Federal Bar Association
Massachusetts Chapter

Newsletter

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Christopher E. Hart, Editor
MARCH 10, 2015

President's Column

By Lisa M. Tittemore

Our Chapter has had a very productive start to 2015. Never ones to let a little weather stand in the way, the staunch New Englanders of the Massachusetts Chapter of the FBA have been busy organizing panels, receptions, brown bag lunches, and our popular breakfast with the bench program, as well as preparing the groundwork for numerous upcoming activities. Our reception on January 16, 2015, at the Federal Courthouse in Springfield marking Magistrate Judge Neiman's retirement was inspiring, very well attended, and a fun event to honor an exemplary magistrate judge.

I hope that you will enjoy reading more about these events in the pages of this Newsletter, whether or not you were able to attend.

Looking ahead, I am extremely pleased that we will be honoring Judge Nathaniel M. Gorton, U.S. District Court District of Massachusetts, at our always well-attended and popular ***Annual Judicial Reception***, this year on June 10, 2015. The Judicial Reception will be held at the Boston Harbor Hotel, Wharf Room, from 6-9 pm. Please save the date!

Our ***Breakfast with the Bench*** series continues, with a special breakfast with First Circuit Chief Judge Lynch and Judge Barron scheduled for March 25, 2015; and with Judge Wolf on April 16, 2015.

(continued on next page)

Above: FBA MA President braving record snowfall.

The Massachusetts Chapter of the Federal Bar Association Honors Magistrate Judge Kenneth P. Neiman with January Retirement Reception

By Nathan A. Olin, Esq., Connor, Morneau & Olin, LLP

On January 16, 2015, the Massachusetts Chapter of the Federal Bar Association joyously honored Magistrate Judge Kenneth P. Neiman on the occasion of his retirement with a reception at the United States District Court in Springfield. Judge Neiman officially retired on January 5, 2015, the twentieth anniversary of his initial appointment as the magistrate judge for Hampden, Hampshire, Franklin and Berkshire counties. The retirement reception marked those twenty years.

Several hundred attendees, including lawyers, judges, courthouse staff, local dignitaries, family and friends of Judge Neiman, filled the court's atrium on a sunny Friday afternoon for the festive event. Lisa Tittemore, President of the FBA Massachusetts Chapter, welcomed the guests and brought

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President's Column *continued from page 1*

Our ***Committees*** are established and planning events, and we welcome your participation and suggestions. For example, our Immigration Committee is planning a program on March 12, 2015, with Immigration Judges Robin Feder and O'Malley. And the Civil Rights Committee will be hosting a seminar on April 8 with Judge Timothy Hillman and Prof. Karen Blum on Section 1983 Litigation. The formation of additional Committees is being considered, so please let us know if there is a subject area you would like to see included:

Committee	Chairs	Board Contact
Criminal Law Committee	Michael Ricciuti and Kimberly West	Scott Lopez
Immigration Law Committee	Matthew Maiona and Sara Ward	Jonathan Handler
Intellectual Property Committee	Brandon Scruggs and Bo Han	Lisa Tittemore
Diversity Committee	Erika Reis and Raquel Webster	Michelle Schaffer
Bankruptcy Committee	John La Liberte and Keri Wintle	Jon Mutch
Civil Rights Committee	Karen Blum and Michelle Hinkley	Howard Friedman
Philanthropy Committee	Amy Bratskeir and Sara Colb	Patrick Curran
Employment Law Committee	Sean O'Connor and Inga Bernstein	Juliet Davison
Social Security and Disability Law Committee	Mala Rafik and Terrence Parker	Martin Rooney

The ***MA Young Lawyers Division*** and ***MA Law School Chapters*** continue to be hard at work putting on events, including a very well attended program at Suffolk Law School featuring U.S. District Judge Gustavo A. Gelpi, Jr. and Professor Karen M. Blum on January 13, 2015. Other activities include a series of trainings at local law schools on interviewing skills, a panel on intellectual property law at New England Law, and attendance at District Court swearing in ceremonies to represent our Chapter in welcoming new admittees.

Our efforts continue to be focused on achieving the important mission of the FBA.

> *The mission of the Association is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary and the public they serve.*

Please contact me with your suggestions and contributions. I look forward to collaborating with you.

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The Massachusetts Chapter of the Federal Bar Association Honors Magistrate Judge Kenneth P. Neiman with January Retirement Reception *continued from page 1*

special greetings from other chapter members throughout the state. She also presented Judge Neiman with a special "Jumbos" tribute, a reference to their mutual alma mater, Tufts University.

Other speakers included United States District Judge Mark G. Mastroianni, who told stories of appearing before Judge Neiman as a criminal defense attorney, as well as the court's Western Division Chief, Bethaney Healy, who served many years as the judge's courtroom deputy. Also, Robert Farrell, Clerk of Court, gave Judge Neiman an American flag that had flown over the United States Capitol on January 5, 2015, in the judge's honor. The flag was commissioned by United States Congressman Richard E. Neal, who was also in attendance. At the end of the ceremony, Bernadette Wyman, Judge Neiman's longtime assistant, along with Board Member, attorney Nathan A. Olin, presented him with a sculpture, created by the world-renowned Western Massachusetts artist, Josh Simpson, on behalf of the judge's former law clerks, staff and special friends. In part, the inscription on the sculpture reads: "Justice. Wisdom. Integrity."

