

HeadNotes

To paraphrase Thomas Paine, these are the times that try lawyers' souls. Among the many challenges facing the profession is a perfect storm in legal education: the cost of obtaining the JD degree continues to escalate at the same time that the recent financial crisis has "decimated the legal industry" and exacerbated an ongoing glut of new lawyers (*Gomez-Jimenez et al. v. New York Law School*, 36 Misc. 3d 230 (New York Cty. 2012)). The result has been a continuing bleak employment outlook generally for new law graduates, who typically have incurred massive amounts of debt in pursuit of a degree, the economic value of which is increasingly problematical. Given the nature of the profession and the ingenuity of its members, it is perhaps not surprising that some of these disgruntled students have hit upon a practical way of putting their new knowledge to work: suing their law schools.

In the *Gomez-Jimenez* case, decided earlier this year, Judge Melvin Schweitzer of the New York State Supreme Court dismissed an action brought under General Business Law (GBL) Section 349 by nine graduates of New York Law School, alleging in effect that they were fraudulently induced to attend the School and pay its annual tuition in excess of \$47,000 by misleading information used in promotional materials distributed by the School and posted on its website, with respect to the percentage of its graduates who find jobs and the average starting salary for new graduates (similar actions have been brought in other jurisdictions against other law schools under similar theories; to date, none has been successful). Under GBL 349, an action will lie 1) if the defendant's alleged conduct was consumer-oriented; 2) if it was deceptive or fraudulent in a material way; and 3) if the plaintiff suffered injury in fact. In dismissing the complaint, Judge Schweitzer noted among other things that the School's disclosures complied with ABA requirements and thus were consistent with how other law schools disclose this information; that the limitations of the information presented (such as a small sample size) were duly disclosed; that the plaintiffs (most of whom in fact are employed at present) failed to establish individual injuries in fact; that their proposed measure of damages, the difference between their actual earnings and the earnings alleged to be promised by the School's promotional materials, was entirely too speculative, especially given the intervening financial crisis; and, perhaps most tellingly, that the law mandates that the material allegedly relied upon must be deceptive to a "reasonable" consumer before it will be actionable. In the latter regard, the plaintiffs were hoist by their own petard: the record showed that they were sophisticated and knowledgeable about the plethora of information available on the Internet and elsewhere regarding legal employment prospects, so that a "reasonable" consumer in their position would not reasonably have relied exclusively on the alleged misrepresentations.

More generally, Judge Schweitzer's opinion is a thoughtful exposition of the current crisis in the legal profession, and well worth reading for that reason alone. Bottom line, quoting a *New York Times* article on the subject: "Since it is unlikely, based on overall economic conditions, that the demand for legal services will grow robustly for the foreseeable future, the legal industry will be forced to live with uncertainty for some time to come."



Given the uncertainty of the outlook for demand for their services, business lawyers may be well advised to seek areas into which to diversify their practice. One of the few clear growth areas in legal practice relates to health care law—especially in the wake of the Patient Protection and Affordable Care Act, a.k.a. Obamacare. But the complexity of the new law, and the remaining uncertainties surrounding its implementation, create a minefield for the unwary practitioner. In "Proceed With Caution: Matters to Consider for Business Lawyers Transitioning into Health Care," Craig Garner provides both scholarly analysis and practical advice for the business lawyer considering a foray into health care law. Mr. Garner, a practicing attorney and consultant in the health care field, is a former CEO at Coast Plaza Hospital in Los Angeles, and currently is an adjunct professor of health care law at Pepperdine University. He brings his perspective to bear from both the legal and managerial sides of the profession.

As this issue went to press (our deadline was before Election Day), electoral politics dominated the news. Partisan considerations aside, one prominent feature of this election was the historically low 11 percent approval rating of the U.S. Congress—as one wag put it, "there are toothaches that have a higher approval rating." Perhaps predictably, our Congress has sought to give the appearance, however cosmetic it may be, that it is changing its evil ways. Scott Colesanti, an adjunct professor at Hofstra Law School and a prior contributor to the *Journal*, has highlighted one such measure: the Stopping Trading On Congressional Knowledge, or STOCK, Act. In "Taking Stock of the STOCK Act," Mr. Colesanti notes that the new law, enacted at the request of the President, actually adds little to the existing array of enforcement tools against insider trading, since there is no indication that Congress is at present immune from such prosecutorial measures as the "Misappropriations Theory," which applies generally to third parties who trade on inside in-

formation. Thus, the law may in substance be little more than a “feel good” measure designed to impress the public that Congress is attempting to police itself; however, the author notes that it does at least highlight the issue and change the tone of the debate. More generally, Mr. Colesanti provides a concise refresher and overview of the development of insider trading law.

Next up is our ethics guru, Evan Stewart of Zuckerman Spaeder, who revisits a topic he has lucidly explored in earlier issues: the attorney work product doctrine, a leading candidate for the endangered species list. Lamenting along with the singer-songwriter Joni Mitchell (“You don’t know what you got ‘til it’s gone”), Mr. Stewart shows how the sensible approach to the doctrine taken in the Second Circuit *Adlman* case is again under threat from a recent case in the federal district court for the western district of New York. The underlying issue is when attorney work product may be said to be produced “in anticipation of litigation,” so as to be exempt from discovery under FRCP 26(b)(3). In his usual clear and engaging prose, Mr. Stewart gives a heads-up to business lawyers who may think their work product is protected from discovery, as long as it is prepared “the right way.”

