



Federal Bar Association

Massachusetts Chapter

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Newsletter

Trevin C. Schmidt, Editor

SUMMER 2020

President's Column

By Juliet A. Davison



These are challenging and unprecedented times. We are confronting issues of police violence and entrenched racism as never before and we are living through the catastrophic coronavirus pandemic which has caused unremitting devastation to the citizens of Massachusetts, the United States and to the world. We all live with deep uncertainty as to what the future holds and what our lives will look like in six months, a year, two years, five years.

Yet there are silver linings and glimmers of hope on the horizon. The coronavirus has

taught us that we are nimbler than we knew as the Courts and practitioners have quickly become conversant with technologies which enable and facilitate productive remote work. And many of us hope that the time has come where we commit to the necessary conversations and actions to address the intransigent problems of racism in our country.

With respect to our Chapter, I am pleased to report that we were able to pivot quickly to conduct our business virtually and seamlessly. It has been a real learning experience for us. Our meetings are fully subscribed and our Board has been eager and determined to continue our tradition of unique and informative programming and planning for social “gatherings”.

We are, of course, extremely disappointed that we had to postpone our Annual Judicial Reception at which we were going to recognize The Honorable Stephen G. Breyer, Associate Justice of the United States Supreme Court for his service to the country, the judiciary and the legal community. The Reception would have been a memorable and noteworthy event and we were most honored that Justice Breyer accepted our invitation. Planning for the Reception was already well underway when the coronavirus struck and we very much hope that we will be able to pick up where we left off once regular activity resumes.

But we are looking forward to our virtual “year-end” event at the end of September at which we will gather to mark a productive and unprecedented year. Please stay tuned for the exact date and for the announcement of our special guest speaker.

While, as noted below, we have had to postpone many events that were scheduled to take place in the Spring, we have a hosted a slew of interesting and timely programs over the summer, a time in which historically, our programming has slowed down. Notably, on July 30th, the Chapter together with the FBA National Civil Rights Committee sponsored a program titled “Police Violence and Police Misconduct Litigation in Boston.” The panelists included Judge William G. Young, Suffolk County District Attorney Rachael Rollins, Professor Dick Lehr,

author of “The Fence”, Sr. Assistant Corporation Counsel, Erika Reis and plaintiff's civil rights attorney, Howard Friedman. We had an extremely knowledgeable panel and more than 500 attendees “zooming” in from all over the country. The program was enormously informative.

Our signature Breakfast with the Bench program has continued to thrive, with even greater attendance in the Zoom era. On May 28th, we were pleased to welcome Chief Judge Saylor who addressed the topic of “The State of the Massachusetts District Court Amidst the Pandemic”. And on July 28, 2020, the Chapter hosted a Breakfast with the Bench with Judge Sorokin joining us to discuss Federal District Court practice in the coronavirus era.

We have spent much of our time over the past few months supporting and facilitating communication between the District Court and practitioners about the operation of the Courts and the ongoing administration of justice in the Commonwealth. On May 21st, the Chapter supported the Western Massachusetts virtual Bench/Bar Conference; on June 18th, the Chapter sponsored a lunch in Worcester with Judge Hillman and Magistrate Judge Hennessy on “What has Changed in the Worcester District Court”; and on June 25th, we supported a state-wide virtual program in which Chief Judge Saylor spoke to the Massachusetts bar community about the operations of the Court, the measures being implemented in connection with the eventual re-opening of the Court and anticipated guidance on how and when jury trials might be reinstated. All of these events have been instructive and collaborative.

We are looking forward to additional programming as well. On September 2, 2020, the Chapter will host a program on “Remote Mediation in the Era of Coronavirus” with Magistrate Judge Dein and Judge Margaret Hinkle (ret.), to be moderated by Chapter Treasurer, Josh Segal. And on September 15th, Chapter member Kent Sinclair will moderate a program on Cyber Security and Data Breach with Magistrate Judge Katherine Robertson and attorney Scott Lashaway speaking on the panel.

