GABLE GOTWALS
COUNSEL

RAISING THE BAR

Recent Awards

- *Ten GableGotwals attorneys have been recognized by Chambers USA, a leading national and international law firm and attorney ranking guide. The firm has also been recognized in the areas of Energy and Natural Resources, General Commercial Litigation and Corporate/ Commercial. The qualities on which Chambers USA rankings are assessed include technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities most valued by the client.*

- *Diana T. Vermeire, an Of Counsel attorney in GableGotwals' Oklahoma City office, has been named to the Lawyers of Color's Second Annual Hot List, which recognizes early to mid-career minority attorneys working as in-house counsel, government attorneys, and law firm associates and partners.*

- *GableGotwals was announced among the winners of the prestigious 2014 M&A Awards, sponsored by UK-based AI Global Media, Acquisition International Magazine and DealFlow. The firm was specifically recognized by Sustained Excellence to Legal Services—USA.*

- *GableGotwals was named to the 2014 A-List during the Tulsa People Reader's Choice survey.*

10th Circuit upholds judgment in favor of claim administrator

Timothy Carney and Erin Dailey recently obtained a victory for an insurer before the Tenth Circuit Court of Appeals. The issue in *Nelson v. Aetna Life Insurance Company*, No. 13-5073 (10th Cir. June 18, 2014), was whether Aetna acted arbitrarily or capriciously in denying disability benefits to the plaintiff under ERISA. Read the full decision at www.ca10.uscourts.gov/opinions/13/13-5073.pdf.

The plaintiff argued that the district court had erred in refusing to supplement the administrative record with a social security disability award that came down several months after her claim had been denied (and after she had filed suit against Aetna). The plaintiff also argued that Aetna had acted arbitrarily and capriciously by rejecting two treating physicians' opinions that the plaintiff was disabled in favor of the opinions of five independent experts who reviewed the plaintiff's detailed medical records. The Tenth Circuit rejected both arguments.

Regarding the social security award, the Tenth Circuit reiterated that "[i]t is clearly established in this circuit that, 'in reviewing the administrator's decision under the arbitrary and capricious standard, the federal courts are limited to the administrative record'" as it existed at the time of claim denial. Opinion at 7 (quoting *Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151, 1157 (10th Cir. 2010)). The court also determined that the U.S. Supreme Court's decision in *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008), did not require the district court to supplement the record with a social security decision that did not even exist at the time the plaintiff's claim was denied.

Regarding Aetna's rejection of the treating doctors' opinion that the plaintiff could not work, the Tenth Circuit agreed with the district court that it was not unreasonable for Aetna to rely upon the reports prepared by the five independent specialists who reviewed the plaintiff's extensive medical history in favor of the conclusory opinions of her own doctors.

Tim can be contacted at (918) 595-4810 or tcarney@gablelaw.com.
Erin can be contacted at (918) 595-4863 or edailey@gablelaw.com.

Labor & Employment Client Seminar

The Labor & Employment Practice Group will be offering clients the opportunity to attend a complimentary seminar this fall. Topics covered will include compliant workplace policies, non-competes, FLSA classification pitfalls and future mandates. The seminar will be offered from 7:30 am to noon in Tulsa on Friday, October 10, and in Oklahoma City on Tuesday, October 21.

To secure your spot, contact Melissa Bogle at 918-595-4929 or mbogle@gablelaw.com.

Major Litigation Victory for Superior Pipeline Company

Mia Vahlberg recently achieved a major litigation victory for her midstream client Superior Pipeline Company. A producer behind one of Superior's gas processing plants claimed entitlement to a percentage of Superior's condensate proceeds even though the contract did not require it. Superior won in district court, the producer appealed, but Oklahoma's Court of Civil Appeals affirmed judgment for Superior. On June 2, 2014, the Oklahoma Supreme Court denied the producer's Petition for Certiorari (Case No. 111,373). In addition, the court also awarded Superior 100% of its attorneys' fees, just under $200,000.00. Congrats to Mia and kudos to Superior for remaining steadfast through the lengthy litigation process. *Mia can be contacted at (918) 595-4803 or mvahlberg@gablelaw.com.*

Oklahoma's Newest Courtroom

Deborah C. Shallcross has extensive family law experience both inside and outside the courtroom as a retired judge of 30 years. She is uniquely qualified to offer a Private Trial courtroom or arbitration and mediation outside the courthouse. Oklahoma law allows the appointment of a Referee in family law cases. Former Judge Shallcross conducts a trial and provides a Decision with detailed Findings of Fact and Conclusions of Law to the parties and to the assigned Judge. The assigned Judge reviews the Recommendations of the Referee and enters the Decree of Dissolution.

