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Exterior of the Middlesex Probate and Family Court in Cambridge

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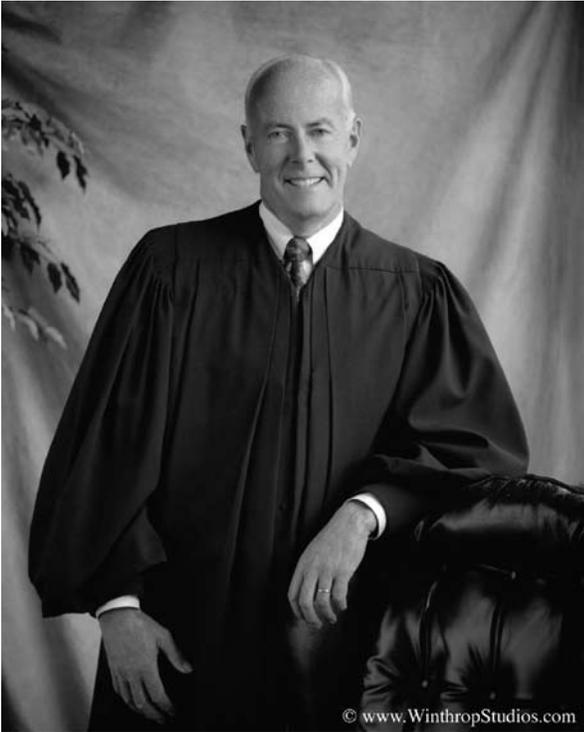
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# In Memoriam

## Justice Francis Patrick O'Connor (December 12, 1927 — August 3, 2007)



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Justice Francis Patrick O'Connor died on August 3, 2007, at the age of 79. Appointed to the Supreme Judicial Court ("SJC") by Governor Edward King, and sworn in on December 4, 1981, Justice O'Connor became the tenth occupant of the seat first occupied by William Endicott in 1873, when the SJC was expanded to its current seven members. Prior occupants of seat number seven include Robert Braucher, Paul Kirk, James Ronan, and Fred Field. Justice O'Connor became the first justice from Worcester County to be appointed to our highest court since Chief Justice Arthur Prentice Rugg, who served from 1906 until 1938. In his 16 years on the SJC, Justice O'Connor authored 433 majority opinions and 144 dissenting and concurring opinions. He was married to his beloved wife for 52 years, and was the proud father of 10 children and grandfather to 30 grandchildren. Justice O'Connor reached the constitutionally mandated age of retirement in 1997.

Prior to his distinguished service on the SJC, Justice O'Connor served two years in the United States Army in Korea after World War II. After his military service, he graduated from the College of the Holy Cross in 1950, and Boston College Law School in 1953. Following law school, Justice O'Connor served as a law clerk to then-Chief Justice of the SJC, Raymond S. Wilkins, and later became the first SJC law clerk to be appointed to the SJC. For the next 20 plus years, he worked with distinction in private practice for firms in Boston and Worcester, and served his community and parish in Shrewsbury in several elected and appointed positions. In 1976, as one of his first judicial nominations, Governor Michael Dukakis appointed O'Connor as an associate justice of the Massachusetts Superior Court, where he served until he joined the SJC.

Justice O'Connor's career was marked by his keen intellect, his strong principles and his impeccable integrity. He often gained attention for his dissenting opinions in which he not merely parted company with the court's majority, but where he wrote passionately about the human condition. Prior to his judicial career, O'Connor was a founding member of Massachusetts Citizens for Life, and his later judicial opinions exemplified his profound respect for human life. In his 1997 dissenting opinion in *Planned Parenthood League of Massachusetts v. Attorney General*,<sup>1</sup> he disagreed with the majority's conclusion that a statute that required a minor seeking an abortion to have the consent of both parents violated the due process provisions of our state constitution.<sup>2</sup> For Justice O'Connor, the statute was constitutionally sound where it also provided the minor with the option of judicial authorization for the abortion in lieu of the dual consent of her parents, as well as exceptions for minors who have only one available parent.<sup>3</sup> But his dissent was not merely an examination of the due process clause under these circumstances, and the appropriate deference owed to the considered judgment of the legislature. Rather it reflected deep reverence for the sanctity of life. He wrote:

[I]t may only be as a result of consultation with a second parent that a minor concludes from what has been said that abortion does not simply terminate a potentiality of life or an expectancy thereof but that, while the fetus resides in its mother's womb the fetus takes nourishment and grows, and early in the pregnancy the fetus has a readily detectable heartbeat. The minor may conclude from what she has

1. 424 Mass. 596, 603 (1997) (O'Connor, J., dissenting, with whom Lynch, J., joined).

2. *Id.* at 603-09.

3. *Id.* at 604-06. Justice O'Connor's dissent was in line with then-existing Supreme Court precedent. In *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990), the

Court held that the constitutional objection to Minnesota's two-parent notice requirement is removed by the judicial bypass provision of the statute. In reference to *Hodgson*, Justice O'Connor wrote that "there being no relevant difference in the text or history of the United States and Massachusetts Constitutions, *Hodgson* is persuasive authority for the proposition that [the Massachusetts statute] is constitutional as written." *Planned Parenthood*, 424 Mass. at 607.

been told by the second parent that abortion terminates a human life. As a result, the minor may choose life.<sup>4</sup>

Similarly, in the context of the “right to die” cases,<sup>5</sup> Justice O’Connor was a strong advocate of the tenet that life is a precious gift from God that outweighs any societal interest which may be accomplished through the legal embrace of suicide. In *Guardianship of Doe*,<sup>6</sup> he dissented from the majority’s decision which permitted the termination of the life of a profoundly retarded woman who lived in a persistent vegetative state.<sup>7</sup> In his dissent, he wrote:

I would agree that the law should recognize a competent person’s right to refuse or withdraw medical treatment when that choice is not motivated by a desire to die but, instead, is reasonably motivated by a desire to avoid procedures that are in themselves, and not simply because they prolong life, physically or emotionally painful. Suicide, however, is a different matter. Society’s respect for the value of every human life without reference to its condition, the cornerstone of American law, is inconsistent with a State’s recognition of a legal right to commit suicide, assist suicide, or engage in voluntary euthanasia (mercy killing in accordance with the wishes of the suffering person) ... A humane society provides support of every kind, including moral support, to those who are burdened in order that they may live, not “go,” as the Probate Court judge, with this court’s approval, would have it, [ ] in “peace.” No “legal system” is worthy of that appellation unless its primary function is to protect the most vulnerable members of society. It follows that, in the absence of otherwise compelling legislation, no court should recognize a legal right to commit suicide, whether by action (e.g., lethal injection) or by inaction (e.g., withdrawal of nutrition and hydration, or withdrawal of antibiotic medication to treat pneumonia). Nor should any court recognize a corresponding right to assist in suicide or to engage in the closely related practice of voluntary euthanasia.<sup>8</sup>

