



Federal Bar Association

Massachusetts Chapter

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Newsletter

Harrison Kaplan, Editor

WINTER 2019

President's Column

By Jonathan Handler



The great Harvey Weiner, my predecessor as President, has referred to this Chapter as "one of the best kept secrets in the Massachusetts legal community." The more time I spend in this role, the more I have come to understand just what Harvey meant. What this Chapter has accomplished through the hard work of lawyers generously volunteering

their time, and with the tremendous support of the federal bench beginning with Chief Judge Saris, is a wonder to behold.

Just in the first 4+ months of my term, we have sponsored our second annual "Wills for Vets" Program, held multiple sessions of our signature "Breakfast with the Bench" Program, sponsored a Pro Bono Immigration Training program, and supported the Discovering Justice Mock Trial Program, among other activities. In January alone, we held a breakfast with Judge Zobel (more on her below) in Boston and a lunch with Judge Hillman in Worcester, participated in the annual "Walk to the Hill for Civil Legal Aid," and supported the District Court's "Young Lawyers' Roundtable."

What has been accomplished is remarkable and much is owed to prior Chapter leaders. In particular, my predecessors Harvey Weiner and Scott Lopez have been instrumental in pushing the Chapter to excel. We have had and continue to have a board of devoted, energetic members of the Massachusetts legal community representing a wide variety of practices (e.g., large firms, small firms, defense firms, plaintiffs' firms, criminal defense firms, prosecutors, and public defenders, etc.) and differing perspectives. And it is important to emphasize that we are not the Boston Chapter, we are the Massachusetts Chapter. The Worcester and Springfield bars are ably represented on our board, and the events we hold in those communities have been well attended by the bar and well supported by the federal bench. In addition to the great support provided by the bench, Clerk of Court Robert Farrell, Carolyn Meckbach, and

their colleagues have been instrumental in the Chapter's growth and success.

While we look back with satisfaction at recent accomplishments, we also look forward to the promise of the coming weeks and months. Among other future programming, we will hold a "Breakfast with the Bench" on March 4 with Chief Judge Saris speaking on the always-topical issue of criminal justice reform. We look forward to the first of what we hope will become another signature program – our new event series (tentatively titled, "FBA MA Chapter Presents") where we will try to expand both the subject matter of our programs and the audience we hope to attract. Our first program, featuring UCLA law professor Adam Winkler speaking on corporate rights, is scheduled for March 22. Please watch for an announcement of our next event later this year, a panel discussion on immigration issues. We are also excited to once again sponsor the "Goldilocks on Trial" program put on by Judge Bailey in the Bankruptcy Court. (If you have not participated, you really should – it will leave you with a smile for the rest of the day.) Another upcoming event that we are proud to actively support is the District Court's CARE and RESTART Job Skills Program for men and women on federal probation. More to follow on all these topics in future newsletters.

To return for a moment to one of our signature programs – I like to say that there is no better way for a lawyer to spend an hour than attending one of our Breakfasts with the Bench. (Talk about "bang for the buck.") This is true for lawyers of any level of experience but especially for more junior lawyers. Where else can you spend sixty minutes listening to and exchanging ideas with a sitting federal judge on a range of highly relevant, practical topics? (The answer is, nowhere.) If you have never attended, try it. You'll see.

Our other signature event is the Annual Judicial Reception, which this year will be held June 11 in the Wharf Room of the Boston Harbor Hotel. We are particularly excited about this year's event because we will have the great pleasure of honoring Judge Rya Zobel and celebrating her forty years on the federal bench. We hope you will join us in June for what promises to be an exceptional event. Details can be found elsewhere in this Newsletter.

With your help, we hope to make the gem that is this Chapter a little less hidden. Onward to Spring.



Federal Bar Association

Massachusetts Chapter

THE MASSACHUSETTS CHAPTER OF THE
FEDERAL BAR ASSOCIATION

Cordially invites you to attend its

Annual Federal Judicial Reception

June 11, 2019

6:00 pm - 9:00 pm

Boston Harbor Hotel

Wharf Room, 70 Rowes Wharf

Boston, Massachusetts 02110

The Massachusetts Chapter will proudly recognize:

THE HONORABLE RYA W. ZOBEL

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

To reserve tickets, please contact:

Debora Corbett

Brody Hardoon Perkins & Kesten, LLP

699 Boylston Street, Boston, MA 02116

617-880-7134 * dcorbett@bhpklaw.com

\$100 - individual tickets (FBA members)

\$150 - individual tickets (non-FBA members)

\$ 950 Firm Sponsors

(10 tickets and FBA recognition of sponsorship at event)

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

Your firm is invited to sponsor this event. Please inform Debora Corbett no later than May 31, 2019, if your firm will be a sponsor.

Government Relations Update

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

As of press time, the Massachusetts Chapter is excited to be sending a delegation to Washington, D.C. for Capitol Hill Day on March 21, 2019, and the accompanying national Leadership Summit on March 22-23. During Capitol Hill Day, Nathan Olin, Juliet Davison and Rob Farrell, Clerk of the United States District Court, will be meeting with the Massachusetts House and Senate offices to discuss important legislative issues critical to the “third branch” such as ensuring adequate funding for the federal courts and filling judicial vacancies.

