DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Sheila Davidson

& the Law Department of New York Life

THE SPEAKERS

Sheila Davidson
Executive Vice President, Chief Legal Officer, and General Counsel, New York Life Insurance Company

Thomas Kelly
Partner, Debevoise & Plimpton LLP

Steve Saxon
Partner, Groom Law Group

Michael Banks
Partner, Morgan, Lewis & Bockius LLP

Ellen Dunn
Partner, Sidley Austin LLP

Todd Cosenza
Partner, Willkie Farr & Gallagher LLP

(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our website, directorsroundtable.com.)

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished Guest of Honor and her colleagues, we are presenting Sheila Davidson and the Law Department of New York Life Insurance Company with the leading global honor for General Counsel and Law Departments.

New York Life is a major international insurance provider. Her address focused on key issues facing the General Counsel of an international insurance corporation. The panelists' additional topics included financial institution issues; employment disputes; insurance disputes; ERISA, and corporate governance. Karen Todd, Executive Director and Chief Operating Officer of the Directors Roundtable, moderated the program.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel.

Sheila Davidson

Executive Vice President, Chief Legal Officer, and General Counsel, New York Life Insurance Company

Sheila Kearney Davidson is Executive Vice President, Chief Legal Officer & General Counsel of New York Life Insurance Company. In addition to leading the company's legal operations, she also oversees its compliance, governance and operational risk functions.

Ms. Davidson joined New York Life in 1991 and has served in many leadership positions in legal, compliance and administrative areas. She was appointed to New York Life's Executive Management Committee in January 2001.

Ms. Davidson is a member of the New York State Bar. She serves on the boards of Fairfield University, Madison Square Park Conservancy, the Citizens Budget Commission and the Life Insurance Council of New York. She is a frequent speaker on topics such as legal and compliance best practices and diversity.

In 2018, the New York City Bar Association honored Ms. Davidson with their Diversity and Inclusion Champion Award. In 2016, the *National Law Journal* named Ms. Davidson one of America's 50 Outstanding General Counsel citing her commitment to diversity. She is the founding executive sponsor of The Women's Initiative, New York Life's Employee Resource Group that connects and empowers women across the company.

Ms. Davidson graduated *cum laude* from Fairfield University with a B.A. She received her J.D. from George Washington University.

New York Life Insurance Company

New York Life Insurance Company is a Fortune 100 company founded in 1845. It is the largest mutual life insurance company in the United States and one of the largest life insurers in the world. Headquartered in New York City, New York Life's family of companies offers life insurance, retirement income, investments and long-term care insurance. New York Life has the highest financial strength ratings currently awarded to any U.S. life insurer from all four of the major credit rating agencies.

For over 170 years, New York Life and its subsidiaries have helped ensure the financial well-being of families and communities with a variety of insurance, retirement, and investment products. And we maintain the highest ratings currently awarded to any life insurer for financial strength. But more importantly, each of our insurance policies represents our promise to pay. And we always have, and always will, stand behind every promise.

We built our business to endure. Since 1845, we've kept the promises we made to protect our policy owners and their beneficiaries. We've been able to stand by them, because each promise is backed by stability and proven financial strength.

With an industry-leading cash reserve, we're prepared to meet all of our commitments, with money to spare. We've paid dividends from before the Great Depression, through the Great Recession, and every year in between.

Behind every product and every promise we make is a passionate and committed team of people. We're nothing without our people. And they're your people too.

New York Life is 20,000 employees and agents across 120 offices in the U.S. and a thriving global asset management operation. Together, we span a wide variety of nationalities, generations, cultures, and backgrounds. But one common goal unites us every day: strengthening our clients' financial security now and in the future. Here are just a few of the ways we're working to achieve this mission:

Our agents are professional problem solvers who will help you identify solutions to meet your financial objectives.

Through the New York Life Foundation, we partner to improve lives through grants and the giving of our time and talent.

Our seven Employee Resource Groups empower employees of diverse backgrounds, promote collaboration, and coordinate professional development activities.

KAREN TODD: Good morning! I'm Karen Todd, the Chief Executive Officer and Executive Director of the Directors Roundtable and we're very pleased that you're here. I want to specifically thank the people of New York Life Insurance Company for coming, as well as the outside law firms and business executives and corporate counsel who made a point to be here today.

The Directors Roundtable is a civic group whose mission is to organize the finest programming on a national and global basis for Boards of Directors and their advisors which include general counsel.

Over the last 27 years, this has resulted in more than 800 programs on six continents. Our Chairman, Jack Friedman, started the series after speaking with corporate directors who told him that it was rare for a large corporation to get validated for the good that they do.

He decided to provide a forum for executives and corporate counsel to talk about their companies, the accomplishments in which they take pride, and how they have overcome the obstacles of running a business in today's changing world.

We honor General Counsel and their law departments so they may share their successful actions and strategies with the Directors Roundtable community, both in the program today and globally through the transcript that we'll make.

Today, it's our pleasure to honor Sheila Davidson, the Executive Vice President, Chief Legal Officer and General Counsel, and the law department of New York Life Insurance Company, many of whom are here today. I'd like to give them a round of applause.

I would also like to introduce our Distinguished Panelists, Tom Kelly with Debevoise & Plimpton, Steve Saxon with Groom Law Group, Michael Banks with Morgan Lewis & Bockius, Ellen Dunn with Sidley Austin, and Todd Cosenza with Willkie Farr & Gallagher.

As a special surprise for Sheila, I have a letter from the Dean of the George Washington University Law School which is her alma mater. Here's the letter.

> Dear Sheila:
>
> Congratulations from your friends at GW law on receiving this very special world honor. The Directors Roundtable could not have chosen a more accomplished General Counsel to recognize with this distinguished award. Throughout your illustrious career, you have epitomized the consummate professional.
>
> Since joining New York Life in 1991, you have served in myriad leadership roles culminating in your current position as Executive Vice President, Chief Legal Officer and General Counsel. You also have contributed immeasurably to our GW law community through the years and are a loyal and dedicated member of our Dean's circle.
>
> We are indeed fortunate to count you among our esteemed alumni. All of us here at GW law are proud of your manifold achievements. We are thinking about you on this momentous occasion and send our very best wishes for a memorable event and continued success in every endeavor.
>
> Blake D. Morant, Dean and Robert Kramer, Research Professor of Law.

Now, I'm going to turn it over to Sheila for her presentation.

SHEILA DAVIDSON: Thank you! I want to thank the Panelists who are here today. We've had very long and deep relationships with them at New York Life. Thank you to my team, the fine lawyers at New York Life who excel in their areas of expertise and provide daily critical and much appreciated support. Also, to our business leaders, they are outstanding professionals who make New York Life and me look good every day so thank you.

I have been General Counsel of New York Life since January of 2000. I was hoping for some audible gasps suggesting that my youthful appearance belies this. Sometime in the second decade of my job, I quite suddenly transitioned from the young up-and-coming GC to the senior seasoned advisor.

Throughout all this time I remain passionate about my role as the Chief Legal Officer of New York Life.

Today, I thought I would share with you several questions I'm most commonly asked about being a long-serving General Counsel at New York Life.

The first relates to Mutuality. New York Life is a Fortune 100 company, but it's not publicly traded. A question that I often get is, "What is a mutual life insurance company and how is it different from a publicly traded company?"

In simplest terms, a public company is owned by and operated for the benefit of its shareholders. The pressure on public companies to meet quarterly estimates for earnings per share leads them to focus on short-term results, often logically at the expense of long-term performance. By way of contrast, a mutual insurance company exists to serve and provide value to its policyholders.

Has everyone had their coffee? Let's talk about life insurance. When an individual buys a life insurance policy, he or she is investing in a guarantee that can extend decades into the future. The insurer is making a promise to be around 30, 40 or 50 years from now to pay your beneficiaries.

A mutual company is uniquely aligned with the long-term interests of its policyholders. In a mutual company, there's no conflict between the short-term financial expectations of investors and the long-term interests of policyholders.

In practical terms, we like to say that we don't think in quarters; we think in quarter centuries.

By removing investor pressure to maximize short-term investment returns, mutuality prioritizes permanence and financial strength over rapid growth enabling a long-term focus that better serves our policyholders.

This long-term lens informs everything that we do. Our nearly $600 billion dollars of assets under management are invested for the long term. We are less concerned about day-to-day fluctuations and the equity and bond markets and with short-term liquidity than with matching our assets to our long-term liabilities, those promises we make to be there for our policyholders 30, 40 or 50 years from now.

Investments in internal controls, human resources, technology are similarly thought of not as short-term expenses but rather as long-term investments.

Management views themselves as stewards and that our obligation is to carefully and responsibly oversee the long-term interests of our policyholders.

At a high level, that's the difference between a public company and a mutual company, and that's why we believe that the mutual structure is the appropriate one for a company that extends long-term guarantees. Don't worry, while we're not subject to the SEC public reporting regime, for all their practical intents and purposes, we operate with the rigor and discipline of other Fortune 100 companies.

Another area I'm often asked about is, the Complex Regulatory Scheme. How are you regulated and how do you manage multiple regulators?

The insurance business is state-regulated, and our principal regulator is the New York Department of Financial Services. New York insurance law and regulation are among the most rigorous of all 50 states. Since we operate in all 50 states, we are also regulated by the other 49.

Seguros Monterrey New York Life, our Mexican subsidiary is one of the largest life insurers in Mexico where we are regulated by the *Comision Nacional de Seguros y Fianzas* or CNSF.

We have a large asset management business, two broker dealers, several investment advisors and an affiliated mutual fund family, the MainStay Funds. We're also regulated by the SEC.

We sell products in the retirement market, so we must comply with ERISA and we're regulated by the Department of Labor. Our products are tax-advantaged so we also answer to the IRS. We're a large employer, so we're under the purview of the EEOC and state employment regulators.

Our asset management business is international, so we're regulated by authorities in France, the United Kingdom, Belgium, Luxembourg, Ireland, Australia, Japan, Korea and other countries in Europe, Asia and the Middle East. I think you get the picture that we have a complex business and we're heavily regulated.

The next question usually is, "How do you manage that?"

We have a staff of 100 plus lawyers and around 150 compliance professionals. Some are on the ground in countries where we have larger operations, but most are here in New York. They are deeply experienced with strong knowledge of their areas of expertise. Many of them, including me, are former regulators.

Our philosophy in respect to regulatory relations is to be compliant, cooperative and collaborative. We play for the long-term in this space, too. We cultivate strong relationships with our regulators and because of our compliance culture, they often seek out our input when they're considering a new regulation.

We also have relationships with local and international law firms in every jurisdiction in which we do business. The eyes and ears of these trusted advisors enable us to stay abreast of regulatory developments and also provide valuable introductions to, and credibility with, key regulators.

The regulatory structure in which we operate relates to another area which I'm often asked about by newly minted general counsels, a "Seat at the Table." I'm asked all the time, "How do you ensure that the business sees you as a partner?"