But Justice O’Connor was not an ideologue; his jurisprudence came without an agenda and displayed an honest consistency. For example, in *Commonwealth v. Colon-Cruz*,<sup>9</sup> he joined the majority of the SJC in finding unconstitutional the death penalty.<sup>10</sup> Later, in the infamous case of *Commonwealth v. Amirault*,<sup>11</sup> Justice O’Connor was the lone dissenter from the court’s opinion which held that the defendants’ article 12 face-to-face confrontation rights were violated by the seating arrangements

provided for child witnesses, but that the defendants had waived that claim by not raising it in a timely manner.<sup>12</sup> Justice O’Connor did not accept the majority’s conclusion that its prior case law put the defendants on sufficient notice to have raised the claim sooner, and the confrontation violation for him was not harmless beyond a reasonable doubt.<sup>13</sup>

Justice O’Connor’s dissenting opinion in *Matter of Prager*,<sup>14</sup> is a fine example of what he believed to be the proper role of compassion and rehabilitation in our law. In *Prager*, the court denied the petitioner’s application to become a member of the bar due to his federal conviction as a marijuana trafficker and fugitive, which demonstrated his lack of moral character.<sup>15</sup> Without discounting the crimes committed by the petitioner, Justice O’Connor’s dissent focused on the deference owed to the Board of Bar Examiners, which found him to be a proper candidate for bar membership, and the petitioner’s considerable work with people living with and dying of AIDS, and the effect his experiences had on him.<sup>16</sup> Quoting the board in part, Justice O’Connor wrote:

“The concept that human redemption is possible and valuable is both well established in law and premised upon longstanding, even ancient traditions. The public interest would be ill-served if we refused to recognize rehabilitation when it is adequately proved. Avoidance by us of making a judgment concerning rehabilitation would itself be an act which would tarnish the image of the Bar.” This case presents an appropriate opportunity for the court to deliver to the bar and the public the encouraging and humane message that the court will recognize and support a wrongdoer’s rehabilitation when it has been fairly proved as it was here. The court fails to do so and therefore conveys the opposite, discouraging, message. I respectfully dissent from the court’s order.<sup>17</sup>

Justice O’Connor’s jurisprudence also inspired legislative action. In *Jean W. v. Commonwealth*,<sup>18</sup> the SJC announced its intention to abolish the judicially created “public duty rule” at the first available opportunity after the conclusion of the 1993 legislative session.<sup>19</sup> The following year, the legislature enacted a statute providing public employers immunity from suit for

any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, *which is not originally caused* by the public employer or any other person acting on behalf of the public employer.<sup>20</sup>

4. *Id.*

5. See, e.g., *Guardianship of Doe*, 411 Mass. 512, 530 (1992); *Norwood Hosp. v. Munoz*, 409 Mass. 116, 131 (1991); *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 448 (1989).

6. 411 Mass. 512 (1992).

7. *Id.* at 513.

8. *Id.* at 531-32 (O’Connor, J., dissenting).

9. 393 Mass. 150 (1984).

10. *Id.* at 171-72. In 1982, article 26 of the Massachusetts Declaration of Rights was amended to provide that:

No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

MASS. CONST. amend. art. 116. Despite this, the majority found the newly enacted death penalty needlessly chilled a capital defendant’s right to a jury trial in violation of article 12. *Colon-Cruz*, 393 Mass. at 171-72.

11. 424 Mass. 618 (1997).

12. *Id.* at 619-53.

13. *Id.* at 653-60 (O’Connor, J., dissenting).

14. 422 Mass. 86 (1996).

15. *Id.* at 87-102.

16. *Id.* at 102-06 (O’Connor, J., dissenting).

17. *Id.* at 110.

18. 414 Mass. 496 (1993).

19. *Id.* at 499.

20. St.1993, c. 495, § 144 (codified at MASS. GEN. LAWS ch. 258, § 10(j) (2006)) (emphasis added).

It is well accepted that Justice O'Connor's concurrence in *Cyran v. Ware*,<sup>21</sup> which formulated the concept of "originally caused," is the likely source for the language used in the statute.<sup>22</sup> *Cyran* dealt with the common-law "public duty rule," that was the subject of the SJC's criticism in *Jean W.* The common-law version provided, as a general matter, that "no liability attaches for failure to use due care in carrying out general governmental functions ... because the duty of due care is owed to the general public and not to any specific individual."<sup>23</sup> Justice O'Connor's concurring opinion would have applied that rule to bar governmental tort liability only where "a plaintiff has been harmed by a condition or situation which was not originally caused by the public employee, and is attributable to the employee only in the sense that the employee failed to prevent or mitigate it."<sup>24</sup> This became the foundation for the later codification of the rule.<sup>25</sup>

These cases are but a few examples of Justice O'Connor's voice on the court. His majority opinions for the court delivered a comprehensive

analysis of the legal issues they presented. His contributions to the *Massachusetts Reports* are marked not only by scholarship, but by the practical utility they provide for the bench and bar. His dissents revealed a passion for justice, a humane understanding of our contemporary society, and a dedication to the improvement of both. Writing about dissenting opinions and collegiality for this publication shortly after his retirement, Justice O'Connor wrote that "honesty is a virtue[]" and a judge should not sign on to an opinion with which he or she disagrees. "Indeed, judges must be independent, and that independence does not conflict with, or compete with, collegiality, for which we all must strive."<sup>26</sup> In all, he believed that a well-crafted dissent will exert a "moral force" on the prevailing view of today, and perhaps influence, or even become, the majority view of tomorrow.<sup>27</sup>

William J. Meade

21. 413 Mass. 452 (1992).

22. *Brum v. Town of Dartmouth*, 428 Mass. 684, 693 (1999); Joseph W. Glannon, *Liability for "Public Duties" Under the Tort Claims Act: The Legislature Reconsiders the Public Duty Rule*, 79 MASS. L. REV. 17, 26 (1994).

23. *Cyran*, 413 Mass. at 455 (quoting *Dinsky v. Framingham*, 386 Mass. 801, 807 (1982)).

24. *Id.* at 467 (O'Connor, J., concurring).

25. Justice O'Connor made a similar contribution to the development of the public duty rule in his dissent in *A.L. v. Commonwealth*, 402 Mass. 234, 251-61 (1988) (O'Connor, J., dissenting).

26. Francis P. O'Connor, *The Art of Collegiality: Creating Consensus and Coping with Dissent*, 83 MASS. L. REV. 93, 95 (1998).

27. *Id.*

# Product Liability In Massachusetts: A 2008 Update

by Raymond J. Kenney Jr.



