PIETRAGALLO

PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP

FALL 2009

COLLATERAL WARS

by Mark Gordon, Esq.

Risk-sharing programs, commonly referred to as "loss-sensitive programs," have been in existence for decades. Larger insureds rarely seek to purchase guaranteed cost coverage because it is expensive, it is unavailable in hard-market cycles, and because the sophisticated insured recognizes that the transfer of risk to an insurer for losses that are anticipated, based on the insured's historical experience, is not financially prudent.

In more recent years, large deductible programs have become in vogue, although other risk-sharing programs remain in existence, including, but not limited to, retrospectively rated premium programs and reinsurance programs with reimbursement features.

In each of the above-referenced risk-sharing programs, the insured pays a finite fixed cost to its insurer and will fund a certain amount of the losses incurred within the program. The carrier, in turn, issues a policy which, on its face, provides coverages for the casualty line of business which the insured seeks to protect. The policy itself obligates the carrier to pay losses on behalf of its insured. The insured, through contractual obligations with the carrier, is to reimburse the carrier for claims paid up to the level for which the insured is contractually at risk. Not surprisingly, the carrier has a vested interest in making certain that its insured has the financial capability and incentive to reimburse the carrier to the level of the insured's risk share. Thus, the need for collateral.

Risk managers who enter into risk-sharing programs on behalf of insureds recognize the potential financial benefits that are afforded to insureds which manage their risks through loss control measures and claims management. However, many risk managers did not contemplate the adverse financial impact that the pyramiding of collateral would have on their respective companies' finances when the programs were first entered into.

Increasing collateral demands to support new policy years, where losses in prior years had not developed as adversely as anticipated, creates great tension between the insured and its carrier. Increasing collateral demands on the insured deprives the insured of allocating monies to operations that would generate corporate growth. Ignoring collateral issues is not an option. The cost of collateral, in many instances, can exceed the costs of premium for the insured's primary casualty program.

Collateral is, however, a necessary evil. Statutorily mandated, collateral protects the financial strength of an insurance company by providing to the carrier a safety net which can be accessed by the carrier in the event that the insured fails to meet its promise to pay or reimburse its carrier for paid losses, premiums and assessments.

Importantly, our clients today are confronted with an unstable economy where capital and credit are difficult to access. There is, therefore, greater pressure on insureds to manage collateral requirements. The best way to manage collateral is to understand how collateral

Continued on page 8

SPECIAL
RISK MANAGEMENT
FOCUS

INSIDE THIS ISSUE:

PITTSBURGH

PHILADELPHIA

STEUBENVILLE

SHARON

WEIRTON

WEST CHESTER

www.PIETRAGALLO.com

Practice Spotlight: Risk Management

Our Risk Management Group brings a multi-faceted approach to the issues that face our clients. We are comprised of individuals who have expertise in the fields of insurance, workers'compensation, employment and corporate law. Our litigation practice is national in both scope and reputation. This experience enables our group to reduce risk exposure and the cost of risk for our clients.

We work with clients in industries where risk is a major cost component and where effective management of risk increases profitability. Working in concert with best-in-class vendors, we increase the financial performance of each client's risk management program, manage losses to mitigate financial exposure, reduce total insurance costs and assist with the creation of alternative risk transfer vehicles.

Our group has created and implemented customized practices that are employed by our clients, their insurers, third-party administrators, brokers, lawyers and physicians. These practices yield better investigations, management and resolution of claims. Our efforts keep small losses from becoming large, and large losses from becoming catastrophic.

We have successfully litigated coverage and premium disputes for our clients and have successfully defended insurers for alleged E&O liabilities. Our group has reduced costs to clients through successful class code litigation.

We are experts in insurance insolvency and the array of complex litigation that arises from it, including professional liability claims, reinsurance claims and broker liability. We have been retained to represent the Insurance Commissioner of Pennsylvania relating to insurance company liquidations, and have served as chief counsel to the Liquidator.

Members of our group have served as experts in state and federal courts in litigation involving claims handling errors and insurance coverage issues. Insurance departments consult us as experts on risk.

We counsel employers on how to reduce exposure in the setting of employment liability. Members of our group address issues such as discrimination claims, privacy and monitoring issues, wage and hour disputes, and hiring and firing practices. Likewise, we assist our clients with the preparation of employee manuals and personnel policy development; all designed to reduce the risk of litigation and the costs associated therewith.

Our group assesses the viability of portfolio transfer for our clients in the settings of merger and acquisition. We value potential pre-existing liabilities for successor companies.

We are involved in forming captive insurance companies and other alternative risk transfer vehicles. Many of our clients have entered into alternative risk transfer arrangements with spectacular cost savings.

We have been retained by the world's leading brokers to assist with the organization and representation of group captive insurance companies in an array of industries.

For more information, please contact Mark Gordon at 412-263-1838 or via e-mail at MG@PIETRAGALLO.com.

Virtual Testimony and Its Impact On the Confrontation Clause

by James W. Kraus, Esq.

The Modern Courtroom

Rapid advances in technology have brought extraordinary change to our world and the way we view it. In this brave new world of flat screens, high definition, streaming video and Internet connections, we have taken audio/video technology from the status of "the next best thing to being there," to something that is increasingly preferable to being there.

In most respects, this trend is positive, and has lead to substantial progress and improvements in the way we live and enjoy our lives. For the criminal trial practitioner, however, it is ever more important that this march toward progress not impinge on the basic constitutional rights of criminal defendants or compromise the ability to defend.

Video Testimony and Rights of the Accused

Federal court practice, particularly cases involving wire fraud, money laundering and changes under the Foreign Corrupt Practices Act, can often involve the reliance upon witnesses from places far outside a chosen venue. Often, the government asserts jurisdiction and venue based not on the site of physical transaction or the location of the principal actors, but rather on the location of an Internet server or the headquarters of a financial institution. As a result, the government may be inclined to meet the challenge of presenting witness testimony from across the country or from around the world by using video technology.

All strategic considerations notwithstanding, it is critical that counsel analyze all such requests with heavy regard for the defendant's right under the U.S. Constitution to confront the witness against him or her. The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him."

Consistent with the Sixth Amendment, Rule 26 of the Federal Rules of Criminal Procedure requires that in every trial, the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules. In the rarest of circumstances, this right may be compromised where "considerations of public policy necessities of the case" dictate.

Rule 15 of the Federal Rules of Criminal Procedure which authorizes the use of depositions in certain circumstances, also articulates the defendant's right to physical face-to-face confrontation by specifically providing for a defendant present at a deposition. Even a defendant in custody "shall" be produced for the deposition unless the defendant waives the right to be present in writing or is disruptive.

> It is critical that counsel analyze all such requests with heavy regard for the defendant's right under the U.S. Constitution.

Craig v. Maryland

The U.S. Supreme Court's 1990 decision in *Craig v. Maryland* is the seminal authority on the use of video technology in a criminal trial. *Craig* involved the review of a Maryland Rule of Criminal Procedure permitting child victims of abuse to testify by one-way closed-circuit television from outside the courtroom. The defendant could see the testifying child witness on a video monitor, but the child witness could not see the defendant. The Supreme Court approved Maryland's rule. The *Craig* court cautioned, however, that the right of confrontation – absent a physical, face-to-face confrontation – can only be satisfied where denial of such confrontation is necessary to further an important public policy and only where the reliability of testimony is otherwise assured.

Obviously, *Craig* does not establish a one-size-fits-all rule for the use of video technology. It does require, however, that courts address a proposed departure from the usual testimonial procedures be made by the trial court on a case-by-case basis. In that regard, courts generally are required to (1) hold an evidentiary hearing, and (2) find that the denial of physical face-to-face confrontation is necessary to further an important public policy interest, and that the reliability of the testimony is otherwise assured.