In response, Judge Neiman spoke fondly of his twenty years serving as the magistrate judge for the court's Western Division. He described what an honor it has been for him to be a judge and how he has tried to use his role as a neutral arbiter to help thousands of parties resolve their disputes. To that end, Judge Neiman announced that he had been specially designated by the judges of the district to serve as a recall magistrate judge for civil mediations. He also thanked his family, friends, and colleagues, as well as the many lawyers for their zealous advocacy on behalf of their clients during his years on the bench.

The event ended with a fabulous reception catered by Luisa Cardaropoli and warm wishes all around for the judge. Judge Neiman and his wife, Jan, finished the night with a private dinner with his law clerks, staff and their families.

THE MASSACHUSETTS CHAPTER OF THE
FEDERAL BAR ASSOCIATION

Cordially invites you to attend its

Annual Federal Judicial Reception

June 10, 2015

6:00 pm - 9:00 pm
Boston Harbor Hotel
Wharf Room, 70 Rowes Wharf
Boston, Massachusetts 02110

The Massachusetts Chapter will proudly recognize:

The Honorable Nathaniel M. Gorton

For his Dedicated Service to the Judiciary,
the Bar, and the Community that the Court serves

To reserve tickets, please contact:

Debora Corbett
Brody, Hardoon, Perkins & Kesten, LLP
699 Boylston Street, Boston, MA 02116
617-880-7134 * dcorbett@bhpklaw.com

$85 - individual tickets (FBA members)
$100 - individual tickets (non-FBA members)

$ 850 Firm Sponsors * $1,500 Corporate Sponsors
(10 tickets and FBA recognition of sponsorship at event)

Please make checks payable to: **FBA Mass. Chapter**

Your firm is invited to sponsor this event.
Please inform Debora Corbett as soon as possible and
no later than May 29, 2015, if your firm will be a sponsor.

Clerk's Update

By Robert J. Farrell

The Judges of this Court have amended Local Rule 203, Bankruptcy Appeals, to align the Rule numbers to the amendments found in the Federal Rules of Bankruptcy Procedure, which took effect on December 1, 2014. This amendment and the full Local Rules may be found on the court's website at http://www.mad.uscourts.gov/general/rules-home.htm.

The bench of the United States District Court continues to see a number of changes.

Judge Douglas P. Woodlock has advised President Obama he will become a Senior Judge on June 1, 2015. Judge Woodlock received his commission from President Reagan in 1986. Chief Judge Patti B. Saris said: "Over the last twenty-nine years, Judge Woodlock has been a preeminent judge, respected by the bench and bar for his outstanding judicial abilities. He has presided over difficult, high-profile criminal trials and his written opinions are well known for the quality of analysis and research. I also highlight the important role Judge Woodlock plays as guardian of the court's heritage. He was deeply involved in the design of this courthouse and continues to serve as a caretaker of its beauty. He has also preserved the legacy of the court through his careful stewardship of our history, portraits and governance."

On January 7, 2015, Allison D. Burroughs was sworn in as a United States District Judge for the District of Massachusetts. Judge Burroughs will sit in Boston. Judge Burroughs is a graduate of Middlebury College and received her J.D. from the University of Pennsylvania Law School. Prior to joining the bench, Judge Burroughs was a partner in the Boston law firm of Nutter McClennen & Fish. Before entering private practice, she served in the Boston and Philadelphia offices of the United States Attorney's Office. During her sixteen years as an Assistant United States Attorney, Judge Burroughs developed trial and investigation expertise in sophisticated white collar and economic crimes. Judge Burroughs began her legal career as a law clerk for U.S. District Judge Norma L. Shapiro in the Eastern District of Pennsylvania.

Katherine A. Robertson was sworn in as a United States Magistrate Judge on January 5, 2015, sitting in Springfield. Magistrate Judge Robertson graduated from Princeton University and summa cum laude from Western New England University School of Law. She began her legal career as Law Clerk to U.S. District Judge Frank H. Freedman in Springfield from 1990 through 1992 and then with the Honorable John M. Greaney of the Massachusetts Supreme Judicial Court until 1996. Ms. Robertson was a partner in the firm Bulkley, Richardson and Gelinas, LLP in Springfield, MA where she had a primary focus on employment law and complex business disputes. In 2011, Magistrate Judge Robertson was hired as an Assistant District Attorney in the Appellate Division of the Hampden District Attorney's Office. Chief Judge Patti B. Saris said: "Ms. Robertson has a wealth of experience in complex civil litigation and criminal law. She impressed us with her professionalism as well as her compassion. She will be an outstanding Magistrate Judge in Springfield."

