Federal Bar Association
Massachusetts Chapter

Newsletter

Tracy Roosevelt, Editor

WINTER 2016

President's Column

By Matthew Baltay

The Federal Bar Association of Massachusetts is as vibrant as ever. Our partnership with the federal court remains very strong as we continue to fulfill the Federal Bar Association mission of strengthening the federal legal system and serving the needs and interests of federal practitioners, the federal judiciary and the public they serve.

Our service to the bar and partnering with the bench is exemplified by our Breakfast with the Bench series. We hold a breakfast at the Moakley Courthouse monthly. These are open to the bar, involve presentations by current judges and allow for open dialogue between bench and bar. FBA Board Member Scott Lopez of Lawson & Weitzen heads up this series. We have been fortunate to have had breakfasts this year with the following members of the Massachusetts federal bench: Judge George A. O'Toole, Jr. (October 2015), Judge Frank J. Bailey (October 2015), Judge Indira Talwani (November 2015), Judge Leo T. Sorokin (December 2015) and Judge F. Dennis Saylor, IV (January 2016). The judges present on a variety of topics. For example, Judge O'Toole started our series this year with comments on jury empanelment, and Judge Saylor presented in January on "Trial Tips and Rarely Granted Motions." Judge Jeffrey R. Howard, Chief Circuit Judge for the First Circuit, will present on April 27 on appellate law issues.

Springfield has been similarly busy with a roster of excellent programs under the steady leadership of FBA Board members Nate Olin of Connor Morneau & Olin and David Lawless of Robinson Donovan. For example, Judge Ponsor presented on January 21 to the FBA on his thirty years on the federal bench, Judge Boroff presented in November on bankruptcy issues confronting non-bankruptcy lawyers, and Judge Mastroianni presented on March 16 on issues in criminal law.

In other areas, the FBA continues its mission of education and partnering with the court and community. Just to mention a few, on February 24, Judge Talwani and an all-star panel presented to a packed audience on the recent amendments to the Federal Rules of Civil Procedure. In November, the FBA hosted a job skills workshop at the Courthouse for probationers and the FBA participated in the annual Discovering Justice mock trials in December. Upcoming events include an April 6 seminar on Technology in the Courtroom and a program on the reentry courts. Also noteworthy is a March 24 event at which Judge Talwani, Judge Dein, and the FBA's Matt Moschella and Steve Hansen will head up a training on the reinvigorated pro se mediation program. In this program, the FBA staffs mediations of federal court litigation matters involving a pro se litigant as referred by the court.

Lastly, we are very pleased to announce the honoree for this year's Annual Federal Judicial Reception, Judge F. Dennis Saylor, IV. The reception will be on June 7 at the Boston Harbor Hotel. We look forward to seeing our friends and colleagues for an enjoyable evening.

Thus, I am pleased to report that the FBA of Massachusetts is thriving.

SAVE THE DATE

THE MASSACHUSETTS CHAPTER OF
THE FEDERAL BAR ASSOCIATION

ANNUAL FEDERAL JUDICIAL RECEPTION

JUNE 7, 2016
6:00 PM - 9:00 PM
BOSTON HARBOR HOTEL

WE WILL RECOGNIZE:

THE HONORABLE F. DENNIS SAYLOR, IV
FOR HIS SERVICE TO THE JUDICIARY, BAR, AND COMMUNITY

Full listing on page 13

Clerk's Corner

Update from Robert Farrell, Clerk of Court, US District Court, District of Massachusetts

Courtroom Evidence Presentation Systems

On April 6, 2016, Judges George A. O'Toole and F. Dennis Saylor IV will host an overview of the courtroom evidence presentation systems currently in use at the Moakley Courthouse in Boston. This training is open to all practicing attorneys and any staff responsible for the handling and presentation of evidence. The Judiciary Evidence Recording System used by the jury to review electronic evidence during deliberations will also be demonstrated. Two concurrent sessions will be offered at 3:00 p.m. This will be followed by panels moderated by Judge Burroughs on "Civil Practice - Recurring issues unique to multidistrict litigation" and Judge Leo T. Sorokin on "Criminal Practice - Recurring issues unique to multi-defendant cases.

