Innovations in Recording Trials in Superior Court

*Feeney v. Dell Inc.:* Consumer Class Actions and Public Policy

Faithless Servants Beware: Massachusetts Forfeiture Law is More Severe Than *Astra USA, Inc. v. Bildman* Might Suggest

What Implementing the Green Communities Act Means for Massachusetts

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*Boston Gas*: Massachusetts Chooses Pro Rata Allocation for Long Tail Claims

Why Massachusetts Should Care About the HITECH Act
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The Army and the BBA

Though we see news accounts of soldiers being deployed to Iraq and Afghanistan from National Guard and Reserve components in Massachusetts, Boston is no longer a place where the military is seen in uniform on the streets — except on infrequent occasions, such as holiday weekends when a Navy ship is in port.

Recently, however, the U.S. Army came to the Boston Bar Association and asked for help. Lt. Colonel Anthony Sciaraffa of the U.S. Army’s Judge Advocate General (JAG) Corps accompanied by Bill Sinnott, Corporation Counsel of the City of Boston, and Don Stern, former U.S. Attorney and now a partner at Cooley Godward, made the request. They explained that the Army, and particularly the families of soldiers deployed to Iraq and Afghanistan from National Guard and Reserve components, were being overwhelmed with legal issues arising from the hardships of lengthy deployments and the economy.

The result is that soldiers in the field are being distracted from their missions. They often arrive home to a host of legal issues, some known, some unknown, after lengthy deployments. Many of the legal issues continue after the service members’ discharge from active duty or the reserves, and their transition into veteran and civilian status.

The soldiers and their families need help knowing how to access the extensive legal services community in Greater Boston. They also need help learning how to apply for pro bono assistance from the many lawyers and private law firms ready, willing, and able to offer such assistance.

Facilitating access to justice is a key component of the BBA mission. When we learned that the enlistees and their families, a seemingly invisible client population, need help with many of the same legal issues as other low income people served by Boston’s extensive legal services network, the BBA responded.

The BBA promptly formed a Committee for Legal Services for Veterans, Military Personnel, and their Families. Bill Sinnott, a retired Colonel in the Marine Corps Reserves, kindly agreed to chair the Committee, bringing to this challenging task his extensive knowledge of the military and its culture.

About 25 lawyers have agreed to serve on the Committee. They are a very diverse group, and include experienced representatives of Greater Boston Legal Services and the Volunteer Lawyers Project; two Army National Guard JAG officers; the head of the Attorney General’s Civil Rights Division (which oversees the enforcement of veterans rights for the Commonwealth); private lawyers and in-house counsel who have served as line or JAG officers in all five military branches (Army, Navy, Air Force, Marine Corps., and Coast Guard); former Co-Chairs of the BBA Sections most implicated by the needed legal services, such as Trusts and Estates, Bankruptcy, Family Law, and Public Service, who can, through the networks in their Sections, enlist many lawyers to assist, on a pro bono basis or otherwise; legal affairs and active duty Coast Guard officers; Pro Bono Counsel and Public Service Managers from various private firms, who handle the intake of pro bono cases into their firms’ assignment systems; a lawyer/Army veteran who serves on the ABA’s Legal Assistance for Military Personnel (LAMP) Committee, which addresses these issues nationally; and two first-year students at Boston College Law School, both just discharged from the U.S. Navy – one as a helicopter pilot and the other
as a surface officer from the fleet – who volunteered to take the Committee’s minutes and share current stories about legal issues faced by sailors they commanded.

One particularly important set of voices on the BBA Committee are the legal services lawyers and administrators at the New England Center for Homeless Veterans and Shelter Legal Services, who have shared candid descriptions of their clients, who served in conflicts ranging from Vietnam to Desert Storm to Iraqi Freedom. These veterans are often reluctant to ask for legal assistance, coming as they do from a culture that defined them as the ones who should protect the vulnerable and never seek help for themselves.

The BBA Committee has learned, for instance, that while Vietnam veterans became homeless, on average, in about 10 years after discharge, veterans coming home from Iraq and Afghanistan often have no place to live within 18 months. Five percent of homeless veterans at the New England Center are female.

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The goal of the Committee is to first learn the facts and the scope of this situation, including the types of legal services needed, the best methods to deliver them, and how an effective and sustainable referral network can be established between the military community, on the one hand, and the legal services community and the private bar on the other.

This is no small undertaking given the range of issues that the Committee has heard about to date, the crisis in which many veterans, military personnel, and their families find themselves, and the absence of any regular process for the military to communicate with legal services lawyers and the private bar on a large scale basis. Several leadership initiatives are already underway, from which the BBA and its members can draw lessons.

One notable model, which has been in place for several years, is Looney & Grossman’s program for providing legal services to members of the U.S. Coast Guard and their families. Led by Dick Grahn, the firm’s Managing Partner and a member of the BBA Committee, Looney & Grossman has implemented an effective referral system that matches Coast Guard personnel with interested lawyers competent in the relevant areas of legal need. Working with the Legal Affairs Officer and active duty Coast Guard Officers at the Coast Guard Headquarters in the North End of Boston, Looney & Grossman has handled matters involving family law, estate planning for Coast Guard members with special needs children, probate, consumer law, the Uniformed Services Employment and Reemployment Right Act, and landlord-tenant problems. The Coast Guard has honored the lawyers at Looney and Grossman with a major award for their work.

A remarkable initiative, led by Norfolk County District Attorney William Keating, and his assistant Kevin Bowe, who also are members of the BBA Committee, is a program to educate first responders, such as police, firefighters, and emergency medical technicians, about how to detect the symptoms of post-traumatic stress disorder (PTSD) when they confront participants in emergency or criminal incidents. The program has recently been expanded to identify defendants at the District Court level who are recent combat veterans and provide them with information regarding PTSD and substance abuse counseling, as well as financial assistance for veterans. The goal is to create awareness among prosecutors, defense counsel and court personnel so that appropriate remedies—such as pre-trial probation—are used to both protect public safety and offer relief outside of the criminal justice system to individuals who suffer from PTSD as a result of their combat experiences.