BENEFITS INCLUDE:

- Less expensive. There are no other dockets or emergency matters that require the Judge's time, therefore a trial that could take five days in a traditional courtroom, typically takes two under this system.
- Less stressful and more private. The Private Trial is held in a conference room at the GableGotwals law office or at counsel's office. Attorneys control the schedule and environment.
- Quicker resolution for your clients. Our Family Court Judges have large dockets and are extremely busy. The Private Courtroom provides the option to fast track the case and allows you to better manage your time and your clients' resources. Your clients have all the same rights as with a traditional trial, including the right to appeal.

If you are interested in learning more, please contact Deborah Shallcross at (918) 595-4819 or dshallcross@gablelaw.com.

We Are Employment Law

GableGotwals' labor and employment group represents employers in all aspects of employment law. We regularly counsel employers on day-to-day human resource issues, ensure compliance with state and federal laws and regulations, and assist in preparing contracts, handbooks and policies. We have extensive experience appearing before government agencies and representing employers in labor disputes and all types of employment related individual and class-action litigation. Our knowledge and skill means efficiency and savings in solving your issues, and confidence that we understand the real world consequences to your company.

GableGotwals…Solving Problems and Managing Opportunities.

Tom C. Vincent II joins the GableGotwals Team in Banking Compliance Law

GableGotwals welcomes Tom C. Vincent II as an Of Counsel attorney in our Tulsa office. Tom's practice will focus on compliance issues, particularly in the banking industry. Tom brings extensive industry experience to his practice, having served as Senior Vice President and Chief Compliance Officer at The F&M Bank and Trust Company. Tom also held several compliance-related positions with BOK Financial Corporation (BOKF) and its subsidiaries, including serving as Chief Compliance Officer for BOSC, Inc., BOKF's subsidiary broker-dealer, and also as Senior Vice President and the Manager of Corporate Governance and Wealth Management Compliance. He is also a Certified Regulatory Compliance Manager with experience in investment advisory and trust/fiduciary compliance, and has held various broker-dealer and investment advisory securities licenses.

Tom can be reached at 918-595-4857 or tvincent@gablelaw.com.

D.C. Circuit decision regarding attorney client privilege applied to internal investigations

by Erin Dailey

The issue in *In re Kellogg, Brown & Root, Inc.*, No. 14-5505 (D.C. Cir. June 27, 2014), was whether the district court had erred in ordering the defendant to produce documents from an internal investigation that the defendant claimed was privileged. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) the circuit court found that the district court had erred, warranting the issuance of a writ of mandamus.

In issuing the writ, the higher court held that obtaining legal advice did not need to be the "but for" reason for the investigation in order for the investigation to be privileged. Rather, "so long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion." The court further noted that a communication could have two primary purposes – one business and one legal – and that would not diminish the applicability of the privilege. The court also determined that communications did not have to be with the lawyers in order to be privileged – the privilege also protected communications with non-attorneys who were conducting the investigation at the direction of in-house counsel.

The full decision is here: http://www.cadc.uscourts.gov/internet/opinions.nsf/701A3512988256CD85257D04004F78AA/$file/14-5055-1499662.pdf

A Journal Record Viewpoint by Jeffrey D. Hassell

Gavel to Gavel: Bank rules can confound

Published May 21, 2014

There is no doubt that banks are subject to more regulation almost every day. For example, take the Dodd-Frank Wall Street Reform and Consumer Protection Act. Signed into law in July 2010, it requires that agencies complete almost 400 new rule-makings. As of this writing only a little more than half of those have been finalized. So, while there have been at least 200 new sets of regulations since July 2010, banks can expect almost 200 more in the future, just arising from Dodd-Frank.

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Bank regulations serve many purposes, including ensuring the safety and soundness of banks and the financial system itself. Among other things, those regulations require banks to maintain certain capital levels, monitor the quality of their loans and avoid certain investments. Also, there are regulations addressing bank branch activity, additional lines of business such as securities, or insurance and financial reporting.

Other regulations require banks to assist the government in efforts to thwart illegal activities such as money laundering and terrorist financing. Banks carry out many different activities in order to fulfill these regulatory duties, most of which happen in the background and are not readily apparent to the bank customer. For example, banks are required to report to the government certain currency transactions and various other suspicious activities.

