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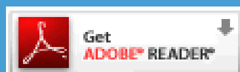

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FALL 2011

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The *Boston Bar Journal* is the premier publication of the Boston Bar Association. We present timely information, analysis, and opinions to more than 10,000 lawyers in nearly every practice area. Our authors are attorneys, judges, and others interested in the development of the law. Our articles are practical. Our publication is a must-read for lawyers who value being informed on important matters of legal interest. The *Boston Bar Journal* is governed by a volunteer Board of Editors dedicated to publishing outstanding articles that reflect their authors' independent thought, and not necessarily the views of the Board or the Boston Bar Association.

N.B. Judges serving on the Board of Editors of the *Boston Bar Journal* do not participate in discussions about or otherwise contribute to articles regarding impending or pending cases.

Lisa C. Goodheart

Lisa C. Goodheart Takes Office as BBA President

Meet the BBA's New President

Sugarman, Rogers, Barshak & Cohen Partner Becomes BBA President

It was 1985 and U.S. District Judge William Young was presiding over the New Bedford Harbor PCB Superfund litigation at the old Federal Court House on Milk Street. Among the Boston lawyers working on the case were a future Massachusetts Governor, a future federal judge, a future Superior Court judge and two future BBA presidents, and one future ABA president.

"It was an incredible opportunity for a young litigator eager to learn and get experience," recalls Lisa C. Goodheart, now a partner at Sugarman, Rogers, Barshak & Cohen and the BBA's new President. I saw lots of examples of really great lawyering, and it was that case that really got me started in the environmental arena and showed me how challenging and fun the work could be. Over the years since then, environmental issues have become increasingly important to me."

To say that Goodheart is extraordinarily well-liked, respected and well-connected is an understatement. When her former colleague, Deval Patrick, became Governor of Massachusetts, he appointed her Chair of the Judicial Nominating Commission. Under her leadership the JNC recommended over 250 highly qualified judicial applicants to the Governor, resulting in over 90 judicial nominations. What's more, she proved especially effective in ensuring that the JNC produced a very diverse talent pool.

Margaret H. Marshall, the retired Chief Justice of the Supreme Judicial Court, and a BBA Past President, considers Goodheart the ideal of a lawyer — a woman with palpable leadership

What's the Word on Lisa C. Goodheart?

"[Lisa has] great judgment and skillful leadership. I have known Lisa since she was an associate at Hill & Barlow more than 20 years ago. She is smart and confident yet humble, insightful and deferential to others' views. She gives everyone the space to participate. With those qualities, she was masterful at leading the Judicial Nominating Commission. She will bring great judgment and vision [to the BBA Presidency] and at the same time the understanding that by including others the decisions will be better.
— *Governor Deval Patrick*

skills, a commitment to ensuring that we have a healthy judicial system, and an outstanding counsel for her clients. "Lisa has appeared before me," says Marshall. "She presses the advantage when she has it, and she doesn't when she doesn't. That is a rare skill."

Years after the New Bedford Harbor litigation, Goodheart's frequent trial partner, Dylan Sanders, remembers being at the Superior Court with her — representing a property owner seeking to recover the costs of investigating and assessing a spill of a hazardous material by a former tenant.

The jury seemed mesmerized by Goodheart's incisive cross-examination of the opposing party's expert. After an especially devastating question, one juror gave her the "thumbs up" sign. "You don't see that every day," observes Sanders.

Establishing Herself in Boston

A brand new lawyer at Drinker Biddle in Philadelphia in 1985, she relocated to Boston three years into the New Bedford Harbor case, accepting a job at Hill & Barlow in 1988. ABA Past President Mike Greco worked with her on a number of cases, and says that when she came up for partnership, she had the enthusiastic support of every partner at the firm.

"Even when she was an associate, Lisa would produce a perfectly worded and perfectly argued brief," says Greco. "And if it meant that she had to stay up until the wee hours to get it done, she would stay up with not only no complaints but with the determination that we had a professional obligation to our client to do the best that we were capable of."

At the time of its dissolution in 2002, Hill & Barlow had some 140 lawyers. Goodheart moved her litigation practice – heavily focused on environmental and land use disputes — to DLA Piper, which at the time was a 750-lawyer national firm. By the time she left DLA Piper three years later, the firm had 3,000 attorneys around the globe.

Moving to Sugarman, Rogers, Barshak & Cohen

"When I began to think about making a move and considered where I might like to be, the fact that I had developed relationships with lawyers all over town through the BBA was invaluable," says Goodheart.

After inviting a friend from Sugarman Rogers Barshak & Cohen to lunch, one thing led to

"Lisa knows deeply her success is the result of the team effort of many people. She shows with a kind of relaxed grace that you can rise to the top of your profession and have a full and rich family life. She's an important model for how our profession needs to be as we look toward the future." – *The Honorable Margaret H. Marshall (Ret.), Past President, Boston Bar Association*

"What makes Lisa an outstanding leader is that she has no ego. She is a terrific and compassionate listener who truly wants to understand what the issues are. She has a wonderful way of cutting through any irrelevance and getting to the heart of the matter. Then she brings to that process terrific judgment in working through to a solution." – *Michael Greco, Past President, American Bar Association, Partner, K&L Gates*

"The three things that Lisa will bring to the table as BBA President? (a) enthusiasm for the position; (b) good judgment on issues that will come before her; and (c) importantly, a welcoming attitude to all members of the bar, big firm, small firm, solo…She'll be a good President." – *Richard W. Renehan, Past President, Boston Bar Association, Partner, Goulston & Storrs.*

"Lisa has a terrific ability to translate very complicated regulations to make them very clear to folks who are operating on the ground. She works especially well in the most contentious situations, making it clear to the opposing side that their disputes are not personal. I know how much she has on her plate, yet she makes all her clients feel she's available to them." — *Audrey K. Wang, Office of General Counsel, Harvard University*

another, and today Goodheart has a thriving practice at this 25 lawyer firm focusing almost exclusively on litigation.

"I'm proud and excited that I will be SRBC's third BBA President," she says. "As soon as I joined the firm I had an immediate sense of being at home. A big part of that is so many of my partners here are involved in professional and civic activities, including but not limited to bar association work. I knew my involvement in those sorts of things would be supported, appreciated and valued."

Building Connections in the Arts Community

Goodheart has been involved in dance ever since she took a modern dance class to fulfill a missing gym credit at Williams College. While at the University of Pennsylvania Law School, she began performing with Wizards on Wheels, a hip-hop roller skating troupe in Philadelphia. When she moved to Boston as a practicing lawyer, she also studied jazz, modern and Afro-Caribbean dance and performed with several area dance companies, some of which she also helped to run.

"Lisa used to come and take my class at the old Joy of Movement Center in Cambridge," says jazz dance teacher Adrienne Hawkins, Artistic Director of Impulse Dance Company. "She used to come on her roller skates, come sideways up the stairs, and then skate home."

Used to seeing Goodheart wearing her dance and skate gear, Hawkins was surprised the day her student arrived in a suit. On further questioning, she was shocked to learn that this particular student was a lawyer.

"Lisa defied any stereotypes I might have had about lawyers," says Hawkins. "She was very humble in her learning style, but also very focused and persistent, with attention to detail."

For years, Goodheart spent many late nights in the dance studio after long days in the office and courtroom. It was sometimes grueling but it taught her important lessons. "I learned how to focus and pace myself, she says. "I was very motivated to find a way to make it all work, and somehow it did."

After giving birth to her first child in 1996, Goodheart limited her dance involvement to serving on the board of Rainbow Tribe and providing pro bono services to that company and AileyCamp Boston, a free summer dance camp program for Boston public school students.

"Lisa and I were partners for years at Hill & Barlow and then at DLA Piper. She was the lawyer of choice in many situations when my clients needed litigation assistance. She understands better than most lawyers how to harmonize business advice and litigation advice, and that's an unusual skill." – *Elliot M. Surkin, Managing Partner - Boston Office, DLA Piper*

"When an environmental matter arose a few years ago at a SUPERVALU property in New England, a trusted environmental consulting firm highly recommended that we hire Lisa to represent our interests. We made that call and have been extremely satisfied ever since. Lisa is incredibly responsive and appears to be tireless, providing SUPERVALU with real time updates and legal interpretation, no matter the hour or day. Her knowledge of Massachusetts environmental regulations is outstanding and she is firm yet rational when defending our position."
– *Douglas Kasefang, Director, Environmental Affairs, SUPERVALU, Boise, ID*

"Lisa has that most valuable—and rare—quality for a great lawyer: the ability to distill complex information and diverse points of view into a clear and compelling vision of what's really important. Respecting all points of view, she is able to find common ground—the things that matter most to all parties—and put them in the proper perspective. This framework, once established, allows solutions to flow easily, as if they were self-evident. Lisa manages to do this with an unfailingly pleasant and courteous demeanor. Her positive attitude is infectious; working with her is a personal as well as a professional pleasure." – *Scott Simpson FAIA, LEED AP, Senior Director, KlingStubbins, Cambridge*

No doubt Goodheart's experience in balancing her "day job" as a lawyer with her semi-professional work as a dancer will serve her well as she combines her duties as BBA President with her obligations to her clients.

As Dylan Sanders puts it, "Lisa's capacity for work is just astounding. She's also extremely efficient. If anyone can write a brief on a Blackberry, it would be Lisa."

A Sneak Peek at the 2011 – 2012 Program Year with BBA President Lisa Goodheart

Lisa C. Goodheart, a litigation partner at Sugarman, Rogers, Barshak & Cohen and the BBA President who could make the Energizer Bunny look lethargic, was giving the Section Co-Chairs their marching orders for the 2011-2012 program year. Inside the BBA conference center at 8:30 a.m. on a Friday in June, these key members of her leadership team hung on her every word, scribbling notes about what she expected.

The qualities she attributed to the men and women in the audience – creativity and initiative, the ability to get things done and motivate others, a commitment to professional excellence, and a passion for access to justice and serving the community – are the very same attributes that define the BBA's new President. Not surprisingly, she cut her teeth chairing the BBA's Environmental Law Section from 2002 to 2004.

"As leaders, you have a responsibility to look beyond the usual suspects and find and promote new talent, and shine the spotlight on potential leaders of the future," she said.

She expected them to plan and execute the high quality programs which played a huge role in taking the BBA over the 10,000 member threshold last spring.

But she also expected more. "You are the hosts of your Section's events, and you want to make everyone feel included. You have an ambassador role, and that involves bringing new people to the table."

