Delaware Banker

Spring 2021
Vol. 17 No. 2

COVID Insurance Claims

Will Businesses Be Protected?

Delaware Banker

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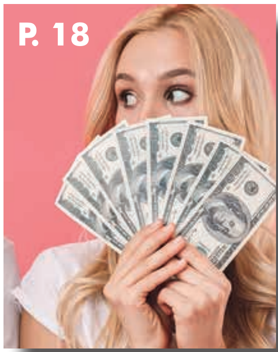
Vol. 17, No. 2

The Quarterly Publication of the Delaware Bankers Association



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Delaware Banker
Editing & Design
Greg Koseluk

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View from the Chair

by
Joe Westcott
Market President
Capital One

Chair
Delaware Bankers Association

"This year has truly flexed our muscles, but having gone through it, we have emerged stronger individually and as an association."

As I come to the end of my tenure as the chair of the Delaware Bankers Association, I'm struck by the realization that for the first time in our organization's history, there's been a chair who never met in-person with the board or the members. In this unprecedented year of strange occurrences, you might even wonder if I really exist. The words of the poem "Antigonish" by William Hughes Mearns come to mind.

"Yesterday upon the stair,
I met a man who wasn't there!"

Physical evidence to the contrary, I, and, the rest of the board and members of the Delaware Bankers Association have been here advancing the work of the DBA across many important areas.

Like the rest of America, and indeed the world, since March 2020, we've been conducting most of our business remotely wherever possible. We held our 125th anniversary annual "dinner" virtually. The event featured most of the usual features, including congratulatory messages from the Governor and our Congressional delegation. We all missed the networking and fellowship with colleagues. But in a year when pound-packing was particularly challenging, at least we skipped the calories of a dinner banquet!

The DBA also held its 2020 Delaware Trust Conference virtually on a conference platform and in a year when similar conferences were scaling back, actually offered more sessions to their attendees. Similarly, such DBA stalwart programs as Teach Children to Save Day and Women Connect adapted to prevailing conditions to continue to serve their respective audiences. As with most of us, flexibility has become the watchword. Indeed, the pandemic has taught us methods to expand many of our programs into a hybrid model of in-person and virtual delivery systems and serve broader populations.

The DBA board has also been at work addressing the other major challenge of the year: social equality. As an association, we are committed to fostering an industry that provides equal opportunity and inclusion for all the members of our society. Delaware's bankers fill a vital position in the community. As such, we must be leaders in providing economic opportunities, fair treatment, access, and pathways for advancement for both the populations we serve as well as the individuals we employ. Your association and its members will continue to work together to create a Delaware that will truly be the First State in opportunity for all.

It would be an understatement to say this has been a demanding twelve months. However, I am proud of all that the Delaware banking industry has accomplished in the face of these challenges. This year has truly flexed our muscles, but having gone through them, we have emerged stronger individually and as an association. That's something of which we can all be proud!

By the time you read this, many, if not most of you, will have received the COVID-19 vaccination. So, while I may have been invisible as your chair for 2020-21, I hope to be a very visible and in-person past-chair. See you soon!

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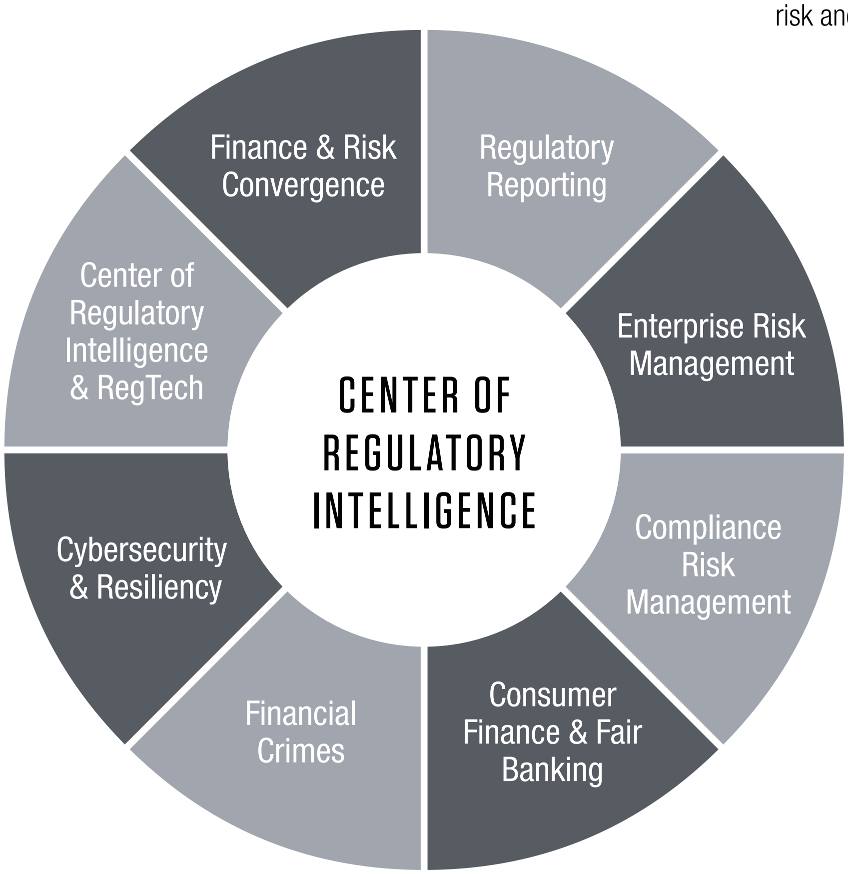

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President's Report

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

"Our desire to be successful enables us to overcome whatever obstacles get in the way."

Synonymous with spring is the Masters Tournament held annually at the Augusta National Golf Club. Whether you are a fan of golf or not, the course is picturesque in natural simplicity. Robert Trent Jones in "The Complete Golfer" said, "From tee to green, there is nothing but closely cropped green turf. These broad expanses of fairway, punctuated with pines and dotted with flashes of white sand, give Augusta a clean, sprightly appearance." An eloquent way of describing an idyllic scene; sun shining, azaleas in full bloom, birds singing and chirping in the background, and the unmistakable thwack of a pro hitting the golf ball just right.

If you watched the final round on Sunday this year, you could not help but feel for Xander Schauffele, who birdied the seventh and eighth holes, then masterfully made four straight birdies from holes 12 to 15 to get within two of the leader Matsuyama. And then, at the 16th, he hit his tee shot into the water, a triple-bogey, which dropped him out of contention. No doubt, he would have liked a do-over.

The word do-over usually suggests the results from an action were not preferred, that the outcome was somehow unsuccessful or altogether unsatisfactory. Goodness knows that I have had my fair share of wanting a do-over, an opportunity to get it right. But as we know, things do not always go smoothly. In life, there are bumps, and snags, and roadblocks along the way. But is that not precisely when we pick ourselves up by our bootstraps, carry on, and learn what it takes to be resilient? Our desire to be successful enables us to overcome whatever obstacles get in the way.

There is also a flip side to a do-over. The do-over of which you wish you had more. The time when it finally all comes together and the outcome is exactly what you had hoped for. The moment when you realize everything went off as intended, leading to not just a good result, but an especially excellent result. What a feeling of euphoria! Nothing can beat the sheer happiness and excitement felt when a team accomplishes a sought-after goal without being derailed by the myriad of obstacles that get in the way.

Reflecting on the past year of state-mandated stay-at-home orders, workplace shutdowns, social distancing, mask-wearing, and the like, I am sure everyone is ready to put it all behind. With vaccinations bringing hope for a new normal, we look forward to the day when the pandemic is safely in the rearview mirror. Definitely no need for a do-over!

That said, much of what we experienced and learned through the pandemic will influence the future of how we work. Virtual meetings are here to stay. Working remotely will continue to benefit employees and employers by providing flexibility. And work-life balance (as much as work and life can be in balance!) will return.

Through it all, our members have generously supported the Delaware Bankers Association and the Delaware Financial Education Alliance. These same members have so unselfishly given their time and talent to contribute to the welfare of their industry, their community, and each other. The Board of Directors remained engaged and available to address whatever needed to be tackled, whenever it needed to be tackled. And finally, our small but mighty team has been amazing: delivering top- notch programs using new technology, keeping the lines of communication open with legislators, exuding unwavering positivity that we will keep the lights on and the virtual door open. Collectively, we achieved the exact outcome for which we had hoped.

Now that is a do-over I would gladly welcome.

Thank you.

