YLD
Allegheny County Bar Association

Point of Law

The E-Newsletter of the Young Lawyers Division of the Allegheny County Bar Association

Spring 2022

Family Feud with the Judges Returns

By Lauren R. Nichols

Survey says… a great time was had by all! The YLD Member Services Committee hosted its annual Family Feud with the Judges event on Thursday, March 3, 2022 at the Rivers Club. This year marked the return of the in-person event after a hiatus due to the COVID-19 pandemic. Enthusiasm for the event was high, and over 40 YLD members and law school students attended. The Member Services Committee is especially grateful to the local judges who attended the event and led their respective teams to glory and… not so much glory. Judges in attendance included representatives from the Allegheny County Court of Common Pleas Civil, Criminal, and Family Divisions, the Pennsylvania Superior Court, and the Western District of Pennsylvania Bankruptcy Court.

Attendees began the evening mingling and enjoying happy hour drinks and hors d'oeuvres before separating into five teams each helmed by an esteemed member of our local judiciary.

Team 'The Learned Hand' led by Judge Thomas Caulfield

The teams battled it out over twelve rounds of questions, many of which were compiled via surveying YLD members about topics ranging from least favorite law school classes to popular streaming services. Extra points for best team name were awarded to Team Gavel Gals, helmed by Judge Nicola Henry-Taylor. Member Services Committee members Lizzie Rubenstein and Kerven Moon hosted the evening with aplomb and could give Steve Harvey a run for his money if they ever decide to abandon their legal careers.

YLD member Joanne Parise, a f irst-time attendee at the Family Feud event, said she enjoyed the evening's competition and had a great time talking and connecting with Superior Court Judge Mary Jane Bowes,

Continued on page 2

Table of Contents

Point of Law Newsletter

Editor in Chief
Alexandra Farone

Senior Editors
James Baker
Zachary Gordon
Stephen Matvey
Tara Sease

Editors
Ian Everhart
Michael Hutter

YLD Officers
Chair: Asra Hashmi
Chair-Elect: Taylor Gillan
Secretary: Maria Coladonato
Treasurer: James Baker
Immediate Past-Chair:
Amanda Scarborough

YLD Council
Corey Bauer
Anthony Bianco
Morgan Bonekovic
Nicholas Bunner
Thomas Cocchi Jr.
Jamie Drennen
Allison Erndl
Jesse Exilus
Alexandra Farone
Amelia Goodrich
Zachary Gordon
Rebecca Johnson
Aleksandra Kocelko
Kelly McGovern
Danielle Parks
Elizabeth Rubenstein
Tara Sease

Family Feud with the Judges Returns

Continued from page 1

someone who Ms. Parise might not normally meet in her practice.

The contest was heated, but Team Women Take All ultimately pulled away with the victory and won $25 Amazon gift cards for team members along with bragging rights for next year.

When asked why she chose to attend the event, Judge Bowes (who helmed the winning team) said she finds being around young attorneys and law students to be reinvigorating and enjoys the enthusiasm she sees in young practitioners. She also said the event itself is just a really good time.

The evening was graciously sponsored by Compass Rose Financial, and $5 of every ticket sold benefited the YLD Scholarship Fund. A special "thank you" again goes to Judges Bowes, Caulfield, Connelly, Henry-Taylor, Hertzberg, and Taddonio for their attendance and support. Be sure to stay on the lookout for other fun networking and social opportunities led by the YLD Member Services Committee! ■

Lauren R. Nichols is an Associate Attorney with Jack Goodrich & Associates, P.C. Her practice focuses on personal injury, Workers' Compensation, and Social Security Disability. She can be contacted at lauren@goodrichpc.com.

The Role of Counsel for Benefit Corporations

By Eryn Correa

Over the past several years, Larry Fink, the CEO of investment management company BlackRock, Inc., has become an influential voice on the importance of stakeholder capitalism – the idea that corporate leaders should consider the impacts of their decision-making on employees, customers, suppliers, communities, and the environment, as well as their shareholders' bottom line. And, as CEO of the world's largest asset manager with over $10 billion under management, people are paying attention.