Two-Way Video Conferencing

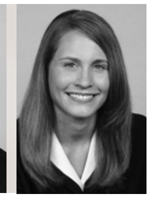
While *Craig* addressed the use of one-way closed-circuit video technology to protect a child witness against the potential for intimidation, more recent decisions have dealt with the proposed use of two-way live video conferencing in order to accommodate circumstances that relate more to convenience rather than protection of government witnesses. The U.S. Court of Appeals for the 11th Circuit, sitting en banc, addressed this issue squarely in its 2006 decision in *U.S. v. Yates*.

In *Yates*, defendants were charged in the Middle District of Alabama with mail fraud, conspiracy to defraud the United States, and conspiracy to commit money laundering, arising out of the operation of an Internet pharmacy. Prior to trial, the government moved for an order allowing the introduction of testimony from two witnesses in Australia by means of live two-way video conference. The government asserted that both of the witnesses were essential to the government's case in chief, and that though both witnesses were willing to testify, they were not willing to travel to the United States. The defendants opposed the motion, asserting that the proposed testimony would violate the Sixth Amendment right to confrontation.

Continued on page 10

Social Networking Sites: A Potential Hornet's Nest for Employers

by Daniel J. McGravey, Esq. and Amy C. Lachowicz, Esq.



The use of social networking sites such as Facebook, Twitter and MySpace has increased dramatically over the past few years and, as a consequence, employers now face a hotbed of potential liability. Social networking sites are virtual communities in which users create online profiles of themselves. Individuals have the opportunity to post information about themselves, blog, and share photographs, videos and websites.

The numbers alone illustrate the incredible surge in popularity. For example, Facebook has approximately 250 million active users, two-thirds of whom are out of college. Of those users, more than 30 million update their "status" at least once a day. Each month, approximately 1 billion photos are uploaded and, each week, more than 1 billion pieces of content such as blogs, notes and web links are shared.

A recent "Deloitte L.L.P. 2009 Ethics and Workplace Survey" found that about 55 percent of employees visit a social networking site at least once a week – but only 22 percent of companies have formal policies that dictate how employees can use social networking sites.

Employers could find themselves held liable for employees' actions on these sites regardless of whether their participation is on the job or off-hours. The most efficient, cost-effective manner for an employer to reduce its risk is by crafting and enforcing a written policy regarding the use of social networking sites by their employees.

Employers could find themselves held liable for employees' actions on these sites.

Setting aside the most obvious and palpable issue for employers – the decrease in productivity as a result of the substantial amount of time spent by employees on social networking sites – there are many other areas of concern. These areas of concern are triggered by the actual content of employees' online comments.

Discrimination Claims

An employer who discharges an employee for a legitimate reason may nevertheless face an uphill battle in court as a result of the employee's social networking profile. For example, the employee's social networking profile may contain personal information identifying that employee as a member of a protected class – including age, ethnicity, race, sexual orientation or disability. That disclosure gives the employee the chance to argue that the basis for his discharge was the protected characteristic and not what the employer proffered as its legitimate reason. This could be particularly effective for an employee who did not disclose the disability to his or her employers, but posted, blogged or discussed it on his or her social networking profile.

Liability To Third Parties

Employees who post comments about other companies or their products can expose their employer to liability. Indeed, what an employee writes on his profile about his employer's competitors, friends or associates can be costly. It can trigger claims by the third party for tortious interference with contract, business disparagement, libel or defamation. What could be worse, however, is if employees post photographs or video without permission, thereby triggering copyright infringement issues for the employer.

Release of Confidential Information

A company's competitive advantage in the marketplace may be compromised by an employee's release of confidential, proprietary or trade secret information on the employee's online profile. Customer lists, "secret formulas" and confidential information, which otherwise may qualify for legal protection, can lose that protection if an employee posts, blogs, or otherwise releases the information, even inadvertently, on their online profile.

Hostile Work Environment

If an employer discovers that its employee is harassing another employee, the employer may have an obligation to investigate and remedy the situation. Similarly, threats of violence by employees against other employees, i.e. "cyber-bullying," may trigger an employer's obligation to take action.

Identifying Candidates For Hire

With the wealth of available information, employers may find it tempting to use social networking sites to gather information about potential job candidates. Employers, however, must be cautious not to run afoul of Title VII, which prohibits discrimination in hiring based on race, color, religion, sex or national origin – all of which are frequently posted on social networking sites.

Guarding Against Liability

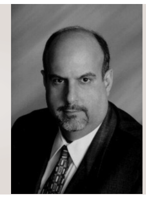
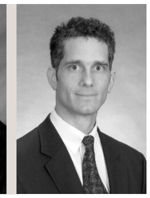
An employer can minimize its liability by having a written policy that sets clear expectations for the proper use of social networking sites. The policy must define what is appropriate and should include:

- A requirement that express authorization of the employer be obtained before an employee may blog or post in his capacity as a company representative;
- A description of disciplinary measures if the policy is violated;
- A warning that employees cannot discuss trade secrets, proprietary or other confidential information;
- A disclaimer warning employees that opinions they express relating to their company are their own opinion and not that of the employer;
- A provision that employees cannot disparage their employer in a way that violates the employee's duty of loyalty to the employer.

To be effective, however, the policy must be updated regularly to consider advancing technologies and it must be enforced consistently and uniformly. A key component should include the training of managers and supervisors. With these steps in place, an employer will have gone a long way towards minimizing the risk of litigation from the popularity of social networking sites.

For more information, please contact Daniel J. McGravey at 215-320-6200 or via e-mail at DJM@PIETRAGALLO.com or Amy C. Lachowicz at 215-320-6200 or via e-mail at ACL@PIETRAGALLO.com.

The Day The Supreme Court Failed To Consider 401(k) Liability: What Should Insureds Do To Reduce Their Exposure?

by Robert J. D'Anniballe, Jr., Esq. and Tyler J. Smith, Esq.

On February 20, 2008, the U.S. Supreme Court provided additional incentives for employers and/or individual defined contribution plan sponsors to employ best practices when it comes to managing individual participant accounts.

For the first time in our nation's history, employers and/or plan sponsors may now be held personally liable for individual account losses under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA is a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry.

Many industry analysts believe that this decision may open the floodgates to litigation.

The epic journey began on June 2, 2004 when James LaRue ("LaRue") filed suit in the U.S. District Court for the District of South Carolina, Charleston Division, against his former employer, DeWolff, Boberg & Associates, Inc. ("DeWolff"). LaRue alleged that DeWolff breached its fiduciary duty to manage his 401(k) plan in accordance with his specific instructions. More specifically, as is the case in many 401(k) programs, LaRue was permitted to direct plan administrators on how he wanted his money invested. LaRue alleged that DeWolff failed to invest his money as he directed and, as a result, his interest in the plan was depleted by approximately $150,000.

This lawsuit was somewhat complicated because under ERISA, one is somewhat limited in the type of recoverable damages. Due to these limitations, LaRue did not make a specific monetary demand for $150,000. Instead, he asked the court for restitution or to be "made whole," which can be an acceptable item of damage provided for by ERISA.

During the litigation, DeWolff filed a Motion for Summary Judgment and argued that even if the court were to accept LaRue's allegations as true, he was not entitled to relief as a matter of law. In deciding DeWolff's Motion, the District Court cited *Great-West Life & Annuity Ins. Co. v. Knudson*, a U.S. Supreme Court case that held "Restitution can be appropriate equitable relief where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. . . . [F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."

Applying the legal holding in *Great West* to LaRue's facts, the District Court held that the concept of restitution simply did not fit. Specifically, the court concluded the $150,000 never belonged to LaRue because it represented potential value, not actual earnings, and as such, there was nothing to restore, nor was the $150,000 ever in DeWolff's possession. The court reasoned that awarding LaRue $150,000 as restitution would impose personal liability on defendants, which was not permissible under ERISA.

