

BostonBarJournal

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A Publication of the Boston Bar Association

**Deep Impact: The Economic Crisis
and Legal Services Funding**

**New Standing Order: Hello Standard
Definitions, Goodbye General Objections**

**Child Abuse and a New Child Advocate:
Changes in Investigation and Oversight**

**At Last! The Massachusetts Uniform
Probate Code**

**Class Action Scrutiny: Will Massachusetts
Courts Follow Emerging Federal Trends?**

***Commonwealth v. Fremont*: Innovative
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The Lawyers' War on Terrorism and Human Rights



At the Law Day Dinner in 2007, the Boston Bar Association recognized 36 Boston lawyers for their pro bono representation of Guantanamo Bay detainees. In presenting the award, then BBA President Jack Cinquegrana stated “[e]ven as these lawyers have suffered the derision of those who confuse political debate with disloyalty, and the preservation of individual rights

with disrespect for the public’s protectors, they courageously forge ahead to uphold principles that we as a profession know are sacred.”

Lawyers did not always play such a laudatory role in the years following September 11. In *The Dark Side*, ranked as one of *The New York Times* ten best books of 2008, Jane Mayer recounts the Bush administration’s abuse of civil liberties in its war against terrorism. What is particularly troubling is the participation of government lawyers in sanctioning the administration’s misdeeds. Among other things, lawyers supported the indefinite detention of both foreign nationals and U.S. citizens as “illegal enemy combatants” without providing them any meaningful opportunity to contest their status. Lawyers approved the government’s secret eavesdropping on American citizens’ telephone conversations and other communications without warrants required by the Foreign Intelligence Surveillance Act. They endorsed the extradition of terrorist suspects to countries such as Egypt, Morocco, Syria and Uzbekistan where they were tortured. And they authorized the Central Intelligence Agency and military to use “enhanced” interrogation techniques themselves, including beatings, confinement in small crates, and simulated drowning known as waterboarding.

According to Mayer, the vice president’s counsel, David Addington, played a central role in devising the administration’s legal strategy for the war on terror. Just as important was the part played by Berkley Law Professor John C. Yoo when he served as deputy chief in the U.S. Department of Justice’s Office of Legal Counsel. The OLC is perhaps the most prestigious and powerful legal office in the federal government; its opinions generally are binding on the entire executive branch. Through a series of written memoranda issued in the immediate aftermath of September 11 through the summer of 2003, the OLC established the legal foundation for the administration’s efforts to fight terrorism at any cost to human rights.

Many of those memoranda have been publicly released – several as recently as in early March 2009 – and reading the

OLC’s legal positions is chilling. In its interrogation memoranda, for example, the OLC misinterprets the criminal torture statute so that it applies only in the narrowest of circumstances. The requirement for “severe” physical pain is twisted to require pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” The OLC posits that mental pain or suffering is severe only when the psychological harm is of “significant duration, i.e., lasting for months or even years.” But it is the OLC’s constitutional analysis that strains credibility. The lawyers assert, among other things, that

- As commander-in-chief, the president is unrestrained in the exercise of his power to use whatever means he deems necessary to prevent attacks against the United States.
- Congress has absolutely no authority to interfere with the president’s national security powers.
- The First and Fourth Amendments do not restrict the president’s powers domestically when he is acting in the national defense.
- The president can nullify the Geneva Conventions and other treaties in the exercise of his commander-in-chief powers.

Many of the OLC’s contentions plainly were wrong. The U.S. Supreme Court has rejected several in cases like *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). When Yale Law School Dean Harold Koh read the 2002 interrogation memorandum, he called it “perhaps the most clearly erroneous legal opinion I have ever read”; the DOJ expressly withdrew it in 2004. In October 2008, the OLC repudiated a 2001 opinion supporting the president’s unfettered use of the military domestically to combat terrorism. On January 15, 2009, five days before a new president was sworn in, the OLC wrote that numerous positions asserted in nine opinions from 2001 to 2003 no longer reflect its current views.

The harm was already done. In responding to the dangers of a post-9/11 world, Addington and Yoo failed to act as lawyers, who, as one former top State Department lawyer put it, “have to be the voice of reason and sometimes have to put the brakes on, no matter how much the client wants to hear something else.” But they did not just fail to stop wrongdoing. Rather, as Jack Goldsmith (who assumed leadership of the OLC in late 2003) recounted, the OLC memoranda were viewed as “golden shields” against criminal prosecution. The legal advice gave the president, CIA officials, military officers and others the license to act with impunity. The lawyers who gave it bear at least moral responsibility for the human rights violations that resulted. ■

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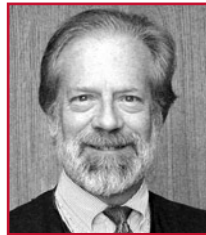
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N.B. Judges serving on the Board of Editors of the *Boston Bar Journal* do not participate in discussions about or otherwise contribute to articles regarding impending or pending cases.

By Manisha H. Bhatt

Deep Impact: The Economic Crisis and Legal Services Funding



Manisha H. Bhatt is a senior attorney in the Family Law Unit at Greater Boston Legal Services. She serves on the Boston Bar Journal Board of Editors.

It is 9:00 a.m. Greater Boston Legal Services (GBLS) has just opened for business and the reception area is swarmed with people with various legal problems. Some are elderly, disabled or otherwise unable to work, but have been denied social security benefits. Some are homeless, struggling to find shelter from the winter's frigid temperatures. Some are abuse victims desperate to live an abuse-free life. All of these people are poor. They come to our firm as their last hope for legal representation to safeguard their fundamental human rights: the right to suitable housing, the right to live independently and the right to live free of fear. Since the economic crisis began in the summer of 2008, people who were once ineligible for our services have become eligible (a household income of \$510 per week or less for a family of four). Unemployed doctors, lawyers and other highly educated professionals are now coming to GBLS for services. An advanced degree unfortunately does not grant immunity from life's problems and the need for legal assistance in times of crisis.

The high volume of clients that come to GBLS mandates that we have three full-time receptionists to handle the unending telephone calls and the numerous people walking in the office desperate for services. Because of our office's proximity to the Probate and Family Court, Housing Court, Department of Employment and Training, Department of Mental Health, Social Security Office and Immigration Court, panicked clients walk in without an appointment, having just been denied unemployment benefits, having just been served eviction papers, or experiencing a combination of emergency situations. To accommodate these emergencies, each department has one attorney or paralegal on "emergency duty." Reception contacts the appropriate staff member who then meets with the client, advises her and assesses the case for representation. When a receptionist goes on a much-needed lunch break, another staff person must cover because two receptionists are not enough to handle the incessant client stream. Indeed, in its more than 100 years of existence GBLS has always been a flush law firm — flush with clients. It has never been flush with funding.

The Numbers

Legal services agencies statewide are funded by the Massachusetts Legal Assistance Corporation (MLAC). IOLTA and the state budget fund MLAC. The housing crisis devastated IOLTA revenue such that the projection for funding legal services programs for fiscal year 2009 is \$9 million compared to \$17 million in fiscal year 2008 — an unprecedented 54% reduction in one year. In addition to the IOLTA cuts, MLAC received an additional 6% cut in the fiscal year 2010 state budget. These cuts are dealing a crushing blow to legal services.

GBLS is one of 17 legal services organizations local and statewide that receive MLAC funding. As the program serving the largest number of people, GBLS receives 25 cents of every dollar appropriated to MLAC. Our 140-person firm includes attorneys, paralegals, administration and support staff. Dedicated law students, the majority of whom

volunteer their time because of lack of funding, and volunteer lawyers consistently augment our ability to provide critical services to our clients. Each year we serve over 15,000 clients in the areas of elder law, public benefits law, immigration law, health and disability law, employment law, housing law, consumer law and family law. We have a unit that provides outreach to and represents the Asian community. Despite the large volume of people that we serve, we are forced to turn away half the people eligible for services because we do not have enough staff to handle their cases. Even in prosperous economic times, we struggled to meet the needs of an extremely deserving but unrelenting client stream.