Buried in the 2,400 pages of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 are several provisions that, on their face, seem to have little to do with the law’s main objectives of preventing another financial crisis and protecting consumers, but serve other Congressional agendas. One prominent example is the so-called “conflicts mineral” rule, intended to promote transparency in the resource extraction market, and more particularly to exert moral suasion against resource companies contemplating payments to certain foreign governments for the right to develop natural resources therein—akin, perhaps, to the shooting of an admiral on the deck of his ship in Voltaire’s *Candide* “pour encourager les autres” (to encourage the others). This provision amends the Securities Exchange Act of 1934 to apply to issuers of securities in the United States; but as always, and especially with Dodd-Frank, the devil is in the details. The Securities and Exchange Commission has now issued rules to govern the required disclosures. In “New SEC Rules for Resource Extraction Issuers to Disclose Payments to Governments,” Guy Lander of Carter Ledyard & Millburn, along with his colleagues Steven Glusband, Bruce Rich, and Gideon Even-Or, explain what is required and provide a practical guide to preparing the relevant forms. Mr. Lander is a past Chair of the Business Law Section and a frequent contributor to the *Journal*.

Apart from Dodd-Frank, another area of financial regulation which has escalated dramatically in recent years is the “Know Your Customer” (“KYC”) requirement, which applies to all financial firms. In large part the legacy of the September 11 attacks and the USA PATRIOT Act enacted thereafter, the regulators have continued to ramp up the KYC requirement, aimed at preventing the use of the

financial system to launder money for purposes of terrorism or criminal activity. In “New FINRA Know Your Customer and Suitability Rules Require Brokerage Changes,” Morrie Simkin of McLaughlin & Stern, a Section member and expert in broker-dealer law, explains the new rules issued by the Financial Industry Regulatory Authority, which to some extent replace former rules of the National Association of Securities Dealers, FINRA’s predecessor, and the New York Stock Exchange. While noting that the new KYC rule appears simple on its face, Mr. Simkin explains that in practice it is quite complex when read together with the new suitability rules, which pertain to assuring that investments recommended and sold to customers are suitable for those customers. Indeed, as he explains, FINRA has already issued three Regulatory Notices to implement and clarify the new rules. Mr. Simkin’s article provides practical “takeaways” for broker-dealer firms to consider as they undertake implementation of the new requirements.

Another of the less-noticed aspects of the Dodd-Frank reform law is the creation of a new Federal Insurance Office (“FIO”). Historically insurance, unlike other financial services, has been and continues to be regulated exclusively at the state level—a 1944 federal law, the McCarran-Ferguson Act, provides that no federal law applies to insurance unless by its terms it “specifically relates” to insurance. The financial crisis, and specifically the government bailout of insurance giant AIG, renewed calls for a greater federal role in insurance regulation. In the end, as a compromise FIO was created with a more limited mandate—essentially to oversee and study insurance regulation and make recommendations to the umbrella regulator created by Dodd-Frank, the Financial Stability Oversight Council (“FSOC”). In “Why FIO Matters,” Ethan T. James and Amanda G. Wise, both partners at Debevoise & Plimpton, clarify exactly what FIO is and is not expected to do. While FIO has no direct regulatory responsibilities, the authors explain how it is serving a key role in both national and international policymaking with respect to regulation of the business of insurance.

“Inside the Courts,” a summary of currently active securities-related litigation prepared by the attorneys of Skadden Arps, has proven to be one of the most valuable ongoing features of the *Journal*. As concise as it is comprehensive, this issue’s version covers the gamut from Auction Rate Securities to Statutes of Repose. The compendium leads off with a case recently accepted by the United States Supreme Court, *Amgen, Inc. v. Conn. Retirement Plans and Trust Funds*, in which the Court will consider whether a securities fraud plaintiff alleging a “fraud on the market” theory must establish materiality in order to gain class certification.

This issue concludes with yet another echo of the financial crisis. In “Lender Beware: Eleventh Circuit Court of Appeals Allows TOUSA Decision to Stand,” attorneys Alan Lepene, William Schrag, John F. Isbell and Andrew

L. Turscak, Jr. of Thompson Hine LLP discuss a case that has reverberated through the lending community and the bankruptcy bar since the bankruptcy court initially decided it in 2009. TOUSA, Inc. was a large residential developer and builder that went under during the financial crisis due to its exposure to the Florida real estate market. The lower court avoided payments made to prior lenders as a fraudulent conveyance under the Bankruptcy Code, because certain subsidiaries of TOUSA had pledged assets to secure a new loan to repay the existing debt even though the subsidiaries were not themselves liable on the prior loan, holding that the subsidiaries did not receive

reasonably equivalent value for the assets they transferred. Although the District Court reversed, the Court of Appeals largely reinstated the lower court's decision, and this summer the Eleventh Circuit Court of Appeals denied a petition for *en banc* review. The authors note that while this apparently closed the door on one chapter of the TOUSA story, the case may hold broader implications for future financing structures. For this reason, their article is well worth the attention of all business attorneys—not just those engaged in bankruptcy or secured lending practice.

David L. Glass

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