



Federal Bar Association

Massachusetts Chapter

Tracy Roosevelt, Editor

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WINTER 2017

President's Column

By Scott P. Lopez



Seven years ago, Past President Eve Piemonte called me and asked me if I would be willing to serve on the Board of Directors for the Federal Bar Association's Massachusetts Chapter. At the time, I had been a member of the Federal Bar Association for more than ten years, but I had no idea that our Chapter was one of the most active and vibrant chapters in the country. I remember walking into my first Board meeting wondering what would be expected of me. What I remember most about that first meeting was the feeling of being welcomed by my colleagues and future friends.

I am honored and humbled to begin my term as President of this wonderful Chapter. However, my experience is not unique. If you are reading this, someone in this organization reached out to you, brought you to an event, or asked you to join the Federal Bar Association. To all the young lawyers who are looking to build relationships with attorneys who practice in the federal court, this organization is for you. This organization has the support of the federal bench and provides opportunities for any lawyer to meet and learn from our federal judges.

At the outset, I would like to thank my immediate predecessor, Matthew Baltay for his hard work and dedication to this Chapter over the past year. Under his leadership, our Chapter has continued to grow and serve the federal bar and bench. We all owe him our thanks!

The mission of the Federal Bar 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. The vision of the Association is to be recognized as the premier bar association serving the federal practitioner and judiciary.

Locally, your Massachusetts Chapter is as diverse a group of lawyers as one can imagine who work in government positions, private practice, universities, corporations and the federal judiciary. Our membership continues to grow as we attract new practitioners, at all stages of careers, who practice in federal court.

Our signature Breakfast with the Bench series is continuing as strong as ever with President-elect Harvey Weiner planning this year's series. The Breakfast series is an excellent opportunity to meet and talk with our federal judges in an informal setting. We are lucky to have a bench that is willing to share their time with us.

Our Young Lawyers Division ("YLD") is planning another active year. At this year's National Annual Meeting, our YLD received a Presidential Citation for its innovative "Brief Bites" Lunch Series. However, the YLD will not rest on its laurels as it plans for another year of Brief Bites as well as a membership drive.

It is no secret that our Chapter is successful because our federal judges – the First Circuit, District Court, Magistrate, Bankruptcy and Immigration – as well as Assistant U.S. Attorneys and Assistant Federal Defenders – participate in our Chapter's activities. Our Chapter would not be what it is without their support and the support of our Clerk of Court, Robert M. Farrell.

Never forget that this is your bar association. It thrives because lawyers who care about the federal legal system and the administration of justice devote their time and energy to making our system of justice the best in the world. In this remarkable election year we need to remind ourselves that it is our responsibility to work toward a more perfect union and equal justice under the law each and every day. I look forward to working with all of you in the year ahead.



SAVE THE DATE

THE MASSACHUSETTS CHAPTER OF THE FEDERAL BAR ASSOCIATION

ANNUAL FEDERAL JUDICIAL RECEPTION

JUNE 13, 2017

6:00 PM - 9:00 PM

BOSTON HARBOR HOTEL, WHARF ROOM

WE WILL RECOGNIZE

THE HONORABLE DENISE J. CASPER

FOR HER SERVICE TO THE JUDICIARY, BAR AND COMMUNITY



The Ginny Hurley Memorial Scholarship

Ginny Hurley was responsible for organizing all of the educational programs at the Court for the bench, bar and public. 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 process. In memory of her tremendous work for these students, the Massachusetts Chapter of the Federal Bar Association established the Ginny Hurley Memorial Scholarship.

In August 2016, five Lindsay Fellows and fourteen Nelson Fellows, became the first recipients of the Ginny Hurley Memorial Scholarship. Following their Moot Court/Mock Trial and graduation, Matthew Baltay, Immediate Past President of the Federal Bar Association's Massachusetts Chapter, awarded each Fellow scholarship funds for books and tuition expenses.



Lindsay Fellowship Graduation Ceremony, August 5, 2016, Matthew Baltay, Immediate Past President of the Federal Bar Association's Massachusetts Chapter and the 2016 Lindsay Fellows
(Photo L-R: Jemmie Tejada, Hon. Judith G. Dein, Jose Medina, Suzette Schand, Madeline Weinreb, Jewel Duberry-Douglas and FBA-MA Immediate Past President Matthew Baltay.

Nelson Fellowship Graduation Ceremony – August 12, 2016.

(Photo L-R:) FBA-MA Immediate Past President Matthew Baltay, Delilah Demopoulos, Nyah Romulus, Nathan Camilo, Julie Le, Anna Stefanov, Jasmyn Dore, Kaia Walters, Gloria Revanche, Joseph Appiah, Edosa Osemwegie, Veliona Gjoleka, Jason Diaz, Jade Williams)



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 Erika P. Reis at c/o Eversource Energy, 800 Boylston Street, Boston MA 02210.

Government Relations Update

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



FBA-MA Immediate Past President Matthew Baltay (5th from left) accepting an award for the Massachusetts Chapter at the Annual Meeting in Cleveland, Ohio in September.

As the FBA National Council Delegate for the Massachusetts Chapter, I am pleased to summarize several pieces of exciting information from our national leaders. First and foremost, Immediate Past President Matthew Baltay and I were honored to represent the Massachusetts chapter at the September annual meeting in Cleveland. There, we heard from a variety of dignitaries, including both senators from Ohio, and met specifically with the incoming national president, U.S. Magistrate Judge Michael J. Newman, who is pushing a civics initiative for all chapters nationwide, as well as the new president-elect, Kip Bollin. Matthew and I also picked up awards, both for our newsletter as well as for our “Brief Bites” series. As your national delegate, I also happily voted in favor of the new LGBT section. In addition, we were thrilled to learn that our very own Matthew Moschella (Massachusetts chapter president in 2012-2013) is the new FBA general counsel.