The dawn of the subprime crisis led to an eclipse of legal services funding nationwide. This unprecedented decline in funds resulted in staff downsizing in legal services offices statewide. We are not immune to the downsizing epidemic. GBLS alone lost \$2 million in annual IOLTA funding in the last six months. GBLS staff are taking a salary reduction, hoping to save jobs. Despite the reduced salaries, everyone knows that there are no guarantees. The grim financial forecast places 20 people (or perhaps more) at risk of losing their jobs. For the last three months, each practice unit has been strategizing how a staff potentially reduced by 10-15% can serve a growing client population. Fresh, new ideas for expanding client services that each GBLS unit entertained in early 2008 are now being put on hold. The prospect of a reduced work force requires us to focus instead on delivering the most basic and urgent services.

But what do the numbers really mean?

A couple of months ago, I was staffing the domestic violence center in Suffolk Probate and Family Court. A frightened, 22-year-old woman came to me for assistance with a restraining order. Her partner had physically and sexually abused her. This client impressed me because, despite her young age, she was quite knowledgeable about her rights. I represented her in the initial *ex parte* hearing. We were scheduled to return to court for a second hearing 10 days later. I informed my client of the process. She told me that her sister would accompany her at the next hearing for emotional support.

At that next hearing, I saw a former client, a woman whom I had represented six years earlier in a restraining order and divorce case when she was 22. I asked her what

she was doing back in court. She replied, “Manisha, you now represent my little sister. I’m here for support. Apparently, this stuff (domestic violence) runs in the family. I told my sister that I got through it, that she has rights, and she is going to get through it too. She does not have to put up with this nonsense.” I was speechless. After a few moments, I regained my composure and asked her to update me about her life. She told me that she is pursuing a master’s degree in nursing and that she is working part-time in a local hospital to pay for school. I was so happy for her!

At the end of the hearing, I hugged both clients goodbye. I was amazed that the scared, overwhelmed young woman that I represented six years ago is now a nurse, caring for countless many and empowering her little sister to leave an abusive relationship. I began to wonder: How many other legal services clients are there that have, in turn, educated and empowered others to fight against injustice? How can we accurately quantify the impact of the work that we do? Can we really measure the human impact of the cuts in our staffing? I do not think it is possible.

Conclusion

Knowledge, when used for the greater good, is like a pebble thrown into calm waters – the resulting wave spreads farther and farther. Serving one client results in serving countless clients, because once people are educated about their rights, they empower others to fight for themselves. Therefore, the numbers about legal services funding cuts tell an incomplete story. I wonder: what is the monetary value of ensuring that a family has food stamps so children receive adequate nutrition? What is the value of removing obstacles low wage earners face so they maximize their employment opportunities and their income to support their families? What is the value of helping a family live in suitable housing and not on our streets? What is the value of rescuing a person from torture and persecution by helping them get political asylum? What is the value of helping children growing up in a peaceful, abuse-free household? Is GBLS’ \$2 million cut indicative of the resulting tear the loss of legal services will make to the fabric of our just society? My colleagues and I ardently believe there is no accurate way to measure the devastation of these cuts. We remain steadfast in our effort to provide our clients with critical services to the best of our abilities while we remain in GBLS’ employ. A just society cannot afford that we do otherwise. ■

By Andrew A. Rainer and Judge Janet L. Sanders

New Standing Order: Hello Standard Definitions, Goodbye General Objections



Andrew A. Rainer is an Assistant Attorney General, and the coordinator of the bi-monthly Suffolk Superior Court Bench-Bar-Clerk meetings.



Judge Janet L. Sanders was appointed to the Superior Court in October 2001. She is currently the Regional Administrative Justice for Norfolk County. She serves on the Superior Court Education Committee and on the Supreme Judicial Court Committee on Judicial Performance Evaluations. She serves on the Boston Bar Journal Board of Editors.

The scenario is a familiar one in civil litigation: one attorney sends the other a twenty-page request for production of documents, which begins with six pages of boilerplate definitions. Opposing counsel responds with multiple objections to the definitions, together with the same general objection to each request that it is “vague and unduly burdensome.” He then produces documents “subject to” this general objection.

Two years later, on the eve of trial, it is discovered that one party wrote various e-mails on the topic of the litigation that were not produced. Each attorney faults the other. The judge is caught in the middle: did the requesting attorney drop the ball in failing to clarify with opposing counsel what had not been produced, are sanctions appropriate against the attorney who appears to have failed to provide a complete response, and more important, should the trial be postponed to allow further discovery?

Superior Court Standing Order 1-09, which took effect January 12, 2009, is intended to prevent precisely this kind of situation. The new definitions for written discovery contained in the Standing Order provide a uniform framework for discovery requests. The Standing Order also prohibits the use of general objections and places responsibility on the producing attorney to define the scope of the search that was made and to identify in general terms what was withheld.

Before this Standing Order was adopted, the responsibility to achieve clarity in production lay more with the lawyer receiving the information. That lawyer may — or may not — have had enough experience to detect ambiguities in opposing counsel’s discovery responses. Clarifying that response would then require chasing down opposing counsel with phone calls and letters — maybe even a motion to compel. This Standing Order is intended to put everyone on a more even footing.

The genesis of the Standing Order was a series of discussions among lawyers and Superior Court judges meeting regularly in Suffolk County. Lawyers in the group expressed frustration with the common practice of incorporating into discovery requests detailed definitions of commonly used terms, such as “documents,” “identify,” and “concerning.” Local Rule 26.5 of the United States District Court for the District of Massachusetts contains a set of definitions for these terms that practitioners in that court have used for many years. Courts in California and New York have similar rules.

The discussions also identified another area of concern voiced by a number of

judges. In an effort to protect themselves from an inadvertent waiver of a legitimate objection, counsel responding to discovery requests would routinely preface their responses with general objections. Such objections, however, obscured the fact that not all responsive information was being produced.

With these discussions as background, the Rules Committee of the Superior Court, then chaired by Judge Ralph Gants, drafted a proposed standing order, which was published and circulated among members of the bar for comment, then approved by the Superior Court judges in the fall of 2008. As finalized, Standing Order 1-09 includes the following:

- A uniform set of definitions of terms commonly used in all written discovery requests. Although a party may add definitions tailored to the particular litigation, counsel need not waste time and paper to recreate these standard definitions every time a set of interrogatories or document requests goes out, since they are now incorporated automatically. Moreover, by standardizing the definitions, the Standing Order eliminates any ground for responding counsel to object to them.
- Prohibition of the widespread practice of general objections to interrogatories. All objections must be specific to a particular interrogatory and must have a good faith basis. If a party responds to an interrogatory after making a specific objection, that party must also state whether any information has been withheld. If it has been, then the nature of the information withheld must be described generally and a justification offered for withholding it.
- Clarification of objections to the production of documents and things. Production is often an ongoing process, and general objections are permitted until that process is completed. Once production is complete, however, the responding party must be specific if he or she objects to the production of certain items, and must describe in general terms the nature of the documents or things not produced because of the objection. The responding party must also be clear as to the scope of the search that was conducted, and identify areas or locations that were not searched.

It is also important to understand what this Standing Order does NOT do:

- It does not expand the scope of discovery. The scope of discovery is defined by Rule 26(b) to include “any matter not privileged” that is relevant to the subject matter of the pending action, so long as the request is reasonably calculated to lead to admissible evidence.
- The Standing Order does not recognize any difference between electronic discovery and paper discovery – nor should it. As parties leave more pixel trails than paper trails these days, principles of discovery should not turn on the format in which information is maintained.
- Although the Standing Order draws no distinction between electronic information and that which is printed on paper, it does not require that electronic discovery must be undertaken in every case. The cost or burden of retrieving electronic data may be too great to merit such a search when measured against what is at stake in the particular case. What the Standing Order does require, however, is candor: if electronic storage locations are not searched, then the lawyer responding to a discovery request must inform the opposing side and explain why the search was not more extensive. If opposing counsel is not satisfied, then at least the issue is on the table, and can be resolved upfront rather than sprung on a judge or the opposing party late in the litigation.
- The Standing Order should not be construed to require attorneys to spend a large amount of time reviewing irrelevant material. Although the attorney responding to a discovery request must describe in general the categories of documents or information not produced, that obligation can be met without reviewing each and every document in that category.

