Home for the holidays

I continue to be inspired by the countless stories illustrating the remarkable pro bono efforts of our members. In the spirit of the holiday season, I thought I would include in my column a remarkable pro bono story including the MBA’s own Michael E. Mone Sr. (president 1993-94) that he shared at a gathering of MBA past presidents in November.

The story surrounds the representation of Guantanamo Bay detainee Oybek Jabbarov, an immigrant farmer in Afghanistan. Jabbarov was handed over to the U.S. government by Afghanistan’s Northern Alliance, who identified him as a “foreign fighter” in order to receive a lucrative cash reward. Far from being an enemy combatant, Jabbarov spent eight years in Guantanamo separated from his wife and two young children.

The admirable work of Mone and other fellows of the American College of Trial Lawyers brought about justice for Jabbarov, and ultimately, as asylum in Ireland, where he was reunited with his family this time last year to begin a new life together.

The following is an excerpt from Michael’s acceptance remarks after being honored by the ACTL.

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MBA mentoring program kicks off second year

BY JENNIFER ROSINSKI

Boston Municipal Court Chief Justice Charles R. Johnson delivered the keynote address at the opening ceremony of the second year of the MBA’s Tiered Community Mentoring Program on Oct. 28.

Held at Suffolk University Law School, the event also featured remarks from Susan Prosnitz, executive director of Suffolk’s Rappaport Center for Law and Public Service.

“I wish I were one of you,” said Johnson, who urged the participants to work toward living a balanced life while striving for professional greatness. “If you want to become part of something important, you can choose no better profession than that of a lawyer.”

The mentoring program matches up 10 practicing lawyers with

BAR NEWS

Construction Law practice group forms

The Massachusetts Bar Association has launched the Construction Law Practice Group, which is part of the Civil Litigation Section.

The practice group provides attorneys throughout the commonwealth with continuing legal education, practical information, resources and networking opportunities to expand or further hone their practice in construction law.

The group will provide both the specialist and the generalist with practice tips and insights into

SECTION REVIEW

Section Review articles will now run regularly in Lawyers Journal

SEE PAGE 2 FOR A COMPLETE LISTING OF THIS ISSUE’S CONTENTS.
“Michael” he refers to below is that of his son, Michael E. Mone Jr., whom he practices with at Esdaile, Barrett & Esdaile in Boston.

Just before Christmas of last year, Michael sent out an e-mail to all of the lawyers on the Guantánamo list serve. The list serve had been an invaluable tool to all of the detainees lawyers in sharing information, discussing strategy and providing representation to the clients. The subject line of the e-mail was “Home for the Holidays.” It reads in part:

“Yesterday evening in Dublin, a plane touched down carrying a young woman and her two sons. They were met by officers from the Irish government, who helped them collect their belongings and ushered them through customs and out the doors for international arrivals. Waiting for them on the other side was their husband and father, Oybek Jabbabar. After eight years of separation and unimaginable anguish, the Jabbabar family is finally reunited.

They spent today getting settled in their new house on the west coast of Ireland. Mrs. Jabbabar loves her new home, but worries how she will ever keep the place clean. The boys rode their new bicycles around the neighborhood, a present from their father.”

Michael’s e-mail continued to the other detainee lawyers and it could be directed to each of the men and women who you honored this morning:

“I write to tell you this because it is through our collective efforts that this reunion, eight years in the making, came about, and you all deserve to share in the joy of this moment.”

Why did lawyers, including the Fellows of the College, undertake the representation of these men in a very unpopular cause? They did it because it is part of their DNA. It is the reason we are an American lawyer. All of you have or will have an opportunity at some point in your career to undertake an unpopular representation. I would urge all of you to seize that opportunity because it will never forget.

Let this story serve as a reminder of the very reason many of us were first inspired to attend law school. I hope Michael’s story of heroes among us renews your motivation to seek pro bono opportunities whenever possible. As attorneys, we are privileged and poised to have a positive influence in people’s lives, whether we are serving clients in Guantánamo Bay or in our own neighborhood in Massachusetts.

I wish you and your families a merry holiday season and a happy New Year. To find out more information on pro bono or other volunteer opportunities, visit www.massbar.org/PROG.
VIce preSident richard p. Campbell naMed one of “best Lawyers”

Massachusetts Bar Association President-elect Richard P. Campbell has been named the 2011 Boston Product Liability Litigator of the Year by Best Lawyers, a peer-review publication that selects one lawyer for each specialty in each community.

The founder and shareholder of Campbell, Campbell, Edwards & Conroy PC in Boston, he represents individuals in personal injury matters, commercial disputes, multi-district litigation, class actions, aviation disasters, toxic tort and product liability disputes. In addition, he organizes and leads his firm’s pro bono project, educating parents, students and school administrators about civil and criminal social host liability laws.

Campbell was awarded Boston College Law School’s highest award for dedication to the law — the Founder’s Medal — and was the 2009 recipient of the ABA Tort Trial & Insurance Practice Section (TIPS) Andrew C. Hecker Memorial Award in recognition for his leadership, outreach, enthusiasm, professionalism and pride in TIPS.

He chairs the MBA’s Peremptory Challenges Task Force, and is a trustee and Olive Wendell Holmes Fellow of the Massachusetts Bar Foundation, the MBA’s philanthropic partner.

Campbell is also a fellow of the American College of Trial Lawyers, a past chair of the American Bar Association’s 34,000-member Tort Trial & Insurance Practice Section, and a former chair of the Board of Overseers at Boston College Law School.

In addition to the “Lawyers of the Year” designation for high-profile legal specialties in large legal communities, Best Lawyers compiles its annual list of outstanding attorneys by conducting peer-review surveys in which thousands of lawyers confidentially evaluate their professional peers.

The 17th edition of The Best Lawyers in America (2011) is based on more than 3.1 million detailed evaluations of lawyers by other lawyers. To search the complete list of lawyers, visit www.bestlawyers.com.

Andrew P. Strehle, partner, Brown Rudnick LLP (left), and Albert W. Wills, executive director, Brown Rudnick Center for the Public Interest (right), present MBA President Denise Squillante with a $25,000 check to fund the 2011 Mock Trial Program.

Brown Rudnick sponsors 26th annual MBA Mock Trial

Brown Rudnick LLP, through its Center for the Public Interest, presented the Massachusetts Bar Association with a $25,000 check for the Mock Trial Program on Nov. 16. The international law firm has supported the program since 1998.

More than 100 schools across the state are expected to compete in this year’s 26th annual program, which kicks off in January with preliminary trials. The program places high school teams from 16 regions across the state in a simulated courtroom situation.

This year’s criminal case involves a charge of involuntary manslaughter against a teenager for the death of two people in a car accident. The defendant is accused of stealing a stop sign as part of a high school scavenger hunt. The finals will be held on April 1. Last year, The Winsor School of Boston won the state championship and placed 11th in the national tournament.

Don’t forget to check us out online at www.massbar.org

Thank you!
To our friends and clients...
Wishing you a prosperous new year.

Dennis J. Calcagno, Esq
617.328.8888
WWW.NORTHEASTMEDIATION.COM
Case Evaluation | Full Neutral Panel
MBA Monthly Dial-A-Lawyer Program
5:30–7:30 p.m.
Statewide dial-in #: (617) 338-0610

Civil Litigation Section Council
open meeting
4–6 p.m.
MBA, 20 West St., Boston

FirmFuture 2010, The Practice
Management & Legal
Technology Conference
8 a.m.–5:30 p.m.
Caple Merriot, 110 Huntington Ave.,
Boston
For more information, visit www.
fifmfutureconference.com

Friday, Dec. 3
Legal Chat: What to Do About
that File Lingering on Your Desk
Noon–1 p.m.
NOTE: There is no on-site attendance for Legal Chats.
Real-time webcast at www.massbar.org/ ondemand

Wednesday, Dec. 8
Employment Law for Lawyers
4–7 p.m.
MBA, 20 West St., Boston
Taxation Law Section Council
open meeting
4–5 p.m.
MBA, 20 West St., Boston

Thursday, Dec. 9
Eighth Annual In-House
Counsel Conference: Doing
Business in the Electronic Age
9 a.m.–1 p.m.
MBA, 20 West St., Boston
Real-time webcast at www.massbar.org/ ondemand
Young Lawyers Division
Holiday Open House
5:30–7:30 p.m.
MBA, 20 West St., Boston

Friday, Dec. 10
Legal Chat: Relationship
Building During the Holiday
Season and Beyond
Noon–1 p.m.
NOTE: There is no on-site attendance for Legal Chats.
Real-time webcast at www.massbar.org/ ondemand

Wednesday, Dec. 15
‘Tis the Season: Handling Snow
and Ice Cases
4–7 p.m.
MBA, 20 West St., Boston

