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Land Court Department of the Trial Court
By Gordon H. Piper

Case Focus

Shifting Tides: District of Massachusetts Orders Correctional Facility to Provide Opioid Treatment
Arlan Fuller

Legal Analysis

Spaulding v. Town of Natick School Committee: Allowing Free Speech while Accomplishing Municipal Work
By Mina Makarious and Paul Kominers

Legal Analysis

Taming a Strange New Beast: Securities Regulators Take on Digital Currency
By Jack Falvey and Brendan Radke

Legal Analysis

Recovering Punitive Damages in Attorney Malpractice Cases
By Jessica Kelly

Legal Analysis

Look Before You Click: The Enforceability of Website and Smartphone App Terms and Conditions
By Kevin Conroy and John Shope

Heads Up

Obtaining National Consensus on Key Opinion Practices: An Introduction to the Statement of Opinion Practices
By Stanley Keller and Steven O. Weise

Practice Tips

A Streamlined Form of Closing Opinion (2019 Update)
By Donald W. Glazer and Stanley Keller

Case Focus

Until Death Do Us Part(ition)
By Elizabeth Sillin and Colin Korzec

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Land Court Department of the Trial Court

By Gordon H. Piper

I am honored to have been asked to offer a few initial observations about the Land Court Department, from my new perch as its Chief Justice, a role I assumed at the end of October last year. I thank Trial Court Chief Justice Paula M. Carey for selecting me to serve.

We at the Land Court relish our status as the smallest of the seven departments of the Trial Court. Our seven justices hear cases from every corner of the Commonwealth. We “have gavel, will travel,” trying cases from Pittsfield to Nantucket, and in many courthouses in between. Our center of gravity does remain the high-rise courthouse on Pemberton Square in Boston, where most hearings take place, the Recorder’s office is located, and the court’s legal, title examination and surveying experts are based.

We also are enthusiastic about our responsibilities to adjudicate cases placed in our specialized jurisdiction. Our justices—and everyone else at the Land Court—appreciate the trust placed in us to understand and apply the law in a broad range of real-estate-related cases. We understand that lawyers and parties come to the Land Court expecting us to be up to speed and engaged on the subject matter with which we have been entrusted. While many of our judicial colleagues sitting in other departments of the Trial Court (and even some members of our own families) may quietly wonder, looking at the types of cases we hear, how the judges of the Land Court get up and come to work each morning, I assure you that we do so with gusto. We value role we play in the development of the common law of real estate in Massachusetts.

I have taken on my new job at a time of considerable change and opportunity at the court. My immediate predecessor, Chief Justice Judith C. Cutler, reached the age of retirement after a decade on the bench, the last five years as our Chief. And her predecessor, Chief Justice Karyn F. Scheier, also retired at the end of 2018; she had been a member of the court since 1994, including ten years as Chief Justice. These two distinguished jurists left indelible positive marks on our court and the Commonwealth’s judicial system.

We were delighted to welcome in January of this year Justice Jennifer S. D. Roberts and Justice Diane R. Rubin, who came to the Land Court after long years of prominent private practice and are leaping into their new positions, taking on very ample caseloads. They join four other greatly accomplished and respected Associate Justices, Hon. Keith C. Long, Hon. Robert B. Foster, Hon. Howard P. Speicher, and Hon. Michael D. Vhay. It is good to have our right-sized court up to its full fighting strength, at least for now. And I am grateful not only for the talent and dedication of my judicial colleagues, but of the entire leadership and staff of the court, including (but by no means limited to) Recorder Deborah J. Patterson, Deputy Court Administrator Jill K. Ziter, Deputy Recorder Ellen M. Kelley, Chief Title Examiner Edmund A. Williams, and Chief Surveyor Stephen LaMonica.

Improvements over the last several years in the general and real estate economies of the Commonwealth have brought a change in the mix of the court’s work. When the real estate markets were moribund and property values stayed stagnant, a disproportionate share of the court’s work concerned mortgage foreclosure and tax lien foreclosure matters, and others arising out of transactions and development plans in distress. Servicemembers Civil Relief Act cases have declined somewhat from the peak of more than 30,000 new cases filed in a year. More recently, an increasing percentage of our case load is driven by the state’s vibrant development activity—zoning and subdivision permit appeals, including some arising out of very large and complicated project plans. We also have rapid growth in the court’s volume of partition cases, with common owners of land seeking the court’s aid in equitably dividing their joint real estate

asset. Both land use and partition cases demand additional courtroom time and more legal research and writing, continuing the pressure on the judges and staff of the court to keep up.

The court, which labors a bit with an undeserved reputation as a place of green eyeshades and quill pens, is moving ahead with a number of twenty-first century innovations. Like the rest of the Trial Court, the Land Court has embarked on e-filing of cases. We are underway with an initial pilot program in our Servicemembers Civil Relief Act case type, our largest by volume, and expect soon to expand that pilot to include more filers, before opening those cases to e-filing by all lawyers and firms. Following that, we intend to pilot e-filing in another large category of cases, those seeking the foreclosure of the right of redemption following real estate tax lien takings. Over the next several years we will push to bring e-filing to a wide variety of the court's docket, including most of our Miscellaneous case types. The density of pleadings filed in many Land Court cases—a number of which include large plans, lengthy reports, and other challenging exhibits—may present some challenges, but the court shares with the bar the goal of being able over the coming years to have filed and accessed on line most of our ordinary case types. We soon will launch in at least one of the court's sessions a trial of a “judicial tools” setup, which should allow the judge and clerk in that session to work with digital versions of many of the filings in the cases that judge is hearing.

We also have commenced work on modernizing the computer systems used by our Surveying Department, with the intention to have current drafting and survey production and indexing capabilities in use. The court is the repository of registered land plans from across Massachusetts dating back to soon after the founding of the Land Court in 1898, and, in later phases of this project, we hope to have digitized many of these critical plans, to enhance access to them by the bar, surveyors, and the public.

In a continuing effort to provide more efficient hearing and disposition of contested cases, a committee now chaired by Justice Speicher is convening, and will look over the court's rules, standing orders, and procedural practices, building on past rules changes to expand opportunities to expedite, simplify, and reduce the cost of litigation in the Land Court. We anticipate soliciting the involvement of the bar and other stake holders in this effort over time. A related effort will look over the court's mediation and other alternative dispute resolution process and methods. While we of course will insure every litigant the chance to have his or her case decided by the court, we acutely are aware that not infrequently the best resolution is one the parties themselves reach. We intend to seek out more and better ways to facilitate that.

One area of the court's business that continues to grow in volume and complexity are the many cases subsequent to registration, our “S-cases,” in which the court is asked to make orders relative to the certificates of title for registered land. Our long-time Chief Title Examiner, Edmund Williams, soon will be retiring after decades of extraordinary service to the court, the conveyancing bar, and the citizens of the Commonwealth. He has helped the court issue extensive guidelines and guidance to the court's land registration districts and the real estate bar. His successor, once selected and in place, will be challenged to hold to the high standards of the court's Title Examination Department, and to continue positive strides made in the processing of the important S-case petitions. The last comprehensive revision to the court's Guidelines on Registered Land issued in 2009, and the new Chief Title Examiner will work closely with the justices of the Land Court, with the input of the court's Assistant Recorders and the bar, to make any needed updates and expansions to those guidelines.

My new post as Chief Justice of the Land Court presents exciting opportunities and challenges. I am grateful to have the very best judicial colleagues, court leaders, and so many other members of the Land Court team working alongside me, helping the court achieve great things for the users of the court and the citizens we serve.

The Honorable Gordon H. Piper has served on the Land Court since his appointment by Governor Jane M. Swift in 2002. Trial Court Chief Justice Paula M. Carey appointed him Chief Justice of the Land Court Department in October, 2018. Chief Justice Piper holds a 1978 bachelor of arts degree from Vanderbilt University, summa cum laude, where he was admitted to Phi Beta Kappa. In 1982, he received his JD degree, cum laude, from Cornell Law School.

Shifting Tides: District of Massachusetts Orders Correctional Facility to Provide Opioid Treatment

By Arlan Fuller

In [*Pesce v. Coppinger*](#), Civ. A. No. 18-cv-11972-DJC (D. Mass. Nov. 26, 2018), the United States District Court for the District of Massachusetts ordered that, under the Americans with Disabilities Act (“ADA”) and the Eighth Amendment, a Massachusetts jail was required to provide an inmate, Geoffrey Pesce, prescribed methadone treatment during his incarceration. This decision will have a significant impact on the provision of medical treatment for opioid use disorder in prisons. While other jurisdictions have provided methadone treatment to incarcerated populations, Massachusetts generally has not. Further, the case is the first time a federal judge in Massachusetts has ordered that treatment must be provided.

I. The Question of Opioid Treatment in Prison

In the midst of the nation’s opioid epidemic, there is a debate as to whether to allow medical treatment for opioid use disorder in jails and prisons. Medical treatment is usually methadone, buprenorphine or another prescribed drug that reacts with the same receptors in the brain as drugs like heroin or oxycodone but does not produce a “high” if taken as directed. Studies show that about half of prisoners entering the jail system meet the criteria of substance use disorder and of that group, nearly half have a diagnosed opioid use disorder. Most jails and prisons, however, prohibit even prescribed use of methadone and buprenorphine on the grounds that the drugs present safety and security concerns.

Without treatment, however, relapses may occur, often resulting in disability or premature death. In the case of opioid use disorder, a very present danger exists in the immediate post-release period when treatment has been interrupted during incarceration. A 2007 [*New England Journal of Medicine*](#) study found incarcerated patients to be 129 times more likely than the general population to die of an overdose in their first two weeks following their release. But, even though the data identifies a need to consider methadone or buprenorphine treatment in prison, institutions, particularly in Massachusetts, have been slow to adopt policies allowing for such treatment. Although the Commonwealth has recently [announced pilot programs](#) for medical treatment in both jails and prisons, based on [legislation](#) passed last year, those programs have yet to begin.

