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Legal Update

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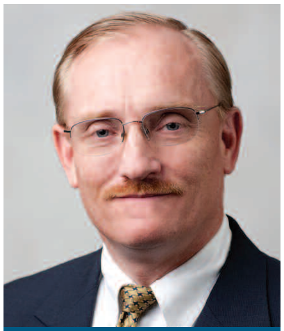
Environment

Climate change impacts financial disclosure, reporting obligations


Scott R. Dismukes


David A. Rockman

The issue of climate change is changing the climate for required corporate disclosures and reporting obligations. Earlier this year, the U.S. Securities and Exchange Commission issued interpretive guidance to provide public companies with instructions on how to comply with existing SEC disclosure requirements as they relate to climate change issues. The guidance provides direction with respect to many different aspects of potential climate change impacts — resulting from laws or regulations designed to address greenhouse gas emissions and from exposure to physical aspects of climate change.

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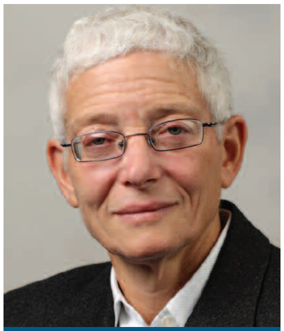
Labor & Employment

Developing airtight confidentiality agreements


Roberta Jacobs-Meadway


Maria L. Petrillo

Confidentiality agreements, sometimes referred to as non-disclosure agreements ("NDAs") are contracts commonly used in business when companies seek to both share and protect proprietary information, particularly information tied to or based on intellectual property: patents, trade secrets, copyrights, potential trademarks and licensing agreements. The purpose of an

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The purpose of SEC reporting requirements is to ensure that investors have relevant, material information about publicly traded companies prior to making investment decisions. The failure of a company to provide material information to investors — even in situations where it can be argued that the company did not know of the information — can and typically does lead to shareholder lawsuits against the company. With the high-profile status of climate change issues over the past several years, it could be argued that companies should already have been accounting for, and reporting on, climate change related risks. The issuance of the new SEC guidance serves to underscore this point, and to provide a framework for evaluating and disclosing climate change risks and impacts.

This attention from the SEC to climate change issues comes at the same time that climate change legislation continues to be debated in Congress and while the U.S. Environmental Protection Agency is busy implementing greenhouse gas reporting rules that went into effect at the beginning of 2010 and readying other greenhouse gas regulations for both vehicles and a wide range of industrial and commercial sources.

Given the pendency of new laws and regulations addressing the subjects of climate change and greenhouse gas emissions, it was already important for companies to assess their greenhouse gas impacts for both compliance purposes and in order to be prepared for the quickly evolving regulatory landscape. This new guidance from the SEC will require a focus not just on the technical and environmental side of this issue, but on the financial and accounting impacts that result.

While SEC regulations pertain to public companies, they also have the ability to affect and influence conduct and practices at private companies. To the extent the SEC regulations influence the standard practice of accounting for climate change-related impacts, that adjustment to the standard practice, in terms of setting a minimum floor of acceptable practice, and the consequential effect on a company's accounting practices and cost projections, leads to a cascade effect that raises expectations for banking and accounting reviews of financial issues. As such, even if not directly and immediately applicable to private companies, it will undoubtedly affect how private companies have to address climate change issues.

Even before this current guidance, affected companies were required to disclose material effects of compliance with federal, state and local environmental laws and regulations. Those effects could range anywhere from potential cost to cleanup pollution to the cost of installing pollution control equipment to limit the release of pollutants into the environment.

The guidance provides an overview of which rules require the disclosure of climate change issues and which include description of business (Regulation S-K Item 101), legal proceedings (Regulation S-K Item 103), risk factors (Regulation S-K Item 503(c)) and management's discussion and analysis (Regulation S-K Item 303). The guidance also outlines four ways climate change issues may be subject to disclosure under the existing SEC rules.

Resounding Impact

When assessing potential disclosure obligations, the guidance states that a company should consider whether the impact of certain existing laws and regulations regarding climate change is material. For example, Item 101 requires disclosure of any material estimated capital expenditures for environmental controls, which could include controls to regulate greenhouse gas emissions. The guidance also states that companies must assess whether any enacted climate change legislation or regulation is reasonably likely to have a material effect on the company's financial condition or results of operation to report in Item 303.

In certain circumstances, a company should also evaluate the potential impact of pending legislation and regulation related to climate change. When evaluating pending legislation for possible MD&A disclosure, a company must evaluate the likelihood of enactment and whether it is reasonably likely to have a material effect (either positive or negative) on the company, its financial condition or results of operations.

Examples of possible consequences of pending legislation and regulation related to climate change include costs or profits from sales of emissions allowances under a "cap and trade" system, costs required to update the facility to comply with greenhouse gas emission limitations, and direct or indirect changes to profit or loss arising from an increased or decreased demand for goods and services.

The guidance is not limited just to developments on climate change under U.S. law. Instead, a company should consider the risks or effects on its business of international accords and treaties relating to climate change, and disclose those risks if material. The guidance specifically noted the Kyoto Protocol and European Union Emissions Trading System (EU ETS) as potential sources of disclosure obligations.