Johnson v. United States (2015)

Samuel James Johnson, was a white supremacist with a substantial criminal record who was closely surveilled by the Federal Bureau of Investigations due to his potential and actual engagement in suspected domestic terror groups. Throughout his involvement he unknowingly offered information to undercover agents which relayed his desire and plan to carry out domestic attacks. Mr. Johnson was known to possess illegal firearms and weapons. Upon his arrest and Indictment he was charged with being a felon in possession of a firearm and ammunition and fell under the Armed Career Criminal Act (ACCA) residual clause which carried a 15 year statutory minimum for having three violent felony convictions, most notably possessing a sawed off shotgun. 18 USC § 924 (e) (2) (b) defined "violent felony" as an act that threatens "use of physical force against the person of another," "is burglary, arson, or extortion," "involves use of explosives", or "otherwise involves conduct that presents a serious potential risk of physical injury to another." The latter being defined as the "residual clause".

In short, after appealing his Judgment, the Eighth Circuit affirmed the District Court's sentence of 15 years. The Supreme Court granted certiorari, argued the matter on November 5, 2014, and again on April 20, 2015 to address the question of whether or not the residual clause was unconstitutionally vague.

The opinion of the Court, found the residual clause to be in violation of the Fifth Amendment with Justice Scalia's opinion stating "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes." Justices Kennedy and Thomas concurred, and in writing separate opinions disagreed that the residual clause of the ACCA was unconstitutionally vague. Justice Alito dissented, finding that the circumstances surrounding Johnson's arrest and ultimate Indictment could have met the narrow interpretation of the ACCA's residual clause. Notably, Johnson was in possession of his sawed-off shotgun while carrying out a drug deal in a public parking lot.

The Judges of this court executed General Order 15-1 on October 6, 2015 providing a Standing Procedural Order for the appointment of counsel and motions for relief under Johnson v. United States 135 S.Ct 2551 (2015). The Court's General Orders can be found under Attorneys-General Court Orders - on the Clerk's Office website.

Amendments to the Federal Rules of Practice and Procedure 12/1/2015

Under the Rules Enabling Act, 28 USC §§ 2071-75, amendments to the following rules take effect on December 1, 2015:

- Bankruptcy Rule 1007
- Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84, and the Appendix of Forms Under 28 U.S.C. § 2074(a) and the Supreme Court orders dated April 29, 2015, the amendments will govern all proceedings commenced on or after December 1, 2015, and all proceedings then pending insofar as just and practicable.

Significant changes to the Federal Rules of Civil Procedure include, among others: 1. The time for service of process under Rule 4(m) is shortened from 120 days to 90 days. 2. The time for holding the initial case management conference under Rule 16(b) has been shortened by 30 days, and new topics for the Rule 26(f) and Rule 16 conferences have been added.

Amendments to the Federal Rules of Practice and Procedure 3. The scope of discovery in Rule 26(b)(1) has been amended, and the need for proportional discovery tailored to the reasonable needs of the case has been highlighted. 4. Rule 37(e) has been rewritten to address the preservation and loss of electronically stored information. 5. Rule 1 has been amended to state that parties as well as courts have an obligation to secure the just, speedy, and inexpensive determination of every action.

Text of amended rules and supporting documentation:
http://www.uscourts.gov/rules-policies/current-rules-practice-procedure

http://www.mad.uscourts.gov/attorneys/pdf/RulesComparisonChart.pdf

Amended bankruptcy forms:
http://www.uscourts.gov/forms/bankruptcy-forms

Reappointment of Magistrate Judith Gail Dein

The court is accepting public comments on the reappointment of Magistrate Judith Gail Dein. The public notice is available through this link: http://www.mad.uscourts.gov/general/pdf/01082016 Public Notice - MJ Dein Reappointment.pdf

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

News from the Western Division

United States Bankruptcy Judge Henry Boroff addressing Western Division attorneys.

This year, for the first time, the Massachusetts Chapter's Western Division is hosting a discussion series with the members of our local judiciary. 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.

