The Aging Workforce

As Employees Gray, Age Discrimination Suits Rise

The Law of Diversity

Law Firms Commit to Recruit, Retain Diverse Workers

Damage Control

Limiting Exposure to Workplace Harassment Claims
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This year’s Spring USLAW NETWORK conference brings us to Charleston, South Carolina, a city steeped in tradition, yet full of promise and future potential. As we gather in this historic city, all of us at USLAW have had the opportunity to reflect on the organization’s past and prepare for its future.

Amidst the backdrop of unprecedented economic changes, USLAW NETWORK and our members are seeing firsthand the impact of a contracting national — and global — economy. We are also witnessing a period of great political change — with new legislation and federal programs on the horizon.

As an organization, we have committed ourselves to helping our member firms’ clients weather the economic storm and respond and adapt to changing federal and state regulations.

And this, the third issue of USLAW Magazine, is just one of the tools we are using to help keep our clients ahead of the curve. In this issue, we cover:

- Recent amendments to the Americans with Disabilities Act, which dramatically expand the scope of individuals covered by the statute, potentially increasing exposure for commercial clients; and
- Changes to the Consumer Product Safety Improvement Act, which modify that statutory scheme and alter the equilibrium between manufacturers, retailers, and importers.

Be sure and take a look at the information on page 16 about the new USLAW Employment and Labor Law Road Show. In times of economic uncertainty, workplace-based lawsuits and challenges can rise. The road show is just one of the ways we’re helping employers protect themselves and mitigate risk during a period of rising unemployment, increased reductions in force or layoffs, and heightened workplace stress.

Sincerely,

Renée F. McElhaney
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**May 1 - 3, 2009**
- The 2009 USLAW Collection II (Women’s Weekend)
- Four Seasons Resort and Club
- Dallas, Texas

**September 24 - 26, 2009**
- Fall 2009 USLAW NETWORK Client Conference
- Westin St. Francis
- San Francisco, California

Please contact Roger Yaffe, USLAW Executive Director, at roger@uslaw.org for more information.

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Managing multiple employment centers, competing state and federal statutes, and a diverse employee base?

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Employment counsel and human resource executives face an alphabet soup of complexities today. From RIFS and WARN to ADA, FMLA, OWBPA and beyond, competing federal statutes as well as state and local laws have made employment law a legal minefield for employers.

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For more information, visit us at www.uslaw.org or contact Roger Yaffe at roger@uslaw.org.
The population of the United States is aging, resulting in increasing numbers of individuals in the labor market who are over 50. Americans are not only aging, they are working longer. According to a 2008 Gallup Poll, 45% of Americans reported they expect to retire later than originally planned due to financial need.

Simultaneously, the proportion of younger workers entering the labor force is declining. In developing short- and long-term workforce strategies, employers must be aware of their rights, responsibilities and potential liabilities with respect to an aging labor demographic — especially if plans to reorganize or downsize loom on the horizon — as well as implementing effective hiring and retention strategies to keep experienced and reliable workers.

According to the Boston College Center on Aging and Work, people age 50 and over will constitute 41% of the population by 2010. By 2030, 19.7% of the population (71.5 million Americans) will be 65 or older, compared with 12.4% in 2000.

Not surprisingly, labor force participation for older workers has increased steadily in recent years. The Bureau of Labor Statistics reports that between 1977 and 2007, employment of workers 65 and over increased 101%, compared to an increase of 59% for total employment (age 16 and over). By 2016, the number of workers age 55-64 is expected to climb 36.5%. Workers age 65 and over are expected to account for 6.1% of the labor force in 2016, compared to 3.6% of the 2006 labor force. All workers 55 and older are expected to account for over 22% of the total labor force by 2016. Simultaneously, the number of workers age 16-24 is projected to decline 6.9%.

The number of age discrimination claims has risen in recent years, in part because of a graying workforce. The number of these charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) in 2007 was 21% higher than in 1997, representing 23.2% of all charges filed with the EEOC in 2007.

A rocky economy may exacerbate employer risk. Spikes in age discrimination charges tend to occur during economic downturns. For example, the number of age discrimination charges filed in 2002 was 14.5% higher than those filed in the previous year. In 2007, the number of age discrimination charges filed was 15.4% higher than 2006.

While companies know all too well that it is unlawful to discriminate on the basis of age, less workforce education emphasis is generally placed on prevention in this area, as compared to other areas of legal risk.

Age discrimination lawsuits, and potential liabilities, are expensive. In 2008, a jury in Ohio returned a $47 million verdict in favor of an ex-employee who was allegedly terminated for refusing to fire three older workers out of concerns about age and disability discrimination. Punitive damages accounted for $43.1 million of the verdict.

In another lawsuit, a jury in New Jersey returned a verdict awarding $10 million in punitive damages in an age discrimination
case in which a former manager, who had also been terminated by the company, testified that his former boss had a practice of firing older workers and replacing them with younger ones.

Statements by decision-makers related to age discrimination can be incriminating. Litigation cases that have upheld age discrimination claims reveal workplace comments such as: “you’re getting too old for that type of work;” “I usually don’t hire older guys because younger guys are cheaper labor;” “you look old enough to be called a human antique;” “in your day and age….” “I bet you have something hurting on your body at all times.”

To prevent costly and time-consuming claims and potential litigation — particularly in today’s economic climate — companies must increase training and implement preventive measures aimed at minimizing exposure to age discrimination claims.

**LAYOFFS AND DISPARATE IMPACT CLAIMS**

In addition to protecting persons age 40 and older from intentional disparate treatment, the Age Discrimination in Employment Act (ADEA) provides a cause of action for persons within the protected age group who are adversely affected by a policy or practice that disparately impacts older workers. Layoffs and reductions in force tend to disproportionately affect older workers. Where it can be shown that a layoff has a disparate impact on the protected age group, companies bear the burden of proving that layoff determinations were based upon a reasonable factor other than age.

The sluggish economy and resulting projected increase in layoffs will contribute to increases in age discrimination claims. Therefore, it is essential that companies clearly identify the reasons for a layoff and carefully plan and document the factors used in making these decisions. The most objective criteria possible should be identified and utilized. Any resulting disparate impact upon any protected classification must be scrutinized and re-evaluated.

Companies executing reductions in force (RIF) through separation and severance agreements are required by the ADEA to provide specific information to workers in the protected age group. The law requires that employees who are asked to execute a waiver or release of age discrimination claims must be notified that they have a right to consult legal counsel. These employees have a prescribed period to consider an agreement before executing it, and have another seven days after executing an agreement to revoke it. In addition, employees asked to waive age discrimination claims in a layoff must also be provided information about who was, and who was not, selected for the reduction in force, including information regarding job titles and ages. This is a broad overview of the requirements as legal mandates also differ by company size and locations. It is best, before implementing a RIF, that the company seek legal counsel to ensure minimal exposure to layoff risk.

**STRATEGIES TO MAXIMIZE YOUR WORKFORCE PRODUCTION**

A February 2008 Report of the Taskforce on the Aging of the American Workforce posits that as the population ages and more people retire, many industries could face worker and skill shortages. During a time of mass layoffs and increasing unemployment, the concept of having a shortage of labor is difficult to comprehend in many industries. Yet, some industries are more susceptible than others to experiencing a gap in available and qualified workers and/or a loss of experienced employees to competitors. Whether or not individual companies will experience a labor shortage in the long-term, effective hiring and retention strategies will go a long way in attracting and keeping the best and most reliable workers of all ages and maximizing a company’s investment in its people.

At a minimum, companies should incorporate intergenerational training and increase efforts to prevent ageist comments and discriminatory acts. Not only will training help a company avoid age discrimination claims, but it will help create a corporate culture that fosters cooperation, knowledge transfer and positive morale. In turn, this will enable the company to retain its most valuable employees of any age group.

Objective and critical performance appraisals are always valuable tools for acknowledging top performers, instilling a greater sense of loyalty and value, and reducing the possibility of unlawful biases that could contribute to employment decisions. When the workforce must acquire new skills — whether in implementing new technology or work processes — training and education programs should be provided.

Some employers perceive older workers as more costly, a dilemma only exacerbated by health insurance premiums that increase in correlation with age. Other employers proactively invest in strategies to capitalize on the knowledge, experience, skills and customer relationships of experienced workers and to reduce turnover costs, including the risk of losing experienced workers to competitors. A number of companies, particularly in the growing service industries, recruit older workers, and leverage their experience to develop programs to attract younger people to the industry. For example, CVS instituted a program that uses experienced pharmacists over age 50 to mentor inner-city high school students during summer internships. The company has increased the number of workers in its ranks who are over age 50 while introducing younger students within their communities to pharmacy as a career.

Other options to retain experienced workers include:

- Providing alternatives to full-time employment to capitalize on the knowledge-base of employees who may wish to reduce hours;
- Scaling benefits to tenure;
- Permitting contract or consulting work upon retirement;
- Implementing phased-retirement programs;
- Increasing part-time positions to accommodate workers who may want more time off and work flexible hours.

In an aging workforce, successful companies will implement hiring and retention strategies to recognize workers of all ages. Ideally, a company’s corporate culture should foster knowledge sharing, encourage loyalty and promote professional development. It will effectively encourage older workers to mentor younger employees, and thereby attract and retain the best workers — young and old — available in the workforce.

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In 2005, Wal-Mart sent ripples through the law firm community when it told its top 100 law firms that merely paying lip service to diversity was no longer enough. With its new commitment to diversity, Wal-Mart told its law firms that each firm had to have at least one person of color and one woman among the top five relationship attorneys handling its business on behalf of their firm.

Following that announcement, Wal-Mart stood firm on its pledge, firing two law firms for a lack of diversity. It was the shot heard ‘round the legal profession. Suddenly, diversity policies were no longer luxuries. They were must-haves.

Today, Wal-Mart is one of 100 major companies that have signed on to a pledge known as the Call to Action. The Call to Action commits companies to promising to end or limiting relationships with law firms that fail to demonstrate a “meaningful interest in being diverse.”

Similarly, other companies have begun demanding the same from their law firms. Del Monte, Pitney Bowes, Sara Lee, Visa International, and Cox Communications have all begun requiring firms to demonstrate not only a greater commitment to diversity, but results as well — greater numbers of women and minority lawyers in the upper ranks.

And it isn’t just the major players that care about the composition of their law firms’ workforce. Even smaller employers are asking more specific questions of their counsel when it comes to diversity issues.

But diversity isn’t just about appeasing major companies and clients. Diversity is good for retention, recruiting, and reflecting the society in which law firms operate. As the racial, ethnic, and cultural makeup of companies shifts, along with their customer bases, commercial entities are looking to their law firms to understand how that changing demographic influences perspectives. A mix of talent and backgrounds on a law firm team enables that firm to better understand its clients’ interests and issues.
A LOOK AT THE NUMBERS
Even today, the numbers are startling. Women graduate from law school in nearly the same numbers as men. In 2006, women earned 48.1% of all J.D.s awarded, according to statistics compiled by the American Bar Association (ABA). For many years, there has been relative parity in the number of women and men attending law school.

In 2005 statistics compiled by the National Association for Law Placement (NALP), women represented 44.3% of all law firm associates and just 17.9% of law firm partners.

For minorities, the statistics are no less striking. In a 2004 progress report prepared by the ABA’s Commission on Racial and Ethnic Diversity in the Profession, the ABA reported that minority representation in the legal profession remained significantly lower than in most other professions, with total minority representation among lawyers hovering just under 10%, according to 2000 Census data. By contrast, that same Census data found that nearly 21% of all accountants and nearly 25% of all physicians were members of a minority group.

Of still greater concern, the ABA found that minority entry into the legal profession had slowed considerably since the mid 1980s and 1990s, and total minority representation among law students had dropped between 2001-2002 and 2003-2004, falling from 20.6% to 20.3%.

ON COURSE FOR IMPROVEMENT
As the ABA tackles diversity in the profession at the top, many USLAW NETWORK member law firms have individually stepped up to improve minority law student and lawyer recruiting, retention, and professional satisfaction.

USLAW NETWORK Colorado member Rothgerber Johnson & Lyons established the RJ&L Michael D. Nosler Scholarship in 2006. The scholarship provides the opportunity for a talented diverse second-year law student at either the University of Denver Sturm College of Law or the University of Colorado School of Law to receive a $10,000 scholarship towards his or her third-year law school tuition upon completion of a paid clerkship with RJ&L during the second trimester of the recipient’s second year of law school. Working with Colorado State University, the firm also developed and underwrites a Diversity in Law Scholarship, which helps minority students pursue a legal education.

The firm was also one of the founding members of the Colorado Pledge of Diversity, a consortium of Colorado law firms that have committed to the active recruitment and retention of minority law students, first as summer associates and ultimately as full time attorneys.

Recognizing that recruitment is only one part of the efforts to promote a diverse workforce, RJ&L also undertakes focused efforts to ensure that all attorneys are provided full access to opportunities that will enhance and foster their professional growth. They take their commitment to diversity very seriously by actively and visibly supporting a variety of programs that promote the education and career development of minorities in the field of law — a practice they will continue.

The firm’s commitment to diversity has a high profile. Many of its attorneys are actively involved in organizations geared towards helping women and minorities succeed...
One of the most sweeping expansions of an existing law was quietly signed into law in September 2008. The ADA Amendments Act of 2008 (ADAAA or Act) was enacted by President George W. Bush on September 25, 2008, reversing numerous Supreme Court decisions and significantly expanding the number of individuals — or potential litigants — now protected by the Americans with Disabilities Act (ADA).

