



The Massachusetts Chapter of The Federal Bar Association

Matthew C. Baltay - Editor

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President's Column

By Mary Jo Harris



Welcome to the Massachusetts Chapter of the Federal Bar Association!

The Federal Bar Association has been dedicated to the practice of federal law and the advancement of the professionalism of the federal legal profession for over 80 years. The Massachusetts Chapter of the FBA is one of the most dynamic of the 84 local FBA chapters throughout the country. We have a proud history of promoting unmatched interaction between attorneys and the federal judiciary, offering programs that enhance high standards of professional competence and ethical practice, and keeping our members informed of developments in their fields of interest. If you are not already a member of the Mass. FBA, I hope that you join us!

This year, the Massachusetts Chapter builds on the successful, award winning programs that our members have developed in the past, and we look forward to growing our membership this year as we strengthen our bonds with our fellow federal practitioners, our sister chapters in our Circuit and beyond.

Many of our events are free to our members, including our Breakfasts with the Bench and Conferences with the Clerks, and I encourage you to click on our "Recent Events" for a quick snapshot of our activities.

We publish an award winning quarterly newsletter, which is distributed to all Massachusetts FBA members and which provides substantive analysis of current issues affecting federal practice. Members are encouraged to contact us with ideas for future articles. We chair the bi-annual Job Interview Skills Workshop, in conjunction with two probation programs out of the U.S. District Court of MA. C.A.R.E. and R.E.S.T.A.R.T. are programs designed to help the federal offender re-enter society post-incarceration. Our chapter has also created a pro-bono mediation program, which provides training for interested attorneys who then may enter limited appearances for purposes of assisting pro-se litigants engage in mediation of disputes. This year, we also look forward to working with the District Court as Massachusetts prepares to host the 2012 First Circuit Conference in October.

In all of our activities, the Massachusetts Chapter of the FBA works to serve our judges, create opportunities for our members to become more involved with the court, and network with their fellow lawyers. Please take advantage of the benefits membership provides, and reach out to one of our Committee Chairs to get involved.

Sincerely,
Mary Jo Harris
President, FBA-Massachusetts

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Breakfast with Judge Casper

By Mary Jo Harris

In November 2011, the FBA hosted a Breakfast with our newest District Court Judge, Denise Casper, who was appointed to the Massachusetts court this year. Although she has not been on the bench long, Judge Casper shared some observations that lawyers who appear before her would do well to consider. Judge Casper views respecting the jury, and in particular, being mindful of the best use of their time, to be of paramount importance. Therefore, she makes herself available early on trial days, and is on the bench at 8:45 to address any issues before the jury is seated. She views jury voir dire to be useful in identifying areas of bias or prejudice, but is disinclined to conduct extensive juror questioning except in unusual or complex matters. At the Rule 16 conference, she



will schedule the case through dispositive motions, and will hold an additional conference at the close of discovery (rather than setting a trial date from the outset). Partial motions for summary judgment that may narrow the issues for trial are welcome, but Judge Casper expects lawyers to comply with the letter and the spirit of Local Rule 7.1, and make meaningful attempts to resolve disputes without unnecessarily relying on the court to do so.

Judge Casper is tasked with organizing the Judges Conference that will be held on October 18-19, 2012. We look forward to working with her in making this Conference a success for both bench and bar.



Law of Wine

By Mary Jo Harris

The Mass. Chapter of the FBA held the first of what is hoped will be an annual event, discussing the "Law of Wine." Immediate Past President Chris Sullivan and Robins, Kaplan, Miller & Ciresi hosted the event, moderated by District Court Judge Richard Stearns (a native of California, with extensive knowledge of the history of the West Coast's wine industry), with the assistance of Top of the Hub Sommelier Matthew Ryan. Participants learned about the relationship between "new world" and "old world" vines, the role immigration and later, the railroad industry had on the creation of American wineries, and the government's efforts to regulate it. We also enjoyed delicious white and red wines, and mastered the fine art of swirling and sipping!



Judge Stearns with Top of the Hub Sommelier, Matthew Ryan



Judge Stearns discussing the Law of Wine.