Stakeholder capitalism is an interesting theory that does bear f inancial fruit. *See, e.g.,* David C. Ferran, Torrey Project's Evaluation of the Financial Performance of Highly Ethical Companies and Stakeholder-Focused Companies (2019). But practically speaking, how can counsel assist in embedding the values of stakeholder capitalism into a company's structure?

Benefit Corporations

Corporate leaders who are ready to make a strong commitment to stakeholder values can incorporate as a benefit corporation. A benefit corporation is a legal structure that is similar to a c-corporation but requires (1) corporate leadership to consider the impact of its decision-making on its stakeholders; (2) a company to have as its purpose a general public benefit and a specific public benefit that is tailored to the company's business; and (3) an annual benefit report that publishes the company's success or failure in obtaining its goals as a benefit corporation, as measured against a third-party standard. *See, e.g.,* 15 Pa. C.S. §§ 3301-3331 (2016).

From a practical and administrative standpoint, counsel can assist in creating a structure where this commitment is adhered to and prioritized. The bylaws of a benefit corporation should clearly state the duties of corporate leadership and whether they extend to officers as well as directors (in Pennsylvania, officers are held to the same standards of decision-making as directors. 15 Pa. C.S. § 3323(a)(2016)). Furthermore, corporate leadership can consider amending their bylaws to reflect specific values. For example, a company that would like to make a stronger commitment to diversity and inclusion could require in their bylaws that a certain percentage of directors on their board be women or women-identifying individuals.

Furthermore, board meetings should consistently have as an agenda item the impact of strategic decisions on the company's stakeholders. Additionally, the company should be advised to task management with selecting a third-party standard and should be tracking and reporting key stakeholder metrics against it. This allows the board to stay well-informed and make adjustments before publishing the annual report. Overall, the goal is to make stakeholder capitalism the bedrock of the company and have all decisions filtered through this lens.

Policies and Procedures

In some circumstances, particularly for early-stage companies with small teams, incorporating as a benefit corporation can be an administrative burden. In these cases, benefit corporation concepts can be folded into the structure of a company without incorporating with the state as a benefit corporation. For example, companies that would like to commit their corporate leaders to stakeholder capitalism values can define this as a duty of officers and directors in the bylaws, even if the company is not a benefit corporation (where state law allows). Embedding these values into decision-making has the benefit of saving early-stage companies

Continued on page 6

A Voice for the Voiceless

A spotlight on the issues faced by the ALS Community and related proposed legislation

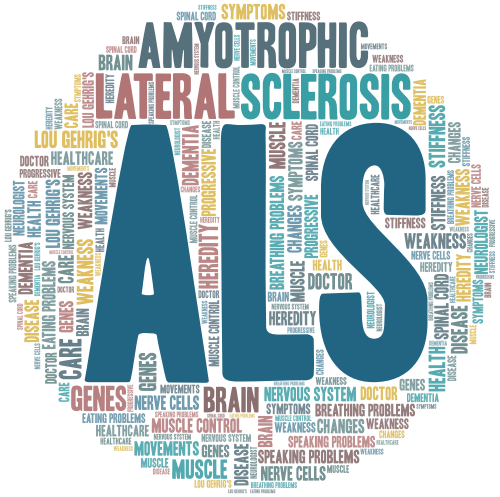
By Leah D. Zawasky

Imagine as a young person in your 30s, you have a sharp mind and you are still fully aware of what is going on around you, but in a matter of a few months, your muscles suddenly stop working. You are now unable to walk and cannot hold a fork to feed yourself. Worst of all, you can no longer move your mouth to speak to even convey your needs – you are a prisoner trapped inside of your own body. This is ALS.