The bill sailed through Congress, where it was passed by overwhelming margins. Despite the potentially negative impact on employers, the Act had the support of many in the business community, including the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Restaurant Association and the Society for Human Resource Management.

Now that the ADAAA is law, employers of all shapes and sizes are naturally worried about its scope and impact — and justifiably so. The new law guts a common employer defense, and many experts agree: the changes are going to have real and sustained impacts.

With its scope and focus change, the ADAAA, which was effective January 1, 2009, will reshape how workplace disability suits are litigated.

Rejecting Supreme Court cases that narrowly construed the definition of “disability” under the ADA, the critical inquiry under the ADAAA is not now whether an individual has a disability. Today, the focus is whether covered entities have satisfied their obligations to reasonably accommodate disabled applicants and employees.

Additionally, the Act effectively broadens the definition of the term “disability” and requires less of a burden of proof by the employee for establishing it, which will likely increase disability-related claims. And with the increased emphasis on how an employer responds to an alleged disability discrimination claim rather than if an employee actual qualifies as “disabled,” it effectively makes it exceedingly difficult for an employer to defend an ADA suit by arguing the plaintiff is not disabled.

Several high profile cases litigated through the lower courts and ending on the docket of the U.S. Supreme Court moved Congress to amend the ADA.

Two often cited cases influencing this decision are: Sutton v. United Airlines, Inc. (1999) and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams (2002). Both decisions were decidedly pro-employer.

In Sutton, two sisters with severely myopic vision that was corrected by wearing glasses or contact lenses applied for global pilot positions with United Airlines. They were not hired because United’s policies required pilots to have uncorrected vision of 20/100. Without glasses or contacts, their vision was worse.
They filed suit under ADA, alleging they were unjustly eliminated as candidates because they were disabled or “regarded as” disabled by United. The Supreme Court concluded the sisters were not disabled and held that employers and courts should look at conditions in their corrected states when making hiring decisions.

The Supreme Court also ruled in favor of United on the sisters’ “regarded as” disabled claim. Although the sisters contended that United’s uncorrected vision requirement substantially limited them in the “major life activity of working,” the Court found that being disqualified from the job of global pilot did not constitute being “substantially limited in working” as there were several other pilot jobs with United for which the sisters would qualify.

In Toyota Motors v. Williams an employee developed carpal tunnel syndrome while working the assembly line. The company reassigned the employee; however, she was eventually terminated due to poor attendance. She filed suit based on the contention that her disability substantially limited her in the major life activity of performing manual tasks.

While the Court acknowledged that carpal tunnel is a physical impairment, in interpreting the law, it focused on the extent to which the employee was limited in major life activities. The court held that the employee had to prove she was “substantially restricted” in performing ordinary day-to-day tasks, not just those related to her manual job duties. On this basis, it ruled that she did not qualify as “disabled” under the ADA.

WHO’S PROTECTED NOW UNDER ADA?

The result of Sutton, Williams, and other cases called into question the ability of the ADA to protect those for whom it was written. The result was Congress’ intervention — and a subsequent redefinition of the rules of engagement under the ADA.

The ADAAA redefines disability coverage much more broadly. It expressly overturns the Williams ruling by instructing courts to interpret “substantially limits major life activities” consistent with the broad remedial purposes of the Act. It expands the class of impairments qualifying as a disability by defining “major life activities” as including, but not limited to:

- Lifting;
- Bending;
- Speaking;
- Breathing;
- Learning;
- Reading;
- Concentrating;
- Thinking;
- Communicating; and
- Working.

In effect since January 1, 2009, employers should be well underway in adapting their processes, procedures, and reactions to claims.

Under the new law, even people who have successfully managed their impairments will now be covered by the ADA. In Sutton, the sisters had managed their myopia with corrective lenses. Under the revised ADA, they would now be protected.

The ADAAA also includes episodic impairments and those in remission, if, when active, the impairment substantially limits a major life activity — a position rejected by the Supreme Court in Williams — meaning the ADA now covers individuals with:
- Diabetes;
- Epilepsy;
- Depression;
- Bipolar disorder; and
- Cancer.

Under the broader terms, the new ADAAA may extend to still more conditions not previously covered under the ADA.

The ADAAA also eliminates the mitigating measures defense, which required the courts take into account medically assistive tools or medicines when determining if an individual is “disabled.”

Structured to address and overturn the Sutton ruling, this change prohibits considering corrective medically prescribed measures in determining disability. In turn, the number of employees, including those who have successfully managed their impairments, are now under the protection of the ADA.

The ADAAA loosened the restrictions on interpreting what it means to be “regarded as having” an impairment under the ADA. Under the new law, employees need only show they were discriminated against because of an actual or perceived impairment, excluding those considered “transitory and minor,” which are “disabilities” lasting six months or less.

IMPRINTS ABOUND

So, what can employers expect to see in 2009 and beyond?

Some states have existing laws on the books that are substantially more expansive than even the amended ADA. In those states — specifically California, New Jersey, and New York — employers must comply with tougher ADA regulations at both the state and local levels and won’t likely see much of an impact as a result of the ADAAA.

With the broader class of individuals now protected under Federal law, employers must adapt to a broader definition of disability and an inverse narrowing of defenses and models for responding to claims.

Changes abound for employers in most of the country. In effect since January 1, 2009, employers should be well underway in adapting their processes, procedures, and reactions to claims to mitigate the increased risk they face as a result of the ADAAA.

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Signed into law by President Bush on September 25, 2008, the ADA Amendments Act ("ADAAA") becomes effective January 1, 2009. With the expanded scope and reach of federal disability law under the ADAAA, there are a number of prudent steps employers can take now to mitigate their risk, and protect themselves and their company from lawsuits stemming from this recent legislative change.

In light of the legal changes, employers can reasonably expect:

1. Increased numbers of employees for whom reasonable accommodation must be offered;
2. Increased numbers of ADA-based lawsuits;
3. Increased difficulty obtaining the summary dismissal of claims by marginally-impaired employees.

While some experts believe the ADAAA will not cause a general increase in litigation, it is likely there will be some rise in the number of cases filed because of the relative ease in stating a claim. As is often the case with new legislation, workers may also seek to test the new statutory provisions. Potentially, there may be more trials in ADA cases, as many cases which were previously dismissed due to the narrow interpretation of the term “disabled” may now find an easier path to a jury.

As a net positive for employers, the ADAAA does not radically alter the duty to accommodate. It only modifies the definition of disabled, meaning most employers will not have to make radical and costly changes to ensure compliance. There are however, some practical steps employers can take to reflect the statutory changes and minimize their risk of a lawsuit, including:

1. **Ensure all documents are up to date.** Review all internal policies and procedures to make sure any definitions of disability track the new law. Employee handbook or employment manual changes made should be republished and clearly communicated to all employees. Because the changes at issue are mostly definitional, it is unlikely that employers will need to completely rewrite or make major policy revisions.

2. **Job descriptions matter more.** Audit existing job descriptions for accuracy, paying particular attention to the definition of essential functions for each position. Because the focus of court review in ADA litigation will now hinge on the issue of reasonable accommodation, job descriptions will play an increased role in defending employment decisions.

3. **Educate on definitional changes.** Retrain all supervisory, management and human resource personnel on the duty to accommodate, and particularly, the duty to engage in an interactive process with all employees who claim disability. Individual decision makers must understand the comparative case under which many additional people who were not previously covered may now be considered “disabled” under the ADAAA.

4. **Create protocols and procedures before they are needed.** If concerns about a wave of accommodation requests in response to the ADA changes exist, consider creating both a protocol and a task force to deal with the requests. Protocols can place both the duty to engage in the interactive process and the decision to offer accommodation in the hands of specially trained employees, and thereby limit the likelihood that decisions will be made that don’t reflect the requirements of the new law.

5. **Train to avoid.** Train supervisors, managers, human resources personnel and anyone else who makes decisions about accommodation about the ADAAA. Employees in these positions should understand the implications of the change in the definition of disability, and they should be highly aware of the “regarded as disabled” source of liability, so they avoid behaviors that might fall into this category. Working with outside counsel to make sure training is completely accurate in light of the subtleties of the ADAAA is crucial.

6. **Be prepared.** Expect more lawsuits to be filed and place a renewed emphasis on documentation. The ADAAA makes it easier for employees to bring claims of disability discrimination. The defense of these suits will be more difficult for employers; as the new expanded definition of term disability will limit some frequently used defenses available to employers. Creating a clear and straightforward paper trail regarding any accommodation decision, and bona fide nondiscriminatory reasons for any adverse employment decision will be more essential than ever. Human resources, managers and supervisors must keep precise records and document all employment decisions thoroughly.

7. **Engage all relevant departments.** Discussions between internal legal departments and outside counsel about potential coverage issues will be helpful when facing requests for accommodation by marginally-disabled employees whose requests would have been rejected under the prior version of the ADA.

Given that the ADAAA requires covered employers to accommodate a broader spectrum of disabled employees and will likely result in an increased number of disability-based discrimination claims, employers should take practical steps now to mitigate these risks and limit their exposure. Wise and thoughtful policies and procedures today can prevent an onslaught of lawsuits tomorrow.
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Workers’ compensation is a statutory system originally designed to efficiently provide comprehensive benefits to injured workers without litigation. It is a “no fault” system of compromise recognized as beneficial for both workers and employers. While the worker may be at fault for some or all of their injuries, they are awarded damages without regard to their own negligence. Through purchasing worker’s compensation insurance, the employer is protected in that they cannot be sued by the employee and the onus of paying statutory obligations and benefits is shifted to the insurance carrier. This creates a duty of good faith and fair dealing.

The system as designed raises several questions: To whom does the workers’ compensation carrier owe the duty of good faith and fair dealing? Is the duty owed primarily to the employer, who pays the premium, or the employee, the beneficiary of the policy? This dilemma creates a real problem for carriers because the interests of employers and employees are diametrically opposed in the claims context. Employers are primarily concerned with the “bottom line;” and want carriers to take a hard line approach — to deny questionable claims; to pay benefits only when ordered; and make employees prove their claims. Employees want carriers to accept and approve their benefits without question or “red tape.”

Most state workers’ compensation systems have a mechanism to address alleged unfair claims practices of compensation carriers or self-insured employers. Under most state systems, issues of unfair claims practices are the exclusive jurisdiction of workers’ compensation departments. These states impose a wide range of penalties or fines for alleged unfair practices.

In these states, courts stop short of finding that injured workers owe a duty of good faith and fair dealing to carriers. The trend is for courts to impose a duty of good faith and fair dealing solely on the compensation carrier. The “price of poker” has gone up for compensation carriers, and they often pay out substantial sums in either settlements or verdicts. This legal fallacy puts carriers in a precarious disadvantage by allowing employees to sue for bad faith.

THE QUANDARY OF GOOD FAITH AND FAIR DEALING

In the Gruenberg v. Aetna Ins. Co. case, the California Supreme Court stated that the law implies a covenant of good faith and fair dealing in every contract, including insurance policies. The duty requires that neither party do anything to injure the right of the other to receive the benefits of the agreement.

The Gruenberg decision set a precedent that has been adopted by many states. As part of the implied duty of good faith and fair dealing, most states require that an insurer provide “equal consideration” to the interests of its insured as to itself. Other states have held that an insurer owes duties which are fiduciary in nature.

In the workers’ compensation insurance context, the insured under the policy is clearly the employer. The employer pays the premium. Typically, the employer usually must pay a portion of the workers’ compensation benefits. The duty of good faith and fair dealing is owed to the employer.

Courts have instead turned the tables, making the compensation carrier the dual insurer of both the employer and the employee. Under those circumstances, depending upon whose interests are taken into consideration, the compensation carrier is always exposed to bad faith claims from either the employer or the employee.
Courts allowing direct bad faith suits against compensation carriers ignore two salient points. The injured worker was not a party to the insurance contract; and no consideration was given for the benefit of the bargain. The dangerous precedent flies in the face of settled case law and public policy.

...COURTS HAVE INSTEAD TURNED THE TABLES, MAKING THE COMPENSATION CARRIER THE DUAL INSURER...

THE CAUSES OF ACTION
Courts supplant the “bad faith” jurisdiction of administrative boards in several unique ways. Many states’ decisions simply find that the injured worker is the intended beneficiary of the workers’ compensation insurance policy and, as such, the carrier owes the worker a duty of good faith and fair dealing. Any violation of this duty is a tort which must be addressed in court.

In many court decisions an insurer’s tort liability for bad faith is deemed separate from its liability for a workers’ compensation claim. In those cases, courts hold that the injuries were committed by the carrier independent of the on-the-job injury; therefore, the acts by the carrier are no longer within the exclusive jurisdiction of the workers’ compensation commission.

Other decisions shy away from an analysis of the duty of good faith and fair dealing and focus upon causes of action dealing with intentional torts, such as intentional infliction of emotional distress allegedly committed by industrial carriers, making the claim subject to court jurisdiction. For example, Demag v. American Ins. Companies, was a case in which a widow brought a three count complaint against her husband’s employer and the employer’s workers’ compensation insurance carrier. The first count was for declaratory relief making the claim subject to court jurisdiction. In Travelers Ins. Co. v. Savio, the Court ruled that Colorado’s workers’ compensation act did not preclude an employee from bringing a common law tort action against a worker’s compensation insurance carrier for bad faith. The Colorado Statute § 8-44-105 required that every workers’ compensation insurance contract “contain a clause to the effect that the insurance carrier shall be directly and primarily liable to the employee.” Unfortunately, the Hays court forgot that Arizona did not have such a similar statute that required the workers’ compensation insurer to be directly and primarily liable to the employee.