What's New at the DBA

New Associate Member

Bankers Healthcare Group

Meredith Crawford, SVP
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Website: www.bankershealthcaregroup.com

BHG is transforming the financial industry; leveraging the power of data, analytics, and cutting-edge technology to become not only the number one source for professional loans, but the creator of the largest community bank network in the country. Since 2001, BHG has originated more than $7 billion in loan solutions to top-quality borrowers, which community and midsize banks can access via a state-of-the-art loan delivery platform. Building on nearly two decades of innovation, BHG and its family of brands now offer a full suite of financial solutions that span business, consumer, and SBA 7(a) loans, credit cards, collection services, risk management services, and point-of-sale financing with a focus in patient lending. With record growth year after year, BHG continues to be recognized regionally and nationally: earning a spot on the Inc. 5000 for 14 years running, and receiving accolades from Great Place to Work® and Fortune magazine, among others. BHG is partially owned by Pinnacle Bank (PNFP) and has headquarters in Davie, FL and Syracuse, NY.

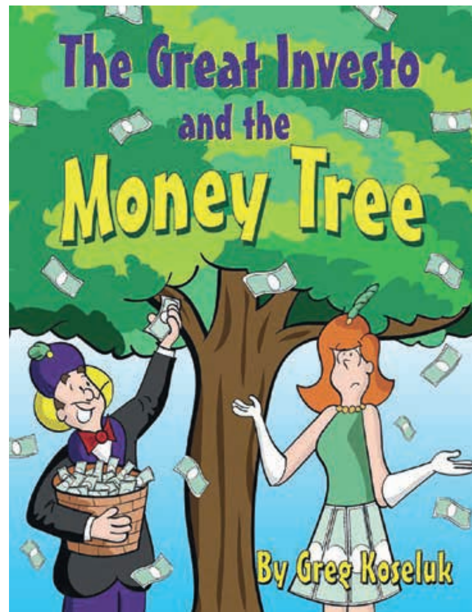
Delaware Banks Receive $47,286 in Distributions from American Bankers Mutual Insurance, Ltd.

American Bankers Mutual Insurance, Ltd., the reinsurer for the directors and officers (D&O), bond and cyber insurance program co-endorsed by American Bankers Association (ABA) and Delaware Bankers Association (DBA), declared a $2.5 million distribution to be shared by qualified ABA member banks insured through ABA Insurance Services, a member of Great American Insurance Group.

This is the 31st consecutive year that the industry's leading professional liability and bond insurance provider has declared distributions to eligible ABA member banks, bringing the total to $91.3 million since the program's inception. Banks that purchase their directors and officers, bond, cyber and related insurance from this program and are current ABA members are eligible to receive a distribution.

"Even during periods of economic uncertainty, this program provides a stable source of insurance and continues to offer meaningful distributions for our members," said Rob Nichols, ABA president and CEO. "This is one of the many ways an ABA membership can add value for your institution."

23rd Annual Teach Children to Save Day



The week of April 19 to April 23 over 200 banker volunteers taught an estimated 4,300 students in over 200 public, private, and parochial classrooms, throughout Delaware as part of the 23rd annual Teach Children to Save Day. This year, due to the COVID-19 restrictions, bankers conducted lessons virtually. Each lesson was also introduced by Governor John Carney.

This year's lesson was taken from the book *The Great Investo and the Money Tree*. The book illustrates the benefits of saving, not only to the individual, but to the entire community. The book was written and illustrated by Greg Koseluk of the Delaware Bankers Association. The book was created specifically for the 2021 Teach Children to Save Day event and was made possible with the support of Barclays, Capital One, Wells Fargo, County Bank, Fulton Bank, M&T Bank, Shore United Bank, WSFS Bank, Artisans' Bank, Bank of America, Discover Bank, and First Citizens Community Bank.

The Delaware Bankers Association and the Delaware Financial Education Alliance coordinate the program in partnership with the University of Delaware's Center for Economic Education and Entrepreneurship (CEEE). The CEEE develops the lessons which meet Delaware's state economic education standards.

Artisans' Bank Celebrates 160 Years

Artisans' Bank is celebrating the institution's 160th anniversary. Artisans' Bank was formed in 1861 by a group of ten area businessmen who had the vision of creating a bank for local working people: the "Artisans". The founders of Artisans' Bank endeavored to create a mutual bank, owned by its depositors, that gave back to the community it served. Each founder invested $4 and after charter costs and supplies, Artisans' Bank was chartered in February of 1861 and opened that April with working capital of $1.93. Elizabeth D. Albano, the 12th president of Artisans' Bank (pictured above with the bank's Wall of Presidents), says, "The occasion of our 160th anniversary causes me to pause and reflect upon my 30 years with the Bank; a time during which I have seen Artisans' continually advance to meet the evolving needs of our clients and the community at large. Our founders may not have been able to foresee what today's market would look like 160 years ago, but the foundation they created of being a stable and trusted advisor to the community has proven to be timeless."

COVID-19

Will Your Customers Prevail on COVID-Related Business Interruption Insurance Claims?

by
Brent C. Shaffer
Young Conaway Stargatt & Taylor, LLP

Many customers of Delaware banks have suffered unprecedented economic losses from restrictions imposed on businesses by Governor Carney related to Delaware's State of Emergency, which he declared on March 12, 2020 due to the public health threat caused by COVID-19. Good bankers always keep a close eye on their customers' financial health, and many become trusted advisors to those customers in protecting that health. A great debate arose a year ago as to whether businesses should be filing claims under their property insurance policies to cover COVID-19-related losses. The conventional wisdom was that insurers would not pay such claims. Indeed, insurance claims under various theories to recover lost business income due to COVID-19 were routinely denied, and such denials were then tested in an absolute flood of litigation throughout the country over the past year. The fact that these cases number in the thousands is no doubt a testament to the wide-spread effect of various governmental closure orders and other restrictions on businesses. Now that many courts have weighed in on COVID-19 coverage, where do businesses stand on recovering money from their insurers?

Common Threads

A survey of cases reveals many common threads, but not entirely consistent rulings. Most cases brought by businesses against their insurance companies who have denied coverage under business interruption and other related types of insurance were originally filed in various state courts, but then quickly "removed" to federal courts by the insurance company defendants (federal courts have jurisdiction due to "diversity" of the location of the insured and the insurance companies). Regardless of whether the cases were brought in state or federal court, state law controls how these coverage cases are decided. Most of the court rulings to date have been on motions as opposed to full trial outcomes; primarily motions of the insurers to dismiss the cases up front for failure to state a valid claim. This means that the procedural posture of the court decisions requires the court to assume that the facts alleged by the insured businesses are correct; the court then determines whether the law provides the business with a sufficient legal basis to argue for insurance coverage under those facts.

All of these cases are breach of contract cases; in other words, the business sues for damages because the insurer did not pay as required under the policies, or the business seeks a ruling from the court instructing the insurer to declare coverage under the insurance policy. Even though these disputes turn on precise contract language in the policy at hand, most insurance policies are written on standard Insurance Services Office ("ISO") forms. As a result, the cases are about the interpretation of similar language and tend to be good precedent for other coverage disputes. The type of the business/nature of the COVID-related closure in each particular dispute tends not to matter much, because all of these cases deal with similar COVID concerns and similar governmental orders across the country. At most, a few court decisions have tried to make factual distinctions between essential businesses that did not have to physically close their operations and those businesses that were forced to close.

Bases for Insurance Claims

The bases for businesses to seek coverage in COVID-19 situations are primarily under business interruption insurance (more properly termed "business income" insurance), "extra expense" coverage (related to business income), and "civil authority" coverage. In a few cases, the businesses have also claimed entitlement to monies under "sue and labor," "ingress and egress," and "dependent property" coverage. Under each of these types of insurance, for an insurance company to be required to pay a claim there must be (1) a covered loss (i.e., in these cases actual loss of business income during suspension of operations); (2) a cause of loss that is a covered cause of loss (in these cases, direct physical loss or damage); and (3) no exclusion from coverage (that applies to defeat the claim even if it is a covered cause of loss).

The first of the various theories of covered loss is under business interruption insurance. Most policies contain the following business income provision: "We will pay for the actual loss of business income you sustain due

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to the necessary suspension of your operations during the period of restoration. The suspension must be caused by direct physical loss of or damage to property at the described premises." The second basis, "extra expense" coverage, is from a statement in the policy that the insurer "will pay necessary extra expense that you incur during the period of restoration that you would not have incurred if there had been no direct physical loss or damage to the property at the described premises." The third theory of recovery is the "civil authority" coverage provision, which usually states that "when a covered cause of loss causes damage to property other than property at the described premises, we will pay for the actual loss of business income you sustain and necessary extra expense caused by the action of civil authority that prohibits access to the described premises," provided that both access to the immediately surrounding area is prohibited as a result of the damage and the civil authority's action is in response to dangerous physical conditions resulting from a covered cause of loss that caused the damage.

With respect to exclusions from coverage, there are two exclusions that are typically brought up in the COVID-19-related cases: the "virus exclusion" and the "ordinance or law exclusion." The virus exclusion states that the company will not pay for loss or damage caused directly or indirectly by any virus that induces or can induce physical distress, illness or disease, regardless of whether it is otherwise a covered cause of loss. The ordinance or law exclusion denies coverage of losses as a result of the enforcement of any ordinance or law regulating the construction, use or repair of the property.