Until recently, if asked, "Do you know someone with ALS?" Many people in the city of Pittsburgh may have answered, "No." Amyotrophic Lateral Sclerosis (ALS), also known as Lou Gehrig's disease, and the legal issues faced by those within the ALS community have historically not been known as a topic for debate. However, in October 2020, when former Pittsburgh Steeler Tunch Ilkin announced his newly discovered terminal diagnosis, the topic of ALS was brought to public discussion.

While the progression of this disease can vary from patient to patient, unlike other medical conditions or diseases, ALS is imminently fatal. There is currently no known cure. ALS is a progressive neurodegenerative disease that affects nerve cells in the brain and spinal cord. Symptoms can begin in the muscles that control the extremities, speech and swallowing, and progresses to muscle weakness and paralysis eventually throughout the entire body.

Over the course of the COVID-19 pandemic, the world witnessed many flexibilities implemented throughout the medical field, specifically with respect to the swift approval granted for vaccines. In light of these recent changes, we should ask why many treatment



options for those suffering with ALS are still prevalently restricted.

In an effort to create more opportunities for people living with ALS to access new treatments, the Promising Pathway Act (H.R. 3761/S. 1644) was recently presented to Congress. This Act would allow a provisional approval pathway for medicines intended for serious or life-threatening diseases, like ALS. Pursuant to the Act, the FDA must establish a priority review system to evaluate completed provisional approval applications within 90 days of receipt. A provisional approval application may be approved if the FDA determines that: (1) there is substantial evidence of safety for the drug and (2) there is early evidence of efficacy, based on adequate and well-controlled investigations.

Arguments will likely emerge regarding the risks of allowing FDA approval early, or even prematurely. However, many individuals battling terminal and rapidly-progressing illnesses such as ALS are more likely to willingly volunteer for even experimental treatments or medications. The ALS Association acknowledges that people living with ALS are willing to tolerate much greater risks on medications that meet endpoints including clinically meaningful delay in ALS progression. In order for individuals to more easily take advantage of new treatments and medications, the FDA would also need to take steps to fully fund and staff ALS issues.

Despite the fact that we associate the COVID-19 pandemic with significant negativity, one silver lining that has emerged is the significant advancements and utilization of telehealth. Though the flexibility of telehealth has been tremendously helpful for the ALS community, it is not yet a permanent and long-term healthcare option unless new laws are passed by Congress.

Specifically, the recently-proposed Creating Opportunities Now for Necessary and Effective Care Technologies (CONNECT) for Health Act (H.R. 2903/S. 1512) would expand coverage of telehealth services through Medicare and make these COVID-19 flexibilities permanent. If enacted, this law would also allow the Centers for Medicare & Medicaid Services (CMS) to waive certain restrictions, such as limitations on the types of technology that may be used for telehealth. Individuals with ALS already have compromised immune systems, and their risk of contracting additional illness is significantly decreased by not requiring patients to travel to and from medical facilities each time they need to consult with their medical provider.

Last, but in no way least, Congress has proposed a well-deserved spotlight on

Continued on page 6

The Double-Edged Nature of Police Stops

By James Baker

A common policing criticism involves the disproportionate rate of Black persons being stopped by law enforcement. Studies have found support for "driving while Black" leading to an increase in traffic stops, with estimates indicating Black individuals are 20 percent more likely to be stopped than white drivers and twice as likely to be subject to a search of their vehicle. *Research Shows Black Drivers More Likely to Be Stopped by Police,* New York University (May 5, 2020). In setting a low bar for police to engage in investigative stops, our legal system can often reinforce, rather than scrutinize, unequal police tactics.

While police require a warrant or probable cause of lawbreaking to take an individual into custody, far less is required to stop an individual on the street or pull a vehicle over. Police need only reasonable suspicion that a crime or traffic violation might be occurring to stop and investigate someone. Any traffic violation can justify a stop, such as failing to signal 100 feet before an intersection or having a burnt-out tail light. 75 Pa.C.S. §§ 3334(b), 4304. Courts view reasonable suspicion based on the "totality of the circumstances." *In re T.W.,* 22 EAP 2020 (Pa. March 9, 2021).