Indirect Consequences of Regulation or Business Trends

The guidance notes that legal, technological, political and/or scientific developments regarding climate change may create new opportunities or risks. For instance, according to the guidance, a company may face decreased demand for goods that produce significant greenhouse gas emissions or increased demand for goods that result in lower emissions. Additionally, companies may encounter increased competition to development innovative new products, increased demand for generation and transmission of energy from alternative energy sources and decreased demand for services related to carbon based energy sources (such as drilling services or equipment maintenance activities).

As a result, according to the guidance, a company should consider the actual and potential indirect consequences that may result from climate change related regulatory or business trends. The guidance also notes that a company may be required to disclose reputational risks, depending on the nature of the business and sensitivity to public opinion, if the public's perception of any publicly available data relating to greenhouse gas emissions could expose it to adverse business or financial consequences.

Physical Impacts of Climate Change

Companies should also evaluate the actual and potential impacts of significant physical effects due to climate change. These significant physical effects include severity of weather (e.g. floods, hurricanes), rising sea levels, arability of farmland, and water availability and quality. The possible material consequences of these physical effects include: property damage and operational disruptions for companies with operations concentrated on coastlines; indirect financial and operational disruptions due to severe weather, such as floods and hurricanes; increased insurance claims and liabilities; decreased agricultural production capacity in areas affected by drought or other weather-related changes; and increased insurance premiums and deductibles, or a decrease in availability of coverage for companies with plants or operations in areas subject to severe weather.

According to the SEC, this new interpretive guidance is not intended to create new legal requirements or modify existing legal requirements, but rather to provide clarity and enhance consistency for public companies and their investors. The guidance does not change the standard of "materiality" for determining whether disclosure of environmental liabilities is required.

The U.S. Supreme Court, in *TSC Industries v. Northway*, determined that information is "material" if it would be important to a reasonable shareholder or investor, or if it would have "significantly altered the total mix of information made available." Rather, the new guidance is intended to outline SEC's views on how existing disclosure requirements apply to climate change matters. Further, the SEC was careful to say that its guidance was not intended as an opinion on any aspects of climate change.

The instructions from the SEC cover a wide range of climate change issues, and show that the guidance will have wide-reaching influence. It is also clear that most of the issues require a potentially significant amount of speculation and prediction — both as the likelihood of political and regulatory choices that may or may not be made to address climate change, as well as the physical aspects and consequential business impacts of such physical issues — in order to apply these considerations to real-world business concerns.

In this respect, application of the guidance may vary, but reporting norms will likely emerge as familiarity with application of the guidance grows, just as has happened in then past when there have been expansions of reporting requirements to include other environmental issues.

Ultimately, though, the concerns identified in the guidance are the types of concerns that forward looking businesses are well advised to consider under any circumstance. Now there is a further legal basis to require them to undertake this analysis for climate change issues.

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Labor & Employment

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NDA is to create a confidential relationship between the entity with the proprietary information and the person/entity to whom it is disclosed. Such agreements can arise between companies considering a joint venture, an inventor seeking a manufacturer, a distributor/retailer retaining a new sales executive, and an establishment interviewing consultants to develop and expand existing back-office programs. While involving myriad scenarios, confidentiality agreements raise many common issues and concerns: what information is disclosed; for what end; how is the information identified; to whom is it disclosed; how is it used; how long is it maintained; what happens to it after the purpose of the disclosure has been met; and what are the consequences of breach, or other disclosure beyond the permitted disclosure.

To prepare airtight NDAs, companies should focus on the following key elements and considerations:

1. **Define the confidential/proprietary information subject to non-disclosure.**

Increasingly, companies insist on protecting "trade secrets and other confidential and proprietary information… of whatever kind" and define trade secrets to include but not be limited to broad categories of information: "any formula, drawings, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value… from not being generally known to and not being regularly ascertainable by proper means by other persons… and (ii) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy." By invoking such language, the parties embrace the provisions of the Uniform Trade Secrets Act (largely adopted by most jurisdictions) to accord substantial protection to both trade secrets and other confidential/proprietary information.

2. **Specify the exclusions of certain types of information from the definition of confidential information.**

Often the non-disclosing entity wants to retain certain rights and individuals seek to protect information that the recipient can demonstrate they had before any disclosure. Such may include information that becomes known to the public through no fault of the recipient; information already in the possession of a particular party; information that comes into its possession lawfully from another source; information that becomes public knowledge without breaching the NDA and information independently created by the recipient.

3. **Allocate responsibility for inventions during the course of employment.**

To assure loyalty and continued adherence to the NDA, require the employee to agree to disclose promptly and agree to assign to the company his/her entire right, title and interest in any "inventions" disclosed to,

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made, conceived or developed by that employee at any time during the course of employment or an applicable period after employment ends. "Inventions" need to be carefully defined and should expressly include ideas and concepts if these are intended to be covered by the term. Not surprisingly, companies wish to assure full cooperation by their employees to perform any acts necessary both during and after employment to fully vest in the company or to establish as a matter of record any such ownership rights or inventions.