The Hays court also looked to other states permitting independent tort actions with some form of statutory penalty provision. The court also noted that the statute’s penalties appeared to be modest; therefore, the legislature could not have intended them to be the sole remedy.

Many other jurisdictions have adopted similar rationales in granting injured workers’ rights and claims against workers’ compensation insurance carriers. By doing so, these courts have created irreconcilable problems for insurance carriers. The carriers’ position is akin to an attorney representing both a husband and wife in a divorce proceeding, or an attorney representing two partners in the sale of business by one to the other.

The statutory scheme and judicial interpretation in many states is fraught with peril, contradiction and conflicts of interest. In litigation, The Rules of Professional Conduct would not permit an attorney to represent an employer and an employee in an adversarial proceeding. However, an insurance carrier owes the duty of good faith and fair dealing to both an employer and employee when their positions inherently conflict with one another. The employer many times wants the employee to undergo extensive medical exams or be denied the claim. Conversely, the employee is attempting to streamline the process and receive immediate care and benefits.

Many jurisdictions impose on insurance carriers a duty recognized by professional rules to be impossible to carry out ethically and therefore representation is a conflict and prohibited. When a carrier can be sued by the employer for overpaying a claim and yet be sued by an employee for underpaying the same claim, the system — whether judicially or legislative created is neither fair nor carried out in good faith.

Don Myles has been a partner with Jones, Skelton & Hochuli since 1987. He is Chair Emeritus of USLAW NETWORK. Don is a member of the American Board of Trial Advocates (ABOTA), having tried in excess of 45 cases to verdict. He has published articles concerning professional liability, insurance coverage and bad faith, as well as trial practices and procedures. He can be contacted at (602) 263-1743 or dmyles@jshfirm.com.

Les S. Tuskai has been a partner with Jones, Skelton & Hochuli, P.L.C., since 2007. He concentrates his practice on insurance bad faith, extra-contractual liability, insurance consulting, insurance coverage and disputes, professional malpractice, and other areas of complex civil litigation. Mr. Tuskai has been retained as an expert in civil litigation and rendered expert opinions on a number of occasions in the areas of insurance law, claims handling and subrogation. Les can be reached at (602) 263-1761 or ltuskai@jshfirm.com.

THE LEGALLY FLAWED ARIZONA DECISION
The Supreme Court of Arizona’s decision in Hays v. Continental Insurance Company was a legal nightmare which conferred court jurisdiction on workers’ compensation bad faith cases. Hays relies on the tortured and misguided interpretation of A.R.S. § 23-930.

In Hays, the plaintiff claimed to have suffered a back injury while at work. The carrier denied the claim. The worker requested a hearing before the Arizona Industrial Commission to contest the carrier’s denial. The carrier provided no justification for its denial, and the Commission awarded benefits to the worker. The worker filed a lawsuit in state court claiming that the carrier had acted in bad faith for intentionally withholding payment without reasonable justification. The carrier moved to dismiss the complaint under A.R.S. § 23-930, claiming that the statute divested the court of jurisdiction.

The Hays court ignored the exclusive “bad faith” jurisdiction language of the statute, holding instead that it was “ambiguous.” The court speculated the statute only potentially deprived the judiciary of all power to hear damage actions sounding in bad faith. The court also argued that it gave the commission exclusive jurisdiction over only administrative complaints and penalties authorized and created by the statute, leaving intact the court’s jurisdiction over common law damage actions.

Hays examined the statute’s legislative history, claiming to have found nothing expressing any intent on its meaning. The court noted that the statute did not have a statement of purpose, nor was it enacted as part of a comprehensive body of legislation.

In presenting its rationale, Hays relied on the Colorado Supreme Court’s decision in Travelers Ins. Co. v. Savio. There, the Court ruled that Colorado’s workers’ compensation act did not preclude an employee from bringing a common law tort action against a worker’s compensation insurance carrier for bad faith. The Colorado Statute § 8-44-105 required that every workers’ compensation insurance contract “contain a clause to the effect that the insurance carrier shall be directly and primarily liable to the employee.” Unfortunately, the Hays court forgot that Arizona did not have such a similar statute that required the workers’ compensation insurer to be directly and primarily liable to the employee.

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The statutory scheme and judicial interpretation in many states is fraught with peril, contradiction and conflicts of interest. In litigation, The Rules of Professional Conduct would not permit an attorney to represent an employer and an employee in an adversarial proceeding. However, an insurance carrier owes the duty of good faith and fair dealing to both an employer and employee when their positions inherently conflict with one another. The employer many times wants the employee to undergo extensive medical exams or be denied the claim. Conversely, the employee is attempting to streamline the process and receive immediate care and benefits.

Many jurisdictions impose on insurance carriers a duty recognized by professional rules to be impossible to carry out ethically and therefore representation is a conflict and prohibited. When a carrier can be sued by the employer for overpaying a claim and yet be sued by an employee for underpaying the same claim, the system — whether judicially or legislative created is neither fair nor carried out in good faith.
In 2006, employers paid a staggering $59.8 million in damages over workplace harassment claims, according to the Equal Employment Opportunity Commission.

In 2007, employers paid an even higher price: $65.6 million for workplace harassment claims. More than 27,000 claims were filed, and EEOC evidence indicates those numbers are trending upward in record numbers. A worsening economy has some experts predicting an additional uptick as record corporate layoffs and economic stress take hold.

In today’s environment, employers have little chance of mounting an affirmative defense against harassment claims. According to EEOC data, only 58% of all employers facing harassment claims were able to cover their burden of proof to defend against workplace harassment claims.

Training and educating employees is absolutely critical to limit corporate exposure to claims. Absent clear evidence that employers have adequately trained employees to be conversant with the company’s harassment policy, an employer has little or no chance of creating an affirmative defense.

The key to preventing liability is a thorough system of training and policies that enables an employer to promptly and thoroughly respond to complaints immediately when they arise.

**HARASSMENT POLICIES — AN EMPLOYER’S FIRST LINE OF DEFENSE**

Effective workplace harassment policies will contain a number of key provisions, including:

- **Employee Understanding:** All employers should adopt a strong policy that clearly defines “harassment” and provides examples of verbal, nonverbal, physical, and visual harassment that will not be tolerated.

Employer policies must articulate a clear complaint procedure that encourages employees to report harassment and prohibits any retaliation for coming forward and participating in an investigation. An effective policy that mitigates risk will also emphasize the importance of immediately reporting concerns or complaints, whether an employee is a potential victim or witnessed potentially harassing conduct. Employees must be explicitly warned of the range of possible punishments for those who have engaged in any form of harassment.

- **Grievance Procedures:** A clear path for filing a grievance or complaint must also be provided. An employer grievance procedure should clearly define whom an employee should contact with a harassment concern, such as a supervisor, human resources representative or a company officer. List the contact information for those charged with
handling harassment claims, and offer several options for employees to report harassment or ask questions about the policy. Any grievance procedure must also include the ability to bypass a supervisor, in case the supervisor is the alleged harasser.

Confidentiality Provisions: Assure employees of a prompt, thorough, and objective investigation. Do not promise confidentiality, but to the extent possible maintain it. Explain why complaints of harassment cannot be completely confidential, as a thorough investigation will require interviewing the alleged harasser.

Planned Policy Communication: Communicate and distribute the policy to all employees and post it prominently throughout the workplace. Additionally, obtain a written, signed acknowledgement from each employee stating that they have read and understand the policy and against harassment, and the complaint procedures.

Ongoing Training: Provide annual anti-harassment training to all employees that covers the basic policy and includes updates reflecting any changes in the law or employer procedures. Maintain attendance and participation records for all training sessions.

CONDUCTING AN INTERNAL INVESTIGATION

Even the best and most comprehensively administered harassment policies can fall short and the inevitable happens — an employee lodges a harassment complaint against another employee.

The first critical step is to investigate the claim and try to resolve matters internally. Such prompt action can, in some cases, eliminate the potential for claims being made to state and federal agencies and the need for costly and damaging litigation.

Employers must take all harassment allegations seriously regardless of how trivial they may at first appear. Employees often understate matters, due to embarrassment and fear of retribution. Cultural differences may also affect the manner in which an employee alleges harassment.

Consequently, it is prudent to have the employee put the complaint in writing. This step will assist the employer in the event the matter is litigated by coralling the employee’s claims up front. Once the complaint has been put in writing, follow up by investigating each complaint as soon as it emerges. Swift action demonstrates to employees that your company does not tolerate harassment in any form and at any level.

In this step, it is critical that an employer’s actions are fair and consistent. Take disciplinary action when necessary.

In launching an internal investigation, picking the right investigator is critical to ensuring the process is objective, and is viewed as such by your employees. Your investigator should be someone who is not involved in day-to-day activities, such as your Human Resources Director. This person should demonstrate sensitivity not only to the employee who raises the harassment allegation, but also to the alleged harasser. Harassment has a ripple effect and impacts other parties involved or affected.

The investigator should have the demonstrated ability to exercise appropriate discretion. Harassment claims are emotionally charged and employees must know that when they make complaints, they will not be subject to ridicule or retaliation from other employees. Moreover, to the extent confidentiality can be maintained, it minimizes any legal exposure to your company by ensuring that only the appropriate people are privy to an investigation and the details of it.

It is also wise to involve — either in-house counsel or outside counsel specializing in employment law — before launching an investigation. Your attorney can assist in the process and determine if disciplinary action is warranted.

This interview should instill confidence in the employee that his or her concerns are being taken seriously and that confidentiality will be maintained...

HANDLE WITH CARE

In a harassment allegation, begin by promptly interviewing the employee lodging the complaint. This interview should instill confidence in the employee that his or her concerns are being taken seriously and that confidentiality will be maintained, to the extent it is possible to do so. Remind the employee that he or she will not be retaliated against for making the complaint. Treat each harassment allegation separately, and keep the facts straight so that you can accurately determine if harassment occurred in each situation.

Prior to officially launching each investigation, determine who will be involved and if it will impact any other issue involving employer-employee relationships. Then, review all relevant personnel policies and define the scope of the investigation.

The following questions and issues should be addressed with the employee alleging harassment:

1. What happened?
2. Where and when did it happen?
3. How did it make you feel?
4. Who was there?
5. What did they see?
6. What have they told you?
7. What have you told them?
8. Has it ever happened before?
9. Who have you told this to and what did they say?
10. Have you kept any written records or diaries relevant to the issues?
11. Are there any employer documents related to a claim such as personnel file memos, expense reports, payroll records, or the like?
12. Ask the employee for any witnesses that he/she believes can corroborate his/her version of events.
13. Are there any other issues that the employee wishes to discuss? Any other matters that may be important for the investigator to clear up?
14. Make sure that you have a list of every allegation before adjourning the interview.
15. Explain how long you expect the investigation to take, and let the employee know that the company will apprise him/her of the outcome of the investigation.

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EMPLOYERS’ DEFENSE:
WHAT EVERY COMPANY MUST KNOW TODAY
TO BE PREPARED FOR TOMORROW

WHO WILL BENEFIT?
Designed specifically for in-house counsel, human resources managers, regional managers, and adjusters who handle lawsuits or face employment issues in the workplace, USLAW’s Employment & Labor Law Road Show takes the topics of most timely interest and brings them directly to the Client’s workplace.

BUILD-YOUR-OWN PROGRAM
The program is completely customizable and is tailored to the Client’s needs. Offered cafeteria style, topics can also be preselected based on time requirements. The full program is a 4-6 hours however, can be narrowed down to a one hour lunch and learn. If applicable, Continuing Legal Education Hours are available.

NATIONAL COUNSEL RIGHT NEXT DOOR
Employers’ Defense was created and will be presented by the highly experienced Employment & Labor Law lawyers of USLAW NETWORK’s Employment Practice Group. The group consists of approximately 150 USLAW NETWORK member attorneys based in more than 45 states across the nation. The independent firms that make up USLAW have been vetted through USLAW’s strict admission requirements. All subject matter will be presented by USLAW attorneys with an expertise in that area.

ABOUT USLAW
In today’s global marketplace, legal needs often transcend geographic boundaries. Clients with complex needs turn to USLAW NETWORK member firms to represent them in the courtroom and the boardroom, next door and across the United States. When a difficult legal matter emerges — whether it’s in a single jurisdiction or nationwide — USLAW is there. We represent some of the country’s leading businesses in matters ranging from complex litigation, employment law, products liability and professional malpractice defense.

For more information and to schedule your In-House Employers’ Defense Program today, please contact:
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www.uslaw.org

SAMPLING OF TOPICS INCLUDE:

1. It’s a New Day: Recent Federal and State Legislative Changes to Employment Laws Governing the Workplace
2. New Frontiers
   • Employee Free Choice Act
   • Family Responsibility Discrimination
   • Associational Discrimination
3. Trends in Employment Cases
   • The Fair Labor Standards Act
   • The Faragher/Ellerth Defense
   • The Americans with Disabilities Act
4. Factors to Consider in Evaluating an Employment Case

www.uslaw.org
In Charleston, South Carolina, tradition runs deep. Founded in 1670, the City is one of the country’s oldest settlements. Today, Charleston is the fastest growing city in South Carolina — and it is a city that sits firmly in the nexus of past and future.

