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Legal Analysis

Calling it Quits or Moving in Together? Considerations for Small Liberal Arts Colleges in the Wake of Mount Ida

By Laurie R. Bishop

Voice of the Judiciary

Some Thoughts About the Appeals Court

By Hon. Mark V. Green

Legal Analysis

CPCS v. AG – The SJC Establishes an Unprecedented, Global Remedy for the Victims of the Amherst Drug Lab Scandal to Address Extraordinary Lab Misconduct that Was Compounded by Intentional Prosecutorial Misconduct

By Daniel N. Marx

The Profession

Lawyers and Depression

By Jeffrey Fortgang

Case Focus

NEGPA v. DEP: The SJC Upholds the Commonwealth's Climate Change Mitigation Program

By David Lyons

Legal Analysis

Pay Equity in Collegiate Athletic Coaching and the Massachusetts Equal Pay Act

By Janet P. Judge and Andrew E. Silvia

Legal Analysis

Cell Tower Dumps

By Mason Kortz and Christopher Bavitz

Heads Up

The Fiduciary Litigation Session

By Robert J. O'Regan

Case Focus

In a Matter of First Impression, the Supreme Judicial Court Narrows the *In Pari Delicto* Defense

By Emily E. Renshaw and Jason D. Frank

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Legal Analysis

Calling it Quits or Moving in Together? Considerations for Small Liberal Arts Colleges in the Wake of Mount Ida

By Laurie R. Bishop

Last year's abrupt closure of Mount Ida College in Newton—and its rapid acquisition by the University of Massachusetts at Amherst—highlights a new and frightening reality for many small, private colleges in the Commonwealth and nationwide. Advancing the legacy and mission of many such institutions, while simultaneously navigating between the desire to retain independence and the importance of avoiding sudden closure, now seems to require a new level of ingenuity and appetite for organizational change. Nor is this challenge unique: in Massachusetts alone, over the past few months Newbury College announced its impending closure, while Hampshire College is exploring a merger.

Faced with mounting debt, shrinking enrollment, and a failed attempt at merging with a sister school, Mount Ida appeared left with few options. The resulting transaction left students, staff, faculty, politicians, regulators, and lawyers with more questions than answers. Students, staff, and faculty felt betrayed; the Massachusetts Senate launched an inquiry into the speedy purchase by UMass Amherst with state funds; the Attorney General opened an investigation into whether top officials at Mount Ida College violated fiduciary obligations; even Governor Charlie Baker called for new Board of Higher Education regulations requiring institutions to provide notice of “any known liabilities or risks which may result in imminent closure.” Overall, it seemed an ignoble ending for an institution that had survived for over a century.

Yet this need not have been the outcome. Colleges and their counsel facing similar circumstances can take key concrete steps to help avoid the Mount Ida pitfalls. Early and ongoing institutional consideration of key warning signs, understanding the array of options short of outright closure, remaining cognizant of legal requirements and deadlines, and deploying effective public relations are all critical in guiding institutions through such existential challenges.

Recognize Early Warning Signs

Small, private institutions like Mount Ida usually exhibit early warning signs well before closure is imminent. Senior administrators and board members should be aware of their institution's financial conditions and demand frequent updates on comparative market data with objective gauges. Warning signs include excessive deferred maintenance (sometimes paired with incongruous investment in new facilities meant to jump start growth), low endowment levels, and falling enrollment numbers with corresponding deep tuition discounts to increase yield.

When warning signs surface, institutions need to be realistic rather than idealistic about what improvements or corrections can be made, and how long they may take. “Giving it the old college try” for too long—instead of seriously exploring other options—can prove fatal.

If a merger or acquisition is a possibility, acting when time is still on your side—before the major repercussions of those early warning signs have begun to emerge, such as staff layoffs and cuts to programs—will pay dividends. Combining institutions is a lengthy process, and doing it well, with a view towards respecting and maintaining the individuality of each, takes even longer. Merger counsel and other advisors, including public relations support, should be retained early. Working with merger counsel is critical not only because they are experts in the field, but also because as the merger begins to develop and grow, in-house counsel for the institution will be engrossed in tasks such as managing board, presidential, and cabinet questions, along with the continued day-to-day operations of the College.

Assess Your Options

Distressed small colleges should be aware that their options are not limited to closing entirely (like Mount Ida) or to traditional acquisition by a larger institution (that may or may not care about maintaining some semblance of the smaller college's identity). Legal counsel has a key role in assisting institutions in evaluating the viability of the wide range of options that are available.

One alternative is to solidify an existing long-term partnership to provide enhanced offerings for students and a deeper reserve of resources—financial and otherwise—to draw upon. Depending on the existing depth of the relationship, this may also lessen the distraction and upheaval often caused by mergers and acquisition. The School of the Museum of Fine Arts recently adopted this approach with Tufts University, with which it has partnered since 1945. The result is the innovative “SMFA at Tufts,” where students have the option of pursuing a BFA or 5-year combined BFA + BA/BS degree in conjunction with Tufts.

Another option is to capitalize on natural and mutually beneficial geographic or program synergies. For instance, the 2016 merger between Berklee College of Music and The Boston Conservatory, the oldest music conservatory in the United States, presented such opportunities. With directly adjacent campuses in Boston's Back Bay and similar commitments to the arts, the institutions were able to capitalize on and maintain their different areas of strength while providing additional and related opportunities to students of each. Similarly, Wheelock College's merger into Boston University leveraged a natural geographic relationship to combine Wheelock's unique focus on early childhood and education studies with Boston University's significant resources.

Even when the fit seems natural to outsiders careful attention must be paid to the individual “identities” and missions of the merging institutions. Current students retain expectations of the pre-merged entity, and incoming students will expect an institution that reflects the one to which they applied. Donors may also remain loyal to the pre-merged entity, and expect future donations to support continuation of some of the pre-merged entity's programs. In other words, the success is often based not only on synergies, but also (in part) on the preservation and respect of both institutions' missions. Choosing a partner that complements your institution — as opposed to one that competes for the same students in the same area — can help in continuation of the missions of both.

Understand the Legal Requirements

If closure or a merger is imminent, counsel must ensure that key legal obligations are not overlooked or postponed by the institution's administration. Under current regulations, institutions of higher education *must* notify the Massachusetts Department of Higher Education (DHE) of their intention to close “as far in advance as possible.” 610 C.M.R. § 2.07(3)(f)(2). The president of the institution must provide DHE with a signed Notice of Intent to Close, sent to the Commissioner of Higher Education. Per DHE guidelines, the written notice should include:

- a. A statement of intent to close and the general rationale;
- b. An estimated timeline for the closure, the anticipated final termination date, and the approximate number of students currently enrolled; and
- c. Disclosure of any preliminary discussions or plans with other institutions that may offer the potential for articulation.

The school must then complete the Independent Institution Notice of Closure and keep in direct communication with DHE during the closure process. This includes, but is not limited to, forwarding copies of all communications to students, former students, alumni, and the media regarding the closure.¹

¹ <http://www.mass.edu/foradmin/closures/documents/GuidelinesClosureSeptember2016.pdf>

Similarly, notice *must* be given to, and approval obtained from, the Attorney General’s Office when a public charity (such as a college or university) sells “all or substantially all” of its assets, or where there will be a material change in the nature of the activities conducted by the public charity. G.L. c. 180 § 8A(c). In practice, the Attorney General expects to receive an 8A(c) notice if more than 75 % of the organization’s assets are being disposed of. While this notice must be provided no later than 30 days before the closing of the transaction, the Attorney General’s office should be notified as soon as possible after the details of the transaction have been agreed, to avoid delay in closure. If an institution of higher education dissolves completely, it must file a dissolution complaint with the single justice of the Supreme Judicial Court for Suffolk County. G.L. c. 180, § 11A.

In the wake of Mount Ida and the growing number of closures, institutions in the Commonwealth may soon be held to earlier disclosure requirements and increased oversight. In early January 2019, the Massachusetts Board of Higher Education proposed a new process to screen, monitor, and potentially intervene when a private college or university exhibits symptoms of financial distress. The Board’s Final Report and Recommendations,² which remains subject to discussion and debate, proposes that (1) the Department of Higher Education screen all private colleges using a metric designed to estimate whether the college has the resources “to fully teach out its current students”; (2) schools identified in the screening process be subject to an active monitoring protocol; and (3) if a school could not, in the Department’s judgement, ensure by December 1 that it has the financial means to complete the current and subsequent academic year, the institution would be required to notify students and complete a full contingency plan approved by the state.³ Schools that fail or refuse to take part in the process would be subject to potential sanctions.

When to Tell Your Students and What to Tell the Press

While certain merger/closure notice requirements are mandated by law, a far more difficult strategic question is when to tell students, parents, faculty and employees — and how to handle the press that will inevitably follow.

One of the key criticisms following the Mount Ida closure was the lack of transparency by the administration and the Board in announcing the closure. Not until March of 2018 — two months before the end of the school year — did Mount Ida officials reveal that they were in merger talks with Lasell College. Just two weeks after this announcement, the sale to UMass Amherst was announced, giving students, faculty, and staff minimal warning.

Given the significant disruption that closures and mergers can cause, critical to any successful merger is the early involvement and coordination of outside counsel with public relations professionals. Together, they can tailor a sound strategy for senior administrators that balances the critical importance of transparency with the need to maintain confidentiality for some period of time (to identify potential options, merger partners, and/or contingency plans). Wheelock College gave its faculty nearly two years’ notice that closure was imminent, and sent out over 60 requests for proposals to potential merger partners before their ultimate merger with Boston University. This allowed faculty, students, and staff time to evaluate their options, and allowed Wheelock to proceed with the best deal possible for the school and its constituents.

²https://www.insidehighered.com/sites/default/server_files/media/THESIS%20Working%20Group%20Final%20Report.pdf

³ The report does not specify which entity would be responsible for annually screening colleges’ financial condition, what score on the metric would trigger closer state monitoring and how, specifically, the 18-month warning would be triggered.