4. **Deal specifically and frankly with potential ambiguities in language to establish expectations.**

Ambiguity resulting from inconsistent or uncommon usage has the potential to work serious consequences for companies and individuals. Such ambiguities may defeat the intentions and expectations of at least one party and result in contentious litigation and unexpected consequences. See as a parade example *Mattel, Inc. v. MGA Entm't, Inc.* U.S. App. LEXIS 29187 (9th Cir. Cal. Dec. 9, 2009). The Bratz dolls, some sketches, the name and a preliminary sculpt were developed by a former Mattel employee (Bryant) who pitched the idea for the Bratz doll to MGA while still in Mattel's employ. In the opinion filed July 22, 2010, the United States Court of Appeals for the Ninth Circuit commenced by asking: "Who owns Bratz?" Mattel argued, *inter alia*, that Bryant violated his employment agreement by going to MGA with the Bratz idea rather than disclosing it and assigning the idea to Mattel. While Mattel prevailed in the district court, and that court awarded the entirety of the Bratz franchise to Mattel, the victory was short-lived. On appeal, the Ninth Circuit reversed, determining that Bryant's agreement with Mattel, which provided his commitment to turn over to Mattel all inventions "as defined below" included "developments" and "designs" but not "ideas." The Court of Appeals found that while "the agreement could be interpreted to cover ideas… the text does [not] compel that reading." Agreements with employees other than Bryant did include a transfer of the employee's ideas. The appellate court deemed fatal the district court's failure to consider extrinsic evidence or to permit a properly instructed jury to decide the issue.

5. **Adopt and adhere to internal policies to maintain secrecy of proprietary information.**

To invoke the protections of the Uniform Trade Secrets Act, companies must show they engaged in reasonable efforts to protect their confidential information from disclosure. In a recent case, Bimbo Bakeries, the makers of Thomas' English Muffins, moved to enforce a confidentiality agreement and enjoin a former employee from working for a competitor. Record evidence established that the executive was one of only seven in the company with complete access to the processes that created the muffin's famed "nooks and crannies." Integral to the court's analysis was the extent to which the company had sought to keep secret this and other proprietary information.

6. **Limit each party's use of the confidential information.**

Importantly, confidentiality agreements can specify what information is to be used and to guide a court, if necessary, as to the scope of the opportunity for disclosure and potential consequences. For example, a confidentiality agreement can specify that the confidential information may be used to evaluate the disclosing company's new product but it cannot be used in the recipient's business.

7. **Define the standard by which parties will handle the confidential information.**

Investigate whether the recipient's practices regarding maintaining secrecy of its own information parallel your own. If such practices are substandard, the confidentiality agreement must contain specific provisions concerning limiting the access to confidential information and specifying to whom it may be disclosed and the steps which are expected to maintain confidentiality, including limits on numbers of copies, password protections, and limited physical access.

8. **Define the time period during which disclosures maybe made and the period which confidentiality of information should be maintained.**

Critically lacking in some confidentiality agreements are periods within which the confidentiality of the information is to be maintained. The failure to set such time frames creates problems in future. A good rule of thumb is to make the confidentiality time period start with the beginning of the disclosure time period and to specify the time, if any, when the confidentiality expires.

9. **Consider the introduction of non-competition and non-solicitation provisions in any employment contract.**

Often, a company has invested substantial time, money and resources in the development and retention of its inventions, trade secrets and confidential information. To further protect that investment, companies should consider carefully drafted provisions precluding competition and solicitation after the employment period ceases. Such provisions provide the legal basis to reinforce the confidential relationship between the parties and the mechanism to preclude reemployment by a competitor when a rogue employee seeks to capitalize on his/her access to confidential and proprietary information. With an appropriate record, i.e., downloading confidential economic projections and business plans, theft of recipes for complex products, etc., the court will enjoin misappropriation or misuse of data and award damages.

10. **Remedies in the event of breach.**

Confidentiality agreements should specify the potential consequences in the event of misuse or misappropriation/disclosure of proprietary information. Common remedies include the right to enjoin misuse or misappropriation of the protected information, enforcement of confidentiality provisions by barring employment by a competitor, an award of consequential and punitive damages, and attorneys' fees and costs in the event that the breach is established.

11. **Whom do you trust?**

Many potential business partners will, as a matter of policy, not enter into an NDA. The inventor or author who wants to interest the company in developing her idea or publishing a book using her program is going to be told to rely on her patent and copyright rights, or forgo making the disclosure. Such potential business partners often will simply refuse to consider an idea, proposal, program or the like that comes unsolicited and other than through a recognized broker or agent.

The person wishing to make the disclosure has to evaluate the potential risk of misuse against the potential reward of disclosure and the integrity of the party to whom the information will be disclosed.

12. **Buyer beware!**

No matter how airtight the agreement, technology makes it increasingly difficult to control and restrict the flow of information even as there are means based on technology to restrict disclosures and travel the flow of information. That is, while information may be encrypted, password protected and access limited, means exist to secure access and replicate that crucial data. MGA recently has accused, for example, Mattel of conspiring to steal its trade secrets by improperly gaining access to showrooms, which are open to buyers and potential buyers, but not competitors, in an effort to protect information which is confidential prior to product launch.

At day's end, assuming the non-disclosing party is prepared to sign an NDA, the surest way to have an agreement that protects the confidential information is to enter into an agreement with reputable businesses sensitive to reputational considerations to disclose not more than is necessary during the preliminary stages, and to take steps to secure each patent, copyright and trademark protection as may be available.

Before disclosing anything, the disclosing party should: understand the prospects for patents and have on file at least a provisional application if such may properly be filed; understand the scopes and limits of copyright protection and make application for registration if and to the extent protectable; understand what can and cannot be protected by trademark; and make application for registration if such is reasonable under the circumstances.

