EAGLE INTERNATIONAL ASSOCIATES

Presents

ARE YOU READY
TO BE ENTERTAINED IN PHILLY?

September 12, 2018

Le Meridien Hotel
Philadelphia

EAGLE INTERNATIONAL ASSOCIATES

MISSION STATEMENT

Eagle International Associates is an international network of independent law firms, adjusters and claims related service providers throughout the United States and Europe. Eagle members are dedicated to providing insurance companies and self-insureds with the highest quality legal and adjusting services for competitive and fair compensation. As members, we are committed to the highest ethical standards and act with professionalism and civility in all our endeavors. Eagle members exceed their clients' expectations for quality and service. At every opportunity, we promote the use of Eagle and its members and refer existing relationships through active participation in Eagle's meetings, programs and seminars.

DIVERSITY POLICY

Eagle International Associates, Inc. is of the strong belief that our organization is stronger, more valuable, and more effective through the inclusion of adjustors and attorneys of diverse gender, sexual orientation, racial, ethnic, cultural backgrounds, and all religious or non-religious affiliations. Eagle recognizes that the inclusion of such diversity is vital in order to achieve excellence and to serve its clientele effectively. Eagle is committed to a further understanding of its cultural filters and the absolute need to accept each person as a valued, talented, unique individual, which, when working with other Eagle members, will bring the organization and all its members genuine benefits and competitive advantage in the marketplace.

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PROGRAM

12:15 pm **Registration/Sign-In**

12:50 pm **Welcome Remarks**
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.
Program Introduction
Lindsey J. Woodrow, Esq., Waldeck Law Firm P.A.

1:00 pm **What's at Risk? A Lot If You Don't Know What Damages Are Recoverable**
A Panel Discussion
Moderators: Jason J. Campbell, Esq., Anderson Murphy & Hopkins, LLP
Matthew L. Schrader, Esq. Reminger Co., LPA
Panelists:
Michael J. Flaherty, Esq., Claims Attorney, ALPS Corporation
Regis Moeller, Litigation Services Manager, Esurance Insurance Company

1:45 pm **The Latest in Damages Around the States and Beyond**
Moderator:
Shea Backus, Esq., Backus, Carranza & Burden
Panel:
Eagle Members

2:15 pm **BREAK**

2:30 pm **Taking 'El Loco' Out of In Loco Parentis: Successfully Defending Schools in a Freaked-Out World**
Moderators: David D. Hudgins, Esq., Hudgins Law Firm, P.C.
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.
Panelists:
Timothy J. Curtis, Esq., Goebel Anderson, P.C.
Eric Seaborg, Client Advocate – Public Entity/Education Practice, Willis Towers Watson
L Roeg Williamson, JD, CCM, CLMP, Technical Claims Specialist, CM Regent Insurance Company

3:30 pm **BREAK**

3:45 pm **Who is a Fiduciary and Why it Matters and Tips for Financial Services Compliance and Risk Management**
Moderators: Brian P. Nally, Reminger Co., LPA
Michael P. Shaw, Esq., Niles Barton & Wilmer LLP
Panelists:
Rachel Berk, Senior Manager, Deloitte Financial Advisory Services LLP
Daneen E. Downey, Deputy General Counsel, Asset Management and Corporate Affairs, Janney Montgomery Scott
Deirdre B. Koerick, Sr. Vice President and Chief Compliance Officer, Lincoln Investment Planning, LLC

5:00 pm **Closing Remarks**
5:15 pm **Cocktail Reception**
6:30 pm **Dinner**

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MODERATORS and PANELISTS

Shea Backus is a shareholder of Backus, Carranza & Burden in Las Vegas, Nevada. Shea earned her B.S. from University of California, San Diego and J.D. with a certificate in Indian Law from Sandra Day O'Connor College of Law at Arizona State University. Her litigation practice concentrates in commercial and civil litigation with an emphasis on general liability, professional liability, and construction. She is admitted to practice in the state and federal courts in Nevada, as well as some tribal courts.

Rachel Berk is a Deloitte Risk & Financial Advisory senior manager in Deloitte Financial Advisory Services LLP. She has over fifteen years of experience providing forensic accounting, investigative, litigation consulting and regulatory compliance consulting services across industry sectors. More recently, Rachel has focused on the financial services industry including global commercial banks, hedge funds, and private equity firms.

Rachel leads investigations relating to complex accounting issues and financial analyses, and has directed numerous matters to assess unauthorized activity that has occurred at global financial institutions. She also manages investigations on financial statement fraud, Ponzi schemes, fraud risk assessments, asset misappropriations involving money transfers and wire fraud, and potential violations of the Foreign Corrupt Practices Act (FCPA).

Rachel is a frequent speaker and has taught numerous seminars on accounting, fraud, internal controls, and SEC topics for corporate clients and law firms. She has also co-authored several publications relating to fraud and corruption for global financial institutions.

Jason J. Campbell is a partner at Anderson, Murphy Hopkins LLP in Little Rock, Arkansas. His practice is primarily concentrated on professional liability defense and products and premises liability defense. Jason has been recognized by Best Lawyers in America since 2011 and Mid-South Super Lawyers. He earned his B.S.B.A at the University of Arkansas, Fayetteville in 1997 and his J.D. from the University of Arkansas, Fayetteville, Leflar Law Center in 2001. He is also a graduate of the Litigation Management Institute held at Columbia University; the IADC trial academy; and the ABA Construction Forum Trial Academy.

Timothy J. Curtis is the chair of the Construction Litigation practice of GAPC and has practiced law in both Utah and Arizona. Tim's practice focuses not only on construction but also on the resolution of complex civil litigation matters including personal injury, insurance coverage analysis and bad faith litigation, liability defense of schools and educational institutions, product liability, professional liability, and transportation claims. Tim is an AV rated attorney by Martindale Hubbell and has consistently been recognized as Utah's "Legal Elite" by Utah Business magazine, and as a "Super Lawyer" by Mountain States Super Lawyers (Thomson Reuters). He is admitted to practice in all Utah and Arizona state and federal courts, and the Tenth Circuit Court of Appeals.

Daneen E. Downey, Esq., serves as Janney's Deputy General Counsel, Asset Management and Corporate Affairs. Daneen leads the firm's asset management legal and compliance efforts and supports the general corporate legal needs of the firm.

Daneen has a broad range of relevant industry experience including prior roles as a corporate and regulatory attorney, most recently serving as the General Counsel and Chief Compliance Officer for Radcliffe Capital Management, an investment adviser located in Bala Cynwyd, PA. Prior to Radcliffe, Daneen worked with Cipperman Compliance Services where she provided compliance consulting services to investment advisers

and broker dealers in a wide range of regulatory and compliance matters. Additionally, Daneen has served as in-house counsel for a clearing broker-dealer and as an associate attorney at two nationally recognized law firms – Morgan Lewis and Klehr Harrison, specializing in regulatory matters, securities litigation and general business practices.

In 2011, Daneen co-founded a compliance consulting firm servicing the financial services industry. While Daneen is no longer an active participant in this business, she remains an owner. Daneen is a graduate of King's College and Widener University School of Law.

Michael Flaherty is a claims attorney for Attorney's Liability Protection Society. He received his undergraduate degree from James Madison University and his law degree from George Mason School of Law. Mike began handling claims for ALPS, a Montana based LPL carrier, in 2002 and works in the company's Richmond, Virginia office. Prior to joining ALPS, Mike spent four years as staff counsel for a national labor union. Mike also spent a year as staff counsel to the Virginia General Assembly.

David D. Hudgins is the founder of Hudgins Law Firm, P.C., a litigation, business and insurance practice serving clients in Virginia, Maryland and Washington, D.C. He was born in Virginia and attended Hampden-Sydney College and the University of Richmond School of Law. Mr. Hudgins devotes his legal practice almost exclusively to insurance and corporate defense litigation, and he has represented clients in such diverse areas of practice as professional liability, products liability, church liability, errors and omissions, private security, intellectual property, admiralty, financial agents and brokers, defamation, municipal liability, discrimination, commercial liability, construction, personal injury defense and trust and estate litigation. Mr. Hudgins has extensive jury trial experience, and he handles insurance coverage determinations and declaratory judgment actions as a regular part of his practice. He is a contributing author for the Virginia CLE Publications Handbook Insurance Law in Virginia, and is a co-author of Tort and Personal Injury Law in West's Virginia Practice Series. Mr. Hudgins is a member of the Bars of Virginia, Maryland, and the District of Columbia. He is admitted to practice in all state and federal courts in these jurisdictions as well as the United States Supreme Court. Mr. Hudgins is a member of several voluntary state and local bar associations and has been elected to membership in the Federation of Defense and Corporate Counsel and the American Board of Trial Advocates. Other memberships include the Virginia Association of Defense Attorneys, the Defense Research Institute, the Association of Defense Trial Attorneys and the Claims and Litigation Management Alliance. Mr. Hudgins is a past Chairman and member of the Board of Directors of Eagle International Associates.

Deirdre B. Koerick is Sr. Vice President and Chief Compliance Officer for Lincoln Investment Planning, LLC and its affiliated investment adviser, Capital Analysts LLC. She is responsible for firm-wide compliance and licensing issues for the broker dealer and the investment advisers. She has over thirty years in the securities compliance business. During her career, she was Senior Examiner at the Philadelphia Stock Exchange; Assistant Vice President at Janney Montgomery Scott, Inc. and Vice President and Director at Capital Analysts Incorporated. She operated her own independent compliance consulting firm for several years prior to joining Lincoln Investment in 1998. Deirdre received her MBA, Finance in 1980 from Temple University and her BS, Business Management in 1977 from The Pennsylvania State University.

She has been a speaker at industry national conferences on matters relating to compliance and she was also former Chairman of the Insurance Affiliated Broker Dealer Forum, a compliance officers networking group.

Regis Moeller is the Director of Litigation for the Esurance Insurance Company. His responsibilities include overseeing the company's corporate litigation and managing Esurance's staff and retained counsel. A

graduate from the Pennsylvania State University, Mr. Moeller received his J.D. from the Duquesne University School of Law and spent twenty (20) years as a trial lawyer practicing in the areas of civil litigation, insurance defense, workers compensation, subrogation, insurance coverage and franchising law. He is licensed in multiple states, has authored publications on the handling of subrogation and insurance related claims, and been a presenter for various regional and national associations. He has multiple published appellate decisions credited to his name and has authored Amicus Curiae briefs on behalf of an international insurance organization. He also served on the Amicus Committee of the National Association of Subrogation Professionals.

Brian Nally is a Partner out of Reminger's Cleveland and Indianapolis offices. His national litigation practice focuses on securities litigation and arbitration, as well as business litigation. Brian regularly represents broker-dealers, registered representatives, Registered Investment Advisors, and other clients in the financial services industry in state and federal court litigation and arbitration disputes before the Financial Industry Regulatory Authority (FINRA) arbitration and American Arbitration Association (AAA). Brian also has experience representing clients in government regulatory investigations or enforcement actions brought by FINRA, the Securities and Exchange Commission, professional boards (e.g., the CFA Institute, CFB Board), departments of securities, the department of insurance, and the Internal Revenue Service. Additionally, Brian represents financial institutions, banks, businesses, Directors and Officers, and other parties in complex litigation.

Brian has been recognized as a "Rising Star" by Ohio Super Lawyers Magazine in 2014, 2015, 2016, 2017, and 2018, a recognition given to less than 2.5% of lawyers in the State of Ohio. He is also "AV" Rated by Martindale-Hubbell, peer rated for Highest Level of Professional Excellence.

After obtaining his undergraduate degree, cum laude, from Coker College, Brian spent time in the financial services industry as a summer equity research analyst for Jefferies & Co. in New York. Brian then attended Case Western Reserve University School of Law, where he was a member of the McGee National Civil Rights Moot Court Team, member of the Dean's List, recipient of the CALI High 'A' Award Winner for Evidence, and recipient of the Sidney H. Moss Award.

Mitch Orpett, as Eagle's attorney representative for the State of Illinois, is a founding member and former managing director of Tribler Orpett & Meyer, P.C., a Chicago law firm serving the insurance and business communities. He was one of six lawyers who formed the firm in 1984. His practice is devoted to the defense of various professional and casualty claims and to the resolution of insurance and reinsurance disputes. He has been active in litigation, arbitration and other methods of alternative dispute resolution and has served both as advocate and arbitrator. He has been listed in all editions of Euromoney Publications' *Guide to the World's Leading Insurance and Reinsurance Lawyers* and in *Who's Who Legal, Insurance & Reinsurance*. He has also been named as an Illinois "Super Lawyer" and to the Illinois Network of Leading Lawyers, in recognition of his work as an insurance and reinsurance lawyer.

Mitch has devoted nearly 40 years of service to the profession, holding numerous leadership positions in the American Bar Association, among others. He was elected to the ABA's Board of Governors and served for many years on its policy-making body, the House of Delegates. He was the chair of the ABA's Section Officers Conference, in which capacity he represented the approximately 240,000 members of the sections and divisions of the American Bar Association. Previously, he was chair of the ABA's 30,000 member Tort Trial and Insurance Practice Section and of the ABA's Standing Committee on Continuing Education of the Bar. He was also vice chair of the ABA's Presidential Commission on the Unintended Consequences of the Billable Hour (United States Supreme Court Justice Stephen G. Breyer, honorary chair).

Mitch is a graduate of the University of Illinois, where he earned his bachelors and masters of arts degrees. He is a 1978 graduate of that institution's College of Law.

Matthew L. Schrader is a shareholder in Reminger Co., L.P.A.'s Columbus office. He is the Co-Chair of the firm's general casualty and excess/surplus group. Matthew has litigated and tried cases involving professional liability, medical malpractice, wrongful death, products liability and copyright infringement. Matthew has tried cases in both the state and federal courts throughout Ohio. He has also argued and briefed appeals in Ohio's appellate courts and the Fourth and Sixth Circuits. Matthew earned his B.A. from Xavier University, University Scholar in 1998 and his J.D. from the University of Dayton School of Law in 2001.

For nearly 10 years, Matthew served as the Coach of and Advisor to the Mock Trial Team of the Capital University School of Law, where he also served as Adjunct Professor teaching second and third year law students trial advocacy and evidence. Matthew serves as general counsel to a central-Ohio non-profit foodbank and a central-Ohio non-profit behavioral health and wellness center . He has also spoken to attorney and claims professional audiences throughout the country on a wide array of topics. He is Rated AV® Preeminent™: Very Highly Rated in Both Legal Ability and Ethical Standards by Martindale Hubbell Peer Review. Matthew has been recognized as a Rising Star and as a Super Lawyer by Ohio Super Lawyers Magazine in 2011, 2014-2018. Matthew was named to Top Lawyers Central Ohio by Columbus CEO Magazine in 2014, and 2016-2018.

Eric Seaborg as Client Advocate for the Public Entity/Education Practice, is responsible for growing, expanding and enhancing the brand with existing and prospective business partners within the Willis Towers Watson Northeast & Atlantic/South regions. Prior to joining Willis Towers Watson, Eric served for 9+ years as a Senior Risk Management Consultant for United Educators supporting their book of over 1,200 public and private Higher Education and K-12 members. He collaborated on immediate and long-term strategies to reduce accidents while providing risk management preventative solutions including Crisis Management, Enterprise Risk Management (ERM), Title IX and Harassment/Discrimination prevention, transportation issues, study abroad and international travel, social media, bullying and hazing. During his tenure at United Educators, he was also on loan as a Higher Education Specialist for the Association of Governing Boards presenting to Boards and Executive leaders on ERM.