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## Introduction

This article is sixth in a series of articles reviewing product liability law in Massachusetts.<sup>1</sup> Since 2002, the law of product liability in Massachusetts has dealt both with substantive law issues relating to causes of actions, causation, defenses and punitive damages, as well as with the “process,” in the broad sense of the term, involved in the disposition of defective product claims. This includes issues regarding federal preemption, certification of classes and applicable evidentiary principles.<sup>2</sup> As the United States Congress increasingly enters the field of product regulation, now adding certain protections to the sale of firearms, courts continue to be faced with a search for any remaining common law liability in cases involving such a diverse array of products as cigarettes, boat motors, cell phones and agricultural pesticides.<sup>3</sup> Not surprisingly, in an area such as product liability, which relies so heavily upon expert testimony, determining the reliability of that testimony under principles enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>4</sup> has continued to occupy the courts during the period covered here.<sup>5</sup> In addition, the United States Supreme Court now has guidelines for the assessment of punitive damages.<sup>6</sup> Finally, a recent example of congressional action

which will have an effect upon the resolution of product disputes lies in the enactment of the Class Action Fairness Act of 2005,<sup>7</sup> which broadly expands federal diversity jurisdiction in class actions.<sup>8</sup>

## I. Causes of Action

### A. Breach of Warranty

The United States Court of Appeals for the First Circuit, in its opinion in *Smith v. Robertshaw Controls Co.*,<sup>9</sup> pointed up the difference between seeking recovery for a defective product under a theory of strict liability, as articulated in *Restatement (Third) of Torts: Product Liability*, in which there is no obligation of notice to the seller, and an action for breach of implied warranty of merchantability pursuant to Massachusetts General Laws chapter 106, section 2-314.<sup>10</sup> This statute is intended as the Massachusetts equivalent of strict liability,<sup>11</sup> but does include a requirement of prompt notice to the seller, subject to section 2-318.<sup>12</sup>

In *Smith*, the plaintiff was seriously burned by a fireball which erupted from below his propane water heater as he attempted to light it.<sup>13</sup> The heater was equipped with a Robertshaw Unitrol 110 gas control valve, which the plaintiff alleged was defective.<sup>14</sup> After the fire, the Dennis Fire Department took photographs of the water heater.<sup>15</sup> While the plaintiff was still in a coma following the fire, the heater was removed by a gas fitter who stored it for a year and then presumably discarded it.<sup>16</sup> The plaintiff was injured on May 24, 1997 and filed suit on May 22, 2000 against Robertshaw, American Water Heater Company (the supplier of the heater) and Amerigas Propane, L.P. (the provider of the gas).<sup>17</sup> The plaintiff acknowledged that no notice had been provided to Robertshaw or American Water Heater prior to suit.<sup>18</sup> The trial court granted summary judgment to all three defendants.<sup>19</sup>

In citing General Laws chapter 106, section 2-607(3)(a) to the effect that “the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy,” the court commented that the notice need not take any particular form, but merely be sufficient to let the seller

1. Raymond J. Kenney, *Product Liability in Massachusetts Enters the Twenty-First Century*, 86 MASS. L. REV. 74 (2002); Raymond J. Kenney, *Product Liability in Massachusetts Approaches the Millennium*, 80 MASS. L. REV. 110 (1995); Raymond J. Kenney, *Product Liability In Massachusetts Enters the 1990's*, 75 MASS. L. REV. 70 (1990); Raymond J. Kenney, *Defective Products in Massachusetts — a 1984 Update*, 69 MASS. L. REV. 108 (1984); Raymond J. Kenney, *Defective Products in Massachusetts - Recent Trends*, 64 MASS. L. REV. 173 (1979).

2. It is worth repeating the caveat that this article is not intended to deal with every issue involved in product liability cases, so it should be read in conjunction with the earlier articles in the series.

3. See *infra* Part III.

4. 509 U.S. 579 (1993) (principles subsequently adopted by the Supreme Judicial Court in *Commonwealth v. Lanigan*, 419 Mass. 15 (1994)).

5. See *infra* Part V.

6. See *infra* Part IV.

7. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in various sections

of 28 U.S.C.).

8. See *infra* Part VI.

9. 410 F.3d 29 (1st Cir. 2005).

10. MASS. GEN. LAWS ch. 106, §2-314 (2006).

11. *Back v. Wickes Corp.*, 375 Mass. 633, 639 (1978); *Swartz v. Gen. Motors Corp.*, 375 Mass. 628, 630 (1978).

12. MASS. GEN. LAWS ch. 106, § 2-318 (2006).

13. *Smith*, 410 F.3d at 32.

14. *Id.*

15. *Id.*

16. See *id.*

17. *Id.* at 36.

18. *Id.*

19. *Id.* at 34.

know that the transaction is still troublesome and must be watched and that the transaction is claimed to involve a breach, thus opening the way for normal settlement through negotiation.<sup>20</sup> In fact, as the court noted, oral notice which indicates the nature of the problem and that this particular seller sold the goods in question is sufficient in most circumstances, provided that the seller is able to infer which sales are involved and that an identified buyer is asserting legal rights.<sup>21</sup>

In affirming summary judgment for Robertshaw and American Water Heater, the court did not rely solely upon the lateness of the notice, because the failure to give notice is not a defense to an action for breach of warranty unless the defendant is prejudiced by the lack of notice.<sup>22</sup> Unreasonably late notice and prejudice are separate requirements and both must be present in order for the defense to succeed.<sup>23</sup> The court determined that the loss of the heater and control, coupled with the lateness of the notice, constituted prejudice as a matter of law.<sup>24</sup> The court held that to show prejudice based upon a lack of notice, it is enough if the delay may have deprived the defendant of useful evidence that may have helped him, whether or not such evidence (resulting from an inspection of the heater and control) would have affected the outcome of the case. The question is simply whether the defendant was prejudiced by the lost evidence (which might have shown that the heater and valve were in good working condition or that one or the other had been damaged by misuse), and not whether the plaintiff was also prejudiced (as he was) or who was prejudiced more or whether the plaintiff as opposed to some third party was responsible for the loss.<sup>25</sup>

Almost 30 years ago the Supreme Judicial Court (“SJC”) declared that a claim for breach of implied warranty under sections 2-314 through 2-318 of chapter 106 of the General Laws is “congruent in nearly all respects with the principles expressed in section 402A of *Restatement (Second) of Torts*, which defines strict liability of a seller for physical harm to the user or consumer of the seller’s product.”<sup>26</sup> *Smith*, in applying the preclusion requirement of General Laws chapter 106, section 2-607(3)(a) when the defendant establishes prejudice from the lack of prompt notice, poignantly points up a significant and potentially case-ending difference between Massachusetts law and the *Restatement* provisions.

## B. Voluntary Assumption of a Duty

Noting the importance of the issue both to the industry and to consumers, the SJC, in *Cottam v. CVS Pharmacy*, applied to pharmacies the principles involved in the voluntary assumption of a duty.<sup>27</sup> Under

Massachusetts law, when one either gratuitously or for consideration voluntarily assumes a duty or undertakes to render services to another which he should see as necessary for the other’s protection, he will be liable for resulting harm if he acts negligently.<sup>28</sup> The SJC has been careful, however, to limit this duty to the specific task undertaken because the imposition of a broader duty would, in the words of the court, “effectively ‘penalize’ the defendant” beyond the steps actually undertaken.<sup>29</sup>