At the Leadership Summit, Erica Reis and President Jonathan Handler will join the Massachusetts delegation for two days of conferences and trainings, culminating in the national mid-year meeting where legislative issues will be discussed and debated.

One exciting topic will be the revealing of the report of the Diversity and Inclusion Task Force Report, a comprehensive study examining and providing action plans for increasing diversity and inclusion throughout all aspects of the association. Olin (now a part of the national Sections and Divisions Council) and Past-President Scott Lopez (now a First Circuit Executive) have been a part of the D&I Task Force. Other discussions will revolve around “blue slips” rules changes pertaining to the appointment of judges and the impending Supreme Court census citizenship case.



The Ginny Hurley Memorial Scholarship

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

Ginny derived great satisfaction coordinating the Court’s summer programs for high school and college students – the Lindsay and Nelson Fellowship programs. She helped nurture and train the next generation to appreciate and participate in the legal progress. In memory of her tremendous work for these students,

the Massachusetts Chapter of the Federal Bar Association has established the Ginny Hurley Memorial Scholarship. This scholarship, for books or tuition expenses, will be awarded annually to all graduating Lindsay and Nelson Fellows.

The Lindsay Fellowship

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

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

The Nelson Fellowship

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

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

Donations are welcome. Checks should be made out to **Federal Bar Association – Massachusetts Chapter.**

Please include a note designating the funds for Ginny Hurley Memorial Scholarship.

Donations should be sent to new FBA Treasurer Josh Segal, Lawson & Weitzen, LLP, 88 Black Falcon Avenue, Suite 345, Boston, MA 02210

Young Lawyers' Roundtable

Starting at the Court's Bench and Bar Conference in 2012, and each year since, the District Court has held – by invitation only – a Young Lawyers' Roundtable event for attorneys who have been practicing 10 years or fewer and who had been selected to attend by one of the area bar associations. This year's program was held on January 10, 2019, and the Chapter was pleased to be able to nominate a number of deserving members to attend and participate in a lively, informative, and enlightening discussion. Chapter President Jonathan Handler also had the honor of addressing the group to welcome the attendees and remind them of the many excellent reasons to join the FBA.



During this year's program, the attorneys had the opportunity to meet in a small group with a number of judges to discuss three hypothetical scenarios touching on ethics, civil discovery, and evidentiary rules, all of which are pertinent to problems often encountered by young lawyers. The judges led small group discussions of these cases, and then all the attendees circled up and reflected on the topics covered by the small groups. The program is designed to give judges a chance to meet and hear from younger lawyers and provides an opportunity for them to meet federal judges in an informal and more casual setting.

This year Judge Hillman of the USDC and Judge Bailey of the Bankruptcy Court led the event with the able assistance of our own Carolyn Meckbach from the District Court Clerk's Office. As in past years, the Court stressed its desire that the program include a diverse group of lawyers in every sense of the word, including lawyers who primarily practice criminal bankruptcy law.



Young Lawyers' Roundtable - January 10, 2019

Immigration Committee Hosts Pro Bono Motions Training

On November 5, 2018 forty one attorneys attended the Immigration Law Committee's pro bono training on Motions to Reopen. The panel took place at the Boston Immigration Court and was co-sponsored by the PAIR Project and American Immigration Lawyers Association NE Chapter. The presenters Howie Silverman and Ellen Driver provided a comprehensive training covering all aspects of Motions to Reopen including those based on in absentia orders and exceptional circumstances.



Immigration Law Committee's Pro Bono Training on Motions to Reopen - November 5, 2018

Discovering Justice

Discovering Justice, a Boston-based civic and justice education non-profit organization, celebrated its annual “Evening of Mock Trials” on December 11, 2018. Hundreds of young students from the Citizen Schools program and other regional schools participated in the twelve week program that culminated in a series of mock trials that took place at the John Joseph Moakley United States Courthouse, with the assistance of federal and state judges and practicing attorneys. The opening ceremony included a keynote address from Rachael Rollins, the Suffolk County District Attorney.



After Chief Judge Patti B. Saris administered an Oath of Office to the student attorneys, 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 trials ran smoothly and efficiently and were presented to the juries for deliberation. Following the verdict, students, volunteers, and family members celebrated the successful program with pizza in the foyer of the Moakley Courthouse.



Photo credits: Reba Saldanha

Discovering Justice, *continued.*



Photo credits: Reba Saldanha

Breakfast with the Bench

:: January 8, 2019

The FBA- MA Chapter was delighted to host a Breakfast with the Bench with Judge William J. Kayatta, Jr. of the First Circuit on January 8, 2019. Judge Kayatta spoke on Procedure and Practice in the First Circuit and shared some thoughts on effective advocacy in the First Circuit in an informative and engaging presentation.



