

MORTGAGE BANKERS ASSOCIATION REGULATORY COMPLIANCE CONFERENCE

**NUTS AND BOLTS OF COMPLIANCE IN KEY AREAS
INCLUDING FCRA AND FACTA**

The Impact of *Cole v. U.S. Capital* on Mortgage Lenders

September 6-8, 2006

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Many mortgage lenders, as well as other participants in the consumer lending industry such as credit card issuers, automobile finance companies and insurance companies engage in a practice known as “prescreening.” Prescreening involves the use of information maintained by consumer reporting agencies to target consumers to receive solicitations for the credit or insurance products of consumer lenders or insurance companies.

The FCRA & “Prescreening”

Pursuant to the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (the “FCRA” or “Act”), access to information maintained by consumer reporting agencies is strictly controlled. A person must have a “permissible purpose” to access such information. 15 U.S.C. § 1681(b). In most instances, a consumer authorizes a prospective lender with whom it wishes to do business to access the consumer’s credit. In the case of prescreening, however, the proposed transaction is initiated by the lender rather than the consumer, and the consumer has not authorized access to his or her credit information. Under these circumstances, the FCRA permits a company to access that information (or to cause another person to access that information on the creditor’s behalf) only if the company will extend a “firm offer of credit” to the consumer.

The FCRA defines a “firm offer of credit” as “any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer.” 15 U.S.C. § 1681a(l). However, a creditor may condition such an offer on the consumer meeting the following specific requirements: 1) the creditor may apply additional pre-selected criteria bearing on the consumer’s creditworthiness; 2) the firm offer may be conditioned on verification that the consumer continues to

meet the specific criteria used to select the consumer for the offer; and 3) the offer may be conditioned on the consumer's furnishing any collateral that was both established before the selection of the consumer for the offer and disclosed to the consumer in the offer. *Id.*

In sum, the FCRA generally prohibits accessing consumer information maintained by a consumer reporting agency absent express consent by the consumer. An exception is created so long as the person accessing the information without express approval does so for the purpose of making a "firm offer of credit."

Lenders "prescreen" consumers by creating sets of criteria which, if satisfied by a given consumer, would qualify that consumer for a loan or other extension of credit. Those criteria are typically provided to a third-party company specializing in marketing or fulfillment (mailing, postage, etc.) or both. The third-party creates a proposed mailer or flyer and contacts one or more of the consumer reporting agencies ("CRAs") to obtain a list of consumer names and addresses of those consumers who meet the pre-set criteria. In some cases the third-party itself may qualify as a CRA. Once the names and addresses have been provided, the mailer or flyer is sent to the consumers identified. Consumers are told that they are "pre-approved" for a loan or that a loan is "guaranteed." Consumers then typically respond by calling a toll free telephone number to provide any verification of information required or additional details (such as the amount of equity they may have in their home). Assuming the information is verified and they otherwise meet the collateral requirements of the lender, the loan or credit is then extended.

Cole v. U.S. Capital

Until recently, many lenders engaged in prescreening without much, if any, resulting litigation. In 2004, however, the United States Court of Appeals for the

Seventh Circuit issued its opinion in *Cole v. U.S. Capital*, 389 F.3d 719 (7th Cir. 2004) which resulted in numerous class action cases being filed against virtually every lender in the United States who engages in prescreening. As of this time, over 100 cases are pending in numerous states, with concentrations in Chicago, Illinois and Orange County, California. The *Cole* case and the cases that have subsequently been filed are driven primarily by what terms must be included in a mailer or flyer related to an offer to make it “firm.”

The promotional credit flyer mailed to the plaintiff in *Cole* stated that plaintiff was pre-approved to participate in an exclusive offer made by the defendants. *Id.* at 722. It also stated that the plaintiff was eligible to “receive a Visa or MasterCard with limits up to \$2,000 as well as up to \$19,500 in AUTOMOTIVE CREDIT!” *Id.*

In addition, the notice also informed the plaintiff that she was selected for the offer based on information obtained in her credit report and that while she met the initial criteria for inclusion in the special credit offer, her final acceptance was conditioned on her ability to meet the full eligibility requirements. *Id.*

The promotional flyer then explained certain specific criteria that plaintiff would have to meet in order to take advantage of the special credit offer. *Id.* For instance, the flyer informed plaintiff that she could not have a car payment that exceeds 50% of her gross income, that she must be eighteen years of age with an annual income of at least \$18,000, and that any bankruptcies must be discharged.