In *Cottam*, the pharmacy, consistent with its practice, provided the plaintiff with computerized information about risks and side effects of the drug he ordered.<sup>30</sup> According to the plaintiff, however, he received only the “short-form” printed warning, which did not identify the adverse side effect that he sustained.<sup>31</sup> The pharmacy did have a “long-form” version of the warning which mentioned the subject side effect.<sup>32</sup> In illustrating that the scope of the duty assumed is a fact-specific inquiry, the court pointed out that if the pharmacy’s communication with a patient concerning a drug is limited to only one side effect of that drug, then the pharmacy’s duty is limited to warning correctly regarding that one side effect.<sup>33</sup> When, however, as in *Cottam*, the pharmacy’s communication to the patient goes beyond a warning label of a single side effect, or even a warning very explicitly limited to several potential side effects, and reasonably can be understood by the patient to be a complete and comprehensive listing of all known side effects, then the pharmacy’s duty is to furnish correct advice and warnings regarding all known side effects of the drug, with potential liability resulting from inaccuracies or incompleteness in the advice given.<sup>34</sup> We should expect the court in future cases to continue carefully to delineate the reasonable scope of any voluntary undertaking, lest those who otherwise would be willing to take action for the protection of others should refrain from taking any steps whatsoever under the risk of an overly broad interpretation of their willingness to act, a point recognized by the court.<sup>35</sup>

In *Cottam*, the court affirmed the judgment for the plaintiff for the permanent injury he sustained when he failed to seek timely medical attention for a side effect he suffered after taking the drug.<sup>36</sup> The court rather summarily dismissed the defendant’s argument that the plaintiff would not have heeded the warning even if provided because he continued to smoke cigarettes despite the health warnings on cigarette packages.<sup>37</sup> The court first observed that Massachusetts law affords a rebuttable inference that a warning, if properly given, would have been followed.<sup>38</sup> It then in a sense presaged its decision in *Haglund, v. Philip Morris, Inc.*,<sup>39</sup> by noting that because of the addictive nature of nicotine,

20. *Id.* at 35 (quoting U.C.C., § 2-607, cmt. 4 (1962)).

21. *See id.*; *Delano Growers Coop. Winery v. Supreme Wine Co.*, 393 Mass. 666, 675 (1985).

22. MASS. GEN. LAWS ch. 106, § 2-318 (2006).

23. *Smith*, 410 F.3d at 36, n.3.

24. *Id.* at 19, 21; *see Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 449 (1st Cir. 1997) (holding summary judgment appropriate if “a reasonable jury would ... have been compelled to find prejudice”).

25. *Smith*, 410 F.3d at 37.

26. *Back v. Wickes Corp.*, 375 Mass. 633, 640 (1978) (emphasis added).

27. *Cottam v. CVS Pharmacy*, 436 Mass. 316, 323-26 (2002).

28. *See Mullins v. Pine Manor Coll.*, 389 Mass. 47, 53 n.10 (1983) (adopting § 323 of the *Restatement (Second) of Torts* insofar as the duty was voluntarily undertaken for consideration); *see also Davis v. Westwood Group*, 420 Mass. 739, 746-47 (1995) (expanding the concept to include gratuitous undertakings, in keeping with full text of § 323). Liability is imposed under *RESTATEMENT (SECOND)*

OF TORTS § 323 (1965), which has been cited with approval by the court, upon two distinct theories; namely (1) if the negligent performance of the undertaking increases the risk of harm; or (2) if the harm is suffered because of the other’s reliance upon the undertaking. *Id.*

29. *Davis*, 420 Mass. at 747 n.13.

30. *See Cottam*, 436 Mass. at 318.

31. *Id.*

32. *See id.*

33. *Id.* at 325.

34. *Id.* at 325-26.

35. *Id.* at 324.

36. *Id.* at 328.

37. *Id.* at 327.

38. *Id.* (citing *Harlow v. Chin*, 405 Mass. 697, 702-03 (1989) and *Wolfe v. Ford Motor Co.*, 6 Mass. App. Ct. 346, 352 (1978) (inference is rebuttable)).

39. 446 Mass. 741 (2006). *See* text accompanying notes 98-121.

long-term smokers who would not ignore warnings regarding prescription drugs physically may be unable to heed the warnings regarding smoking.<sup>40</sup>

There is a second thread to the decision in *Smith v. Robertshaw Controls Co.*,<sup>41</sup> which, in contrast to the scope of the undertaking in *Cottam*, serves helpfully to delineate the breadth of a voluntarily assumed duty. In *Smith*, the plaintiff sought to charge Amerigas, the supplier of the propane, with responsibility for the fire because in 1995 Amerigas responded to the plaintiff's complaint of the smell of leaking gas in his backyard by sending a licensed plumber/gas fitter to the premises.<sup>42</sup> The inspector found and fixed a corroded pipe at ground level outside the house.<sup>43</sup> Although years before the fire, Amerigas had adopted a voluntary industry safety program which the plaintiff claimed created a duty to inspect and warn, the plaintiff had no contract with Amerigas for service or safety inspections, but only for delivery of propane gas to an outside underground tank.<sup>44</sup> Thus, Amerigas had no legally enforceable duty to inspect the plaintiff's water heater — plaintiff never requested such an inspection, nor did Amerigas represent that it would do so.<sup>45</sup> The court observed that neither of the *Restatement* requirements for the imposition of a duty<sup>46</sup> were presented by the facts in *Smith*; namely, the inspector's failure to inspect the water heater, while it did not diminish a risk that could have been diminished, did not increase the risk of harm, nor could the plaintiff have relied upon Amerigas to conduct an inspection, because no particular relationship existed between the plaintiff and Amerigas regarding inspection of the water heater.<sup>47</sup>

### C. Duty to Warn

The goal of product liability law is to prevent accidents by inducing conduct that is capable of being performed.<sup>48</sup> Essential to that goal is the obligation to make the end user of a product aware of the risks attendant upon the use of that product. The following principles provide the practical means by which that obligation is satisfied in certain limited situations.

#### 1. Scope of Physician's Duty to Warn

In *Coombes v. Florio*,<sup>49</sup> the SJC, in a sharply divided decision, has included persons other than the patient himself within the scope of a physician's liability for failure to inform his patient of the side effects of medications which he prescribed for that patient. An opinion authored by Justice Roderick Ireland, joined by Justices Judith Cowin and Francis Spina, in overruling the allowance of summary judgment in favor of the defendant-physician, held that a physician owes a duty

of care to everyone foreseeably put at risk by the physician's failure to warn his patient of the side effects of his treatment.<sup>50</sup> In *Coombes*, the elderly patient had been prescribed a number of medications which in combination, according to the plaintiff's medical expert, had the potential to cause "additive side effects," especially in older persons, more severe than the side effects resulting from separate use.<sup>51</sup> The side effects included drowsiness, dizziness, lightheadedness, fainting, altered consciousness and sedation.<sup>52</sup> Allegedly, the defendant-physician failed to inform his patient of these side effects and did not advise him to refrain from driving while taking the medications.<sup>53</sup> The patient allegedly lost consciousness while driving his automobile and struck and killed the plaintiff's decedent.<sup>54</sup> The plaintiff's expert opined that the accident probably was caused by a combination of the patient's medical conditions and the medications he was taking.<sup>55</sup> Justices Ireland, Cowin and Spina did not posit the physician's duty of care to others upon the existence of a special relationship between physician and patient, nor upon a theory of a duty voluntarily assumed by the physician, but rather upon ordinary negligence principles.<sup>56</sup>

Justice John Greaney concurred in overruling the grant of summary judgment, but he specifically rejected ordinary negligence principles as the basis for his concurrence.<sup>57</sup> Instead, he felt that the limited facts of the case overcame summary judgment. Also, he limited the physician's duty to third persons specifically to a failure of the physician to advise his patient to refrain from driving while taking the medications.<sup>58</sup> The four justices reasoned that the risk of the uninformed patient, namely serious injury or death due to a motor vehicle accident, was the same risk faced by the public at large, and therefore their imposition of liability upon the physician for failure to warn did not result in a significantly greater burden upon him.<sup>59</sup> Justice Greaney specifically and vigorously dissented from the broad proposition that a physician owes a duty of care to everyone foreseeably put at risk by the physician's failure to warn his patient of the side effects generally of his treatment of that patient.<sup>60</sup>

In strongly worded dissenting opinions, Chief Justice Margaret Marshall and Justice Robert Cordy refused to extend a physician's duty beyond that owed to his patient. Each expressed the view that imposing upon the physician obligations to persons other than his patient greatly interferes with the physician-patient relationship and with the physician's professional judgment in determining the extent of information that is appropriately conveyed to his patient.<sup>61</sup> Further, Justice Cordy

40. *Cottam*, 436 Mass. at 327.

