delaware banker

Winter 2022
Vol. 18 No. 1

Business Email Compromise...
Phishing...
Fraudulent Wire Schemes...

What's Your Liability?

Delaware Bankers Association

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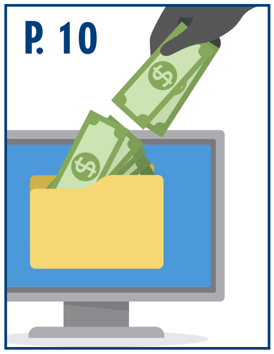

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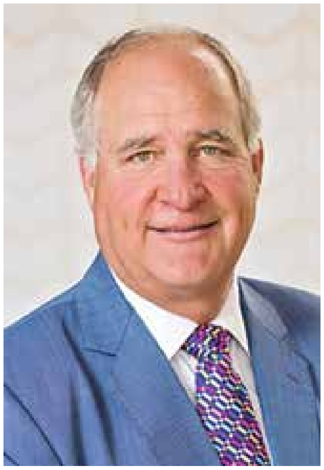

by
Thomas M. Forrest
President & CEO
U.S. Trust Company of Delaware

Chair
Delaware Bankers Association

"Prediction is very difficult, especially if it's about the future."

As we jump over each successive variant hurdle striving toward the finish line of the COVID pandemic, one phrase that keeps cropping up is "the new normal." Many pundits have weighed in on what this new normal will look like, and most of those opinions vary wildly. It's not surprising since, as Niels Bohr, the Nobel Prize-winning physicist, pointed out: "Prediction is very difficult, especially if it's about the future." That other great sage, Yogi Berra, put it even more succinctly when he noted: "The future ain't what it used to be."

Before you hide under the bed and fret over the last prediction of what our new normal lives will look like, let me comfort you with some predictions from the past.

Has Beans - Inventor Nikola Tesla, you know the guy with the car named after him, predicted that by 2000 people would no longer be drinking coffee. Maybe he was foreseeing the boutique chains and meant that we'd no longer be drinking plain, inexpensive brew.

The Attack of the Giant Turnips - In 1900, one expert claimed that by now, fruits and vegetables would be enormous in size, with blueberries as large as apples, three-foot-long carrots, and basketballs the size of tomatoes. It was hard enough to get kids to eat small veggies!

For a Sunnier Future - A 1950 article in Popular Mechanics estimated that by 2000 hurricanes would be non-existent. Brewing storms would simply be snuffed out by igniting large oil fires on the water and sucking the air out of the hurricane.

A Retirement Home with a View - Robert Heinlein, the science fiction author, suggested that the moon would be used as a retirement community. Living out your golden years on the lunar surface would help prolong life because the lower gravity would be easier on aching joints and weak hearts.

Clothing Options or Optional? - 1930 Frederick Edwin Smith, former British Lord Chancellor, estimated that by 2030 we'd only have three clothing outfits: one for work, one for leisure, and one for formal occasions. The pandemic has rendered those all into sweatpants! To simplify the future even more, Robert Heinlein said that we'd just ditch clothes altogether except around strangers and older relatives.

But if you really want valid predictions, it's hard to beat the Jetsons. Back in 1962, George Jetson and his family accurately foresaw video calls, robotic vacuums, tablet computers, smartwatches, printed food, pill cameras, and flat-screen TVs. I'm still waiting for my flying car, but apparently, that's not too far off, or so they say!

You want normal, old or new? Fortunately, Delaware's banks have excelled at normal for over 200 years. In that time, we've added to what's normal. One hundred years ago, few bankers could have predicted the technologies and services that are now commonplace. But today, as back then, Delaware banks have been committed to employing their resources, human and otherwise, for the good of our customers and the community.

I suppose the point is that predictions are iffy at best and that the new normal best left to politicians and cable news talking heads. Jo Brand summed it up nicely when she said: "Whatever situation you are in, that is what normal is for you."

Best wishes for a normal day,

President's Report

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

"As business models evolve, banks are in the best position to continue to put customers at the center of every strategy. "

What's all the buzz about cryptocurrency? Cryptocurrencies are revolutionizing the future of payments. According to Forbes, Cryptocurrency is decentralized digital money based on blockchain technology. You may be familiar with the most popular versions, Bitcoin and Ethereum. Still, there are more than 5,000 different cryptocurrencies in circulation. And unlike the U.S. Dollar or the Euro, there is no central authority that manages and maintains the value of a cryptocurrency.

Recently the Federal Reserve issued a report assessing the potential benefits and risks of creating a U.S. central bank digital currency, or CBDC. While the Fed took no official position on creating a CBDC, the agency said it "will continue to explore a wide range of design options," adding that it "does not intend to proceed with the issuance of a CBDC without clear support from the executive branch and from Congress, ideally in the form of a specific authorizing law." The OCC issued an interpretive letter clarifying its approach for approving crypto-related activities for national banks. Additionally, a report by the President's Working Group on Financial Markets highlighted the risks of stablecoins, recommending that they be issued by insured depository institutions that are subject to consolidated supervision and that any providers of custodial wallets be subject to appropriate federal oversight.

In a recent column, ABA President and CEO Rob Nichols discussed the growing interest in cryptocurrencies among banks and consumers. Nichols noted that cryptocurrencies are an increasingly hot topic of conversation.

Cryptocurrencies: Unlocking Banking's 'New Frontier'

According to a November Pew Research Center survey, 86% of Americans have heard about cryptocurrencies, and 16% have invested in, traded or used them. Cryptocurrency use is growing particularly rapidly among younger Americans, with 31% of Americans between ages 18 and 29 participating in crypto transactions.

Banks have begun making inroads into the crypto services business—offering a responsible pathway for consumers to adopt these novel financial products. Bank customers know they can rely on their banks to steward their finances and keep their financial data safe. A recent Morning Consult poll highlighted banks are the most trusted among all financial services providers. It is no surprise that consumers want to receive cryptocurrency services from their bank. A NYDIG survey confirmed that 81% of bitcoin holders would shift their bitcoin to a bank if it offered secure bitcoin storage. Undoubtedly, this "new frontier" of cryptocurrency represents a huge opportunity for banks.

But in order for banks to successfully navigate this new frontier, regulatory architecture needs to catch up - quickly. More clarity is needed from the banking agencies about how banks can offer these services in a safe manner. Without this clarity, the unlevel playing field between banks and the rapidly growing cadre of firms seeking to operate as banks while evading the full scope of bank regulations will continue.

The ABA is taking a deep dive into how to support banks' participation in crypto and other digital assets through advocacy and technology partnerships. Expanding into cryptocurrency products and solutions will not be for every bank, but banks should have access to the tools, partners and regulatory frameworks that allow them to meet their customers' needs.

The future of payments is rapidly evolving. To remain relevant, banks will have to embrace emerging technologies. As business models evolve, banks are in the best position to continue to put customers at the center of every strategy. The DBA will continue to advocate for a regulatory framework that helps banks facilitate the management of CBDC holdings and payments.