Physical Cause of Loss

As mentioned above, there must be a direct physical loss or damage for coverage to occur. This issue is at the heart of all of the COVID-19-related cases. Many of the cases involve businesses claiming that government proclamations that prohibit access or limit use cause physical loss; and in many of the cases the argument is also made that coronavirus droplets that are on the insured premises (or assumed to be on the insured premises) themselves create physical loss to the premises. The plaintiff businesses in these cases seize on the "loss or damage" policy language and seek to distinguish physical loss from physical damage as a covered cause of loss.

No Coverage in Most Cases

How have bank customers faired so far in their insurance litigation? Not well in most states. With the understanding that most of the reported decisions are currently under appeal to higher courts, the majority of these decisions have held that there is no insurance coverage under any of the theories of covered loss because there is no direct physical loss or damage to the premises. These decisions do not equate the government-mandated limits on access to a physical loss such as a fire. Moreover, most of the courts that have not found a covered cause of loss have also stated that the virus exclusion would defeat the claim, even if they had found a covered cause of loss. For example, the U.S. District Court for the Central District of California, in a case involving hotels, ruled that the virus exclusion prevents any business income or civil authority coverage because the executive orders to close were caused by a virus: the desire to halt the physical spread of COVID-19. *West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Insurance Companies*, 2020 WL 6440037 (Oct. 27, 2020). Similarly, among many other rulings, coverage has been denied to optometrists by courts in Alabama; an online marketing firm in Florida; restaurants in Iowa; barber shops in California; restaurants in New York; a law firm in Pennsylvania; and barber shops in Texas.

Coverage Granted in Some Cases

There are a few cases with the opposite result. Courts denied insurers' motions to dismiss and permitted businesses to allege coverage under property insurance policies in cases involving restaurants in Ohio, Missouri and Washington. Also, in an additional case in Missouri, dentists were allowed to precede to trial over coverage. These cases found that there was a direct physical loss under the policies because of loss of access to the property causing the loss of a property's essential functionality or because of actual contamination by COVID-19. The policies in some of these cases did not have the virus exclusion, but in other cases the policies did and these courts found the virus exclusion not to apply because the loss of income was caused due to government shutdown orders and not COVID-19 itself. Although these cases have received much publicity and offer a glimmer of hope for businesses, they are already being called into question. More recent decisions from the same courts that allowed the cases to proceed in both Missouri and Ohio have now denied coverage in similar situations.

In 2020, legislation was introduced in 11 states and Puerto Rico, and bills were introduced in the U.S. House of Representatives, that would force insurers to retroactively pay for business interruption losses from coronavirus shutdowns. Some of these initiatives passed various assemblies, but only an Illinois bill that established a task force to study the need for changes to business interruption insurance policies became law. As of this writing, in 2021 similar legislation has been introduced in seven states.

Delaware Result

How would Delaware courts rule on this issue? There are no reported Delaware decisions on the topic as this issue goes to press. However, Delaware courts often look to case precedent from neighboring states in the Third Federal Judicial Circuit, such as Pennsylvania. There are several Pennsylvania decisions denying coverage for COVID-19 claims. Most recently, the United States District Court for the Middle District of Pennsylvania in *Kahn and AARK Enterprises LLC d/b/a Mauldin's v. Pennsylvania National*

Mutual Casualty Insurance Company, filed February 8, 2021, granted the insurance company's motion to dismiss, finding no basis existed for the case to proceed under business income, extra expense and civil authority coverages. Applying Pennsylvania law to the closure of a South Carolina restaurant, predictably the court based its denial on the lack of physical loss of or damage to property. The case focused on policy language requiring some issue with the physical premises that impedes business operations. Like other courts, the court in *Kahn* used ordinary meaning to define the otherwise undefined phrase "physical loss" in the policy as relating to or involving material things, pertaining to tangible objects; not a mere economic impact.

As of this writing, no bills have been introduced in Delaware to compel insurance companies to pay COVID-19-related claims.

Conclusion

Bankers should continue to focus on assisting their customers with paycheck protection program loans and other relief provided by the Small Business Administration, rather than encourage them to pursue insurance claims. In Delaware, it is a fairly safe bet that these businesses do not have a pot of gold on the way from their insurers, and help from the legislature is unlikely.

As counsel to parties involved in commercial real estate transactions, Brent Shaffer is known for using his experience of over 30 years to focus on the most essential elements and client goals of each transaction, and for his meticulous drafting of documentation to minimize misunderstandings and avoid litigation for each deal as well. Brent takes a practical approach, based largely on his extensive understanding of the reasoning behind common deal requirements. As commercial real estate transactions grow increasingly complex — with more mixed-use projects, more investors in the debt stack, and more regulation affecting every aspect — Brent's clients rely on him for the advocacy and documentation they need to protect their interests.

Select Participation And Syndication Issues

by
Sara T. Toner[1]
Richards, Layton & Finger, P.A.

Commercial real estate finance has evolved from straightforward single lender/borrower structured loans into more complex, layered capital-market transactions involving multiple lenders. This "evolution" provides borrowers with access to larger-sized loans and permits banks to pool resources, allowing banks to enhance liquidity while spreading its risk and credit exposure. Lenders should be mindful of the structures and pitfalls involving loan participations and syndications, as hidden within these transactions are all sorts of risks that lenders should be aware of. While there are many benefits to participation and syndicated loan structures, parties should think about what will happen in the event of a borrower default. This article provides a primer on these structures and identifies key issues to be aware of.

The Basics: Participation Agreements

Let's start with the basics. A loan participation is an arrangement where a lender originates (the "lead lender") a loan to a borrower and then sells a portion of that loan to one or more other banks (the "participant"). A participation involves a separate loan transaction with the borrower and the lead lender on the one hand, and a participation agreement with the participant bank(s) and lead lender on the other, essentially creating two closings or transactions. The participation agreement creates the framework for the relationship between and among the lead lender and participant banks and governs the obligations each owes the other with respect to the loan. In a participation, the lead lender sources the loan with the borrower and is the named lender in the loan documents with the borrower. The participant bank is not named in the loan documents. It is important to recognize that a participant is not a lender and is not in privity with a borrower, agent or other lenders. Because the lead lender remains a lender for the interest that is the subject of the participation, the lead lender remains responsible to the borrower and other lender participants as though the participation was not sold. Participants are not considered creditors of the borrower and cannot make claims against the borrower or the collateral securing the loan.

The role of the lead lender is active in nature, as this lender sources, manages and administers the loan. Typically the lead lender drafts the participation agreement. Since this structure facilitates the sale of the loan by the lead lender, the participation agreement is somewhat slanted in favor of the lead lender. The role of the participant is somewhat passive or behind the scenes in nature, as there is typically no interaction between the participant and the borrower. The participant lender funds a percentage of the loan amount, shares in the revenue derived from the loan, and assumes risk for the loan based on its percentage ownership of the loan. The terms are either *pari passu* or senior/subordinated. In a *pari passu* structure, the participants share the upside and downside of the loan equally. All payments are paid first to the lead lender, who then disperses to each participant in accordance with their respective participating interest. In a senior/subordinated structure, by contrast, the senior lender is paid first and the subordinate participation interest is paid only if there are sufficient funds left over to make the payments.

Key Benefits:

1. For the lead lender, a participation: (a) may satisfy lending needs of its borrower without exceeding lending limits, (b) provide risk diversification, and (c) improve the lead lender's liquidity position.

2. For the participant, a participation: (a) may supplement its loan portfolio when loan demand is weak, and (b) may reduce servicing burdens and origination costs while allowing the participant to make other investments.

When disputes arise they typically are the result of the banks involved in the participation having diverging views on the handling of the loan in the event of a borrower default. Many times the lead lender is the borrower's relationship bank, so it is not unusual for the lead lender to have a greater interest in working with the borrower than the participating bank. A well-drafted participation agreement may be difficult to litigate when things go awry because of the inherent sophistication of these agreements.[2] Courts strictly construe the language of participation agreements between the lead lender and the participants, citing the sophistication of the parties involved.[3] As such, if a borrower defaults and there are subsequent disputes arising out of the participation, courts will generally consider the terms of the participation agreement to determine the parties' rights and obligations. Duties and intentions generally will not be implied.

