinary feats. Not so for the career of Don Sutton. Despite having a 21-year career, mostly with the Los Angeles Dodgers, Sutton never pitched a no-hitter; he only won twenty games once; and only once led the league in any category. Sutton was once called the "family sedan" of pitchers; he would get you there, but not in a very exciting fashion. But by the end of his career, Sutton had joined the rarified strata of pitchers who had won 300 games or more, 324 to be exact. He also recorded more than 3000 strikeouts. "I never considered myself flamboyant or exceptional," Sutton said of his accomplishments. "But all my life, I've found a way to get the job done."

Don Sutton's approach to baseball is a template for success in most endeavors. Each employee of our member banks is a potential Hall of Famer, not by closing mega-deals or dazzling billionaire clients. We show that we're exceptional by providing our customers and the community with reliable, trustworthy financial products and services.

Aristotle said: "We are what we repeatedly do. Excellence, then, is not an act, but a habit." Delaware's banking community has a reputation for providing consistently excellent service, from the opening of the first bank in the state back in 1795, to the formation of the Delaware Bankers Association in 1895, to the Financial Center Development Act in 1981, all the way up to today. Through wars, financial crises, and pandemics, the First State's financial institutions have met each challenge with steadfast commitment.

So, we don't have to be flamboyant, just consistent. It's what I've tried to do since starting in the proof department at Wilmington Trust in 1977, and throughout my 45 years in the banking and trust industry. As bankers, we only need to continue doing the best, most reliable job for the First State. Stay consistent my friends!

President's Report

by
Sarah A. Long
President, CEO & Treasurer
Delaware Bankers Association

"Participants were struck by the breadth and depth of the discussions."

Every March, the Delaware Bankers Association travels to Washington, D.C. to meet with federal regulators and elected officials on various issues affecting the industry, Delawareans, and our State. Due to the timing of the trip, the DBA is generally the first State Association to hear what lawmakers, regulators, and the administration are planning in the weeks and months ahead. Beyond hearing about key policy issues directly from the lawmakers who put them into action, strong banker attendance can help shape those policies to strengthen economic growth.

On Thursday, March 5, 2020, the DBA met with our congressional delegation the day after appropriations leaders in Congress unveiled the $8.3 billion COVID-19 aid package and literally moments after the bill sailed through the House and Senate. Sen. Coons and Rep. Lisa Blunt-Rochester briefed our group about the sweeping spending bill that would combat the spread of the new coronavirus and pump billions of dollars into prevention efforts and research to quickly produce a vaccine for the deadly disease.

That speedy action by an otherwise bitterly divided Congress underscored just how seriously the government was taking the threat of COVID-19. Little did we know that COVID-19 would be all-consuming for the next two years.

Fast forward to 2022. Discussions about COVID-19, keeping the economy growing during the lockdown, and the 2021 attack on the United States Capitol, have been relegated to the background and replaced with Russia's invasion of Ukraine, staggering inflation, ESG, climate change, cryptocurrencies, and cyber-attacks.

The visit was again held virtually, and participants were struck by the breadth and depth of the discussions. ABA President Rob Nichols, and James Ballentine, Chief Policy Offer, provided updates on the issues affecting the banking industry in preparation for bankers' virtual visits to Capitol Hill.

We were briefed by the Acting Chairman of the FDIC, Martin Gruenberg, on everything from potential rate adjustments to support the Deposit Insurance Fund, to an expected joint Notice of Public Rule Making on the Community Reinvestment Act, to reducing the potential risk of consumer harm by avoiding potential UDAAP violations through risk-mitigating activities.

Rohit Chopra, Director of the CFPB, shared his concerns with auto repossession, student lending, junk fees, data aggregation, non-bank supervision, buy now pay later, and small business data collection.

The view from the OCC Acting Comptroller of the Currency Michael Hsu focused on his top priorities at the OCC and current regulatory issues facing the banking sector. What was at the top of the list? Maintaining consumer equity within digital transformation, responsible innovation, and keeping a consistent, careful, and cautious approach to bank involvement in cryptocurrency.

Of course, the visits with our Congressional Delegation were an outstanding part of the event. We thanked the Delegation for ensuring our nation has the laws and regulations in place for our Country to succeed in the world. Ever grateful for the support they provide to the financial services industry in Delaware, LIBOR legislation in the March Omnibus bill negated the need to propose similar legislation in the Delaware Legislature. A win for the industry!

The DBA Annual Washington visit allows bankers to talk with legislators and regulators about the successes and concerns of Delaware's banking industry. These officials need to hear ideas firsthand to produce workable laws and regulations. This is our chance to make suggested modifications to burdensome rules and solve problems together. But isn't that the Delaware Way? Finding common ground and working together for the good of our State.

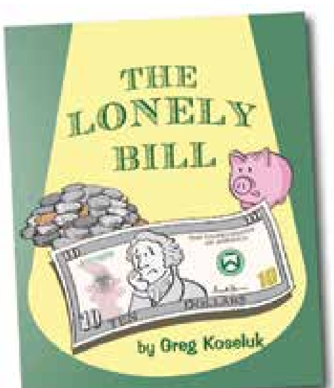
Sarah

What's New at the DBA

DBA Visits Washington Virtually

Over 70 Delaware banking professionals attended the 2022 Delaware Bankers Washington Visit, April 6th and 7th. As in 2021, the event was held virtually due to pandemic restrictions in the nation's capital. The visit started with a House update from Representative Lisa Blunt Rochester. This was followed with afternoon briefings from the American Bankers Association and the FDIC. Thursday sessions included CFPB and OCC briefings, and visits with Senators Chris Coons and Tom Carper. The event was sponsored by The Federal Home Loan Bank of Pittsburgh; Discover Bank; and Richards, Layton & Finger.

DFEA Publishes 9th Children's Book on Saving



The Delaware Financial Education Alliance has published its 9th children's book on financial literacy. "The Lonely Bill," written and illustrated by Greg Koseluk, tells the story of a ten-dollar bill given to a boy on his birthday. The bill is placed in the boy's piggy bank where he learns from coins already there what happens to money when it's squandered and how money can grow. As with the other DFEA books, "The Lonely Bill" was created for Delaware's Teach Children to Save Day effort.

The Lonely Bill explains the value of saving in a local bank for the depositor and for the community as a whole. The book was made possible thanks to the generous support of: Discover Bank, Barclays, Capital One, TD Bank, WSFS Bank, Bank of America, Fulton Bank, M&T Bank, Wells Fargo, Artisans' Bank, Comenity, First Citizens Community Bank, Shore United Bank.

2022 Teach Children to Save Day

DBA President Sarah Long teaches at Brandywine Springs Elementary

Vernita Dorsey, SVP, Director of Community Strategy, WSFS Bank, poses with students at Eisenberg Elementary

The 2022 Delaware Teach Children to Save Day effort, the 24th annual, ran the week of April 25th through 29th. Approximately 250 banker volunteers visited classrooms throughout Delaware to teach over 7,000 public, private, and parochial school students about the importance of saving for a financially independent future. Teach Children to Save Day is part of a national program developed by the American Bankers Association's Education Foundation to teach children about the importance of saving. The Delaware Bankers Association and the Delaware Financial Education Alliance coordinate the program in partnership with the University of Delaware's Center for Economic Education and Entrepreneurship (CEEE). The CEEE develops the lessons which meet Delaware's state economic education standards.

Delaware Banks Receive $70,133 in Distributions from American Bankers Mutual Insurance, Ltd.

American Bankers Mutual Insurance, Ltd., the reinsurer for the directors and officers (D&O), bond and cyber insurance program endorsed by American Bankers Association (ABA) and Delaware Bankers Association (DBA), declared a $3 million distribution to be shared by qualified ABA member banks insured through ABA Insurance Services, a member of Great American Insurance Group. This is the 32nd consecutive year that the industry's leading professional liability and bond insurance provider has declared distributions to eligible ABA member banks, bringing the total to $94.3 million since the program's inception. Banks that purchase their directors and officers, bond, cyber and related insurance from this program and are current ABA members are eligible to receive a distribution.