The most important part of the flyer, however, specified that the consumer was guaranteed to receive a credit line of at least \$300 for the purchase of a vehicle, that the offer could be revoked if the consumer no longer met the initial criteria, and provided the plaintiff with information as to how to be omitted from any future offerings. *Id.* at 723. In other words, while Plaintiff was being offered guaranteed

credit, she was only guaranteed to receive \$300, and that had to be used to purchase a new car.

Finally, the flyer specified that the “guaranteed approval is neither expressed nor implied, interest rates may vary from 2.9% to 24.9% based on individual credit worthiness and lenders credit parameters.” *Id.*

The district court granted Defendants’ motion to dismiss, accepting their reasoning that they had in fact guaranteed credit, and that therefore they had extended a firm offer of credit that satisfied the “permissible purpose” requirements of the FCRA. A strict reading of the plain language of the FCRA supports that argument and the District Court’s decision - a firm offer of credit is “any offer of credit . . . that will be honored” if the consumer meets the pre-determined criteria. There is no question that in *Cole* there was an offer of some credit, and no allegation by the plaintiff that she had tried to accept the offer but had been rejected.

The Seventh Circuit disagreed, however, and reversed the district court, holding that merely offering “some” credit was not sufficient. In other words, contrary to the plain language of the FCRA, not just “any” offer of credit will do. Instead, a district court must scrutinize an offer of credit to ensure that it has “value” to a consumer before it can be held to constitute a “firm offer of credit.”

In applying its interpretation of the FCRA to the promotional credit flyer in *Cole*, the court first considered the plaintiff’s argument that the defendants’ offer was merely a sham to justify obtaining her credit report and could not be considered a “firm-offer of credit” since the amount of credit offered was only \$300 towards the purchase of a vehicle. *Id.* Plaintiff essentially argued that the Defendants did not access her credit information for the purpose of extending an offer of credit, but rather for the purpose of trying to sell her a car. Plaintiff argued that the offer of a mere \$300 was only made

to justify the access to her credit for purpose of soliciting her business to buy a car. The Defendants responded with an argument that under the FCRA, all that is required is that some amount of credit be guaranteed, regardless of the amount of credit offered. *Id.* The Seventh Circuit rejected the Defendants' argument, reasoning that the express purpose of the FCRA was the protection of consumer data and privacy. *Id.* Accordingly, the court determined that in order to comport with the express purposes of the FCRA, an offer of credit must not only be honored, but it must also be of sufficient value to the consumer to justify the absence of the statutory protection of the consumer's privacy. *Id.* The court held that a district court must consider the entire offer and the effect of all the material conditions that comprise the offer to determine whether the offer is "a firm offer of credit" as contemplated by the statute. *Id.* at 728.

The Seventh Circuit made it clear that while *the amount of credit* to be extended is an important consideration, a court should also take into consideration *all* terms of the offer, including: 1) the rate of interest charged; 2) the method of computing interest; 3) the length of the repayment period; 4) whether the terms were confusing, contradictory or buried in fine print; and 5) the type of credit offered. *Id.*; n.9. Thus, whether an offer is a "firm offer of credit" turns on a fact-intensive analysis of the entire offer with the key determination being whether, based on all the terms in the offer, it is clear that the offer will be honored and that the offer will be of sufficient value to the consumer to justify the risks of exposing consumer information to third-parties without prior consent. *Id.*

The court then went on to apply its interpretation of the FCRA to the flyer at issue. *Id.* According to the court, it was not clear from the promotional flyer whether the offer would be honored even if the consumer were to meet all the conditions set

forth in the offer. *Id.* The court based its reasoning on the fact that while the flyer stated that the Plaintiff was guaranteed at least \$300 towards the purchase of a vehicle, the offer also stated that “[g]uaranteed approval is neither express nor implied.” According to the court, the terms themselves were completely contradictory and created a genuine question as to whether the offer of credit would be honored. *Id.*