LaRue filed a timely appeal to the Fourth Circuit Court of Appeals who affirmed the decision of the District Court, but seemingly on different grounds. Specifically, the Fourth Circuit cited to the U.S. Supreme Court's decision in *Massachusetts Life Ins. Co. v. Russell*, which permitted claims under ERISA, but only on behalf of the entire plan rather than on behalf of any one participant's individual interest. LaRue, presumably quite troubled by this point, sought and miraculously received allocatur from the U.S. Supreme Court to advance his appeal.

Finally, on February 20, 2008, the U.S. Supreme Court distinguishing LaRue's case from *Russell*, reversed the decisions of the lower courts and held that ERISA authorizes a private cause of action by an individual defined contribution plan participant against its administrators under a theory of breach of fiduciary duty, changing the litigation landscape that has been in place for more than 20 years!

The court opined that ERISA authorizes recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account. The principal statutory duties imposed by ERISA relate to the proper management, administration, and investment of plan assets, with an eye toward ensuring that the benefits authorized by the plan are ultimately paid to plan participants. The majority found the misconduct that LaRue alleged fell squarely within that category, unlike the misconduct in *Russell*.

Many industry analysts believe that this decision may open the floodgates to litigation. This however, remains to be seen. First, LaRue did not win the war, just a legal battle, which allows him to continue pursuing his loss. The case was remanded back to the District Court for further litigation, at which point DeWolff may have other opportunities to have the case dismissed.

Nonetheless, this result may intrigue many plaintiff attorneys across the country, while leaving employers quite queasy about potential liability for their employee's individual contribution plans, especially when one considers today's volatile financial markets.

If nothing else, the U.S. Supreme Court's ruling has reinforced for all of us the grave importance of employers and employees working together to provide the best opportunity for achieving the expectations and objectives of retirement programs.

Continued on page 11

Walk The Line: Reporting Anticipated Fraud Violations May Be A Risky Proposition for SOX Whistleblowers

by Christopher A. Iacono, Esq.

Assume for a moment that you are a senior financial officer of a publicly-traded company who discovers that the company is concealing the compensation levels of several top executives, disguising these payments as reimbursements and discretionary bonuses. Moreover, these payments have not been included as compensation in the most recent drafts of your company's annual proxy statement. You are legally responsible for certifying your company's soon-to-be-filed proxy statement, which you believe contains numerous material misrepresentations related to the concealed compensation.

Troubled by the potential for what you believe to be imminent fraud, you wish to disclose your concerns to the company's board of directors, but fear retaliation if you do so. If you blow the whistle on this anticipated violation and are terminated as a result, will the whistleblower provision of Sarbanes-Oxley protect you? The answer, unfortunately, is most likely "no."

> Judicial interpretations combined with the inherent shortcomings of the language of the current statute create a formidable dilemma for potential whistleblowers.

Section 806 – The Whistleblower Provision of SOX

Section 806 of the Sarbanes-Oxley Act is intended to encourage and protect whistleblowers. Section 806 prohibits companies from discriminating or retaliating against employees who provide information, cause information to be provided, or otherwise assist in the investigation regarding any conduct which the employee reasonably believes constitutes a violation of selected federal fraud statutes.

The statute, as written, presumes that a violation has already occurred. Accordingly, most courts that have considered this issue have found that an employee who reports an anticipated violation before an actual violation has occurred is not protected under Section 806.

For example, in *Livingston v. Wyeth, Inc.*, the plaintiff was terminated after complaining that his employer was going to miss an internal deadline for implementing a training documentation program. The plaintiff alleged that if the company missed the deadline and failed to report it, the company would be providing false and misleading information to shareholders. The 4th Circuit Court of Appeals rejected this claim and held that these complaints did not constitute protected activity under Section 806. The court reasoned that plaintiff's complaints relied solely upon speculative future contingencies and, therefore, did not concern a violation of any fraud statute.

The SOX Whistleblower's Dilemma

Such judicial interpretations combined with the inherent shortcomings of the language of the current statute create a formidable dilemma for potential whistleblowers. If an employee reports an anticipated violation, the employee may face termination without the ability to seek a legal remedy. If, on the other hand, the employee stands by and knowingly allows a violation to occur, the employee is arguably complicit in the violation, which could result in civil and criminal exposure for the employee for violating federal securities laws.

This Hobson's choice is further complicated for those employees who are officers or directors of a company. Officers and directors owe fiduciary duties to the shareholders, which include a duty of loyalty. In short, this duty requires the officers and/or directors always to place the interests of the corporation and the shareholders above their own. Therefore, an officer or director who allows a fraud violation to occur in order to protect his or her own self-interest has arguably breached the duty of loyalty and can be exposed to liability.

A minority of courts have allowed employees who blow the whistle on an anticipated violation to qualify for Section 806 protections, in spite of the statute's plain language. In *Ciavarra v. BMC Software*, for example, the District Court for the Southern District of Texas found that reporting of an "anticipated" violation of Sarbanes-Oxley was sufficient to permit a reasonable jury to find that a whistleblower was protected by Section 806, albeit without any analysis of the language of the statute.

In the minority cases, as in the majority jurisdictions, courts still require the employee to show both that he or she believed a violation would occur and that this belief was objectively reasonable. When dealing with anticipated violations, it will be more difficult to prove objective reasonableness because a corporation will likely argue that it would not have permitted a violation to occur. In light of the foregoing challenges, the question facing a potential corporate whistleblower is: "What can I do to protect myself from retaliation?"

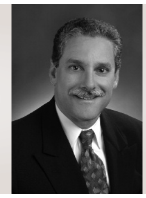
Best Practices for SOX Whistleblowers

First, the employee should keep a record of any and all objections to the anticipated fraud: copies of e-mails, correspondence with superiors, voice mails, and anything else in which the employee's objections are documented. This will protect the employee in two situations. If the employee decides to blow the whistle on an anticipated violation, he or she will be required to show that the belief that the conduct was a violation was reasonable and in good faith. Having a record of the objections will better enable the employee to show that his or her belief was both objectively reasonable and in subjective good faith as required by Section 806.

Continued on page 12

Updates To The Antitrust Division's Corporate Leniency Policy

by Joseph D. Mancano, Esq. and Divya Wallace, Esq.



In our Winter 2008 newsletter, we discussed the U.S. Department of Justice Antitrust Division's Corporate Leniency Policy ("Leniency Policy"). Under the Leniency Policy, amnesty from prosecution is automatic to the first corporation that self-reports its criminal activity to the Antitrust Division and provides incriminating information about its co-conspirators.

On November 19, 2008, the Antitrust Division of the Department of Justice issued a document entitled "Frequently Asked Questions Regarding The Antitrust Division's Leniency Program." Despite its innocuous title, this document summarizes significant changes to the Leniency Policy. The most significant change to the Leniency Policy is likely in direct response to the Antitrust Division's loss in the *Stolt-Nielsen* case, which was discussed in our earlier newsletter.

The new policy also discusses when a conditional leniency letter may be applicable for non-antitrust violations.

The Antitrust Division's Reaction to *Stolt-Nielsen*

As we previously reported, on April 8, 2003, the Antitrust Division revoked its amnesty agreement with Stolt-Nielsen on the basis that Stolt-Nielsen failed to terminate its anticompetitive conduct. After prolonged litigation, the U.S. District Court in Philadelphia held that the Antitrust Division had no reasonable basis to revoke the amnesty agreement. The Court ordered the dismissal of the indictments brought against Stolt-Nielsen, its subsidiaries and executives.

After the Stolt-Nielsen loss, the Antitrust Division issued new guidelines regarding its Leniency Policy. Under these guidelines, a leniency applicant cannot seek pre-indictment judicial review of the Antitrust Division's decision to revoke a leniency agreement. This new provision gives the Antitrust Division a tremendous strategic advantage.