Alexander Henlin, Anthony Froio, Lisa Tittmore and Chris Sullivan

The Massachusetts Chapter of the Federal Bar Association Announces 2012 Federal Judicial Reception Honoree

The FBA is pleased to announce that it has selected United States District Court Judge Michael A. Ponsor as the FBA 2012 Annual Federal Judicial Reception Honoree. According to Massachusetts Chapter President Mary Jo Harris, "Judge Ponsor exhibits the highest of judicial dedication, values and integrity and is the ideal honoree." The entire Federal Bar Association is very pleased with the selection. A date will be set and announced shortly for the late winter 2012 event.

Kazakhstan Judges Visit

By Mary Jo Harris

The FBA, and specifically Matt Moschella, Susan Weise, the litigation team from the City Law Department (Raquel Webster, Dawn Beauchesne, Michelle Hinkley, Julie Ciollo, Amy Brateskier), Marty Rooney, and Cortney Merrill (from Campbell, Campbell, Edwards & Conroy), did a fabulous job hosting a high level delegation of judges from Kazakhstan, including a mock trial before Judge William Young on October 28, 2011.

Judge Bailey, late of Sherin & Lodgen and now on the US Bankruptcy Court, brought the judges to the courthouse for a full day of activities, starting with observing a mediation with Magistrate Judge Bowler, then trial with us. Raquel and Dawn presented an abbreviated trial, based on training materials from Jon Mutch at Robins, Kaplan, Miller & Ciresi.

Judge Young then took everyone to view the robing room and jury room, then to his own chambers for a discussion with the judges. The visiting judges asked questions about the size of the district court bench, the appellate process and procedures, and commented on the facilities (and for those of you who haven't been to chambers, they are awesome!) Judge Young is such an advocate of the jury system as you know, and he was a compelling advocate for our system here. I saw several of the visiting judges nod when he explained to them that he instructs juries that, " 'Verdict' comes from two Latin words, meaning, 'to speak the truth.' That is your role in our system of jurisprudence. You speak the truth with your verdict."

The presentation included openings and closings, and examination of a treating medical doctor, followed by deliberations and a jury decision (the defense won!) The case was a pedestrian motor vehicle accident, and the attorneys did a masterful job. Judge Young commented afterwards on the quality of the presentation, and one of the visiting judges asked if the participants were real attorneys, or actors who did trial practice training - so many thanks to our volunteers for making the FBA look so good.



Volunteers Needed for FBA/MBLA Job Interview Skills Program

Raquel Ruano, of the City of Boston Law Department and Alexandra Alland, of the State Auditor's Office, are helping the Federal Court to run a Job Interviewing Skills Program for the participants of the "CARE" and "RESTART" programs. These programs assist ex-offenders in their reentry to society and employment. The FBA Job Skills Program is an event where members of these two federal re-entry programs will receive some job training from an employment specialist, and then participate in three mock job interviews. The FBA is looking for volunteers to serve as mentors to the program participants as they do their mock interviews. Volunteer mock interviewers are needed as well. The event is being held in the Jury Assembly room at the John J. Moakley Courthouse from 12 Noon until 1:45 p.m., on January 4, 2012. Please contact either Raquel Ruano at Raquel.Ruano@cityofboston.gov or Alexandra Alland at Alexandra.Alland@sao.state.ma.us for more information.

THE FIRST CIRCUIT CASE FOCUS: The First Circuit Court of Appeals: Pomegranates and Insurance Policy Interpretation (*Welch Foods Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA.* 659 F.3d 191 (1st Cir. Oct. 24, 2011))

*By Harvey Weiner and Jane A. Horne, Peabody
& Arnold LLP*

The Court of Appeals for the First Circuit recently had its hand in an area that, perhaps surprisingly, has attracted recent media attention throughout 2011: litigation over pomegranate juice products. See, e.g., Sheri Qualters, *First Circuit arguments focus on coverage for suits over pomegranate claims*, NAT'L L. J. (2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202518005184>.

In *Welch Foods Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA.* 659 F.3d 191 (1st Cir. Oct. 24, 2011), the First Circuit held that a directors and officers' liability insurance policy did not provide coverage for Welch's defense or indemnity costs in defending two deceptive advertising lawsuits: one brought by POM Wonderful LLC, a Welch competitor, and a "copycat" class action lawsuit brought on behalf of consumers. The three-judge panel, made up of Chief Judge Sandra Lynch, Judge Jeffrey Howard and Judge Juan Torruella, reached its decision by taking

a strict policy interpretation route—a *per curiam* decision issued a mere nineteen days following oral argument.