Public Policy Preview

If there are bar associations that reach for whatever public policy issue seems fun and flashy, that has never been the BBA way. Goodheart pointed to a continued core public policy agenda in the coming year:

"Lisa is an inspiration to all who seek a full and rewarding professional, civic and personal life. Her dedication to excellence reaches all that she touches, and the result is an impeccable record of achievement in her legal career and in her service to the bar, the judiciary, her community and her family." – *William "Mo" Cowan, Chief of Staff, Office of the Governor*

"Lisa brought an extraordinary level of dedication, thoroughness and leadership to her role as Chair of the Governor's Judicial Nominating Commission. While helping the Governor to appoint as diverse and highly qualified a group of jurists the Commonwealth has ever seen, she set a new standard of dignity and fairness in the judicial selection process. Her leadership and commitment will inspire the Commission's work for years to come as her colleagues and successors on the Commission continue to follow her lead and her example." – *Ben T. Clements, Partner at Clements & Pineault, and former Governor's Counsel*

"When Lisa came to Sugarman, Rogers, Barshak & Cohen, we counted our blessings; every one of our hopes has been fulfilled and then some. She is a wonderfully collaborative partner. Lisa knows how to build consensus. She uses the power of her intellect and her rational analysis to be very persuasive. Her style [as BBA President] is going to be one of being able to bring people of different viewpoints to the table."
–Tony Doniger, Past President, Boston Bar Association, Partner, SRBC

"Lisa is a natural leader. She capitalizes on people's strengths. In a group she draws people out and makes

(1) Access to Justice (Adequate funding for legal services and representation of indigent and underserved people.)

(2) Administration of Justice (Adequate funding for the third branch of government, protecting the independence of the judiciary, and keeping it free from political interference.)

(3) Enhancing the Quality and Fairness of Our Laws (Modernizing antiquated laws, amending laws with unintended consequences, and adopting uniform laws for Massachusetts.)

Building a Sustainable Future

A More Diverse and Inclusive Profession

Proud to stand on the shoulders of her predecessors Don Frederico, Jack Regan, Kathy Weinman, Tony Doniger and Jack Cinquegrana, Goodheart acknowledges that the BBA has a sound portfolio of diversity and inclusion initiatives -- including a group mentoring program, strong partnerships with affinity bar groups, and the Beacon Awards – all managed by the Diversity and Inclusion Section. Goodheart places a great deal of value on ensuring that these important initiatives continue.

Innovative Responses to Changes in How Lawyers Are Practicing

While lawyers at all stages of their careers are witnessing unprecedented change in career opportunities and trajectories, no group has been harder hit than new lawyers. Goodheart believes it is important for the BBA to provide essential support. Proud of the work the New Lawyers Section has done in providing a series of free basic skills training seminars, she looks forward to seeing such efforts continue. At the same time, she will be considering recent recommendations made by the Task Force on the Future of the Profession.

A Greener Profession

Having spent 26 years representing clients in environmental cost-recovery cases, permitting appeals, land use disputes, enforcement actions, insurance coverage actions, design and construction matters, and a broad range of business litigation matters, Goodheart finds herself thinking a great deal about the environmental

sure everyone has an opportunity to contribute. She knows how to give credit to others, and to help others shine. In part that is because she, herself, is so modest and unassuming. At the same time she's a real task master. She juggles an amazing number of balls without ever compromising quality or results." - *Christine Netski, Partner, Sugarman, Rogers, Barshak & Cohen*

"Lisa is everything you hope for and fear in opposing counsel: smart, prepared and savvy yet professional, cordial and ethical beyond reproach. It's a testament to Lisa that our friendship was forged while trying a case against each other and has prospered ever since." - *Jonathan Sablone, Partner, Nixon Peabody LLP*

"She's practical, looking toward outcomes as opposed to process. I had as much fun working with Lisa on cases where we were on opposing sides as when we were on the same side. She shows a high level of professionalism and attention to detail in everything she takes on. I'm very glad to see Lisa leading the BBA." *Kenneth Kimmell, Commissioner, Massachusetts Department of Environmental Protection*

"I've had the good fortune to work with Lisa on the BBA Environmental Law Section Steering Committee for years -- including when she chaired the Committee -- and not to have to oppose her in litigation very often. Lisa will make a wonderful BBA President: knowledgable, savvy, enthusiastic, tireless and accessible. I'm delighted at the prospect." - *Arthur P. Kreiger, Anderson & Kreiger LLP*

"Lisa is smart, she is knowledgeable, she is professional, she gets along with everybody; she is firm and tough but always polite and respectful. I

pressures we have placed on our planet and the energy needs of our society.

"What are our responsibilities as lawyers to bring about the changes – in response to those pressures – that will ensure that we have a sustainable future?" she asks. "These are not just questions for environmental lawyers – they affect all of us as lawyers and citizens, and they cut across all practice areas."

Stay tuned. Expect Goodheart to pull together a work group representing the broadest possible spectrum of BBA talent to take a fresh look at what it means to build a greener profession.

Rest assured about three things!

Whatever group the BBA's 89th President appoints will be filled with top notch talent, going beyond the usual suspects, of course.

She will have a range of differing viewpoints at the table.

Any recommendations about the role that lawyers can play in developing a greener profession and supporting a greener planet will be thoughtful and well considered, pleasantly surprising anybody who might have been naïve enough to be looking for the usual platitudes. ■

don't think there's anybody I know who has a bad word to say about Lisa." – *Seth Jaffe, Partner, Foley Hoag*

"Lisa has a warm personality coupled with excellent litigation instincts. [As an attorney] she's diligent, smart, engaged, and thick-skinned. She's able to see both sides but be a zealous advocate. [As BBA President] Lisa will bring outstanding interpersonal skills, the ability to delegate, and an instinct to do the right thing!" – *Joseph D. Steinfield, Partner, Prince Lobel*

"Lisa and I have been colleagues for 16 years. There is not a day that goes by that she and I don't share a laugh about something. She's a joy to work with in the most stressful situations, and I've never seen her lose her temper. As hard as she works in her bar activities and in her own practice, she goes out of her way to be a terrific mentor. That includes me and many younger lawyers." - *Dylan Sanders, Of Counsel, Sugarman, Rogers, Barshak & Cohen*

Essential Info about Lisa C. Goodheart

Born in Trenton, New Jersey and reared in suburban Philadelphia.

Holds a B.A. from Williams College (*cum laude*, Phi Beta Kappa), and a J.D. from the University of Pennsylvania Law School (*cum laude*).

Married to Marc L. Goodheart, Vice President and Secretary of Harvard University, and described by the Harvard Crimson as "a brilliant lawyer with a sharp wit and an even sharper pen."

The Goodhearts are the parents of Nina, 15, a sophomore at Brookline High School, and Naomi, 12, a 7th grader at Brookline's Amos A. Lawrence School. Both girls are musical theater buffs and aspiring triple threats (they act, sing and dance).

Her mother is Peggy Campolo, an outspoken advocate for LGBT equality within the Baptist Church.

Her father is Dr. Anthony Campolo, an ordained Baptist minister and professor emeritus of sociology at Eastern University who also taught at the University of Pennsylvania; he provided spiritual counsel to President Clinton and keeps a busy international speaking schedule.

President's Page

Court Funding and Sustainability

By Lisa C. Goodheart

As I start my term as President of the Boston Bar Association, I feel honored by the opportunity to serve this great organization. I congratulate Don Frederico on his very successful presidency and thank him for focusing attention on the future of the profession. I am excited about the BBA's plans for the year ahead, yet also sobered by the difficulty of many of the issues on which we'll be working. One of those issues is state court funding.

Support for adequate court funding is a longstanding BBA policy priority, for reasons that hardly need explaining. It's essential that our courts function safely, soundly and with reasonable efficiency, and it costs money for them to do so. Lawyers have a special understanding of the role of the courts in our society and system of government. Because of this, we also appreciate the seriousness of the threat posed by sustained underfunding of our court system.

As the budgetary squeeze on our state courts has tightened in recent years, the BBA has responded. In 2009, BBA President Kathy Weinman convened a task force that reported on the likely adverse consequences of budget cuts on the administration of justice. The following year, the task force reconvened by BBA President Jack Regan produced a new report which warned that further court funding

cuts would lead to dire consequences. This past year, under Don Frederico's leadership, the BBA issued a report entitled "Justice on the Road to Ruin." The grim title says it all.

This year, the BBA will pursue a robust public policy agenda that includes court funding and a range of other issues. We will remain focused on the challenges faced by new lawyers entering the profession. We will continue to seek greater diversity and inclusion within our ranks. I'm also eager for the BBA to explore environmental sustainability in the practice of law, and to cultivate the "greening" of our profession as a hallmark of professional excellence and civic responsibility.

These initiatives have something important in common – they all reflect the BBA's investment in and commitment to a sustainable future. This investment stems from the understanding that building a sustainable future for our profession and our communities is a shared responsibility. At the BBA, we recognize the importance of preserving and enhancing the sustainability of the things we value.

It is particularly troubling to consider the escalating court funding crisis in terms of sustainability. In Massachusetts, we expect the reliable delivery of a high caliber of justice from our state courts. But our court system must consume substantial resources to remain healthy, and it's been put on a starvation diet. Certainly, some of the immediate adverse consequences are dramatic and painful to see. But perhaps even worse, though less readily apparent, is the damage to the strength and vitality of our courts that will reveal itself only over time.

We are already cutting into sinew and bone. The signs are increasingly visible that our state courts have reached the breaking point in terms of their ability to administer justice with the degree of efficiency that we expect. Many will be disappointed and frustrated by this, but none should be surprised. The significantly reduced FY 2012 judiciary budget has come in the wake of earlier budget reductions over a number of years, and the effects are cumulative.

It's not "just" the prospect that cases will take longer to grind through the system, and parties will wait longer for decisions and judgments. It's not "just" a matter of staff layoffs and courthouse closings, meaning the loss of valuable human capital and greater inconvenience for litigants. It's not "just" the increasingly difficult working conditions for judges and court staff, which interfere with the administration of justice in ways great and small. All of these consequences of underfunding are real and specific problems. But they also point to something more fundamental, which is that to underfund our courts is to systematically rip and tear at the fabric of justice. The results can be irreparable.

As lawyers, we need to press for court funding in light of our understanding that a well-functioning judicial branch is a constitutional imperative, not an optional luxury. We need to make the case for a sustainable system of justice, accessible to all. And at least some of the critical aspects of a sustainable system of justice are easy to identify. A sustainable system is one that's supported with sufficient resources to carry out its mission. It's one that isn't shackled by the imposition of unjustified constraints on the effective management of resources. It's one that isn't rocked by sequential funding cuts that undermine sound planning and preclude infrastructure investments.

Looking ahead, we'll need to be louder, clearer and more persuasive than ever in advocating for the state courts' funding needs. It's no exaggeration to say that what's at stake is the sustainable future of a Massachusetts court system that is capable of meeting our expectations of justice. ■

Case Focus

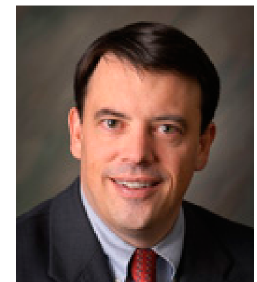
AT&T Mobility LLC v. Concepcion: Is Feeney Finis?

