



Federal Bar Association

Massachusetts Chapter

Tracy Roosevelt, Editor



Newsletter

IN THIS ISSUE:

President's Column

Announcements

The Ginny Hurley Memorial Scholarship

Government Relations Update

Committee Corner

News from the Western Division

Events

FBA Judicial Reception

Western Division Event

Breakfast with the Bench

Worcester Division Event

Goldilocks On Trial

Case Notes

Luncheon On The Investigation of Whether ExxonMobil Misled the Public About the Risks of Climate Change

Luncheon on the Volkswagen Diesel Emissions Fraud Scandal

Fast-Forwarding Privacy: A Video Tape Rental Statute in the Digital Era

President's Column

By Matthew Baltay



The Federal Bar Association of Massachusetts is on a roll. We came off a very busy spring and carried the momentum into the summer with a full slate of programs.

Our annual Judicial Reception went very well on June 7, 2016. Judge F. Dennis Saylor IV was honored for his service and dedication to the federal judiciary. The highlight of the reception was Judge Saylor

comments regarding the road he has travelled and his experience as a federal court judge. Also of note was the warm introduction delivered by Judge Nathaniel Gorton. The event was extremely well attended.

On May 19, our President-Elect, Scott Lopez, met in Washington, D.C. with the FBA national leadership to discuss FBA national priorities including adequate funding for the federal courts, prompt attention to judicial vacancies and the creation of an Article I immigration court. Scott then met with Senator Edward Markey and Congressman Joseph P. Kennedy III as well as Senator Warren's policy counsel to discuss the importance of these issues.

In Boston, we held another of our successful monthly Breakfasts with the Bench on June 21 with Chief Magistrate Judge Boal. Our monthly Breakfasts with the Bench, held at the Moakley Courthouse in Boston, allow for candid presentations and discussion between the bench and bar. Other Breakfasts with the Bench held this year include one on April 27, 2016 with First Circuit Chief Judge Jeffrey R. Howard, one with Judge Saylor on "Trial Tips and Rarely Granted Motions", and breakfasts with Judge Leo T. Sorokin, Judge Indira Talwani, Judge George A. O'Toole, Jr. and Bankruptcy Judge Frank Bailey.

Moving across the Commonwealth, we held a panel discussion in Springfield in May with Magistrate Judge Robertson on federal practice issues specific to the Western Division. Another very successful program was put on by Judge Hillman and Magistrate

Judge Hennessy, who presented in Worcester on June 28, 2016 on the recent amendments to the Federal Rules of Civil Procedure.

Our programming could not take place without our section committees. For example, on June 2, our Environmental Law Committee presented on climate change with a panel moderated by Nancy Reiner and Susan Crane. As just another example, our Philanthropy Committee led by Amy Bratskeir participated in the annual mock trial at the Federal Bankruptcy Court in Boston on June 22 with Judge Bailey. The event included a mock trial put on by fourth graders from Chelsea, with guidance from FBA volunteers and court staff. The event was a success by all accounts.

Looking ahead, we have several exciting programs on the calendar. On July 28, our Health Law Committee will put on a program at the Federal courthouse in Boston on implications of the U.S. Supreme Court's June Escobar Ruling on False Claims Act cases. The panel will include Hon. Dennis F. Saylor, IV, Suzanne E. Durrell, Gregg Shapiro, Asst. United States Attorney, and Larry M. Kraus. We will begin the next Breakfast with the Bench series with Judge Hillman on September 15. And on September 22, the FBA will host a program on current SEC enforcement priorities with John Duggan of the Boston SEC office and area practitioners Ian Roffman and Nick Theorodou.

Thus, I am pleased to report that the Federal Bar Association of Massachusetts is thriving.

EXECUTIVE OFFICERS:

President
Matthew C. Baltay

President Elect
Scott P. Lopez

Vice President
Harvey Weiner

Secretary
Juliet A. Davison

Treasurer
Jonathan I. Handler

National Delegate
Nathan A. Olin

Immediate Past President
Lisa M. Tittlemore

Past President
Michelle I. Schaffer

Co-Vice-President for the First Circuit

Matthew C. Moschella
Oreste Ramos

Newsletter Editor
Tracy Roosevelt

Full listing on page 14



The Ginny Hurley Memorial Scholarship



Ginny Hurley joined the Clerk's Office of the United States District Court, District of Massachusetts in 1976 as a Deputy Clerk. Through the years her responsibilities grew and she touched the lives of virtually every member of the Court family. From 2003 until her passing, Ginny was responsible for organizing all of the educational programs at the Court for the bench, bar and public. Her title of "Outreach Coordinator" reflected the fact that she was the face of the court, welcoming all who came to take part in the judicial system, including dignitaries from around the world, international and national press, and students from down the street, all with grace and a smile. Ginny was a good friend, teacher and mentor. She was a quick wit, and had the ability to make people laugh.

Ginny derived great satisfaction coordinating the Court's summer programs for high school and college students – the Lindsay and Nelson Fellowship programs. She helped nurture and train the next generation to appreciate and participate in the legal progress. In memory of her tremendous work for these students, the Massachusetts Chapter of the Federal Bar Association has established the Ginny Hurley Memorial Scholarship. This scholarship, for books or tuition expenses, will be awarded annually to all graduating Lindsay and Nelson Fellows.

The Lindsay Fellowship

Every year, the Court selects approximately six Lindsay Fellows for a program that lasts approximately nine weeks. Fellows are college upperclassmen with an interest in a legal career. Each Fellow is assigned to a judge during the first month of the program. During that first month, the Fellows also attend an intensive program on legal research and writing with a qualified instructor. Each Fellow is assigned to either the United States Attorney's Office, Federal Defender Office or the United States Probation Office during the second month of the program. Prior to graduation, the Fellows return to the district court to compete in a moot court program before a federal judge.