Donald L. Cabell was sworn in as a United States Magistrate Judge on January 21, 2015, sitting in Boston. Magistrate Judge Cabell was a Commonwealth Scholar at the University of Massachusetts at Amherst where he graduated with honors. He is a graduate of Northeastern University School of Law. Magistrate Judge Cabell began his legal career as an associate in the firms Hale and Dorr and Peckham, Lobel, Casey, Prince and Tye in Boston. In 1995, Magistrate Judge Cabell was hired as an Assistant United States Attorney. During his time with the United States Attorney's Office, he has served in the major crimes unit and anti-terrorism and national security unit. For the past two years, Magistrate Judge. Cabell served as the Justice Attaché in the Office of International Affairs at the United States Embassy in Paris, France. Chief Judge Patti B. Saris said of the selection: "Don Cabell has extensive experience as an Assistant United States Attorney. He has tried numerous cases over his approximately twenty year career as a prosecutor, and has an in-depth understanding of the proceedings in criminal cases. Prior to his career as a prosecutor, he also worked as a civil litigator in two prominent Boston law firms. We are confident of his ability to be fair, reasonable, patient and respectful in the courtroom, and we look forward to welcoming him to the court family."

Magistrate Judge Robert C. Collings and Magistrate Judge Kenneth P. Neiman have both retired, but have returned to the court on recall status.

Upcoming Events:

- **March 12:** Brown Bag Lunch with Judges Rob Feder and Brenda O'Malley, 12-1:00 pm. RSVP to sara@maionward.com.
- **March 12:** The FBA MA is pleased to co-sponsor the MBLA's program, "Demystifying the Federal Bench: A Conversation with African American Federal Judges" from 6-8:30 pm. (*see* http://www.massblacklawyers.org for more details)
- **March 25:** Our "Breakfast with the Bench" series continues with breakfast with First Circuit Chief Judge Lynch and Judge Barron.
- **April 8:** The Civil Rights Committee of the FBA, Massachusetts, is hosting a discussion with Judge Timothy Hillman and Prof. Karen Blum on "Litigating Section 1983 Cases in Federal Court,"4-6pm, Suffolk Law School Faculty Dinings Room, Fourth Floor of Sargent Hall, 120 Tremont Street.
- **April 16:** "Breakfast with the Bench" with Judge Wolf.
- **June 10:** Annual Judicial Reception, at the Boston Harbor Hotel, Wharf Room, from 6-9pm.

Supreme Court Quietly Narrows "Effects"-Based Personal Jurisdiction

By Daniel McFadden, Foley Hoag LLP

It is settled that a non-resident defendant may not be sued in a state without a showing that the defendant had certain "minimum contacts" with that forum. This prerequisite for the exercise of personal jurisdiction traces its roots to principles of constitutional due process, as explained by the Supreme Court in 1945 in its seminal decision *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

But what happens when a defendant acts outside the forum with the knowledge – or even intent – that his action will cause a harm felt within that state? Since the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984), many courts have found "effects"-based personal jurisdiction over such defendants. Recently, however, the Supreme Court quietly narrowed *Calder's* impact. Now even "effects"-based jurisdiction requires some actual contact between the defendant and forum state.

In *Calder*, the plaintiff was the actress Shirley Jones, a resident of California. She claimed that she had been libeled by an article that appeared in the National Enquirer, a magazine with a large circulation in that state. Jones brought suit in California courts. However, two of the defendants, the author and editor of the article, both resided and worked in Florida. Those defendants sought dismissal for lack of personal jurisdiction. The Supreme Court disagreed in a unanimous opinion authored by then-Justice Rehnquist.

Although the allegedly libelous article had been prepared in Florida, the Court explained that "[t]he article was drawn from California sources, and the brunt of the harm . . . was suffered in California," making California "the focal point both of the story and of the harm suffered." *See Calder*, 465 U.S. at 788-89. Further, although the defendants "remain[ed] in Florida," their actions were "expressly aimed at" and "knowingly caused the injury in" California. *See id.* at 789-90. Jurisdiction was therefore proper in California "based on the 'effects' of [the defendants'] Florida conduct in California" and because that conduct was "calculated to cause injury to [Jones] in California." *Id.* at 789, 791.

In sum, *Calder* suggests that a defendant creates personal jurisdiction when his actions in a different state are intended to cause "effects" in the forum state. Many lower courts have adopted this approach. The First Circuit, for example, has explained that the *Calder* defendants created personal jurisdiction in California because "(i) their intentional actions were aimed at the forum State, (ii) they knew that the article was likely to have a devastating impact on the plaintiff, and (iii) they knew that the brunt of the injury would be felt by the plaintiff in the forum State where she lived, worked and the article would have the largest circulation." *Hugel v. McNell*, 886 F.2d 1, 4 (1st Cir. 1989). In the First Circuit's view, "[t]he knowledge that the major impact of the injury would be felt in the forum State constitutes a purposeful contact or substantial connection whereby the intentional tortfeasor could reasonably expect to be haled into the forum State's courts to defend his actions." *Id.; see also Astro-Med, Inc. v. Nihon Kohden Am. Inc.*, 591 F.3d 1, 10 (1st Cir. 2009) ("Consistent with [*Calder*], a defendant need not be physically present in the forum state to cause injury (and thus 'activity' for jurisdictional purposes) in the forum state." (internal quotation marks omitted)). Indeed, one judge of the First Circuit has proposed extending *Calder* to its logical maximum: "Specific jurisdiction may be established based exclusively on the in-forum effects of the defendant's extra-forum conduct. That is the essence of *Calder*." *Astro-Med*, 591 F.3d at 23 (Lipez, J., concurring).