Thursday, Dec. 16
MBA Boston holiday reception
5–7 p.m.
MBA, 20 West St., Boston

Friday, Dec. 17
Legal Chat: Traps for the
Unwary
Noon–1 p.m.
NOTE: There is no on-site attendance for Legal Chats.
Real-time webcast at www.massbar.org/ ondemand

Wednesday, Jan. 5
MBA Monthly Dial-A-Lawyer
Program
5:30–7:30 p.m.
Statewide dial-in #: (617) 338-0610

Thursday, Jan. 13
Complex Issues and Emerging
Trends in Class Action Litigation
4–7 p.m.
MBA, 20 West St., Boston

Thursday, Jan. 20
House of Delegates meeting
2–5 p.m.
DCU Center, 50 Foster St., Worcester

Tuesday, Jan. 25
Massachusetts Bar Foundation
Annual Meeting
5:30–7:30 p.m.
John Adams Courthouse, Social Law Library,
1 Pemberton Square, Boston
For information, contact (617) 338-0647 or
visit www.massbarfoundation.org

Wednesday, Jan. 26
Removal: Are We There Yet?
4–7 p.m.
MBA, 20 West St., Boston

Thursday, Jan. 27
Resolving Disputes Among
Members of Closely-Held
and Family Businesses
4–7 p.m.
MBA, 20 West St., Boston

For more information, visit www.massbar.org/events/calendar.

Calendars:
Don’t forget to check us out online at
www.massbar.org

MBA President Denise Squillante addresses the event participants.

The innovative mentoring series was the idea of Norfolk and Family Court
Associate Justice Angela M. Ordoñez, who also delivered remarks.

MBA MENTORING PROGRAM

MBA President Denise Squillante
addresses the event participants.

PHOTOS BY JENNIFER ROSINSKI

SUSAN PRETZEL, executive director of Suffolk’s Rappaport Center for Law and Public Service, introduces MBA
President Denise Squillante.

‘You end up where you aim.’
—Students’ Parent, Roxbury Community College

“You should dream big,” she said. “End up where you aim.”

Among the attorney mentors are MBA
Past President Valerie A. Yarashus.

“Past President Valerie A. Yarashus
predicted as child growing up in Fall
River. “You should dream big,” she said.
“End up where you aim.”

Each team of mentors will participate in
eventuals several events throughout the
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Court hearing in December, and attending
a networking and mentoring event at Rox-
bury Community College in February.

The innovative mentoring series was
the idea of Norfolk and Family Court
Associate Justice Angela M. Ordoñez, who also delivered remarks.

Nancy and John Adams Courhouse,
Social Law Library,
1 Pemberton Square, Boston

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As part of the twice-a-year Veterans Dial-A-Lawyer Program, a dozen volunteer attorneys answered calls on Nov. 17 from veterans seeking help with their legal problems.

“We were able to answer every call that came in to the Veterans Dial-A-Lawyer Program,” said LRS/Public Services Manager Claudia J. Staten.

Paid for with a grant from the Massachusetts Bar Foundation, the philanthropic partner of the Massachusetts Bar Association, volunteers answered calls primarily related to family law issues and veterans’ benefits. The Veterans Dial-A-Lawyer Program is part of the MBA’s Serving Our Veterans in the Law effort.

One of the regular volunteers for the Dial-A-Lawyer Program is Richard A. Sugarman, an Air Force veteran and current U.S. Army Reserve major in the Judge Advocate General’s Corps, assigned to the 804th Medical Brigade headquarters based at Fort Devens.

Sugarman, who has been mobilized with the Army since last February, will be deploying to Iraq in early 2011.

“With the state of economy as it is, coupled with the surge in the number of veterans facing legal issues, there is a great need to help these veterans. The Veterans DAL programs provide an avenue to help the veterans in an efficient and very beneficial way.”

Representatives from the Department of Veterans Services and veteran service officers were on hand to help the volunteers with any questions that came up.

“We appreciate the funding through the Massachusetts Bar Foundation and the partnership we have with the Department of Veterans Services and Shelter Legal Services,” said Elizabeth A. O’Neil, the MBA’s director of Community and Public Services. “The Massachusetts Bar Association is committed to assisting veterans with their legal problems.”

The next program, which has not been scheduled, will be held in the spring. Attorneys wishing to volunteer for the next program should send an e-mail to lrs@massbar.org or call (617) 338-0556.
Title insurance is valuable protection for owners and lenders in today’s real estate market. Upon the issuance of an Owner Title Insurance Policy (owner policy), the property owner is protected from a vast array of title defects and ownership challenges. The owner can finance or sell the property knowing that ownership challenges are eliminated by the foreclosure, and the title to the property is also subject to defects in the title searched at the Registry of Deeds, completed prior to the purchase of real estate at a foreclosure sale, may reveal undischarged mortgages granted by a prior owner. The title search may also show tax liens, tax takings or other liens that have not been released or discharged prior to the foreclosure.

A mortgage foreclosure must be commenced by a holder that holds the mortgage at the time of publication of the notice of the required foreclosure notice. With the recent increase in foreclosures, foreclosure sales are common. As a result, the lender can sell the property to the highest bidder at a public auction, and the buyer becomes the owner of the property.

Foreclosed lenders have found that there is a lot of goodwill with customers. They also use confidentiality agreements to prevent employees from disclosing proprietary company information. In the commonwealth, it is in the public interest to protect a client’s right to pursue the facts in each case.”

The recent flurry of activity by courts, attorneys, and other parties on the effects of the recent economic decline and the increasing number of foreclosures has raised questions about the enforceability of restrictive covenants. The recent event of the Massachusetts Federal National Mortgage Association (Fannie Mae) and the Mortgage Elecronic Registration System (MERS) has been extensively analyzed in the media. The Massachusetts Federal National Mortgage Association (Fannie Mae) and the Mortgage Elecronic Registration System (MERS) has been extensively analyzed in the media.

The Massachusetts Foreclosure Review Board (the Board) was established by the Massachusetts General Laws Chapter 256, Section 10. The Board is an independent body of current Massachusetts law in this area. The Board is responsible for the enforcement of Chapter 256, Section 10, which is applied to certain broadcasting outlets that have otherwise been found to be “enforceable only if it is necessary to protect a legitimate business interest, reasonably limited in time and space, and consonant with the public interest” and “valid if they are reasonable in light of the facts in each case.”4 These matters have been analyzed on a case-by-case basis.5 The Massachusetts Supreme Judicial Court has specifically categorized those legitimate employer interests which provide a satisfactory basis for enforcement of a non-competitive agreement:

It is sufficient to state that the interests which may be protected have fallen into three generic categories: (1) trade secrets ... and (3) goodwill ... If any or all of these interests are present in a given case in which a non-competitive covenant is part of a contractual agreement, then the absence of equitable factors which would militate against enforcement ... a court of equity would not deny enforcement of a reasonable covenant.”6

Foreclosures and the value of title insurance

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Foreclosures and the value of title insurance
The lack of an I-9 policy could subject your company to civil or criminal penalties. If your company is found to be in violation of the I-9 requirements, you could be fined up to $16,000 per unauthorized employee. For a third offense, or more, employers are liable for unlawful hiring, including criminal penalties with penalties of up to $3,200 per unauthorized employee. For a second offense, penalties range from $375 to $3,200 per unauthorized employee.

Criminal Penalties

Employing workers who are unauthorized for employment may also subject the employer to criminal penalties. Proactive knowledge is required. By Presidential executive order, on Sept. 14, 2007 — DHS has promulgated new “no-match” rules that would have required employers to take certain steps in order to obtain “safe harbor,” but on Oct. 7, 2009, DHS withdrew its no-match rules, leaving in place a standard of a totality of circumstances.

By participating in a no-match letter from SSA does not, by itself, create constructive knowledge, but the letter and the employer’s failure to act on the letter will be factors that DHS will use when ascertaining whether an employer has constructive knowledge that an employee is not eligible for employment.

If knowledge or constructive knowledge is found:

• When the federal authority investigating the employer determines that the employer has engaged in a pattern and practice of employing unauthorized workers, the federal agency can fine employers up to $5,000 for each unauthorized worker, and put the employer in prison for up to 3 years.

Special education law

The phrase “special education” evokes different ideas for different people: Some think of increasing costs that burden underfunded school districts, while others argue that schools do not provide enough services for children in need. I see special education law as ensuring equal educational opportunity for all students by protecting the rights of disabled children in our public schools.

State and federal laws mandate that specialized instruction be provided for children ages 3 to 21 who have one or more recognized disabilities. Examples of disabilities include autism, a physical impairment, specific learning disability or a psychological disorder. Students are entitled to a free appropriate public education (FAPE) in the least restrictive environment (LRE). Specialized instruction comes in the form of services and accommodations in order to achieve FAPE for a particular student based on his or her needs. LRE recognizes the value of not removing children from the general population of students unless educational needs demand otherwise. Students may require relatively minor modifications while remaining in all general education classes, or a residential school, or anything in between.