<http://www.mad.uscourts.gov/outreach/lindsay.htm>

The Nelson Fellowship

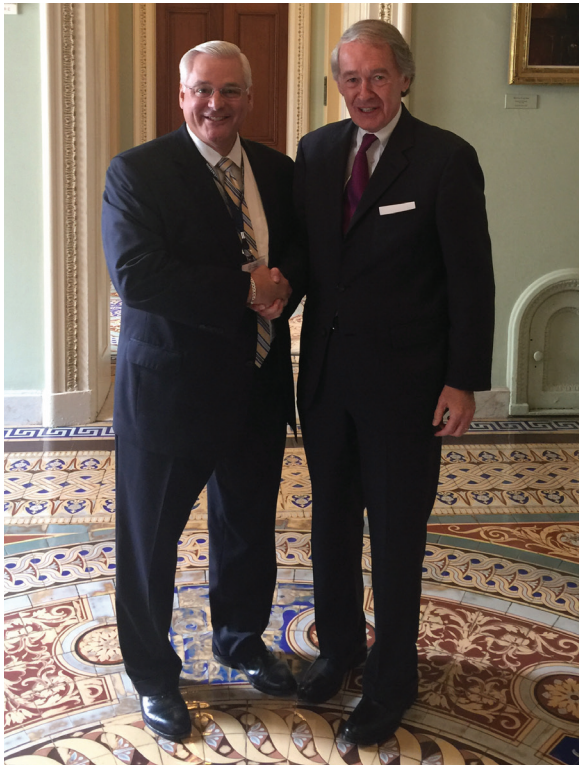
Every year, the Court selects approximately twelve Nelson Fellows. Fellows are high school students who are encouraged to attend college. Each Fellow is assigned to a judge and works in that judge's chambers. The Nelson Fellows attend trials and other court proceedings with their assigned judge and assist in office operations and court management. The Fellows take part in structured classes in subject areas such as civil rights and public speaking. During this intensive summer program, students meet community leaders, visit local colleges, and are introduced to organizations that facilitate the college application process. The final and most exciting event is the mock trial before a federal judge.

<http://www.mad.uscourts.gov/outreach/nelson.htm>

Donations are welcome. Checks should be made out to **Federal Bar Association – Massachusetts Chapter**. **Please include a note designating the funds for Ginny Hurley Memorial Scholarship.** Donations should be sent to FBA Treasurer Jonathan Handler at c/o Day Pitney, One International Place, Boston MA 02110.

Government Relations Update

By Nathan A. Olin – National Council Delegate,
Massachusetts Chapter



As the FBA National Council Delegate for the Massachusetts Chapter, I am pleased to summarize several pieces of interesting information recently coming out of Washington, D.C. Most significantly, about sixty FBA leaders from across the country—including our own President-Elect Scott Lopez—participated in Capitol Hill Day on May 19, 2016. Scott was able to meet with Senator Edward Markey and his Senior counsel, Andrew W. Cohen, Congressman Joseph P. Kennedy III and his Senior Legislative Assistant, Eric S. Fins, and Senator Elizabeth Warren’s Counsel Stephanie O. Akpa to discuss the FBA National’s 2016 Public Policy Priorities. Specifically, Scott requested our legislators’ support for adequate funding for Federal courts, prompt action on fulfilling judicial vacancies, and the creation of a specialized Article I court for adjudication of claims under the Immigration and Naturalization Act. The latter two issues are discussed more fully below. According to Scott, the District of Massachusetts is fortunate to have Senators and Congressmen who appreciate the need for adequate funding for Federal courts as well as prompt action on judicial vacancies. Moreover, they were all receptive to receiving more information on the specialized Article I court which Scott provided to them after Capitol Hill Day.

Also in Washington D.C., I attended the April mid-year meeting where the strong growth of the association nationally was stressed. One particular area of pride for Massachusetts is how well we have responded to the “law school challenge” by creating law student chapters throughout the Commonwealth,

most recently at Western New England University School of Law in Springfield.

Regarding the national issue of unfilled judgeship slots, things are only going more slowly than the usual snail’s-pace during this election year. Adding to the mix, of course, is the nomination of Chief Judge Merrick Garland to the Supreme Court. According to a May 10, 2016 memorandum from Bruce Moyer, Counsel for Government Relations, “Judge Garland’s nomination remains a stalemate, despite a sustained campaign by the White House and Democratic-aligned interest groups.” The advocates, the memo continues, “are targeting GOP senators in close reelection contests in nine states to spotlight their opposition to action on the Garland nomination.” Obviously, most federal practitioners, including many of us in Massachusetts, will be focusing on the role of the Supreme Court generally, and the Garland nomination in particular, as the presidential race intensifies this summer.

Finally, as noted above, federal immigration court restructuring is underway. The national FBA has taken a position supporting the transfer of responsibilities for the adjudication of immigration claims under the Immigration and Naturalization Act, from the Executive Office of Immigration Review (within the Department of Justice) to a specialized Article I court (established by Congress). According to Mr. Moyer, the Government Accountability Office is in the early stages of the review project, sitting down with experts and groups associated with the immigration courts in order to gather information and data. As evidenced by President-Elect Lopez’s trip to Capitol Hill, we will be tracking this particular issue, as well as many other important national FBA concerns, in the months ahead.