II. The Pesce Decision

Given the significant numbers of prisoners with opioid use disorders, it is no surprise that courts would eventually be faced with questions regarding the availability of treatments. In July 2018, Pesce was charged with driving with a revoked or suspended license in violation of the terms of his probation. Pesce had struggled with opioid use disorder for several years. He was in active recovery since 2016 and receiving methadone treatment. It was agreed that any sentence resulting from the charges would be served in the Essex County House of Corrections. However, that facility did not provide methadone treatment to inmates. To obtain medically necessary treatment, and avoid the risk of overdose and death upon his release, Pesce requested that he be allowed to continue methadone treatment while in jail. When Pesce did not receive a response, he sought an injunction ordering that his treatment continue while he was incarcerated.

Pesce argued that the jail’s policy of denying access to methadone treatment violated his rights under the ADA. The ADA states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied benefits of the services, programs, or activities of a public

entity, or be subjected to discrimination by any such entity.” Pesce asserted that the refusal to administer methadone deprived him of the benefit of health care programs, and that such conduct constituted discrimination on the basis of his disability.

Pesce also argued that the jail’s policy against methadone treatment constituted cruel and unusual punishment in violation of the Eighth Amendment. The jail’s policy did not permit the treatment, regardless of his doctor’s and other medical professionals’ opinions regarding the treatment of patients who, like Pesce, struggle with recovery without methadone treatment.

Pesce demonstrated that he would suffer irreparable harm. Before starting methadone, Pesce had overdosed three times in less than 24 hours. His doctor described him as at “high risk of overdose and death upon his release” without continued methadone treatment. Statistics provided to the court also showed the dangers in not treating incarcerated individuals with opioid use disorder, including the 2007 [New England Journal of Medicine](#) study that found that nearly 50 percent of all deaths among those released from jail or prison were opioid related, with most occurring within a month of release.

The court determined that the medical needs of Pesce outweighed any harms and security concerns of the jail. The court recognized that the prison has a legitimate concern for the safety and security of its inmates. However, in Pesce’s case, methadone would be administered in the presence of prison officials and, because it is in a liquid form, would be extremely difficult to smuggle into the prison. Therefore, the court deemed the medical benefits to Pesce were greater than the risk posed to the prison. Lastly, the Court held that the public interest would be better served by ensuring that Pesce received proper medical care while in prison.

III. The Impact of the Decision

This decision will have significant and far-reaching impact. It is the first time a federal judge in Massachusetts has ruled in favor of providing methadone access in prison. Prisons in Massachusetts will need to provide access to methadone and buprenorphine treatment or likely face similar legal actions. Adding to the debate, the U.S. Court of Appeals for the First Circuit recently [affirmed](#) a preliminary injunction ordering a jail in Maine to provide buprenorphine to treat an opioid use disorder. *Smith v. Aroostook Cnty.*, 922 F.3d 41 (1st Cir. 2019). In *Smith*, as in *Pesce*, the court found the plaintiff would likely prevail on a claim that withholding treatment violates the ADA and Eighth Amendment. With these decisions, Massachusetts will now face even more pressure to successfully implement the upcoming pilot programs providing opioid maintenance therapy. Similar programs have been successful, such as in [New York City](#), which in 2018 treated 900 prisoners daily with methadone and nearly 4,000 prisoners over the entire year. In fact, 74% of all prisoners with an opioid use disorder were maintained on methadone or buprenorphine during their incarceration.

More broadly, Massachusetts (and elsewhere) will need to determine whether treatment for opioid use disorder for those incarcerated should be considered a discretionary therapy that can be denied, resulting in forced withdrawal and inevitable relapse upon release, or a vital and necessary health service that is protected under by law. In the last issue of the [Boston Bar Journal](#), former Massachusetts Attorney General Martha Coakley and Rachel Hutchinson stated that “as the opioid epidemic grows, the way we view addiction is changing.” The Federal Court’s decision confirms this trend, showing that the corrections system offers an opportunity to engage individuals who might not have strong connections to the health system. Indeed, instead of posing a threat to those struggling with substance use disorder, the corrections system could prove to be a critical point of intervention to address an individual’s health needs. *Pesce* may be the first case to address medical treatment of opioid use disorders in Massachusetts, but it is unlikely to be the last.

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Spaulding v. Town of Natick School Committee: Allowing Free Speech while Accomplishing Municipal Work

By Mina Makarious and Paul Kominers

The Middlesex Superior Court’s November 2018 decision on cross-motions for partial summary judgment in *Spaulding v. Town of Natick School Committee*, MICV2018-01115 (Nov. 21, 2018) (Kirpalani, J.), is a reminder that all constitutional rights (like all politics) are local. The case arose from a series of School Committee meetings, the type of quintessential local government activity repeated daily in hundreds of cities and towns throughout the Commonwealth. Notwithstanding this seemingly banal background, the issues in the case are at the heart of the First Amendment’s powers and its limits — namely, how strictly a governmental entity can regulate speech in a public forum it has itself created. The answer, according to *Spaulding*, is that a local government body can control speech just enough to allow it to focus on the tasks at hand, but no more.

Factual Background

In *Spaulding*, two mothers of former Natick Public School students had attempted to speak during “Public Speak” portions of Natick School Committee meetings. The School Committee reserved the Public Speak portion of each meeting to permit members of the public to address the School Committee without response from its members. The Committee had a participation policy for this portion of the meetings that, among other things, (1) limited each speaker to three minutes of time; (2) advised speakers that “[i]mproper conduct or remarks will not be allowed. Defamatory or abusive remarks are always out of order,” and (3) instructed speakers that they “may offer such objective criticisms of the school operations and programs as concern them, but in public session the [School] Committee will not hear personal complaints of school personnel nor against any member of the school community.”

The School Committee applied this policy to restrict or prevent the two mothers from speaking on at least three occasions. The ACLU, on behalf of Ms. Spaulding and Ms. Sutter, challenged the School Committee’s participation policy facially, and as applied to the two mothers. The plaintiffs argued that the policy was not content-neutral and failed to set definite standards on what speech was allowed. The plaintiffs sought partial summary judgment declaring portions of the participation policy unconstitutional.

Facial Challenge

The court first assessed whether Public Speak was a traditional, designated, or limited public forum, quickly concluding that the Public Speak is a “designated” public forum, or a forum “which the government has opened for use by the public as a place to assemble or debate.” In designated public fora, the government may impose reasonable time, place, and manner restrictions on the exercise of free speech rights. However, any content-based restrictions must pass strict scrutiny, meaning they must be narrowly tailored to advance compelling government interests.

The court accepted that the School Committee had a compelling interest in conducting its business in an orderly and efficient fashion and that it therefore had the right to manage public participation at its meetings so long as it did so using rules narrowly tailored to advance that end. To assess whether the School Committee’s rule barring “personal complaints of school personnel,” or complaints “against any member of the school community” was narrowly-tailored, the court first reviewed the School Committee’s jurisdiction. It determined that the School Committee had jurisdiction over their district’s superintendent, budget, and overall goals and policies. The School Committee exercised no direct control

over personnel other than the superintendent, and therefore could properly bar personal complaints against personnel other than the superintendent from Public Speak. Attendees could, however, voice personal complaints about the superintendent, and the participation rules were unconstitutional insofar as they barred such complaints.

The court also took issue with the requirement that the comments be “objective.” It held (after reviewing definitions of “objective” and “subjective”) that while a requirement that comments be based on “externally verifiable phenomena” might be proper, the School Committee acted improperly in prohibiting subjective comments rooted in individuals’ concerns.

Finally, the court held that the portion of the policy barring those making otherwise germane and appropriate comments from identifying the parties involved was unconstitutional. The public’s free speech rights, the court held, superseded any interest the School Committee had in protecting community members’ privacy.

The court then turned to the section of the Participation Policy prohibiting “defamatory” or “improper and abusive” remarks, holding that the policy banning “defamatory” remarks was constitutional only to the extent that it barred speech that had actually been adjudicated defamatory. Otherwise, the policy would be an unconstitutional prior restraint on speech concerning public officials and public business. The court read a similar limit into the policy on “improper and abusive” remarks, holding it was only constitutional to the extent that it barred threats, fighting words, or obscene content – all types of speech at the outer limits of First Amendment protection.

As-Applied Challenges

The court then ruled on the plaintiffs’ as-applied challenges to the plaintiffs’ treatment at the January 8, February 5, and March 12 meetings.

On January 8, Spaulding had introduced herself as “the mother of a child that was mercilessly bullied into suicide here in Natick” before School Committee members cut her off. After hearing just her first sentence, the court ruled, School Committee members could not have known whether Spaulding’s comment would pertain to business within their jurisdiction. If particular students or teachers had bullied her child, then she had no right to say so at Public Speak, but if the bullying had somehow been committed by the superintendent, school operations, or school policies, then she did.

On February 5, Sutter began to speak about the “retaliation and retribution” she and her family had received “at the hands of the Natick Public Schools.” School Committee members quickly reprimanded her, insisted that she stop speaking, and then suspended the meeting. As with the analysis of the January 8 meeting, the court held that the School Committee cut Sutter off before she could make clear whether her complaints were about aspects of the school system within or outside of the School Committee’s jurisdiction. The court also noted that the Participation Policy did not bar discussion of Public Speak itself.

On March 12, Sutter again began to speak about “retaliation and retribution.” The School Committee reminded her that, under the participation policy, she could not discuss individuals or make defamatory statements. The court held that, again, Sutter had the right to discuss the superintendent or discuss operations or policies within the School Committee’s jurisdiction, whether her comments were positive or not.

What the Court’s Decision Means for Cities and Towns

Spaulding was settled shortly after the trial court's decision, so there will be no appellate review. Nonetheless, the case holds some important lessons for local government entities.

First, *Spaulding*'s conclusion that Public Speak was a "designated" public forum implies that if the Natick School Committee had not included the Public Speak portion of the meeting in the first place, it would not have created a public forum in which it had to hear the plaintiffs. Government entities cannot choose whether traditional public fora like sidewalks and parks will be open to speech, but they can decide whether to designate and maintain non-traditional public fora.

Second, the fact that the plaintiffs sought to speak during the "Public Speak" portions of the school committee's meetings, rather than during the School Committee's conduct of its scheduled business, is also important because the Massachusetts Open Meeting Law requires public bodies to set agendas for their meetings and adhere to the topics on the agenda. G.L. c. 30A, § 20(b). The plaintiffs did not appear to challenge, for instance, the School Committee chair's asking certain audience members to restate their comments at a later part of the meeting when particular issues were due to be taken up. Further, as noted in the case, the Open Meeting Law also gives the chair of a local public body the authority to determine whether to allow public input at all during the conduct of its business. *Id.*, § 20(g). Thus, absent an open-ended portion of an agenda such as the "Public Speak" portion of the Natick School Committee meetings, public bodies may have significantly more power to ask members of the public to focus their comments on the particular issue at hand. In other words, public bodies certainly may do their jobs, and may focus on doing so.