It appears, however, that there is little left of *Calder's* "effects" doctrine after the Supreme Court's recent decision in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), a unanimous opinion authored by Justice Thomas. In *Walden*, the plaintiffs attempted to carry $97,000 dollars while travelling by air from Puerto Rico to Nevada. During a layover in Georgia, their cash was seized by police officer Anthony Walden, who was monitoring the airport in cooperation with the federal Drug Enforcement Administration. The plaintiffs continued on to Nevada, while Walden (and the cash) remained in Georgia. Walden later prepared an allegedly false and misleading affidavit seeking forfeiture of the cash as the proceeds of drug trafficking.

Although the money was later returned, the plaintiffs filed an action against Walden in Nevada and claimed that the seizure and attempted forfeiture violated the Fourth Amendment. Walden moved to dismiss for lack of personal jurisdiction in Nevada, as he had acted at all relevant times in Georgia. Nevertheless, the Ninth Circuit held that Walden had "expressly aimed" at least his false affidavit at Nevada by submitting it with the knowledge that it would affect people in that state. Nevada could consequently exercise personal jurisdiction with respect to that portion of the case under the *Calder's* "effects" principles.

The Supreme Court reversed and, in the process, substantially narrowed *Calder's* reach. The Court explained that the outcome in *Calder* was in fact driven by "effects" *caused by the defendants' actual contacts with California*, including that they "relied on phone calls to 'California sources' for the information in their article" and "widely circulated" the article in that state. *Walden*, 134 S. Ct. at 1123. In other words, "mere injury

to a forum resident is not a sufficient connection to the forum," but rather "an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State." *See id.* at 1125. "The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* This is true even if the defendant acts with "knowledge of [a plaintiff's] strong forum connections." *See id.* at 1124. Consequently, because Walden "never traveled to, conducted activities within, contact any in, or sent anything or anyone to Nevada," the courts in that state could not assert personal jurisdiction over him. *See id.* 1124. Thus, as the Seventh Circuit recently explained, "after *Walden* there can be no doubt that the plaintiff cannot be the only link between the defendant and the forum" and "[a]ny decision that implies otherwise can no longer be considered authoritative." *Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) (internal quotation marks omitted).

The holding in *Walden* appears to substantially undermine, if not entirely obviate, *Calder's* "effects" test. After all, if "effects" in the forum are only jurisdictionally relevant to the extent they arise from the defendant's actual contacts with the state, then why not look directly to those contacts in the first instance? And the Court's stealthy evisceration of *Calder* is not an anomaly – the year 2014 also saw the Supreme Court reject the longstanding assertion of general personal jurisdiction based upon a defendant's "continuous and systematic" activities in the forum. *See Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). There is a clear trend towards narrowing the boundaries of personal jurisdiction, one that parties and courts would be wise to heed.

First Circuit Clarifies ERISA Exhaustion Procedures

By Sara A. Colb, Day Pitney LLP

In October the First Circuit considered whether under ERISA an employee's failure to exhaust procedures for challenging the denial of benefits was excusable where those procedures were not identified in the primary plan document ("the Plan"). Specifically, the Court considered whether ERISA permits the Plan to incorporate appeals procedures by reference to another document, the summary plan description ("the Summary Plan"). Finding that such express incorporation was acceptable under ERISA, the Court found that Plaintiff failed to exhaust the required internal appeals procedures and was thus barred from suit.

Michele Tetreault injured her back while working as a store manager at the Limited. She received long term disability benefits from 2004 to 2008. In 2008 a new Plan Administrator informed Tetreault that she was no longer eligible for long term disability benefits since, based on its review of her medical records, she could perform sedentary work. The Plan Administrator informed Tetrault that she could appeal the decision in writing, but had to do so within 180 days. Tetreault did not file her appeal until almost a year later, which was denied as untimely. Plaintiff challenged that denial in federal court.

Tetrault's main argument was that under ERISA only the Plan (referred to in the statute as "the written instrument") can impose claims procedures, and where the Plan here did not include the 180-day deadline, she was not bound by it. Somewhat sidestepping the question of whether only the Plan can contain claims procedures, the Court found that the Plan here did because it explicitly incorporated the Summary Plan by reference, which contained the 180-day appeal deadline.

In conducting its analysis the Court considered some relevant language from the Supreme Court's decision in *Cigna Corp v. Amara*, 131 S. Ct. 1866 (2011), which Plaintiff relied on for the distinction it draws between the two documents at issue here – the Plan and the Summary Plan. *Amara* notes that these documents are created by two different parties: the Plan Sponsor creates the Plan, and the Plan Administrator typically writes the Summary Plan. The Supreme Court cautioned that making the Summary Plan automatically binding would "mix responsibilities by giving the administrator the power to set plan terms indirectly by including them in the [Summary Plan]" which could "allow the plan administrator to circumvent the required procedures for making amendments." *Amara* also noted that Summary Plans are intended to give beneficiaries a digestible summary of the terms of the Plan and "do not themselves constitute the terms of the plan."