The BBA Committee has also identified the need for training materials, both for lawyers and judges, to familiarize them with essential but unfamiliar aspects of the law pertaining to military personnel. These statutes include the Service Members Civil Relief Act, which provides important rights (such as loan interest reductions and foreclosure prohibitions) to the military and their families while the service member is deployed, and the Uniformed Services Employment and Reemployment Rights Act, under which employees retain the right to regain their civilian jobs once they return from military duty. When military personnel and their families appear pro se in our Housing, District, Juvenile, Probate and Family, and Bankruptcy Courts, their veteran status may not be recognized and their lack of legal representation strains already overburdened judges and clerks in these sessions.

These are pressing needs: the increased deployments ordered by the President will affect many of our fellow Massachusetts citizens – 3,700 members of the National Guard and Reserves are expected to deploy overseas in 2010. More will be heard on this important initiative from the BBA, which is very glad that the U.S. Army came by to visit.

Editor’s Note: BBA members interested in serving on a legal subject matter panel to represent military personnel, veterans, and their families on a pro bono basis may contact Paul Dullea, the BBA’s Director of Community Affairs, at pdullea@bostonbar.org.
Since at least the spring of 2006, the Superior Court has used state-of-the-art digital recording machines with a trained monitor in the First Criminal Sessions in Suffolk and Springfield, in the Suffolk SDP trial session and on Martha’s Vineyard and Nantucket. As of January 21, 2009, the funding for per diem court reporters was eliminated. As a result, thirty-five JAVS (Jefferson Audio Video System) digital audio machines were installed and assistant clerks in civil sessions have been trained to operate them. Up to twenty sessions per day in Superior Court now are digitally recorded, including all civil sessions in Suffolk and Middlesex. Overall, the transition has gone fairly smoothly.

Session clerks and other employees in the clerk’s office have been trained to operate the JAVS system from a console at the clerk’s bench. The console includes a computer screen that conveys quite a bit of information, including lighted bars that show graphically, for each of the microphones, whether and at what volume sound is registering. Procedures for court personnel backing up the day’s court proceedings from the JAVS digital recorder hard drive onto a compact disc have been established. Back-up discs are created daily, and remain in the custody of the clerk-magistrate.

The microphone locations seem optimal from the standpoint of eliminating dead zones. It should be possible for counsel to speak from counsel table, from the back corner of the jury box (as when questioning a witness), or in the middle of the jury box (as during opening or closing), with or without the podium. Counsel who like to move between counsel table and the witness box during an examination should be able to do so, on the record all the while. The witness should be able to leave the stand to point out details on a chalk and still be recorded. Volume and sound quality on the recording will vary, but a transcriber can isolate and amplify the right track so as to make an accurate transcript. Thus far, it appears that as long as people are speaking loudly enough to be heard, they are also being recorded.

On request, the tapes of these courtroom proceedings are provided to court transcribers who generally have a very short turn around time with transcripts. Transcript orders are processed through the Office of Transcription Services (OTS) and are being produced in no more than sixty to ninety days. Court personnel should provide trial counsel with a copy of the OTS Brochure for Digitally Recorded Courtrooms which explains how to forward a Superior Court Transcript Order Form to OTS.

A written procedure has been established to obtain a transcript, even a daily transcript, from a trial recorded by JAVS. The procedure to order a transcript may be even easier than when the trial is recorded by a court reporter, because transcripts from JAVS recorded trials can be ordered on-line at http://trialcourtweb.jud.state.ma.us/admin/ots/forms.html. OTS selects an Approved Court Transcriber from the Trial Court’s List to prepare the transcript. The rate for the transcript is the same whether prepared by reporter or transcriber. AOTC has hired 60 court transcribers, all of whom have passed the necessary tests both for typing and for compliance with Uniform Transcript Format.

Trial counsel should be aware that each courtroom using JAVS can handle up to eight microphones. Each of the courtrooms has been configured with microphones in these approximate locations: Judge’s bench; Sidebar; Clerk’s bench; Witness stand; Counsel Table 1; Counsel Table 2; Jury rail - back corner. Because of the configuration of the courtrooms in Middlesex, an additional microphone has also been added at the Jury rail - one-third back from the corner.
Trial counsel should be aware, and attentive to, difficulties in recording that may arise in multi-party trials, especially where counsel are sharing a table and microphone. It appears that the microphone at the sidebar is set up so that it records but does not amplify; obviously this should be checked at the start of every trial. Trial counsel need to ensure a microphone is near whenever counsel is speaking. However, to date, no complaints in this regard have been received.

Concerns have not been raised so far as to the accuracy of the tapes from the JAVS digital recorders or the accuracy of the transcripts produced. Sybil Martin, Manager of Office of Transcription Services in AOTC, has advised that, to her knowledge, no one thus far receiving a transcript has reported any complaints with the accuracy of the transcript received. Each transcript is mailed out with an assessment form as to the accuracy of the transcript. Though only approximately 20% of the assessment forms have been returned to OTS, no complaints as to the accuracy of the transcripts have been received by OTS.

Not only are the transcripts being produced more timely, these transcripts are also being produced in a uniform format. The AOTC is pleased that since June, 2008 a uniform transcript is provided by court reporters and court transcribers. The Uniform Transcript Format (UTF) is a major accomplishment of the OTS within AOTC. UTF provides formatting instructions for the production of all transcripts in all courts of the Commonwealth and ensures that court reporters and court transcribers prepare transcripts in accordance with this standard.

New time standards on the production of transcripts are also in effect. As of January 1, 2010 all transcripts, whether by court reporter or by court transcribers, are now due within one hundred and twenty days. Since July 2009, the Superior Court is providing the Supreme Judicial Court with reports on the number of outstanding transcript requests together with an indication of the number of days that have elapsed since the transcript request was filed.