The list of postponed/canceled events from our Spring calendar, in addition to the Annual Judicial Reception, is long and includes: our Welcome Reception for our newest Bankruptcy Judge, Janet Bostwick, our Welcome Reception for our new Chief of Probation, Ricardo Carter, our panel on Attorney Wellness (which we co-sponsored with the Massachusetts Defense Lawyers Association), a Discussion with the Deans of our local law schools, a book talk with Professor Jack Goldsmith on his book “In Hoffa's Shadow” and our “Giving Back” outing to serve dinner at Rosie's Place with Chapter members and volunteers from the Clerk's office. We look forward to conducting these events live when it is safe to do so.

In closing – we look forward to seeing you, virtually, at our upcoming programs and, in person, when it is safe to gather again.

Breakfast with the Bench: May 28, 2020

By Erika P. Reis, President-Elect - FBA Mass. Chapter, City of Boston Law Department

On May 28, Chief Judge F. Dennis Saylor IV joined us for a Breakfast with the Bench to discuss how the Court is dealing with Covid-19. He also gave us some insight on the next steps as the Court prepares to reopen and what that may look like.



Breakfast with the Bench: July 28, 2020

By Erika P. Reis, President-Elect - FBA Mass. Chapter, City of Boston Law Department

On July 28, Judge Leo Sorokin joined us for a Breakfast with the Bench. The Judge gave us an update on the Court and what in-person proceedings may look like moving forward. He also got input from our members on their experiences and any feedback they may have for the Court.

“What has Changed in the Worcester District Court” with Judge Hillman and Magistrate Judge Hennessy

By Brian Murphy, Murphy & Vander Salm LLP

On June 18, 2020, the Massachusetts Chapter of the Federal Bar Association in conjunction with the Worcester County Bar Association hosted a conversation with the bar and the bench about how the courts would begin returning to normal. Chief Judge Saylor along with Judge Hillman and Chief Magistrate Judge Hennessy all participated in a lively conversation about the challenges and opportunities presented by re-opening in a COVID-19 world. The judges shared the many concerns the court was attempting to address. Chief Judge Saylor explained that the court had hired an epidemiologist to provide recommendations on how to re-open. Though the final decisions are still being made, some of the ideas being considered including using a second courtroom for jury deliberations or doing jury selection in the jury room. Social distancing and masks, including during evidentiary hearings when examining witnesses, seem to be inevitable necessities. The judges answered questions from the bar and all enjoyed a lively discussion.

National Civil Rights Committee

By Robert Sinsheimer, Esq., Sinsheimer & Associates

The National Civil Rights Committee opened up its Board meeting to the entire membership in July. Some folks may not realize that their dues include National membership automatically, so if you are working remotely this summer, this might be a good time to learn more about your National committee, and plug in.

The work of the Civil Rights Committee has suddenly moved front and center as National debate once again focuses on police misconduct. Democrats have proposed legislation to do away with “qualified immunity.” Our committee is struggling to find an appropriate place to be heard given that we must remain decidedly bipartisan. The struggle is healthy. There is unity in the proposition that the United States federal courts are focused on the preservation of human dignity and civil liberties, and this is true regardless of which side of the proverbial “v” an individual attorney might appear in any given case.

Virtual Roundtable with the Bench

By David Lawless, Esq., Robinson Donovan, P.C.

On May 21, 2020, the Massachusetts Chapter of the FBA held its first virtual roundtable event. Chief Judge Saylor joined the Judges of the U.S. District Court and Bankruptcy Court in Springfield as a surprise guest and gave his perspective on current and future court operations in light of the COVID-19 pandemic. U.S. District Judge Mark G. Mastroianni, Senior U.S. District Judge Michael A. Ponsor, U.S. Magistrate Judge Katherine A. Robertson, U.S. Magistrate Judge Kenneth P. Neiman, and U.S. Bankruptcy Judge Elizabeth D. Katz provided the view from the Western Division.

The event was well-attended by attorneys located both in western Massachusetts and throughout the Commonwealth. The panelists and participants discussed, amongst other topics, hearings and mediations by video conference, courtroom etiquette in a virtual courtroom, what attorneys and litigants can expect going forward, the impact of COVID-19 on the Bankruptcy Court, and the impact of the COVI-19 pandemic on local small business. The Massachusetts Chapter of the FBA extends its particular thanks to Clerk of Court Robert M. Farrell, Division Manager Bethaney A. Healy, and Public Information Specialist Carolyn Meckbach for making this first-of-its-kind event possible.



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.