Like its hometown, USLAW NETWORK’s Charleston member firm, Buist Moore Smythe McGee, PA, is a thoroughly modern firm with an esteemed history. The firm, in its current incarnation, was established in 1970 through the merger of two of Charleston’s oldest law firms — Buist, Buist, Smythe & Smythe and Moore, Mouzon & McGee. The two firms that combined to create today’s Buist Moore Smythe McGee shared nearly 200 years of history when they merged.

Known as Charleston’s business law firm, Buist Moore Smythe McGee is Charleston’s fourth largest law firm. Recognized more than any other Charleston law firm, 20 Buist Moore attorneys are ranked in The Best Lawyers in America 2009. Additionally the firm is ranked number one in South Carolina and Charleston in Construction and Maritime Law as well as number one in Charleston in numerous practice areas, including:

- Alternative Dispute Resolution;
- Commercial Litigation;
- Environmental Law;
- First Amendment Law;
- Insurance Law;
- Labor & Employment;
- Personal Injury Litigation;
- Real Estate Law.

The firm’s success since its inception nearly 40 years ago can be attributed to its unflagging focus on client service.

“At Buist Moore Smythe McGee, the focus is client service. I know many firms make that claim, but this is something we really focus on across the firm, from the youngest associate to the most seasoned shareholder,” says Jim Myrick, a shareholder with Buist Moore and USLAW NETWORK’s primary liaison between the firm and the NETWORK.

“Our attorneys take an individualized approach to each matter or case based on the needs of the client. Tailoring a strategy that will reach the earliest and best resolution for the client is the firm’s ultimate goal. We are a strong advocate of alternative procedures to resolve disputes without costly and time consuming litigation and trials, and our clients really benefit from our flexibility and innovation when it comes to integrating business and legal strategy for our clients,” says Henry Smythe, the firm’s Managing Director.

Using steadfast client service and attentiveness as a springboard, the firm’s 45 attorneys provide domestic and international clients sophisticated legal services ranging from complex litigation matters in the specialty areas of maritime, construction and products liability to general litigation encompassing all aspects of insurance defense work. More than half of the firm’s attorneys are active trial lawyers and represent clients at both the trial and appellate levels in federal and state courts. The firm’s busy appellate practice has been involved in many landmark South Carolina decisions.

For decades, the diverse and complex field of business law has been an integral feature of the firm. Buist Moore represents financial institutions, corporations, partnerships, limited partnerships, limited liability companies, captive insurance companies and other business associations in all aspects of commercial activity, including entity selection, business formation, mergers and acquisitions, dissolutions, and creditors’ rights. Attorneys have years of experience in the creation of corporate entities, including corporations, partnerships, limited partnerships, limited liability companies, and other business associations.

The transactions with which the firm’s attorneys have been involved cover the full range of modern acquisition techniques and structures. These include mergers and acquisitions, sales of assets, statutory share exchanges, exchange offers, hostile and friendly tender offers, proxy contests, and leveraged-buy out techniques.

As Charleston’s business community has changed, the firm’s client base has expanded to encompass clients diverse in size, industry and geography, ranging from Fortune 500 companies, to start-up enterprises, to individuals.

Today, Buist Moore counts many household names among its clients, including:

- Alcon Labs;
- Bombardier;
- Bovis;
- Black & Decker;
- Bridgestone/Firestone;
- Conoco-Phillips;
- Eli Lilly;
- Eli Lilly & Co.;
- Georgia-Pacific;
- Johnson Controls;
- Louisiana Pacific Corporation;
- Philip Morris;
- State Farm Insurance and
- Yamaha.

Buist Moore’s innovation doesn’t stop with client service. The firm is widely recognized by the Charleston business community as being a great place to work. The firm is the only law firm in South Carolina to be listed among the 2008 Best Places to Work in South Carolina, a program sponsored by the South Carolina Chamber of Commerce, South Carolina Society for Human Resource Management and SC Biz News to businesses demonstrating exceptional commitment to its employees. Becoming a “best place to work” has long been a goal of the firm: “Being a firm that people come to and stay with has long been a goal of our firm,” says Myrick.

“For generations our lawyers have sought to provide service worthy of a designation like South Carolina Best Place to Work, and we are proud our employees have voted as such,” Smythe adds.
The Consumer Product Safety Commission (CPSC) began operating in 1973 as part of the Consumer Product Safety Act (CPSA). Today, with a primary purpose of safeguarding the public against unreasonable risks of injuries associated with consumer products, the CPSC has jurisdiction over approximately 15,000 types of consumer products, including toys, clothing, appliances, furniture, playground and sports equipment.

The 2008 CPSIA legislation broadly expanded CPSC’s authority, tightened regulation and introduced tougher regulatory standards and measures. Specifically, it:

- Established product conformity certification and third-party testing standards;
- Revised a series of standards affecting children’s products, including bans and limits on products containing lead and phthalates;
- Authorized creation of a public database for incident complaints;
- Empowered state’s attorneys general to enforce CPSC violations;
- Granted the CPSC unilateral “Stop-Sale” authority; and
- Substantially increased civil and criminal penalties for violations.

Within these areas, Congress charged the CPSC with promulgating a slew of new standards and regulations that will significantly impact manufacturers, distributors and retailers of consumer products.

**Conformity Certification**

Under the new rules, all products currently subject to safety regulations enforced by the CPSC must be accompanied by a General Conformity Certificate (GCC) that confirms the product has been tested based on a reasonable testing program and complies with all applicable rules, ban standards and regulations. The certificate must also specify those applicable rules, bans, standards or regulations.

**Who Must Issue The Certificate?**

The new CPSIA legislation is not entirely clear, however, on who must issue the certificate. One section of the legislation stipulates the manufacturer, importer and private labeler must issue a certificate of conformity. Another section grants the CPSC the authority to designate one party and relieve other parties of that obligation. The CPSC, in its November 10, 2008 Final Rule, exercises that authority.

In the case of an imported product, only the importer must issue the certificate, which shall be made available to the CPSC upon request before the product or shipment is introduced into domestic commerce.

Prior to enactment of the 2008 CPSIA, conformity certificates were required with respect to only eleven CPSC standards. The new legislation expands the requirement to all Acts administered by the CPSC, including: the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Poison Prevention Packaging Act, the Refrigerator Safety Act, the Children’s Gasoline Burn prevention Act, and the Virginia Graeme Baker Pool and Spa Safety Act. This expansion resulted in thousands of inquiries and partially prompted the CPSC’s decision to streamline the certification process.

Under the new CPSC guidelines, it is the responsibility of the manufacturer and importer to determine whether its product or shipment is subject to the certificate requirement. The CPSC also warned importers that after an initial period of adjustment any failure to abide by the general certificate requirement “will subject shipments to refusal of admission into the country and potential destruction.” Questions regarding the applicability of certificate requirements to any particular product should be referred to
products counsel to avoid running afoul of the new regulations.

**Information the Certificate Must Contain**

Conformity certificates must include:
- Identification of the product;
- Citation to each CPSC regulation or statutory requirement to which the product is subject and is being certified;
- Identification of the manufacturer or importer, including address and telephone number;
- Contact information for the individual maintaining records of test results;
- Date and place where the product was manufactured;
- Date and place where the product was tested for compliance; and
- Identification of any third-party laboratory on whose testing the certificate depends.

**Certificate May Be Provided By Electronic Means**

The 2008 CPSIA amendment states: “Every certificate required under this section shall accompany the applicable product or shipment of products covered by the same certificate and a copy of the certificate shall be furnished to each distributor or retailer of the product.” There has been much debate over the definition of “accompany” and “furnish” and whether providing the certificate electronically complies with these terms.

The CPSC recognized logistical problems of importers providing a paper certificate with the contents of a shipping container packaged with items not subject to certification requirements, as well as bulk shipments that are broken down and shipped to different distributors and retailers. It also acknowledged the burden on smaller manufacturers who ship to independent retailers. Lastly, the CPSC conceded that international shipments are now largely tracked and otherwise conducted electronically. For these reasons, the CPSC decided to accept conformity certificates in electronic format.

The CPSIA defines “electronic certificate” as information available by electronic means that provides the required information and meets the availability requirements. In this context, the “accompany” requirement is met “if the certificate is identified by a unique identifier and can be accessed via a World Wide Web URL or other electronic means, provided the URL or other electronic means and the unique identifier are created in advance and are available, along with access to the electronic certificate itself, to the Commission authorities as soon as the product or shipment itself is available for inspection.” The “furnish” requirement is satisfied “if the distributor(s) and retailer(s) of the product are provided a reasonable means to access the certificate.”

The CPSC has not placed any limitation on the type of electronic platform, stating: “Any entity or entities may maintain an electronic certificate platform and may enter the requisite data.” However, the entity required to issue the certificate ultimately retains legal responsibility for its completeness, accuracy and availability in a timely fashion.

**THIRD PARTY TESTING**

For children’s products, the conformity certificate must be based on testing by a third party laboratory that has been specifically accredited to perform the particular children’s product test applicable to the product. The new legislation also contains provisions for accreditation of proprietary testing laboratories owned by a manufacturer. The stipulations dictate, however, that the test results must be protected from undue influence by the manufacturer and that violations of this rule can be reported confidentially to the Commission.

The CPSC will issue a series of requirements for accreditation of testing laboratories to perform tests and assess children’s product’s compliance with CPSC regulations regarding lead paint, full size cribs, pacifiers, small parts, children’s metal jewelry, baby bouncers, walkers, jumpers, as well as general compliance with all other children’s product safety rules. The requirements for accreditation of testing laboratories must be issued on a strict timetable mandated by the statute.

**CHANGES AFFECTING THE CHILDREN’S PRODUCTS INDUSTRY**

The 2008 CPSIA will profoundly affect the children’s merchandise industry, which includes all products intended for children 12 or younger. Many of the new requirements are complex, and some of the more substantial highlights are set forth below.

The legislation bans children’s products in which any part contains lead in a concentration of 600 parts per million, as of February 10, 2009, 300 parts per million as of August 14, 2009, and 100 parts per million as of August 14, 2011. As written, the ban currently applies to all products sold after these dates, regardless of the date of manufacture.

Congress has given the Commission authority to exempt certain products from the 100 parts per million rule where circumstances warrant. The commission may also exclude materials or products that surpass the lead limit yet do not result in absorption into the human body. The limits do not apply to parts of the product that are inaccessible to a child after use and abuse of the product. Congress has also permitted the CPSC to issue rules to assist further in determining which components are inaccessible to a child, and to issue rules regarding electronic devices in children’s products.

Three phthalates — DEHP, DBP and BBP — are banned in children’s toys and child care articles in concentrations greater than 0.1 percent after February 10, 2009. In addition, the legislation provides for an interim ban on DIDP, DinP and DnOP in concentrations greater than 0.1% in children’s items that can be placed in the mouth, or have any one dimension smaller than 5 centimeters. The CPSC is required to appoint a Chronic Hazard Advisory Panel under 15 U.S.C. 2077 to study the effects of phthalates and phthalate substitutes to determine whether to continue this interim ban on a permanent basis.

The CPSC is required to issue regulations by August 14, 2009 requiring manufacturers to include postage paid product registration cards with 15 specified categories of durable nursery products. The cards must be attached to the surface of the product. The information contained in the cards may not be used for any purpose other than to facilitate a recall. In addition, the CPSC must issue regulations requiring manufacturers mark the product and its packaging with identifying information such as: production dates, and batch and run numbers.

Catalog, printed and internet advertisements for children’s products that require small parts and other specified warnings must display these warnings immediately adjacent to that advertisement.” Internet advertisements must be compliant by December 12, 2008. Catalog and printed advertisements must be compliant by February 10, 2009.

By February 10, 2009 the voluntary ASTM F-963-07 Consumer Safety Specification for Toy Safety is considered a CPSC standard and becomes mandatory. Beginning no later than August 14, 2009, the legislation requires the Commission to evaluate existing voluntary standards for durable infant and toddler products and begin promulgating standards for two categories of durable infant and toddler products every 6 months. These rules will apply to products manufactured thereafter except for cribs. Regarding cribs, the legislation will ban the use and sale of non-complying cribs owned by hotels, day care centers and retailers.

Continued on page 35
Retailers, manufacturers, importers and distributors, beware. Sweeping changes to the Consumer Product Safety Act (CPSA) require that these types of commercial entities take significant steps now to comply with the new regulations. Some of the new rules are already in effect, and others will become law over the next several years, meaning retailers and product distributors must be well versed in the new regulations to conform now and remain in compliance in the future.

If your business imports and distributes one of the more than 15,000 consumer goods regulated by the Consumer Product Safety Commission, your company will very likely be affected. And while the impact of the Consumer Product Safety Improvement Act of 2008 (CPSIA) depends on the nature of your business, one thing is certain: Noncompliance is not an option.

Regulators can now mete out severe civil and criminal penalties to any business running afoul of new regulations.

Sellers and importers of children’s products must be particularly vigilant. Coming on the heels of numerous product safety recalls and a wave of negative publicity, new third-party testing requirements, advertising restrictions, bans on certain chemicals, and rules regarding product certification impose numerous additional restrictions applicable exclusively to sellers and importers of children’s products, toys, and all-terrain vehicles.