Committee Corner

For the past several years, the Massachusetts Chapter of the FBA has been busily creating a “committee” structure that more or less follows the national “section and division” framework. This means that your FBA membership goes even further. Not only do you have access to all of the national and local publications and programs, you also can link into Massachusetts-only events and connect with other nearby members who share common, practice-specific interests. Although parts of the following list will be changing soon, these individuals have been the committee liaisons and chairs for this past year. Many of these folks have dedicated significant hours to advance the Massachusetts chapter and they are due deep thanks. For more information, please link on the “Officer” tab of the FBA Massachusetts website.

Coordinator of Committees

Nathan A. Olin

Aviation Law/Transportation Law and Security Committee

David Bannard and Christopher Howe (chairs)

Peter Netburn (board liaison)

Bankruptcy Committee

John La Liberte and Keri Wintle (chairs)

John Mutch (board liaison)

Civil Rights Committee

Karen Blum and Michelle Hinkley (chairs)

Howard Friedman (board liaison)

Criminal Law Committee

Michael Ricciuti (chair)

Scott Lopez (board liaison)

Diversity Committee

Erika Reis and Raquel Webster (chairs)

Michelle Schaffer (board liaison)

Employment Law, Social Security and Disability Law Committee

Mala Rafik (chair)

Juliet Davison (board liaison)

Environmental Law Committee

Susan Crane and Nancy Reiner (chairs)

Lisa Tittlemore (board liaison)

Health Law Committee

Jason Drori and Michelle Peirce (chairs)

Kenneth Pickering (board liaison)

Immigration Law Committee

Matthew Maiona and Sara Ward (chairs)

Jonathan Handler (board liaison)

Intellectual Property Committee

Brandon Scruggs and Bo Han (chairs)

Lisa Tittlemore (board liaison)

International Law Committee

Thomas Ayres and Christopher Hart (chairs)

Harvey Weiner (board liaison)

Philanthropy Committee

Amy Bratskeir and Sara Colb (chairs)

Patrick Curran (board liaison)

Interested in contributing to the Newsletter?
Contact Tracy Roosevelt at troosevelt@foleyhoag.com.



FBA Judicial Reception

On Tuesday, June 7, 2016, the Massachusetts Chapter of the Federal Bar Association held its Annual Judicial Reception at the Boston Harbor Hotel and proudly recognized the Honorable F. Dennis Saylor IV.

FBA President Matthew Baltay of Foley Hoag kicked off the presentations and delivered the awards.

The Honorable Nathaniel Gorton introduced Judge Saylor with a history of his life and experience before coming to the bench. Judge Saylor provided brief remarks to the community of lawyers, judges and family members gathered to celebrate him.

The FBA-MA also honored Lisa Tittlemore of Sunstein Kann Murphy and Timbers as past President and Susan Weise from the Litigation Division of the City of Boston in recognition of twenty years of exemplary service to the Federal Bar Association.

The Board of Directors and members of the FBA-MA came together from around the state for this momentous evening.



News from the Western Division

The Massachusetts Chapter's Western Division hosted Judge Mastroianni and Magistrate Judge Robertson for two well-attended bench-bar meetings this spring.

MARCH 16, 2016

March's event featured Judge Mastroianni discussing trial practice and procedure. He spoke to and took questions on a broad range of topics, from jury selection to closing statements. Judge Mastroianni was joined by a surprise guest, Judge Ilana Rovner of the United States Court of Appeals for the Seventh Circuit. Judge Rovner shared her experience as a district court judge, as well as her warmth and humor.



L-R Row 1:

Board Member David Lawless of Robinson and Donovan, P.C. with District Judge Mark G. Mastroianni, Crowd listening to Judge Mastroianni and Seventh Circuit Judge Ilana Rovner, Judge Rovner speaking



L-R Row 2:

Board Member Nathan Olin of Connor, Momeau & Olin, LLP with Judge Rovner, Judge Rovner (center) with Bethaney Healy and Tamara Figueroa of the United States District Court, Massachusetts Western Division

MAY 12, 2016

Our discussion with Magistrate Judge Robertson in May focused on pre-trial practice issues relevant to both civil and criminal practitioners. It took the form of a question and answer session moderated by Carole Sakowski Lynch and Thomas O'Connor. Both events this spring were very well attended. We are in the process of planning next year's events and welcome your thoughts and suggestions.

We would like to thank both the participating judges and the members of the local bar for their enthusiastic participation in this discussion series, which is providing a unique opportunity for engagement between the judiciary and the organized bar in western Massachusetts. For further information about anything happening at the Western Division, please contact Board Member David S. Lawless or Board Member Nathan A. Olin.



L-R Row 1:

Magistrate Judge Katherine A. Robertson speaking, Magistrate Judge Robertson with John Pucci of Bulkley, Richardson & Gelinas, LLP, Magistrate Judge Robertson (center) with panelists Carole Sakowski Lynch and Thomas O'Connor