By Donald R. Frederico and Clifford H. Ruprecht

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the United States Supreme Court, by a 5-4 decision, held that the Federal Arbitration Act ("FAA") preempted a California rule invalidating provisions in consumer contracts that require individual arbitration and that waive any right to bring a class action. Although the case before it involved the application of a California rule premised on the doctrine of unconscionability, the Court's holding effectively overrules the Massachusetts Supreme Judicial Court's decision in *Feeney v. Dell Inc.*, 454 Mass. 192 (2009), that class action waivers in consumer contracts contravene Massachusetts public policy. *See* D. Frederico, "*Feeney v. Dell Inc.*: Consumer Class Actions and Public Policy," *Boston Bar Journal*, Winter 2010, at 6-7. Barring circumstances, such as fraud or duress, that negate the elements of contract formation, companies that sell consumer goods or services in Massachusetts may again rely on class action waivers contained in properly framed arbitration provisions of their consumer contracts.

In *Concepcion*, plaintiffs brought a putative class action, claiming that their cell-phone provider engaged in an unfair sales practice by charging them sales tax on phones that were advertised as free. The cell-phone contract required arbitration and provided that consumers could arbitrate in their individual

Donald R. Frederico is a partner in the Boston office of Pierce Atwood LLP, where he focuses his practice on defense of class actions and other complex litigation. He is the immediate Past President of the Boston Bar Association.



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capacity only, not as representatives of a class. The California Supreme Court had struck down such class action waivers as unconscionable in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005). The Supreme Court in *Concepcion* held that the *Discover Bank* rule is preempted by Section 2 of the FAA, 9 U.S.C. § 2, which provides that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Plaintiffs argued that Section 2's savings clause precluded enforcement of the class action waiver. 131 S. Ct. at 1746. The Court disagreed, holding that a state law rule is not within the FAA's savings clause if it "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id*. at 1748. The *Discover Bank* rule failed under this analysis for several reasons, including the relative formality, slowness and cost of class-wide proceedings, and the greatly increased risk to defendants in class actions. *Id*. at 1751-53. On this latter point, the Court observed that businesses opting to resolve consumer claims through arbitration choose to forego multilayered appellate review and accept a greater risk of error because arbitration is less expensive than court litigation and the risk of harm in a single-plaintiff case is limited. Not so with class-wide arbitration, where the aggregation of claims renders the risk of error "unacceptable" to defendants, and where defendants would "be pressured into settling questionable claims." *Id.* at 1752. *Cf. D.* Frederico, *supra*, at 7 (requirements for class certification "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... .")

Thus, although the *Concepcion* majority reaffirmed the principle that the FAA requires only that arbitration agreements be placed on an equal footing with other contracts, it concluded that even a rule of general applicability will violate the FAA if it vitiates essential features of the agreement to arbitrate. A requirement that a corporate defendant arbitrate on a class basis or not at all, the Court reasoned, would so skew the balance of arbitration's costs and benefits that it would deprive the contractual

arbitration provision of its fundamental purpose. Such an impairment of the contractual right to refer disputes to arbitration is precisely what the FAA's preemption clause is designed to prevent.

The Supreme Court's rejection of California's *Discover Bank* rule effectively overrules the SJC's rejection of class action waivers in *Feeney v. Dell, Inc*. Although *Feeney* is premised on public policy rather than unconscionability, this difference is not a distinction. *See Feeney*, 454 Mass. at 200, n.26 ("the reasoning of those courts [basing their decisions on grounds of unconscionability] have often overlapped and incorporated public policy.") Indeed, the SJC in *Feeney* had rejected the same FAA preemption argument that the Supreme Court would later adopt in *Concepcion*. And the SJC based its public policy rationale in *Feeney* on the need for class proceedings to vindicate small-dollar consumer claims, *see id.* at 204 (citing *Discover Bank*), an issue the Concepcion majority rejected as insufficient to overcome FAA preemption. 131 S.Ct. at 1753. *See also*, *Cruz v. Cingular Wireless, LLC*, No. 08-16080 (11th Cir., August 11, 2011)(rejecting public policy argument in light of *Concepcion* despite evidence that class action waiver would prevent vindication of small-dollar consumer claims).

After *Concepcion*, the argument that a class action waiver in an arbitration provision is unenforceable because it is unconscionable or against public policy appears foreclosed. Counsel seeking to avoid such waivers must find other grounds for doing so. Because challenges based on fraud, duress or similar state law doctrines would often raise individual issues, even if otherwise successful, they may preclude class certification. Counsel representing defendants in putative consumer class actions should, at the very outset, review their clients' consumer contracts for arbitration clauses containing class action waivers, and invoke any such waivers at the earliest opportunity. ■

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Legal Analysis

Commonwealth v. Fremont: the SJC Addresses the Intersection Between the Massachusetts Public Records Law and Court-issued Protective Orders

By James Carroll, Peter Simshauser and Christopher Clark

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Skadden, Arps has represented the Fremont entities in the Superior Court and in the appellate proceedings before the Appeals Court and Supreme Judicial Court. Skadden, Arps also represented General Electric Co. in *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798 (1999), discussed below.

Introduction

In *Commonwealth v. Fremont Investment & Loan*, 459 Mass. 209 (2011), the Supreme Judicial Court issued an important decision interpreting the Massachusetts Public Records Law, G.L. c. 66, § 10 ("MPRL"). The SJC held that the MPRL does *not* nullify or override a court-issued protective order governing confidential documents produced to the Commonwealth in litigation. The SJC affirmed the Superior Court's order rejecting an attempt by a third party to obtain, via the MPRL, confidential documents that a company produced to the Commonwealth in litigation in reliance on a court-issued protective order. The third party sought the confidential documents for use in other, out-of-state litigation against the company.

The decision is significant for Massachusetts practitioners in two respects. First, *Fremont* revisits and builds upon the SJC's jurisprudence addressing the parameters of the MPRL and its interplay with established doctrines that protect documents from

disclosure; *i.e.*, the attorney-client privilege, the work product doctrine, and court-issued protective orders. Second, *Fremont* teaches that while a MPRL request does not override a court-issued protective order, third parties seeking to obtain confidential documents produced by litigants to the Commonwealth, on a case-by-case basis, may have the alternative to obtain them via intervention in the underlying litigation to attack the scope or applicability of the protective order.

The SJC's Pre-*Fremont* MPRL Jurisprudence

The MPRL is the Massachusetts analog to the federal Freedom of Information Act, 5 U.S.C. § 552. It provides all members of the public with a right to inspect, examine or copy any and all documents that qualify as "public records." The term "public records" is defined by the statute to include an extensive range of books, papers, and other documents or data made or received by the Commonwealth or any of its agencies.[1] Although there is a series of statutory exemptions to the MPRL's open-access provisions, the law has been interpreted to require the state government to be transparent and forthcoming in providing its records to inquiring members of the public.[2]

In the twelve years prior to *Fremont*, the SJC issued two decisions addressing the interplay between the MPRL on the one hand, and the work product doctrine and attorney-client privilege, on the other. In those decisions, the SJC weighed a number of competing considerations, including the public's right, conferred by the Legislature in the MPRL, to access public documents, as well as the importance of inherent judicial powers and other core legal doctrines.

In *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798 (1999), the SJC held that the MPRL *can* be used to obtain documents from public entities that otherwise would be protected by the work product doctrine. General Electric requested documents from the Department of Environmental Protection relating to the designation of certain property as a Superfund site. The SJC rejected the DEP's refusal to produce the documents on the basis that they were attorney work product, holding that the documents were not exempt from disclosure because the text and legislative

history of the MPRL confirm that "the Legislature clearly considered, but rejected the exemption sought by the defendant."[3]

Eight years later, in *Suffolk Construction Co. v. Division of Capital Asset Management*, 449 Mass. 444 (2007), the SJC held that the MPRL does *not* entitle a requestor to obtain documents that are protected by the attorney-client privilege, despite the absence of any express statutory exemption to this effect. The plaintiff construction firm submitted a MPRL request seeking documents about a state agency's decision not to pay the firm for certain project costs. Relying on the privilege, the agency refused to produce communications with its attorneys. In rejecting the construction company's claim, the SJC interpreted the MPRL, and its statutory silence on the attorney-client privilege, "in light of the common law." The SJC specifically cautioned against construing the MPRL in a "mechanistic way that upends the common law and fundamentally makes no sense."[4] Critical to the SJC's holding was its conclusion that the MPRL should not be construed to extinguish a core legal doctrine absent an express statement by the Legislature. The SJC reviewed the historical underpinnings of the attorney-client privilege, and cited the role of the privilege as "a fundamental component of the administration of justice."

Fremont

Two Superior Court Proceedings

In 2007, the Massachusetts Attorney General commenced a civil enforcement action alleging that Fremont, a former mortgage lender, had violated Chapter 93A (the "AG Action"). At the outset of discovery, the court entered a stipulated confidentiality and protective order governing the exchange of discovery materials. In reliance on the protective order, Fremont produced millions of pages of documents to the AG containing confidential information, including sensitive borrower-specific information and confidential information about Fremont's loan-issuance practices. The AG Action subsequently was settled by consent order in 2009.

Samuel Lieberman, an attorney associated with a firm representing a proposed class in federal securities litigation in California against Fremont's former officers and directors, served a MPRL request on the AG requesting all of the documents Fremont produced during discovery in the AG Action, as well as deposition transcripts and exhibits. Although the AG produced thousands of pages of documents in response to Lieberman's MPRL request, she refused to turn over documents that Fremont had designated confidential pursuant to the protective order. Lieberman could not obtain those documents via discovery in the California action because of the federal bar in securities cases on discovery prior to a complaint surviving a motion to dismiss.[5]

In his attempt in Massachusetts to avoid the federal discovery bar, Lieberman pursued twin strategies. He first commenced a new lawsuit against the AG seeking injunctive relief to compel the AG to produce documents responsive to his MPRL request (the "MPRL Action"). He then filed a motion pursuant to Mass. R. Civ. P. 24 to intervene in the underlying AG Action to challenge the protective order.

In the MPRL Action, Lieberman argued that the MPRL required the AG to produce all documents that had been produced by Fremont, on the theory that they became "public records" once held by the AG, and the MPRL did not exempt them from disclosure. The AG filed a motion for judgment on the pleadings, which Fremont supported as an intervening party, arguing that the MPRL request did not override the protective order in the AG Action. The court agreed and held that the MPRL did not negate the order, and, therefore, that Fremont's confidential documents were not subject to disclosure under the MPRL.

In the AG Action, the court denied Lieberman's motion to intervene as of right and his motion for permissive intervention, without providing reasoning.

Lieberman appealed both decisions to the Appeals Court, which consolidated the appeals. The SJC then asserted jurisdiction and heard the matter on direct review. The SJC requested amicus briefing, and one national association filed a brief supporting Lieberman.

The SJC Decision

The SJC affirmed the Superior Court's order in the MPRL Action. The SJC held that the MPRL does not embody a legislative determination that the public's interest in access to government records overrides the courts' inherent authority to enter protective orders. The SJC framed the question as "whether the public records law constitutes a legislative determination that the public interest in access to government records overrides the traditional authority of courts to enter protective orders, and thus obligates the Attorney General to provide the documents to Lieberman."[6] In answering in the negative, the SJC reasoned that Lieberman's position, if upheld, would create significant separation-of-powers issues, in light of the longstanding "inherent power" of courts to "issue protective orders." In addition, the SJC reasoned that if the Legislature had intended so dramatically to limit judicial power, it would have done so explicitly and not by implication.