When considering how to ensure CPSIA compliance, companies importing and distributing any type of product — and particularly those in the business of children’s products — should review three primary areas of their business, including:

- Product safety policies and procedures;
- Personnel policies governing employee interaction and response to compliance issues; and
- Contracts with business partners to mitigate risk under CPSIA rule changes.

Creating Systems That Protect and Prepare

As a starting point, retailers, manufacturers, importers and distributors should begin with a thorough review of the systems currently in place for detecting, reporting and responding to product safety issues. We’ve outlined recommended steps to address corporate policy weaknesses and update them in light of new regulations.

1. Review Systems for Detecting Safety Concerns: As a starting point, companies should audit their current product safety
policies to ensure all procedures reflect with current (and phased-in) regulatory and recall requirements. To mitigate your company’s risk, this policy must be internally and externally facing and extend to your company’s domestic and international business partners.

Extensive information concerning the current regulatory framework is available at the Consumer Product Safety Commission’s website (www.cpsc.gov), including timelines summarizing scheduled rulemaking and upcoming compliance deadlines. If your company does not already have a product safety policy in place, one should be developed and implemented immediately.

2. Establish Procedures for Responding to Red Flags: A company’s product safety policy must also govern and delineate how the company will respond to red flags indicative of potential violations under the CPSA. Consumer complaints, customer warranty returns, consumer watchdog alerts, and notices published by the Consumer Product Safety Commission can signal potential product safety issues — and companies must have safeguards in place to react and respond.

To avoid running afoul of the CPSA changes, companies should modify product safety policies to help detect, analyze, and respond to red flags expeditiously:

a. Collecting Information: All policy handbooks should outline how and which sources a company will use to monitor and identify potential hazards in its product mix. Depending on the volume and nature of the products sold, distributed, or manufactured, a variety of information sources exist for identifying potential red flags. These can include input from stores, customer correspondence, reports via customer hotlines, product claims, public lawsuit information, or National Injury Information Clearinghouse letters published by the Commission.

b. Compiling Information: Once information sources have been defined, policies must include how companies will collect and compile the safety data gathered. Information must also categorize data by the type of hazards and harms identified.

Data collection systems should also assess whether additional action is necessary, such as reporting a hazard to the Commission or implementing a recall.

to assist in the monitoring process, a weekly report identifying the following information may be useful and include: Date Incident Reported to Company; Transaction Information; Customer/Client Information; Store Where Sold; Incident Date; Supplier/Source Information; Product Information; Product Defect; Injury or Damages; Source of the Information; Claim Number.

Sellers and importers of children’s products must be particularly vigilant. Coming on the heels of numerous product safety recalls and a wave of negative publicity...

3. Regularly Review Your Policy For Compliance: To ensure continuous compliance and a policy that reflects changing regulations or rules, companies should consider a periodic review process. The Commission has established an aggressive schedule for formal rulemaking on more than 40 issues over the next several years. In the last two months alone, the Commission has issued formal regulations that establish rules for advertising of children’s products and standards for third-party testing of cribs and pacifiers. For purposes of conducting the periodic review process, it is recommended that companies designate a Product Safety Coordinator tasked with leading a team who determines the most cost-effective means of compliance.

**ESTABLISHING A LINE OF DEFENSE**

Company employees charged with implementing product safety policies are the most critical line of defense against a violation. There are several steps employers should take to ensure corporate employees are well prepared to identify, address and respond to any product safety issue early on.

1. Designate a Product Safety Coordinator: A high-level manager or executive should be designated as a company’s internal Product Safety Coordinator. The Product Safety Coordinator serves as point person for all product safety issues, with the attendant responsibilities of ensuring employee compliance and implementing the company’s recall plan whenever necessary. The Product Safety Coordinator should have the authority to implement interim changes to product safety policies whenever new regulations go into effect.

2. Establish Training Programs for Key Personnel: To ensure continuous compliance, companies can establish ongoing training programs for key personnel in areas such as supply-chain management, quality control, and marketing, among others. New regulations affect supply chain, quality control and marketing departments and many companies will need to upgrade their training programs and safety procedures to reflect this change.

a. Supply-Chain Management: Beginning Nov. 12, 2008, all containers bound for U.S. ports were required to be accompanied by a certificate of conformity declaring that all products being imported for warehousing or consumption comply with all applicable regulations. This

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Forty-three years ago, President Lyndon B. Johnson signed Medicare into law, enrolling former President Harry S. Truman as the first Medicare beneficiary during the law’s signing ceremony on July 30, 1965. From its inception, it was the Government’s intention that Medicare should not shoulder the burden of the cost of a recipient’s medical cost if another entity should be considered the primary payer. In fact, the Act specifically provided that Medicare would be the secondary payer for medical treatment incurred by a Medicare recipient who also sustained an on-the-job injury and was entitled to a payment of medical benefits under state workers’ compensation laws.

Since that time, Medicare has undergone numerous revisions. Most notable was the enactment of the Medicare Secondary Payer (MSP) statute in 1980, which was created, in part, to continue Medicare’s attempt to curb the rising costs of the program. The MSP was enacted to provide protection for Medicare in cases where Medicare recipients suffered personal injuries requiring medical treatment under circumstances where a third party was responsible for the accident/injuries, similar to the protection that the original Act provided as to work-related injuries. Despite its passage in 1980, the MSP was seldom followed by the business industry, and until 2001 it was rarely enforced by the Center for Medicare and Medicaid Services (CMS), an entity of the Department of Health and Human Services (DHHS). Even after 2001, CMS’ enforcement was restricted only to certain categories of workers’ compensation cases.

That situation will undoubtedly change, since on December 29, 2007, President George W. Bush signed into law The Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA). This Act, in part, provides “teeth” to the general requirements of reporting to and protecting the interest of Medicare with regard to the resolution of personal injury claims by Medicare recipients.

Effective July 1, 2009, the MMSEA will require liability insurers, self-insureds, group health plans, and non-group health plans, among other to:

- Determine whether a personal injury claimant is a Medicare beneficiary;
- Report and protect the interest of CMS with regard to the formal or informal resolution of any personal injury claims made by a Medicare beneficiary.

The MSP statute, soon to also be enforced through the MMSEA, generally requires insurers to pay for a Medicare recipient’s treatment if another insurance plan — workers’ compensation, liability, self-insured or no-fault — has or can be reasonably expected to have responsibility for making medical payments. In those instances, Medicare becomes a secondary payer, and the insurer becomes the primary payer responsible for the cost of the claimant’s medical care. With the passage of the MMSEA and its enforcement of increased requirements upon insurers to protect the interest of CMS, insurers will now have increased responsibilities for investigating personal injury claims. Consequently, settlement negotiations of those claims will become far more difficult to navigate.

Failure to follow the requirements put in place with the passage of the MMSEA will subject the violating party to significant penalties, including civil penalties of
$1,000.00 per day, per claim. Other damages can be assessed for failure to protect CMS’s subrogation rights as of the date of settlement, regardless of whether that failure is willful or accidental.

THE ROAD AHEAD

With its expanded enforcement authority, civil penalties and broad scope, MMSEA will have a sweeping impact on insurance companies, self-insured companies and other defendants, and will usher in a fundamental change to the way personal injury claims are documented, investigated, evaluated, negotiated and settled by business or insurance entities. Unfortunately, the specific requirements, policies, and procedures for complying with the requirements of the MMSEA are not yet set in stone. However, it does appear that the road ahead has generally been paved, and CMS has indicated that the final specific requirements are forthcoming as deadlines to comply with the regulations loom.

Registration. Entities, including self-insurance, no-fault insurance, self-insureds, and others who are properly designated as Responsible Reporting Entities (RREs) must register with the CMS Coordination of Benefits Contractor (COBC) between May 1, 2009 and June 30, 2009. Although an RRE may use an Agent (RRA) to perform the task of reporting actual claims, the RRE must itself register. The RRE will remain solely responsible for ensuring that the requirements of CMS are being followed, regardless of who is reporting the actual claim. Upon registering, an RRE will receive notification via email of a profile which will include, in part, the RRE’s Reporting ID and the assigned seven (7) day file submission time frame for submitting the initial text reports and future files to the COBC.

New Claim Handling Philosophies. Beginning July 1, 2009, when a personal injury claim is either made OR settled, the first hurdle to overcome for the defendant must be to determine whether the claimant is a Medicare Beneficiary as of that date. Under the MMSEA, the obligation for determining whether the claimant is a Medicare Beneficiary rests solely with the defendant. There is currently no safe harbor for failing to properly make this determination, including circumstances where misleading information is provided by the claimant. In situations where a claimant is not a Medicare recipient, the claim can be processed just as such claims have been in the past. However, the defendant must also have protocols in place to ensure that for those personal injury claims settled after they are reported, that the claimant has not since become a Medicare recipient at the time of resolution or payment of any kind.

With personal injury claims made by a Medicare recipient, the defendant, at the time of any potential settlement, must be prepared to properly submit a report to CMS/its contractor and satisfy CMS’s subrogation rights for an amount at least equal to either the amount of settlement or CMS’s subrogation right as of that date; which ever is lower. This payment must be made regardless of theories of liability or comparative negligence!

Reporting Protocols. CMS is in the process of finalizing data reporting protocols that will require the Responsible Reporting Agent (RRA) to exchange data electronically with the proper CMS contractor. The information which must be reported will include very specific information, some of which is not generally obtained through normal investigative protocols, such as a claimant’s date of birth, address, social security number, as well as information about the primary plan and the specific terms of the resolution of the claim.

Reporting Timing. CMS will also dictate when this required information must be submitted. In cases where no money is paid on the claim at all until the time of settlement, insurers will only be required to report on a claim at the time of settlement, judgment, award or other payment. This includes payments to claimants via gift cards whether a release is obtained or not. For claims in which at least one payment has been made on behalf of, or to, the claimant, with continued payment obligations being accepted, the information must be reported to CMS right away. Responsible Reporting Entities are also obligated to update information with CMS on a quarterly basis throughout a claim’s duration; during a window to be assigned by CMS to each Responsible Reporting Entity.

Impact of MMSEA on Claim Resolution. With any and all payments of any kind to a Medicare recipient who has asserting a personal injury claim, whether a release is obtained in exchange or not, a report must be submitted to CMS’s properly designated contractor as generally set forth above. This report must also include the specific terms of the settlement, including, where appropriate, the claimant’s attorney’s fee and expenses. With receipt of this information, the defendant will be informed of CMS’s subrogation rights as of that date, which subrogation interest must be satisfied pursuant to the CMS demand and/or an amount equal to the payment to the Plaintiff if the amount is less than CMS’s subrogation assertion. The obligation for

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"YOU ARE HEREBY PERMANENTLY DISBARRED!"

No lawyer ever wants to hear those words. For all lawyers, ethical conduct is the cornerstone upon which our legal system is built, and the profession has repeatedly underscored its commitment to integrity and upholding ethical standards.

But ethical lapses may pose a particular threat to lawyers just beginning their legal careers. And for those less seasoned, ethical conduct — adhering to it and understanding its implications — is every bit as important as legal competence itself.

For some, a law career can be a real pressure cooker, and the daily stress of the profession, combined with ambition and drive, can sometimes lead younger lawyers to take ethical risks, even when they know better. Mix in a little money, a splash of power, and you’ve created a volatile cocktail that can — and sometimes does — lead to unethical and even criminal behavior.

The recent fall of one of America’s most influential and wealthiest lawyers clearly illustrates the risks.

On June 27, 2008, Richard “Dickie” Scruggs was sentenced to five years in prison and fined $250,000 for conspiring to bribe a state court judge for $50,000. Scruggs’ decision cost him his license to practice law and instantly destroyed his titan-like reputation as a legal tycoon.

Indeed, Scruggs had committed one of the most reprehensible crimes a lawyer can
The bribe shocked the legal profession. And it provides a pitch-perfect ethics lesson for young lawyers, many of whom are undoubtedly influenced by the personal wealth and professional distinction Scruggs achieved.

Scruggs was notorious for his legal acumen and his wealth. His knack for taking on big companies earned enormous payouts for his clients while enriching Scruggs personally — and his reputation extended far beyond the legal community.

The charismatic and wealthy plaintiffs lawyer in *The King of Torts* by John Grisham was said to have been modeled after Scruggs.

Scruggs was also portrayed in the movie *The Insider* for his take down of big tobacco in the 1990s. Scruggs reportedly earned a record $1 billion fee aftercornering the tobacco companies into settling. The tobacco industry reportedly paid nearly $250 billion in settlements around the country. The case cemented Scruggs’ position as one of the most influential and wealthiest attorneys in America.

Hurricane Katrina’s landfall along the Gulf Coast in 2005 heralded Scruggs’ next big coup — and it was also the harbinger of his downfall. Leading the Scruggs Katrina Group, comprised of some of the lawyers who had assisted him in the tobacco litigation, Scruggs targeted the insurance industry, when, in the aftermath of the disaster, some insurance companies denied coverage to homeowners.

The Katrina Group launched a full-fledged assault on insurance giant State Farm. Before long, the group had reached a $150 million settlement with the company, reportedly earning Scruggs and his group nearly $30 million in fees.

One of the Katrina Group’s members was John Jones, a lawyer in Scruggs’ home state of Mississippi.

When Scruggs refused to pay Jones the $4 million for what Jones believed to be his equal share, Jones filed suit. Despite the relatively insignificant amount disputed, a conspiracy to bribe the judge with whom the suit was pending would soon follow.