Prior to United Educators, Eric demonstrated a successful 26-year career in Higher Education administration at Towson University, Towson, Maryland; Dartmouth College, Hanover, New Hampshire; Maryland Institute, College of Art, Baltimore, Maryland; and Anne Arundel Community College in Arnold, Maryland. He has served as a Chief Administrative Officer, Associate Vice President for Business Operation, and Fiscal Officer. Additionally, Eric held a number of diversified management positions within the divisions of Business Affairs, Student Services, and Academic Affairs. He was an adjunct faculty member for the Department of Mass Communications at Towson University teaching Group Dynamics, Non-verbal Behaviour, and Event Management.

Eric holds both a Bachelor of Science Degree and Master of Arts Degree in Mass Communications at Towson University. He also holds certification in ISO31000 for Enterprise Risk Management.

Michael P. Shaw is a partner with Niles, Barton & Wilmer LLP in Baltimore, Maryland where his practice focuses on advising registered investment advisers, broker-dealers, hedge funds and private equity firms on SEC, FINRA and state regulatory matters, and represents such clients in regulatory enforcement

proceedings. In addition, Michael advises businesses across a broad range of industries on general business, corporate and litigation matters. He earned a J.D. from Catholic University of America, Columbus School of Law, and a B.S. in Economics from Marquette University. Michael holds the Certified Regulatory Compliance Professional (CRCP®), Chartered Financial Consultant (ChFC®), and Chartered Life Underwriter (CLU®) designations. He serves on the Chartered Financial Analyst (CFA®) Society Baltimore Board of Directors, is a member of the National Association of Personal Financial Advisors (NAPFA), Baltimore Chapter, and is a frequent contributor to financial services trade publications.

L Roeg Williamson has worked for School Claims Services, now CM Regent Insurance Company, since 2009 handling large and complex casualty, error and omissions, employment practice liability, and property litigated claims. During his time with the organization he has held roles of Senior Litigation Analyst, Casualty Supervisor, and is currently a Technical Claims Specialist utilizing his skill set for both CM Regent and its parent company, Church Mutual Insurance Company.

Mr. Williamson began his career with GuideOne Insurance in 1998 as a claims adjuster handling specialty lines property and casualty claims. He moved to Millers Mutual Insurance in 2001 with their property and casualty department before temporary leaving the insurance field to pursue a law degree. Mr. Williamson returned to the insurance industry in 2005 with Nationwide Insurance, handling all litigated auto specialty claims in the Commonwealth of PA before moving on to his current employment.

Mr. Williamson graduated from Susquehanna University in 1998 with a Bachelor of Arts degree in English. He earned his Juris Doctorate degree from Appalachian School of Law in 2005. Mr. Williamson also is a Certified Civil Mediator, a Certified Litigation Management Professional (CLMP) with the CLM, and certified in fraud claims handling with NICB. Additionally, Mr. Williamson has his adjuster license in 15 states and is also a licensed property, casualty, and allied lines resident producer in Pennsylvania.

Lindsey J. Woodrow of Waldeck Law Firm P.A., located in Minneapolis, Minnesota, is licensed and practices law in Minnesota State and Federal Courts. She received her B.A. in 2004 from Gustavus Adolphus College, and received her J.D. in 2008 from Hamline University School of Law. Prior to joining Waldeck Law Firm, she was a Judicial Law Clerk for the Honorable Chief Judge John H. Guthmann in Minnesota's Second Judicial District, Ramsey County, Minnesota. She is a member of the Hennepin County and Minnesota State Bar Associations, the Minnesota Defense Lawyers Association (MDLA), the Minnesota State Bar Association (MSBA), and is admitted to practice law in the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community. She is also admitted to practice and is a member of the State Bar of Wisconsin and the State Bar Association of North Dakota. She is a member of Eagle International Associates, Inc., Twin Cities Claims Association and the Claims and Litigation Management Alliance. Lindsey J. Woodrow practices exclusively in insurance defense matters, including construction law, product liability, insurance coverage, no-fault, UM/UIM, auto liability, SIU/EUO, professional liability, employment law and liquor liability. This includes all phases of litigation from pre-suit through trial and appeals.

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WHAT'S THE RISK?

A LOT IF YOU DON'T KNOW WHAT DAMAGES ARE RECOVERABLE

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What's at Risk? A Lot If You Don't Know What Damages Are Recoverable

By: Melvin Davis, Esq., Reminger Co. LPA[1]

Knowing what damages are recoverable in a tort action in your jurisdiction is essential to formulating an effective litigation strategy and claim evaluation. Starting in the 1950s, and continuing to the present day, states have increasingly enacted laws limiting both the type and amount of damages that are recoverable in tort actions, particularly with respect to punitive and noneconomic damages, i.e. nonpecuniary harm that results from an injury or loss such as pain and suffering, loss of consortium, companionship, mental anguish, and other intangible loss. Knowing your insured's maximum recovery or exposure can be a key element in determining how to evaluate a claim. The following will provide an overview of damages generally recoverable in tort actions, common limitations on punitive damages and noneconomic damages, with a focus on Ohio law, and strategic considerations to consider when evaluating settlement or formulating an effective litigation strategy.

I. Evaluating Damages

Initially, one the most important aspects of evaluating potential damages or exposure in a tort action is knowing your jurisdiction, claimant, and opponent. Key considerations include, but are not limited to, the following: (1) recoverable damages may vary significantly state by state depending on that's state tort-reform laws; (2) jury verdicts may vary significantly by venue, as particular areas are known for being more liberal, moderate, or conservative, on average, with damage awards; (3) damages for the cause of action(s) in question may be limited by statute; (4) a claimant may be more or less sympathetic depending on their demeanor, presentation, and story; and (5) opposing counsel, and their strategy, reputation, and goals, may vary dramatically and affect your overall litigation strategy.

First, knowing your jurisdiction is key. As recoverable damages and tort-reform laws vary significantly from state to state, an upfront look at the jurisdiction's applicable damage provisions is a first and necessary step in formulating a litigation strategy. In Ohio, for example, litigants and insurance representatives should be advised that compensatory damages for non-economic loss are generally limited to three times the amount of damages for economic loss, and punitive damage awards are limited to twice the amount of total compensatory damages.[2]

[1] Special thanks to my colleague, Steven A. Chang, Esq. of Reminger Co., L.P.A., for his assistance and research in preparing this presentation.

[2] *See infra*, section III and V.

In addition, this step should include some investigation into the venue at issue. Certain jurisdictions, typically those in higher-population areas where the cost of living is greater, may have a jury pool that is more liberal with respect to awarding higher damage awards. Conversely, some venues in more rural districts are well known for being, on average, more conservative, returning lower damage awards.

Second, knowing your cause of action is important. For example, in Ohio, wrongful death actions are not subject to the statutory limitations for non-economic loss.[3] A survivorship claim of the decedent, however, has been held to be separate and distinct from a wrongful death claim, and the damages for conscious pain and suffering that occurred prior to the decedent's death that may be awarded would be subject to statutory limitations.[4]

Third, a consideration of the claimant at issue is necessary to determine whether a jury might be more sympathetic to their cause. This evaluation can include everything from their demeanor, presentation, eloquence, or even personal appearance if the plaintiff has suffered catastrophic and visible injuries.

Finally, litigants and insurance representatives should be mindful and do their due diligence on opposing counsel. Some counsel may have a reputation for being savvy claimant's counsel, and a real threat of exposure to your insured. Others may have a reputation for taking cases in volume, whose claims may not be as substantiated and are generally more likely to agree to a nuisance-level settlement. Finally, some counsel may have a reputation for being uncooperative, or even abusive, in litigation, using extensive (and often unnecessary) discovery as a tool to apply pressure to up a settlement offer. All of these factors should be considered in formulating an effective strategy to resolving your claims.

II. Wrongful Death Claims

Wrongful death claims are a good example of a cause of action that may be limited or controlled by state statutory laws. Ohio, for example, has promulgated specific statutory provisions determining what compensatory damages may be awarded in a civil action for wrongful death, as opposed to other tort claims. They include: (1) loss of support from the reasonably expected earning capacity of the decedent; (2) loss of services; (3) loss of society, including loss

[3] "R.C. 2315.18 does not apply to a wrongful death action. Wrongful death actions cannot be capped under Ohio law." *Fischer v. A-Best Prods. Co.*, Cuyahoga C.C.P. No. 615514, 2008 Ohio Misc. LEXIS 393, at *4 (Sept. 12, 2008).
[4] *Id.*

of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education; (4) loss of prospective inheritance; and (5) mental anguish.[5]

In determining the loss of future income arising from the death of the decedent, courts have looked to a variety of factors, including, without limitation, the victim's life expectancy, character, health, habits, talents, prospects, prior earnings, probable future earnings, needs of and contributions to defendant and current returns on investments.[6] For minors, parents may also recover for the loss of support from the expected earning capacity of a deceased minor child, where such claims are non-speculative.[7] The Supreme Court of Ohio has held that such damages are to be measured "by the experience and judgment of the jury, enlightened by a knowledge of the age, sex and physical and mental characteristics of the child, supplemented with evidence as to the position in life and earning capacity of the parents."[8]

In addition, wrongful death claims may be unique in some states in that punitive damages may be unavailable or limited.[9] Punitive damages, however, may be awarded in survivorship claims brought on behalf of the decedent, which has been recognized as a separate and distinct action in many jurisdictions, such as Ohio.[10]

Wrongful death actions are also unique with respect to settlement. R.C. 2125.02(C) mandates that a trial court obtain the probate court's consent to a settlement of a wrongful death suit.[11] Specifically, the probate court in Ohio has been determined to have the exclusive jurisdiction to approve wrongful death settlements. Any settlement or dismissal of a wrongful death action without the approval of the probate court is deemed void.[12]

III. Evaluating Punitive Damages

In evaluating potential liability or exposure to punitive damages, important considerations include whether your jurisdiction permits (or requires) bifurcation on the issue of punitive damages at trial, the applicable evidentiary standard, whether there is a statutory cap on punitive damages

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[5] R.C. 2125.02(B).
[6] *Robertson v. Dep't of Pub. Safety*, Court of Claims, No. 2001-09214, 2006-Ohio-2542, ¶ 17.
[7] *Howard v. Seidler*, 116 Ohio App. 3d 800, 689 N.E.2d 572, 1996 Ohio App. LEXIS 5549 (Ohio Ct. App., Mahoning County 1996).
[8] *Howard v. Seidler*, 116 Ohio App.3d 800, 810 (7th Dist. 1996), citing *Immel v. Richards*, 154 Ohio St.52, 56, 93 N.E.2d 474 (1950).
[9] *See Estate of Owensby v. City of Cincinnati*, 385 F. Supp. 2d 619, 624 (S.D. Ohio 2004) (holding that punitive damages is not authorized under the language of 2125.02).
[10] *Fischer v. A-Best Prods. Co.*, Cuyahoga C.C.P. No. 615514, 2008 Ohio Misc. LEXIS 393, at *4 (Sept. 12, 2008).
[11] *Boyd v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 97703, 2012-Ohio-2513, ¶ 14 ("This statute clearly mandates that the personal representative must obtain the probate court's consent to settle a wrongful death action.").
[12] *Id.* at ¶ 15.

in your jurisdiction, and whether there are potential immunity defenses to punitive damages. In most jurisdictions, obtaining punitive damages is a high bar—requiring proof by clear and convincing evidence that "[t]he actions or omissions of [the] defendant demonstrate malice or aggravated or egregious fraud[.]"[13] Punitive damages are typically reserved for the most severe cases, as they are "intended to punish and deter conduct resulting from a mental state so callous in its disregard for the rights and safety of others that society deems it intolerable."[14]

a. Bifurcation

Nearly all jurisdictions will have a statute or civil rule that either permits or requires bifurcation of punitive damages for tort actions. In Ohio, bifurcation of the issue of punitive damages is mandated by statute in any tort action that is tried to the jury, upon motion by any party.[15] Significantly, trial courts have no discretion in determining whether to bifurcate a trial if it is a tort action that falls under the statute.[16] In all other actions that do not otherwise qualify for mandatory bifurcation by statute, Ohio Civil Rule 42(B) provides trial courts with the discretion to separate trials for the purpose of "convenience, to avoid prejudice, or to expedite or economize," and may separate a trial "of one or more separate issues, claims, cross-claims, counterclaims, or third-party claims."[17]

Typically, a plaintiff may only proceed with the second stage of a bifurcated trial when the jury determines in the initial phase that the plaintiff is entitled to recover compensatory damages.[18] The initial stage of the trial relates only to the presentation of evidence, and a determination by the jury, on whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property.[19] During this stage, no party is permitted to present, and the court will prohibit any party from presenting, any evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages.[20] Notably, evidence that goes to the issue of both liability and punitive damages is typically permitted unless otherwise excluded by other evidentiary rules.

Once the jury finds that a party is liable and awards compensatory damages, a plaintiff may proceed with the second stage of the trial and present evidence on the issue of punitive

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[13] R.C. 2315.21(C)(1).
[14] *Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 473, 575 N.E.2d 416 (1991).
[15] R.C. 2315.21(B)(1) ("In a tort action that is tried to a jury and in which plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated . . .").
[16] *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, ¶ 12.
[17] Civ.R. 42(B).
[18] *Kleinholz v. Goettke*, 173 Ohio App.3d 80, 2007-Ohio-4880, 877 N.E.2d 401, ¶ 15 (1st Dist.).
[19] R.C. 2315.21(B)(1)(a).
[20] *Id.*

damages. During this stage, the parties will present evidence that goes to the issue of malice, which is generally defined as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will, or spirit of revenge, or (2) a conscious disregard for rights and safety of other persons that has great probability of causing substantial harm."[21]

In this phase of the trial, not only may a party present evidence supporting the extent of tortious conduct undertaken by the defendant, but a party may also present evidence of financial vulnerability.[22] Specifically, evidence of financial vulnerability of a victim is admissible during the punitive damages phase of a trial and is permitted to "enhance[s] damages where it applies."[23] Significantly however, evidence of financial vulnerability (or lack thereof) may only be used "as an enhancing factor, a sword for the destitute plaintiff, not a shield for the willful tortfeasor."[24] Where "the victim happens to be financially secure, this should not reduce the culpability or the liability of the tortfeasor for engaging in willfully damaging conduct."[25] Accordingly, most courts will prohibit the introduction of evidence of financial *stability* by the tortfeasor, except to rebut evidence of financial vulnerability that has been presented by the victim.[26]

Although this may vary by state, under current Ohio statutory law, the trier of fact determines both the liability of the defendant and the amount of damages.[27]

b. The applicable evidentiary standard

A party seeking punitive damages typically has the burden to prove by clear and convincing evidence that the defendant acted with malice in order to recover punitive damages.[28] "Clear and convincing evidence," has generally been defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt, in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."[29]

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[21] *Gold Craft Co. v. Ebert's Constr. & Remodelling, LLC*, 10th Dist. Franklin No. 09AP-448, 2010-Ohio-3741, ¶ 13 (citation omitted).
[22] *Am. Chem. Soc'y v. Leadscope, Inc.*, 10th Dist. Franklin No. 08AP-1026, 2010-Ohio-2725, ¶ 75
[23] *Caruso v. Leneghan*, 8th Dist. Cuyahoga No. 99582, 2014-Ohio-1824, ¶ 42.
[24] *Id.* at ¶ 42.
[25] *Id.*
[26] *Id.* at ¶ 44 (noting that "evidence of the absence of vulnerability can be considered when affirmative evidence of vulnerability is introduced").
[27] R.C. 2315.21(D)(1). Notably, punitive damages in Ohio used to be determined by the Court under former section 2315.21(C). *See Shimola v. Nationwide Ins. Co.,* 25 Ohio St.3d 84, 495 N.E.2d 39 (referencing former section 2315.21(C) in stating that the amount of punitive damages is determined by the Court after a finder of fact determines that punitive damages should be awarded).
[28] *See, e.g.* R.C. 2315.21(D)(4).
[29] *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22.