Certainly, Standing Order 1-09 will require some changes in the way attorneys conduct discovery and may, in the short run, even increase the number of discovery disputes. It requires that each side be more candid with the other. However, it was promulgated with the understanding that lawyers would be reasonable in their discovery demands. A lawyer who is unreasonable in those demands stands little chance of convincing a judge to enforce them. ■

By Jinanne S. J. Elder

Child Abuse and a New Child Advocate: Changes in Investigation and Oversight



Jinanne S.J. Elder is partner in the Cambridge, Massachusetts law firm of Bowman, Moos, Elder & Noe. She focuses her practice on family law, administrative law, foster care and adoption, probate, child abuse and neglect, guardianship and conservatorship.

In July, 2008, Governor Patrick signed two bills comprising Chapter 176 of the Acts of 2008 revising the law and practice affecting children alleged to suffer abuse and neglect and their families, codifying in G.L. c. 18C the Office of Child Advocate, previously established by executive order, and changing the name of the Department of Social Services to Department of Children and Families (“DCF”). The legislation’s alterations of the child abuse and neglect reporting and investigation process and grant of authority to the Child Advocate are particularly interesting.

The Child Abuse and Neglect Reporting and Investigation Process

Ch. 176 made four sets of revisions to the process surrounding reports to DCF of suspected child abuse and neglect under G.L. c. 119, §51A, known as “51A’s” or “51A reports,” and DCF’s investigation of these reports under G.L. c. 119, § 51B, known as “51B investigations” which produce “51B reports”.

Interface with criminal justice system accelerated. The amendments accelerate the criminal justice system’s involvement in the treatment of 51A reports by: (1) explicitly authorizing, thus implicitly encouraging, mandated reporters – the long list of professionals who come in contact with children and must report suspected abuse or neglect – to contact local police or the Child Advocate, in addition to filing a 51A report with DCF; (2) authorizing hospital personnel to photograph visible areas of trauma on a child without a parent’s consent, and requiring them to transmit the photos immediately to DCF and to notify DCF and law enforcement immediately if they collect other physical evidence of abuse or neglect; (3) requiring that DCF notify the district attorney and police immediately when evidence indicates reasonable cause to believe that a child has died or suffered serious abuse, sexual assault or exploitation as a result of abuse or neglect, or where evidence of physical abuse may be destroyed, rather than waiting as under prior practice until the end of the 51B investigation.

Confidentiality and privilege exceptions expanded. Prior law required mandated reporters to disclose confidential information to DCF during a 51B investigation, regardless of any statutory or common law privileges, only if (1) the information was relevant to the specific investigation; (2) the mandated reporter believed that such information might aid DCF in determining whether a child had been abused or neglected; and (3) the investigator requested the information. The revisions significantly broaden mandated reporters’ obligations. Even if a mandated reporter does not

file the 51A report under investigation, he or she must provide information to DCF that *relates to* the investigation, regardless of his or her belief regarding its relevance to the investigation, and irrespective of its otherwise privileged or confidential nature under common law or any statute. Moreover, the broadened exception extends to litigation. No statutory or common law privilege precludes the admission of *any* such information gleaned in the investigation in *any* civil proceeding concerning child abuse and neglect or placement, *or* custody of a child.

Investigation time frames expanded. Ch. 176 also extends the time frames for completing emergency and non-emergency 51B investigations, thus opening opportunities for families to provide and DCF personnel to compose a fuller picture of the circumstances relating to the issues under investigation. While emergency investigations still must begin within two hours of receiving the 51A, the 51B investigator must now make an initial determination and interim report within 24 hours and complete the final report within five business days rather than one as previously. Non-emergency investigations must begin within two business days and be completed within fifteen business days, rather than ten calendar days under prior law. The DCF area director may approve a waiver extending the investigation periods on her own initiative or at the request of law enforcement.

Multiple reports, false reporting and failure to report addressed. DCF must convene clinical review teams when three or more 51A reports involving separate incidents have been filed on the same child or on any child in a family within a three month period and must immediately notify law enforcement and the Child Advocate when the review is completed. To protect against both false reporting and failures to report, fines have been increased and the potential for imprisonment in the house of correction for up to two years added.

The Child Advocate

The Act also codifies in a new G.L. c. 18C the Office of the Child Advocate who is appointed by and reports directly to the Governor. The Child Advocate is charged with (1) ensuring that children in state care and custody receive timely, safe and effective services and humane and dignified treatment, along with a free and appropriate education; and (2) conducting a systemic examination of the care and services provided to children and families.

Investigatory authority. Agencies within the Executive Office of Human Services must notify the Child Advocate of “critical incidents,” defined as the death, near death or serious bodily injury of a child in the custody of or receiving services from the agency, or of circumstances creating a reasonable belief that an agency failed to protect a child causing imminent risk of or serious bodily injury to the child. The Child Advocate must also receive and address complaints from the public and children in state care. In evaluating these complaints, the Child Advocate may subpoena witnesses and documents and access and inspect relevant records of any facility, residence or program. She may also review a variety of records from which rules of privilege and confidentiality might otherwise bar her. The Child Advocate must maintain the confidentiality of such records but may submit the results of her investigations of critical incidents to the governor, attorney general, district attorney, agency personnel, or chairs of the joint committee on children and families.

Systemic study and reform. In consultation with a twenty-five member advisory board and a new interagency child welfare task force, the Child Advocate must create a five year plan for a coordinated, systemic response to child abuse and neglect. The plan must include related mental health, substance abuse and domestic violence services and address issues such as the reporting and investigation processes, placements, staff qualifications and service delivery models.

What Does It Mean?

By augmenting the investigatory tools available for unveiling child abuse and neglect and involving the criminal process early on, Ch. 176 promotes a faster, more aggressive response to serious allegations of child abuse, moves the fulcrum point further away from family privacy and autonomy to family intervention and child protection, and expands the evidence available in private as well as state-involved child custody disputes. The increased potential for criminal prosecution should impel implicated caretakers to take protective measures promptly and consult with criminal defense counsel early in the investigation. The Child Advocate’s powers heighten the scrutiny and accountability of the child protection system. They also provide a mechanism for thoughtful study and improvement of the system. Taken together, the ramifications of both sets of changes will be interesting to watch. ■

By Raymond H. Young and Leiha Macauley

At Last! The Massachusetts Uniform Probate Code



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On January 15, 2009, Governor Patrick signed Senate Bill Number 2622, enacting the Massachusetts Uniform Probate Code (“MUPC”) as Massachusetts G. L. c. 190B. Through the diligent efforts of the Massachusetts Bar Association/Boston Bar Association Joint Committee on the Uniform Probate Code, practitioners and state representatives, and nearly 40 years after the National Conference of Commissioners on Uniform State Laws approved and recommended the Uniform Probate Code for enactment in all states, Massachusetts has joined the numerous other states that have adopted variations of the UPC. Provisions relating to guardians and guardianship proceedings, personal representative bonds, and durable powers of attorney go into effect on July 1, 2009. The remainder of the MUPC goes into effect on July 1, 2011. The MUPC will simplify and streamline the administrative process for routine trust and estate matters, modernize the laws governing Massachusetts trusts and probate matters, and align Massachusetts trust and estate laws more closely with those of other jurisdictions.

The MUPC applies to pre-existing governing instruments, but it does not apply to those instruments that became irrevocable prior to its effective date. The MUPC also *will apply* to any proceedings in court pending on, or commenced after, its effective date, *regardless* of the date of the death of the decedent, unless the court finds the former procedure should apply in a particular matter. Unless there is a clear indication of contrary intent, any rule of construction or presumption provided in the MUPC applies to governing instruments executed (but not yet irrevocable) before the effective date.