Western Division Event

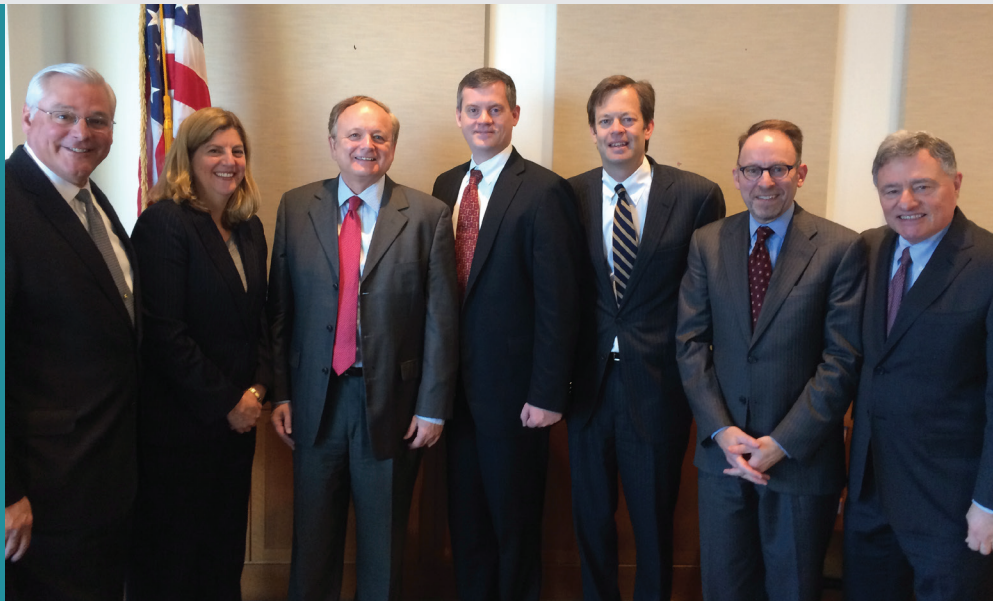
Nate Olin in the Western Division hosted a fantastic event in Springfield! *"Trial Practices with Judge Mastroianni"* turned into *"Trial Practices with Judge Mastroianni and Judge Ilana Rovner of the Seventh Circuit Court of Appeals."* Judge Rovner has Springfield connections and has been sitting here on occasion this winter, connecting remotely to Chicago, including today. Judge Mastroianni invited her at the last minute and it was wonderful. We had over 50 attendees and were treated to a riveting discussion about trial issues by both judges. The reception was great too.

Thank you to Nate Olin, David Lawless and the Western Division's divisional clerk, Bethaney Healy, for all of their hard work, as well as Rob Farrell who once again made the trek to Springfield.

Breakfast with the Bench:

On April 27, 2016, the FBA hosted a **"Breakfast with the Bench"** with the Honorable Jeffrey R. Howard. Chief Judge Howard discussed *"Suggestions for your next Appeal."*

From L to R: Scott Lopez, Lisa Tittlemore, Chief Judge Howard, Rob Farrell, Matthew Baltay, Jonathan Handler and Harvey Weiner.



Worcester Division Event

On June 28, 2016, the Worcester Division of the FBA, and the Worcester County Bar Association, sponsored a panel discussion with Judge Hillman and Magistrate Judge Hennessy to discuss the impact of the 2015 Amendments to Federal Rules of Civil Procedure. The rules seek to promote cooperation among litigants and eliminate unnecessary and costly discovery practices. The Judges offered their insights and stressed the major themes of the new amendments: cooperation; early and active case management; proportionality; and uniform sanctions for the failure to take steps to preserve electronically stored information. Approximately thirty attorneys attended the presentation at the Harold D. Donahue Courthouse, followed by a reception with the Judges.

- Kenneth C. Pickering



Goldilocks On Trial

On June 22, 2016 our Chapter's Philanthropy Committee participated in "Goldilocks On Trial," a mock trial led by Judge Bailey in Boston's Bankruptcy Court. Judge Bailey and his staff put on the event and thankfully called on us to help recruit attorney volunteers. The mock trial participants, children aged 8 through 12, were from the Chelsea Boys and Girls Club. The Philanthropy Committee chaired by Board member Amy Bratskeir recruited several FBA members (and a few potential new-members) who graciously volunteered their mornings to help the children execute a great mock trial. Naturally, Goldilocks was "on trial" for Trespass, Vandalism, and Theft; the jury (comprised of children) convicted her only of Trespass despite compelling evidence that she broke Baby Bear's Chair and ate his porridge. Her sentence was: 1 year in "juvie" (as they said!) and 1 year of community service -- cleaning Nahant Beach.



For some of the kids, it was their first time in Boston. The children were awed by just being in the courtroom itself, let alone sitting at Counsel's Table and speaking on behalf of their "clients." As their group leader told us, the kids "couldn't stop talking about the experience the whole ride home and until they left that day and they loved each getting their own "mentor" for their role." This was a wonderful opportunity to engage with local youth and the bench.



Luncheon On The Investigation of Whether ExxonMobil Misled the Public About the Risks of Climate Change

By Nancy Reiner, Managing Director of Major, Lindsey & Africa and Susan Crane, Law Office of Susan J. Crane

On June 2, 2016, the Environmental Law Committee of the FBA's Massachusetts Chapter held its second brown bag lunch at the offices of Sunstein, Kann, Murphy & Timbers, LLP in Boston, Massachusetts. The talk focused on the investigation into whether ExxonMobil misled investors and the public about the risks of climate change over the last forty + years. The Committee was honored to have as its guest speakers Bradley Campbell, President of the Conservation Law Foundation (CLF), David Nicholas, an environmental attorney in Newton, MA and Josh Kratka, a senior attorney at the National Environmental Law Center. Matthew Pawa, a litigator who has represented plaintiffs in precedent-setting climate change cases, was scheduled to speak at the luncheon but withdrew after receiving a Congressional document demand from thirteen Republican members of the House Science, Space and Technology Committee. The House Committee's demand was also sent to other private attorneys, numerous environmental groups, and twenty state attorneys general, alleging that they worked together in "coordinating" probes of Exxon and other fossil fuel companies in violation of the companies' First Amendment rights to "conduct scientific research [on climate change] free from intimidation of threats of prosecution." Notably, most respondents rejected the request from Rep. Lamar Smith, R-Texas, Chairman of the House Science Committee and a "climate change denier." The Massachusetts Attorney General was one of twelve attorneys general who refused to produce the requested documents.