Among other reasons to stop a person, reasonable suspicion can be based on nervousness, "[e]rratic or evasive driving," attempts to "shield" items on the body by facing away from police, walking with "hands inside a pocket," or the fact it is nighttime or the stop occurs in a "high crime area." *Id.* While one of these factors alone generally does not support a police stop, it is unusual for individuals interacting with police not to be nervous, and a skeptical police officer is generally free to construe a wide range of behavior as evasive or indicative of criminal behavior. In fact, even completely innocent actions can form the basis of a decision to stop and question an individual. *Commonwealth v. Miranda,* 1120 WDA 2018, *1 (Pa. Super. Aug. 30, 2019) (unpublished memorandum).

Another major reason to stop and detain an individual is "exigent circumstances," which again covers a broad range of conduct. *Lange v. California,* 594 U.S. ___, Docket No. 20-18 (2021). In striking down a categorical authorization for police to chase fleeing misdemeanor suspects, the United States Supreme Court shared no qualms validating a wide variety of police stops where there is concern or "a risk of escape, destruction of evidence, or harm to others." *Id.* (Kavanaugh, J., concurring). There is, on the other hand, a categorical authorization for police to chase down a fleeing individual suspected of committing a felony, even if the felony were for a non-violent offense such as theft or forgery. 18 Pa.C.S. §§ 3903, 4101.

Between the pillars of reasonable suspicion and exigent circumstance, police have great discretion to stop and question someone based on circumstance or discomfort from police presence. This constitutional standard justifies expansive law enforcement activities, yet the current state of the law fails to consider the flipside: that these tactics put police and the public in danger and lead to disproportionately dangerous outcomes.

What has been missing from legal jurisprudence are the countless instances of police exercising their broad authority to stop and detain individuals on minimal justification that come to nothing. There is scarce information on the effectiveness of current police tactics. Loose estimates show that police might find contraband on every fourth person they wind up searching. *Police are searching black drivers more often, but finding more illegal stuff with white*

Continued on page 8

The Role of Counsel for Benefit Corporations

Continued from page 3

the additional burden of drafting an annual benefit report at a time when resources may already be stretched thin.

Even companies that are not as strapped for resources can be selective in how they incorporate the values of stakeholder capitalism into their company structure. To do this effectively, corporate leadership should carefully consider their values and where they can have the most impact. It will then be the task of counsel to find creative solutions in helping the company to achieve these values.

This can largely be accomplished through written policies and procedures. For example, a company committed to climate action could have a policy regarding carbon offsets, could commit to a net-zero pledge, or tie their executive compensation to r educing greenhouse gas emissions (or all three!). A company committed to employee retention could have a policy on internal hiring or an employee handbook that outlines generous paid time off. Rather than being tied to a specific model of decision-making, policies and procedures allow a company some flexibility in establishing and adhering to the values of stakeholder capitalism that resonate most strongly with the company and its operations.

Conclusion

Embedding the values of stakeholder capitalism into a company's structure is a matter of the corporate leadership's risk appetite. It is likely that at some point during the course of a company's lifetime, the shareholders' bottom line and the company's values will likely collide. The risk lies in the uncertainty of when and where profit and values will be at odds with one another. It could occur with decisions the company has relative control over; for example, a company that values environmental preservation could find a building that has cheaper rent but that requires more energy to operate, which increases the company's carbon footprint. In this situation, corporate leadership has a good amount of control over whether or not to move their operations. Conversely, a company could be faced with a crisis that requires them to act more quickly. This same company could have a fire at the current building, which forces them to move. At a time when their building is destroyed and they have an option for cheaper rent, will corporate leadership still want to be tied to the values of environmental preservation?

For companies that are committed to the values of stakeholder capitalism, it is the role of counsel to mitigate these risks by gaining a thorough understanding of the company's values and building structures that provide for clear guidelines in managing them. While counsel cannot mitigate against every unforeseen risk, it can help in removing the ad hoc nature of the commitment by devising a plan for decision-making in line with the company's identified values. ■

Eryn Correa is the Founder and Managing Partner of Correa Legal. She focuses her practice on providing general counsel services for emerging companies and benefit corporations and is the Chair of the Board of Directors of Sustainable Pittsburgh. Eryn can be contacted at ecorrea@correalegal.co.