Alliance Data is now Bread Financial™

Alliance Data announced it will now be known as Bread Financial, a tech-forward financial services company that provides simple, personalized payment, lending and saving solutions. After a multi-year transformation to streamline its business model, Bread Financial has emerged as a modern financial services company backed by technology and platform solutions that empower today's consumer. The company's prior market-facing brands are now unified under the singular, cohesive Bread Financial brand.

Food Bank of Delaware Receives Donation Worth More Than 1 Million Meals from Bank of America

Chip Rossi, President, Bank of America Delaware presents the donation to Cathy Kanefsky, President and CEO, Food Bank of Delaware

Bank of America presented a $350,000 donation, equivalent to over one million meals, to the Food Bank of Delaware to address food insecurity in the region. In Delaware, more than 114,000 people are facing hunger, and almost 33,000 of them are children, according to Feeding America. As the pandemic continues, hunger relief organizations in Delaware and across the country are facing ongoing challenges such as increased demand for their services and rising food prices.

Cover Story

Preserving the Attorney-Client Privilege

Practical Advice to Shift the Balance in Your Favor

by
J. Zachary Haupt
and
Matthew R. Clark

Morris, Nichols, Arsht & Tunnell LLP

The attorney-client privilege is a long-recognized legal principal that, in general terms, serves to protect confidential communications between an attorney and his or her client from disclosure. As exemplified by Delaware case law, it is not always clear whether or how the privilege will be applied with respect to communications between a fiduciary and counsel when the communications relate to a trust. Developments in Delaware's statutory and case law provide insight into how the privilege may be applied and what strategies may be implemented to increase the likelihood that the privilege will be applied in a manner that is consistent with a client's expectations.

Background and Development of Delaware Law

The basic requirements for invoking the attorney-client privilege are set forth in Delaware Rule of Evidence 502(b), which provides that a client can refuse to disclose, and to prevent any other person from disclosing, confidential communications made for the purpose of facilitating the rendition of professional legal services to the client when the communications are between certain categories of people covered by the rule. A court will not honor an otherwise valid assertion of the privilege, however, if one of many well-recognized exceptions apply.[1] This article focuses on the fiduciary exception that, in certain circumstances, allows beneficiaries of a trust to gain access to a fiduciary's communications with counsel.

The fiduciary exception is a common law exception most prominently addressed by the Delaware Court of Chancery in *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A. 2d 709 (Del. Ch. 1976). In *Riggs*, the trustees hired counsel to prepare a memorandum addressing legal issues and providing an opinion in connection with a petition for instructions and in anticipation of potential tax litigation on behalf of the trust. When the beneficiaries later filed a claim against the trustee for breach of trust in connection with tax-related matters, the beneficiaries sought the memorandum in discovery.

To determine whether the memorandum was protected from production by the attorney-client privilege, the court conducted a two-step analysis.

First, the court considered whether the trustees had retained counsel (a) to represent the trust and to provide advice that would advance the interests of the trust and its beneficiaries, or (b) to protect the trustees' own interests in anticipation of litigation in which the trustees would be defendants. *Id.* at 711-12. To answer this question, the court examined the "the purpose for which [the memorandum] was prepared, and the party or parties for whose benefit it was procured, in relation to what litigation was then pending or threatened." *Id.* at 711. The court concluded that the memorandum was prepared for the benefit of the beneficiaries of the trust, as opposed to the trustees' own defense in any litigation against the trustees. That court's analysis focused on the fact that the memorandum had been commissioned in connection with potential tax litigation between the trust and the state rather than claims against the trustee, but also noted that the attorney's fees for the advice had been paid from the property of the trust, which the court found to be "a strong indication of precisely who the real clients were" and a "significant factor" favoring the beneficiaries' access to the memorandum. *Id.* at 711-12.

Second, the court considered whether the beneficiaries should be permitted to inspect documents prepared by an attorney on their behalf at the request of the trustees or whether the privileges asserted were of "such compelling importance" as to allow the documents to be withheld. *Id.* at 712. The court found that the documents should not be shielded from the beneficiaries, in part because the court believed that it was crucial for beneficiaries to be knowledgeable about the trust's administration so that the beneficiaries could hold the trustees accountable with respect to the trustees' exercise of their fiduciary duties. *Id.* The court noted that this result was consistent with leading treatises and long-standing precedent under English common law, from which Delaware's trust law principles derived. *Id.*

In 2007, Delaware enacted Section 3333 of Title 12 of the Delaware Code, which codified a fiduciary's right to retain counsel in connection with any claim that has or might be asserted against the fiduciary and provided that the payment of counsel fees and related expenses from the fiduciary fund would not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege. Section 3333 has been modified several times since its enactment, most significantly in 2015, and now provides as follows:

> (a) In the case of a fiduciary that retains counsel in connection with any matter whether or not related to any claim that has

(Continued on p . 12)

(continued from p. 11)

> been or might be asserted against the fiduciary and pays such counsel's fees and related expenses entirely from such fiduciary's own funds, any communications with such counsel shall be deemed to be within the attorney-client privilege.
>
> (b) Except as otherwise provided in the governing instrument, a fiduciary may retain counsel in connection with any matter that is or that might reasonably be believed to be 1 that will become the subject of or related to a claim against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege even if the communications with counsel had the effect of guiding the fiduciary in the performance of fiduciary duties. However, in the event that the fiduciary is determined by a court to have breached a fiduciary duty related to such matter, the court may, in its discretion, deny such fiduciary the right to have all or some part of the fiduciary's counsel fees paid from such fund and may require the fiduciary to reimburse any such fees and expenses that have been previously paid.

As a result of the 2015 amendments, Section 3333 was expanded to expressly provide (i) that communications between a fiduciary and counsel who was both retained by the fiduciary and paid out of the fiduciary's funds shall be deemed to be within the attorney-client privilege and (ii) that the payment of attorney's fees from the trust fund does not cause the fiduciary to waive the attorney-client privilege even with respect to communications that have the effect of guiding the fiduciary in the performance of its fiduciary duties. 80 Del. Laws ch. 153 (2015) (amending 12 Del. C. § 3333). The 2015 modifications could reasonably be read to create a bright line rule providing that, if the source of payments for counsel was the trustee's own funds, any confidential communication with such counsel is deemed privileged.

In 2019, the Court of Chancery had an opportunity to reconsider *Riggs* in light of Section 3333. In *J.P. Morgan Trust Company of Delaware v. Fisher,* 2019 WL 6605863 (Del. Ch. Dec. 5, 2019) (Laster, V.C.)[2], the trustee consulted with counsel regarding several proposed alternatives related to a financial transaction that would significantly affect a valuable trust asset. After deciding upon a course of action, the trustee filed a petition seeking a declaration that the trustee had acted properly in all respects. In discovery, the beneficiaries sought the production of documents from the trustee relating to the transaction. The trustee produced some of the requested documents, but withheld others on the basis of the attorney-client privilege.

In deciding the motion, the court applied the *Riggs* two-step analysis. First, the court concluded that the trustee was obtaining advice in its role as trustee about matters pertaining to the trust and not for its own defense. *Id.* at *6-7. Next, the court concluded that the production of the requested information was necessary to enable the beneficiaries to evaluate the trustee's actions in the exercise of its fiduciary duties. Thus, the court concluded that production was required under the *Riggs* analysis. *Id.* at *7.

Turning to the impact of Section 3333, the court concluded that the statute did not supersede *Riggs* or render it inapplicable. Instead, the modifications clarified that the source of payment for counsel's fees for the advice has been "de-emphasized" and is "not dispositive" of the trustee's ability to maintain privilege, and further clarified that a claim against the trustee need not be filed or explicitly threatened for the trustee to maintain privilege as long as it was one "that might reasonably be believed to be one that will become the subject of a claim." *Id.*

Notably, the court specifically addressed and rejected the trustee's argument that, by modifying Section 3333, the General Assembly adopted a bright line rule that payment of counsel's fees from the trustee's own funds causes ***any*** confidential communications with such counsel to be covered by the attorney-client privilege. Instead, the court found that Section 3333(a) merely codifies a fiduciary's common law right to retain counsel and invoke the privilege without creating a statutory barrier to the application of an exception to defeat a claim of privilege in such circumstances. Accepting the trustee's argument would have overruled *Riggs*—the progenitor of "an established line of Delaware authority" and the "leading American case on the fiduciary exception"—and supplanted the myriad other exceptions to the attorney-client privilege that may otherwise be applicable. *Id.* *10. The court concluded that result was not a reasonable reading of the language or legislative history of Section 3333. *Id.* *8-10.