The special education team makes decisions about all issues from eligibility to post-graduate concerns. The team is composed of school staff and the family. Families often have other, non-legal professionals involved to support their goals, including special education advocates, to guide them through the process. Parents may also get independent evaluations of their children from neuropsychologists, educational consultants and other professionals. Independent evaluations are sought to supplement a school district’s evaluations of a student. Attorneys may be involved in a consulting role.

Ideally the team discusses a student and reaches a consensus on eligibility and what specialized instruction is required. An individualized education plan (IEP) is written to document the services and accommodations to be provided for the student. The team must convene at least once a year to discuss the student’s progress and, if necessary, redraft the IEP. A school district is run. Can it conduct its own evaluations of a student at least three years.

Parents and the school members of a team may disagree on any number of things. Attorneys usually get involved when these issues cannot be resolved either within the team process or through mediation. When a family does not accept the school district’s final proposal, then the family can turn to litigation, which begins with filing a complaint with the Bureau of Special Education Appeals (BSEA), the administrative agency designated to hear disputes. If a case is resolved in the hearing officer, unless an appellate court says otherwise if one of the parties appeals into the court system.

School districts have an incentive to avoid litigation. Attorneys usually get involved when these issues cannot be resolved either within the team process or through mediation. When a family does not accept the school district’s final proposal, then the family can turn to litigation, which begins with filing a complaint with the Bureau of Special Education Appeals (BSEA), the administrative agency designated to hear disputes. If a case is resolved in the hearing officer, the decision is subject to review by an appellate court, unless an appellate court says otherwise if one of the parties appeals into the court system.

School districts also have an incentive to make decisions that are not legally sustainable. Will every school district make decisions that are not legally sustainable? Will every school district have enough money to hire adequate special education professionals?

Peter A. Hahn, Esq., represents clients in special education cases in addition to juvenile, criminal and estate planning matters.
Insurers are faced with a variety of rules concerning their business activities. Many of these government guidelines that make the insurance company must look at the policy limits in exchange for a release agreement. The plaintiff so long as she entered into an appropriate release agreement. The plaintiff later individually, and as assignee of the insured’s rights, filed suit against the insurer seeking damages pursuant to M.G.L. c. 93A. Following a jury-waived trial the judge found for the plaintiff and awarded $15,000,000. The appeals court refused to accept the insurer’s position that the loss was not covered by insurance. The court additionally noted that the plaintiff should have been better informed of the ongoing investigation, and the insured kept abreast of the initial demand when it was first made. In its defense, the insurer argued that one could reasonably construe the plaintiff’s actions as subterfuge, and the time limit demand made to manufacturer a bad faith insurance claim. The court, though, accepted the plaintiff’s statement at face value that he had moved quickly for the purpose of placing himself first in line before the other claimants potentially exhausted the coverage.

This case underscores the precarious situation in which insurers are often placed when presented with a low gift tax rate now as opposed to a higher estate tax rate in the future. Additionally, the do- nor can skip one or more generations without incurring the GST tax, thereby completely escaping one or more transfer tax levels. • Trustees of trusts that are exempt from the GST tax should consider making beneficiary distributions to beneficiaries two or more generations below the trust’s donor, thereby eliminating a future GST tax. • Personal representatives of estates of decedents dying in 2010 who left a surviving spouse should fund QTIP trusts with as many of the as- sets passing the surviving spouse as possible. The QTIP trusts’ assets will not be subject to the federal estate tax, thereby escaping the federal estate tax on both the decedent’s and surviving spouse’s death.

The estate tax reprieve’s end brings more tax transfer planning uncertainty, but provides some opportunities — which may never be available again — for wealthy clients if they act quickly before year’s end.

Lisa M. Rico is a partner at Gilmore, Rees & Carlson PC in Wellesley. She concentrates her practice on estate planning, and represents tax-exempt organizations and charitable trusts. In addition, she provides tax advice to partnerships and other pass through entities. She is currently the chair of the MBA’s Taxation Law Section, as well as the co-chair of the Estate Planning and Administration for Business Owners, Forums and Rendezvous Committee of the American Bar Association’s Real Property, Trust, and Estate Law Section.
Employment cases: Two tips for lawyers representing plaintiffs

By Ellen J. Messing and Kevin C. Merritt

If you are representing an employee in an employment case, be alert for employer behaviors that can be capitalized on:

DEVIANCES FROM ESTABLISHED POLICY

Frequently, plaintiffs are discharged, or subjected to other adverse actions, in situations where applicable workplace standards are not applied as they ordinarily are. Hiring and promotion standards, compensation plans, performance evaluations and disciplinary procedures may not be utilized at all, or may be manipulated by an employer to penalize a disfavored employee in favor of others or to give vent to bigoted beliefs.

Failure to apply long-held policies can be effective evidence of discriminatory animus and pretext. For example, it happens frequently that an employer cites an employee’s mediocre performance as grounds to deny the employee a promotion. Yet almost as frequently, the employer has not applied the same standards to co-workers.

Of course, this suggests that performance was not the employer’s real motivation. See, e.g., Masterson v. Librum & Douk, 263 FEP 808 (E.D. Pa. 1993) — a judgment for a female plaintiff denied partnership in a law firm for failing to generate income. See, e.g., Farber v. Massillon Bd. of Educ., 917 F.2d 1391 (6th Cir. 1990) — a trial court’s failure to find pretext clearly erroneous where the employer had no reason to fire the plaintiff.

The victimized employee unexpectedly may find herself the object of a personnel action, such as transfer or a change in title or responsibilities. This change is often accompanied by an employer statement of beneficial intent, such as the goal of separating her from a harasser. Moreover, it is routine for the victim to experience shunning or exclusion in the workplace, especially where the perpetrator has a power advantage over the victim — for example, as the victim’s supervisor.

Often an employer’s mere inaction punishes the victim. For example, the employer may drag its feet in investigating the victim’s complaint; the harassment continues; and the employee remains stuck in an untenable situation. On the other hand, if the employee reacts to the situation in a manner commensurate with its seriousness — for example, by taking a medical leave of absence — the employee often will be penalized for malingering, lack of commitment to work, etc. If the employee quits, that “proves” to the employer that she was just oversensitive or lazy, or cynically setting up the employer for litigation.

An employer’s choice to focus its responses on the harassment victim rather than the perpetrator may be powerful evidence of retaliation. A plaintiff in such circumstances should return the focus to the employer. Highlight the actions that the employer could have taken to address the problem without punishing the victim — for example, by transferring the perpetrator, not the victim.

Similarly, you can highlight all the steps the employer did take that hurt the employee, and explain why those steps were inappropriate — for example, declining to punish the harasser, or leaving the harasser in place as the victim’s supervisor. See, e.g., Billings v. Town of Grafton, 515 F. 3d 39 (1st Cir. 2008) — a summary judgment was in error where the plaintiff complained about a supervisor’s harassment and was subsequently transferred to a different office; Davis v. City of Sioux City, 115 F. 3d 1365 (8th Cir. 1997) — a retaliation verdict for the plaintiff was upheld where the plaintiff, after complaining about a supervisor’s harassment, was voluntarily transferred to a less-desirable position.

Focus on the plenary powers that the employer has in the workplace: the employer had innumerable options, but only chose to pursue options that were harmful to the plaintiff.

LAW PRACTICE GUIDE

1.9 Policy

Continued from page 7

in order to avoid these serious consequences.

Marisa deFranco has more than 14 years of experience specializing in immigration and nationality law. She was a recipient of a national award for her pro bono work, the National Legal Aid & Defender’s Association’s Beacon of Justice award, in October 2010. In her practice in Salem, deFranco serves all the immigration needs of both her business and family based clients, including business visas, green cards and I-9 audits for corporate clients, marriage and relative petitions for families, and MassLegal Actions in federal court and deportation proceedings for individuals. She is the chair of the MBA Immigration Law Section Council and previously served as the New England Chapter chair of the American Immigration Lawyers Association (AILA) and on the National Liaison Committee for the Vermont Service Center. In 2009, deFranco was appointed a commissioner on the Massachusetts Commission on the Status of Women.

Rodney S. Dowell, Esq.
Director, Law Office Management Group

Your law practice advisor.

Assisting Massachusetts attorneys in establishing and institutionalizing professional office practices and procedures to increase their ability to deliver high-quality legal services, strengthen client relationships, and enhance their quality of life.
IN THE HEART OF THE CITY’S
FINANCIAL AND BUSINESS CENTER

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New England states differ in approaches to damage allocations

By Kenneth E. Rubinstein and Tobias W. Crawford

Each state’s approach to joint and several liability, contribution and comparative negligence can lead to dramatically different results for your client. Although the New England states are geographically close, they are worlds apart in how they apportion damages among joint tortfeasors. Knowing these differences can dramatically affect the outcome in a case.