A Voice for the Voiceless

Continued from page 4

the caregivers of individuals battling ALS. Specifically, the Credit for Caring Act (H.R. 3321/S. 1670) was created with the intent to offer financial assistance in support of family caregivers. As stated above, individuals battling ALS are physically not capable of caring for themselves. Caregivers often struggle to balance taking the time needed to care for their loved one when this typically results in significant time away from work and a decreased earning capacity. The Credit for Caring Act would create a new tax credit up to $5,000/per year for family caregivers who spend, on average, $7,242 annually out-of-pocket on care.

The above-discussed pieces of legislation have brought these important topics back to the forefront of national discussion. This much-needed discussion will serve to highlight the ongoing struggles of individuals affected by ALS, and hopefully at least some of these proposed acts will become law. Individuals battling ALS along with their caregivers and loved ones must not be forgotten – for them, every moment matters. ■

Leah D. Zawasky is a family law attorney at Notaro Epstein Family Law Group, P.C. She is an active supporter of the ALS Association of Western PA and writes this article in memoriam of Tunch Ilkin and Brian Zawasky. She can be contacted at leah@pghdivorcelaw.com.

Transparency in the Age of Data Breaches

By Anokhy Desai

Cyber risk professionals have given countless CLE seminars about data breaches, often covering the basics of crisis management, business continuity, and disaster recovery. The ACBA hosted one such CLE as recently as this month, entitled "Getting Sued and Getting Hacked."

The first large data breach occurred in 2004, affecting 92 million records at AOL, and the most recent breach at the International Red Cross affected the data of 515,000 individuals. Jonathan Krim & David A. Vise, *AOL Employee Charged in Theft Of Screen Names,* Wash. Post (June 24, 2004); Laura Dobberstein, *Red Cross Forced to Shutter Family Reunion Service Following Cyberattack and Data Leak,* The Register (Jan. 20, 2022). Given the prevalence of educational opportunities concerning data breaches and their nearly constant occurrences, organizational clients are typically aware of what to do if and when their company faces one. This usually includes best practices like finding out what data was affected or accessed, informing law enforcement, speaking with internal stakeholders like the legal and public relations teams, and determining whether it is appropriate to publish or send out a notice of the breach to affected individuals. Transparency and good faith are key in navigating through and recovering from a breach.

In spite of this prevalence of education regarding data breaches, education services company Pearson plc ("Pearson") was recently charged with misleading investors about a 2018 data breach involving the theft of millions of student records, including personally identifiable information (PII) like dates of birth and email addresses. U.S. Sec. and Exch. Comm'n, *SEC Charges Pearson plc for Misleading Investors About Cyber Breach,* sec.gov (Aug. 16, 2021). In the press release that followed the $1 million SEC settlement, the agency noted that Pearson referred to the 2018 cybersecurity incident affecting millions of login credentials at 13,000 schools and universities as a "hypothetical risk" in its 2019 semi-annual report, and had overstated its "inadequate disclosure controls and procedures," violating §§ 17(a)(2)-(3) of the Securities Act of 1933 and § 13(a) of the Exchange Act of 1934. *Id.*