Pictured L to R: Stephen Hansen, FBA-MA Secretary, Harvey Weiner, FBA-MA immediate past-President, Jonathan Handler, FBA-MA President, Judge William J. Kayatta, Jr. and Juliet Davison, FBA-MA President-Elect

Lunch and Conversation

:: January 14, 2019

On January 14, 2019, the Mass. Chapter of the FBA hosted a lunch and conversation with the U.S. District Court Judge Timothy Hillman. It was an engaging and interesting hour of conversation covering a wide array of topics of interest to those practicing in the federal court. The Chapter appreciates Judge Hillman's willingness to share his thoughts and experiences.



Pictured L to R: Leonard Angiulo; Martin Castles; Brian Murphy; U.S. District Court Judge Timothy Hillman; FBA-MA President Jonathan Handler

Lunch and Conversation

:: March 6, 2019

On March 6, 2019, the Mass. Chapter of the FBA hosted a lunch and conversation with the Chief Magistrate Judge David Hennessy. It was an entertaining and educational question and answer session traversing the wide breadth of responsibilities of a federal magistrate judge. The Chapter appreciates Judge Hennessy's willingness to share his thoughts and time and thanks Angiulo Law for its generosity in providing lunch.



Pictured L to R: Chief Magistrate Judge David Hennessy, Brian Murphy, Leonard Angiulo, FBA-MA President Jonathan Handler.

ARBITRATION OF EMPLOYMENT DISPUTES - TEXTUALISM AS APPLIED TO "CONTRACTS OF EMPLOYMENT"

New Prime Inc. v. Oliveira, 586 U.S. ____ (2019).

By Lori Caron Silveira, Esq., Adler Pollock & Sheehan P.C.

Introduction

On January 15, 2019, Justice Gorsuch, the self-described textualist on the U.S. Supreme Court, authored the opinion of the Court in the matter of *New Prime Inc. v. Oliveira*, interpreting the term “contracts of employment,” as used in the Federal Arbitration Act (the “FAA” or the “Act”), as including relationships between businesses and independent contractors. Justice Gorsuch, writing for a unanimous Court, held that plaintiff Dominic Oliveira, a trucker driving for defendant New Prime, had the right to litigate his wage and hour claims in court, rather than have them decided by an arbitrator.

The Facts, the FAA, and Agreements to Arbitrate

New Prime operates trucks in interstate commerce. Oliveira drove for New Prime under agreements that characterized him – rightly or wrongly – as an independent contractor. The agreements between New Prime and Oliveira provided that any disputes arising out of the parties’ relationship would be resolved by an arbitrator. The agreements explicitly included within the scope of issues to be determined by the arbitrator disputes over arbitrability of the claims asserted.

In the course of working for New Prime, Oliveira filed a class action lawsuit in federal court in Boston, alleging that New Prime does not pay its drivers minimum wage. New Prime responded to the class action suit by petitioning the U.S. District Court for the District of Massachusetts to invoke its statutory authority under the FAA to compel arbitration according to the terms of the parties’ agreements.

Not so fast, said counsel for trucker Oliveira and his fellow members of the plaintiff class. The FAA does not always authorize a court to compel arbitration. Section 1 of the Act carves out from the Act’s coverage “contracts of employment of . . . workers engaged in foreign or interstate commerce.” Whether deemed an employee or independent contractor, Oliveira and his New Prime agreements qualified as a “contract of employment of a worker engaged in interstate commerce.” Not so, said New Prime, reminding Oliveira and the Court that the parties had delegated not just the substantive disputes between them but also the issue of arbitrability to an arbitrator under the parties’ agreement, and that, therefore, the Court was required to stay the federal court litigation and send both the arbitrability issue and Oliveira’s wage claims to arbitration. New Prime further argued that Section 1 of the FAA had no application to Oliveira, as he was an independent contractor, and that Section 1, by its plain meaning, does not cover independent contractor agreements but only covers “contracts of employment.”

The U.S. District Court and the First Circuit sided with Oliveira. The First Circuit held that under the Act, a court must first resolve whether the parties’ contract falls under the Act or falls within its Section 1 exclusion. The First Circuit then concluded that Section 1 excludes not only contracts of employment but also excludes contracts between businesses and independent contractors. Accordingly, whether Oliveira was an independent contractor or an employee of New Prime, the parties’ agreements were “contracts of employment,” and the courts lacked authority under the Act to order Oliveira’s wage claims, as well as the arbitrability of those claims, to arbitration. Undeterred, New Prime filed a petition for a writ of certiorari in the U.S. Supreme Court, which granted certiorari and reviewed the First Circuit’s decision.

The Conditional Authority of Courts to Compel Arbitration

In analyzing New Prime’s argument that the trial court should have compelled arbitration of Oliveira’s wage claims, the Court first noted that the FAA does not require a court to compel arbitration in every case that involves a pre-dispute agreement to arbitrate. Even if the parties emphatically express a preference for arbitration, the court must first determine that the agreement between the parties does not come within the Section 1 exclusion of the Act.