In the first underlying suit, POM Wonderful accused Welch of falsely representing that the chief ingredients in its White Grape Pomegranate Juice—prominently displaying pomegranates on its label—were white grape and pomegranate juice, when they were actually white grape and apple juice. In September 2010, a California jury found that Pom Wonderful proved “by a preponderance of the evidence that the name, label, packaging or advertising of Welch’s 100% Juice White Grape Pomegranate product was, although literally true, nevertheless deceptive or had a tendency to deceive a substantial number of actual consumers” and that Pom Wonderful proved “by a preponderance of the evidence that [Welch] intended the name, label, packaging or advertising to deceive consumers.” However, the jury found also that Pom Wonderful failed to prove “that it suffered injury, consisting of lost sales or lessening of goodwill as a result of [Welch’s] conduct” so the case was dismissed. An appeal to the Ninth Circuit is pending.

In the class action, consumers alleged that they were injured by Welch’s acts of unfair competition in falsely representing that pomegranate juice was a main ingredient of the juice drink, while the product was in fact comprised almost entirely of apple and grape juice. The California Court approved a settlement, which included giving consumers at least \$30 million in coupons for Welch products.

Welch sought both defense costs and indemnity for these lawsuits from three of its insurers, National Union and former co-defendants Axis Surplus Insurance Co. and Zurich-American Insurance Co. In October 2010, Judge Rya Zobel of the District Court of Massachusetts found that the claims in both actions fell outside the scope of the coverage afforded to Welch in all three policies and granted summary judgment to the insurers. Axis and Zurich settled with Welch while the First Circuit appeal was pending—leaving National Union as the sole appellee to face Welch in front of the Court of Appeals.

On October 24, 2011, the First Circuit affirmed the decision of the District Court in favor of National Union. The Court found that coverage was precluded by the plain and unambiguous language of the policy’s antitrust exclusion, which precluded coverage for claims involving “antitrust violations, price fixing, price discriminations, unfair competition, [and] deceptive trade practices,” and that this exclusion was *not* limited to antitrust claims. The Court held that, although the policy’s antitrust exclusion bears the label “Antitrust Exclusion,” and several of the descriptions of covered claims refer to typical antitrust claims, “the plain language of the other excluded claims - - particularly ‘unfair competition’ and ‘deceptive trade practices’ is far broader and not so limited.” The Court pointed out that the policy itself states that the descriptions in the headings of the policy are solely for convenience and form no part of the conditions of coverage,

“thus precluding the weight Welch wishes to assign the heading.” Further, the Court noted that every word in an insurance contract must be given meaning. The Court explicitly rejected application of the doctrine of *noscitur a sociis*, which, it determined, cannot be used to overrule the plain meaning of a policy’s terms.

Because the Court found that the antitrust exclusion applied, it declined to address the perhaps more intriguing issue of whether the jury verdict in the Pom Wonderful case meant that the final adjudication exclusion, precluding coverage where “any final adjudication establishes that . . . [a] deliberate fraudulent act was committed,” also applied to bar coverage. National Union had argued that the District Court’s judgment should be affirmed based on the jury’s finding in the POM Wonderful case that Welch engaged in intentionally deceptive conduct. Welch countered that the policy’s fraudulent act exclusion applied only if a “final adjudication” established that Welch committed a deliberate fraudulent act. Welch argued that the jury’s findings did not constitute a final adjudication because the jury’s answers to special questions were immaterial to the actual judgment, and therefore, not a final adjudication establishing that Welch had intentionally committed a fraudulent act. Welch argued also that, because it had won, it could not have appealed the jury’s findings, as it had neither cause nor grounds to do so as the prevailing party in the action. Therefore, Welch argued, it could not be bound by such findings in the coverage action.