Although the enforcement and oversight of states' unfair and deceptive practices statutes and breach notification laws have come to be known as the domain of consumer protection departments under the Attorneys General and, depending on the nature of the breach and size of the affected organization, occasionally the Federal Trade Commission (FTC), it is unsurprising that other agencies are using their enforcement power to protect consumers and their data. While the SEC is not viewed as a consumer protection group, a brief search of their work since the beginning of this year yields several fraud- and deception-based charges. *See* U.S. Sec. and Exch. Comm'n, *Press Releases,* sec.gov (Mar. 4, 2022). Similarly, the federal Department of Health and Human Services (HHS) is known for their consumer-forward approach to enforcing the HIPAA Privacy and Security Rules. Additionally, the HHS-enforced Health Information Technology for Economic and Clinical Health Act (HITECH Act) requires the agency to maintain a public list of breaches of inadequately-protected health information for incidents affecting at least 500 individuals in order to disincentivize poor security practices that directly affect consumer data. The HHS list shows 88 of these cases from 2022 thus far that are currently under investigation. U.S. Dept. of Health and Hum. Serv's, *Cases Currently Under Investigation,* hhs.gov (Mar. 2, 2022).

The final terms of breach-related settlements with government agencies

Continued on page 8

The Double-Edged Nature of Police Stops

Continued from page 5

drivers, The Washington Post (Oct. 27, 2015).

This leaves a large number of police interactions never to be reviewed by any court or governmental body. Such information could show inadequacies in the factors underlying the reasonable suspicion factors. As prosecutions are only instituted when contraband is discovered after a stop, individual cases then focus on the factors that led police to take the "correct" action. This pulls the focus from de-escalation tactics and rewards expansive policing tactics.

Similarly, suppression courts do not deal with deadly encounters where police use their authority to enter a home or chase a suspect and then apply mortal force. Even in the recent *Lange* case, none of the 4 authored opinions in the United States Supreme Court express any concern for the fact that their decision encourages police to rush after a suspect into an unknown building that could potentially have armed and dangerous individuals inside. Nor has there been much concern until recently about the use of no-knock warrants despite strong protections allowing homeowners to defend their property against intruders. Meanwhile, the government routinely argues that police need to stop and frisk individuals because they might be a danger to the officer. There is such a heavy focus on allowing law enforcement to root out criminal behavior that the legal perspective is seemingly not concerned with the negative implications of these rulings.

Ultimately, what this legal framework reveals is that police are permitted to stop and question nearly anyone who engages in, or could be suspected of engaging in, fairly common activities even where doing so may cause the situation to escalate and become more dangerous. It is no wonder that heavily policed areas, which tend to have larger minority populations, have also been the areas where anti-police sentiments have taken hold. Courts and legal advocates need to take a broader look at the negative repercussions of current case law to create better standards that allow police to perform their public safety function without endangering that very safety. ■

James Baker is an Associate Attorney at Sikov and Love, P.A., whose practice focuses on estate planning and guardianship matters. He is the current YLD Treasurer and Chair of the Anti-Racism Committee.

Transparency in the Age of Data Breaches

Continued from page 7

depend on multiple factors, including whether there was a willful or knowing violation of certain rules. In addition to rules that the SEC, FTC, and HHS oversee, breached companies must also be aware of certain state breach notification rules. Every state has its own breach notification rule that mandates similar actions like notifying that state's Office of the Attorney General if a breach has impacted a certain number of residents or has met other conditions. Eight states, however, specifically penalize willful or knowing violations of their breach notification rules both to incentivize transparency and cooperation during the process and to further promote consumer protection. The short but growing list includes Alabama, Arizona, Missouri, New Hampshire, New Jersey, Rhode Island, South Carolina, and West Virginia. Amelia Gerlicher, Todd Hinnen, and Dominique Shelton Leipzig, *Security Breach Notification Chart,* PERKINS COIE (rev. Sept. 2021). It is worth noting that California may be missing from the list, but it makes up for its absence through its enforcement of the California Consumer Privacy Act (CCPA). Also notably not on the list is Pennsylvania, a growing technology hub that may soon find the need to update its rule to promote transparency and protect its residents. Whether or not the state in which your organizational client is facing a data breach penalizes knowing violations, the most important guidance they can receive to mitigate risk and maintain consumer trust is to embrace transparency. ■

Anokhy Desai is a law student at the University of Pittsburgh and information security policy graduate student at Carnegie Mellon University. She focuses on data privacy and cybersecurity and can be contacted at a.desai@pitt.edu.