The First Circuit was not persuaded that *Amara* barred the incorporation of the Summary Plan's terms by reference here. The Court explained that *Amara* "held only that terms from [Summary Plans] should not *necessarily* . . . be enforced" where the Plan is silent as to the significance of those terms. Here, the Plan expressly incorporates the terms in the Summary Plan, and is therefore not silent. In other words, *Amara* "pose[d] no automatic bar to a written instrument's express incorporation of terms contained in a summary plan description." The Court went on to reason that while it is true that a Summary Plan, serving merely to advise beneficiaries of their rights, does not itself create rights, "that may change when the document that unquestionably does create such rights . . . expressly states that the language in [the Summary Plan] does too." Finding that such incorporation was permissible, the Court upheld the District Court's finding that Plaintiff was barred by her failure timely to appeal internally.

The FAAAA Preempts the Mass Independent Contractor Laws As Applied to Motor Carriers Like FedEx

By Robert T. Ferguson, Jr, Hinckley, Allen & Snyder, LLP

In a pair of February 5, 2015 decisions likely to garner wide interest, Judge Stearns has held that, as applied to freight and package delivery motor carriers, the Massachusetts Independent Contractor Law is preempted by the Federal Aviation Administration Authorization Act ("FAAAA"). *See Schwann, et al. v. FedEx Ground Package System, Inc.*, 11-11094, Docket No. 149 (Feb. 5, 2015); *Remington, et al., v. J.B. Hunt Transport, Inc.*, 15-100100, Docket No. 20 (Feb. 5, 2015). In so holding, Judge Stearns resolved a question left open by the First Circuit's recent decision in *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11 (1st Cir. 2014).

The decisions are traceable to Judge Stearns' July 3, 2013 summary judgment decision in *Schwann*. In that case, the truck-driver plaintiffs claimed that FedEx had misclassified them as independent contractors – rather than employees – in violation of the Massachusetts Independent Contractor Law, M.G.L. c. 149, § 148B. FedEx moved for summary judgment on grounds that § 148B is preempted by the FAAAA, which forbids states from enacting or enforcing laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." According to FedEx, the Massachusetts statute imposes a significant impact on FedEx's rates, routes, and services. Therefore, enforcement of § 148B would prevent FedEx from carrying out its business decision to use independent contractors for package pick-up and delivery in violation of the FAAAA.

Judge Stearns denied FedEx's motion on grounds that, as a statute of general applicability, any impact that § 148B might have on motor carriers like FedEx is too attenuated to trigger preemption. Judge Stearns went on to conclude that the drivers were FedEx employees and granted their summary judgment motion on the misclassification claim.

Later, in a September 2014 opinion in a separate case, the First Circuit in *Massachusetts Delivery Ass'n v. Coakley* rejected the notion that § 148B could not be preempted by FAAAA simply because it is a statute of general applicability. Even generally applicable state laws must be carefully evaluated to determine whether they have an impermissible effect on a carrier's prices, routes, and services. In the First Circuit's view, because § 148B governs the classification of couriers for delivery services, the law clearly concerns a motor carrier's "transportation of property" and "potentially impacts the services the delivery company provides, the prices charged for the delivery of property, and the routes taken during this delivery." But the Court did not decide this question, instead remanding the case for a determination whether the effect of the Massachusetts statute rises to the requisite level for FAAAA preemption.

Reversing course in light of *Massachusetts Delivery Ass'n v. Coakley*, Judge Stearns has now decided that it does. Revisiting his earlier *Schwann* decision, Judge Stearns stated that § 148B "would unquestionably" have an impact on carrier's prices, routes and services "by in effect proscribing the carrier's preferred business model." That is, compliance with the Independent Contractor Law would fundamentally alter the carrier's business model – a result the FAAAA was designed to prevent. As a result, Judge Stearns concluded that "the entire statute must be treated as preempted," withdrew his prior ruling on this issue, and entered summary judgment in favor of FedEx on the misclassification claim.

Judge Stearns reached the same conclusion in a different case, only on a motion to dismiss. Using the same logic employed in *Schwann*, Judge Stearns in *Remington* dismissed the truck drivers' misclassification claims with prejudice and directed the clerk to close the case. Just as § 148B is preempted as applied to FedEx in Schwann, it is also preempted as applied to J.B. Hunt in Remington.

Schwann has already been appealed, and Judge Stearns denied reconsideration of his *Remington* decision in light of the Schwann appeal. Meanwhile, the *Massachusetts Delivery Ass'n v. Coakley* case remains pending on remand. Stay tuned.

Interested in contributing to the Newsletter? Contact Christopher Hart at chart@foleyhoag.com.

Event with Hon. Gustavo Gelpi and Professor Karen Blum

The Massachusetts Chapter held a terrific event on Jan. 13, 2015 at Suffolk Law School, with Hon. Gustavo Gelpi and Prof. Karen Blum speaking on a number of timely topics, including legal issues around police brutality lawsuits, the importance of the independence of the judiciary to the rule of law, and the 50th anniversary of the Voting Rights Act.