An overarching issue for participant lenders to be aware of is that the lead lender generally owes no fiduciary duties to a participant.[4] Delaware courts have not specifically addressed whether a lead lender owes a fiduciary duty to a participant.[5] Nationally, the prevailing view is encapsulated in *First Citizen's Federal Savings & Loan Assoc. v. Worthen Bank & Trust Co., N.A.*[6] In this case, a participant bank sued the lead lender for breach of fiduciary duty. The standard of care articulated in the applicable participation agreement was that the lead lender would "administer the loan in accordance with the same degree of care that the administrator would exercise in servicing and administering a loan of its own account." Applying California law, the United States Court of Appeals for the Ninth Circuit held that the participation agreement did not create a fiduciary duty, because the standard of care in the agreement was lower "than that ordinarily imposed on fiduciaries, who generally must exercise greater care in handling property with which they are entrusted than in handling their own." The holding of *First Citizen* is now the prevailing national view. Thus, a loan participation agreement will only create fiduciary duties if the parties expressly establish express duties within the four corners of the participation agreement.

A reliance disclaimer included in a participation agreement generally will be enforced by courts adding a further layer of protection for the lead lender in disputes arising out of the agreement. Keep in mind that most participation agreements will not obligate the lead lender to repurchase a participation interest in the event of a borrower default, and importantly, courts will not impose an obligation to repurchase when the agreement does not expressly provide for one.[7] Also noteworthy is that most participation agreements will not impose an independent duty on the lead lender to disclose information to a participant bank that the participant could have determined through its own due diligence.[8] Rather, independent analysis of the inherent risks of the credit is the sole obligation of the participant bank. A well-drafted participation agreement will expressly obligate the lead lender to promptly provide credit information about the borrower and notices regarding material changes affecting the borrower.
As borrower defaults typically are the most significant source of friction, the lead lender and participants should be mindful of how major enforcement decisions are addressed. Some agreements will obligate the lead lender to consult with participants about actions that address a borrower default, such as enforcement actions or modifying the loan. Other agreements provide that enforcement actions are the sole purview of the lead lender. When notice and consultation rights are provided, it is also important to think about decision and approval paralysis and how disputes are to be resolved when the lead lender and participating banks cannot agree on what to do. While most participation agreements will cover the initiation of an enforcement action once, for example, a foreclose has been filed, most participation agreements are silent on subsequent decision-making process and authority applicable to the enforcement process. Moreover, the flexibility to deal with the resolutions of a default, such as by a deed-in-lieu-of foreclosure or loan restructuring, may be extremely limited by restrictions and limitations in the participation agreement. For example, extensions of maturity, reductions in interest rates, waivers of payments or defaults, reductions in principal, or releases of security or guaranties may be restricted without the consent of each participant. These issues raise valuable drafting considerations to be mindful of when dealing with borrower defaults. In short, a well-drafted participation agreement is extremely important when a borrower defaults.

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The Basics: Syndicated Loans

Syndicated loans and participations share similar attributes—such as allowing a lender to make a larger loan to a borrower than a single lender may be able to provide—they are structurally quite different. A participation is essentially a sale of an interest in a loan. A syndicated loan, by contrast, is a joint endeavor where lenders join together as a group to offer a loan to a borrower. Thus, the syndication is documented in one transaction where the lenders and borrower are all in privity of contract with each of pursuant to the loan agreement. In syndicated loan documents, one lender is the lead lender and the other lenders are members of the syndicate. The roles of lenders in a syndicated loan may vary, but the typical participants include an arranging bank and an agent. The arranging bank is "the lead manager" who organizes the funding based on the term sheet. The bank must organize other lending parties who are willing to participate in the syndicate and share the lending risks. The agent in a syndicated loan serves as a link between the borrower and the lenders. The agent owes a contractual obligation to both the borrower and the lenders. The role of the agent to the lenders is to provide them with information that allows them to exercise their rights under the syndicated loan agreement.

Key Benefits:

1. Lenders initiating syndications may be able to increase profitability in transactions by bringing other lenders into the deal.
2. May provide an administrative ability that a lender may not have, such as administration of a construction loan.
3. Allows a bank to make a loan that is outside the scope of the lender's risk exposure. A syndicate allows lenders to spread the risk and share in the financial opportunity.
4. The liability of each lender is limited to their share of the total loan. The agreement for all members of the syndicate is contained in the loan agreement.

The form of loan documentation for a syndicated loan is the same as the documentation for a single lender, with certain key exceptions. The loan documentation will include the concept of the lead lender acting as agent for the lenders. This relationship is usually set forth in the loan agreement, which functions as the main contract for the relationship between the lenders and the borrower. The loan agreement also may include a provision that appoints the lead lender as the agent. While all lenders are a party to the loan documentation, only the agent interacts with the borrower; however, the loan documents will include obligations of the other lenders, such as advancing loan proceeds or situations where the syndicate lender group has consent rights.

Although the loan agreement typically contains the entire "deal" between and among the lenders and the borrower, there are times when the agent and lender syndicate group may enter into a separate co-lender or intercreditor agreement. Typical syndicated loan documentation will appoint the agent as the exclusive agent for the syndicate. Similar to a participation agreement, it is commonly provided that the agent does not owe fiduciary duties to the syndicate lenders. As the majority of the agent's responsibilities are administrative, the agent will not have liability to the other lenders for losses arising from the loan transaction. The loan documentation will impose restrictions on an agent's power to agree to specified amendments or waivers without lender consent. These may vary by transaction, but generally will include: (a) extension of interest, principal payment and maturity dates; (b) reduction of principal or the interest rate; (c) any write-off or increase in the principal amount; (d) release of any material portion of the collateral; (d) release of a borrower or any guarantor from any material obligations with respect to the loan; (e) consent to a material transfer that is not otherwise permitted by the loan documents; and (f) modification of lender consent rights or the definition of required lenders or majority lenders. There may be other restrictions on an agent's consent rights in light of the transaction type. For example, in construction loans, it is not unusual to see lender consent requirements related to significant changes in the project that could have an adverse effect on value or the construction budget. These consents or approvals may require unanimous majority or supermajority consents.

When disputes arise in a syndicated loan, the mechanisms for how to proceed are usually well defined. For example, removal of the agent is usually addressed but limited to gross negligence, willful misconduct or a breach by the agent of its obligations as agent. The loan agreement will typically specify consequences for a breach by a lender of its obligations. There are a variety of formulations, but generally the loan documentation will provide that if a lender defaults in its obligations, its voting and other rights are suspended and its right to receive payments is subordinated to the other lenders until the default is cured. This provision also may address the right of the other lenders to advance funds on the defaulting lender's behalf and the right of the non-defaulting lenders to purchase the defaulting lender's interest, sometimes at a discount. When a borrower defaults on a syndicated loan, communication between the agent and the other members of the lending group is critical to building the consensus required to address the defaulted borrower and maximize the lenders' recovery. Collaborating on a strategy to address a defaulted loan with a diverse syndicate group of lenders can be daunting. In a situation where a borrower defaults, decision-making by the agent and syndicate can be crucially important. It is better to consider these issues at the outset. As a member of a group of syndicate lenders, the ideal time to address decision-making is at loan origination.

Conclusion

Participation and syndication agreements can be lucrative alternatives to traditional commercial finance. While each provides significant advantages to lenders, there are pitfalls and issues to be aware of with each structure. Whether a lender is considering a loan participation or a syndication, it should approach any such transaction prudently and perform its own due diligence on both the borrower and the lead bank. Careful drafting and consideration of what could happen when/if a borrower defaults is an important part of considering the risks and potential rewards offered by these structures.

Sara T. Toner is chair of the Real Estate Group of Richards, Layton & Finger, Delaware's largest law firm. She has substantial experience in real estate finance, asset-based lending, loan modifications, and workouts and restructurings, with particular focus on structuring and negotiating commercial mortgage loans. Ms. Toner acts on behalf of lenders, borrowers, and other providers of debt and equity capital across all asset classes in connection with commercial real estate transactions and finance, including traditional, portfolio commercial mortgage structures as well as non-recourse, CMBS, mezzanine financing, and other leveraged finance structures.

Ms. Toner advises clients regarding the acquisition, sale, lease, and development of commercial real estate properties in Delaware and throughout the U.S. She is proficient in obtaining approvals and resolving disputes in land use matters, both in an advisory capacity and before zoning boards and planning commissions. Also experienced in the formation of limited liability companies for the acquisition and development of real estate, Ms. Toner provides advice with respect to LLCs regarding formation, drafting of operating agreements, and member disputes.