Sarah

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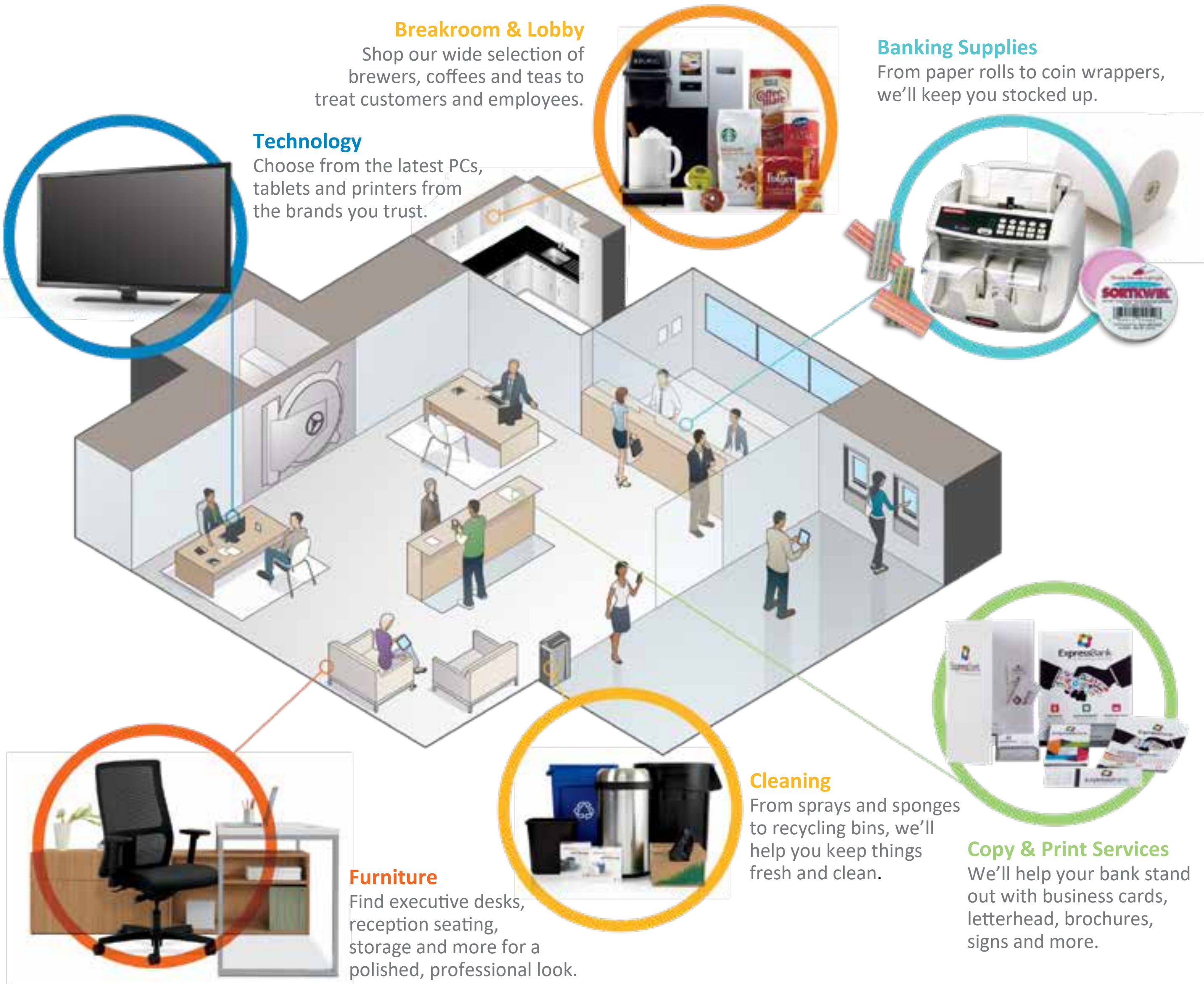

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What's New at the DBA

DBA Regulatory Compliance School

DBA
Regulatory Compliance
School

Compliance professionals received updates on the latest changes in the regulatory environment at DBA Regulatory Compliance School, December 9th and 15th. The sessions were conducted in-person, and virtually for maximum convenience. Lending Compliance and Hot Topics were featured the first day, with BSA/AML highlighting the second day's agenda. The sessions are available for credit on-demand. Thanks to presenting sponsor, Troutman Pepper.

Women Connect Happy Hour

Women Connect celebrated its first in-person event of the year, December 8th at Makers Alley in Wilmington. In addition to much-missed networking, attendees enjoyed an open bar, live music, cornhole, and light appetizers. The event was made possible in part by the generous sponsorship of Wilmington Trust.

Brushing Up on Business Writing Skills

Dozen of financial services professionals honed their writing skills during two DBA events in January. On January 12th the DBA's Business Writing Workshop, attendees refined and enhanced their writing abilities. Then on January 26th attendees received practical punctuation instruction with Taking the "Grr" Out of Grammar. Both sessions were facilitated by Linda Comerford of Comerford Consulting.

DBA / Office Depot Program Improvements

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The DBA has partnered with Office Depot to provide our members significant discounts on a wide range of office and banking supplies, furniture, print and copy services, promotional products, break room provisions and more.

Our program, which combines the purchasing power of banks across the country, has flexed its collective muscle to revamp the program's discounted core list of over 1,300 items. In addition, our program is a HP "Big Deal" member, bringing you significant savings on HP ink and toner.

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UD Trust Minor Holds Legacy Case Competition

In an ongoing partnership between education and industry, local industry professionals judged the Legacy Competition for Trust Minors at the Lerner College of Business and Economics. The top prize of $2,500, as well as second and third place cash prizes for the winning teams, was generously donated by Lynn Welch Watson, a long-time individual supporter of the program. The Legacy Case Competition is the most recent addition to the growing list of experiential learning activities included in the program, whose recent graduates have accepted positions at many of the state's top banks and trust companies. If you are interested in recruiting top talent from Lerner College's Trust Management Minor, or learning more about the program, contact Jennifer Zelvin McCloskey at jzmac@udel.edu.

Cover Story

What Bankers Need to Know About Liability for Business Email Compromise, Phishing, and Fraudulent Wire Schemes

by
Mary C. Zinsner
Susan E. Flint
Sarah E. Siu

Troutman Pepper Hamilton Sanders LLP

The surge in cases involving wire fraud is causing financial institutions to dedicate teams of in-house lawyers and outside counsel to sort through the fall-out. Financial institutions nationwide receive hundreds, if not thousands, of demand letters from bank customers and third parties involved in fraudulent wire transactions every week, with bank lawyers reviewing the letters and evaluating exposure. But it is not just the lawyers who need to understand the applicable law — bankers and employees need to understand the risks and exposure. Taking simple precautions is the best way to avoid wire fraud losses.

Wire transfer cases are on the rise.

Wire fraud cases arising from what the FBI calls business email compromise (BEC), phishing, and other fraudulent wire schemes are multiplying. In 2020, the FBI reported that BEC and other internet-enabled theft, fraud, and exploitation resulted in adjusted financial losses of $1.8 billion. Surprisingly, even sophisticated parties and publicly traded companies are getting caught. In this type of scheme, once the money is wired, it is typically not recovered and tracing the funds can become difficult.

In a typical BEC scheme, the fraudster impersonates a senior executive or business partner, reaching out to a company staff member to change an account number or provide new wiring instructions to pay a debt, conduct a real estate closing, of fulfill a purchase order. The recipient of the email does not notice what can be subtle differences in an email address, such as a hyphen or an underscore (for example, using JohnDoe@abc_title.com instead of John Doe@abctitle.com) and complies with the request, believing the person to be their executive or trusted partner. The money is wired by the "receiving bank" (the bank initiating the wire at the sender's request) to the fraudster's account at the "beneficiary bank" (the bank receiving the transferred funds, which usually has no idea its customer is a fraudster). The fraudster withdraws the money before the fraud is detected, and there is little that the sender or banks involved in the transaction can do to claw it back.

In phishing or account takeover schemes, a bank customer is induced to provide fraudsters usernames, passwords, and security token codes, believing that it is interacting directly with the bank. Unbeknownst to the customer, the hacker gains possession of account credentials and security codes and is now capable of wiring hundreds of thousands of dollars or more from the account. In other cases, the bank itself is defrauded by a hacker who pretends to be a bank customer and interacts with a manager or other bank employee to conduct fraudulent transfers.

Article 4A of the UCC is the starting point in any wire fraud analysis.

Article 4A of the UCC defines the duties, liabilities, and rights or parties to a funds transfer. States enacted Article 4A of the Uniform Commercial Code to provide norms and predictability with respect to fund transfers:

> A deliberate decision was … made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles. … [A] critical consideration was that the various parties to funds transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately. This consideration is particularly important given the very large amounts of money that are involved in funds transfers.
>
> § 4A - 102, Cmt.

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Under the UCC, determining if the financial institution bears liability usually turns on whether the bank is a receiving bank, or whether the bank is a beneficiary bank. The UCC's requirements are more rigorous for receiving banks. If the bank is the beneficiary bank receiving the wire and crediting the funds as directed in the payment order to the account of a customer who may be a fraudster, it is usually not liable to the sender for the transaction under the UCC.