In other national news, unfilled judicial slots, highlighted by the Supreme Court vacancy following the death of Justice Antonin Scalia, remain of paramount concern. According to a Bruce Moyer, Counsel

for Government Relations, “while media speculation will mount in the coming weeks over the filling of the Scalia vacancy,” a more immediate question over judicial vacancies will involve the district and circuit courts. “Current Article III vacancies continue to rise to historic levels, well over the 100-vacancy mark” and more than double the 54 openings President Obama faced eight years ago following George W. Bush’s presidency. Also, Moyer continues, funding for the federal courts remains at last year’s spending levels, as with the rest of the government. According to Moyer, “just before adjourning in December, the 114th Congress adopted a continuing resolution that extended government spending FY 2016 funding levels for roughly another five months to April 29, 2017.” Finally, notes Moyer, Chief Justice John Roberts early in January issued his traditional year-end report, focusing primarily on the operational business of the federal courts and praising district judges for their unceasing tenacity in administering justice. While the federal courts in general and the Supreme Court in particular were a focal point during the contentious 2016 election season, the Chief Justice steered well clear from controversy, using his annual report to highlight what he said was the underappreciated role of federal district judges.



FBA-MA Immediate Past President Matthew Baltay, Cathy Bollin, FBA President-Elect Kip Bollin, and FBA-MA Board Member Nathan Olin.



FBA President USMJ Michael J. Newman and FBA-MA Immediate Past President Matthew Baltay.

Committee Corner

The Federal Bar Association's Massachusetts Chapter has a robust committee structure. Many of our various committees have been creating and holding Massachusetts-only events which allow members to connect with other lawyers, experts, and judges who share common, practice-specific interests. In addition to several successful summer and fall programs—e.g., the Health Law Committee's discussion of the Supreme Court's recent *Escobar* decision; the Criminal Law Committee's 2016 bench-bar discussion; and the Intellectual Property Committee's patent damages panel—many exciting programs are already lined up for early 2017. These will include a bankruptcy law discussion for non-bankruptcy practitioners (sponsored by the Bankruptcy Law Committee); a panel with the new regional immigration director (sponsored by the Immigration Law Committee); and a series of events being coordinated for labor, employment and disability law practitioners (sponsored by the new Employment Law, Social Security and Disability Law Committee). Finally, if you are interested in helping to establish an LGBT Committee—to parallel the new section just approved by the national FBA—please let one of your Massachusetts Chapter board members know.

Coordinator of Committees

Nathan A. Olin

Diversity Committee

Erika Reis (chair)

Intellectual Property Committee

Brandon Scruggs and Bo Han (chairs)
Lisa Tittlemore (board liaison)

Aviation Law/Transportation Law and Security Committee

David Bannard and Christopher Howe (chairs)
Peter Netburn (board liaison)

Employment Law, Social Security and Disability Law Committee

Mala Rafik and Missy Fulton (chairs)
Juliet Davison (board liaison)

International Law Committee

Thomas Ayres and Christopher Hart (chairs)
Harvey Weiner (board liaison)

Bankruptcy Committee

Keri Wintle (chair)
Andrea O'Connor (board liaison)

Environmental Law Committee

Elizabeth Smith (chair)
Lisa Tittlemore (board liaison)

Philanthropy Committee

Amy Bratskeir and Sara Colb (chairs)
Patrick Curran (board liaison)

Civil Rights Committee

Karen Blum and Michelle Hinkley (chairs)
Howard Friedman (board liaison)

Health Law Committee

Jason Drori and Michelle Peirce (chairs)
Nathan Olin (board liaison)

Criminal Law Committee

Michael Ricciuti (chair)
Brian Murphy (board liaison)

Immigration Law Committee

Matthew Maiona and Sara Ward (chairs)
Jonathan Handler (board liaison)

Young Lawyers Division

On November 2nd, the Federal Bar Association's Massachusetts Chapter's Young Lawyers Division hosted a breakfast event with Chief Judge Patti B. Saris at the Moakley Courthouse. Chief Judge Saris spoke to a room of nearly 40 young attorneys about her fascinating career path from private practice, to the U.S. Senate, to the Justice Department, and ultimately to the federal bench. She also answered numerous questions from attendees and provided advice on how to be more successful practitioners before the federal bench.

At a luncheon held on December 21st, Judge Dein spoke about her experiences as an attorney and a judge and how young lawyers can improve their advocacy in federal court. She touched on both civil and criminal law, discussing topics ranging from mediations to detention hearings. There was also a great dialogue about to improve efficiency in the courtroom, both from the judge's perspective and from the lawyers' perspective.



Chief Judge Patti B. Saris (second from L) with FBA-MA YLD Board Members Jacob Lantry, Matthew McGarry and Sean McKendry.

L to R: Matt McGarry, Jacob Goodelman, Nicole O'Connor, Judge Dein, Sean McKendry.





L-R:
FBA-MA's Health Law Section
Co-Chairs Michelle Peirce, Judge
F. Dennis Saylor IV, Gregg Shapiro,
Lawrence Krauss and
Suzanne Durrell.

Civil Health Law Section Panel: Implications of the U.S. Supreme Court's June Escobar Ruling on False Claims Act Cases

The dog days of summer did not stop nearly 60 attorneys, including four sitting judges, from attending the Massachusetts Chapter of the Federal Bar Association's Civil Health Law Section's panel discussion, Implications of the U.S. Supreme Court's June *Escobar* Ruling on False Claims Act Cases – Perspectives from All Sides of the Issues.

Escobar recognized the important "implied certification" theory in False Claims Act cases and created numerous questions about the reach and application of that theory. The Honorable Dennis Saylor provided valuable judicial insight about *Escobar's* implications.

The panelists' diverse experience provided attendees with practical insight about future FCA cases. Gregg Shapiro, Chief of the Affirmative Civil Enforcement Unit for the United States Attorney's Office for the District of Massachusetts, shared his individual perspective based on his years of experience.

The defense and whistleblower perspectives were shared respectively by Lawrence Kraus, a litigation partner in Foley & Lardner's Boston Office, and Suzanne Durrell, a nationally known attorney and affiliate of the Whistleblower Law Collaborative in Boston.

The panel was moderated by Michelle Peirce, the section's co-chair.