Third, notwithstanding these first two lessons, refusing to create opportunities for public dialogue is likely a shortsighted approach to addressing First Amendment issues. No local government entity can completely immunize itself from criticism, and neither should it be able to. *Van Liew v. Stansfield*, 474 Mass. 31, 38–39 (2016) (remarks about a local official are "at the core of the speech that the First Amendment to the United States Constitution protects"). Providing opportunities for public input, as uncomfortable as it may be for elected or appointed officials to hear, promotes good governance and an opportunity for those officials to engage on important issues. Thus, local governments should think very hard before simply closing off all opportunities for public input at public meetings.

Fourth, the court made clear that public bodies could limit public comments to issues within the public body's jurisdiction. However, where that jurisdiction begins and ends can be difficult to determine. In *Spaulding*, the court agreed that if the plaintiffs had in fact begun to discuss particular personnel (other than the superintendent) or students, the School Committee could end those comments because the Committee's role was limited to policy issues. Local government officials therefore need not fear that they will entertain comments that are outside of their roles or face pressure to assert jurisdiction over issues on which they legally have no say. On the other hand, one could argue that the School Committee's jurisdiction was broad enough to include investigating those incidents to determine whether they warranted policy changes. Further, while not at issue in *Spaulding*, one can easily imagine a situation in which a local board or committee had previously asserted that it *did* have broad jurisdiction to address a particular issue, which could make it difficult to exclude speech on that issue later.

Finally, once the government body permits the public to speak on a topic within the government body's jurisdiction, and the speaker does so at the appropriate time, the government body cannot silence the speaker based on what they say on that topic. This is at the core of First Amendment jurisprudence. The government cannot tell the public what to say; rather, it can only place reasonable restrictions on where and when to say it. The School Committee's key error in *Spaulding*, it appears, was not in opening the School Committee meetings for speech, or in requiring speakers to stay on topic. Rather, the mistake was in prematurely cutting off speakers they believed would discuss topics the public officials deemed inappropriate. Although it can be difficult to do so, public officials should remain open to letting

members of the public make their complete comments and, only if necessary, redirect speakers to stay on topic. Further, fears that what a member of the public might say could create liability for public officials (e.g., if members of the public discuss private matters) can be overstated: given the speech courts require be permitted, it is unlikely that a court could construe a public officials' mere listening to speech as endorsing a particular viewpoint.

Biography

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Taming a Strange New Beast: Securities Regulators Take on Digital Currency

By Jack Falvey and Brendan Radke

The emergence of blockchain technology led in recent years to a surge in sales and trading of digital currencies – including well-known currencies like Bitcoin as well as hundreds of offerings of so-called digital “tokens” issued for use on individual websites. In 2017 and 2018 alone, more than \$20 billion was raised through “initial coin offerings,” in which technology companies, typically startups, sold tokens for use on their web-based platforms. Federal and state regulators have scrambled to understand the technologies behind this new class of assets, including whether and by whom they should be regulated. The federal Securities and Exchange Commission (“SEC”) has been at the forefront in these efforts. In April 2019, after two years of proceeding in fits and starts, it recently issued guidance that finally seeks to set firm ground rules for issuers. This article reviews the SEC’s and other regulatory and enforcement responses to date, and the landscape going forward.

Digital Currency Basics

What is Blockchain Technology?

Digital currency is built on blockchain technology, often described as a “distributed ledger” digital technology. A blockchain is a form of online database that operates upon a peer-to-peer network of computers. Those networks may be decentralized, meaning that transactions upon the ledger are independently verified by individual computers (called nodes) accessing the network rather than being routed through a proprietary central data system. In a blockchain transaction, a user requests a transaction; that request is broadcast to the network of nodes; and those nodes verify the transaction and the user’s status through a known algorithm. Once verified, the transaction is combined with others and memorialized in entries called “blocks” of data for the ledger. Finally, the new block is cryptographically (*i.e.*, securely) linked to the previous block after validation by the network, and added to the existing blockchain. The resulting blockchain is immutable, and the new block of data then is available to the next user on the chain. Major financial and technology firms have embraced and invested heavily in blockchain: it is widely expected to cut costs and processing times sharply in fields such as financial services and supply chains.

What is Digital Currency?

The best-known application of blockchain is Bitcoin, the digital currency created over a decade ago whose market value rose as high as \$20,000 per digital coin at its peak in 2017 before falling sharply since. Bitcoin and its competitors (such as Ether and Litecoin) are sometimes referred to as “cryptocurrencies” – digital assets that can be used as exchange media in online commercial transactions with parties. The novelty of cryptocurrency is that it requires no third-party bank or other agency to clear transactions: the transfer occurs directly between two parties and is permanently memorialized on the blockchain. Cryptocurrencies are now exchange-traded and widely distributed, with growing acceptance among mainstream businesses.

Digital currency also includes so-called digital “tokens,” a term used because conceptually, they are said to operate like arcade tokens – they function like money on the host’s website. A digital token typically works on the framework of an existing blockchain (say, on the Ethereum blockchain) rather than a blockchain unique to the issuing company, and is generally capable of use only upon the issuing company’s application. Hundreds of companies have issued tokens as a feature of their applications – typically to attract users to the site and seek to build loyalty in a wide range of uses.

What is an Initial Coin Offering?

Issuers have offered tokens for sale in a process referred to as an “initial coin offering” or “ICO.” In advance of token sales, offerors have issued an offering document, usually referred to as a “white paper,” that generally described the company, its plans for the token sales and their intended use, and, to varying extents, how the issuer plans to use the proceeds from the token sales. Until recently, the offerors usually didn’t conceive of the tokens as securities, in part because the tokens had a designated utility on the offeror’s web-based platform, and in part because they were referred to as “tokens” or “coins.” The offering materials typically had nowhere near the required content of a registration statement that would need to have been filed with the SEC in an offering of securities.

Despite the often scant offering information, ICOs in the last several years attracted a community of purchasers who collected and traded the tokens. Issuers sold tokens in limited supply; and third parties launched unregulated, online trading exchanges through which tokens could be traded and their value bid higher than the issuing price. The result was a considerable amount of speculation on their value.

The market for digital tokens exploded in 2017 and early 2018. While available data is inexact, hundreds of ICOs are thought to have raised roughly \$20 billion in those two years alone. Total funds raised through ICOs increased from 2017 to 2018, while at the same time the average offering size was halved, from an average of \$24 million in 2017 to \$12 million in 2018. ICOs were launched around the globe. Initially, China had the largest presence in this market (until it essentially outlawed them in late 2017). The United States accounted for most of the market in 2017, and the United Kingdom, Singapore, and Eastern European countries also became popular forums.¹ Amounts raised have dropped sharply since early 2018, with an estimated \$100 million having been raised in the first several months of 2019.²

The SEC Takes on Digital Currency

The success of many ICOs and the subsequent climb in many tokens’ trading value commanded the attention of state and federal regulators in 2016 and 2017. The SEC saw a need to balance “support [of] innovation and the application of beneficial technologies” with concerns that issuers were essentially raising capital in defiance of securities laws.³

The DAO Report and *Munchee* Order

In mid-2017 – after billions had already been raised through ICOs – the SEC began a series of incremental steps to delineate its regulatory and enforcement reach.⁴ In the so-called DAO Report issued in July 2017 (involving a virtual organization known as “the DAO”), the SEC announced that digital currencies were securities if they met the test for an “investment contract,” an enumerated type of security

¹ Daniele Pozzi, ICO Market 2018 vs 2017: Trends, Capitalization, Localization, Industries, Success Rate, Cointelegraph (Jan. 5, 2019), <https://cointelegraph.com/news/ico-market-2018-vs-2017-trends-capitalization-localization-industries-success-rate>.

² #*Crypto Utopia*, Autonomous NEXT, <https://next.autonomous.com/crypto-utopia> (last visited May 16, 2019); Paul Vigna, *Bitcoin Is in the Dumps, Spreading Gloom Over Crypto World*, WSJ (Mar. 19, 2019), <https://www.wsj.com/articles/bitcoin-is-in-the-dumps-spreading-gloom-over-crypto-world-11552927208?mod=searchresults&page=1&pos=5>.

³ Public Statement on Digital Asset Securities Issuance and Trading (Nov. 16, 2018), <https://www.sec.gov/news/public-statement/digital-asset-securities-issuance-and-trading>.

⁴ William Hinman, Director, Division of Corporation Finance, Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), <https://www.sec.gov/news/speech/speech-hinman-061418>.

under the federal securities laws.⁵ The SEC applied the Supreme Court’s 1946 decision in *SEC v. W.J. Howey Co.* that defined an investment contract – essentially, any contract that involves an investment of money in a common enterprise with a reasonable expectation of profits from the efforts of others.⁶ The DAO Report found the digital token at issue to be a security, but under a relatively unique set of facts; the DAO currency carried with it voting and profit-sharing rights, which most digital currencies lack and which strongly resemble rights associated with common stock.⁷

The next SEC action of note was its December 2017 Cease and Desist Order to a token issuer called Munchee that provided more generally-applicable guidance.⁸ The *Munchee* Order indicated that a token would likely be deemed a security if a company: primed purchasers to expect profits (*e.g.*, by describing how a token would or could increase in value); broadly marketed tokens rather than targeting sales to users of the platform; and/or used proceeds from the token sale to further develop the platform. All of these activities suggested that the Munchee token met the key *Howey* factors: purchasers reasonably expected to profit from the efforts of others by holding the tokens and were investing in a common enterprise, *i.e.*, development of the platform. The company agreed to shut down its offering.

SEC Enforcement Remedies for Failure to Register

In late 2017 and most of 2018, the SEC stepped up its public statements referring to digital currencies as securities. Top SEC officials noted that they were proceeding carefully but also that, as SEC Chairman Clayton stated in late 2017, he had “yet to see an ICO that doesn’t have a sufficient number of hallmarks of a security.” The SEC had issued dozens of investigatory subpoenas to issuers in 2017, but it had commenced few actions against digital currency offerors.