Other salutary provisions include (i) a limitation on the number and nature of copies of the material that may be distributed, tagged for tracking purposes; and (ii) a time limit on the availability of the disclosed material to the disclosure.

If there is going to be an ongoing working relationship, where such provisions may be seen as not practical, there should be a separate agreement addressing the product of any collaborative effort: ownership; right to use; right to modify; right to sell; right to license; right to patent or otherwise protect.

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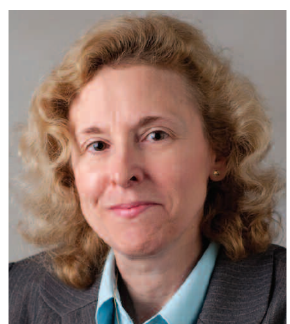
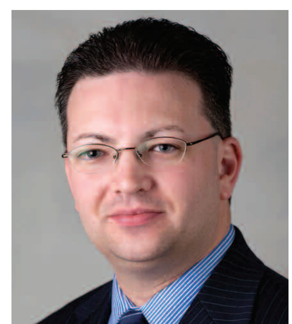
Insurance Coverage and Compliance

Pennsylvania's New Right to Know Law


Heidi B. Hamman Shakely


Ryan B. Caboot

Is information that you give to a state or local agency available to the public?

Governor Rendell signed into law Pennsylvania's new Right to Know Law ("RTKL"), which became effective overall on January 1, 2009. Under the RTKL, state and local agencies must make public records available to the public. Any person who is a legal resident of the United States may make a written request for public records from Pennsylvania's government agencies. The RTKL established the Office of Open Records ("OOR") and created a new review process for when an agency denies access or limits disclosure to government records. As shown in the chart, under the new review process an agency's denial may be appealed to the OOR and then to a state court.

Public records

The RTKL generally presumes that all records held by government agencies are public records. A state or local agency record is available to the public unless it falls under one of the 30 exempted categories (e.g., trade secrets), a legal privilege (e.g., attorney-client) or a federal or state law or regulation or a judicial order that protects the record from disclosure. Three of the 30 exempted categories, including the personal identification information, noncriminal investigation and predecisional deliberations exemptions, are discussed below.

Personal identification information exemption

The exemption for personal identification information is not broadly defined, but lists specific types of an individual's contact information which is protected from disclosure, such as a Social Security number; a driver's license number; personal financial information; home, cellular and personal telephone numbers; and a personal email address. However, home addresses, except for those of law enforcement officers and judges, are not included in the list of protected information. Due to the limited scope of this exemption, for example, a public school employee's home address may be available to anyone. In *Pennsylvania State Education Association v. Department of Community and Economic Development*, the Commonwealth Court granted a preliminary injunction to the Pennsylvania State Education Association ("PSEA") temporarily stopping the disclosure of public school employees' home addresses in 2009. Although the court determined that the RTKL does not specifically exempt the home addresses of the PSEA members

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from disclosure, the court stated that their home addresses are protected by the right to privacy under the Pennsylvania Constitution. However, on September 24, 2010, the Commonwealth Court ultimately decided that it lacked jurisdiction because the home addresses sought to be protected were not in the possession of a Commonwealth agency, but were instead held by a public school district.

Noncriminal investigation exemption

The exemption for records about noncriminal investigations protects from disclosure, among others, complaints, investigative notes and correspondence, and records that, if disclosed, would reveal the progress of an investigation. In *Department of Health v. Office of Open Records (PA Commonwealth Court - 9/9/10)*, the OOR had decided that certain records (e.g., staff notes and witness statements) relating to the Department of Health's surveys and inspections of a health care facility should be released to that facility in response to its RTKL request. Such inspections and surveys may result in the Department's issuance of a citation or statement listing the facility's deficiencies in complying with specific requirements. The OOR argued that the noncriminal investigation exemption is limited to those investigations initiated by some triggering event, like a complaint, and does not apply to an agency's regularly conducted inspections and surveys that occurred in the instant case. The Department appealed the OOR's decision to the Commonwealth Court. The court disagreed with the OOR's narrow interpretation of the noncriminal investigation exemption and overruled the OOR's decision. The court held that the exemption is broad, applies to the Department's surveys and inspections and protects the Department's staff notes, witness statements and other materials relating to those surveys and inspections from disclosure to the public.

Predecisional deliberations exemption

The exemption for predecisional deliberations includes in its protection from disclosure those state and local agency records which reflect internal deliberations before the agency reaches a decision on a matter. An agency's internal deliberations may relate to matters such as budget recommendations, legislative proposals and amendments, and proposed or contemplated policy. Memos, research and other documents used in predecisional deliberations are not available to the public under this exemption. In *Grumet v. Department of Insurance (OOR - 9/23/09)*, the OOR agreed with the Insurance Department that its records of notes, analysis and other thoughts of its agency representatives, in making a determination regarding rate increase applications filed by a company, involved predecisional deliberations and were not subject to disclosure.

Protecting your confidential records from disclosure

If a record, which you believe is confidential, is provided to a state or local agency and there is a RTKL request for that record, the agency may not be required to advise you about the request and consequently, you may not be able to protect it from disclosure. Therefore, what can you do in your submission of records to minimize the potential disclosure of your confidential records to the public by a government agency? The following is a list of practical steps that may help protect your confidential information when you submit it to an agency.