Additionally, the court found that the small amount of credit, as well as the fact that the offer of credit was limited towards the purchase of a vehicle, created a question as to whether the offer had value to a consumer. *Id.* Moreover, the court found it significant that the offer did not inform the plaintiff of her precise rate of interest, nor did it specify the method by which the interest would be calculated. *Id.* In addition, the offer was silent as to the repayment period. *Id.* The court then reasoned that all of these missing factors were essential considerations in determining whether an offer of credit had any value to a consumer. *Id.* The court finally found that the fact that these terms were missing rendered it impossible for the court to determine the value of the offer, if any, for the Plaintiff. *Id.* Accordingly, the court ruled that since the Plaintiff had pled sufficient facts which would allow her to establish that the Defendants’ promotional credit flyer had no real value, the lower court had erred in dismissing the Plaintiff’s complaint. *Id.*

Cole’s Impact

Following the Seventh Circuit’s decision in *Cole*, the law firm representing the Plaintiffs in *Cole* filed a large number of lawsuits against lenders and creditors who engage in prescreening. Many of these cases were filed on behalf of the members of a single family, and most involve nearly identical allegations. Almost every case alleges a violation of both section 1681b (no permissible purpose for accessing the plaintiff’s consumer information because no “firm offer of credit” was extended) and section

1681m (required opt out disclosures were not clear and conspicuous). Most of these cases were filed in the U.S. District Court for the Northern District of Illinois, with additional cases being filed in Indiana, Wisconsin, California, Florida and other states. While one particular plaintiffs' firm has filed a large number of these cases, a second group of lawyers has filed another large number of cases, and several other firms have filed smaller numbers of cases.

These cases all allege that the defendants have "willfully" violated the FCRA by prescreening consumers without making offers of credit that qualify as "firm offers" under the Act. The FCRA provides that a person who violates the Act is liable for any actual damages caused by the violation. It will be a very rare case in which a plaintiff will be able to allege that he or she incurred actual damages as a result of prescreening. Moreover, the individualized inquiry into such damages would almost surely defeat any effort at certifying a class. However, the Act also provides for statutory damages of between \$100 and \$1,000 per violation of the Act if the violation is "willful." 15 U.S.C. § 1681n. In another noteworthy Seventh Circuit decision in 2005, the court held that to "willfully" violate the Act, a lender must "knowingly and intentionally" violate the Act. *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005). The court wrote: "[t]o act willfully, a defendant must knowingly and intentionally violate [the FCRA], and it must also be conscious that [its] act impinges on the rights of others." *Id.* (emphasis added, alterations in original). The inquiry in the Seventh Circuit is therefore subjective and focuses on the lender's knowledge and intention.

In January of 2006, the U.S. Court of Appeals for the Ninth Circuit issued yet another opinion in *Reynolds v. Hartford Financial Services Group*, 435 F.3d 1081 (9th Cir. 2006). *Reynolds* was not a prescreening case, although it was based on the

FCRA. The issue in *Reynolds* was whether the adverse action notice requirement of the FCRA required an insurer to notify a consumer if the consumer received less than the most favorable rate being offered when the insurance company sold an initial policy to the consumer. *Reynolds* is significant to the prescreening litigation pending in the Ninth Circuit because of its discussion of what a plaintiff must offer in order to establish a willful violation of the Act. The Ninth Circuit said that a defendant acts willfully if it acts

either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in *reckless disregard* of whether the policy contravened those rights.

Id. at 1099 (emphasis added). Thus, the Ninth Circuit standard for willful conduct appears to include the possibility that “reckless” behavior will be sufficient, while the Seventh Circuit focuses on actual knowledge and intent.

One recent decision in the U.S. District Court for the Northern District of Illinois resulted in summary judgment for the plaintiff because the court concluded that the mailer in issue did not contain sufficient terms to constitute a firm offer of credit. *Kudlicki v. Farragut Financial Corp.*, No. 05 C 2459 (N.D. Ill. Jan. 20, 2006). Moreover, the court held that the defendant acted willfully, supporting that conclusion with a statement that the compliance officer who reviewed the mailer “is not an attorney, and there is no competent evidence that any attorney reviewed defendant’s mailer.” This opinion suggests that a defendant who prescreens and sends a mailer that does not contain sufficient terms from which the court can determine its value, and which was not reviewed by an attorney, will be found to have willfully violated the statute.