The courts reallocate uncollectible shares among the remaining defendants in accordance with their relative degree of fault, C.G.S. § 52-572h(g)(2) (2009). Juries apportion damages between named defendants and settling tortfeasors, but not the entire universe of negligent tortfeasors, American Casualty Co. v. Kearsy, 234 Conn. 660, 668-69 (1995). Connecticut applies traditional joint and several liability principles to intentional and strict liability torts, C.G.S. § 52-572h(c) (2009).

MAINE

Like Connecticut, Maine has a modified comparative negligence statute, but neither state bars juries from reducing damages by the percentage of fault assigned to the plaintiff, to the extent considered just and equitable, Pelletier v. Fort Kent Golf Club, 662 A.2d 220, 223 (Me. 1995). Instead, juries reduce “total damages, by dollars and cents, and not by percentage, to the extent considered just and equitable,” Pelletier, 662 A.2d at 223.

For the purposes of contribution, however, tortfeasors do contribute in proportion to their causal fault, Dongo v. Banks, 448 A.2d 885, 894 (Me. 1982). The amount that a plaintiff has already recovered from settling tortfeasors will offset the damage award. A non-settling defendant may seek contribution from a settling tortfeasor to the extent the settling tortfeasor’s share exceeds the amount paid under the settlement.

Massachusetts recognizes joint and several liability, Shantigar Found. v. Bear Mountain Builders, 441 Mass. 131, 141 (2004). Each defendant is liable in full regardless of the defendants’ relative degrees of fault. Massachusetts defendants may offset their damages somewhat by seeking contribution from other tortfeasors “against whom recovery is sought,” but not from settling tortfeasors, M.G.L. c. 231B, § 1 (2009); M.G.L. c. 85, § 46h (2009). If a plaintiff holds a tortfeasor liable for more than their pro-rata share of damages, then that tortfeasor may seek partial reimbursement from other tortfeasors “against whom recovery is sought,” but not from settling tortfeasors, M.G.L. c. 85, § 46h (2009). If a plaintiff holds a tortfeasor liable for more than their pro-rata share of damages, then that tortfeasor may seek partial reimbursement from other tortfeasors “against whom recovery is sought,” but not from settling tortfeasors, M.G.L. c. 85, § 46h (2009).

Each tortfeasor’s proportional fault is irrelevant because tortfeasors contribute equal pro-rata shares. Although juries do apportion fault between the named defendants and the plaintiff under Massachusetts’ modified comparative negligence statute, trial judges only reduce damages by the percentage of fault assigned to the plaintiff and the amount received under settlements, M.G.L. c. 85, § 1 (2009). Each defendant remains fully liable for the rest of the damages, Shantigar Found., 441 Mass. at 141. Massachusetts judges cannot apportion damages to absent tortfeasors, including ones that have settled previously.

New Hampshire

New Hampshire follows joint and several liability to an extent. If the jury apportions 50 percent or more of the fault to one defendant, then that defendant is joint and severally liable for all of the damages, R.S.A. § 507-7-reb (2009). A defendant less than 50 percent at fault is only liable severally. Juries may apportion damages among the entire universe of tortfeasors (even including non-parties) and the defendant.

Connecticut has adopted a modified comparative negligence statute, C.G.S. § 52-572h(g)(2) (2009). Defendants are only severally liable under C.G.S. § 52-572h(g)(1) (2009). Defendants are only severally liable under C.G.S. § 52-572h(g)(1) (2009). Each defendant is liable for their proportionate share of fault, C.G.S. § 52-572h(g)(2) (2009). Each defendant is liable for their proportionate share of fault, C.G.S. § 52-572h(g)(2) (2009). Each defendant is liable for their proportionate share of fault, C.G.S. § 52-572h(g)(2) (2009).

Each settling tortfeasor’s share exceeds the amount paid under the settlement.

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The newly-enacted Massachusetts Prompt Pay Act (M.G.L. c. 149, sec. 29E) represents the most significant legis- lation to affect private construction in Massachusetts. Named “An Act Promoting Fairness In the Construction Industry - Promot- ing Payment,” the law is intended to improve the flow of funds to those who furnish and pay for the labor and materials in private construction. Slow payment, particularly to subcontractors, has been a chronic problem in Massachusetts. Con- tractors and subcontractors often wait months for periodic progress payments while they struggle to make payrolls and maintain credit. Change orders for extra work or additional costs can take even more months, precluding the contractor or subcontractor from even billing for the work performed for an additional period of time for payment for it. But unfair contract provi- sions resulting from unequal bargaining power typically prevent any meaningful recourse. Moreover, contractors and subcontractors become the unwilling lenders financing the project.

The new law addresses this inequity by establishing outside deadlines for submission, approval or rejection, and payment of applications for periodic progress payments, and for submission and approval or rejection of change order requests; by allowing for prompt com- mencement of dispute resolution proce- dures for rejected payment applications and change order requests; by limiting the application of contractual payment terms (“pay-if-paid clauses”); and by restricting contractual terms requiring continued performance when amounts due are not paid. It applies to prime con- tractors, subcontractors and suppliers who are entitled to file mechanic’s liens under M.G.L. c. 254 on projects where the prime contract has an original price of $3 million or more. It does not apply to residential projects of 4 or fewer units, or where the prime contract was entered into before the effective date of the Act, November 8, 2010.

Here’s how the Prompt Pay Act works:

PAYMENT APPLICATIONS

Contracts and subcontractors must provide an application for payment at reasonable time periods, with periodic payment applications are submitted, approved or rejected, and paid. The parties are free to negotiate those time periods provided they’re rea- sonable and don’t exceed the prescribed limits.

The reasonable time period for sub- missions of an application may not ex- ceed 30 days. The cycle begins with the end of the first calendar month occur- ring at least 14 days after the applicant’s commencement of work. Payments are based on actual progress, although mile- stones may still be a basis for payment if the time between applications doesn’t exceed 30 days.

Once submitted, the reasonable time period for approval or rejection of an application may not exceed 15 days. But since the prime contractor must re- ceive, review, and assemble applications from its subcontractors for inclusion in its own submission, the law allows the prime contractor an additional 7 days to approve or reject a subcontractor’s ap- plication. Likewise, the law allows each tier below the prime contractor 7 days more than the tier above for approval or rejection of an application from the tier below.

The grounds for rejection are not prescribed by the law and remain sub- ject to the parties’ contract. However, to help with due diligence in process moving, any rejection, whether in whole or in part, must be in writing, explained, supported, and not irratio- nal for the rejection, and be certified as made in good faith.

The treatment of an application for payment that’s neither approved nor re- jected within the specified time is the concept that effects significant change. Instead of remaining unprocessed and unpaid by inaction, the application is “deemed” approved. To account for pos- sible oversight or error, an application that was “deemed” approved may still be rejected up until the time payment is due, but the rejection must otherwise meet the statutory requirements for rejection. Meanwhile, a “deemed” approval ap- plication advances in line toward payment.

Finally, regardless of whether ap- proval was express or “deemed,” the rea- sonable time period for payment of an application may not exceed 45 days after approval. Although this outside limit is probably more generous than many will negotiate, it curtails the uselessness of “pay when paid”, the ubiquitous contract- term which can indefinitely delay payment downstream until payment is received from upstream.

CHANGE ORDERS

The law also requires contracts and subcontractors to provide reasonable time periods within which written requests for change orders increasing the con- tract price are approved or rejected. The time period for approval or rejec- tion of change orders may not exceed 30 days after submission of the request or commencement of the changed work, whichever is later. As with payment applications, the prime contract and each lower tier, is allowed 7 days longer than the tier above for approval or rejec- tion of a change order request from the tier below. Requirements for submis- sion and entitlement remain a matter of con- tract. Rejection may be in whole or in part, but here too it must be in writing, explained, supported and not irrational for rejection, and be certified as made in good faith.

Here again, the consequence of inaction effects a dramatic change to business as usual. If a change order re- quest is neither approved nor rejected within the specified time, it’s likewise “deemed” approved, unless properly rejected before payment is due. And once approved, whether expressly or “deemed”, the change order request may be submitted for payment with the next application for payment. Consider- ing the risk of being “caught in the middle”, any recipient of a change or- der request will undoubtedly be more conscientious in properly and timely processing that request.

DISPUTES

Disputes over rejected payment ap- plications or change order requests are inevitable, even under the new law. Prompt resolution of these disputes, however, has been thwarted by contract provi- sions which require the resolution of all disputes to await completion of the project. Consistent with the improve- ments to the flow of funds approach of the Prompt Pay Act directs that the rejection of a payment application or a change order request must be decided by dispute resolution procedure, and any pro- vision that requires a party to delay use of that procedure for more than 60 days is void and unenforceable.