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 Josh Segal, Lawson & Weitzen, LLP, 88 Black Falcon Avenue, Suite 345, Boston, MA 02210

Panel on Police Violence and Police Misconduct Litigation in Boston

By Juliet Davison, President - FBA Mass. Chapter, Davison Law, LLC

George Floyd, Breonna Taylor, Elijah McClain – sadly, they and countless others have become household names. Addressing police violence is now at the forefront of the national conversation. Boston has not had major publicized incidents in recent days.

On January 25, 1995, Boston Police Officers beat a black man to within an inch of his life. They were chasing a murder suspect, and in the dark, attacked one of their own, who was dressed in plain clothes. Upon discovering their error, they ran away. No officer was indicted. In 1998, the victim prevailed against individual officers in a civil action tried before the Honorable William J. Young. The City of Boston then settled for seven figures shortly before empanelment of a separate trial to determine its independent liability. Author Dick Lehr, who was with the Boston Globe Spotlight team at the time, published a gripping account of the full story in 2009: “The Fence” (Harper Collins). Mr. Lehr is now a Professor of Journalism at Boston University.

On July 30, 2020, the Chapter, together with the National Civil Rights Committee of the Federal Bar Association sponsored a conversation about police violence and the current state of police litigation in Boston, looking back at “The Fence” for lessons learned and discussing the current and future landscape. The panelists included Suffolk County District Attorney Rachael Rollins, Howard Friedman, Esq., plaintiff’s police misconduct attorney, and Erika Reis, Esq., Sr. Assistant Corporation Counsel for the City of Boston along with Judge Young and Professor Lehr. Rob Sinsheimer, Esq., one of the attorneys who represented the plaintiff in the 1998 trial, moderated the panel.

The panel addressed a range of topics from the legacy of the beating and the 1998 trial to the current state of the doctrine of qualified immunity to the impact of racism on policing. With over 500 attendees by Zoom, the discussion was lively and informative and allowed for a healthy exchange of views. The agenda for the panel is set out below.

MODERATOR INTRO	ROB SINSHEIMER
THE FENCE STORY	DICK LEHR
THE ACTUAL COURT CASE (INTRO TO QUALIFIED IMMUNITY)	JUDGE YOUNG
DIFFICULTIES OF CRIMINAL PROSECUTION/RACE MATTERS	DISTRICT ATTORNEY RACHAEL ROLLINS
CIVIL PLAINTIFFS’ WORLD TODAY	HOWARD FRIEDMAN
CIVIL DEFENSE WORLD TODAY	ERIKA REIS
SIGNIFICANCE OF MEDIA (NOT EVERY CASE HAS A VIDEO) (NOT EVERY COP IS “GUILTY”)	D. LEHR
CONCRETE PROPOSALS FOR SYSTEMIC CHANGE	H. FRIEDMAN D.A. ROLLINS
GOVERNMENT PERSPECTIVE	D.A. ROLLINS ERIKA REIS
THE VIEW FROM THE BENCH	JUDGE YOUNG
LAST WORD	ALL
Q AND A	

The Chapter looks forward to continued programming addressing these and related topics in the coming year.

Jurisdiction Not Conferred by Website and Online Learning Platform Accessible in Massachusetts

Chen v. United States Sports Academy, Inc., 956 F.3d 45 (1st Cir. 2020)

By Darian M. Butcher, Esq., Day Pitney LLP

In *Chen v. United States Sports Academy, Inc.*, the United States Court of Appeals, First Circuit (Selya, J.) affirmed the District Court's dismissal (Saylor, J.) of Kuan Chen's complaint for want of jurisdiction. Chen's asserted basis for jurisdiction over United States Sports Academy, Inc. ("USSA") was USSA's maintenance of an informational website and online learning platform that was accessible nationwide, and which Chen alleges he accessed in Massachusetts.

Chen's complaint originated from his enrollment in 2008 in a doctoral program offered by USSA. USSA is incorporated in Alabama and maintains a principal place of business there. USSA is mainly involved in online education and offers a distance-learning program through an online learning platform that is accessible twenty-four hours a day in all fifty states. At the time of his enrollment, Chen was residing in Alabama. Between 2008 and 2010, Chen completed coursework toward his doctoral degree while residing in Alabama, except for brief periods when he resided temporarily in Missouri and New York. In or after 2010, Chen moved to Massachusetts and temporarily stopped work toward his doctoral program. Then in 2016, Chen sought to resume his pursuit of the doctoral degree from USSA. However, when he attempted to access his USSA coursework online, he was "locked out" and unable to log on to his account. Chen then contacted USSA and began a series of communications with the company about his access to the online learning platform and the requirements for completing his doctoral program, which ultimately resulted in Chen filing a complaint against USSA.