In another recent case in the U.S. District Court for the Northern District of Illinois a different judge granted summary judgment for the defendant on the basis

that, although the defendant failed to make a firm offer of credit, there was no evidence to support the plaintiff's claim that the defendant willfully violated the statute. *Murray v. New Cingular Wireless Services*, 432 F. Supp. 2d 788 (N.D. Ill. 2006). In yet another case in the U.S. District Court decided on July 31, 2006, a third judge found that he could not grant either plaintiff's or defendant's motion for summary judgment on the basis of willfulness, finding that the issue was one for the jury to decide. *Murray v. Sunrise Chevrolet*, ___ F. Supp. 2d ___, 2006 WL 2165747 (N.D. Ill. 2006). Motions for summary judgment in numerous other prescreening cases are presently briefed and awaiting ruling.

In *Reynolds*, the defendant argued that its practice of not sending an adverse action notice to consumers was reviewed and approved by an attorney. The Ninth Circuit stated that a company that makes a "diligent and good faith" effort to determine "the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute" does not act willfully. *Reynolds*, 435 F.3d at 1099. However, the court said that a defendant may not rely upon "creative lawyering" and that if the conclusions of the attorney who reviewed the practice in question are "implausible," the mere fact that the defendant conferred with a lawyer may not establish a lack of willfulness. *Id.* The court wrote:

Whether or not there is a willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on the specific evidence as to how the company's decision was reached, *including the testimony of the company's executives and counsel.*

Id. (emphasis added). Putting the decisions from *Kudlicki* and *Reynolds* together, a defendant in an FCRA prescreening case may be forced to waive the attorney-client privilege and present testimony from an attorney who reviewed the mailer in issue in order to successfully rebut the plaintiff's claim of a willful violation of the statute.

Battles over whether the mere assertion of a “reasonable procedures” or “lack of willfulness” defense results in the waiver of the attorney-client privilege if an attorney was involved in the process of determining whether an offer complied with the FCRA are presently under way in a number of cases. In several cases the parties have reached stipulations regarding a limited waiver of the attorney-client privilege so that defendants can offer evidence that they were informed by their attorneys that their offers complied with the statute. It remains to be seen whether the presentation of such evidence will be sufficient to justify summary judgment for a defendant, or whether courts will find that the question of whether conduct was willful is one for the jury.

The stakes in this litigation are high. Many of the defendants have made millions of offers of credit. In the hypothetical case of a lender who accessed the consumer information of 10 million consumers, the lender would face potential damages of \$10,000,000,000. That’s \$10 billion (10 million violations x \$1,000 per violation).¹ Even at the statutory minimum of \$100 per violation, such a lender would face a minimum of \$1,000,000,000 in potential liability.² Moreover, the combination of *Cole*’s requirement of a fact intensive inquiry into the “value” of an offer combined with *Ruffin-Thompkins*’ fact intensive inquiry into the knowledge and subjective intent of the lender makes summary judgment a challenge.

Over the course of the past year, there have been a number of noteworthy developments in this litigation.

¹ It is also possible that multiple mailings or offers to the same consumer could be considered multiple violations of the Act, thereby even further increasing the potential exposure.

² There are good arguments that a district court judge has the discretion on Constitutional grounds to reduce such an award, even if it comprises the statutory minimum.

First, cases against small defendants or defendants with small net worth are being settled on an individual basis. While the exact terms of these settlements are largely confidential, it is believed that they have been resolved for relatively minimal amounts of money. In some cases, plaintiffs have named both the lender and the third-party “mailhouse” or “print and fulfillment” company who sent out the physical mailer as a defendant. In some of the auto finance company cases, both the auto financier as well as a car dealership is named as a defendant. In some of these cases the plaintiffs are settling with the smaller or lower net worth defendants but pursuing their claims against the larger defendants.