Notes:
1- Sara T. Toner is a director of Richards, Layton & Finger, P.A. The views expressed in this article are those of the author and not necessarily those of Richards, Layton & Finger or its clients.
2- *See Northwest Bank & Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 726 (8th Cir. 2003).
3- *See New Bank of New England v. Toronto-Dominion Bank*, 768 F. Supp. 1017, 102 (S.D. N.Y. 1991).
4- *See Banco Espanol de Credito v. Security Pac. Nat'l Bank*, 973 F.2d 51, 53 (2d Cir. 1992); Banco Urquijo, S.A. v. Signet Bank/ Maryland, 861 F. Supp. 1220, 1249 (M.D. Pa. 1994) ("a fiduciary relationship does not arise from a lender participation agreement unless the agreement expressly provides for such a relationship").
5- While Delaware courts have not specifically addressed this issue, applying New York law in *Vornado PS, L.L.C. v. Primestone Inv. Partners, L.P.*, 821 A.2d 296, 322 (Del. Ch. 2002), aff'd, 822 A.2d 397 (Del. 2003), the Chancery Court addressed lender obligations owed to debtors and stated that under "New York law 'no fiduciary duty aris[es] out of the contractual arms' length debtor and creditor relationship' between a borrower and a lender."
6- *First Citizen's Federal Savings & Loan Assoc. v. Worthen Bank & Trust Co., N.A.* 919 F.2d 510 (1990).
7- *See First Citizens Fed. Savings and Loan Ass'n v. Worthen Bank & Trust Co. N.A.*, 919 F.2d 510, 514 (9yh Cir. 1990).
8- *Banco Espanol de Credito* 973 F.2d at 56.

Understanding and Avoiding the Reciprocal Trust Doctrine

by
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When implementing a plan involving the transfer of assets to more than one trust with overlapping donors and beneficiaries, prospective donors and their advisers should be mindful of the possible application, and implications, of the so-called "reciprocal trust doctrine." In its simplest form, if A creates a trust for the benefit of B, and B creates a substantially identical trust for the benefit of A, the reciprocal trust doctrine enables a court (generally at the urging of the IRS) to "uncross" the trusts whereupon A and B will each be treated as the donor of the trust for his or her own benefit.

Depending upon the terms of the trusts' governing instruments, the uncrossing of these trusts can have catastrophic transfer tax implications that will undermine an otherwise carefully crafted plan. Consequently, it is important to have at least a general understanding of the doctrine, to recognize situations in which it may arise, and to have a strategy to avoid its application.

The Doctrine

The reciprocal trust doctrine was first articulated in 1940 by the Second Circuit Court of Appeals in *Lehman v. Commissioner*.[1] In *Lehman*, two brothers created identical trusts for the benefit of one another and their descendants. Upon the death of the first brother to die, the Court uncrossed the trusts and ruled that the property that the deceased brother could have withdrawn from the trust created for the deceased brother's benefit was includable in the deceased brother's estate. In making its ruling, the Court found that the brothers had essentially engaged in a quid pro quo whereby the brothers were considered to have paid one another to create a trust for their own benefit. In sum, the Court held that "a person who furnishes the consideration for the creation of a trust is the settlor, even though in form the trust is created by another."[2]

The *quid pro quo* reasoning described in *Lehman* was met with inconsistent application by the courts until the United States Supreme Court addressed the issue in 1969 in a case styled as *United States v. Grace.*[3] In *Grace*, a decedent transferred assets to a trust appointing himself, his nephew, and an unrelated person as trustees. The terms of the governing instrument directed the trustees to pay to the decedent's wife all of the trust's income, granted the trustees discretion to distribute principal to decedent's wife, and granted to the decedent's wife a testamentary power to appoint the remaining trust property among the decedent and their children. Fifteen days later, the decedent's wife created a trust for her husband's benefit that was substantially identical to the trust created for her by her husband and funded the trust with assets that had been transferred to her by her husband in the preceding years. Recognizing the general difficulties of applying the *quid pro quo* standard, the Court ruled that the value of the assets of the trust created by the decedent's wife were includable in the decedents' estate as a result of the reciprocal trust doctrine, and stated:

> *[W]e hold that application of the reciprocal trust doctrine is not dependent upon a finding that each trust was created as a quid pro quo for the other. Such a 'consideration' requirement necessarily involves a difficult inquiry into the subjective intent of the settlors. Nor do we think it necessary to prove the existence of a tax-avoidance motive. As we have said above, standards of this sort, which rely on subjective factors, are rarely workable under the federal estate tax laws. Rather, we hold that application of the reciprocal trust doctrine requires only that the trusts be interrelated, and that the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as they would have been in had they created trusts naming themselves as life beneficiaries.*[4]

Consequently, the *Grace* standard appears to require (i) interrelatedness and (ii) an arrangement that, to the extent of mutual value, leaves the settlors in approximately the same position. If both of these elements are met, a court may conclude that the deemed-donor possesses beneficial interests or powers over the trust property that results in estate inclusion, resulting in an unexpected estate tax liability.

There is no safe harbor in the Treasury Regulations or other guidance that provides clean comfort to donors or their advisers regarding exactly what facts will, or will not, trigger application of the reciprocal trust doctrine in all circumstances. Rather, taxpayers and practitioners are left to analyze the case law and private letter rulings following *Grace* to predict what position the IRS may take based upon the specific facts of the situation.

Increased Importance in Recent Years

Although the reciprocal trust doctrine has existed for more than eighty years, the stakes have increased in recent years due to developments in transfer taxation and the increased use of certain planning techniques. One feature of the 2017 Tax Cuts and Jobs Act ("TCJA") is the substantial, albeit temporary, increase of the estate, gift and generation-skipping transfer tax exemption amount. The exemption amount, which is $11.7 million per person in 2021, was a "mere" $5.5 million per person prior to the enactment of the TCJA and, as recently as 2001, was less than $1 million per person. Under current law, the exemption is scheduled to revert to pre-TCJA levels (adjusted for inflation) in 2026, but Congress and the Biden Administration have signaled that changes to the transfer tax regime are on the horizon, possibly as soon as this year. Consequently, the window of opportunity to transfer a tremendous amount of wealth transfer-tax-free that has existed for the past few years may soon close for a period of time, if it hasn't closed already.[5]

(continued on p. 20)

(continued from p. 19)

It often makes sense from a tax-planning perspective for a wealthy individual to utilize his or her transfer tax exemption during his or her lifetime by making completed gifts of property. Making such gifts not only removes the gifted assets from the donor's taxable estate, but it also prevents the future appreciation of such assets from accumulating while under the donor's ownership. Lifetime gifting is especially effective during periods of inflated transfer tax exemptions because donors can leverage the system to a much greater extent. Especially when faced with a potentially declining exemption amount, prospective donors may desire to take action for tax-planning purposes, but may not have fully come to terms with the implications of gifting a substantial portion of their personal wealth. Donors may be uncertain about their own future needs and should be very reluctant to part with assets that could leave them with less assets than they require or desire in the future. Heroic gifting for tax-planning purposes that leaves the donor strapped for cash during his or her golden years is the epitome of allowing the "tax tail to wag the dog."

So-called "spousal lifetime access trusts," or "SLATs", are a popular planning technique that has helped some donors resolve these concerns, at least in part. A common example of SLAT planning involves Spouse 1 making a gift of assets equal to Spouse 1's remaining exemption amount to a trust for the benefit of Spouse 2 and their descendants, and Spouse 2 making a gift of assets equal to Spouse 2's remaining exemption amount to a trust for the benefit of Spouse 1 and their descendants. If the SLATs are designed correctly, contributions to the SLATs will effectively utilize the spouses' transfer tax exemptions and none of the trust property will be included in either spouse's taxable estate. SLAT planning may seem simple enough, and it has been quite popular during recent years as a result of the inflated transfer tax exemption amount. Such planning, however, can be complicated or undermined entirely by the reciprocal trust doctrine because the uncrossing of the SLATs may result in the spouses being treated as donors of trusts with respect to which they possess powers or rights that result in estate inclusion.

To be clear, the reciprocal trust doctrine can arise in myriad situations, but SLATs tend to be one of the more obvious situations in which the doctrine may be invoked.

Avoiding Application of the Doctrine

Although no safe harbor or other authority precisely sets forth steps to avoid application of the reciprocal trust doctrine, a variety of factors derived from court decisions, private letter rulings, and scholarly articles have become widely recognized as important considerations to avoid application of the reciprocal trust doctrine when making multiple transfers with overlapping parties.

Timing: As mentioned above, application of the reciprocal trust doctrine requires an element of interrelatedness. Separating gifts by a meaningful period of time should strengthen the argument that the gifts are not interrelated. Unfortunately, it is not clear exactly what period of time would be meaningful in this regard, although *Grace* indicates fifteen days is likely not sufficient. As a general rule, the longer the period of time the stronger the argument will be, and of course there should be no prearranged agreement obligating the second donor to make the second transfer.

Beneficiaries: One of the seemingly best ways to undermine a potential argument that trusts are interrelated or that the donors' economic positions have not changed is to ensure that the trusts have different beneficiaries. For example, one trust could be created for the benefit of the grantor's spouse and descendants (i.e. a SLAT described above), while the other trust could be for the benefit of the grantor's descendants only. Alternatively, other family members, loved ones or charities could be included among the class of only one trust's current beneficiaries. Similarly, the identities of the remainder beneficiaries could be different among the trusts. Any distinctions that cause the trusts to be dissimilar or that create a disparity in the economic positions of the donors should be helpful.