More School Closures Are on the Horizon

According to recent reports from the *Chronicle of Higher Education*, U.S. colleges expect to see a steady decline in enrollment, and more schools are likely to close or merge in the coming years. In Massachusetts, the decline in enrollment among all categories of colleges has been between 1.3 - 1.7% annually from 2013 through 2016.⁴ The result is that colleges and universities without large endowments rely disproportionately on enrollment numbers and tuition to stay afloat from year to year, and the amount they disburse in student aid determines their bottom line.⁵

Indeed, Moody's reported in July of 2018 that approximately 25 percent of private nonprofit colleges and universities spent more than they earned in the 2017 fiscal year.⁶ The July 2018 Moody's report expanded on its close-to-accurate 2015 prediction that closure activity would as much as triple and mergers would double by 2017, observed that a future increase in closures toward the range of 15 per year, and reported that one in five small private colleges nationwide is under fundamental stress.⁷

In light of these general trends and the Mount Ida debacle, counsel has a particularly important and valuable role to play at all stages: (1) Identifying risks early by reminding administrators to remain vigilant for financial red flags; (2) Keeping DHE and the Attorney General on notice when required if closure is possible; and, possibly most importantly; (3) Advising administrators on how to stay honest and transparent with your students, faculty, and staff while still meeting their fiduciary responsibilities.

Laurie R. Bishop is a partner at Hirsch Roberts Weinstein LLP, where her practice focuses on advising colleges, universities, and non-profit organizations on policies, procedures, and risk-management decisions. She serves as acting general counsel to Berklee College of Music, and assisted in their successful merger with Boston Conservatory of Music. Laurie is a member of the Planning Committee for the annual BBA Higher Education Legal Conference.

⁴ https://www.huffingtonpost.com/entry/us-colleges-are-facing-a-demographic-and-existential_us_59511619e4b0326c0a8d09e9

⁵ Id.

⁶ <https://www.insidehighered.com/quicktakes/2018/07/25/moodys-private-college-closures-11-year>

⁷ Id.

Some Thoughts About the Appeals Court

By Hon. Mark V. Green

A few months past my first anniversary as Chief Justice of the Appeals Court, I am pleased to have been invited to offer a few reflections about the Court, and my initial experience as Chief.

I am fortunate to have taken on my new duties at a time of great transition at the Court. A number of long term senior managers and other employees have recently retired. In addition, half of the Justices on the Court have been appointed within the last 3 1/2 years. With those changes in personnel, along with the adoption of new technology, have come both the need and the opportunity to reexamine many of our operations, and in many ways to reimagine the Court itself. More directly and immediately, the changes have provided me with the opportunity to assemble a terrific senior management team with the hiring of our new Court Administrator Gina DeRossi and the promotion of Mary Bowe to the position of Chief Staff Attorney, who join our Clerk Joe Stanton, our Law Clerk Manager Maggi Farrell and my incomparable assistant Monique Duarte.

We are very pleased with the success of our movement to a digital platform. By rule, all nonimpounded and non pro se briefs and other materials are now filed electronically, and we take in no paper at all in those cases (which comprise well over 90% of our filings). The Justices have for several years – even before e-filing began – worked with case materials largely without resort to hard copy, preparing for, and participating at, oral argument with iPads. Justices circulate draft opinions to the other members of the panel – and in the case of published opinions, to the entire court – for review by email, and the entire editorial process thereafter is fully electronic. Besides saving trees, the digital platform offers more convenient access to the information, and saves time as the content is transferred from the Clerk's Office to the Justices, and then among panel members and support staff as opinions are processed toward release; by contrast, when I arrived as part of the Court's expansion in 2001 all opinions were circulated in hard copy by interoffice mail, and all comments returned in the same matter, often taking days or week for communication of comments that now are often completed in an afternoon.

The increase in convenience and efficiency has translated to an acceleration of our speed. We are reaching cases for argument, and deciding them after argument, as quickly as ever in the Court's history. Most cases are argued between four and four and a half months after they are briefed and ready; by way of comparison, when I joined the Court, it took fourteen months to reach criminal cases after they were briefed and ready, and twenty-two months to reach civil cases. And over the past twelve months, the median time for release of a decision after argument was fifty-four days. On a somewhat related note, I am also pleased to report that we are hearing argument in an increasing share of our cases – more than 75% now, compared to around 60% just eight or nine years ago, and around 50% in the more distant past. Breaking with tradition, we held panel hearing sessions in July 2018, to positive response, and hope to repeat that pilot program this coming summer.

We are also able to make more information easily available to our stakeholders. Except for impounded cases, our hearing lists and docket sheets are available on our website, as are briefs in cases scheduled for argument. Since January, audio recordings of oral arguments are also now made available on the website within a few days. We recently compiled a manual of our internal operating procedures, and expect to make it available on our website in the near future.

We are expanding our outreach in other ways as well. We regularly conduct panel hearings away from the John Adams Courthouse, at various law schools and other venues in all corners of the Commonwealth. Thanks to the sponsorship of the Flaschner Judicial Institute, and jointly with the Supreme Judicial Court,

we held a terrific bench-bar conference in December, and we are currently assessing what we learned from our bar colleagues, and how best to respond to their suggestions. And we are working to improve the frequency and content of our communication with the bar and the public, through the Listserv maintained by Clerk Stanton and the quarterly Review produced by Court Administrator DeRossi.

I previously mentioned the significant number of newly appointed Justices on the Court. They have brought energy, intellect and fresh perspective to an already strong Court. I consider among my most important responsibilities as Chief the duty to instill in our new arrivals a sense of the culture and traditions of the Court. And in that regard, it is a particular priority to preserve and enhance the Court's culture of collegiality, mutual respect and effective communication, while pursuing the highest level of excellence in our decisional work that we can attain. So far, at least, and with the assistance of my other more seasoned colleagues (and, of course, the talent and dedication of the new recruits), it seems to be working. I am also indebted to many of those who welcomed me when I arrived on the Court, and in particular former Chief Justice Armstrong and Justices Brown, Dreben and Kass, who each came back last spring for a series of "Lunches with the Legends."

In a little more than three years, on October 6, 2022, the Appeals Court will mark its 50th anniversary. Compared to the Supreme Judicial Court (which celebrated its 325th last year), the Superior Court (which celebrated its 150th a few years before that), or even the Land Court (which is coming up on its 125th in a few years), we are still young. And, as I have mentioned, we are in an exciting time of transition and opportunity. I consider it a unique privilege to be entrusted with stewardship of the Court at this exciting time.

The Honorable Mark V. Green was appointed Chief Justice of the Appeals Court by Governor Charles D. Baker on December 6, 2017, having served on the Court as an Associate Justice since his appointment by Governor Jane M. Swift on November 1, 2001. He holds a bachelor of arts degree in philosophy from Cornell University, with distinction in all subjects, and is a 1982 cum laude graduate of Harvard Law School.

Legal Analysis

CPCS v. AG – The SJC Establishes an Unprecedented, Global Remedy for the Victims of the Amherst Drug Lab Scandal to Address Extraordinary Lab Misconduct that Was Compounded by Intentional Prosecutorial Misconduct

By Daniel N. Marx

In *Committee for Public Counsel Services v. Attorney General*, 480 Mass. 700 (2018), the Supreme Judicial Court provided an unprecedented remedy for the victims of the Amherst lab scandal, thousands of people who were wrongfully convicted based on evidence tainted by former state chemist Sonja Farak. Although the SJC recently established a protocol for the Hinton lab scandal to vacate the wrongful convictions that resulted from Annie Dookhan’s misconduct,¹ the Amherst case was different—and worse. Not only did Farak engage in extraordinary lab misconduct with far-reaching consequences, but her misdeeds were compounded by the prosecutorial misconduct of Assistant Attorneys General Anne Kaczmarek and Kris Foster, who minimized the scope of the scandal by withholding evidence about Farak’s drug abuse and misleading defense attorneys, the courts, and the public. As the SJC concluded in *CPCS v. AG*, “the government misconduct by *Farak and the assistant attorneys general* was ‘so intentional and so egregious,’” that “harsher sanctions than the *Bridgeman II* protocol [were] warranted.”² Therefore, the SJC ordered the wrongful convictions of all “Farak Defendants” to be dismissed with prejudice, and the implementation of that remedy is now underway.

Lab Misconduct

Sonja Farak worked as a state chemist for 10 years, beginning at the William A. Hinton State Laboratory Institute in Jamaica Plain (“Hinton lab”) in 2003. Farak transferred to the satellite facility in Amherst (“Amherst lab”) in 2004, and she worked there until her arrest in January 2013. The Amherst lab was smaller, employed fewer chemists, and had “basically ... no oversight.”³ Throughout her decade-long tenure there, Farak engaged in shocking misconduct.

As a chemistry graduate student, Farak smoked marijuana and also experimented with cocaine, ecstasy, and heroin. Shortly after joining the Amherst lab in 2004, Farak began to consume the “standards,” illegal substances used to test evidentiary samples. Over several years, she nearly exhausted the methamphetamine oil, and by 2009, she had stolen ketamine, cocaine, and ecstasy. Then, Farak turned to evidentiary samples submitted by police departments. During the worst periods of her addiction, through 2013, Farak abused drugs on a daily basis.

Farak’s misconduct also undermined the reliability of her colleague’s work. Farak had “unfettered access” to the entire lab, and in later years, she tampered with samples assigned to other chemists, violated security protocols, and manipulated inventory information. As the SJC recognized, her “extensive and indeterminable” misconduct, over many years, “diminishe[d] the reliability and integrity of forensic testing at the Amherst lab.”⁴

¹ *Bridgeman v. District Attorney for the Suffolk District*, 476 Mass. 298 (2017) (“*Bridgeman II*”).

² *CPCS v. AG*, 480 Mass. at 725 (emphasis added); see *id.* at 704 (recognizing the prosecutorial misconduct by AAGs Kaczmarek and Foster “compounded” the lab misconduct by Farak).

³ *Id.* at 706.

⁴ *Id.* at 727, 729.

Prosecutorial Misconduct

Unlike the Hinton case, the Amherst lab scandal also involved prosecutorial misconduct that the SJC characterized as “egregious, deliberate, and intentional.”⁵ This troubling confluence of lab *and* prosecutorial misconduct prompted the SJC to impose “the very strong medicine of dismissal with prejudice” for all tainted convictions.⁶

After Farak’s arrest in January 2013, investigators searched her car and collected drugs, paraphernalia, and counseling records that revealed Farak struggled with addiction and abused drugs in 2011. But neither the victims of the Amherst scandal nor the public learned about this critical evidence until almost one year later. Despite their legal and ethical obligations, AAG Kaczmarek (who prosecuted Farak) and AAG Foster (who handled to discovery requests about the Amherst lab) intentionally hid the documents, stonewalled defense attorneys, and misled the courts.