We held two well-attended events this fall. Magistrate Judge Neiman discussed mediation and Bankruptcy Judge Boroff discussed common bankruptcy issues that confront non-bankruptcy lawyers. The practical insights provided by both judges were a great way to begin our series.

Judge Ponsor joined us on January 21, 2016. He was followed by Judge Mastroianni in March and Magistrate Judge Robertson will join us in May. Please look for emails confirming dates and topics for upcoming meetings. Meetings are held at the United States Courthouse in Springfield at 4:00 p.m. and are followed by a reception. Admission is free to both members and non-members. We hope that you will be able to join us and thank everyone who has participated thus far.

In other news, the Western Division is helping to form a law student chapter of the FBA at Western New England University School of Law. For further information about anything happening at the Western Division, please contact Board Member David S. Lawless or Board Member Nathan A. Olin.

From L to R: Judge Boroff with FBA Member Andrea O'Connor and Nathan Olin, National Council Delegate.

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. First, regarding the national issue of unfilled judgeship slots, you may be surprised to learn that, in all of 2015, there were only eleven judicial confirmations from Congress, with ten at the district level and one at the circuit level (Federal Circuit). According to a January 8, 2016 memorandum from West Allen, Chair of the Government Relations Committee, and Bruce Moyer, Counsel for Government Relations, "this was the lowest number of judicial confirmations since 1960 and part of a broader trend." "At the end of the first session of the 114th Congress," the memo continues, "thirty-one judicial nominees awaited confirmation, including nineteen noncontroversial nominees whose only final hoop of approval remained a Senate floor vote." Fortunately, the District of Massachusetts is not currently considered a "hot-spot"—a judicial district where there are three or more unfilled vacancies—but our chapter will continue to keep a close eye on the national statistics in the upcoming year.

Second, the federal judiciary's financial resources to promptly administer justice in 2016 are in "very good shape" because of the massive omnibus spending bill approved by Congress in December of 2015, according to Allen and Moyer. It is probably not surprising that much of the judiciary's budget is devoted to the payment of salaries and compensation of court personnel. To that end, the bill included monies for salaries and expenses sufficiently above last year at a level that will avoid the need for personnel cuts. The omnibus spending bill, according to the January 8th memo, also included $948 million for new courthouse construction, including courthouse projects in Nashville (TN), Toledo (OH), Charlotte (NC), Des Moines (IA), Greenville (SC), Anniston (AL), Savannah (GA), and San Antonio (TX).

Third, Chief Justice John G. Roberts, Jr.'s 2015 Year-End Report on the Federal Judiciary focused on the major amendments recently made to the Federal Rules of Civil Procedure. The Chief Justice highlighted a few rules changes, including Rule 26(b)(1), which further reinforces reasonable limits on discovery through increased reliance on proportionality, and the amendment to Rule 1, which expressly recognizes the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation. According to Chief Judge Roberts, the new Rule 1 passage "highlights the point that lawyers—through representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes." Locally, please look out for upcoming programs from our chapter that will soon be reviewing these amendments, and others, in depth. Please also stay tuned for further FBA updates from our nation's capitol.

The YLD team involved in the Discovering Justice program included: (above L-R) Steve Hansen, Nicole O'Connor, Shannon Phillips, John Boscia, and Jacob Goodelman. The participating members of the Brooke Roslindale school were: Hansly Remfort, Rickenson Guerrier, Anai-jhe Sadberry, Nashaylah Pierre-Louis, Malyeeke Adams, Gracie Onaiwu, Brittlyanne Remfort, Mina Breen, Kelvin Feliz, Darnel Cineas, Makayla Johnson, Samantha Lamour, Rayshon Irby, and Naomi Knight.