Typically, state common law claims, such as breach of contract or negligence, are displaced by the UCC. Unless a party can allege negligence by the bank occurred outside of the four corners of the wire transfer transaction, common law claims are preempted by the UCC. If the negligence occurred before or after the wire transfer process, a common law negligence claim may be asserted. For example, a complaint will frequently allege the beneficiary bank was negligent in opening the account of the fraudster, or failed to take prompt action to stop withdrawals from the fraudster's account after the beneficiary bank was on notice of the wire fraud. Typically, however, the victim has no relationship with the beneficiary's bank, which can give rise to a common law duty of care. Although common law claims sometimes survive the pleadings stage, it is rare that these cases survive summary judgment as often other common law defenses such as causation and standing bar the claims.

Beneficiary bank exposure.

The U.S. Court of Appeals for the Eleventh Circuit is one of the few federal circuit courts to analyze negligence and Article 4A claims in the context of a business email fraud scheme. See *Peter E. Shapiro, P.A. v. Wells Fargo Bank N.A.*, No. 18-15014, 2019 U.S. App. LEXIS 35604 (11th Cir. Nov. 27, 2019) (unpublished). The case involved familiar parties: two lawyers involved in a closing, a fraudster, and the two banks involved in the wire transaction. A Florida lawyer engaged by family members to handle the sale of a car dealership received an email from a lender's lawyer directing that the funds for a loan payoff be sent to a bank account at M&T. Then, the Florida lawyer received another, fraudulent, set of wire instructions, by email, purporting to be from the same lender's lawyer, this time directing that the funds be wired to a Wells Fargo account instead. The Florida lawyer directed his bank to wire $504,611.13 to the fraudster's Wells Fargo account. Wells Fargo received the wire transfer and processed it, relying on the account number even though there was a name mismatch between the intended beneficiary's name and the name on the account that received the wired funds. The Florida lawyer sued Wells Fargo for negligence and violations of Florida's version of Article 4A, alleging that it should not have processed the wire because the bank's automated systems knew that the beneficiary identified in the wire was not the owner of the Wells Fargo account identified in the payment order. The district court dismissed the common law negligence claim on preemption grounds and granted summary judgment for Wells Fargo on the Article 4A claim.

The Eleventh Circuit affirmed, holding that Article 4A displaced the common law negligence claim by specifically defining the duties, rights, and liabilities of the parties in a misdescription-of-beneficiary case. The court found that the lawyer's UCC claim also failed. Article 4A provides that if a payment order identifies both an account name and account number, and the bank lacks "actual knowledge" that the account name and number do not match, the beneficiary bank (Wells Fargo) may rely on the number as the proper identification of the beneficiary of the order. The court relied on the comments to section 4A-207:

> A very large percentage of payment orders issued to the beneficiary's bank by another bank are processed by automated means using machines capable of reading orders on standard formats that identify the beneficiary by an identifying number or the number of a bank account. The processing of the order by the beneficiary's bank and the crediting of the beneficiary's account are done by use of the identifying or bank account number without human reading of the payment order itself … If the beneficiary's bank has both the account number and name of the beneficiary supplied by the originator of the funds transfer, it is possible for the beneficiary's bank to determine whether the name and number refer to the same person, but if a duty to make that determination is imposed on the beneficiary's bank the benefits of automated payment are lost.

2019 U.S. App. LEXIS 35604 at *11-12. Noting that Article 4A states expressly that a beneficiary bank does not need to determine whether the name and number refer to the same person, the court found that no violation of UCC Article 4A had occurred.

In another case involving BEC, the Northern District of Georgia granted a motion to dismiss a complaint, including negligence, Bank Secrecy Act, and UCC claims. *Hofschutle v. SunTrust Banks, Inc.*, No. 1:20-cv-01676, 2021 WL 5230732 (N.D. Ga. Mar. 4, 2021) involved allegations that a hacker intercepted emails between the plaintiff and her broker, used information in those emails to open accounts at the defendant banks in the broker's name, and then tricked the plaintiff into making wire transfers to the hacker's accounts. The court declined to find preemption, ruling that negligence claims were only preempted if inconsistent with the duties imposed by the UCC. However, the court held that the plaintiff had still failed to state a claim for negligence because she had not alleged any direct relationship with the banks; banks do not owe common law duties to noncustomers to vet applicants for new accounts, and the account opening was not the proximate cause of the plaintiff's injury. The court also rejected the Bank Secrecy Act claim, finding that the statute only created duties to the government, not to noncustomers. Finally, the court dismissed the plaintiff's claims under Article 4A of the UCC, holding that Article 4A-201, governing security procedures, only applied to the bank, which initiated the wire transfer at the plaintiff's behest, not the beneficiary bank where the funds were sent.

Receiving bank liability

Receiving banks, or those that receive and send the wire transfer order, are more vulnerable to lawsuits by their customer. This result is evident in *Precision Computer Services, Inc. v. Newtown Savings Bank*, No. AANCV186029468S, 2021 WL 5370456 (Conn. Super. Ct. Oct. 26, 2021), where a Connecticut court recently granted summary judgment to the plaintiff in a $67,560 wire fraud suit. There, a fraudster impersonated the owner of the plaintiff company, emailing its bank's branch manager to request that the bank process an attached invoice as a wire transfer. The fraudster's email address mimicked the owner's email address with a slight variation. The fraudster carbon-copied a real employee of the company, who replied that she would have the bank initiate the wire, but that the owner would need to authorize it. The fraudster replied by email. The bank processed the wire transfer to an international account.

The company sued, alleging that the bank had failed to comply with Article 4A because the owner had not authorized the wire transfer and the bank had not followed reasonable security procedures. The court agreed. While the payment order had been confirmed by an authorized individual, the employee, it had not been initiated by an authorized individual. Therefore,

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it was not an authorized order under the terms of the bank's agreement with the company. Furthermore, the bank could not shift liability to the company, because it had technically violated its security procedures by accepting an unauthorized payment order and had failed to comply with "reasonable commercial standards" by not taking any steps to confirm the authenticity of the email, such as calling the supposed sender of the email or requiring the sender to answer security questions. *But see Sarrouf Law LLP v. First Republic Bank*, No. 19-P-31, 97 Mass. App. Ct. 467 (2020) (appellate court affirmed grant of summary judgment in favor of receiving bank on claims of negligence and violation of California UCC, finding that the bank's law firm customer had not established any relevant duty breached by the bank and the UCC displaced the common law negligence claim under the circumstances alleged).

Several other courts have considered what constitutes a commercially reasonable security procedure, including finding that the banks' security tokens were commercially reasonable as a matter of law. *See Alvarez Rodriguez v. Branch Banking and Trust Co.*, 529 F. Supp. 3d 1309, 1325-26 (S.D. Fla. 2021) (finding that that the security protocol, which included customer identification, user identification, password, and a token, was commercially reasonable); see also *Experi-Metal, Inc. v. Comerica Bank*, No. 09–14890, 2010 WL 2720914, at *6 (E.D. Mich. July 8, 2010) (finding as a matter of law the bank customer agreed that the security procedure was commercially reasonable).

Tips for bankers to avoid BEC and malware scheme losses.

Banks, deposit account customers, and virtually every business in America conducting business by wire and fund transfer must be ultra-vigilant in recognizing the risks from BEC and fraudulent wire schemes. The best steps parties can take to avoid losses are precautionary, rather than reactionary. These steps can help prevent banks from incurring losses from wire transfer schemes:

- Verify information, even from trusted sources. Remember that hackers can trick both the customer and the initiating bank. Any verification calls to customers initiating wire transfers should use phone numbers found in business records rather than those provided in a potentially fraudulent email, and confirm the authenticity of instructions verbally, not by email.

- Continually review your wire transfer security procedures and audit practices to make sure employees are following them. Be wary of engaging in additional practices not required by the written security processes that the bank and customer agreed to, as the bank could be accused of impliedly expanding the written policy by custom and practice.

- Have contractual provisions in the customer's wire transfer requests governing liability between the bank and the customer, outlining the customer's responsibilities in providing accurate wire information, and confirming the finality of a wire order.

- Be extra vigilant of "updated" wiring instructions from a regular customer and nonbusiness email addresses.