41. 410 F.3d 29 (2005).

42. *Id.* at 38.

43. *Id.*

44. *Id.*

45. *Id.*

46. RESTATEMENT (SECOND) OF TORTS § 323 (1965) states that:

One who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform the undertaking, if (a) his failure to exercise such care increases the risk of harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

47. *Smith*, 410 F.3d at 34.

48. *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 21 (1998).

49. *Coombes v. Florio*, 450 Mass. 182 (2007).

50. *Id.* at 190 (Ireland, J. concurring).

51. *Id.* at 185, 192.

52. *Id.* at 184, 192.

53. *Id.* at 185.

54. *Id.*

55. *Id.* at 185-86.

56. *Id.* at 187.

57. *Id.* at 196 (Greaney, J., concurring and dissenting).

58. *Id.* at 196, 201.

59. *Id.* at 191 (Ireland, J., concurring); *id.* at 198 (Greaney, J. concurring and dissenting).

60. *Id.* at 196 (Greaney, J., concurring and dissenting).

61. *Id.* at 201-02 (Marshall, C.J., dissenting); *id.* at 206-07 (Cordy, J., dissenting).

felt that expanding the scope of the duty could result in opening to others heretofore confidential physician-patient communications.<sup>62</sup>

In their respective opinions, the justices sharply disagreed about the breadth of the holding in *Cottam v. CVS Pharmacy*.<sup>63</sup> Justices Ireland, Cowin, Spina and Greaney cited *Cottam* for the proposition that, in addition to his duty to inform his patient of the side effects of his treatment, the physician has a parallel duty of care to persons foreseeably affected by his failure to warn.<sup>64</sup> Justice Greaney limited that parallel duty to a failure in *Coombes* to warn the patient against driving while medicated.<sup>65</sup> The chief justice and Justice Cordy opined that the specific language of *Cottam* limits its holding to one imposing an obligation upon physicians “after considering the history and needs of their patients and the qualities of the drug, ... to inform their patients of those side effects they determine are necessary and relevant for patients to know in making an informed decision.”<sup>66</sup> In light of the diversity of opinions among the six justices, it remains for future decisions for the court to define the scope of a physician’s duty to warn and its effect upon the physician-patient relationship.

## 2. Adequacy of Warning

A product is defective and in breach of an implied warranty of merchantability if it lacks adequate warning of the risks attendant upon its reasonably foreseeable uses.<sup>67</sup> In the case of adequate warnings, however, the SJC has stepped back from the hindsight approach articulated in *Hayes v. Ariens Co.*<sup>68</sup> to a less stringent state-of-the-art approach.<sup>69</sup> With regard to warnings, a manufacturer, being held to the standard of an expert in the field, is responsible to warn or provide instructions only about risks that were reasonably foreseeable at the time of sale or which could have been discovered by way of reasonable testing prior to marketing the product.<sup>70</sup>

## 3. Learned Intermediary Doctrine

Typically, a patient’s involvement in decisionmaking regarding the use of a prescription drug is minimal or non-existent, so the law of the commonwealth has permitted prescription drug manufacturers to satisfy their duty to warn by providing the prescribing physician, the “learned intermediary,” with adequate information regarding the risks associated with use of the drug in question.<sup>71</sup> *Cottam* now extends the protection of that doctrine to pharmacies in circumstances where the pharmacist has no specific knowledge that the prescription drug being furnished to a particular customer creates an increased risk to that customer.<sup>72</sup> In short, under those limited circumstances, unless the pharmacist voluntarily provides warnings, he or she has no duty to warn the customer of potential side effects of the prescription drug because the duty to warn runs from the drug manufacturer to the prescribing physician.

## 4. Bulk Supplier Doctrine

The bulk supplier doctrine, first applied in Massachusetts in *Hoffman v. Houghton Chemical Corp.*,<sup>73</sup> is similar in nature to the learned intermediary doctrine in that it takes a practical approach to the means by which warnings are conveyed to end users of the product. After receipt in bulk, certain products often are repackaged or reformulated by an intermediary before reaching the end user. The *Hoffman* court recognized that bulk products typically are delivered in large quantities and are stored in bulk, and, because they likely reach the end user in different form or in the intermediary’s packages, it is not practical to expect a bulk supplier to label its product in a manner that would reach the end user.<sup>74</sup> Therefore, both in claims of negligent failure to warn and in claims of breach of warranty for failure to warn,<sup>75</sup> the bulk supplier satisfies its duty to warn by furnishing adequate warnings to the intermediary, so long as the supplier has reasonable assurance that adequate warnings will be passed on by the intermediary to the ultimate user.<sup>76</sup> The *Restatement (Second) of Torts* articulates the test for the reasonableness of the supplier’s reliance upon the intermediary as follows:

while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it unless he knows that the other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing. It may well be that he should take the risk that this information may not be communicated, unless he exercises reasonable care to ascertain the character of the third person, or unless from previous experience with him or from the excellence of his reputation the supplier has positive reason to believe that he is careful.<sup>77</sup>

In a case in which a plaintiff was injured by an explosion as he was removing with an acetylene torch the lid of a 55-gallon drum which had contained toluene supplied in bulk to the plaintiff’s employer, the court was faced with the adequacy of a jury instruction on the question of the supplier’s reasonable reliance on the intermediary.<sup>78</sup> Noting that the question of reasonable reliance is fact-intensive, the court found the following jury instruction to be appropriate:

You may consider as factors whether [the defendant] had any knowledge of the training policies and/or the manner in which its product was used by [Compton] and its employees. Did [the defendant] make reasonable inquiries

62. *Id.* at 213 (Cordy, J., dissenting).

63. 436 Mass. 316 (2002).

64. *See Coombes*, 450 Mass. at 191 (Ireland, J., concurring).

65. *Id.* at 197-98 (Greaney, J., concurring and dissenting).

66. *Id.* at 210 (Cordy J., dissenting) (quoting *Cottam*, 436 Mass. at 321); *see also id.* at 202-05 (Marshall, C.J., dissenting).

67. *Bavuso v. Caterpillar Indus., Inc.*, 408 Mass. 694 (1990).