PAY IF PAID

Contract provisions that expressly condition any obligation to pay upon receipt of payment from a third party have long been considered onerous by subcontractors and lower tiers. Unlike “pay when paid” provisions, which delay but don’t preclude eventual pay- ment, “pay if paid” provisions shift the entire risk of non-payment to those who have no connection with the reason for non-payment and are usually least able to bear that risk. These provisions have been banned against public policy in a number of states, but until now, they’ve been upheld in Massachusetts.

The Prompt Pay Act states that “pay if paid” provisions void and un- enforceable with only two exceptions. For the exceptions to apply, they must be clearly stated in the contract, and the party seeking to enforce the payment condition bears the burden of proof as to each element. If neither exception applies, the party otherwise obligated to pay must pay, regardless of whether it receives its own payment.

The first exception permits “pay if paid” where non-payment from the third party is due to a failure in perfor- mance by the party seeking payment. The party seeking payment of the pay- ment condition must have provided written notice of the deficiency, and the seeking party must have failed to cure within the time required by its contract, or in the absence of a con- tractual cure period, within 14 days after receipt of written notice.

The second exception applies where the third party fails to pay because it is insolvent or becomes insolvent within 30 days of submission of the application for payment. But in order to be ex- cused from payment, the party seeking to enforce the payment condition must have taken reasonable steps to obtain security and minimize the risk of non- payment. The measures prescribed by the law are the same as those required to obtain a mechanic’s lien before submis- sion of its first application for payment for on-site work, maintaining, perfect- ing and foreclosing on the lien, and pursuing all reasonable legal remedies to obtain payment until there’s a rea- sonable likelihood further action will not resolve the problem. The party seeking payment may question or challenge the legal remedies taken in pursuing payment from the third party, and if not satisfied, may file a summary proceeding in court for a judicial deter- mination.

SUSPENSION OF WORK

How long a contractor or subcon- tractor may suspend work following a re- jection on which it’s not being paid is also covered. Prior to the new law, contract provisions prohibiting suspension of work for any reason, or requiring an unreasonable least notice and cure periods for non-payment, made stopping work a risky move. Now, any contract provision requiring a person to continue working if payment of an approved amount is not received within 30 days of when it’s due, is void and unenforceable. There are two exceptions.

The first exception is when non- payment is due to a dispute over the quality or quantity of work. This would typically arise where defects or errors in quantity measurement appear after pay- ment had been approved for apparently correctly completed work. The only exception is when non-payment is due to a default occurring after approval of the payment. This would typically arise where the party seeking payment has defaulted in some other way, such as abandonment of the project, caus- ing damages that far exceed the cost of the payment. For either exception to apply, the party seeking to prevent suspension must have given prior notice of the dispute or default, and paid all sums due less the amounts attributable to the dispute or default.

Contents of the new prompt pay law is a welcome step in changing the culture of an industry hard hit by the recession. Opponents claim it’s an interference with their freedom of contract. But if it works as intended, and the practices of the better owners and contractors here and prevalent in other states become routine, the party seeking payment will far outweigh the academic criticism. Either way, it’s the law. And to make sure of the prompt payment, the new act provides that any contract provision which pur- ports to waive or limit the terms of the law is void and unenforceable.
that may be present in the contract.14 They cannot be used solely to protect an employer from ordinary competition in the workplace.15 It is best to enforce these promptly, and an employer that fails to act to protect its interests after receiving notice of a clear violation may have to wait to have its rights.16

A material change in an employee’s job duties and responsibilities will often result in a court finding that the agreement governed only that prior position and has been rescinded.18 If an employer discharges an employee prior to the expiration of an employment contract for a fixed term that contains a non-compete provision, in a manner constituting a material breach by the employer, this has the potential to excuse the employee from the requirement to honor the restrictive covenant.19

Finally, in a fairly recent case (upheld on appeal), an aggressive lawsuit was filed against a former employee to enforce a non-compete with what the court found to be an improper motive, brought based on limited investigation and ultimately insufficient evidence, which efforts completely boomeranged and resulted in the employer itself being found liable for an unfair act in trade and commerce. The employer was forced to pay treble damages and attorney’s fees to its former employee.20

CONCLUSION

Although the terms of many non-compete agreements may often be identical from one business to the next, whether or not enforcement of a non-compete provision against an employee is reasonable under the circumstances will be determined by the actual facts presented by a given employee’s departure from an employer. Massachusetts courts have historically displayed a consistent willingness to examine these disputes in detail and take appropriate steps, including injunctive relief if needed.


necessary, to protect both employers’ and employees’ legitimate — but sometimes conflicting — rights when this happens. Given the nearly unlimited variety of industry-driven issues confronted by both employers and employees when they part ways, Massachusetts policymakers should not overlook established precedence and well-developed common law before creating any new statutory standards (which may well have unintended consequences) to govern such an occurrence.

Our economy and region have traditionally provided a welcome home to many successful and growing businesses, as well as their employees, under the current legal framework described above. Given the current economic climate, it would be wise to tread carefully before tilting — in either direction — this challenging but often fairly resolved balance of interests.

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LIABILITY
Continued from page 8

Demand for policy limits by an injured party in a multi-claimant loss. When the evidence indicates that the claim exceeds policy limits, the insurer might want to seriously consider offering the limits of coverage (in exchange for a release extinguishing all liability in favor of the insurer, and insured — in right) even when there may be other potential claimants, depending on the facts of the particular claim. The court in the subject case rejected the insurer’s reason for not timely extending the policy’s coverage limits, which was that it needed to determine the exposure on the other claims and possibly divide the total coverage, in fairness to all claimants and the insured. Though there was little discussion in the case concerning the claims of the other injured parties, it does not appear they had significant value, and two of the claims were never fully pursued. If those claims had been quickly presented with values obviously exceeding or approaching policy limits, the situation would most certainly have changed, and the insurer would have been allowed — in fact, required — to coordinate a division of the coverage limits.

The case makes one understand how a seemingly reasonable decision — and one likely made for what was thought to be an appropriate course of action to protect all parties’ interests — can have severe consequences if later deemed incorrect.

As a practice note, insurers should be advised that if the limits of coverage are not going to be immediately extended and further time is needed to investigate the claimant’s settlement demand, it is the safest bet to quickly inform the claimant of the need to investigate and notify the insured of ongoing developments.

Another option available to an insurer when faced with a difficult situation is to reject the policy limits demand, and offer an option of indemnity to the insured for any damages that may later be awarded over the policy limits. In the situation where questions exist whether the settlement warrants payment of policy limits, this presents a way for insurers to insulate themselves from extraneous liability down the road, the decision not to pay the policy limits in settlement. By making this offer, the insurer should not later be held responsible for damages (like those stipulated to in a judgment between the injured party and insured) as the insured would have no reasonable justification for entering into an agreement for judgment given that he or she would face no personal liability. This option remains available in those circumstances where there are questions whether the claim’s value exceeds the limits of coverage, and the insurer is being pressured to offer its policy limits to settle the claim.

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Ruling applicable to leases between private owners and public agencies

**BY KARLA E. ZARBO AND BRIAN C. O’DONNELL**

INTRODUCTION

On May 10, 2010, the Supreme Judicial Court (SJC) issued a decision which interpreted the preemption of the Commonwealth’s public construction bidding laws to a situation in which a university with a private party for the development and maintenance of a newly constructed dormitory, by entering into a long-term lease, with a private party for the development and maintenance of a newly constructed dormitory, by entering into a long-term lease, and awarding the construction project to a private developer, was found to be in violation of the Massachusetts Attorney General’s Office, which enforces the competitive bidding requirements. The decision is important in that it provides some guidance to public awarding authorities and bidders regarding the interpretation and application of the Commonwealth’s public construction bidding laws.

**STATUTORY FRAMEWORK**

The Commonwealth’s public construction bidding laws require that “every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency . . . must be awarded using the specific methods prescribed in the laws.”

**EVENTS SURROUNDING BRASI’S PROPOSAL TO UNIVERSITY OF MASSACHUSETTS, LOWELL**

The University of Massachusetts, Lowell (UML), part of the publicly-funded state university system, wanted to expand the campus housing available to its student population within the city of Lowell.

The plaintiff, Brasi Development Corp. (Brasi), a private development firm, had not previously undertaken any student housing projects, and was not certified by DCAM. Brasi incorporated in 2005 for the sole purpose of purchasing and developing a particular parcel of land in Lowell, in close proximity to UML’s campus. Brasi purchased the parcel in 2006, and at some point had previously approached UML about a project, but no agreement was reached.