Further, if a party is relying on the second prong of the definition of malice – that the defendant acted with a conscious disregard of a person's that had a great probability of causing substantial harm – Courts have held that knowledge of a *mere possibility* that an action could result in harm is not sufficient to rise to the level of "conscious disregard," for a finding of malice.[30]

c. The applicable caps on punitive damages

An award of punitive damages can be limited in two ways. First, several states, including Ohio, have limited the amount of punitive damages that a court or trier of fact can award by statute. Second, the Supreme Court has established standards in which a punitive damages award can also be limited on constitutional grounds upon a finding that an award of punitive damages is constitutionally excessive.

In Ohio, an award of punitive damages for tort actions is limited by statute to two times the amount of compensatory damages awarded to plaintiff, unless the defendant is a small employer or individual, in which it is limited to the lesser of two times the amount of compensatory damages or 10% of the employer's or individual's net worth, up to a maximum of $350,000.00.[31]

In all other cases, an award of punitive damages may be limited on constitutional grounds. In determining the reasonableness of a punitive damages award, the United States Supreme Court in *State Farm Mut. Auto Ins. Co. v. Campbell* has set forth three factors: (1) the reprehensibility of the tortfeasor's conduct; (2) the ratio of punitive damages to compensatory damages, and (3) civil penalties authorized in comparable cases.[32] According to the United States Supreme Court, in conducting this analysis "few awards exceeding a single digit ratio between punitive damages and compensatory damages . . . will satisfy due process."[33]

The first guidepost, the degree of reprehensibility of the defendant's conduct, is "the most important indicium of the reasonableness of a punitive damages award."[34] A review of reprehensibility includes consideration of whether "the harm caused was physical as opposed to economic," (2) "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others," (3) "the target of the conduct had financial vulnerability," (4) "the conduct

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[30] *Preston v. Murty*, 32 Ohio St.3d 334, 336 (1987) (noting that "a possibility or even probability [of harm] is not enough," to establish actual malice).
[31] R.C. 2315.21(D)(2)(a)-(b).
[32] *Am. Chem. Soc'y v. Leadscope, Inc.*, 10th Dist. Franklin No. 08AP-1026, 2010-Ohio-2725, ¶ 74, citing *State Farm Mut. Auto Ins. C. v. Campbell*, 538 U.S. 408 (2003). Notably, the punitive damages cap set forth in R.C. 21315.21 "were based on guidance provided by the United States Supreme Court in [*State Farm*]." *Rieger v. Giant Eagle, Inc.*, 8th Dist. Cuyahoga No. 105714, 2018-Ohio-1837, ¶ 35.
[33] *State Farm*, 538 U.S. at 418.
[34] *Barnes v. Univ. Hosp. Of Cleveland*, 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142, ¶ 33.

involved repeated actions or was an isolated incident," and (5) "the harm was the result of intentional malice, trickery, or deceit, or mere accident."[35]

The second guidepost, the ratio of punitive damages to compensatory damages, is less clear. Both the Supreme Court of Ohio and the United States Supreme Court have rejected the notion of a bright-line mathematical formula in assessing reasonableness of punitive damage awards.[36] The court has recognized that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards if, for example, a particularly egregious act has resulted In only a small amount of economic damages."[37] To that end, Courts have allowed a 6,250-to-one damages ratio to stand, but have invalidated 20-to-one ratios.[38]

The third indicium of excessiveness involves comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable conduct. In setting forth this fact, the Supreme Court noted that courts should afford "substantial deference" to legislative enactments concerning appropriate sanctions for similar conduct.[39]

IV. Prejudgment Interest

Prejudgment interest is an important consideration in not only determining the potential exposure to claims, but also in coordinating an effective settlement negotiation strategy. Specifically, failing to make a good-faith settlement offer can potentially subject your client to higher exposure if liability is ultimately found.

a. The policy behind prejudgment interest

Generally, the reasoning behind imposing prejudgment interest is to "encourage litigants to make a good faith effort to settle their case, thereby conserving legal resources and promoting judicial economy . . . [and] to prevent parties who have engaged in tortious conduct form frivolously delaying the ultimate resolution of cases."[40] In Ohio, the General Assembly has codified the right to prejudgment interest in civil actions based on tortious conduct in R.C. 1343.03(C) where a party failed to make a good faith effort to settle the case.[41]

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[35] *State Farm*, 538 U.S. at 419.
[36] *Barnes*, 2008-Ohio-3344, ¶ 34.
[37] *Id.*
[38] *Id.*
[39] *State Farm*, 517 U.S. at 583.
[40] *Moskovitz v. Mt. Sinai Medical Center*, 69 Ohio St.3d 638, 657-58, 635 N.E.2d 331 (1994).
[41] The statute provides, in relevant part: "Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case." R.C. 1343.03(C).

Significantly, courts have distinguished between a "failure" to make a good faith effort from acting in "bad faith."[42] For example, Ohio courts have held that a party's mere inactivity can constitute a failure to make a good faith effort, without a demonstrating that doing so was in "bad faith."[43]

b. Considerations when negotiating settlement

In determining whether a party has made a good faith effort to settle, the Supreme Court of Ohio has established guidelines for a trial court to utilize, including whether a party has: "(1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party."[44] Significantly, if a party has "a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."[45] The term "good faith effort to settle," has been interpreted to mean "an honest, purposeful effort, free of malice and the design to defraud or to seek unconscionable advantage."[46] Notably, courts have also held that it is the plaintiff's burden to initiate a settlement negotiation to ultimately be entitled to prejudgment interest.[47]

c. Considerations when reporting

Notably, there are also other considerations that a litigant must consider in the course of litigation as it relates to the discoverability of your client's files to make a determination of a "good faith effort to settle" under the prejudgment interest standard. Specifically, the Supreme Court of Ohio has held that in an R.C. 1343.03(C) proceeding for prejudgment interest, neither the attorney-client privilege nor the work product exception precludes discovery of the contents of an insurer's claims file.[48] The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered.[49] This is generally recognized as an "exception" created by the Supreme Court of Ohio to the attorney-client privilege. This exception has also extended to the defense attorney's file –

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[42] *Howard v. Seidler*, 7th Dist. Mahoning Nos. 97 C.A. 193, 98 C.A. 45, 2000 Ohio Appl. LEXIS 1102, at *10 (Mar. 3, 2000), citing *Kalain v. Smith*, 25 Ohio St.3d 157, 495 N.E.2d 572 (1986).
[43] *Black v. Bell*, 20 Ohio App.3d 84, 88, 484 N.E.2d 739 (1984).
[44] *Kalain v. Smith*, 25 Ohio St.3d 157, 159, 495 N.E.2d 572 (1986)
[45] *Id.*
[46] *Perkins v. Miami Valley Regional Transit Authl*, 2nd Dist. Montogmery Nos. 9563 and 9696, 1987 Ohio App. LEXIS 5551, at *11 (Jan. 12, 1987) (citation omitted).
[47] *Id.*
[48] *Nat'l Union Fire Ins. Co. v. Ohio State Univ. Bd. Of Trs.*, 10th Dist. Franklin No. 04AP-1340, 2005-Ohio-3992, ¶ 7, citing *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638 (1994).
[49] *Id.*

courts have held that all materials are discovery except those that reveal the theory of defense, *regardless of where they are found*.[50]

V. Damage Caps

States have also promulgated statutes to limit the amount of compensatory damages that can be sought and obtained in tort-related cases with respect to noneconomic losses. These limitations are important to consider when formulating an effective litigation strategy.

a. Economic v Noneconomic limits

Generally, the economic losses arising directly from a tortfeasor's conduct are not limited by statute.[51] "Economic loss" may include, but is not limited to: (1) wages, salaries or other compensation lost; (2) expenditures for medical treatment, rehabilitation, or other care or services; and (3) any other expenditures incurred as a result of an injury or loss to person or property.[52]

States, however, have applied damage caps to compensatory damages awarded for non-economic losses in tort actions. "Noneconomic loss" is generally defined as nonpecuniary harm that results from an injury, including, but not limited to, pain and suffering.[53] In Ohio, the amount of compensatory damages for noneconomic loss is limited to the greater of $250,000.00 or three (3) times the economic loss.[54]

b. Exceptions to the caps

Some states, such as Ohio, may also provide for exceptions to the compensatory damages that can be awarded for noneconomic loss in extreme situations. For example, under Ohio's statutory scheme, the compensatory damage cap for noneconomic losses does not apply where there is: 1) permanent and substantial physical deformity, 2) loss of use of a limb, 3) loss of a bodily organ system, or 4) permanent physical functional injury that prevents a person to independently care for self and perform life-sustaining activities.[55] Courts have held that these exceptions require "extreme qualifications," and are not liberally construed.[56]

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[50] *Cobb v. Shipman*, 11th Dist. Trumbull No. 2011-T-0049, 2012-Ohio-1676, ¶ 2
[51] *See, e.g.*, R.C. 2315.18(B)(1) ("There shall not be any limitation on the amount of compensatory damages that represents the economic loss of the person who is awarded the damages in the tort action.").
[52] *See* R.C. 2315.18(A)(2).
[53] *See* R.C. 2315.18(A)(4) ("'Noneconomic loss' means nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.").
[54] R.C. 2315.18(B)(2).
[55] R.C. 2315.18(B)(3).
[56] *Weldon v. Presley*, N.D.Ohio No. 1:10 CV 1077, 2011 U.S. Dist. LEXIS 95248, 2011 WL 3749469, *6 (Aug. 9, 2011).

c. When are caps applied

Damage caps are typically applied after a jury has rendered a verdict as to liability and damages. Under Ohio law, the statute specifically provides that the statutory damage caps shall be applied in a jury trial "only after the jury has made its factual findings and determinations as to the damages."[57] In Ohio, both trial and appellate courts possess remitter authority where an excessive verdict is returned. Remittitur gives the plaintiff the option of accepting a lower damages award (as determined by the trial court) or receiving a new trial.[58]

VI. Conclusion

Performing effective due diligence into the issue of damages at the outset of a case can go a long way in formulating an effective litigation strategy. Further, by determining the potential exposure of a claim, you are able to access the risk and decide if an early resolution is more cost-effective than engaging in extensive litigation. You should consult with defense counsel who will be familiar with the jurisdiction, venue, and claimant's counsel, which are all important factors to consider when evaluating a claim. Even if a matter is pre-suit and will not lead to a formal assignment, please remember that Eagles are always willing to assist.

[57] R.C. 2315.18(E)(1).
[58] *Wightman v. Consolidated Rail Corp.*, 86 Ohio St.3d 431, 715 N.E.2d 546 (1999).

ARMING TEACHERS WITH FIREARMS:

WHAT IS THE CURRENT STATE OF THE LAW?

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ARMING TEACHERS WITH FIREARMS:
WHAT IS THE CURRENT STATE OF THE LAW?

In the immediate aftermath of the Parkland, Florida high school shooting on February 14, 2018, in which 14 students and three school administrators were killed, and 17 others were wounded, by a lone 19-year old armed with an assault rifle, President Trump said that, "If you had a teacher who was adept with the firearm, they could end the attack very quickly . . . If the coach had a firearm in his locker when he ran at this guy . . . he wouldn't have had to run. He would have shot and that would have been the end of it. . . . Highly trained, gun adept, teachers/coaches would solve the problem instantly, before police arrived.. . . You give [teachers] a little bit of a bonus, so practically for free, you have now made the school into a hardened target" *CNN*, Feb. 22, 2018; *USA Today*, Feb. 22, 2018; *Yahoo News*, Feb. 22, 2018; *N.Y. Times*, Feb. 22, 2018. Various teacher organizations, as well as law enforcement agencies were almost universal in their criticism of such an idea. *N.Y. Times*, Feb. 22, 2018; *USA Today, Feb. 22, 2018.* Experts in school safety and security have also expressed the view that arming teachers or school administrators will not deter or reduce the incidence of school shootings, but will, more likely, increase the level of violence and pose additional liability risks to schools that do so. *See, e.g.*, Dragan, *School Safety and Security: Protecting Students in the Age of School Shootings* (May 1, 2018). www.education-expert.com/2018/05/school-safety-and-security-protecting students-in-the-age-of-school-shootings/.

The President also said, "Gun-free zone to a maniac – because they're all cowards – a gun-free zone is 'let's go in and let's attack because bullets aren't coming back at us.' . . . To a killer or somebody who wants to be a killer, that's like going in for the ice cream. That's like, 'Here I am, take me.'" *CNN*, Feb. 22, 2018; *Yahoo News*, Feb. 22, 2018. However, there does not appear to be any evidence in support of the proposition that gun-free zones operate as "magnets" for mass

shooters. *Guns in Schools*, Giffords Law Center, http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/guns-in-schools/.

Irrespective of the merits of the policy debate over whether arming school teachers or administrators might make schools safer, and more secure from gun violence, there remain the twin questions of what such a law might look like, and what liability risks might be created, exacerbated, or perhaps minimized by enacting such a law.

For purposes of illustration, we examine a recently-enacted Wyoming statute and a corresponding local ordinance of the Park County School District (Cody, WY), enacted just several weeks ago on April 17, 2018. The statute, *Wyo. Stat.* 21-3-132, was enacted in July 2017, and is entitled "Possession of Firearms on School Property". In summary, the statute authorizes local school districts to adopt rules that permit school employees to carry a concealed weapon on school property if he/she holds a concealed carry permit, and has secured approval from the school district. The rules to be adopted at the local level require, at a minimum:

- An application and approval process.
- The firearm be maintained on the person of the employee, or kept in a lock box under the employee's direct control.
- An initial course of at least 24 hours of training, including 8 hours of "scenario based training".
- A revocation and/or suspension process.

The statute also contains various notice requirements to the community and to local law enforcement, and a waiver provision for "isolated rural schools". The full text of the statute is printed in the Appendix.

Park County School District #6, which includes the city of Cody, Wyoming, adopted a school firearms Policy in accordance with the statute on April 17, 2018. A copy of the complete text of Policy CKA (Firearms: Personnel Authorized to Carry) is also printed in the Appendix. The text of the Policy generally follows the minimum requirements of the statute, with several minor variations. Among them, the application process requires all School District employees seeking to secure approval to submit to a Department of Family Services Central Registry Screening, and a psychological suitability examination, to be subject to random drug and alcohol testing, and to undergo 18 hours of annual training (the statute requires a minimum of 12), and to be trained to address active shooter situations, hostage situations, and situations with armed students who present a threat to themselves or others. The Policy also contains some provisions pertaining specifically to the use of firearms, specifically,

> An employee who receives approval by the Board to carry a firearm pursuant to this policy shall only fire his or her firearm if he or she reasonably perceives that his or her life, or the life or lives of others, are in imminent risk of death or serious bodily injury.
>
> In the event that a firearm is fired for any reason, the employee shall be placed immediately on paid administrative leave pending an investigation of the incident.

