FUTURE LAWYER'S FORUM

The Times They Are A Changin'

By George Pammer

Come senators, congressmen
Please heed the call
Don't stand in the doorway
Don't block up the hall
For he that gets hurt
Will be he who has stalled
There's a battle outside ragin'
It'll soon shake your windows
And rattle your walls
For the times they are a-changin'[1]
- Bob Dylan

Never has the above lyrics rang more true in our society than they do right now. Iconic singer and songwriter Bob Dylan, composed these lyrics at a time when our country was at a great crossroads in our history. The Vietnam War was raging, Civil Rights were being fought for and against, there was civil unrest, protests, and a clash of political ideologies.

Just a little background on 1964, the year Bob Dylan released this song. Jack Ruby was convicted of murder in slaying of Lee Harvey Oswald and sentenced to death by a Dallas jury on March 14, 1964. The conviction was reversed Oct. 5, 1966 and Ruby died Jan. 3, 1967, before a second trial could be held. Three civil rights workers were murdered in Mississippi, which resulted in 21 arrests and a trial and conviction of seven by a federal jury. Nelson Mandela was sentenced to life imprisonment in apartheid ruled South Africa. The President's Commission on the Assassination of President Kennedy issued Warren Report concluding that Lee Harvey Oswald acted alone. The following year, 1965, Dr. Martin Luther King, along with 2,600 others, were arrested for protests during a three-day demonstration against voter-registration rules in Selma, Alabama and this was the same year that Malcolm X was assassinated.


George Pammer

The purpose of sharing all of that is not to impart a history lesson. It is instead to point out that now the times we are living in are a changin' once again. We face many of the same societal issues even though the names have changed. Congress is faced with making a determination on a Supreme Court nominee, or maybe not. The presidential election is one that is clearly history in the making. The worldwide terror threat continues to grow; we now have diplomatic relations with a Communist country. New York State will administer a new bar exam this July known as the UBE, and Dean Salkin is leaving her position at Dean of Touro Law School.

Yes, for those of you that have not heard, the Dean of Touro Law School, Patricia Salkin, is indeed leaving. The Touro College system has offered her the position of provost for the entire college, and Dean Salkin has accepted. The tentative schedule is for her to assume her new position on August 1, 2016. Her new position will still provide her the ability to be involved with the law school as well as remain on faculty where she plans to continue teaching.

Dean Salkin has made great strides in her tenure. In her email to the student body informing them of her decision to accept the position she stated: "I am grateful for the support each of you have given to me from the day I joined the Jacob D. Fuchsberg Law Center family. I am proud that together we have accomplished a lot. We have more than doubled our endowment, added an endowed chair in health law & policy, and we have raised nearly $1.5 million in direct student scholarship support and with the help of many friends we have raised close to $16 million in support for our school. Equally as important, we have introduced a culture of philanthropy with our future alumni through the new tradition of the graduating class gift." Dean Salkin continued: "On a personal note, I have been truly honored to serve as Dean of Touro Law Center for the past four years. Everyone in our community welcomed and continuously demonstrated support and friendship for me and for my family. I have learned from everyone in this community, and I appreciate the culture that makes us unique and special. I recently heard someone say that 'People Make the Place,' and I could not think of a better example of how true this is than here at Touro Law."

I could not agree more. Dean Salkin is one of the people that make the place. She would arrive before the students in the morning and go home after the evening students at night. She would return phone calls and emails at two in the morning, always making herself available to the students at Touro. As Provost of Touro College she will still be involved with the law school but assuredly it will not be the same. She will be involved with the selection process of her replacement, but it is in this writer's opinion that she is irreplaceable. The Times They Are A Changin'.

Note: George Pammer is a 3rd year law student at Touro Law School. George is a part-time evening student and the President of the Student Bar Association. He has also held the position of Vice-President in the SBA as well as in the Suffolk County Bar Association – Student Committee, where he was one of the founding members.

1 Bob Dylan - The Times They Are A-changin' Lyrics | MetroLyrics http://www.metrolyrics.com/the-times-they-are-achangin-lyrics-bob-dylan.html

REAL ESTATE/BANKING

Is Dodd-Frank Working?

By James C. Ricca and Lindsay E. Mesh

The regulatory history of banking in the United States is marked by our government's response to economic events. When we look at our country's economic history, as demonstrated by the attached graph depicting U.S. recessions and gross domestic product, we see that major bank reforms were passed in response to depressions, recessions and catastrophic economic events.