Powers of Appointment: Another method of differentiating the terms of the trusts in a manner that distinguishes the economic interests of the relevant parties is to grant powers of appointment to beneficiaries of one trust but not the other, or to alter the scope of the power or the time that such power may be exercised. For example, in the SLAT context, it may be sufficient to grant to one spouse a broad limited power of appointment exercisable during life or upon such spouse's death in favor of any person other than either spouse, either spouses' estate, either spouses' creditors or the creditors of either spouses' estate, and to grant to the other spouse a limited power of appointment exercisable only at death and in favor of only such spouse's descendants.

Distribution Standards: Yet another way to create separation with respect to economic positions is to alter the standards for distribution. For example, one spouse may be eligible to receive only income for such spouse's health, education, maintenance and support, while the other spouse may be eligible for discretionary distributions of both income and principal.

Withdrawal Rights: Similar in concept to providing different distribution standards, the trusts could provide beneficiaries with different withdrawal rights. Indeed, if withdrawal rights are included at all, such rights must be different or there will be a strong argument that the donors' economic positions are unchanged. Consequently, consider granting withdrawal rights to only one beneficiary but not to the other.

Assets: Contributing different assets to the trusts may also serve to substantially alter the donors' economic interests. Even if similar values are contributed to the trusts, contributing marketable securities to one trust and illiquid, closely-held business interests to the other will clearly alter the donor's interests.

Trustees and Other Fiduciaries: Another way to distinguish the trusts is to name different trustees or other trust fiduciaries. Similarly, one trust could create the role of distribution adviser or a distribution committee to direct the trustee with respect to distribution decisions and/or investment adviser to direct the trustee with respect to trust investments.

Design the Trusts to Qualify as Asset Protection Trusts: Consider designing the trusts so that, even if they were uncrossed, each trust would constitute an asset protection trust under Delaware's Qualified Dispositions in Trust Act that is not includable in the donor's estate.[6] Doing so may obviate both asset protection related issues and tax-related issues that could arise if the trusts were to be treated as self-settled for creditor rights purposes.

Conclusion

Donors and their advisers should remain vigilant to avoid the application of reciprocal trust doctrine and should understand the potential implications if the doctrine were successfully invoked. Failing to prepare accordingly may have substantial adverse tax implications that will undermine an otherwise well-designed plan.

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

Notes:
1- 109 F.2d 99 (2d Cir. 1940).
2- *Id.* at 100, citing Scott on Trusts § 156.3 (1st ed. 1939).
3 -395 U.S. 316 (1969).
4- *Id.* at 324.
5- Some commentators have speculated that Congress may attempt to make any reduction in the transfer tax exemption retroactive to the date of introduction of the legislation as opposed to a date on or after the date that the legislation passes. Notably, Senator Bernie Sanders formally proposed the "For the 99.5% Act" on March 25, 2021, which would reduce the estate, gift and generation skipping tax exemption to $3.5 million in the case of estates and $1 million in the case of gifts, but the effective date for such reductions is December 31, 2021 in the current draft.
6-12 *Del. C.* §§ 3570 et seq.

Compliance Focus

Servicemembers Civil Relief Act: More Compliance Risks Than Meet the Eye

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"Some aspects of the SCRA make compliance uniquely challenging, many having to do with military nomenclature and vexing complexities of personnel management of the uniformed services."

Over the past 2 decades there has been increased regulatory scrutiny over compliance with the Servicemembers Civil Relief Act (SCRA) in large measure due to the war on terrorism and the activities of CFPB's Office of Servicemembers Affairs.

Unlike most consumer protection laws, the SCRA does not have implementing regulations, which leaves financial institutions to rely on the text of federal law itself and guidance, the latest of which comes from the OCC's SCRA booklet issued in March as part of the Comptroller's Handbook series. The protections and benefits afforded by this comprehensive law ensure that servicemembers and their dependents do not have to face certain legal and financial burdens during periods of military service.

Managing SCRA compliance risk requires vigilant adherence to all the familiar elements of an institution's compliance management system. However, there some aspects of the SCRA that make compliance uniquely challenging, many having to do with military nomenclature and vexing complexities of personnel management of the uniformed services of the United States, which include commissioned officers of the U.S. Public Health Service Commissioned Corps and the National Oceanographic and Atmospheric Administration. Briefly, here are ten such complexities and related questions for financial institutions to consider when it comes to SCRA compliance.

1. Submission of Military Orders or Related Documents - Unless your bank takes advantage of the safe harbor provision discussed below, servicemembers must request the SCRA's 6-percent interest rate reduction and provide a copy their military orders or related documents. *Has your bank conducted specialized training of staff tasked with analyzing the dizzying array of different military orders to accurately discern the key information needed to determine eligibility – service component, title authority, notification date, start date, and end date of military service?*

2. Independent Bank Verification - If a bank independently verifies military service by searching the Defense Manpower Data Center (DMDC) as part of proactive reviews of the DMDC to determine whether a customer is in military service, such independent verification establishes a safe harbor for the SCRA's proof of military service requirement for the 6-percent interest rate limitation. *Does your bank avail itself of this safe harbor, and if so, does it properly document the DMDC search results?*

3. Follow-up Process When No Orders Are Received - Aside from the safe harbor provision above, the SCRA does not address what to do when a servicemember requests the interest rate benefit but fails to provide requisite evidence of military service. The SCRA is silent about what should be done by way of follow up. *When benefits are requested but no orders are received, has your bank established a process for follow-up notification to the servicemember of the need for additional information?*

4. National Guard Service Under USC Title 32 § 502(f) - This section of the United States Code grants the President or Secretary of Defense the authority to activate the National Guard for a period of 30 consecutive days or more for purposes of responding to a national emergency. *Does your bank make sure to distinguish between federal activation under Title 32 (or Title 10 which has no minimum 30 days' service requirement) as opposed to activation by a governor purely within the jurisdiction of a state-specific, state-controlled mission to which federal SCRA benefits and protections do not apply?*

5. PCS/TCS/TDY/TAD Orders - These are abbreviations for orders commonly issued by the military for Permanent Change of Station, Temporary Change of Station, Temporary Duty, and Temporary Additional Duty. Such orders are frequently submitted by servicemembers when requesting SCRA benefits. While they are evidence of military service, such orders do not provide true start or end dates of military service. Rather, such orders depict interim dates of military service. *Do your SCRA procedures account for how to treat PCS/TCS/TDY/TAD orders with respect to determination of periods of military service for SCRA benefits and protections?*

6. Early Notification Period - Orders activating Reserve components (which include the Air Force and Army National Guard) provide time for servicemembers to get their affairs in order before reporting for active duty. The period of time from receipt of orders (notification date) until the active duty start date is known as the early notification period, and SCRA benefits and protections apply during this period. *Do your SCRA policy and procedures distinguish notification date from start date and ensure that Reservists are receiving SCRA coverage during that period? Also, did you know that accounts opened during the early notification period are eligible for SCRA benefits and protections?*

7. Timeline of Key Dates - The SCRA is very much about critical dates and periods of time during which servicemembers become eligible, enjoy special benefits and protections, and are ultimately time barred from coverage. Eligible accounts must have been opened prior to the start of military service. Requests for benefits must be made within 180 days after the end of military service. During account life cycle, there may be multiple sets of orders and corresponding benefit periods to manage especially for servicemembers serving in the National Guard or Reserves. *Is your SCRA compliance program actively monitoring the critical time periods: 1) Request period, 2) Benefit period, 3) Early notification period, 4) Active duty period, and 5) Post-active duty period?*

8. Complaints - Does your customer complaint administration program capture complaints by servicemembers, analyze the root cause, assess possible violation of other laws, and mandate action to prevent recurrence of possible or actual violations of law or bank policy?

9. State Compliance - Several states, e.g., AR, CA, GA, IL, IN, LA, NY, NC, OH, PA, SC, and WA, have mini-SCRA laws that provide additional or different benefits and protections. *Does your compliance program incorporate applicable state law into policy, procedures, systems, and controls?*

10. Waivers - Waivers of any of the SCRA protections are permitted in accordance with USC Title 50 § 3918. A waiver must be in writing, executed as a separate instrument from the obligation to which it applies, and must be executed during or after military service. *Does your SCRA compliance program include when and how to administer waivers?*

For Your Benefit

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

"This new law is very complicated and carries many provisions and caveats."

American Rescue Plan Act of 2021

President Joe Biden signed the American Rescue Plan Act of 2021 (ARPA) into law on March 11, 2021. Along with providing financial relief for individuals, state and local governments, schools, businesses and for other purposes, the law contains the following measures of special interest to employers and their employees:

COBRA Subsidy - The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) allows employees who would lose employer-sponsored health insurance because of job loss (or a reduction in working hours) to continue that insurance for 18 months. However, the employer can require the employee electing COBRA coverage to pay the entire cost of the premium.