The June lunch program was moderated by Nancy Reiner and Susan Crane, Co-Chairs of the FBA Massachusetts Environmental Law Committee. Brad Campbell first spoke about the House Science Committee's demand for documents that Pawa and others received and its potential attempt to "silence speech" on such an important public health and environmental issue. Campbell also noted that the major fossil fuel companies and trade groups spend almost [\\$115 million a year to deny man-made climate change and to oppose efforts to reduce carbon emissions](#), according to a report by the British research organization, "Influence Map." Exxon alone spends about \$27 million annually in such efforts.

Campbell discussed the history of Exxon's understanding of climate change in the 1970's and 1980's and its efforts to "undermine the scientific consensus" of man-made climate change. Campbell views Exxon's denial tactics as right from the "same playbook" as the Big Tobacco cases, where the tobacco companies challenged the well-established science of the causal connection between cigarettes and cancer.

Campbell went on to discuss the Conservation Law Foundation's planned lawsuit against Exxon alleging Clean Water Act and RCRA violations at its Everett, Massachusetts facility. CLF alleges that Exxon has not met its legal obligations to protect a local community against a "very specific and perhaps even imminent danger" posed by the bulk storage of petroleum and petroleum-contaminated soil and groundwater on a facility built on fill. CLF's lawsuit focuses on both reductions of NPDES permitted discharges and climate change adaptation. As Campbell stated when he first gave notice of the impending suit:

ExxonMobil knowingly and unlawfully misled regulators about whether its Everett facility can withstand rising seas, more intense precipitation, and other climate impacts without spewing oil and other toxic pollutants into adjoining neighborhoods, the Mystic River, and the Boston Harbor. Today's lawsuit—the first of its kind—aims to hold ExxonMobil accountable for decades of dishonesty and require that the Everett facility meet the legal standards for climate-readiness.

CLF's lawsuit differs from the [investigations by the attorneys general of Massachusetts, New York](#), and eighteen other states because CLF also focuses on climate change adaptation. The attorneys general, on the other hand, are all investigating whether Exxon misled investors and/or the public about the effect that its carbon emissions have on climate change, including whether securities laws were violated. CLF's claim against Exxon is being brought in collaboration with the [Mystic River Watershed Association](#) and a coalition of local environmental groups from communities that have the lowest incomes and are the most polluted. The litigation will contrast the wider role of Exxon in denying climate change with the local damages in Everett, Massachusetts.

After Campbell's fascinating discussion, David Nicholas, an attorney in Newton, and Josh Kratka, a senior attorney at the National Environmental Law Center, spoke about their very recent victory in the 5th Circuit Court of Appeals after six years of litigation involving an ExxonMobil oil refinery and chemical complex in Baytown, Texas near

(continued on next page)

Houston, the largest industrial facility in the U.S. The ruling overturned a District Court decision, which had found that only ninety-four of approximately four thousand accidental air pollution releases occurring at the refinery over a 4-year period were actionable but caused no harm, with no economic benefit accruing to ExxonMobil. The 5th Circuit reinstated the Clean Air Act enforcement suit, remanding it to the District Court and ordering that all of the release events be taken into account “for assessment of penalties based on the correct number of actionable violations.”

The lawsuit was first brought in 2010 under the citizen suit provisions of the Clean Air Act allowing for the private enforcement of federal law in the absence of government action. Various environmental groups alleged that Exxon illegally released about 5,000 tons of toxic pollutants during “startup and shutdown, equipment malfunctions, and other unforeseen events” at the Baytown complex over an 8-year period. They alleged that most of those incidents, also known as upsets, are “avoidable and generally ignored by regulators.” They asked the Court to assess \$640 million in penalties against Exxon for Clean Air Act violations dating back to 2005.

Kratka’s and Nicholas’s discussion regarding their successful 5th Circuit appeal of the Clean Air Act citizen suit and Campbell’s talk about CLF’s lawsuit against Exxon regarding its Everett, Massachusetts facility were both dynamic and thought-provoking. All three speakers generated excellent questions from the engaged audience, which made the discussions even more captivating and lively.

Luncheon on the Volkswagen Diesel Emissions Fraud Scandal

By Susan Crane, Law Office of Susan J. Crane, and Nancy Reiner, Managing Director of Major, Lindsey & Africa

On January 26, 2016, the newly-formed Environmental Law Committee of the FBA’s Massachusetts Chapter held a lively and well-attended kick-off luncheon in Boston on the Volkswagen diesel emissions scandal. Chris Barry-Smith, First Assistant Attorney General, and Fred Augenstern, Assistant Attorney General, both of the Massachusetts AG’s Office, discussed the Commonwealth’s actions against Volkswagen arising from the emissions “defeat” devices installed in approximately 15,000 Massachusetts VW diesel vehicles and over half a million nationally.

Volkswagen began marketing its new “clean” diesel vehicles in 2008, promising that its innovative advanced technology provided peppy performance and excellent fuel consumption but without any of the dirty air emissions previously associated with diesel engines. VW described its new line of vehicles, rolled out in VW, Porsche, and Audi models, as so clean burning that emissions would be 25% lower than

those of traditional gasoline-powered cars. These false claims lured eco-conscious consumers to the new diesel lines, for whom environmental “friendliness” was a very high priority in selecting an automobile.