The improper efforts to minimize Farak’s misconduct were nearly as extensive as the lab misconduct itself. The AAGs mischaracterized exculpatory evidence as “assorted lab paperwork,” including the counseling records investigators forwarded under the subject line: “FARAK admissions.” They falsely insisted such documents were “irrelevant” and baselessly asserted “privilege” claims. They denied discovery requests, moved to quash subpoenas, and misled then-Superior Court Justice Jeffrey Kinder to believe that all evidence had been disclosed.

This prosecutorial misconduct severely undermined the judicial process. Relying on the “misleading evidentiary record,” Judge Kinder ruled Farak’s misconduct began in July 2012 and only affected her work. As a result, thousands of Farak Defendants received no post-conviction relief. In *Commonwealth v. Cotto*, 471 Mass. 85 (2015), and *Commonwealth v. Ware*, 471 Mass. 97 (2015), the SJC concluded “the scope of Farak’s misconduct [did] not appear to be . . . comparable to the enormity of Dookhan’s misconduct” and, for that reason, refused to extend to Farak Defendants the conclusive presumption of egregious government misconduct that, in *Commonwealth v. Scott*, 467 Mass. 336 (2014), it granted to Dookhan Defendants.⁷

CPCS v. AG

More than two years after *Cotto* and *Ware*, the victims of the Amherst scandal still had not been identified, much less notified of their tainted drug convictions and afforded any meaningful relief. Thus, in September 2017, Petitioners in *CPCS v. AG* filed an action pursuant to G.L. c. 211, § 3, to address: (i) the scope of the scandal; (ii) the appropriate remedy for the victims; and (iii) specific policy proposals to prevent (and, if necessary, respond to) future crises.

Petitioners contended “all convictions based on drug samples tested at the Amherst lab during Farak’s tenure should be vacated and dismissed with prejudice, regardless of whether Farak signed the drug certificate,” because Farak’s lab misconduct, compounded by Kaczmarek and Foster’s prosecutorial misconduct, tainted the evidence in those cases.⁸ The AG conceded Farak undermined the reliability of

⁵ *Id.* at 705 (quoting *Bridgeman II*, 476 Mass. at 316).

⁶ *Id.* at 725.

⁷ *Id.* at 717 (quoting *Cotto*, 471 Mass. at 111).

⁸ *Id.* at 725.

samples that other chemists analyzed. Yet, based on Farak’s uncorroborated claim that she did not tamper with her colleagues’ work until June 2012, the AG argued any “whole lab” remedy should start at that later time.⁹ Taking a narrower view, the DAs insisted only defendants for whom Farak signed drug certificates were entitled to relief.¹⁰

Regarding the remedy to which “Farak Defendants” would be entitled, Petitioners asked the SJC to vacate all tainted convictions and dismiss the underlying charges with prejudice. The AG concurred, but only for the more limited class whom it considered Farak’s victims. Meanwhile, the DAs argued the *Bridgeman II* protocol was sufficient and no further remedy was required.

Finally, as a “prophylactic remedy” to avoid the need for protracted litigation to address any future scandal, Petitioners proposed the SJC issue: (i) a “*Brady* order” “requiring specific disclosures” by the Commonwealth in all criminal cases and, further, “setting forth specific disclosure deadlines”; (ii) a “*Bridgeman II* order” to “require a prosecutor that knew, or had reason to know, that misconduct had occurred in a particular case” to notify the Trial Court and CPCS within 90 days and to provide a list of affected defendants; and (iii) a *Cotto* order to “require a government attorney who knows that attorney misconduct affected a criminal case to notify” the Trial Court, CPCS, and the Office of Bar Counsel within 30 days.¹¹ Recognizing the need for real reform, the AG endorsed the proposed orders. The DAs, however, disagreed, arguing the existing discovery rules are adequate and the SJC should not fashion a “one size fits all” solution for future problems.

“Farak Defendants”

The SJC defined the “Farak Defendants” to be narrower than “all Amherst lab cases” but broader than “only Farak cases.” It held that, in addition to persons for whom Farak signed drug certificates, “Farak Defendants” include all defendants whose cases were analyzed by any Amherst chemist on or after January 1, 2009, and all defendants convicted of methamphetamine offenses whose cases were handled by the Amherst lab during Farak’s tenure.¹² For all those defendants, the SJC held their tainted convictions must be vacated and the underlying charges dismissed with prejudice.

The SJC explained its expanded definition of “Farak Defendants” reflected the “extensive and indeterminate nature” of Farak’s misconduct, which involved methamphetamine since 2004 and “spiraled out of control at the beginning of 2009,” when Farak began to manipulate lab systems, steal from police-submitted samples, and tamper with samples assigned to other chemists.¹³ Such misconduct, the SJC held, “diminishe[d] the reliability and integrity of the forensic testing at the Amherst lab” and “reduce[d] public confidence in the drug certifications from other labs.”¹⁴

⁹ *See id.* at 727.

¹⁰ *See id.* at 726.

¹¹ *Id.* at 730, 733-734.

¹² *See id.* at 734-735.

¹³ *Id.* at 729.

¹⁴ *Id.* at 727.

“Brady Checklist”

In addressing the proposed *Brady* order, the SJC affirmed the basic principle that, to fulfill his or her “core duty . . . to administer justice fairly,” a prosecutor must provide all material, exculpatory evidence to a defendant “without regard to its impact on the case.”¹⁵ This “*Brady* obligation” has long been recognized under the due process guarantees of Massachusetts Declaration of Rights and the U.S. Constitution; procedural rules, such as Mass. R. Crim. P. 14(a), the “automatic discovery” rule for criminal cases; and ethical rules, such as Mass. R. Prof. C. 3.8(d), (i), and (g), which prohibit prosecutors from avoiding the discovery of exculpatory evidence and require prosecutors to make timely disclosures. Nevertheless, rather than issue a standing *Brady* order, the SJC asked the Advisory Committee “to draft a proposed *Brady* checklist to clarify the definitions of exculpatory evidence.”¹⁶ The ABA has promoted such checklists, and several federal courts have implemented them.¹⁷

As the SJC acknowledged, however, “no checklist can exhaust all potential sources of exculpatory evidence.”¹⁸ Ironically, a detailed list of discoverable materials may obscure the more basic commitment to fundamental fairness. It is not hard to foresee disputes in which prosecutors elevate form over substance by arguing that evidence is not *Brady* material because it does not correspond to any category on a *Brady* checklist. Moreover, no checklist could have prevented the intentional misconduct that exacerbated the Amherst scandal. AAGs knowingly possessed exculpatory evidence about Farak’s misconduct, but they intentionally refused to turn it over to defendants.

Even for law-abiding, ethical prosecutors, there remains a deeper problem. *CPCS v. AG* demonstrates how evidence, such as Farak’s counseling records, appears from the conflicting prosecution and defense perspectives. Although prosecutors dismissed these materials as “irrelevant,” Attorney Luke Ryan, who represented several Farak Defendants, immediately realized their exculpatory importance and notified the AG’s Office: “[I]t would be difficult to overstate the significance of these documents.”¹⁹ In our adversarial system, prosecutors tend to see evidence in the context of proving a defendant’s guilt, and defense counsel must examine evidence to establish a defendant’s innocence. Put simply, prosecutors are not trained, experienced, or motivated to consider evidence in that way.

Standing Orders

The SJC cited two reasons for declining to issue the proposed *Bridgman II* and *Cotto* orders. First, the remedies in those cases reflected the alarming magnitude of the Hinton and Amherst scandals.²⁰ Second, in the event of “similar, widespread abuse” in the future, the remedy must “correspond to the scope of the

¹⁵ *Id.* at 730 (quoting *Commonwealth v. Tucceri*, 412 Mass. 401, 408 (1992), and citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

¹⁶ *Id.* at 732.

¹⁷ ABA Resolution 104A (as revised) (Feb. 4, 2011); *see, e.g.*, Standing Brady Order, No. XX-XX (EGS), at http://www.dcd.uscourts.gov/sites/dcd/files/StandingBradyOrder_November2017.pdf.

¹⁸ *CPCS v. AG*, 480 Mass. at 733.

¹⁹ *Id.* at 716 (quoting Attorney Ryan’s letter to the AG’s Office).

²⁰ *See id.* at 734.

misconduct.”²¹ The SJC suggested “the balance of equities” may not always justify a “global remedy” rather than a case-by-case response.²²

All agree the recent scandals were unprecedented, and remedies for such government misconduct should be tailored to the harms. A key lesson, however, has been that “existing professional and ethical obligations,” which the DAs consider sufficient, are not self-executing. Affirmative litigation by advocacy groups and defense attorneys as well as repeated judicial intervention by the SJC was needed to reveal the full scope of the misconduct and to provide meaningful remedies.

At first, the AG assumed that Farak’s misconduct began only six months before her arrest. But as Superior Court Justice Richard Carey found, that “assumption was at odds with the evidence uncovered even at that early juncture.”²³ Then, after *Cotto* and *Ware*, the AG appointed former Superior Court Justice Peter Velis and AAG Thomas Caldwell to investigate, and it also convened grand juries in Hampshire and Suffolk, calling Farak and many others from the Amherst lab to testify. These efforts erroneously concluded Farak’s misconduct neither affected the work of other chemists nor involved misconduct by prosecutors.

Meanwhile, on remand from *Cotto* and *Ware*, Judge Carey conducted an extensive evidentiary hearing at which Kaczmarek, Foster, and others were subjected to cross-examination under oath in open court. That adversarial proceeding revealed more misconduct. Judge Carey found that, by their “intentional and deceptive actions,” the AAGs “ensured that justice would certainly be delayed, if not outright denied.”²⁴ Both prosecutors “perpetrated a ‘fraud upon the court’” and “violated their oaths as assistant attorneys general.”²⁵ Even then, however, Judge Carey mistakenly concluded Farak’s misconduct impacted only her cases.

Finally, when the SJC took up the issue again in *CPCS v. AG*, three years after *Cotto* and *Ware*, the record established far more extensive lab misconduct and the outrageous prosecutorial misconduct that further prejudiced the victims of the Amherst scandal. Affirming Judge Carey’s view, the SJC held Farak, Kaczmarek, and Foster had all engaged in egregious misconduct. But departing from Judge Carey’s more limited ruling, the SJC also decided the remedy could not be confined to those defendants whose drug certificates Farak signed.