Although civil trials in large numbers have been digitally recorded for less than nine months, a preliminary assessment is that the JAVS system, together with the court transcribers, is producing accurate and timely transcripts. Any counsel with an adverse experience or with any suggestions for improvement is welcome to notify Richard Parsons, Associate Court Administrator, as well as OTS.

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In *Feeney v. Dell Inc.* 454 Mass. 192 (2009), the Supreme Judicial Court held that class action waivers in arbitration clauses of consumer contracts are unenforceable as a matter of public policy. Plaintiff alleged that Dell had violated chapter 93A by charging purchasers of optional service contracts for Dell computers a sales tax that was not imposed by Massachusetts taxing authorities. He commenced a putative class action under G.L. c. 93A, § 9(2). Dell compelled arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 4 (2000) (the “FAA”). The arbitrator denied plaintiff’s request for class certification because of the waiver provision in the contract’s arbitration clause, and ruled for Dell on plaintiff’s individual claims. Plaintiff unsuccessfully sought relief in the Superior Court, and the SJC granted direct appellate review.

Plaintiff argued that the class action waiver contravened public policy, and the SJC agreed. The Court held that “[i]t is ‘universally accepted’ that public policy sometimes outweighs the interest in freedom of contract, and in such cases the contract will not be enforced.” 454 Mass. at 199-200. Citing the statute, its own case law, and the Attorney General’s amicus brief, the Court held that “expressions of three branches of Massachusetts government indicate that the public policy of the Commonwealth strongly favors G.L. c. 93A class actions.” Id. at 200. The Court also found evidence of “a strong public policy in favor of the aggregation of small consumer protection claims” in chapter 93A’s legislative history. Id. at 201. Throughout, the Court referred to “[t]he right to a class action in a consumer protection case,” and characterized this “right” as “a public — not merely a private — right: it protects the rights of consumers as a whole.” Id. at 202-03. The availability of attorney’s fees, damages and multiple damages to prevailing plaintiffs, reasoned the Court, is not “sufficient to ensure that a consumer or business with a small-value claim will be able to find an attorney willing to take the case absent the ability to aggregate claims.” Id. at 204. The Court concluded:

> "Allowing companies that do business in Massachusetts, with its strong commitment to consumer protection legislation, to insulate themselves from small value consumer claims creates the potential for countless customers to be without an effective method to vindicate their statutory rights, a result clearly at odds with our public policy."

Id. at 205.

The contract contained a choice-of-law provision specifying Texas law, and Dell argued that Texas would honor the class action waiver. Applying the Restatement (Second) of Conflict of Laws, the Court refused to enforce the choice-of-law provision, finding that “the strong public policy in favor of class actions for small value claims under G.L. c. 93A is a ‘fundamental policy’” warranting application of Massachusetts law. Id. at 207. The Court also rejected Dell’s arguments that the FAA preempts state public policy (id. at 208-09), and that the class action waiver should be severed from the arbitration clause, in part because applicable arbitration procedures would not permit class arbitration (id. at 210-11 & n.34). Finally, the Court held that the Complaint failed adequately to allege that the collection of the sales tax constituted “the conduct of trade or commerce,” and remanded for dismissal without prejudice. Id. at 212-13.

As the SJC’s analysis of the choice-of-law issue demonstrates, courts are split on the enforceability of class action waivers in consumer contracts. See M. Duvall, *Class Action Waivers*, ABA Class Action and Derivative Suit Committee Newsletter, Vol. 20, No. 1 (Fall 2009). The SJC’s decision is consistent with decisions of other courts refusing to enforce such waivers. See, e.g., *Laster v. AT&T Mobility LLC*, 2009 U.S. App. LEXIS 23599 (9th Cir. October 27, 2009). However, by couching its decision in terms of “strong public policy” and consumer “rights,” the Court risks misinterpretation. The SJC did not hold that every consumer claim merits class treatment. Rather, it held only that a company may not, by contract, avoid consumer class actions. A chapter 93A plaintiff seeking class certification still must show that “the use or employment of the unfair or deceptive act or practice has caused similar injury to
Faithless Servants Beware: Massachusetts Forfeiture Law is More Severe Than
Astra USA, Inc. v. Bildman Might Suggest

Massachusetts courts have long held fiduciary parties to strict standards of behavior. Fiduciaries that fall short of those standards expose themselves to a variety of consequences, some of which may be quite harsh. One is equitable forfeiture, the subject of this article. It can require that an employee who is also a fiduciary (such as a corporate officer) repay compensation received during the period of his or her breach, in addition to traditional damages. Depending on the employee and the period of time the employee is in breach, equitable forfeiture can result in millions of dollars of recoupment for an employer.

Recently, the Supreme Judicial Court issued an opinion in Astra USA, Inc. v. Bildman, a long-running litigation involving the disgraced chief executive of a Westborough-based pharmaceutical company. Although the case was decided under New York law (Astra USA was incorporated in New York), it is significant for Massachusetts practitioners because in dicta the Court pointed out apparent discrepancies between Massachusetts and New York forfeiture law. In particular, the Court noted that Massachusetts forfeiture law is considerably more lenient toward the breaching fiduciary than New York law with respect to the degree of potential forfeiture. The Court also suggested that in Massachusetts, unlike New York, a disloyal employee is entitled to apportionment (or an offset, as it is sometimes called) of compensation based on services performed that were unrelated to the breach.

Bildman leaves the reader with the distinct impression that in any circumstance Massachusetts forfeiture law is more relaxed than its New York analog. That impression is not unreasonable in light of Bildman’s dicta, particularly the Court’s statements juxtaposing Massachusetts and New York forfeiture law.

There are, however, Massachusetts cases that support the proposition that forfeiture law in the Commonwealth is much more severe than Bildman’s dicta might suggest and that Massachusetts judges retain considerable discretion in deciding just how much forfeiture is equitable.