The attached chart of U.S. Gross Domestic Product and Recessions illustrates legislative action and reaction:

- In response to numerous bank failures in 1863, Congress passed the National Banking Act, which took local "Wildcat Bank" notes out of circulation, introduced a uniform national currency, set up a system of federally chartered banks and created the office of the Comptroller of Currency.
- In response to the Panic of 1907, when the New York Stock Exchange fell almost 50 percent and there was a massive nationwide bank run, Congress passed the Federal Reserve Act of 1913.
- In response to the stock market crash of 1929 Congress passed the Banking Act of 1933, which established the Federal Deposit Insurance Corporation ("FDIC"), The Securities and Exchange Act of 1934, creating the SEC and the Glass Steagall Act which separated banks into two types — commercial banks and investment banks.
- In response to the 2008 Financial Crises, our lawmakers passed the Dodd-Frank Wall Street Reform Act ("Dodd-Frank"), the most sweeping rewrite of our country's financial laws since the New Deal.


James C. Ricca


Lindsay E. Mesh

The 2008 Financial Crises was a result of a number of events: the U. S. housing bubble collapsed, securities tied to subprime mortgages tanked, high risk investments called derivatives backfired and regulators and credit rating agencies failed to recognize the danger. This resulted in a sudden decline in the stock market (DJI fell 700 points), a liquidity shortfall in the U.S. banking system, the collapse of financial institutions (WAMU, Lehman Brothers), lack of credit availability, business failures, a decline in consumer wealth, a sharp increase in residential foreclosures, evictions and prolonged vacancies, and unemployment (2.6 million jobs lost).

At the time it was signed into law, President Obama told the country that Dodd-Frank would "lift our economy." The statute itself declared that it would "end too big to fail" institutions and "promote financial stability." Dodd-Frank has implemented many "reforms" by creating new and strengthening existing regulatory agencies and giving greater oversight powers. However, too-big-to-fail institutions have not disappeared. In fact, big banks have over-all grown bigger. On the other hand, small community banks have struggled with Dodd-Frank's new compliance and reporting regulations, which they have found costly, time consuming and burdensome. In 2008 the top 10 U.S. banks held $9.75 trillion in assets; they now hold $10.1 trillion. But "small banks" (defined as having $10 Billion in assets or less) have shrunk in numbers. The U.S. has lost over 1,000 small Banks over the last decade.

Most glaringly, Dodd-Frank has not eliminated the practice of "Shadow Banking," which was responsible for

(Continued on page 26)

Is Dodd-Frank Working? *(Continued from page 12)*

much of the risky and speculative practices that contributed to the 2008 financial crises. Shadow Banking is where a regulated financial institution uses an intermediary to engage in an unregulated activity that it is not permitted to do. Shadow Bankers are hedge funds, private equity firms, special purpose vehicles, insurance companies, crowdfunding organizations, and money market funds. Shadow banking activities include creating credit default swaps, securitizing loans and trading on the derivatives market.

Dodd-Frank

Dodd-Frank increased regulatory powers for existing Federal agencies and created a number of new federal agencies, which are focusing oversight on a financial institution's activities and the type of services offered, as opposed to the Pre-Dodd-Frank traditional oversight, where a financial institution was primarily regulated by a state or federal agency, dependent upon whether the institution was a state or federal bank.

Enforcement tools under Dodd-Frank that can be seen employed by regulators include fines, restricting activities, restricting credit, requiring termination of select personnel, receivership and criminal prosecution. There have been a number of civil actions brought against the big banks involved in the 2008 Financial Crises, however the fines that have been imposed amount to little more than the cost of doing business:

S.E.C. Fines/Settlements to Investment Banks

- JPMorgan Chase - $31.3 billion
- $91 billion annual revenue, $2.25 trillion in assets
- Bank of America - $57.8 billion
- $85.1 billion annual revenue, $2.13 trillion assets
- Wells Fargo - $9.7 billion
- $84.3 billion annual revenue, $1.31 trillion assets
- Citigroup - $12.8 billion
- $76.9 billion annual revenue, $1.87 trillion assets
- Fannie Mae/Freddie Mac – Placed in conservatorship

With respect to criminal prosecutions and jail time for individuals responsible for the subprime mortgage mess, there has been only one.

What has Dodd-Frank managed to accomplish?

As for some of Dodd-Frank's successes, recent evidence suggests that as a result of tighter regulations on investments, the big banks have been forced to lend more, resulting in more capital in the banking system in order to increase income. Bank executives and other critics of tighter regulations have said that Dodd-Frank would hurt the big banks' ability to lend. Yet, while much of JPMorgan's Wall Street business was lackluster in the third quarter, lending wasn't. Despite problems elsewhere at the bank, JPMorgan's lending continues to grow. The bank's outstanding loans have jumped by about 10 percent in the past year. The big banks are more lending focused then they used to be, creating more capital than before in order to absorb loan losses, which was one of the big problems of the financial crisis.