- State that the information should not be disclosed to third parties who are not the staff of the agency and stamp or mark all pages of the documents with "Confidential."
- Highlight any privileges, federal and state laws and judicial orders prohibiting or limiting disclosure of the same type of records and explain why they apply to your records.
- If applicable, indicate that your records contain confidential proprietary information or trade secrets.
- Identify pertinent public record exemptions in the RTKL and explain why they apply to your records.
- Preserve your right to assert any and all additional confidentiality arguments in the future.
- Make a written request that you or your representative be notified of any request, inquiry or subpoena that may be made for the submitted records and provide the necessary contact information.

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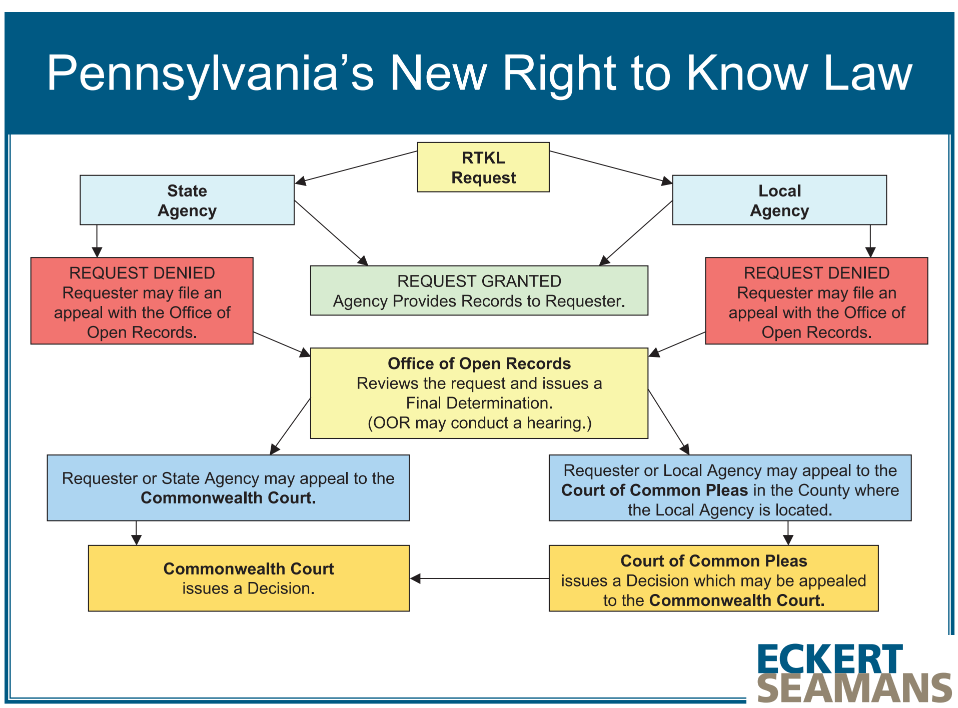

Bankruptcy

Finally, an end to *Frenville*, but does it matter?


Tara L. Lattomus

I'm certain that most of my colleagues in the Delaware Bar and elsewhere would agree with the statement that the Third Circuit is a very well respected court in a number of areas of law. However, for those of us that practice bankruptcy law, the one exception may be the highly criticized *Frenville* decision. *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984). *Frenville* addressed the often litigated issue of when a claim arises in the context of a bankruptcy proceeding. While there are a number of tests applied to make this determination, the Third Circuit adopted the accrual or "right to payment" test which according to the Fifth Circuit has been universally rejected. *Cadleway Props. Inc. v. Andrews (In re Andrews)*, 239 F.3d 708 (5th Cir. 2001). Therefore, when the circuit had the opportunity to reverse *Frenville*, it did just that in *Jeld-Wen, Inc. v. Van Brunt (In re Grossman's Inc.)*, 2010 WL 2181291 (3d Cir. June 2, 2010), but it is unclear if it will have any real effect.

The facts of *Grossman's* were sad, but not unusual in the mass tort arena. The claimant, Ms. Van Brunt, was exposed to asbestos years prior to *Grossman's* bankruptcy. Approximately ten years after confirmation of *Grossman's* plan of reorganization, Ms. Van Brunt was diagnosed with mesothelioma and died the following year. Prior to her passing, Ms. Van Brunt filed suit against *Grossman's* successor-in-interest, Jeld-Wen. Jeld-Wen moved to reopen *Grossman's* bankruptcy proceedings seeking a determination that Ms. Van Brunt's claim had been discharged. The bankruptcy and district courts applying *Frenville* held that Ms. Van Brunt's claim was not discharged in the bankruptcy because her right to payment arose under state law when her injuries were manifest which occurred after the bankruptcy was commenced.

After recognizing the significant amount of authority in disagreement with *Frenville*, the Third Circuit set forth the question of whether it should continue to follow the right to payment test. The circuit concluded that *Frenville* does not comport with the view of the legislature and Supreme Court that that the definition of a claim under the Bankruptcy Code should be given the broadest possible interpretation in order to grant a debtor the broadest possible relief. *Frenville* also fails to consider that a claim may exist in a bankruptcy proceeding before a right to payment exists under state law. Accordingly, *Frenville* was overruled.