The diverse panel generated interesting and spirited discussions about this long-awaited ruling from the U.S. Supreme Court. Attendees were able to continue the discussion at a reception that followed at the Moakley Courthouse.

The Health Law Section is co-chaired by Michelle R. Peirce and Jason Drori. Peirce is a shareholder at Donoghue Barrett & Singal, P.C. and co-manages the firm's litigation group. Drori is Senior Counsel at Foley & Lardner.

FBA IP Committee Panel Presentation on Patent Damages: Trial Practice, Data, & Trends

On December 8, 2016 the Intellectual Property Committee of the Federal Bar Association's Massachusetts Chapter held a panel presentation on patent damages, including trial practice, data, and trends. The four panelists were the Honorable Judge Richard Stearns of the U.S. District Court for the District of Massachusetts; Buck DeWolf, Chief Intellectual Property Counsel of GE and General Counsel for GE Global Research; Doug Kline, Chair of IP Litigation at Goodwin Procter; and Chris Barry, partner at PricewaterhouseCoopers and author of PwC's annual Patent Litigation Study. The event was well-attended and included lively discussion between panelists and attendees.

Chris Barry set the stage by going over some key data and trends from PwC's annual Patent Litigation Study. Points of interest included the shift towards jury trials over bench trials over the last two decades; the narrowing gap between patentee success rate in jury trials and bench trials; differences in damage awards between jury trials and bench trials; the disparity in damages awards for practicing and non-practicing entities; and district court patent case data by jurisdiction, including case load, time-to-trial, patentee success rate, and damages awards. Mr. Barry also discussed appellate data that showed high rates of appeal in patent cases and a tendency towards reversal when the patentee succeeded at the trial court. In addition, Mr. Barry discussed data showing an increase in both requests for and awards of attorneys' fees in the wake of the Supreme Court's *Octane* decision in 2014. The PwC Annual Patent Litigation Study that Mr. Barry's presentation was based on is available online at: <http://www.pwc.com/us/en/forensic-services/publications/patent-litigation-study.html>.

Judge Stearns discussed jury feedback from recent trials about effective and ineffective ways to present patent cases and damages to juries. First, he emphasized the importance of telling the invention story to the jury so they can get a sense of the practical problem that the inventor solved with the patent. This also allows building drama

(continued on next page)

and romance in cases that could otherwise become dry and technical for juries. Second, Judge Stearns emphasized that damages cases usually hinge on the credibility of the expert witness. Accordingly, each party and its expert must guard against over-reaching, which can diminish credibility. He also suggested that parties might consider stipulating to a damages amount, contingent upon a finding of liability. Judge Stearns also offered some other practical advice for trial lawyers in patent cases including the importance of being organized and also facile with electronic presentation equipment.

Doug Kline discussed practical challenges in building a damages case, including apportionment issues for the many cases where the patent covers only a portion of the actual product sold to the consumer. He used the example of a case involving encrypted content sharing over a network and offered creative options for developing evidence for apportioning the value of the encryption versus the value of the content shared.

Buck De Wolf discussed the in-house counsel perspective of patent cases and patent damages. He emphasized how the business team at large companies may not see any strategic value for patent litigation, just cost. He also emphasized the trend in large companies pursuing alternative fee arrangements in order to make their patent litigation costs more predictable. Mr. De Wolf noted that patent law developments over the last decade have made significant impacts in how many patent litigations play out. For example, since the Supreme Court's eBay decision nearly a decade ago, it has become much easier to settle patent suits brought by non-practicing entities for lower amounts since non-practicing entities can rarely make credible threats for injunctions post-eBay.

The panelists all did a tremendous job and received high praise from those in attendance. After the panel presentation, the panelists and audience enjoyed an excellent reception hosted by PwC.



Judge Mastroianni admires "Freedom from Fear," one of Norman Rockwell's Four Freedoms, presented to the US District Court's Springfield courthouse.

News from the Western Division

The presentation of Norman Rockwell's Four Freedoms and Golden Rule to the United States District Court's Springfield courthouse took place on October 6, 2016. The Honorable Michael Ponsor presided and remarks in presentation of the exhibit were made by Laurie Norton Moffatt, Director & CEO of the Norman Rockwell Museum, David S. Lawless, Esq., Robinson Donovan, P.C., John Spack, Executive Director of Discovering Justice, and Judge Ponsor. All are welcome to enjoy the permanent exhibit, which is on display in the atrium of the courthouse.

The Western Division of the FBA cordially invites you to join us for our upcoming civil practice bench-bar roundtable with Judge Mastroianni and Magistrate Judge Robertson on January 25, 2017 from 4:00 to 5:00 p.m.

The Court's U.S. District Court forum scheduled for March 7, 2017 from 4:00 to 6:00 p.m. will be simulcast at the Springfield courthouse. Admission is free and refreshments will be served.

For further information about anything happening at the Western Division, please contact Board Member David S. Lawless or Board Member Nathan A. Olin.



The Honorable Michael Ponsor and FBA-MA Board Member David Lawless.

Breakfast with the Bench:

On October 6, 2016, the Federal Bar Association's Massachusetts Chapter hosted the new term's first "Breakfast with the Bench" with the **Honorable Allison D. Burroughs** of the Mass. Federal District Court. Judge Burroughs discussed "**On Judging Others: Lessons Learned in My First 18 Months.**"



From L to R: FBA-MA President-Elect Harvey Weiner, Judge Allison Burroughs and FBA-MA Vice President Jonathan Handler.



From L to R: FBA-MA President Scott Lopez, FBA-MA President-Elect Harvey Weiner, Judge Maureen O'Sullivan, Clerk of Court, Robert M. Farrell, Judge Robin E. Feder, FBA-MA Vice President Jonathan Handler.

On October 28, 2016, Federal Bar Association's Massachusetts Chapter hosted a "Breakfast with the Bench" with the **Honorable Robin E. Feder** of the Boston Office of the U.S. Immigration Court, assisted by the **Honorable Maureen O'Sullivan** of the same court. The subject was "**What Every Lawyer Should Know**"

On December 15, 2016, the Federal Bar Association's Massachusetts Chapter hosted its third "Breakfast with the Bench" of the season with the **Honorable Timothy Hillman**. Judge Hillman discussed "**An Update on the Authentication and Admissibility of Digital Evidence.**"



From L to R: FBA-MA President-Elect Harvey Weiner, Clerk of Court, Rob Farrell, Judge Timothy S. Hillman, Sardiaa Leoney, Peter Netburn.