Due to deceptive software installed by VW that would not be discovered for many years, its “clean” diesels do not come anywhere close to meeting stringent U.S. and Massachusetts Clean Air Act standards for nitrogen oxides (NOx), emitting between five and 40 times permitted levels. NOx gases are odorless and colorless, contribute significantly to smog, cause related respiratory problems, and are associated with marine eutrophication. During annual vehicle inspections when the cars are stationary, the defeat device software turns on an emissions control device that limits emissions of NOx to acceptable levels. When operating the vehicles under road conditions, however, the hidden bypass device renders the emissions control devices inoperable, improving both driving performance and fuel efficiency.

The defeat device went unnoticed until mid-2015, when a watchdog group detected VW’s grand deception while performing emissions testing under driving conditions. These tests showed that the vehicle window emissions stickers,

(continued on next page)

required whenever a new automobile is sold, contained falsified data supplied by VW for both NOx and CO2 emissions. VW has admitted to this. According to Mr. Augenstern, the only real factual question is how high up in the company this vast conspiracy extends.

Section 177 of the federal Clean Air Act permits states to adopt more stringent air emission standards, and Massachusetts is one of more than a dozen so-called 177 states. Under Massachusetts' regulations, tampering with a vehicle's emission control device is strictly prohibited. Defeat devices such as those installed by VW are subject to fines of up to \$37,000 per day. In addition, numerous other violations of the Mass. Clean Air Act and unfair and deceptive acts under the Mass. Consumer Protection Act (c. 93A) have been alleged.

Mr. Barry-Smith explained that VW's fraud on the regulators translates directly to consumer fraud. Among the Commonwealth's allegations are that VW acted deceptively in selling unlawful vehicles with fraudulent emissions representations, contrary to express warranties provided to purchasers. Additional allegations of c. 93A violations are predicated upon VW's unfairness in lying to regulators who govern the vehicles being introduced into Massachusetts commerce and violating statutes designed for the protection of public health, safety or welfare.

The speakers acknowledged that the potential claims world-wide, with a total of approximately 11 million diesel automobiles containing the defeat device sold, could add up to enormous fines and penalties from regulators and huge payouts to defrauded consumers and impacted VW dealerships. The speakers acknowledged that even as the #1 automobile manufacturer in the world, VW's pot of money to pay out on these claims is limited. With the potential for billions of dollars in civil fines for violations of environmental laws in every single state, the objective of state regulators is not to kill the company but to achieve a penalty resolution that makes sense and is achievable. In addition to civil lawsuits brought by the states, defrauded consumers, and impacted VW dealerships, the U.S. Department of Justice is handling criminal investigations into VW's wrongdoing.

Regardless of the eventual outcome, regulators and defrauded consumers agree that a prompt remedy is needed to get the polluting diesel cars off the road. No merchant may sell a flawed diesel vehicle, although there is no such prohibition on sales directly by private individuals. The vehicles that are already in use can still be driven until an agreement is reached with the regulators and a solution is found.

The problem is there is no simple, cost-effective technological "fix" for these cars. In early January, both California and the EPA rejected a remedy offered by VW because it didn't go far enough. For those vehicles that can be appropriately retrofitted with effective emissions control devices that do not compromise vehicle performance, VW will have to offer recall repairs. Then consumers who continue to drive their cars would be given a deadline to have the repairs made, after which their vehicles would not pass an annual inspection. For unrepairable vehicles, rescission would be an appropriate remedy, with a buyback agreement between VW and vehicle owners.

In mid-April 2016, VW agreed in principle to give American consumers the option of having their impacted vehicles repurchased or having repairs made to fix the emissions problem. Drivers of leased diesel vehicles would be able to cancel their leases without penalties. Although the details still need to be worked out, vehicle owners would likely be given some amount of monetary compensation as well. This settlement will not affect actions being brought by state governments.

Fast-Forwarding Privacy: A Video Tape Rental Statute in the Digital Era

By Thomas Carey, Partner, Sunstein Kann Murphy & Timbers LLP, Boston, MA

Contentious Supreme Court nominations began with that of Robert Bork, whose originalist views led him to proclaim that there is no constitutional right to privacy. Americans, he believed, have only such privacy rights as may be conferred by statute. Little did he imagine that his own personal experience would lead to just such a statute.

While Judge Bork's nomination to the Supreme Court was in the balance and with his views on privacy very much in the news, a reporter obtained a list of the videos that Judge Bork and his family had rented from a local video store and published the list. The backlash from this incident led to the 1988 Video Privacy Protection Act (VPPA)¹.

The VPPA provides a civil remedy against a "video tape service provider" that knowingly discloses personally identifiable information (PII) concerning its "consumers." "Consumer" is defined to include "any renter, purchaser, or subscriber of goods or services" from the video tape service provider. The VPPA authorizes courts to award punitive damages and attorneys' fees to successful plaintiffs.

Given the demise of Blockbuster, this piece of legislation might be no more than an historic curiosity. But judges with a penchant for more imaginative interpretations of statutes than Judge Bork would have countenanced have breathed new life into this statute, making it relevant to today's cellphone app developers.

Two ongoing class action lawsuits have resulted in opinions that represent a lively conversation among those trial judges and appellate courts that have considered the VPPA's vitality in the mobile phone era. The most recent opinion was a breakthrough success for privacy advocates.

Cartoon Network and USA Today each developed free cellphone apps that allowed users to access video content. The apps would also transmit data to aggregators that would identify the videos that were watched. The data included the

Android ID² and, in the case of USA Today, the GPS coordinates, of the user's device.

