



The Massachusetts Chapter of The Federal Bar Association

MATTHEW C. BALTAY • EDITOR

NEWSLETTER • FALL 2012

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Out-Going President's Column

by Mary Jo Harris



Fall is a beautiful time in New England. Students are back, a new academic year has started, and a new year for our Chapter has begun. It's a lovely time to pause for reflection, and to anticipate the year ahead under the leadership of incoming President, Matthew C. Moschella.

The past year was a strong one for the Massachusetts Chapter of the Federal Bar Association. We hosted twelve events over the year, among them a seminar on the Jurisdiction and Venue Clarification Act with Magistrate Judge Leo Sorokin and Suffolk Law Professor Karen Blum; Patent Law Claim Construction with Judge Douglas Woodlock and the IP Chapter of the FBA; Criminal and Civil Practice before the Magistrate Judges, co-sponsored with the BBA; Using Federal Courts to Recover Stolen Art, with the Southern District of New York Chapter, and a well-received event on the Law of Wine, with Judge Richard Stearns.

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In-Coming President's Column

by Matthew C. Moschella



The Massachusetts Chapter has strong momentum heading into our new year due to the excellent leadership of our past president, Mary Jo Harris. We are looking forward to another productive year. We are working on several existing and new initiatives to involve more members of the Chapter in our activities and to collaborate on programs with the national Sections, Divisions, and Chapters in other states. As in the past, the existing programs for this year will include:

- The CARE/RESTART job skills workshop on November 7, 2012;
- The Pro Bono Mediation Advocates Program for *pro se* parties;
- Regular breakfast series with Judges assigned to District of Massachusetts; and
- The Annual Judicial Reception to take place in the spring.

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These gatherings are among the Chapter's signature events. They are offered to our members at no cost, and in my view, are unparalleled opportunities for members to engage with our Judges, colleagues, and sister chapters of the FBA.

We partnered with the Boston Bar Association and the Women's Bar Association to present a CLE on Insights and Observations on Successful Strategies for First Circuit Appellate Practice. The Chief Judge and Judges of the First Circuit devoted a late afternoon to over 100 practitioners and gave no-nonsense, practical advice on appellate advocacy.

The Chapter's annual Judicial Reception, held in April, honored Judge Michael A. Ponsor and was a tremendous showing of support for an extraordinary Judge. Lawyers and judges from across the Commonwealth came together in tribute to Judge Ponsor's fine, honorable and empathetic career. This year's success was recognized by the National FBA, as we were awarded a Chapter Activity Presidential Achievement Award, and our Newsletter, ably edited each quarter by Matthew Baltay, received a Meritorious Newsletter Recognition Award! The success of our Chapter is due entirely to the conviction and dedication of our members, and in particular younger lawyers, who have given freely of their time to advance the cause of justice in the Commonwealth. Our members have worked with the CARE/RESTART program run by the District Court and the U.S. Probation Department to provide guidance and practical skills to federal offenders re-entering society post-incarceration. They provide limited appearances on behalf of pro-se litigants in the District and Bankruptcy courts. They have actively sought to mentor law students poised to begin their careers. In all this, our members exemplify the standards we, as lawyers, hold as ideal: To educate, to uphold the law we are sworn to protect, to support our courts, and to make ethical practice the hallmarks of our profession.

It has been an honor to work with such wonderful judges, lawyers and people. I look forward to helping Matt Moschella, who has been intimately involved with the Chapter's many initiatives, as he takes over the leadership of the Massachusetts Chapter of the Federal Bar Association effective October 1, 2012.

Sincerely,

Mary Jo Harris

Immediate Past President, FBA-Massachusetts

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The Federal Lawyer, by submitting articles and updates on Chapter activities. We encourage all members of our Chapter to submit articles concerning substantive and procedural federal issues.

On the publication front, the Chapter will continue to issue a regular e-newsletter and aim to increase its contributions to the FBA's national publication, These gatherings are among the Chapter's signature events. They are offered to our members at no cost, and in my view, are unparalleled opportunities for members to engage with our Judges, colleagues, and sister chapters of the FBA.