Astra USA, Inc. v. Bildman

In Bildman, a pharmaceutical company (Astra USA) terminated and then sued its chief executive officer (a Mr. Lars Bildman) for breach of fiduciary duty. The alleged misconduct, brought to light by a BusinessWeek investigation, concerned allegations that Bildman and others sexually harassed former female employees, and that Bildman personally directed Astra USA’s general counsel to authorize company payouts in settlement of potential claims. After BusinessWeek published the results of its investigation, the U.S. Equal Employment Opportunity Commission filed suit against Astra USA, resulting in a consent decree in which Astra USA established a multi-million dollar fund to compensate victims of sexual harassment at the company. Astra USA in turn sued Bildman.

Numerous other persons similarly situated,” and that the plaintiff “adequately and fairly represents such other persons.” G.L. c. 93A, § 9(2). See Moelis v. Berkshire Life Ins. Co., 451 Mass. 483, 489-90 (2008). These statutory requirements reflect a balancing of consumers’ interests in vindicating their small claims with the interests of business defendants to be free from pressure to settle unmeritorious cases, and to exercise their due process rights to advance individual defenses in appropriate cases. Courts interpreting Feeney should not mistake the SJC’s “public policy” reasoning for a rejection of these countervailing policies embedded in the statute.

By James R. Carroll and Jason C. Weida

Jason C. Weida is a litigation associate in the Boston office of Skadden, Arps, Slate, Meagher & Flom. His litigation practice encompasses a broad array of matters affecting public and private companies, including securities class action defense, subprime-related issues, insurance, and employment-related disputes.
Following a seven-week trial, the jury awarded more than $1 million in damages on Astra USA's breach-of-fiduciary-duty claim, but the Superior Court Judge denied its request for equitable forfeiture of Bildman’s compensation (approximately $7 million between 1991 and 1996). Forfeiture of all Bildman’s compensation, the Superior Court concluded, was unreasonable and unfair and “the lack of New York Court of Appeals decisions explicitly mandating forfeiture in all cases of breach of fiduciary duty” suggested “a less strict approach in determining how to impose forfeiture.” Looking to Massachusetts forfeiture law to fashion an equitable remedy, the Superior Court observed that “a fiduciary is generally required to repay only the portion of his compensation in excess of the worth of his services.” Following an evidentiary hearing to determine “the value of Bildman’s services during the period in question,” the Superior Court found that Bildman’s services were commensurate with his salary, and consequently denied further recovery.

Astra USA appealed, and on direct review the Supreme Judicial Court reversed in relevant part. Chief Justice Marshall, writing for the Court, held that New York’s so-called “faithless servant” doctrine required equitable forfeiture of all Bildman’s compensation during the period of disloyalty and that apportionment of relief based on the “value” of Bildman’s services was unavailable as a matter of New York law. Addressing the Superior Court’s reliance on Massachusetts forfeiture law, the Court held that although New York forfeiture law was “harsh,” she was bound to apply it:

Once it was determined that from 1991 to his termination on June 25, 1996, Bildman, a senior employee, officer, and director, had committed numerous and substantial breaches of his fiduciary duties to Astra [USA], forfeiture is warranted of all Bildman’s compensation for the period of disloyalty … .

New York’s forfeiture law has been described as harsh, as the judge determined it to be. For New York, however, the harshness of the remedy is precisely the point.

As a result, Astra USA’s award multiplied by a factor of seven.

In the course of discussing the Superior Court’s ruling, the Chief Justice did a curious (and some might say unnecessary) thing. She used New York forfeiture law as a foil to make obiter dicta pronouncements concerning Massachusetts forfeiture law. Specifically, she stated that “Massachusetts forfeiture law is more lenient on the issue of retainable compensation than New York law.” And she implied without elaboration that in Massachusetts, unlike New York, a disloyal employee is entitled to apportionment of compensation based on his or her faithful services: “Under Massachusetts law, the value of the disloyal employee’s faithful services is determinative; under New York law, it is irrelevant.”

These propositions are tested below.

Massachusetts Forfeiture Law
Fiduciaries Are Held To a High Standard in Massachusetts

Massachusetts courts have long and consistently described a fiduciary’s duty to its principal in the strictest of terms. Nearly a century ago, the Supreme Judicial Court recognized that the duty is “founded on the highest and truest principles of morality.” More recently, in Demoulas v. Demoulas Super Markets, Inc., a case involving the duty owed by shareholders in a close corporation, the Court called fiduciary duty “paramount,” requiring a fiduciary “to act with absolute fidelity” and to place “[his] duties to the corporation above every other financial or business obligation.” Invoking Benjamin Cardozo’s repeated phrase, the Demoulas Court said this about a fiduciary’s standard of conduct: “Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”

In a typical breach-of-fiduciary-duty case, an officer of a corporation diverts his or her time and energy from an employer in order to establish a competing enterprise, luring away key employees. For example, in Chelsea Indus., Inc. v. Gaffney, the defendants (executives at Chelsea, a manufacturing company) were found to have breached fiduciary duties by surreptitiously creating a new competing business. Among other things, the defendants used work time to plan their new business and conducted self-serving field work at the expense of the company. These acts, the Supreme Judicial Court concluded, “amply support the conclusion that the defendants violated their fiduciary duty of loyalty to Chelsea.”

But the duty precludes a variety of conduct beyond just injurious competition. Essentially any conduct that is inconsistent with an employer’s interests may trigger breach of fiduciary responsibilities. Bildman, supra, is a case in point. Fidelity Mgmt. & Research Co. v. Ostrander is another example. In Ostrander, a portfolio manager was found to have breached fiduciary duties when she made a personal investment on favorable terms from financier Michael Milken in exchange for her purchase of certain securities on behalf of Fidelity mutual funds.