The ARPA provides a 100% subsidy of COBRA premiums from April 1, 2021, through Sept. 30, 2021, for employees and their family members who lost health insurance due to the involuntary termination (or reduction in hours) of their employment. These individuals would be allowed to elect subsidized COBRA even if they had earlier declined the COBRA option, or had enrolled in COBRA and then dropped it. The subsidy would not apply to employees who voluntarily terminated their employment or who qualify for another group health plan.

The subsidy is funded by the federal government through a refundable payroll tax credit. The ARPA contains new employee notice requirements for plan administrators; the U.S. Department of Labor will issue model notices for this purpose. Employees may elect subsidized COBRA any time from April 1, 2021, through 60 days after receiving notice of the benefit.

FFCRA Leave - The ARPA extends the FFCRA employer tax credit for voluntarily provided leave through Sept. 30, 2021, and adds employee time off related to COVID-19 testing and immunization as permissible reasons for taking the voluntary leave. It also increases the amount of wages eligible for the family leave credit from $10,000 to $12,000 per employee, and it provides an additional 10 days of voluntary emergency paid sick leave for employees, beginning April 1, 2021.

Unemployment - The ARPA extends three pandemic-related federal unemployment programs that were otherwise scheduled to end in March or April 2021. These include:

Pandemic Unemployment Assistance, which provides weekly benefits to independent contractors, self-employed individuals and other workers who would typically not be eligible for unemployment benefits;

Pandemic Emergency Unemployment Compensation, which provides weekly benefits to individuals who have exhausted their eligibility for all other unemployment benefits; and

Federal Pandemic Unemployment Compensation, which provides an additional $300 weekly payment to individuals who are already receiving PUA, PEUC or regular unemployment benefits.

ACA - The ARPA temporarily increases the dollar amount and expands eligibility for federal subsidies for health insurance coverage purchased through the Affordable Care Act (ACA) Exchanges. Currently, the ACA's premium tax credits are not available to individuals with income at or above 400% of the federal poverty level. The ARPA temporarily eliminates this income cap on these subsidies for a period of two years.

DCAP - For taxable years beginning after Dec. 31, 2020, and before Jan. 1, 2022, the ARPA increases the annual contribution limit for a dependent care assistance program (DCAP) from $5,000 to $10,500 (and from $2,500 to $5,250 for married individuals filing taxes separately).

Employee Retention Tax Credit - The ARPA extends the employee retention credit through the end of 2021 (the credit was set to expire in June 2021). This credit was originally enacted with the Coronavirus Aid, Relief and Economic Security (CARES) Act to encourage employers to retain on their payroll employees who could not report to work because of COVID-19-related reasons.

This new law is very complicated and carries many provisions and caveats. Please contact Weiner Benefits Group for more information and or to get on our mailing list for regular legislative updates.

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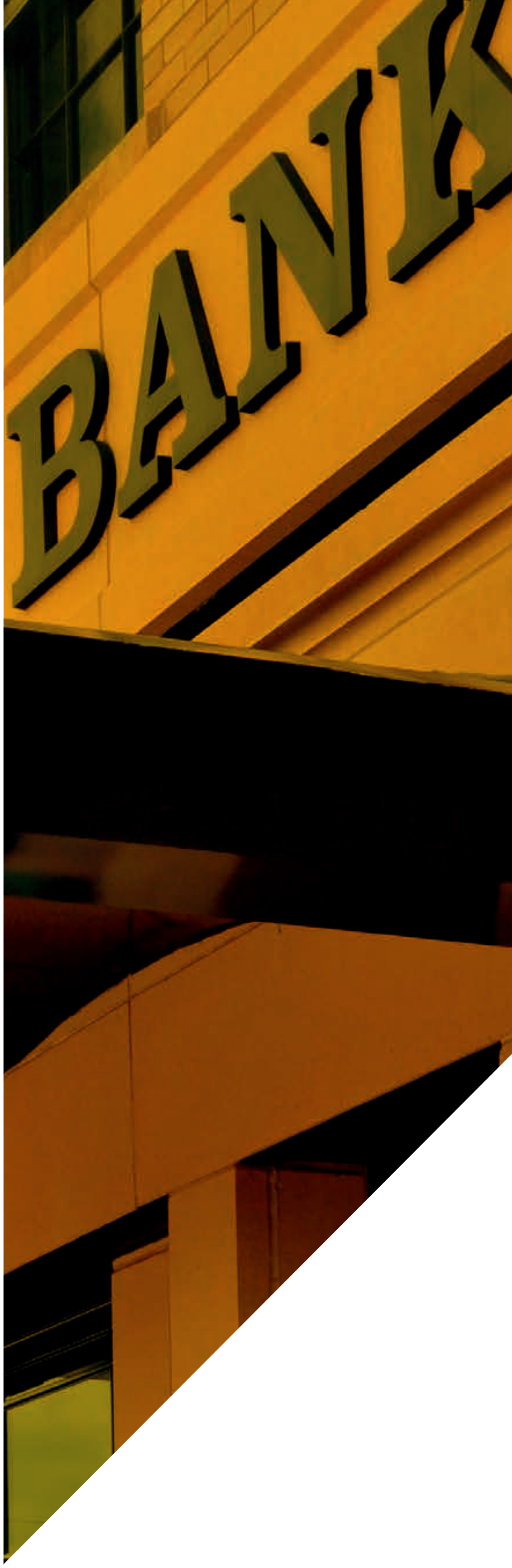
With over 200 attorneys representing financial services companies, Troutman Pepper has a long history of serving the banking industry by forging strong relationships with clients. We are proud to support the **Delaware Bankers Association** as trusted advisors assisting with bank regulation, consumer and real estate lending, M&A and capital raises, workouts and restructurings, and operational issues.



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DBA Calendar of Events

2021 Women Connect Speaker Series -

Six Sessions! Live and On-Demand! Six dynamic speakers to engage and empower! Each session will be available both live on the day of the event, and on-demand at your convenience. One price gives you full access to all six sessions: $199 for DBA Members ($249 for non-members).

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- ***Building Your Personal Brand*** - Laura Meyer, CEO & Founder, Joy Brand Creative
- ***Business Ready Essentials*** - Danielle Turcola, President, Professionalism International, Inc.
- ***Building Rapport and Engagement*** - Cathleen Hitchens, SVP of Human Resources, Flagship Credit Acceptance
- ***Take the Work Out of Networking! -*** Panel Discussion

Coming Soon...

June 17: *Leveraging your LinkedIn* - Michael Coniglio, AVP, Senior Business Analytics and Reporting Analyst, Wilmington Trust

July 22: *Exploring Emotional Intelligence* - Linda Comerford, Comerford Consulting

Foundations of Delaware Trusts

The Delaware Financial Education Alliance proudly presents three new virtual video sessions in the Foundations of Delaware Trust series. Each session is now available on-demand. Sessions are only $199 each for DBA members or just $459 for all three. Each Session Approved for 2.5 CTFA Credits ABA/ICB; 2.00 Delaware CLE Credits! Don't miss these informative seminars.

Discretionary Decision-Making - A discussion on fiduciary duties and how to interpret the various types of discretionary trust provisions. Instructors: Cynthia D.M. Brown, President, Commonwealth Trust Company; and, Todd A. Flubacher, Partner, Morris, Nichols, Arsht & Tunnell LLP.

Estate Planning Strategies to Minimize Taxes and Control Wealth Transfer - An overview of existing wealth transfer taxes, a discussion regarding possible upcoming changes to those taxes, and a review of various wealth transfer strategies available to clients to reduce or eliminate the imposition of tax. Instructors: Matt D'Emilio, Managing Member, McCollum D'Emilio Smith Uebler LLC; and, Mark Doyle, Principal, Fiduciary Counsel, Bessemer Trust Company of Delaware, N.A.

Reading and Interpreting a Trust Document - A focus on key trust document provisions such as Crummey powers, dispositive provisions, investment limitations, duty to notify provisions, etc. Instructors: David Diamond, President, The Northern Trust Company of Delaware; and, Daniel Hayward, Partner, Gordon, Fournaris & Mammarella, P.A.

2021 Delaware Trust Conference - October 19 & 20

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breaking into banking

Breaking Into Banking

The DBA is pleased to offer two new online videos in Keusal Learning's "Breaking into Banking" series. Breaking into Banking 101: Fundamentals of Commercial Banking; and, Breaking into Banking 201: Analyzing Repayment Sources. Breaking into Banking 101 contains 10 learning modules, over 5 hours in total content. Breaking into Banking 201's nine modules covers topics including how to analyze income statements, balance sheets, collateral, and risk rating. Each module includes a video lesson and a multiple-choice self-check. Many of the lessons include exercises for learners to work through that are related to a sample company outlined in the course's Reference Guide (pdf). This course is appropriate for credit analysts, lenders, portfolio managers, and others who need skills in financial statement analysis and writing credit documents.