Significant Changes for Practitioners

Estate Administration

INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS. If a decedent dies testate, a magistrate may issue a statement of informal probate of the will and appoint a personal representative

upon the filing of a petition with the original will and a death certificate, and at least seven days' notice to heirs and devisees. Informal probate will keep a simple will that generates no controversy from becoming caught up in lengthy judicial proceedings, with the following streamlined changes:

- A will submitted for informal probate need not be notarized so long as it is properly attested by witnesses.
- The personal representative must publish notice within 30 days after issuance of the informal probate statement.
- While an inventory must be prepared, the personal representative does not need to file an inventory or accounts with the court.
- A closing statement will settle the administration and foreclose claims from beneficiaries and creditors if certain conditions are met.

SUPERVISED ADMINISTRATION. Upon a court order for supervised proceedings, the entire administration of a decedent's estate will fall within the court's oversight and will be viewed as one continuous proceeding. Under supervised administration, the personal representative may not distribute assets without court order. Any interested party may request supervised administration, and a testator may affirmatively request or discourage supervised administration in her will. Ultimately, however, the court will determine whether administration will be supervised.

CHANGES TO INTESTATE SUCCESSION. The MUPC directs that all property, both real and personal, not disposed of by a decedent's will, passes to heirs in the same manner. Also, the MUPC enlarges a surviving spouse's share of an intestate estate to:

- All intestate property if the decedent's and surviving spouse's only surviving descendants are descendants of their marriage;
- \$200,000 plus $\frac{3}{4}$ of any balance if the decedent is survived by a parent but no descendants;
- \$200,000 plus $\frac{1}{2}$ of the balance if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more descendants who are not descendants of the decedent; or
- \$100,000 plus $\frac{1}{2}$ of the balance if one or more of the

decedent's surviving descendants are not descendants of the surviving spouse.

The MUPC does not alter current law concerning a spouse's waiver of a will.

PREMARITAL WILLS. Under current law, marriage revokes a will unless it is clear from the will that it was executed in contemplation of the marriage. Under the MUPC, unless a will expresses a contrary intention, a surviving spouse will receive an intestate share of that portion of the estate passing under the will to anyone other than the decedent's descendants.

PRIVATE AGREEMENT AMONG SUCCESSORS. By private agreement, successors (those who succeed to a decedent's interests under a will or under the laws of intestacy) may alter the shares, interests, or amounts of distributions to which they are entitled, and the personal representative is bound by the agreement.

OTHER ESTATE ADMINISTRATION CHANGES INCLUDE:

- An increase in the small estate ("voluntary") administration personal property ceiling to \$25,000.
- A decrease to 4 percent of the interest earned on a pecuniary devise under a will or pecuniary distribution under a trust unpaid one year after the decedent's death.
- Distribution instructions will have binding effect for tangible personal property that can be identified from a separate writing signed by the testator.
- After divorce, non-probate property transfers to a former spouse will be revoked, making the rule applicable to transfers of probate and non-probate property the same.
- An executor has the power, prior to appointment, to carry out the decedent's written instructions with regard to the decedent's body, funeral, and burial arrangements.
- If there is any question as to the validity of a decedent's will, or if the original will cannot be located, an interested party must bring a formal testacy proceeding to obtain a court order validating the will. Likewise, if a decedent dies intestate with assets in excess of the voluntary administration ceiling, an interested party must file a formal testacy petition for adjudication of intestacy.

Trust Administration

NO CONTINUING COURT OVERSIGHT FOR TRUSTS. Testamentary or *inter vivos* trust petitions for various matters, including appointment and removal of a trustee, settlement of accounts, determination of questions arising out of administration, compromise of some controversies, and termination and distribution, will not subject the trust to continuing supervisory proceedings.

FORECLOSING BENEFICIARY CLAIMS. A beneficiary has only six months after receiving a final account or statement showing the trust termination or termination of the trustee's appointment to commence a breach of trust claim. Such receipt by a minor beneficiary's parent will likewise bar a claim commencing more than six months after receipt.

OTHER CHANGES FOR TRUSTEES AND BENEFICIARIES INCLUDE:

- Within 30 days of accepting a trustee appointment, the trustee must notify all current beneficiaries (and beneficiaries with future interests, if possible) of (a) the appointment, (b) the court having jurisdiction over the trust, and (c) the trustee's name and address.
- A trustee is required to release annual accountings and a copy of the governing instrument to a beneficiary who makes a request.
- A trustee has an express duty to administer the trust in a situs appropriate to the trust's purposes and its efficient management.
- In formal proceedings concerning trusts and estates, the MUPC extends limited virtual representation, permitting a person who is not otherwise represented, or is unborn or unascertained, to be bound by an order to the extent his or her interest is represented by another party with a substantially identical interest.
- A parent may represent a minor child if there is no conflict of interest.

Guardianship and Conservatorship

DISTINGUISHING GUARDIANSHIP AND CONSERVATORSHIP. Under current law, the court may appoint a guardian of the person and a guardian of the estate. The MUPC provides that a guardian will make decisions pertaining to the "incapacitated" person's support, care, health, and welfare, and a conservator will manage the "protected" person's property. Without good cause to act otherwise, the court will appoint as guardian or as conservator (or both) the individual named in the incapacitated person's most recent durable power of

attorney. Both conservatorship and guardianship provisions list others entitled by successive priority.

PARENTAL DELEGATION TO AGENT. A parent or guardian may appoint a temporary agent for a period of up to 60 days and may delegate to that agent any power that the parent or guardian has concerning the care, custody or property of the minor or incapacitated person.

PARENTAL APPOINTMENT OF GUARDIAN. A parent's appointment of a guardian now will be effective immediately upon the first to occur of the parent's death, a doctor's statement that the parent is unable to care for the minor, or the court's adjudication that the parent is an incapacitated person. The guardian must then accept the appointment within 30 days by petitioning the court to confirm the appointment.

COURT OVERSIGHT OF GUARDIANS AND CONSERVATORS. The MUPC increases its oversight of all guardian and conservator appointments in the following manner:

- Guardians must report in writing to the court within 60 days of appointment detailed information about the incapacitated person, his living arrangements, required services, the guardian's visits, plans for future care, opinions as to current care, and more.
- Conservators are subject to the Uniform Prudent Investor Act and must provide an inventory of the protected person's estate within 90 days.
- An annual report and review is required for a guardian and conservator.
- The guardian does not have the authority to revoke the incapacitated person's health care proxy.
- After specific findings of the court, a minor's conservator may establish a revocable trust for the minor's benefit, extending the trust term beyond the age of majority, and a protected person's conservator has broad authority to establish an estate plan, including the power to make, amend or revoke the protected person's will.
- The probate court may no longer grant a guardian authority to commit an individual to a mental health or retardation facility. Such authority may only be granted to a guardian by the district court.
- A guardian may only admit an incapacitated person to a nursing facility after a court finding that the admission is in the incapacitated person's best interest, even if the incapacitated person does not object to the admission. ■

By Mark P. Szpak and Anne E. Johnson

Class Action Scrutiny: Will Massachusetts Courts Follow Emerging Federal Trends?



Mark P. Szpak is a partner in the Litigation Department of Ropes & Gray, where he frequently represents clients in complex and class action litigation and intellectual property matters.



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Recent developments have made federal courts an increasingly demanding environment for class actions. Within just the last year, the United States Court of Appeals for the First Circuit reinforced its guidance in prior decisions that lower courts are entitled to probe the merits of an action when conducting the “rigorous analysis”¹ required by Federal Rule of Civil Procedure 23. See *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 24-26 (1st Cir. 2008). Moreover, where the plaintiff’s claim depends on a “novel or complex” theory of injury, *New Motor Vehicles* now requires courts to conduct a “searching inquiry” into whether class certification requirements can be met. Other circuit courts have reached similar conclusions. Given this federal landscape, plaintiff class action attorneys may well begin looking to state courts as a preferable forum for class action litigation. Recent Massachusetts state court decisions, however, appear also to be heightening the bar for resort to the class action device.