Our Chapter is working on several new initiatives. Among the goals of our Chapter for this year are (i) increasing the participation of members in our activities; (ii) increasing membership and participation by more firms and agencies; (iii) establishing law school committees in each local law school; and (iv) working closely with the national Sections and Divisions concerning substantive and social programs focusing on different practice areas. To further this goal, the Chapter plans to implement liaison positions with each of the national Sections and Divisions. Such relationships will provide opportunities to create programs of mutual interest.

We welcome your input, ideas, and involvement and encourage you to participate actively in the Chapter. Please contact us to become involved.

Matthew C. Moschella

President, FBA-Massachusetts



United States District Court for the District of Massachusetts:2012 Bench and Bar Conference: A great success!

Changing Landscapes in Law, Legal Practice and Beyond

October 18-19, 2012

The 2012 Bench and Bar Conference was held on October 18-19, 2012 in Newton, Massachusetts. Chief Judge Mark Wolf presided and over 350 members of the bench and bar attended. Highlights included a discussion of the Supreme Court by Erwin Chemerinsky, Dean of the University of California School of Law (Irvine), a keynote presentation by Chief Judge Wolf on the State of the Court and a captivating talk by Jeffrey Toobin on the Obama White House and the Supreme Court. Participants also engaged in a series of breakout sessions on current topics ranging from technology in the courtroom and the vanishing jury trial to e-discovery and current litigation issues in the bankruptcy court. The conference concluded with a Chief Judges' Round Table, which was a frank open session at which Chief Judge Wolf, soon to be Chief Judge Saris, Chief Bankruptcy Judge Frank Bailey and Chief Magistrate Leo Sorokin answered questions posed by the bar. All agreed that the conference was a great success that should be repeated soon.



Judge Michael A. Ponsor and Mary Jo Harris



Christopher Sullivan and Scott Lopez



Mary Jo Harris introducing Chief Bankruptcy Judge Frank J. Bailey, Judge Patti B. Saris, Chief Judge Mark L. Wolf, Chief Magistrate Judge Leo T. Sorokin



Chief Judge Mark L. Wolf



Judge Edward F. Harrington, Jonathan I. Handler and Michael A. Collora



Lisa Tittlemore and Jack Schecter



Mary Jo Harris, Rayford Farquhar, Magistrate Judge Judith G. Dein and Magistrate Judge Kenneth P. Neiman



Linda Sandstorm Simard, Sara Jane Shanahan, Jack Schecter and Benjamin Stern



Christopher Sullivan, Michelle Schaffer and Matthew Moschella



Lisa Tittlemore and Ginny Hurley

Judge Timothy S. Hillman's Swearing In Ceremony

By Christopher P. Sullivan, Robins, Kaplan, Miller & Ciresi L.L.P.

On September 6, 2012, United States District Court for the District of Massachusetts convened in an unusual spot: the Hanover Theater on Main Street in downtown Worcester. The entire Massachusetts federal bench assembled on the theater's stage as Chief Judge Mark L. Wolf brought the session to order. With hundreds of people, including many Massachusetts state court judges and administrators attending, the Chief Judge publicly administered the oath of office to the District's newest judge, Timothy S. Hillman. A sense of excitement and enthusiasm spread through the entire room.

Tributes to Judge Hillman's character, ability and work ethic were offered by all who spoke. United States Senator Scott Brown and Congressman James P. McGovern spoke. Each praised Judge Hillman as a person and for his distinguished work for last 6 years as a federal magistrate judge.

Chief Magistrate Judge Leo Sorokin called Judge Hillman a "superb colleague" as he informed the audience of the tremendous work that the judge had done in founding and administering the RESTART program for ex-offenders to help them rebuild their lives.

After the oath of office was administered, the judge who perhaps knows Judge Hillman best, his predecessor in Worcester, F. Dennis Saylor, IV, placed the judicial robe on Judge Hillman and told the audience Judge Hillman was a "wonderful person" and a "very good" judge. Finally, Judge Hillman had his turn to speak. He thanked his family, friends and judicial colleagues for their support and guidance. He also thanked Senator John Kerry, who was unable to attend, as well as Senator Scott Brown, Congressman Jim McGovern and many other public officials for their confidence and support. Recognizing the responsibility of his new office, Judge Hillman said "Sitting in judgment on another is a profound and lonely experience." He promised to always remember Nelson Mandela's warning that "Our deepest fear is not that we are inadequate. Our deepest fear is that we are powerful beyond measure."