Let me go back to what I said earlier about our business really being about keeping promises. We consider our reputation, the foundation of the trusts that our customers place on us, to be one of our most important corporate assets. This, of course reinforces our culture of compliance.

Since we're so heavily regulated, understanding the regulatory environment and how to operate in it is table stakes for our business leaders. Because of this, there is a natural symbiotic relationship between business and legal and compliance.

> "A mutual company is uniquely aligned with the long-term interests of its policyholders. In a mutual company, there's no conflict between the short-term financial expectations of investors and the long-term interests of policyholders. In practical terms, we like to say that we don't think in quarters; we think in quarter centuries." – *Sheila Davidson*

The investment in this is, of course, two-sided. Just as business leaders need to be familiar with the regulatory environment, our lawyers have to have a deep understanding of our business, our strategy, and our metrics. We have no choice but to be at the same table.

The question then is, "If the lawyers are at the table with the senior business leaders, how do we lawyers maximize our effectiveness?"

The cardinal rule is that we never, ever presume to be or, worse yet, try to prove that we are the smartest people in the room. The cure for what I call "smarty-pants syndrome," that often afflicts lawyers who join from private practice is to have an actuary give a brief tutorial explaining stochastic modeling.

I'm going to give you a very brief explanation of this and, even after 27 years at New York Life, I can't begin to do it justice, but I'm going to give it a try. Because life insurers extend long-term guarantees, measures of solvency are of critical importance. Like any company, in order to prove solvency, an insurer must prove that its assets exceed its liabilities.

In the insurance industry, however, assets and liabilities are anything but clear-cut. For example, liabilities depend on predicting mortality. Who dies when? Assets depend on forecasting investment returns. Where will interest rates, the stock market and inflation be 20, 30 years from now? That's some pretty heavy-duty prognostication.

Rather than guessing at the most-likely outcome and basing pricing, reserving and investment assumptions on the guess, actuaries employ stochastic modeling.

Stochastic modeling uses random variations to look at what investment conditions, mortality, experience and other factors might be like in or over a given period. Stay with me.

Based on a random set of variables, the experience of a policy, an investment portfolio or a collection of policies or even the whole company is projected, and the outcome is noted. This is done again with a new set of random variables and the process is repeated thousands of times. Patterns are noted, and actions may be taken to mitigate not only probable risk but also extreme risks that may be remote or "in the tail" as actuaries say.

It took me a minute to explain even what stochastic modeling is. Our actuaries build these models, analyze the results and advise our investment finance and product professionals on the implication of the output. This is critical to the management of a life insurance company. It requires complex mathematical and analytical skills so sophisticated that it is unlikely that at any time a lawyer is going to be the smartest person in the room.

The point of this is that if the experience at the table is going to be truly collaborative and effective, all experts need to be able to

explain themselves clearly to non-experts. For lawyers, this means we must read, write and speak in clear, plain English, not legalese.

My example of stochastic modeling is relevant to the insurance business; there are other deep technical experts on the business side of almost any company, technologists, engineers, chemists and others. All of whom have something to teach the lawyers advising them, and none of whom would want you to cite regulations with the CFR [Code of Federal Regulations] reference.

Another area of importance is Training and Development of Legal Talent. The most valuable assets of any law firm or legal department ride up and down in the elevator every day. A common topic among general counsels is, "What's the best way to train and develop your lawyers?"

To tackle that issue, around seven years ago, we, in the legal department at New York Life, instituted what we call a formalized knowledge transfer and development program for our attorneys.

The goal of the program is to identify by critical expertise or knowledge that needs to be retained within the organization, to structure the sharing of critical professional knowledge, and to enhance the development of all attorneys.

Each lawyer has a personalized plan developed by the lawyer and his or her supervisor. The plans are focused on what the individual needs to learn and what they can teach someone else. How does this work in practice?

I'll give you an example. Most of our tax lawyers are very senior and deeply experienced. They can answer the most arcane questions relating to the taxation of mutual life insurance companies off the top of their heads. Their advice to the business is often oral and "at the table."

A few years ago, we recognized that we needed to preserve these tremendous resources. We hired a junior tax lawyer who spent a large part of her time cataloging and documenting the knowledge of the experts organized by relevant section of the Internal Revenue Code.

Now, this was a tremendous learning experience for the junior attorney. Believe it or not, a very enjoyable one for the experts because they got to teach somebody something that they spent their lives learning and a valuable one for the company as we now have documented years of knowledge and experience in a way that we can use it.

I'll give you a few more examples of how our program works. We give some attorneys rotational assignments in client areas, employment lawyers in HR, litigators in the operational risk management, product lawyers in compliance. We also give lawyers stretch assignments on business project teams, to get them to both network and learn about the business. We encourage trading places where two lawyers train each other in their areas of expertise.

In addition to individualized plans, we also provide educational programs on soft skills for all attorneys to experience together in a classroom setting, with a rotating year-long focus on writing, presentation skills, issue spotting, and leadership.

Overall, this knowledge transfer and development program enhances the legal and business knowledge of our lawyers, helps to hone client-facing skills, and strengthens internal networks. All of this makes our lawyers more effective "at the table."

Our efforts in legal are complemented by a holistic corporate talent development program. A significant focus of this program is ensuring that we teach and preserve the company's core values and culture. The investment in our talent and culture is consistent with that long-term outlet that I described earlier that drives our business model.

I hope that you may have learned a bit about what a mutual insurance company is, how the mutual structure supports the purpose of providing long-term guarantees that provide financial security and peace of mind.

I painted a picture of the complexity of our business and a bit about the heavy-duty analytics that enable us not to portend the future but to prepare for it. That's the business that we're in.

You probably come away with an appreciation for how heavily regulated life insurers are and, given the nature of the business that we're in, you have a sense about how we manage the delivery of legal services to support our long-term mission.

There's a broader implication of what I have talked about today that I'd like to leave you with.

Debate is ongoing in Congress, in academia and the popular press about whether and how to reform corporate governance to move away from the short-termism of management in response to quarterly earnings pressure, circling shareholder activists and a singular focus on the maximization of shareholder value.

As recently reported in the Harvard Law School forum on corporate governance and financial regulation, Professor Colin Mayer of Oxford leads the project called the Future of the Corporation. He's put forth a radical reinterpretation of the nature of the corporation that focused on corporate purpose, its alignment with social purpose, trustworthiness of companies and the role of corporate culture in promoting purpose and trust.

Critics say this is unworkable. Now, a few minutes ago, I referenced that New York Life developed a statement of its values and culture. These are the simple statements.

First, the New York Life values. "We act with integrity and humanity. Grounded in and confidence and humility, we serve as stewards for the long-term. We are here for good, conveying permanence and doing the right thing."

Second, the New York Life culture. "We are a mission-driven company guided by our strong core values and foundational strategies. We are a "we place" not a "me place." We foster individual accountability and collective pride."

As corporate governance reforms like Professor Mayer's are considered, I suggest that the mutual corporate structure is an existing successful example of this model. The structure is uniquely aligned with the corporate purpose of life insurers providing long-term guarantees, and consistent with the social purpose of providing financial security and peace of mind. I hope you've gotten a feeling of how that works in practice at New York Life. Food for thought, and now you may need some more coffee.

KAREN TODD: Before we move on to the panelists, I have a few questions for Sheila. The first was related in a very amusing anecdote last night at dinner and I don't know if she'll repeat it for us this morning, but I'd like to ask her to tell us about some of the challenges she's faced, having started her career in a male-dominated field.

SHEILA DAVIDSON: The first thing that I'll note is that I graduated from law school in 1986 and more than half of my class were women. I don't know why it's male-dominated, but I will tell the story that I gave last night. When I first became General Counsel, I was 38 years old and I went to a meeting of an organization that I won't name but it's an organization for lawyers in the life insurance business.

I went into my first meeting and it was a cocktail hour reception and it was pretty much all older, white men. One of them came up to me and said, "What do you do?" I said, "I'm the General Counsel of New York Life. Nice to meet you." He said, "What division?" I said, "No, I'm the General Counsel of New York Life." He said, and I quote, "Not the whole big company, dear."

Today, our law department varies between 50-50 or more women lawyers depending on the year and when you measure it. I feel that that's a harbinger of things to come. When people are measuring gender diversity and they're happy with 30 percent, we strive for more in that regard.

KAREN TODD: Great. Can you also tell us what you look for in outside counsel?

SHEILA DAVIDSON: My first maxim is that we don't hire law firms. We hire lawyers and we tend to develop long-term relationships with lawyers and they become our trusted advisors. Like the lawyers who come in-house, they learn our business. They learn our culture and they become very supportive partners in the business.

We look at diversity. We try to challenge our firms to make sure that they have an eye on diversity. If I get a list of partners and I count the names and, assuming gender think, that there's not enough women on it or if there are pictures and there's not enough

diversity, you'll get a call from me. We look for rational billing practices. Overall, that's pretty much the whole package.

KAREN TODD: Thank you. Our next speaker is Tom Kelly with Debevoise.

TOM KELLY: Thank you very much and welcome everyone. Thank you, Sheila, particularly for the explanation of stochastic modeling. I have to admit I've been doing this a long time and I've never really been exactly sure what that is.

Are there any actuaries in the room by the way? Okay, I won't tell my actuary jokes. I've actually been involved with actuaries and I would say after the fact that it is also educated guessing in some forms.

SHEILA DAVIDSON: What they say is first, they put the arrow in the tree and then they draw the target around it.

TOM KELLY: That's property/casualty actuary. I'm going to talk briefly about one flavor of corporate transaction in the life insurance industry that we've been dealing with more of which is reinsurance transactions.

Our corporate insurance practice here at Debevoise – I might be the only transactional lawyer on the panel – is mostly an M&A practice but an increasingly large part of it for 10 years at least is bulk reinsurance transactions. These are basically the insurance industry's form of asset deal as opposed to a stock deal.

I'm just going to hit the high points of it, but we certainly do see more and larger volume with such transactions, larger in size and deeper in sophistication and complexity of bulk reinsurance transactions in the life industry.

To mention just a couple that we've been involved in this year, Jackson National has acquired about $7 billion worth of annuity business from John Hancock Manulife. Hartford sold its life business. They did that by selling the Hartford Life Companies. The buyer of those companies reinsured a big block of about $10 billion of annuity business to Global Atlantic, a reinsurer, as a way of effectively financing the transaction and reducing the capital that they would need to make the acquisition. Those are just two recent examples.

I'm going to talk just briefly about why people are doing these transactions, how the documents evolved from the lawyer's point of view, actually working on the documents, what are the sort of pressure points and key negotiating issues in these arrangements. Finally, the critical issue of security for reinsurance and how those devices have been evolving.

Why do people do these transactions? The main reasons are to release or redirect capital, for example, for businesses determined by a company to be non-core and frequently these are referred to as legacy businesses. These are fairly old, established businesses and they may be no longer deemed core to the company, or not business lines that they want to be in at all. They want to de-risk and get out of them and frequently pass on the expense of the administration to a reinsurer.