During May 2007, Brasi obtained zoning approval from the city’s planning board to develop its property as a student dormitory. The court found that this change in zoning use provided Brasi with an economically viable use of the property at the expiration of any agreement with the university.

About eight months after Brasi received planning board approval, during February 2008, UML issued a request for proposals (RFP) to solicit bids for a privately developed housing facility for 120 students, located in close proximity to UML’s campus. The RFP sought a five-year lease with the potential to extend the agreement for two additional five-year terms.

Although the RFP did not provide that the dormitory must be newly constructed, it contained UML’s design specifications for the square footage of rooms, window placement, ratio of parking spaces to apartment units, numbering system to be used for each room, security system devices compatible with UML’s network, the types and placement of vending machines, and a desire for a consistent character with the UML’s existing architecture and with the City of Lowell.

The RFP included a sample “lease agreement,” and a general lease, which reserved to UML the right to approve all improvements, architectural design plans, construction materials and product specifications. The sample agreement made future assignment of the agreement contingent upon UML’s written approval, and prohibited granting any easement without UML’s assent. The successful bidder would also be required to give written notice before mortgage financing. The sample agreement granted UML a right of first refusal to purchase the property, but that right was later waived.

The university would be responsible only for the lease payments, but not for any construction costs. The RFP further specified that the selected bidder would bear maintenance and repair costs for the building and grounds during the lease, including snow and trash removal and daily cleaning, and would assume all operation costs, such as utility payments, Internet and cable access.

However, any subcontracting of these services required UML’s advance approval. In addition, the successful bidder would be required to procure liability insurance coverage for the duration of the project, with UML to be listed as an additional named insured, and must provide advance notice before any insurance cancellation could take effect.

The RFP contained an occupancy schedule, under which any construction was to be completed within 15 months, and specified that the agreement of either the fall of 2008 or August 2009 was a critical factor in selecting among the proposals. The university would not be required to make any payments until the dormitory was available for occupancy, and there were substantial penalties if the selected bidder failed to meet the deadline.

Although the bidding process was open, the RFP did not comply with the competitive bidding requirements set forth in G.L. c. 149, §§ 44A-44H. Moreover, the RFP expressly stated that the contract would not necessarily be awarded to the lowest price and meeting bidding laws. UML received seven responses to the RFP, including one from Brasi. The three goals, including, among other things, the selection, were for new construction, while the remainder proposed to renovate and convert existing structures. Two bidders proposed structures without any modifications. Brasi claimed its estimated construction costs to be at least $25 million. On May 9, 2008, UML submitted Brasi’s submission, subject to various additional conditions not included in the RFP. These conditions included a provision for UML to have the right for full review and approval of the site plans, and that Brasi hire a consultant approved by UML, or that UML be given greater control and sign-off on the project, including the right to attend weekly progress meetings during construction. On May 12, 2008, Brasi accepted UML’s conditions.

**THE ATTORNEY GENERAL’S INVESTIGATION**

In response to a notice of protest, the attorney general initiated an investigation to determine whether UML’s proposal to build a student housing facility was subject to the public construction bid laws. The attorney general held a bid protest hearing on June 11, 2008, attended by representatives of UML and the protestors.

While the attorney general’s bid protest was pending, during August 2008, UML and Brasi executed a lease agreement, in which the university would be obligated to pay annual rent of $1,702,000 for the first year of the agreement with subsequent increases up to $1,920,636 by the fifth year, exclusive of maintenance and tenants’ payments. The subsequent rent payments would be negotiated. The agreement was for an initial two-year term, with an option every five years at UML’s option, for a total of 30 years. Under the agreement, Brasi repossessed the property.

On Aug. 13, 2008, the attorney general issued a bid protest decision, allowing the protest, based on the attorney general’s determination that the contemplated dormitory project was a construction bidding laws. Based on the attorney general’s bid protest decision, UML sent a notice to Brasi intending to...
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Tidelands, submerged lands and public rights:

Arno v. Commonwealth and Alliance v. Energy Facilities Siting Board

BY JAMY BUCHANAN MEDEJA

CHARACTERIZATION OF CASES/HOLDINGS

In a unanimous, populist decision that navigates closer to immortality the public’s rights in current and former tidelands, Joseph V. Arno v. Commonwealth,1 required the Massachusetts Superior Court to consider the intact “tidal flats” referred to “the area between mean high water and mean low water known as ‘public trust rights.’” The SJC concluded registration cannot extingu- e these rights, because neither the Land Court nor the attorney general has been legislatively authorized to do so.2

This note reviews Arno, as amplified by an immediately subsequent and more pernicious decision by a divided SJC, Alliance v. Energy Facilities Siting Board,3 which concluded the Legis- lature could allow one state agency to “stand in the shoes” of another, usual agency in reviewing tidelands-related li- cense applications, without meeting the Arno-affirmed criteria for the permanent dissolution of trust rights.4

KEY UNDERLYING DEFINITIONS OF TERMS

Before recasting the recent case, it is helpful to pause to define the terms used herein.

First, the land below the high water mark “since the Magna Carta” has been impressed with “public rights designed to protect the free exercise of navigation, fishing and fowling” and collectively known as “public trust rights.”5 These rights are currently held in trust for the people by the Massachusetts Legislature, which, in usual circumstances, statuta- rily delegates issuance of licenses for uses and structures on or in tidelands to the Massachusetts Department of Environ- mental Protection (“DEP”), pursuant to Mass. Gen. Laws Chapter 91.6

Second, “tidal flats” refers to “the area lying seaward of flats.”7 Together, tidal flats and submerged lands are referred to as “tidelands.”8 Finally, “tidelands,” while not defined in the Arno case, are discussed therein (and comprise much of the City of Boston, for example).9

COMMON PROCEDURES OR PROCESSES FOR CHAPTER 91 LICENSING IN RELATION TO THESE CASES

In practice, legal processes on the subject of public trust rights tend to concern filled tidelands, because few landowners or developers dispute the continuing public trust rights to currently flowing tidelands. During pro- ceeding to license structures or uses on tidelands, the state tends to focus on proving that the developer intends use to use waterfront sites and, of late, the general public’s recreational access for strolling along the waterfront. In general, the public is entitled to “fish, fowl and navigate” along currently flowing tidelands between the high and low water marks. While a subject of great controversy and misunderstand- ing among beachgoers, simply strolling or beach bathing is not legally within the general public trust rights on land owned, currently flowing tidelands in Massachusetts.

Filling existing tidelands, the state defines structured public walkways, such as “broadwalks” along the water’s edge, as “water dependent uses” and generally requires them to be built right at the water’s edge at a developer’s ex- pense, whereas restaurant seating areas for dining near the water are defined as “non-water dependent uses,” and gen- erally are required to be set back sub- stantially from the water’s edge. Future plans on this precedent will be subject of reference material in both the Alliance majority and dissenting opinions.

ALLIANCE’S MAJORITY AND MINORITY DISTINCTIONS OF ARNO’S HOLDINGS

Less than a month after releasing the Arno decision requiring express delegation of authority to do away with public trust rights, a divided SJC decided the Alliance case built in the Chatham Bars Island case, Margaret H. Marshall authoring the dissenting opinion and Justice Margo Botsford the majority. Marshall vocifer- ously disagreed with the majority on the adequacy of the legislative delegation of authority to decide tidelands matters, which “are distinguished from delega- tions by referencing, among other things, the fiduciary nature of the Legis- lature’s responsibilities in tidelands matters.”10

Arno’s fundamental holding over- turns the lower court’s holding and concludes that not even the Land Court or the attorney general can “divest the public’s rights” in tidelands, absent an adequate delegation of authority to do so from the Legislature. The case also reaffirms that any successful legislative delegation of authority to extinguish public trust rights would be required to comply with the prerequisites articu- lated in Opinions of the Justices.11 The Arno decision did not elect to empha- size any particular prerequisite, other than to include the unusually assertive observation that an adequate delegation of authority for permanent extinguish- ment of public trust rights “may not be possible.”12

Arno also holds that public trust rights do not need to be included in Land Registration certificates to remain extant, and that the Legislature is act- ing as a fiduciary for the public, not as an owner, in exercising its authority. In practice, this means the frequent prior use of “reservation of waterfront rights” need not be included in the registration certificate to be nevertheless effective, because the rights already exist and the Land Court has no authority to take them away.13

If Arno navigated the existence of public trust rights closer to immor- tality, the majority opinion in the Alliance case built intervening breakwaters, with ostensible channel markers for proceed- ing safely onward. By making it easier for the Legislature to provide for other authorities to make delegated decisions regarding public trust rights, however, it is syllogistic that it will be easier to dilute these rights or prioritize their ac- tualization differently from prior state authorities have.