The SJC, however, did not foreclose completely the possibility that Lieberman might seek access to Fremont's document production in the AG Action. Although the SJC affirmed the denial of Lieberman's motion to *intervene as of right* because Lieberman did not "seek to intervene for any reason related to the outcome of the Attorney General's suit or its settlement, or for a reason related to Fremont's loan origination and sales practices in Massachusetts," it remanded the matter for further consideration of whether *permissive intervention* should be allowed to enable Lieberman to seek modification of the protective order or to challenge Fremont's designations.

Intervention Proceedings Following Remand (To Date)

On remand, Lieberman reasserted his motion for permissive intervention, arguing that intervention would not cause any undue delay or prejudice to the original parties to the action because it had been settled and there likely would not be multiple intervention requests. Fremont opposed the motion, arguing that Lieberman, who had since moved to another law firm, lacked standing and that the requested intervention was inappropriate in light of the pending bar on discovery in the California securities litigation. The Superior Court allowed Lieberman's motion to intervene, commenting that

although permissive intervention was the appropriate procedural mechanism for Lieberman to seek to challenge the protective order, a grant of intervenor status had no effect on whether the underlying protective order should be modified. The Superior Court requested additional briefing to allow Lieberman to argue that the protective order should be modified to permit the production of certain documents. That proceeding is ongoing.

Strategies For Safeguarding Confidential Documents Against MPRL Disclosure Following *Fremont*

Although *Fremont* clarifies that a MPRL request does not nullify a court-issued protective order, the SJC did not extinguish Lieberman's efforts to obtain Fremont's confidential documents from the AG, as the ongoing proceedings demonstrate. *Fremont* thus signals that private parties litigating with the Commonwealth need to plan for -- and, where possible, limit exposure to -- a MPRL request or an attempt to attack a protective order via intervention.

Anticipate Collateral MPRL Litigation. Parties who produce confidential documents to the Commonwealth, either in litigation or in response to investigative demands or subpoenas, even in reliance on a court-approved protective order, face a risk that the documents may be obtainable by third parties. Producing parties may have to contest third parties' collateral attacks on a protective order. In addition to the risk of document disclosure, such proceedings can be expected to be time-consuming and expensive.[7]

In *Fremont*, the SJC provided guidance as to the factors that the Superior Court could consider in exercising its "considerable discretion" in deciding whether permissive intervention is appropriate: "Mass R. Civ. P. 24(b) states that the judge 'shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.' We have noted previously that a judge might consider such factors as a party's delay in seeking intervention (and the circumstances of such a delay), the number of intervention requests or likely intervention requests, the adequacy of representation of the intervening party's interests, and other similar factors."[8] In addition, several

federal district courts have denied a motion to intervene filed by a third-party seeking access to documents subject to a protective order where intervention would frustrate a discovery limitation in a collateral case.[9]

Even if intervention is allowed, the intervenor still must demonstrate that the protective order should be modified in order to obtain access to the confidential documents. In *Fremont*, the SJC provided guidance as to the factors that the Superior Court could consider in evaluating a challenge to whether the documents are validly covered by the protective order, including “changed circumstances that may render certain materials no longer validly covered by the order” (including, for example, a claim that there no longer are trade secrets to protect). The SJC also stated that the Superior Court could consider “the reasonable reliance of a party on a protective order in its production of information” which, the SJC recognized, “may be particularly salient where a party has disclosed new information in discovery that would not otherwise have been disclosed, and that was reasonably expected at the time of disclosure to remain confidential within the terms of the order.”[10]

If intervention and modification of the protective order are allowed, the Superior Court’s order is likely immediately appealable. Several federal courts have held that an order allowing intervention and modification of a protective order can be appealed immediately either as a final order or pursuant to the collateral order doctrine,[11] which is closely related to the doctrine of present execution in Massachusetts state court.[12] A party seeking appellate review of a Superior Court decision allowing intervention and modifying a protective order should request a stay of that decision pending completion of the appellate proceeding, on the grounds that compelling disclosure of the confidential documents effectively would moot any potential appellate review.[13]

Negotiate Stipulated Protective Orders With The MPRL In Mind. Parties producing confidential documents to the Commonwealth should negotiate protective orders that maximize protection against disclosure pursuant to a MPRL request. Two types of provisions are most important. First, producing parties should insist that documents meriting avoidance of public disclosure qualify for confidential

treatment under the protective order, consistent with the evolving body of case law on the scope of protection afforded to confidential information and trade secrets.[14]

Second, producing parties should insist on a provision stating that confidential documents are being provided only on a temporary basis, and requiring their return to the producing party at the earliest possible date (*e.g.*, at the conclusion of litigation or investigation). Indeed, because one of the factors the SJC identified as a proper consideration in evaluating a motion for permissive intervention is whether intervention would delay the conclusion of the underlying action, some public intervenors may wait until after a case has ended to attempt to intervene. In circumstances where a MPRL request or motion to intervene is made after documents have been returned, parties will not need to be concerned that the AG may eventually produce them. In addition, requiring the return of confidential documents at the earliest possible time minimizes the risk of a court determining that the documents are not entitled to confidential treatment due to "changed circumstances" or the passage of time.

Evaluate Whether Highly Confidential Documents Should be Produced at All. In light of the risk that confidential documents produced to the AG may be subject to disclosure to third parties, parties also should evaluate whether highly confidential documents should be produced to the Commonwealth in the first instance.[15] Parties need to weigh the benefits of protecting such sensitive documents from disclosure against considerations such as the additional costs of resisting production and the effect of refusing to produce the requested documents on the party's relationship with the AG (or other branches of the Commonwealth). In some circumstances there may be a benefit to delaying a production by weeks or months, and such timing-related considerations also should be balanced.

Conclusion

The SJC's *Fremont* decision clarifies that a MPRL request does not invalidate a court-issued protective order, but leaves open the possibility that an underlying protective order may be subject to challenge by a third party -- and that confidential documents produced in reliance on a protective

order may later be ordered to be disclosed. As a result, parties producing documents to the Commonwealth need to consider the possibility of a MPRL request by a third party and should plan accordingly. ■

Endnotes

1. G.L. c. 4, § 6(26).

2. *See* G.L. c. 66, § 10(b) (requiring that a custodian of a public record to respond within ten days to a request to inspect or copy public records); *id.* § 10(d) (requiring that the clerk of every city and town "post, in a conspicuous place in the city or town hall in the vicinity of the clerk's office," a statement that any citizen may obtain certain public records). *See generally* William Francis Galvin, *A Guide to the Massachusetts Public Records Law* (2009) at www.sec.state.ma.us/pre/prepdf/guide.pdf (last visited Aug. 10, 2011).

3. 429 Mass. at 805.

4. 449 Mass. at 458.

5. *See* Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(3)(B) ("In any private action arising under [the Securities Exchange Act of 1934], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.").

6. 459 Mass. at 213.

7. In a recent opinion holding that documents produced pursuant to a Freedom Of Information Act request could not serve as the basis for a False Claims Act suit, the U.S. Supreme Court recognized that private plaintiffs' use of freedom of information statutes to obtain documents to bring subsequent litigation can be "a classic example of [] 'opportunistic' litigation." *Schindler Elevator Corp. v. United States ex. rel. Kirk*, 563 U.S. ___, 131 S. Ct. 1885, 1888 (2011).

8. 459 Mass. at 219. The SJC further emphasized that a Superior Court order on a motion for permissive intervention is reversible only for "clear abuse of discretion." *Id.* at 209; *see also Mass. Fed'n of Teachers v. School Comm. of Chelsea*, 409 Mass. 203, 209 (1991) ("Permissive intervention is wholly discretionary ... and the decision of the trial court will be reversed only for clear abuse of discretion" (internal quotation marks omitted)); 14 Mass. Prac. §§ 3.66, 3.68 (discussing intervention and collecting cases).

9. *E.g.*, *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005) (affirming the district court's denial of a motion to intervene filed by a third-party litigant who was "attempt[ing] to circumvent the close of discovery" in a collateral state court proceeding); *Deus v. Allstate Ins. Co., Inc.*, 15 F.3d 506, 526 (5th Cir. 1994) (affirming the district court's denial of a motion to intervene filed by a third party who sought documents for use in a separate case reasoning that "[i]ntervention generally is not appropriate where the applicant can protect its interests and/or recover on its claim through some other means," such as by "filing a discovery request in [his] case"); *see also* 8A Charles A. Wright et al., Federal Practice & Procedure § 2044.1, at 275-76 (3d ed. 2010) ("If the limitation on discovery in the collateral litigation would be substantially subverted by allowing access to discovery material under a protective order, the court should be inclined to deny modification.").

10. 459 Mass. at 219.

11. *E.g.*, *United States v. Higuera-Guerrero (In re Copley Press, Inc.)*, 518 F.3d 1022, 1026 (9th Cir. 2008) (court had "jurisdiction under the collateral order doctrine" to review a district court order granting an intervenor-newspaper's motion to unseal court documents); *Newby v. Enron Corp.*, 443 F.3d 416, 417, 420 (5th Cir. 2006) (court had "jurisdiction to hear this interlocutory appeal" because the "order granting intervention is effectively unreviewable on appeal from a final judgment"); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992) (order allowing intervention is immediately appealable "either as a final order ... or as a collateral order"); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990) (similar); *see generally* Moore's Federal Practice and Procedure § 24.24[3], at 24-114-15 ("An order granting a motion to intervene is usually not subject to immediate appeal. The grant of intervention is most appropriately reviewed as part of the final judgment. Nevertheless, a grant of intervention may be appealed if it meets the requirements of the collateral order doctrine." (citation and footnotes omitted)); *but cf. Mayflower Develop. v. Town of Dennis*, 418 N.E.2d 349, 353 n.8 (Mass. App. Ct. 1981) (stating in dicta that "[a]n order granting leave to intervene is interlocutory and cannot be appealed as of right").

12. *Breault v. Chairman of the Bd. of Fire Comm'rs of Springfield*, 401 Mass. 26, 31 n.6 (1987) (stating that the "collateral order doctrine" is "a doctrine closely analogous to our rule of present execution"); *DiLuzio v. United Elec., Radio & Mach. Workers of Am.*, 391 Mass. 211, 214 (1984) (acknowledging that the collateral order doctrine "has a close Massachusetts counterpart in our rule of present execution"); *see McMenimen v. Passatempo*, 452 Mass. 178 (2008) (analyzing the doctrine of present execution); 14 Mass. Prac. § 4.11 (discussing the collateral order doctrine and doctrine of present execution).