Users of these apps filed class action lawsuits alleging violations of the VPPA. In both cases, the defendants argued that the plaintiffs were not "subscribers" within the meaning of the VPPA because the services were free, and that sharing the Android ID was not the disclosure of PII for purposes of that statute. Earlier cases had held that a device identifier was not PII, so precedent seemed to be on their side.

The first of these cases to go to trial involved The Cartoon Network. In 2014, a federal trial court in Georgia granted a motion to dismiss the complaint.³ The court said the user qualified as a "subscriber" to the Cartoon Network service even though it was free, but that the Android ID was not PII.

Next up was Gannett, the publisher of USA Today. Gannett contended that the Android ID cannot be PII because it identifies an object, rather than a human being. A federal judge in Massachusetts rejected that argument, pointing out by analogy that, while a home address describes an object, not a person, there can be little doubt that it is PII.⁴

Gannett also contended that the Android ID cannot be PII because it cannot be linked to a specific person without also knowing who owns the phone in question. The court responded that the same could be said of every identifier other than a person's name. For example, the court pointed out, a social security number is a string of nine numbers that only takes on meaning if it can be identified as the number of a specific person, but it is unquestionably PII.

The court in the Gannett case then considered whether the plaintiff was a subscriber. After reviewing several definitions, the court concluded that subscriptions involve payment, registration, commitment, delivery, and access to restricted content, or some combination of these attributes. The USA Today app had none of these characteristics, so it "appears to merely be a more convenient form of visiting the USA

² The Android ID is established on devices that use Google's Android operating system. It is created when a user first boots up the device and it remains unchanged unless the user does a "factory reset" of the device, which deletes the phone's data and settings.

³ *Ellis v. Cartoon Network Inc.* (ND Ga 2014) (Civ. No. 1:14-CV-484).

⁴ *Yershov v. Gannett Satellite Information Network Inc.* (D.Mass. 2015) (Civ. Non. 14-13112-FDS).

¹ 18 USC §2710.

(continued on next page)

Today website.” Under these circumstances, an individual who downloads and uses the USA Today app was deemed not to be a “subscriber” within the meaning of the VPPA.

Following this ruling, the Eleventh Circuit Court of Appeals decided the appeal of the Cartoon Network case. It first considered whether the plaintiff, using a free app that required no registration, was a subscriber. It was persuaded by the reasoning in the USA Today decision and concluded that the plaintiff was not a subscriber. On that basis, the trial court’s dismissal of the complaint was affirmed. The Court of Appeals made no mention of whether the Android ID was PII.⁵

In April 2016, the Court of Appeals for the First Circuit decided the appeal of the district court’s ruling about the USA Today app. The panel agreed with the trial court that the Android ID constitutes PII, a conclusion that was bolstered by the simultaneous transmission of GPS data that would make it easier to locate the user’s home.⁶

On the question of whether the plaintiff was a “subscriber,” the court flatly disagreed with the Eleventh Circuit decision in *Cartoon Network*: “[B]y installing the App on his phone, thereby establishing seamless access to an electronic version of USA Today, [the plaintiff] established a relationship with Gannett that is materially different from what would have been the case had USA Today simply remained one of millions of sites on the web that [he] might have accessed through a web browser.”

While the First Circuit allowed for the possibility that further facts might ultimately lead to a different conclusion, it held that, for purposes of Gannett’s motion to dismiss the complaint, the plaintiff should be considered a subscriber and thus the motion to dismiss should be denied.

Gannett is the first case in which a VPPA plaintiff complaining about a free app has survived a motion to dismiss the complaint. Previous plaintiffs, like the one in *Cartoon Network*, have stumbled either on the question of whether PII was disclosed or of whether they were subscribers for purposes of the VPPA.

The VPPA is attractive to class action lawyers because it not only confers explicit privacy rights but allows judges to grant attorneys’ fees to successful plaintiffs. Until now, the VPPA has been like a mirage to these lawyers and their clients – tempting

but frustrating because of the difficulties associated with applying a statutory vocabulary from the 1980s to the world of cellphone apps.

Now that a plaintiff has survived a motion to dismiss its class action, and now that a court has held both that the Android ID may be PII and that a user of a free app may be a subscriber, we can expect the VPPA to become a prominent player in privacy litigation. Judge Bork might well wonder how a statute aimed at video tape stores could ensnare cellphone app developers, but alas he is no longer with us to warn against taking liberties with statutory language.

The VPPA does not forbid sharing data about an individual’s video watching; it merely requires the consent of that individual. However, the manner in which that consent must be obtained is intricate. If your app is passing along device identifiers and data that includes video usage, consult with an attorney about this sensitive question.

Want to draft a Case Note
for the next edition of the
FBA Massachusetts Chapter
Newsletter?

Please send your submissions to
the editor, Tracy Roosevelt, at
troosevelt@foleyhoag.com.

⁵ *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015).

⁶ *Yershov v. Gannett Satellite Information Network*, 820 F.3d 482 (1ST Cir 2016).