One bank activity that may directly involve a customer is the Customer Information Program requirements under the USA Patriot Act. Banks are required to have procedures to verify the identity of their customers and maintain records of the information they gathered for that purpose. For example, banks must obtain individual customers' names, dates of birth, addresses and Social Security numbers. Banks must keep records of how that information was verified. Also, banks must consult lists of known or suspected terrorists or terrorist organizations provided to the banks to determine whether a customer appears on any such lists.

Complying with these regulations is essential for the legal operation of a financial institution. Communicating to customers how these requirements protect their financial interests and satisfy government mandates should be part of any bank's customer outreach.

Jeffrey D. Hassell is a shareholder with the firm of GableGotwals and a former banking executive and bank general counsel. He can be reached at jhassell@gablelaw.com or 918-595-4823.

A Blog by Adam C. Doverspike and Jeffrey A. Curran

2014 Oklahoma Products Liability Reform Protects Sellers Significantly. Manufacturers Receive Less Relief.

The Oklahoma legislature passed the products liability reform bill, HB 3365, by supermajorities in both chambers: 69-19 in the House and 34-8 in the Senate. Governor Fallin signed the bill into law May 2, 2014.

Taking effect November 1, 2014, the reform legislation provides substantial protections to sellers from product liability lawsuits. The reform also provides protections to manufacturers; however, those protections are undermined by the statute's limitations.

Product Sellers

Sellers who are not manufacturers of a product received significant protection from product liability lawsuits. The reform forbids product liability lawsuits against product sellers, except in statutorily enumerated situations. Sellers familiar with those exceptions can avoid inadvertently exposing themselves to liability. Specifically, sellers do not usually exercise substantial control over the design or testing of products nor do they usually alter or modify products. Thus, the reform excludes most sellers from any vicarious liability based on simply being a conduit of a product.

Sellers still face some residual liability because they cannot control several statutory exceptions. Consumers may still bring suit against sellers if:

- *The consumer cannot "identify the manufacturer" after a good-faith effort; or*
- *The manufacturer is not subject to service of process in Oklahoma; or*
- *The court determines that the consumer would be unable to enforce a judgment against the manufacturer.*

Importantly, the reform limits discovery initially to determining whether any of the statutory exceptions apply. Thus, plaintiffs' lawyers cannot launch full discovery before showing an exception applies.

Sellers also remain liable for ordinary negligence claims if the seller does not "exercise reasonable care" in assembling, inspecting or maintaining a product, or if a seller fails to pass on warnings or instructions from the manufacturer and the sellers' actions cause harm. This limitation will likely precipitate a growth in claims that sellers did not exercise reasonable care, and consequently creates fertile ground for new case law on what constitutes reasonable care in "inspecting" or "maintaining" a product.

Manufacturers

Manufacturers receive less substantive relief from the reform. Ostensibly, the biggest protection is a rebuttable presumption that a manufacturer is not liable for injury based on formulation, labeling or design if the manufacturer "complied with or exceeded mandatory safety standards or regulations" from the federal government. That presumption loses much of its value in the details. First, the reform explicitly excludes manufacturing flaws or defects. The law governing those claims remains even if a manufacturer "complied with all quality control and manufacturing practices mandated by the federal government." Little creativity is needed for plaintiffs' attorneys to alter future pleadings to allege such a flaw or defect.

Second, the presumption may provide little cost savings depending on how and when during litigation the judiciary decides whether a presumption has been rebutted. If the courts permit significant discovery before addressing whether the presumption has been rebutted, the reform loses even the small benefit it provides.

Third, the presumption is rebuttable merely by showing the standards "were inadequate to protect the public from unreasonable risks, injury or damage." Manufacturers should expect a rise in expert testimony about what is adequate to protect the public.

Finally, the presumption is rebuttable by showing the manufacturer withheld or misrepresented information to the federal government agency that approved the product's safety. Manufacturers should expect an increased scope of discovery to identify any possible error or exclusion that could support a showing that the manufacturer misrepresented information to the government.

Those limitations notwithstanding, manufacturers may receive a hidden benefit in being able to remove more products liability cases to federal court. Once a seller's non-liability is established, more products liability cases will satisfy the requirements for diversity jurisdiction. Thus, the reform may provide a new avenue to the federal courthouse.

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A Blog by David B. McKinney

Employers: You Can Manage the Affordable Care Act Without Cutting Employees' Hours

The Affordable Care Act ("ACA") gives many Americans the opportunity to buy health insurance without facing limitations on preexisting conditions or lifetime benefits. It also requires large employers — which employ 50 full time equivalent workers — to offer a health plan to employees who work an average of 30 hours or more. This is called the "Employer Mandate."