From L to R: FBA-MA President Scott Lopez, Magistrate Judge Marianne Bowler, Magistrate Judges Donald Cabell, Chief Judge Patti Saris, District Judge Allison Burroughs and Jack Pirozzolo.

2016 Federal Bench-Bar Discussion

By Scott Lopez, Lawson & Weitzen, LLP

On Wednesday, September 28, 2016, the Federal Bar Association's Massachusetts Chapter's Criminal Law Committee and the Boston Bar Association's Criminal Law Steering Committee co-sponsored their annual Federal Bench-Bar Discussion. Well over 100 federal-court practitioners attended this program which focused on hot-button issues in federal criminal and civil practice.

I moderated the criminal panel with Jack Pirozzolo, a partner at Sidley Austin, LLP. The judges who discussed criminal topics included Chief Judge Patti Saris, District Judge Allison Burroughs, and Magistrate Judges Marianne Bowler and Donald Cabell. The criminal topics discussed included when the court grants stays when there is both a criminal case and civil case filed involving the same alleged securities fraud, challenges of coordinating large gang cases, discovery disputes over electronic discovery, recent policy changes regarding plea agreements and cooperation agreements, attorney voir dire, and recent sentencing guideline amendments and related issues.

From L to R: Chief Magistrate Judge Jennifer Boal, District Judge Leo Sorokin and Magistrate Judge Katherine Robertson.

The civil panel was moderated by Michael Ricciuti, a partner at K&L Gates and Rachel Hershfang, Senior Trial Attorney at the Securities and Exchange Commission. The judges who discussed civil topics included District Judges Denise Casper and Leo Sorokin, Chief Magistrate Judge Jennifer Boal, and Magistrate Judges Robert Collings, Judith Dein and Katherine Robertson. The civil topics discussed included the use of juror questionnaires, attorney voir dire, effective and ineffective use of technology at trial, effective and ineffective techniques or practices at trial, what lawyers are doing well or poorly as advocates, tips to enhance motion practice, and how to handle difficult opponents.

A reception following the program gave attendees the opportunity to socialize with members of the bench in an informal setting. Feedback received from attendees after the program was very positive.

Hot Topics in SEC Enforcement

On September 22, the FBA hosted a panel at Foley Hoag LLP on **"Hot Topics in SEC Enforcement."** The speakers were: John T. Dugan, Associate Regional Director, SEC Boston Regional Office, Ian Roffman, Nutter McClennen & Fish LLP and Nicholas C. Theodorou, Foley Hoag LLP. Interesting details regarding enforcement trends were discussed. Topics included insider trading, whistleblowers, cyber security, investment advisor issues and the Financial Fraud Task Force. Questions were also taken from the audience.

From L to R: Clerk of Court, Robert Farrell, Nick Theodorou, Ian Roffman, John T. Dugan and FBA-MA Immediate Past President Matthew Baltay.





**SAVE THE
DATE**

3-7-17

U.S. District Court Forum

The Court is pleased to announce that it will hold its U.S. District Court Forum, featuring the district judges and the chief magistrate judge in a panel discussion, on March 7, 2017 from 4-6 p.m.

The forum will be held in the Jury Assembly Room at the Moakley U.S. Courthouse, but will also be simulcast to the Springfield and Worcester Courthouses to allow more members of the bar to attend. The Court also notes that this program will be offered free of charge. The judges will answer questions about their practices and procedures and new developments in the law.

Questions will be posed to the judges by a panel of attorneys:

Yvonne W. Chan, Partner, Goodwin

Lisa C. Goodheart, Partner, Sugarman Rogers, Barshak & Cohen P.C.

Ken C. Pickering, Partner, Mirick O'Connell

Tim Watkins, Assistant Federal Public Defender, Federal Defender's Office

Bill Weinreb, First Assistant U.S. Attorney, U.S. Attorney's Office

Eleanor Williams, Assistant Vice President and Counsel, MassMutual

The panel discussion will be followed by a reception for all attendees and the judges. Although admission will be free, space at all three locations (Boston, Springfield and Worcester) is limited and online registration will be required. Registration will begin on or about February 3, 2017 and there will be an ECF announcement about registration when it opens.

We hope you can join us on March 7th for this event.

America First, Sovereign Immunity Second: Proposed Amendment to FSIA's Definition of Commercial Activity May Upset Delicate Balance between Sovereign Immunity and Accountability

By Thomas Ayres, Foley Hoag LLP, Co-Chair, Federal Bar Association's Massachusetts Chapter's International Law Committee

With voters expressing increased skepticism regarding the benefits of free trade and globalization, politicians have sounded alarms about foreign sovereigns using perceived complicated networks of state-owned corporations to conduct business in the United States. Republican Senator Chuck Grassley of Iowa, who chairs the Senate Judiciary Committee, has recently proposed legislation that would limit the ability of state-owned corporations to avail themselves of the protections afforded by the Foreign Sovereign Immunities Act (FSIA).

In short, Senator Grassley's bill would eliminate the immunity of a foreign state-owned parent (*i.e.*, the majority shareholder) of a company that engages in commercial activity in the United States even if the parent does not itself engage in commercial activities here. With Republicans in control of Congress and the White House and outcry over Chinese trade and commercial practices reaching deafening levels, Senator Grassley's proposed amendment (or some version thereof) may very well become law. Yet it is unclear how courts would interpret the new law and how potential plaintiffs and defendants would adapt their legal strategies accordingly.