(l-r): *Jack Schecter, Robert Farrell (Clerk of Court), Allen Barrett (President of the FBA Law Student Division at Suffolk Law School), Amy Bratskier, Scott Lopez, Chris Sullivan, Michelle Hinkley, Matthew Moschella, and Harvey Weiner, with Prof. Karen Blum and Hon. Gustavo Gelpi in front.*

In re Nexium and its Impact on Litigants

By Caroline Donovan, Foley Hoag LLP

On Friday, December 5, 2014, the jury in *In re Nexium (Esomeprazole) Antitrust Litigation*, C.A. 12-md-02409 (Young, J.), handed down a verdict for defendants AstraZeneca and Ranbaxy Laboratories, clearing the drug makers of antitrust liability. This makes the District Court for the District of Massachusetts the first court to have tried a case involving reverse payment settlements after the Supreme Court decided in *Federal Trade Commission v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), that such claims could violate antitrust laws. In light of this verdict, it bears returning to some of the summary judgment decisions to understand how *In re Nexium* will impact litigants in reverse payment settlement cases going forward.

What *Actavis* Allowed

Revere payment settlements or "pay-for-delay" agreements are deals in which brand drug manufacturers pay generic competitors not to bring generics to market, preserving the patent holder's period of market exclusivity.

In *Actavis*, the Supreme Court held that reverse payment settlements may be antitrust violations and counseled that "a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects." 133 S. Ct. at 2227, 2237. It instructed that the lawfulness of a challenged settlement should be decided under the rule of reason and stated that "the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." 133 S. Ct. at 2236, 2237. How this would play out in the lower courts remained to be seen.

Reverse Payments in *In re Nexium*

Applying this standard, the Court in *In re Nexium* added some heft to *Actavis's* already-significant expansion of antitrust liability for reverse payment settlements. For starters, the Court had earlier held that agreements other than cash payments could come within the *Actavis* framework. The deals at issue in *In re Nexium* all involved agreements between AstraZeneca, the patent holder of Nexium, and would-be generic competitors Ranbaxy, Teva Pharmaceuticals, and Dr. Reddy's Laboratories to settle patent litigations about Nexium at terms the plaintiffs argued were sufficiently advantageous to Ranbaxy, Teva, and Dr. Reddy's to constitute reverse payments. *In re Nexium*, 968 F. Supp. 2d 367, 392 (D. Mass. 2013). Agreeing that these settlements could constitute reverse payments, the Court allowed plaintiffs—a group of drug distributors, end-payors, including consumers, and pharmaceutical retailers—to proceed and adduce evidence in support of their claims.

So what were the terms of these settlements and how did the Court parse whether they met the *Actavis* standard?[1]

[1] This article examines only the alleged reverse settlement payments, not the other claims at issue, including, for example, overarching conspiracy and causation.

AstraZeneca-Ranbaxy settlement

At issue in the AstraZeneca-Ranbaxy settlement--and agreed to on the same day the parties settled litigation concerning Nexium--were (1) a series of side agreements allowing Ranbaxy to distribute and supply certain AstraZeneca products, and (2) an agreement by AstraZeneca not to market its own generic during Ranbaxy's 180-day period of generic exclusivity. The Court found that both could constitute reverse payments. It emphasized that the side agreements "were lucrative for Ranbaxy[,] . . . negotiated in conjunction with the Ranbaxy Settlement [and] . . . formally extraneous to the Nexium patent litigation, falling into a category of non-traditional settlement forms which logically trigger heightened antitrust scrutiny." 2014 U.S. Dist. LEXIS 126954 at *80. Further, the Court found "notable that the [the agreements] essentially provided a steady flow of revenue to Ranbaxy, based on use of AstraZeneca's intellectual property, in the precise time period during which it agreed to refrain from marketing its generic Nexium product." *Id.* The Court also held "that AstraZeneca's agreement to refrain from marketing generic Nexium during Ranbaxy's exclusivity period may be considered part of an illegal reverse payment," given that it was foregoing the economic benefits associated with its own sale of Nexium during this period. *Id.* at 83.

AstraZeneca-Teva settlement

The deal negotiated between AstraZeneca and Teva involved an agreement to settle the Nexium litigation and litigation involving another AstraZeneca drug at $9 million, a figure that Plaintiffs claimed, and the Court agreed, could constitute a significant forgiveness of debt designed to secure Teva's delayed entry into the generic Nexium market. *Id.* at *142. Faced with competing expert opinions concerning the value of the settlement, the Court found it a jury question whether the settlement figure constituted a reverse payment. *Id.* at *143.

AstraZeneca-Dr. Reddy's settlement

By contrast, the Court rejected the possibility that the AstraZeneca-Dr. Reddy settlement could constitute a reverse payment, despite that it too involved settlement of the Nexium litigation and litigation involving another AstraZeneca drug. *Id.* at *157-158. The Court considered the differences between the simultaneously settled AstraZeneca litigation, which involved AstraZeneca's agreement to dismiss its appeal of a decision for Dr. Reddy's in another matter on the same day it settled the Nexium litigation. "The Court observe[d] a key difference, however, between Teva and [Dr. Reddy's] respective arrangements: Teva agreed to the amount of damages it owed in a case it lost, whereas [Dr. Reddy's] agreed to the dismissal of an appeal in a case it won. The latter hardly seems to qualify as a large and unjustified payment as imagined by the *Actavis* Court." *Id.* at *164. Finding the Plaintiffs' evidence weaker than that it put forward with the Teva settlement, the Court also cited the Plaintiffs' failure to quantify the extent of the reverse payment. *Id.* at *165.