The issue of when a claim arises has broad reaching implications. As the circuit recognized, this determination dictates whether a claim is subject to the automatic stay and whether it can be discharged. Only claims arising prior to the bankruptcy are stayed and only claims arising prior to confirmation of a plan are capable of being discharged.

The circuit then undertook a review of a number of cases that made this determination according to tests characterized as the conduct test and pre-petition relationship test or some variation thereof. The conduct test basically looks to when the underlying conduct giving rise to the injury occurred in order to characterize the claim. The pre-petition relationship test also looks to the underlying conduct but requires the existence of some type of pre-petition relationship between the debtor and the claimant such as the purchase, use, operation or exposure to the debtor's product for a claim to arise. Those courts adopting the pre-petition relationship test are usually concerned that the conduct test is overly broad. By requiring the additional element of some type of pre-petition contact between the debtor and the claimant, the claimant is identifiable during the bankruptcy proceeding. The pre-petition relationship test has been criticized as too narrow. The circuit also mentioned the fair contemplation test adopted by the Ninth Circuit that states that a claim arises once it is within the fair contemplation of the claimant.

The circuit recognized that regardless of the test applied, there appears to be a consensus among the courts that a claim arises pre-bankruptcy if a claimant is exposed to a product prior to the bankruptcy even if the injury does not manifest until after the bankruptcy is filed. Without announcing the adoption of any particular test, the circuit concluded that "a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code." Based upon the requirement of some type of "exposure" to a product or conduct it appears that the Third Circuit is leaning in favor of the pre-petition relationship test.

The question then becomes, does this new test matter? After concluding that under the new test, Ms. Van Brunt held a pre-petition claim based upon her pre-petition exposure to asbestos, the circuit stated that it does not necessarily follow that her claim was discharged. Regardless of the test applied, a claimant must receive adequate notice of the bankruptcy and claims bar date in order to satisfy fundamental due process. Inadequate notice precludes discharge. While declining to evaluate the adequacy of the notice provided to Ms. Van Brunt, the circuit did offer some guidance. The case being an asbestos matter, the circuit implied heavily that the creation of a trust for future claimants would go a long way to alleviate its due process concerns. Section 524(g) of the Bankruptcy Code was specifically enacted to create such trusts for future asbestos claimants. However, this section of the code was not enacted at the time of *Grossman's* bankruptcy and a future trust was not created under its plan. However, this isn't the only consideration. The circuit stated that other factual considerations include the circumstance of exposure, whether and/or when a claimant became aware of their exposure, whether notice of the claims bar date was directed to the claimant, whether the claimant was known or unknown to the debtor during the bankruptcy proceeding, whether the claimant had a "colorable" claim on the

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Energy

"Where do you think you are, Pennsylvania?"

Deanne M. O'Dell

In the late 90s, one could hardly turn on the TV without seeing an Electricity Choice advertisement produced by the Pennsylvania Public Utility Commission to encourage customers to shop for their electricity generation supplier. The commercials featured a variety of comical scenarios from a Parisian break-up to a game show to a mobster entering into witness protection. In all of these commercials, the main character sought to change electricity suppliers and was always met with the retort of "Where do you think you are, Pennsylvania?"

All of the pieces appeared to be in place to honor the promise of the commercials. There was the idea – restructure the electricity market so that consumers would no longer be dependent on their prior monopoly provider for generation services. (Note consumers would still continue to receive distribution, or wires, service from their current electricity company regardless of whether or not the customer received generation service from an alternative supplier.) There was the law – the Electricity Generation Customer Choice and Competition Act of 1997 separated energy into generation, transmission and distribution and mandated that consumers be able to shop for their generation supplier. There was the promise – by creating competitive options, the price consumers paid for the service was expected to decrease. There was an influx of new competitive entrants (known as electricity generation suppliers or EGSs) – 87 received licenses between 1997 and 1998 where before there were none. And, of course, there was the catchy advertising campaign which included a 6-foot, 400-pound speaking robot named EC (for Electricity Choice) used to educate school children about choice.

Despite all of this, virtually nobody shopped for electricity in this timeframe. Why? The answer is straightforward – the imposition of rate caps. Recognizing that the prior monopoly provider (known as the electric distribution companies or "EDCs") had made investments in infrastructure before the law passed that may become uneconomic and unrecoverable in a competitive environment (known as "stranded costs"), rate caps were put in place to ensure recovery. The theory was that as long as stranded costs remain, the EDC should receive guaranteed cost recovery and, once paid, the rate caps could expire. In fact, two problems resulted from the rate caps. First, the rate caps failed to keep pace with the ever increasing market price for fuel. Second, the lack of market-reflective pricing for the generation service provided by the EDC halted the ability of EGSs to offer competitive services. They simply could not provide generation service at below-market pricing like the EDC and, therefore, they did not come into the market. With no competitive alternatives available, consumers generally had no choice but to receive generation services from their EDC, just as they had been doing prior to the promise of restructuring.