> "Our philosophy in respect to regulatory relations is to be compliant, cooperative and collaborative. We play for the long-term in this space, too. We cultivate strong relationships with our regulators and because of our compliance culture, they often seek out our input when they're considering a new regulation." – *Sheila Davidson*

The purpose may be to leverage a reinsurer's specific product or investment management experience. A lot of the reinsurance has been done by new entrants such as Apollo, Carlyle or Blackstone.

Why are they interested in life reinsurance? It has a great deal to do with the investment management opportunities and the belief that they can do a better job with the management of the assets.

I mentioned exiting non-core businesses. One feature of these transactions is that they may be businesses with a negative economic value and as opposed to the traditional payment of a ceding commission by a reinsurer which represents the present value of the future profits of the business.

It may be a future-loss business and you frequently have a negative ceding commission being paid by the company that's reinsuring the block of business. That's paying someone to take a block of business on but at least it draws a line under the exposure and you're off that risk.

Another reason is as a source of financing for acquisitions or an acquisition of a company, where the acquirer of the company doesn't want all the business lines of the company.

One example of that is Aviva sold its life and annuity business several years ago to Athene. Athene wasn't really interested in the life business and, as a result, reinsured simultaneously on the day of the closing of the acquisition of the company to Global Atlantic.

I'd like to mention something about the documents from the point of view of lawyer/technician working on reinsurance agreements. At a high level, the big change is that, historically, reinsurance agreements were heavily under-lawyered. They were more driven, more drafted and negotiated by actuaries than by lawyers.

This comes out of historic practice of ordinary course reinsurance which is distinct from bulk reinsurance. Ordinary course is laying off a portion of the risk that insurance companies like New York Life write.

These are very simple forms compared to the kind of documents that firms like ours come up with in complicated corporate transactions that have a lot of gaps in them from the point of view of a corporate lawyer. The expectation was that if there was a dispute, there would be an arbitration panel of experienced industry people who would read between the lines and basically be guided by industry custom.

That is not the way that transactions of the size and complexity that these deals have taken on really can work. Now, you have agreements that are much more lawyered and negotiated to leave as little as possible to doubt.

I want to touch upon a few of the issues that are always negotiated in the life reinsurance agreement. Frequently, there are non-guaranteed elements like the ability of the insurer to change cost of insurance charges. In order for the ceding company to get credit for reinsurance, the reinsurer can't have total control over those.

From an economic point of view, the reinsurer wants to have total control or as much control as possible over those because it's now the reinsurer's economics at least to the extent of the quota share. There are many different ways to approach this but it's always one of the most sensitive points of negotiation.

Inuring reinsurance is when some reinsurance is already in place on the block and it's everybody's desire to keep it in place. Who takes the collection risk of that reinsurance? Is that the ceding company or is it the reinsurer? Is the reinsurer taking gross or net of that reinsurance? Will there be some minimum net retention requirement? Why would the reinsurer want that?

If the reinsurer takes an 80 percent quota share, leaving the ceding company with 20 percent, the reinsurer might well want the ceding company to always have at least a 10 percent minimum net retention that they can't reinsure to anybody else. They have, everyone's favorite expression, "skin in the game."

They are not completely off the economics and there isn't the moral hazard of being completely indifferent to what the non-guaranteed element setting is for or how the businesses are administered or how claims are settled.

Administration sometimes goes to the reinsurer. Sometimes it stays with the ceding company. If it does go to the reinsurer, it's always from the ceding company's point of view, a topic of serious concern that the administration of the business is out of their hands but they're still accountable. For the ceding company, this is an indemnity arrangement and it is still accountable to its policyholders and its regulators.

Exchange programs are an issue because life insurance companies are always developing new products and talking to their policyholder base about whether they want to exchange an existing product for a new

product. If you're the reinsurer and you've paid for a block of business with a certain assumption about lapses and stickiness in that business over time, you don't want the ceding company to be targeting the policyholder base on policies that you bought and causing those a great deal more lapses than you expected.

Finally, dispute resolution, for the reasons that I mentioned about the nature of the contracts, there's been a move away from historical arbitration by industry experts to court litigation where everybody hopes that the actual language of the contract that everybody negotiated so carefully with such effort will actually be enforced.

Recapture and termination triggers are always a subject of intense negotiation. The ceding company is always exposed to the credit risk of the reinsurer. If the reinsurer appears to be approaching insolvency it may be necessary to take that business back, recapture it. There are triggers based on ratings downgrades, capital deterioration and other things that are red flags on the way potentially to insolvency.

The problem is that the whole transaction from both parties' points of view has been structured and priced on the assumption that there will never be a recapture. This is a block with a 30-, 40-, or 50-year life and it's going to stay with the reinsurer. Recapturing is the last thing that the ceding company really wants to do; it's an absolute last resort.

From the reinsurers' point of view, here is one example of the issues that can arise if the reinsurer has paid a ceding commission for this business and it's recaptured in five years. It was expected to generate profits for 30- or 40-year life. What about that ceding commission? Does the (unamortized) portion of that ceding commission have to get returned?

I'm going to skip over a couple of slides and just say a word in closing about security arrangements. The main thing to take away is that, under some circumstances, the reinsurer has to provide some form of security like assets and a trust. The assets that support the business go into a trust held apart from the assets of the reinsurer in order for the ceding company to get reinsurance credit.

It was commonly necessary to do that only for regulatory reasons. Since the financial crisis, that is not true at all.

We mostly find ourselves negotiating security where it isn't required for regulatory reasons simply to provide comfort to the ceding company. The most common form is the so-called comfort trust. It's not required for regulatory purposes, they don't have to comply with the regulatory requirements for reinsurance trust but it's there as a form of security.

There are many heavily negotiated terms such as: is there going to be an over collateralization, what are the asset mix, what are the investment guidelines that the reinsurer has to follow for that pool of assets.

I am going to conclude with that. Thank you very much.

KAREN TODD: You mentioned that there are new entrants into the reinsurance field, can you tell us what factors are driving that?

TOM KELLY: A lot of these companies are backed by private equity or non-traditional sources of capital. There is some sense that the insurance business provides some diversification of investments and asset flows for these players. There is certainly the appeal of assets under management, the ability to invest these enormous pools of assets that are within a life insurance company and, as I mentioned, the belief that they can do it better. It's really remarkable that you do see strategically established life insurance companies doing these deals but mostly you see companies that didn't exist 10 years ago.

KAREN TODD: Thank you. Has the tax law changed these deals?

TOM KELLY: Yes, it has. It's not uncommon, particularly for some of the newer entrants to reinsure through a U.S. company which is useful for regulatory reasons. For example, avoiding the need that an unlicensed company in the U.S. would have to provide security that follows regulatory requirements but then have a Bermuda affiliate. They would retrocede some substantial portion of the risk for all the reasons that people do business in Bermuda.

One aspect of the tax law was the so-called BEAT, base erosion and anti-abuse tax, that basically penalizes the transfer between affiliates of premium income and so imposes a tax on the premiums that are transferred from a U.S. company to its Bermuda affiliate. Many people have been working this year with their tax lawyers on how to address that, how to structure around it, what the alternatives are, should the Bermuda company elect to be treated as a U.S. taxpayer. There is talk of possible relief from the IRS from what some people think was not necessarily an intended consequence.

KAREN TODD: Thank you. Our next speaker is Steve Saxon with Groom Law Group.

STEVE SAXON: We appreciate all of you being here and thank you Karen and Sheila for having me here. It's a great honor to be here. Thanks to the other panelists. I appreciate being with such a distinguished group of lawyers. Thank you very much.

I want to say a special thanks to my group from Groom Law Group and just take a second to recognize them. Jenny Eller runs our fiduciary group and will, one day, run Groom Law Group. Elizabeth Dold is our IRS guru who works very closely with the folks at New York Life. Tom Roberts is probably the most knowledgeable and distinguished ERISA lawyer working on annuity and insurance products.

You've all heard of LeBron James from basketball, well, at Groom Law Group, our LeBron James is Jason Lee. Jason Lee is our up-and-coming star. He handles the most complex and difficult problems, so thank you for being here, LeBron – I mean Jason.

Sheila Davidson is a leader. If you talked to my Groom Law Group colleagues, they'll say one of the things that Steve Saxon says quite a bit is, "Leadership matters." I work with over 60 financial institutions and I can say unequivocally that your leadership has made a big difference in New York Life and that is exemplified in my opinion most prominently in the quality and the dedication of the staff that you have.

Lots of firms that we deal with have a great deal of turnover in the legal staff. In New York Life, you have the best lawyers and those lawyers stay at New York Life for a long time. What that means is, at the end of the day, although New York Life occasionally drops the ball, it doesn't drop as far, and it doesn't drop as often. I can say that leadership really has made a tremendous difference there and it's your leadership and you should be recognized for that.

When I was thinking about today, I decided I would talk about what it's like working in Washington, D.C. I was trying to think of a theme or an idea and I came across a quote, "Things are not always what they seem to be."

I decided to look it up. That quote comes from my favorite Roman poet, Phaedrus, from 50 AD. He lived at the time of Jesus Christ. In fact, he's the only Roman poet I know.

He said, "Things are not what they appear to be. Your first impression may be deceiving." I thought that encapsulates quite a bit about what we see and how things work in Washington. I want to share with you a couple of stories that characterize or demonstrate that theme.

One story is from when I was asked by the Republican side of the Senate Finance Committee to appear before the committee to defend some legislation in the ERISA disclosure area. I thought, "This will be a slam-dunk. The legislation is on the right track and our financial institution clients can cope with the data that needs to be collected. They can manipulate it. They can provide the required reports. It's at the end of their technological spectrum, but they can do this – this will be easy."

The day of the hearing – if you've been in the Senate Finance, it's a very large room with old, stained wooden oak walls. It's very impressive – I was there early, and I was sitting around with a lot of the guys in the press thinking that this would be fairly routine.

I looked over my shoulder, and in the doorway was a very tall, handsome man. He was impeccably dressed and he had a cape over his shoulders. I said to myself, "I know that guy, who is that?" It was Jesse L. Jackson and Jesse was appearing on behalf of the Democrats.

That's interesting. I didn't know Jesse worked in the ERISA space, and along with Jesse was a small elderly woman who had with her a white handkerchief and she was crying. I thought to myself, "This could be interesting."

Steve Saxon is going to talk about the technological innovations allowing us to comply with recent ERISA legislation. Jesse and his friend would be appearing before the Senate Finance Committee, opposing this legislative solution. What first appeared to me to be a slam-dunk for Steve Saxon, was now turned into something most problematic.

I will tell you, and this is a fact, that on the front page of *The Washington Post* the next day was a picture of Jesse L. Jackson and this humble, small woman who did a very nice job for the Senate Finance Committee the day before.