The Employer Mandate has had a significant consequence: some employers are cutting employees' hours to avoid the mandate. Large employers are not required to offer healthcare to employees who work less than an average of 30 hours. Some employers are aggressively cutting hours, which deprives workers of a significant part of their income and forces them to buy insurance out of their own pocket.

The transition to part-time workers is a significant problem for the American economy — and should not happen. The little-known reality is that it does not need to happen.

Large employers, which can afford to offer reasonably-priced healthcare to their employees, should offer it. Some employers, however, simply cannot — or will not — offer healthcare to all workers. Retail stores, convenience stores, restaurants, etc., would go broke if they offered healthcare to their employees. Other employers face significant dilemmas because they are being forced to offer healthcare services that are repugnant to the owners.

There is another way — a way that protects employers and employees from the ACA's penalty taxes without extending coverage to workers. Here is an outline of the way to comply with the law without covering additional workers:

Establish an employer-funded, "Bare Minimum," health plan. The Bare Minimum Plan does not need to include all the bells and whistles that a health insurance policy must include. It does not need to offer coverage to the employee's entire family; it can exclude spouses and children over the age of 26. It does need to provide coverage for fundamental benefits such as hospitalizations, physician services, lab work, diagnostic tests, and drugs.

Provide the lowest permitted value. The Administration has done a good job helping employers know whether their plans provide the "minimum value" required by law. The plan could provide the minimum value that passes the Administration's test. In general, this would permit about a $6,000 annual deductible.

Charge the highest premium permitted by law. The law requires employers to make their plans "affordable." To satisfy this requirement, a plan can charge a premium of 9.5% of total family income — and this is just for the employee's coverage.

To be on the safe side, you could tell employees that the premium will be 9% of the husband's and wife's total income — and require the employee to prove what the income is.

You could charge an additional "COBRA" premium for each child who is covered by the plan.

You should make a written offer of the plan to each employee who works close to 30 hours per week or more. If you offer the plan to your over-30 hour employees, you should have complied with the law — and should not owe the employer's penalty tax.

Since you charge the employee a premium of more than 8% of the family's income, the employee should be exempt from the obligation to buy coverage on the Exchange or to pay a penalty tax.

Employees, who are not currently covered by your health plan, should be in the same situation as they are today: they should have a job that pays a living wage but they do not have health insurance or a legal obligation to buy it.

Employees could buy insurance on the Exchange, but might not be eligible for some of the ACA premium subsidies. In all likelihood, they will be able to get better and cheaper coverage on the Exchange. However, since you are charging more than 8% of family income, even if the employee does not get coverage, the employee should be exempt from the "penalty tax."

Consider alternatives. You could offer an "indemnity" insurance plan that is exempt from many of the ACA's rules and covers some of your employees. A self-funded indemnity plan would need to cover most employees who work over 35 hours per week (and probably 30 hours per week after new regulations are issued). An indemnity plan comes with a whole set of legal and tax issues, so you should get professional advice before you adopt such a plan.

Watch out for discrimination. The ACA prohibits employers from offering a nice insurance package to highly compensated workers and a bad insurance package to other workers. If you have a nice policy for some employees, you should consult with a specialist to determine whether the other workers must be covered by your nice policy — or whether the law exempts the other workers from coverage.

The "discrimination rule" currently applies to self-funded plans, but it will apply to insured plans later. The new discrimination regulations have not been written, so stay tuned for future developments.

If you cannot afford to insure all of your workers — or if, for some reason, you simply will not do so — at least you should consider the law's alternatives that would let your workers continue to receive a living wage.

Executive Q&A with The Oklahoman:

GableGotwals' chief David Keglovits is a fan of Notre Dame and the law

Dave Keglovits joined Tulsa-based GableGotwals in 1990, fresh out of the University of Texas law school. A commercial litigator, he made partner six and a half years later, was named firm president in 2005, and currently serves as chairman and chief executive officer.

When his two daughters were very young, Dave Keglovits, a commercial litigator with Tulsa-based GableGotwals, helped argue a 1999 case in which Bill Koch, of the family-owned Koch Industries, sued his brothers over the way oil was being measured. Keglovits' then 5 year old wanted constant updates on what became known in their house as "the oil-stealing case." Every night when he arrived home, the two would review the basic, non-confidential aspects of the trial.