Finally, the Policy also contains a provision pertaining to the defense of sovereign immunity. Wyoming has a governmental immunities that is not dissimilar to the federal Tort Claims Act, and numerous state Tort Claims Acts. *Wyo. Stat.* 1-39-101 through 1-39-121. The local Policy states:

> Nothing herein is intended to limit or prevent the school district or any board member or employee from asserting the defense of governmental immunity to any claim arising from the possession or use of a firearm. To the extent an employee uses a firearm as authorized by and in compliance with this policy, such conduct shall be deemed to be within the scope of the employee's employment for immunity purposes.

One can imagine a broad range of issues arising from a teacher's use (or non-use) of a firearm in the context of a school shooting incident. In no particular order:

- What are the negligent training implications if an armed teacher inadvertently shoots a student or other bystander during a school shooting incident? Is the school district liable, or is the training provider? What if the training provider is a law enforcement agency?

- What are the liability implications if a teacher/administrator fails to keep the firearm in his/her possession or control, as required by the Policy (and the statute), and a weapon is stolen or lost?

- What are the liability implications if an unauthorized teacher/administrator brings a weapon to school and it is used, either in the commission of a crime, or if it misused in an attempt to stop or prevent a shooting incident from occurring?

- What are the liability implications if an authorized teacher, with a concealed carry permit and all of the appropriate training, fails to respond to a school shooting incident, as expected, and death or injury results? Is the teacher liable for having failed to stop or prevent the incident? Is the school?

- What are the liability implications for a school if the teachers and administrators seek concealed carry approval in such small numbers that the number of armed teachers on the school campus at any one time is always very small, or even non-existent?

- What are the liability implications for a school district that chooses not to adopt concealed carry rules for its teachers, but other surrounding communities typically do? Does the prevailing local culture create a duty of care on each local school?

- What are the liability implications if an armed and approved teacher mistakes a school scuffle for a shooting incident, forms an objectively reasonable perception that his life or the lives of others in the area, are at risk, and shoots someone? Must the "imminent risk of death or serious bodily injury" be posed by someone with another firearm? Or can a teacher use a gun to break up a fist fight?

- What are the liability implications if a teacher with a firearm delays calling law enforcement to intervene in a shooting incident because the teacher has elected to "take matters into his/her own hand" by using a firearm to intervene in the incident in an attempt to stop it?

- What are the liability implications if the teacher's firearm of choice is clearly inadequate to counter, for example, an assault rifle being used by a live shooter?

- Given the high prevalence of suicide among mass shooters, is it possible that arming teachers will actually encourage a mass shooter to attack an "armed" school? Or, might the presence of armed teachers encourage a mass shooter to arm himself more heavily than he otherwise would?

- What are the coverage and underwriting implications of a school district electing to permit its employees to bring concealed firearms into a school?

On the subject of liability claims against third parties resulting from a mass shooting at a school, the estate of one of the teenage victims of the Parkland, Florida high school shooting filed suit on April 30, 2018 against the shooter, an armed school security guard who is alleged to have been unresponsive to the attack, several mental health agencies who are alleged not to have properly treated the shooter's mental health issues or to have failed to notify law enforcement that he posed a risk of violence because of his mental state, and several of his adult guardians for having failed to prevent the shooter from having access to firearms and for failing to intervene and secure proper mental health treatment for him. A copy of the Complaint in *Pollack v. Cruz, et al*, Docket No. CACE-18-009607-(26)(Broward County, April 30, 2018), is attached in the Appendix.

One final source of information. Concealed carry laws are almost exclusively a matter of state law, and evaluating a third-party liability claim resulting from a school shooting incident where armed teachers or administrators may have played a role requires knowledge of what the local laws are with regard to carrying concealed weapons in school. The following compendium of such laws is largely taken from a gathering of the relevant state statutes compiled by researchers at the Giffords Law Center to Prevent Gun Violence. *See generally* http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/guns-in-schools/. In addition to this collection of statutory references on guns in schools, the Giffords web site contains a wealth of additional information about state and federal gun laws, background checks, "safe schools"

training, Second Amendment case law, etc. Irrespective of your political views on gun ownership and gun safety, the site is a rich resource of information. *See* http://lawcenter.giffords.org/.

State	**Guns in K-12 Schools**	**Concealed Carry in K-12 Schools**	**Statutory Citation**
AL	Prohibited	Allowed	Ala. Code § 13A-11-72(c), (e) and (g).
AK	Prohibited	Allowed	Alaska Stat. §§ 11.61.210(a)(7), (8) Alaska Stat. §§ 18.65.755.
AZ	Prohibited	Prohibited in public schools; private schools may prohibit.	Ariz. Rev. Stat § 13-3102(A)(12), (C)(4), (H), (M) (4), (5); § 15-341(A)(23) *see also* Op. Att'y Gen. Ariz. No. I16-009 (R15-024) (Sept. 2, 2016), 2016 Ariz. AG LEXIS.)
AR	Prohibited	Prohibited	Ark. Code Ann. § 5-73-119(b)(1), 306(14). An exception applies to possession at private K-12 schools and preschools run by houses of worship in certain circumstances.
CA	Prohibited	Prohibited	Cal. Penal Code §§ 626.9(b), (c), (e)(1); Cal. Penal Code § 30310(a).
CO	Prohibited	Prohibited	Col. Rev. Stat. § 18-12-105.5(1), 214(3).
CT	Prohibited	Prohibited	Conn. Gen. Stat. § 53a-217b(a).
DE	Prohibited	Prohibited	Del. Code Ann. Tit. 11, §1457(a)-(c).
DC	Prohibited	Prohibited	DC Code Ann. § 22-4502.01.
FL	Prohibited	Prohibited	Fla. Stat. §§ 790.06(12)(a)(7), (9), (10), 790.115(1)-(2)(a), (c); 810.095.
GA	Prohibited	Prohibited	Ga. Code Ann. § 16-11-127.1.
HI	No relevant statute		Hawaii has no relevant statute.
ID	Prohibited	Prohibited	Idaho Code § 18-3302C, 3302D(1), (2)(e), (4).

State	Guns in K-12 Schools	Concealed Carry in K-12 Schools	Statutory Citation
IL	Prohibited	Prohibited	720 Ill. Comp. Stat. 5/24-1(a)(4), (a)(9), (a)(10), (c)(1), (c)(1.5), (c)(4); 430 Ill. Comp. Stat. 66/65(a)(1).
IN	Prohibited	Prohibited	Ind. Code ann. §§ 35-47-9-1(a), 2.
IA	Prohibited	Prohibited	Iowa Code §§ 280.2; 724.4B(1).
KS	Prohibited	Schools May Prohibit	Kan. Stat. An. § 21-6301(a)(11); H.B. 2052, 85th Leg., Reg. Sess. (Kan. 2013); Kan. Stat. Ann. § 75-7c10(a).
KY	Prohibited	Prohibited	Ky. Rev. Stat. Ann. §§ 237.110(16)(f), 527.070.
LA	Prohibited	Prohibited	La. Rev. Stat. Ann. §§ 14:95.2(A), 14:95.6; 40:1379.3(N)(11).
ME	Prohibited	Prohibited	Me. Rev. Stat. Ann. Tit. 20-A, § 6552.
MD	Prohibited	Prohibited	Md. Code Ann., Crim. Law § 4-102.
MA	Prohibited	Prohibited	Mass. Gen. Laws ch. 269, § 10(j).
MI	Prohibited	Prohibited	Mich. Comp. Laws §§ 28.425o(1)(a), 750.237a(4), (6)(b), (6)(d).
MN	Prohibited	Prohibited	Minn. Stat. § 609.66, Subd.1d.
MS	Prohibited	Prohibited	Miss. Code. Ann. §§45-9-101(13); 97-37-17.
MO	Prohibited	Prohibited	Mo. Rev. Stat. §§ 571.030.1(10); 571.107.1(10).
MT	Prohibited	Prohibited	Mont. Code. Ann. § 45-8-361(1), (5).
NE	Prohibited	Prohibited	Neb. Rev. Stat. §§ 28-1201(8), 28-1204.04(1), 69-2441(1)(a).
NV	Prohibited	Prohibited	Nev. Rev. Stat. Ann. §§ 202.265(1)(e), 202.3673(3)(a).

State	Guns in K-12 Schools	Concealed Carry in K-12 Schools	Statutory Citation
NH	**Allowed**	**Allowed**	*See* NH Rev. Stat. Ann. §§ 193-D:3; 193-D:1; 193:13.
NJ	Prohibited	Prohibited	N.J. Stat. Ann. § 2C:39-5e.
NM	Prohibited	Prohibited	N.M. Stat. Ann. §§ 29-19-8(B), (C); 30-7-2.1.
NY	Prohibited	Prohibited	N.Y. Penal Law §§ 265.01(3), 265.01-a, 265.20(a)(3).
NC	Prohibited	Prohibited	N.C. Gen. Stat. § 14-269.2.
ND	Prohibited	Prohibited	N.D. Cent. Code § 62.1-02-05.
OH	Prohibited	Prohibited	Ohio Rev. Code Ann. § 2923.122.
OK	Prohibited	Prohibited	Okla. Stat. tit. 21, § 1280.1. *But see* Okla. Stat. tit. 21, § 1277(D).
OR	Prohibited	**Allowed**	Or. Rev. Stat. §§ 166.360(4); 166.370(1), (3)(d), (g).
PA	Prohibited	Prohibited	18 Pa. Cons. Stat. Ann. § 912.
RI	Prohibited	Prohibited	R.I. Gen. Laws § 11-47-60.
SC	Prohibited	Prohibited	S.C. Code Ann. §§ 16-23-420(A); 16-23-430; 23-31-215(M)(5), (6), (7).
SD	Prohibited	Prohibited	S.D. Codified Laws § 13-32-7; *but see,* S.D. Codified Laws § 13-64-1.
TN	Prohibited	Prohibited	Tenn. Code Ann. § 39-17-1309(b), (c); *but see,* Tenn. Code Ann. §§ 49-50-803 and 49-7-161; 2016 TN S.B. 2249, amending Tenn. Code Ann. §§ 49-6-816 and 39-17-1309.
TX	Prohibited	Prohibited	Tex. Penal Code § 46.03(a)(1), (f); Tex. Educ. Code § 37.125(a).
UT	Prohibited	**Allowed**	Utah Code Ann. § 76-10-505.5.
VT	Prohibited	Prohibited	Vt. Stat. Ann. Tit. 13, § 4004.

State	**Guns in K-12 Schools**	**Concealed Carry in K-12 Schools**	**Statutory Citation**
VA	Prohibited	Prohibited	Va. Code Ann. § 18.2-308.1(B), (C).
WA	Prohibited	Prohibited	Wash. Rev. Code Ann. § 9.41.280.
WV	Prohibited	Prohibited	W. Va. Code § 61-7-11a(b); *but see* 2017 WV SB 388 (signed by the Governor Apr. 26, 2017), amending W. Va. Code §§ 61-7-11a, 61-7-14.
WI	Prohibited	Prohibited	Wis. Stat. § 948.605.
WY	**No relevant statute**	**Allowed** for school employees	Wyo. Stat. 21-3-132.

APPENDIX

- Wyoming Gun Statute

- Cody Wyo. Gun Ordinance

- *Pollack v. Cruz* Complaint

WYOMING FIREARMS STATUTE

21-3-132. Possession of firearms on school property.

(a) The board of trustees in each school district may adopt rules and regulations, in consultation with local law enforcement, to allow the possession of firearms by employees possessing a valid concealed carry permit under W.S. 6-8-104 on or in any property or facility owned or leased by the school district. Employees of a school district who hold a valid concealed carry permit issued under W.S. 6-8-104 may carry a concealed firearm on or into school facilities or other areas designated by the board of trustees, provided the employing school district has adopted rules and regulations that allow possession of firearms on school property and the employee has received approval by the board of trustees as required by this section.

(b) For purposes of this section, "employee" means any person employed under contract with the board of trustees of a school district, including but not limited to, superintendents, assistant superintendents, principals, assistant principals, teachers, guidance counselors, librarians, teacher's aids, coaches, business managers, secretaries or administrative assistants, janitors, bus drivers, volunteers or other employees on contract with a school district.

(c) The rules required by subsection (a) of this section shall at a minimum:

(i) Establish an application and approval process for employees possessing a valid concealed carry permit under W.S. 6-8-104 to carry a firearm on school property;

(ii) Require any person carrying a firearm pursuant to this section to maintain the firearm on his person at all times or in a concealed biometric container or lock box within the direct control of the individual at all times;

(iii) Establish ongoing training requirements, curricula and instructor qualifications, subject to approval by local law enforcement, including:

(A) An initial course of training comprised of not less than sixteen (16) hours of live fire handgun training, and eight (8) hours of scenario based training using nonlethal training, firearms and ammunition; and

(B) Annual firearm qualification and documented recurrent training of not less than twelve (12) hours with an approved instructor.

(iv) Provide a process for the revocation or suspension of the authorization under this section for an employee to carry a firearm on school property.

(d) The board of trustees in any school district may waive all or part of the training requirements of subsection (c) of this section for isolated rural schools and employees in those schools.

(e) The superintendent of the district shall notify the parents and guardians of students attending school in the district of the ability of employees to carry firearms and the rules and regulations governing possession.

(f) The superintendent of the district shall notify all law enforcement agencies with jurisdiction over the area of the location and names of all employees who receive permission to carry firearms from the district's board of trustees. The identities of the employees who receive permission to carry firearms from the district's board of trustees shall be confidential and are not public records for purposes of W.S. 16-4-201 through 16-4-205.

(g) Nothing in this section shall authorize an employee to carry a firearm, concealed or otherwise, on or into any facility or other school district property without the express approval of the board of trustees and notification of parties as required by this section.

(h) Nothing in this section shall authorize a student of a school district to carry a firearm, concealed or otherwise, on or into any facility of a school district.

(j) Any rules and regulations adopted under this section shall only apply to persons who are employees, as defined in subsection (b) of this section.

PARK COUNTY SCHOOL DISTRICT #6
BOARD OF EDUCATION POLICY

Code: CKA

FIREARMS: PERSONNEL AUTHORIZED TO CARRY

Pursuant to W.S. 21-3-132, the Board of Trustees of Park County School District No. 6 may authorize employees to conceal carry firearms on property or in facilities owned or leased by Park County School District No. 6, subject to the terms, condition, and limitations prescribed by state law and federal law, this policy and such other policies, rules and regulations adopted by the Board of Trustees. The Board of Trustees shall establish and approve ongoing training requirements, curricula and instructor qualifications, subject to approval by local law enforcement. Employees are subject to and shall comply with Policy EBC – Emergency Preparedness. Safety protocol for Employees Authorized to Carry will be made in consultation with the Superintendent, School Resource Officer (SRO), School Safety and Security Supervisor, local law enforcement and subject matter experts. Student safety and security shall be the first priority of all employees in the event of an emergency. Conceal carry staff members shall consider their skills, training and available tactics when determining the safest course of action for student safety during an emergency.

DEFINITIONS:

"Board" shall mean the Board of Trustees of Park County School District No. 6.