To determine applicability of the Section 1 exclusion for “contracts of employment,” the Court focused on the Act’s “statutory sequencing.” Simply put, Sections 3 and 4 of the FAA empower a court to stay litigation and compel arbitration, but if Sections 1 and 2 do not cover the agreement in question, then the court lacks authority to stay the litigation and compel arbitration. Working backward within the threshold “exclusion” sections, Section 2 provides that the Act applies only when the parties’ agreement to arbitrate is set forth as a “written provision in any maritime transaction or a contract evidencing a transaction involving commerce.” Section 1 of the Act limits the “commerce contracts” to which the Act will apply by excluding “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” According to Justice Gorsuch and the Court, in 1925 Congress excluded certain transportation workers from the Act because by that time, Congress had already prescribed alternatives to litigation of work disputes for those workers.

Despite the agreement between Oliveira and New Prime characterizing arbitrability as a threshold issue for the arbitrator, the Court agreed with the First Circuit that the statute trumps the parties’ agreement, and that a court must, in the first instance, decide whether the Section 1 exclusion for “contracts of employment” applies before staying the litigation and sending the matter to arbitration. Put differently, the Act controls arbitrability, and the Section 1 exclusion must be heeded, even if the parties have provided otherwise by agreement.

Unwilling to “give up the ghost” on the parties’ terms of engagement, New Prime cited the contractual “delegation clause” in

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the parties' agreement, as well as the severability principle, as additional support for submission of the arbitrability issue to an arbitrator. The parties' delegation clause explicitly conferred upon an arbitrator the authority to decide whether the dispute must be arbitrated. Applying the contractual severability doctrine, a court must treat a challenge to the delegation clause separately from a challenge to the validity of the entire agreement. If a party does not specifically challenge the validity of the agreement to arbitrate, then both parties may be compelled to arbitrate all of their disputes, including disputes regarding the substantive terms of their contract. New Prime argued that Oliveira had not specifically challenged the parties' delegation clause and that, therefore, any dispute must be submitted to arbitration.

In response to New Prime's delegation and severability arguments, the Court again emphasized that the Act is king. A court has jurisdiction to compel arbitration under the Act only if the arbitration clause is contained in a contract not excluded from the Act. Again, said the Court, it is for the court to decide if an arbitration clause falls within or without the boundaries of Sections 1 and 2 of the Act. Statutory sequencing – Sections 1 through 4 of the Act – either keeps a worker's claims in court or dispatches them to arbitration.

"Contracts of Employment" and Independent Contractor Agreements

Having articulated its statutory charge to compel arbitration only of agreements that fall within the boundaries of the Act, the Court then turned its attention to whether Oliveira's contract with New Prime constituted a "contract of employment of workers engaged in interstate commerce." Interestingly, both sides agreed that Oliveira qualified as a worker engaged in interstate commerce, and for purposes of the appeal, Oliveira also agreed to assume that his agreement with New Prime established only an independent contractor relationship and not an employer/employee relationship. The question, then, became whether Oliveira's work relationship with New Prime constituted a "contract of employment" that Congress had excluded from the Act.

Acknowledging the "fundamental canon of statutory construction" that "words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute," Justice Gorsuch cautioned that giving new meaning to old statutory terms would be unconstitutional, and that new interpretations would upset "reliance interests" in the subtle meaning of statutory language. Having declared the Court's intent to follow the "plain meaning" approach, the Court then concluded that the term "contract of employment," as used in the FAA by Congress in 1925, includes an agreement between a business and an independent contractor. In defense of this conclusion, the Court noted that as of 1925, the term "contract

of employment" wasn't defined and was not (at least not yet, anyway) considered a term of art bearing some specialized meaning. Rather, all work performed by workers as employees, independent contractors, or otherwise, was treated as "employment." In reviewing dictionaries and legal authorities, the Court found no evidence that a "contract of employment" necessarily referenced a formal employer-employee or master-servant relationship. The Court also noted that Congress had used the word "workers," as distinguished from "employees," in Section 1 of the Act, noting that the term "employees" would have been the natural choice if Congress had intended the term "contracts of employment" to apply to employees only. While the Court did not find this dispositive, it considered use of the term "workers" as further evidence that Congress intended to use the term "contracts of employment" in a broader sense so as to exclude from court-compelled arbitration the claims of an independent contractor against a company.

Frustrated by the Court's inclination to apply Sections 1 through 4 of the Act sequentially to ignore the parties' agreed-upon terms, New Prime next focused on the distinction acknowledged today between employees and independent contractors. New Prime argued that by 1925, the words "employee" and "independent contractor" had already assumed distinct meanings, and that, therefore, Congress must have intended to exclude from the Act contracts of employment but not contracts with independent contractors. Oliveira disagreed, arguing that the word "employment" has a much longer history in the English language than the word "employee," which only made its first appearance in the 1800s. In analyzing and considering the history of the words "employment" and "employee," Oliveira and New Prime found common ground, essentially stipulating that the term "employee" has evolved to denote those who work for a wage at the direction of another, and further agreeing that the term "employee" may have influenced the development of the term "employment" in recent years. None of this persuaded the Court, however. Regardless of how the words "employee" and "employment" have evolved since 1925, the history of the Act and the use of the terms "employment" and "workers" made clear to the Court that a contract of employment was not necessarily limited to the master-servant relationship but also embraced independent contractor agreements.