Discovering Justice

By Steve Hansen, Eckert Seamans Cherin & Mellott, LLC

Discovering Justice, a Boston-based civic and justice education non-profit organization, celebrated its Sixteenth Annual "Evening of Mock Trials" on December 14, 2015. Hundreds of young students from the Citizen Schools program participated in the twelve week program that culminated in a series of mock trials that took place at the Moakley United States Courthouse, with the assistance of federal and state judges and practicing attorneys. The Federal Bar Association Young Lawyers' Division (YLD), along with their group of students from the Edward Brooke Charter School in Roslindale, appeared before the Honorable Judge Dennis Saylor to present the trial of Jones v. Hartwell School District, a civil suit alleging violations of the First Amendment.

After opening remarks by the Honorable Judge Nathaniel Gorton, teams of students were sent to their assigned courtrooms to conduct their trials. Each student was assigned the role of an attorney representing the plaintiff or the defendant. With the assistance of volunteer attorneys, the students had prepared for their individual roles in the trial—delivering the opening statements, questioning witnesses on direct and cross-examination, and delivering the closing statements to the jury. In a credit to all student participants, the trial ran smoothly and efficiently and was presented to the jury for deliberation. Following the verdict, students, volunteers, and family members celebrated the successful program with pizza in the foyer of the Moakley Courthouse.

Young Lawyers Division

From L to R: Jacob Goodelman, Nicole O'Connor, Shannon Phillips, Michelle Byers, The Honorable F. Dennis Saylor IV, Jacob Lantry, Jennifer Ioli, and Steve Hansen.

On December 14, 2015, the Discovering Justice program held mock trials at the U.S.D.C. for the District of Massachusetts in Boston. The Young Lawyers Division of the Massachusetts Chapter of the FBA coached one team from the Brooke Charter School in Roslindale, Massachusetts. Several YLD members, including the entire YLD board, volunteered in various capacities to facilitate the team's mock trial. Throughout the fall, Stephen Hansen (YLD Immediate Past Chair), Nicole O'Connor (YLD Chair Elect), Shannon Phillips (YLD Vice Chair), and Jacob Goodelman volunteered as mock trial coaches, visiting the school weekly to teach trial skills and preparation. Michelle Byers (YLD Chair), Jennifer Ioli (YLD Secretary), and Jacob Lantry (YLD Treasurer) volunteered as jurors. The YLD mock trial team performed wonderfully, and we all enjoyed the event. It was rewarding to observe the dedication and preparedness of the trial team, and it was overall an inspiring evening.

Pictured: Attendees at the FBA CLE program with Massachusetts Bankruptcy Judge Frank J. Bailey on October 27, 2015.

CLE Breakfast with Judge Bailey: "Bankruptcy Issues for Non-Bankruptcy Attorneys"

By Peter C. Netburn, Hermes, Netburn, O'Connor & Spearing, P.C.

On October 27, 2015, the Massachusetts Chapter of the Federal Bar Association sponsored a CLE breakfast with Judge Frank J. Bailey of the U.S. Bankruptcy Court for the District of Massachusetts. Although the breakfast lasted only an hour, Judge Bailey was able to provide an introduction to bankruptcy law and the bankruptcy system, highlighting the significant legal authorities, the Massachusetts Local Rules and the public policies that underlie the United States bankruptcy system. Judge Bailey discussed the historic statutory and judicial evolution of United States bankruptcy law and addressed the basics of bankruptcy practice, including practice before Massachusetts bankruptcy courts. Given that many in attendance do not regularly practice bankruptcy law, Judge Bailey graciously gave a tour of his courtroom, which has undergone a significant renovation since the United States District Court for the District of Massachusetts sat in the John W. McCormack Courthouse. Judge Bailey has been a strong supporter of the Massachusetts Chapter of the FBA and the Chapter has worked with him, and looks forward to doing so again in the future with respect to Judge Bailey's "Goldilocks" Mock Trial Program for middle school students.

Breakfast with the Bench Series

By Scott P. Lopez, Lawson & Weitzen, LLP

Each month the Mass. Chapter of the FBA sponsors a breakfast with a member of our bench. Each breakfast features a judge or magistrate judge from the First Circuit or the District Court for the District of Massachusetts. Each breakfast is open to the bar and is held in the Judges' dining room in the Moakley Courthouse. We are fortunate to have judges who enjoy participating in these events and are open and candid about the important issues discussed. Special thanks to all the judges who have participated in this unique program.