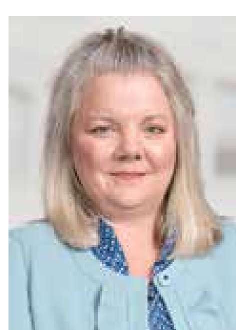
- Educate bank employees to double-check email addresses for slight variations, such as hyphens or underscores.

- Act with urgency once on notice of fraud, whether you are the receiving bank or the beneficiary bank. The key is to get the funds frozen. Inform customers that the banks are just one resource to recovering funds and urge them to communicate with law enforcement. The receiving bank should immediately commence a wire recall once a fraud declaration is filed by the customer.

- Be aware of applicable privacy laws, which preclude a bank from providing a noncustomer with account information of the bank's customer or the customer's attorney or representative, if the bank's customer is accused of being a fraudster.

- Develop frequently asked questions and guidelines, so that the treasury management, relationship managers, and sales associates know how to answer common questions clients face when they are victims of a wire fraud.

The new normal requires bankers and employees to know and understand the law.



Mary C. Zinsner is a partner at Troutman Pepper Hamilton Sanders LLP in Washington, D.C. Mary has over 30 years of experience representing financial institutions nationwide in wire fraud, Uniform Commercial Code, lender liability, class actions involv¬ing data breach, consumer finance, and privacy matters. Mary practices extensively in federal and state trial and appellate *courts in Virginia, Maryland, and the District of Columbia. Having clerked for the Honorable Claude M. Hilton, United States District Judge for the Eastern District of Virginia, she is very familiar with local federal court practices and frequently lectures on litigation practices in the "Rocket Docket." Mary served on the Board of Governors of the Virginia Bar Association from 2014 to 2018 and currently serves on the Board of Directors for the Virginia Law Foundation. Mary recently joined the American Arbitration Association's roster of arbitrators.*

Susan E. Flint is a partner at Troutman Pepper Hamilton Sanders LLP and is associated with the firm's office in Charlotte, N.C. Susan is in the firm's Consumer Financial Services practice which specializes in issues arising in the financial services industry. Susan is an experienced attorney with more than 25 years representing banking clients in multiple areas including retail and small business banking, consumer lending, complex commercial litigation, third party vendor issues and advising on third party legal process issues. Susan has been a frequent instructor at the American Institute of Banking and the Minnesota Banker's Associate on issues related to the handling of third party legal process as well as a panelist on litigation discovery issues, in house counsel litigation perspectives and creditor rights issues.

Sarah E. Siu is an associate at Troutman Pepper Hamilton Sanders LLP in Richmond, Virginia. As a member of Troutman's Consumer Financial Services group, she represents financial institutions nationwide in matters relating to wire fraud, the Uniform Commercial Code, debt collection, and mortgage servicing, as well as other consumer protection statutes. Sarah leverages her experience as a law clerk for the Honorable Justice Stephen R. McCullough on the Supreme Court of Virginia to regularly serve her clients in both state and federal courts.

Trustees:
Think Carefully Before Rushing to Court to Resolve Trust Disputes

by
Matthew P. D'Emilio
and Kerry M. Porter

McCollom D'Emilio Smith Uebler LLC

Disputes among beneficiaries and trustees are sometimes inevitable. When those disputes reach an impasse, trustees are often required to engage outside counsel to determine the best course of action and the potential risks of litigation. Without careful consideration of the rules that apply to fee-shifting in Delaware trust litigation, a trustee can find itself footing the bill not only for its own litigation expenses but also the expenses of the trust beneficiaries.

As a starting point, Delaware courts adhere to what is known as the "American Rule," which requires litigants to pay their own litigation expenses regardless of which party prevails in the action.[1] Courts will not deviate from this rule absent special circumstances, which include equitable doctrines, statutory provisions, and contractual agreements that permit fee-shifting.[2]

Bad Faith Exception

The "bad faith exception" is an equitable exception that permits fee-shifting if there is a finding that a party brought litigation in bad faith or acted in bad faith during the course of the litigation. The standard for this exception is high, and its application is generally limited to circumstances of egregious conduct,[3] where a party has acted "vexatiously, wantonly, or for oppressive reasons."[4]

Section 3584 of Title 12 of the Delaware Code

Section 3584 provides that in trust matters, a court "as justice and equity may require, may award costs and expenses, including reasonable attorneys' fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."[5] Section 3584 "supplements" a court's authority to award fees under the American Rule, and gives it "somewhat greater flexibility in exercising its discretion to shift attorneys' fees" beyond the stringent limitations of the bad faith exception.[6] It is considered a more relaxed standard in comparison to the bad faith exception.[7]

In exercising discretion "as justice and equity may require," Delaware courts recognize the common law rules that a trustee is entitled to reasonable attorneys' fees when defending a trust and the trustee's own actions as a trustee,[8] and that it is generally proper for a trustee to pay attorneys' fees "(i) where the attorney's services are necessary for the proper administration of the trust, or (ii) where the services otherwise result in a benefit to the trust," even if the litigation is unsuccessful.[9] However, a trustee who initiates litigation solely "to insulate itself from possible surcharges" or out of a "desire to receive absolution" for its conduct is not entitled to have its legal expenses paid from the trust.[10] Further, "[a] court may always deny an award, wholly or in part, if the trustee has acted in bad faith, fraudulently, or engaged in other wrongful conduct."[11]

Still, a trustee is "entitled to seek judicial instructions on issues that concern the administration of the trust,"[12] and seeking "judicial resolution of disputes may confer a benefit on the trust," regardless of the parties' motives.[13] For example, attorneys' fees incurred in connection with negotiating the termination of a trust or seeking instructions as to whether interested beneficiaries may terminate a trust concern the trust administration and have been held as properly payable from the trust.[14] Further, attorneys' fees from litigation that resulted in the removal of a trustee who was "adjudicated as a faithless fiduciary"[15] or breaking a deadlock among co-trustees[16] have also been held as properly payable from trust assets because the litigation ultimately conferred a benefit to the trust. However, attorneys' fees in connection with petitions for instructions filed simply to resolve a "difficult decision" faced by the trustee will not be awarded from the trust, and will draw the ire of the court.[17]

When weighing a party's motives for initiating litigation and the potential benefits to the trust as a result of that litigation, the Delaware Supreme Court has described the analysis to be undertaken as follows:

> Any formula that by default values one over the other, however, compromises the paramount concern of trust law: the welfare of the trust itself. A proper cost-benefit analysis assesses both the benefit incurred and the motives behind the litigation. There may be circumstances where the negative effects of a trustee or beneficiary's personal motives outweigh any incidental trust benefit produced by litigation. … [T]he balancing of benefit and motive is properly within the broad discretion [of the court].[18]

(Continued on p. 18)

Trusts

(continued from p. 17)

Trust Instruments

It is common for trust agreements to include provisions granting a trustee the authority to employ attorneys at the trust's expense, permitting a trustee to seek judicial approval of an accounting, and permitting a trustee to obtain a release from liability prior to taking a particular action.[19]

In contradiction of the common law rules considered under Section 3584, provisions in a trust agreement can expressly permit a trustee to initiate litigation "to insulate itself from possible surcharges" or out of a "desire to receive absolution" and to fund such litigation from the assets of the trust, even if the litigation confers no benefit to the trust or its beneficiaries and is not required for the proper administration of the trust.[20]

In the absence of such express permission to engage in solely self-interested conduct at the expense of a trust, courts will defer to the other exceptions to the American Rule to determine when litigation expenses are properly payable from the trust at issue or another party.