Background

Chinese state-owned entities have recently attracted attention by invoking sovereign immunity as a defense in U.S. litigation against them. A March 2016 decision by the Hon. Judge Eldon Fallon of the U.S. District Court for the Eastern District of Louisiana in a multidistrict litigation against Chinese drywall manufacturers raised concerns that state-owned industrial conglomerates are taking advantage of the FSIA's presumptive immunity for agencies and instrumentalities of foreign states. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 168 F. Supp. 3d 918 (2016). The facts of the case are well-known: from 2005 to 2008, drywall manufactured in China was used to construct new homes during the housing boom and to reconstruct buildings damaged by Hurricanes

Rita and Katrina. After installation of the drywall, owners and occupants reported unusual odors, appliance failures, and even health problems. Some defendants in this sprawling litigation have pursued settlement and remediation paths, while others have challenged jurisdiction.

Plaintiffs named as one of the defendants China New Building Materials Group ("CNBM Group"), an entity directly and wholly owned by the People's Republic of China that sat atop the corporate family involved in the manufacture and sale of the defective drywall. Discovery revealed that defendants Taishan Gypsum Co. Ltd. and its wholly-owned subsidiary Taian Taishan Plasterboard, Co. Ltd. (collectively "Taishan") had manufactured and sold the drywall. CNBM Group was two corporate tiers above Taishan, and its indirect, minority equity interest in Taishan never rose above 21%. Evidence showed that CNBM Group analyzed the volume of Taishan's sale of drywall to the United States, but only after the litigation began. CNBM Group also participated in developing and employing the strategy to respond to the litigation together with other defendant subsidiaries situated between it and Taishan.

Legal Analysis

As an agency or instrumentality of a foreign state by virtue of its ownership by the Chinese government, CNBM Group was presumptively immune from suit under the FSIA. With no evidence that CNBM Group had itself engaged in commercial activity during the relevant time period in order to bring it within the "commercial activities" exception found in Section 1605(a)(2) of the FSIA, the plaintiffs argued that the actions of Taishan were attributable to CNBM Group due to their close corporate relationship. In light of that argument, the plaintiffs needed to overcome the hurdle set by the U.S. Supreme Court in *First National City Bank v. Banco para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 627 (1983), which—in line with long-established jurisprudence on "piercing the corporate veil" with regard to privately-owned corporations—established that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Bancec* and subsequent FSIA jurisprudence holds that this presumption can be overcome by showing an intra-instrumentality alter ego relationship, *i.e.*, the parent extensively controls the subsidiary and is routinely involved in its day-to-day operations such that a relationship of principal and agent is created.

As stated in *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 448 (D.C. Cir. 1990), "[m]ajority shareholding and majority control of a board of directors, without more, are not sufficient to establish a relationship of principal to agent under [the] FSIA." Judge Fallon held that CNBM Group's "indirect minority ownership [of Taishan] filtered through multiple levels of investment cannot overcome the presumption." Nor was he moved by the fact that CNBM Group and some of its subsidiaries shared common officers and directors, office

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buildings and logos (but did not share any of these with Taishan). Judge Fallon did not consider CNBM Group's actions to be nefarious:

Plaintiffs' evidence shows that CNBM Group behaves as a responsible shareholder: by issuing guidance to its representatives on the boards of directors of its *direct* subsidiaries [] and instructing those directors to consult with CNBM Group for 'significant decisions'—e.g., changes in high-level executive officers, significant investments, and financial guarantees to other entities.

Under *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), subsidiaries of agencies or instrumentalities are not entitled to the same status (and resulting presumption of immunity) under the FSIA as their state-owned parents. Judge Fallon's order applies to CNBM Group only, and he has yet to determine whether the court has personal jurisdiction over the other companies related to CNBM Group and Taishan based on their contacts with the forum states.

Proposed Amendment

Senator Grassley's bill, introduced on September 14, 2016, is based on the premise that "[a]s they have grown larger, more opaque, and more involved in commercial activity with companies and consumers in the United States, state instrumentalities have continued aggressively to assert that they are immune to suit..." As a result, plaintiffs "should not be required to prove an alter ego relationship between members of an instrumentality to establish subject matter jurisdiction." The bill proposes the following addition (in italics) to the definition of commercial activity found at 28 U.S.C. § 1603(d):

(1) A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(2) *For purposes of section 1605(a)(2), a commercial activity of an agency or instrumentality of a foreign state shall be attributable to any corporate affiliate of the agency or instrumentality that—*

(A) directly or indirectly owns a majority of shares of the agency or instrumentality; and

(B) is also an agency or instrumentality of a foreign state.

Observations

Senator Grassley's proposed amendment would cast aside the precedents articulated in *Bancec* and those in *Foremost-McKesson* that majority shareholding, without more, is insufficient to establish an alter ego relationship. It would seemingly offer plaintiffs a shortcut around a difficult and costly investigation (either prior to filing suit or afterward through jurisdictional discovery, if granted)

into the decision-making processes and daily operations of foreign corporate conglomerates. Plaintiffs would merely require documentary evidence regarding the ownership structure of the entities within a corporate group—which is generally filed publicly pursuant to government-mandated disclosure requirements—to establish that the agency or instrumentality directly or indirectly owns a majority of shares in the entity engaged in commercial activity in the United States.

Of course, prospective foreign defendants could adapt to the proposed amendment to the FSIA by structuring their corporate ownership in a manner that limits ownership of subsidiaries to less than 50%. Indeed, in the Chinese drywall litigation, CNBM Group was found to have only an indirect, minority equity interest in Taishan that never rose above 21%. That is not to imply that the conglomerate's corporate structure was specifically designed to comply with existing FSIA jurisprudence, yet Senator Grassley's amendment would not make Taishan's commercial activity attributable to CNBM Group. Moreover, given that agencies and instrumentalities are created and organized by foreign governments, public disclosure requirements could be relaxed such that information on corporate ownership would not be as readily available. One could envision foreign governments implementing other policies designed to shield its state-owned entities and their subsidiaries to impede discovery efforts.

In addition, Senator Grassley's bill does not explain why foreign state-owned corporations should be treated any differently with respect to the alter ego analysis than foreign privately-owned corporations for the purposes of jurisdiction, thus raising due process concerns. Another unintended consequence could be that foreign governments introduce retaliatory, special-purpose legislation that makes it easier to bring suit against U.S. corporations.