After the ceremony concluded, a lovely reception for all the invited guests was held on the second floor balcony of the theater where many had a chance to offer their congratulations and best wishes.



Chief Judge Mark L. Wolf administered the oath of office to the District's newest judge, Timothy S. Hillman.

Report from the 2012 FBA Annual Meeting and Convention

By Jack C. Schecter, Sunstein Kann Murphy & Timbers LLP

The Federal Bar Association held its Annual Meeting and Convention in San Diego from September 19 through September 22, 2012, and the Massachusetts Chapter was well represented. Our president-elect, Matt Moschella and our past president, Chris Sullivan, made the trip out to sunny San Diego. I also attended as the Chair of the FBA's Intellectual Property Section.

In addition to the excellent CLEs organized by the San Diego Chapter, the Annual Meeting featured a number of great events for meeting and networking with other FBA members from around the country. Thursday evening,

in addition to a Federal Civil Litigation Section Social Hour, we attended a reception held in the hangar deck of the U.S.S. Midway, a decommissioned aircraft carrier that has been converted into a floating museum. Friday was filled with CLEs and meetings, followed by the FBA Sections and Divisions Happy Hour and a Mexican-themed open air fiesta on the San Diego bay, complete with a Mariachi band.

On Saturday, in addition to the FBA Sections and Divisions Leaders meeting and the National Council Meeting, we attended the annual awards luncheon. I'm happy to report that the Massachusetts Chapter again did exceedingly well. Not only did our chapter receive the Chapter Activity Presidential Excellence Award, but we also received a Meritorious Newsletter Recognition Award, and we were recognized for our use of the FBA's Best Membership Practices. Along with the many awards the Massachusetts Chapter took home, I'm also pleased to report that the Intellectual Property Section's newsletter, *The IP Legal Browser*, also took home a Meritorious Newsletter Recognition Award. The awards luncheon was capped off with the swearing in of new FBA board members and Circuit Vice Presidents, including the newest board member, Matt Moschella, and the newly-elected First Circuit Vice President, Chris Sullivan.



Chris Sullivan being sworn in as Federal Bar Association First Circuit Vice President by the Honorable Michelle Burns, Magistrate Judge, District of Arizona, at the Federal Bar Association Annual Meeting, September 22, 2012



Jack Schecter, Chris Sullivan and Matt Moschella at the Federal Bar Association Annual Meeting in San Diego, held from September 19 - 22, 2012.

Following Saturday night's Installation Banquet for the Federal Bar Association's new President, Robert J. DeSousa, it was time to head to the airport for the return trip to Boston.

In addition to raising the profile of the Massachusetts Chapter, the Annual Meeting presented a great opportunity to network with other FBA members throughout the country. I strongly encourage anyone who's interested to look into attending next year's meeting, scheduled for September 26-28, 2013 in San Juan, Puerto Rico. Please visit the FBA's web site for the meeting at <http://www.fedbar.org/Education/Calendar-CLE-events/2013-Annual-Meeting-and-Convention.aspx>, and feel free to contact this year's Massachusetts Chapter attendees if you have any questions.

Breakfast with Judge Sorokin

By *Evan C. Ouellette, Brody, Hardoon, Perkins & Kesten*

On May 16, 2012, the FBA Massachusetts Chapter hosted a well-attended “Breakfast with the Bench” with Magistrate Judge Leo T. Sorokin on the topic of the impact of social media on the law. M.J. Sorokin shared insights on many of the issues involved with the impact of social media on discovery.

He noted his surprise regarding the relatively small number of electronic discovery disputes he has seen and identified a tendency of the bench to encourage the parties to engage in phased discovery where practical. Unnecessary time and expense may be avoided if the parties initially limit electronic discovery to what is necessary to evaluate summary judgment positions and evaluate the case. M.J. Sorokin also spoke about the evolving body of law regarding spoliation of electronic evidence.

M.J. Sorokin also discussed the increasing prevalence of electronic and social media discovery in criminal matters. He noted that warrant applications seeking access to electronic data such as e-mail, GPS information and EZ Pass records have outpaced traditional search warrant applications, involving access to homes and vehicles. M.J. Sorokin encouraged civil attorneys to get creative and think outside of the box when considering what types of electronic and social media discovery may be accessible and relevant to their cases.