For example, in *Merrill Lynch Tr. Co., FSB v. Campbell*, the trust agreement contained provisions that allowed the trustee to obtain judicial approval of its accounting, conditioned the release of trust assets on receipt of a release or a judicially approved accounting, and entitled the trustee to pay attorneys' fees incurred in obtaining that judicial approval from the trust.[21] Although the trustee-initiated litigation was for the trustee's self-interested "desire to receive absolution," the Court concluded that the express language of the trust agreement permitted the trustee to initiate the litigation and to have its fees paid by the trust, and declined to infer any bad faith on the part of the trustee for the purpose of shifting fees to the trustee.[22]

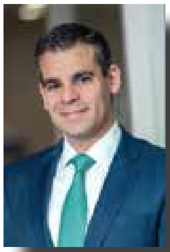
In a more recent case, *J.P. Morgan Tr. Co. of Delaware v. Fisher*, the trustee initiated an action seeking a broad declaration that it had complied with all of its duties during its service as trustee, approval of its accountings, and authorization to resign as trustee of the trust.[23] The trust beneficiaries responded with counterclaims seeking monetary damages from the trustee and, by the time of trial, asserting that the trustee had breached its duty of care by overseeing the trust in a grossly negligent manner, including filing the litigation. The beneficiaries opposed the trustee's request to have its litigation expenses paid from the trust pursuant to the terms of the trust agreement and Section 3584, and further sought to have their own expenses paid by the trustee personally.

Notwithstanding the Court's conclusion that the trustee did not commit any actionable breach of duty, the exculpatory provisions contained in the trust agreement, and the trustee's express authority in the trust agreement to pay accounting fees from the trust, the Court nevertheless denied the trustee's request for its litigation expenses to be paid from the trust. The Court further ordered the trustee to reimburse 50% of the litigation expenses incurred by the minor beneficiary of the trust.

According to the Court, this was a "close call." Ultimately, the Court found that the trustee's motivations for filing the litigation ("to insulate itself from possible surcharges" and out of a "desire to receive absolution" for its conduct), the trustee's litigation tactics (taking "hardline positions" and "resist[ing] legitimate discovery requests"), and the trustee's insistence on obtaining a release from the trust beneficiaries before taking certain actions, were cause enough to tip the scale out of the trustee's favor. On that last point specifically, the Court stated that "a trustee who insists on a release as the price [of] doing what is in the best interests of the trust—and what the trustee's fiduciary duties therefore require—engages in self-interested conduct by extracting a personal benefit at the expense of the trust and its beneficiaries."[24]

On the trust beneficiaries' request to hold the trustee responsible for their expenses, the Court rejected the trustee's argument that Section 3584 required a finding of bad faith conduct to hold the trustee personally liable for the fees of another party. Under the more relaxed standard of Section 3584, the Court considered the trustee's and the adult beneficiary's conduct leading up to and during the litigation, and determined that because both had contributed to the circumstances that ultimately lead to the trustee-initiated litigation, both should bear their own legal expenses and the trustee and the trust should equally bear the cost of the minor beneficiary's expenses. The Court concluded that the minor beneficiary, who was represented by a guardian *ad litem*, should not have to bear the expense of protecting his own interests in litigation that he had no part in causing. Notably, the Court did not specifically address the provisions of the trust agreement that permitted the trustee's accounting fees to be paid from the trust.

The holdings in *Fisher, Campbell*, and similar cases illustrate that trustees do not have a "blank check" when it comes to litigation expenses. While sometimes entirely unavoidable, trustees should not rush to the Court for resolution of all disputes. When litigation is necessary, trustees must be mindful of the cost of their litigation strategy, as courts will thoroughly scrutinize their conduct leading up to and during the litigation when determining who should bear the cost of litigation.



Matt D'Emilio is the Managing Member of McCollom D'Emilio Smith Uebler LLC. Matt focuses his practice on advising individuals and corporate fiduciaries in all matters relating to trusts and estates, including estate and wealth transfer planning, trust and estate administration, and fiduciary litigation.

Kerry Porter is an associate at McCollom D'Emilio Smith Uebler LLC. Kerry practices in the areas of estate and trust fiduciary litigation, estate and tax planning, estate and trust administration, and advising individual and corporate fiduciaries in all matters relating to trusts and estates.

Notes

1- *In re Tr. u/a McKinley*, 2002 WL 31934411, at *5 (Del. Ch. Dec. 31, 2002).

2- *Id.*

3- *See Deputy v. Deputy*, 2020 WL 1018554 (Del. Ch. Mar. 02, 2020); *Hurd v. Hurd*, 2018 WL 1470599 (Del. Ch. Mar. 26, 2018).

4- *Merrill Lynch Tr. Co., FSB v. Campbell*, 2009 WL 2913893, at *13 (Del. Ch. Sept. 2, 2009).

5- 12 *Del. C.* § 3584.

6- *Re IMO Restated Revocable Tr. of Lawrence F. Conlin*, 2014 WL 242655, at *6 (Del. Ch. Jan. 21, 2014).

7- *In re IMO Tr. for Grandchildren of Gore*, 2013 WL 771900, at *2 (Del. Ch. Feb. 27, 2013).

8- *Lynch v. Barba*, 2018 WL 1613834, at *10 (Del. Ch. Apr. 3, 2018).

9- *Campbell*, 2009 WL 2913893, at *11.

10- *J.P. Morgan Tr. Co. of Delaware v. Fisher*, 2021 WL 2407858, at *21 (Del. Ch. June 14, 2021).

11- *Id.*

12- *McKinley*, 2002 WL 31934411, at *4.

13- *In re Unfunded Ins. Tr. Agreement of Capaldi*, 870 A.2d 493, 498 (Del. 2005).

14- *McKinley*, 2002 WL 31934411, at *3-4.

15- *Id.* at *4.

16- *Alexander v. Alexander*, 2017 WL 1403285, at *2 (Del. Ch. Apr. 19, 2017).

17- *Fisher*, 2021 WL 2407858, at *20.

18- *Capaldi*, 870 A.2d at 498.

19- *Campbell*, 2009 WL 2913893, at *11.

20- *Id.* at *11-13.

21- *Campbell*, 2009 WL 2913893, at *13.

22- The trustee was not entitled to have its attorneys' fees paid from the trust for a separate injunctive action seeking to enjoin an arbitration proceeding against the trustee's affiliate because there was no express provision in the trust agreement authorizing payment of those fees, and because the injunctive action "conferred no benefit on the Trust and served no useful purpose in the Trust's administration." *Id.* at *12. *See also Matters of Estate and Trust of Kalil*, 2018 WL 793718, at *20 (Del. Ch. Feb. 07, 2018) (denying portion of litigation expenses that related to entities that "operated in parallel" to the trusts but were "neither beneficial nor necessary to the proper administration of those trusts").

23- *Fisher*, 2021 WL 2407858 (Del. Ch. June 14, 2021).

24- *Id.* at *22. *Cf. Copeland v. Kramarck*, 2006 WL 3740617 (Del. Ch. Dec. 11, 2006) (denying fees where trustee had no contractual indemnification to rely on).

Home4Good:
A Partnership Supporting Homeless Services in Delaware

Family Promise® NNCC helps hundreds of Delawareans at risk of, or already experiencing, homelessness thanks to the active engagement of community partners and stakeholders, and programs such as Home4Good.

by
by Kate Swanson
Community Investment Manager
The Federal Home Loan Bank of Pittsburgh

In January 2021, Delaware's Family Promise of Northern New Castle County (Family Promise® NNCC) was looking to expand its Pathway to Diversion program, which helps families experiencing homelessness avoid the trauma of having to go through the shelter system.

The need for homeless services has always outpaced funding and support, but the COVID-19 pandemic and resulting economic effects have made housing challenges tougher for many Delaware families. With community need greater than ever, Family Promise NNCC requested support from the Delaware State Housing Authority (DSHA).

Through DSHA and the Federal Home Loan Bank of Pittsburgh (FHLBank), Family Promise NNCC applied to the Home4Good program – a flexible, collaborative pool of funds that channels dollars to local service organizations working to help those who are experiencing homelessness or are at risk of homelessness. Led by Jere' Hunter, Director of Family Services, a small team of case workers submitted an application for the 2021 funding round.

In November 2021, the annual awards were announced, and Family Promise NNCC was selected to receive $170,000 in grants over the next year. Of this amount, $50,000 was designated for Diversion Services and $120,000 for Rapid Re-Housing Services.

"As an organization focused on providing families with the home, livelihood and resources for lasting independence, our work was made more complex by COVID-19," said Tyler Shade, Executive Director of Family Promise NNCC. "The Home4Good funding from DSHA and FHLBank Pittsburgh allowed for a new vein of resources to help our communities – especially to fill gaps in services for people and families that don't fit into more stringent guidelines for support."