By most accounts, the bribe itself was fairly unsophisticated. The lack of sophistication was perhaps the biggest shock of all. Scruggs and four other attorneys, including his son Zach, who had only been practicing law a handful of years, conspired to pay off a state court judge for $50,000 in exchange for a favorable decision in the fee dispute between Scruggs and Jones. A favorable judicial ruling might have freed Scruggs from his financial obligation to Jones.

The conviction of Dickie Scruggs offers an unyielding example of the legal profession’s commitment to ethical conduct for all lawyers. The Model Rules of Professional Conduct, or similar versions adopted by various states, which govern the ethical conduct of lawyers, do not discriminate among the profession’s highest achievers or wealthiest practitioners who commit ethical violations.

The Rules of Professional Conduct are designed to guide and provide structure to a lawyer while acting as a member of the legal profession, an officer of the court, and as a professional with significant authority and responsibility to the public.

When a lawyer’s conduct fails to meet the standards set forth in the Rules of Professional Conduct, the lawyer is tasked with correcting the conduct. When the conduct becomes criminal, the legal profession and the legal system itself are tarnished, the foundation of our rule of law crumbles, and the legal system itself are tarnished, the law.

As lawyers, we have an obligation to not only uphold the rules for ourselves — but to also step up and speak out when we see others engaging in what could be perceived as an ethical violation. In the Scruggs’ case, the act — and subsequent repercussions could have been prevented entirely by at least one of the five lawyers involved in the Katrina Group. That, however, never occurred.

Additionally, the court’s willingness to impose the most severe penalties when a lawyer’s conduct becomes criminal also provides a clear message that lawyers have special responsibilities for upholding the quality of justice and the integrity of our legal system.

The conviction and disbarment of Dickie Scruggs is a timely reminder to lawyers and their clients that doing whatever it takes to win, including even the slightest unethical conduct, may lead to severe consequences.

At his sentencing hearing, Scruggs said to the federal judge, “I could not be more ashamed than to be where I am today, mixed up in a judicial bribery scheme that I participated in. I realized that I was getting mixed up in it. And I will go to my grave wondering why.”

Scruggs added, “I have disappointed everyone in my life, my wife, my family, my son, particularly.” In the end, Scruggs traded away money, notoriety, the perks of fame, his personal and professional integrity, and his formerly venerated reputation. “I deeply regret my conduct. I’m sorrowful for it. It is a scar and a stain on my soul that will be there forever,” he said as the court closed the file on the bribery charge — and his career.

In the end, Scruggs traded away money, notoriety, the perks of fame, his personal and professional integrity, and his formerly venerated reputation.
Europe has the most advanced and restrictive data privacy regime in the world. Data protection law in the UK — and in all other EU member states — originates from European law, namely the Data Protection Directive. Following the passing of the Directive, each Member State of the European Union had to adopt the Directive by integrating its terms into the domestic law of each EU state.

In the UK, implementation of the Directive was achieved through the Data Protection Act of 1998 (the Act), which delegates responsibility for compliance to the data controller and regulates the processing of personal data, including sensitive information. The Privacy and Electronic Communications (EC Directive) Regulations of 2003 (the Regulations) complete the implementation of the Data Protection Directive terms into UK Law.

These regulations encompass direct marketing messages by electronic means such as telephone, e-mail and text messaging, and the stipulations apply to any entity responsible for processing personal information. The legislation specifically defines various terms to clarify its intent and who it affects. For example, “Personal Data” is information in a structured paper file or electronically stored file which relates to a living person and can be used to identify that individual. That information may include names, addresses, dates of birth and personal preferences.

“Sensitive Personal Data” refers to personal data specifying race or ethnic origin, political opinions, religious beliefs, trade union membership, physical or mental health, sexual life and alleged or actual criminal activity/criminal records.

“Processing” is anything that can be done to or with personal data including obtaining, recording, and holding, organizing, amending, retrieving, disclosing or destroying such data. A data controller is the entity which determines the manner in which the personal data is used. A data processor is any entity which processes any personal data on behalf of a data controller.

At the time that personal data is collected from individuals (for example employees), the individuals must be provided with “fair processing information.” Fair processing information includes:

- The identity of the data controller in relation to that personal data;
- If the data controller is outside of the European Economic Area, the identity of its nominated representative;
- The purposes to which the individual’s personal data will be put (e.g. for transactional or marketing purposes); and
• Any other information which is necessary to ensure that the proposed processing is fair.

In relation to sensitive personal data, express (preferably written) consent should generally be obtained from the individual. Additionally, express consent should be obtained before personal data is transferred outside the EEA, unless the transfer is necessary for the performance of a contract. That said, however, the requirement to obtain consent to the transfer of personal data outside of the EEA can be avoided if certain model contracts are in place between the data exporter and the data importer (safe harbour agreements).

In relation to marketing communications, consent should generally be obtained from the individual before such communications are sent to him/her by email or SMS. However, such consent is not necessary where:

• An email address has been provided in the course of a sale (e.g. a hotel booking) or negotiations relating to the same; and
• The data controller only wishes to continue to market its own products/services; and
• The data controller has given the individual the opportunity to opt out of receiving such marketing communications at the time his personal data was collected.

The exception outlined above, is known as a “soft opt-in.” Even where the soft opt-in approach applies, it is necessary to provide the individual, each time the individual is contacted by, for example, email or SMS, with the opportunity to opt out of receiving further marketing communications by electronic means.

If personal data is being requested, it should be adequate, relevant and not excessive in relation to the purpose or purposes for which it is to be processed. For example, if a data controller wanted personal data so that an individual could enter a prize competition to win free flights or hotel rooms, it would not be relevant for the data controller to collect data about the individual’s sexual preferences or trade union memberships.

OBLIGATIONS IN RELATION TO PERSONAL DATA

Personal data should be accurate and kept up to date. This principle is self-explanatory but it is imperative that the data controller consistently handle this task as it is an obligation that cannot be delegated. The data controller should provide some method for data subjects to check and verify, on a regular basis, data held by the data controller. For example, this may be done by the provision of an annual statement to customers, setting out the information held and requesting updates, or providing a method for checking data, such as secure on-line access to a customer details area of a website.

Personal data should not be kept for longer than is necessary for the purposes for which it has been obtained and in respect of which it is processed. This principle requires the destruction of personal data if and when it becomes no longer relevant. Unfortunately, there are no interpretive provisions relating to this principle. Data controllers will need to review all data processed and the purposes for such processing and then determine — in relation to each type of data — how long the data needs to be kept for the relevant purposes. The useful method for compliance is to draw up a data retention policy that sets out the relevant periods of time for which data in relevant categories should be held. Where data controllers keep personal data for long periods of time, they should document the reasons for such retention periods. If subjected to an investigation by the Information Commissioner’s Office, it is helpful to be able to show that some thought has been given to relevant data retention periods.

Personal data must be processed in accordance with the rights of data subjects, and applicable data protection legislation. A person will be in breach of this principle if, amongst other things, he or she:

• Contravenes the rights of access provisions set out in the legislation;
• Fails to comply with a justified request to cease processing or fails to respond to such a request within 21 days of its receipt; or
• Fails to comply with a request to cease direct marketing processing.

Accordingly, procedures must be in place to ensure that computer systems are configured appropriately to allow accurate recording of the giving of consents, both at the time of collection of personal data and thereafter so that changes can be made whenever a data subject changes his marketing preferences. Procedures must also be in place to ensure that any notices or requests are responded to and dealt with promptly.

Appropriate technical and organizational measures must be taken against unauthorized or unlawful processing, and the loss or destruction or damage of personal data. The aim of this provision is to ensure that appropriate care is taken of personal data. Data controllers should consider appropriate measures to ensure data integrity (for electronic processing), including the installation of virus protection software files, adopting encryption for data transfers, using privacy enhancing technologies and making regular backups that are securely stored. For manual processing, considerations should be given to appropriate security measures, such as storage of paper records in lockable, fireproof cabinets. The data controller should also ensure the reliability of all employees who have access to personal data (so far as is reasonable in the circumstances).

Under English law, if the Information Commissioner considers that a data controller is contravening or has contravened data protection legislation, his office may serve an enforcement notice requiring the data controller to do one of the following:

• Stop processing any personal data or personal data of a particular description;
• Stop processing personal data in a certain manner;
• Take certain steps to remedy the situation, which can include rectifying or even deleting personal data from records.

Failure of a data controller to comply with an enforcement notice issued by the Information Commissioner is a criminal offence, which is punishable by a fine, which may be unlimited.

Where any offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other similar officer of the data controller, then that person may also be convicted of the same offence.

In addition to action by the Information Commissioner, an individual can bring a claim in damages against the data controller for the loss he may suffer as a result of a breach of the Data Protection legislation.

The Act and the Regulations provide certain rights to individuals relating to the personal data held about them. These rights include the right of subject access to information relating to the data itself and its processing. The individual’s right to prevent data processing likely to cause personal damage or distress and to prevent processing for the purposes of direct marketing.

Data controllers to whom the UK legislation applies are required to notify the Information Commissioner and pay a nominal fee. Processing of personal data without

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WHAT HAPPENS WHEN PEOPLE RECEIVE CASH?
Sooner or later, they spend it. Too often it is sooner with the “help” of close friends, relatives, and even strangers.

As most experienced attorneys can attest to, this has frequently been their concern for plaintiffs for who obtain a “once in a lifetime” recovery. Now, this concern is greater than ever because of the pressures created by this economy. These claimants need to protect their funds for future medical needs and income.

In today’s economy, the lure of immediate “cash” is even more pressing. Injured parties faced with foreclosures and mounting financial needs will find it difficult to protect their settlement funds to insure they are there to pay for their future medical care needs.

The job of everyone involved in the settlement process is going to be tougher today and tomorrow. Plaintiffs will be faced with difficult, once in a lifetime decisions and be flooded with bad advice from uninformed or self-interested sources. The lure of “CASH” is greater than ever. People will be encouraged to believe that they can do better with cash.

We have learned from years of experience and, beyond any doubt, that a structured settlement as a part of the plaintiff’s package is the best protection for their future.

ARE THERE MANY OPTIONS?

There is no end to the creativity a structured settlement consultant can bring to the table. The settlement annuity plans that can be put together are unique to each injured party, and will truly meet the needs of injured parties.

Structured settlements have proven to protect settlement recipients from financial misfortune. It is an agreement between the families and the defendant or their insurance carrier. It is based on a financial plan for immediate cash and future tax-free payments which takes into consideration the future needs of the family. It is also a program designed by the plaintiff with the help of their attorney and the structured settlement specialist to maximize their settlement funds.

Most structured settlements include upfront cash for the family, and for attorney fees, and for other investments. The structured annuity is a crucial element in a well thought out settlement plan, but only one piece of the entire package.

The insurance company purchases annuities from one or more highly-rated life insurance companies, who in turn make the periodic payments to the family members.

These guaranteed payments can be made for virtually any length of time, often for the recipient’s life. In the event of the individual’s death, a guaranteed portion of the settlement may be made to the estate or a named beneficiary such as a relative or child. The plan may even defer funds in cases involving minors or be designated to a beneficiary such as a scholarship fund or religious organization. Inflation can be countered by including periodic increases in the benefit package or providing lump sums at future dates. A structured settlement may be designed to include an educational fund, retirement income, or even mortgage payments.

Settlement funds can disappear in a number of ways, including bad investments, loans to friends and relatives, and unwise or frivolous purchases. Because a structured settlement is a guaranteed source of tax-free funds, it is very difficult for even the sophisticated investor to match the guaranteed rate-of-return generated by a structured settlement annuity.

It is a win-win concept designed to protect settlement funds of injured parties.

WHAT CAN BE DONE TO PROTECT THESE SETTLEMENTS?

As a part of the settlement agreement, a structured settlement can provide:

1. Security: In today’s financial markets, highly rated life insurance companies are very secure guarantees for the future.
2. Income Tax free: The IRS specifically provides for tax free status of structured settlement payments.
3. High Yields: The typical rate of return in many current structured settlements is 5%+ (Income Tax Free).
4. Guaranteed Lifetime Payments: Structured settlements assure income for life which is very important to plaintiffs who can expect to have medical costs for the rest of their life.
5. Inflation increases: Structured payments can build in annual increases for the life of the plaintiff to help protect against the increased cost of medical and living expense.

THE MOST IMPORTANT BENEFIT OF STRUCTURED SETTLEMENTS HAS ALWAYS BEEN SECURITY. TODAY, THAT SECURITY IS MORE IMPORTANT THAN EVER.

By Joel Mullis, Ringler Associates
Our involvement in USLAW has been great for our claims program. One of our greatest challenges is finding lawyers and law firms across the myriad jurisdictions where we see cases who not only understand our business, but also our approach to claims.

— Mack Savage
US BANK

With a risk management background that includes considerable time spent working for both insurance companies and their insured clients, Mack Savage, Assistant Vice President and Claims Manager for US Bank, understands the complexities of insurance claims and how to balance the sometimes disparate needs of the client and the insurance company. With a complete 360 degree view of risk management, Mack effectively supervises all the insurance elements of claims made against US Bank, including workers’ compensation, personal injury, employment practices liability, and property claims.

U.S. Bancorp (NYSE:USB), with $247 billion in assets, is the parent company of U.S. Bank, the 6th largest commercial bank in the United States. The company operates 2,556 banking offices and 4,903 ATMs, and provides a comprehensive line of banking, brokerage, insurance, investment, mortgage, trust and payment services products to consumers, businesses and institutions.