Second, one case was tentatively settled on a class wide basis. In that case, Indymac Bank settled for \$1.6 million to a nationwide class that contained as many as 20 million individuals. The terms of the Indymac settlement as approved by the district court on January 11, 2006 called for a \$3,000 award to the Plaintiff, \$330,000 in attorneys’ fees to Plaintiff’s attorney, and \$1,267,731 to the 11,421 class members who filed claims (\$111.00 to each claimant), with the balance going to charity. This settlement was later challenged by class members who claimed that they did not receive notice of the proposed settlement and that the notice procedures approved by the court were insufficient. The class members who objected had sued Indymac in another jurisdiction, and their litigation would have been preempted had the settlement in Illinois been approved. The court granted their motion to vacate final approval of the settlement and the Indymac litigation continues.

A similar settlement was negotiated in a second case, filed by the same plaintiff and law firm against GMAC Mortgage, pending before the same judge as the Indymac case. Curiously, in that case the court refused to consider preliminary approval of the settlement. In the GMAC Mortgage case, a motion for class certification was pending

and fully briefed at the time the parties informed the court they intended to seek preliminary approval of the settlement. Rather than affording the parties an opportunity to present their motion, the court instead denied the pending motion for class certification, holding, among other things, that the Plaintiff was not an adequate class representative and her counsel was not adequate. The court reasoned that because the Plaintiff had not pursued individual settlement prior to settlement on a class wide basis, she had somehow acted improperly and shown herself and her counsel to be unqualified. The court also reasoned that the plaintiff was “abusing” the class action procedure by seeking to hold GMAC Mortgage accountable for devastating damages for a mere technical violation of the statute.

The Plaintiff in the GMAC Mortgage case filed a petition for leave to appeal to the Seventh Circuit pursuant to Federal Rule of Civil Procedure 23(f). On January 17, 2006 the Seventh Circuit granted that petition and vacated the district court’s order, remanding the case to the district court with an instruction that it be reassigned to another judge. Unfortunately, Judge Easterbrook, writing for the panel, made a number of comments related to issues that were not briefed by the parties or raised with the court that are of concern. First, he mentions in passing that the offer at issue in the GMAC Mortgage case was made prior to the effective date of certain amendments to the Act contained in FACTA related to section 1681m (requirement of clear and conspicuous disclosures of the consumer’s right to opt out of future prescreened offers of credit) and that those amendment therefore wouldn’t apply in this case, and second, he indicates that the settlement proposal (as he understood it) was “untenable” in that it resulted in the named Plaintiff receiving 300% of the maximum possible statutory damages while the class members would likely each receive less than 1% of the minimum possible statutory damages. He indicates that

this seems like a “sellout.” Finally, in remanding the case, the Seventh Circuit “strongly suggested” that the Executive Committee of the U.S. District Court for the Northern District of Illinois consider reassigning all of the Murray family’s FCRA cases to a single judge to ensure consistent handling.

This latter comment relates to the third notable development in these cases. A number of judges in the Northern District of Illinois have now certified classes in cases nearly identical to the case against GMAC Mortgage where certification was denied. *Murray v. New Cingular Wireless*, No. 04 C 7666, --- F.R.D. ---, 2005 WL 3115813 (N.D. Ill. Nov. 17, 2005); *Murray v. Cingular Wireless II*, 05 C 1334 (N.D. Ill. Dec. 22, 2005); *Kudlicki v. Farragut Financial Corp.*, No. 05 C 2459 (N.D. Ill. Sept. 29, 2005); *Wanek v. CMA Mortgage, Inc.*, 05 C 4775 (N.D. Ill. April 17, 2006); *Tremble v. Ocean Bank*, No. 05 C 2625 (N.D. Ill. Apr. 21, 2006). Judges in the Northern District of Illinois are thus in harmony at the moment. There are no decisions either granting or denying certification of classes in any of the cases pending in California as of the date of this writing. Motions for class certification have been denied in two cases in Florida. *Preston v. Mortgage Guaranty Ins. Corp.*, 5:03-CV-111-Oc-10GRJ (M.D. Fla. June 22, 2004); *Glatt v. PMI Group, Inc.*, 2:03-cv-326-FtM-29SPC (M.D. Fla. Sep. 7, 2004).