In his complaint, which he initially filed in Massachusetts state court, Chen alleged claims for breach of contract, unfair and deceptive business practices, unjust enrichment, and fraudulent inducement against USSA. USSA removed the case to the District Court on the basis of diversity jurisdiction. USSA then moved to dismiss Chen's complaint for want of jurisdiction. In support of its motion to dismiss, USSA attached an affidavit by its president, Thomas J. Rosandich. Rosandich's affidavit averred, among other things, that USSA was incorporated and headquartered in Alabama and did not have a physical presence in Massachusetts or pay taxes in Massachusetts. According to Rosandich's affidavit, Chen primarily completed his coursework while residing in Alabama, and there were only two enrolled USSA students who were physically present in Massachusetts as of January 2019. Chen did not dispute the contents of Rosandich's affidavit by offering a competing affidavit or other evidence.

The District Court relied on Rosandich's affidavit and dismissed Chen's complaint. In reaching its decision, the District Court utilized the "prima facie approach." Under this approach, the District Court limited its inquiry to whether Chen had proffered facts that, if credited by the Court, would support a finding of personal jurisdiction. The District Court found that Chen had not proffered such facts, and that USSA's business contacts with Massachusetts were not sufficient to render USSA "essentially at home" in Massachusetts, and therefore subject to general jurisdiction. Similarly, Chen's unilateral move to Massachusetts did not provide a sufficient basis

for the exercise of specific jurisdiction. Chen appealed the District Court's order dismissing the complaint.

On appeal, the First Circuit considered the jurisdictional issues de novo because the District Court's decision was based on the prima facie record. Before the First Circuit, Chen argued that the District Court improperly relied on Rosandich's affidavit because it was a document extraneous to the complaint. The First Circuit rejected this argument as USSA moved to dismiss the complaint for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), which requires a court when employing the prima facie approach to reviewing jurisdiction to examine the pleadings, the plaintiff's properly documented evidence, and the defendant's undisputed jurisdictional facts. Chen also argued that the contents of Rosandich's affidavit were disputed and that affidavit should be disregarded because the parties had not yet engaged in discovery. The First Circuit rejected both of these arguments. First, the Court noted that facts are not rendered disputed by Chen's counsel's challenge to these facts in an unsworn brief or in argument before the court. Second, the Court highlighted Chen's opportunity to move for jurisdictional discovery and his failure to do so. The First Circuit also referred to Chen's "fatal" omissions – failing to move to strike Rosandich's affidavit and failing to object to the District Court's consideration of the affidavit in his opposition to USSA's motion to dismiss.

In deciding whether USSA is subject to general jurisdiction in Massachusetts, the First Circuit considered USSA's business contacts in Massachusetts. Chen argued that USSA's website established sufficient contacts with Massachusetts to confer general jurisdiction on Court. Chen analogized USSA's activity in Massachusetts through its website to the activity of Amazon or eBay in that USSA is also selling a product to persons located in Massachusetts and the purchaser is not required to leave the state to obtain USSA's product. Chen also argued that USSA was affecting the Massachusetts economy by diverting students from Massachusetts educational institutions. The First Circuit rejected all of Chen's arguments. The Court noted again that USSA is incorporated in Alabama and maintains a principal place of business there. Contrary to Chen's arguments concerning USSA's website, the First Circuit also found that USSA's general business operations in Massachusetts were not "so unusually substantial" that USSA is "at home" in Massachusetts. The Court likened USSA's website to a "mere whiff of a virtual presence." Specifically, the Court held that USSA's informational website and interactive online learning platform that are accessible in Massachusetts, and its two enrolled students in Massachusetts did not, "singly or in the aggregate, constitute a pattern of general business operations" sufficient to render USSA subjected to general jurisdiction in Massachusetts. However, the First Circuit noted the possibility that a corporation's "pervasive virtual presence" in a forum could lead to a finding that its business contacts were "so continuous and systematic as to render it at home in the forum."