The First Circuit Court of Appeals: Table Saws, “Flesh Detection Technology” and Defective Design (*Osorio v. One World Techs., Inc. et al.*) 659 F.3d 81 (1st Cir. Oct. 5, 2011)

By Erica Tennyson and Jonathan Handler of Day Pitney LLP

Manufacturers of potentially dangerous products (and their counsel) take heed: the First Circuit has clarified, and arguably lowered, the standard for bringing a claim for defective product design. In *Osorio v. One World Technologies, Inc.*, the Court upheld a \$1.5 million jury verdict against Ryobi, a table saw manufacturer, agreeing with the district court that Ryobi could be held liable for defective design because of its failure to incorporate new “flesh-detection technology” into its benchtop table saw design. The First Circuit held that the feasibility of an alternative design is a fact question to be determined by a jury, not a legal issue that can be decided on a dispositive motion.

Carlos Osorio worked for a contractor who repaired and installed hardwood floors. As he was using the Ryobi Model BTS 15 benchtop table saw (BTS 15) to cut a piece of wood, with the blade guard and rip fence safety features removed, his left hand slipped and he severely injured his hand. Osorio sued Ryobi, the product’s manufacturer, for negligence and breach of the implied warranty of merchantability. He claimed that the BTS

15 was unreasonable dangerous due to a defective design. The jury found for Osorio and awarded him damages of \$1.5 million. Although the jury also found that Osorio was negligent and thirty-five percent at fault for the accident, the finding of comparative negligence did not affect his damage award because Ryobi was found to have breached the implied warranty of merchantability. At the conclusion of trial, Ryobi moved for judgment as a matter of law on the grounds that the plaintiff had failed to make a prima facie case that a reasonable alternative design exists and that he failed to present sufficient evidence of design defect to support the jury's verdict.

It is well-established that, under Massachusetts law, a product must be "reasonably fit" for its intended purposes. In the 1978 case of *Back v. Wickes Corp.*, 275 Mass. 633, 378 N.E.2d 964, 970 (Mass. 1978), the Supreme Judicial Court listed five factors to consider in assessing the reasonableness of a product's design: the gravity of the danger posed by the current design, the likelihood that the danger will occur, the mechanical feasibility of a safer design, the financial cost of a safer design, and the adverse consequences to the product and consumers that would result from an alternative design. The BTS 15 is a lightweight, portable and inexpensive benchtop table saw. Osorio argued that the product should have implemented the "SawStop," a mechanism that allows a table saw to sense when its blade comes into contact with flesh, stop the blade and retract. Ryobi argued that Osorio's alternative design was not viable because it would make the saw larger, heavier and nearly twice as expensive.

The Court held that the jury has discretion to balance the relevant factors to decide whether a product's design is unreasonable. The jury was within its right to find that the plaintiff's proposed alternative design was a viable alternative – despite the fact that

a plaintiff's expert testified that the SawStop would add about \$150 to the purchase price of the table saw, which Osorio's employer purchased at Home Depot for \$179. The Court found that a plaintiff is not required to make a prima facie showing of the feasibility of an alternative design. Neither the extra cost nor the added weight were fatal to Osorio's claim as a matter of law.

The case is particularly notable because the plaintiff's defective design theory relied heavily on the testimony of his expert, Dr. Stephen Gass, who invented and was selling the SawStop and therefore had a vested interest in the outcome of the case. A few years earlier, Dr. Gass tried unsuccessfully to license the SawStop to Ryobi and other major tool manufacturers. The plaintiff argued that the major manufacturers collectively agreed to refuse to adopt the new technology to limit their collective liability. Dr. Gass is currently lobbying the Consumer Product Safety Commission for stronger safety rules for saws and a requirement that they incorporate flesh-detecting technology.

Plaintiff's attorneys and safety advocates have praised the holding for increasing safety standards on table saws. They argue that, if the technology exists and it is economically feasible to make saws safer, Ryobi may be held liable for consciously choosing not to implement the new technology. Indeed, the Consumer Product Safety Commission recently voted in support of a standard requiring flesh-detection devices on new table saws. Defense attorneys lament that a plaintiff's case may go to a jury if a safety mechanism has been invented, without regard for the feasibility of the mechanism and where no manufacturer has adopted the technology. Critics also claim that the decision will force manufacturers to implement safety mechanisms that will make their products prohibitively expensive for many users.

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