The remedy for breach of fiduciary duty can take multiple forms. The most common remedy is consistent with a tort remedy: the amount of loss actually caused by the misconduct. But the employer must of course prove that an injury occurred, and that the injury was proximately caused by the employee’s breach. Causation in such cases may prove a high hurdle. In Augat, Inc. v. Aegis, Inc., for instance, the Superior Court ruled that an employer was entitled to three years of lost sales revenue resulting from the departure of key sales personnel the defendant had solicited. On appeal, the Supreme Judicial Court vacated the lower court ruling, holding that the plaintiff had not established a sufficient causal nexus between three-years worth of lost sales and the employees’ departure.
Equitable Forfeiture Can Be Comprehensive And Severe

Equitable forfeiture is a different species of remedy entirely. It holds that a disloyal employee forfeits the right to retain or receive compensation for conduct in violation of his or her fiduciary duties. Unlike traditional damages, equitable forfeiture does not require causation or even proof of harm. Indeed, the fact that an employer profited during the period of disloyalty does not prevent or limit forfeiture. And no contractual provision permitting forfeiture (in an employment agreement or compensation plan, for example) is necessary.

Despite the Chief Justice’s dicta in Bildman, the historical rule in Massachusetts is that an employer is entitled to recoup all compensation — salary, bonuses, et cetera — paid during an employee’s period of disloyalty. Consider this 1911 pronouncement by the Supreme Judicial Court in Little v. Phipps:

If the [employee] does not conduct himself with entire fidelity towards his principal...he loses his right to compensation on the ground that he has taken a position wholly inconsistent with that of [employee] for his employer, and which gives his employer, upon discovering it, the right to treat him so far as compensation, at least, is concerned, as if no agency had existed. This may operate to give the principal the benefit of valuable services rendered by the [employee], but the [employee] has only himself to blame.

Since Phipps, however, Massachusetts courts have been given the discretion to permit a disloyal employee “to repay only that portion of his compensation, if any, that was in excess of the worth of his services to his employer.” In Meehan v. Shaughnessy, the Supreme Judicial Court could have but did not require defendants (departed law firm partners) to repay their old law firm compensation they had received during the period of their breach when they sought to establish a new law firm. The Court relied on the trial court’s unchallenged finding that the defendants’ work product did not wane during the period of disloyalty: “Here, the judge found that throughout the period in question the [defendants] worked as hard, and were as productive as they had always been. This finding was warranted, and is unchallenged by [the plaintiff]. In these circumstances, we conclude that the value of the [defendants’] services was equal to their compensation.”

Apportionment does not appear to be commonplace and is certainly not required. An excellent article published in this journal a decade ago reported relatively few instances where Massachusetts courts exercised their discretion to apportion forfeiture damages:

Despite the apportionment limitation, Massachusetts decisions to date have not readily strayed from requiring a disloyal employee to forfeit the right to retain or receive compensation for conduct in violation of his or her fiduciary duty. While courts are to examine each case with discretion and reference to the peculiar factors found to be present, the baseline proposition remains one of forfeiture.

A variety of cases confirm the Courts’ discretion under Massachusetts law to fashion a remedy of total forfeiture during the period of breach:

- Compass Forwarding Co. v. Prior, 62 Mass. App. Ct. 1107, 2004 WL 2375645, at *3 n.10 (2004) (affirming forfeiture of all compensation during period of disloyalty: “notwithstanding the defendants’ many years of work as Compass employees, the judge carefully tied, and limited, the salary...forfeitures to just the years within which the wrongful conduct occurred.”);
- Boston Children’s Heart Found., Inc. v. Nadal-Ginard, 73 F.3d 429, 435-36 (1st Cir. 1996) (affirming forfeiture of all compensation during period of disloyalty under Massachusetts law, and rejecting appellant’s argument to “stray from the baseline and require” apportionment);
- Diversified Ventures, Inc. v. Moriarty, No. 910457, 1994 WL 879858, at *23 (Mass. Super. Ct. Feb. 14, 1994) (refusing to apportion forfeiture damages: “where a serious willful violation of the duty of loyalty was proven, it is not inequitable to award damages equal to the entire compensation paid to Moriarty during the period he misrepresented and failed to disclose his activities with respect to the Portfolio”);
- BBF, Inc. v. Germanium Power Devices Corp., 13 Mass. App. 166, 177 (1982) (affirming forfeiture of all compensation during period of disloyalty: “It may be that the judge could have allowed these defendants a credit for the fair value, if any, of their services to BBF during this period, but we cannot say that the judge abused her discretion by disallowing all salary paid by BBF to these defendants during the pertinent period.”) (internal citations omitted); and
- Prod. Mach. Co. v. Howe, 327 Mass. 372, 379 (1951) (affirming forfeiture of all compensation during period of disloyalty: “It is suggested...that compensation to a disloyal agent may be ‘apportioned’ in relation to his services properly performed...In our opinion the conduct of the defendant during the period when the salary in question was being paid was such that he must be held to have forfeited his right to compensation.”).

When willing to apportion forfeiture damages in a particular case, Massachusetts courts place the burden of proving the “value” of services squarely upon the disloyal employee. In Gaffney, supra, the Supreme Judicial Court rejected the notion that the defendants were entitled to retain the entire compensation they received upon proof that Chelsea was profitable despite their disloyal conduct. Instead, the Court held that “unless [the defendants] proved the value of their services, Chelsea was entitled to recover their entire compensation.” Because the defendants had not done so, the judgment of the Superior Court awarding full compensation was affirmed.

Other courts have described this burden as particularly onerous. In Orkin Exterminating Co. v. Rathje, a diversity case governed by Massachusetts law, the federal district court found that although the defendant breached his fiduciary duties to Orkin, he was not required to repay his
salary because the value of his services was commensurate with his salary during the period of disloyalty. On appeal, the First Circuit set aside the district court’s finding as “very hard to credit” in part because of the defendant’s “heavy” burden of proof: “[T]he court apparently failed to factor into its finding the heavy burden on defendant to prove that his work was worth the full amount paid him by Orkin.”