While the jury in *In re Nexium* ultimately found no anticompetitive injury, the Court's decision on the legal questions at summary judgment still leaves play in the joints in these now triable claims.

The Federal Bar Association, Massachusetts Chapter congratulates board member Leonard Kesten for being named a "Lawyer of the Year" by Massachusetts Lawyers Weekly. Job well done!

Annual Walk to the Hill for Civil Legal Aide

On January 29, 2015, hundreds of attorneys gathered for the Equal Justice Colaition's annual "Walk to the Hill for Civil Legal Aid," which calls on state legislatures to fund the Massachusetts Legal Assistance Corporation. This year's walk included a number of bar presidents, pictured here.

Photo L to R: Lisa M. Tittemore, President FBA MA Chapter; Julia Huston, President Boston Bar Association; Charlotte Glinka, President Massachusetts Academy of Trial Attorneys; Kara DelTufo, President Women's Bar Association of Massachusetts; Marsha Kazarosian, President Massachusetts Bar Association; Doreen Rachal, President Massachusetts Black Lawyers Association.

Photo credit: Boston Bar Association.

FBA MA President Lisa Tittemore and FBA YLD Secretary Jennifer Ioli.

Recent Rulings Clarify Who Can Sue and Be Sued Under the FCA in the First Circuit

By Daniel Marx, Foley Hoag LLP

The False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, is a potent tool for regulators and whistleblowers alike, and it presents a significant risk for potential defendants who deal with the government, particularly those in heavily regulated industries like pharmaceutical manufacturers and government contractors. The stakes in FCA actions can be quite high, given the prospect of trebled damages, statutory penalties and attorneys' fees, not to mention the risk of debarment or suspension. Therefore, entities and the individuals who run them must be knowledgeable about who can sue under the FCA and who can be sued.

Who Can Sue?

Under the FCA, only the first relator can bring a *qui tam* action. All of the others, who lose the race to the courthouse, face dismissal under "the first-to-file rule." Id. § 3730(b)(5). That rule aims to incentivize whistleblowers to make prompt reports of suspected fraud against the government and also to protect defendants from multiple lawsuits based on the same alleged scheme.

In *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111 (1st Cir. 2014), the First Circuit affirmed the dismissal of FCA claims that "ran afoul of the first-to-file rule," *id.* at 113, which as the appeals court noted, is both "jurisdictional" and "'exception-free.'" *Id.* at 117 (quoting *United States ex rel. Duxbury v. Ortho Biotech Prods., Inc.*, 579 F.3d 13, 33 (1st Cir. 2009)). In enforcing the first-to-file rule, the First Circuit applies an "essential facts" test. *Id.* at 117-18. Under this test, § 3730(b)(5) bars later "related action[s]" that are based on the same underlying facts, but it does not require "identical facts." As the court explained in *Wilson*, it "would be contrary to the plain language and legislative intent" of the first-to-file rule to impose an "identical facts" requirement. *Id.* at 118. When applying the "essential facts" test, courts must carefully consider the facts and circumstances of similar FCA actions, *see id.* at 119, because there is no litmus test for too much commonality. In *Wilson*, however, the First Circuit concluded that the district court had reached the correct result, because "[t]he overlaps among the two complaints were considerable: the same defendants, the same drugs, the assertion of nationwide schemes, and the allegations of specific mechanism of promotion common to both and leading to common patterns of submission of false claims under the federal Medicaid program." *Id.* at 118.

More recently, in *United States ex rel. Ven-a-Care of the Florida Keys, Inc. v. Baxter Healthcare Corp.*, 772 F.3d 932 (1st Cir. 2014), the First Circuit affirmed the dismissal of another FCA action, and in doing so, the appeals court clarified the first-to-file rule as well as the essential facts test for applying that rule.

> [T]he first-to-file rule requires that we check to see whether the complaint in the first qui tam suit provided enough detail to ensure that "the government knows the essential facts of a fraudulent scheme."

Id. at 937 (quoting *Wilson*, 750 F.3d at 117). That being said, the requisite level of detail is considerable lower than the particularity that Fed. R. Civ. P. 9(b) demands to plead fraud. *See id.* at 940 n.8. Unlike Rule 9(b), the point of the first-to-file rule is "to ensure the federal government receives the information it needs to launch a meaningful investigation into fraudulent conduct." *Id.* at 937. That purpose is served once a relator files a complaint that adequately informs the government of the "essential facts" of the alleged scheme, thereby enabling the government to investigate. *Id.* at 939, 942. Accordingly, later whistleblowers "must show not only that they provided more detail" than the initial relator, but also that the initial relator "did not provide enough detail—even if it provided some." *Id.* The first-filed FCA action in *Ven-a-Care* satisfied the rule because it "identif[ied] the key highlights about . . . the supposed fraud," even if the pleading "did not offer a 'play-by-play' of events or a detailed narration of how the alleged fraud played out." *Id.* at 940. The complaint described the basic features of the fraud, such as "the pricing mechanism" for the alleged scheme, the specific drugs involved, the time period and certain "corroborating evidence." *Id.* That was enough, the First Circuit held, to permit the government to conduct its investigation and, therefore, to close the courthouse door to later relators.

Who Can Be Sued?