M.J. Sorokin also led a spirited discussion amongst attendees regarding the effect of social media on jury trials. The discussion involved anecdotes regarding instances of jurors using personal electronic devices in the courthouse to research the cases before them or the parties involved in the litigation. M.J. Sorokin stated that the majority of judges have amended their instructions to specifically forbid jurors from accessing electronic search engines such as Google and social media devices such as Facebook to research trial matters. M.J. Sorokin also discussed recent case law regarding the ability of attorneys to use Google or Facebook to research individual jurors during the *voire dire* and jury selection process.

For additional information on many of these topics discussed, M.J. Sorokin provided the following resource: 1. 5 Fed. Cts. L. Rev. 119 (Federal Courts Law Review 2011 DISCOVERY OF SOCIAL MEDIA, Kristen L. Mix).

The Purported Copyright Violators’ Counterattack (Shirokov v. Dunlap, Grubb & Weaver, PLLC, et al., CA No. 10-12043, 2012 WL 1065578 (D. Mass. 2012))

By *Harvey Weiner and Kiley Belliveau, Peabody & Arnold LLP*

A case that has been a recent staple of the blogosphere, but has surprisingly been under the radar of traditional media, is *Shirokov v. Dunlap, Grubb & Weaver, PLLC, et al.*, Civil Action No. 10-12043-GAO (D. Mass.), a purported class action. While music and movie companies have been vigilant in protecting their intellectual property from illegal downloading and file sharing on peer-to-peer networks, this case alleges that one law firm, its clients and others may have gone too far in enforcing such intellectual property rights by conspiring to force improper settlements. In a 105-page, 19-count Second Amended Class Action Complaint, Shirokov, who apparently downloaded the movie “Far Cry”, alleged that the defendants entered into a scheme to profit from copyright infringement allegations through fraud and extortion, which caused members of the putative class to make millions of dollars in excess settlement payments. He alleged that in pre-suit demands some defendants misrepresented the movie maker’s rights in the movie at issue by asserting that the movie maker was entitled to statutory damages and attorneys’ fees when some of the defendants allegedly knew that the movie maker was not entitled to those remedies under the applicable statute.

Motions to dismiss were filed, extensively briefed, and, on March 1, 2012, Magistrate Judge Jennifer Boal issued a thorough 68-page opinion, dismissing one of the defendants for lack of jurisdiction and for other reasons and dismissing 11 of the 19 counts against the other defendants. The opinion devoted 15 pages (pp. 11-25) to discussing the jurisdiction issue, and devoted the remainder to the 19 counts. While Shirokov was never actually sued for copyright infringement and did not make a settlement payment, the Court held that, at least at the motion to dismiss stage, he had standing to bring the claim and the action is not barred either by the Noerr-Pennington doctrine or the litigation privilege. Moreover, the Magistrate Judge allowed to remain three counts sounding in conspiracy, three counts alleging misrepresentation and failure to provide certain information, the 93A count and a count seeking a declaration that the copyright to “Far Cry” is invalid. On March 27, 2012, District Judge O’Toole “[a]fter careful review of the magistrate judge’s thorough and meticulous Report and Recommendation,” adopted it without change.

Civil Action No. 10-12043-GAO) (D. Mass.), Paper No. 90. A motion to certify the class has been briefed and was argued on June 27, 2012. The class certification motion is pending as of October 9, 2012 and a Scheduling Order has not yet been entered in the case.

If, in the future, attempts to prosecute copyright violations are occasionally met with expensive and time consuming countersuits, such as *Shirokov*, copyright holders and their counsel may become more selective in trying to enforce their intellectual property rights.

The First Circuit Court of Appeals: Revocation of a Firearm License for Submitting False Information on License Renewal Form is not a Violation of the Second Amendment

By Lisa Skehill Maki, City of Boston Law Dept.