Home4Good in Delaware

The voluntary Home4Good program is available to FHLBank Pittsburgh members thanks to member engagement, support from our elected officials and coordination with our community. This program provides FHLBank members a path to back community homeless services organizations in ways that aren't funded by other, less flexible, government or nonprofit funding.

Home4Good in Delaware would not be possible without FHLBank's partnership with DSHA. In addition to a financial match for available funding, DSHA also provides critical administrative support, and manages all post-award administration, including disbursements, compliance and monitoring.

Home4Good Programs in Delaware

Home4Good in Delaware defines homelessness as being experienced by individuals and families who do not have a fixed, regular and adequate nighttime residence. This issue is addressed through three primary funding programs based on the degree of imminent need including Rapid Re-Housing, Homelessness Diversion and Innovation.

Rapid Re-Housing programs assist individuals and families who meet the definition of "literally homeless" in solving the challenges to obtaining permanent housing through rapid response. Individuals and families are referred to Rapid Re-Housing provider agencies by Delaware's Centralized Intake System.

Homelessness Diversion programs are intended to prevent homelessness for people seeking shelter by helping them identify immediate alternate housing arrangements and, if necessary, connecting them with services and financial assistance to help them return to permanent housing.

Innovation programs provide non-traditional solutions in addressing homelessness for people at imminent risk of losing current housing and becoming homeless by making the delivery of services more efficient or effective. This can include, but is not limited to, street outreach, establishment of a landlord risk mitigation fund, housing location services and re-entry assistance.

How to Participate

Delaware's homeless service providers serve as the primary applicants for the Home4Good program and must be supported by an FHLBank member financial institution to qualify for funding during an open funding round.

To participate, FHLBank members complete member co-applicant forms indicating which areas or applications they would like to support.

All applications are then objectively scored by FHLBank and DSHA in consultation with representatives from Delaware's Continuums of Care or other community leaders. Awards are announced by December of each year.

(continued on p. 22)

Community

(continued from p. 21)

The five scoring criteria are:

- Program description
- Organizational and financial capacity
- Leveraging, program budget and cost-effectiveness
- Partnerships, collaboration and coordination
- Program outcomes and performance measurements

The Future of the Home4Good Program in Delaware

Thanks to the Home4Good funding from DSHA and FHLBank Pittsburgh, Family Promise NNCC has been able to expand and improve its Rapid Re-Housing & Diversion services for families experiencing homelessness. “Family Promise NNCC plans on building off of our newfound momentum to ensure we’re able to serve every family experiencing homelessness in Delaware,” said Tyler Shade, Executive Director.

According to the Housing Alliance of Delaware, more than 3,000 Delawareans will experience homelessness each year. Fortunately, organizations across the state have been working to invest in services that support these individuals. For our members, Home4Good provides a way to offer help to the individuals and communities they serve.

“We’re honored to be a part of this initiative and proud to support the organizations working to address homelessness through a multitude of different approaches,” said DSHA -Director Eugene R. Young, Jr. “From rapid re-housing to innovation, each one plays a valuable role in ensuring Delawareans have access to housing opportunities and support services.”

FHLBank is proud of our Home4Good partnership in Delaware that continues to bring forward new projects with the support of our members, elected officials, community partners and DSHA. We encourage our members and stakeholders to take full advantage of this program, which will benefit our communities in collaborative and meaningful ways in Delaware and across our footprint.

To learn more, visit www.fhlb-pgh.com or destatehousing.com.

In 2021, Home4Good grants were awarded to 13 programs from 10 Delaware organizations, including:

New Castle County Department of Community Services
Brandywine Counseling and Community Services, Inc.
Family Promise NNCC
Ministry of Caring, Inc.
People’s Place II
The Way Home
West End Neighborhood House, Inc.
YWCA Delaware, Inc.
Salvation Army
Catholic Charities, Inc.

The Home4Good grants were supported by multiple FHLBank member financial institutions including:

Arch Reinsurance Company
Artisans’ Bank
Community Bank Delaware
County Bank
Del-One Federal Credit Union
Dover Federal Credit Union
First Citizens Community Bank
Fulton Bank, N.A.
Genworth Life Insurance Company
Life Insurance Company of North America
Meridian Bank
Millers Capital Insurance Company
NORCAL Mutual Insurance Company
NY Life Insurance & Annuity Company
QBE Insurance Corporation
Santander Bank, N.A.
Stepping Stones Community Federal Credit Union
Technology Insurance Company, Inc.
Tuscarora Wayne Insurance Company
Wesco Insurance Company
Wilmington Savings Fund Society, FSB.

Kate Swanson is the Community Investment Manager at the Federal Home Loan Bank of Pittsburgh, where she manages Home4Good and oversees other programs including Banking On Business, Community Lending Program and First Front Door.

***FHLBank Pittsburgh** provides reliable funding and liquidity to its member financial institutions, which include commercial and savings banks, community development financial institutions, credit unions and insurance companies in Delaware, Pennsylvania and West Virginia. FHLBank products and resources help support community lending, housing and economic development. As one of 11 Federal Home Loan Banks established by Congress, FHLBank has been an integral and reliable part of the financial system since 1932. Learn more by visiting www.fhlb-pgh.com.*

***The Delaware State Housing Authority** (DSHA) was formed in 1968, and has been dedicated to providing quality, affordable housing opportunities and supportive services to low- and moderate-income Delawareans. In addition to its role as the state’s Housing Finance Agency, DSHA is unique in that it also serves as a Public Housing Authority and acts as a Community Development and Planning Agency.*

Accounting for Success

The Financial Professional's Role on a Nonprofit Board

Jonathan D. Moll, CPA

Belfint Lyons & Shuman, P.A.

"All community leaders with a business background have a skill set that positively contributes to governing an NPO."

Financial acumen is the hot commodity sought after by governing boards of nonprofit organizations (NPO). If you are a financial professional working in Delaware, there is a good chance you have been approached by a leader of a local NPO to volunteer your time for a worthy cause. If you accept that invitation, your transition into the treasurer's role usually begins immediately. All community leaders with a business background have a skill set that positively contributes to governing an NPO. However, the unique environment that NPOs operate in requires a few areas of specialized knowledge. Based on my experience as a board member, and from working directly with NPO boards in a professional capacity, treasurers should strive to become well-versed in the following five areas:

Managing Liquidity - A treasurer's role in liquidity management should not focus on the NPOs ability to pay its bills today. Instead, it requires the ability to analyze cause-and-effect scenarios that will impact the organization's future liquidity. Effective liquidity management goes beyond building next year's budget. It includes interpreting how routine decisions made by the board will impact long-term sustainability.

Complying with Financial Reporting Requirements - A treasurer's responsibility extends beyond understanding who the third-party users of the NPO's financial statements are and the applicable deadlines. The treasurer should possess a financial literacy sufficient to conceptualize the story that the financial statements tell about the organization and anticipate how it might impact decisions made by third parties. Financial reporting metrics unique to NPOs such as donor-restricted net assets, the functional allocation of costs, and reporting for endowment funds provide useful information about efficiency and impact. A treasurer's role in helping portray the organization's impact through its financial statements will improve the usefulness of the financial statements for purposes such as fundraising and board engagement.

Complying with Tax Reporting Requirements - A NPO's tax-exempt status is its greatest asset. Effectively navigating the IRS Form 990 helps to preserve this exemption. A treasurer should anticipate required reporting matters that might grab the attention of the IRS such as transactions with related parties or lobbying expenditures. The ability to influence the IRS' risk assessment of the organization exists through responses to governance and policy questions in Part VI of the form. All board members should have a general grasp of how the NPO maintains its public charity status through reporting on Schedule A. Maintaining an elevated level of awareness of new revenue streams helps identify potential Unrelated Business Taxable Income and corresponding reporting obligations.

Managing Risk - The financial professional's role on a board can be lonely when at times it feels as if you are the only left-brained dominant individual in a right-brained world. When board agenda items celebrate mission critical accomplishments such as new program launches and new funding sources, the treasurer might only "hear" the risks such as unfunded budget expenditures and interest rate exposure. But it is that mindset that leads to the treasurer's key role in risk management. The treasurer often has the unique skill set needed to identify threats to the organization, both external (i.e., cyber; market risks) and internal (i.e., liquidity; management succession; the adequacy of policies and controls). The treasurer is well positioned to formulate and implement plans to mitigate these risks.