Things are not always what they may seem to be, and now I'm going to tell you one other story and about the Trump administration.

A couple of years ago, there was an election in the United States and Donald Trump won the election. I'm a Democrat but Donald Trump won the election. He left New York and came to Washington. You can have him back any time you want.

I thought, given the fact that the Republicans controlled both the House and the Senate and we now had a Republican in the White House, the floodgates of regulatory relief that had been shut for eight to ten years in Washington would open up and there would be new guidance in the form of opinions and exemptions. We would be working very hard to bring out all this new guidance for the benefit of all of us who work in the retirement services space.

I went to see Tom Roberts and he said, "Yes, we can get the general account legislation through that Paul Goldstein has been supportive of." By the way, that legislation is going to be introduced next week, but it didn't happen earlier and so our first impression was dead wrong. Why is that?

I thought that after we met with the transition team and the transition team said to us, "Look, we want to partner with you. We want to solve the problems that are facing retirees and American workers in the retirement space." We got more excited.

But, when the leadership took over – most often we work with the Labor Department or the IRS at Treasury – it became apparent that the White House was controlling the agenda at the Labor Department.

They had very specific ideas about what would be undertaken and reviewed and what wouldn't. Like the health reg that you've probably heard about. That's what DOL [Department of Labor] worked on and the things that we wanted were there, but they weren't being worked on.

Another thing was happening. There's a term in Washington called "slow walking." If you're a career staffer and you ideologically do not agree with the political views of your boss, you'll do the work, but you'll do the work very meticulously and slowly and it just might not get done on time. That's what's happened.

There are also folks who are in outright rebellion and they refuse to do the work. Where we initially had the view that we would get a whole lot of things done – those things just aren't getting done.

I'll share with you one positive aspect when things are not always what they seem. We had the midterm elections just last week and the Dems took over the House. I thought our opportunity to get stuff done just flew out the window because the Republicans were no longer controlling both the House and the Senate. Again, not so fast, that couldn't be further from the truth.

The truth is that there were Republicans who had been blocking this bill called the RESA legislation. It's multiple employer plan (MEP) legislation which is supposed to enhance the opportunity for smaller employers to participate in retirement plans. That had been pushed aside by the Republicans in the House because it was initiated in the Senate. The bill originated in the Senate and it's a revenue-raiser tax bill and those bills should not originate in the Senate. They're supposed to originate in the House and they weren't going to move it forward.

Guess what? The Dems in the House are happy to make it move forward. In fact, it may make no sense, but we may get the RESA legislation.

I'm going to stop there. We have a lot of other stories we can tell, but my time is up. I look forward to talking to you a little bit more later. Thank you.

KAREN TODD: Steve, what other changes do you see happening over the next few years in this space?

STEVE SAXON: I did mention the MEP's legislation. There has always been a feeling in Washington that only about 40 to 50 percent of American small businesses have an employee benefit plan. We need to do more to create opportunities for these companies to have a retirement plan.

If we don't do things like this in the United States, then something we call the employer-based benefit program for both health and pension will go away. It's a voluntary program. The alternative to that, which I don't like, is that every American worker will have an IRA and that is it.

The problem I have with IRAs is they should not be the primary long-term savings vehicle for Americans. You simply can't save enough money to have a secure and safe retirement at the end of the day.

A major focal point for my team over the last few years has been enhancing the opportunities to build out the retirement system from the tax standpoint. Liz is an expert on this. If Congress takes away the ability of employers to deduct amounts that are contributed to a plan or they limit the amount that you can put into a plan, that's going to make it more difficult for us to save, so we have to continue that fight.

KAREN TODD: Thank you. Are the tax breaks that were given to smaller companies opening the door for any new solutions?

STEVE SAXON: My view on the tax breaks is that they are very nice, but they were temporary. When the tax breaks came out, the market took them into account and that gave us a temporary boost – but it's very complicated.

Every time you take away money from the Treasury, you have to find something else to supplant that and we're going to have to deal with that. My view is that there's a lot of political motivation behind the use of the tax code to build up support for a particular candidate in an election.

What the tax code does more than anything else, it represents our social goals and objectives. We want to enhance education. We want to enhance the opportunity for people to have coverage for medical and retirement. We give tax breaks for issues like that.

Right now, particularly with the entitlements that we have, we're spending a lot of money and we're going to have to come to grips with that.

KAREN TODD: Thank you. Our next speaker is Michael Banks with Morgan Lewis & Bockius.

MICHAEL BANKS: Thanks, Karen. Good morning. I'm a litigator and I focus my practice in large part on employment-related litigation. I thought I'd tackle a topic of interest and that's the "Me Too Movement" and its impact on companies and corporate investigations. Or, as some might call it, the inevitable reaction to "Not the whole big company, dear." Unlike Steve's favorite philosopher, I would say this is exactly what it appears to be.

The "Me Too Movement," which has come upon us in a big wave, has changed the way we as employment litigators and our clients face these issues. It used to be that we thought of them as litigation problems. We did our best to dispute sharply the accusations of the accuser. We argued that occasional infractions were not severe and pervasive and did not create liability. We wallowed in the statute of limitations when someone came forward and said, "So-and-so did this to me more than 300 days ago." We said, "Not a problem. We now have a defense."

The world has changed after Harvey Weinstein. Maybe we expected this from the film industry but when it hit Charlie

Rose and Matt Lauer and more familiar and seemingly more trusted names, our entire world turned upside down. It changed the way we operate. It's not just about litigation and the assertion of affirmative defenses anymore, because we're not just dealing with these issues in courts. We're dealing with them in the courts of public opinion.

Those often matter a great deal more for our big companies. The scrutiny these days of corporate officers and directors in this arena is sometimes excruciating. The consequences are quite severe. For those of you who have been following the news, just in the last few weeks beyond what Steve talked about in Washington, we had major walkouts of thousands of employees at Google protesting tens of millions of dollars paid to executives who were accused of sexual harassment and forced out of the company.

It's no longer just an issue of forcing someone out but the whole concept of enriching executives who are accused or even found responsible of wrongdoing is changing the landscape for our clients. Clients deal with consumer boycotts and the severe tarnish that is associated with the brands that they have built over sometimes 50 or 100 years when their executives and managers are accused as part of this "Me Too Movement." Worst of all, it's hitting law firms.

You may know that in 2018, the chair of one of the largest law firms in the United States was forced out over these kinds of issues and, just this week, one of the largest and most profitable and prominent law firms in the United States was targeted at Harvard Law School, not because it was accused of sexual harassment, but merely because their agreements require compulsory arbitration rather than an opportunity for jury trials when sexual harassment claims are filed by partners and employees.

And these issues are no longer confidential. What used to start as internal investigations coupled with confidential allegations and the movement of a complaining woman somewhere within the company used to end with a quiet settlement – perhaps even a discipline or training or education, or even a quiet termination of a perpetrator.

Now with social media, nothing happens so quietly anymore. The legal landscape has changed not only in terms of direct liability and the risk of a far more public disclosure. You may not be aware, but if a company settles a claim of sexual harassment and includes in the settlement agreement a confidentiality provision, the cost of that settlement is not tax-deductible for the company. That was the consequence of an amendment to the Internal Revenue Code within the last couple of years.

There is also potential legislation pending. There have been bills introduced in Congress and on many state levels to ban the use of compulsory arbitration as an exclusive way of resolving sexual harassment claims.

It's hit the bottom line for many big companies in more staggering ways besides big payouts.

When Steve Wynn was accused of widespread sexual harassment, the stock price of his company, Wynn Entertainment, dropped 20 percent and there was a shareholder derivative action. Twenty-first Century Fox settled a shareholder derivative action in this space for $90 million.

> "The cardinal rule is that we never, ever presume to be or, worse yet, try to prove that we are the smartest people in the room. The cure for what I call 'smarty-pants syndrome,' that often afflicts lawyers who join from private practice is to have an actuary give a brief tutorial explaining stochastic modeling. . . . Stochastic modeling uses random variations to look at what investment conditions, mortality, experience and other factors might be like in or over a given period."
>
> – *Sheila Davidson*

We're seeing more than what we saw in the past, which was a bevy of employment disputes and employment-related issues. This is moving to shareholder issues, massive liability potential and involvement of the Board of Directors.

I've been dealing with a company I obviously won't identify. It's a publicly traded company that is now looking at one of these issues that just surfaced within the last two weeks. The Board of Directors convened a subcommittee to oversee the investigation and we've had three full conference calls of the entire Board of Directors within the last nine days. That is not something we would have seen in the past.

Corporate Boards are paying very close attention because they are accountable. It's not just corporate officers now, but the directors feel accountable for what happens in this space. We're even seeing changes in the insurance markets. Not life insurance (near and dear to your heart), but the way Employment Practices Liability and D&O [Department of Labor] insurers are approaching this.

They are sometimes insisting on widespread training and even workplace culture audits. We're conducting broad-based workplace culture audits for clients where we will come in and conduct interviews and look at their policies and examine in a proactive, preventive way what they're doing to avoid these problems.

Companies are also changing the way they write executive agreements. Executive agreements that used to have generous parachute and exit clauses are now sometimes drafted with forfeiture clauses that apply when an executive is accused of or found to have engaged in sexual harassment. Cause definitions in these agreements and executive severance plans are being changed.

Companies like Google that in the past may have been making these multi-million dollar payouts to accused executives are looking much more closely at clause terminations in their executive contracts and not hesitating to invoke them. Executives used to think, "I had an accusation against me; at least I'll get my $10 or $20 or $30 million payout." They're now being told, "No, we can't face the public and we can't face our shareholders and Board of Directors."

The scrutiny is obviously much greater. It's also changed considerably the way we conduct investigations in conjunction with our clients that have robust legal departments with in-house attorneys. It affects who does the investigations and how we do them.

For us, in the old days – meaning about a year ago – investigations used to be a form of pre-litigation activity. They were almost always subject to the attorney-client privilege. They were done by litigators like me with an eye towards producing an attorney-client privileged report that might be given to senior executives. It was potentially shared with the Board, but it would never make its way into evidence. We saw this investigative process as the first step in defending claims or avoiding claims, perhaps in determining how to settle claims quietly.

It's not the case anymore. When we conduct an investigation now, a question arises at the outset, "Is this going to be a privileged investigation hidden from public view or will our investigators necessarily be witnesses? Will they be testifying in court if a lawsuit is filed or appearing before the board or shareholders or the public or perhaps even communicating a message to the media about what they found?" It requires a great deal of thought by our clients.

Our clients now must think about, "What are the respective roles in this process? What are the roles of in-house legal counsel? Is outside counsel expected to be an investigator, a litigator or a fact-finder?"

Often, we start our investigations as privileged-investigations but we tell our clients right up front to be prepared to waive the privilege. We may look at this and reach certain determinations and conclusions or make factual recommendations that you don't want to bury.

Our report may end up as Exhibit A in the defense of your claims or your report to shareholders or the Board. We have to give it a great deal of thought. It's one thing for me to investigate or my colleagues to investigate and to interview company executives or witnesses, but what about the accuser?