In late 2018, the SEC brought and settled two enforcement actions spelling out, for the first time, the remedies that it would demand where it determined that an ICO amounted to an unregistered securities offering. In each case it: imposed penalties of \$250,000; required implementation of a public claims process whereby investors who purchased the tokens in the initial offering would notified of their rights to sue and a mechanism by which they could recover the consideration paid for the tokens plus any amounts to which they are entitled under Section 12(a) of the Securities Act; required registration of the tokens as securities; and required ongoing compliance with its public reporting requirements.⁹

⁵ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207 (July 25, 2017), <https://www.sec.gov/litigation/investreport/34-81207.pdf>. (“The DAO Report”).

⁶ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207 (July 25, 2017), *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946) (the definition embodies a “flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits”); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (“form should be disregarded for substance”); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975) (the emphasis should be “on economic realities underlying a transaction, and not on the name appended thereto.”); see 15 USC § 77(b)(a)(1), Section 2(a)(1) of the Securities Act of 1933 and 15 U.S.C. § 78c(a)(10), Section 3(a)(10) of the Securities Exchange Act of 1934.

⁷ The DAO Report, at 1, 3.

⁸ Public Statement, SEC Statement Urging Caution Around Celebrity Backed ICOs (Nov. 1, 2017), <https://www.sec.gov/news/public-statement/statement-potentially-unlawful-promotion-icos>; In the Matter of Munchee Inc., Securities Act Release No. 10445 (Dec. 11, 2017), <https://www.sec.gov/litigation/admin/2017/33-10445.pdf>.

⁹ Press Release, SEC, Two ICO Issuers Settle SEC Registration Charges, Agree to Register Tokens as Securities (Nov. 16, 2018) <https://www.sec.gov/news/press-release/2018-264>.

The SEC's settlement in February 2019 settlement with Gladius Network was also significant, since it signaled the somewhat softer line it would take in a scenario where the issuer self-reported and cooperated. As with the prior settlements, the company agreed to register its tokens and establish a notice and claims process, but avoided any monetary penalty due to its self-report, cooperation, and remedial steps.¹⁰

The April 2019 Investment Contract Framework and First No-Action Letter

Finally, and most recently, the SEC announced on April 3, 2019 two significant actions. First, it issued a "Framework for 'Investment Contract' Analysis of Digital Assets" ("Framework") that, though not a rule or regulation, provides a roadmap for how the SEC intends to apply *Howey*.¹¹ It states essentially that two factors drive its analysis: whether the purchaser would be relying on managerial efforts of others, and whether he or she anticipated profits from those efforts. Key factual considerations are: the state of development of the issuer's network; whether company management continued to oversee it; and whether the issuer had taken any steps to enhance the token's market price including its tradability on secondary markets. A token has a better chance of avoiding classification as a security if (1) the token is not designed for use as an investment, (2) the network on which it is utilized is complete prior to the sale, and (3) there is little, if any, opportunity for price appreciation.

On the same date, the SEC's Corporation Finance Division issued its first "no-action letter" to a token issuer, allowing it to proceed with an unregistered token issuance on the issuer's proposed terms, which aligned with the Framework factors.¹² The requestor, TurnKey Jet, Inc. proposed to issue a token usable to purchase private jet services through its network. The SEC stated it would take no action against the company if the unregistered sale adhered to the proposed terms. Among the terms prescribed in the letter were that the tokens were usable immediately upon sale, TurnKey Jet would not use sale proceeds to develop its network, the tokens' value was fixed at a dollar, they would be repurchased only at a discount and could not be used or transferred elsewhere, and that marketing would focus solely on the tokens' functionality.

The Framework and no-action letter together provide a guide to whether and how an offeror may avoid having its token classified as a security and being subject to SEC registration and regulation. Alternatively, token issuers whose tokens will be deemed securities might be able to structure more restricted offerings so as to comply with any of several different exemptions: Regulation D, applicable to private offerings to qualified investors; Regulation S, a safe harbor applicable to offerings occurring solely overseas; or Regulation A+, providing a streamlined process for SEC registration, disclosure, and review of certain offerings capped at \$50 million, with other restrictions.¹³ Finally, more established digital-token offerors may just bite the bullet and pursue a traditional securities offering. For example, in April 2019, blockchain software provider Blockstack filed with the SEC a securities registration statement for a \$50 million token sale pursuant to Regulation A+.

Other Federal and State Law Enforcement

¹⁰ Gladius Network, LLC, Securities Act Release No. 10608 (Feb. 20, 2019), <https://www.sec.gov/litigation/admin/2019/33-10608.pdf>.

¹¹ Statement on Framework for "Investment Contract Analysis of Digital Assets" (Apr. 3, 2019), <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets>.

¹² TurnKey Jet, Inc., SEC No-Action Letter (Apr. 3, 2019), <https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm>.

¹³ See 17 C.F.R. §§ 230.500 et seq.; 17 C.F.R. §§ 230.901 et seq.; 17 C.F.R. §§ 230.251 et seq.

While the SEC has been the most visible actor, a range of government agencies have sought to regulate or launch enforcement matters in connection with ICO activity. They include:

U.S. Department of Justice: The Department of Justice has actively investigated and prosecuted a number of high-profile cases against individuals for fraud and money laundering based on deliberate and materially misleading statements in connection with ICOs and other token sales. Recent cases include *United States v. Zaslavskiy*, No. 17-CR-647 (E.D.N.Y.) (filed October 2017), the first federal criminal action against an ICO issuer; *United States v. Rice*, No. 3:18-CR-587-K (N.D. Tex.) (filed November 2018); and *United States v. Crater*, No. 19-CR-10063 (D. Mass.) (filed February 2019).

U.S. Commodity Futures Trading Commission: The Commodity Futures Trading Commission (“CFTC”) views certain digital currencies as commodities and has pursued enforcement actions and published extensive guidance in the area.¹⁴ It deems virtual currencies to be commodities under the Commodity Exchange Act,¹⁵ which prohibits fraud in the sale or trading of commodities and derivative instruments based upon commodities. Recently, two federal courts upheld the CFTC’s position that digital currencies are commodities.¹⁶

Financial Crimes Enforcement Network: FinCen, the U.S. Department of the Treasury’s Financial Crimes Enforcement Network, has issued guidance concerning digital currency since 2013. In 2018, it announced that it too intends to apply its regulatory requirements to digital currencies, and on May 9, 2019, it issued extensive guidance describing how crypto businesses may be considered “money transmitters” and thus subject to the restrictions of the Bank Secrecy Act and other laws.¹⁷

State regulators and Cross Border Actions: Securities and financial services regulators in Texas, Massachusetts, and New York all have brought recent enforcement matters. Cross-border, the North American Securities Administrators Association, an organization of state, provincial, and territorial

¹⁴ The SEC largely concedes that the cryptocurrencies Bitcoin and Ether aren’t securities, in light of their decentralized and operational networks, but this will remain a fact-specific inquiry. The Director of its Division of Corporate Finance observed in June 2018: “[W]hen I look at Bitcoin today, I do not see a central third party whose efforts are a key determining factor in the enterprise... Applying the disclosure regime of the federal securities laws to the offer and resale of Bitcoin would seem to add little value... Over time, there may be other sufficiently decentralized networks and systems where regulating the tokens or coins that function on them as securities may not be required.” W. Hinman, Remarks at the Yahoo Finance All Markets Summit, <https://www.sec.gov/news/speech/speech-hinman-061418>; see also <https://www.cftc.gov/Bitcoin/index.htm>.

¹⁵ See 7 U.S.C. § 1a(9) (commodities include “all other goods and articles ... and all services, rights and interests ... in which contracts for future delivery are presently or in the future dealt in”); *In the Matter of Coinflip, Inc., d/b/a Derivabit*, CFTC No. 15-29 (Sept. 17, 2015), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliporder09172015.pdf>; *CFTC v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018); *CFTC v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492 (D. Mass. 2018);

¹⁶ *McDonnell*, 287 F. Supp. 3d at 228 and *My Big Coin Pay, Inc.*, 334 F. Supp. 3d at 498.

¹⁷ U.S. Dep’t of Treas., Letter to The Honorable Ron Wyden (Feb. 13, 2018), <https://coincenter.org/files/2018-03/fincen-ico-letter-march-2018-coin-center.pdf>; Kenneth A. Blanco, Director, FinCEN, Prepared Remarks at the 2018 Chicago-Kent Block (Legal) Tech Conference (Aug. 9, 2018), <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-2018-chicago-kent-block>; Kenneth A. Blanco, Director, FinCEN, Prepared Remarks at the 11th Annual Las Vegas Anti-Money Laundering Conference and Expo (Aug. 14, 2018), <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-11th-annual-las-vegas-1>; FIN-2019-G001, “Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies,” (May 9, 2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20CVC%20Guidance%20FINAL.pdf>.

securities regulators, announced a coordinated series of state and provincial enforcement actions in the United States and Canada.¹⁸

Conclusion

The SEC has proceeded cautiously in its early years of addressing digital currency offerings. Ultimately, though, its enforcement matters in 2017 and 2018, capped by its April 2019 guidance, have sought to thwart the use of ICOs to raise operating capital without complying with securities laws. Going forward, those involved in digital currency offerings will need to navigate carefully the federal securities laws, other federal and state laws, and the efforts of myriad enforcement authorities who will be closely watching the digital currency arena for currency, antifraud, and other regulatory compliance.

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¹⁸ In the Matter of Mintage Mining, LLC, Tex. State Sec. Board, Order No. ENF-19-CDO-1774 (Feb. 21, 2019), https://www.ssb.texas.gov/sites/default/files/Mintage_ENF_19_CDO-1774.pdf; 2018 Enforcement Report, Tex. State Sec. Board (Feb. 7, 2019), https://www.ssb.texas.gov/sites/default/files/YEAR_IN_ENF_2018_post.pdf; Press release, NASAA, State and Provincial Securities Regulators Conduct Coordinated International Crypto Crackdown (May 21, 2018), <http://www.nasaa.org/45121/state-and-provincial-securities-regulators-conduct-coordinated-international-crypto-crackdown-2/>; Letter, N.Y. Dep't of Fin. Servs., In re Bittrex, Inc. (Apr. 10, 2019), <https://www.dfs.ny.gov/system/files/documents/2019/04/dfs-bittrex-letter-41019.pdf>.