EXECUTIVE OFFICERS

President

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

President Elect

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

Vice President

Harvey Weiner
Peabody & Arnold, LLP
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 951-2054
hweiner@peabodyarnold.com

Secretary

Juliet Davison
Davison Law
280 Summer Street, 5th Floor
Boston, MA 02210
(617) 345-9990
juliet@davisonlawllc.com

Treasurer

Jonathan I. Handler
Day Pitney LLP
One International Place
Boston, MA 02110
(617) 345-4734
jihandler@daypitney.com

National Delegate

Nathaniel A. Olin
Connor, Morneau & Olin, LLP
73 State Street, Suite 310
Springfield, MA 01103
(413) 455-1730
nolin@cmolawyers.com

Immediate Past President

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

Past President

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

Co-Vice-President for the First Circuit

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

Co-Vice-President for the First Circuit

Oreste R. Ramos
Mendez & Alvarez LLC
Popular Centre, 19th Floor
209 Munoz Rivera Avenue
San Juan, San Juan, Puerto Rico
(787) 274-4937
oramos@pmalaw.com

BOARD MEMBERS

Amy Bratskeir
MBTA Law Department
10 Park Plaza, Suite 7760
Boston, MA 02116
(617) 222-6108
Amy.Bratskeir@Boston.gov

Patrick M. Curran Jr.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
One Boston Place, Suite 3220
Boston, MA 02108-4403
(617) 994-5700
patrick.curran@ogletreedeakins.com

Brian A. Pérez-Daple
Assistant United States Attorney
United States Attorney's Office
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3318

Howard Friedman
Law Offices of Howard Friedman, P.C.
90 Canal Street, 5th Floor
Boston, MA 02114
(617) 742-4100
hfriedman@civil-rights-law.com

Stephen Hansen
Eckert Seamans Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
(617) 342-6838
shansen@eckertseamans.com

Michelle Katherine Hinkley
Hinkley Law Group
153 Main Street, Suite 1C
Medford, MA 02155
(781) 874-9207
michelle.hinkley@hinkleylawgroup.com

Leonard H. Kesten
Brody Hardoon Perkins & Kesten, LLP
One Exeter Plaza
Boston, MA 02116
(617) 880-7100
lkesten@bhpklaw.co

Lisa Skehill Maki
City of Boston Law Department
One City Hall Plaza, Suite 615
Boston, MA 02201
(617) 635-4022
Lisa.Maki@boston.gov

Jonathan David Mutch
Robins Kaplan
800 Boylston Street, 25th Floor
Boston, MA 02199
(617) 859-2722
JMutch@RobinsKaplan.com

Peter C. Netburn
Hermes, Netburn, O'Connor & Spearing, P.C.
265 Franklin Street, 7th Floor
Boston, MA 02110
(617) 210-7720
pnetburn@hermesnetburn.com

Kenneth C. Pickering
Mirick, O'Connell, DeMallie & Lougee LLP
100 Front Street
Worcester, MA 01608-1477
(508) 791-8500
kpickering@mirickoconnell.com

Erika Reis
City of Boston - Law Department
One City Hall Plaza, Room 615
Boston, MA 02201
(617) 635-4042
Erika.Reis@cityofboston.gov

Martin J. Rooney
Curley & Curley, P.C.
35 Braintree Hill Office Park, Suite 103
Braintree, MA 02184
(617) 523-2990

Sara K. Ward
Maiona & Ward Immigration Law
31 Milk Street, Suite 315
Boston, MA 021091
(617) 695-2220

Susan M. Weise
City of Boston - Law Department
One City Hall Plaza, Room 615
Boston, MA 02201
(617) 635-4040
susan.weise@cityofboston.gov

HONORARY BOARD OF DIRECTOR MEMBERS:

Craig J. Nicewicz
Operations Manager, Public Sector
US District Court for the District
of Massachusetts
1 Courthouse Way
Boston, MA 02210
(617) 748-9161

Robert Farrell, Clerk of Court
US District Court for the District
of Massachusetts
1 Courthouse Way
Boston, MA 02210
(617) 748-4223

**LAW SCHOOL COMMITTEE CHAIR
EX OFFICIO MEMBER BOARD OF DIRECTORS**

J. Martin Richey
Supervising Assistant Federal Public Defender
Federal Public Defender Office

WORCESTER DESIGNEE:

Kenneth C. Pickering
Mirick, O’Connell, DeMallie & Lougee, LLP
100 Front Street
Worcester, MA 01608-1477
(508) 860-1544
kpickering@mirickoconnell.com

SPRINGFIELD DESIGNEE:

David S. Lawless
Robinson Donovan, P.C.
1500 Main Street, Suite 1600
Springfield, MA 01115
(413) 732-2301
dlawless@robinsondonovan.com

JUDICIAL MEMBER:

The Honorable Timothy S. Hillman
US District Court for the District
of Massachusetts
Donohue Federal Building
595 Main Street
Worcester, MA 01608

PHILANTHROPY CHAIR:

Amy Bratskeir
MBTA Law Department
10 Park Plaza, Suite 7760
Boston, MA 02116
(617) 222-6108
Amy.Bratskeir@Boston.gov

YOUNGER LAWYERS DIVISION:

Michelle M. Byers, Chair
Hermes, Netburn, O’Connor & Spearing, P.C.
265 Franklin Street, 7th Floor
Boston, MA 02110
(617) 728-0050
mbyers@hermesnetburn.com

Nicole O’Connor, Chair-Elect
City of Boston – Law Department
One City Hall Plaza, Room 615
Boston, MA 02201
(617) 635-4039
Nicole.OConnor@cityofboston.gov

Shannon Phillips, Vice-Chair
City of Boston – Law Department
1 City Hall Square, Room 615
Boston, MA 02201
(617) 635-4051
Shannon.Phillips@cityofboston.gov

Jake Lantry, Treasurer
Campbell Campbell Edwards & Conroy PC
One Constitution Center, 3rd Floor
Boston, MA 02129
(617) 241-3000
jlantry@campbell-trial-lawyers.com

Jennifer Ioli, Secretary
Sherin and Lodgen LLP
101 Federal Street
Boston, MA 02110
(617) 646-2182
jlioli@sherin.com