13. *E.g.*, *In re Copley Press, Inc.*, 518 F.3d at 1025 (noting that the district court "stayed its order" pending appellate review, and commenting that "[s]ecrecy is a one-way street: Once information is published, it cannot be made secret again. An order to unseal thus 'conclusively determine[s]' that the information will be public. For the same reason, such an order is 'effectively unreviewable on appeal from a final judgment.'").

14. *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 167 & n.1 (1979) (cataloging statutory definitions of trade secrets and stating that Mass R. Civ. P. 26 "provides for the issuance of protective orders to avoid the disclosure of trade secrets "). *See also* 31 Mass. Prac. § 21.4 (discussing trade secrets and confidential information). In addition, parties producing documents to the Commonwealth should be aware that the MPRL expressly exempts from the definition of "public record" — and therefore provides an independent basis to oppose disclosure of — any "trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit." G.L. c. 4, § 7(26)(g).

15. One recent decision issued by the Seventh Circuit held that a public records request did not constitute "discovery," and therefore a private securities plaintiff barred by federal law from conducting discovery was not prohibited from attempting to obtain documents via a public records request. *Am. Bank v. City of Menasha*, 627 F.3d 261 (7th Cir. 2010) (Posner, J). Although that case did not involve documents protected by a confidentiality order, it highlights the potential risk of unintended disclosure once a governmental agency receives a party's confidential documents.

Legal Analysis

Data Breach Class Action Litigation – A Tough Road for Plaintiffs

By Timothy H. Madden

Introduction

With the increased prevalence of e-commerce, e-banking and other forms of electronic communication, and the attendant need to transmit or store sensitive personally identifiable information such as names, birth dates, social security numbers, financial account numbers and other similar data, the protection of this sensitive information has come under serious scrutiny. Many organizations, ranging from financial institutions to health care organizations to universities and retailers have suffered embarrassing occasions in which their customers', employees', students' or patients' personally identifiable information has either been accidentally lost or intentionally stolen. Naturally, the loss or theft of personally identifiable information — a "data breach" — has increasingly resulted in litigation, often brought as a class action on behalf of all of the hundreds, thousands or even tens of thousands of individuals whose personally identifiable information has been compromised.

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An examination of the growing body of data breach-related case law reveals that unless plaintiffs can demonstrate that they have suffered actual harm, such as the fraudulent use of their financial

information, courts have been reluctant to allow such litigation to proceed past the earliest stages, let alone to certify classes of plaintiffs or award damages. Massachusetts courts are no exception. This article will survey how courts in Massachusetts and elsewhere have treated these cases, assess why plaintiffs have had such difficulty finding success in this arena, and discuss an alternative enforcement mechanism that may cause businesses to pay greater attention to securing the confidential information they maintain.

Background

We all have heard of the biggest data breaches – TJX, Hannaford, Sony Playstation and others – with new ones seemingly reported every day. Literally thousands of organizations have suffered publicly reported data breaches in the years since the electronic transmission and storage of personally identifiable information has become increasingly widespread. Since 2005, there have been at least 2,600 known data breach incidents, affecting over 535 million records.[1] That pace breaks down to several new data breaches being reported each week.

Data breaches generally take one of two forms: the accidental loss of electronic records containing personally identifiable information (for example, a lost laptop, the accidental e-mailing of records, or the accidental loss of back-up tapes in transit); or the intentional and unauthorized intrusion into an organization's computer network and subsequent theft of information, often called "hacking." Because of the recent proliferation of state laws and regulations requiring prompt notice to individuals whose personal information is affected by a data breach, these incidents often result in public disclosure, and can lead to national media attention.[2] As a result of this public disclosure and media scrutiny, class action litigation is often filed virtually immediately upon disclosure of the existence of a data breach incident.

Arguably, the immediate filing of the claims may explain the lack of fraud or identity theft in some cases; in some, though, it may be that the data is never exploited, either because it doesn't wind up in the hands of criminals or because of advanced fraud controls now employed by financial and other

institutions. In those cases where the data breach has resulted in actual fraudulent use of personal information, plaintiffs have seen some success recovering their economic losses, whether it be in the courtroom or at the negotiation table. Where there is no demonstrable use of the compromised information, however, class action plaintiffs are forced to seek to recover damages related to the aggravation and emotional distress incurred, and time and money spent closing accounts, monitoring their credit, or worrying about and taking measures to guard against the potential for future fraud or identity theft. Plaintiffs have brought these claims under myriad legal theories, including negligence, breach of contract, breach of fiduciary duty, negligent misrepresentation, violation of state consumer protection laws such as Mass. General Laws ch. 93A, and others. Sometimes, class action plaintiffs also seek to invoke the protections of the various state data breach notification laws.[3] All of these types of claims, however, have faired poorly, in Massachusetts and elsewhere.

The Typical Data Breach Class Action Litigation: Case Dismissed

Courts across the country, including in Massachusetts, have not been receptive to data breach class actions absent the existence of actual, demonstrable economic harm to the plaintiff class. These cases have generally been dismissed, often on a Rule 12 but sometimes on Rule 56 motions, under one of two rationales: courts have generally held either that plaintiffs lack standing under Article III of the United States Constitution because with no harm there is no injury-in-fact and no case or controversy; or, that plaintiffs fail to make out the essential elements of their claims because they have suffered no recoverable damage.

Lack of Article III Standing

For a plaintiff to have Article III standing, three elements must be established:

First, the plaintiff must have suffered injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of…. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Where, as is the case in the vast majority of data breach class actions, the plaintiff merely alleges an increased risk of harm in the form of future fraud or identity theft, but no actual, present harm, courts have frequently held that such plaintiffs lack Article III standing.[4]

Failure to State a Claim

While the majority of data breach cases are decided on standing grounds, factually similar cases have been dismissed on the basis that plaintiffs failed to make out the essential elements of their claims, often because they have suffered no actual harm. In these cases, just like in the standing cases, plaintiffs usually allege that they have suffered emotional and/or financial harm related to their need to guard against future fraud or identity theft. Courts, however, have held that claims for potential future harm are too speculative to support a claim for damages. Some plaintiffs have even argued by analogy that data breach cases are similar to circumstances in which plaintiffs have been awarded damages related to their need to monitor for future occurrences of serious medical conditions, however courts have generally distinguished these cases on their facts and have not been inclined to accept this analogy.[5]

An example of a data breach case that was dismissed for failure to state a claim is *Belle Chasse Automotive Care, Inc. v. Advance Auto Parts, Inc.*, No. 08-1568, 2009 WL 799760 (E.D. La. March 24, 2009). There, the court granted the defendant's Rule 12(b)(6) motion to dismiss the plaintiffs' negligence claim stemming from an intrusion into the company's computer network. The court held that the plaintiffs failed to state a claim because they did "not allege that any third party accessed their information and stole their identities, or that any other concrete financial loss resulted from the alleged negligence." *Id*. at *4. *See also Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629 (7th Cir. 2007) (affirming dismissal of negligence claim related to data breach because expenses incurred monitoring credit not compensable harm). Courts have come to the same conclusion not just on negligence claims, but

also on data breach related claims alleging breach of contract, breach of fiduciary duty, negligent misrepresentation, alleged violations of state consumer protection laws and other tort claims.[6]

Have Data Breach Class Actions Fared Any Better in Massachusetts?

Simply put, no. While there have been only a few data-breach related cases resolved by Massachusetts courts, the outcomes of those cases have fit the above patterns. Where there is actual, demonstrable harm to the plaintiff class, claims have seen some success. But, where there is no demonstrable use of compromised personal information, Massachusetts courts have been no more receptive than other courts across the country.

In the case stemming from the data breach suffered by the TJX Companies, *In re TJX Comp. Ret. Sec. Breach*, 564 F.3d 489 (1st Cir. 2009), certain claims brought by banks that had issued credit cards compromised in the breach survived a motion to dismiss, at least in part because those banks could demonstrate that they had been required to reimburse cardholders for fraudulent transactions following the incident, and thus had suffered actual economic harm.

On the flip side, in a recent District of Massachusetts case, the plaintiff class pressed claims arising from the defendant's alleged failure to adequately protect class members' personally identifiable information in a manner consistent with the requirements of Massachusetts law and the defendants' marketing materials, and permitted unsecured (and unnecessary) access to employees (and thus, reasoned the plaintiffs, acted in an unfair and deceptive manner). *See Katz v. Pershing, LLC*, No. 10-1227, 2011 WL 1113198 (D. Mass. March 28, 2011). There, Judge Stearns granted the defendant's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, ruling that because the plaintiff did "not allege that any of her [personal information] has been lost, stolen, disclosed, or accessed by an unauthorized person[,]" "any potential injury that Katz might suffer at some point in the future because of a misappropriation of her [personal information] is far too speculative to satisfy standing requirements; therefore, she has failed to satisfy the injury-in-fact requirement." *Id*. at * 1.[7] While *Katz*

did not involve the theft or loss of personally identifiable information, and seems to leave the door slightly ajar for plaintiffs whose personal information is actually "lost, stolen, disclosed or accessed," the principles at issue translate and the *Katz* court relied upon and cited to more traditional data breach cases. When viewed in combination with established Massachusetts case law rejecting claims for damages related to solely future harm, *see, e.g., Urman v. South Boston Sav. Bank*, 424 Mass 165 (1997) (threat of future harm not recoverable as tort damages), it becomes clear that even in a more typical data breach case, absent allegations of actual harm suffered, Massachusetts courts are unlikely to allow plaintiffs to proceed past the earliest stages of litigation.

Is There Any Hope for Plaintiffs?

Given the near universal dismissal of data breach related class action litigation absent present, identifiable harm, is there any hope for plaintiffs in Massachusetts or elsewhere? The answer may be "not directly," but through enforcement actions brought by the Office of the Attorney General.

The Massachusetts Attorney General has, in at least one instance, brought claims under M.G.L. ch. 93A against a business that suffered a data breach. The Attorney General's claim related to the defendant's failure to comply with industry standards for the protection of personally identifiable information, and resulted in a settlement payment in the amount of $110,000. Notably, this claim was brought by the Attorney General prior to the effective date of 201 C.M.R. 17.00, the stringent regulations defining the "Standards for the Protection of Personal Information of Residents of the Commonwealth," yet the settlement requires compliance with those regulations and other industry standard protections.[8] For example, the settlement of this matter requires the defendant to implement, maintain and adhere to a written information security program, review its information security program annually, adhere to payment card industry compliance standards and implement increased security measures on its computer systems.

While this case could be seen as a precedent for private plaintiffs to bring suit under ch. 93A for an organization's unfair and deceptive failure to comply with industry standards and/or the stringent data security requirements found in 201 C.M.R. 17.00, it is doubtful that such a claim would survive a motion to dismiss absent allegations of actual loss. Even though the Attorney General need not prove actual harm as a basis for an enforcement action under ch. 93A, § 4, private plaintiffs do need to prove actual harm to state a claim for damages under ch. 93A, *see Hershenow v. Enterprise Rent-A-Car Company of Boston, Inc.*, 445 Mass. 790 (2006) (clarifying that actual loss caused by the defendant's conduct is an essential element under ch. 93A). This actual harm requirement, combined with the case law discussed in this article, makes it unlikely that a data breach plaintiff who could not prove demonstrable harm would survive under such a theory.