If I meet with the accuser, I don't treat that as a privileged communication. That person is not there in the capacity as my client

even though she may be a manager or even a senior executive of the company. She's there as an adversary. That's fine, but we need to know that going in and say, "Does the person conducting the interview intend to litigate this case if filed? Is this going to be a privileged communication and how do we handle it?"

The whole landscape has changed as we move from simply defending claims as outside lawyers to being part of a much broader solution that our clients are trying to embrace. Finally, when the investigation is concluded, what do we do? It used to be axiomatic that we'd write up a report, mark it privileged-confidential, send it to the general counsel or others in the legal department, and it would then hold up the short leg of someone's desk to keep it from wobbling.

Those reports are much more likely to be widely read, and we have to ask questions such as, "Do we write a report? For whom is it written? To whom is it circulated? Everyone who receives it will have a measure of accountability. People will want to know, what did you do with that report? What did you do with that finding?" Anyone who saw it will be responsible for taking action, so we ask, "Does it go to the Board? Does it just go to executives? Who has access to it?"

I can say honestly in conclusion, it's a very perilous landscape for companies at this moment, but it's also an exciting opportunity because the time of, "Not the whole big company, dear," is gone. Fortunately, those days are behind us and we have an opportunity as outside counsel working with our colleagues, and I see many of you here who are inside counsel, to change workplace cultures, to create not only opportunities but diversity and downright decency that the workplace did not have or at least did not have uniformly for many years.

We're not just focused on litigation avoidance anymore. We're trying to make this a better place that treats employees with dignity, with decency and creates opportunity for them instead of the workplace being sometimes for some people, a source of dread or a source of worry or fear or a source of that glass ceiling cap on opportunity. Those of us who practice in this area, while a little frightened for our clients at times, see this as a moment of great opportunity for change and we want to be part of it.

Thank you.

KAREN TODD: It's obvious that there's a need for a sea change in the corporate culture of America and probably other countries as well. What do you see as the most effective strategies that corporations can take to make sure that they're handling this appropriately?

MICHAEL BANKS: The single most effective thing I believe for our clients is diversity and inclusion. It all starts there. When Sheila talked about her experience a couple years ago when you were 38, that was born out of a lack of diversity and inclusion. It was an old, white male environment where people were incredulous that a

38-year-old woman could be the General Counsel of a storied, robust and large company like New York Life.

If those old, white men had been surrounded by women and people of color and people of different sexual orientation, those notions that have contributed to so many of the problems that we are reacting to as litigators and investigators would not be so ingrained. I say that as an old, white male, by the way.

KAREN TODD: I agree that if someone makes a claim, it needs to be heard. What do you do when it turns out that the claim is false?

MICHAEL BANKS: This is part of what makes the landscape perilous. The court of public opinion is very harsh and unforgiving and there is a tremendous temptation to reach decisions that are expedient and reactionary. They do not always look at the long-term interest of the company. Even the most careful investigations don't always yield perfect truth.

This may be the single biggest challenge – what does a company do when a public-facing executive, for example, is accused of wrongdoing and sharply denies it and the facts are inconclusive? We're still finding our way up through this landscape where careful inquiry and extensive investigation may not be enough. I have to say I don't have a perfect answer about how companies will deal with this.

I know that giving the dignity of an investigation and listening and gathering facts is absolutely imperative. We just don't have all the right solutions, especially some of these claims that are surfacing now or are based on events that occurred a very long time ago. Many of them involve events where there are no other witnesses.

The best we can do is not to favor either side or assume someone is truthful or untruthful but we often find ourselves just unable to determine precisely what happened and that's both frightening and challenging.

KAREN TODD: Thanks very much. Our next speaker is Ellen Dunn with Sidley Austin.

ELLEN DUNN: Thank you, Karen. It's a great honor to be invited here to celebrate Sheila's recognition and many achievements as well as those of the New York Life Law Department.

I've had the privilege of working with Sheila and a number of the excellent lawyers at New York Life for most of my legal career and I'm grateful to each of them for all that they have taught me about insurance.

It's certainly a testament to the institution and its culture that many of the lawyers I began working with over 20 years ago at New York Life are still with the company.

I'm going to talk about some recent trends and developments in insurance disputes with a particular focus on insurance regulatory issues and the sorts of disputes that companies and others can become involved in with regulators.

Although U.S. federal involvement in the insurance space appeared to be increasing during the Obama administration, that trend has reversed since 2017 with the rescission of Prudential's Systemically Important Financial Institution or "SIFI" designation and the Fifth Circuit's vacating of the Department of Labor's fiduciary rule as two of the more prominent examples.

As Sheila mentioned, the insurance business has always been heavily regulated by the states, but the activities of the current federal administration have motivated certain states, such as New York and California, to become even more outspoken in their

approaches to protection of policyholders and oversight of insurers and others who are licensed by state regulators.

Federal pronouncements about restricting access to health care have been met by reminders from New York, for example, that health plans in the state must contain all required consumer safeguards and that health insurance policies have to cover all 10 essential benefits set out in the Affordable Care Act.

Although the Department of Labor's fiduciary rule is no more, New York has promulgated its own best interest regulation which applies many of the same general principles to sales of life insurance and annuities.

California, New York and now other states have issued robust cybersecurity laws and regulations that impact the way in which personal information is stored and shared by insurers as well as obligations in the event of a security breach.

The Department of the Treasury has endorsed a concept called a "regulatory sandbox" for financial technology companies, which allows innovations to be tested with real customers without the full burden of regulation. New York has strongly opposed that idea, arguing that companies can change and thrive by developing ideas within a strong state regulatory framework.

Enforcement priorities for state insurance regulators are focusing on data breaches and protection of sensitive policyholder information, possible discrimination in the use of big data and solvency – with long-term care insurance as a particular target, although not necessarily one with a solution, at least not yet. Other issues include use of third-party administrators in converting blocks of business and a variety of consumer sales practices.

As for the future, big data and long-term care will inevitably consume significant regulatory resources. Long-term care, because many of the policies currently in force were priced based upon models that have proved unsustainable.

Public disclosures by some insurers show that long-term care policies sold in the 1980s and 1990s sometimes assumed interest rate returns of seven percent or eight percent over the life of the policy.

New money rates today are more like four percent to four and a half percent and, during the financial crisis, they were significantly lower. Lapse rates, or the pace at which policyholders give up coverage by failing to pay premiums, were also forecast imperfectly.

Actuaries weren't sure what sort of product to compare long-term care to and projected lapse rates five or six times higher than what their experience ultimately showed. People are also living longer and requiring more institutional care in old age than in the 1980s and 1990s.

Absent significant rate increases on the older blocks of long-term care business, more long-term care insolvencies will

unfortunately likely follow that of Penn Treaty, which is the largest long-term care insolvency to date.

Guarantee funds, which serve as the safety net for insolvent insurers, are grappling with how best to address long-term care impairments since they don't always fit within the statutory framework of the funds.

On a brighter note, insurers currently selling long-term care are designing products with sensitivity to all of these challenges and are looking for innovative solutions.

As for big data, the increased use of automated underwriting methods to replicate decision-making typically done by individual, human underwriters, has prompted the National Association of Insurance Commissioners and certain individual regulators such as those in the states of Ohio, Nebraska and Iowa to scrutinize the information that's fed into the automated underwriting process.

Automated underwriting of life insurance is possible because insurers are in some cases able to gather enough information about the applicant through conventional data sources such as the Medical Information Bureau, prescription drug databases and motor vehicle records.

Automated underwriting can reduce policy issue costs as well as the time it takes to issue a policy. The models used in the automated process may trigger manual review of records by an underwriter under certain circumstances such as when an additional medical examination is appropriate.

Insurance regulators are raising questions about how those models operate and particularly whether they're supported by experience, how the accuracy of the data that is fed into the model can be assured and whether there is any use of less conventional data sources such as social media.

On the one hand, social media is a potential treasure trove of information but there are also obvious concerns about its accuracy. There will be more to come on this issue for sure and I think I will leave it there.

KAREN TODD: Could you describe for us what guarantee funds are and what they do?

ELLEN DUNN: Guarantee funds are created by state insurance statutes and are an attempt to ensure that policyholders get some payment when an insurance company goes into insolvency proceedings and has to be liquidated.

Long-term care presents particular challenges for state insurance guarantee funds because there are some statutory schemes, New York is one example, where a pure long-term care company is not covered by the guarantee fund statute and so there's no safety net.

Guarantee fund statutes are being actively reviewed for possible amendments and the guarantee funds themselves are trying to determine how best to meet the needs of long-term-care policyholders.

KAREN TODD: Thank you. In terms of social media and insurance policies, shouldn't insurance companies be able to consider all available information before they issue a policy?

ELLEN DUNN: There are arguments that social media can provide useful information that is relevant to the writing of an insurance policy since in many cases it provides insight into the lifestyle of an applicant. There are also laws and general ethical principles that require companies to be fair when they are determining whether a policy should be written or how it should be classified.

In evaluating these competing considerations, underwriters confront the question of whether information on social media is accurate. Also, not every applicant participates in social media or discloses the same sort of information on his or her social media account. Although use of social media and other non-traditional underwriting sources is a current topic of debate, there is understandable skepticism about whether social media information can be fed into an automated model and consistently yield a fair result regarding the issuance of coverage.

KAREN TODD: Thank you. Our final speaker is Todd Cosenza with Willkie Farr & Gallagher.

TODD COSENZA: I'm Todd Cosenza, a partner with Willkie Farr & Gallagher. I predominately do securities and M&A litigation. I'm going to be covering some recent developments in M&A litigation and securities class actions.

Before I go into my presentation, Sheila, I want to thank you for having me on this panel, and one thing I did want to remark is we had a dinner last night and we were all praising Sheila and congratulating her for this award and this honor.

One thing she made clear repeatedly is that this honor is really on behalf of the New York Life legal department. You're so humble and the praise you gave to all the members of your legal department speaks volumes for you as a person and how you value all of your team. Congratulations to everyone at New York Life for this honor.

Moving on, there are a few topics I want to cover so people are aware. I know New York Life is not a publicly traded company. I typically do deal with a lot of issues related to securities class actions and offerings but there have been some significant developments in securities class actions over the last year or two.

The first is, within the last year, the Supreme Court has ruled in an important case called Cyan that securities class actions under the 33 Act can be brought in both federal and state court. This has been an issue that has been disputed. Mike litigated this issue in three different cases and argued extensively on this that federal courts should have exclusive jurisdiction over 33 Act class actions. The Supreme Court has gone in the other direction.

What this has led to, particularly for a number of financial institutions and investment banks, are plaintiffs trying to bring section 11, or section 12 claims against issuers and underwriters. Probably the most favorable state court jurisdictions are those where you are able to get discovery very early on, or with favorable judges and, frankly, less sophisticated judges who don't really understand the securities laws.