Reading both cases together, one concludes it is indeed not possible to extinguish public trust rights, once they have been found to have ever existed, without an express legislative delegation of authority to do so built from the Legislature, making that express delegation very dif- ficult to accomplish. But read with the Alliance majority, indirect expressions of intent to delegate authority would seem to suffice, particularly where the issue is which commonwealth entity has delegated authority to act with respect to public trust rights as opposed to anyone (other than the Legislature) having authority to extinguish them en- tirely. Also, as noted in both the Alliance majority and dissent, the influence of current, politically favored movements, such as development of renewable energy resources, can realign perceptions of what matters in actualizing public trust rights.

The delegation of authority issues addressed in Alliance were decided in the context of the politically charged subject of transmitting energy through state waters from the nation’s largest in-water energy facility in federal waters in Nan-ucket Sound. A contextual fact both the majority and the dissent acknowledged as influential in all relevant proceed- ings.14

The Alliance’s majority and dissent both agreed that express delegation of authority to make decisions regarding tidelands was necessary, but disagreed as to whether the required delega- tion criteria had indeed been met by the specific legislation, which makes no mention of public trust rights.15

In practice, the two types of deleg- ated authority fuse when it comes to a particular project or geographic location. Put colloquially, once “the decision is made,” whoever that may be, has made a final decision about what is and is not an adequate utilization of the public’s trust rights in tidelands that’s it for many generations to come. Most current Chapter 91 tidelands licenses bear extremely long terms.

And, as with many matters, who de- cides often determines what is decided. Once a commonwealth license to use or build on tidelands has issued in final form by any state agency, be it the usual Department of Environmental Protec- tion or the unusual Energy Facilities Siting Board, the public’s trust rights are treated as adequately actualized and are not available for debate or reconsid- eration again until termination or extin- guishment of the license, usually many lifetimes hence.

Also, as a matter of human nature, once the licensed project has been built, subsequent generations acclimate to the changed environment and find it non- sensical, if not aberrant, to suggest ex- tant public trust rights merit substantial current attention.16

POSSIBLE FUTURE LITIGATION

There are a few jurisprudential gems embedded in the extremely care- fully written, unsigned list of Arno’s trust rights Arno decision by the Hon. Robert J. Cordy.18 For example:

• The Arno decision recognizes that licenses to fill tidelands are generally revocable, and subject to a condition subsequent that they be used for “a proper public purpose.” The exact scope of the public pur- pose “likely encompasses at least the conditions set forth in the notices issued when the fill was filled.”19

• This statement, hovering between dictum and a mandate, poses sub- stantial challenges for both property owners and the Commonwealth, where very few filled tidelands are, still, being filled for the exact same purposes as when they were first filled. Practitioners providing legal opinions on tidelands con- ocurrence matters may want to make note of the revocability of a license to fill, while observing that, to the extent the developer has paid for the fill, revoked an otherwise extendable fill li- cense solely for a change in the use of the property. It is not yet known how Arno will impact the

14 457 Mass. 663 (2010), and the subsequent legislative proceedings.
15 This author serves as Gen. William F. Weld’s recent special counsel and general counsel for the then-Executive Office of Environmental Affairs at the time. Hon. Robert J. Cordy sat at his chief legal counsel for the commonwealth.
16 Arno, 457 at 456.
Taking a second look at children's asylum claims

First Circuit reverses decision for failure to take child-sensitive approach

BY AMY M. GRUNDER

In a surprising reversal, the U.S. Court of Appeals for the First Circuit recently vacated its April 6, 2010 decision in Mejilla-Romero v. Holder upholding the denial of asylum to a child. At a panel rehearing Aug. 6, 2010, the court reversed the BIA’s Immigration Appeals

The First Circuit made passing reference to the murder of Celvyn’s family members, but failed utterly to address the family’s sustained involvement in political struggle with an entrenched elite and its government backers. Instead, it found that the fifth-grader’s testimony “contained no clear explanation" for the motivation of “Hubert” or his family.

In his dissent, Stahl found that the majority’s mischaracterization of the facts necessarily produced a holding that led to address the petitioner’s actual claim, preventing meaningful review. This failure alone, he wrote, called for a remand. But more troubling, in his view, was the majority’s failure to give effect to guidelines that required recourse to the objective record to supplement a child’s testimony. After his own exhaustive review of the supporting evidence, Stahl concluded, “if this is not a case where we can reverse a denial of asylum, I have trouble imagining the set of facts that would permit such a reversal.”

He observed in a footnote that the First Circuit “among the least likely to reverse a decision of the BIA.”

The petition for rehearing was joined as amici. Among the cases noted was the Attorney General’s Office of Immigration Appeals and the U.S. Courts of Appeals for the Fourth, Fifth, Eighth and Eleventh Circuits.

The petition for rehearing was denied by the BIA and taken from Circuit Judge Norman H. Stahl, who exhoratated his colleagues for upholding a decision that relied almost exclusively on the oral testimony of children, and to accord greater compensatory weight to documentary and other objective evidence.

The Second, Sixth, Seventh, and Ninth Circuits have all recognized and applied the guidelines over the last decade.

The First Circuit’s about-face was ironic, given the three-judge panel’s own failure to apply the guidelines back in April, when it found that the immigration judge had properly denied asylum. That lapsing of judgment, the dissent from Circuit Judge Norman H. Stahl, who exhoratated his colleagues for upholding a decision that relied almost exclusively on the oral testimony of children, and to accord greater compensatory weight to documentary and other objective evidence.

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to terminate their agreement on Aug. 20, 2008. Brasi filed the instant declaratory judgment action. The attorney general countered, seeking a determination that the bid protest decision be upheld. The parties agreed to resolve the matter through submission of cross-motions for summary judgment.

COURT'S LEGAL ANALYSIS

The issue before the Court was essentially whether the commonwealth’s public construction bid laws apply when a public agency enters into a contract with a private entity to build a facility on private property, where the public agency retained significant control over the construction process. In beginning its analysis in Brasii, the Court noted that in the context of other similar competitive bidding statutes, such as public procurement and public works, the SJC had previously found such competitive bidding laws may be broad enough to encompass long-term leases between public agencies and private parties. 2 The Court noted, however, that a determination as to whether a lease is subject to competitive bidding is a fact-specific analysis, which cannot be based on any one single factor.

The SJC continued on in its analysis to expressly agree with the Appeals Court’s most recent use of a multi-factor test in Andrews v. Springfield, 3 decided under the same competitive construction bid law at issue in Brasii, G.L. c. 44A, § 2(D). In Andrews, the Appeals Court concluded that the City of Springfield’s long-term lease agreement for the construction of an animal shelter was construction of a building by a public agency for purposes of the competitive bidding laws. Without explicitly setting a new test to determine the applicability of the public construction bidding laws, the Appeals Court in Andrews considered several factors to be significant in support of its decision: 1) the length of the lease term; 2) the awarding authority’s detailed description and construction requirements; 3) the degree of the awarding authority’s control of the construction process; and 4) the fact that the lease payments were more than the costs of constructing the building.

In reaching its conclusion, the Appeals Court also relied on the awarding authority’s express intention, as stated in its RFP, that it sought to acquire an additional core facility for its long-term use, and to ultimately purchase the property at the end of the lease term, thus obtaining ownership of the facility through public funds. While agreeing with the Appeals Court’s analysis and conclusion reached in Andrews, the SJC held that the specific facts of the case will be sufficient for every situation. Thus, the Court adopted a totality of the circumstances test, which takes into account the unique circumstances of each case.

The SJC found the following factors to be useful, but not dispositive, in determining the applicability of competitive bidding requirements to “build to lease” agreements: 1) the degree of control the public agency retains over development and construction of the project; 2) the length of the lease, including any extensions; 3) whether public funds will be expended; 4) whether payments made under the agreement will substantially cover the construction costs; 5) whether, at the end of the lease term, the public agency will have the lease option or the remaining value of a nominal sum, or the property would otherwise be automatically transferred to the public agency, which initially owned the property, sold or leased it to the private party, or the agency had a building constructed and then leased the newly constructed building; and 7) whether the building is of such a specialized nature that it would be unsuitable for another commercial purpose without significant renovations.

The Court noted that if the terms of the RFP here were considered in isolation, then the project would not have been subject to competitive bidding. The Court expressly found many of the RFP’s design requirements to be common and not indicative of a specialized level of design. Moreover, although the RFP’s provisions for the electrical system and security features were particular to meet the needs of the university, the Court noted that some level of customization of leased space is common and a tenant’s involvement in that process will not convert a lease into a public construction agreement.