In retrospect, the problem has not only been the slow pace of justice but also the need to litigate with the AG and DAs, for many years, to secure relief from the SJC. Shortly after Farak’s arrest, the ACLU of Massachusetts and CPCS reached out to prosecutors and proposed that both sides work collaboratively to ensure a swift, meaningful response. Those overtures were ineffective, and another G.L. c. 211, § 3 petition to the SJC was required. When confronted with a “lapse of systemic magnitude,”²⁶ the criminal justice system should not depend on defendants to bring lawsuits, like *CPCS v. AG*, to vacate wrongful convictions.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 711.

²⁴ *Id.* at 720.

²⁵ *Id.* at 702, 720 (quoting Judge Carey’s opinion).

²⁶ *Bridgeman II*, 476 Mass. at 335 (quoting *Scott*, 467 Mass. at 352).

Conclusion

Farak was arrested in January 2013, and *CPCS v. AG* was decided in October 2018, nearly six years later. As of this writing, it is estimated that more than 10,000 individuals were wrongfully convicted as a result of the Amherst lab scandal, and the total number could prove to be significantly higher. Most of these “Farak Defendants” have only recently been notified of their vacated convictions, and many still have not been identified or had their records cleared.

CPCS v. AG was an important effort by the SJC to remedy the harm from unprecedented lab and prosecutorial misconduct. It is also a crucial reminder that further reforms are needed to prevent such malfeasance and, in the event of a future scandal, to ensure that all stakeholders in the criminal justice system—most importantly, prosecutors—will immediately, effectively, and cooperatively investigate the full extent of the problem and, if necessary, proactively implement an appropriate remedy to see that justice is done.

Daniel Marx is a founding partner of Fick & Marx LLP, a boutique firm in Boston, Massachusetts, focused on representing diverse clients in criminal prosecutions, complex civil litigation, and appeals. Along with attorneys from the ACLU of Massachusetts, Mr. Marx served as pro bono counsel for Petitioners Hampden County Lawyers of Justice, Herschelle Reaves, and Nicole Westcott in CPCS v. AG. In addition, Mr. Marx previously served as pro bono counsel for the petitioners in Bridgeman v. District Attorney for Suffolk County.

Lawyers and Depression

By Jeffrey Fortgang, Ph.D.

When I joined the clinical staff of Lawyers Concerned for Lawyers over 20 years ago, I expected that the focal problem among our clients would be alcoholism and other addictions. After all, the genesis of LCL, before any funding or staff, was a group of lawyers in recovery who sought to help save the careers and lives of their alcoholic peers. And, make no mistake, problems with alcohol (and to a lesser extent, drugs) continue to abound. But the number one presenting complaint at LCL for years has been either anxiety, stress or depression, which often go together. Similar findings appeared in a [large-scale survey of lawyers published in 2016](#), which also found that alcohol problems and depression often co-occur in the same lawyers. In this article I seek to provide an overview of depression as it appears in lawyers, some of the obstacles that can stand in the way of their getting appropriate help, and how these obstacles can be surmounted – drawing upon my clinical experience and a recent survey that I conducted.

Nature of Depression

Depression is among the more treatable mental health conditions. It develops as the result of multiple converging factors, including biological (affected by neurochemical phenomena), hereditary (particularly for bipolar depression), individual psychology and resiliency (e.g., self-esteem, degree of characteristic optimism, experience of healthy loving and supportive relationships), and environmental (both past, such as upbringing and trauma, and present, such as home and work environment). A depressed person may find temporary relief in alcohol or addictive drugs, but over time heavy or frequent use of such substances actually tends to worsen the depression.

More lasting improvement in mood may be derived from psychotherapy/counseling, antidepressant medication, or a combination of the two. Antidepressant medication does not lend itself to abuse, since its action is cumulative rather than immediate, but some trial and error may be involved in finding the most beneficial medication for the individual. Novel treatments—like the use of ketamine and procedures like transcranial magnetic stimulation—have not yet been fully examined.

There are also a number of lifestyle factors that can ameliorate and prevent depressions. These include exercise, meditation and relaxation, a balance between work and personal life, connections with community, and more. Unfortunately, the benefits of these factors are more difficult for a person in the midst of a depressive episode to grasp or pursue.

Obstacles to Getting Help

The legal profession, unfortunately but understandably, is imbued with a culture that tends both to contribute to the development of depression (under the “environment” category mentioned above) and to stand in the way of recognizing the problem and getting help for it. Much of the work of lawyers is inherently adversarial; in lawsuits or criminal trials, for example, there will be winners and losers, in about equal proportions. (Prominent psychologist [Martin Seligman has discussed this issue in detail](#).) What’s more, attorneys may view other professional peers more as competitors than as comrades.

A skilled attorney possesses the ability to scan a document, argument, etc., for any errors or weaknesses – but this work mode, when transferred to life in general, is almost a prescription for how to lower one’s mood. Those who maintain better moods may be more likely to “see the glass as half-full,” and yet also recognize and accept their vulnerabilities. They allow themselves to express feelings in an authentic way to trusted others, and to ask for and accept help when needed. Lawyers, however, are acculturated to a

role of problem-solver, in control; too many of them lose the distinction between professional role and true self. Having developed a professionally useful veneer of toughness, they may ignore their actual feelings and needs, in a counterproductive reach for self-sufficiency. And by design or practice, those practicing law are often less able to pursue the positive lifestyle choices that could serve as protective factors, often sacrificing the time necessary to pursue self-care, healthy relationships, or work-life balance to meet intense timing and workload demands while needing to appear both calm and competent.

These are generalization, of course, that certainly don't apply to all lawyers and law students, and I have been encouraged by seemingly greater openness to these topics in new lawyers. But all too frequently clinicians at LCL are accustomed to encountering lawyers whose problems have been building for years, and who never sought any kind of assistance until they reached a point of major crisis.

Perspectives Gleaned from Survey

My LCL colleague Shawn Healy and I wrote a book about depression in lawyers, and I also conducted an anonymous survey of over 250 lawyers who identified themselves as having experienced clinical depression. The response rate seemed indicative of a pent-up wish to communicate about a problem that is widely prevalent among lawyers (at a rate that appears to be at least 3 times that of the general population) yet not often acknowledged. The anonymous nature of the survey seemed to provide a welcome means of sharing the experience of vulnerability in a profession in which that kind of openness might often be considered a liability.

Although most survey responders were over the age of thirty, the greatest number reported onset of depression during their twenties, an age that typically coincides with law school and the start of their careers. Other authors, in fact, have noted a surge in both depression and problem drinking during law school as the student is immersed in a demanding academic system and inducted into "lawyer culture."

Among the depressive symptoms that those surveyed had first noticed were intense emotion (e.g., crying, despair), diminished energy and motivation, and a downcast perspective ranging from pessimism to hopelessness. In many cases, a sense of self-doubt and paralysis characterized the experience of depression. While a common phenomenon, it can lead to devastating consequences when important deadlines and correspondence are ignored (such as leaving mail from the Board of Bar Overseers unopened).

The lawyers represented in my survey tended not to confide in colleagues. Many of them pointed to shame, stigma, image, and fear of being viewed as "weak" as barriers to reaching out. Imbued in lawyer culture, a number of responders expressed the sense that slogging through a stressful work life, keeping much of their authentic selves very private, and viewing peers more as competitors than as supports were inherent aspects of professional life.

Surmounting Obstacles to Getting Help

Not all those who took the survey reported they were able to access effective treatment or experience improvement. Of those who did, many first turned to family members before finding and receiving the greatest benefit from professional mental health providers. In describing what helped them get past obstacles to acknowledging their depression and getting help, many pointed to getting a push from professional peers who, in some cases, were willing to share their own similar struggles and how they had gotten back on track. But such attempts to help can admittedly be awkward and perhaps especially complicated among lawyers. One survey respondent wrote, "Our system is one of confrontation rather than truth finding, which tends to make weakness a tool for winning rather than a cause for alarm for the health of a colleague." On the other hand, I've received numerous calls over the years from lawyers and

judges who are sincerely concerned about other attorneys. When they can find a way to persuade a colleague to come in, talk with me or one of the other clinicians, and put together a constructive plan, the long-term impact of their action can be invaluable.

Seeking Assistance

Once an attorney recognizes he or she may have a problem, it is still challenging to ask for help. Delay and avoidance are very understandable, but often allow problems to mushroom to crisis proportions. Finding a provider who accepts the right health insurance plan is another obstacle. Lawyers Concerned for Lawyers can be one very useful resource.

LCL, funded through a small portion of your annual professional license fee, offers a range of services too varied to catalog here (see our website, www.lclma.org/), provided by both law practice advisers and clinical staff. Clinicians meet with lawyers (and their family members) upon request to assess problems, offer brief counseling when indicated, and make referrals to outside clinical professionals for longer-duration services as needed. Referrals are made mindful of both individual needs and health insurance plan acceptance. As with any licensed mental health practitioner, our relationship with clients is confidential, and LCL is exempt from any requirement to report lapses in professional conduct. LCL also coordinates discussion and support groups, either in person or online, for those dealing with particular stresses.

Whether through LCL or another avenue toward appropriate treatment of depression, as one of the responders to my survey wrote, “There is no down side to treating this illness; you will feel better and you will be a better family member, friend and lawyer.”

Dr. Fortgang, licensed in psychology and alcohol/drug counseling, has been on Lawyers Concerned for Lawyers staff for 20 years and in private practice (Newton, Boston).

Case Focus

NEPGA v. DEP: The SJC Upholds the Commonwealth's Climate Change Mitigation Program

By David Lyons

In a unanimous decision last September, the Supreme Judicial Court (“SJC”) upheld the Commonwealth’s latest climate change regulations to reduce greenhouse gas emissions from electric generators, rejecting those generators’ arguments that the regulations violate the Massachusetts Global Warming Solutions Act (the “GWSA”). *New England Power Generators Ass’n, Inc. v. Dep’t of Env’tl. Prot.* (“NEPGA”), 480 Mass. 398 (2018). With the Legislature and the Governor continuing to focus on this issue, the SJC likely will be called upon again to decide other climate change cases.