In sum, the court in *Fisher* affirmed the continued viability of Riggs and interpreted the 2015 amendments to Section 3333 to (i) clarify that communications between a trustee and counsel may be protected by the attorney-client privilege notwithstanding whether counsel's fees are paid from the trustee's own funds or the trust fund, but (ii) not alter or address Delaware law providing that the application of exceptions to the attorney-client privilege, such as the fiduciary exception, may defeat an assertion of privilege in either such circumstance.

Practical Advice

The lesson in *Fisher* is clear: trustees cannot rely on the source of payments to preserve the privilege. Instead, the measure of whether beneficiaries of a trust may gain access to a trustee's communication with counsel is still based on the recipient of and the nature of the advice. Under Delaware law, a trustee may only withhold from beneficiaries legal advice that the trustee received regarding a claim asserted against the trustee or regarding a matter that might reasonably be believed to be a matter that will lead to such a claim.

If trustees desire to maintain the privilege over such communications with their counsel, they should consider (1) taking steps in advance to establish a foundation that the legal advice is not subject to production under *Riggs*—i.e., that the advice was provided to the trustee to protect the trustee's own interests against pending or potential claims by the beneficiaries; and (2) taking steps when asserting the privilege to highlight why the communication is protected.

1. Establish that the Recipient of the Advice is the Trustee (Not the Trust).

Separate Counsel. One method of demonstrating that the advice relates to the trustee's defense against anticipated, threatened, or asserted claims and not about how to carry out its duties to the trust and its beneficiaries is to retain separate counsel to advise the trustee with an engagement letter that limits the scope of the engagement to issues involving the trustee's potential liability to the beneficiaries.

Separate Payments. Whether counsel's fees are paid using trust funds or using the trustee's own funds is not dispositive, but when considered with other factors, paying for legal advice using the trustee's own funds may weigh in favor of a finding that the advice was provided for the benefit of the trustee and not the trust.

Separate Communications. Assuming that separate counsel is not retained, trustees should consider maintaining separate, readily-identifiable lines of communications with counsel (i) for legal advice about how to carry out its duties to the trust and its beneficiaries; and (ii) for legal advice obtained for the trustee's own defense against anticipated, threatened, or asserted claims. Separate lines of communication will emphasize the separate nature of the advice and may aid in the assertion of the privilege months or years later by (a) making privileged communications easier to identify, distinguish, and redact; (b) simplifying the process of describing the communications on a privilege log; and (c) focusing the Court on privileged communications in the event they are subject to *in camera* review.

2. View the Privilege Log as an Objective Observer

When the trustee's assertion of privilege is tested in litigation by withholding documents from the beneficiaries in discovery, the trustee's counsel will be required to prepare a detailed log of withheld documents that identifies, among other things, "the subject matter of the communication sufficient to show why the privilege apples, [which] *must show sufficient facts as to bring the identified and described document within the narrow confines of the privilege.*" *Klig v. Deloitte LLP,* 2010 WL 3489735, *5 (Del. Ch. Sept. 7, 2010) (Laster, V.C.) (emphasis added).

To maintain the privilege and avoid production under *Riggs*, it is critical that the descriptions of the subject matter of the withheld communications are sufficient that the opposing party and the court can understand the basis for the claim of privilege and assess its propriety. *Klig,* 2010 WL 3489725, at *5. In *Fisher*, the Court reinforced the importance of such descriptions in the context of a trustee seeking to withhold documents from a beneficiary, finding that the descriptions on the trustee's privilege log "indicate that counsel was performing work on behalf of the trust …" and supported the conclusion that the legal advice at issue "affected core concerns of the trust and its beneficiaries." *Fisher*, 2019 WL 6605863, at *3, 7.

(Continued on p. 14)

(continued from p. 13)

Thus, trustees should take care to work with outside counsel to ensure the descriptions of documents conveying legal advice to protect the trustee's own interests against pending or potential claims by the beneficiaries are clearly indicated to a neutral observer working without the document to provide context. Those descriptions should convey that the withheld document (1) conveys legal advice; (2) from the trustee's counsel; (3) regarding a pending or potential claim against the trustee by the beneficiaries.

Compare the following examples:

Example 1. A third party has approached the trustee with an offer to purchase trust property. The trustee is concerned about its potential liability to the beneficiaries for selling the property and has retained counsel to advise it about such liability. The trustee has asserted privilege over an email from its counsel explaining to the trustee how to conduct the sale in a manner that minimizes its potential liability to the beneficiaries. Consider the following descriptions of the email:

A: Email with legal counsel regarding potential sale of trust property.
B: Confidential chain email communication with counsel to trustee requesting and providing legal advice regarding trustee's potential liability to beneficiaries for selling trust assets.

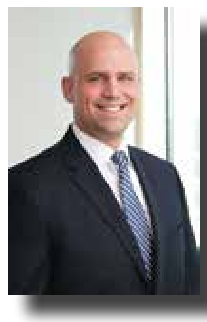
Example 2. One of two beneficiaries have approached the trustee about decanting the trust. The trustee is concerned about its potential liability to the non-consenting beneficiary for conducting the decanting and has retained counsel to advise it about such liability. The trustee has asserted privilege over a memorandum from its counsel discussing possible claims that the non-consenting beneficiary could assert against the trustee. Consider the following descriptions of the memorandum:

A: Memorandum from legal counsel regarding decanting.
B: Confidential memorandum from counsel to trustee providing legal advice regarding trustee's potential liability to beneficiary for decanting trust.

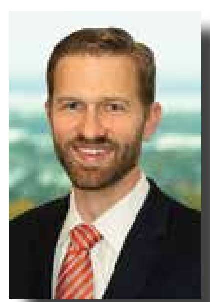
In both examples, description A is accurate, but leaves the opposing party and the Court with questions. Description B, on the other hand, provides the opposing party and the court with the facts necessary to assess whether the withheld communication falls within the *Riggs* exception. There are no guarantees in litigation, but a description that clearly meets the elements of Delaware law for withholding the communication better positions the trustee with opposing counsel and the court if a dispute arises—and may avoid one altogether.

Conclusion

The Court of Chancery has provided trustees with guideposts to determine what communications with counsel must be disclosed to beneficiaries and what communications can be protected as privileged. In short, the recipient of and the nature of the advice is key: legal advice about how a trustee should carry out its duties to the trust and its beneficiaries likely must be produced to the beneficiaries, while legal advice obtained for a trustee's own defense against anticipated, threatened, or asserted claims likely can be withheld. Trustees who desire to obtain legal advice must understand the distinction and take steps at the time the advice is rendered and the time the privilege is asserted to protect their communications with counsel from disclosure.



J. Zachary Haupt is an associate at Morris Nichols in Wilmington, Del. Zach's practice focuses on trust law, estate planning and state and federal taxation. He regularly works with clients to settle new trusts and to modify existing irrevocable trusts through decantings, mergers, consent modifications, non-judicial settlement agreements, administrative amendments, and judicial reformations. Additionally, Zach assists clients with the creation and modification of estate plans and the administration of Delaware estates.



Matthew R. Clark is special counsel in Morris Nichols' corporate and commercial litigation group. Matt litigates complex corporate, commercial and trust disputes before the Delaware Court of Chancery and the Delaware Superior Court. In his fiduciary litigation practice, he represents trustees, executors, and beneficiaries in all types of trusts and estates disputes. His experience includes cases concerning directed trusts, construction and interpretation of trusts and wills, trustee breach of fiduciary duties, trustee compensation, undue influence, and trustee self-dealing.