This has led to a mushrooming of cases being brought in state courts in California, Florida, and Wisconsin. Now, there have been various defenses that are being brought forward that those cases really should be in either the state where the issuer has been incorporated or where the underwriters primarily do their business. Those are issues that are being actively litigated right now.

The second issue is this new theory of price maintenance. It almost dovetails with what we're talking about earlier relating to the "Me Too Movement," and price maintenance theory in some ways can be viewed as "Me Too" meets the 10b-5. Basically, what the price maintenance theory is, if a company makes various statements that they have a great corporate culture, they follow the highest ethical practices in any of their public disclosures.

If, for example – we're dealing with this in CBS and the Liberty Tax – there are issues where a senior executive is alleged to have engaged in sexual harassment or untoward conduct, plaintiffs firms will point to that and say, "You made a misstatement in your various public disclosures that you had this great company. You follow the highest ethical considerations. You're supposed to be diverse and very inclusive. All those statements are basically now misstatements due to the fact that your senior executives have been alleged to have engaged in wrongdoing."

Typically, under allegations made against senior executives, there's a stock price drop and the plaintiffs' bar is pointing to the fact you made these statements earlier on to show your stock price had been inflated due to saying you had this great corporate culture. Now that the truth has emerged, there's been a stock price drop and all shareholders are entitled to the data associated with the stock price drop.

That's a really new and novel argument that's being bought in a number of these cases and that's a very interesting theory. There's a case now pending in the

Second Circuit that predates the "Me Too Movement" but it's a very similar theory that was brought against Goldman Sachs during the mortgage and financial crisis litigation where plaintiffs pointed to the fact that Goldman Sachs claimed that they follow these ethical rules. They have all these rules in place to prevent conflicts.

Based on SEC settlements particularly relating to the ABACUS transaction, we see a lot of publicity back in the day. Those statements were false and now there's an issue before the Second Circuit as to a level of proof the plaintiffs have to put forward for that class action to proceed, past the class certification stage. This is a really new and interesting area of securities litigation that's going forward.

This is the price maintenance theory. It's from the Basic/Levinson case and Halliburton. That's the vendee and this is why I was mentioning the issue that's right now before the Second Circuit on a 23(f) petition where the district court has certified the class and now the Second Circuit is determining whether or not the price maintenance theory is a viable theory to allow class actions to go forward.

Moving forward, the next recent update in M&A litigation which I wanted to cover is the area of appraisals. This has been an area over the last seven or eight years that has received a lot of attention because hedge funds typically would buy stock and companies were being acquired. They would fund litigation claiming that the company is being acquired at a discount and let the plaintiffs' bar bring cases alleging that the company was worth a lot more than it had been acquired for.

This had become a fertile area because courts would look at after the fact with the benefit of hindsight whether or not a fair price was paid at the time of the transaction. There were a number of cases particularly about four or five years ago where the plaintiffs' bar received a windfall. Courts determined,

> "In addition to individualized plans, we also provide educational programs on soft skills for all attorneys to experience together in a classroom setting, with a rotating year-long focus on writing, presentation skills, issue spotting, and leadership."
>
> – *Sheila Davidson*

doing various analyses, particularly a DCF {Discounted Cash Flow] analysis, that the companies that have been acquired at a discount and basically paid to the firms that brought these cases and their shareholders a huge premium that they said they were denied as part of the transaction.

This created a lot of consternation within the M&A bar and M&A litigation because of a lack of certainty on when you pay a price then you have to set aside some level of potential reserve even though this price had been agreed to in an arm's-length negotiation.

There was a lot of criticism of a number of judges, particularly in Delaware courts, as to making their own determinations about the fair price of the shares. This has led to a number of decisions all within the last year that have all decided that either the price paid to acquire a company or a price very close to that, was the proper metric and at the market. The arm's-length negotiation process in terms of the company acquiring the shares was a fair proxy.

We're now seeing the courts move back to a different standard, and being a lot more deferential as long as you had a sound bidding process and an arm's-length negotiation that what was paid for the company in terms of its stock is the best proxy for value. That is change. We have this in the Dell case. This starts with the Court of Chancery decision in Dell, where, as I mentioned before, this is one of the cases where the Court of Chancery relied on its own independent DCF analysis after the fact to reach a fair value figure which was 28 percent above the deal price.

The Delaware Supreme Court found that the Chancery Court made a mistake here and didn't give any weight to market data. That's the decision: to afford no weight to the deal price as an indicator of value was inconsistent with accepted financial principles and the findings made by the trial court. This led to the flurry of the recent cases I'm now going to touch on where the court remanded the Dell case back to the Chancery and said you have to go back, consider the market price – not just do your own independent assessment of value.

Post-Dell, we now have the AOL litigation where Verizon acquired AOL for $50 per share. The Chancery Court relied solely on its own DCF analysis which is not different than what happened in Dell and did not refer to the deal price and finding a fair value of $48.70.

In this case, the people who brought the appraisal action in theory were doing worse than if they had participated in the transaction, so they're getting $1.30 less. Then Vice Chancellor Glasscock again subsequently reduced the value by another $0.62. He had made a mathematical calculation error and stated that no DCF method can be "sufficiently vigorous" to prevent good-faith arguments that the values should be otherwise. What he stated substantiates the wisdom of reliance on the deal price as appropriate.

We are now seeing a morphing back in the Delaware courts to what the price was pursuant to an arm's-length transaction assuming that there are no hiccups in the deal itself. There's not some breach of duty of loyalty or flow to disclose some level of conflict of interest within the boards.

That's a big shift over the last year in the Delaware courts and a very similar case is Blake Capital. Again, during the appraisal, the amount found by the Chancery Court was very similar to the deal price.

Forward to now, since the upshot of these cases is that hedge funds in the past have profited from asking judges to increase the prices post the closing of a transaction. They had a number of high-profile wins where they were able to get windfalls in these cases. Now, in light of this new line of cases in the Delaware courts, the number of appraisal cases being brought forward are going to be significantly reduced and they're really going to highlight cases or where there was some level of conflict or problem that had not been disclosed when the transaction was announced to the public. This is an area of litigation that is going to slow significantly.

Next, and this is a case from a few years ago, but it's important because there have just been a series of cases in Delaware that have relied on it. It was a KKR & Co. transaction where they integrated acquisition. Several shareholders challenged the merger saying that there was a breach of fiduciary duty and that the merger should be subjected to enhanced scrutiny and an entire fairness review instead of a business judgment review. KKR was also a controlling shareholder of financial holdings which is the company that was being acquired.

In this case, a lot of private equity firms and subsequent transactions have been relying on this holding. The court found that the transaction was subject to the business judgment level review which is obviously very deferential as compared to an entire business level review which is typically, the court assesses its own level of justice because the merger has been approved by a majority of the shares held by these interested stockholders that were fully informed.

Unpacking that, what the court is saying is if you disclose the level of your control in the proxy that was sent out to the shareholders and the shareholders of the company being acquired and a number of disinterested shareholders vote in favor of the transaction, the court is not going to second-guess shareholders making their own rational decision to go forward with the transaction.

What this has led to is companies, particularly in these controlling companies, entering into these transactions putting very fulsome disclosure in the proxies to make sure shareholders are fully aware of all the various tentacles that the controlling shareholder has over the company. That's to make sure they get the benefit of the business judgment rule; it's actually had a significant benefit to all shareholders because everyone is in favor now of significant upfront disclosure. The Delaware court is saying that, if you have full disclosure and all the disinterested shareholders or majority of them still vote in favor of the deal, we're not going to second-guess the economic interest because they have the most significant economic interest.

This is something that a number of cases and transactions have relied on going forward post-Corwin. There have been some challenges to this but it's an important thing for people to be aware of.

The next case I'm going to cover is Kahn vs. M&F Worldwide. This case has a special place in my heart because I litigated it and argued it in the Delaware Chancery Court. I went up to Delaware Supreme Court and Ronald Perelman/MacAndrews & Forbes had a controlling interest in M&F Worldwide and they wanted to take it private. This was, prior to this case, anytime a controlling shareholder tries to take a company that has a controlling interest private, the court would look at the transaction under the entire fairness standard of review.

With this case, we argued for, and what the Delaware Supreme Court eventually agreed with, was to put in important deal protections – never do this when you set up the acquisition process – first, a fully disinterested special committee that's fully empowered to negotiate the transaction on behalf of the entity being acquired and two, a condition again as we saw in Corwin that the majority of the disinterested shareholders vote in favor of the transaction.

If you put both of those deal protections into place from the beginning, the court will look at the transaction if it's approved under the deferential business judgment standard of review. This has had a significant impact on a number of transactions where major corporations or private equity firms have a significant interest and a publicly traded company will rely on MFW [MFW Shareholders Litigation] in essence to take the company private if they want to acquire the remaining shares.

When we hear MFW, this is what's being referred to. There have been some subsequent developments where plaintiffs have challenged based on facts as to whether or not the special committee was fully empowered from the beginning of the process and the Delaware courts uniformly have been very deferential to trying to employ the MFW standard to going private transactions, absent some blame, conflicts or issues with the special committee as it's negotiating the transaction.

The last case I want to touch on which received a lot of press earlier this year, actually the last month or two, is Akorn vs. Fresenius. Almost everyone, in particular in-house, probably received little blurbs from law firms talking about this.

This is the first time that the Delaware Chancery Court found that "the high burden imposed by Delaware law imposing a material adverse effect (MAE) justifying termination of a merger agreement had been met" and I would stress that this case created a lot of questions and comments from clients. The facts of this case are very strange and extreme and there was a long trial to try to figure out whether or not the merger agreement could be terminated.

There were various nefarious acts alleged going on with the company that was going to be acquired: data not shared about various testing results, whistleblowers coming forward saying that there are problems with the acquired company and allegations from the company making the acquisition that they were not fully aware of all these issues and then obviously, major issues with targets and financial targets being met by the company being acquired which is what led to the court's determination.

Akorn actually was the plaintiff in this case. They were the company being acquired because they were trying to compel Fresenius to close the transaction. They obviously lost and this case is now being taken up to the Delaware Supreme Court.

My only key takeaway for them from this case is, now, we cannot advise clients that this has never happened because now it's happened. The second takeaway is this is going to create some level of uncertainty because companies acquiring another company have avenues to potentially renegotiate if there's been some material change to performance in the company being acquired during this interim period before closing.

The odds of successfully litigating a case and winning and being able to terminate the merger are a little bit higher but are still very small. In this case, the facts were egregious and have led to an egregious result. There should be some caution about taking bold principles out of this case.

Delaware courts, particularly the Chancery Court, are very sensitive to creating uncertainty for transactions. This case will likely be an outlier and I'm not expecting a number of MAE cases to suddenly pop up where the Delaware Chancery Courts allow companies to walk away from merger agreements but that's just my view on it. That could change over the next year or two. With that, I'm done.