In a last ditch effort to persuade the Court to narrowly define "contracts of employment" as including only contracts of employment and not independent contractor relationships, New Prime noted that in 1925, seamen and railroad employees were all traditional employees and not independent contractors. The Court dismissed this argument, indicating that a number of workers included within the terms "seamen and railroad employees" were, in fact, independent contractors, including shipboard surgeons and certain railroad workers.

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Policy Considerations Favoring Arbitration under the Federal Arbitration Act

Declaring New Prime unable to succeed as textualists at “squeeze[ing] [any] more from the statute’s text,” the Court then turned to New Prime’s argument based on the policy underlying the FAA to “counteract judicial hostility to arbitration and establish a federal policy favoring arbitration agreements.” Here, the Court noted that legislative language is often a “hard-fought compromise,” and that simply favoring arbitration and staying Oliveira’s wage and hour class action litigation might constitute an unwarranted interpretation or “paving over” of “bumpy statutory texts” to advance the policy goal. The Court speculated that perhaps there were legislative compromises that must be honored, and that interpreting the Section 1 exclusion of “contracts of employment” narrowly might advance a policy goal at the expense of a Congressional compromise intended to exclude worker agreements like Oliveira’s from the Act. The Court concluded, “by respecting the qualifications of Section 1 today, we ‘respect the limits up to which Congress was prepared to go’ when adopting the arbitration act.”

Courts’ Inherent Power to Compel Arbitration

Left with a depleted supply of arguments to remain in federal court on Oliveira’s claims, New Prime argued that even if the Arbitration Act did not empower the Court to compel arbitration with independent contractor Oliveira, then the Court should compel arbitration anyway because courts have the inherent authority to stay litigation in favor of an ADR mechanism chosen by the parties. The Court steered clear of this argument, however, declining to “tangle with” an issue not addressed in the courts below. Cert was granted, said the Court, only to resolve existing confusion regarding whether the term “contracts of employment,” as excluded from the Arbitration Act, refers also to agreements with independent contractors.

Textualism and the Evolution of Statutory Terms

Justice Ginsburg offered a short and sweet concurring opinion that agreed with the majority that words generally should be interpreted as having their ordinary meaning at the time Congress used them in enacting a statute. However, Justice Ginsburg noted, for future reference, that Congress also has the power to design legislation to govern changing times and circumstances. The language of the Sherman Act, for instance, was designed to evolve, as was the language of the Securities Exchange Act. Undoubtedly anticipating future cases in which Justice Gorsuch and others may seek to employ a “textualist” approach, Justice Ginsburg noted that sometimes, “[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic.”

Conclusion

The *New Prime* decision delivers a victory to litigants who would prefer to have their day in court, and this victory comes after a series of decisions in which a divided U.S. Supreme Court has compelled the “little guy” to arbitrate claims, rather than litigate them. It is likely that we have not seen the last of decisions challenging agreements to arbitrate. In this case, however, a textualist member of the U.S. Supreme Court authored an opinion in which the ordinary meaning of the term “contract of employment” was deemed to include the arguably different concept of an agreement with an independent contractor. An interesting twist on the application of textualism. Go figure.

Lori Caron Silveira is a shareholder at Adler Pollock & Sheehan P.C., where she represents corporate and governmental clients in both Rhode Island and Massachusetts in defending employment disputes, including sexual harassment, discrimination and retaliation claims, wage and hour matters, and termination of employment cases. Lori also handles traditional labor relations matters, including collective bargaining.

Smile, You're on Candid Camera!

MA District Court Declares the MA Wiretap Statute Unconstitutional Insofar as it Prohibits Recording of Government Officials Performing Their Duties in Public Space

Martin v. Gross, 340 F. Supp. 3d 87 (D. Mass. 2018)

By Keith H. Bensten, Day Pitney LLP

In *Martin v. Gross*, 340 F. Supp. 3d 87 (D. Mass. 2018), Chief Judge Saris held that the Massachusetts Wiretap Statute, Mass. Gen. Laws ch. 272, § 99 (the “Wiretap Statute”) is unconstitutional insofar as it prohibits audio recording of “government officials,” including law enforcement officers, performing their duties in “public spaces.” The decision involved two cases: one filed by private citizens (*Martin v. Gross*); and another filed by a nonprofit that engages in undercover journalism (*Project Veritas v. Conley*).

The Wiretap Statute criminalizes the willful “interception” of any “communication.” An “interception” occurs when one is able “to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device” without the consent of “all parties to such communication.” The Wiretap Statute does not criminalize recording that is done openly or video recording that is not accompanied by audio recording.

In *Martin*, plaintiffs K. Eric Martin and René Pérez sued the Suffolk County district attorney and the Boston police commissioner seeking declaratory and injunctive relief. Both plaintiffs have openly recorded police officers performing their duties in public on numerous occasions. They have recorded one-on-one interactions with the police, traffic and pedestrian stops of others, and protests. Neither plaintiff has been arrested for violating the Wiretap Statute. Both asserted that they have wanted to secretly record police officers performing their duties in public on many occasions, but neither has done so for fear that doing so would endanger them or provoke hostility from police officers.