"Concealed Carry Firearm" shall, for purposes of this policy, mean any modern, concealable handgun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

"Employed Under Contract" shall mean:

> Employees employed by Park County School District No. 6, including, but not limited to: the superintendent, assistant superintendents, principals, assistant principals, teachers, guidance counselors, librarians, teacher's aides (paraprofessionals), coaches, business managers, secretaries or administrative assistants, janitors, and bus drivers. For purposes of this policy and W.S. 21-3-132, classified and other at-will employees at the rural schools may be offered at the discretion of the Board of Trustees, an at-will contract in order to meet the requirements of the statute. The review, consideration or approval of an application by an employee to carry a firearm shall in no way be construed to alter the at-will status of any employee.

"Firearm" shall, for purposes of this policy, mean any weapon, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

"Local Law Enforcement" shall be defined as the City of Cody Chief of Police and the Park County Sheriff.

"School District" shall mean Park County School District No. 6.

"School district property" shall mean all real property, buildings, facilities, and structures owned or leased by Park County School District No. 6., and shall also include vehicles owned or leased by the School District.

LIABILITY INSURANCE

As a part of the district's umbrella insurance coverage, the board of trustees carries liability insurance acquired to protect employees against damage suits arising out of the employee's performance of his/her duties within the scope of his/her employment and assigned responsibilities with the school district. Reference Policy GCBH – Liability Insurance.

APPLICATION AND REQUIREMENTS

Any person Employed Under Contract by the School District who wishes to carry a firearm on school district property shall submit an application through the Superintendent to the Board. CKA-R1- (*Application to Carry Firearm on School Property*). The application shall be signed by the employee and sworn under oath. The Board, in its sole and absolute discretion, may initially approve, deny or initially approve with conditions such application, for any reasons, based on the Board's determination of what is in the best interests of the School District. The Board may limit the number of persons who carry firearms within the School District or within a school.

Any person Employed Under Contract by the School District who wishes to carry a firearm on school district property shall satisfy the following requirements. Upon completion of all requirements (with the exception of the requirement in section f.2, which must be completed on an annual basis if the employee is approved), the Board will determine whether to approve, deny or approve with conditions the employee's application to carry:

a. Employee must be in good standing and shall not currently be on nor have been on any plan of improvement within the past five years.

b. Employee shall have been employed by the Park County School District No. 6 for a minimum of two continuous years prior to making application.

c. The employee must possess and maintain a valid State of Wyoming concealed firearm permit issued pursuant to W.S. 6-8-104, and must submit a copy of such permit with the application, and must submit all renewals of that permit during the time while the employee is authorized to carry a firearm on school district property.

d. The employee shall submit to a Wyoming Department of Family Services (DFS) Central Registry Screening.

e. The employee shall submit to a psychological suitability exam by a provider selected by the Board of Trustees. The results of the psychological suitability exam shall be received by and remain the property of Park County School District No. 6. Results of the exam shall be submitted by the provider to the district before an application will be considered. At the discretion of the Superintendent and by recommendation of an Administrator, subsequent exam(s) may be required.

f. The employee shall fulfill the training requirements and curricula as determined and approved by The Board and Local Law Enforcement in *CKA-R4*. Additionally, initial and annual training requirements shall include live fire with barricades, kneeling, magazine change and firing from the non-dominant hand. The employee shall submit a certificate of completion for the initial training.

1. Prior to carrying a firearm on School District property, successfully complete an initial training course approved by the Board comprised of not less than sixteen (16) hours of live fire handgun training, and eight (8) hours of scenario based training using non-lethal training, firearms, and ammunition.

2. Thereafter, the employee shall provide documentation of qualification and recurrent training to include live fire and scenario based training of not less than eighteen (18) hours each year with a board approved trainer. The Board of Trustees also recommends participation in law enforcement training opportunities when available.

3. In addition to, or as part of the training requirements above, the employee shall participate in training specifically designed to address active shooter situations, hostage situations, and situations with armed students who present a threat to themselves or others.

g. The employees shall consent in writing to drug and alcohol testing, including but not limited to random drug and alcohol testing (refer to CKA-R5). Written consent shall be included in the application form attached to this policy as Regulation CKA-R1.

h. Each employee who is approved by the Board to carry a firearm on school district property shall keep and maintain the firearm on his or her person at all times, or at the discretion of the Board, in a concealed, locked, biometric container within the direct control of the individual at all times.

i. All expenses for the psychological suitability exam, Wyoming DFS central registry screening, drug testing, concealed biometric container and initial training with associated costs shall be borne by the district. All other expenses such as but limited to: firearms, ammunition, holster, and annual training shall be borne by the employee.

j. Employee will disclose to their administrator or direct supervisor any circumstance that would reasonably reflect on their competence to convey a firearm into a school safety zone, including but not limited to a citation or arrest for or conviction of a crime (other than parking or minor moving traffic violations), the use of any medication or other substance that could impair the person's judgment, or any medical, mental or other condition that could impair or interfere with the person's ability to responsibly convey a deadly weapon into a school safety zone. Failure to do so is cause for disciplinary action including and up to termination.

k. Policy CKA authorizes approved employees to carry a firearm on School District property. The employee shall have no authority under this policy to carry such firearm on school district business or activities away from or off of school district property.

USE OF FIREARMS

An employee who receives approval by the Board to carry a firearm pursuant to this policy shall only fire his or her firearm if he or she reasonably perceives that his or her life, or the life or lives of others, are in imminent risk of death or serious bodily injury.

In the event that a firearm is fired for any reason, the employee shall be placed immediately on paid administrative leave pending an investigation of the incident. The District shall require that a fit-for-duty exam be taken and passed prior to the Employee Authorized to Carry **resuming** their duty, and shall require the employee to follow any recommendations as a result of the exam. The results of the psychological suitability exam shall be received by and remain the property of Park County School District No. 6. The District shall absorb the cost of this exam.

Nothing herein is intended to limit or prevent the school district or any board member or employee from asserting the defense of governmental immunity to any claim arising from the possession or use of a firearm. To the extent an employee uses a firearm as authorized by and in compliance with this policy, such conduct shall be deemed to be within the scope of the employee's employment for immunity purposes.

REVOCATION/SUSPENSION OF BOARD APPROVAL TO CARRY FIREARM

Any employee who is approved by the Board to carry a firearm on School District property is subject to having such privilege suspended by the Superintendent at any time for any reason, including at the request of the employee. The Superintendent shall notify the Board, supervising administrators or supervisors, and Local Law Enforcement of any suspension. The Board shall review any suspension of privileges and may suspend or revoke at any time without prior notice to the employee for any reason. There shall be no right to a hearing, appeal or other recourse following such decision. The suspension may be temporary or permanent at the discretion of the Board.

WITHDRAWAL OF PRIVILEGE

If an armed employee decides to withdraw from staff conceal carry status, withdrawal notification must be submitted in writing to the Superintendent. Once accepted by the Superintendent, forfeiture of conceal carry status is immediate. The Superintendent will notify the Board, supervising administrators or supervisors, and Local Law Enforcement.

FIREARMS/HOLSTER AND AMMUNITION

The Employee Authorized to Carry must present a firearm, holster, and ammunition, meeting the requirements as stated in CKA-R2 and CKA-R3, for inspection and review by trainers and/or law enforcement advisors identified by the Board of Trustees. The employee shall use the firearm in initial and annual training events; and carry this firearm only, upon approval of the application. The make, model, caliber, and the serial number of firearm approved for use will be documented in the individual's application packet – CKA-R1.

If an approval applicant requests to change either firearm or holster, applicant shall refer to CKA-R2.

The Employee Authorized to Carry is responsible for the care and cleaning of their approved firearm. Maintenance shall be consistent with the manufacturer recommendations.

Firearms will be inspected once a year per CKA-R2 and Employee Authorized to Carry shall provide written documentation of the inspection and condition of the firearm to the Superintendent.

NOTICE OF APPROVAL

The Superintendent shall notify parents and guardians of students attending school in the district of the ability of employees to carry firearms and the rules and regulations governing possession.

The Superintendent shall notify Local Law enforcement of the location and names of all employees approved by the Board to carry firearms on school district property.

The Superintendent shall notify supervising administrators or supervisors the names of the concealed carry employees, for **whom** they directly supervise.

CONFIDENTIALITY

The identities of the employees who receive permission to carry firearms from the Board shall be confidential and are not public records for purposes of W.S. 16-4-201 through 16-4-205.

PARK COUNTY SCHOOL DISTRICT #6
BOARD OF EDUCATION POLICY

COMPLIANCE

Any employee approved to carry a concealed weapon on school district property shall comply with all provisions, regulations, and exhibits of this policy. Any employee who is authorized by this policy to carry a firearm who fails to comply with any provision of this policy will be subject to disciplinary action, up to and including termination.

LIMITATIONS OF THIS POLICY

Nothing in this policy shall be construed to permit, allow or in any way authorize any person to carry a firearm or other weapon, concealed or otherwise, in violation of local, state and federal law. Any person who is approved to carry a firearm pursuant to this policy shall be responsible for complying with any and all applicable laws.

Nothing in this policy shall authorize a student or member of the public to carry a firearm, concealed or otherwise, on school district property.

Approval for an employee to carry a firearm pursuant to this policy shall not convey any property right, additional compensation, or any continuing right to carry a firearm. The Board of Trustees may revoke or suspend such approval at any time, without notice or a right to a hearing, as described above. Approval to carry a firearm shall not be construed to imply any continuing contract status, or any employment contract rights.

Adopted: 4/17/2018

Filing # 71417129 E-Filed 04/30/2018 01:50:58 PM

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE-18-009607-(26)

ANDREW POLLACK, as Personal Representative of the Estate of **MEADOW POLLACK**, Decedent,

Plaintiff,

vs.

NIKOLAS CRUZ; SCOT PETERSON; the ESTATE OF LYNDA CRUZ; JAMES SNEAD; KIMBERLY SNEAD; HENDERSON BEHAVIORAL HEALTH, INC.; JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC.; and SOUTH COUNTY MENTAL HEALTH CENTER, INC.,

Defendants.
_____/

COMPLAINT AND DEMAND FOR JURY TRIAL

ANDREW POLLACK, as Personal Representative of the Estate of MEADOW POLLACK, Decedent, by and through undersigned counsel, sues the Defendants, NIKOLAS CRUZ, SCOT PETERSON, the ESTATE OF LYNDA CRUZ, JAMES SNEAD, KIMBERLY SNEAD, HENDERSON BEHAVIORAL HEALTH, INC., JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC., and SOUTH COUNTY MENTAL HEALTH CENTER, INC., for wrongful death as follows:

PARTIES, JURISDICTION, VENUE, AND ALLEGATIONS COMMON TO ALL COUNTS

1. This wrongful death action is for damages in excess of this Court's minimum jurisdictional requirements, exclusive of interest and costs.

2. The potential beneficiaries of a recovery for wrongful death in the instant action are: Plaintiff, who is the surviving father of the Decedent; Shara Kalpan, who is the surviving mother of the Decedent; and the Decedent's Estate. Plaintiff and Shara Kaplan reside separately in, and are citizens of, the state of Florida.

3. This wrongful death action accrued in Broward County, Florida.

4. Jurisdiction of the subject matter, personal jurisdiction over the Defendants and venue are all proper in Broward County, Florida.

5. The Defendant NIKOLAS CRUZ is over the age of 18 years, *sui juris*, and a beneficiary of Defendant, the ESTATE OF LYNDA CRUZ.

6. The Defendant, the ESTATE OF LYNDA CRUZ, is Case No.: 062018CP000799A001CE in the Probate Court in and for the Seventeenth Judicial Circuit in and for Broward County, Florida, and consists of the assets of Lynda Cruz, the adoptive mother of the Defendant, NIKOLAS CRUZ, as of her death on November 1, 2017, and names NIKOLAS CRUZ as a beneficiary.

7. The Defendant SCOT PETERSON is over the age of 18 years and *sui juris*,

8. The Defendant JAMES SNEAD, is over the age of 18 years, *sui juris*, and the husband of Defendant, KIMBERLY SNEAD.

9. The Defendant KIMBERLY SNEAD is over the age of 18 years, *sui juris*. and the wife of Defendant, JAMES SNEAD.

10. The Defendant, HENDERSON BEHAVIORAL HEALTH, INC., is a Florida not for profit corporation that was at all times material hereto licensed to do and doing business in Broward County, Florida.

11. The Defendant, JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC., is a Florida not-for-profit corporation that was at all times material hereto licensed to do and doing business in Palm Beach County, Florida.

12. The Defendant, SOUTH COUNTY MENTAL HEALTH CENTER, INC., is a Florida not-for-profit corporation that was at all times material hereto licensed to do and doing business in Palm Beach County, Florida.

13. At all times material hereto, NIKOLAS CRUZ suffered from and was subject to severe mental illness and was prone to violence.

14. At all times material hereto until her death, NIKOLAS CRUZ resided with his adoptive mother, Lynda Cruz.

15. The following chronological summary sets forth relevant events that occurred during the period in which NIKOLAS CRUZ resided with Lynda Cruz:

    a. In November, 2012, Lynda Cruz reported that NIKOLAS CRUZ attacked her with a plastic vacuum cleaner hose.

    b. In January, 2013:

        i. Lynda Cruz reported that NIKOLAS CRUZ threw her against a wall because she took away from him his X-box video game system.

        ii. Lynda Cruz told police that NIKOLAS CRUZ suffered from ADHD, OCD, and anger issues.

        iii. A counselor with HENDERSON BEHAVIORAL HEALTH, INC. determined that NIKOLAS CRUZ did not warrant hospitalization for mental health evaluation.

    c. During the 2013 school year, NIKOLAS CRUZ accrued 26 disciplinary incidents at the middle school he attended, averaging almost three per month.

    d. In February, 2014, NIKOLAS CRUZ enrolled in Cross Creek, a school for students with emotional and behavioral disorders.

e. In June, 2015, school records note that NIKOLAS CRUZ was distracted on more than one occasion by other students' inappropriate conversations concerning guns, people being killed, or armed forces.

f. In January, 2016, NIKOLAS CRUZ enrolled as a full-time student at Marjory Stoneman Douglas High School in Parkland, Florida.

g. In February 2016, police received a report that NIKOLAS CRUZ had posted a photograph of himself with guns on Instagram, stating to the effect that he planned "to shoot up the school." A deputy responded to the house, found that he had knives and a BB gun, and subsequently passed the information to Broward Sheriff's Deputy SCOT PETERSON, the School Resource Officer ("SRO").

h. In September, 2016:

   i. NIKOLAS CRUZ was suspended from school and referred to social workers after getting into a fight following a break-up with his girlfriend.

   ii. NIKOLAS CRUZ turned 18 years of age.

   iii. A student reported to SRO Deputy SCOT PETERSON that NIKOLAS CRUZ, while depressed, had cut himself and ingested gasoline in an attempt to kill himself. The student further stated that NIKOLAS CRUZ wanted to buy a gun for hunting, had drawn a swastika on his backpack next to the words "I hate n-----s".

   iv. Counselors from HENDERSON BEHAVIORAL HEALTH, INC., advised police that NIKOLAS CRUZ "was not a risk to harm himself or anyone else" because he was on a treatment plan for ADHD, depression, and autism.

v. The Florida Department of Children and Families opened an investigation of NIKOLAS CRUZ, calling him a "vulnerable adult due to mental illness". The report notes that he plans to buy a gun, but "it is unknown what he is buying the gun for."

i. In November, 2016, The Florida Department of Children and Families closed its investigation of NIKOLAS CRUZ. It reported that his "final level of risk [was] low," noting that his mental health clinician stated that he took his medication regularly and kept his appointments. The report further found that he suffered from depression, ADHD, and autism.

j. In January, 2017, NIKOLAS CRUZ was suspended for "low assault" and referred for a threat assessment.

k. In February, 2017:

i. NIKOLAS CRUZ was expelled from school after fighting and told not to return.

ii. NIKOLAS CRUZ purchased the AR-15 rifle that he would use approximately one year later in committing the massacre at Marjory Stoneman Douglas High School. This was one of at least ten guns he purchased after his 18th birthday.

l. In September, 2017, the Federal Bureau of Investigation received a report from Mississippi that someone identifying himself as "nikolas cruz" had left a message on a YouTube channel stating "I'm going to be a professional school shooter."