Fifteen years later, Keglovits said he still enjoys his work and the now more sophisticated discussions it sparks with his teenage daughters. Along with commercial litigation, including representing Oklahoma Natural Gas in rate-setting cases before the Oklahoma Corporation Commission, Keglovits serves as chairman and chief executive officer for GableGotwals. Founded after WWII, the firm employs 146, including 80 lawyers — 55 in Tulsa and 25 in Oklahoma City.

From its Oklahoma City offices at Leadership Square, Keglovits sat down with The Oklahoman to talk about his life and career. On the following page is an edited transcript...

PERSONALLY SPEAKING

Position: GableGotwals law firm, chairman and chief executive

Birth date: Aug. 5, 1963

Hometown: Tulsa

Education: University of Texas, juris doctor; University of Notre Dame, bachelor's in accounting

Family: Wife, Jennifer "Jenny" Allen Keglovits, a Sand Springs native and medical malpractice defense attorney (they met their second year at UT); daughters, Sarah, 19, a freshman at Stanford University; and Kelly, 15, a sophomore at Holland Hall School

Civic contributions: He serves on the boards of the Tulsa Area United Way and the Tulsa Symphony Orchestra, and on the board of advisers for the Tulsa Metro Chamber of Commerce

Pastimes: Golfing, snow skiing, reading (He just finished "Lawrence in Arabia" by Scott Anderson, which Sarah recommended) and watching Netflix movies (last watched was "Roman Holiday," chosen by Kelly)

Q: Tell us about your roots.

A: I grew up in Arlington, Texas, where my parents still live. My mother taught reading to seventh graders and my father, who's an accountant by training, functioned as a treasurer for Bell Helicopter. I have a younger brother and sister, and had an older sister who died at the age of 5 or 6 of a rare respiratory disease when I was 3. The Bell Helicopter plant shut down for two weeks every summer, and my parents were good about taking us on family vacations. We saw the Grand Canyon one year and Grand Teton National Park twice.

Q: When did you first consider becoming a lawyer?

A: As a kid, I'd watch "Perry Mason." I was drawn in by the fun of taking the pieces of evidence, putting it together as a puzzle and convincing someone you're right. In seventh grade, I took debate and extemporaneous speech. I had a great teacher — Mr. Bledsoe — who encouraged me to stick with it, which I did throughout high school, along with playing soccer.

Q: And college?

A: I studied accounting at Notre Dame. It was the only school I applied to; I'm not sure what my backup plan was. We were a Catholic family; my mom is Irish and my dad's grandfather emigrated from Croatia. When I was growing up, we'd gather around the radio to listen to Notre Dame games. My mother had a brother who went there, and today our whole family travels to Notre Dame once a year to watch a football game together. My freshman year, Gerry Faust was just starting his first year as football coach and, to build a fan base, came around to the dorms and had pizza with all of us students.

That first game, we beat LSU and were No. 1 for one week, which was great, until Faust went on to have the one of the worst records among Notre Dame coaches. I loved Notre Dame, where students came from all over the country and world. I learned about their communities, which broadened me as a person. I played intramural soccer and flag football and, my senior year, worked as a bartender in the Senior Alumni Club. After graduation, I balked at going straight to law school and instead joined a big eight accounting firm in Houston, where I worked two years and saved money before going on to the University of Texas (UT) in Austin. UT was ranked among the top 15 law schools in the country and very affordable for state residents like me.

Q: When you joined GableGotwals fresh out of law school, did you aspire to be the chief executive officer of the firm?

A: No. But I became president in 2005 when our then president, John Barker, was asked to become general counsel for ONEOK, and we needed someone to take over his job. People liked the fact that I was a CPA before law school, so I'd helped watch the books and with receivables. I stepped into the CEO role three years ago, which is more strategic. We carefully watch the economic drivers of our state and plan to meet relevant needs, such as bringing on Drew Edmondson, former state attorney general and district attorney, to handle Indian law issues. We're demonstrating to out-of-state companies with multi-state operations that we can do quality work, and at a better price, than firms based in Dallas, Houston, Chicago or elsewhere. We're already representing Occidental (which acquired Tulsa-based Cities Service) and ONEOK in other states.

Q: Your firm ranked among the top five in medium-size businesses in The Oklahoman's Top Workplaces rankings last fall. Why do you think that was?

A: We try very hard to balance being a business and being a family. We have a very competitive chili cook-off every year, a karaoke contest (no, I don't compete) and an annual retreat for our lawyers; every other year it's at Big Cedar. Our employees go together to Drillers games, the Bedlam OU-OSU basketball game and entered four relay teams in last month's Oklahoma City Memorial Marathon. I know it sounds trite, but we think of ourselves as a team.