A Legacy of Policy Innovation

Massachusetts is one of a handful of states that have pressed the envelope in adopting climate change policy, from spearheading *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) (compelling EPA to begin the process to regulate carbon dioxide as a pollutant under the federal Clean Air Act) to coordinating the formation of the country’s first multistate emissions trading market, the Regional Greenhouse Gas Initiative (“RGGI”). As the SJC noted, ever since the Legislature adopted the GWSA in 2008, Massachusetts has been “a national, and even international, leader in the efforts to reduce . . . climate change.” *NEPGA*, 480 Mass. at 399. Among other provisions, the GWSA mandated a reduction in greenhouse gas emissions by 80% below the 1990 level by 2050. M.G.L. c. 21N, § 3(b). Industry has strenuously opposed these policies, especially the electric generators who have shouldered the most immediate compliance burdens. Regulating greenhouse gases at the state level both raises the costs for power plants and their customers, they argue, and fails to ameliorate the environmental problem, as emissions simply shift to neighboring, unregulated jurisdictions.

Kain v. Department of Environmental Protection, 474 Mass. 278 (2016), previously [discussed in these pages, spurred more DEP action, including the regulations at issue in NEPGA](#). *Kain* addressed M.G.L. c. 21N, § 3(d), which requires DEP to develop aggregate limits for different sources of emitters. The SJC decided in *Kain* that the agency’s implementation of the RGGI program was insufficient to comply with the statutory mandate. Among other things, the Court ordered DEP to promulgate “regulations that address multiple sources or categories of sources of greenhouse gas emissions, impose a limit on emissions . . ., limit the aggregate emissions released from each group of regulated sources . . ., [and] set [declining] emission limits for each year. . . .” *Id.* at 300.

Kain thus laid the foundation for a series of climate-change policies. Shortly thereafter, Governor Baker issued [Executive Order 569](#), initiating a rulemaking process that culminated in the two key regulations contested in *NEPGA*. The “Cap Regulation” was the focus of the plaintiffs’ challenge and imposes annual, declining limits for greenhouse gas emissions on in-state electric generators. 310 Code Mass. Regs. § 7.74. The Clean Energy Standard, 310 Code Mass. Regs. § 7.75, requires utilities to procure more of their power from non-emitting sources. *Id.*

The plaintiffs filed suit challenging the rulemaking on September 11, 2017. Befitting the policy stakes, a single justice of the SJC reserved and reported the case to the full Court before any substantive motions or briefing at the Superior Court. *See* M.G.L. c. 211, § 4A (empowering the SJC to transfer cases from the lower courts).

The SJC Upholds Sector-by-Sector Emissions Limits

The electric generators mounted a three-pronged attack on the regulations. First, they alleged that DEP and the Department of Energy Resources lacked the authority to issue the Cap Regulation. They argued that the GWSA provision directly regulating electric generators, G.L. c. 21N, § 3(c), forecloses other regulations under § 3(d), which generally authorizes sector-by-sector emission limits. 480 Mass. at 399. Second, they argued that the Cap Regulation will *increase* greenhouse gas emissions. *Id.* Finally, they claimed that a sunset clause in the statute barred § 3(d) regulations from being effective beyond 2020. *Id.* at 399-400. The SJC was unpersuaded.

First, the Court concluded that §§ 3(c) and 3(d) complement, rather than conflict with, each other. The electric sector is just one of several categories of emission sources within the scope of § 3(d). *Id.* at 404. The Court relied on conventional tools of statutory interpretation and an assessment of the Legislature’s overall policy objectives, noting that although § 3(c) aims specifically at electric generators, nothing in either § 3(c) or § 3(d) precludes electric sector regulations under § 3(d). *Id.* at 406-07. The SJC also rejected the plaintiffs’ argument that DEP’s interpretation was unreasonable. Because electric generators account for roughly 20% of the state’s greenhouse gas emissions, the SJC reasoned that it would be anomalous to exclude electric generators from the declining sector-by-sector limits under § 3(d). *Id.* at 405.

Second, the SJC rejected the plaintiffs’ argument that the Cap Regulation is arbitrary and capricious, holding that the generators had not met their burden to show that the regulation lacked “any conceivable grounds upon which [it could] be upheld.” *Id.* at 410. The plaintiffs argued that if high-carbon, in-state electricity is replaced by high-carbon, out-of-state electricity, consumers will face higher costs with no environmental gains. The SJC characterized that concern as speculative and found “multiple conceivable bases to support the rule” in the administrative record. *Id.* at 408. Applied together, the SJC concluded that the Cap Regulation and the Clean Energy Standard will encourage the development of clean generation sources in Massachusetts and neighboring states. *Id.* at 409-10.

Last, the SJC disagreed with the plaintiffs’ interpretation of a provision in the GWSA stating that § 3(d) regulations “shall expire on December 31, 2020.” Rather than invalidating any emission limits effective beyond this date, the SJC concluded that the timing provision only requires DEP to issue new regulations by December 31, 2020, and likened the date to an “implementation deadline[], not [a] termination” date. *Id.* at 411.

Looking Forward

Although the state has made significant strides to reduce emissions—cutting them by [more than 20%](#) between 1990 and 2016—the formidable economic and technical obstacles that stand in the way of the GWSA-mandated 80% reduction by 2050 mean that *NEPGA* will not be the last climate change case to reach the courts.

Indeed, with the wave of policymaking launched by the GWSA and reinvigorated by *Kain* continuing to build, climate change may reach the SJC again sooner rather than later. On August 9, 2018, Governor Baker signed *An Act to Advance Clean Energy*, 2018 Mass. Acts c. 227. Though less aggressive than a Senate version promoted by environmental advocates, the Act made several important changes, including raising the targets for the state’s Renewable Portfolio Standard (which requires utilities to procure energy from renewable sources). The Act also directs the Department of Energy Resources to implement a [Clean Peak Standard](#) to promote clean energy sources to meet peak-period demands, which historically have been met by burning dirtier fuel sources. Governor Baker also signed *An Act Promoting Climate Change Adaptation, Environmental and Natural Resource Protection and Investment in Recreational Assets and Opportunity*, 2018 Mass. Acts c. 209, which authorizes \$2.4 billion in bonds for environmental projects

and codifies initiatives begun by E.O. 569, including the statewide [Hazard Mitigation and Climate Adaption Plan](#). Most recently, the state expanded its regional leadership role, [joining with nine other states and the District of Columbia](#) to launch a regional strategy, analogous to RGGI, to reduce emissions from transportation. With the reach of climate change regulations expanding rapidly, the SJC surely will address climate change again soon.

David Lyons is an associate at Anderson & Kreiger LLP. He advises public- and private-sector clients in permitting and litigation matters, with a focus on environmental, energy, and municipal law.

Legal Analysis

Pay Equity in Collegiate Athletic Coaching and the Massachusetts Equal Pay Act

By Janet P. Judge and Andrew E. Silvia

Introduction

The newly enacted Massachusetts Equal Pay Act (“MEPA”)¹ may change the way colleges and universities in Massachusetts think about how they compensate the coaches of their intercollegiate sports teams.

Under preexisting federal law, courts and academic employers across the country have struggled to apply equal-pay concepts to male and female coaches of similar but gender-segregated sport teams (*e.g.*, men’s versus women’s basketball) and coaches of very different sports teams (*e.g.*, field hockey versus football). While few would argue against the principle that persons of different genders should receive equal pay for comparable work, the application of that concept has proven especially thorny in college and university athletic coaching, where pay differentials often are tied to the market value of the sport coached rather than the gender of the coach.² Determining what constitutes comparable work between coaches of different genders when they are coaching different teams has proven to be a complicated legal task.

In practice, many schools have opted to forgo the time-consuming and complicated in-house analyses of comparable work across sports and have focused instead on market-based pay systems that determine compensation for coaches of particular teams based primarily on market data reflecting salaries paid to coaches of those teams at other colleges and universities. While not without controversy, courts have found this market-based pay system to be a “nondiscriminatory factor other than sex,” justifying certain pay differentials under federal pay-equity law. In the sports world, this has resulted in higher compensation, for example, for the almost exclusively male head and assistant coaches of men’s basketball and ice hockey, as compared to their women’s basketball and ice hockey counterparts, who may be male or female.³

This has created an interesting legal issue in Massachusetts, where the newly enacted MEPA no longer permits schools to rely directly on market forces to justify a difference in pay between coaches of different genders performing comparable work, even though it would not prohibit the differential if those same coaches were of the same gender. As a result, schools should consider revisiting their compensation system to ensure compliance with the new law, either by identifying nondiscriminatory factors that justify disparate pay rates or by adjusting the compensation of individual coaches where such factors do not exist.

¹ M.G.L. c. 149, § 105A (2018).

² For example, a recent study found that individuals surveyed generally agreed with the concept of wage equality, but the lowest level of agreement was with respect to individuals in sporting professions, including college coaches and professional athletes. Emily Dane-Staples, “Update in Attitudes Towards Wage Equality in Gendered Professions,” *THE SPORT JOURNAL*, June 19, 2018, *available at* <https://thesportjournal.org/article/update-in-attitudes-towards-wage-equality-in-gendered-professions/> (last accessed Jan. 4, 2019). The study participants provided qualitative responses that explained that revenue generation, profits, success, and other monetary reasons justified their more forgiving attitude towards wage inequality in the area of athletic coaches. *Id.*

³ While the coaches of men’s intercollegiate teams are almost exclusively male, the coaches of female intercollegiate teams are *not* almost exclusively female. Indeed, according to a recent NCAA article, more men than women are coaching women’s teams. Rachel Stark, “Where are the Women?” *NCAA CHAMPION MAGAZINE*, Winter 2017, *available at* <http://www.ncaa.org/static/champion/where-are-the-women/> (last accessed Feb. 4, 2019).