Conclusion

Any person affected by the loss of their confidential, sensitive personal information – which, by now, almost certainly includes you or someone you know – naturally feels violated and harmed by the experience. Nevertheless, unless there is an unlikely sea change in how courts deal with data breach litigation, it would appear to be the case that unless affected individuals have either suffered actual identity theft or been the victims of actual fraud – and can overcome the high hurdle of establishing a causal connection between that harm and the defendant's loss of their personal information – class action plaintiffs will likely remain unable to recover on claims resulting from a data breach.[9] ■

Endnotes

1. *See* http://www.privacyrights.org/data-breach (last visited August 9, 2011) (listing publicly available details of data breaches since 2005).

2. State data breach laws generally require that individual notice be provided as soon as practical to each person whose personally identifiable information has been compromised. Often, state laws also allow for alternative notice in the form of e-mails to affected individuals, a press release and/or publication of a notice in local media, where it is unduly costly or unfeasible to provide individual notice. *See, e.g.*, M.G.L. ch. 93H. For a full list of state data breach notification laws, *see*

http://www.ncsl.org/IssuesResearch/TelecommunicationsInformation Technology/SecurityBreachNotificationLaws/tabid/13489/Default.aspx (last visited August 9, 2011). Recently proposed federal legislation may soon preempt many of these state laws, in whole or in part. Among other discrete federal laws, the HITECH Act, 42 U.S.C. § 13001, *et seq*., requires notice by covered entities in cases where HIPAA-protected health information is compromised, and the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801, *et seq*., imposes similar obligations on covered financial institutions.

3. State data breach notification laws, however, generally do not provide for a private right of action, but instead require notice to regulators and affected individuals in the event of a covered data breach. *See, e.g.*, M.G.L. ch. 93H.

4 *See, e.g.*, *Hammond v. The Bank of New York Mellon Corp.*, No. 08-Civ-6060, 2010 WL 2643307, at *7 (S.D.N.Y. June 25, 2010) (claims stemming from accidental loss of back-up computer tapes containing personal information, no allegations of loss or actual damages); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046 (E.D. Mo. 2009) (claims arising from hacking incident, but no allegations of actual harm); *Randolph v. ING Life Ins. & Annuity Co*., 486 F. Supp. 2d 1 (D.D.C. 2007) (claims arising from stolen laptop, but no allegations of actual harm).

5 In *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 223-27 (2009), the Supreme Judicial Court held that cigarette smoker plaintiffs who had sustained some observable lung tissue damage could recover for expenses associated with monitoring for future development of lung cancer. However, it does not appear that any Massachusetts data breach plaintiffs have successfully argued that such a theory should equally apply to future harm related to financial fraud or identity theft resulting from a data breach incident.

6 A helpful fact (from a defense perspective) in many of these cases is that upon learning of the data breach, many of the defendants provided affected individuals with credit monitoring free of charge for some defined period of time, thus undermining any argument that plaintiffs incurred damage because they had no reasonable choice but to pay for such a service in order to protect against future loss.

7 *Citing Sea Shore Corp. v. Sullivan*, 158 F.2d 51, 56 (1st Cir. 1998) ("[f]uture injury must be imminent to qualify as injury-in fact" to ensure that the "alleged injury is not too speculative").

8 See press release, "Major Boston Restaurant Group That Failed to Secure Personal Data to Pay $110,000 Under Settlement With AG Coakley" available at http://www.mass.gov/?pageID=cago pressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2011_03_28_briar_group_settlement&csid=Cago (last visited August 9, 2011).

9 It should be noted that while the vast majority of data breach cases are dismissed for the reasons described in this article, there are outlier cases in which claims have survived. *See, e.g., Rowe v. Unicare Life and Health Ins. Co.,* No. 09-2286, 2010 WL 86391 (N.D.Ill. Jan. 5, 2010) (denying Rule 12(b)(6) motion and permitting claim to proceed under Illinois law based on allegations of emotional distress and risk of future harm resulting from data breach in which personally identifiable information was temporarily available to the public via the internet).

Practice Tips

"You Need a Permit for That?" Some Practical Tips for Local Permitting

By Andrew Upton

Local permitting is not for the faint of heart. There are no law school classes on the subject, few relevant continuing legal education courses, and there is little professional literature on the subject. There is often considerable variation in rules and enforcement from agency to agency and from municipality to municipality. Local permitting has few clear guidelines and is fraught with uncertainty, a problem that can be compounded by the fact that the client rarely enters the process with a realistic expectation of the time and costs involved.

Andrew Upton practices administrative law at DiNicola, Seligson & Upton, LLP with an emphasis on licensing, permitting, zoning and government hearings and investigations.

This article sets forth a few practice tips, as well as some warnings for the unwary, that may help guide the permit-seeker. Patience and flexibility are key assets as you proceed through the process.

Give the Project Extra Lead Time

When a government regulator estimates that a permit can issue in a month, add at least three more weeks to your total project timeline. Most government offices are subject to delays due to

budget-related understaffing, unexpected retirements, occasional inefficiency, and sometimes even holidays that those in the private sector have never heard of. Even more frequently, delays will be attributable to your client's failure to produce the necessary documentation required for the application. Financial information, personal information for corporate officers, and original signatures needed on multiple forms, are frequent causes of delay. Manage the expectations of your client by making him or her aware that the speed, and the cost, of the project depends on his or her ability to timely produce documents needed for the application filing.

Work with Your Government Official

Many government employees work at olive drab metal desks in drafty old buildings, for relatively low pay. Their work environment is not exactly like what you might see in the break room at Google. Therefore, your attitude matters. Be courteous and polite. Work with them to get results. Don't send incomplete forms and expect someone else to proofread your work. Don't call at 4:45 on Friday afternoon and expect someone to spend 30 minutes on the phone with you explaining their process. Be clear and firm in your requests, but if you are overly aggressive, you risk losing the important goodwill of the person in charge of your application.

Know What You Need

A client will often say "I didn't know you needed a permit for that." It is your job to scope out the total range and type of permits your project will need. Restaurants and service stations need numerous permits. Convenience stores and specialty retailers need fewer, but still require filings well in advance of opening. Always ask your point of contact if any additional permits are needed. Inquiring about the permits held by similarly situated businesses can also reveal additional permit needs.

Know Your Permits

Certain permits, like liquor licenses, confer a limited property right and in certain circumstances can be transferred for value. Others, like most food and entertainment licenses, run with the operator and expire by their terms when a new operator takes over. Many permits need to be renewed, either annually or less frequently. Some permits run with the calendar year and expire December 31, and others run for a year from the date of issue. Knowing your permit portfolio and its value, transferability, and renewal obligations is an essential component of both business formation and transactional work.

Listen to Your Regulator

Most government officials you will encounter will have processed and approved more permits and licenses than you will ever see. Listen to their advice on the process. You want to do the easy things like meet application deadlines, submit the correct payments, and submit complete documentation. It is important to have direct, personal contact with the permit-issuing agency because every agency or office handles things differently. If they say not to put your application in a binder – don't bind it no matter what your client or supervising partner says. If they suggest attaching floor plans or photographs, even when those are not required by their rules or suggested in the filing materials, do it. If it makes the application easier for a government employee to process, do it.

Limit Your Arguments

Your main point of contact will likely be a clerk at an agency. His or her job is to help process the paperwork, get the application advertised, scheduled, and heard by an administrative decision maker. If you have a problem with the process, the clerk does not want to hear you quoting *International Shoe* or lecturing them on the anti-discrimination provisions of the federal housing law. This behavior is generally counterproductive. If you have a serious issue, you can always ask to speak to a supervisor or

legal counsel, and you generally have the right to appeal a denial. Patience and cooperation will help you move things along, while browbeating the clerk with your legal knowledge will probably not.

Don’t Overplay Your Politics

Most local government employees are aware of the elected officials who oversee them, but are not necessarily beholden to political interests. These employees tend to stay in their positions for a long time, and often enjoy union or civil service protections. Trying to intimidate them by saying you know someone on the City Council is not likely to have much effect. If your project has political support, make sure to include letters from elected officials and have them testify on your behalf. Their testimony in an official capacity will have a greater impact than a perceived political threat.

Show Community Support

There is strength in numbers. Most permitting and licensing hearings are open to the public and there is often a chance for public comment on each application. It is much harder for a regulator to criticize or oppose a project when there are dozens of people in the audience to voice their support. This approach can be especially effective in a small town setting where the audience is likely to contain the friends and neighbors of the board members.

Conclusion

The small business permitting process is about understanding the scope of the permits needed and the permitting process, and working cooperatively with the players involved. The permit-granting authorities, and those who work for them, have enormous discretion in the permitting process. Work with them, talk with them, and respect them, and your path to approval will be a smoother and quicker one. ■

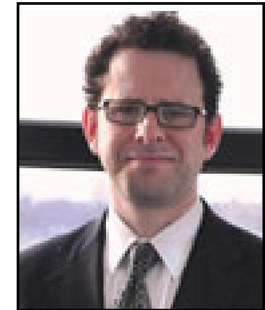
Practice Tips

Getting Uncle Sam To Talk: Obtaining Potentially Important Evidence from the FBI For Use in Civil Proceedings

By Joseph L. Sulman

Obtaining information from a non-party for use at trial can lead to frustration and headaches for civil attorneys – particularly if the sought-after information is maintained by the FBI. Not surprisingly, the FBI does not simply turn over documents or provide witnesses for testimony when it receives a subpoena. In fact, if served with only a subpoena, the FBI will reject it as improper. A party seeking such information must follow a certain request procedure, established by case law and regulation. If the FBI still denies the request, the party must initiate a separate action or, in some circumstances, file a motion.

The process for seeking and obtaining records or testimony from the FBI requires navigating through a host of legal issues, including forum selection, standing, the Administrative Procedure Act, and the law enforcement privilege. This article summarizes the request process and guides the practitioner through the issues that may arise. N.B.: The process is the same for obtaining records from any



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agency in the federal Department of Justice (under which the FBI is classified), but for simplicity's sake this article refers to the FBI only.

First, the requesting party must send a written request to the U.S. Attorney's Office of the jurisdiction in which the case is pending. This document is referred to as a "*Touhy* request," named after *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). A subpoena should accompany the request or immediately follow it, so that the party can file a motion to compel if the request is denied. The letter should be clearly marked as a *Touhy* request and should identify both the specific FBI case or file to which it refers and the specific documents or information requested. If possible, it should also identify the FBI agents involved in the creation of the documents or items.