Indeed, imagine the following scenario: A corporation enters into an amnesty agreement with the Antitrust Division and voluntarily provides incriminating information. Soon thereafter, the Antitrust Division revokes the amnesty agreement. The Antitrust Division then uses the incriminating information it obtained from the corporation to secure an indictment against that corporation. Although the corporation may challenge the revocation of the amnesty agreement post-indictment, the corporation's challenge will do little to eliminate the stigma of the indictment or the damaging information contained within the indictment.

Additional Changes to the Leniency Policy

Clarification of the Marker Process

The Antitrust Division's revised policy also provides clarification on its marker process. Under the marker process, if the corporation is the first in line to report criminal conduct, then the Antitrust Division will place a "marker." The "marker" is significant because it ensures that no other corporation can "skip over" the first amnesty applicant. After the "marker" is placed, the corporation is given a certain period of time to complete its investigation and report its findings to the Antitrust Division.

Under the new guidelines, the Antitrust Division summarizes four requirements to obtain a marker. Counsel must: (1) report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct discovered; (3) identify the industry, product, or service involved in terms that are specific enough to allow the Antitrust Division to determine whether leniency is still available and to protect the marker for the applicant; and (4) identify the client.

Furthermore, the Antitrust Division clarified that a corporation is generally given a 30-day period to report its findings. This marker, however, may be extended at the Antitrust Division's discretion so long as the leniency applicant shows that it is making a good-faith effort to complete its application in a timely manner.

The Leniency Policy's Application to Non-Antitrust Crimes

The new policy also discusses when a conditional leniency letter may be applicable for non-antitrust violations. Generally, the protections of a conditional leniency letter will apply to offenses that are committed in connection with the antitrust violation (i.e. mail fraud, wire fraud and conspiracy to defraud).

The conditional leniency policy, however, only binds the Antitrust Division and not other federal or state prosecuting agencies. Accordingly, the leniency letter would not prevent the Criminal Division of the U.S. Department of Justice from prosecuting an applicant for a violation regardless of whether that violation was committed in connection with an antitrust offense. Similarly, the leniency letter would not protect a company from any civil liability.

What is the "Discovery of Illegal Activity?"

The new policy also discusses what the Antitrust Division considers the "discovery of illegal activity." Generally, the grant of conditional leniency protects the applicant for any activity committed in connection with a criminal antitrust violation before the date of the conditional leniency letter. There are instances, however, where there may be a significant

Continued on page 12

works, why carriers want it, and what one can do to control it. While carriers have a legitimate need for collateral, there is a need for the insured to monitor the collateral which is actually required versus that which becomes excessive and detrimental to its growth and stability.

Why So Much?

Collateral allows a carrier to recognize the losses or premiums that its insured will pay to it in the future. To have a greater understanding as to what the carrier requires, and to secure a greater understanding as to what the insured may do to protect its own interests, an example is in order.

The best example to highlight these issues is the large deductible workers' compensation policy. In the case of the large deductible workers' compensation policy, the carrier assumes full statutory liability for all workers in the scope of coverage. High-deductible policies, in the end, perform in the same manner as a guaranteed cost workers' compensation policy, even though the employer (insured) contractually retains a significant portion of the risk. Regardless of the funding mechanics, deductible claims are paid by the carrier. The insured, thereafter, reimburses the carrier for claims paid within the insured's retention.

While the high deductible feature requires the insured to pay back to the carrier those amounts the carrier pays out within the insured's retention layer, the carrier remains responsible to pay those claims covered by the policy. Thus, the insurer retains both the credit risk and the timing risk of reimbursement. Insurers manage their credit risk with collateral and their timing risk with a loss escrow, loss fund or sweep account.

The amount of collateral required by the carrier is predicated on anticipated losses, which are based on the insured's historical loss profile. This figure may be adjusted based on the financial health of the insured, which accounts for a carrier's ongoing request of its insured for financial statements. An insured with strong financials may be so attractive a risk to an insurer that an insurer may elect to contribute its own surplus to underwrite the insured which is seeking a reduced level of collateral. Clearly, there is less willingness for an insurer to contribute its surplus to collateralize an account when the insured's financials are weak.

What Steps Should the Insured Take at the Time of Policy Inception?

It is vital for the insured and its carrier to set the insured's loss pick correctly. Accurately estimating losses prospectively is crucial to the equation. If a loss pick is too high, the financing obligations of the insured will be greater than that which is necessary. Similarly, if the loss pick is too low, the insured's initial cost may be lower, but the insured may be in for an unanticipated expense thereafter.

> While carriers have a legitimate need for collateral... there is a need for the insured to monitor the collateral which is actually required versus that which becomes excessive and detrimental to its growth and stability.

The estimate of the loss pick should be reviewed carefully. The insured, with the aid of an experienced broker, should determine whether there have been changes within its company that would favorably impact the historical levels of losses. A capable broker should communicate those changes within the client's company that would have such favorable impact to the carrier.

Some examples that might favorably impact a company's loss pick would be reduction in the workforce, improvements in automation which effectively eliminates some or all of the physical aspects of the work performed by the employees of the company, and/or an insured's commitment to better loss prevention and claims management.

The more sophisticated brokers have the ability to form their own actuarial assessments that may have greater credibility than the actuarial data utilized by the carrier. Oftentimes, underwriters will agree to compromise on the loss pick where independent actuarial data is shared with the carrier.

You Can Change Your Actuarial Profile

An insured's loss pick will take into consideration the carrier's estimate of ultimate losses that will be incurred in a given policy year. The actuaries and underwriters assigned to the insured's program evaluate how, from a historical perspective, the insured's losses had developed over time. If losses are permitted to fester, the carrier will pay out more benefits and expenses over the life of those claims.

An insured who appropriately involves itself in the loss prevention and claims process, and who intelligently partners with its carrier and defense counsel to resolve claims early on, reduces the prospects of adverse development. In turn, this will have a favorable impact on actuarial projections as to how the insured's losses will develop, thereby reducing collateral requirements.

Utilize Your Broker in the Process

A sophisticated and capable insurance broker is equipped to present your company's story to a carrier. Presenting a credible story as to the efforts the insured is making to reduce the risk of loss and/or in mitigating losses once they occur to avoid adverse development is an important tool in reducing loss expectations and, accordingly, collateral requirements. Further, a capable broker has the resources to identify trends within its client's casualty programs that could justify reduction in collateral requirements.

Choose the Right Program Structure

Once a client understands the true cost of collateral – in terms of the cost of capital that is unavailable for other business purposes – the client's strategic decisions about the size and type of

Continued on page 9

retentions will include collateral in the equation. The question becomes not simply how much risk to transfer and how much to retain, but the manner in which the retentions are handled. Retention represents a significant unknown, but the certainty of a loss-sensitive program comes at a price, and that price includes the burden of collateral.

Many risk managers assume that retaining a higher level of risk share will necessarily reduce the costs of insuring the risk of the insured. That is not, however, always the case. The insured that decides to take on greater retention in a layer where losses have not historically occurred may find that the reduction in premium by the carrier for this new self-insured layer is outweighed by the adverse impact of the increased collateral requirements. A competent broker can aid the insured in an appropriate analysis as to what retention levels the insured should seek.

Actively Include the Carrier's Credit Management in the Underwriting Process

The carrier's prime goal in collecting collateral may be to secure its surplus, but the carrier is also hedging against its own credit risk; and with that in mind, the insured should work with its credit management to open the lines of communication on the perceptions of the insured's credit worthiness. Collateral should be manageable if the right loss pick is developed, the correct structure is utilized, and the insured makes an effort to build the correct relationship with its carrier.