The Board Interpreter – The most vital role of a treasurer is as an interpreter and effective communicator. The education and experience of a treasurer gives them the ability to comprehend more easily the complex financial and compliance issues unique to NPOs. However, it is important for an entire board to understand the facts and circumstances to make well-informed timely decisions based on consensus. A treasurer's goal must be to elevate the financial literacy of the entire board. The treasurer must be able to present the issues to the board in a concise and unbiased manner to allow a board to operate effectively.

All business and financial expertise is welcome on an NPO board. However, an understanding of the industry specific issues provides a competitive advantage for organizations in carrying out their missions. While the NPO benefits from this expertise on the board, the opportunity is extremely beneficial to the volunteer as well. It is a broadening experience that provides exposure to the leadership styles of other local community members. It expands the volunteer's perspective of unique corporate cultures and business models, contributing to the individual's evolving skill set that can be carried forward to the next volunteer opportunity.

"Alternative Investments" in Retirement Plans

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

"The outsized returns that many investors achieved in 2021 are not expected to continue indefinitely."

With inflation on the rise and among other reasons, investors are showing an increasing appetite for risk. To this end, more investors are trending away from the public markets into alternative investments such as private equity, corporate loans, and real estate. This includes retirement plans where there is growing interest in "alternative investments."

Alternative investments are relatively expensive, lack liquidity, and can be difficult to evaluate. There are very high minimums and funds are locked up, sometimes for many years. There is concern that because alternative investments tend to be opaque, the risks may not be well understood by many plan fiduciaries.

Department of Labor Issues Cautionary Letter

During the Trump administration in 2020, the Department of Labor issued an information letter stating that alternative investments can be added to defined contribution plans without violating ERISA's fiduciary standards.

This letter did not endorse adding private equity directly to an investment lineup. Rather, the letter stated it may be appropriate for defined contribution plans to include private equity indirectly through a target date, target risk or a balanced fund.

In December, the Department issued a follow up letter clarifying the 2020 letter. This letter was issued because the Department is concerned that the original letter has been used as a marketing tool and has been interpreted as a broad endorsement of alternative investments in defined contribution plans.

The Department states that the original 2020 letter was directed only to large plan sponsors that have both a defined benefit and a defined contribution plan where the plan fiduciaries have experience evaluating private equity.

The letter further states that the Department does not believe alternative investments are appropriate for most defined contribution plans.

Public Pension Plans Hope to Increase Returns by Taking on More Investment Risk

Public pension plans today face a significant funding gap. It is estimated that unfunded liabilities in these plans total almost one trillion dollars. This predicament is due to years of underfunding; overpromising; unrealistic demands from public unions; and rich early retirement programs.

Demographics are now exacerbating this dilemma. The graying of America is resulting in a cash flow shortfall as the number of retirees is increasing relative to the number of active workers. Benefits paid out by most public pension systems now exceed contributions coming in. Two obvious ways to close the funding gap are reduce benefits and/or raise taxes. These alternatives present obvious political challenges so many plans have chosen instead to try and increase investment returns by taking on more risk.

Historically, pension plans have been conservative investors allocating their portfolios primarily to publicly traded stocks and investment grade bonds.

However, in recent years, many public pension plans have allocated a portion of their portfolios to alternative investments such as private equity, corporate loans, and real estate

To date, these investments appear to be paying off. Alternative investments were a big driver of the returns during 2021 in many public pension plans. While these returns are impressive, some public pension plans achieved comparable or better returns while maintaining a more traditional portfolio invested in publicly traded stocks and bonds. That said, the outsized returns that many investors achieved in 2021 are not expected to continue indefinitely.

We continue to monitor the changing regulatory and legislative landscape. Please contact me to for further information or to receive our Retirement Plan Advisors Group Fiduciary Hot Topics newsletters from which this content is derived.

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Predictive RCM

Peter Dugas
Executive Director
CAPCO RISC Services

Leah Robinson
Senior Consultant
CAPCO Center of Regulatory Intelligence

"How can firms better leverage predictive monitoring and future-state assessments to inform today's business and operations decisions?"

Amidst constantly changing requirements and the rising cost of noncompliance, financial institutions continue to improve their methods for tracking financial services-specific laws and regulations. But many institutions struggle with the next step in establishing a wholistic risk management program: how can firms better leverage predictive monitoring and future-state assessments to inform today's business and operations decisions?

It starts with integrating real-time synthesis of financial, economic, political, civil, and government actions into an institution's impact analysis. This provides the board, senior management, compliance teams, and audit functions with a consistent framework to anticipate government actions, threats, and opportunities that drive effective responses and long-term business strategies.

The analytical foundation of regulatory change management programs needs to broaden to encompass data from a more inclusive set of issuing authorities (i.e., government instrumentalities, agencies, departments, etc.) and issuance types (i.e., speeches, reports, studies, working papers, etc.). These additional sources provide risk analysts, subject matter experts (SMEs), and the three lines of defense with unique perspectives to produce actionable intelligence necessary for identifying, tracking, escalating, and resolving emerging issues and compliance risks enterprise-wide.

Using only prudential or primary regulators to inform impact analysis does not provide a firm with a comprehensive enough understanding of what will be necessary to ensure compliance with prescribed practices, policies, and procedures, and/or ethical standards. Solely considering final rulemakings and legislation can have the same consequences.

Developing high-quality and forward-looking analysis requires collaboration across the three lines of defense and a more focused approach to incorporating complementary perspectives and issuance types. This analysis must proactively identify trends to highlight key topics and compliance themes that require deeper research or greater focus.

Financial institutions should consider the following areas when incorporating a predictive approach to their regulatory change management program, including:

- Producing actionable analysis in a timely manner and with the appropriate level of granularity
- Identifying internal SMEs who can employ due diligence for known and potential government actions impacting the financial institution
- Ensuring the SMEs provide accurate applicability determinations, impact analyses, monitoring decisions, and regulatory interpretations
- Scoping, analyzing, and summarizing intelligence from multiple data feeds into actionable intelligence
- Centralizing and communicating risk alerts and ad-hoc analysis of events and their relevance to the institution or the wider financial sector
- Maintaining a forward-looking and nuanced understanding of the legal and regulatory landscape
- Communicating complex ideas effectively, succinctly, and professionally in written or spoken formats to a wide array of audiences, including non-technical stakeholders

Case Study

A case study in the predictive monitoring and future-state assessments for a financial institution is in managing emerging supervisory and regulatory expectations for climate change risk. While financial institutions with operations in the United Kingdom (UK) and European Union (EU) have monitored this compliance theme for over a decade, in the United States (US) financial institutions have had to rapidly update their monitoring and interpretation of government frameworks for climate-related financial risks.

To respond to emerging compliance themes in climate change financial institutions should review their current issuing authorities and issuance types in scope for their regulatory change management program, and whether they need to be updated to reflect an emerging risk that allows the firm to be proactive rather than reactive. These analyses must consider government agencies, industry associations, non-governmental organizations, and think tanks that are currently out of scope but can provide financial institutions with actionable intelligence for a modern risk management framework for climate change. The updated list of issuing authorities that allowed for financial institutions in the US to update and/or develop their climate change risk management program included organizations that were outside of there typical risk and compliance organizations they would monitor, including:

- Bank of England (BoE)
- Board of the International Organization of Securities Commissions (IOSCO)
- European Banking Authority (EBA)
- European Central Bank (ECB)
- Financial Stability Board - Task Force on Climate-Related Financial Risks (TCFD)
- International Financial Reporting Standards (IFRS) Foundation
- Network of Central Banks and Supervisors for Greening the Financial System (NGFS)
- United Nations - Intergovernmental Panel on Climate Change (IPCC)
- World Bank

In the US, financial institutions could map their updated issuing authorities to the issuance types that clearly outline the direction the Biden Administration is taking for a whole-of-government approach to managing the risks from climate change.