Mack also brings more than 15 years of experience in claims and risk management to USLAW as an advisor to the organization’s retail practice group.

“USLAW is incredibly fortunate to work with a professional of Mack’s caliber,” says Tommy Thornton, chair of the USLAW retail group and an attorney with Carr Allison, USLAW’s Alabama firm. “Mack’s insight helps us stay ahead of changes in the retail industry, so we can provide the most innovative and comprehensive counsel to our clients. And his perspective on client needs enables us to continuously hone our approach to service delivery and client care.”

Mack joined US Bank in 2005. Prior to joining the financial institution, he was an Assistant Claims Manager with SUPERVALU INC. Before moving to the client side, Mack spent 12 years in the insurance industry, with Kemper Insurance as a Team Manager and Liberty Mutual Insurance as a Technical Claims Specialist monitoring complex litigated cases.

“Mack’s professionalism, preparedness and legal acumen and insistence that those who work for him provide the highest quality service garners him high praise and respect from judges, opposing counsel and his defense counsel,” says Mark Solheim, immediate past chair of USLAW NETWORK and a partner with Larson King, USLAW’s Minnesota firm. “Mack’s support of USLAW has been unrelenting since the group’s formation. The organization’s success is the result of his leadership as a client adviser, as well as a friend and a colleague.”

Since his introduction to USLAW, Mack has worked with more than twenty USLAW firms in the NETWORK.

“Our involvement in USLAW has been great for our claims program. One of our greatest challenges is finding lawyers and law firms across the myriad jurisdictions where we see cases who not only understand our business, but also our approach to claims. Being involved with USLAW has exposed us to many attorneys and firms well before we actually engaged them to help with a case. Having a relationship with the attorney and/or firm gives us an invaluable head start in making sure each case concludes favorably for the bank.”

“The NETWORK adds tremendous value in that the firms are pre-vetted and the representation is pragmatic and cost effective. Because both the attorney and I have a relationship with USLAW we have a common bond that improves our ability to develop and maintain a strong relationship. The USLAW relationship gives me added confidence… I feel like that in many ways I have not just a specific firm representing me, but the entire USLAW network, and having had a chance to get to know all of the talented attorney’s within USLAW, that is a great feeling!”
Quality Representation. Personal Service.

In 1999, the founding partners of Franklin & Prokopik broke from a larger Baltimore, Maryland-based firm with a clear vision: to provide legal services to business clients in a more cost-effective manner — and one that facilitated the high personal touch the firm’s business base required to integrate legal and business strategy.

“Founding our own firm allowed us to truly deliver on our shared philosophy of quality representation with personal service. Instead of the cookie cutter approach we saw many firms using, we believed tailored representation that merged business interests with legal counsel would better serve our clients’ diverse interests,” says Bert Randall, partner with Franklin & Prokopik.

With 40 attorneys and three offices across Maryland, including headquarters operations in Baltimore and offices in Easton and Hagerstown, Franklin & Prokopik represents the entire state of Maryland as USLAW’s Maryland member firm. In addition to the practice areas listed above, the firm continues to expand its other practice areas, including bankruptcy/creditor’s rights, estates and trusts, tax, workers’ compensation and general civil litigation. The firm’s client base is diverse and includes household names such as FedEx, Brink’s, Clear Channel, Food Lion, SYSCO, and LiveNation.

“Many firms say they provide responsive counsel that is both pragmatic and legally sound. We’ve found that Franklin & Prokopik really delivers on that promise. And I especially appreciate their willingness to jump in and assist me ‘off the clock’ when I need it”, says Richard Munisteri, Vice President and Associate General Counsel with LiveNation, the largest producer of live music concerts in the world, annually producing over 16,000 concerts for 1,500 artists in 57 countries.

“The attorneys at F&P are smart enough to know and strike the right balance in how much to involve me in managing the case — looping me in or getting my approval at the right junctures without overdoing it, or underdoing it,” adds Munisteri.

Franklin & Prokopik is also recognized for its diversity and innovative programs to accommodate a changing workforce. “Nearly half of our partners are women, and our management team has taken strong steps to build an inclusive work environment. We recognize a diverse workforce strengthens the service and the product we offer our clients. To preserve and promote a representative workforce, we offer flexible working arrangements for men and women and work hard to accommodate the disparate needs of our attorneys and staff,” says Bob Franklin, one of the firm’s founding partners.

Franklin & Prokopik has made their membership in USLAW NETWORK a central tenet of their client service program. “The ability to refer our clients to vetted, approved law firms — firms we know and trust to meet our clients’ needs — has been very helpful not only to our attorneys, but most importantly, to our clients. We’ve been able to help them secure cost-effective and legally effective representation in jurisdictions from coast to coast,” says Randall.

Clients agree. “Franklin & Prokopik introduced me to USLAW. Bert Randall was already representing Clear Channel on several matters, so I knew he had my best interests in mind when he connected me to USLAW. Since that initial introduction in 2007, I’ve worked with many USLAW lawyers and law firms. My relationship with USLAW enables me to quickly get in touch with firms that I know will be responsive and I can trust to do an excellent job for Clear Channel. When a legal issue arises in a jurisdiction I’m not familiar with, I can reach out to the folks in USLAW and find a competent legal partner to assist me expeditiously,” says Linda Theode, Corporate Counsel with Clear Channel Communications, Inc. and a client advisor to USLAW NETWORK.

For more information on Franklin & Prokopik, please visit their web site at www.fandpnet.com or call Bert Randall at 410-230-3622.
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Employment & Labor Law • Transactional

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In today’s global marketplace, legal needs often transcend geographic boundaries. Clients with complex legal needs turn to USLAW NETWORK member firms to represent them in the courtroom and the boardroom, next door and across the United States.

When a complex legal matter emerges—whether it’s in a single jurisdiction or nationwide—USLAW is there. We represent some of the country’s leading businesses in matters ranging from complex commercial litigation, employment law, products liability, and professional malpractice defense.

USLAW NETWORK is a national organization composed of over 60 independent, defense-based law firms with nearly 4,000 attorneys covering the entire United States. An alliance with the Trans-European Law Firm Alliance (TELFA) gives us access to 26 European law firms each representing its own jurisdiction. USLAW NETWORK law firms:

- Are fully vetted and subject to a rigorous review process;
- Are AV-rated by Martindale-Hubbell;
- Become part of the USLAW NETWORK by invitation only;
- Possess broad commercial legal capabilities;
- Have substantial litigation and trial experience.

USLAW / TELFA Affiliation Provides Resources Across Europe

In 2007, USLAW established a mutual relationship with TELFA, the Trans-European Law Firm Alliance, a network of 26 law firms in Europe representing more than 700 lawyers. Our affiliation with TELFA offers USLAW member firms and their clients access to top-quality, qualified counsel in Europe.

TELFA offers USLAW clients:

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- Service unaffected by costly bureaucracy;
- Direct, cost-effective access to leading lawyers in different markets;
- Partner-led personal service;
- Swift access to the institutions of the European Union;
- Independent advice with conflicts of interest kept to a minimum.

TELFA member firms subscribe to formal quality, training and IT standards. As a result, TELFA does much more than enable referrals. Instead, it coordinates and facilitates their clients’ needs for counsel in unfamiliar markets, while offering the assurance and peace of mind that the quality of advice and service they will receive is consistent across TELFA firms.

USLAW NETWORK is founded on the relationship between its lawyers and their clients throughout the organization. Working with USLAW NETWORK firms helps clients:

- Streamline the law firm procurement process;
- Access competent legal counsel across the US and in Europe, through our affiliation with the Trans-European Law Firm Alliance;
- Access top-quality CLE and ongoing legal education opportunities through our web site and our Spring and Fall client conferences;
- Access a variety of USLAW-sponsored resources, including our Rapid Response Handbook, our web site and a series of compendiums on US law and other issues.
Next, employers must interview the alleged harasser. In your interviews here, begin by explaining that the company will thoroughly analyze the claims and that the investigator is a neutral party. Emphasize, however, the importance of being truthful, regardless of any discomfort that may arise regarding the subject matter discussed. Remind the employee that anything less than candor may result in discipline.

Start the discussion with broad questions. Investigators might ask the alleged harasser if they have ever engaged in the generally described conduct with any employee. Then, move on to more detailed questions. Be vigilant in how you construct your questions to avoid leading questions. Open-ended questions allow for an open-ended dialogue, which should be the goal of the investigation. Inquire about each instance of unwelcome conduct the victim has alleged and note the areas of agreement and disagreement. Ask the employee for names of any witnesses he or she believes can either corroborate his or her version of events or disclose additional facts that offer explanation for the conduct that may come to mind later.

In the event the accused claims the accuser is lying, ask why he or she believes the accuser is lying. This will help ascertain the motives the complaining employee may have. If the alleged harasser admits any misconduct he or she should be advised that the company will not tolerate it and pending the outcome of the investigation, he or she may face disciplinary action.

In dealing with witnesses, it is vital they are told from the outset that their cooperation is appreciated. These employees may be as nervous about being interviewed as the complaining employee and alleged harasser. Review the company’s anti-harassment policy with each witness and remind them the interview is part of enforcing this policy. Also, emphasize the sensitivity and confidentiality of the situation. Witnesses should be clearly instructed not to discuss the investigation with anyone else besides the investigator.

Often, witnesses will want information about how the investigation has resolved, but they should be told that due to privacy concerns, the company is unable to advise them of the outcome of the investigation. Remind employees that they may be disciplined for failing to maintain confidentiality.

Be conscious of — and document — any motivations or biases a witness may bring to the table. Employees who are called in to be interviewed may have an axe to grind, and those issues may color their reporting. Carefully consider if witnesses are providing hearsay, gossip or actual relevant information. Investigators should stick only to the facts.

Where the accused provides relevant information that he or she indicates may be corroborated by a witness, make sure to follow up on that information with the relevant parties. Last, consider obtaining written statements from employees with critical information. This may be particularly important where the investigator suspects the employee may be leaving the company soon.

Once the investigator has interviewed all necessary parties, a report or summary memo should be prepared for the company. The report can be used later, if necessary, to show that an independent investigation was conducted. It also assures the complaining and accused employees that the matter has been handled appropriately and that due process has been followed. Know, however, that any written material generated during the investigation, or at its conclusion, will likely be discoverable should litigation ensue. If the material is prepared by an attorney, this may give you the opportunity to claim it is protected from disclosure. Ultimately, however, if a report is prepared properly, an employer will want it to be discoverable, as it will support any affirmative defenses the employer asserts.

At the close of the investigation, the investigator will have to determine if any alleged conduct violates the company’s policies and procedures, but should refrain from speculating whether the law has been broken, both with the employees involved and with management.

Your investigator should have kept detailed notes of each and every interview he or she conducts. Remember, all materials generated during the investigation are likely to become evidence if the employee pursues the matter administratively with the EEOC, the appropriate state civil rights division, or in litigation. If the interviewer is the employer’s attorney, notes taken during the investigation will likely be protected from discovery by virtue of the work-product privilege. Regardless, you must preserve these materials.

In the event the investigator determines no harassment occurred, this should be clearly stated in the report. Any such action must be taken consistent with the company’s anti-harassment and disciplinary policies.

If the investigator believes a violation has occurred, then each violation should be identified, as well as the policy that the conduct violated. The report should summarize the key facts the investigator uncovered. In identifying the key facts, the investigator should note any inconsistencies, and describe the credibility of the witnesses.

The results should be provided to both the complaining employee and the alleged harasser. Remember, this document is likely to wind up as an exhibit if litigation results, so it should be drafted with utmost care. Often, it is wise to seek legal advice in finalizing this document.

The company must determine what discipline is warranted in the event the complaint is founded. Discipline must be implemented consistent with your written harassment policy. Appropriate discipline may involve any of the following: verbal warning, written reprimand, suspension with or without pay, attendance at a training session, company-wide retraining, transfer, relocation, financial payment to offset the cost of the investigation and/or the damage caused by the alleged harasser’s actions.

Employers may also wish to offer remedies directly to the victim, including offers to transfer the victim to a different department or another office. Any such change in this regard must be made with the complainant’s consent; otherwise, employers risk a retaliation claim. The complaining employee should not face anything that could be viewed as punishment in rectifying the situation.

Place a memorandum in both the complaining employee’s and the alleged harasser’s personnel files. As to the accused, make sure any such document does the following: thanks the employee for bringing forward the complaint; states that the matter has been investigated and documents the outcome; informs the employee that the company will continue to enforce its policies in the future, including the anti-harassment policy; advises the employee to immediately inform the company if any future harassing conduct occurs; and reminds the employee to bring forward any issues that appear to involve retaliation for making the harassment complaint.

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CPSC POWER EXPANDS (Continued from page 19)

PUBLIC DATABASE OF INCIDENTS
Within 180 days after the enactment of the new legislation, The CPSC must submit a detailed plan to Congress for establishing a publicly available, searchable “database on the safety of consumer products” which must be accessible through the CPSC’s website. The database must include reports received by consumers, health care professionals, child service providers, public safety entities and local, state or federal government agencies. Consumers or other entities that submit product-related incident reports to the CPSC must supply contact information to the CPSC; however, unless the consumer or entity expressly consents, the CPSC is not permitted to disclose this contact information to the product manufacturer.