RECENT BREAKFASTS:

:: October 28, 2015

The Honorable George A. O'Toole, Jr.

Judge O'Toole delivered an overview of jury empanelment in his court. Judge O'Toole began his discussion by commenting on the institution of the jury and its role in our society. Judge O'Toole also discussed how jury service has evolved over the years. The main focus of Judge O'Toole's presentation was on the institutional importance of empaneling an impartial and random jury in civil and criminal cases notwithstanding the parties' attempts to empanel a jury that is favorable to their client's cause.

From L to R: Clerk Rob Farrell, Judge O'Toole, FBA's Scott Lopez

:: November 17, 2015

The Honorable Indira Talwani

Judge Talwani discussed her thoughts, impressions and observations about her first year on the bench. Judge Talwani gave us her insight on the challenges that confront an Article III judge. Specifically, she also noted the increased number of motions to dismiss that are filed and the challenge of ruling on these motions and other motions in a thoughtful and timely manner. She also gave the members in attendance some tips on how to better focus arguments in motions. Finally, she discussed her approach to sentencing in criminal cases.

:: December 16, 2015

The Honorable Leo T. Sorokin

Judge Sorokin discussed the different challenges faced by a U.S. District Judge and a U.S. Magistrate Judge. Judge Sorokin provided an overview of each role and how they differ. Specifically, he discussed the differences in the number and types of cases handled by a U.S. Magistrate Judge and a U.S. District Judge, the increased number of trials that a U.S. District Judge will preside over, and sentencing in criminal cases which he described as the most challenging aspect of being a U.S. District Judge.

From L to R: Scott Lopez, Judge Sorokin, Rob Farrell

From L to R: Scott Lopez, Judge Saylor, Clerk Rob Farrell

:: January 20, 2016

The Honorable F. Dennis Saylor IV

Judge Saylor shared his thoughts on the issue of rarely granted motions and trial tips. Specifically, Judge Saylor noted that because our district has a random draw there is an institutional reluctance to permit district-shopping (by change of venue motions) or judge-shopping (by recusal motions). Judge Saylor also provided some trial tips. Specifically, he discussed his preference for disciplined case presentation and noted that some practitioners do not organize direct examinations in advance of trial which oftentimes results in long-winded, convoluted and objectionable questions. Judge Saylor strongly encouraged counsel to prepare outlines in advance of trial for openings, direct examinations, cross-examinations and closings to avoid wasting time at trial.

Join the International Law Committee for a panel discussion on developments relating to the Foreign Corrupt Practices Act. The event is tentatively scheduled for May (date and location TBD).

Questions?

Please contact co-chairs Thomas Ayres (tayres@foleyhoag.com) or Chris Hart (chart@foleyhoag.com).

Closing the Courthouse Door to Sovereigns? A Discussion of the Supreme Court's Recent FSIA Case, OBB Personenverkehr AG v. Sachs

By Christopher Escobedo Hart, Foley Hoag LLP, Co-Chair, FBA Massachusetts International Law Committee

Is the Supreme Court making it harder to sue sovereigns in federal court? Yes, according to the Court's most recent – and unanimous -- Foreign Sovereign Immunities Act (FSIA) decision in *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015). Sachs stands for the proposition that, in order to invoke the "commercial activities" exception to the FSIA and sue a sovereign for tort claims, the gravamen of a private claimant's suit must have occurred in the United States.

Background

The facts of the case are, to put it plainly, awful. Carol Sachs, a U.S. citizen and California resident, bought a Eurail Pass in 2007. Using the pass some months later, she attempted to board a train in Innsbruck, Austria, and in the process slipped from the platform and onto the tracks. The petitioner's moving train crushed her legs, which had to be amputated.

Sachs sued OBB Personenverkehr, an Austrian company that operated the train, in federal court on five different theories: negligence, two theories of strict liability, and two implied warranty theories. The District Court dismissed her claims, and a Ninth Circuit panel affirmed. The Ninth Circuit en banc, however, reversed the District Court, and OBB Personenverkehr petitioned for certiorari.