Notes -
1- Delaware Rule of Evidence 502(d) sets forth a non-exhaustive list of six exceptions. Other common law exceptions, like the fiduciary exception, are also recognized.
2- The matter was resolved by a final judgment and order entered on September 16, 2021. No appeal was filed.

The Rise of Women's Wealth

Understanding Generational and Gender Dynamics for Planners

by
Gina M. Nelson

Chilton Trust Company, N.A.

The last 50 years have seen enormous societal shifts in the role women play in their own personal finances. From getting married later in life to securing more senior and higher paying positions to inheriting significant amounts of money, more women find themselves as the financial decision maker of the family today than ever before. As a result, many of the tools traditionally used for men have become appropriate for women as well.

However, not all generations view their wealth through the same lens, and each generation has its own unique set of needs when it comes to financial planning.

Baby Boomers and Women Inheriting Wealth

Baby Boomer women are expected to gain the most wealth in the near future. By 2030, women are expected to control the majority stake of the $30 trillion that is currently held by that generation. Women have long had a longer life expectancy than men in the United States, and the latest CDC numbers (from February 2021) show that gap is widening. Women now outlive men, on average, by more than five years. The basic estate plan in many family situations sees the first spouse to die leaving the majority of their assets to the surviving spouse, statistically the wife. Therefore, as second to die, it is often the wife's estate plan that controls the ultimate disposition of wealth to family, non-family heirs and charities.

Even though Baby Boomer women are expected to gain control of their generation's assets, women of this generation are much less likely to have taken an active role in the family's finances than in younger generations. Additionally, an estimated 70% of widows change advisors within one year of their partner's passing. With these points in mind, advisors should be all the more focused on including Baby Boomer women in important planning discussions while their spouse is living. Such financial education and inclusion in planning conversations is key to providing Baby Boomer women with a solid foundation from which to make lasting decisions about their family's wealth. Additional tax planning, permissible changes in trusts and wills, changes to investment and real asset management, and reviews of powers of appointment may all be up for discussion for these surviving spouses.

Generation X, Millennials and Shifting Marital Statistics

For Generation X ("Gen X") and Millennial women, their contribution to a shift in societal norms has yielded more women with significant wealth of their own, independent of their families and their partners. As more women joined the workforce in the '80s and '90s, Gen X and Millennial women leaned into their careers and increasingly delayed marriage as well as starting a family. For example, in 2021, the median marrying age for an American woman was 28 years old, dramatically higher than the median marrying age of 20 in the 1960s. As a result, women are gaining higher profile positions, owning more businesses, and overall, entering into marriage with far more individual assets than previous generations, leading many to now take into account the financial implications of walking down the aisle before deciding to say, "I do."

Historically the domain of men, pre- and post-marriage financial planning is increasingly being driven by women. Though traditional prenuptial ("prenup") and postnuptial ("postnup") agreements are still somewhat common, often prospective spouses or the newly wed find these discussions uncomfortable or unpalatable. Another option for women of independent means to consider is a Delaware asset protection trust ("DAPT") in lieu of the prenup or postnup. When properly established, funded and administered, the DAPT can shield a woman's assets from substantially all creditors, including a future spouse. Timing here is key, as transfers must take place prior to marriage in order to maintain protection over the trust assets in the event of divorce. Unlike a prenup, DAPTs do not require disclosure of assets and are not generally subject to equitable interpretations or rewrites by a judge. For these reasons, many women may prefer the use of the DAPT over the use of the prenup.

Also particular to Gen X and Millennial women is a growing trend towards long-term committed relationships, where women may choose not to get married for philosophical, financial or personal reasons. Many of these women have accumulated wealth they wish to protect. While a prenup/postnup will not apply in cases of unmarried partners, a DAPT can still be an effective means of protecting one's independent wealth. Women in committed, non-married relationships may also wish to consider a legal co-habitation agreement that sets forth which assets may be available to each partner, which remain the sole property of each individual and how assets will be divided should the relationship end. Especially important to address is the disposition of the shared home, whether it be owned, mortgaged or rented: consideration of the home can avoid the

(Continued on p. 18)

(continued from p. 17)

awkwardness or financial issues that may befall an ex-partner who is obligated on a lease or who may have contributed to the equity of a residence that they do not own.

Going one step further, a growing segment of Gen X and Millennial women are choosing never to marry or live with a partner. For these women, the importance of having an up-to-date estate plan is significant. In particular, planning for incapacity takes on heightened importance when a spouse or partner is not available to assume the role of decision-maker from both a medical and financial standpoint. Creating and regularly updating health care proxies, advanced directives and financial powers of attorney ensures that timely and appropriate medical and financial decisions are made with full knowledge of the person's circumstances and wishes. Additionally, having a revocable trust or will ensures that assets pass as intended, and not as per the state law default.

For the first time, many women in these generations have made the protection of assets one of their principal financial planning concerns. Regardless of their marital status, unlike preceding generations, Gen X and Millennial women have accumulated significant independent wealth, shifting more of them into the role of financial decision-maker and necessitating a parallel shift in planning patterns that historically focused on men.

Generation Z and Millennials Shifting Views of Wealth

Each rising generation brings a new set of collective values to the financial landscape, and the young Millennial and Generation Z ("Next Gen") women are no different. Women of that age group are hitting the high-net-worth stratosphere at an increasing rate, and with that comes an entirely new set of wealth priorities. As more women achieve top-level positions in the workforce, the number of opportunities to own businesses and gain leadership in influential institutions increases for the younger generation. Specifically in the financial space, Next Gen investors are starting to invest earlier than previous generations. Perhaps more importantly, younger women are taking initiative to leverage their wealth in line with their values in ways that Baby Boomer and Gen X women previously have not. Based on the world events these generations have grown up with, Next Gens are on the whole extremely altruistic, although not in the traditional sense. Next Gen philanthropists, especially women, hold an entirely different set of charitable values from previous generations, as many believe that they have an opportunity to address societal problems and issues through impact investing. This investing is often aimed at Environmental, Social and Governance ("ESG") issues. As industry professionals, recognizing this motivational difference in younger generation clients is key to developing lasting relationships.

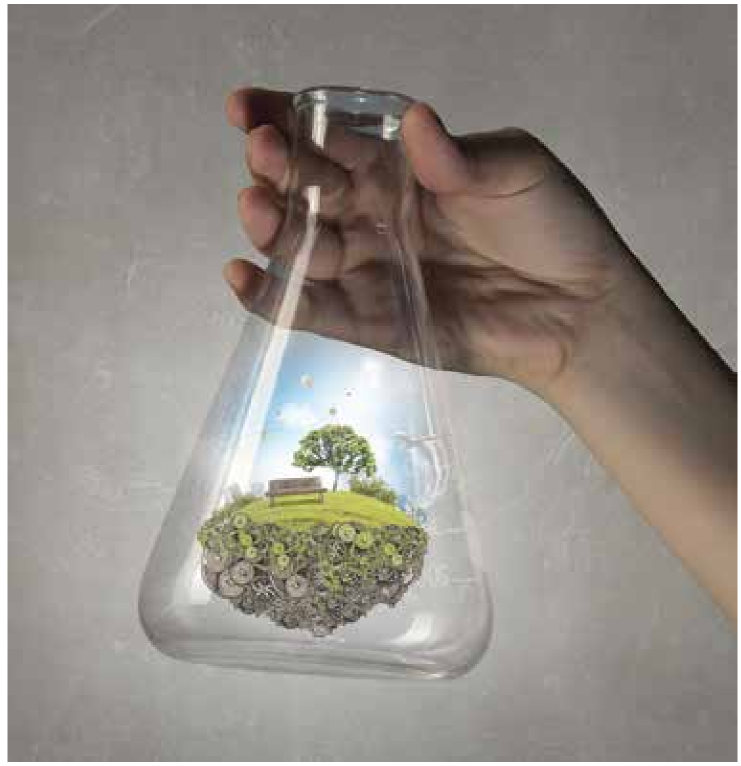
As the importance of ESG investing for these women – and in fact their generation as a whole - rises, incorporating these desires into financial and estate plans becomes a priority. In the trust space, without specific language in the trust document, it can be difficult to ensure that ESG investments will be incorporated and/or given priority over other investments that might produce better returns. Ensuring that the necessary language to facilitate impact and ESG investing is included in planning documents guarantees that trustees have the option to invest as per the grantor or beneficiary's wishes.