The statute does permit manufacturers to review incident reports prior to entry into the public database. The decree, however, only allows 10 business days for a company to receive, investigate and comment upon these reports and complaints. There are very few grounds for objection to this process. Objections are primarily limited to those based on inaccuracy of the report, or confidential information contained in it.

The CPSC must establish the database within 18 months after submission of its “detailed plan” required by the statute. All manufacturers of consumer products will need a procedure in place to rapidly respond to these reports and protect the company from the inadvertent dissemination of inaccurate or confidential information on the publicly available database.

STATE ATTORNEYS GENERAL ACTIONS
The 2008 CPSIA now expands the authority of state attorneys general by allowing them to file suits for injunctions and enforce several other violations in District Court. State attorneys general do not, however, have the power to sue for monetary damages or to assess penalties for these infringements.

State attorneys general must notify the CPSC thirty days before filing suit. However, if the state attorney general determines that the product poses a “substantial hazard,” it is not required to notify the CPSC before filing suit. Some surmise the exception subsumes the rule since most state suits seek to enforce CPSC orders recalling products where “substantial hazard” is already determined.

Additionally, granting authority to 50 state attorneys general who are influenced by political agendas may lead to a variety of legal and public-perception issues.

ENHANCED COMPULSORY STOP-SALE AUTHORITY
The legislation extensively broadens CPSC’s powers and allows it to bypass prior requirements of a notice and hearing for companies allegedly violating its standards. Under the new legislation, if the CPSC determines a product is “imminently hazardous,” it can force companies to take action or do so itself unilaterally.

The CPSC has already taken advantage of this power. On August 27, 2008, it issued a safety alert press release advising consumers to stop using Simplicity Bassinets. The CPSC claimed the owner, SFCa, Inc., did not cooperate with the Commission to recall the product. In issuing the release, the CPSC explicitly stated that it was, “using its new authorities in the Consumer Product Safety Improvement Act, to release this warning upon making a finding that the health and safety of the public require immediate notice.”

The CPSC now has the power to halt the sale and distribution of consumer products without a hearing, and that scope should compel companies to re-evaluate their practices when negotiating the terms of voluntary recalls with the CPSC.

INCREASED CIVIL AND CRIMINAL PENALTIES
Prior to the 2008 CPSIA, the CPSC could request the Department of Justice charge civil penalties ranging from $8,000 per violation to a maximum of $1,825,000. The 2008 CPSIA substantially increases these penalties to a minimum of $100,000 per infraction, and up to $15,000,000 for a related series of violations. The CPSC’s position is that each noncompliant product constitutes a violation, meaning that a shipment or sale of 150 violating products could subject a manufacturer, distributor or retailer to $15 million in civil penalties.

The 2008 CPSIA also significantly increased criminal penalties with fines and imprisonment up to five years. Previously, criminal penalties were a misdemeanor and given lower priority by the Department of Justice. The new criminal penalties will garner more attention as they constitute a felony.

The 2008 CPSIA also added forfeiture of assets provisions and removed the requirement that the CPSC must provide notice to the company before pursuing officers and directors individually. These topics and how companies can safeguard assets will be explored in future issues.

MANAGING AND MITIGATING MANUFACTURER RISK
The 2008 CPSIA legislation forces manufacturers, importers and distributors to reevaluate and revise their current product safety policies and procedures. The CPSC creates a vastly different playing field today for companies who make or sell the more than 15,000 products covered by the CPSC, and with its complexity and potential for significant penalties, manufacturers, retailers and distributors should take extreme care (and exercise caution) in reviewing their procedures and making changes. Because of the breadth and potential risk for damages, companies of all sizes should consult their counsel for guidance on how to move forward in this new product climate.

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requirement applies to all categories of consumer goods, and failure to comply can result in destruction of the shipment contents. Supply chain and shipping personnel should be briefed on the new regulations and policies implemented to ensure adherence to new procedures.

b. Quality Control Personnel: Under forthcoming regulations, the Commission will establish third-party testing standards for children’s products ranging from baby bouncers to metal jewelry. New rules relating to uniform information to be contained in recall notices, testing of random samples, and certain banned chemicals are expected as well. Certain lead restrictions will apply retroactively to current inventory taking effect in February 2009. Implementing standard quality control procedures now, both in-house and among supply chain partners, is essential to ensure product quality conforms to new requirements.

c. Marketing Personnel: New regulations applicable to certain toys restrict advertising that provides consumers with a direct means for purchase or order, such as catalogs, other printed materials, and Internet web sites. Toys or games for use by children ages 3 to 6 that include small parts, or any toy for use by children age 3 years or older that contains a balloon, small ball, or marble, must prominently display a warning label required by regulation. The requirements for Internet advertising take effect Dec. 12, 2008; the requirements for catalogues and other printed materials take effect in February 2009.

3. Whistleblower Protection: One of the biggest potential landmines of the new legislation includes some of the most expansive whistleblower-retaliation protections under any federal statute. As such, employment policy manuals must be amended to reflect the changes and human resource managers and hiring managers should be educated on anti-retaliation rules.

**EXECUTING CONTRACTUAL REQUIREMENTS AND PARTNER AGREEMENTS**

Under the new regulations, controls for third-party testing have been stepped up, and companies can be held liable for the actions of suppliers and manufacturers. All new contracts should reflect the new reality under the CPSIA to include provisions that help shift and share the burden associated with them.

Some experts also recommend companies look to product safety experts to help them craft compliance policies and protocols...

1. Third-Party Testing: Under the new law, every manufacturer, importer, or private labeler of children’s products must have the product tested and certified by an accredited independent lab. Manufacturers, importers, and private labelers of such goods must enter into new contracts for testing with third-party laboratories as the new testing standards are phased in. Seek advice on drafting these contracts at the outset to ensure that the proper and necessary protections are in place.

2. Other Contracts: Standard purchase agreements with manufacturers and suppliers will need to be reviewed and, in some cases, renegotiated to ensure compliance with the new standards. Issues that may need to be addressed include inspection and oversight responsibilities of certain importers, requirements for regular testing of product batches, and clear delineation of all reporting and recall responsibilities, including allocations of costs and expenses associated with any recall.

3. Outsourcing Certain Responsibilities: Depending on the scope and nature of a business, it may be possible to outsource certain responsibilities or shift certain burdens to other parties in the supply chain. Numerous import/export service providers and sourcing companies are available by contract to handle new issues related to certification of shipments and testing of goods. Such an arrangement may be especially well-suited for small- to mid-size retailers sourcing directly from overseas.

Changes related to the Consumer Product Safety Improvement Act of 2008 are extensive, and the Commission has been granted wide authority and resources to enforce its new rules. In combination with heightened consumer sensitivity to product safety issues and active and engaged watchdog groups, compliance with all consumer product safety rules is more important than ever. Failure to do so can lead to not only hefty civil or criminal penalties, but also substantial public relations damages.

The new rules are intricate, sweeping and impact everything from manufacturing contracts and import procedures to corporate data collection policies. To protect the viability of your business, manufacturers, importers, distributors and retailers are wise to establish now a comprehensive product safety policy. Some experts also recommend companies look to product safety experts to help them craft compliance policies and protocols, given the complexity of the new regulations — and the risks associated with non-compliance.

As we enter a new era of product safety regulations, protecting your customers is the best way to protect your business, your goodwill, and your investment.
properly reporting and satisfying CMS subrogation interest now rests with the defendant, and can not be transferred to the claimant or claimant’s attorney.

This protocol is in effect for both non-litigated and litigated claims. Although a Hardship Petition for reduction of the subrogation interest can be made to CMS on behalf of the claimant, if that is denied an exhaustive appellate process must then be followed.

Assuming CMS will not compromise their subrogation right as of the time of settlement, the minimum threshold for settlements of personal injury claims with a Medicare recipient will thus “effectively” be the amount of CMS’s subrogation right as of that date! Thus, a “nuisance value settlement” will after July 1st, 2009, have to equate to an amount in excess of Medicare’s subrogation right as of the date of the settlement, regardless of admissions or assessments of liability for the personal injury claim.

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REGISTRATION TIME LINES

CMS has issued an implementation time line for compliance with new MMSEA requirements. Liability, no-fault and workers’ compensation insurers and self-insureds should adhere to the following schedule:

January 1, 2009 - June 30, 2009
Recommended reporting systems development period

May 1, 2009 - June 30, 2009
Electronic registration via the Coordination of Benefits secure web site for responsible reporting entities

July 1, 2009 - September 30, 2009
Testing period for responsible reporting entities

October 1, 2009 - December 31, 2009
Responsible reporting entities must transmit first submissions based on a predetermined schedule with the Coordination of Benefits contractor

January 1, 2010 and beyond
All required entities submitting appropriate files and in compliance

Everyone must remember that the requirements to protect CMS’s interest have been long standing. The Center for Medicare Services is still working on the specific reporting requirements as generally required by the MMSEA. However, these regulations and requirements will apply to all businesses and or industries which defend personal injury claims by Medicare recipients across the board.
Dealing with loan delinquencies nationwide?

In today’s tighter economy, across the country, lenders and creditors are increasingly challenged by cash strapped debtors. USLAW, with our network of bankruptcy and creditors’ rights attorneys drawn from our 60+ member firms in more than 45 states, has the resources and the experience to help creditors exercise their rights in debtor bankruptcy proceedings.

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having notified the Information Commissioner constitutes a criminal offense.

The Information Commissioner generally only has jurisdiction in relation to data held or processed in the UK. Therefore the legal implications of the UK legislation on data protection will not apply outside the UK. Throughout Europe, similar rules do exist, based on the European Directive referred to above.

The provisions of the Act apply to a data controller established in the UK and who processes personal data in connection with their establishment; or, if the data controller is established neither in the UK nor in any other EEA State but uses equipment in the UK (his own or third party’s) for processing the data, otherwise than for the purposes of transit through the UK. In this context, each of the following is (amongst others) to be treated as established in the UK: a body incorporated under the law of, or any part of, the United Kingdom; any person who would not otherwise be established in the UK but maintains a regular practice in the UK or an office, branch or agency through which he carries on any activity in the UK.

Data protections, the obligations of data controllers and processors and the rights of data subjects are complex. Breach of data protection laws in the UK can result in both civil and criminal penalties. Particular care needs to be taken when exporting personal and sensitive personal data to jurisdictions outside of the EEA.

For more information on Wedlake Bell please visit www.wedlakebell.com.

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Europe takes the protection of data and data privacy very seriously. With some of the strongest laws on the books governing the collection and use of personal data, any company operating in the EU that collects, compiles or uses consumer or individual data must be well versed in the guidelines contained in the EU Data Protection Directive (The Directive), as well as the specific laws adopted by EU member countries in order for each of them to comply with the Directive.

The EU Directive was adopted by the European Union to protect the privacy of and personal data collected for or about citizens of the EU, particularly for the purposes of processing, using, or exchanging data.


The EU Directive is predicated on the following seven guidelines:

1. NOTICE — Subjects whose data is being collected should be given notice.
2. PURPOSE — Data collected should be used only for stated purpose(s).
3. CONSENT — Personal data should not be disclosed or shared with third parties without consent.
4. SECURITY — Once collected, personal data must be kept secure from potential abuse, theft, or loss.
5. DISCLOSURE — Subjects whose personal data is being collected should be informed as to the party or parties collecting such data.
6. ACCESS — Subjects should granted access to their personal data and allowed to correct any inaccuracies.
7. ACCOUNTABILITY — Subjects should be able to hold personal data collectors accountable.

EU data protection rules apply not only when responsible parties are established or operating within the EU, but whenever a controller uses equipment located inside the EU to process personal data. Controllers from outside the EU who process personal data inside the EU must comply with this directive.
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The Center for Forensic Economic Studies is a firm of economists and statisticians specializing in litigation support. In 1980, Jerome Staller, then a senior government economist, formed a firm dedicated to applying economic and statistical analysis to problems arising in litigation. The firm provided attorneys and courts with calculations of damages in civil litigation. It also provided statistical analyses of liability in mass-tort and civil-rights matters. The firm earned a reputation for reporting the results of such analysis clearly and coherently. Building on its two main areas of practice — analysis of damages in personal injury matters and the statistical analysis of liability and damages in labor and employment matters — the firm has greatly expanded its scope.

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Setting itself apart from the norm, the USLAW Compendium of Law will address the legal questions that often arise. The Compendium is a multi-state resource that permits its users to easily access State common and statutory law regarding a variety of litigation oriented issues. The focus of the Compendium is on the procedural aspects of the law so that our clients will have a reliable resource. The Compendium addresses issues that arise prior to the commencement of litigation and carry through to the completion of trial.

Written by USLAW attorneys, the Compendium takes advantage of local knowledge and practice in each of the jurisdictions the Network serves. This local knowledge is highlighted in many cases by a venue map that illustrates the nature of the venue be it more defense or plaintiff oriented. Member firms created these maps at the request of our clients highlighting USLAW Network’s responsiveness to client’s needs.

The Compendium of Law will be available on CD and on www.uslaw.org. The Compendium will be updated annually with changes made available in a password protected area of the USLAW web site.

General Sections Include:
• Pre-Suit and Initial Considerations
• Negligence
• Discovery
• Evidence, Proofs & Trial Issues
• Damages
• Insurance

For more information or to receive your copy of the USLAW Compendium of Law, visit us online at www.uslaw.org or contact Roger Yaffe at 1-800-231-9110.