Background

Equal pay for college coaches of different genders has historically been regulated by and subject to litigation under federal laws, including the federal Equal Pay Act (“EPA”), which prohibits employers from paying an employee less than employees of the opposite sex “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions,” but allows employers to justify certain pay differentials based on “any other factor other than sex.”⁴

The prevailing market-forces system arose from litigation under the federal statutes to justify disparities in pay between male and female coaches. It traces its roots back to two federal cases decided in 1994. In one, the Ninth Circuit Court of Appeals held in *Stanley v. Univ. of So. Cal.* that “an employer may consider the marketplace value of the skills of a particular individual when determining his or her salary.”⁵ In the other, a federal district court in Minnesota in *Deli v. Univ. of Minn.*⁶ rejected the pay-equity claim of a female college coach who asserted that pay differentials based on market forces and tied to the gender of the team coached violated the EPA. In *Deli*, the court noted that the lower market rate for a female women’s gymnastics head coach as compared to the rates for male head coaches of certain men’s teams, including football, basketball, and hockey, was lawful as it was based on market rate analysis and thus fell within the EPA’s statutory exception. Essentially, the *Deli* court determined that the market rate, even if tied to the gender of the student-athlete coached (and not the gender of the coach), was a “factor other than sex” upon which the school reasonably relied in making its compensation determinations.⁷ The *Deli* court noted that the EPA “refers to discrimination based on the sex/gender of the claimant; not the gender of those supervised or served by the claimant.”⁸

With these rulings, the *Stanley* and *Deli* courts provided precedential support for schools not to rely on a coaching position’s subjective skill, effort, responsibility, and working conditions, and instead base a coach’s compensation on objective market data, which generally placed a greater economic value on the coaching positions of certain high-profile men’s sports as compared to coaches of women’s and lower-profile men’s teams. As a result of *Stanley*, *Deli*, and subsequent cases like them, many colleges and universities have simply relied on market forces to justify the compensation of their coaches rather than developing and documenting an equitable compensation system grounded in nondiscriminatory job-related tasks and responsibilities. That might have to change in Massachusetts under the MEPA.

Coaching Compensation under the MEPA

The MEPA, which took effect on July 1, 2018, provides that “[n]o employer shall discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate

⁴ 29 U.S.C. § 206(d). Litigators have also raised claims involving equal pay for college coaches under Title IX, which prohibits discrimination in any education program on the basis of sex, including in employment, recruitment, and distinctions in rates of pay, and Title VII, which prohibits gender discrimination in the terms, conditions, or privileges of employment. See 20 U.S.C. § 1681 (Title IX); 42 U.S.C. § 2000e-2(a)(1) (Title VII).

⁵ *Stanley v. Univ. of So. Cal.*, 13 F.3d 1313, 1322 (9th Cir. 1994) (“Unequal wages that reflect market conditions of supply and demand are not prohibited by the [federal Equal Pay Act]” (citing *EEOC v. Madison Community Unit Sch. Dist. No. 12*, 818 F.2d 577, 580 (7th Cir. 1987))).

⁶ *Deli v. Univ. of Minn.*, 863 F. Supp. 958, 961 (D. Minn. 1994).

⁷ *Id.* at 960-61.

⁸ *Id.* at 961 (quoting earlier Seventh Circuit non-athletic case). The court further found that absent market justifications, the comparable work analysis also justified certain pay inequities where the comparators coached more student-athletes, supervised more staff, attracted greater crowds, brought in more revenue, and had additional responsibilities due to their team’s higher media profiles. *Id.* at 961-62.

less than the rates paid to its employees of a different gender for comparable work.”⁹ “Wages” are defined as including “all forms of remuneration,” including bonuses, commissions, paid time off, retirement plans, and any other benefits.¹⁰

Like the EPA, the MEPA defines “comparable work” as work that “requires substantially similar skill, effort, and responsibility and is performed under similar working conditions,” and provides that the job title or job description alone does not determine comparability.¹¹ “Skill” includes the “experience, training, education, and ability required to perform the jobs.”¹² “Effort” refers to the amount of physical or mental exertion needed to perform a job.¹³ And “[r]esponsibility” encompasses the degree of discretion or accountability involved in performing the essential functions of a job, as well as the duties regularly required to be performed for the job.¹⁴ According to the Massachusetts Attorney General’s interpretation, however, the MEPA’s “comparable work” standard is “broader and more inclusive than the ‘equal work’ standard of the federal Equal Pay Act.”¹⁵

Any MEPA claim involving college coaches of different genders would face the threshold question of whether the coaches are performing comparable work. A female coach of the women’s basketball team who earns less than her male counterpart coaching the men’s basketball team, for example, might argue that both basketball coaches perform comparable work—they both coach the same sport, oversee a similar number of assistants, coach a comparable number of student-athletes, play the same number of games, and bear responsibility for rules compliance, recruiting, budget, and general program oversight. To justify a pay difference in accordance with MEPA on the grounds that the work is not comparable, the school would have to show that the men’s head coaching position requires differing skill, effort, or responsibility, or is performed under differing conditions. Otherwise, a school would have to show that one of the law’s carefully enumerated exceptions (which are discussed below) applies. Depending on the facts, a school may or may not be able to make either showing before a Massachusetts court. In an interesting twist, a male coach of the same women’s team would not be able to make a claim under the law, because if both coaches are male, there would not be a higher-paid employee of a different gender performing comparable work.

With respect to the threshold question of whether the two jobs referenced above—coach of the women’s basketball team and coach of the men’s basketball team—are “comparable work,” it is worth noting a February 2018 pay-equity decision, again by the Minnesota federal district court, in *Miller v. Bd. of Regents of Univ. of Minn.*¹⁶ In *Miller*, the court found that under the federal EPA, the level of responsibility required of a Division I women’s ice hockey head coach was not comparable to that required of a Division I men’s ice hockey head coach because the men’s team “attracts vastly more attention, draws vastly higher attendance, and earns vastly more revenue than the women’s hockey team”

⁹ M.G.L. c. 149, § 105A(b). Massachusetts’ previous equal-pay law, which was the first of its kind in the country when enacted in 1945, prohibited discrimination in the payment of wages “as between the sexes . . . for work of like or comparable character.” M.G.L. c. 149, § 105A (1945). “Comparable” work under that earlier version of the law came to be defined relatively narrowly by courts, effectively leaving Massachusetts’ law no stronger than the federal EPA enacted in 1963.

¹⁰ M.G.L. c. 149, § 105A(b); Office of the Attorney General, *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, Mar. 1, 2018 (the “AG’s Guidance”) sec. 4, available at <https://www.mass.gov/files/documents/2018/05/02/AGO%20Equal%20Pay%20Act%20Guidance%20%285-2-18%29.pdf> (last accessed Feb. 4, 2019).

¹¹ M.G.L. c. 149, § 105A(a).

¹² AG’s Guidance sec. 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Miller v. Bd. of Regents of Univ. of Minn.*, No. 15-CV-3740, 2018 WL 659851 (D. Minn. Feb. 1, 2018).

and “the men’s hockey coach is under more pressure to win—and has more demands on his time—than the women’s hockey coach.”¹⁷ The court determined that the additional pressure to win and the time demands imposed on the male coach of the men’s team constituted “a substantial difference in responsibility” that justified the pay differential.¹⁸ In the *Miller* case, the court made this finding even where the two coaches had identical written job responsibilities and where the women’s program, which was coached by a woman, had significant success at the national level.¹⁹ Massachusetts courts have yet to consider such arguments regarding similar skill, effort, and responsibility under the MEPA.²⁰

In cases where two coaches are found to be performing comparable work under the MEPA, schools must then show that any pay disparity is the result of one of the following factors in order to justify the gender pay differential: (1) a system that rewards seniority with the employer; (2) a merit system; (3) a system that measures earnings by quantity or quality of production, sales, or revenue; (4) the geographic location in which the job is performed; (5) the education, training, or experience of the employee to the extent such factors are reasonably related to the job; or (6) travel, if it is a regular and necessary condition of the job.²¹ Importantly, in order to rely on any of the first three permissible reasons, a school must be able to show that it has developed a compensation “system.”

The MEPA does not incorporate the EPA’s “any factor other than sex” provision and, while it authorizes pay differentials based on a *system* that measures earnings by quantity or quality of revenue, it does not permit simple reliance on “market forces” or “market rates” to justify differences in pay for comparable work among workers of different genders.²² In assessing a pay-equity claim involving college coaches of different genders, the primary issues at stake will be whether they are performing comparable work, and if so, whether any of the six permissible factors described above apply. Based on arguments like those discussed in the case law described above, schools considering coaches’ compensation under the MEPA likely will focus on the ability of the men’s programs to generate sales or revenue at rates greater than the women’s programs. In order to do so, however, schools must be able to point to a compensation “system,” consisting of a plan, policy, or practice that is predetermined and predefined, which is used to make compensation decisions, and which is uniformly applied without regard to gender.²³ This will require considerably more from schools than has been necessary to justify pay disparities under federal law.

Conclusion

The MEPA is a new statute, and the meaning of its provisions have yet to be interpreted by the Massachusetts courts. Whether the MEPA will have any real effect on pay equity in collegiate coaching remains to be seen. It may prompt schools to raise the compensation of female coaches of women’s teams. One certain implication of the statute is that Massachusetts colleges and universities that have traditionally relied on market-based factors to justify pay disparities between coaches of different genders will need to review their compensation models for compliance with the MEPA and may need to modify them. Some schools may find the need to completely revamp their compensation structure, while others

¹⁷ *Id.* at *7.

¹⁸ *Id.*

¹⁹ *See id.* at *1, 7.

²⁰ The most well-publicized case filed under the new MEPA involved a claim by the principal flutist in the Boston Symphony Orchestra that she was compensated significantly less than the principal oboist, who was male. The case settled in February 2019 without any judicial opinion, but it highlights the type of issues courts may be required to address—namely, were the female flutist and male oboist performing comparable work? *Rowe v. Boston Symphony Orchestra, Inc.*, No. 18-02040D (Mass. Super.).

²¹ M.G.L. c. 149, § 105A(b) (2018).

²² AG’s Guidance sec. 5.

²³ AG’s Guidance sec. 5.

may be able to adapt their current scheme to fit the parameters of the MEPA and its permitted factors. Schools may also consider conducting a pay-equity audit, as the MEPA provides a complete affirmative defense to employers who have conducted a good-faith, reasonable self-evaluation within the previous three years and before an action is filed against it, and have made reasonable progress towards eliminating any unlawful gender-based wage disparities revealed by the audit.²⁴

Janet P. Judge is a partner at Holland & Knight LLP where she co-chairs the Collegiate Sports group. Recognized by Best Lawyers as the 2019 Lawyer of the Year for Sports Law in Boston, Ms. Judge represents colleges and university clients on a wide variety of higher education matters.

Andrew E. Silvia is a litigation associate in Holland & Knight's Boston office. He represents employers and educational institutions in all aspects of labor and employment law.