On the question of specific jurisdiction, the First Circuit noted the three inquiries required by the Due Process Clause: (1) whether Chen's claim against USSA directly arose from USSA's activities in Massachusetts; (2) whether USSA's Massachusetts contacts "represent an purposeful availment of the privilege of conducting activities in that states; and (3) whether the exercise of specific jurisdiction over USSA is reasonable under the circumstances. The First Circuit focused on the "purposeful availment"

requirement, which requires a finding the defendant's contacts with the forum were voluntary (i.e., that the defendant's contacts resulted from its own actions) and that the defendant's conduct and connection to the forum state made it foreseeable that the defendant may be "haled into court" in the forum. First, the First Circuit considered USSA's informational website. Citing to a 2016 decision, *A Corp. v. All Am. Plumbing, Inc.*, 812 F.3d 54, 61 (1st Cir. 2016), the Court confirmed its prior holding that the "mere availability" a primarily informational website in a forum is insufficient, on its own, to subject a defendant to jurisdiction in Massachusetts. Further, the Court noted the lack of evidence in the record that USSA directed its website to Massachusetts residents or that it derives significant revenue from its website from Massachusetts residents.

The First Circuit then considered whether USSA's online learning platform would subject it to specific jurisdiction in Massachusetts, which it described as a "novel question." Ultimately, the First Circuit found that USSA's online learning platform did not subject it to specific jurisdiction in Massachusetts because it was not sufficiently foreseeable to USSA that it would be subject to jurisdiction in Massachusetts solely because it was foreseeable that Massachusetts residents might access the online learning platform. In reaching this conclusion, the First Circuit also noted the dearth in the record relating to the other two USSA students based in Massachusetts. Specifically, the Court noted that the record lacked evidence that USSA targeted these other students, or that USSA derived significant revenue from them. Moreover, the Court noted that all of Chen's allegations about USSA's case-specific contacts with Massachusetts arose from Chen's unilateral activity (i.e., logging on to the USSA online learning platform, paying tuition, and communicating with USSA all while allegedly in Massachusetts). Related to this, the First Circuit noted the lack of evidence that USSA had any knowledge of Chen's relocation to Massachusetts before he filed his complaint.

Chen v. United States Sports Academy, Inc. is a reminder to all about the limitations of general and specific jurisdiction when the contacts with the forum state are limited to the mere availability of a website or other interactive online platform.

* * *

Darian M. Butcher is a senior associate at Day Pitney LLP. Darian focuses her practice on the representation of trustees, beneficiaries, heirs, guardians and conservators in contested and uncontested matters involving trusts, wills, estates, guardianships and conservatorships.

First Circuit Reverses Dismissal of Action Alleging "100% Natural" Food Label is Deceptive on Products Containing GMOs

Lee v. Conagra Brands, Inc., 958 F.3d 70 (1st Cir. 2020)

By R. Levi Barry, Esq., Day Pitney LLP

In *Lee v. Conagra Brands, Inc.*, the First Circuit reversed the district court's dismissal of an action in which a consumer, Margaret Lee (the "Plaintiff"), brought a putative class action against Conagra Brands, Inc. ("Conagra" or the "Defendant"), a cooking oil manufacturer and distributor, alleging that the "100% Natural" label on Conagra's vegetable oil violated the Massachusetts law prohibiting unfair and deceptive trade practices, because the oil contained genetically modified organisms (GMOs).

Relevant State and Federal Laws

The Conagra dispute put several parallel, and sometimes competing, regulatory edicts at issue: the Massachusetts' Consumer Protection Act ("MCPA"); the Federal Trade Commission ("FTC") rules and regulations; and, the Food & Drug Administration's ("FDA") labeling standards. Massachusetts General Laws Chapter 93A, Section 2, bars "unfair or deceptive acts or practices." Under the MCPA, when determining whether an act is unfair or deceptive, Massachusetts courts are to be guided by the interpretations of "unfair" or "deceptive" as found in analogous FTC acts.

The FTC's interpretations instruct that a food product label generally qualifies as deceptive, and thus in violation of Chapter 93A, when it has the capacity to mislead reasonable consumers into acting differently from the way they otherwise would have acted, such as to entice a reasonable consumer to purchase the product. However, pursuant to an agreement between the agencies, the FTC defers to the FDA's determinations as to whether food product labeling is deceptive.