Accounting for Success

by
Christopher J. Ciminera, CPA, QKA
Belfint Lyons & Shuman, P.A.

Quick Reference Guide to the Taxation of Retirement Plan Distributions

A major benefit to employees who are participating in a qualified retirement plan is the deferral of taxes. Pre-tax deferrals, employer contributions, and the related earnings grow tax-free until the amounts are distributed from the plan. Unfortunately, when a participant takes a distribution upon retirement or an early distribution that is not rolled over, the federal government expects to receive its fair share. The taxation of retirement plan distributions is complex, so it is easiest to keep them straight by following the chart we provided on the next page. To supplement the chart, let's discuss a few concepts on the taxation of distributions.

The taxation of the distribution depends on the type of distribution, when the distribution takes place, whether the distribution is eligible for rollover, and the age of the participant or beneficiary.

No Taxes Withheld

It is important to note that distributions of $200 or less are not required to have federal taxes withheld. Additionally, distributions that are rolled over to an IRA or another qualified plan are tax-free. In this case, federal taxes are deferred until distributed from that IRA or qualified plan.

10% Tax* at the Individual Taxation Level

The Federal government imposes a 10% early withdrawal tax generally if a participant has not reached age 59 ½. There are exceptions including death, disability, substantially equal periodic payments for the participant's life expectancy or joint life expectancy including the beneficiary, or separation of service at age 55 or older. See Tax Topic 558 from the IRS and the chart below for exceptions.

Mandatory 20% Withholding or Optional 10% Withholding

Mandatory 20% federal tax withholding depends on whether a distribution is considered an eligible rollover distribution. Those eligible rollover distributions are noted below in the chart and generally include distributions due to normal retirement age, early retirement at 59 ½, termination from the plan sponsor, disability, and a Qualified Domestic Relations Order (QDRO). If a distribution is not an eligible rollover distribution, then 10% federal tax is withheld unless the participant or beneficiary elects to waive such withholding. Some examples of distributions that are not eligible to be rolled over include hardship distributions and required minimum distributions.

*Recently the tax court has held that the Code Section 72(t)(1) 10% early distribution requirement is a tax, not a penalty. Code Section 72(t)(1), clearly labels this as a tax. Other tax court cases have found this to be the case.

Chart Footnotes.

** Non-spousal beneficiaries may ask to have benefits distributed by the plan in a plan-to-plan transfer to an inherited IRA.*

~ Generally, distributions made prior to age 59 1/2 will be assessed an additional 10% early distribution tax.

^ 10% early withdrawal tax does not apply if from an IRA provided the funds are used to buy a first home, pay for college, or needed due to financial hardship.

10% early withdrawal tax applies to distributions made before age 59 1/2 if the distribution came from a 401(k) or 403(b) Plan, even if the money is used to buy a first home, to pay for college, or needed due to financial hardship.

(1) Distributions $200 or less are not subject to Federal withholding.

(2) Based on the assumption that distribution is paid to participant. If the participant rolls over the distribution to an IRA or another qualified plan, the distribution is tax free (see (a))

(b) Distribution treated as though it were paid in a direct rollover to an eligible retirement plan if the distribution is eligible for tax-free rollover treatment and is recontributed to an eligible retirement plan within the 3-year period beginning on the day after the date on which the distribution was received.

Distributions			Federal Tax (1)(2)		
	Eligible Rollover Distribution?	10% Early Distribution Tax~	Mandatory 20% Withholding	10% Withholding	Participant May Waive Withholding of Taxes
General					
Tax-free Rollover **(a)**	Y	N	N	N	N/A
Distribution due to IRS Levy under Section 6331	N	N	Y	N	N
Distribution to Alternate Payee due to QDRO	Y	N	Y	N	N
In-Service					
Part of a Series of Substantially Equal Periodic Payments made for the Life (or Life Expectancy) of the Employee or the Joint Lives of Such Employee and Designated Beneficiary	N	N	N	Y	Y
Qualified Reservist Distribution	N	N	N		
Hardship Withdrawals (except as noted below)	N	Y	N	Y	Y
Medical Reasons (to the extent you pay deductible medical expenses exceeding 7½% of you AGI even if you don't itemize your deductions)	N	N	N	Y	Y
College Costs or Primary-Residence made before 59½	N	Y^	N	Y	Y
Corrective Distribution	N	N	N	Y	Y
Coronavirus Related Distributions	Y (b)	N	N	Y	Y
Distributions due to certain emergencies and disasters	N	N	N	Y	Y
Distributions up to $5,000 for a qualified birth or adoption distribution	N	N	N	Y	Y
Permissive withdrawals from Automatic Enrollment Plan	N	N	N	N	N
Separation of Service					
Terminating (during or after reaching age 55)	Y	N	Y	N	N
Death					
Death Distributors - Spousal Beneficiary	Y	N	Y	N	N
Death Distributors - Non -Spousal Beneficiary	N*	N	N	Y	Y
Disability					
Distributions due to Disability	Y	N	Y	N	N
Retirement					
Normal Retirement (NRA)	Y	N	Y	N	N
Required Minimum Distribution (RMD)	N	N	N	Y	Y
Early Age 59½	Y	N	Y	N	N
Retirement - Early Age 55 or Older	Y	N^	N	Y	Y
Plan Termination					
Plan Termination	Y	N	Y	N	N
Conversions					
In-Plan Roth Conversion to Designated Roth Account	N/A	N	N	N	N/A

Lending Law Update

by
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"The net effect is an increase in closing costs for many loan transactions."

How Will the Recent Changes to the Delaware Title Insurance Rating Manual Affect You and Your Mortgage Loan Customers?

Effective January 1, 2021, and amended effective March 16, 2021, the Delaware Insurance Department approved the Delaware Title Insurance Rating Bureau ("DTIRB") Rate/Rule Filing that revised the DTIRB Rating Manual for title insurance. Notably, these Rating Manual revisions affect Delaware banks and their mortgage loan customers by eliminating lower reissue rates; simplifying the rate calculation for insuring mortgage assignments; increasing the rates applicable to certain mortgage modifications; increasing the rates applicable to simultaneously-issued title insurance policies; and eliminating negotiated rates for certain customers. The net effect is an increase in closing costs for many loan transactions.

Reissue Rate Elimination: Prior to the 2021 revisions, lower rates applied to the reissuance of a lender's or owner's title insurance policy (up to the liability amount of the previously-issued title insurance policy for the same property) within five (5) years prior to the application for the new policy. The 2021 revisions eliminate the application of these lower reissue rates to such lender's and owner's title insurance policies.

Mortgage Assignments: In the event of a mortgage assignment within ten (10) years from the date of the mortgage's execution, a new title insurance policy or an endorsement to the existing policy providing coverage up to and including the mortgage assignment's recordation date will now be issued at a rate equal to thirty percent (30%) of the loan policy rate, provided that the policy is issued by the same insurer that issued the original policy. This revision simplified the calculation of the applicable mortgage assignment rate by eliminating the previously-used separate rate table and, instead, applying a fixed percentage.

Mortgage Modifications: For extensions or modifications of mortgages that do not increase the unpaid principal balance, rates for new title insurance policies or endorsements of existing policies will now be calculated on the unpaid principal balance immediately prior to the extension or modification at a rate equal to fifty percent (50%) of the loan policy rate, provided that the initial policy was issued within the preceding five (5) years (previously this calculation was based on fifty percent (50%) of the lower reissue rate). Unchanged is the application of one hundred percent (100%) of the loan policy rate to any extensions or modifications of mortgages that involve initial policies issued before the preceding five (5) years or with respect to an increase in the unpaid principal balance.

Simultaneously-Issued Policies: Prior to the 2021 revisions, rates for simultaneously-issued owner's and lender's title insurance policies were based on an owner's policy rate and a lower lender's policy rate, respectively. The 2021 revisions provide that the owner's policy rate (and not the lower lender's policy rate) is to be applied to the policy with the higher liability amount, even if the policy with the higher liability amount is the lender's title insurance policy.

Negotiated Rates Elimination: Prior to the 2021 revisions, the State of Delaware or any of its political subdivisions, the United States Government, and certain charitable and educational entities had the right to subject their title insurance rates to competitive bidding or a negotiated agreement. The elimination of this right by the 2021 revisions subjects all such parties to the rates set forth in the revised Rating Manual.

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I realized I wanted to do something so I can see the impact in my community. The DCF addresses a lot of things in the state, and I love how it's evolved in the last 10 years.

Donald W. Nicholson, Jr. and family
Senior Financial Advisor,
Donald W. Nicholson & Associates, Ltd.

TO LEARN MORE, PLEASE CONTACT:

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