16. On November 1, 2017 Lynda Cruz died after a brief illness.

17. That same day, a cousin of Lynda Cruz called the police to report that NIKOLAS CRUZ had weapons and requested that they be removed.

18. Shortly thereafter, NIKOLAS CRUZ moved in with a family friend, Rocxanne Deshamps, and her son, Rock.

19. The Deschamps forbade NIKOLAS CRUZ from bringing or otherwise possessing any guns on the property, and after arguments and at least one fight, NIKOLAS CRUZ vacated the Deshamps' residence.

20. In late November, 2017, NIKOLAS CRUZ moved in with a friend from school and his parents, JAMES SNEAD and KIMBERLY SNEAD (collectively, "the SNEADS").

21. The SNEADS allowed NIKOLAS CRUZ to bring and possess his guns on their property, including the AR-15 rifle that he subsequently used in committing the massacre at Marjory Stoneman Douglas High School.

22. At all times material hereto, the SNEADS undertook to maintain exclusive control over NIKOLAS CRUZ'S guns by placing them in their locked gun safe to which JAMES SNEAD has asserted he possessed the only key.

23. At all times material hereto, contrary to said assertion by JAMES SNEAD, NIKOLAS CRUZ had access to one or more of his guns, while residing at the SNEADS' residence, including the AR-15 rifle that he subsequently used in committing the massacre at Marjory Stoneman Douglas High School.

24. On or about January 5, 2018, the Federal Bureau of Investigation received a report from "a person close to NIKOLAS CRUZ" who was worried about him "getting into a school and just shooting the place up." The caller reported concerns about his "gun ownership, desire

to kill peoples, erratic behavior, and disturbing social media posts, as well as the potential of him conducting a school shooting."

25. Sheriff Scott Israel reported that his office has responded to or been involved in some way with 23 type calls involving NIKOLAS CRUZ or his family prior to the shooting. However, based on logs of the original calls and additional records obtained by CNN, it appears that the Broward County Sheriff's Office actually received 45 calls in the past decade related to the Cruz home, NIKOLAS CRUZ or his brother. Descriptions of those calls range from "mentally ill person" to "child/elderly abuse," "domestic disturbance," "missing person," and more. The vast majority of the calls resulted in "no written report."

26. On February 14, 2018, NIKOLAS CRUZ removed the AR-15 from the gun safe at the home of the SNEADS and, employing an UBER driver, travelled to Marjory Stoneman Douglas High School in Parkland, Broward County, Florida.

27. On that date, at approximately 2:21 p.m., NIKOLAS CRUZ entered Building 12 and began shooting both students and teachers alike.

28. NIKOLAS CRUZ used his AR-15 rifle to kill 17 students and teachers, and shooting and wounding more.

29. The Decedent, MEADOW POLLACK, was one of the 17 people whom NIKOLAS CRUZ shot to death.

30. Specifically, NIKOLAS CRUZ shot MEADOW POLLACK four times after she exited a classroom on the third floor of Building 12. In an awe inspiring display of heroism and fortitude, after being shot, MEADOW POLLACK, crawled down the hallway to another student, a freshman. MEADOW POLLACK then laid her bullet riddled body on top of the other student, who had not yet been shot, in an attempt to protect the freshman. But

NIKOLAS CRUZ was unrelenting in his savagery. He pointed his assault rifle at MEADOW POLLACK'S back and shot into it repeatedly. The bullets pierced through MEADOW POLLACK'S back and into the child beneath her, killing both students. In a final act or barbarity, NIKOLAS CRUZ shot MEADOW POLLACK in her head.

COUNT I
WRONGFUL DEATH AGAINST NIKOLAS CRUZ

31. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

32. As result of NIKOLAS CRUZ shooting and killing MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

33. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, NIKOLAS CRUZ, for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT II
WRONGFUL DEATH AGAINST SCOT PETERSON

34. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

35. Confucius perfectly sums up SCOT PETERSON's conduct on February 14, 2018: "To know what is right and not do it is the worst cowardice." SCOT PETERSON is a coward.

36. When NIKOLAS CRUZ entered Building 12 on the Marjory Stoneman Douglas High School campus on February 14, 2018, at approximately 2:21 p.m., he did so by entering the east stairwell.

37. His AR-15 rifle was inside a soft black case. When he exited the stairwell, he pulled the AR-15 rifle out of the case and began firing.

38. NIKOLAS CRUZ set off the school's fire alarm prompting the start of the evacuation of some 3,000 students and staff.

39. NIKOLAS CRUZ then began shooting into four classrooms.

40. NIKOLAS CRUZ then then took another stairwell to the second floor and shot another victim.

41. Some students took cover inside classrooms while others jumped over fences to escape and take shelter.

42. At approximately 2:22 p.m., SCOT PETERSON was near the Administration Building.

43. Also, at approximately 2:22 p.m., the first 911 call is made to the City of Coral Springs communications center.

44. At approximately 2:23 p.m., SCOT PETERSON headed in the direction of Building 12. He advised over Broward Sheriff's Communication Dispatch: "Be advised we have possible, could be firecrackers, I think we have shots fired, possible shots fired, 1200 Building."

45. Instead of actually entering Building 12 as he should have, SCOT PETERSON positioned himself out of harm's way, though within earshot of the NIKOLAS CRUZ'S carnage, outside of the southeast corner of Building 12 and the northeast corner of Building 7.

46. SCOT PETERSON cowered in his safe location between two concrete walls outside of Building 12 the entire time NIKOLAS CRUZ trained his AR-15 and rained bullets upon the teachers and students of Marjory Stoneman Douglas High School.

47. Also at approximately 2:23 p.m., Coral Springs Fire Department was dispatched to the school.

48. A Broward Sheriff's Deputy advised Broward Sheriff's Communication Dispatch that shots were heard all the way out by the football field. SCOT PETERSON, from his safe and cowardly position, called on multiple occasions for the school to be locked down.

49. SCOT PETERSON's lockdown prevented students and teachers from escaping Building 12. SCOT PETERSON even commanded: "We're in total lockdown right now. Nobody's leaving the school, everybody's in lockdown."

50. SCOT PETERSON had no doubt the gunfire was coming from Building 12. Indeed, at approximately 2:24 p.m., he advised Broward Sheriff's Communication Dispatch: "We're talking about the 1200 building, it's going to be the building off Holmberg Road."

51. NIKOLAS CRUZ continued firing at the teachers and students of Marjory Stoneman Douglas High School for what must have seemed like an eternity to those inside Building 12.

52. At approximately 2:27 p.m., hearing the calls for help over Coral Springs Dispatch, a Coral Springs Officer arrived at the school.

53. Also at approximately 2:27 p.m., the cowardly SCOT PETERSON, still in his safe location, advised Broward Sheriff's Communication Dispatch: "Make sure I have a unit over in the front of the school, make sure no one comes inside the school." SCOT PETERSON continues his directive advising Broward Sheriff's Communication Dispatch to order the

real police officers to stay away: "Broward. Do not approach the 12 or 1300 building, stay at least 500 feet away at this point."

54. Also at approximately 2:27 p.m., while SCOT PETERSON remained guarded by two concrete walls outside of Building 12 for four minutes, NIKOLAS CRUZ took Building 12's east stairwell to the third floor, where he dropped the AR-15 rifle, ran down another set of stairs, exited the building, and ran toward the school tennis courts.

55. Law enforcement officers from Coral Springs Police Department and Broward Sherriff's Office arrived at various entry points along Marjory Stoneman Douglas High School's campus. As the law enforcement officers made their way to Building 12, doing what they were sworn and trained to do, some stopped to render aid to gunshot victims they encountered as they approached.

56. At approximately 2:29 p.m., Coral Springs Officer Tim Burton found SCOT PETERSON still shielded from danger in his safe position outside of Building 12, near the northeast corner of Building 7.

57. The pusillanimous SCOT PETERSON remained safe in his position away from NIKOLAS CRUZ, never once attempting to go inside Building 12 where the School Resource Officer knew the shooting was taking place, never once attempting to save a life, never once attempting to fire a single bullet at NIKOLAS CRUZ.

58. Rather, SCOT PETERSON waited and listened to the din of screams of teachers and students, many of whom were dead or dying, and the blasts of NIKOLAS CRUZ's repeated gunfire.

59. At approximately 2:32 p.m., real law enforcement officers made their way into Building 12. However, it was too late to stop NIKOLAS CRUZ. He had already left.

60. Prior to February 14, 2018, SCOT PETERSON underwent the Broward Sherriff's Office active-shooter training program.

61. Prior to February 14, 2018, SCOT PETERSON received at least one refresher training in Broward Sherriff's Office active-shooter training program.

62. Any suggestion that SCOT PETERSON was precluded by his training to enter Building 12 and addressed and killed NIKOLAS CRUZ before NIKOLAS CRUZ murdered MEADOW POLLACK would be patently false.

63. According to SCOT PETERSON'S training, Broward Sheriff's Office Department of Law Enforcement Standard Operating Procedures 4.37.2(C): "If real time intelligence exists the sole deputy or a team of deputies may enter the area and/or structure to preserve life. A supervisor's approval or on-site observation is not required for this decision."

64. There was only one person on the Marjory Stoneman Douglas High School campus on February 14, 2018 between 2:22 p.m. and 2:27 p.m. who could have stopped NIKOLAS CRUZ.

65. There was only one other person on the Marjory Stoneman Douglas High School campus on February 14, 2018 between 2:22 p.m. and 2:27 p.m. who was armed.

66. There was only one person on the Marjory Stoneman Douglas High School campus on February 14, 2018 between 2:22 p.m. and 2:27 p.m. who was trained to deal with an active shooter.

67. Unfortunately for the teachers and students of Marjory Stoneman Douglas High School, that one person was SCOT PETERSON.

68. During a February 25, 2018 interview with Jake Tapper on CNN, Broward Sherriff Scott Israel confirmed "while the killer was on campus with this horrific killing, there was one

deputy, one armed person within proximity of that school. And that was [SCOT PETERSON]."

69. Sheriff Israel added in the interview that "one deputy was remiss, dereliction of duty, and he's now no longer with this agency. And that's [SCOT PETERSON]."

70. SCOT PETERSON did nothing. He had the opportunity and obligation to prevent the death of those innocent people, including MEADOW POLLACK, who were on the third floor of Building 12. But he let those innocent people die because he was a coward.

71. On February 23, 2018, Broward Sherriff Scott Israel held a press conference after reviewing the footage of SCOT PETERSON'S pusillanimity on February 14, 2018, and Israel aptly stated he was: "Devastated. Sick to my stomach." When asked what SCOT PETERSON should have done when gunfire broke out at the Parkland school on February 14, Israel likewise aptly said SCOT PETERSON should have gone into the building and "[a]ddressed the killer. Killed the killer."

72. During the February 25, 2018, interview with Jake Tapper on CNN, Broward Sherriff Scott Israel unequivocally and rightly stated: "[D]o I believe if SCOT PETERSON went into that building, there was a chance he could have neutralized the killer and saved lives? Yes, I believe that."

73. Continuing in his interview with Jake Tapper, Broward Sherriff Scott Israel rightly recognized: "We push to the entry, to the killer. We get in, and we take out the threat."

74. In a separate interview on February 25, 2018, with an NBC 6 local news reporter, Israel added: "I gave [SCOT PETERSON] a gun. I gave him a badge. I gave him the training. If he didn't have the heart to go in, that's not my responsibility."

75. When SCOT PETERSON was observed on surveillance footage at 2:23:44 cowering at the southeast corner of Building 12, NIKOLAS CRUZ had not yet gone to the third floor and killed MEADOW POLLACK.

76. SCOT PETERSON irrefutably owed a duty of care to MEADOW POLLACK to have done by 2:23:44 what Sheriff Israel said: Enter Building 12, address the killer and kill the killer.

77. Had SCOT PETERSON done so, MEADOW POLLACK would not have been shot and killed.

78. There was an allocation of resources to employ and deploy SCOT PETERSON as an SRO for the purported safety and welfare of the administration, teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK.

79. This employment and deployment of SCOT PETERSON included stationing SCOT PETERSON as an SRO at all times during school hours to protect the administration, teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK, from a variety of threats, including those posed by active shooters.

80. The administration, teachers and students, including MEADOW POLLACK, constituted a discrete class of persons for whose benefit the employment and deployment of SCOT PETERSON, and the ostensible consequential deterrent and protective effects, provided.

81. Moreover, Marjory Stoneman Douglas High School was mandated to otherwise be a gun-free zone.

82. MEADOW POLLACK and her fellow students, the teachers and the administration all relied – MEADOW POLLACK and those killed or injured on the third floor to their detriment – on SCOT PETERSON being stationed as an SRO at all times during school hours to protect them from a variety of threats, including those posed by active shooters,

and being the only person armed with a firearm and hence the only one capable of protecting them from these threats.

83. SCOT PETERSON affirmatively further induced that reliance.

84. SCOT PETERSON had direct and continuing contact with the administration, teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK.

85. The students, including MEADOW POLLACK, were at all times at the school compelled into a custodial relationship with adults, all of whom save SCOT PETERSON, were mandatorily disarmed.

86. SCOT PETERSON'S duty of care to MEADOW POLLACK to enter Building 12, address the killer and kill the killer, is not barred by the public duty doctrine; that doctrine is inapplicable because SCOT PETERSON was not simply attempting to enforce a law and/or engaged in the protection of the general public; SCOT PETERSON owed MEADOW POLLACK this duty of care pursuant to traditional principles of tort law.

87. Alternatively, this duty of care is not barred by the public duty doctrine; the public duty doctrine is inapplicable because SCOT PETERSON was not simply attempting to enforce a law and/or engaged in the protection of the general public; instead, SCOTT PETERSON affirmatively sought to provide a service to the administration, teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK; this duty of care is thus engendered by the undertaker doctrine.

88. SCOT PETERSON undertook the duty to protect the administration, teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK, from a variety of threats against unreasonable risk of physical harm, including those posed by

active shooters, and he was required to exercise reasonable care in the fulfilment of that duty, which commanded that he enter Building 12, address the killer and kill the killer,

89. Alternatively, there exist one or more exceptions to the public duty doctrine.

90. First, SCOT PETERSON had a special relationship with the administration teachers and students – especially the students – at Marjory Stoneman Douglas High School, including MEADOW POLLACK, which gave rise to a duty to protect them against unreasonable risk of physical harm, and to enter Building 12, address the killer and kill the killer.

91. This special relationship existed, in whole or in part, by the aforesaid: Allocation of resources to employ and deploy SCOT PETERSON; the employment and deployment of SCOT PETERSON; the school grounds serving as a gun-free zone; the reliance on the employment and deployment of SCOT PETERSON; the further inducement by SCOT PETERSON of the reliance on his employment and deployment; the direct and continuing contact made by SCOT PETERSON; and/or the compelled custodial relationship.