As Senator Grassley pointed out in his bill, the Supreme Court warned in *Bancec* that U.S. courts have "consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." Yet what prospective domestic plaintiffs consider to be evasive and impenetrable corporate structures, prospective foreign defendants may consider to be appropriate protection against aggressive and intrusive affronts to their sovereignty, not to mention in line with the way that privately-owned foreign corporations structure their subsidiaries in order to do business in other countries. Regardless, the friction between respecting the immunity of foreign states and their agencies and instrumentalities and holding them accountable in U.S. courts for commercial activity will likely heat up in the coming months and years.

Interested in contributing to the Newsletter?

Contact Tracy Roosevelt at
troosevelt@foleyhoag.com.

Supreme Court Reaffirms Dirks Standard for Insider Trading

Salman v. United States, 580 U.S. ___ (2016)

By Maria Galvagna Mesinger, Lawson & Weitzen, LLP*

In a unanimous decision handed down on December 6th, the Supreme Court, by affirming the conviction of the “tippee” in an insider trading prosecution, settled a conflict between the Second and Ninth Circuit Court of Appeals as to whether a tipper must receive a pecuniary benefit in return for the illicit disclosure in order to violate insider trading laws. Adhering to the standard set in *Dirks v. SEC*, 463 U.S. 646 (1983), whereby “tippee” liability was predicated upon whether the “tipper’s” disclosure breached a fiduciary duty and the tipper derived a personal benefit from sharing the confidential, non-public information, the decision by the Court, delivered by Justice Samuel Alito, determined that “the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds.”

The petitioner, Bassam Salman, was convicted of securities fraud after trading on confidential inside information received from a friend, who received it from his brother, a former investment banker at Citigroup (and who was also the brother-in-law of Salman). There was testimony at trial that the former investment banker gave the information to his brother with the intent that the latter would receive a financial benefit. The brother, in turn, testified that his friend Salman knew the source of the confidential information. While Salman’s appeal was pending in the Ninth Circuit, the Second Circuit overturned the convictions of two portfolio managers on the grounds that the *Dirks* standard did not permit the inference of a personal benefit to a tipper to a trading relative or friend “...in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.” *United States v. Newman*, 773 F.3d 438, 452, cert. denied, 577 U.S. ___. In *Salman*, the Ninth Circuit ultimately declined to follow *Newman*. In reviewing the conflicting standards, the *Salman* decision concurred with the Ninth Circuit, stating that the Second Circuit requirement was inconsistent with *Dirks*. The Supreme Court acknowledged that although there are some circumstances where assessing whether a tipper personally benefits from a disclosure would “not always be easy for courts”, the instant case involved “precisely the ‘gift of confidential information to a trading relative’ that *Dirks* envisioned.”

The *Salman* decision does not necessarily assure automatic victory for the prosecution in future cases, however, and does not completely overturn *Newman*. The *Salman* Court distinguished the *Newman* defendants from *Salman* by noting that the defendants in *Newman* were “several steps removed” from the insiders and the prosecution did not offer any evidence that they knew the information was illicit, or that the tipper received a personal benefit in exchange for the information. And, although the *Salman* decision eliminates the ability of defendants to use *Newman* to force prosecutors to prove a pecuniary benefit to tippers, it also refused to eliminate the benefit requirement of *Dirks* entirely. The Court was also silent as to what constitutes a “friend” for purposes of triggering the benefit standard of *Dirks*.

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Amendments to the Federal Rules of Appellate Procedure

By Catherine Scott, Peabody & Arnold LLP

Pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071-75, amendments to the Federal Rules of Appellate Procedure took effect on December 1, 2016. The First Circuit has adopted the amendments in full.

Significant changes to the Federal Rules of Appellate Procedure include, among others:

- Filings made under Rules 5, 21, 27, 35, and 40 now have word limits, rather than page limits. These include petitions for permission to appeal and their oppositions and cross-petitions pursuant to Rule 5 (limited to 5,200 words) and any rehearing and en banc filings pursuant to Rules 35 and 40 (limited to 3,900 words). These filings must now also contain a Certificate of Compliance with Type-Volume Limit, included as a revised Form 6 in the new Rules.
- Word limits for briefs filed pursuant to Rules 28.1 and 32 have been reduced. Briefs filed under Rule 32, where there is no cross-appeal, have a 13,000 word limit for principal briefs (formerly 14,000) and 6,500 words for opposition and amicus briefs (formerly 7,000). Briefs filed under Rule 28.1, where there is a cross-appeal, have 13,000 words for the appellant's principal brief; 15,300 words for the appellee's opening and response brief (formerly 16,500); 13,000 words for the appellant's response and reply brief (formerly 14,000); and 6,500 words for appellee's reply brief (formerly 7,000). Amicus briefs in a Rule 32 appeal have 6,500 words in support of an appellant's opening brief and 7,650 words in support of appellee's opening and response brief. A Certificate of Compliance with Type-Volume Limit is still required for briefs filed under these Rules (see revised Form 6).
- These word limit changes are summarized in a new Appendix to the Federal Rules of Appellate Procedure for easy consultation.
- Parties can still rely on the page limits set forth in Rules 28.1 and 32, which remain at 30 pages for principal briefs, 35 pages for an opening and response cross-appeal brief, and 15 pages for a reply brief. No Certificate of Compliance is required if a brief complies with these page limits.
- Cover pages, corporate disclosures statements, tables of contents, tables of citations, statements regarding oral

argument, addenda, certificates of counsel, signature blocks, proof of service, and any other items are still excluded from the word limits.

- The Rules also eliminate a three-day service period for documents served electronically under Rule 26. Deadlines will now run from the date of service of a document when served electronically upon another party.

Certain of the Rules' numbering has been changed, so be aware of that as well. For example, the list of items excluded from word count limits can now be found in Rule 32(f), rather than 32(a)(7)(B)(iii).

Though changes to the Federal Rules of Appellate Procedure primarily involve word limits, attorneys must be careful to consult the new Appendix to the Rules, as well as the revised Form 6 setting forth the proper Certificate of Compliance.