All of that is changing now as the generation rate caps expire. Pennsylvania has 11 EDCs that provide electricity service to consumers and the rate caps for seven electric service territories have already expired. These seven EDCs serve approximately 40 percent of all Pennsylvania consumers and include UGI Utilities Inc., Pike County Light & Power Company, Citizens Electric of Lewisburg, Wellsboro Electric Company, Duquesne Light Company, Pennsylvania Power Company, and PPL Electric Utilities, Inc. Notably, in the first six months of the recent rate cap expiration for PPL Electric Utilities, Inc., which is the second largest service territory in terms of customers, 37.5 percent of all PPL's customers switched to a competitive supplier. According to the Pennsylvania Public Utility Commission, this particular service territory has grown faster than any other market not only in the Commonwealth but in other states across the country.

On December 31, 2010, the rate caps for the remaining four EDCs – Metropolitan-Edison Co., Pennsylvania Electric Co., PECO Energy Co., and Allegheny Power will expire. These four EDCs serve approximately 61 percent of all Pennsylvania consumers. Currently, there is virtually no shopping in any of these service territories. Based on recent experience, however, a significant number of competitors are expected to enter these markets to help fulfill the promise of the early advertising campaign.

For consumers of all types — residential and business — this means they will have the ability to choose from an ever-increasing array of competitive offers to better suit their specific electricity needs and desires. Such offers will include competitive pricing, various program structures and other value added products that may not be available from the EDC. The Pennsylvania Public Utility Commission's PA PowerSwitch website (www.papowerswitch.com) is a good way to search for offers. Because consumers will contract directly with the various EGSs, understanding the contract terms and conditions is important. For example, consumers need to be sure that they are making an "apples-to-apples" comparison of the EDC's rate and the EGS's price for generation service. Further, business customers in particular will want to be sure that the contract clearly sets forth liabilities for non-performance and adequately addresses contract assignment and creditworthiness issues. Carefully reviewing and negotiating contracts with EGSs will provide consumers with the best chance of fully realizing all the benefits that a restructured electricity market has to offer. While the Pennsylvania Public Utility Commission's advertising campaign may have been premature, the time is now here and consumers can or will soon be able to take advantage of the competitive market for generation services.

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Bankruptcy

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claims bar date and other facts specific to the circumstances. As Ms. Van Brunt was provided with notice only by publication for injuries that manifest ten years after *Grossman's* confirmed its plan, it seems reasonable to conclude that her claim probably wasn't discharged under the *Grossman's* due process analysis. So while Ms. Van Brunt's representative is now the holder of a pre-petition claim, it does little to help the *Grossman's* or Jen-Weld that the claim is not likely to be discharged.

Frenville is now history, but the new issue becomes whether notice was adequate to result in discharge of the claim. Without discharge, the end of *Frenville* arguably doesn't accomplish much. Is it now necessary to create a trust for future claimants to avoid pre-petition claims popping up for posterity? Will a reorganized debtor or purchaser of the debtor's assets ever be safe without one? So while the Third Circuit has finally come into the fold, it is difficult to determine whether it has really unmuddied the water or merely thrown in a few new rocks.

Tara L. Lattomus is a member of the firm. She can be reached at 302.425.0430 or tlattomus@eckertseamans.com.

Firm News

Eckert Seamans' strategic growth initiative has continued with the addition of more new faces and energy, particularly increasing its strength in such areas as FDA Regulatory, Immigration, Energy and Transportation.

Members

Lawrence R. Bailey, Jr. joins the firm's White Plains, New York office. He is widely recognized for his work in transportation law, including Federal Employers' Liability Act and other railroad matters, product liability, litigation and personal injury defense. Larry has successfully represented major railroad companies in defense of significant FELA litigation matters in northern New York and in federal court in New Jersey. He is a member of the New York State and American Bar Associations, the National Association of Railroad Trial Counsel, Defense Research Institute, Federation of Insurance and Corporate Counsel and the International Association of Defense Counsel. He earned his J.D. from the New York University School of Law and his undergraduate degree from Lehigh University.

Brian L. Buniva joins the firm's Richmond, Virginia office. He represents public utilities, publicly traded and closely held businesses, individuals, developers and local governments. Brian prosecutes and defends numerous permit and licensing matters before a variety of regulatory agencies and also guides clients in obtaining air, water, wetlands, solid and hazardous waste and other environmental permits. In addition, he assists clients in negotiating their obligations under CERCLA, RCRA, the Clean Water Act, the Clean Air Act and all other similar state and local laws. Brian earned his J.D. from the University of Richmond School of Law, Graduate Program in Public Administration at American University, and A.B. in Government from Georgetown University.

P. Terrence Gaffney joins the firm's Washington, DC office. He practices in the area of intellectual property law with a heavy emphasis on life sciences matters, leading efforts for clients with matters before the U.S. Food and Drug Administration, the U.S. Federal Trade Commission, Congress and other government agencies with regulatory control over the pharmaceutical, biologics, medical device and dietary supplement industries. His practice includes advising pharmaceutical, biotechnology, medical device and dietary supplement companies on a wide range of issues related to the development, manufacture, reimbursement, and sale of pharmaceutical, biologic, medical device, and dietary supplement products. Terry earned his J.D. from the Cleveland State University, Cleveland-Marshall College of Law and his undergraduate degree from John Carroll University.