Once the FBI receives the *Touhy* request, it refers to federal regulation 28 C.F.R. § 16.26 to determine if compliance is warranted. The FBI will not disclose records or permit an agent to testify in a civil action if doing so would 1) violate a statute or procedural rule, 2) violate a regulation, 3) reveal classified information (unless such information has been lawfully declassified), 4) reveal a confidential source (unless the investigative agency and source do not object), 5) reveal investigative records compiled for law enforcement purposes, or 6) reveal trade secrets improperly. *Id.*, § 16.26(b). If none of these circumstances apply, the regulation provides that the Deputy or Associate Attorney General will authorize disclosure if doing so is "appropriate under the rules of procedure governing the case or matter [and] under the relevant substantive law concerning privilege." *Id.*, § 16.26(a). In practice, the U.S. Attorney is delegated with making the decision whether to authorize disclosure. This regulation sets forth a procedural rule to guide the FBI in its evaluation of a *Touhy* request; it does not provide the government with an independent privilege or right to withhold information.

As expected, case law demonstrates that the FBI does not easily disclose its records or make its agents available to testify at court proceedings. Consider the case of an Arab-American involved in an employment discrimination lawsuit who sent a *Touhy* request for a file the FBI maintained on him, in order to prove that a co-worker falsely accused him of bomb-making. While the FBI produced the file,

it redacted the name of the informant - the very information the plaintiff needed for his civil suit. The Eighth Circuit affirmed the district court's ruling in favor of the FBI on the plaintiff's motion to compel. *Elnashar v. Speedway Superamerica, LLC*, 484 F.3d 1046 (8th Cir. 2007).

If the FBI denies the *Touhy* request in whole or in part, it will cite one or more of the justifications set forth in 28 C.F.R. § 16.26. At that point, and depending on the jurisdiction, the party seeking the information can do one of two things: it can file a separate action in federal court for violation of the Administrative Procedure Act (APA), or, if the underlying action is already in federal court, it can file a motion to compel. The First Circuit clearly allows a party involved in a federal lawsuit to file a motion to compel to enforce a subpoena to the FBI rather than initiate a separate APA action, but other circuits differ and the practitioner must check the case law for the jurisdiction in question. In all federal circuits, however, the requesting party must bring a separate APA action if the underlying dispute is in state court, since a state court does not have jurisdiction to enforce a subpoena served on a federal agency.

The FBI most often cites the law enforcement privilege (sometimes called the investigatory privilege) as justification for denying a *Touhy* request. This privilege applies to certain information related to law enforcement activities, as explained by the First Circuit:

> The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.

Commonwealth Puerto Rico v. United States, 490 F.3d 50, 64 (1st Cir. 2007).

While the law enforcement privilege is widely recognized, it is qualified and can be overcome by a sufficient showing of need. Courts determine on a case-by-case basis whether the requesting party has demonstrated an authentic necessity, given the particular circumstances, to overcome the qualified privilege. "When the information sought is both relevant and essential to the presentation of the case

on the merits and the need for disclosure outweighs the need for secrecy, the privilege is overcome." *Miller v. Mehltretter*, 478 F. Supp. 2d 415, 424 (W.D.N.Y. 2007). Since the APA dictates the standard of judicial review, the court ultimately examines whether the FBI's assertion of the privilege was arbitrary and capricious. As a practical matter, however, the APA standard does not often have significance. This is because determining whether the FBI acted arbitrarily and capriciously in asserting the privilege first requires an evaluation of whether the privilege applies or has been overcome by a sufficient showing of need in the given case. If the privilege does not apply or is overcome, then disclosure is warranted. The arbitrary and capricious analysis becomes significant when the FBI discloses some, but not all, of the requested information, and the court must evaluate whether the FBI acted arbitrarily and capriciously in determining what to disclose and what not to disclose. *See Cabral v. U.S. Dept. of Justice,* 587 F.3d 13, 23 (1st Cir. 2009).

As with all privilege claims, evaluating an assertion of the law enforcement privilege depends largely on specific facts; however, the case law provides some general guidelines. The Fifth Circuit has noted that "the law enforcement privilege is bounded by relevance and time constraints," and, "[t]herefore the privilege lapses either at the close of an investigation or a reasonable time thereafter." *In re Dept. of Homeland Sec*., 459 F.3d 565, 571 (5th Cir. 2006). This statement may be overbroad, however: the case law does not reveal a *per se* rule that a closed investigation nullifies the privilege. Still, the privilege is certainly strongest when an investigation is open; other key factors supporting the privilege include when the request seeks confidential sources and other highly sensitive law enforcement information and the relevance of the requested information to the pending case is weak. *See Cabral,* 587 F.3d at 23 (upholding assertion of privilege where requests were overly broad and not directly relevant to the primary issue at hand); *Borchers v. Commercial Union Ins., Co.*, 874 F. Supp. 78, 80 (S.D.N.Y. 1995) (upholding assertion of privilege where requests sought identity of and information provided by confidential informants, since informants expected confidentiality to remain indefinite and disclosure would discourage future informants from providing assistance); *Commonwealth of Puerto Rico*, 490

F.3d at 68 (1st Cir. 2007) (upholding assertion of privilege where disclosure would reveal “the number and types of personnel used by the FBI to conduct operations” at issue, including agents names).

On the other hand, the requesting party may show that the privilege does not apply or that it is overcome by a sufficient showing of need. Instances where the privilege has been found inapplicable include where a city asserted the privilege to refuse to reveal whether it supplied undercover officers at a certain demonstration which was the focus of a complaint against the police, *Kunstler v. City of New York*, 439 F.Supp.2d 327, 328 (S.D.N.Y. 2006), and where the claim for privilege, even if strong, was not properly presented before the district court, *Friedman v. Bache Halsey Stuart Shields, Inc*., 738 F.2d 1336 (D.C. Cir. 1984). Instances where the privilege, once established, has been overcome include where the investigative materials and witness statements constitute the best evidence of possible malicious prosecution, *Vidrine v. U.S.,* 2009 WL 1844476, *3 (W.D. La. June 22, 2009), and where the requested testimony from an FBI agent did not seek information about contacts with law enforcement officials or seek disclosure of confidential sources or vulnerable witnesses, *Mehltretter*, 478 F. Supp. 2d at 424. *See also Kitevski v. City of New York*, 2006 WL 680527, *4 (S.D.N.Y. March 16, 2006) (ruling that city police department failed to provide sufficient facts to justify privilege); *Schiller v. City of New York*, 2007 WL 136149, 14 (S.D.N.Y. Jan. 19, 2007) (rejecting claim of law enforcement privilege where city only offered conclusory assertions of harm in disclosure).

Some courts have applied a multi-factored analysis to evaluate an assertion of the law enforcement privilege. These factors are:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely

> to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996). It should be noted that most published decisions on the law enforcement privilege do not apply these factors. The First Circuit has also not applied this particular analysis to date.

A recent example may illuminate how the District of Massachusetts addresses an assertion of the law enforcement privilege by the FBI. In this case, *Aiello v. Manzi*, C.A. 08-10635, D. Mass., the plaintiff (represented by this writer) asked the FBI to produce a wire-tapped recording of a conversation between himself and the Defendant. The plaintiff had helped the FBI record the conversation as part of an unrelated investigation. Despite the fact that the plaintiff was the only informant whose interests were at stake, and despite the fact that the FBI investigation had already been made public through media reports and a related proceeding, the FBI refused to produce the recording based on the law enforcement privilege.

After the plaintiff moved to compel, the Court (Magistrate Judge Robert Collings) reserved ruling on the motion until trial, when it determined, based on conflicting testimony concerning the conversation, that the privilege had been overcome by a sufficient showing of need.

In summary, while there is a standard process for requesting FBI records or testimony, the case law does not provide a well-defined rule for when a Court will compel the FBI to comply with a proper request. Generally, however, a party can overcome the law enforcement privilege only by showing that the requested information contains, beyond a speculative level, relevant and material evidence that is essential to the party's claim or defense. ■

Editor's Note

Earlier this year, the Boston Bar Association published *Justice on the Road to Ruin*, a report with disturbing ramifications for lawyers, litigants, and frankly, anyone who cares about the soundness of our justice system. According to the BBA report, funding for the Massachusetts Trial Court has plummeted by 14 per cent in just three and a half years — resulting in the loss of over 1,000 experienced employees. By contrast, appropriations for the rest of state government were reduced by 2.2 per cent during that same period.

Despite the valiant efforts of judges and court personnel to implement sound management strategies for making do with less, the reality is that inadequate funding — resulting in real pain for real people — continues to be of pressing concern to *Boston Bar Journal* readers. Over the next several issues of the *Journal*, we will be presenting a series of articles detailing the impact of a justice system starved for resources.

In this edition, Manisha Bhatt has written an article about the impact of funding cuts in Family Court on probate litigants and their lawyers. We invite similar submissions from our readers. How has the reduction of funding for our state courts affected you? What tips might you have for fellow practitioners working in the state courts?

The *Journal's* Board of Editors recognizes that state funding raises a host of important policy questions and that reasonable minds may differ as to what is the most prudent course of action. Accordingly, we take no position on these questions, deferring to the BBA's policy-making body, the Council. We seek, rather, to present the funding, facility, management, and operational challenges facing the state courts from a variety of perspectives, in hopes of illuminating the effect of a struggling court system on the people who work in or seek justice through it each day, and enriching our readers' knowledge of our third, co-equal branch of government, on which all the citizens of Massachusetts depend for the resolution of disputes and preservation of rights. ■

The Profession

Justice Delayed: The Ramifications of the Trial Court Budget Cuts

By Manisha Bhatt

Manisha H. Bhatt is a senior attorney at Greater Boston Legal Services. She serves on the Boston Bar Journal Board of Editors and is co-chair of the pro bono committee of the litigation section. Manisha wishes to thank Chief Justice of the Probate and Family Court Paula M. Carey and Register Sandra Giovannucci for providing some factual information for the article.

The day started out as it always does. My client and I rushed into the courthouse at 9:00 a.m. to avoid being tardy for a hearing. It was a big day and a big case for my client, with personal safety during the proceedings being of paramount concern. To calm her fears, I reminded her that there would be a court officer inside the courtroom to ensure safety. As we turned to enter the courtroom, an unusual thing happened. We could not get in.

The courtroom was locked. It was completely dark inside. My client and the thirty people around her were confused. Having practiced before the judge for years, I know he is always on the bench at the appointed hour. Therefore, I was perplexed that the courtroom was locked. I told my client that we needed to wait for a court officer to obtain some information. I cautioned her that due to budget cuts, two court officers were staffing the entire probate and family court, therefore it could be a while. Fortunately, a moment later, a court officer approached. He explained to everyone that their hearings had been rescheduled. While they expressed frustration, he gently reminded them that they had all received a rescheduling notice in the mail three weeks prior. Since I did not get a rescheduling notice, I approached the court officer. He explained that he was aware of our situation and that the case would be heard in a different courtroom. Due to the safety concerns, the court officer accompanied us down the hall.