The nature of the misconduct might play a role as well in limiting the application of the apportionment exception. In Nadal-Ginard, supra, the First Circuit postulated that apportionment is not appropriate in cases involving “egregious” misconduct: “It is only when a court is satisfied that a defendant has established the value of his services, and that his or her conduct was not egregious, that such an offset is factored into the damages equation.” But the First Circuit did not elaborate on what type of misconduct might be considered “egregious” for purposes of deciding whether to apply the apportionment exception, and virtually no other Massachusetts appellate decision explores the subject. The few Superior Court decisions that discuss the nature of the disloyal employee’s conduct relative to apportionment do not provide the analysis necessary to draw principled conclusions.

Conclusion

The circumspect reader will not rely too heavily on Bildman for guidance on Massachusetts forfeiture law. The above authorities show that Massachusetts courts certainly have the discretion to craft a harsh remedy when circumstances so warrant. Although some courts have as a matter of discretion in appropriate cases declined to award an employee’s full compensation received during periods of disloyalty, the baseline has been and remains one of full forfeiture.

Endnotes


2. For the BusinessWeek article, see Mark Maremont, Abuse of Power: The Astonishing Tale of Sexual Harassment at Astra USA, BUSINESSWEEK (May 13, 1996).


5. 455 Mass. at 135 n.28.

6. Id. at 134.


12. 404 Mass. 419, 440 (1989). In light of their discretion to fashion equitable remedies, Massachusetts courts have considered several categories of evidence to prove the value of services, including the nature of the employee’s services, the quality and quantity of services, the nature of the disloyalty and its relationship to the employee’s ability to perform employment functions. E.g. Anderson Corp. v. Blanch, 340 Mass. 43, 50-51 (1959); Lydia E. Pinkham Medicine Co. v. Gove, 303 Mass. 1, 6 (1939).


14. 72 F.3d 206, 209 (1st Cir. 1995) (emphasis supplied).

15. Compare Moriarty, supra, at *23 (determining that a company executive’s undisclosed transaction for personal gain constituted “a serious and willful violation of the duty of loyalty” that precluded apportionment), with Ellis v. Varney, 18 Mass. L. Rptr. 394, 420-21, 428 (Mass. Super. Ct. Jan. 9, 2004) (determined that a director’s self-interested vote for and acceptance of an “unfair” bonus provision “was not so egregious as to warrant the forfeiture of [the director’s] entire compensation”).
What Implementing the Green Communities Act Means for Massachusetts

During last year’s legislative session, an omnibus energy law known as the Green Communities Act — Chapter 169 of the Acts of 2008 (“GCA”) — reinvented the state’s energy policy. The GCA promised more renewable power and a goal to return real savings to consumers by reinvigorating efficiency programs operated by investor owned electric and gas energy utilities.

With respect to energy efficiency, the GCA replaced the prior statutory cap on efficiency spending with a mandate that utilities procure “all cost effective” energy efficiency, or efficiency which costs less than supply, treating efficiency like a commodity on par with generation. To implement this new paradigm, the Program Administrators (“PAs” – the 12 electric and gas utilities serving Massachusetts) were required by the GCA to develop three-year Statewide Energy Efficiency Plans (“SEEPs”) to integrate their efficiency programs for maximum effect. The SEEPs were developed over several months with input from the newly formed 11 member Energy Efficiency Advisory Council (“EEAC”) whose members are appointed by the Governor and are comprised of several state agency officials, the Attorney General as a statutory consumer advocate, and business groups like Associated Industries of Massachusetts (“AIM”). By January 30, 2010, the Massachusetts Department of Public Utilities is mandated by the GCA to hear testimony and public comment, and approve the SEEPs for implementation.

Funding for the new programs will come primarily from three sources: (i) existing electric and gas program funding; (ii) proceeds of auctioning carbon allowances under the Regional Greenhouse Gas Initiative, 80% of which are earmarked to augment energy efficiency programs; and (iii) a new Energy Efficiency Reconciliation Factor (EERF) tariff on customer bills. The EERF tariff represents a $700 million investment by consumers in energy efficiency over three years. The EERF was controversial, especially for groups like AIM that represent high technology and biotech companies that are particularly sensitive to the price of electricity and gas, but the hope is that this investment will show real returns in the form of lower energy usage.

The result of all this effort is a tripling of gas and electric energy efficiency spending over the next three years (to about $1.6 billion cumulatively, although outside funding is being sought to mitigate some bill impacts), with aggressive energy reduction targets and penalties if the utilities do not meet their goals. While in previous years the energy efficiency programs were considered successful if reductions less than 1 percent could be verified, the “all cost effective” energy efficiency mandate of the GCA resulted in an agreement between the PAs and the EEAC to establish annual energy use decreases of 2.4% in electric usage, and a 1.2% in gas usage by 2012. This will make Massachusetts a leader in the United States in per capita energy efficiency spending and reduction goals.

With the new EERF expected to add between 10-15% on gas and electric distribution rates, individual customers can achieve cost savings only if they reduce energy usage. Planned new marketing and education efforts by the PAs, along with new programs and rebates, will provide additional incentives to encourage implementation of energy efficiency measures by customers.

The GCA also requires utilities to purchase a greater percentage of renewable power. Utilities can recover costs for long term renewable power contracts (Section 83) and implementing smart grid pilots (Section 85). Also, new tariffs for recovery of utility owned solar installation costs can be imposed on ratepayers (Section 58). By subsidizing renewable power, the GCA seeks to make renewable energy more cost competitive with conventional power over time. As sustainability accounting and supply chain footprinting and scoring become more widespread throughout commerce and industry, business clients are well advised to take advantage of the renewable power incentives offered through utility companies and state programs.