In *Hightower v. City of Boston, et al.*, F.3d, 2012 WL 3734352 (1st Cir. Aug. 30, 2012) the United States Court of Appeals for the First Circuit held that the Boston police department's revocation of a Class A unrestricted firearm license after a determination that false information had been submitted on a license renewal form did not violate the Second Amendment. At issue in the case was an as-applied challenge to the revocation of the plaintiff's firearm license and a facial attack of the Massachusetts firearm licensing statute. Massachusetts General Laws, Chapter 140, Section 131, *et seq.*

For approximately ten years, the plaintiff, Stacey Hightower, was a police officer with the Boston police department. From approximately 1998 through 2008, Ms. Hightower possessed an unrestricted Class A firearm license which authorized her to carry a concealed firearm. Although a police officer does not need a firearm license to carry a department-issued firearm, a firearm license is necessary to carry a personal firearm.

In 2008, prior to her resignation from the Boston police department, Hightower applied to renew her unrestricted Class A firearm license. Boston police officers are required to fill out a Massachusetts firearm license application along with a Boston police department form known as a "Form G-13S" when applying for or renewing a firearm license. The "Form G-13 S" asks several questions of a police officer, one question being whether the applicant has "charges pending" at the time of the application.

The question regarding "charges pending" inquires whether an applicant has internal affairs charges pending at the time of the application or renewal. Hightower answered "no" to the question as to whether charges were pending against her. Upon submission of her license renewal forms, Hightower was re-issued an unrestricted Class A license to carry concealed.

Several weeks later, Hightower submitted her resignation to the Boston police department. Upon submission of her resignation it was discovered that Hightower was resigning from the department with charges pending. Consequently, a personnel order was posted within the department reflecting Hightower's resignation with charges pending.

After viewing the personnel order regarding Hightower's resignation, the Boston police department licensing commander revoked Hightower's firearm license for answering the application form untruthfully pursuant to Mass. Gen. Laws, Ch. 140, § 131(f) which provides:

A license may be revoked or suspended by the licensing authority if it appears that the holder is no longer a suitable person to possess such license.

Hightower then brought suit in United States District Court for the District of Massachusetts seeking a declaration that the Second Amendment secures the right to publicly carry a handgun outside of her home for the purpose of self-defense, and that this right could not be revoked based on a "suitability" determination by a licensing official. In so doing, Hightower brought a facial attack on the Massachusetts firearm licensing scheme as well as applied challenge stemming from the revocation of her license.

The First Circuit held that "[u]nder our analysis of *District of Columbia v. Heller*, 554 U.S. 570 (2008), the government may regulate the carrying of concealed weapons outside of the home."

Writing for the Court, Chief Judge Lynch explained: "We conclude that the revocation of a firearms license on the basis of providing false information as to the existence of pending complaints or charges on the firearms license application form is not a violation of the Second Amendment in this case," and "because Hightower has not shown that the statute [G.L.c. 140, §131] lacks any plainly legitimate sweep, her facial attack fails."

Two Recent District of Massachusetts Cases Conclude that the False Claims Act's "First to File bar" is Triggered by Complaints that Fail to Meet the Standards of Rule 9(b)

By David W. Lieberman, Day Pitney LLP

In two recent decisions, *United States ex rel. Banignan v. Organon USA Inc.*, No. 07-121153-RWZ, 2012 U.S. Dist. LEXIS 76130 (D. Mass. June 1, 2012) and *United States ex rel. Heineman-Guta v. Guidant Corp.*, No. 09-11927-RGS, 2012 U.S. Dist. LEXIS 92702 (D. Mass. July 5, 2012), District of Massachusetts courts have concluded that the "first-to-file" bar contained in the False Claims Act, 31 U.S.C. § 3730(b) (5) (the "FCA"), is triggered by earlier complaints that fail to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). While unresolved in the First Circuit, this question has engendered conflicting results in other circuit. Compare *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 515-17 (6th Cir. 2009) (rejecting the bar) with *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) (applying the bar).

The False Claims Act allows private persons, called relators, to bring *qui tam* actions on behalf of the United States against persons or entities who knowingly submit false claims to the federal government. *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 53 (1st Cir. 2009). The United States is given an opportunity to intervene and control the litigation and, if it declines, the relator may maintain the action on its behalf. In either event, the relator is authorized to collect a portion of any recovery awarded to the government. *Id.* Historically, the FCA has been susceptible to abuse by "parasitic" relators who file *qui tam* actions designed to secure a portion of the recovery attributable to claims that the government either is already actively prosecuting, or is aware of and has declined to pursue. See *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649-652 (D.C. Cir. 1994) (explaining this history). Accordingly, Congress has repeatedly attempted to "walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *Id.* These efforts have resulted in the presence within the FCA of a number of jurisdictional bars that limit a relator's ability to bring claims to those that meet specified criteria. See *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13 (1st Cir. 2009).