What if, Despite the Insured's Best Efforts, it Perceives it is not Being Treated Fairly by the Carrier?

As noted above, many companies who were involved in programs where increased risk sharing occurred have not always seen a reduction in costs and improvement of cash flow that were initially anticipated. The constant requirement to securitize current policy years with collateral will undoubtedly lead to adverse financial consequences.

Oftentimes, our clients are asked to continuously collateralize a current program where the insurer retains the benefit of collateral protection provided in earlier policy years, which the insured perceives is far more than necessary to protect the carrier against losses reported in the earlier program years. It is anticipated that the carrier will contend that fresh collateral is necessary because of anticipated future adverse developments on existing claims incurred in prior program years, which includes a component of IBNR (Incurred But Not Reported claims).

At some point in time, there may be a need to challenge the carrier's rationale for retaining collateral.

At some point in time, there may be a need to challenge the carrier's rationale for retaining collateral. An independent actuarial assessment may be appropriate to challenge the assumptions of the insured's actuaries and underwriters.

One should routinely review the underwriting assessment that the carrier constructed that generated the loss pick in a given policy year. This would include review of the carrier's actuarial assessment which led to the ultimate predictions for the insured in that policy year. Thereafter, the insured should objectively assess whether the losses in a given policy year occurred with the frequency and severity that were anticipated when the loss pick was initially derived.

This assessment should not be made in the first or second year after the end date of a given policy, as losses which are known to have occurred within the policy will not be credibly developed. Other losses may not be known to the insured and carrier at all.

The insured should work diligently with its carrier's claim representatives and, when appropriate, defense counsel, to rapidly and accurately assess the likelihood that a claim can be successfully defended. In those instances where the likelihood of success is high, those claims should be defended. Other claims should be evaluated early on for settlement potential. All claims have settlement value, ranging from nuisance value to values that will exceed the insured's retention levels. Claims that are aggressively handled at the outset can be intelligently valued for settlement early on in the claim process if the insured's vendors (claim representative, broker and defense counsel) are performing their jobs correctly.

In reducing the time gap between the occurrence and the closing of the claim, an insured should be able to keep small claims from becoming large and large claims from becoming catastrophic. Each insured should have the objective to close all claims within three years of presentation. Substantially meeting this objective will vastly eliminate legacy claims, which will favorably impact the company's actuarial profile and reduce collateralization requirements.

To meet these objectives, the insured must be intimately involved in its programs. Frequency issues should be addressed through loss prevention. Severity issues should be addressed through post-loss mitigation efforts. The insured needs to understand its programs, how claims impact its finances, and what the insured's involvement in the process, coupled with the involvement of a capable broker and counsel, can do to mitigate ultimate loss exposure and collateral requirements.

For more information, please contact Mark Gordon at 412-263-1838 or via e-mail at MG@PIETRAGALLO.com.

Mr. Gordon would like to acknowledge Pamela Ferrandino, National Casualty Practice Leader for Willis HRH, a national expert on collateral issues, whose input was invaluable for the production of this article.

Virtual Testimony continued from page 3

The District Court in *Yates* granted the government's motion and permitted the testimony, disposing of the confrontation clause argument by finding that two-way video conference would allow the defendants to see the witnesses and the witnesses to see the defendants. The court found that the "important public policy" interest was satisfied through the government's assertion that the witnesses would provide the fact finder with "crucial evidence."

As a result of the court's ruling, the two witnesses did testify by live two-way video technology. For this purpose, the trial was re-convened in a conference room at the U.S. Attorney's office. The testimony was not without technical difficulties as the witnesses demonstrated that they were not able to identify the defendants, which was attributed in part to the difficulty of the technician in zooming in the images at the U.S. Attorney's conference room.

The two defendants in *Yates* were convicted and appealed their conviction to the U.S. Court of Appeals for the Eleventh Circuit. A three-judge panel of the Eleventh Circuit vacated the convictions based on a finding that the use of the two-way video conference violated the confrontation clause of the U.S. Constitution. On petition for re-hearing en banc, the Eleventh Circuit once again ruled that the convictions should be vacated.

The Government's Burden

The *Craig* test, with its requirement that deviation from face-to-face confrontation be found to be necessary to further an important public policy, as well as the context in which it was established – protection of a vulnerable witness for which there was probable cause to believe the potential for intimidation by the accused – creates a substantial burden for the government. Accordingly, it is not surprising that the government will often seek to limit the application of *Craig*.

In *Yates*, the government offered two basic arguments to support its assertion that *Craig* did not apply. First, it argued that *Craig* should not apply because the testimony was presented by two-way video conference rather than one-way conference as in *Craig*. The government also argued that two-way video conference testimony is superior to testimony taken by deposition under Federal Rule of Criminal Procedure 15, asserting that it should be admissible whenever Rule 15 deposition testimony would be.

Both arguments, while superficially appealing, failed to address the right of confrontation. The government in *Yates* probably could have avoided the entire problem by arranging for a Rule 15 deposition.

As often happens, however, it appears that the government didn't come to grips with its witness availability problem until near the eve of trial. By that time, a Rule 15 deposition is impossible or at least extraordinarily difficult to arrange without delaying trial. Accordingly, the government simply argued that since the Rule 15 deposition would have been an available avenue for the witness testimony, the two-way video conferencing at trial would be sufficient. The Eleventh Circuit rejected both of these arguments.

The U.S. Supreme Court has not yet ruled on how or whether *Craig* should be applied to the use of video conferencing. There are examples of some federal courts of appeal approving the use of two-way closed-circuit television without strict application of *Craig*.

In *U.S. v. Gigante*, the Second Circuit Court of Appeals distinguished the *Craig* use of one-way closed-circuit television from the use of two-way video conferencing, and found it unnecessary to apply the *Craig* test.

In *Yates*, the government argued that *Gigante* demonstrated that *Craig* did not apply to the use of two-way video feed. The Court disagreed, commenting that the *Gigante* court should have applied *Craig*. It specifically noted that the court in *Gigante* did actually hold the required evidentiary hearing regarding the need for the two-way video evidence, and found that both live testimony and a Rule 15 deposition under the circumstances were inappropriate or impractical, citing the fact that the witness was a former mobster participating in the Federal Witness Protection Program, was at an undisclosed location, and was in the final stages of inoperative fatal cancer and unable to travel. As a result, the court in *Yates* found that the *Craig* necessity standard likely would have been satisfied in *Gigante*, had it been applied.

Back to the Future

While *Yates* does not yet represent a consensus of authority on video conferencing and the confrontation clause, there are decisions consistent with this holding that might provide support in arguing against unwanted video testimony. Prior to *Yates*, the Eleventh Circuit had rejected arguments that the *Craig* test was inapplicable in a habeas review of a Florida Supreme Court decision, in *Harrell v. Butterworth*. In 2005, the Eighth Circuit Court of Appeals, in *U.S. v. Bordeaux*, also declined to follow the *Gigante* court's rejection of the application of *Craig* to video conferencing.

Some authority exists to support the government's argument in favor of the video conferencing alternative to live witness testimony. In *Horn v. Quarterman*, the Fifth Circuit Court of Appeals applied *Craig* in an appeal by a Texas habeas petitioner, and found that the use of video conferencing for testimony by a prosecution witness who was terminally ill with liver cancer did not violate the confrontation clause.

Conclusion

The confrontation clause requires a personal examination of such a nature that ensures a witness will give statements under oath, force the witness to submit to cross-examination ("the greatest legal engine ever invented for the discovery of truth"), and permit that a jury is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Intrinsic in this meaningful examination, absent the exception set forth in *Craig*, is the personal, face-to-face meeting of the defendant and his accuser. The importance of the "demeanor" evidence referred to by the Supreme Court in *Craig* cannot be discounted.