92. Additionally or alternatively, SCOT PETERSON was an actual or apparent agent of the School, and the special relationship exception to the public duty doctrine in the context of schools and minor children, like MEADOW POLLACK, is firmly entrenched in the law.

93. Additionally or alternatively, a special tort duty exception to the public duty doctrine exists because SCOT PETERSON became directly involved in circumstances which placed people, including MEADOW POLLACK, within a "zone of risk" by creating or permitting dangers to exist or otherwise subjecting them to danger.

94. SCOT PETERSON permitted the danger that was NIKOLAS CRUZ to go to the third floor to continue his killing spree when SCOT PETERSON had ample opportunity to prevent that.

95. Additionally or alternatively, SCOT PETERSON'S special duty existed in whole, or in part, with the teachers and students of Marjory Stoneman Douglas High School, including MEADOW POLLACK, because SCOT PETERSON'S lockdown of Building 12 and false assertions that the shooter was or might be elsewhere besides Building 12 prevented other, real – brave – law enforcement officers from entering the Building and addressing and killing the killer before the he murdered MEADOW POLLACK.

96. Additionally or alternatively, SCOT PETERSON'S special duty existed in whole, or in part, with the teachers and students of Marjory Stoneman Douglas High School, particularly those on the third floor of Building 12, including MEADOW POLLACK, because SCOT PETERSON's failure to enter while at the same time commanding a lockdown of Building 12 while NIKOLAS CRUZ was not yet on the third floor, restrained their freedom to act to protect themselves from the violent acts of NIKOLAS CRUZ.

97. The inaction and dereliction of duties by SCOT PETERSON as described herein, taken together, constituted a clear and present danger to the health and well-being of the teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK.

98. The inaction and dereliction of duties by SCOT PETERSON as described herein, were made while he was in the course and scope of his duties as an SRO but in bad faith, or with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights and safety of the teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK.

99. SCOT PETERSON breached his duties owed to the teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK by committing one or more of the following acts of commission and/or omission:

a. Failing to enter Building 12;

b. Failing to attempt to take out the threat, NIKOLAS CRUZ;

c. Failing to attempt to neutralize the killer, NIKOLAS CRUZ;

d. Failing to attempt at saving a single life but his own;

e. Failing to respond those victims relying upon him for protection;

f. Failing to exercise reasonable care in the fulfilment of the duties he undertook to protect; and/or

g. Failing to follow the policies and procedures reasonably calculated to mitigate, reduce and/or eliminate the risk of the injuries and harm during an active shooting.

100. As result of SCOT PETERSON acting in bad faith, or with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

101. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, SCOT PETERSON, for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act,

caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT III
WRONGFUL DEATH AGAINST THE ESTATE OF LYNDA CRUZ

102. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

103. At all times material hereto prior to her death, LYNDA CRUZ knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

104. At all times material hereto prior to her death, LYNDA CRUZ owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to:

a. properly supervise and obtain proper diagnosis and treatment for NIKOLAS CRUZ;

b. take appropriate steps to prevent NIKOLAS CRUZ from obtaining the means and/or opportunity to harm others; and

c. inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone.

105. LYNDA CRUZ was negligent and breached her duty of reasonable care as described herein.

106. As result of LYNDA CRUZ'S negligence, which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

107. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, the ESTATE OF LYNDA CRUZ, for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT IV
WRONGFUL DEATH AGAINST JAMES SNEAD

108. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

109. At all times material hereto, JAMES SNEAD knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

110. At all times material hereto, JAMES SNEAD owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to keep any and all guns in their care, custody, and control secure from use in a crime, and specifically from any such foreseeable use by NIKOLAS CRUZ.

111. JAMES SNEAD was negligent and breached his duty of reasonable care for the safety and protection of the public and MEADOW POLLACK by allowing NIKOLAS CRUZ to have access to his guns over which the JAMES SNEAD had asserted control as a condition of NIKOLAS CRUZ residing in the Snead home.

112. As result of JAMES SNEAD'S negligence, which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

113. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, JAMES SNEAD, for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT V
WRONGFUL DEATH AGAINST KIMBERLY SNEAD

114. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

115. At all times material hereto, KIMBERLY SNEAD knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

116. At all times material hereto, KIMBERLY SNEAD owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to keep any and all guns in their care, custody, and control secure from use in a crime, and specifically from any such foreseeable use by NIKOLAS CRUZ.

117. KIMBERLY SNEAD was negligent and breached her duty of reasonable care for the safety and protection of the public and MEADOW POLLACK by allowing NIKOLAS CRUZ to have access to his guns over which KIMBERLY SNEAD had asserted control as a condition of NIKOLAS CRUZ residing in the Snead home.

118. As result of KIMBERLY SNEAD'S negligence, which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

119. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, KIMBERLY SNEAD, for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT VI
WRONGFUL DEATH AGAINST HENDERSON BEHAVIORAL HEALTH, INC.

120. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

121. At all times material hereto, HENDERSON BEHAVIORAL HEALTH, INC. knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

122. At all times material hereto, HENDERSON BEHAVIORAL HEALTH, INC. owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to:

a. properly diagnose and treat NIKOLAS CRUZ; and

b. take reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone.

123. HENDERSON BEHAVIORAL HEALTH, INC. was negligent and breached its duty of reasonable care by not properly diagnosing and treating NIKOLAS CRUZ and/or not taking reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone, as described herein.

124. As a direct and proximate result of the negligence of HENDERSON BEHAVIORAL HEALTH, INC., which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving

mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

125. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, HENDERSON BEHAVIORAL HEALTH, INC., for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT VII
WRONGFUL DEATH AGAINST JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC.

126. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

127. At all times material hereto, JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC. knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

128. At all times material hereto, JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC. owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to:

c. properly diagnose and treat NIKOLAS CRUZ; and

d. take reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone.

129. JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC. was negligent and breached its duty of reasonable care by not properly diagnosing and treating NIKOLAS

CRUZ and/or not taking reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone, as described herein.

130. As a direct and proximate result of the negligence of JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC., which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

131. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC., for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT VIII
WRONGFUL DEATH AGAINST SOUTH COUNTY MENTAL HEALTH CENTER, INC.

132. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

133. At all times material hereto, SOUTH COUNTY MENTAL HEALTH CENTER, INC. knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

134. At all times material hereto, SOUTH COUNTY MENTAL HEALTH CENTER, INC. owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to:

e. properly diagnose and treat NIKOLAS CRUZ; and

f. take reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone.

135. SOUTH COUNTY MENTAL HEALTH CENTER, INC. was negligent and breached its duty of reasonable care by not properly diagnosing and treating NIKOLAS CRUZ and/or not taking reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone, as described herein.

136. As a direct and proximate result of the negligence of SOUTH COUNTY MENTAL HEALTH CENTER, INC., which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

137. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, SOUTH COUNTY MENTAL HEALTH CENTER, INC., for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

Dated this 30th day of April, 2018.

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WHO IS A FIDUCIARY AND WHY IT MATTERS

AND

TIPS FOR FINANCIAL SERVICES COMPLIANCE AND RISK MANAGEMENT

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Who is a Fiduciary and Why it Matters and Tips for Financial Services Compliance and Risk Management

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Change and uncertainty. These are two words that sum up the challenges facing the financial services industry. In recent years, the Securities and Exchange Commission (SEC), Department of Labor (DOL), and Financial Industry Regulatory Authority (FINRA) have focused on sweeping changes to the duties owed to clients, fee structures, potential conflicts of interest, and protecting senior investors, among other things. Companies and individuals in the financial services industry are constantly trying to keep up with new rules and regulations, potential changes to their business model, and a moving target when it comes to investigations and enforcement actions. In this article, we will discuss the most significant changes and why they matter.

I. THE FIDUCIARY STANDARD – WHY IT MATTERS

A. Background

Historically, two primary models have been used to provide investment advice to individuals. The first model involved individuals working with a "broker," referred to as a registered representative of a securities broker-dealer. Under this model, the broker makes a recommendation to a client (typically a recommendation to purchase a security of a fund) and the broker earns a commission for each securities transaction. This is a transaction-based model where the broker owes the client a duty of care to ensure the recommendation is "suitable." The broker does not owe the client a "fiduciary duty" and the broker does not have any obligation to monitor the client's brokerage account or offer ongoing advice to the client. The investment professional (and the associated broker-dealer) in this model is regulated by FINRA. The second model is slightly different. An individual who works with an "advisor[1]," referred to as an Investment Advisor (IA), receives investment advice (as opposed to securities transactions) through a Registered Investment Advisor (RIA) firm. Under this model, the advisor provides advice about how to "manage" a client's overall investment portfolio and earns a percentage fee based on the size of the assets under his or

[1] "Advisor" and "Adviser" are used interchangeably throughout this paper. The meaning is the same.

her management ("AUM"). For example, an advisor could charge a 1% advisory fee on a $1,000,000 portfolio and earn a $10,000 fee each year for managing the portfolio. This relationship imposed a *fiduciary duty* on the advisor and required the advisor to provide ongoing advice. Advisors and RIA firms providing services under this model are regulated by the SEC (over $100M of AUM) or state securities regulators (under $100M of AUM).

In 2010, the Dodd-Frank Act directed the SEC to study and evaluate the effectiveness of the existing legal and regulatory standards of care applied to broker-dealers and investment advisers. In 2011, the Staff of the SEC submitted to Congress a detailed report, recommending a new uniform fiduciary standard of conduct for both broker-dealers and investment advisers when providing personalized investment advice to retail investors. After studying the existing legal and regulatory scheme, the Staff of the SEC concluded that customers do not understand the different standards of care and expect that an investment professional would always act in their best interest—regardless of whether the financial professional is a broker or an advisor. Consequently, the Staff of the SEC determined it appropriate to hold broker-dealers and investment advisers to the same standard when providing personalized investment advice to retail customers. In other words, the Staff recommended a uniform fiduciary standard of care.

As a result of the SEC's delay in developing a rule that would impose a uniform fiduciary standard on brokers and advisors, President Obama, during the following February 23, 2015 address to the AARP, called on the DOL to update its rules that require retirement advisors to act in the best interest of their clients:

> *"Today, I'm calling on the Department of Labor to update the rules and requirements that retirement advisors put the best interests of their clients above their own financial interests. It's a very simple principle: You want to give financial advice, you've got to put your client's interests first."*[2]

In response, on April 6, 2016, the DOL released its "Fiduciary Rule", which imposes a "fiduciary duty" on individuals who provide advice to defined-contribution plans (401(k) plans, 403(b) plans, ESOPs, SEP plans), defined-benefit plans (pensions), and Individual Retirement Accounts (IRAs). The scope of the DOL rule was seen as a significant expansion of the then-existing definition of what would be considered "investment advice" and who would be potentially considered fiduciaries subject to the DOL's rules and regulations.[3] After various delays and millions of dollars spent by the industry in an effort to comply, the rule was eventually struck down by the Fifth Circuit Court of Appeals on March 15, 2018.

As a consequence of the DOL rule being struck down, the SEC decided to act. On April 18, 2018, the SEC proposed "Regulation Best Interest," consisting of two proposed rules and an interpretation, in order "to address retail investor confusion about the relationships

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[2] https://www.iamagazine.com/viewpoints/read/2016/02/03/final-fiduciary-rule-coming-soon *(President Barack Obama, Feb. 23, 2015).*

[3] https://www.pwc.com/us/en/industries/financial-services/regulatory-services/dol-fiduciary-duty-rule.html.

that they have with investment professionals and the harm that may result from that confusion."[4] The new rules would require broker-dealers to act in retail customer's best interest when recommending any security or investment strategy. At their core, the proposed rules are designed to "enhance investor protection" by applying consistent principals to both investment advisers and broker-dealers and requiring that investment professionals, regardless of name "provide clear disclosures, exercise due care, and address conflicts of interest."[5] The rule explains that people must "act in the best interest of the retail customer at the time a recommendation is made without placing the financial or other interest of the broker-dealer or natural person who is an associated person making the recommendation ahead of the interest of the retail customer."[6] Additionally, the proposed rule seeks to clarify the obligations owed by investments advisers. To promote clarity, the Regulation Best Interest proposes the use of a new disclosure document, a customer/client relationship summary ("CRS"), outlining, in clear terms, the nature of the relationship between the investment professional and customer.

Under this new Regulation Best Interest, the first rule addresses a broker-dealer's obligations. In this regard, a broker-dealer satisfies its duty to retail customers by complying with three obligations: (1) Disclosure Obligation—disclose key facts about relationship, including material conflicts of interest; (2) Care Obligation—exercise reasonable diligence, care, skill and prudence to understand the product, have reasonable basis to belief what is in a client's best interest; and (3) Conflict of Interest Obligation—establishment, maintenance, and enforcement of policies and procedures designed to at identify, disclose, and eliminate, or at least mitigate, material conflicts of interest, including those arising from financial incentives. The second rule, relating to the CRS, requires the provision of a standardized, short-form (maximum four pages) disclosure highlighting differences between services offered, applicable standards, fees, and any conflicts of interest. As part of this CRS, the proposed rule would restrict broker-dealers and associated persons from using the terms "adviser" or "advisor" as part of the name or title in their interactions with retail customers. Finally, the rule interpretation reaffirms that investment advisers owe a fiduciary duty to their clients. When comparing Regulation Best Interest (which again would apply to brokers) to an investment adviser's fiduciary obligation, there are two major differences: (1) advisers, not broker-dealers, have an ongoing obligation to monitor a retail customer's account; and (2) while advisers must disclose conflicts of interest, a broker-dealer must mitigate or eliminate any material conflicts of interest.

B. Impact on Litigation/Arbitration

The impact on litigation and increased regulatory risk from the move toward a more universal fiduciary standard is playing out right before us. From the litigation perspective, a

[4] SEC Press Release 2018-68.

[5] Ibid.

[6] SEC Release No. 34-83062.

breach of fiduciary duty claim has consistently been the most asserted claim in FINRA arbitration actions, dating back to 2012 and well-before the DOL and SEC Regulation Best Interest.[7] These claims were often asserted under state law (either statutory or common law) or simply asserted without any legal justification. With the industry's attempt to get ahead of the regulatory rule-making process, many firms have simply adopted a fiduciary standard themselves, proclaimed on their website and in their marketing materials that they "put a client's interest first", and/or changed their business model to better address the disclosure of potential conflicts of interest. These changes and narratives will create additional ammunition for plaintiff's attorneys pursuing claims in litigation or arbitration and, presumably, claims for breach of fiduciary duty will likely be on the rise.

Regulators have also been aggressive in their approach to a firm's handling of conflicts of interest. A primary example is the SEC's recent focus on 12b-1 fees. On February 12, 2018, the SEC announced that the Division of Enforcement would agree not to recommend financial penalties against investment advisers who self-report violations of the federal securities laws relating to certain mutual fund share class selection issues and promptly return money to harmed clients.[8] Under Section 206 of the Investment Advisers Act of 1940, investment advisers are required to act in their clients' best interests, including an affirmative duty to disclose all conflicts of interest. A conflict of interest arises when an adviser receives compensation (either directly or indirectly through an affiliated broker-dealer) for selecting a more expensive mutual fund share class for a client when a less expensive share class for the same fund is available and appropriate. That conflict of interest must be disclosed.[9] Under the SEC's program, the Enforcement Division will recommend standardized, favorable settlement terms to investment advisers who self-report that they failed to disclose conflicts of interest associated with the receipt of 12b-1 fees by the adviser, its affiliates, or its supervised persons for recommending to advisory clients in a 12b-1 fee-paying share class when a lower-cost share class of the same mutual fund was available for the advisory clients. For people who do not self-report, the Division warns that it expects to recommend stronger sanctions in any future actions against investment advisers that engaged in the misconduct but failed to take advantage of this initiative.[10] In addition to the self-reporting initiative, the SEC has taken an aggressive approach in its examination of firms and its expectation that firms would assess all available options for the lowest cost fund available.