Until relatively recently, much of the litigation and commentary on the FCA centered around the public disclosure bar, see Claire Sylvia, *The False Claims Act: Fraud Against the*

Government § 11:34 (2012), which deprived a federal court of subject matter jurisdiction over any relator-initiated action that was "based upon the public disclosure of allegations or transactions" in specified fora unless the relator was an "original source" of the information. 31 U.S.C. § 3730(e)(4). In 2010, however, Congress amended the FCA to eliminate the jurisdictional language and permit the government to oppose dismissal of an action predicated on public disclosure. See Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010). Thus, as to claims filed after 2010, the public disclosure bar is a much less potent weapon for defendants. See *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010) (noting the non-retroactive nature of these amendments). Consequently, litigation has increased with respect to another of these bars, the so-called first-to-file bar.

The first-to-file bar provides that "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b) (5). The First Circuit has viewed the statutory purpose of the first-to-file bar as coextensive with the public disclosure bar, "to provide incentives to relators to 'promptly alert the government to the essential facts of a fraudulent scheme.'" *Duxbury*, 579 F.3d at 32 (quoting *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001)). Congress's purpose in passing that provision, however, is far from clear. See Sylvia at § 11:73 (noting that "scant legislative history exists to explain the provision," but suggesting that Congress was primarily concerned with "preventing class actions or multiple separate suits based on identical facts and circumstances"). In any event, under First Circuit precedent, a complaint will be barred by the first-to-file bar if it states "all the essential facts of a previously filed claim" or "the same elements of a fraud described in an earlier suit." *Duxbury*, 579 F.3d at 32 (quoting *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 232-33 (3d Cir. 1998)).

Unsettled in the First Circuit is when a previously filed complaint is considered a "pending action" for purposes of the first-to-file bar. The Sixth and Ninth Circuits have concluded that a complaint that is itself jurisdictionally barred by the public disclosure bar is not "pending" for purposes of the first-to-file bar. See *Poteet*, 552 F.3d at 515-17; *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 825 (9th Cir. 2005). The Sixth Circuit has gone further to conclude that a complaint that fails to meet the heightened pleading standards of Rule 9(b), likewise is not "pending" under the first-to-file bar. *Poteet*, 552 F.3d at 515-17. However, the D.C. Circuit recently disagreed

with that conclusion, noting that “a complaint may provide the government sufficient information to launch an investigation of a fraudulent scheme even if the complaint does not meet the particularity standards of Rule 9(b).” *Batiste*, 659 F.3d at 1210.

In *Banigan and Heineman-Guta*, relators argued that two District of Massachusetts courts should, like the Sixth Circuit, conclude that an earlier filed complaint that fails to comply with the strictures of Rule 9(b) is legally incapable of serving as a complaint, and cannot, therefore trigger the first-to-file bar. See *Banigan*, 2012 U.S. Dist. LEXIS 76130 at *6 n.16; *Heineman-Guta*, 2012 U.S. Dist. LEXIS 92702 at *4. The courts, viewing the first-to-file bar as primarily concerned with precluding fraud on which the government has already been put on notice, adopted the reasoning of the D.C. Circuit in *Batiste* (*Banigan* pre-dated the D.C. Circuit’s decision in *Batiste* and relied upon similar reasoning in the district court’s *Batiste* opinion).

The order in *Heineman-Guta* has already been appealed to the First Circuit. See Notice of Appeal, *Heineman Guta*, No. 09-11927-RGS (Jul. 7, 2012) ECF No. 56, appeal docketed, No. 12-1867 (1st Cir. Jul. 24, 2012). This case should provide the court an opportunity for the First Circuit to clarify the contours of the first-to-file bar in this circuit.