In *Project Veritas*, plaintiff Project Veritas Action Fund (“PVAF”) sued the Suffolk County district attorney challenging the constitutionality of the Wiretap Statute. PVAF is a nonprofit that uses secret recordings to investigate government officials and candidates for public office. Although PVAF has not secretly recorded government officials in Massachusetts, PVAF identified four projects that it claims it would have pursued but for the Wiretap Statute.

The parties in both cases cross moved for summary judgment on plaintiffs’ claim that the Wiretap Statute is unconstitutional in the circumstances presented. In *Martin*, plaintiffs’ summary judgment motion concerned the secret recording of police officers performing

their duties in public. In *Project Veritas*, plaintiff’s motion concerned the secret recording of government officials doing the same. The district attorney also filed a motion to dismiss on ripeness grounds in both cases. (In *Martin*, defendants raised other preliminary issues that are not addressed in this article.) In support of its ripeness argument, the district attorney argued that the resolution of plaintiffs’ claims involved a host of fact-dependent considerations that plaintiffs did not sufficiently develop in either case.

The Court rejected the district attorney’s ripeness argument. The Court explained that plaintiffs desired to secretly record government officials and police officers performing their duties in public but have not done so because of the Wiretap Statute. The Court also noted that defendants have sought criminal complaints and have charged people for violating the Wiretap Statute numerous times in recent years. The Court thus concluded that there was a live controversy and that resolution of the case need not be postponed.

The Court then considered three issues in its constitutional analysis on the parties’ summary judgment motions: (1) whether plaintiffs’ claims should be treated as “facial” or “as-applied” challenges; (2) what level of scrutiny ought to apply to plaintiffs’ claims; and (3) whether the Wiretap Statute survives that degree of constitutional scrutiny. On the first issue, the Court noted that constitutional claims in similar cases often have the characteristics of both facial and as-applied challenges. Here, the Court held that the challenges were facial because plaintiffs sought to partially invalidate the Wiretap Statute. But the Court noted that the claims were limited to two sets of circumstances: secret recording of police officers performing their duties in public spaces; and secret recording of government officials doing the same.

On the second issue, the Court rejected PVAF’s argument that strict scrutiny ought to apply. The Court held that the Wiretap Statute is a content-neutral restriction on conduct and not a content-based restriction on expression. On this basis, the Court concluded that intermediate scrutiny applied.

On the third issue, the Court explained that to pass muster under intermediate scrutiny a law must be narrowly tailored to serve a significant government interest but need not be the least restrictive means of satisfying that interest. Instead, there must be a close fit between the ends and means. Defendants argued that the government interest at issue was ensuring that all citizens receive “guaranteed notice of being recorded, so that one can respond appropriately.”

The Court held that the Wiretap Statute is not sufficiently tailored to serve the government’s interest. In reaching this conclusion, the Court relied on the First Circuit’s decision in *Glik v. Cunniff*, 665 F. 3d 78 (1st Cir. 2011). That case involved a 42 U.S.C. § 1983 claim by a man who was arrested for using his cell phone to openly film several police officers arrest someone on Boston Common. In *Glik*, the First Circuit held that openly filming government officials engaged in their

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duties in a public space was protected by the First Amendment, subject to reasonable time, place, and manner restrictions. The First Circuit reasoned that gathering information about public officials that can be disseminated to others furthers a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs. Relying on these precepts, Judge Saris held that the First Amendment right recognized in *Glik* extends to secretly recording government officials, including police officers, performing their duties in public spaces, subject to reasonable time, place, and manner restrictions. In explaining her decision, Judge Saris echoed the *Glik* Court's statement that the privacy interests of police officers and government officials must yield to the First Amendment interest in newsgathering and information dissemination.

Judge Saris also addressed some hypotheticals that defendants raised about the potential impact of the Court's ruling. In particular, defendants expressed concern that secret recording might implicate public safety issues where police officers meet with confidential informants or encounter crime victims on the street. In those situations, Judge Saris reasoned that police officers may conduct such conversations away from bystanders or in private (i.e., non-public) settings. Judge Saris also cited case law noting that police discussions concerning matters of national and local security often do not occur in public settings.

The *Martin* decision is especially notable today when police interactions with the public are the subject of intense debate and scrutiny. The decision may serve as a check on government power insofar as it may encourage government officials, including police officers, to perform their duties in an appropriate and lawful manner. More broadly, the decision is a timely reminder of the importance of the First Amendment's protection for newsgathering and information dissemination.

Keith Bensten is an associate at Day Pitney LLP. An experienced civil litigator, Keith represents businesses and employers in complex commercial, product liability, and employment litigation. He has represented businesses and individuals in litigation matters in federal and state courts throughout the United States.

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Please send your submissions to the Editor, Harrison Kaplan, at hkaplan@eckertseamans.com.

Complaint Dismissed Against Massachusetts Resident on Forum Non Conveniens Basis

Snöfrost AB v. Håkansson, No. 18-10798 (D. Mass. 2018)

By *Darian M. Butcher, Day Pitney LLP*

In *Snöfrost AB v. Håkansson*, No. 18-10798 (D. Mass. December 19, 2018), the United States District Court for the District of Massachusetts (Woodlock, J.) granted a motion to dismiss on forum non conveniens grounds. The motion was filed by defendant Susanne Håkansson, a Massachusetts resident, who, despite the apparent geographical convenience of having the litigation proceed in Massachusetts, maintained that the claims against her should be heard by the Malmö District Court in the Kingdom of Sweden. Plaintiff, Snöfrost AB (“Snöfrost”), a Swedish special purpose company, opposed the motion.