As we were walking, I thanked the court officer for his assistance. With his usual humility, he replied that it was his pleasure. Being one of only two court officers responsible for the security of five judges and five simultaneous court sessions, he rushed off to the next courtroom. As my client and I watched him depart, my client said, “Manisha, I had no idea that the budget cuts were that bad. He has to run around to all of the courtrooms because there’s only one other court officer? Something should be done!” I nodded in agreement. She was absolutely right. We expressed how fortunate we were that despite being so understaffed, this court officer went above and beyond the call of duty to ensure public safety. Suddenly, I was reminded of all of the changes that have gradually occurred over the last couple of years. The budget cuts have gone deeper than I’d ever expected. All levels of service the trial court provides have been impacted due to the extraordinary cuts. It was at that very moment that I realized that the trial court is at a crossroads and the journey ahead is perilous for all of us.

How did this happen?

In FY 2009, the trial court initially was awarded a budget of $605.1 million. For FY 2012, the trial court was awarded a budget of $509.2 million, meaning that over the last three years the trial court has sustained budget cuts of approximately $100 million. Realizing the gravity of the situation, the trial court acted swiftly. To avoid layoffs, the trial court implemented an absolute hiring freeze in October 2008, targeted voluntary personnel reductions and did not pay negotiated salary increases to 3500 of its clerical employees. The trial court reduced its operations costs by either renegotiating or terminating leases and consolidating three separate courts. To reduce statewide building operating costs, the trial court formed a “green team” to implement a plan that conserves energy usage. Furthermore, the trial court eliminated service contracts with alternate dispute agencies, restricted assignments of state pay guardian ad-litems, eliminated funding for education conferences and even terminated service contracts on spring water dispensers for employees.

The success of the trial court’s target of voluntary personnel reductions and energy conservation procedures may be readily apparent to the 42,000 people for whom death, divorce or other drama drives

them to our esteemed halls of justice on a daily basis. They expect prompt service for their client or swift amelioration of personal difficulties. Registries, civil and criminal clerk's offices statewide operate with drastically reduced staff. Empty desks abound, waiting lines are frequently long and only every third light is working. The once ubiquitous security officers patrolling the hallways are relegated to building entry points only.

Assessing the Damage

If my experiences are any indication, the expectation of prompt service and swift amelioration of difficulties should be sharply adjusted. My testimony is not intended to criticize, but to narrate the stark reality we currently face. Two months ago, I requested a hearing and was immediately offered my choice of available dates. However, two weeks ago, I requested a hearing on a different case but was told that I have to wait to be given a hearing date and that I would be informed as soon as it could be assigned. I have no indication when my case will be scheduled. Over and above scheduling delays, delays in receiving decisions on important motions are having unintended and costly consequences. I was in court in June for a motion involving child support. The judge took the motion under advisement. Due to the backlog of cases, I was told not to expect a decision until the end of September. My client has been without child support for many months.She has exhausted her savings and the charity of friends and family. The delay in receiving a decision has forced her to go on welfare and get food stamps.

Cold-hard facts support my observations and experiences. Since FY 2007, the court system has lost 1,126 workers statewide, roughly 14.8% of its workforce. These workers will not be replaced. At this very moment, the average staffing level in the trial court system is 68%. This means that there are not enough people in some clerk's offices to simply *answer the phone*. Right now there are some courthouses where there are *no* judicial secretaries to assist judges in typing up and mailing court orders. This deficiency, especially when a case is taken under advisement, results in a delay of several weeks if not *months* before people learn the outcome of family, financial or business disputes. The situation is currently destined to become worse. Every month the trial court loses 20 employees

through attrition while maintaining an absolute hiring freeze. Understandably, the trial court may need to adjust operating hours and further consolidate court operations if its budget is not increased to allow for modest hiring. Adequate staffing is the vital link to justice without delay, a right guaranteed to all pursuant to our state constitution. That vital link is in serious jeopardy.

What may not be readily apparent are the numerous dedicated staff who far exceed reasonable expectations. Retired judges are *volunteering* their time to adjudicate cases where there is a backlog. Registry and clerk staff are *volunteering* to work on weekends and take on additional tasks to get caught up on work. From their own pockets, many judges have purchased computer software that transcribes their orders as they render decisions, because they wish to reduce the burden on the already diminishing number of judicial secretaries. Court officers, who five years ago were two in each court room, have dwindled in number such that frequently there are not enough officers for each courtroom. This is frightening! Many attorneys witness cases every day where the stakes are high and the emotions even higher. Fights have broken out inside the courthouse and at times within the courtroom itself. Without adequate court and security officers attending to the courtrooms and patrolling the courthouse, all who access and dispense justice are in danger. Yet every day, judges go onto the bench without a court officer because they do not want to delay us. How long can this continue?

Conclusion

While our nation slowly climbs out of financial crisis, we have executed the fine art of accomplishing more with less. We grin and bear it. However, the threat of diminished funding of our third branch of government mandates all attorneys to a call to action. It is our solemn duty to our clients and as officers of the court. Access to justice is a constitutional right and is far too precious to be compromised. The trial courts are the light of our justice system. Just as the moon draws its illumination and power by absorbing the sun’s rays, attorneys, and our clients, draw power from our prompt access to the trial courts. Attorneys simply cannot perform our duty effectively without the support of an adequately staffed trial court system. Let us fulfill our oath that we each took upon admission to the bar and advocate for increased funding for the trial court, lest it be lights out for all of us. ■

Voice of the Judiciary

This Week in Housing Court

By Hon. Robert Fields

I have always described the Housing Court as a place where the law and real people intersect, where the rubber hits the road all day long. This intersection is becoming busier every day as the volume of cases increases and each case seems to demand more attention and more creativity than ever before — all at a time when the court's resources are diminishing.

All cases begin in the clerk's office where the staff's obligation to input mountains of data is routinely interrupted in order to help folks at the counter with professionalism and compassion. Unfortunately, the adage that we must "do more with less" has reached its limit due to the fiscal constraints of the Trial Court. The economic downturn, which increases the number and types of cases before the court, has the simultaneous effect of diminishing the staff available to handle those cases. We have reached a point where we do not have sufficient staff to effectively process the court's caseload, resulting in inordinate delays in entering judgments, issuing executions, and docketing. Our litigants often are among the most vulnerable in our society. Nonetheless, by reason of staffing shortages our division has recently been forced to close the clerk's office to the public for two hours in the middle of the day and reduce the number of courtroom sessions we currently provide in some of our locations simply in order to keep up with the demands of case processing; desperate steps that we have never taken before. The powerful determination of our court and its very talented, creative and driven staff

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to serve the public can only be accomplished within its means and, currently, this means less access to the public it is designed to assist.

There is a popular conception that cases handled by the Housing Court are “routine”. This is incorrect. The court regularly hears, among others, cases involving: hoarding, toxic torts, personal injury, housing discrimination, and zoning. A few examples from my docket *for this week alone* will highlight the variety and breadth of the court’s docket on any given day, as well as the fundamental interests at stake.

I heard a motion this week, for example, to stop an eviction scheduled by a bank that foreclosed on a property and thereafter pursued summary process (eviction) proceedings. Over the past couple of years, post-foreclosure eviction matters have become daily occurrences for the court. In this matter, the defendant was the former owner who was defaulted in the eviction case because on the original trial date she appeared and claimed that the named defendant was deceased and that she was “some sort of relative” who was possibly going to seek an appointment as executor in Probate Court. However, she wouldn’t answer any questions, including providing her name, and a default entered. Now she was back at court, very articulate and very much alive, but without explaining her misleading behavior in asking for the default to be vacated. The next day, in a different case, the defendant was a former property owner facing eviction, and the bank’s own evidence showed that it had failed to comply with the requirements of the foreclosure statute; the eviction case was dismissed due to the bank’s failure to meet its burden that it has superior right to possession under the summary process laws.

I also heard an eviction trial this week where the landlords rented the upstairs apartment to their grown children with grandchildren. The tenants described extreme and constant verbal abuse by the landlords that was clearly illustrative of a long-term, disturbing family dynamic. Here, however, it was presented in the context of a bona fide landlord-tenant dispute. The landlords did not deny the behavior, which was inappropriate and damaging in any context but supportive of a legal claim in an eviction matter. That case was followed by another eviction case where a church was evicting tenants from its parsonage. A tenancy which had begun as an act of charity had

been converted to a standard landlord-tenant arrangement where the landlord was a pastor and the tenants his parishioners, who had counterclaims alleging breach of the warranty of habitability. When another trial began and one of the attorneys started by saying that their case was not your typical eviction case, the word “typical” had lost its meaning. That case involved an unmarried couple with a young child who had ended their relationship, and the father was evicting the mother out of the home he owned. The mother was willing to relocate, but her efforts were thwarted by a history of bad credit (the parties agreed that the debt was common to both of them). They already had an ongoing Probate and Family Court matter pending and it was clear that their housing matter needed to be integrated into that case.

Perhaps unsurprising in the present economy, many of the cases I hear arise out of the financial condition of the tenant or the property owner. In many cases, tenants lose their income and cannot make the rental payments or property owners can’t afford to meet their obligations to repair or provide utilities. At Housing Court, the litigants often first sit with staff Housing Specialists who attempt to mediate and determine if there are agreeable resolutions to the problems brought to the court. The Housing Specialists also integrate the community’s resources into their problem solving strategies; e.g., rental arrearage payments from a local agency, or forbearance by the Water and Sewer Commission on a water shut off, or consultation from the Tenancy Preservation Program (TPP) which assists the parties and the court in cases in which the disability of a tenant or household member contributes to the reason the case came to court. Often the case is resolved by these specialists. As cases become more protracted and complex, and with no means to increase our staff, these specialists have become spread very thin and all too often parties are made to wait long periods of time to be able to mediate. Again, a valuable, tested mechanism of the court for dispute resolution has become less valuable because many litigants cannot wait to benefit from their services.

More than a thousand cases each year are brought by city and town code enforcement departments because property owners do not properly maintain their properties. Each week, the court devotes three specially scheduled sessions to such matters. An increasing number of these cases result in the appointment of a Receiver taken from the court's receivership list because the owner is either unwilling or unable to remedy the conditions. I had several receivership cases this week, including one where the cockroach infestation was so bad in a two family house that the local health department condemned it. Cases that involve the appointment of Receivers are extremely demanding on the court's resources, requiring many hearings and review of expansive receivership reports as part of the court's monitoring of the receivership. Though an invaluable code enforcement tool, eliminating blighted buildings and sometimes sparking a community-wide rehabilitation effort, the demands on the court's resources involved in receivership cases means that our staff must be diverted from other very important work.

In the midst of this week I also presided over a jury trial in which one party was *pro se*. That case, a home improvement matter gone awry, began and ended in one day only as a result of all the court's departments (the clerks office, the security staff, and the housing specialists) working in unison towards a common goal. Such seamless coordination is, unfortunately, becoming more and more difficult to perform as the demands of jury cases on the court's resources — particularly on its security staff who must accompany the jury at all times — leave the court with less staff available to attend to the other business of the court.

In short, the Housing Court is a high-volume court with complicated and important cases. It is a privilege to be a judge on the court and to serve the litigants who come before it. However, diminished resources daily affect our ability to serve the litigants who come before us. And this is especially distressing given that the interest at stake is among the most fundamental: a person's home. ■