Ruling Sparks Debate Over Rights of Transgender Prisoners: *Kosilek v. Spencer*, C.A. No. 00-12455-MLW, 2012 U.S. Dist. LEXIS 124758, (D. Mass. Sept. 4, 2012)

By Sara A. Colb, Day Pitney LLP

In a controversial decision handed down in September, *Kosilek v. Spencer*, C.A. No. 00-12455-MLW, 2012 U.S. Dist. LEXIS 124758, (D. Mass. Sept. 4, 2012), the United States District Court for the District of Massachusetts ordered the Massachusetts Department of Correction (“DOC”) to provide prisoner Michelle Kosilek with gender reassignment surgery. The court held that the DOC’s refusal to do so constituted cruel and unusual punishment in violation of the Eighth Amendment. Although the decision stirred up much debate, and was by the court’s own admission unprecedented, a closer look at the facts suggests the court had little room to decide otherwise.

Michelle Kosilek (formerly known as Robert Kosilek) is currently serving a life sentence, without possibility of parole, for the 1990 murder of his wife. Kosilek suffers

from a severe gender identity disorder characterized by the belief that he is a woman trapped inside a man’s body. This condition is recognized as a severe mental illness by the medical community, and its treatment is governed by standard protocols. These protocols indicate various treatments including psychotherapy, hormone therapy, and – in some cases – sexual reassignment surgery. Pursuant to these protocols, there are certain severe cases of gender identity disorder where sexual reassignment is the only appropriate treatment and is deemed medically necessary. After many other treatments failed to alleviate Kosilek’s extreme mental anguish, his doctors determined that his was such a case, and prescribed sexual reassignment surgery as “the only adequate treatment” for his severe condition. *Id.* at *5. The DOC refused to provide the surgery.

Kosilek faced a difficult burden to establish that the denial of this procedure constituted cruel and unusual punishment. As the court explains, “to establish a[n] [Eighth Amendment] violation when a prisoner’s health is at issue,” an inmate must show not only that he has not received adequate medical care, but also “that the official responsible for his care has intentionally ignored a serious medical need or otherwise been deliberately indifferent to it.” *Id.* at 8. Indeed, in the predecessor case (decided by the same judge in 2002), despite its finding that Kosilek was being inadequately treated for a serious medical condition, the court nonetheless found that Kosilek failed to prove that the DOC acted with deliberate indifference, and therefore failed to establish an Eighth Amendment violation.

Kosilek prevailed this time around on account of several significant factors the court could not ignore. First, the DOC’s own doctors found sexual reassignment surgery to be the only adequate treatment for his condition. Refusing to follow its own doctors’ prescribed treatment, the DOC could not credibly argue that Kosilek was receiving adequate treatment. To be considered “adequate” a medical treatment must be the “product of sound medical judgment” and must be “based on the needs of the particular prisoner.” *Id.* at * 35. It must also comport with the standards of prudent professionals in the community. *Id.* at *9. The DOC fired the doctors who prescribed gender reassignment for Kosilek, and hired a doctor who categorically opposed the surgery in all cases, and who rejected the standard protocols on that basis. The DOC attempted to establish the adequacy of Kosilek’s treatment based on this doctor’s conclusion that Kosilek should be treated with antidepressants rather than surgery. The court did not find this opinion to be the product of sound medical

judgment, because antidepressants had already proven ineffective in Kosilek's case. Indeed, Kosilek attempted suicide while being treated with antidepressants. Such treatment was thus not an individualized assessment "based on the needs of the particular prisoner." Further, in rejecting the standard protocols, the doctor's approach fell outside the standards of prudent professionals who treat gender identity disorder. As such, the court had no basis to ignore the medical conclusions – rooted in established standards of care – of the DOC's own doctors. Thus, Kosilek satisfied the first prong of the test.

Next, Kosilek asserted the existence of evidence that the DOC intentionally ignored a serious medical need. This prong of the test has both an objective and subjective component. Kosilek had to show that the DOC knew he had a "serious medical need," to satisfy the objective prong, and that prison officials acted with "deliberate indifference to [his] health or safety" to satisfy the subjective prong. The court found that Kosilek established that the DOC knew he suffered from a serious medical need, as the treating doctors repeatedly informed the DOC in writing of their opinion that the surgery was necessary, and that until it was performed Kosilek was at great risk of harming himself. *Id.* at *125. Indeed, the DOC Commissioner ultimately admitted in testimony that "she understood and accepted the DOC doctors' view that Kosilek is at substantial risk of serious harm and that the sex reassignment surgery is the only adequate treatment for his condition." *Id.* at *5.