Finding the right balance between raising rates on all to benefit certain segments of the economy or certain favored industries may take some trial and error and it may take several years to know if all the aspirations of the GCA are realized or have come at too severe a cost to ratepayers and the Massachusetts economy. Increasing tariffs for various subsidies may leave the customer with little idea as to what their actual rates will be in the years ahead, especially when the wild cards of new transmission investments and variable fuel costs are thrown into the mix. With billions of ratepayer dollars and thousands of jobs on the line, the risks of getting it wrong are real. AIM looks forward to working with the PAs and other stakeholders to insures that implementation of GCA continues to move toward the endpoint we all desire—a cleaner environment—while also providing the rate predictability and regionally competitive costs necessary for a vibrant economy.
Guidelines approved by the Supreme Judicial Court effective September 1, 2009, aim to prevent the unnecessary inclusion of certain personal identifying data (PID) in publicly-accessible documents filed with or issued by the courts, to reduce the risk of identity theft. The guidelines, applicable to civil and criminal cases throughout the state court system, are available along with a one-page summary in clerks’ offices and at www.mass.gov/courts/sjc/personal-data-guidelines.html.

PID is frequently required to be included in publicly-accessible court documents. Given the difficulty of cataloguing and evaluating each of the reasons PID is included, the subcommittee appointed to study the issue concluded that non-binding guidelines should be implemented for a provisional period. The guidelines are intended to focus the attention of litigants and courts on (1) minimizing the inclusion of PID in the short term, and (2) considering revisions to current practices, court rules, standing orders, and court-issued forms, so as to facilitate the eventual adoption of a binding rule.

Redaction or Omission of Data.

The main thrust of the guidelines is that, unless an exemption applies, no publicly-accessible document filed with a court should include a complete version of the PID elements listed below. The filer (including any party or non-party) should redact data from pre-existing documents, or omit data from documents drafted for the purpose of filing, so that the document includes at most:

1. the last 4 digits of a social security number, taxpayer identification number, credit card or other financial account number, driver’s license number, state-issued ID card number, or passport number.

2. the first initial of a person’s mother’s maiden name, if the name is identified as such.

Redactions are to be marked with the filer’s name, the date, and the phrase “PID Guidelines,” to avoid later questions about alteration of documents. The filer is to keep an unredacted copy of the document and furnish it to any party or the court promptly upon request.

Exemptions.

Deletion or omission of data is unnecessary if any of the following applies:
1. The information in the document is specifically required by law, court rule, standing order, court form, or court order.

2. In a criminal or youthful offender case, the information is the defendant’s social security number, driver’s license number, state-issued ID card number, passport number, or mother’s maiden name identified as such. This exemption was created because virtually all criminal and youthful offender cases necessarily include numerous complete PID elements of the defendant in publicly accessible documents.

3. The filer reasonably believes that the complete information is needed to resolve an issue before the court or to establish the identity of a person before the court. The filer should first consider giving the complete information to the parties, or to the person or entity to whom a requested court order would be directed, without filing it with the court. For example, particularly in civil cases, a motion for an order to a third party to produce records, such as hospital records or criminal offender record information (CORI), need not include the person’s unredacted personal identifying data. The motion and any resulting order may include redacted data, and the moving party may then, when serving the order on the entity required to respond, provide any unredacted data the entity requires in order to respond.

4. The document is a transcript of the court proceeding, filed by a court reporter or transcriber, or is the official record of an agency adjudicatory proceeding or another court proceeding, filed by that agency or court.

5. The document is produced directly by a non-party in response to a subpoena or other court order. But any party that intends to offer such a document in evidence should, where feasible, make a copy, redact it in accordance with the guidelines, and offer the redacted copy.

FILER’S RESPONSIBILITY. The guidelines make it solely the filer’s responsibility to redact or omit data. The clerk should encourage compliance with the guidelines but need not review documents for compliance and should not reject them for non-compliance. The guidelines also specify that the filing of a document that contains one or more of the filer’s own complete data elements does not by itself waive the applicability of the guidelines to the filing of such filer’s complete data elements by any other filer.

COURT-ISSUED DOCUMENTS
The guidelines provide that in any order, decision, or other court-issued document that will be publicly accessible, the court should avoid inclusion of a complete version of any PID element covered by the guidelines, unless the complete data: (1) is specifically required by law, court rule, standing order, or court-issued form; (2) is necessary to effectuate the purpose of the document being issued; or (3) is for other good cause.

OTHER PROVISIONS
The guidelines do not limit a filer’s ability to move to impound, pursuant to Trial Court Rule VIII or SJC Rule 1:15, any document containing PID elements. Additional guidelines apply to appellate court filings. For example, it is rarely necessary to include complete PID in an appellate brief, and such briefs may be subject to wide electronic dissemination. Thus, if a filer includes any complete PID element in an unimpounded appellate brief, the filer should simultaneously file an additional copy of the brief with the data element redacted or omitted.

The interim guidelines are expected to provide both a measure of protection against identity theft in the near term and a basis for later adoption of a binding rule on the subject. The issue may gain importance to the extent that such documents may be made available over the Internet. Adherence to the guidelines and awareness of the principles they embody will help the bar and the court system to do their parts to combat this growing problem. Comments on how the guidelines are working in practice are welcome and should be directed to PIDGuidelines@sjc.state.ma.us or PID Guidelines, Supreme Judicial Court, One Pemberton Square, Suite 2500, Boston, MA 02108.
This past summer, in *Boston Gas Co. v. Century Indemnity Co.*, 454 Mass. 337 (2009), the Supreme Judicial Court held that liability for claims involving damage that occurs over multiple years — “long tail” claims arising, for example, from environmental pollution and asbestos exposures — should be allocated to insurance policies on a “pro rata” basis. In doing so, the SJC rejected the policyholder’s argument — and two Appeals Court holdings — that allocation should be made using a “joint and several” approach, thus joining the majority of state supreme courts that have considered the issue and settling the law on this important issue in Massachusetts.