Witnesses are often judged by factors that reach far beyond the words that they utter from the witness stand, including the manner in which they enter the courtroom, their willingness to make eye contact with trial participants, and their ability to control nervous gestures as they deliver their testimony. Accordingly, defense counsel should remain vigilant in preserving all of the benefits of a true face-to-face meeting between the accused and accuser.

For more information, please contact James W. Kraus at 412-263-2000 or via e-mail at JWK@PIETRAGALLO.com.

Prior to *LaRue*, employers could not be held personally liable for individual defined contribution plan participant losses. Therefore, many chose to administer their own individual contribution plans. *LaRue* does not take away the employer's right to conduct business in this fashion. On the contrary, *LaRue* simply mandates that one who decides to administer these plans must do so in accordance with industry standards, and that their failure to do so may expose them to liability.

If one chooses to administer the plan, many financial experts have recommended some of the following practices:

- Conduct and record due diligence to show that you have endeavored to select, monitor and retain the best funds and investment adviser.
- Document all pertinent facts supporting decisions to select, retain and/or eliminate an investment option or adviser.
- Consider an investment fund provider for guidance on how to select the investment funds.
- Consider an attorney to advise on due diligence.
- Consider professionals to assist in determining the extent of their compliance with ERISA §404(c).
- Encourage employee participation by using automatic enrollment, rebalancing and progressive savings features.
- Develop and implement programs designed to educate plan participants from making uninformed decisions about how much money they will need at retirement.
- Evaluate how well the plan serves employees by looking beyond participation rates to the percentage people are deferring.
- Vendor management, particularly in regard to fees charged.

Some employers may consider mitigating their liability exposure by appointing third-party investment professionals to manage the plan and its investments. However, this may not absolve them from any and all liability. Some jurisdictions may hold the employer liable for its failure to meet industry standards for selection, retention and/or monitoring of the third-party professional. Similarly, employers could be responsible for the third-party professional's conduct.

To that end, employers might consider structuring agreements with third-party professionals to defend, hold harmless and indemnify the employer in the event of a claim. On an interesting side note, employers might be eligible for a tax credit for small employer pension plan startup costs.

> Employers might consider structuring agreements with third-party professionals to defend, hold harmless and indemnify the employer in the event of a claim.

Employers should evaluate potentially available insurance coverage to protect the sponsor and plan administrators from fiduciary liability claims like those in *LaRue*. Some insurance coverage experts are raising the issue as to whether individual 401(k) claims might trigger the "benefits due" exclusion found in the typical fiduciary liability policy.

Some "benefits due" exclusions provide that the carrier "shall not be liable for that part of the loss, other than defense costs." A number of carriers have added an endorsement clarifying that its "benefits due" exclusion does not exclude *LaRue*-type claims.

The general proposition under the law is that if one chooses to act for the benefit of another, they must do so in a reasonable fashion. Applying this logic to the present situation, if an employer chooses to provide a 401(k) or similar plan for its employees, the employer must endeavor to administer that plan reasonably. After all, the futures of its employees and their families depend on it.

The holding in this case may create similar opportunities for participants in the defined benefit arena. As such, plan sponsors of defined benefit plans beware.

Robert J. D'Anniballe is a partner in Pietragallo's Steubenville office and can be reached at 740-282-6705 or via e-mail at RJD@PIETRAGALLO.com.

Tyler J. Smith is a partner in Pietragallo's Pittsburgh office and can be reached at 412-263-2000 or via e-mail at TJS@PIETRAGALLO.com.

Walk The Line continued from page 6

Second, if the employee decides not to blow the whistle because of fear of retaliation and allows a violation to occur, a record of objections will still be important. In the event of a government investigation, such a record will allow the employee to protect him or herself from both criminal and civil liability by showing he or she was not complicit in the violation. Having a clear documentary record of opposition to fraudulent conduct will allow the employee to assert the most effective individual defense.

Next, a whistleblower should strongly consider reporting an anticipated violation to a government agency, such as the SEC or the U.S. Attorney's Office, instead of, or in addition to, his or her superiors.

Reporting suspicious activities has three benefits for whistleblowers. First, it allows the whistleblower to avoid liability for fraud by demonstrating a lack of scienter or fraudulent intent. If ultimately forced to go through with an act that furthers the fraud, the act of reporting to the government may be evidence that the employee did not intend to aid the fraudulent scheme or agree to any conspiracy to perpetuate the scheme.

Second, it permits the whistleblower to report potential fraud without directly alerting those perpetrating the fraud to his or her opposition, thus potentially avoiding retaliatory action altogether. The government will recognize the importance of not revealing the identity of a confidential informant and will have an incentive to preserve the anonymity of a valuable whistleblower.

Third, if retaliation nonetheless occurs, the government's involvement will likely enhance the whistleblower's chances of recovering under Section 806. If the government pursues an action based upon the whistleblower's statements, it enhances the whistleblower's ability to argue that his or her belief that a violation was occurring was reasonable under Section 806.

Finally, given the current state of the law, it may be best for the employee to wait as long as possible before reporting anticipated fraud. Unfortunately, although it may seem counterintuitive for an employee not to report fraud as soon as he or she believes it is going to occur, a greater delay may increase the likelihood of receiving the protections of Section 806. A delay may allow the company to take more steps towards committing the violation.

In jurisdictions that do not apply Section 806 to reporting of anticipated violations, the delay may reduce the number of contingencies that must occur before the violation is complete and result in a higher likelihood of the employee successfully invoking the protections of Section 806. In jurisdictions that do apply Section 806 to anticipated violations, this may permit the employee to present more evidence and argue more persuasively that his or her belief that a violation was occurring was reasonable.

The narrow protections of Section 806 of Sarbanes-Oxley can make blowing the whistle a risky proposition. Between risking liability by waiting until a fraudulent scheme is complete, and blowing the whistle too early and sacrificing the protections of Section 806, those who discover corporate fraud in progress must walk a fine line to ensure their own well-being.

Section 806 appears not to have provided enough encouragement and protection to whistleblowers. In fact, in its current form, Section 806 may be deterring corporate employees from disclosing instances of anticipated fraud. While it is possible that the Obama administration will introduce legislation intended to increase whistleblower incentives as part of new regulatory statutes, whistleblowers must, in the interim, operate under the current framework of Section 806. For now, a potential whistleblower can improve his or her chances of receiving the protections of Section 806 by following the guidelines described above.

Christopher A. Iacono is an associate in Pietragallo's White Collar Criminal Defense, Health Care Litigation and Commercial Litigation Practices. He can be reached at 215-320-6200 or via e-mail at CAI@PIETRAGALLO.com.

Updates To The Antitrust Division's Corporate Leniency Policy continued from page 7

lapse in time between the date the applicant discovered the anticompetitive activity being reported and the date the leniency application was made.

In such instances, the Antitrust Division reserves the right to "grant conditional leniency only up to the date the applicant represents it terminated its participation in the activity." In these instances, the Antitrust Division will likely insist on the insertion of a discovery date and termination date in the conditional leniency letter.

Conclusion

If a corporation discovers that it has engaged in anticompetitive activity, it should still consider an application under the Leniency Program. Indeed, its failure to do so could result in higher fines and likely jail time for its executives. The new revisions to the Leniency Policy, however, give the Antitrust Division significant strategic advantages and enormous discretion to revoke conditional leniency. Accordingly, a corporation must proceed cautiously with a leniency application.

Information about the Antitrust Division's Leniency Program, as well as guidelines and model leniency letters, can be found on the U.S. Department of Justice's website at www.usdoj.gov/atr/public/criminal/leniency.htm

For more information about corporate leniency or other related antitrust issues, please contact Joseph D. Mancano at 215-320-6200 or via e-mail at JDM@PIETRAGALLO.com or Divya Wallace at 215-320-6200 or via e-mail at DW@PIETRAGALLO.com.