Next Gen women also tend to view their wealth as a tool for targeted, charitable giving as well as a vehicle for socially responsible investing. While charitable giving takes place across all generations, today's younger philanthropists and their giving habits are often driven by which organizations will have the greatest impact on a cause. By contrast, older generations' charitable intent is often driven towards giving based on relevance or connection to their own lives (e.g. alma mater, local service foundations and organizations, personal causes). Of further importance to Next Gen donors are organizations aligned with their personal views and beliefs that are also capable of achieving measurable outcomes. Such organizations can inspire Next Gen philanthropists to mobilize quickly and flexibly in order to allocate funds in a targeted manner that will achieve visible results.

As women's wealth continues to grow, they are increasingly taking the lead in making financial decisions. Advisors should strive to understand the generational differences among women and how their wealth priorities, attitudes and needs are evolving. While each woman's priorities, wealth history and values will be unique, advisors need to acknowledge, prepare for, and be engaged in this dramatic shift of generational and gender wealth dynamics.

Gina M. Nelson is Senior Vice President – Head of Fiduciary Services with over 15 years of experience in various trust and estate roles. Prior to joining Chilton Trust, Ms. Nelson served as Executive Director/ Global Head of Trusts and Estates Risk at J.P. Morgan where she was responsible for Risk Management of all of J.P. Morgan's trust companies, which include the U.S., Delaware, Bahamas, and other international entities. Prior to J.P. Morgan, Ms. Nelson has over 10 years of trust company experience, serving as a resource on complex fiduciary matters, reviewing and approving new business, and developing and enhancing fiduciary processes and procedures. She has spoken on panels at several key industry events, including the Delaware Trust Conference and the Mourant Ozannes International Trust and Private Client Conference. Ms. Nelson began her career practicing law and opened her own practice where her focus was estate planning and trust and estate administration. Ms. Nelson received her B.A. in French and European Studies from Vanderbilt University and her J.D. from the University of Minnesota School of Law. Ms. Nelson also devotes her time to organizations focused on ocean conservation.

Environmental Due Diligence



Emerging Contaminants And Changing Standards

by
Robert W. Whetzel Esq.
and
Philip K. Micha Esq.

Richards, Layton & Finger, P.A.

Environmental due diligence is a significant component of commercial real estate transactions, and a Phase I environmental site assessment ("ESA") is the usual starting point for due diligence. Although the Phase I ESA has become a near-commodity, not all assessments are created equal, and understanding the scope of what is (and is not) encompassed by a Phase I ESA is critical to making good business decisions. Recent changes in the Phase I standard, and the increasing regulatory focus on "emerging contaminants" like PFAS and Gen X chemicals, warrant a careful review of environmental due diligence practices to ensure that risks are identified and well understood.

Updated Phase I Standard

Environmental due diligence for commercial real estate transactions, including financing, is typically based on a Phase I ESA. For many years, there was no commonly accepted standard for environmental site assessments. In 1997, the American Society for Testing and Materials ("ASTM") first developed a standard for Phase I ESAs, and that standard has been adopted into federal and state law as the basis for various "all appropriate inquiry" defenses to liability.

In November 2021, ASTM updated the standard used for the Phase I ESA for the first time in eight years. While the revisions to the standard were numerous, the most significant updates were to clarify the definitions for recognized environmental conditions, also known as RECs. Potential purchasers (and lenders) often focus on the RECs that are identified in the Phase I ESA report, and inconsistencies and lack of clarity in the applicable definitions raised concerns about the quality and consistency of the assessments.

The updated ASTM standard, known as E1527-21, clarifies the differences between several categories of environmental concerns that may exist at a site: (i) recognized environmental conditions, known as "RECs" (unaddressed release of hazardous substances and petroleum products), (ii) historical recognized environmental conditions, known as "HRECs" (a previous release of hazardous substances or petroleum products affecting the subject property that has been addressed to the regulatory authority's satisfaction and meeting unrestricted use criteria), and (iii) conditional recognized environmental conditions, known as "CRECs" (a recognized environmental condition addressed to the satisfaction of regulatory authorities with hazardous substances or petroleum products allowed to remain in place subject to controls). The updated ASTM standard includes a decision flow chart to accompany the updated definitions, with the goal of producing more consistent application of the relevant terminology. Additionally, the standard notes that users may wish to conduct non-scope investigations for emerging contaminants such as 'forever chemicals,' also known as PFAS.[1] Although these compounds are not included in the required scope of the ASTM standard, there is now heightened emphasis on the importance of these "non-scope considerations."

Federal and state regulators are in the process of updating their regulations and guidance to reference the updated ASTM standard. Although the EPA's All Appropriate Inquiry rule references the previous ASTM standard (E1527-13), the agency has issued a proposed rule that would allow parties to meet the All Appropriate Inquiry test by conducting a Phase I ESA pursuant to the new E1527-21 standard, or the previous E1527-13 standard. EPA set April 13, 2022 as the effective date of this new rule, in the absence of adverse comments.

(continued on p. 20)

(continued from p. 19)

Regulatory Focus on Emerging Contaminants and 'Forever Chemicals'

State and federal regulation of emerging contaminants (also known as "forever chemicals," "Gen-X," and/or "PFAS") is a significant development with the potential to impact a wide range of commercial transactions and business practices. These chemical compounds are seemingly ubiquitous, and have been found in drinking water, groundwater, wastewater, and other environmental media. Several of the PFAS compounds have been linked to adverse health effects, and recent studies have found PFAS in untreated well water in Delaware.[2] In addition, the average blood levels of certain PFAS compounds for residents in certain areas of Delaware are reported to be higher than national levels.[3]

A wide variety of PFAS compounds have been produced since the 1940's and used in a broad array of domestic and industrial applications. Uses include nonstick cookware, stain resistant coatings for carpets and fabrics, food packaging, cosmetics, shampoo, paints, and firefighting foam, among others. Once released to the environment, PFAS break down very slowly and can accumulate in humans, and the environment, hence the "forever" moniker. The useful attributes of these compounds (long-lasting, non-stick) are also the reason the compounds persist and accumulate in the environment.

Due to concerns that exposure to PFAS may lead to adverse health outcomes, regulators in many states and the EPA have increased their focus on PFAS.[4] In Delaware, there are proposed limits on the allowable levels of certain PFAS compounds in drinking water, and these same levels will be used in the site investigation and remediation context.[5] At a minimum, increased testing for PFAS compounds will be required, and some level of remedial efforts are likely.

Listing PFAS as Hazardous Substances

On July 2, 2018, the Delaware Department of Natural Resources and Environmental Control ("DNREC") added PFOA and PFOS as regulated hazardous substances under the Delaware Hazardous Substances Cleanup Act[6] and adopted the EPA's screening level of 70 parts per trillion. This policy provides that it will be in effect for three years, at which point DNREC will reevaluate the listing. DNREC has not yet issued an updated evaluation, but the agency is working with the Division of Public Health to set the drinking water maximum contaminant levels for certain PFAS compounds.

Parties involved with a Phase I ESA for commercial property located in Delaware should consider investigation of PFAS compounds as a non-scope consideration, both to evaluate potential risk and as a basis for all appropriate inquiry defenses under Delaware law. EPA has announced its intent to list PFOA and PFOS as hazardous substances under federal law, and at that point parties will need to investigate these substances to qualify for CERCLA liability protections.

When identified as part of a Phase I ESA, a suspected or actual release of PFAS will likely be considered a REC. Due to the long-lasting nature of PFAS and their ability to be present in several environmental media (soil, water, air), potential or actual PFAS contamination presents challenges for site owners, potential buyers, and lenders. Investigation and remediation of PFAS-contaminated property can be challenging because of the difficulty in accurately sampling for these compounds; PFAS compounds can be present in many fabrics and items that may contaminate samples, including in the items that store the samples themselves. Remedial technologies for PFAS contamination are still evolving—carbon treatment of contaminated water and excavation and off-site landfilling of contaminated soil are typical remediation options, and other treatments are under development.