In addition, a look at the financials suggests that some big banks may actually be shrinking. The thinking behind Dodd-Frank was that if strict regulations were imposed on the biggest banks raising their cost of doing business, then big banks would shrink on their own eliminating the need to go in and force them to break up. For a while, it seemed like that line of thinking was flawed, however, now it seems to be coming to fruition. JPMorgan in its earnings release said that assets, after pretty much going straight up since the financial crisis, have dropped in the past six months by $160 billion, or 6 percent; the assets at Bank of America were flat from the quarter before. Also, although the number of small banks has diminished, there is evidence that community banks have weathered the storm and are making a comeback. In 2008 community banks held $3 trillion in assets and now hold $3.8 trillion.

The financial system today still has a long way to go, but it is safer than it was five years ago. Issues that still need to be addressed include: making it easier for small banks to do business; ensuring the government is responding to the risks of shadow banking, and; dealing with the risks of high-frequency trading. But, at least now, there are better rules for the road to financial recovery.

Note: James C. Ricca is a partner at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP and a member of the real estate law group and co-chair of the banking law group.

Note: Lindsay Mesh is an associate at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, concentrating her practice in the areas of real estate finance, banking, foreclosures, and creditors rights.

ERISA Precludes State Class Action for Massive Health Data Breach *(Continued from page 16)*

"State Notice of Privacy Statutes," and went on to find that the plan "must follow state laws that are more strict than the federal HIPAA privacy law:"

> As the U.S. Supreme Court has held, duties under state law are not independent of ERISA when 'interpretation of the terms of respondents' benefit plans forms an essential part of [respondents'] claim.' . . . [S]tate law legal duties are not independent of ERISA if they are 'based on an obligation under an ERISA plan' and if 'they would [not] exist [if the] ERISA plan' did not exist. . . . In the instant case, Defendants' duty to comply with state privacy laws clearly represents "an obligation under [Plaintiffs'] ERISA plan. (*citations omitted*).

So, the court sustained removal, with the result that all of the state-law based causes of action are preempted.

Several observations are in order. In the section of the decision I just cited, the court holds that state law legal duties would not exist if the ERISA plan did not exist. Really? As recited above, the ERISA plan *expressly incorporates "state laws that are more strict than the federal HIPAA privacy laws."* The ERISA plan did not *create* these rights — as it does with so many of the other rights afforded to a "beneficiary" — but assumed legal obligations *that already existed* independently of ERISA and independently of the terms and conditions of the ERISA plan's benefit design.

Next, I note that the plaintiffs flatly stated that the ERISA plan coverage and benefits did not include any privacy rights. The court disagreed by pointing to the language contained in the plan benefits handbook. What is not made clear is whether that handbook was prepared by the plan fiduciary or by Anthem. Why is that important? The plan fiduciary obviously retained Anthem as the administrator of the plan; Anthem has all the tools and a huge provider network. What if it were Anthem and not the plan itself (through its board or other fiduciary) that prepared the employee benefits handbook, and it contained not only the provisions of the plan benefit design but also a variety of technical and administrative duties and obligations imposed not by the plan but by Anthem? If it were Anthem that incorporated language to the effect that the plan has to follow state privacy laws, is that an obligation of the plan benefit design? What if, next year, the plan fiduciary changes administrators to, say, Cigna, and the new Cigna booklet is silent on the issue? If this hypothetical in fact is what happened here, then the plaintiffs' argument that the privacy duties derive independently of the ERISA plan might hold water, the second "prong" of the *Davila* test might fail, and remand might be granted. (Back to Supreme Kings and all the state based causes of action are restored.)

So, where does this leave the plaintiffs? Unlike the situation in many ERISA cases, these plaintiffs are not without some remedy, albeit not the state based remedies they would like to employ. The federal court will have to determine whether the actions and omissions of Anthem, if proven, implicate a "benefit" due to them under the terms of the ERISA plan, or whether they have an "enforceable right" under the terms of the plan. Also, assuming for the sake of this discussion that the plan benefit design imposes some limitation on the plan's liability in a variety of circumstances (as it almost certainly does) then the plaintiffs' claims, even if established, would be subject to those limitations.

Wouldn't it be ironic, though, if the court later finds that there were no privacy "benefits" due or no "enforceable" privacy rights because the privacy provisions in fact were the creation of Anthem rather than the ERISA plan benefit design?!!

Note: James Fouassier is the Associate Administrator of Managed Care for Stony Brook University Hospital and Co-Chair of the Association's Health and Hospital Law Committee. His opinions and comments are his own and may not reflect those of Stony Brook University Hospital, the State University of New York or the State of New York. james.fouassier@stonybrookmedicine.edu