Litigators' Perspective on the Patent Eligibility of Software: Courts Continue to Refine the Analysis in the Wake of Key Supreme Court Decision

By Lisa M. Tittlemore & Brandon Scruggs, Sunstein Kann Murphy & Timbers

Recent precedential opinions from the Federal Circuit Court of Appeals allow some insight regarding the boundary between what is and what is not patent-eligible subject matter in the field of computers and computer software. In the two cases, [FairWarning IP, LLC v. Iatric Systems, Inc.](#)¹ and [McRO, Inc. v. Bandai Namco Games America Inc.](#),² the Federal Circuit interpreted the Supreme Court's controversial 2014 decision in [Alice Corp. Pty. Ltd. v. CLS Bank Int'l](#).³

Iatric Systems, Inc. was represented at both the district court and appellate levels by the authors and their firm, Sunstein Kann Murphy & Timbers LLP.

In *Alice*, the Supreme Court announced the applicability of a two-step framework for determining patent eligibility under Section 101 of the Patent Act in the context of computer-related patents:

- First, courts must determine whether the patent claims at issue are “directed to” a patent-ineligible concept, such as an abstract idea.
- Second, if the claims *are* directed to patent-ineligible subject matter, courts ask whether any of the additional limitations in the patent claims transform the claim into a patent eligible *application* of a patent-ineligible concept.

Using that framework, which the Court had earlier articulated in the biotechnology context, the Court in *Alice* invalidated patents that covered mitigating settlement risk in financial transactions using a computer system. The Court cautioned that patent eligibility requires more of a patent claim than simply stating an abstract idea and saying “apply it.” However, the Court also warned against reading its decision broadly, “lest it swallow all of patent law,” acknowledging that at some level all inventions rest upon laws of nature, natural phenomena, or abstract ideas.

¹ *FairWarning IP, LLC v. Iatric Systems, Inc.*, Fed. Cir. Case No. 15-1985, --- F.3d ---, 2016 WL 5899185 (Fed. Cir. Oct. 11, 2016).

² *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299 (Fed. Cir. 2016)

³ *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

Although simply implementing a process on a computer does not impart patent eligibility, patents that “improve an existing technological process” may be patent eligible.

The analysis in *Alice* dramatically altered the approach that courts had previously applied in evaluating patent-eligibility for computer-related inventions. Trial judges and the Federal Circuit alike have struggled to apply the *Alice* framework without slipping into an impenetrably vague “I know it when I see it” standard. The Federal Circuit's September and October 2016 decisions in *McRO* and *Fairwarning IP* provide useful guideposts.

McRO involved patent claims that describe a method for automatically producing lip synchronization and facial expressions in animated characters, a process which was previously done by human animators, using a computer, to manipulate the character model using an intuitive process. The invention automated the 3D animator's task, using rules with specific characteristics that require several variables to interact in a certain way. The federal court in Los Angeles granted the defendant's motion to throw out the case, finding the asserted claims “too broad” and unpatentable.

The Federal Circuit reversed and sent the case back to the lower court. The appeals court panel felt that the claimed rules sufficiently focused on the technological improvement realized by the invention rather than a result or effect (*i.e.*, an abstract idea) that relied on generic computer processes and machinery. The automation went beyond “merely organizing [existing] information.” Instead, the rules rendered information into a specific format that created a sequence of synchronized, animated characters. Because the claims were directed to “limited rules in a process specifically designed to achieve an improved technological result,” the claim was not “directed to” ineligible subject matter. Accordingly, the court determined that it was unnecessary to reach step 2 of *Alice*.

In *FairWarning IP*, the patent disclosed ways to detect fraud and misuse of protected health information. The federal judge in Florida invalidated the patent, granting a motion to dismiss. The judge found that FairWarning's patent claims merely implemented in a computer environment the age-old practice of analyzing records of human activity to detect suspicious behavior.

The Federal Circuit affirmed the dismissal, agreeing that the rules in FairWarning's claims were generic database queries that asked the same questions that humans have long asked to detect fraud. Thus, the patent in *FairWarning* merely implemented an old practice in the computer environment.

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The Federal Circuit first determined that, under step 1 of *Alice*, the claims of the patent were “directed to an abstract idea,” namely, the concept of analyzing records of human activity to detect suspicious behavior. The court explained that while the patent claims in *FairWarning* included possible rules to analyze data (e.g., related to accessing data in excess of a specific volume, accessing data during a predetermined time period, or access to data by a specific user), the court distinguished the “rules” from those in *McRO* because the claims in *McRO* “were not directed to an abstract idea, but instead were directed to ‘a specific asserted improvement in computer animation, i.e. the automatic use of rules of a particular type.... The claimed rules in *McRO* transformed a traditionally subjective process performed by humans into a mathematically automated process.”

In *McRO*, it was the incorporation of the rules that improved the technological process, not the use of the computer *per se*. The “rules” set forth in the *FairWarning* patent claims, by contrast, merely implemented an existing practice in the computer environment and did not improve a technological process.

The Federal Circuit also explained that the patent claims in *FairWarning* were not like the claims in its May 2016 decision in [Enfish, LLC v. Microsoft Corp.](#),⁴ where the patent required a self-referential table for a computer database, which functioned differently from conventional database structures. The court found that the table is a “specific type of data structure” which provided an improvement over prior methods because it allowed faster searching of data, more effective data storage, and more flexibility in configuring databases. The court in *FairWarning* explained that in *Enfish* the claims were patent-

⁴ *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016).

eligible under Section 101 because the invention improved the functioning of the computer itself, rather than just taking some abstract concept and implementing it on a computer. The court explained that while the claimed system and method in *FairWarning* “certainly purport to accelerate the process of analyzing audit log data, the speed increase comes from the capabilities of a general-purpose computer, rather than the patented method itself.” Thus, the focus of the claims was not on improvement of the computer as a tool.

Under step 2 of *Alice*, the court did not find anything additional to transform *FairWarning*’s patent claims into a patent-eligible application. The reference to implementation in a “computer environment” and “generic computer elements like a microprocessor or user interface” was insufficient. The court explained that the “practices of collecting, analyzing, and displaying data, with nothing more, are practices ‘whose implicit exclusion from § 101 undergirds the information-based category of abstract ideas.’”