²⁴ M.G.L. c. 149, § 105A(d); AG's Guidance sec. 10.

Cell Tower Dumps

By Mason Kortz and Christopher Bavitz

Introduction

In 2014, the Supreme Judicial Court of Massachusetts ruled in Commonwealth v. Augustine, 467 Mass. 230 (2014) that, under the Massachusetts Declaration of Rights, police must obtain a warrant in order to access cell phone records that can reveal a single person’s location over an extended period of time. Last year, the United States Supreme Court reached the same conclusion under the Fourth Amendment in Carpenter v. United States, 138 S. Ct. 2206 (2018). However, neither decision addressed the practice of so-called “tower dumps,” which involve access to a different type of location information—namely, the identity of all cell phones that were in a particular location at a particular time. This article addresses law enforcement use of tower dumps, providing a technical description, an examination of current law, and some thoughts on trends in widescale data collection efforts

Technical Overview: What Are Cell Tower Dumps?

A cellular network is composed of numerous fixed-location cell towers or “cell sites,” each of which covers three or more directional “sectors.” Whenever a cell phone sends or receives data over a cellular network, it connects to one of these cell sites. The network continually tracks which phones are connected to which sites and sectors at any given time. This information — called cell site location information or CSLI — can be logged by the cellular service provider and stored, in some cases for multiple years. Depending on the density of the cellular network in a particular location, CSLI can be used to track a phone’s location with precision varying from a few miles down to a single city block. Newer cellular technologies allow for even greater detail.

The historical CSLI at issue in Augustine and Carpenter could be defined as information on all of the cell sites that a particular device had connected to over a particular interval. The Supreme Court in Carpenter defined a cell tower dump, on the other hand, as “information on all the devices that connected to a particular cell site during a particular interval.” Carpenter, 138 S. Ct. at 2220. The following examples highlight the distinction between the historical CSLI (Scenario A) and tower dumps (Scenario B):

- SCENARIO A — Police are investigating a crime that took place between November 15 and 19, 2018. Officers have probable cause to believe Smith committed the crime. Smith claims to have been nowhere near the scene of that crime, but officers question his alibi based on eyewitness testimony and other evidence. Officers seek a warrant that would require Smith’s cell phone provider to turn over CSLI indicating the location of Smith’s phone between November 15th and 19th.
- SCENARIO B — Police are investigating a crime that took place at 2:00 pm on November 19, 2018 in the 100-block of Main Street. Officers have no indication as to the identity of the perpetrator. Officers seek warrants that require cellular service providers with towers in the area to turn over CSLI for all cell phones that contacted towers near 123 Main Street between 1:50 pm and 2:10 pm on November 19th.

A tower dump, by its nature, involves access to more users’ data than historical CSLI does; indeed, one federal district court has noted that “[a]ny order authorizing a cell tower dump is likely to affect at least

hundreds of individuals' privacy interests.” In the Matters of the Search of Cellular Telephone Towers, 945 F. Supp. 2d 769, 770 (S.D. Tex. 2013). That said, a typical tower dump is confined in the sense that it covers both a small area and a relatively short time period — often a few hours or even a few minutes. Thus, a tower dump reveals less about any given individual’s movements over a period of time than does historical CSLI.

Current State of the Law

The primary legal question concerning cell tower dumps is whether they require a warrant or, alternatively, can be obtained under the Stored Communications Act (“SCA”), 18 U.S.C. § 2703(d). If the warrant requirement applies, the government would need to show probable cause in order to obtain a tower dump. Section 2703(d) of the SCA, on the other hand, requires only “specific and articulable facts showing that there are reasonable grounds to believe that the contents of [the cell tower dump] are relevant and material to an ongoing criminal investigation.”

Proponents of the warrant requirement argue that individuals have a reasonable expectation of privacy in their location information and that cell tower dumps therefore fall within the ambit of the Fourth Amendment. Alternatively, they argue that even if cell tower dumps do not infringe on any one person’s privacy, the sheer number of data points collected with each dump constitute “dragnet surveillance,” which the Supreme Court has suggested may be unlawful.

The majority of courts to consider the question have rejected these arguments and held that a warrant is not required to obtain a cell tower dump. Many of these decisions rely on the third-party doctrine, which provides that an individual has no legitimate privacy interest — and, therefore, no Fourth Amendment protection — in information that he/she voluntarily discloses to a third party (in this case, that person’s cell phone service provider). Such courts have also noted that, although cell tower dumps collect information about a large number of subscribers, they often cover relatively limited time periods.

On the other hand, at least one United States Magistrate Judge has held that cell tower dumps implicate the Fourth Amendment and therefore require a warrant. See In re United States ex rel. Order Pursuant to 18 U.S.C. Section 2703(d), 930 F. Supp. 2d 698 (S.D. Tex. 2012) (denying § 2703(d) application to obtain tower dump, holding that warrant is required). The court expressly relied on an order extending Fourth Amendment protections to historical CSLI, a decision later reversed by the Fifth Circuit. By its nature, a cell tower dump includes information that turns out not to be relevant to the investigation in question, and the Magistrate Judge was concerned that the government had made no plans for how to handle or dispose of that information. Thus, the court declined to approve an application for a cell tower dump until both (a) it was supported by probable cause; and (b) the government presented a protocol for minimizing the intrusion into the privacy of technological bystanders.

Looking Ahead: Developments Post-Carpenter

Although the Court in Carpenter did not reach the question of cell tower dumps, its decision will certainly have an impact on this evolving body of law. In holding that a warrant is not required to obtain cell tower dumps, many lower courts have expressly relied on appellate decisions permitting warrantless access to historical CSLI. Carpenter has now abrogated those decisions. Historical CSLI and tower dumps raise different privacy concerns, though, so lower courts applying Carpenter and Augustine to tower dumps will still need to engage in an independent analysis of whether the information the government seeks would invade individuals’ reasonable expectations of privacy.

Carpenter set forth two important holdings. First, it limited the application of the third-party doctrine to historical CSLI on the grounds that the pervasiveness of cell phones (and the essentially invisible way in

which they generate location information) rendered any disclosure of CSLI effectively non-voluntary. The application of this holding to tower dumps should be straightforward: because tower dump CSLI and historical CSLI are generated in the same fashion, it stands to reason that the third-party doctrine does not apply to either one.

Second, Carpenter made clear that the collection of seven days of historical CSLI infringes on a cell phone user's reasonable expectation of privacy and, absent exceptional circumstances, requires a warrant. The application of this holding to cell tower dumps is less certain. While tower dumps implicate the privacy of far more people than access to historical CSLI does, they are arguably less invasive at the individual level. The Court in Carpenter declined to state whether there is some lower limit to the collection of CSLI below which a warrant is not required. The SJC in Augustine did reach this question, setting the limit at six hours of CSLI. However, the SJC was presumably thinking of six hours CSLI for a single person--not six hours of CSLI for everyone whose cell phone passed by a specific location in that time period. Thus, the analogy between historical CSLI and tower dump CSLI is imperfect.

Finally, because the Court in Carpenter did not address tower dumps, it did not reach the question of what to do with hundreds, perhaps thousands, of innocent bystanders' location information. Regardless of whether the warrant requirement applies, future courts that address the question of cell tower dumps will need to consider how to craft — or ensure that government entities requesting CSLI craft — mechanisms to minimize potential privacy harms caused by these broad and far-ranging requests.

Warrantless tower dumps, widely approved up until recently, are now on uncertain footing. Tower dumps that cover more than a few hours without a warrant are questionable under Carpenter and almost certainly unlawful in Massachusetts under Augustine. Even narrower tower dumps raise questions due to the number of people affected, although courts may focus more on minimizing harm through search protocols than on the warrant requirement. Courts and practitioners should also keep in mind that, as both the Supreme Court and the SJC observed, the granularity and precision of CSLI continues to increase dramatically as new network technologies are rolled out. The arguments that prevailed in Carpenter and Augustine are likely to become even more compelling as the relevant technologies continue to evolve.

Mason Kortz is a Clinical Instructor at the Harvard Law School Cyberlaw Clinic, part of the Berkman Klein Center for Internet & Society. His areas of practice include electronic search and seizure, online speech and privacy, open records and government transparency, and the law of artificial intelligence.

Christopher Bavitz is the WilmerHale Clinical Professor of Law at Harvard Law School, Managing Director of the Law School's Cyberlaw Clinic, and a faculty co-director of the Berkman Klein Center for Internet & Society.

Heads Up

The Fiduciary Litigation Session

By Robert J. O'Regan

There is good news that a second courtroom will shortly expand the Fiduciary Litigation Session of the Probate and Family Court. This is a pilot program under Standing Order 3-17 (as amended) for complex probate and trust cases. The FLS gives lawyers and judges a solution to the problem that these complex cases seem to not receive the time or attention that they require in the regular sessions of the overwhelmed Probate and Family Court.

Modeled after the successful Business Litigation Session of the Superior Court, the FLS allows for the transfer of complex contested cases and a narrow band of uncontested cases from courts in Essex, Middlesex, Norfolk, Plymouth, and Suffolk Counties. It provides capacity, improved case management, and specialized expertise for the most difficult portions of the caseload within the court's historical jurisdiction. Cases that qualify for transfer must be non-routine and include will contests, determination of heirs, interpretation of instruments, removals and appointments of fiduciaries, contested fiduciary accounts; and equity actions alleging breaches of fiduciary duty, seeking instructions, and to determine title.

For some time, the probate bar in particular has expressed a sense of frustration that these cases often languish on the crowded dockets of the Probate and Family Court. As the court's jurisdiction and responsibilities expanded, particularly after enactment of the equitable division statute and expansion of protective proceedings, the resources in the Probate and Family Court did not keep pace. Probate and Family Court judges now take the bench with more experience in areas other than probate and trust law. These have combined to create an impression that matters involving will contests, trust interpretation, and fiduciary accounts are dry academic exercises to be taken up as a last resort. More than just helping to clear the caseload, the FLS demonstrates the court's understanding that ongoing trust and estate disputes prevent closure after the death of family members, and that beneficiaries are harmed by delayed (or blocked) distributions or fiduciary misconduct.

These are reasons why transfer into the FLS is intended to be simple and quick. Only cases in which all parties have counsel are eligible. Transfers can be initiated by the session judge or an attorney, and virtually all requests have been granted. A key pivot point in the process is that the session judge must recommend the transfer. Transfers are completely administrative, require no hearing, and are not appealable.