KAREN TODD: Thank you. In terms of this material adverse effect case, should it change anyone's due diligence before a deal?

TODD COSENZA: I don't think it will change the level of due diligence. It is going to create a lot more work if there's some deviation in the acquired company's financial performance. The company making the acquisition will be all over them and, in those situations, there's going to be a lot more renegotiation of purchase prices where before the acquiring company would have very little leverage. Now, they have more leverage because there is more uncertainty in terms of the risk of litigation.

KAREN TODD: Yes. With regard to the price maintenance theory, how do you see this evolving?

TODD COSENZA: That's a very good question and it will be interesting. If the Second Circuit actually grants the 23(f) petition and looks at the facts in the Goldman Sachs case, it's very unlikely that the price maintenance theory will survive in that context. It is an unusual case because they are just making general statements in all those lines.

It's actually more interesting in the context of the "Me Too Movement" and some of the related statements. Those are actually more directly implicated and shown to be false than something about a company entering a conflicted financial transaction.

Companies often brag about their great culture and how they're very inclusive. Those statements could be more easily shown to be inaccurate. The Goldman Sachs case may end up setting a bad precedent for these subsequent cases.

KAREN TODD: Thank you. Now, I want to ask the panel, starting with Michael, "What priorities do you feel a corporate board should be looking at now from your practice area?"

MICHAEL BANKS: As I said before, it's diversity and inclusion and just to elaborate on that very slightly, almost all the sexual harassment accusations or claims arise not so much out of sex. They arise out of power imbalances. Power imbalances are perpetuated when you do not have diversity and inclusion in management and executive ranks.

I continue to believe that the message to the boards is that if you empower women, minorities, people who may be different from the stereotypical and ancient noti-ons

of a senior executive, you will sharply diminish these claims and improve the workplace considerably.

I am in a firm that is chaired by a woman. We are one of the largest law firms in the world and our chair is a woman and I guarantee as compared to when I started at the firm 37 years ago, the views of women lawyers are different because of the empowerment of women in my firm and in the workplace generally.

KAREN TODD: Thank you. Ellen?

ELLEN DUNN: I'm going to choose what is probably an obvious one which is cybersecurity. Given the creativity of hackers, the variety of ways in which security can be breached and the fact that financial institutions generally and insurance companies in particular hold much sensitive personal information, most boards are looking at cyber security as a priority.

KAREN TODD: Great. Steve?

STEVE SAXON: If I was appearing before a board which I do from time to time, more Boards of Trustees than Boards of Directors, the one thing I would say is focus on your reputation. The most important thing you have is your integrity and your reputation. New York Life is a good example of that. They trade on their integrity and their reputation. When I invite New York Life lawyers to Washington to meet with officials in the federal government, they say who's coming, who am I going to appear with. Our reputation is at stake and we're not going to be used by anybody.

The board needs to have an objective and their objective should be to maintain – if we have that five-star rating – that with a twist and the twist is this. You remember Phaedrus? He had a relative that was a race car driver in Rome. If you remember the old movie, *It's a Mad, Mad, Mad, Mad World,* the race car driver hopped in the car, and the first thing he did was he took the rearview mirror and broke it off and threw it out. The pretty girl sitting next to him said, "What in the hell are you doing? You just ripped out your rearview mirror." He said, "In racing, as in life, you need to be focused on what's in front of you and not be plagued by the past."

If your focus is maintaining the status, the integrity, the reputation of the company, that needs to be more forward-looking. Michael had a great example and I appreciate all your comments. In the workplace, we have to have training. We have to have communication. We have to have an objective that our work environment will be the very best it can be, and that only occurs because we're forward-looking and we're thinking about ways to improve ourselves at all times.

In front of the board, on your point, I would say this is what we're going to do and we're going to become the best in class with respect to those issues and the purpose and long-term goal always has to be that we'll maintain the integrity and reputation of the company.

KAREN TODD: Thank you. Sheila?

SHEILA DAVIDSON: Ellen mentioned cybersecurity. I would say more broadly, it's how quickly and fundamentally technology is changing business and the fact that the law has not kept up with the technology. It's not just cybersecurity. It's privacy, it's data governance and it's a brave new world.

For lawyers, we are engaging in what I call anticipatory compliance. We're trying to skate to where the puck is going with respect to this and our board is increasingly interested in grappling with how to go about it.

Creating a framework around evaluating the company's use of technology and how that will be viewed in a court of law and in the court of public opinion. Reputational consequences are hugely important.

The second thing that I would say is that always the board should be focused on culture. To the point of those cases where you're saying something that's very different from how you're acting, the role of the board is to pick up on faint signals. If you're constantly beating your chest about being ethical, being inclusive, being diverse and you're not seeing those things in your interactions with management, that's a problem.

KAREN TODD: Great. Tom?

TOM KELLY: Our work in governance is advising boards and working on transactions. How those are presented to boards and the way that they may work out or not. One of the hardest things is to strike a balance in reliance on experts and reliance on specialists both within and outside the company. As a business (with or without shareholders) the board is not expected to be individually expert in every decision and every evaluation of actuarial calculations of financial advisors and all the other kinds of expertise.

However, the board will be held to account if only where shareholders or the constituencies' public opinion and the decisions that need to be made are based on more and more complex raw data.

KAREN TODD: Thank you. Todd?

TODD COSENZA: I have very little to add. I would want to echo one thing. The tone from the top is actually something you hear about and then it drifts away. That's actually really important for the board to pay attention to the executive team and hear what they're saying and make sure they're setting the right tone.

I represent a number of companies and, in the most successful companies, the CEO, CFO, the General Counsel and I say this in a touchy-feely way to be decent to people. Even prior to the "Me Too Movement," a number of those folks who have been the subject of a serious allegation, would have been the effect of significant action. For the last year or two, their practices have changed because of the "Me Too Movement." They probably were ahead of the curve in some sense.

A level of decency and tone from the top actually, if you're an outside director, pay attention to the CEO, CFO and General Counsel to make sure the right messaging and communication is stressed at the company.

KAREN TODD: Great. We'll now take any questions that the audience has.

[AUDIENCE MEMBER]: Michael, when you were discussing the internal investigations, my understanding is that there's potential criticism for long-term outside counsel who were engaged and paid for the investigations that came in the wake of "Me Too." This potentially calls into question the integrity of the investigation itself. How do you combat that when it's your long-standing client and defend them? How do you show your neutrality?

MICHAEL BANKS: It's a great question because as lead outside counsel, how do you establish yourself as not beholden to the executive or executives who may be responsible for your hiring? That's the task of the Board of Directors. If the target of the investigation is a senior executive or if senior executives or stakeholders are in any way implicated or involved in the outcome, it's critical for the Board to become involved and for either a committee of the Board or an Audit Committee Chair or maybe a Compensation Committee Chair to take hold.

> "Today, our law department varies between 50-50 or more women lawyers depending on the year and when you measure it. I feel that that's a harbinger of things to come. When people are measuring gender diversity and they're happy with 30 percent, we strive for more in that regard."
>
> *– Sheila Davidson*

If they're going to use the company's longtime outside counsel in a matter like that, the Board clearly has to take charge but the question you raise is an excellent one. In some circumstances, our clients have said, "We brought you in because you're not a long-time counsel," or conversely, they may bring in someone for actual independence or at least to create the appearance of independence which is vital. You can't have an investigation outcome that looks preordained.

KAREN TODD: Does anyone else on the panel want to address that?

SHEILA DAVIDSON: I would say that we have been in situations where we certainly want the advice and counsel of our most trusted, long-serving outside counsel, but to Michael's point, we may have somebody else not looking over the shoulder but doing key interviews for the investigation and still getting the counsel of a long-serving firm.

KAREN TODD: Does anyone in the audience have another question?

[AUDIENCE MEMBER]: You mentioned there's a power imbalance typically in the "Me Too" types of situations. I was wondering has there been any thought given to adding clawback provisions in the executive employment contracts whereby the perpetrator of the bad deed has to pay back $10 million of bonus funds.

MICHAEL BANKS: Yes.

[AUDIENCE MEMBER]: Should there be clawbacks if they aren't currently being written?

MICHAEL BANKS: I'll leave it to a few folks as to whether there should be but they are becoming more common. It's a feature in securities worlds, too. This first came up more in the securities context when you had financial misconduct.

As a result of the fallout from 2008 we started to see clawback provisions in executive compensation plans and contracts and that's inevitable. I haven't really seen it yet as much in the explicit "Me Too" context, but we'll see those drafted more broadly for either clawbacks or forfeitures as this becomes a feature of corporate America.

KAREN TODD: Anyone else on the panel?

TODD COSENZA: Yes, I would say in connection with that there's going to be a whole slew of litigation about the clawback. As you mentioned earlier, unless there's a pattern of someone engaging in this conduct, no one is going to walk away from a large amount of money. That will be a separate litigation as to whether or not the person is entitled to their compensation.

MICHAEL BANKS: If you see "clawbacks" as getting money back, in the "Me Too" space, that will be uncommon; where you will see it is in the forfeiture. Deferred compensation plans, top hat or unfunded compensation, pension supplement plans for executives, you will see more in the nature of forfeitures for bad behavior.

KAREN TODD: Thank you.

[AUDIENCE MEMBER]: I have one quick comment for Steve. I follow that similar adage. It comes from a real estate mogul. His name is Noah Cross, "You may think you know what's going on Mr. Gittes, but you don't."

A question for Todd, you mentioned about M&A activity with respect to firms that takeover other firms needing to provide significant disclosures for the shareholders to vote. If the majority of shareholders vote in favor of the takeover, such as 60 percent; however the other 40 percent have a very strong, contentious disagreement. How does the court look upon that?

Would it be any different if 80 percent are in favor of the takeover but you have one or only two shareholders that have 10 percent or 20 percent who are very adamant against?

TODD COSENZA: It's a good question. The courts operate in the real world. In these situations, you'd have to get a majority of the disinterested shareholders to vote in favor. If that ends up being a 55/45 sort of split and there were concerns about the transaction whether or not the disclosures are fulsome enough. Those are the cases where the courts would pause and say there's something else going on here and you may not get the full benefit of Corwin.

If you just have the percentages without anything else being troubling about the transaction, the court would go ahead and just apply the business judgment rule to the deal. There has to be percentages coupled with something concealed from shareholders; there's problems with some level of disclosure, or there's a real issue with price. The court would couple those and say I'm not getting rid of this case on a motion to dismiss and deferring to the business judgment rule. That's an excellent question.

KAREN TODD: Thank you. We have time for one last question. This will be the last one.

[AUDIENCE MEMBER]: This is a question that I suspect Steve will want to weigh in on. Wall Street banks have a very bad reputation in the court of public opinion and many of us can cite laws and regulations that reflect that regulation and popular sentiment.

Given that insurance companies are not so much in the headlines, does that create a different dynamic in Washington? For example, are lawmakers and regulators more likely to listen to and respect industry expertise?