Legal Analysis

At issue in the Court's holding was the "commercial activities" exception to the FSIA. In general, the FSIA provides that a sovereign is immune from suit in U.S. Court. However, Congress carved out certain limited exceptions to this immunity from suit, including for those cases where "the action is based upon a commercial activity carried on in the United States by a foreign state." 28 U.S.C. s. 1605(a)(2)[1]. Sachs sought to invoke that exception in her case, arguing that the "commercial activity carried on in the United States" by OBB Personenverkehr AG was the sale of the Eurail pass. The Supreme Court, however, held that Sach's claim could not be "based upon" the sale of the Eurail pass for purposes of the commercial activities exception, and held OBB Personenverkehr AG immune from suit under the FSIA.

The key words the Supreme Court focused on in its analysis were "based upon," a phrase that is not elaborated on in the statute. The en banc Ninth Circuit had held that so long as the commercial activity linking the sovereign with the United States fulfilled a single element of a plaintiff's claim, the claim would in that case be considered "based upon" the commercial activity. The Supreme Court criticized the Ninth Circuit's holding, however, as an "overreading" of a previous Supreme Court case considering the exception, *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). In *Nelson*, the Court held that the commercial activities exception did not apply to a couple who had sued Saudi Arabia and a state-owned hospital under tort theories for the husband's wrongful arrest, imprisonment, and torture while employed at the hospital. There, the Court reasoned that courts should look to the "particular conduct" at issue that would form the "gravamen of the complaint."

Taking its cue from *Nelson*, the Supreme Court reasoned that, in this case, buying a train ticket in the U.S. for travel abroad was not the "gravamen" of a claim stemming from physical injury overseas. As the Court stated, in order to properly consider what the action was "based upon," the court needed to "zero[] in on the core of [the] suit." "Under this analysis," the Court reasons, "the conduct constituting the gravamen of Sachs's suit plainly occurred abroad. All of her claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria." This was true even when considering Sachs's strict liability and implied warranty claims: "[u]nder any theory of the case that Sachs presents . . . there is nothing wrongful about the sale of the Eurail pass standing alone . . . However Sachs frames her suit, the incident in Innsbruck remains at its foundation."

The Supreme Court noted that the alternative would "allow plaintiffs to evade the Act's restrictions through artful pleading," which would "give jurisdictional significance to [a] feint of language" and "effectively thwart the Act's manifest purpose."

However, in a footnote the Court also noted that its decision was limited to the facts at hand. Had the case been different in one of two ways, the Court suggested, the holding in this case might too have been different. In one instance, the domestic conduct at issue could have been more significant to the

[1] This is not to be confused with the exception in the next part of the statute, 1605(a)(3), which allows sovereigns to be sued where "property is taken in violation of international law," so long as there is a "nexus" of commercial activity in the U.S. as defined by one of the two clauses in that section.

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claim. In another, the gravamen of each claim might not have been in the same place. Those might present different types of analysis, cautioning that courts ought not overread *OBB Personenverkehr* any more than the Ninth Circuit overread *Nelson*.

Unanswered Questions

The question of whether the FSIA could apply to OBB Personenverkehr AG in the first place is an important one but it is one that the Court did not reach. It is not straightforward. The statute makes "foreign states" immune from suit, but under the FSIA "foreign states" need not be foreign governments themselves; they can also be a state "agency or instrumentality." OBB Peronenverkehr, owned by a holding company that itself was created by the Republic of Austria, did not directly sell the Eurail pass to Sachs; rather, the passes were sold through a company called The Rail Pass Experts, a Massachusetts-based company. The en banc Ninth Circuit determined that The Rail Pass Experts' actions could be attributed to OBB Personsnverkehr through common law principles of agency. Having passed on analyzing this important issue, it remains an open question for a future Court to decide.

Fallout

Perhaps the most important takeaway from this case is that it is another data point suggesting that the Court is making it more difficult for private claimants to sue sovereigns in U.S. courts. *Sachs* is the third in a line of cases over the past several years limiting such suits. While *OBB Personenverkehr* considered the commercial activities exception to the FSIA, in 2013 the Supreme Court limited the kinds of cases that could be brought under the Alien Tort Statute under *Kiobel v. Royal Dutch Petroleum*. Just last year, in *Daimler AG v. Bauman*, the Court limited personal jurisdiction over American companies for acts occurring abroad.