Recovering Punitive Damages in Attorney Malpractice Cases

By Jessica Kelly

Former clients of attorneys frequently assert Chapter 93A claims in legal malpractice cases, but they do not often win Chapter 93A damages. In Massachusetts, a plaintiff, in extreme circumstances, may recover under Chapter 93A as a result of an attorney's unfair and deceptive conduct. It is unclear, however, whether a former client can recover Chapter 93A damages he or she could have recovered in an underlying case in a subsequent legal malpractice action. Available Massachusetts case law, including an unreported decision on a motion *in limine* by the Superior Court in Chafetz v. Day Pitney LLP, et al., No. SUCV 1484-03597 (Mass. Super. Ct. May 25, 2018), suggests that lost punitive damages, such as those available under Chapter 93A, are not recoverable in a professional negligence case.

I. General Law on Damages Recoverable in Legal Malpractice Actions

Legal malpractice claims represent a hybrid of contract and negligence causes of action, yet recovery is generally limited to tort-based damages, e.g. direct and consequential damages for the reasonably foreseeable losses plaintiff suffered as a result of the attorney's negligent conduct. Plaintiffs often try these claims as a "case-within-the-case," having to prove that they would have obtained a better outcome in the underlying matter had the attorney not breached the standard of care. Plaintiffs also have to prove both the damages they would have recovered, and the collectability of those damages.

Direct damages are those reasonably flowing from the tortious conduct, such as the value of a lost settlement or judgment or the attorneys' fees incurred to fix an attorney's mistake. Consequential damages are those losses that occur as a result of the direct loss, such as damage to reputation, lost profits and other economic losses. The economic loss doctrine, which usually precludes recovery for purely economic losses in negligence actions, is inapplicable to legal malpractice claims.¹

Plaintiffs must also prove that their damages are more than speculative and, if relevant, that they would be recoverable in the underlying action. Emotional distress damages are probably not recoverable in a Massachusetts legal malpractice action absent exceptional circumstances (such as a client being imprisoned as a result of attorney negligence), because emotional distress is usually not a reasonably foreseeable result of an economic loss.² As discussed in detail below, punitive damages and attorneys' fees incurred to prosecute a malpractice action are also not recoverable, unless the former client can also prove that the attorney's conduct violated Chapter 93A.

II. Recovery of Legal Malpractice Damages Under Chapter 93A

Chapter 93A, which protects consumers and businesses against unfair and deceptive business practices, applies broadly to the conduct of any business engaged in trade or commerce. Legal malpractice plaintiffs often plead a Chapter 93A claim on the assumption that the threat of treble damages and attorneys' fees can lead to quicker and more favorable settlements. The reality, however, is that it is rare for a legal malpractice plaintiff to recover damages under Chapter 93A. This is because ordinary negligence or breach of contract alone does not rise to the level of unfair and deceptive conduct. To recover under Chapter 93A, evidence of something more, such as self-dealing or fraudulent acts, must

¹ See Clark v. Rowe, 428 Mass. 339, 342-343 (1998).

² See Meyer v. Wagner, 429 Mass. 410, 423 (1999).

exist.³ It is also unlikely, albeit unsettled, that plaintiffs can recover lost Chapter 93A damages in a subsequent malpractice action.

A. Direct Claims Against Attorneys For Violation of Chapter 93A

The ability of a plaintiff to bring a direct claim under Chapter 93A in a legal malpractice action depends on whether the alleged conduct of the defendant attorney occurred within trade or commerce and whether the conduct is unfair or deceptive. Courts have held that “the practice of law constitutes trade or commerce for purposes of liability under [Chapter] 93A,” but the outcome is very fact dependent.⁴

The closer question is whether the attorney’s conduct was actually unfair or deceptive. An attorney will only be directly liable for violation of Chapter 93A for conduct involving “dishonesty, fraud, deceit or misrepresentation.”⁵ There are few decisions where a Massachusetts court has allowed a claim against an attorney to proceed past a dispositive motion⁶ and even fewer where the attorney was actually found liable under Chapter 93A.⁷ This limited set of case examples suggests, however, that conflicts of interest, financial misconduct and dishonesty are common themes for successful direct Chapter 93A claims regarding attorney misconduct.

B. Claims to Recover Lost Chapter 93A Damages

Although there is no Massachusetts appellate precedent on the issue, legal malpractice plaintiffs are likely barred from seeking punitive damages that they would have recovered in the underlying case absent their attorney’s negligence. Stated differently, it is unlikely that plaintiffs can seek from a former attorney in a legal malpractice action their missed opportunity to recover under Chapter 93A in the original litigation. The rationale was set forth in a motion *in limine* decision in a recent Superior Court action, Chafetz v. Day Pitney LLP, et al.

In Chafetz, the former clients sued two attorneys and two law firms alleging negligence in the handling of a lawsuit against the builder of the former clients’ home and in the builder’s eventual bankruptcy. Specifically, in relevant part, the former clients alleged that the defendants failed to file a non-dischargeable Chapter 93A claim in the builder’s bankruptcy action. The former clients claimed that

³ See *id.*, at 424.

⁴ Compare Brown v. Gerstein, 17 Mass. App. Ct. 558, 571 (1984) (plaintiffs satisfied trade or commerce element because attorney represented them in the context of commercial real estate business), with First Enterprises, Ltd. v. Cooper, 425 Mass. 344, 348 (1997) (internal business dispute was not trade or commerce for purposes of Chapter 93A).

⁵ Poly v. Moylan, 423 Mass. 141, 151 (1996).

⁶ See Blast Fitness Grp., LLC v. Dixon (*In re Blast Fitness Grp., LLC*), Ch. 7 Case No. 16-10236-MSH, Adv. No. 18-01011, 2019 WL 137109 (D. Mass. Jan. 8, 2019) (court held that a breach of duty of loyalty to clients was sufficient to state a claim for violation of Chapter 93A); Baker v. Wilmer Cutler Pickering Hale and Dorr LLP, 91 Mass. App. Ct. 835 (2017) (allegations that company’s lawyers participated in unlawful freeze out of minority members stated a claim for violation of Chapter 93A); Brown v. Gerstein, 17 Mass. App. Ct. 558 (1984) (trier of fact should have been allowed to determine whether attorney’s misrepresentation that he had filed complaint on behalf of clients to stop foreclosure violated Chapter 93A). Of course, the more egregious allegations of lawyers violating Chapter 93A may never appear in court decisions because those cases often settle early in the litigation.

⁷ See Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F.3d 10, 19 (1st Cir. 1997) (affirming judgement on Chapter 93A where attorney engaged in illegal billing practices); Guenard v. Burker, 387 Mass. 802, 809-810 (1982) (affirming finding that attorney’s reliance on unlawful fee agreement held to be a violation of Chapter 93A); Walsh v. Menton, No. 932738H, 1994 WL 879470, at *4 (Mass. Super. Ct. Sept. 23, 1994) (failing to apprise plaintiff “of the status of her account and to return her money upon demand was unfair as a matter of law”).

the “lost potential punitive damages” were a “‘reasonably foreseeable loss’ caused by [their attorneys’] negligence and thus recoverable in the malpractice action.”

On its face, the former clients’ claim made sense, assuming they could prove that the defendant in the underlying matter actually violated Chapter 93A. If it turned out that the attorneys were negligent in not bringing the Chapter 93A claim, the former clients’ missed opportunity to bring such a claim was an actual harm. The former clients’ ability to pursue damages for that harm is founded on the notion that plaintiffs in tort actions should be compensated “for all of the damages proximately caused by the defendant’s negligence.”⁸

The position that lost punitive damages are compensable in a legal malpractice action, however, is the minority view. This view was stated in Jacobsen v. Oliver, 201 F. Supp. 2d 93, 102 (D.D.C. 2002) where the United States District Court for the District of Columbia held that the former clients could assert claims for “lost punitives” in their legal malpractice action. The Court held that the policy reasons for compensating the plaintiffs for their actual harm caused by their attorneys’ negligence was more important than the policy reasons for shielding attorneys in a subsequent malpractice case from lost punitive damages. The Court also noted that “[a]ttorneys who appreciate that they will be liable in malpractice actions for ‘lost punitives’ will be motivated to exercise reasonable care in investigating or defending punitive damages claims.”⁹ Courts in other jurisdictions have taken similar positions.¹⁰

The Chafetz Court, however, took the majority view and granted Defendants’ motion *in limine* to preclude the recovery of punitive damages and/or any mention of them during trial. The Court held that plaintiffs could not seek the lost Chapter 93A damages because the public policy behind the statute is to punish and deter the wrongdoer, e.g. the defendant in the underlying case, and thus, would not be served by making the attorney defendants pay them. The Court also held that the Legislature enacted Chapter 93A to encourage the wrongdoer to settle and take responsibility early on for unfair and deceptive behavior. The Court wrote that the “public policy goal is not fostered by permitting recovery of lost punitive damages in a negligence case against a lawyer.”

The Chafetz Court relied, in substance, on three cases. The first was Kraft Power Corp. v. Merrill, 464 Mass. 145, 159 (2013), where the Supreme Judicial Court held that a plaintiff cannot seek Chapter 93A damages against a defendant who becomes or is deceased. This is because Chapter 93A “can no longer achieve the goals of punishing a defendant or deterring him from future misconduct when the wrongdoer has died.” While not on point to the circumstances in Chafetz, the Kraft case emphasizes that the purpose behind Chapter 93A is no longer served when the punitive and deterring effects of Chapter 93A are no longer directed at the actual wrongdoer.

The second case was Dwidar-Kotb v. Altman & Altman, LLP, NO. MICV2011-04614, 2013 LEXIS 840 (Mass. Super. Ct. Mar. 13, 2013), another Superior Court decision. In Dwidar-Kotb, the former client sued his lawyer for negligence arising from an employment matter in which the former client had sought, among other claims, damages under the Massachusetts Wage Act, which, like Chapter 93A, allows for the recovery of punitive damages. The Court held that the plaintiff could not seek punitive damages under the Wage Act in the subsequent malpractice action, holding that the “purpose of awarding punitive damages would not be accomplished or served in a malpractice claim against attorneys.” In other words,

⁸ Jacobsen v. Oliver, 201 F. Supp. 2d 93, 102 (D.D.C. 2002) (internal quotation omitted).