STEVE SAXON: Good question. Last night at dinner, Sheila brought up issues relating to insurance company sales practices.

Now, the federal regulation of insurance companies obviously is not the same as it is with respect to banks or control of the currency and the Federal Reserve, but there is a person or two in Washington, including Senator Elizabeth Warren, who seem to be running for president now. She has gone out of her way to look into the sales practices of insurance companies, the commissions that are paid, the amount of the commissions, the trips, the bonuses, the different kinds of rewards for selling and that's not going to go away. That's going to continue.

Now, we're in the midst of a Republican administration, so what she's saying is not having the impact it may in 2020, if a Democrat gets into the White House. I don't think that Elizabeth will make it. Maybe she will, but the combination of the activities that she has on Capitol Hill combined with the career staff; and it's not just insurance companies, there are some folks who just have a basic mistrust.

When you hear about some of the extraordinary practices and there's one little bad apple in the pile that everybody is focusing on, there's a real risk for the insurance industry having a continuation of that problem.

KAREN TODD: Thank you. I want to thank the audience for making it here despite everything. I want to thank our Distinguished Panelists for sharing their expertise. I want to thank Sheila for accepting our invitation and I especially want to thank Debevoise for doing an outstanding job in providing this venue.

Thomas Kelly
Partner

Thomas Kelly is a corporate partner and Chair for the Americas of the firm's Insurance Industry Group and has represented insurance companies in a broad range of capital markets and M&A transactions. *Chambers USA* 2018 recommends Mr. Kelly as a leading insurance transactional and regulatory lawyer, where clients praise his "stellar reputation" and report that he is "extremely intellectually focused and very diligent." Mr. Kelly is also a recognized lawyer for Insurance: Non-Contentious by *The Legal 500 US* 2018. He has acted as company counsel on several of the major U.S. life insurer demutualizations and was named a 2002 "Dealmaker of the Year" by *The American Lawyer* for his work on the IPO and demutualization of Principal Financial Group, Inc.

Mr. Kelly is chair of the Insurance Law Committee of the New York State Bar Association, is chair of the Corporate Section of the Association of Life Insurance Counsel, has served as a member of the Insurance Law Committee of the Association of the Bar of the City of New York and was a major contributor to the book *Modern Investment Management and the Prudent Man Rule* (Oxford University Press 1986) written by Debevoise partner Bevis Longstreth. Mr. Kelly is a member of the board of directors of The Royal Oak Foundation.

Mr. Kelly joined the firm in 1984 and became a partner in 1993. He received his A.B. *cum laude* from Columbia University in 1979 and his J.D. *cum laude* from Harvard Law School in 1983, where he was a member of the *Harvard Law Review*. Mr. Kelly served as a law clerk to the Hon. Eugene H. Nickerson, U.S. District Court for the Eastern District of New York, from 1983-1984.

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Steve Saxon
Partner

Stephen Saxon works on a wide variety of administrative, litigative, and legislative matters involving tax-exempt organizations and ERISA. He specializes in matters relating to Title I of ERISA, with respect to which he has obtained scores of advisory opinions and exemptions. Stephen also represents tax-exempt clients in IRS audits and appeals procedures, as well as in restructuring nonprofit organizations to address unrelated business income tax and other issues. In addition, he has worked on numerous Department of Labor audits of plans and financial institutions that service plans.

Stephen heads up the firm's special practice groups on pension plan investments and on 401(k) plan administrative and investment management matters. Among other things, these groups focus on the ERISA, securities, banking, and tax issues that arise in connection with the offering of products to employee benefit plans.

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Groom attorneys work side-by-side in an environment that rewards partnership and values diversity of specializations to create tremendous efficiency in pursuit of our shared purpose.

Michael Banks
Partner

Michael L Banks litigates employment, benefits, commercial, professional liability, intellectual property, and personal injury issues in U.S. state and federal courts. He has tried more than 35 cases – including class, collective, and multiplaintiff actions – for some of the firm's largest clients, tallying a broad array of victories in courts and arbitrations around the United States. He has also litigated and won numerous injunction cases in trade secret and noncompetition disputes, including hotly contested matters against some of the largest and most recognized law firms.

Active in pro bono work and civic organizations, Michael is a past president of the board of directors of the Support Center for Child Advocates, which coordinates the representation of abused and neglected children. He also is a past member of the board of Need in Deed, a Philadelphia-based service-learning organization, and a recipient of the American Bar Association's Frances Perkins Award for Pro Bono Service.

Michael has been particularly active in pro bono death penalty cases. In 1989, he and Morgan Lewis partner Gordon Cooney undertook the representation of John Thompson, who had been sentenced to death by a state court in New Orleans. The representation spanned 14 years of post-conviction proceedings in state and federal courts in Louisiana and led to a new trial for Mr. Thompson. After Michael's closing argument at the 2003 retrial, the jury deliberated for just 35 minutes before acquitting Mr. Thompson, an innocent man who walked out of jail as a free man for the first time since 1985. Michael and Gordon followed that victory with a civil rights lawsuit against the New Orleans District Attorney's Office, in which they won a $14 million jury verdict for Thompson. The verdict was affirmed by the U.S. Court of Appeals for the Fifth Circuit but overturned by a sharply divided U.S. Supreme Court based on a disputed application of municipal liability law. The case is the subject of an award-winning book and a CNN documentary.

Chambers USA called Michael an "accomplished, knowledgeable, and sophisticated lawyer who is amazing on his feet in court." He was named "Litigator of the Week" by *The American Lawyer* in 2009, and he is listed in The Best Lawyers in America and as one of the "Top 100 Lawyers" in Pennsylvania by *Super Lawyers*. His cases have been featured on the front pages of *The New York Times* and *The Wall Street Journal* and in numerous other publications and media.

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Ellen Dunn
Partner

Ellen M. Dunn is co-leader of the Sidley Austin firm's Insurance Litigation group and has 25 years of experience representing life, health and property casualty insurers in litigation, regulatory investigations, administrative hearings and compliance matters, including privacy and data security. She has extensive experience with internal investigations, policyholder and shareholder class actions, insurance insolvencies, complex contractual disputes and commercial arbitrations.

Ellen regularly represents insurers before state insurance departments and in investigations and inquiries by state attorneys general, particularly in connection with market conduct and other compliance issues.

Formerly co-head of another global law firm's U.S. Litigation practice, Ellen also served as a Special Assistant United States Attorney in the Banca Nazionale Del Lavoro ("Iraqgate") investigation for the U.S. Department of Justice.

SIDLEY

Sidley Austin LLP

Sidley Austin LLP is a premier, global law firm with a practice highly attuned to the ever-changing international landscape. The firm has built a reputation as an adviser for global business, with more than 2,000 lawyers in 20 offices worldwide. We maintain a commitment to providing the highest quality legal services, and are dedicated to teamwork, collaboration and superior client service.

The firm's Insurance and Financial Services group combines a powerful insurance sector focus with the firm's global reach to help clients navigate their most complex regulatory, litigation and transactional matters. Our experienced team works closely with lawyers from our offices around the world to serve our insurance industry clients in every aspect of their business operations. In 2018, Sidley was named insurance "Law Firm of the Year" at the *Reactions* North America Awards for the second consecutive year.

Our lawyers understand the issues and challenges inherent in today's insurance marketplace, which is increasingly global and involves the proliferation of new products and technologies. Our knowledge and understanding of the intricacies of the insurance industry make us uniquely suited to handle its most complex matters – including regulatory, white collar and investigations, ERISA and other class actions, reinsurance disputes and other litigation – and our diverse client base includes many of the largest U.S. and international insurance and reinsurance companies, intermediaries, private equity firms, banks and regulatory agencies.

Todd Cosenza

Partner

WILLKIE FARR & GALLAGHER LLP

Todd G. Cosenza is a partner in the Litigation Department and Vice-Chair of the Securities Litigation Practice Group, focusing on complex financial litigation, with a focus on securities class actions. He has obtained victories for his clients in a number of landmark shareholder class actions. Todd also regularly serves as counsel to independent audit and special committees in the context of confidential internal corporate investigations and advises senior executives and boards of directors on corporate governance matters, particularly those involving mergers and acquisitions.

Recently, the *Am Law Litigation Daily* named Todd "Litigator of the Week" for his representation of Lehman Brothers during a 23-day trial in multibillion dollar RMBS litigation. In 2017, Todd was named a *Law360* MVP in Banking for a number of high-profile wins. Chambers USA has ranked him among the leading individuals practicing in securities litigation in the United States (2013-18). In doing so, Chambers USA describes him as "a rock star New York lawyer" and "an incredibly bright rising star with an encyclopedic knowledge of securities law issues and case law." Chambers USA has also complimented his "very good business sense" and his ability to "guide the client through the process with very practical, pragmatic and informed advice."

The *Legal 500* recommends Todd as a leading attorney in the areas of Securities Litigation, M&A Litigation and General Commercial Disputes. He was selected by *Lawdragon* as one of the 500 leading lawyers in America in 2016 and 2017. In 2013, the *New York Law Journal* selected Todd as a "Rising Star." He was the recipient of Fordham Law School's 2012 "Rising Star Award" recognizing the extraordinary achievements of a distinguished alumnus. Todd also has been recognized in New York Super Lawyers (2013-18) in the area of Securities Litigation.

Willkie Farr & Gallagher LLP

Willkie is an elite international law firm of approximately 700 lawyers located in ten offices in six countries. For more than 125 years, we have represented companies across a wide spectrum of businesses and industries, most notably financial services. The firm is comprised of attorneys who are recognized as some of the world's foremost practitioners in their respective areas.

Willkie's collaborative approach is entrepreneurially inspired and client-focused. Clients grow with us over time. They hire us because of our reputation and our experience, and then build longstanding allegiances based on results and the collegial process by which they are achieved. Our focus on client service includes:

A pragmatic approach to the practice of law that puts the client first and forms the basis for longstanding relationships

Best-in-class practices that are frequently recognized by peers, clients and independent review publications

An attention to successful collaboration that encourages our bright and energetic lawyers to serve clients' needs while maintaining high ethical standards and treating others with respect

Lawyers who possess the legal knowledge and experience to handle any transaction and the ability to communicate effectively with clients

Willkie's international experience – including the representation of U.S. and international corporations throughout all regions of the world – is both deep and broad. Located in key business centers throughout the world, Willkie is comprised of the best local market talent in shared strategic areas of practice. Each of our European offices is ranked and recognized within its country as a top local firm. This is an extraordinary distinction and speaks to our specific focus on having the best local talent in each office. Our ability to provide sound judgment and sophisticated legal advice, coupled with significant knowledge of a region's particular rules and regulations, financial and political regimes, and customs and culture, ensures that clients seeking to conduct cross-border business get the maximum benefit from our vast experience.

Our firm's shared areas of concentration and services are aligned to ensure high quality and consistently responsive counsel across our international network of offices. Our continuous focus on the synergies within our firm is supported by a firm culture that values collaboration and cooperation.