Importantly, the listing of PFOA and PFOS as hazardous substances in Delaware exposes previous and current property owners, operators, and other responsible parties to liability for releases of these substances. Liability for the release of hazardous substances is joint, several, retrospective, and not dependent on fault. Thus, if a buyer takes title to a property contaminated with these substances in Delaware, the buyer may be responsible to investigate and remediate these substances. Due to HSCA's strict, retroactive liability, it is possible that DNREC may require site owners and operators to investigate PFAS releases at sites that did not previously address PFAS. To protect against these outcomes, borrowers and lenders should conduct thorough diligence, and investigate the real property for potential sources of PFAS.

Enforcement and Business Risks of PFAS

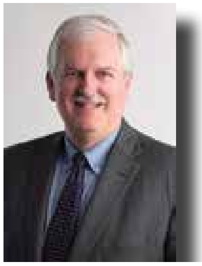
PFAS manufacturers and users are now confronted with a wide range of regulatory investigations, enforcement, and litigation both in Delaware and nationally. Federal and state authorities have initiated various investigations and enforcement actions to identify past releases of PFAS, and are conducting inspections of affected sites, sending information requests, and collecting data regarding PFAS contamination. The State of Delaware recently reached a $50 million settlement with a manufacturer of PFAS compounds regarding alleged PFAS contamination, and the funds have been deposited into a trust for assessing environmental media, funding environmental and natural resource initiatives, and financing community environmental justice and equity grants.

In addition, certain business operations may be impacted by increasing regulation of PFAS. For example, new regulations on PFAS may impact the operations of water suppliers, industrial water users, wastewater treatment facilities, and solid waste handlers. Manufacturers who use water in their operations may be impacted by the potential presence of PFAS compounds, and industries that discharge wastewater may be subject to new limits on their discharges. Disposal of solid wastes, including sludges and biosolids, is also potentially subject to new regulatory limits.

What's a Buyer (or Lender) to Do?

Parties engaged in commercial real property transactions should be aware of the recent changes to the Phase I site assessment standard, and should take steps to ensure that the appropriate ASTM standard is used by environmental professionals. In light of the focus on emerging and previously unregulated contaminants, environmental assessment and diligence practices should also be reviewed. Users and providers of Phase I ESAs should review the scope of work for environmental due diligence and site assessments to ensure that PFAS and other emerging contaminants are adequately addressed.

Standard transactional documents should be scrutinized to ensure that emerging contaminants and ongoing regulatory developments are adequately addressed. Although some commercial transactional documents now include provisions to address emerging contaminants, that is not universally the case. PFAS regulation has arrived, but parties to a commercial real estate transaction have options for diligence and risk assessment and can draft appropriate documents to allocate risk and responsibility.



Robert Whetzel is chair of the Litigation Department at Richards, Layton & Finger, Delaware's largest law firm. With nearly 40 years of experience handling complex environmental matters, Bob advises clients on permitting, regulatory, enforcement, and transactional issues across a wide range of industries. His practice includes matters relating to site acquisition and development, site remediation, and air, water, solid, and hazardous waste permitting and enforcement. A founding member of the American College of Environmental Lawyers, Bob has been recognized in the Lawdragon 500 Leading Environmental & Energy Lawyers, in The Best Lawyers in America, and as a Delaware Today Top Lawyer, where he was the 2021 Top Vote Getter in Environmental Law.

Philip Micha is an associate at Richards, Layton & Finger, where his practice includes the analysis of environmental liability in various contexts for corporate, municipal, individual, and nonprofit clients. He also provides environmental due diligence review for commercial real estate and other transactions, such as for the purchase and sale of solar and wind farms. Working with the firm's Environmental, Real Estate, and Litigation Groups, Phil's diverse law practice is enriched by his master's degree in environmental management. He has been named a Delaware Today Top Lawyer in Environmental Law for the past two years.

Notes:

1-"PFAS" refers to per- and polyfluoroalkyl substances. Two of the more widely used and studied PFAS chemicals are perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonate ("PFOS").

2- A December 2021 report by the United States Geological Survey found PFAS to be widely distributed in untreated well water in Delaware. *See* Occurrence and Distribution of PFAS in Sampled Source Water of Public Drinking-Water Supplies in the Surficial Aquifer in Delaware, 2018; PFAS and Groundwater Age-Dating Results. (December 8, 2021), *available at* https://pubs.usgs.gov/of/2021/1109/ofr20211109.pdf.

3- In February 2022, the Centers for Disease Control and Prevention ("CDC") and the Agency for Toxic Substances and Disease Registry ("ATSDR") released a report regarding a PFAS exposure assessment of residents near the New Castle Air National Guard Base in New Castle County. The CDC assessment found that average blood levels of PFOS and PFOA in the study group were statistically higher than national levels. *See* New Castle County Delaware Per- and Polyfluoroalkyl Substances (PFAS) Exposure Assessment Report. (February 2022), *available at* https://www.atsdr.cdc.gov/pfas/docs/ATSDR-PFAS-EA-Site-C-NewCastleCounty-Report-508.pdf.

4- On October 18, 2021, EPA announced its PFAS Strategic Roadmap, which lays out the agency's regulatory strategy for addressing PFAS contamination nationwide. EPA's roadmap is centered on three strategies: increasing investment in research, implementing authority to restrict PFAS chemicals from being released into the environment, and accelerating cleanup of PFAS contamination. *See* https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024.

5- The Delaware Division of Public Health ("DPH"), which sets drinking water contaminant limits, has proposed limits of 14 parts per trillion for PFOS, and 21 parts per trillion for PFOA. DPH has issued a PFOA and PFOS Implementation Plan, which states that a proposed regulation is planned for to be issued in June 2022 and finalized in September or October 2022. *See* Delaware PFOA and PFOS MCL Implementation Plan, *available at* https://www.dhss.delaware.gov/dhss/dph/hsp/files/MCLimplementationPlanPFAS.pdf.

6- The Delaware Hazardous Substance Cleanup Act, or "HSCA," as it is known, is the Delaware state analog to the federal Comprehensive Environmental Response, Compensation, and Liability Act, or "CERCLA," also known as "Superfund." HSCA establishes the framework for remediation of contaminated sites, including Brownfields.

CFPB Targets Discrimination as Unfair Under UDAAP

Robert W. Cardwell, Jr., Esq.
Managing Principal
CAPCO I RISC Services

"The CFPB has chosen to bypass its delegated rulemaking authority, avoiding the notice and comment process, and crafted a new legal theory of prohibited discrimination by amending its examination manual."

On March 16, 2022, in a press release and blog post, the CFPB announced that it was updating its examination manual to target discrimination that may constitute an "unfair act or practice" under UDAAP outside of the traditional anti-discrimination protections of the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FH Act).

CFPB Director Rohit Chopra said, "When a person is denied access to a bank account because of their religion or race, this is unambiguously unfair. We will be expanding our anti-discrimination efforts to combat discriminatory practices across the board in consumer finance."

The legal standard for unfairness is an act or practice that (1) causes or is likely to cause substantial injury to consumers, (2) which injury is not reasonably avoidable by consumers, and (3) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

This action by the CFPB is significant for several reasons. First, it closes the gap in combating discrimination in connection with deposit operations and other areas that have traditionally been exempt from scrutiny. The expanded examination guidelines target discrimination as unfair in connection with all consumer financial products and services – not just credit but also servicing, collections, consumer reporting, payments, remittances, and deposits. However, there are no limiting factors such as prohibited bases of discrimination enunciated under the ECOA/ Regulation B and the FH Act. Also consider the force multiplier of the Dodd-Frank Act's (DFA) empowerment of state attorneys general and other relevant state regulators to combat unfair discrimination under UDAAP across the entire economy. When coupled with the absence of limiting principles, aside from the definition of unfair under UDAAP, this may result in inconsistent enforcement outcomes.

The updated UDAAP examination manual details how the CFPB will scrutinize advertising, pricing, risk assessments, automated underwriting, use of machine learning for decisioning, policies, procedures, monitoring, testing, training, and remedial action. Documentation of customer demographics and the impact of products, services, and fees provided to different demographic groups will also be examined.