New Motor Vehicles and the Federal Trend Toward “Searching Inquiry”

The First Circuit’s decision in *New Motor Vehicles* exemplifies the increased scrutiny federal courts are applying to class certification. In *New Motor Vehicles*, plaintiffs alleged that various car manufacturers had engaged in a conspiracy to block lower-priced imports from Canada in violation of antitrust and consumer protection laws, resulting in inflated prices for new cars sold in the United States. The district court certified a series of individual state classes. On appeal, the First Circuit vacated the certification order and remanded the matter to the district court for further consideration.

The court’s opinion addresses at length the extent to which a district court is to consider the merits when assessing the propriety of certification under Rule 23. After acknowledging some variance among the federal circuits regarding the necessary degree of inquiry into the merits at certification,² the court held that “a searching inquiry is in order where there are not only disputed basic facts, but also a novel theory of legally cognizable injury.”³ The court observed that it would run contrary to the “rigorous analysis” required by Rule 23 to “put blinders on as to an issue simply because it implicates the merits of the case.”⁴

The court then turned to the proposed class, and held that plaintiffs failed to satisfy Rule 23’s predominance requirement due to a lack of common proof by which antitrust impact and damages could be established. The court explained that the plaintiffs’ theory of the case essentially had two operative stages: in the first, the manufacturers engaged in an

unlawful horizontal conspiracy to inflate suggested retail prices for vehicles in the United States, and in the second, the manufacturers' artificially inflated pricing resulted in higher prices paid by individual purchasers. Emphasizing the novel and complex nature of this theory, the court reasoned that plaintiffs' proposed common proof – namely, an expert economist's analysis accompanied by a statistical model – failed to provide answers to critical questions, including how the alleged horizontal conspiracy affected the prices paid by purchasers and how the effects of the conspiracy could be separated from the effects of permissible vertical restraints.

Thus, *New Motor Vehicles* stands not only for the proposition that attention to the merits may be necessary, but also for a recognition that it is appropriate for the court to examine whether plaintiffs present a workable theory demonstrating how their case can be proven in a manner consistent with Rule 23's requirements. The opinion did not hold that a district court must make factual findings for each component of the rule when deciding a motion for class certification, but it does suggest that courts should take greater care to ensure that there are means of proof amenable to the class action mechanism and that plaintiffs are able to explain how their case can be proven using those means. Importantly, *New Motor Vehicles* suggested that such careful examination is warranted, in part, by the high stakes of a certified class for defendants and the considerable resources the device consumes. At the very outset of its opinion, the court specifically noted that certification can result in "financial exposure to defendants so great as to provide substantial incentives ... to settle non-meritorious cases in an effort to avoid both risk of liability and litigation expense."⁵

Other circuits have articulated a similar concern about the *in terrorem* pressures that class actions can exert, and the focus in *New Motor Vehicles* on predominance and manageability is hardly new. There are a number of well-recognized and longstanding predominance hurdles. As one example, national or multi-state classes premised upon claims under different state laws often present an uphill battle to certification.⁶ Similarly, the need to prove reliance without resort to individualized proof has been prohibitive for many classes, particularly with claims for common law fraud, negligent misrepresentation, and violations of consumer protection statutes proscribing deceptive conduct.⁷ In a recent decision examining both of these challenges — the appropriateness of a national class and the difficulty of proving reliance in a consumer fraud

action — the Seventh Circuit decertified a class of consumers who alleged that a manufacturer's advertisement of a stainless steel clothes dryer was deceptive. *See Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 745-46, 747-48 (7th Cir. 2008). The court held that it was implausible to presume reliance when there was no shared understanding of the defendant's representations and a common motivation for purchasing the product. It further noted its concern that a multi-state class presents the potential to undermine federalism by placing the construction of state law in the hands of a federal court.

In addition to these known obstacles, federal courts are expressing a greater willingness to test the viability of a plaintiff's theory of proof before certifying a class, in the spirit of the "searching inquiry" described in *New Motor Vehicles*. Days after the First Circuit handed down *New Motor Vehicles*, the Second Circuit decertified a class of consumers who were allegedly deceived by defendants' advertising and marketing of "light" cigarettes. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008). The *McLaughlin* court held that a number of questions, including reliance, causation, and injury, would require individualized inquiry such that the predominance requirement of Rule 23 was not satisfied.⁸ On injury in particular, the court noted that neither of plaintiffs' proposed models was plausible as a matter of law, largely because they offered no means to estimate how the market for light cigarettes responds to changes in demand. Thus, much like the First Circuit in *New Motor Vehicles*, the Second Circuit in *McLaughlin* emphasized the need for a viable means of class-wide proof to establish the elements of plaintiffs' cause of action. In doing so, the court underscored the same policy imperatives, emphasizing its view that "Rule 23 is not a one-way ratchet, empowering a judge to conform the law to the proof."⁹

A similar approach is evident in other recent decisions, not only at the circuit level, but among the district courts. As one example, in a multi-district litigation involving claims of false, misleading, and deceptive representations made by various defendants regarding Teflon®-coated products, the Southern District of Iowa refused to certify a proposed set of 23 state-wide classes. *In re Teflon Prods. Liab. Litig.*, 254 F.R.D. 354, 371 (S.D. Iowa 2008). The court focused not only on the lack of class-wide proof on central questions, such as whether class members purchased the same products and were exposed to the same marketing and promotional materials, but also the difficulty defining a litigation class where membership was unascertainable

without resort to speculation. In doing so, the court rejected plaintiffs' insistence that the appropriate criteria existed to evaluate membership when the time came, reasoning that such difficulties only foreshadowed significant manageability concerns for trying liability and damages.

An Uncertain Path Forward for Class Certification in Massachusetts

With these developments in federal courts, more class plaintiffs may elect to pursue their claims in state court. In Massachusetts state courts, the standard for class certification has been articulated in prior decisions as requiring the court to form a "reasonable judgment" that the proposed class meets class certification criteria – an arguably more lenient standard than is reflected in the recent federal trend. In *Weld v. Glaxo Wellcome Inc.*, the Supreme Judicial Court (the "SJC") noted that "[Massachusetts] Rule 23 was written in the light of the Federal rule, hence case law construing the Federal rule is analogous and extremely useful. However, to the extent that rule 23 relaxes some of the requirements imposed on plaintiffs under the Federal rule, our analysis may, in certain respects, differ." 434 Mass. 81, 86 n.7 (2001). The Supreme Judicial Court then went on specifically to observe that "plaintiffs bear the burden of providing information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23 ... they do not bear the burden of producing evidence sufficient to prove that the requirements have been met." *Id.* at 87.

Also, Massachusetts courts have yet to frame the predominance requirement with the same stringency emerging among the federal decisions. The SJC's recent ruling in *Salvas v. Wal-Mart Stores, Inc.* illustrates this. In that decision, the SJC reversed the decertification of a wage and hour class action by rejecting the lower court's determination that plaintiffs needed to present a more detailed trial plan demonstrating that their claims could be proven by common proof.¹⁰ The court concluded that the potential existence of individualized questions pertaining to damages did not defeat class treatment in that case.

Further, consumer cases in particular tend to be colored by the availability of the Massachusetts deceptive trade practices statute — M.G.L. c. 93A ("Chapter 93A") — which independently provides for the remedy of a class action but omits mention of the predominance and superiority requirements. *See* M.G.L. c. 93A, § 9(2). Decisions have expressly held that the court still retains the discretion in a Chapter 93A action to consider issues of predomi-

nance and superiority in determining whether members of the proposed class are "similarly situated" and have suffered a "similar injury." *See Fletcher v. Cape Cod Gas Co.*, 394 Mass. 595, 605-6 (1985). Nonetheless, the SJC continues from time to time to draw upon language from prior decisions referencing that judges should not overlook the "pressing need" in construing Chapter 93A to provide an effective private remedy for consumers. *See Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 391-92 (2004).