Certain informal FDA policies forbid a manufacturer from labeling a product as "natural" if it contains anything "artificial or synthetic (including all color additives regardless of source)," but there is no FDA rule defining permissive affirmative uses of the "natural" label. Relevant to Conagra court, the FDA has not yet issued a ruling as to whether GMOs are natural. Consequently, where, as here, there is no binding rule defining a term, the agency's informal policies do not dictate whether a label has the capacity to deceive a reasonable shopper under Chapter 93A.

The District Court Action

The U.S. District Court for the District of Massachusetts dismissed the complaint for failure to state a claim. The District Court analyzed whether Conagra's oil label was "unfair" within the meaning of Chapter 93A and found no violation therein. Rather, the District Court found that the "100% Natural" labeling conformed to FDA requirements because: (i) it does not contain any added color, synthetic substances, or flavors; and (ii) under FDA policy, Conagra was not required to disclose on the label the use of GMOs. Accordingly, because the "100% Natural" label conformed to FDA labeling standards, the District Court held that it could not be unfair or deceptive as a matter of law.

Appeal to the First Circuit

The Plaintiff appealed the decision to the First Circuit Court. As a threshold matter in the First Circuit's review of the district court's decision, the court noted that, although the lower court addressed whether Conagra's use of the "100% Natural" label was "unfair" within the meaning of Chapter 93A, it had failed to address whether the label was "deceptive." The use of the disjunctive "or" in 93A's proscription of "unfair or deceptive acts or practices" required independent analyses of whether the labeling was "unfair" or "deceptive," and a finding of either results in a violation of the statute. In a rather cursory analysis, the First Circuit found that the use of the "100% Natural" label could have misled a reasonable consumer into buying the product under the false impression that it contained no GMOs. Thus, the Court held, the complaint plausibly alleges a claim under Chapter 93A.

Federal Preemption

After finding in favor for the Plaintiff on this issue – i.e. that Conagra's use of the "100% Natural" label could be "deceptive" under 93A – the court then examined whether federal law favored ruling for Conagra. The Circuit Court first noted that, although no FDA rule requires disclosure of GMO ingredients in vegetable oils, the lack of such a rule does not provide a safe harbor wherein Conagra could affirmatively suggest the absence of GMOs in its labels.

Next, the Court looked to whether federal law preempted relief under Chapter 93A. The Court first noted that a Massachusetts law imposing a labeling requirement beyond that imposed by federal law would expressly preempted. To that point, Conagra argued that the Nutrition Labelling and Education Act ("NLEA") and the National Bioengineered Food Disclosure Standard ("NBFDS") preempted the relief sought.

The NLEA is an express preemption statute that bars state labelling requirements that are "not identical" to certain federal labeling requirements. However, Conagra, neither in its brief nor when pressed at oral argument, failed to point to any of those requirements as being implicated by Plaintiff's claim. As such, the court found that Conagra waived this argument.

Alternatively, the NBFDS forbids states from directly or indirectly establishing "any requirement relating to the labeling of whether a food . . . is genetically engineered . . . or was developed or produced using genetic engineering." Accordingly, Conagra argued that the Plaintiff's claim under Chapter 93A establishes an indirect GMO disclosure obligation and is therefore explicitly preempted by this statute.

However, this reading mischaracterizes the Plaintiff's claim as demanding the affirmative disclosure of GMOs. Rather, the Court notes, the complaint seeks economic relief for Conagra's "misleading" assertion that its vegetable oil is "100% Natural." As discussed above, no federal agency or rule definitively answers the question of whether a "100% Natural" oil can contain GMOs. Therefore, the First Circuit held, no federal rule preempts finding in favor of the Plaintiff.

Conclusion

In short, the First Circuit ruled in favor of the Plaintiff, holding that (i) the “100% Natural” label could be found deceptive under Massachusetts’ Chapter 93A and (ii) federal law did not preempt such a finding. Notably, this latter part of the holding marks a continuation in the First Circuit’s narrow application of preemption doctrine and should constitute a warning to other seeking a safe harbor in federal laws from actions under state consumer protection acts.

* * *

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