Applying the legal concept of unfairness under UDAAP when examining supervised institutions for discrimination will likely prove very expansive because of the ease of establishing a prima facie case. Consider the required finding of substantial injury. The new exam manual states that "foregone monetary benefits or denial of access to products or services, like that which may result from discriminatory behavior, may cause substantial injury." As for the requirement that the injury not be reasonably avoidable by consumers, the CFPB explains "consumers typically cannot avoid the harms of discrimination." Finally, a finding of unfairness requires the act or practice to be injurious in its net effects, i.e., the injury must not be outweighed by countervailing benefits to consumers or competition. The amended exam manual does not provide any example of when an unfair act of discrimination might be outweighed by benefits to consumers or the competitive marketplace. This may be because of how difficult it is to conceive of any scenario wherein a discriminatory act or practice, whether intentional or de facto, would be counterbalanced by benefits to consumers or competition.

The Consumer Financial Protection Act (CFPA), Title X of the Dodd-Frank Act, authorizes the CFPB to "prescribe rules... identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service."

Historically, Congress has circumscribed discrimination, first in connection with housing finance in 1968 (FH Act) and then regarding all credit transactions in 1974 (ECOA). The CFPB has chosen to bypass its delegated rulemaking authority under the DFA, avoiding the notice and comment process, and crafted a new legal theory of prohibited discrimination by amending its examination manual. Whether or not this bold action will withstand legal challenge is yet to be determined.

For now, it behooves all supervised institutions to become well acquainted with the CFPB's new UDAAP exam procedures paying particular attention to the following elements the CFPB will investigate:

- Use of algorithms, models, machine learning and automated underwriting that may result in disparate treatment or disparate impact across differing customer demographics
- Collection and analysis of demographic information for marketing purposes
- Fair and responsible banking policies and procedures that address anti-discrimination in connection with the origination of both credit and non-credit products as well as fairness in servicing and collections
- Disclosures consistent with advertised features and benefits
- Discretionary decision-making processes including tracking of exceptions
- Self-identified disparities across different demographic groups and measures taken to prevent discrimination
- Antidiscrimination training
- Third-party vendor oversight

The Who, What, Where, Why, and How of Retirement Plan Audits

Christopher J. Ciminera, CPA, QKA
Principal –
Retirement Plan Audit Services

Belfint Lyons & Shuman, P.A.

"Operating a retirement plan accurately can be complex and all service providers should possess a high level of relevant training, expertise, and experience."

Your client just found out that an audit is required for their organization's retirement plan. Many questions may be running through their head such as Who? What? Where? Why? How? If your client or you have questions, this column will help answer those questions.

Who (must have an independent qualified plan audit of its retirement plan)?

Employee Retirement Income Security Act (ERISA) Section 103(a) requires that most plan sponsors of retirement plans file an annual report (Form 5500 – Annual Return/Report of Employee Benefit Plan) with the Department of Labor (DOL). The Form 5500 filing consists of the main Form 5500 and different schedules that may need to be attached. One schedule that a large retirement plan must file is a Schedule H (Financial Information). A Schedule H requires that the plan's financial statements be audited by an Independent Qualified Public Accountant (IQPA). Some small plans require an audit and some large health and welfare plans that are self-funded, fully-insured, or a combination thereof, do not require audited financial statements, but those topics are beyond the scope of this column.

Since large retirement plans must engage an IQPA, it is important to know how to determine whether you have a large plan. Generally, large plans are those plans that cover 100 or more participants at the beginning of the year. However, the 80-120 rule provides an exception that allows plans that cover between 80 and 120 participants at the beginning of year to file a Form 5500 consistent with the same size plan-filing as the prior year. For example, if an employer had filed as a small plan filer in 2020 and at the beginning of 2021 had 110 participants, then the plan can file as a small plan for that year, and every other subsequent year, until the plan covers 121 participants. This exception is beneficial to small plans because of the delay of an audit of the plan financials for a year or more.

Who (can audit plan financial statements)?

Hiring an IQPA to perform an audit in compliance with required standards is an important fiduciary responsibility. An IQPA must be certified by a state board of accountancy to practice public accounting and must be independent of the plan. There are many CPAs who fit this definition, but it is important to point out that the DOL's EBP audit quality studies have shown that not all IQPAs are the same.

The AICPA has created tools and resources to assist employers with the selection of an IQPA.

What (must be audited)?

The Form 5500 Schedule H must include audited financial statements. These financial statements include assets, liabilities, revenues, and expenses of the plan. An IQPA will perform auditing procedures that follow generally accepted accounting standards (GAAS) to gain reasonable assurance that the financial statements are stated in accordance with generally accepted accounting principles (GAAP).

ERISA provides plan sponsors the opportunity to instruct an auditor to not perform audit procedures on assets that are held at a qualified institution (bank or similar institution or by an insurance carrier that is regulated, supervised, and subject to periodic examination by a state or federal agency who acts as trustee or custodian). ERISA Section 103(a)(3)(c) permits the auditor to rely on a valid certification by the qualified institution and only to compare the certified assets and earnings values to the amounts reported on the financial statements. The IQPA does perform procedures to gain comfort that the certification is valid and that the values certified are presented accurately in accordance with GAAP in the plan financial statements.

Where (is the audit filed)?

The IQPA audit report is attached to the Form 5500 right after the Schedule H. The Form 5500 is filed directly with the DOL. The DOL has created the ERISA Filing Acceptance System II (EFAST2), which receives the full Form 5500 – Annual Returns/Reports. This information is public and displayed on the EFAST2 website.

Why (must an audit be performed)?

ERISA requires that large plan filers engage an IQPA to audit the financial information of the plan. An audit by an IQPA provides assurance that the financial information that the plan reports is accurately reported to the DOL and plan participants in accordance with GAAP. The IQPA will review plan information, internal controls, processes, and activity and can identify errors, which may be corrected to ensure the plan maintains a qualified status and is operating in accordance with plan and other legislative provisions.

How (will the audit be performed)?

An IQPA will perform an audit of the plan's financial statements in accordance with GAAS to gain assurance that the plan's financial statements are presented in accordance with GAAP or another basis of accounting. As part of GAAS, the IQPA will perform risk assessment procedures and identify areas of risk within the financial statements. The IQPA will focus their attention on areas which may be more prone to error and misstatement and are inherently risky. Because an IQPA will not look at 100% of the transactions that occur in a retirement plan during the year (i.e., gain absolute assurance), an IQPA can only gain reasonable assurance that the financials are accurately stated. Based on the risk assessment process, the IQPA will select relevant transactions on a sample basis to conclude the account being tested does not appear to be materially misstated. As applicable, based on the risk assessment and the plan provisions, testing will be performed over contributions, benefit payments, participant loans, administrative expenses, and for investments not covered by a certification, investment and investment earning values.

Operating a retirement plan accurately can be complex and all service providers should possess a high level of relevant training, expertise, and experience. Now that you know the **Who? What? Where? Why? How?**, I hope you can provide some insight for your client if questions arise.

Why Retirement Plan Sponsors Should Care About Employee Student Loan Debt

Louis D. Memmolo, AIF, GBA, CHRS
Weiner Benefits Group, LLC

"there are compelling reasons plan sponsors should care about the negative effects of student loan debt on their employees and consider taking action."

According to the College Board, the cost of a four-year education increased more than 200% (after inflation) from 1988 to 2018. This has placed a tremendous burden on graduates, with national student loan debt now topping a staggering $1.6 trillion. Surprisingly, while grads ages 25 to 34 are most likely to carry educational loans, the greatest amount of debt is owed by 35- to 49-year-olds, making this a problem not limited to those just entering the workforce.

Whether it's through providing holistic financial wellness programming that addresses this issue or offering a more formal, structured student debt repayment benefit, there are compelling reasons plan sponsors should care about the negative effects of student loan debt on their employees and consider taking action.