Under the FCA, a relator may not bring a qui tam action against a state. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787, 88 (2000). Thus, would-be defendants with close relationships to the state, such as state universities, should consider whether they can fairly be considered "arms of the state" that are immune to such lawsuits.

In *United States and the Commonwealth of Massachusetts ex rel. Willette v. University of Massachusetts*, No. 13-40066-TSH, 2015 U.S. Dist. LEXIS 6666 (D. Mass. Jan. 14, 2015), a former employee of Commonwealth Medicine, a healthcare consulting division of the University of Massachusetts Medical School ("UMMS"), brought FCA claims alleging that Commonwealth Medicine and its Center for Health Care Financing falsely inflated the costs of Medicaid-related services for which the federal government provided reimbursement. UMMS moved to dismiss, arguing that it could not be sued under the FCA. That "dispositive" contention turned on the proper reading of Stevens and whether, under the Supreme Court's decision, UMMS was an "arm of the state."

Because the First Circuit has not yet established "a test for determining whether an entity is a state under the FCA," the district court looked to other circuits, which unanimously apply "the same 'arm-of-the-state' analysis that courts use for sovereign immunity purposes." *Id.* at *5-6. This test involves "two inquiries." *Id*. at *6. First, the court must decide whether the state structured the relevant entity to share sovereignty, and in making that determination, the court should be guided by the following illustrative factors:

1. Whether the entity has the funding power to satisfy judgments without direct state participation;
2. Whether the entity's function is governmental;
3. Whether the entity is separately incorporated;
4. Whether and to what extent the state exerts control over the entity;
5. Whether the agency has the power to sue or be sued, and enter contracts in its own name;
6. Whether the entity's property is subject to state taxation;
7. Whether the state has immunized itself from responsibility for the entity's acts or omissions; and
8. Whether state courts have treated the entity as part of the state.

Id. (citing *Fresinius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 62 n.6, 70 (1st Cir. 2003)). Second, if these factors prove inconclusive, the court must then consider "whether there is a risk, 'legally or practically,' that damages will be paid from the state treasury." *Id.* at *7.

These inquiries led the district court to conclude that UMMS is, in fact, an arm-of-the-state which is not subject to suit under the FCA. The above factors "uniformly point[ed]" to that result. Further, "if any doubt remained," there was a risk that Massachusetts might bear the risk of any adverse judgment. With regard to that second inquiry, the district court made it clear that the key issue "is the risk that the state treasury will be on the hook, not the possibility of satisfying the judgment from elsewhere." *Id.* at *10.

Willette resembles *United States ex rel. King v. University of Texas Health Science Center-Houston*, No. 12-20795 (5th Cir. Nov. 4, 2013), an earlier FCA action against another state university medical center in which a whistleblower alleged fraud in connection with federal research grants. The district court dismissed the case, holding that UTHSCH was an "arm of the state" and not a "person" who could be sued under the FCA. After the Fifth Circuit affirmed, the relator in *King* unsuccessfully petitioned for certiorari to the Supreme Court, asking the Court to reconsider its decision in Stevens and citing a purported conflict among the circuits about the "arm of the state" test. From the First Circuit, the petition cited *Irizarry-Mora v. University of Puerto Rico*, 647 F.3d 9 (1st Cir. 2011), an age-discrimination case in which the appeals court held that the university could not be sued because it was protected by sovereign immunity. Although *Willette* did not cite *Irizarry-Mora*, both cases adopt the same "two-step framework," and parties should expect that the First Circuit will stick to that approach when it eventually addresses this issue in an FCA case.

Conclusion

The FCA is an active area for enforcement activity and private litigation, where the consequences of adverse judgments can be disastrous for entities and individuals. In evaluating these actions—and defending against them—it is critical to consider carefully the parties themselves. Have the whistleblowers violated the first-to-file rule by bringing claims after "similar enough" ones are already pending? *See Ven-a-Care of the Florida Keys, Inc.*, 772 F.3d at 934. Are the defendants "arms of the state" whom the Supreme Court has shielded from liability under the FCA? *See Willette*, 2015 U.S. Dist. LEXIS 6666, at *4-5 & nn.3-4. If the answer to either (or both) of these questions is "yes," false claims litigation may be foreclosed altogether.

YLD Update

By Stephen I. Hansen, Eckert, Seamans, Cherin & Mellott LLC

The Young Lawyers Division (YLD) hosted two mock interview programs for law students at Boston University School of Law and at Suffolk University Law School on January 21 and January 22. The YLD Board Members – Steve Hansen, Shannon Phillips, Nicole O'Connor, Andrew Jacobs, and Jennifer Ioli – conducted thirty minute mock interview sessions of individual law students at both schools. These sessions consisted of a formal private interview with each participating student, followed by a discussion in which constructive feedback was provided on the interview styles and resumes provided. The YLD had a tremendous turnout for both programs. In total, twelve Boston University Law students 20 Suffolk Law Students participated in the program. Timing for both programs could not have been better for the students, as both schools had on-campus recruitment events scheduled for the following week and many students were excited at the chance to practice their interview skills. The YLD received great feedback from the law schools and students and both schools have expressed an interest in continuing the program in the future. Due to the unprecedented snow, the YLD's interview program with New England Law Boston on January 27, 2015 was postponed and will be rescheduled for this spring.

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