Boston Gas sued Century and other insurers to obtain insurance coverage for environmental damage caused by its operation of manufactured gas plants in the Boston area. A jury in federal court found Century liable for coverage for damage arising from the operation of a plant in Everett from 1908 to 1969. The federal trial court — adopting a joint and several allocation approach advocated by the policyholder — allowed Boston Gas to collect the full amount of its damage over the 61-year period from a single Century policy that covered the four-year period from 1966 to 1969, and declared that this policy was also obliged to pay all future cleanup costs for the site. Upon appeal to the First Circuit, that court certified to the SJC the question of whether a pro rata approach to allocation should have been used.

In a comprehensive and scholarly opinion by Justice Cordy, the SJC unanimously held that, where it is not feasible to determine by fact-based analysis what specific damage occurred during each year, the total damage should be apportioned among triggered insurance policies on a pro rata basis, based upon an insurer’s “time on the risk” relative to the total number of years during which the damage occurred. To reach this result, the Court engaged in classic contract construction by focusing on the plain language of the insurance policy and reading it as a whole. Here, the definition of a covered “occurrence” was limited to an accident which results in damage “during the policy period.” Thus, the Court rejected the notion that the policy provided coverage for damage occurring before and after the policy period, stating that “[n]o reasonable policyholder could have expected that a single one-year policy would cover all losses caused by toxic industrial wastes released into the environment over the course of several decades.” The Court indicated that, in making the pro rata allocation, periods during which there were no insurance — whether due to self-insurance or insurer insolvency or otherwise — should be the responsibility of the policyholder.

The SJC found that pro rata allocation serves important public policy objectives because it promotes efficiency by avoiding a second round of litigation in which an insurer, who has been required to pay the entire loss to the policyholder, seeks contribution from other insurers. It also avoids a “false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage,” thus “provid[ing] incentive for responsible commercial behavior.”


In adopting pro rata allocation in *Boston Gas*, the SJC joined ten other state supreme courts in a 30-year national debate which has seen six states opt for the joint and several approach. Although *Boston Gas* has definitively resolved how damages for long tail claims should be allocated in Massachusetts, the SJC expressly noted that the case did not address the allocation of the costs of defending a policyholder, and it suggested that guidance on allocation of such defense costs may entail different analysis which awaits another day.
Heads Up

By Stephen W. Bernstein and Edward G. Zacharias

Why Massachusetts Should Care about the HITECH Act

The Health Information Technology for Economic and Clinical Health Act (American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong., § 13001, et seq. (Feb. 17, 2009), hereinafter the “Act”) includes at least $20 billion in government funding for health information technology. This money is intended, in part, to facilitate the development of a national health information network. To protect information as it moves through the envisioned national system, the Act significantly modifies the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191 (Aug. 21, 1996), hereinafter “HIPAA”) and imposes a national security breach notification law upon entities that possess protected health information (“PHI”). The Act requires covered entities, business associates (including lawyers and law firms in certain circumstances), vendors of personal health records (“PHR”) and certain third-party service providers to notify individuals and/or entities when unsecured PHI or unsecured PHR-identifiable health information is subject to a security breach.

The Act’s security breach notification requirements are particularly salient in Massachusetts, where the healthcare industry is responsible for nearly 16% of the state’s total employment and ranks second in the nation in grants from the National Institutes of Health. Given the scope and economic impact of the Commonwealth’s healthcare industry and the push toward national health reform, the privacy and security of PHI and PHR will continue to require the attention of a large sector of the Massachusetts economy. Moreover, as healthcare spending remains front and center in our national policy debate, there is a continued focus on the delivery of high-quality, effective care as a means of combating rising costs. Analyzing patient data and measuring outcomes are vital to establishing quality metrics necessary to reduce healthcare spending. Accordingly, Massachusetts can expect the volume and the rate of exchange of health information to increase, making it crucial to address privacy and security issues.

The Act defines a security breach broadly to include the unauthorized acquisition, access, use or disclosure of PHI that compromises its security, privacy or integrity. In the event of a breach, entities subject to the Act are required to notify the individual whose information is subject to the breach, other entities responsible for the information and/or certain federal agencies, depending on the circumstances. Notices are subject to specific content, timing and form requirements.

As directed by the Act, both the U.S. Department of Health and Human Services (“HHS”) and the Federal Trade Commission (“FTC”) issued regulations governing the notification requirements in the event of a security breach. The HHS regulations (74 Fed. Reg. 42740 (Aug. 24, 2009)) exempt from the breach notification requirements covered entities and business associates using specific encryption and destruction technologies and methodologies that render PHI “unusable, unreadable or indecipherable”. The FTC regulations (74 Fed. Reg. 42962 (Aug. 24, 2009)) are applicable to vendors of PHRs and related entities, and require such entities to notify individuals when the security of their unsecured PHR-identifiable health information is breached.
Complicating matters further, Massachusetts imposes its own set of comprehensive laws addressing data security and breaches of the “personal information” of Massachusetts residents (Mass. Gen. Laws ch. 93H; 201 Mass. Code Regs. §§ 17.00 – 17.05). Like the federal law, Massachusetts also requires affected individuals to be notified. While the HHS and FTC regulations note that contradictory state laws are preempted by the federal rules, state laws imposing breach notification requirements in excess of those required under federal law are not preempted. While the Act is broader than the Massachusetts law in the sense that PHI captures more than the Commonwealth’s definition of personal information, the risk assessment required under the HHS regulations is flexible and only requires business associates and covered entities to notify affected individuals where the breach “poses a significant risk of financial, reputational, or other harm to the individual.” It should be noted, however, that on October 1, 2009 six Congressmen sent a letter to the Secretary of HHS, Kathleen Sebelius, indicating their concern that the significant risk of harm requirement is inconsistent with Congressional intent and sets too high of a threshold to trigger a notification requirement. It is unclear what action HHS will take to address these concerns, if any.

Compliance with these laws will require the expenditure of significant time and resources. Accordingly, Massachusetts entities subject to the Act (including many lawyers and law firms) should begin immediately familiarizing themselves with the Act, the regulations and the Massachusetts law, and updating their processes and procedures accordingly.
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