These cases show the Federal Circuit incrementally defining the boundary between eligibility and ineligibility under Section 101. This process will continue, in both the computer and non-computer contexts. The possibility of further Supreme Court intervention also looms, although the Supreme Court has declined several opportunities to clarify its Section 101 interpretation since *Alice*. The Federal Circuit is left to bring order to the turmoil in Section 101 litigation by accepting the core of *Alice* while narrowing its interpretation a bit at the edges.

Judge Young Diverges From State Court Standard For Determining Anti-SLAPP Motions to Dismiss

By Steve Hansen, Eckert Seamans Cherin & Mellott, LLC

In a recent decision in *Hi-Tech Pharmaceuticals, Inc. v. Pieter A. Cohen*, No. 16-10660-WGY, Judge William G. Young decided that the preponderance of the evidence standard adopted by Massachusetts state courts to determine a special motion to dismiss pursuant to the Massachusetts Anti-SLAPP statute, M.G.L. c. 231 sec. 59h, impermissibly infringes upon the Seventh Amendment right to a civil jury trial. Instead, Judge Young found that a party seeking to overcome an Anti-SLAPP special motion to dismiss need only make a *prima facie* showing, and to require more would improperly force a judge to take upon the role of fact-finder.

The Massachusetts Anti-SLAPP statute is intended to protect parties from suits that are solely based on the exercise of constitutionally-protected “petitioning activities.” Petitioning activities include all statements that are made to “influence, inform, or at the very least, reach governmental bodies – either directly or indirectly.” *N. Am. Expositions Co. v. Corcoran*, 452 Mass. 852, 862, 864-65 (2009). The statute allows a defendant to file a special motion to dismiss to be heard and determined “as expeditiously as possible.” The statute further requires the Court to consider the pleadings and supporting and opposing affidavits of the respective parties.

In considering a special motion to dismiss, Massachusetts courts developed a two-part, burden-shifting analysis. First, the movant must make a threshold showing that the acts which formed the basis of the complaint or counterclaim were “petitioning activities” under the Anti-SLAPP statute and that the claims against it are “based on...petitioning activities alone...” *Fustolo v. Hollander*, 455 Mass. 861, 865 (2010). Assuming the movant meets that standard, the burden shifts to the adverse party to show by a preponderance of the evidence that the moving party’s petitioning conduct lacked “any reasonable factual support or arguable basis in law.” *Id.* The Massachusetts Supreme Judicial Court found that this burden-shifting analysis struck the appropriate balance between placing the burden on the non-moving party, as the state legislature intended, without creating an insurmountable barrier to relief for the movant. *Baker v. Parsons*, 434 Mass. 543 (2001). However, Judge Young took issue with the preponderance of the evidence standard required of the adverse party as being in conflict with constitutional rights, noting at the outset of *Hi-Tech* that

“the precise burden on the [opposing party] is a somewhat contentious matter and is of great concern to this court.”

In *Hi-Tech*, the plaintiff filed a lawsuit against defendant, Pieter Cohen, alleging libel, slander, product disparagement, and violations of the Massachusetts Consumer Protection Statute, M.G.L. c. 93A. The claims arose from Cohen’s publication of an article about products manufactured by Hi-Tech Pharmaceuticals and an interview that Cohen gave about the article. Cohen filed a special motion to dismiss the Complaint, alleging that the article and the interview concerning the article were constitutionally protected “petitioning activities” under the Anti-SLAPP statute. In the decision, Judge Young agreed that Cohen had made the necessary threshold showing that the publication of the article and the interview constituted protected petitioning activities. Accordingly, the burden shifted to Hi-Tech Pharmaceuticals to show by a preponderance of the evidence that the Cohen’s article and interview were devoid of any reasonable factual support or arguable basis in law.

The First Circuit Court of Appeals has not ruled on whether the Anti-SLAPP statute is unconstitutional when tested against the Seventh Amendment. Furthermore, the Massachusetts Supreme Judicial Court had never considered this issue before, as the Seventh Amendment has never been applied to the states through the Due Process Clause of the Fourteenth Amendment, as have other rights, like those protected by the First Amendment. Several decisions in the District of Massachusetts prior to *Hi-Tech* had applied the burden-shifting *Baker* standard used in the state courts, and a recent decision by Judge Denise Casper in *Steinmetz v. Coyle & Caron, Inc.*, 15-cv-13594-DJC, 2016 WL 4074135, at *6-*7 (D. Mass. July 29, 2016) rejected a challenge to the constitutionality of the Anti-SLAPP statute.

Judge Young analyzed the jury trial protections enshrined in the Seventh Amendment and found the preponderance of the evidence standard for Anti-SLAPP special motions to infringe impermissibly on the protected right of a jury trial. If the Court were to require Hi-Tech to make more than a *prima facie* showing that the petitioning activities had no reasonable basis in law or fact, the Court would be required to make factual findings and credibility determinations properly reserved to a jury. The prevailing Massachusetts state court standard would also have required him to assess the believability of competing affidavits, which Judge Young found to be outside his domain. While noting that his decision would not apply to state court jurisprudence, Judge Young stated in a footnote that, “it [was] hard to see...why the preponderance of the evidence approach adopted by Massachusetts courts infringes any less meaningfully on a litigant’s right to a trial by jury.” Ultimately, Judge Young found that Hi-Tech had met its burden to proffer

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prima facie evidence that Cohen's petitioning conduct had no reasonable basis in law or fact, and therefore, denied the special motion.

Based on Judge Young's decision, litigants responding to special motions to dismiss should consider raising constitutional arguments in order to obtain the benefit of a more lenient standard. Individuals may now find it more difficult to obtain quick resolution of claims that they allege have been raised solely to inhibit or restrict constitutionally-protected petitioning activities. Massachusetts state court practice may be affected by the decision, as non-moving parties may seek to use Judge Young's decision – and the jury trial protections found in the Massachusetts Constitution – to argue for a reconsideration of the preponderance of the evidence standard adopted in Baker.

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