The litigation commenced when Snöfrost filed its *Complaint to Enforce Agreement to Sell Shares of Stock* against Håkansson to enforce a share purchase agreement, or be compensated for the breach of that agreement. Pursuant to the agreement, Håkansson was to sell the issued and outstanding shares of a Swedish company called Farstorps Gård AB to Snöfrost. The agreement was part of a strategy to minimize the tax burden associated with the sale of the Farstorps Gård AB shares by taking advantage of favorable United States tax treatment regarding the disposition of certain assets of Håkansson’s late father’s estate.

In its analysis, the Court began with the presumption against dismissal based on *forum non conveniens*. This presumption weighs in favor of a plaintiff’s choice of forum and presumes, when the plaintiff chooses the home forum, that the choice is convenient. However, when the plaintiff is foreign (as Snöfrost is) the plaintiff’s choice of forum is afforded less deference. Accordingly, the Court began its analysis affording Snöfrost’s choice of forum “diminished deference.”

The Court then engaged in the required two-part analysis to determine whether the litigation could be dismissed on the grounds of *forum non conveniens* and considered (1) whether there is an available and adequate alternative forum for the dispute, and (2) whether “the compendium of factors relevant to the public and private interests implicated by the case strongly favors dismissal.”

Available and Adequate Alternative Forum

Whether there is an available and adequate alternative forum requires separate inquiries. First, availability of a foreign forum depends on whether the proposed forum addresses the types of claims at issue and whether the defendant is amenable to service of process in the proposed forum. To prove the availability of the Malmö District Court, Håkansson agreed to stipulate to the jurisdiction of the Swedish courts and provided signed legal opinions from Swedish law firms that (1) under Swedish law her consent to jurisdiction would be effective, and (2) the Swedish courts have subject matter jurisdiction over the dispute. In reliance on these opinions, and in the absence of

any contradictory evidence presented by Snöfrost, the Court determined that Sweden was an available alternative forum.

Second, adequacy of the alternative forum is determined by examining whether the remedies provided by the proposed forum are satisfactory and whether the parties will be treated fairly. The Court noted that there was nothing in the record suggesting that the Swedish courts could not provide an adequate remedy or that the parties would be treated unfairly. As a result, the Court found that the Swedish courts are an adequate alternative forum.

Compendium of Private and Public Factors

The compendium of private and public factors that form the second part of the overall analysis were identified by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (Jackson, J.), which include as private factors “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; and all other practical problems that make trial of a case easy, expeditious and inexpensive.” The public factors include “the administrative difficulties resulting from court congestion in the plaintiff’s chosen forum; the local interest in having localized controversies decided at home; the interest in having the trial of a case conducted in a forum that is at home with the governing law; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of imposing jury duty on citizens in an unrelated forum.” Of these private and public factors, the District Court considered the location of witnesses, the availability of compulsory process for unwilling witnesses, the location of events that underlie the action, the applicable law, and the respective interests of Sweden and the United States in deciding the action.

Location of Witnesses

All of the material witnesses except Håkansson are located in Sweden or in Europe. In light of Håkansson’s willingness to submit to the jurisdiction of the Swedish Courts, the Court found that Sweden would be a “significantly more convenient forum” than Massachusetts.

Availability of Compulsory Process

Though both parties briefed the issue of the availability of compulsory process, neither suggested that any potential witnesses were unwilling to testify. As the party opposing the dismissal of the action, Snöfrost had the burden of demonstrating that unwilling witnesses exist. It did not, and the Court found that Snöfrost did not rely on the availability of compulsory process factor in its opposition of the motion to dismiss.

Location of Events

The Court found that most relevant events that underlie Snöfrost’s claims occurred in Sweden. Specifically, the Court noted a key meeting during which Snöfrost alleges that discussions finalizing the transaction were had.

(continued on next page)

Applicable Law

The Court found that the case would be governed by Swedish law pursuant to the Massachusetts choice-of-law rules, regardless of a choice of law provision in the share purchase agreement. Massachusetts choice of law rules are guided by the Restatement (Second) of Conflicts of Laws. The Restatement provides that the local law of the state that has the “most significant relationship” to the transaction and parties applies.

The Court found that Sweden had the most significant relationship with the alleged share purchase agreement. The Court noted that the agreement negotiations occurred in Sweden, according to the agreement the shares were to be transferred in Sweden, and it was a Swedish company whose share were to be sold.

Respective Interest of Sweden and U.S.

The Court found that Sweden had a “far greater interest in deciding a matter brought by a Swedish company based on an alleged contract negotiated primarily in Sweden.” In doing so, the Court disregarded Snöfrost’s argument that the United States has a significant interest in the dispute because Håkansson was selling the shares as part of a strategy to allow Håkansson to take advantage of the step-up basis approach available pursuant to United States tax law, which ultimately would result in greater after-tax proceeds of the sale of the shares. The Court found that Håkansson’s motives for entering into the agreement did not change that the dispute is a “Swedish contract dispute.”