- Biden Campaign – Biden-Sanders Unity Task Force Recommendations
- Department of Labor – Press Release
- Department of Treasury – Report
- Financial Stability Oversight Council – Report
- Office of the Comptroller of the Currency (OCC) – Speeches
- Securities and Exchange Commission (SEC) – Speeches
- White House – Executive Orders

Each of these issuance types give financial institutions a clear and predictable path for how the Biden Administration will likely issue new regulations and the timing of those regulations, as well as the frameworks that regulators will develop to ensure financial institutions can manage their climate change risks.

DBA Calendar of Events

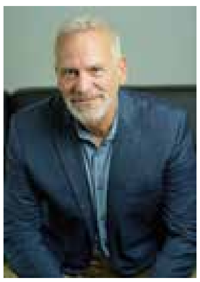
Delaware Bankers Association
Washington Visit
April 6 - 8, 2022

DBA Washington Visit - April 6 - 8

Get the latest updates on issues of interest to Delaware's financial services industry virtually at the 2022 DBA Washington Visit. Briefings will be provided by the American Bankers Association, regulatory agencies, and Delaware's Congressional delegation. Sponsorships are available.

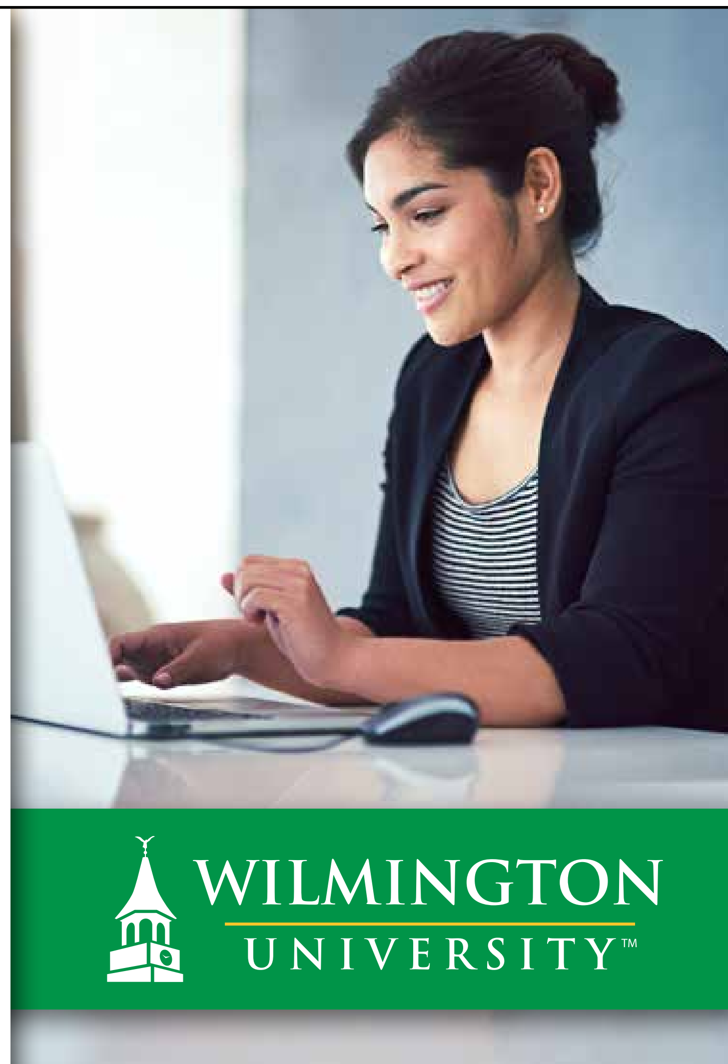
2022 Teach Children to Save Day - April 25 - 29

Save the date for Teach Children to Save Day - April 25th through 29th. Classrooms are now signing up for Delaware's 24th Annual Teach Children to Save event... with the majority being in-person! Over the years Delaware's bankers have taught an important lesson on saving to over 225,000 kids. Bank volunteer registration opens in early March.



2022 DBA Annual Meeting and Dinner - May 12

Be there in-person for the Delaware Bankers Association 127th Annual Dinner, May 12 at the DuPont Country Club, 1001 Rockland Road, Wilmington. Hear keynote speaker Mark Lally, the CEO of First State Compassion. After a 20 year career in law enforcement, Mark trailblazed Delaware's medical cannabis industry, creating industry-leading procedures and policies while focusing on delivering the best products and service to thousands of patients every month.



Women Connect Retreat – May 26

Kickoff the Memorial Day weekend at the Hyatt Place in Dewey Beach and enjoy a refreshing mind and body morning, inspirational keynote, sit down lunch, and early happy hour! The Women Connect Network serves as a catalyst to engage, empower and connect women in the Financial Services Industry. Sponsorships available.

2022
FDIC Directors' College
September 30th

FDIC Directors' College - September 30

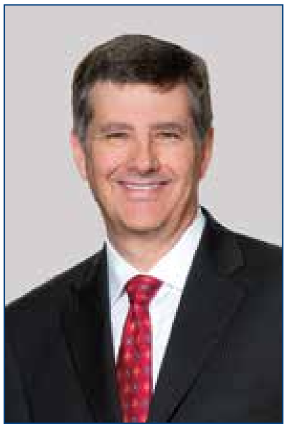
The FDIC Directors' College is an interactive program that provides ongoing education on current topics of interest to bank directors, senior officers, corporate secretaries, and board advisors. The course is designed to help directors and trustees, both new and experienced, stay abreast of the ever-changing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

2022 Delaware Trust Conference - October 18 & 19

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

2022 Delaware Trust Conference
October 18 & 19

Another Reason Why Defaulting Guarantors Love Delays



Brent C. Shaffer
Young Conaway Stargatt & Taylor, LLP

"There is no published Delaware law guidance on whether a statute of limitations for collection on a debt can be waived or deferred."

A recent case from the State of Washington serves as a reminder to Delaware bankers of why being slow to pull the trigger on a guaranty enforcement action may not be a good idea. When a commercial loan goes into default, often the first lender reaction is to enter into a modification or forbearance agreement in the hope that business will improve, the size of delinquency will be reduced, and the guarantor business relationship somehow salvaged. Naturally, individual guarantors also love any reprieve from losing assets to judgments against them in guaranty enforcement actions.

In *Umpqua Bank v. Gunzel*, 483 P.3d 796 (2021), motion for reconsideration denied, 19 Wash. App. 2d 16 (2021), the court held that, under Oregon law, language in a guaranty that deferred the beginning of the statute of limitations period for filing suit to collect under the guaranty (waiving the defense of the statute of limitations if there is any outstanding debt of the borrower for which collection is not barred by other statutes of limitations) was unenforceable because it violated public policy. Just as importantly, the court also found that the statute of limitations began running at the earliest possible time: when the guaranteed loan first when into default (its original maturity date), instead of the much later date when the borrower ceased making partial payments under the loan. This ultimately meant the statute of limitations completely barred the bank from collecting from the loan guarantor, as the result of a long period of accepting partial payments on the loan from the borrower after default.

Would a Delaware court reach the same conclusion? There is no published Delaware law guidance on whether a statute of limitations for collection on a debt can be waived or deferred. It is true that the Delaware Superior Court has stated, with respect to a guarantor's waiver of trial by jury, that "[i]t is also uncontroverted that a party, by virtue of a guarantee, can waive any rights and defense if [sic] the principal may have regarding the enforcement of the obligation as long as the waiver is clear and unequivocal." *First Fed. Sav. Bank v. CPM Energy Sys. Corp.*, 1991 WL 35689, *2 (C.A. No. 88C-MV-249, Mar. 12, 1991) (unpublished). However, in *RBS Citizens, N.A. v. Caldera Management, Inc.*, 2009 WL 3011209 (C.A. No. 08-0242, Sept. 16, 2009), the United States District Court for the District of Delaware invalidated a confession of judgment clause in a guaranty because, given the particular facts of the case, such clause did not effectively waive the guarantor's constitutional right to notice and a hearing.

In conclusion, although a bank should never act rashly or without thorough consideration of the implications of filing a collection action, the statute of limitations is yet another reason, in addition to other waiver and equitable "latches" defenses that could arise, for a bank not to sit on its hands too long when a guaranteed loan is in default.

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– Jack Markell, former governor of Delaware and friend of the Sloan Family

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