Recent Successes

Dismissal from ERISA Action Claim: Daniel J. McGravey and **Alexandra C. Gaugler** were successful in the U.S. District Court for the Middle District of Georgia in having the Southeastern Pennsylvania Transportation Authority (SEPTA) dismissed from an alleged ERISA violation. A retired SEPTA worker living in Georgia had sued SEPTA for the alleged violation, even though SEPTA is not subject to ERISA. After Mr. McGravey and Ms. Gaugler moved to dismiss SEPTA on that ground, the plaintiff amended his complaint to drop SEPTA as a defendant while not objecting to it remaining as one. The court called that assertion "bizarre" in dismissing the claim.

Expunction of Child Abuse Finding: Louis C. Long was successful in obtaining from the Pennsylvania Department of Public Welfare an expunction of an "indicated" finding of child abuse on behalf of a counselor of troubled youth. The counselor had been accused of failing to provide proper supervision of two teens in a mental health facility, one of whom was able to perpetrate a sexual act upon the other in a restroom. The DPW's decision will enable the counselor to complete her master's program and resume gainful employment in her chosen field.

Plastic Surgery Defense: Tyler J. Smith and **Jeanette H. Ho** received a defense verdict for a prominent plastic surgeon in Allegheny County Common Pleas Court in a case involving fraud, breach of contract and battery.

Dismissal of False Criminal Charges: P. Brennan Hart and **Jeanette H. Ho** received a Motion to Dismiss in a civil rights suit filed with the U.S. District Court for the Western District of Pennsylvania. The plaintiff had alleged that a local police chief had filed false criminal charges against him.

Dismissal of Claim of Conspiracy and Tortious Interference with Contractual Relations: P. Brennan Hart and **Jeanette H. Ho** were granted a Motion to Dismiss in the Court of Common Pleas of Blair County on behalf of an insurance broker. The plaintiff had raised claims of conspiracy and tortious interference with contractual relations.

Dismissal for Lack of Personal Jurisdiction: Joseph J. Bosick and **Martha S. Helmreich** obtained the dismissal of their client, a Japanese manufacturer of rubber processing-related equipment, from a product liability action in U.S. federal court on the grounds that the court lacked personal jurisdiction over the corporation. In granting the motion to dismiss, the court held that the plaintiff had not produced any evidence, as it was required to do, to establish that the corporation was subject to either general or specific jurisdiction in Pennsylvania. The court found that the corporation's few recent sales of unrelated products in the state were not sufficient to establish general jurisdiction. It also found that there was no evidence that the corporation was even aware of, much less intended, that the machine, which it had sold 25 years earlier to another entity not located in Pennsylvania, would ever end up in Pennsylvania. Thus it could not anticipate being sued 25 years later in the state for an alleged defect in the machine.

Aggrieved Party Doctrine Amicus Brief: Louis C. Long and **Joshua Siebert** filed an amicus brief before the Pennsylvania Supreme Court on behalf of the Pennsylvania Defense Institute in *Basile v. H&R Block* in litigation over whether the tax preparer waived its right to appeal class certification in the case. While H&R Block's timely appeal became muddled by a second docket number, the High Court did examine the legal issues, ruling the Superior Court misapplied the "aggrieved party doctrine" by requiring H&R Block to appeal the class certification even though summary judgment was later entered in the company's favor. The state Supreme Court, hearing the case for the third time, ruled only that a non-aggrieved party is not required to file a protective cross-appeal to preserve issues should their court victory be overturned. In a concurring opinion, Justice Thomas J. Saylor made specific reference to the amicus brief by Mr. Long and Mr. Siebert.

Upcoming Events

September, 16, 2009, Pittsburgh, PA - **James W. Kraus**, **Shannon V. Poliziani** and **Grant H. Hackley** will present a Lorman seminar on "Document Retention and Destruction."

September, 24, 2009, Pittsburgh, PA - **Richard A. Pollard** will speak to the Risk Management Association, Pittsburgh chapter, on "The Mortgage Mess - Let the Litigation Begin."

September 30-October 3, 2009, San Francisco, CA - **Tyler J. Smith** will speak at the first OR Excellence Conference on "Is This Malpractice? 10 Things That Could Get You Sued."

October 28, 2009, Greensburg, PA - **Bryan S. Neft** will speak on the False Claims Act to the Westmoreland County Bar Association.

November, 13, 2009, Arlington, VA - **Michael A. Morse** will make a presentation at the Society for Vascular Ultrasound's Legislative, Regulatory and Reimbursement Conference.

November 13, 2009, Philadelphia, PA - **Marc S. Raspanti** will be participating on the economic crisis: criminal law implications panel at the Pennsylvania Association of Criminal Defense Lawyers conference.

November 16, 2009, New York, NY - **Marc S. Raspanti** will speak on "The Relators' Bar Speaks Out: What's Coming Down the Pike?" at the American Conference Institute's Financial Institution Fraud Enforcement & Financial Recovery Measures Conference.

November, 23, 2009, Teaneck, NJ - **Marc S. Raspanti** will be co-presenting two seminars on the "NJ False Claims Act" at the NJ Judicial College.

December 18, 2009, Philadelphia, PA - **Kevin E. Raphael** will be presenting at the Pennsylvania Bar Institute on "The Mechanics of Pennsylvania Civil Procedure."

Attorneys in the News

William Pietragallo, II (Bet-the-Company Litigation), **Mark Gordon** (Workers' Compensation Law), **Marc S. Raspanti** (Health Care Law), **Francis E. Pipak, Jr.** (Workers' Compensation Law), **Paul K. Vey** (Medical Malpractice Law) and **Clem C. Trischler** (Product Liability Litigation) were selected for inclusion in the 2010 edition of *The Best Lawyers in America*. Mr. Pietragallo, Mr. Gordon and Mr. Pipak have all been listed in the publication for at least 10 years.

William Pietragallo, II (Business Litigation), **Mark Gordon** (Business Litigation), **Marc S. Raspanti** (Criminal Defense: White Collar), **Gaetan J. Alfano** (Business Litigation), **Joseph J. Bosick** (Civil Litigation Defense), **Anthony J. Basinski** (Business Litigation), **Gayle L. Godfrey** (Personal Injury Defense: Medical Malpractice), **P. Brennan Hart** (Civil Litigation Defense), **Joseph D. Mancano** (Criminal Defense: White Collar), **Francis E. Pipak, Jr.** (Workers' Compensation) and **Clem C. Trischler** (Personal Injury Defense: Products) were selected as "2009 Pennsylvania Super Lawyers" by *Law & Politics* magazine. Mr. Pietragallo and Mr. Raspanti were also named among the top 100 attorneys in the state of Pennsylvania, Mr. Pietragallo as a top 50 Pittsburgh attorney and Mr. Raspanti as a top 100 Philadelphia attorney.

Gaetan J. Alfano was re-elected Vice Chair of the Delaware River Joint Toll Bridge Commission.

Kathryn M. Kenyon was appointed to the Board of Directors of the non-profit Neighborhood Legal Services Association, which offers pro bono legal assistance to the poor in southwestern Pennsylvania.

Joseph D. Mancano was admitted to practice before the U.S. Supreme Court.

Rochelle L. Brightwell and **Tyler J. Smith** were admitted to practice before the Ohio state bar, and **Kathryn M. Kenyon** and **Peter S. Wolff** were admitted to practice before the West Virginia state bar.

Alan G. Towner was elected to a one-year term as President of the Pittsburgh Intellectual Property Law Association for the 2009-2010 term.

Joseph D. Mancano has joined the Philadelphia Bar Association's Military Affairs Committee, which advocates for and assists military personnel and their families.

Christopher A. Iacono has been appointed to the steering committee of the ABA Philadelphia Young Lawyers White Collar Crime Division.