⁹ Id., at 102.

¹⁰ See also Haberer v. Rice, 511 N.W.2d 279, 288 (S.D. 1994); Hunt v. Dresie, 740 P.2d 1046, 1057 (Kan. 1987); Scognamillo v. Olsen, 795 P.2d 1357, 1361 (Colo. App. 1990); Elliott v. Videan, 791 P.2d 639, 645 (Ariz. Ct. App. 1989); Herendeen v. Mandelbaum, 232 So. 3d 487, 492 (Fla. Dist. Ct. App. 2017), review denied, No. SC18-132, 2018 WL 3239289 (Fla. July 3, 2018).

where the attorneys were not responsible for the Wage Act violations, but rather for the failure to bring the Wage Act claims, the purpose of imposing punitive damages no longer existed.¹¹

The third case was Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP, 69 P.3d 965 (Cal. App. 4th 2003), in which the California Supreme Court disallowed the recovery of lost punitive damages in a legal malpractice action. In Ferguson, the Court focused on, among other things, the “moral determination” involved in the award of the punitive damages and that such a determination is a highly subjective decision for the judge or jury in the first instance. As such, the Chafetz Court noted that it would be speculative for it to determine whether and what the Bankruptcy Court may have awarded as punitive damages in the underlying case assuming that the former clients proved that the attorney defendants had been negligent in not bringing the Chapter 93A claim.

The Chafetz Court distinguished the case before it from cases where the legal malpractice plaintiff was a *defendant* in the underlying case who then sought to recover the punitive damages awarded *against* him or her, which the plaintiff alleges would not have been assessed but for attorney negligence. Other courts have not made this distinction and have cited to cases involving both situations interchangeably.¹² From a practical standpoint, seeking to recover punitive damages against an attorney that were actually assessed in an underlying action, is much less speculative than seeking to recover damages that may or may not have been awarded in an underlying action. Perhaps the Chafetz Court left the door open for such claims in Massachusetts because of this significant difference.

In the end, the Chafetz Court entered an order precluding plaintiffs from seeking lost treble damages under Chapter 93A as part of their damages in the legal malpractice action. The decision is in line with the majority view and the purpose of Chapter 93A. Punitive damages are not compensatory, but rather provide the plaintiff a windfall “to punish and deter the wrongdoer”.¹³ Therefore, lost punitive damages should not become compensable in a later malpractice action.¹⁴

III. Conclusion

In sum, legal malpractice plaintiffs can recover for their actual damages, assuming they are not speculative and can be proven to a reasonable certainty. Their ability to recover under Chapter 93A, however, is very limited, unless the lawyer’s own conduct was unfair or deceptive. It is also likely that Massachusetts will follow the rationale of Chafetz and Dwidar-Kotb in regards to the recovery of lost punitives in a legal malpractice action if and when that issue reaches the appellate level.

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¹¹ The same rationale would likely apply to bar claims seeking “lost punitives” in malpractice actions where punitive damages were potentially recoverable in the underlying case under the Massachusetts wrongful death statute, M.G.L. c. 229, or the Massachusetts employment discrimination statute, M.G.L. c. 151B.

¹² See, e.g., Jacobsen, 201 F. Supp. at 100.

¹³ See M. O’Connor Contracting, Inc. v. City Of Brockton, 61 Mass. App. Ct. 278, 285 & n.12 (2004) (holding that punitive damages against municipality “punishes only the taxpayers, who took no part in the wrongful conduct, but who nevertheless may incur an increase in taxes or a reduction in public services as a result of the award”).

¹⁴ According to the Chafetz docket, the case settled shortly thereafter and thus, the appellate courts will have to wait for another case to decide this issue as binding precedent. Just as asserting a punitive damages claim can hasten settlement, so can removing it from consideration.

Look Before You Click: The Enforceability of Website and Smartphone App Terms and Conditions

By Kevin Conroy and John Shope

Modern technology allows individuals to conduct an ever-increasing number of activities through websites and internet-connected smartphone apps. The proprietors of those platforms frequently make their use subject to terms and conditions, some of which—such as arbitration clauses, forum selection clauses, waivers, licenses, and indemnification provisions—carry potentially significant legal consequences. Most users will not have read the terms and, in some instances, may not have even seen the terms or any reference to them. Do these terms amount to an enforceable contract? In at least some circumstances, the answer may be “no.” Answering the question in particular cases involves fact-intensive analysis and potential evidentiary challenges. Businesses offering such platforms, and their counsel, should be aware of these complexities and take precautions to maximize the likelihood that courts will enforce their terms.

The First Circuit and the Massachusetts Appeals Court have addressed this issue in cases involving the terms and conditions of a ride-sharing app and an email account. See *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018); *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565 (2013). In each case, the court concluded that users were not bound by the terms and conditions. *Cullinane*, 893 F.3d at 64; *Ajemian*, 83 Mass. App. Ct. at 575-76. Both courts employed a two-part test to assess whether the terms at issue amounted to an enforceable contract, asking: (1) whether the terms were “reasonably communicated” to the user, and (2) whether the terms were accepted by the user. *Ajemian*, 83 Mass. App. Ct. at 574-75; *Cullinane*, 893 F.3d at 62 (citing *Ajemian*). This two-part test is consistent with the approach taken by other courts around the country. E.g., *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017) (applying California law and articulating the test on a motion to compel arbitration as whether “the notice of the arbitration provision [contained in the terms] was reasonably conspicuous and manifestation of assent unambiguous as a matter of law.”).

A Spectrum of User Interfaces

Analysis of whether the requirements of “reasonable communication” and “acceptance” are satisfied begins with the interface presented to the user. While the possible variations are endless, interface designs tend to fall within three general categories, often referred to as “clickwrap,” “browsewrap,” and “sign-in-wrap” (sometimes called “hybridwrap”). In “clickwrap” interfaces, the user is required to take a distinct, affirmative action to indicate assent to the terms, such as checking a box or clicking a button stating “I agree.” Courts considering this category of interface generally have little trouble finding the necessary notice and assent. E.g., *Wickberg v. Lyft, Inc.*, 356 F. Supp. 3d 179, 184 (D. Mass. 2018).

On the other end of the spectrum is “browsewrap,” where a user receives notice of the terms only by means of a link at the bottom of the webpage (often undifferentiated from other links) or buried in the menus or settings of an app. A typical browsewrap interface does not offer any notice outside of the terms themselves that the user is purportedly agreeing to be bound. Nor does it offer the user any reason to follow the link and read the terms. Courts generally find that browsewrap interfaces do not create enforceable agreements. See *Ajemian*, 83 Mass. App. Ct. at 576 (“[W]e have found no case where [a forum selection clause] has been enforced in a browsewrap agreement”).

The question becomes more complicated and fact-intensive in the case of “sign-in-wrap” interfaces, where the user is informed that signing in, creating an account, or taking some other specified action (but

not an action distinct from the user's intended use of the website or app) will signify assent to the terms, which are often available by following a link within or adjacent to the text of the notice. In such cases, the enforceability of the terms depends on how clearly the interface design notifies the user that he or she will be bound by taking the specified action. Compare [Cullinane](#), 893 F.3d at 64 (finding that the design of Uber's account creation interface did not provide adequate notice to user) with [Meyer](#), 868 F.3d at 79 (assessing a different version of Uber's account creation interface and finding that the design *did* provide adequate notice).

The Importance of Good Design

Several common design features of "sign-in-wrap" interfaces have received judicial attention in determining issues of enforceability. While courts do not demand perfection, incorporating multiple design features that promote notice of the terms and make clear the user's manifestation of assent will increase the likelihood that the terms will be enforced.

Clearly important are the size and color of the language informing the user that proceeding will signify agreement to the terms and the link to the terms. Making these elements as large as other elements on the screen (preferably larger) and in a color that contrasts with the background so as to promote their readability will bolster the argument that the terms were reasonably communicated to the user. A perception that the notice or link is hidden in tiny or otherwise difficult-to-read font may cause a court to find that the user did not have adequate notice. Compare [Meyer](#), 868 F.3d at 78-79 (enforcing terms where text notifying user that creating account would signify assent to the terms, although small, was clearly visible, in contrasting color on an uncluttered screen) with [Cullinane](#), 893 F.3d at 62-64 (holding terms unenforceable in part because the notification appeared in a dark gray, small, non-bold font on a black background and because the screen contained many other elements in equal or larger font size).

The design of the interface should also make obvious to the user that the full content of the terms are available to read by following a link. See [Cullinane](#), 893 F.3d at 63 (questioning "whether a reasonable user would have been aware that the gray rectangular box was actually a hyperlink"). Although blue underlined text may be the quintessential indicator of a hyperlink, other appearances may also be adequate, so long as they are sufficiently differentiated from the surrounding text. E.g., [Wickberg v. Lyft, Inc.](#), 356 F. Supp. 3d 179, 181 (D. Mass. 2018) (pink, non-underlined link); [Selden v. Airbnb, Inc.](#), No. 16-cv-00933 (D.D.C. Nov. 1, 2016) (red, non-underlined links).

The placement of the notice and link are also important. If the notice and link appear above the button a user clicks to proceed, a user reading from top to bottom would encounter these elements, and have an opportunity to investigate the linked terms, before encountering the button to proceed. Courts have also enforced terms where the notice and link are placed below, but in reasonable proximity to, the relevant button. Compare [Meyer](#), 868 F.3d at 78 (finding that placement of the notification text and link directly below the relevant button, immediately visible without any scrolling, contributed to enforceability of terms) with [Specht v. Netscape Communs. Corp.](#), 306 F.3d 17, 23 (2d Cir. 2002) (not enforcing terms where reference to the terms would have been visible "only if [the user] had scrolled down to the next screen"); see also [McKee v. Audible, Inc.](#), No. CV 17-1941-GW(Ex), 2017 U.S. Dist. LEXIS 174278, at *27-28 (C.D. Cal. July 17, 2017) (placement of notice and link to terms at the bottom of the screen "approximately 30-40% of the screen's length below" the button to proceed, separated by a horizontal line, contributed to inadequate notice).