At the same time, recent Massachusetts decisions have also created significant barriers to class action litigation in the state. For instance, courts and commentators have widely acknowledged that the SJC's decision in *Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.* confirms that even Chapter 93A requires a showing of injury and causation. *See* 445 Mass. 790, 800-02 (2006). There, the SJC held that, although the provisions of defendant's rental car contract violated Chapter 93A, the putative class plaintiffs suffered no cognizable injury when the unlawful contract provisions could not deter them from asserting any legal rights and thus they suffered no loss. The SJC also used a recent class action case, *Iannacchino v. Ford Motor Co.*, to embrace the heightened pleading standard set forth by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*. *See* 451 Mass. 623, 636 (2008). The plaintiffs in that case, seeking to proceed on behalf of a class of Massachusetts purchasers of certain models of Ford vehicles, alleged that the vehicles' door handles failed to comply with applicable federal safety standards and asserted claims for violation of Chapter 93A and breach of implied warranty. The court remarked that if the presence of such a defect resulted in consumers overpaying for the vehicle, claims of this type might satisfy the injury and causation requirements recognized by *Hershenow*. Yet the SJC nonetheless affirmed the lower court's dismissal of the action due to insufficient allegations that the vehicles failed to meet a legally required safety standard.

Other decisions have focused on limitations in the availability of class-wide relief per se. Just last year, in *Moelis v. Berkshire Life Insurance Co.*, the SJC held that a court cannot exercise personal jurisdiction over non-resident putative class members absent minimum contacts, effectively precluding national classes from being certified in Massachusetts. *See* 451 Mass. 483, 488-89 (2008). In addition, Massachusetts class plaintiffs in some cases also encounter some of the same class certification barriers as they would in federal court. In *Moelis*, for example, the SJC affirmed the denial of certification as to even a state-wide class. The court held, consistent with federal precedent in

the First Circuit and elsewhere, that the applicability of the statute of limitations precluded certification due to the need for individualized inquiry.¹¹

Finally, though patterned after its federal counterpart, Massachusetts Rule 23 does not include the portions of the federal rule calling for certification of a class as soon as practicable after the commencement of an action. Thus, the Massachusetts rule can readily accommodate the application of the demands emerging in the recent federal certification decisions, as it allows for further prior development of a record and thus sets the stage for the court to assess the merits in deciding whether certification is appropriate. The decision in *Kwaak v. Pfizer, Inc.* rejecting certification of a proposed class of Listerine purchasers fits this model. See 881 N.E.2d 812, 818-19 (Mass. App. Ct. 2008). There, the court concluded, even for claims under Chapter 93A, that there was insufficient information in the record to indicate the similarity of exposure, deception, and causation of defendant's advertising campaign, in a manner similar to the Second Circuit's later decision in *McLaughlin*. *Kwaak* underscores that, even where plaintiffs might be able to satisfy the higher pleading standards that apply

following *Iannacchino*, plaintiffs' ability to prove injury and causation on a class-wide basis remains subject to scrutiny at class certification. In this regard, the reasoning of federal decisions such as *New Motor Vehicles* could well prove influential, especially where establishing injury requires a novel or complex theory.

Conclusion

Though the modern federal Rule 23 was promulgated to provide an antidote to the perceived shortcomings of *de minimis non curat lex* — the principle that the law is not concerned about very small or trifling matters — federal courts appear to be growing more cognizant of the potential shortcomings of the rule itself. As a result, federal courts have become more exacting when considering whether to permit class actions to proceed. Though it remains to be seen whether Massachusetts courts will fully embrace that trend, a number of recent Massachusetts decisions appear to be moving gradually in the same direction. ■

ENDNOTES

1. See *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

2. See 522 F.3d at 24. As discussed in *New Motor Vehicles*, prior First Circuit decisions addressing the need for an inquiry into the merits include *In re PolyMedica Corp. Secs. Litig.*, 432 F.3d 1, 6 (1st Cir. 2005); *Tardiff v. Knox County*, 365 F.3d 1, 4-5 (1st Cir. 2004); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003); and *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000). For a recent discussion of the positions taken among federal circuits on examining the merits, see William B. Rubenstein, "Rigorous Analysis and Class Certification," Am. Bar Ass'n 12th Annual Inst. on Class Actions, at D-1-8 (2008).

3. 522 F.3d at 25.

4. *Id.* at 17.

5. *Id.* at 8. In the wake of *New Motor Vehicles* in the First Circuit, parties will presumably begin to contest the issue of whether a matter requires a "novel" or "complex" theory of injury and thus triggers the "searching inquiry" requirement. It is likely that this issue will be litigated not only at class certification, but when the court sets a schedule and enters a case management order defining the parameters for discovery. Ultimately, *New Motor Vehicles* may thus raise the stakes for both plaintiffs and defendants in certain cases even prior to the parties' opportunity to test the class's viability at the motion for class certification. Plaintiffs may shoulder a greater burden to prevail on the motion under *New Motor Vehicles*, but this protection for defendants may come at the price of more burdensome discovery for both sides before class certification may be reached.

6. See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1019-20 (7th Cir. 2002). But see *In re Pharm. Ind. Average Wholesale Price Litig.*, 252 F.R.D. 83, 106 (D.Mass. 2008) (certifying multi-state class insofar as claims related to consumer protection statutes without a reliance requirement, finding that common questions in that case did predominate over questions affecting individual members).

7. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue."); *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 395 (D.Mass. 2007) (collecting authorities, and denying motion for certification by class of issuing banks asserting claims related to retailer's data breach, concluding on banks' negligent misrepresentation and related M.G.L. c. 93A claims that "[p]roving the element of reliance will necessarily involve individual questions of fact, and the issuing banks will be unable to invoke a presumption of reliance on the part of class members."). But see *Klay v. Humana, Inc.*, 382 F.3d 1241, 1258-59 (11th Cir. 2004) (common questions of law and fact concerning fraud-based RICO claims predominated over individual issues specific to each plaintiff).

8. Some have suggested that the Second Circuit's holding in *McLaughlin* was called into question by the Supreme Court's subsequent decision in *Bridge v. Phoenix Bond & Indemn. Co.*, 128 S.Ct. 2131 (2008), which held that first-party reliance is not an element of a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO") predicated on mail or wire fraud. Importantly, however, *Bridge* did not dispense with the RICO's reliance requirement altogether. See *id.* at 2144 ("[N]one of this is to say that a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud can prevail without showing that someone relied on the defendant's misrepresentations.") (emphasis added). As commentators have observed, unlike in *Bridge*, where there was reliance on the defendant's fraud by a third party, proving reliance by the plaintiff still will be a necessity in many consumer class actions. See, e.g., Donald R. Frederico, "Consumer Class Actions: An Unauthorized Biography," Am. Bar Ass'n 12th Annual Inst. on Class Actions, at C-6-7 (2008).

9. 522 F.3d. 220.

10. See 452 Mass. 337, 367-68 (2008).

11. See 451 Mass. 483, 490-91 (2008) (citing, *inter alia*, *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000)).

By Robert M. Buchanan, Jr.

Commonwealth V. Fremont: Innovative Chapter 93A Litigation Applied To The Mortgage Crisis



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C*ommonwealth v. Fremont Investment & Loan*, 452 Mass. 733 (2008), is a landmark response by the Supreme Judicial Court ("SJC") to the nation's ongoing financial crisis. By October, 2007, many of the subprime mortgage loans made by Fremont Investment & Loan ("Fremont") were in default. In response, the Attorney General's Office fashioned an innovative lawsuit aimed to slow Fremont from foreclosing on Massachusetts homes. Judge Gants entered a preliminary injunction, which "restricts, but does not remove, Fremont's ability to foreclose on loans" that have onerous terms. On appeal from that injunction, the SJC unanimously affirmed.

The AG's Office advanced a novel theory under Chapter 93A, attacking residential adjustable rate mortgages with the following characteristics: (1) the borrower was offered a low introductory interest rate for the first three years of the loan; (2) thereafter this rate jumped to a much higher rate; (3) once the higher rate came into effect, the borrower would need to pay more than 50% of his/her income in order to meet the required loan payments; and (4) the amount borrowed was 100% of the value of the house at the time of closing, or the loan documents imposed a substantial penalty for prepayment. Where a loan of this type cannot be refinanced, Judge Gants found, it is "almost certain the borrower would not be able to make the necessary loan payments, leading to default and then foreclosure." *Fremont*, 452 Mass. at 735.