A simple on-line form on the court's website starts the process. The instructions are clear and easy to follow. Joint applications are encouraged. Argument and attachments of court filings are prohibited. Applications should point out why the expertise and case management advantages of the FSL will move the case to settlement or disposition more effectively. Objections are due ten days from service of an application. They should point out why the case is not complex and raise potential conflicts with a transfer. Both applications and objections must be sent to the session judge and office of the Chief Justice of the Probate and Family Court. If the session judge recommends transfer, it is then screened by the FLS judge. To date, only three transfer requests have been screened out at this stage.

Pending motions or assigned trial dates in a case will likely not affect whether a transfer request is allowed, but rather how it is managed in the FLS. If the issues straddle probate and equity dockets, discovery is mired down, multiple experts or medical evidence will be required, or several days of trial time are unavailable in the session within a reasonable time, the case should be considered for a transfer request.

Because the FLS is intended to promote best case management practices, the standing order requires a case management conference to be held within thirty days after the transfer. The conference will develop a plan to resolve the case efficiently using any tools available such as ADR, pre-trial procedures, and trial schedules. If the case arrives in the FLS with pending motions, hearing dates will likely be set then for quick disposition. Litigants can expect a clear, firm scheduling order to result from the initial conference.

Improved file and time management steps are emphasized by the FLS. Inter-county assignments cause headaches with file maintenance and docketing, but not with the FLS. Under the Standing Order, all filings are to be made directly to the FLS session, and manages docketing with the originating court electronically. To the extent feasible, the FLS uses conference calls and videoconferencing when an in-court appearance is unnecessary. E-mail for notifications, service, and filings also speeds up the process.

Reception for the FLS has been very positive. Lawyers need not be concerned that a session judge may take offense at a request to transfer a case to the FLS. To the contrary, an unscientific survey of judges and court staff shows that session judges generally welcome these applications. A goal is to make it available state wide within the foreseeable future.

Robert J. O'Regan is a partner with Burns & Levinson, LLP. He is past co-chair of the BBA Fiduciary Litigation Committee and past president of the Massachusetts Probate and Family Inn of Court.

Case Focus

In a Matter of First Impression, the Supreme Judicial Court Narrows the *In Pari Delicto* Defense

By Emily E. Renshaw and Jason D. Frank

In *Merrimack College v. KPMG LLP*, [480 Mass. 614](#) (2018), the Supreme Judicial Court limited the equitable doctrine of *in pari delicto*, which bars a plaintiff who has participated in wrongdoing from recovering damages for related losses. Vacating an order granting summary judgment for the auditor defendant, KPMG, the SJC held for the first time that, under the *in pari delicto* doctrine, only the conduct of “senior management,” those who are “primarily responsible for managing” a plaintiff entity, may be imputed to that entity. *Merrimack* could have broad implications for professional services providers and will likely lead to the further development of *in pari delicto* jurisprudence in Massachusetts.

The *In Pari Delicto* Doctrine

In pari delicto, Latin for “in equal fault,” is an equitable doctrine that courts historically have used to assign blame. In Massachusetts, the doctrine has generally operated to bar a plaintiff who engaged in intentional wrongdoing from recovering from a defendant who was an accomplice or co-conspirator. (Where a plaintiff and defendant are merely negligent, the Massachusetts comparative negligence statute, [M.G.L. c. 231, § 85](#), applies.) The practical import of the *in pari delicto* doctrine is that the law “‘will not recognize a right of action’ based on inequitable conduct.” *Merrimack Coll. v. KPMG LLP*, [34 Mass. L. Rptr. 220](#), at 2 (Mass. Super. Ct. May 15, 2017).

Facts and Procedural History

Merrimack College incurred more than \$6 million in losses as a result of a fraudulent scheme by its former Financial Aid Director, Christine Mordach. Unbeknownst to students who had received grants and scholarships, Mordach replaced some grants and scholarships with federal Perkins loans, which she approved without the students’ knowledge or consent. As a result, Mordach was able to make her budget appear more balanced (reducing projected scholarship expense and ultimately increasing tuition revenue). The unsuspecting students were saddled with debt they did not need (they were supposed to receive grants or scholarships) and had neither requested nor agreed to repay. Mordach pleaded guilty to federal charges, was sentenced to prison, and ordered to pay approximately \$1.5 million in restitution.

Merrimack sought to recover its losses from its independent auditor, KPMG, bringing suit for breach of contract, negligence, negligent misrepresentation, professional malpractice, and violation of M.G.L. c. 93A, and contending that KPMG failed to detect Mordach’s fraud. KPMG moved for summary judgment, arguing, in part, that Merrimack’s claims were barred by the *in pari delicto* doctrine. Merrimack contended that it should not be held liable for the misdeeds of a low-level employee.

The Trial Court Decision: *In Pari Delicto* Bars Recovery

The trial court granted summary judgment in favor of KPMG. Relying on traditional principles of agency law, the court concluded that Mordach’s conduct was properly imputed to Merrimack. It deemed her to be a “relatively high-level staffer,” noting that, as Financial Aid Director, Mordach had overseen the award and distribution of almost \$150 million in financial aid and had signed numerous annual management representation letters to KPMG. *Merrimack Coll. v. KPMG LLP*, [34 Mass. L. Rptr. 220](#), at 5. Furthermore, the court explained that in Massachusetts there is no “low-level employee” exception to the law holding employers vicariously liable for employee conduct. *Id.* at 4.

The trial court also concluded that Mordach's fraud was "far more serious" than KPMG's alleged negligence in failing to uncover it, thus further barring Merrimack's recovery under the *in pari delicto* doctrine. *Id.* at 7.

Following the majority of courts, the court declined to recognize a blanket "auditor exception" to the doctrine, noting that such an exception would be inconsistent with Massachusetts law (which in the analogous context of legal malpractice, bars clients who engage in wrongdoing from suing their attorneys for joining in the wrongdoing. *See Choquette v. Isacoff*, [65 Mass. App. Ct. 1](#), 7-8 (2005)). Merrimack appealed from the grant of summary judgment, and the SJC accepted direct appellate review.

The SJC Decision

The SJC vacated the grant of summary judgment. Observing that he was writing on "essentially a clean slate of Massachusetts law," Chief Justice Gants based his ruling on the purposes of the *in pari delicto* doctrine and principles of imputation. 480 Mass. at 626. *In pari delicto*, the court explained, is an equitable doctrine "focused squarely on the moral blame of the parties." *Id.* at 621-22. The rules of imputation, on the other hand, are designed to allocate fairly risks between principals and innocent third parties. *Id.* at 621. Traditional rules of imputation under Massachusetts common law, the court noted, "are not without their limits," and are inapplicable where the aim is to assign blame rather than allocate risk. *Id.* at 626-27. For example, when determining whether punitive damages—which require "a moral judgment" of the defendant's conduct—are warranted against an employer for an employee's misconduct, the court departs from traditional imputation rules. *Id.* at 627-28. In that circumstance, the court explained, the key factor is whether "members of senior management" are morally blameworthy by participating or acquiescing in the misconduct; "[t]he misconduct of lower-level employees—even those at the supervisory level—is insufficient to warrant punitive damages." *Id.* at 628.

For similar reasons, the SJC held that under Massachusetts common law, a corporate entity's "moral responsibility" can be measured only by the conduct of "senior management—that is, the officers primarily responsible for managing the corporation, the directors, and the controlling shareholders, if any." *Id.* In *Merrimack*, the court ruled for the first time that, under the doctrine of *in pari delicto*, only the intentional misconduct of "senior management" may be imputed to the plaintiff and, "only then, will a court need to consider whether application of the doctrine would comport with public policy." *Id.*

On this matter of first impression, while leaving open to interpretation the term "senior management," the SJC observed that Mordach was not a member of senior management whose conduct could be imputed to Merrimack under the doctrine of *in pari delicto*. Although Mordach had substantial responsibilities as Financial Aid Director, she was "not among the select few who were primarily responsible for the management of the college[.]" *Id.* at 629.

The SJC declined to carve out as a matter of public policy an auditor exception to the *in pari delicto* doctrine, which the Court opined was unnecessary to its decision. The Court further raised a question about the intersection between the *in pari delicto* doctrine and another statute, [M.G.L. c. 112, § 87A3/4](#), which provides for the apportionment of losses in cases involving an accounting firm in which a claim or defense of fraud is raised against the plaintiff or another party. The Court declined, however, to interpret the statute, noting that on remand the trial court may do so and consider its proper application. *Id.* at 632.

The Court made clear that its decision was narrowly confined to the question of imputation in the application of the *in pari delicto* defense. Thus, there seems to be no change in Massachusetts law with respect to the imputation of conduct by non-senior management for purposes of Massachusetts's other comparative fault statutes or common law.

Implications

Merrimack could have broad implications for professional services providers, and the issues identified in the decision likely will lead to the further development of *in pari delicto* jurisprudence in Massachusetts. Notably, the SJC did not provide analytical tools to determine precisely what constitutes “senior management” for purposes of the *in pari delicto* doctrine. For example, applying *Merrimack*, will courts impute to a plaintiff corporation the conduct of a corporate controller who manages a 100-person finance department, and engages in a multi-million-dollar accounting fraud scheme? *Merrimack* may also result in strategic behavior by buyers and providers of professional services, as they seek to allocate and minimize risk, and such behavior may increase costs of service providers in Massachusetts. Following *Merrimack*, it is even more critical than ever for service providers to carefully define the scope of their corporate engagements, particularly in the context of audits and investigations.

Emily E. Renshaw is a partner at Morgan, Lewis & Bockius LLP in Boston. Emily focuses her practice on securities litigation and complex business matters. She represents a diverse client base in an array of matters including shareholder and consumer class actions, derivative actions, governmental, regulatory, and internal investigations, and all forms of contractual disputes and business torts. She represents clients before state and federal courts at the trial and appellate levels and in regulatory proceedings before federal and state securities agencies.

Jason D. Frank is a partner at Morgan, Lewis & Bockius LLP in Boston. For the last two decades, Jason has represented clients in shareholder class actions, derivative suits, SEC proceedings, internal investigations, and a broad array of complex business litigation, including auditor malpractice. He has litigated in trial and appellate courts throughout the United States, appearing before courts in virtually every federal circuit.