Placing the notice and link below the relevant button creates another potential obstacle to enforcement of the terms: if the screen prompts the user to enter information such as a username, password, or email address, users on a smartphone or tablet may see a software keyboard appear on the screen when they begin to enter the requested information. Because this software keyboard generally appears at the bottom

of the screen, it may obscure the notice and link. At least one court has found that this contributed to lack of the necessary notice, *see McKee*, 2017 U.S. Dist. LEXIS 174278, at *27-28, although it is reasonable to argue that what matters is what the user sees before he or she engages the keyboard.

Courts also give attention to the particular words used to inform the user that proceeding will signify assent to the terms. If the user is not required to take any action to assent to the terms other than the actions inherent in the ordinary use of the website or app (such as signing in or creating an account), the consequences of that action should be clear to the user. One way to accomplish this is to match the language of the notice to the action the user takes. For example, if the user is required to click a button labelled “Create Account,” the notice should inform the user that “by clicking ‘Create Account’ you indicate acceptance of our terms and conditions.” Where the words used for the notice do not parallel the description of the action, a court may question whether it is sufficiently clear to a user that he or she is assenting to the terms by taking that action. *See, e.g., TopstepTrader, LLC v. OneUp Trader, LLC*, No. 17 C 4412, (N.D. Ill. Apr. 18, 2018) (declining to enforce terms where user clicked a button labelled “Sign Up,” accompanied by a statement reading “I agree to the terms and conditions,” because the website “gave the user no explicit warning that by clicking the ‘Sign Up’ button, the user agreed to the [t]erms”); *see also McKee*, 2017 U.S. Dist. LEXIS 174278, at *22-23 (identifying lack of parallel wording as a factor weighing against enforcement of the terms); *but see Meyer*, 868 F.3d at 80 (“Although the warning text used the term ‘creat[e]’ instead of ‘register,’ as the button was marked, the physical proximity of the notice to the register button and the placement of the language in the registration flow make clear to the user that the linked terms pertain to the action the user is about to take.”).

Finally, the timing and context in which the terms are presented can also contribute to the enforceability of the terms. Several courts have observed that, where the terms are presented in conjunction with a purchase or the creation of an account involving a transactional relationship, an average user is more likely to understand that the transaction or relationship will be subject to the terms. *See Meyer*, 868 F.3d at 80 (“The transactional context of the parties’ dealings reinforces our conclusion.”); *Selden v. Airbnb, Inc.*, No. 16-cv-00933 (D.D.C. Nov. 1, 2016) (“The act of contracting for consumer services online is now commonplace in the American economy. Any reasonably-active adult consumer will almost certainly appreciate that by signing up for a particular service, he or she is accepting the terms and conditions of the provider.”).

Litigation Challenges

Litigating the question of whether a user is bound by the terms of a website or app can present challenges beyond analyzing the interface type and design choices. Because the party seeking to enforce the terms bears the burden to prove adequate notice and manifestation of assent, that party (often the proprietor of the website or app) will need to present evidence of what the user actually saw and did. Where that party is seeking to enforce an arbitration or forum selection clause, it will likely want to satisfy this burden early in the case, before conducting discovery.

The proponent of the terms thus should maintain records of *when* the user accessed the website or app and what it looked like at those times. Because websites and apps are occasionally redesigned, and terms are occasionally updated, simply presenting screenshots of the current version of the website or app is unlikely to satisfy the burden of establishing what the user saw and did. Instead, the proponent of the terms must be prepared to establish when the user took the relevant action on the website or app, what the operative version of the website or app looked like at that time, and which version of its terms were presented to the user. Providing such evidence may be particularly challenging depending on the amount of time that has passed and the ability of the proponent to access or recreate historic versions of the website or app.

Presenting evidence of how the interface appeared to a particular user may be further complicated if the appearance varied based on the device used to access it. A website, for example, may appear differently when viewed on a laptop or desktop computer screen than when viewed on a smartphone. The differing screen size may affect what is immediately visible to the user without scrolling and the relative conspicuousness of the notice and terms vis-à-vis other elements. In the case of smartphone users, there might also be meaningful variation in the appearance of the interface depending on the size of the phone used. *See, e.g., Cullinane*, 893 F.3d at 56 n.3 (noting the 3.5 inch screen size of the iPhone used to access the app in question and reproducing the screenshots in the opinion to correspond to that size). Inability to identify the device used could prevent early enforcement of an arbitration clause or forum selection clause and require further discovery. Conversely, the party challenging the terms might argue insufficient notice by offering competing evidence as to what he or she saw when using the website or app. For example, even if the proponent can establish that the user accessed the website on a desktop computer, the user may have done so in a browser window that occupied less than the full screen, changing the appearance of the interface and potentially the adequacy of the notice. A user will not, however, avoid enforcement of the terms simply by asserting that he or she does not recall seeing notice of the terms or did not read the terms.

Conclusion

Given the potential consequences of enforcement of terms, such as application of an arbitration clause foreclosing a class action, challenges to enforcement will likely continue to arise. Prudent counsel will do well to guard against such challenges through recommending careful design choices and electronic records retention.

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Heads Up

Obtaining National Consensus on Key Opinion Practices: An Introduction to the Statement of Opinion Practices

By Stanley Keller and Steven O. Weise

Over several years, the Legal Opinions Committee of the American Bar Association's Business Law Section (the "ABA Legal Opinions Committee") and the Working Group on Legal Opinions Foundation ("WGLO") worked jointly on a project to identify key aspects of customary practice and other practices applicable to third-party legal opinions that are commonly understood and accepted throughout the United States. Third-party legal opinions (also known as "closing opinions") are sometimes delivered at the closing of a business transaction by counsel for one party to satisfy a condition of the other party's obligation to close. The purpose of the joint project was to foster a national opinion practice that is widely recognized and endorsed, building upon the "[Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions](#)," 63 Bus. Law. 1277 (2008), which was approved by over 30 bar associations and other lawyer groups.

The project was undertaken by a committee of more than 25 members, which included representatives of various state bar groups and others interested in opinion practice. The members included both lawyers who give opinions and lawyers who are counsel to opinion recipients, and whose primary practice areas included commercial finance transactions, capital markets and securities, and real estate.

The result of the project was the recent issuance of the "[Statement of Opinion Practices](#)" (the "Statement") and related "[Core Opinion Principles](#)," both described below, and their approval by many bar associations and other lawyer groups, including the Boston Bar Association.

The Statement of Opinion Practices updates the "Legal Opinion Principles," 53 Bus. Law. 831 (1998), and selected provisions of the "Guidelines for the Preparation of Closing Opinions," 57 Bus. Law. 875 (2002) (the "Guidelines"). The Statement covers such topics as the application of customary practice to third-party legal opinions, the role of facts and assumptions and the law addressed by opinions, as well as key aspects of the opinion process. By using relatively concise and direct statements, it is designed to be easily understood by those called upon to interpret opinions and to create a common understanding for opinion givers and opinion recipients and their counsel to facilitate the opinion process.

In connection with preparation of the Statement, the project committee also prepared the Core Opinion Principles, which is a more concise document drawn from the Statement and designed to be incorporated by reference in or attached to an opinion letter by those who wish to do so. The Statement and Core Opinion Principles are accompanied by an "[Explanatory Note](#)," which includes a table of sources from the Legal Opinion Principles and the Guidelines and identifies those provisions of the Guidelines that are updated by the Statement.

The completion, approval and publication of the Statement of Opinion Practices and Core Opinion Principles is a significant accomplishment toward establishing and harmonizing a national third-party legal opinion practice. The authors of this introduction hope that the Statement and Core Opinion Principles will serve the purpose of facilitating third-party legal opinion practice.

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A Streamlined Form of Closing Opinion (2019 Update)

By Donald W. Glazer and Stanley Keller

At the closing of many business transactions, counsel for the company delivers to the other party – e.g., the investor, lender or acquirer – a letter, commonly referred to as a “closing opinion,” in which counsel provides that other party (the opinion recipient) legal opinions on various matters it has asked counsel to address. Though each closing opinion must be tailored to the specific transaction, closing opinions in general tend to address many of the same matters in similar ways from transaction to transaction.

The meaning of opinions and the work required to support them are based on the customary practice of lawyers who regularly give and who regularly advise opinion recipients regarding opinions of the type being given in the transaction. Customary practice allows opinions to be expressed in only a few words and permits the lawyers preparing them to rely on many unstated assumptions and limitations. By amplifying the meaning of abbreviated opinion language, customary practice provides the framework for preparing and interpreting opinions, thus facilitating the opinion process.

As recognized in the Restatement (Third) of the Law Governing Lawyers, Section 95 (Reporter’s Note to Comment c), customary practice is described and discussed in bar association reports and scholarly writings. In 1998, the Boston Bar Association’s (“BBA”) Legal Opinions Committee of the Business Law Section issued a statement in which it characterized the then new TriBar Opinion Committee’s report, “Third-Party ‘Closing’ Opinions,” 53 Bus. Law. 591 (1998), and the “Legal Opinion Principles,” 53 Bus. Law. 831 (1998), published by the American Bar Association’s (“ABA”) Legal Opinions Committee of the Business Law Section as providing a helpful description of the customary practice followed by Massachusetts lawyers in the preparation and interpretation of closing opinions. In 2002, the ABA’s Legal Opinions Committee issued revised “Guidelines for the Preparation of Closing Opinions,” 57 Bus. Law. 875 (2002) (the “Guidelines”), and, following its 1998 report, the TriBar Opinion Committee supplemented that report with several additional reports. In 2008, the [“Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions,”](#) 63 Bus. Law. 1277 (2008) (the “Customary Practice Statement”), was published. The Customary Practice Statement was approved by many bar associations and other lawyer groups, including the Boston Bar Association, and described the principal elements of customary practice that form the basis for legal opinion practice.

In its 1998 statement, the BBA had noted the desirability of a “more streamlined opinion letter” that omitted disclaimers, qualifications and assumptions which the Legal Opinion Principles made clear are understood to apply, as a matter of customary practice, whether or not stated expressly. Subsequently, the BBA Legal Opinions Committee prepared a streamlined form of closing opinion that could be used by both opinion givers and opinion recipients. That streamlined form, prepared under the supervision of this article’s authors and representing the work of lawyers in many Boston-area firms, was endorsed by the BBA as a useful document to facilitate the closing opinion process and enhance the efficiency of business transactions and was published in the January/February 2006 issue of the Boston Bar Journal.