Justice Breyer, in his recent book *The Court and the World*, offered a broad policy reason why such limitations might be appropriate. In a chapter considering the Alien Tort Statute, he reasons that foreign sovereigns have legitimate concerns about having U.S. courts decide suits concerning actions that occur in their countries, concerns that range from the rule of law, to the interpretation of legal norms, to what possible liability in U.S. courts might mean for doing business in those countries. Perhaps, taking Breyer's view, closing the courthouse door in suits against sovereigns is good foreign policy. Whether that trend will continue remains to be seen.

Recent Amendments to the Federal Rules of Civil Procedure

By Michael Hoven, Foley Hoag LLP

The recent amendments to the Federal Rules of Civil Procedure, which became effective on December 1, 2015, bring significant changes to case management and civil discovery. Attorneys will need to familiarize themselves with the accelerated schedule for service and scheduling order, the redefinition of the scope of discovery, and the new requirements imposed on responses to document requests, and inform clients of the new standard for their obligations to preserve electronically stored information.

Accelerated Schedule

Amendments to Rules 4 and 16 shorten the time permitted for service and for issuing a scheduling order.

Old Rule 4(m)	New Rule 4(m)
Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. . . .	**Time Limit for Service.** If a defendant is not served within 90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. . . .

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Old Rule 16(b)(2)	New Rule 16(b)(2)
Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.	**Time to Issue.** The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

Because the timing of the parties' Rule 26(f) conference and the beginning of discovery are linked to the scheduling order, the combination of the two amendments could permit parties to take discovery up to two months earlier than before.

Proportional Discovery

The definition of the scope of discovery has been substantially revised to make proportionality integral to the scope of discovery and eliminate the frequently cited language permitting discovery of relevant information that was "reasonably calculated to lead to the discovery of admissible evidence."

Old Rule 26(b)(1)	New Rule 26(b)(1)
Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).	***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The factors used to assess proportionality were formerly in Rule 26(b)(2)(C)(iii), with the exception of "the parties' relative access to relevant information," which is a new addition to the Rules. While a party could previously seek a court order to protect itself from discovery that was disproportional under those factors, their incorporation into the scope of permissible discovery itself creates a stronger tool to defend against burdensome discovery. If nothing more, the deletion of the "reasonably calculated" language will compel many attorneys to revise their standard objections to discovery requests.

Delivering and Responding to Document Requests

The new Rules create new opportunities for delivering document requests and impose new obligations in responding to them. First, an addition to Rule 26(d) permits a party to deliver an early Rule 34 request prior to the parties' Rule 26(f) conference, with that request deemed served at the time of the conference.

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New Rule 26(d)(2)
Early Rule 34 Requests. **(A)** ***Time to Deliver.*** More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: (i) to that party by any other party, and (ii) by that party to any plaintiff or to any other party that has been served. **(B)** ***When Considered Served.*** The request is considered to have been served at the first Rule 26(f) conference.

Second, changes to Rule 34 will require responding parties to say more about the time and manner of production and whether documents are being withheld on the basis of an objection.

Old Rule 34(b)(2)(B) and (C)	New Rule 34(b)(2)(B) and (C)
(B) ***Responding to Each Item.*** For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.	**(B)** ***Responding to Each Item.*** For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.
(C) ***Objections.*** An objection to part of a request must specify the part and permit inspection of the rest.	**(C)** ***Objections.*** An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

A responding party must now state that it will, in fact, be producing copies, and identify the time at which production will be complete or be subject to the deadline stated in the request. More importantly, a party must disclose when documents are being withheld on the basis of an objection. Given the 30-day deadline to respond, this places a new premium on the early assessment of a party's information systems to be able to meet this new requirement.

Preservation of ESI

Amended Rule 37(e) clarifies the responsibility of parties in carrying out the preservation of electronically stored information ("ESI") and the sanctioning power of the courts should a party fail to satisfy its responsibility.