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[7] https://www.finra.org/arbitration-and-mediation/2012-dispute-resolution-statistics;
https://www.finra.org/arbitration-and-mediation/2013-dispute-resolution-statistics;
https://www.finra.org/arbitration-and-mediation/2014-dispute-resolution-statistics;
https://www.finra.org/arbitration-and-mediation/2015-dispute-resolution-statistics;
https://www.finra.org/arbitration-and-mediation/2016-dispute-resolution-statistics;
https://www.finra.org/arbitration-and-mediation/2017-dispute-resolution-statistics.

[8] https://www.sec.gov/news/press-release/2018-15.

[9] Ibid.

[10] Ibid.

The push toward a more uniform fiduciary duty demonstrates the importance of clients understanding and addressing:

1. Policies and Procedures – firms should revisit their policies and procedures they have in place, reduce or disclose conflicts of interest, and ensure best execution of trades.

2. Marketing/Sales Literature – firms should balance the language it wants to use for sales and marketing purposes with the understanding that this language could be used against the firm at trial or arbitration.

3. Fee Structure – firms should increase their awareness around point of sale analysis of share classes and fees.[11]

4. Exception Reporting – firms should review their exception reporting to determine if additional measures can be integrated in the firm's processes to identify potential problems.

Attorneys handling litigation involving breach of fiduciary duty claims should be acutely aware of the recent push toward the uniform fiduciary duty, as well as regulators increased scrutiny on firms to disclose or reduce conflicts, especially those dealing with compensation and fees.

II. COMPLIANCE AND RISK MANAGEMENT – TIPS RELATED TO ANNUAL EXAMINATION PRIORITIES.

No financial advisor wants to land in hot water with the SEC or state regulators. Advisors can get clues about regulators' top concerns by looking at the SEC's examination priorities for the coming year, which are published in January of each year by the SEC's Office of Compliance Inspections and Examination (OCIE). As in past years, the 2018 examination priorities identified areas where there is increased risk of potential harm to investors, in particular, to seniors and retirement savers. Since January, OCIE has been targeting these risk areas during its examinations of SEC-registered investment advisors.

This paper provides an overview of the potential regulatory implications of OCIE's examination priorities on an RIA firm. Depending on the amount of its regulatory assets under management, an RIA firm is regulated either by the SEC, or in general, any state where the firm has six or more clients. While this paper refers to the findings of the SEC in relation to SEC-registered firms, the findings are in most cases applicable to state-registered firms as

[11] For example, regulators have spent significant time analyzing the share classes purchased in 529 accounts and have criticized the use of C-Shares in 529 accounts for younger beneficiaries (under the age of 10) and A-Shares in 529 accounts with older beneficiaries (above age 10). See e.g., http://www.investmentnews.com/article/20170316/BLOG09/170319943/finra-is-asking-broker-dealers-whats-in-your-clients-529-savings.

well. State-registered RIA firms should invest the time to know their state's regulations, which may impose additional requirements on the firm.

A. Insufficient Policies and Procedures

Following its analysis of OCIE's examination results of RIA firms during the period 2015 to 2017, the SEC determined that its most frequently cited violations of federal securities laws and regulations were for insufficient compliance policies and procedures, incomplete/untimely regulatory filings, misinterpretation of the custody rule, insufficient Code of Ethics, and books and records errors. Such compliance failures are often attributable to inadequate policies and procedures.

For example, the SEC found the following shortcomings in firms' policies and procedures:

- Firms purchasing "off-the-shelf" template policies and procedures, and not taking the time to tailor them to reflect the firm's actual investment strategies (or failing to update changes to the firm's investment strategies), types of clients, fees, and other aspects of the firm's business

- Firms not complying with the SEC requirement to conduct an annual review of the firm's policies and procedures, or conducting an annual review but not assessing the adequacy and effectiveness of the policies and procedures, or not correcting problems identified during the annual review

- Firms having policies and procedures that, while accurately reflecting the firm's business, are not followed by the advisors who work for the firm, most often with respect to the policies and procedures that pertain to a firm's marketing, its expenses, and its employees' conduct

B. Custody

With respect to the custody rule, it is easy to understand how firms may be confused when completing Form ADV, especially if they're exposed to information about both SEC and State registration requirements. Withdrawal of advisory fees from a client's account is treated differently by the SEC than by state regulators. For example, the SEC has provided guidance that an SEC-registered firm that withdraws its advisory fee from a client's account, and does not otherwise have custody of a client's assets, may respond "no" to the question on Form ADV asking whether the firm has custody of its clients' assets. A State-registered RIA firm, on the other hand, may be required to respond "yes" to this same question depending on that State's regulatory requirements regarding custody. However, a "yes" response to this question by State-registered RIA firms should not require (again, depending on that State's regulatory requirements) the firm to undergo the requirement of a surprise

exam conducted by an independent public accounting firm in instances where the firm actually maintains custody of its clients' assets.

C. Code of Ethics, Books and Records

As for Code of Ethics, common mistakes include a firm not identifying as an "access person" an employee, partner, or director who has access to client accounts, and failing to include the Code of Ethics in Part 2A of Form ADV, or not stating in the ADV that the Code of Ethics is available upon request. Common errors in books and records are attributable to insufficient, inaccurate, and/or inconsistent information, such as the omission of one or more of the firm's advisory agreements, outdated fee schedules and client lists, or contradictory information relating to a firm's business model as described on the firm's website, in its advertisements, and in its disclosures.

D. More Concerns

In addition to the common compliance failures mentioned above, the SEC announced that it will continue to pay attention in 2018 to the following areas:

- *Risks to retail investors.* Here, the SEC is paying close attention to the increasingly popular electronic investment advice platforms, i.e., robo-advice, offered by many firms.

- *Risks to retirement accounts of public employees and the conflicts of interest sometimes associated with these accounts, such as pay-to-play, undisclosed gifts, and entertainment practices.* Related to this is the SEC's focus on senior investors, who historically have been particularly susceptible to manipulation and fraud. To prevent such abuses, the SEC has been examining services that are directed at seniors and assessing whether the firm has implemented processes to prevent the financial exploitation of seniors.

- *Market-wide risks.* The SEC has a mandate to not only protect investors but to protect the fair, orderly, and efficient operation of the markets. Here, the SEC is interested in reviewing a firm's policies and procedures that are intended to prevent a cyber-attack and, if the firm were to become the victim of a cyber-attack, how the firm would respond.

- *Share class recommendation.* The SEC has stated publicly that an advisory firm fails to uphold its fiduciary duty when it causes a client to purchase a more expensive share class of a fund when a less expensive share class is available. Here, the SEC has been focusing on policies and procedures regarding the mutual fund share class selection process, the due

diligence conducted by the advisor before recommending a share class, and the firm's compliance oversight of share class recommendations.

Firms should take advantage of the SEC's stated examination priorities to conduct an ongoing review of their compliance programs to identify deficiencies and gaps, then revise its policies and procedures to address the deficiencies and gaps before the firm undergoes a regulatory examination. Firms would also benefit from taking any client complaint seriously and doing everything within reason to prevent a client who files a complaint with the firm from escalating that complaint to the SEC or a state securities regulator.

III. CONCLUSION

Recent changes to the regulatory landscape have created uncertainty in the financial services industry, in particular with respect to the standard of care that a financial services professional owes to a client when conducting brokerage transactions versus providing investment advice. The continued push toward a fiduciary duty and investor protection is an inevitable upward trajectory—in rule-making, regulatory enforcement, and litigation—and should be an important reminder to financial services professionals, and the firms that employ them, to always consider how investors will either benefit from, or be harmed by, their actions.

HOW FINANCIAL ADVISORS CAN AVOID COMPLIANCE FAILURES:

A REVIEW OF THE SEC'S 2018 EXAMINATION PRORITIES

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How Financial Advisors Can Avoid Compliance Failures: A Review of the SEC's 2018 Examination Priorities

By Michael P. Shaw

No financial advisor wants to land in hot water with the SEC or state regulators. Advisors can get clues about regulators' top concerns by looking at the SEC's examination priorities for the coming year, which are published in January of each year by the SEC's Office of Compliance Inspections and Examination (OCIE). As in past years, the 2018 examination priorities identified areas where there is increased risk of potential harm to investors, in particular, to seniors and retirement savers. Since January, OCIE has been targeting these risk areas during its examinations of SEC-registered investment advisors.

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For example, the SEC found the following shortcomings in firms' policies and procedures:

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Firms should take advantage of the SEC's stated examination priorities to conduct an ongoing review of their compliance programs to identify deficiencies and gaps, then revise its policies and procedures to address the deficiencies and gaps before the firm undergoes a regulatory examination. Firms would also benefit from taking any client complaint seriously and doing everything within reason to prevent a client who files a complaint with the firm from escalating that complaint to the SEC or a state securities regulator.

For additional information about how SEC or state regulations may impact your firm's operations, contact Michael P. Shaw at mpshaw@nilesbarton.com. He is a partner with Niles, Barton & Wilmer where he advises RIAs and broker-dealers on legal, compliance and enforcement matters.

THE CHALLENGE OF COMPLYING WITH MULTIPLE AND DIFFERING FIDUCIARY RULES

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The Challenge of Complying with Multiple and Differing Fiduciary Rules

By Michael Shaw

For nearly eight decades, financial advisors[1] have been subject to federal and state securities laws, regulations and SRO rules regulating the type of service they provide to clients – investment advice, brokerage transactions, the sale of insurance products, and other services. The most recently enacted federal regulation – the Department of Labor fiduciary rule -- expands and, in some respects, creates new regulations that apply to advisors who provide investment advice relating to 401(k) plans, other tax-qualified plans, and IRAs. The challenge for firms and advisors is that the DOL fiduciary rule applies in circumstances when the fiduciary standard under the Investment Advisers Act of 1940 (the "Advisers Act") may not. In addition, advisors who hold certain financial services designations, such as the CFA® and CFP® designations, are required to abide by ethical standards that may differ from the requirements of both the DOL and Advisers Act.

When the DOL fiduciary rule becomes fully effective on January 1, 2018, firms and advisors will be expected to know the circumstances in which a fiduciary standard applies, as well as the differences between multiple fiduciary rules and standards. For instance, the fiduciary standard under the Advisers Act applies when a registered investment adviser ("RIA") or investment adviser representative ("IAR") provides investment advice to a client for compensation. However, once the RIA/IAR delivers his/her recommendations to a client (e.g., in the form of a written financial plan), the fiduciary relationship ends if the recommendation the adviser implements includes only brokerage transactions and/or the sale of insurance products. In this instance, the adviser's obligation to the client under the Advisers Act switches from a fiduciary standard to a suitability standard of conduct.

The new DOL fiduciary rule impacts a financial advisor's duty to a client in the following ways:

- The DOL fiduciary rule no longer allows an adviser to switch (as is permitted under the Advisers Act as described above) from the higher fiduciary standard that applies during the planning, analysis and presentation of recommendations to the lower suitability standard when the recommendations being implemented are limited to brokerage and/or insurance transactions if those recommendations involve a 401(k) plan, other tax-qualified plan, or an IRA.

- The DOL fiduciary rule also raises the standard of conduct from suitability to fiduciary for an advisor who holds the CFP® (Certified Financial Planner) designation and is implementing recommendations involving a 401(k) plan, other tax-qualified plan, or an IRA if the advisor is deemed under CFP Board's ethical standards to be in an other-than-financial planning engagement (CFP Board's fiduciary standard applies only when an advisor is in a financial planning engagement).

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1. For purposes of this article, "financial advisor" and "advisor" refer to a representative of an RIA, BD, insurance company, bank or similar financial institution.

About the Author

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The following example further illustrates the challenge posed by these differing fiduciary rules:

An advisor who holds the CFA® (Chartered Financial Analyst) and CFP® designations delivers a financial plan to a client that addresses the client's goals and objectives, and contains the advisor's recommendations. One of the advisor's recommendations is for the client to rollover her 401(k) funds to a non-discretionary IRA account with a diversified portfolio of stock, bond and cash investments. The advisor also recommends that the client open a discretionary non-tax-qualified brokerage account for the client to take advantage of anticipated market swings.

Under the DOL fiduciary rule, the advisor in the above example must abide by a fiduciary standard of conduct with regard to the 401(k) rollover to the IRA account. Under the Advisers Act, however, the lower suitability standard rather than the fiduciary standard would apply if the advisor's implementation activities are limited to brokerage and/or insurance transactions for the client so long as any advice given to the client is in the context of these transactions and considered incidental to these transactions. The CFP Board's fiduciary standard would apply to this advisor only if the advisor is deemed to be in a "financial planning" engagement, as that term is defined in the organization's ethical standards. In other words, the CFP Board's fiduciary standard would not apply if the advisor is deemed to be in a brokerage-only or in an insurance-only engagement with the client. See chart following this article for further details on these differing fiduciary rules.

Returning to the above example, for the non-tax-qualified discretionary account, the DOL fiduciary rule does not apply. The Advisers Act fiduciary standard, however, would apply to this account if the advisor is providing advice that goes beyond being merely incidental to the transaction. The CFA Institute's ethical standards do not contain a fiduciary standard per se, however, they do require the advisor to "act with loyalty, prudence and care even in the absence of a legal fiduciary duty." The CFP Board's fiduciary standard would apply to the implementation of a non-tax-qualified account, but again, only if the client engagement is deemed to be "financial planning."

Today, and even more so when the DOL fiduciary rule becomes fully effective, firms and advisors are, and will be, faced with the daunting task of determining the appropriate standard of conduct that applies – suitability vs fiduciary --, and if fiduciary, which of the fiduciary rules.

So, where does this discussion leave firms and advisors? How are firms and advisors expected to navigate the quagmire that exists of differing legal standards and differing fiduciary rules?

An approach that would seem to make the most sense is for every firm to start by evaluating its business model to determine whether and how the DOL fiduciary rule applies. All firms engaged in the business of providing advice on qualified retirement plans and IRAs will have work to do to come into compliance with the DOL rule. Firms whose policies and procedures already reflect a fiduciary standard of conduct will still have work to do to comply with the DOL rule, although their hill to climb will not be as steep as firms whose model includes brokerage and/or insurance transactions.

An issue that every firm subject to the DOL fiduciary rule will want to consider is whether it wants to thread the needle in complying with whichever of the aforementioned fiduciary rules apply or, in the alternative, whether it wants to raise the bar for all of its advisors by imposing the highest of the fiduciary rules on all advisors at all times, irrespective of the type of account, nature of the recommendations, or consideration given to the financial services designation(s) held by its advisors. Weighing the cost of revising systems and processes is obviously another important factor firms will want to consider in determining whether to stay with its existing business model, or conclude that changes to its model are necessary.

The ten month phase-in of the DOL fiduciary rule, which begins in April 2017, imposes an obligation on firms to begin this analysis now. In the end, as with any new regulation, a robust compliance program is the best solution to mitigate against the risk of litigation, regulatory fines and potential damage to a firm's reputation resulting from a failure to comply. ★