After finding that there was both an available and adequate alternative forum, and that the compendium of private and public factors weighed in favor of dismissal based on *forum non conveniens*, the Court granted Håkansson’s motion to dismiss, provided that she file a stipulation agreeing to submit to the personal jurisdiction of the Malmö District Court in the Kingdom of Sweden, that venue is proper in the court, and that she will be bound to that court’s determination of the dispute.

Darian Butcher is an associate at Day Pitney LLP. Darian assists business clients in complex commercial disputes, and represents them in litigation in state and federal courts and in arbitration. Darian also represents trustees, beneficiaries, heirs, guardians and conservators in disputes involving trusts, wills, estates, guardianships and conservatorships. Darian has co-authored several articles concerning changes to Massachusetts law and given presentations on legal ethics issues. She is also a member of the Board of the Federal Bar Association Massachusetts Chapter.

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Newsletter?

Please send your submissions to
the Editor, Harrison Kaplan, at
hkaplan@eckertseamans.com.

EXECUTIVE OFFICERS

President

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

President-Elect

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

Vice President

Erika P. Reis
City of Boston Law Department
One City Hall Plaza, Room 615
Boston, MA 02201
617-635-4034
erika.reis@boston.gov

Secretary

Stephen Hansen
White and Williams LLP
101 Arch Street, Suite 1930
Boston, MA 02110
(617) 748-5213
hansens@whiteandwilliams.com

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Joshua M. D. Segal
Lawson & Weitzen, LLP
88 Black Falcon Avenue, Suite 345
Boston, MA 02210
(617) 439-4990
jsegal@lawson-weitzen.com

National Delegate

Nathaniel A. Olin
Olin & Lippello LLP
355 Bridge Street, Suite 4B
Northampton, MA 01060
(413) 203-0010
nate@oliplaw.com

Immediate Past President

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

Past President

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

Co-Vice-President for the First Circuit

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

Co-Vice-President for the First Circuit

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

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One Courthouse Way
Boston, MA 02210
(617) 748-4223

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Matthew McGarry
City of Boston Law Department
City Hall, Room 615
Boston, MA 02201
(617) 635-4042
Matthew.McGarry@boston.gov

BOARD MEMBERS

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

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

Kerry Timbers
Sunstein Kann Murphy & Timbers LLP
125 Summer Street
Boston, MA 02110
(617) 443-9292

Nicole O'Connor
City of Boston- Law Department
One City Hall Plaza, Room 615
(617) 635-4039
Nicole.OConnor@cityofboston.gov

Darian Butcher
Day Pitney LLP
One International Place
Boston, MA 02110
(617) 345-4734
dbutcher@daypitney.com

Cortney M. Godin
Peabody & Arnold, LLP
600 Atlantic Avenue
Boston, MA 02210
(617) 951-2068
cgodin@peabodyarnold.com

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

Yvonne Chan
Goodwin Procter
100 Northern Avenue
Boston, MA 02210
(617) 570-8101
ychan@goodwinlaw.com

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

Harrison Kaplan
Eckert Seamans Cherin & Mellott
Two International Place, 16th Floor
Boston, MA 02110
(617) 342-6893
hkaplan@eckertseamans.com

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

Robert S. Sinsheimer
Sinsheimer & Associates
92 State Street, 9th Floor
Boston, MA 02109
(617) 722-9954

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Chief of Appeals
Federal Public Defender Office
51 Sleeper Street, Fifth Floor
Boston, MA 02210
(617) 223-8061
Judith_Mizner@fd.org

Carolyn Meckbach
Fellowship & Project Coordinator
for U.S. District Court for the
District of Massachusetts
1 Courthouse Way
Boston, MA 02210

Jennifer Serafyn
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United States Attorney's Office
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3318

WORCESTER DESIGNEE:

Brian Murphy
Murphy & Vander Salm LLP
One Mercantile Street,
Worcester, MA 01608
(508) 744-3038
murphy@mvsllp.com

SPRINGFIELD DESIGNEE:

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

JUDICIAL MEMBER:

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

YOUNG LAWYERS DIVISION:

Matthew McGarry, Chair
City of Boston Law Department
City Hall, Room 615
Boston, MA 02201
(617) 635-4042
Matthew.McGarry@boston.gov

Joshua Speicher, Chair-Elect
City of Boston Law Department
City Hall, Room 615
Boston, MA 02201
(617) 635-4042
Joshua.Speicher@boston.gov

Todd Torres, Vice-Chair
UMass Memorial Health Care
One Biotech Park
365 Plantation Street, Suite 334
Worcester, MA 01605
(508) 334-1700
todd.torres@umassmemorial.org

George T. Bahnan, Treasurer
City of Boston Law Department
City Hall, Room 615
Boston, MA 02201
(617) 635-4042
George.Bahnan@boston.gov

Sean McKendry, Secretary
City of Cambridge Law Department
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 349-4121
smckendry@cambridgema.gov