Fourth, numerous judges have now dismissed plaintiffs’ section 1681m claims on the basis that the FACTA amendments have eliminated private rights of action for failing to make clear and conspicuous disclosures of the consumer’s right to opt out of future prescreened offers of credit. Section 311(a) of FACTA added new subsection (h)(8) to 15 U.S.C. §1681m. As amended, Paragraph (8) of subsection (h) provides:

(8) Enforcement

(A) No civil actions. Sections [1681n] and [1681o] of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement. This section shall be enforced exclusively under section [1681s] by Federal agencies and officials identified in that section.

15 U.S.C. §1681m(h)(8). The effective dates for the FACTA provisions varied, with Section 1681m(h) effective December 1, 2004. See 16 C.F.R. 602.1(c)(3)(xiii)(2005). In both subparagraphs (A) and (B) of paragraph 1681m(h)(8), the phrase “this section” refers to “section,” not “subsection,” and necessarily refers to the entire Section 1681m. Thus, under subparagraph (A) there can be no “civil actions” seeking liability under Sections 1681n or 1681o for violations of 1681m.³ Moreover, under subparagraph (B), section 1681m “shall be enforced *exclusively* under section [1681s] by Federal agencies and officials identified in that section.” (emphasis added). Thus, private litigants are no longer permitted to pursue civil actions alleging liability for failure to make a “clear and conspicuous” disclosure under section 1681m.

As of the date of this writing, every court to consider a motion to dismiss plaintiffs’ section 1681m claims that first arose after the effective date of the FACTA amendments has granted that motion and accepted this reasoning. At least one of those cases, *Perry v. First National Bank*, is currently on appeal to the Seventh Circuit Court of Appeals. The *Perry* case has been fully briefed and argued, and a decision could be issued at any time. So far the issue of whether a violation that pre-dates the effective date of the amendment but which was first raised in a complaint filed after the effective date of the amendment has not been resolved. However, as mentioned earlier, Judge Easterbrook mentioned in *dicta* in the GMAC Mortgage case that

³ The FCRA contains two private remedy provisions at 15 U.S.C. §§1681n and 1681o, respectively. The first provides remedies for willful violations of the statute; the latter applies in cases involving negligent violations.

because the offer at issue in that case had been made prior to the effective date of the amendment, the case was unaffected by the amendment. This issue was not part of the appeal, however, and had not been briefed by the parties in the Rule 23(f) petition and the response to that petition. The first few decisions addressing this issue following the *GMAC Mortgage* case have followed Judge Easterbrook's pronouncement, *dicta* or not.

As of the date of this writing, numerous motions for summary judgment are pending in the FCRA prescreening cases. Many issues are raised in these motions, including questions about how many of an offer's terms must be expressed in the initial written communication related to the offer of credit, whether any terms of the offer can be variable depending upon unique information about the recipient unknown to the lender at the time of the offer (such as the amount of equity in the consumer's home and the rate the lender is consequently willing to offer), and how the courts will apply the *Ruffin-Thompkins* standard of willfulness. Lenders are also struggling with issues of attorney-client privilege, as many have engaged in prescreening with the input of both in-house and outside counsel. Their efforts to obtain guidance from lawyers to ensure compliance with the FCRA could be important to establish that if they violated the Act, they did not do so intentionally. On the other hand, arguing that they obviously attempted to comply with the Act by obtaining advice of counsel will likely result in a waiver of the attorney-client privilege—a pill that many defendants have a difficult time swallowing.

In most of the pending cases discovery remains open and the plaintiffs press for production of information related to all aspects of the development and implementation of prescreening programs. Meanwhile, the industry does not appear to have slowed down in its prescreening activity. Until a court of appeals renders a

definitive decision related to how *Cole* will be applied in other contexts, the industry remains exposed to a great and ever increasing risk.

If you have questions about the current status of the prescreening litigation or the most recent developments in this important group of cases, please contact Tom Cunningham at Lord Bissell & Brook in Chicago. Tom can be reached at 312-443-1731 or tcunningham@lordbissell.com.

This piece is intended solely for educational purposes. It is not intended to constitute legal advice or to create an attorney-client relationship. Readers must obtain legal advice specific to their particular enterprise and circumstances in connection with each of the topics addressed. The law in this area is developing rapidly, and the latest developments must always be taken into account.