68. 391 Mass. 407 (1984) (presuming manufacturer to be fully informed of all risks of his product, regardless of actual knowledge or state of art at time of sale, and holding him strictly liable for failure to warn of those risks).

69. *See Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1 (1998).

70. *Id.* at 23.

71. *MacDonald v. Ortho Pharm. Corp.*, 394 Mass. 131, 135 (1985).

72. *Cottam v. CVS Pharmacy*, 436 Mass. 316, 322-23 (2002).

73. 434 Mass. 624, 626 (2001). For a discussion of *Hoffman*, see Kenney, *Product Liability in Massachusetts Enters the Twenty-First Century*, *supra* note 1, at 77-78.

74. *Hoffman*, 434 Mass. at 633-34.

75. *Id.* at 637.

76. *Id.* at 631-32.

77. RESTATEMENT (SECOND) OF TORTS § 388 (1965).

78. *Tilton v. Union Oil Co.*, 64 Mass. App. Ct. 115 (2005).

into the practice of Compton ... in regards to warning its employees in safety procedures[?] Did [the defendant] have any reason to believe that Compton ... was incapable of passing along its knowledge about the characteristics and dangers of the product[?]<sup>79</sup>

The court went on to caution, however, that the bulk supplier's duty does not extend to a duty to police the adequacy of warnings given by the intermediary to end users.<sup>80</sup>

## II. Defenses

### A. Sophisticated User Doctrine

The SJC now has brought the law of warnings applicable to product liability cases full circle by adoption of the sophisticated user doctrine as an affirmative defense in product cases, both those sounding in negligence and those alleging breach of warranty for failure to warn.<sup>81</sup> Unlike the learned intermediary defense and the bulk supplier defense, which identify the intermediate recipients of warnings which satisfy the supplier's or manufacturer's duty to warn, the sophisticated user defense dispenses with the necessity to furnish any warning at all to the end user.<sup>82</sup> It is, in effect, a variation of the long-standing principle that no warning is required for open and obvious conditions,<sup>83</sup> the difference being, of course, that a danger which may not be obvious to an ordinary end user of a product may well be obvious to a sophisticated end user.

*Carrel v. National Cord & Braid Corp.*<sup>84</sup> involves serious injury to a boy who was holding the end of an elastic bungee cord, allegedly manufactured by the defendant, which had been attached to a zip-line course (a ride from a higher platform to a lower platform in a harness attached to a cable) by the director of the Old Colony Boy Scout adventure camp.

79. *Id.* at 116.

80. *Id.* at 117, n.2.

81. See *Carrel v. Nat'l Cord & Braid Corp.*, 447 Mass. 431 (2006).

82. *Id.* at 440-41.

83. *Bavuso v. Caterpillar Indus., Inc.*, 408 Mass. 694, 701-02 (1990).

84. 447 Mass. 431 (2006). See generally Brien M. Cooper, Comment, *Tort Law — Sophisticated User Doctrine*, *Carrell v. National Cord & Braid Corp.*, 90 MASS. L. REV. 151 (2006)..

85. *Id.* at 432.

86. See *id.* at 437-38.

87. *Id.* at 443.

88. *Id.* The court approved the following instruction on the sophisticated user defense:

Let me now explain the manufacturer's duty to warn. The manufacturer of a product owes to a person who reasonably will come in contact with the product a duty to warn of foreseeable danger in the use of the product if the manufacturer has some reason to believe that a warning is needed. The duty is to give adequate warnings ... regarding the nature and extent of dangers which will or may arise from the use or foreseeable misuse of the product about which the manufacturer knows or should know and about which the user is unlikely to be aware ... Even if a product is properly designed, it is unreasonably dangerous and therefore not fit for the purpose for which such products are used if foreseeable users are not adequately warned of the dangers associated with its use.

In some circumstances, however, a warning may be superfluous and it may not reduce the likelihood of injury. Where the danger presented by the use of the product is obvious or whether the user understands

The knot holding the cord to the zip-line became undone and the cord snapped back to strike the plaintiff in the eye.<sup>85</sup> Plaintiff alleged that the cord was improperly tied to the zip-line.<sup>86</sup> His theory at trial was that the Boy Scout camp, which set up the course, and not the plaintiff holding the end of the bungee cord, was the end user, so the defendant manufacturer of the cord should have directed warnings to the Boy Scouts.<sup>87</sup>

The court found that the evidence admitted at trial was sufficient to warrant a jury instruction on the sophisticated user defense.<sup>88</sup> It appeared that the Boy Scouts ran adventure camps, with zip-lines, around the country, conducted training courses and had national safety standards.<sup>89</sup> The Old Colony camp director was trained and certified as an adventure camp director, and he paid particular attention to the knots used on the bungee cord.<sup>90</sup> On the day of the accident, the camp director tied the bungee cord to the zip-line with a knot which a Boy Scout specialist who had inspected the camp during the preceding week stated was inappropriate.<sup>91</sup> The court held that this evidence was sufficient to support a jury finding that the Boy Scouts as users knew or reasonably should have known of the product's dangers.<sup>92</sup> It is not necessary for this defense that the user know the exact characteristics of the product that make it dangerous so long as he or she knows or reasonably should know of the particular danger to be guarded against, so that an additional warning would be superfluous.<sup>93</sup>

*Carrel* illustrates an interesting point regarding trial tactics in a product liability case. Apparently for the first time on appeal, plaintiff contended that the trial judge's charge on the sophisticated user doctrine was improper, in part because the plaintiff, and not the Boy Scouts, was the relevant end user, and, because he was not a sophisticated user, the plaintiff therefore was entitled to an adequate warning

the danger substantially to the same extent that a warning would have communicated and the warning would not reduce the likelihood of injury, the manufacturer has no duty to warn of such a danger ...

[T]here is no duty to give additional warnings of potential dangers to someone who already knows of the hazards which may arise from the use of the product.

A manufacturer has an obligation to warn and provide instructions about risks that were reasonably foreseeable at the time of the sale or that could have been discovered by reasonable testing prior to marketing the product. The manufacturers have the standard of knowledge of an expert in the appropriate field ...

*When considering the extent and nature of the manufacturer's duty to warn, the jury should take into account knowledge that the manufacturer had or could be expected to have, regarding the use of the product as compared to the knowledge and skills of the user. Ordinarily, the manufacturer is in a superior position to recognize and warn about risks in the use of its products as compared to users. However, the duty to warn might be lessened or might not exist if the user's experience, expertise, and knowledge far exceeds the manufacturer's. ...*

If you determine that warnings and/or instructions should have been given, the plaintiff is entitled to a presumption that, if an adequate warning had been given it would have been heeded.

*Id.* at 439-40 (emphasis added).

89. *Id.* at 444.

90. *Id.* at 445.

91. *Id.* at 437, 445.

92. *Id.* at 445.