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Old Rule 37(e)	New Rule 37(e)
Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.	**Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgement.

The new Rule does not create a new obligation to preserve, but specifies how a party can satisfy its obligation: by taking "reasonable steps." The Rule further limits the availability of any sanction to instances in which the court finds prejudice, and restricts certain severe sanctions to cases of spoliation.

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.

The First Circuit Rules on FAAAA Preemption of the Massachusetts Independent Contractor Law as Applied to Motor Carriers

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

Last year's Spring Newsletter featured an article discussing a pair of decisions holding that the Federal Aviation Administration Authorization Act (the "FAAAA") preempts the Massachusetts Independent Contractor Law when it comes to freight and package delivery motor carriers. The First Circuit has just unanimously reversed those rulings in two highly anticipated opinions. *See Schwann, et al. v. FedEx Ground Package System, Inc.*, No. 15-1214 (1st Cir. Feb. 22, 2016); *Remington, et al. v. J.B. Hunt Transport, Inc.*, No. 15-1252 (1st Cir. Feb. 22, 2016).

The *Schwann* and *Remington* cases arose out of the same basic set of facts: truck-driver plaintiffs claimed that they had been misclassified as independent contractors – rather than employees – in violation of the Massachusetts Independent Contractor Law, M.G.L. c. 149, § 148B. Presiding over both cases, Judge Stearns rejected the misclassification claims on grounds that the FAAAA preempted the "entire" Massachusetts statute. Prompt appeals followed.

The First Circuit affirmed those portions of Judge Stearns' decisions holding that the FAAAA preempted the second prong of the independent contractor analysis under M.G.L. c. 149, § 148B. Under the Massachusetts statute, workers are presumed to be employees unless three statutory prongs are satisfied, in which case the employee may be classified as an independent contractor. The second prong – the so-called "usual course of business prong" – requires that the service provided by the would-be independent contractor is "performed outside the usual course of business of the employer." Plaintiff-drivers have frequently focused their misclassification claims on this prong, arguing that motor carriers cannot prove that their drivers perform work outside the motor carriers' usual course of business.

Addressing this issue, the First Circuit stated that the decision whether to provide a service directly through an employee or alternatively through an independent contractor "is a significant decision in designing and running a business." As a result, application of the second prong would require a court to "define the degree of integration that a company may employ by mandating that any services deemed 'usual' to its course of business be performed by an employee." According to the court, this is problematic because it "poses a serious potential impediment to the achievement of the FAAAA's objectives" by requiring a court – "rather than the market participant" – to determine what services a company provides and how it chooses to provide them. Since the Massachusetts statute would "largely foreclose[] a motor carrier's method of providing delivery services, the First Circuit concluded that the FAAAA preempted the second prong of M.G.L. c. 149, § 148B, as applied in this set of cases.

However, the preemption analysis did not end there. Parting ways with Judge Stearns, the First Circuit went on to conclude that the second prong was, in fact, severable from Section 148B. Reasoning that the "separated itemization" of the three statutory prongs allows for a "straightforward deletion of one factor without touching the others," and giving heed to the legislative intent to protect employees against misclassification, the panel concluded that "the legislature's plain aim in enacting this statute favors two-thirds of this loaf over no loaf at all as applied to motor carriers . . . ." Therefore, the FAAAA's preemption of the second prong did not equate to a preemption of the "entire" statute. Neither employer in the *Schwann* and *Remington* cases addressed FAAAA preemption of the statute's first and third prongs. As a result, and in light of its severability analysis, the First Circuit also reversed the lower court's decisions holding that the other two prongs were also preempted by the FAAAA and remanded for further proceedings.

The First Circuit's decision is expected to change how litigants approach the preemption analysis in motor carrier misclassification cases. Its holding that the second prong of the independent contractor analysis is severable will likely bring the other two prongs into focus for purposes of a FAAAA preemption analysis. For plaintiffs and employers alike, the First Circuit's decision will likely result in a new wave of issues in an already complex class of litigation.

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