Even in light of the evidence that Kosilek was at risk of serious harm, the DOC would still have prevailed if it could show that its decision was motivated by a good faith basis. Although the DOC argued that its refusal to provide the surgery was rooted in insurmountable security issues that would arise, the court did not credit this claim because of the overwhelming evidence that it was pretextual, and that the denial was in fact motivated by a fear of "controversy, criticism, . . . ridicule, and scorn." *Id.* at *154.

The court acknowledged there was "superficial appeal" in the claim that "incarcerating someone who is anatomically a female in a male prison or placing a person who murdered his wife in a female prison" posed unacceptable security risks. *Id.* at *142-43. However, it could not ignore the evidence that such concerns could in fact be alleviated, and in any case that they did not motivate the decision to deny the surgery. For example, both DOC commissioners who testified admitted that a few possible alternatives would assure the safety of

Kosilek and other inmates post surgery. Additionally, although the DOC retained experts at trial to testify about security concerns, no such opinions were solicited prior to the DOC's determination that the security risks were "insurmountable." Such evidence convinced the court that the claimed security concerns were neither insurmountable nor the real basis for the denial of the surgery.

Having determined that the DOC was not in fact motivated by concerns for security, the court could not ignore the evidence that the true motivation related to the political implications of providing a publicly-funded sex change operation to a convicted murderer. There was substantial evidence in the record of the influence of public opinion and political pressure, as well as the clearly expressed position of the DOC commissioners against providing the surgery. Without a "good faith penological justification" the court concluded that the refusal to provide the surgery prescribed by the DOC's own doctors violated the Eighth Amendment. *Id.* at *42.

Special Thanks:

The Massachusetts Chapter of the Federal Bar Association is very grateful to and thanks **Davies & Monahan, P.C.** for its assistance with the Chapter's bookkeeping and filings. Davies & Monahan, P.C. provides clients accounting, tax, and business consulting services.

Executive Officers:

President

Matthew Moschella
Sherin and Lodgen LLP
101 Federal Street
Boston, MA 02110
(617) 646-2245
mcmoschella@sherin.com

President Elect

Michelle I. Schaffer
Campbell, Campbell, Edwards & Conroy
One Constitution Plaza
Boston, MA 02129
(617) 241-3102
mschaffer@campbell-trial-lawyers.com

Vice President

Lisa M. Tittlemore
Sunstein Kann Murphy & Timbers LLP
125 Summer Street
Boston, MA 02110-1618
(617) 443-9292
ltittlemore@sunsteinlaw.com

Secretary

Matthew C. Baltay
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1262
mbaltay@foleyhoag.com

Treasurer

Scott P. Lopez
Lawson & Weitzen, LLP
88 Black Falcon Avenue, Suite 345
Boston, Massachusetts 02210
(617) 439-4990
splopez@lawson-weitzen.com

National Delegate

Jonathan D. Mutch
Robins, Kaplan, Miller & Ciresi LLP
800 Boylston Street
25th Floor
Boston, MA 02199
(617) 859-2722
jdmutch@rkmc.com

Immediate Past President

Mary Jo Harris
Assistant General Counsel
TravelCenters of America
Two Newton Place
255 Washington Street, Suite 210
Newton, MA 02458
(617) 796-8344
MHarris@ta-petro.com

Past President

Christopher P. Sullivan
Robins, Kaplan, Miller & Ciresi, LLP
800 Boylston Street
Boston, MA 02199
(617) 267-2300
cpsullivan@rkmc.com

Co-Vice-President for the First Circuit

Katherine Gonzalez-Valentin
Senior Member
Ferraiuoli, LLC
221 Ponce de Leon Avenue
4th Floor
Hato Rey, Puerto Rico 00917
(787) 766-7000
kgonzalez@ferraiuoli.com

Co-Vice-President for the First Circuit

Christopher P. Sullivan
Robins, Kaplan, Miller & Ciresi, LLP
800 Boylston Street
Boston, MA 02199
(617) 267-2300
cpsullivan@rkmc.com

Newsletter Editor

Matthew C. Baltay
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1262
mbaltay@foleyhoag.com