93. *Id.*

from the manufacturer of the cord.<sup>94</sup> Plaintiff's entire approach at trial, however, from opening through closing argument, including testimony from his expert witness, was to the effect that the Boy Scouts were the end user, and that it was they who were entitled to a warning.<sup>95</sup> The court refused to consider this new theory for the first time on appeal, and, because the court declared this to be an appropriate case for the application of the sophisticated user doctrine, the judgment in favor of the defendant cord manufacturer was affirmed.<sup>96</sup> It is not clear from the facts of the case whether a contention by plaintiff at trial that he was the relevant end user would have prevailed, but the case does point up the difficult judgments that counsel must make in selecting a theory upon which to proceed to trial.<sup>97</sup>

## B. Unreasonable Use

The SJC entered the battlefield involving health risks resulting from cigarette smoking in its decision in *Haglund v. Philip Morris Inc.*<sup>98</sup> The plaintiff's decedent began smoking at age 25, initially starting with the defendant's brand, through which he became addicted to nicotine.<sup>99</sup> He tried several times to quit smoking, and died as a result of lung cancer at age 52.<sup>100</sup> Plaintiff's complaint for wrongful death alleged breach of warranty and punitive damages for the wrongful death.<sup>101</sup> Among its 40 affirmative defenses, the defendant raised the so-called *Correia* defense,<sup>102</sup> namely that the damages alleged were caused in whole or in part by the decedent's unreasonable use of the cigarettes and therefore plaintiff's action was barred.<sup>103</sup> *Correia* essentially balances the policy affecting the obligations of a product manufacturer with the obligations of the user of the product. In implied warranty actions, public policy imposes upon the marketer of the product the burden of bearing the loss from accidental injuries from the product.<sup>104</sup> The only duty of the user of the product is to act reasonably regarding a product which he knows to be dangerous and defective. If, however, he unreasonably proceeds to use the product which he knows to be dangerous and defective, he violates that duty and thereby loses the protection of the law. Barring the user from recovery under those circumstances is seen as balancing the strict liability imposed upon the seller.<sup>105</sup>

The *Correia* defense is applicable only after the plaintiff has proved the case in chief.<sup>106</sup> The defendant then must demonstrate that the plaintiff *subjectively* knew that the product was defective and dangerous and that, despite that subjective belief, the plaintiff's use of the product was *objectively* unreasonable. The defendant also must prove that the plaintiff's conduct was a cause of the injury.<sup>107</sup>

Turning to the issues facing it in *Haglund*, the court began with the premise, readily acknowledged by the defendant, that cigarettes are a product that cannot be used safely for the ordinary purposes for which they are fit, namely smoking, because of two inherent dangers: first, cigarette smoking poses serious health risks and, secondly, the nicotine in cigarettes is addictive.<sup>108</sup> Thus, as the defendant conceded, there is no such thing as a "safe" cigarette.<sup>109</sup> This conclusion led the court to the determination that, in most instances the *Correia* defense is inapplicable to cigarette merchandising, because its social purpose — to encourage reasonable use of products by consumers — cannot be accomplished since no reasonable use of cigarettes, as currently designed, is possible. The consumer thereby is deprived of a choice between using a product reasonably or unreasonably.<sup>110</sup> The court based its preclusion of the *Correia* defense upon public policy considerations to the effect that where the defendant affirmatively invites the consumer to use a product that cannot be used safely for its ordinary purposes, then public policy demands that the merchant bear the burden of reasonably foreseeable injuries resulting from that invitation.<sup>111</sup>

Interestingly, even in the case of intrinsically dangerous products such as cigarettes, the court left one vestige of the *Correia* defense intact, by elevating the scope of "unreasonable use" to "overwhelmingly unreasonable use." Acknowledging that cigarettes are a legal product which Congress has foreclosed from removal from the market,<sup>112</sup> in its balancing of public policy interests, the court would permit use of the *Correia* defense in a situation where a smoker, despite knowledge that he or she had a medical condition, such as emphysema, which he or she knew would be exacerbated by smoking, nevertheless persisted in using cigarettes.<sup>113</sup>

The plaintiff alleged that her decedent used the cigarettes exactly as intended and foreseen, that his death was due to addiction to nicotine and that the cigarettes were defectively designed because, prior to 1973, a safer design for cigarettes existed in a non-addictive cigarette through nicotine extraction.<sup>114</sup> The defendant responded that before 1973, technology existed to reduce but not eliminate nicotine from cigarettes, that the risks of cigarette smoking are widely known and individual smoking decisions vary widely among individuals, that there is no scientific consensus about what constitutes a safer cigarette and that the defendant's attempt to market a reduced nicotine cigarette proved unsuccessful.<sup>115</sup> The trial court denied plaintiff's motion in effect to preclude the *Correia* defense, and then sua sponte dismissed the action on the basis of plaintiff's stipulation that the decedent was aware of the risks of smoking and

94. *Id.* at 442.

95. *Id.* at 443.

96. *Id.* at 444-45, 452.

97. See *Commonwealth v. Olson*, 24 Mass. App. Ct. 539, 544 (1987) ("A lawyer cannot try a case on one theory and then, having lost on that theory, argue before an appellate court about alleged issues which might have been, but were not, raised at the trial. That is true whether or not the trial lawyer and the appellate lawyer are the same person, and whether or not they are in any way associated. The appeal must be based on what took place at the trial, not on anything which is presented for the first time before an appellate court."); see also *Commonwealth v. Bettencourt*, 447 Mass. 631, 633-34 (2006) (discussing rare exceptions to this principle).

98. 446 Mass. 741 (2006).

99. *Id.* at 743.

100. *Id.*

101. *Id.* at 743-44.

102. See *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 356 (1983).

103. *Haglund*, 446 Mass. at 744.

104. See *id.* at 746.

105. *Correia*, 388 Mass. at 354-56; see also *Haglund*, 446 Mass. at 749.

106. *Haglund*, 446 Mass. at 749 (citing *Allen v. Chance Mfg. Co.*, 398 Mass. 32, 34 (1986)).

107. *Id.* (citing *Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1, 17 (1st Cir. 2001)).

108. *Id.* at 750.

109. *Id.*

110. *Id.* at 751.

111. *Id.* at 753.

112. *Id.* at 755.

113. *Id.* at 753-54.

114. *Id.* at 744.

115. *Id.*

that he acted unreasonably in starting and continuing to smoke cigarettes. The SJC affirmed the denial of the motion to strike but reversed the dismissal of the action, indicating that the case was terminated prematurely prior to the opportunity for full discovery and a later renewal by the plaintiff of her motion to strike the *Correia* defense on a more fully developed record.<sup>116</sup>

The SJC's opinion also provides an extremely useful synthesis of the law of implied warranty of merchantability, noting that Massachusetts warranty law serves as a functional equivalent to strict liability in other jurisdictions.<sup>117</sup> The court traces the warranty law relating to defective design, stressing its social policy aspects and noting that a plaintiff's burden merely is to convince the jury that a safer alternative design is *feasible*, without regard to whether any manufacturer in the industry employed or contemplated such an alternative or whether in fact such an alternative even is available.<sup>118</sup> The court observed in a footnote that claims of defective design also can be based upon a negligence theory.<sup>119</sup>

In reiterating this feasibility standard for breach of implied warranty of merchantability for defective design, regardless of the availability of an alternative at the time of design and manufacture, the court is applying "hindsight" to the manufacturer's "conscious design choices" criterion earlier identified in *Back v. Wickes Corp.*,<sup>120</sup> for assessing a manufacturer's failure to anticipate the reasonably foreseeable risks of "ordinary" use of a product. In *Haglund*, of course, the court was dealing with a product that could not be made safe by any feasible means. By its position in *Haglund*, as well as its decision in *Vassallo v. Baxter Health Care Corp.*,<sup>121</sup> the court has underscored that Massachusetts law for breach of implied warranty of merchantability comports with section 402A of the *Restatement (Second) of Torts*, and section 2(c) of the *Restatement (Third) of Torts: Product Liability*, except for the notice requirement discussed above.