Alka A. Patel is co-chair of the Professional Advancement Subcommittee of the Allegheny County Bar Association's Minority Bar section. She also chairs the Bar Association's Asian Attorneys Committee.

Jeanette H. Ho has been nominated as the Pittsburgh Chair for Minority Law Day.

Alka A. Patel was appointed to a one-term to the Zone 12 Delegation of the Pennsylvania Bar Association.

Joseph D. Mancano will be serving as an ombudsman for the U.S. Department of Defense's Employer Support of the Guard and Reserve Committee. He will be a neutral mediator in disputes between service personnel attempting to return to employment and their employers.

Michael A. Morse was interviewed by *Health Business Daily* on the risk hospitals face for not reporting adverse events.

Louis C. Long updated his chapter on Post-Trial Motions for the ninth edition of the *Allegheny County Civil Trial Manual*, published by the Pennsylvania Bar Institute. The manual is scheduled for December release.

Michael A. Morse and **Alexander E. Gosfield** authored "Medical Apology Laws and Adverse Event Reporting Under the PSQIA" for the *2009 Health Law Handbook*.

Marc S. Raspanti authored "The 'New' New Jersey False Claims Act: It Was Born to Run" in a four-part series in *The Legal Intelligencer*.

Tyler J. Smith authored "Five-Star Makes Complaints Against Nursing Homes Even More Serious" in *McKnight's Long Term Care News*.

Marc S. Raspanti and **Martha S. Helmreich** authored "How Best to Get Paid After a Successful Qui Tam Case" in the *TAF Quarterly Review*.

Michael A. Morse and **Peter Wolff** authored "Major Amendments to the Federal False Claims Act," which appeared in both *The Legal Intelligencer* and the Allegheny County Bar Association's *Lawyers Journal*.

Philip P. Keating authored "Manipulating the Statute of Limitations: The Government's Statutory Advantage in Foreign Investigations" in *Criminal Litigation*.

Marc S. Raspanti authored "Compliance and Governance for Health Care Organizations and Marketing Sales Activities" for the May/June 2009 edition of the *Journal of Health Care Compliance*.

Thomas J. Ward authored "Planning for the Inevitable" in the *Pittsburgh Catholic Magazine*.

Marc S. Raspanti was interviewed on defense procurement fraud for the April 14, 2009 edition of *Corporate Crime Reporter*.

William Pietragallo, II spoke on "Developing and Presenting Your Case: A Case Study of a Few Good Men" for the Pennsylvania Bar Institute.

Marc S. Raspanti presented "False Claims Act 101: The Anatomy of the False Claims Act" at the PICPA Health Care Conference in Hershey, PA.

Alexandra C. Gaugler spoke on “TARP Enforcement: What the Legal and Financial Sectors Can Expect” to the ABA Criminal Crime Committee's Young Lawyers Subcommittee.

Marc S. Raspanti taught a law school course on “Industry Spotlight: Drugs, Devices and the False Claims Act” at Hamline University School of Law in St. Paul, MN.

Bryan S. Neft spoke on “Federal and State Qui Tam Practice” to the Beaver County, PA Bar Association.

Michael A. Morse and **Douglas K. Rosenblum** spoke on “Federal and State Qui Tam Practice” to the Montgomery County, PA Bar Association.

Marc S. Raspanti spoke on the “New Jersey False Claims Act” to several gatherings of the New Jersey Judiciary.

Richard A. Pollard spoke on “The Current Legal Issues in Lending,” “Loan Workouts,” and “Ethics in Lending” at the Pennsylvania Bankers Association’s Commercial Lending School.

Richard A. Pollard spoke on “Forgotten Wisdom: Thinking Inside the Box” at the Pennsylvania Association of Community Bankers.

Louis C. Long was re-elected as vice president of the Board of Directors of the Knoxville, IA-based National Sprint Car Hall of Fame and Museum.

Gayle L. Godfrey spoke on “Insight from Defense Counsel: Helpful Hints from the Opposing Side” at the Pennsylvania Bar Institute’s “Maximizing Your Client's Recovery in Challenging Times” CLE.

Joseph D. Mancano spoke on “Financial Prosecutions: Be Aware of the Trends” at the 2009 Treasury Initiatives Conference in Malvern, PA.

Marc S. Raspanti participated in the American Health Lawyers Association's “Convener on Stark Law” in Washington, DC.

Michael A. Morse presented on “Apologies and Reporting of Medical Errors,” and Marc S. Raspanti on “Negotiating False Claims Act Settlements” at the HCCA's 13th annual Compliance Institute in Las Vegas, NV.

William Pietragallo, II spoke on “Demonstrative Video Evidence” at the Third Circuit Court of Appeals Conference.

Pamela G. Cochenour presented a two-part program on “How to Interpret and Apply FMLA” to Occupational Medical Physicians.

Marc S. Raspanti presented on “Alternative Dispute Resolutions in Fraud Cases” to the ABA Fraud Conference in Phoenix, AZ.

Michael A. Morse presented on “Whistleblowers and Subtle Retribution: Is the Concept of Whistleblower Protection Illusory?” to the first annual National Institute on Internal Corporate Investigations and In-House Counsel Program in Washington, DC.

Marc S. Raspanti has been reappointed by Governor Edward G. Rendell to serve as a member of the Pennsylvania Commission on Sentencing.

Joseph D. Mancano has been appointed to the National Association of Criminal Defense Lawyers White Collar Crime Committee and the Public Affairs Sub-Committee of the White Collar Crime Committee.

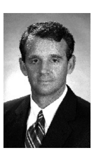
Marc S. Raspanti has been appointed as the Regional Chair of the National Association of Criminal Defense Lawyers White Collar Committee.

Marc S. Raspanti authored, “The Employment Protection and Anti-Discrimination Provisions of the New Jersey State False Claims Act” in the *New Jersey Law Journal*.

Joseph D. Mancano and **Martha S. Helmreich** authored, “The New Confrontation Clause? The Supreme Court *Melendez-Diaz* Decision” in *Upon Further Review*, a Philadelphia Bar Association website publication.

Pietragallo Adds Partner and Two Associates

Pietragallo has added a partner and two associates to its Pittsburgh office.



Timothy M. Hazel has joined the firm as a partner in the business group. He had been a shareholder with the Pittsburgh office of Buchanan Ingersoll & Rooney. Mr. Hazel’s practice is primarily focused on commercial real estate matters, general corporate work, franchise compliance and transactions. He has been involved with matters concerning commercial and industrial sales, leasing, and development. He has also represented borrowers in real estate-backed finance transactions. In addition, Mr. Hazel’s corporate experience includes handling mergers and acquisitions involving privately-owned companies, franchise acquisitions and corporate governance.

Alka A. Patel is an associate in Pietragallo’s intellectual property practice after serving as a senior associate with the Pittsburgh office of a national law firm. Prior to that, she was intellectual property counsel for one of the largest and most diversified specialty metals producers in the world. Prior to her legal career, Ms. Patel worked as a metallurgical engineer for a national specialty metals company.

John A. Schwab is an associate in Pietragallo’s commercial litigation practice. Mr. Schwab had served in the U.S. Marine Corps as the Chief Defense Trial Attorney for the Defense Office, Legal Services Support Section at Camp Lejeune, North Carolina. In 2007, Mr. Schwab served as the Battalion Judge Advocate in Fallujah, Iraq for 2nd Battalion, 6th Marines, Regimental Combat Team 6 for the U.S. Marine Corps.

PIETRAGALLO
PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP
ATTORNEYS AT LAW
38th Floor, One Oxford Centre
Pittsburgh, PA 15219

Address Service Requested

PRESORTED STANDARD
U.S. POSTAGE
PAID
PITTSBURGH, PA
PERMIT NO. 2516

PIETRAGALLO
PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP

ATTORNEYS AT LAW