Impact on Employees

High loan balances can delay the achievement of important financial milestones such as home ownership (23%), emergency savings (34%), and retirement savings (29%), according to a 2019 Bankrate survey. And these delays can have serious downstream effects on other areas of financial wellness. When it comes to planning for retirement, student loan payments can keep employees on the sidelines — missing out on valuable early years of compounding returns.

Student loans are also a significant contributor to worker stress, which can lead to mental and physical health issues as well as absenteeism. According to Kiplinger's 2020 Retirement Survey Sponsored by Personal Capital, respondents ages 40 to 74 reported several negative health effects due to financial stress, including increased anxiety (35.9%), sleep loss (27.4%), weight gain or loss (21.6%), depressive thoughts (20.1%) and chronic illness (5.5%).

Mutual Benefits

Helping with student loan debt can help address many such issues. But the benefits aren't limited to employees — they can also extend to the organizations that employ them. Offering a student loan repayment benefit may help afford employers an opportunity to stand out, attract top talent and boost their bottom line.

Set yourself apart. As this is a relatively uncommon benefit, student loan assistance can help employers differentiate themselves in a tough labor market. And it could particularly assist companies struggling to hire in sectors harder hit during the pandemic such as health care, leisure, hospitality, and travel.

Increase productivity. It's hard to stay engaged and focused on the job when you're having a tough time managing student debt. So, organizations that can help their employees successfully navigate this stressful situation may enjoy improved worker productivity and overall job satisfaction — and the myriad benefits that come with them.

Protect your bottom line. Excessive student loan obligations can siphon off would-be retirement plan contributions and hinder employees' retirement readiness. And that could lead to delayed retirement, which can increase health care costs for sponsors and result in higher turnover due to "promotion blockage."

Attract the right candidates. Student loan repayment benefits offer a potentially outsized advantage for specific subsets of employers. For example, those with workforces with a large percentage of recent grads, older millennials, Gen Xers and employees with post-secondary education (e.g., tech, financial services companies) may want to prioritize offering a student loan benefit.

Why Act Now?

While the legislative fate of SECURE 2.0 and RISE could broaden the range of options for sponsors, employers should consider focusing on this issue in the near term, nonetheless. Student loans are about to become a bigger problem for employees as the moratorium on student debt repayment is set to expire on August 31, 2022.

For sources, see our Fiduciary Hot Topics Newsletter from which this content is reprinted. We continue to monitor the changing regulatory and legislative landscape. Please contact me to for further information or to receive our newsletters.

Louis D. Memmolo is an Accredited Investment Fiduciary and Investment Advisor Representative. Securities and advisory services offered through Royal Alliance Associates Inc., Member FINRA & SIPC. Insurance services offered through Weiner Benefits Group, LLC, which is not affiliated with Royal Alliance Associates Inc. Weiner Benefits Group, 2961 Centerville Rd, Ste. 300, Wilmington, DE 19808. For a comprehensive benchmarking fee and service analysis please call 302-658-0218 or email lmemmolo@royalaa.com.

DBA Calendar of Events

Business Writing Workshop – May 25 - On-Line

Corporate communicators value this highly interactive workshop designed to resolve two of the biggest written communication challenges: writing more effective documents while following a more efficient process. Practical, lively exercises help increase skills in Paragraph Performance from introductions to conclusions, Sentence Sense, Word Wisdom, and Format Force. A review of practical grammar and punctuation rules is included. Documents and messages will look, sound, and feel more professional!

Women Connect Retreat – May 26

Kickoff the Memorial Day weekend at the Hyatt Place in Dewey Beach and enjoy a refreshing mind and body morning, inspirational keynote, sit down lunch, and early happy hour! The Women Connect Network serves as a catalyst to engage, empower and connect women in the Financial Services Industry. Made possible by these prestigious sponsors: Wilmington Trust; M&T Bank; Bank of America; The Bryn Mawr Trust Company of Delaware; Delaware Community Foundation; Pinion; County Bank; U.S. Trust Company of Delaware; and, Wilmington University!

FDIC Directors' College
September 23

The FDIC Directors' College is an interactive program that provides ongoing education on current topics of interest to bank directors, senior officers, corporate secretaries, and board advisors. The course is designed to help directors and trustees, both new and experienced, stay abreast of the ever-changing regulatory environment.

2022
FDIC Directors' College
September 23

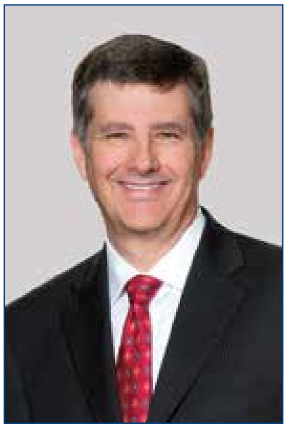
2022 Delaware Trust Conference
October 18 & 19

2022 Delaware Trust Conference
October 18 & 19

Wealth Management Professionals save the date for the 17th Annual Delaware Trust Conference. This premiere event is also the most convenient conference experience! Attend in person at the Chase Center on the Riverfront, or via live stream on your computer, tablet, or phone. And all sessions will also be available for on-demand viewing after the conference! Sponsorships and exhibitor space is available!

Lending Law Update

Legal Opinions: Laws of Different States and How They Affect Costs



Brent C. Shaffer
Young Conaway Stargatt & Taylor, LLP

"Courts generally allow parties to choose which state's law applies to the loan documents."

Counsel opinions have long been required by banks to provide comfort and smoke out problems in connection with loans. This basic primer on how laws of different states affect opinions, and how lawyers think about them, may be helpful to bankers in anticipating transaction costs.

A law firm (and its legal malpractice insurance carrier) is a possible source of recovery for the bank if the loan transaction goes bad and the opinion is not correct. Accordingly, lawyers charge a premium for the legal exposure they undertake in issuing opinions. Costs further increase if multiple opinions are needed due to applicable laws. Lawyers are not competent to give, and do not give, opinions as to the effect of laws of states in which they are not admitted to practice, subject to one major exception. To the chagrin of Delaware lawyers, lawyers across the country routinely provide opinions as to Delaware corporations and limited liability companies. This practice is due to Delaware being the predominant choice for forming borrowers; therefore, non-Delaware lawyers have needed to become familiar with Delaware General Corporation Law and the Delaware Limited Liability Company Act. There is some debate in the legal community as to whether the non-Delaware lawyer provides (or should provide) an opinion on just compliance with the Delaware state statutes governing these entities; or in addition, Delaware case law interpreting the statutes; or furthermore, Delaware contract law in general (especially needed to interpret provisions in a limited liability company's operating agreement).

Consider the example in which a borrower formed in Maryland obtains a loan secured by Delaware real estate and the bank's loan agreement says it is governed by New York law. Three separate lawyers may be needed to cover all opinions typically required by the bank. The borrower's existence, power and authority to enter into the loan, authorization of the loan, and execution of the loan documents all will be governed by the law of the state in which it is formed—Maryland. Only a Maryland lawyer should give these opinions. Courts generally allow parties to choose which state's law applies to the loan documents. Here, the bank's policy is that New York law should apply, requiring a New York lawyer to provide the opinion that the loan documents are enforceable. A wrinkle on this is that courts require the law of the state in which the real estate is located to govern the creation and enforcement of the mortgage lien. Thus, a Delaware lawyer must give the opinion on the enforceability of the Delaware mortgage.

In conclusion, also consider that even more opinions may be needed if properties from multiple states secure the loan; if loan entity guarantors are formed in multiple states; or if the size of the loan triggers a bank policy of requiring additional specialty opinions, such as zoning, "bankruptcy remote" and "authority to file bankruptcy" opinions.

YOUNG
CONAWAY

Young Conaway's commercial real estate and banking attorneys can handle all aspects of your lending transactions. If you need assistance with real estate, asset-based, or other business credit facilities -- or in sorting out complex intercreditor, title and land use issues affecting those facilities -- Young Conaway's team will put you at ease.

Commercial Real Estate, Banking and Land Use

Eugene A. DiPrinzio
Daniel P. Johnson
Brent C. Shaffer
John E. Tracey
John C. Kuffel
Vincent C. Thomas

YoungConaway.com
Rodney Square | 1000 North King Street | Wilmington, DE 19801