Judge Gants reasoned, and the SJC affirmed, that this set of terms may be presumed "unfair" in violation of Chapter 93A (*id.* at 740):

[I]t is unfair for a lender to issue a home mortgage loan secured by the borrower's principal dwelling that the lender reasonably expects will fall into default once the introductory period ends unless the fair market value of the home has increased at the close of the introductory period.

Does this reasoning set a new standard of conduct under Chapter 93A, or does it apply existing standards to a new crisis? Chapter 93A prohibits a broad range of "unfair methods of competition and unfair or deceptive acts or practices." Mass. G.L. c. 93A, § 2. Importantly, the "deception" branch of 93A did not apply in the SJC's consideration of *Fremont*, because Judge Gants "found no evidence" that Fremont "deceived borrowers by concealing or misrepresenting the terms of its loans." *Fremont*, 452 Mass. at 739. Thus the injunction against Fremont rested on the "unfair" branch of 93A. Fremont argued that its loans could not violate Chapter 93A, because all of the loan provisions complied with regulations at the time the loans were made. Previous SJC decisions have held, however, that conduct may be found "unfair," in violation of Chapter 93A, even if the conduct did not violate any other law. *E.g. Kattar v. Demoulas*, 433 Mass. 1, 13-14 (2000).

Several amicus briefs remonstrated that Fremont's loans should not be judged by a retroactive application of new standards. The SJC's decision addressed these concerns, citing federal regulatory guidance dating from 2001 and 2003. Thus, the Court wrote, "the principle had been clearly stated before 2004 that loans made to borrowers on terms that showed they would be unable to pay...were unsafe and unsound, and probably unfair." *Fremont*, 452 Mass.

at 744. “We do not agree that the judge applied a new standard retroactively,” the Court emphasized. *Id.* at 742.

The SJC’s decision affirmed the preliminary injunction entered by Judge Gants. Consequently, Fremont must engage in discussions with the AG’s Office, and seek court approval, before proceeding to foreclose on these loans. *Id.* at 740. However, “the injunction in no way relieved borrowers of their obligation ultimately to prove that a particular loan was unfair and foreclosure should not be permitted, or their obligation to repay the loans they had received.” *Id.* at 741. The SJC did not state what will happen with these loan obligations if the AG ultimately prevails.

Whether *Fremont* will give rise to class actions by private plaintiffs remains to be seen. Such plaintiffs would bear the burden of proving that a violation of Chapter 93A had occurred, and that they were “injured by” the violation. Mass. G.L. c. 93A § 9. As the *Fremont* Court took care to note, “[n]ot all conduct that is institutionally unsafe and unsound is harmful to borrowers.” 452 Mass. at 744, n. 19. In any event, *Fremont* illustrates that Chapter 93A is a powerful and flexible enforcement tool in the hands of the AG’s Office. ■


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Developments in the Law of Religious Accommodation in Employment



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The United States is the most religiously diverse nation on earth. Not surprisingly, given this diversity, adherents' religious (or, in the case of atheists, irreligious) views and practices occasionally conflict in the workplace. This article examines recent developments in the law addressing potential conflicts between an employee's religious practices and the requirements of her job.

In 2008, the Supreme Judicial Court issued two significant decisions addressing the obligations of an employer to accommodate its employees' free exercise of religion: *Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination* (referred to herein by the name of the religious adherent seeking employment, "Marquez"), 450 Mass. 327 (2008), and *Brown v. F.L. Roberts & Co., Inc.* (referred to herein by the d/b/a/ name of the employer, "Jiffy Lube"), 452 Mass. 674 (2008). These cases make it clear an employer's obligation to explore reasonable accommodations is not illusory and that concrete steps must be taken to satisfy its burden.¹

The Legal Framework

Chapter 151B, the Commonwealth's primary anti-discrimination law, prohibits employment discrimination on the basis of certain protected categories, including religion. G.L. c. 151B, § 4(1). With regard to religion, section 4(1A) makes it unlawful for an employer to impose on an employee terms or conditions of employment that require the employee to violate or forego the practice of her religion, and it affirmatively imposes on the employer an obligation to make reasonable accommodation of the employee's religious needs. Section 4(1A) defines "reasonable accommodation" as "such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business," and assigns to the employer the burden of proving undue hardship.

Section 4(1A) does not, however, prescribe a process by which a reasonable accommodation is identified or selected. For instance, must an employer engage in an interactive dialogue with an employee to explore possible reasonable accommodations of her religious beliefs, as is the case with an employee seeking reasonable accommodation of a disability? If so, what consequences flow from the failure to do so? If an interactive dialogue is not required, how is a reasonable accommodation identified, and what happens if one is not identified? Can the interactive process itself be so burdensome as to constitute an undue hardship to the employer, allowing it to avoid engaging in the process entirely? The *Marquez* and *Jiffy Lube* cases address these issues.

The Marquez Decision

David Marquez is a practicing Seventh-Day Adventist. Consistent with his faith, he does not work on the Sabbath. In 1997, he applied for a part-time bus driver position with the MBTA; secured a commercial drivers' license; and passed the MBTA's preliminary screening, testing and interview process. As a result, the MBTA cleared him for hire, and he received his assignment to begin driver training.

The training was scheduled from Tuesday through Saturday; it therefore conflicted (as to the Saturday portion of the training) with Marquez's religious practice. Other than that single Saturday training there would be no other Saturday conflicts between Marquez's religious practice and his employment: part-time drivers work Monday through Friday. In other words, Friday evenings were the sole point of conflict between Marquez's Sabbath obligations and his job requirements.

Marquez informed the MBTA of the training conflict; he was told the MBTA would "look into the issue." At no point did the MBTA explore with Marquez any possible accommodation of his religious practice, however. Instead, the MBTA notified Marquez that it could not grant his request not to work on Friday evenings and therefore would not extend an offer of employment.

Marquez filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”), charging the MBTA with discrimination on the basis of religion by failing reasonably to accommodate him. After public hearing, the Hearing Commissioner concluded that the MBTA refused even to attempt a good faith effort to accommodate Marquez and further concluded that the MBTA did not meet its burden of proving undue hardship. The MBTA appealed to the Full Commission, which affirmed the Commissioner’s ruling and also concluded that the MBTA’s failure to engage in the interactive process itself was a separate violation of G.L. c. 151B, § 4(1A).

Pursuant to G.L. c. 30A, § 14, the MBTA appealed to the Superior Court, which affirmed the MCAD decision in its entirety. The MBTA appealed to the Appeals Court on three grounds: (1) requiring the MBTA to give Marquez Friday evenings off posed an undue hardship or, alternatively, violated the establishment clause of the First Amendment; (2) requiring the MBTA to engage in an interactive process to identify a possible accommodation posed an undue hardship; and (3) the relief granted by the MCAD exceeded its authority. The SJC transferred the case from the Appeals Court on its own initiative.

It was undisputed that Marquez established a *prima facie* case that the MBTA discriminated against him on the basis of religion by failing reasonably to accommodate his sincerely held religious beliefs.² As a result, the burden shifted to the MBTA to *prove* that Marquez was accommodated or that the accommodation of his religious beliefs constituted an undue hardship. G.L. c. 151B, § 4(1A). To meet that burden, the MBTA argued that *any* accommodation that allowed Marquez to leave his route early every Friday evening would constitute an undue hardship as Marquez’s presence was indispensable to the orderly transaction of business and could not be performed by another. On appeal, the MBTA argued that the MCAD decision to the contrary was error.