Nevertheless, the Court ultimately held that certain material differences between the terms of the RFP and the lease agreement which the university entered into with Brasii were critical to the determination that the public construction bidding laws applied. The Court found several factors to be material in reaching this conclusion: 1) the project involved here involved creation of a new building; 2) located adjacent to the university’s campus and dependent on the use of the university’s own existing parking lot; 3) for which the university would grant to Brasii easements of unlimited duration; 4) the university had the right to occupy the building for 30 years, double the amount of time under the RFP; and 5) the increased degree of UML’s supervision over the construction process from that provided in the RFP, specifically the university’s contractual right to attend weekly construction meetings and to approve and monitor the various phases of the work in progress.

PROSPECTIVE IMPACT

Brasii clearly establishes that a public agency does not automatically extend the jurisdiction of the construction bidding laws merely by contracting to lease privately owned property. Underlying the legislatively mandated objectives to ensure fair and open competition for public projects, Brasii contemplates that leases which directly or indirectly use public resources to facilitate construction may be subject to the competitive procurement process.

Such competitive bid requirements may apply where a long-term lease requires that the building be put on the market for sale, lease or transfer at the end of the lease term, thus obtaining ownership of the facility through public funds. The lease payments are subject to competitive bidding if the lease term is capped by statute as was thecase in this case.

In reiterating the SJC’s conclusion that leases with a public agency subject to the competitive bidding laws, the Court suggested that it may be more likely deemed subject to the construction bidding laws if the landlord will make additions to an existing building and the landlord will undergo extensive renovation to meet the needs of the prospective public tenant, even if the lease will not require “ground up” construction. For example, if a long-term lease requires that the landlord will make additions to an existing facility, it may be more likely deemed subject to the construction bidding laws. Conversely, it appears that when “build out” activities undertaken by the prospective landlord are limited in scope, involve only cosmetic changes, or when temporary public use is clearly intended, the lease is less likely to implicate the construction procurement laws.

By adopting the attorney general’s longstanding “totality of the circumstances test”, Brasii requires consideration of all relevant factors. Whether the public tenant exercises significant control over the construction process, the degree to which the lease payments are designed to meet the construction procurement costs, and other indicia that the public agency is actually using the leasing mechanism as a means to facilitate the facts of its use with the ultimate objective of attaining ownership, therefore the particular considerations of the public agency’s RFP and resulting lease necessarily must be reviewed.

A public body otherwise subject to competitive bidding requirements would be well advised to consider whether its construction requirements as part of any lease with a private party would be deemed subject to the construction bidding laws. To the extent to which an RFP would appear likely to implicate the competitive bidding laws, a public agency should integrate terms and conditions into an RFP and lease which clearly describe the public agency’s obligations for procurement compliance and notify prospective landlords or developers that they must assume such obligations.

Public agencies planning to issue an RFP for the lease of office space or any other facility are encouraged to review their plans with the Office of the Attorney General well in advance of publishing their solicitation, in order to discuss the likelihood that its specifications could be found to implicate the construction bidding laws. Such a prospective review may also involve an analysis of whether the leasing arrangements are subject to other statutory procedures governing leasing, even where no construction is contemplated. For example, cities and towns are subject to G.L. c. 30B, § 16 when accruing rental space at a cost exceeding $25,000.

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A listing of the 2010-11 Regional

PHOTO BY JEFF THIEBAUTH

The competition was held before the Bar Association’s 2010 Mock Trial State Tournament.

Bar Association’s 2010 Mock Trial State Tournament.


The competition, the Winsor School team poised at an important moment, to make real progress to play complementary leadership within the

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Commonwealth’s practices in this regard. Once such a site comes to the Court, it will seek a new license for ongoing uses and structures (or proposed new ones) is usually required, at which time one is expected to demonstrate a continuing public purpose for the fill, as well as provision for modern-era public access. The recent articulation of “public purposes” made by the Secretary of Energy & the Environment and published at 301 Mass. Code Regs. 13.04 is informative, in starting one’s analysis of adequate public purposes for previously filled tidelands on which the use has changed since the license or legislative grant to fill, subject to condition subsequent, became effective. These new regulations correspond to the statutory changes made in response to a prior judicial decision and should be read in conjunction with the usual Chapter 91 “Proper Public Purpose” requirements detailed at 310 CMR 9.31.

• Arno observed that certain aspects of the public’s longstanding trust rights may remain in effect, even though they are not referenced statutorily in Chapter 91 and may never have been re-codified since finding “official expression in the Body of Liberties or early colonial statutes.” The requirement that it is possible for an assertion of public trust rights to be made which is not codified in statute and for that assertion to nevertheless meet with success in the courts, if sufficiently supported by historic evidence. Or, in the words of the judge, “the DEP to include in regulations public trust rights which are not referenced in the authorizing statute but are deemed to spring from preceding historic legal authorities.

PRACTICE IMPLICATIONS OF ALLANICE AND ARNO

As a practice note, the particular Arno matter is remanded for Land Court to reconsider exactly which geographic areas of the subject parcels on Nantucket Harbor trust rights should result in all prior factual findings with respect to extant public trust rights.

In such special scenarios, it is difficult to imagine the misreading of Arno (intentional or accidental) resulting in even factual findings concerning the delineation and location of tidelands before assuming a pre-existing registration delineation remains valid with respect to an absence of public trust rights and the consequential absence of need to secure a Chapter 91 license from the commonwealth for structures or uses on the property.

Thus, contrary to the usual practice with respect to property which has passed through Land Court, prior Land Court registration cases involving current or former tidelands are now suspect, with respect to extant public trust rights. In such special circumstances, the rule is that where tidelands were filed and cornell law reviews article, “litigation future case will likely address yet another a “policy” matter as to whether public trust rights should or should not be extinguished (as opposed to never having existed geographically).

Factual research as to the current and historic extent of tidal influence on any particular parcel is usually well worth the effort, although Arno defendants anticipate complying with current state Chapter 91 licensing requirements using the state’s current presumptive jurisdictional delineation. In practice, the vast majority of waterfront owners simply use the state’s presumptive jurisdictional line for tidelands, which is available by inquiry to the DEP.

After ascertaining the state’s presumed jurisdictional line, most developers seek to meet the usual licensing requirements of 310 CMR. 9.00 et seq. in order to proceed without commonwealth opposition and delay. Some experts recognize that the most relevant registered land parcels already contain a waterways encumbrance anyway, so the “practice problem” of public trust re-emerging from old Land Court decisions should be limited to rare circumstances.

Neither Arno nor the Alliance matter had reason to address the looming issue of sea level rise, anticipated in due course but as yet unquantified in dimension, to be determined by virtue of the registration delineation. Before assuring the existence at any time of public trust rights.

Post-Arno and Alliance, it remains ever more paramount to methodology available to a respectable, reliable, useful legal opinion on the trust rights associated with any property. What are truly at risk, however, and truly susceptible to challenge, are prior registration cases in which public rights were said to be extinguished by virtue of the registration delineation, not having once existed. The distinction practitioners should focus on is whether the relevant Land Court action was a decision of a factual matter as to where tidelands were filled and were not, or a “policy” matter as to whether public trust rights should or should not be extinguished (as opposed to never having existed geographically).

How the New England states apportion damages varies widely. An awareness of these differences can impact a case at all stages, and accordingly, counsel should keep the differences in mind in selecting a jurisdiction for suit, and for evaluating the value of their case. Whether in settlement negotiations or trial strategy, what state law applies may matter a great deal.

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Damages allocations

Continued from page 11

proportionally. This approach abandons “the all-or-nothing effect of the traditional contributory negligence rule,” instead “the proportional reduction in liability for each juri

finds the defendants even marginally exempt. Raymond v. Jeanard, 390 A. 2d 358, 363 (R.I. 1978). As the usual Chapter 91 practice issue, then, a jury must find both the plaintiff and defendant negligent before apportioning negligence between them, Callise v. Hidden Valley Condo Ass’n, 773 A. 2d 834, 837 (R.I. 2001). Defendants become joint and severally liable for whatever amount the jury apportions to them, collectively, G.L. § 10-6-3. In this regard, and to avoid a leaky vessel. Such litigants will have to address the fundamental principle of Arno they do not intended to be included in registration certificates” to exist.

And, in addition to the statutory and regulatory references in Chapter 91, many would also note an extensive line of cases maintaining that as littoral boundaries move inward, away from the sea, public trust rights move with them. It is worth recalling that it is not itself which is at risk in such matters, but other new obligations for the public, much like when stormwater changes create wetlands on one’s property and, as a result, developer desires to move forward, owners may have to address the fundamental principle of Arno they do not intended to be included in registration certificates” to exist.

BFI BACKGROUND CHECK

Continued from page 20

The fee for the record is $18 and must be paid by money order or cashier’s check made payable to the Treasury of the United States, or by the use of a credit card payment form found at www.fbi.gov/about-us/cjis/background-checks/ credit-card-payment-form. The client also must fill out and sign an application form in triplicate at www.fbi.gov/about-us/cjis/background-checks/ and click on Applicant Information Form (pdf).

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