James E. Morrison joins the firm's Washington, DC office. He focuses his practice exclusively on business immigration matters. James advises clients in a variety of international industries and disciplines on domestic and global immigration related issues including, among others, inbound and outbound compliance, worldwide movement of personnel, mergers and acquisitions, document retention compliance, government audits and raids, and legislative matters. He represents foreign nationals with demonstrated acclaim for designation as persons of extraordinary ability for both nonimmigrant status and permanent residence in the United States including actors, models, music groups and musicians, artists, entertainers and leading corporate executives. James earned his J.D. from the Pace University School of Law and his undergraduate degree from Radford University.

Douglas M. Palais joins the firm's Richmond, Virginia office. He focuses his practice on litigation, arbitration and counseling on behalf of brokers and agents in the securities and insurance industries. As well as appearing as lead counsel in broker/dealer cases and arbitrations throughout the southeastern United States, Doug has also defended hundreds of insurance agent/broker errors & omissions cases. He appears before federal and state securities and insurance regulators in connection with a wide variety of regulatory issues including broker compensation matters and regulatory enforcement actions. Doug earned his J.D. from the Northwestern University School of Law and his undergraduate degree, *magna cum laude*, from Lafayette College.

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Firms News (continued)

John W. Pauciulo joins the firm's Philadelphia, Pennsylvania office. He advises clients with respect to corporate and commercial transactions, securities and real estate matters. John regularly represents entrepreneurs and business owners in connection with entity formation (including agreements among equity holders) and general contract matters. He structures, negotiates and documents complex business transactions, including mergers and acquisitions, corporate finance transactions, real estate acquisition and development projects and securities offerings. Prior to entering private practice, he worked for two years with the Securities and Exchange Commission's New York office. John earned his J.D. from the Temple University School of Law and his undergraduate degree from Villanova University.

Maria L. Petrillo joins the firm's Philadelphia, Pennsylvania office. She advises clients in traditional labor relations issues, including representing employers in union organizing campaigns, proceedings before the National Labor Relations Board, grievance and contract administration and arbitration. Maria also counsels clients in all aspects of employment law, with particular emphasis on the defense of workplace claims of wrongful discharge and discrimination. In addition, she advises employers on the development and enforcement of personnel policies, protection of trade secrets, and conducting effective internal investigations. Maria earned her J.D. from the Temple University School of Law and her undergraduate degree from Georgetown University.

Thomas M. Smith joins the firm's White Plains, New York office. He has litigated more than 30 bench and jury trials in the state and federal courts including matters such as FELA, construction, real estate, copyright, wrongful death, toxic tort, medical malpractice, product liability, and premises liability. Tom has briefed and argued appeals before the Appellate Divisions for the First, Second, Third and Fourth Departments of the State of New York, the Court of Appeals of the State of New York, and the United States Court of Appeals for the Second Circuit. He earned his J.D. from New York Law School and his undergraduate degree from Rutgers University.

Associates

Yuliya A. Charnyshova joins the firm's Pittsburgh, Pennsylvania office. She focuses her practice on corporate transactions within the hospitality industry. A substantial portion of Julia's practice is devoted to representing hotel owners in the management of large hotel portfolios. She also has litigation experience, serving as second chair in a major product liability defective design federal jury trial, and appeared in civil and criminal court presenting and defending pretrial motions. Julia earned her J.D., *cum laude*, from the Duquesne University School of Law and her undergraduate degree from Brest State University (in Belarus).

Malgorzata Kosturek joins the firm's Pittsburgh, Pennsylvania office. She focuses her practice on general commercial litigation and construction related issues. Gosia earned her J.D., *summa cum laude*, from the Duquesne University School of Law and her undergraduate degree, *magna cum laude*, from the University of Pittsburgh.

Edward G. Lanza joins the firm's Harrisburg, Pennsylvania office. He practices in the area of utilities and telecommunications law, energy regulation, civil litigation and administrative law. In regulated industries matters, Ed's experience includes the representation of public utilities before the Pennsylvania Public Utility Commission in applications for commencement and abandonment of service, tariff changes, extensions of territory and other matters; litigation proceedings for matters such as rate changes, formal complaint matters and commission investigations; and assisting natural gas and electricity providers to obtain licenses to operate in Pennsylvania. He earned his J.D. from The Dickinson School of Law of The Pennsylvania State University and his undergraduate degree from Messiah College.

Nicholas T. Moraites joins the firm's Washington, DC office as an Associate in the Litigation Division. He focuses his practice in the area of litigation, with a particular emphasis on labor and employment disputes and insurance coverage matters. Immediately prior to joining the firm, Nick served in the Office of the Magistrate, Supreme Court of Virginia, as Magistrate for the 17th Judicial District of Virginia. He has also previously worked as a litigator for an intellectual property/internet law boutique and as an associate for a firm specializing in construction defects/contracts litigation. Nick earned his LL.M. and J.D., *magna cum laude*, from the George Mason University School of Law and his undergraduate degree from the University of Pittsburgh.

In addition, **Harold F. Balk** joins as the firm's Director of Business Development. He concentrates his efforts on strategic planning, cross selling and client care programs. Harold's previous experience includes marketing and business development roles at Reed Smith; writing and producing print, radio and television advertising campaigns for Pittsburgh Brewing Company; serving as a National Account Executive of Broadcasting & Promotions for the Pittsburgh Pirates Baseball Club; law assistant to the in-house counsel of PrintCafe.Com; co-owner/operator of Color Me Mine; and account executive with KDKA Radio. He earned his J.D. from the Duquesne University School of Law and his undergraduate degree from Bethany College.

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