Reviewing non-controlling but illustrative federal caselaw with regard to similar requirements under Title VII and the examples of undue hardship articulated in section 4(1A), the SJC concurred that a number of possible accommodations were not reasonable, as they left Marquez’s shift uncovered, or required the MBTA to pay a replacement operator overtime, or mandated involuntary swap shifts. The Court found, however, that the MBTA had failed to *prove* that a fourth possible accommodation — voluntary shift swaps — caused undue hardship. Because the MBTA failed to investigate the possibility that voluntary shift swaps, which were permitted, would provide a reasonable accommodation, the Court held that the MBTA did not meet its burden of *proving* undue hardship. *Marquez*, 450 Mass. at 340. That failure proved fatal; as the Court observed, an employer’s “mere contention” and “mere speculation” that it could not reasonably accommodate an employee is insufficient to meet its burden under G.L. c. 151B, § 4 (1A). Because the MBTA failed to present evidence that it took *any* steps to accommodate or even

investigate possible accommodations, the Court did not address the MBTA’s alternative arguments that requiring an employer to incur more than a *de minimis* cost to accommodate an employee violates the establishment clause.

The SJC disagreed with the MCAD, however, that an employer’s failure to engage in the interactive process is, itself, a separate violation of G.L. c. 151B, § 4(1A), irrespective of whether reasonable accommodation is possible. To the contrary, the Court articulated that there is no obligation to undertake an interactive process if an employer can conclusively demonstrate that all conceivable accommodations to an employee’s religious observance would impose an undue hardship. *Marquez*, 450 Mass. at 341-342. In this regard, the rule articulated by the Court diverges from the law regarding reasonable accommodation of an employee’s disability. Indeed, in the context of disability, an employer’s failure to engage in the interactive process with a disabled employee who is seeking a reasonable accommodation does, itself, violate Chapter 151B. *See* MCAD Guidelines: Employment Discrimination on the Basis of Handicap, § VII.C (1988); *Russell v. Cooley Dickinson Hospital*, 437 Mass. 443, 454 (2002). Moreover, for the disabled, an employee’s initial request for a reasonable accommodation triggers the employer’s obligation to participate in the interactive dialogue process. *See Ocean Spray Cranberries, Inc. v. Massachusetts Commission Against Discrimination*, 441 Mass. 632, 644 (2004).

The Court’s decision is hardly a free pass for employers to skip the interactive process, however. As the Court observed, it will often be difficult, if not impossible, for an employer to prove that *all* conceivable accommodations pose undue hardship unless it engaged in an interactive process with the employee and made a good faith effort to explore the options that result from such a process. *Marquez*, 450 Mass. at 342.

As to the MBTA’s contention that requiring it to conduct an investigation or engage in the interactive process would, itself, be an undue hardship, the Court summarily rejected that argument. “If merely looking into an accommodation, or consulting with an employee about his requested accommodation, were to be considered too great an interference with an employer’s business conduct, then employers would effectively be relieved of all obligation under G.L. c. 151B, § 4(1A)” and eviscerate religious protections in the workplace. *Marquez*, 450 Mass. at 341.

The Jiffy Lube Decision

Bobby Brown is a practicing Rastafarian. His religion does not permit him to shave or cut his hair.

Brown was a technician for Jiffy Lube. In 2002, Jiffy Lube implemented a grooming policy which provided that: “Customer-contact employees are expected to be clean shaven with no facial hair... Hair should be clean, combed, and neatly trimmed or arranged. Radical departures from conventional dress or personal grooming and hygiene standards are not permitted.” In light of his religious

practices, Brown explained that he wished to maintain customer contact without having to shave or cut his hair, but the company rejected his request.

Brown sued. The parties filed cross-motions for summary judgment. At that stage, the Superior Court concluded that Brown had asked for a total exemption from the grooming policy and held that, as a matter of law, an exemption from the policy would constitute an undue hardship because the company had the right to control its public image. Brown appealed and the SJC granted Brown's application for direct appellate review. The sole issue presented by the parties was undue hardship.

In support of the Superior Court's decision, Jiffy Lube argued that Brown had requested a total exemption from the grooming policy, which request foreclosed its ability to exercise its managerial discretion in a way (short of a total exemption) that would have reasonably accommodated Brown. Jiffy Lube also argued that an exemption from a grooming policy constituted an undue hardship *as a matter of law*.

The SJC disagreed. Four points emerge from its decision. First, the decision clarifies that even were an employee to request a *total exemption* from a grooming policy (thereby purportedly foreclosing managerial discretion to offer another accommodation), nonetheless such a request would not relieve the employer of its obligation to provide a reasonable accommodation unless it can prove undue hardship. To the contrary, the Court emphasized that section 4(1A) mandates that as soon as the employer is on notice of a conflict between a policy and an employee's religious practice, the employer *must* either prove undue hardship or provide a reasonable accommodation. In other words, an employer may not avoid its obligation reasonably to accommodate an employee's exercise of religion simply by stating that the accommodation suggested by the employee would constitute an undue burden. The Court noted that to hold otherwise would shift the statutory burden entirely to the employee, eviscerating the statutory requirement that an employer provide a reasonable accommodation. *Jiffy Lube*, 452 Mass. at 683 (citing *Marquez*, 450 Mass. at 341).

Second, the decision reaffirms that although a failure to engage in the interactive process is not, itself, necessarily a violation of the statute, a failure to do so may nevertheless be fatal to the employer's position. Here, because the employer did not explore other potential reasonable accommodations, it could not establish that the employee's suggested accommodation was the only possible accommodation and, therefore, it could not show that no other conceivable accommodation was possible without undue hardship. "Because the defendant did not engage in an interactive process to address the plaintiff's religious needs, it was the defendant's burden to prove conclusively that no other conceivable accommodation was possible without imposing an undue hardship." *Jiffy Lube*, 452 Mass. at 682. *Accord Marquez*, 450 Mass. at 342.

Third, the decision confirms that an exemption from a grooming policy does not constitute an undue hardship *as a matter of law* because, in the absence of an interactive dialogue, an employer is required to "conclusively demonstrate that *all* conceivable accommodations would impose an undue hardship on the course of its business." *Jiffy Lube*, 452 Mass. at 687 (citing *Marquez*, 450 Mass. at 342). Such a demonstration is a factual inquiry and cannot be decided as a matter of law.

Finally, the *Jiffy Lube* decision clarifies that a mere *claim* of non-economic costs concerning public image is not sufficient to demonstrate undue hardship; *proof* of undue hardship is required. To hold otherwise, the Court noted, would upset the statute's deliberate and important balance between employer interests and employee needs: "Requiring proof of undue hardship protects against the misuse of 'public image' [as a defense to a failure to accommodate], and is consistent with the requirement that the statute be construed liberally to accomplish its ends." *Jiffy Lube*, 452 Mass. at 686. Otherwise, "considerations of 'public image' might persuade an employer to tolerate the religious practices of predominant groups, while arguing 'undue hardship' and 'image' in forbidding practices that are less widespread or well known." *Jiffy Lube*, 452 Mass. at 686 (quoting *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 17 (D. Mass. 2006)). Finding that Jiffy Lube presented insufficient evidence of undue hardship, the SJC vacated the award of summary judgment to the employer and remanded the case.

Conclusion

The SJC's *Marquez* and *Jiffy Lube* decisions provide guidance as to the contours of an employer's obligations reasonably to accommodate. Given the unanimity of the decisions, the strong language the SJC used in affirming the consequences of the legislative language shifting the burden to the employer to prove undue hardship, and the consequences of the employers' failure to engage in the interactive process (even though such interactive process is not, itself, a stand-alone violation of Chapter 151B), employers would do well to take seriously employee requests for reasonable accommodation of their religious practices. ■

ENDNOTES

1. On July 22, 2008, the EEOC issued a new Compliance Manual section on workplace discrimination on the basis of religion in violation of Title VII. See EEOC Directives Transmittal No. 915.003, Section 12, Religious Discrimination (July 22, 2008). Although not controlling with regard to the interpretation of state law, the Compliance Manual nonetheless provides additional guideposts to reasonable accommodation of religious practices in the workplace.

2. To establish a *prima facie* case of an employer's failure reasonably to accommodate a religious practice under G.L. c. 151B, § 4 (1A), a complainant must demonstrate that an employer required an employee to violate a religious practice required by the employee's sincerely held belief as a condition of employment and that the employee provided the employer with at least ten days' notice of the employee's scheduling needs. *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination*, 401 Mass. 566, 575-576 (1988); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 138 (1st Cir. 2004), cert. denied 545 U.S. 1131 (2005).



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