Subsequently, effort was undertaken to develop a statement of opinion practices that could be endorsed by many bar associations and other lawyer groups as expressing a national consensus on key aspects of opinion practice based upon customary practice. That effort produced the current [“Statement of Opinion Practices”](#) and related [“Core Opinion Principles”](#) which updates the Legal Opinion Principles in their entirety and selected provisions of the Guidelines. The Statement and the Core Opinion Principles have been approved by many bar associations and other lawyer groups, including the BBA Council on March

19, 2019. The Core Opinion Principles are derived from the Statement and can be incorporated by reference in or attached to a closing opinion by those who desire to do so.

The authors of this article have updated the BBA streamlined form of closing opinion to refer to the Core Opinion Principles and to reflect developments in legal opinion practice since 2006 (as updated, the “[Streamlined Form](#)”).

The Streamlined Form is not intended to be prescriptive. Rather, reflecting a broad consensus on acceptable opinion practices, the Streamlined Form is designed to serve as a helpful starting point for lawyers in drafting closing opinions and as guidance on the opinions lawyers can advise clients to accept. The Streamlined Form addresses an unsecured bank loan. Attachment A to the Streamlined Form includes opinions that would typically be given on the issuance of stock. The explanatory notes to the Streamlined Form, while intended to provide helpful information, cannot substitute for the extensive literature that exists on closing opinions.

The Streamlined Form seeks to address opinion issues in a balanced way. Some noteworthy features are:

- The language used to incorporate definitions from the underlying agreement is more precise than language often used in closing opinions.
- The form avoids the use of the phrase “to our knowledge,” which courts have not consistently interpreted as a limitation. Note 23 suggests a formulation that makes clear that this phrase, if used, is intended as a limitation.
- The introductory paragraphs sharpen the description of the factual investigation undertaken, thus avoiding the suggestion that the opinion preparers conducted a broader investigation than actually performed. The description also makes clear that the opinion preparers may have relied on certificates of public officials for legal matters.
- The corporate status opinion does not use the terms “duly incorporated” or “duly organized,” both of which require a more detailed investigation than many transactions require. The elimination of these terms has been widely accepted for many transactions.
- Paragraph 5 contains a more precise formulation of the no violation of law and no breach or default opinions than appeared in the original form.
- Note 18 provides an analysis of the Restatement approach, which has been adopted in Massachusetts and many other states, for determining when the governing law provision in an agreement should be given effect.
- Note 19 addresses opinions on the enforceability of forum selection provisions that are sometimes requested in cross-border transactions.
- The form proposes a formulation of the no-litigation “opinion” that is narrower than the one often used in the past. (The “opinion” is a factual confirmation and therefore more accurately referred to as a no-litigation confirmation). The narrower formulation is offered as an alternative to declining to cover litigation at all, although the omission of any statement regarding litigation in closing opinions has gained increased acceptance.
- The form includes a provision, often referred to as the “Wachovia provision,” that makes clear limitations on the right of assignees of notes to rely on a closing opinion.
- Attachment A addresses opinions on a corporation’s outstanding capital stock and rights to acquire stock. It also includes a form of opinion that the issuance of the stock does not require registration under the Securities Act of 1933.
- The form leaves space for exceptions rather than identifying particular exceptions that are commonly taken.

No form can accommodate every factual situation or eliminate the need for lawyers to exercise care in preparing closing opinions. Nevertheless, attorneys who have treated the streamlined form of closing

opinion as a starting point in drafting their closing opinions have found that it improves the efficiency of the opinion process. We are hopeful that its approach will continue to gain acceptance to the mutual benefit of both opinion givers and opinion recipients.

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Case Focus

Until Death Do Us Part(ition)

By Elizabeth Sillin and Colin Korzec

On January 8, 2019, the Massachusetts Supreme Judicial Court issued [Ciani v. MacGrath](#), 481 Mass. 174 (2019), which clarified certain provisions of the Massachusetts spousal elective share statute, [G.L. c. 191, § 15](#). Specifically, *Ciani* held that the surviving spouse's elective share of the deceased spouse's real estate is a life estate in possession, not simply an income interest for life. A right to partition (and sell) the real property is now borne – a right that may severely disrupt the estate plan of the testator. Additionally, the SJC again urged the Legislature to update the elective share statute due principally to the fact that the statute is “woefully inadequate to satisfy modern notions of a decedent spouse's obligation to support the surviving spouse or modern notions of marital property,” [Bongaards v. Millen](#), [440 Mass. 10](#), 21 (2003).

Background

Raymond Ciani died testate in 2015 survived by his wife, Susan, and his four adult children from a prior marriage. Raymond did not make any provisions in his will for Susan. Susan timely filed for her elective share of Raymond's estate in accordance with [G.L. c. 191, § 15](#).

Raymond died with personal property valued at just under \$40,000 and with multiple parcels of real estate valued at just under \$638,000. Susan brought partition actions seeking to force the sale of real estate in order to monetize her interest therein. Raymond's children claimed she did not have a right to force the sale, and that she had the right only to receive income produced by the real estate.

The Massachusetts elective share provisions are found in [G.L. c. 191, §§ 15](#) and [16](#) (the Elective Share statute). The Elective Share statute was enacted to prevent spousal disinheritance, either by inadvertence or design. It provides a mechanism by which a surviving spouse can waive the provisions of a deceased spouse's will and take instead a statutorily prescribed share of the decedent's estate.

The Elective Share statute provides a formulaic approach to determining the amount of the surviving spouse's claim. The formula depends on whether the deceased had issue and/or kindred, as well as on the dollar amount of the deceased's estate. The Elective Share statute provides, in part:

[I]f the deceased left issue, [the surviving spouse] shall thereupon take one third of the personal and one third of the real property . . . ; except that . . . if [the surviving spouse] would thus take real and personal property to an amount exceeding twenty-five thousand dollars in value, he or she shall receive, in addition to that amount, only the income during his or her life of the excess of his or her share of such estate above that amount, the personal property to be held in trust and the real property vested in him or her for life, from the death of the deceased. [G.L. c. 191, § 15](#).

The dispute in this case centered on the nature of a Susan's interest in a Raymond's real property where the income-only limitation applies, i.e., where Susan's share of Raymond's personal and real property, taken together, exceeds \$25,000 in value. Susan contended that she held a life estate in an undivided one-third of each parcel of real property and that Raymond's children were tenants in common subject to her life estate. Raymond's children contended that Susan's interest in real estate is limited to an income interest for life, not a life estate. The issue was one of first impression. The judge in the Superior Court reported the ruling to the Appeals Court and the SJC granted direct appellate review.

The *Ciani* Decision

The SJC construed the Elective Share statute by first looking at its plain language and then whether the legislative history supported the Court’s interpretation. The SJC declared:

[W]e read the statute this way: the first clause (“only the income during his or her life”) limits the surviving spouse to an interest in the “income only,” and the second clause (“the personal property to be held in trust and the real property vested in him or her for life”) describes how that limitation is to be achieved for each type of property — the personal property is to be held in trust and the real property is to be vested in the surviving spouse for life.

Ciani, 481 Mass. at 180-81.

Next, the SJC considered the legislative history of the elective share concept to test its statutory interpretation. *Id.* at 183-85. The first iteration of the Elective Share statute simply provided for a widow’s right to waive the provisions made for her in her husband’s will and afforded her a life estate in a prescribed portion of her husband’s real property. In 1833, the statute was revised to afford the widow a limited claim to a deceased husband’s personal property. The statute was reworked in 1854 to allow the spouse to take instead an intestate share of his estate, along with a \$10,000 limitation on the personal property. Around 1861, the concept of the income-only interest in the personal property was introduced. Subsequent revisions around 1900 brought the statute to what it largely looks like today, including the expansion of the statute to include surviving husbands. An additional revision in 1964 adjusted the \$10,000 figure to the current \$25,000. *Id.*

The SJC found that the history of the statute demonstrated that the Legislature consistently and intentionally treated personal and real property differently from the outset. *Id.* The income-only limitation initially applied only to the decedent’s personal property. It was not until 1900 that the real property limitation was enacted. And even then, the SJC held, the real property limitation was characterized as “vested” and not as an “income only” limitation. *Id.* at 186. The fact that the Legislature did not enact an analogous provision for the management of the real property, but instead instructed that the excess of the surviving spouse’s share thereof would be “vested,” supported the Court’s conclusion that the Legislature intended for the surviving spouse to take an ownership interest in the excess. *Id.* The fact that the Legislature simultaneously anticipated that the surviving spouse’s share would be “set off” for the duration of his or her life also supported the conclusion that the Legislature intended to convey a life estate. *Id.*

Ultimately, the SJC found that (i) Susan holds an estate in possession, for life, in her share of the real property, and (ii) Raymond’s children hold an estate in possession, absolutely, in the remaining property, as well as an estate in remainder in Susan’s share. As a result, the parties are tenants in common as to their estates in possession and each has a right to a partition. Instead of simply having the right to live in the house, Susan has the right to force a sale of the property and realize a monetary sum upon the sale. Indeed, Raymond’s children also now have the right to partition as well – possibly forcing Susan out of the house in which she wishes to continue to live. This right has the potential to disrupt a well-intended estate plan by allowing the forced sale of the family residence over the objections of certain members of the family.

Postmortem – My Kingdom for a Postnuptial

The Court noted parenthetically that the Elective Share statute, which has been around in some form since 1783, is “unwieldy and perplexing to apply” and “decidedly gendered” and “in desperate need of an update” by the Legislature to conform with modern notions of spousal support obligations and marital property. *Ciani*, [481 Mass. at 187 n.12](#). Indeed, as the Court noted, a similar appeal to the Legislature was made in 1984 in [Sullivan v. Burkin](#), 390 Mass. 864 (1984), some 35 years ago. *Id.* Several attempts have been made over the years by various bar association committees to address the spousal elective share. To date, no consensus has emerged in Massachusetts about modernizing the elective share law. Until such time as

it does, estate planners must continue to take advise clients as to the pitfalls of the current law and to give further consideration to prenuptials or postnuptials as part of the estate planning process.

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