### III. Federal Preemption

Issues of federal preemption continue to occupy the United States Supreme Court. The Court outlined the essential nature of federal preemption in *Cipollone v. Liggett Group, Inc.*<sup>122</sup> Under article VI of the United States Constitution,<sup>123</sup> laws of the United States are the supreme law of the land, and any state law which conflicts with federal law is without effect, although the historic police powers of the states can be superseded only by the clear and manifest purpose of Congress.<sup>124</sup> Consequently, the purpose of Congress is the "touchstone" of preemption analysis. Preemptive intent may be explicitly stated in the language of the statute at issue, or may be implicitly found either in the event that the state law actually conflicts with federal law, or if federal law

so thoroughly occupies a field that there exists by reasonable inference no room for state law to supplement it.<sup>125</sup> The decisions discussed here illustrate the application of those principles.

#### A. Federal Cigarette Labeling and Advertising Act

The reach of the 1969 revision of the Federal Cigarette Labeling and Advertising Act<sup>126</sup> (the "Act") governing cigarette labeling and advertising was determined initially by the Supreme Court in *Cipollone*. The preemptive effect of the Act subsequently was challenged by regulations promulgated by the attorney general of Massachusetts relating to cigarette advertising.<sup>127</sup> The attorney general imposed prohibitions on retail sales outlets for cigarettes and smokeless tobacco.<sup>128</sup> In *Lorillard Tobacco Co. v. Reilly*, the United States District Court for the District of Massachusetts (with one exception) and the United States Court of Appeals for the First Circuit in all respects upheld the attorney general's regulations as not preempted by the Act and not violative of the First Amendment of the United States Constitution.<sup>129</sup> The court of appeals opined that the Act only preempts the *content* of cigarette advertising and, further, that regulations concerning the location of advertising were merely zoning requirements, typically a subject of state control.<sup>130</sup> In the Supreme Court, a varying array of justices, not unusual in preemption decisions, joined on the several issues presented by the regulations, with an ultimate determination that the regulations are preempted by the Act except as related to minors.<sup>131</sup> After unanimously agreeing that federal law did not preempt state regulations regarding the sale of cigarettes to minors, the Court split in resolving the other substantive issues raised by the Massachusetts regulations. Justice Sandra Day O'Connor delivered the opinion of the Court. Chief Justice William Rehnquist and Justices Antonin Scalia, Anthony Kennedy, David Souter and Clarence Thomas joined with her in holding that there must be a "reasonable fit" between the ends sought in restrictions to commercial speech and the means chosen to accomplish those ends.<sup>132</sup> The chief justice, along with Justices O'Connor, Souter, John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer agreed that the attorney general had established an adequate basis, as a general proposition, to regulate advertising of cigars and smokeless tobacco as it relates to minors.<sup>133</sup> The chief justice and Justices O'Connor, Scalia, Kennedy and Thomas also agreed that the reach of the 1969 federal statute is broader than simply to statements contained in cigarette advertising, because in covering "advertising and promotion" of cigarettes it reaches and preempts the location of cigarette advertising.<sup>134</sup> This group of justices also felt that the attorney general had failed to establish that the outdoor advertisement regulations were not more extensive than necessary to accomplish their intended purpose.<sup>135</sup> Justices Stevens, Ginsburg, Breyer and Souter

116. *Id.* at 754.

117. *Id.* at 746.

118. *Id.* at 748.

119. *Id.* at 747 n.9.

120. 375 Mass. 633, 640, 642 (1978).

121. 428 Mass. 1 (1998).

122. 505 U.S. 504 (1992). For further discussion of the decision, see Kenney, *Product Liability in Massachusetts Approaches the Millennium*, *supra* note 1, at 111-12.

123. U.S. CONST. art. VI, cl. 2.

124. *Cipollone*, 505 U.S. at 516.

125. *Id.*

126. 15 U.S.C. §§ 1331-1340 (2006).

127. See 940 CMR. §§ 21.01-21.07, 22.01-22.09; see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 532-36 (2001).

128. *Lorillard*, 533 U.S. at 534.

129. *Id.* at 532, 537-39.

130. *Id.* at 538-39.

131. *Id.* at 548, 551-52.

132. *Id.* at 556.

133. *Id.* at 551.

134. *Id.* at 548-51.

135. *Id.* at 561.

disagreed with the plurality that the 1969 statute preempted regulations governing the location of cigarette advertising, because in their view the federal law preempts only the *content* of cigarette advertising.<sup>136</sup> Once again, *Lorillard* points up the continuing tension between federal preemption and the Supremacy Clause.

## B. Federal Boat Safety Act and Federal Motor Vehicle Standards

Although in numerous cases the justices of the Supreme Court reach varying conclusions in applying the principles of federal preemption to particular fact situations, *Sprietsma v. Mercury Marine*<sup>137</sup> afforded the Court an opportunity for unanimous agreement that the Federal Boat Safety Act of 1971<sup>138</sup> (“FBSA”) did not preempt the plaintiff’s Illinois common law action. Plaintiff alleged that the outboard motor which struck and killed his wife was unreasonably dangerous because (among other things) it was not protected by a propeller guard.<sup>139</sup> The Illinois courts had decided that the common law action was preempted.<sup>140</sup>

The Court based its holding upon three distinct theories. First, the Court held that FBSA did not expressly preempt the common law because the statute proscribed state “law(s) or regulation(s)” establishing recreational vessel performance standards or imposing requirements for associated equipment not identical to regulations under FBSA. In order to give full effect to both words “law” and “regulation,” the Court determined that FBSA preempted only positive enactments.<sup>141</sup> The Court felt that the saving clause<sup>142</sup> to the effect that “compliance ... does not relieve a person of liability at common law or under state law” supports that conclusion.<sup>143</sup> Second, the coast guard, to whom the promulgation of regulations was delegated by the secretary of transportation, determined after an 18-month study not to adopt a propeller guard regulation, apparently due to the lack of any “universally acceptable” guard for “all modes of boat operation.”<sup>144</sup> According to the Court, this position did not equate with a policy that no regulation of propeller guarding is appropriate pursuant to the policy of the FBSA, but rather is fully consistent both with an intent to preserve state regulatory authority and with a jury’s conclusion that some form of guard should have been installed on this particular kind of boat with this particular type of motor.<sup>145</sup> Thus, unlike *Geier v. American Honda Motor Co.*,<sup>146</sup> where the Court held that the policy of the Federal Motor Vehicle Safety Standard 208 (calling for *alternative* protective systems in motor vehicles) preempted the field, no such preemption exists under FBSA because the coast guard’s decision not to promulgate propeller guard regulations was not tantamount to implied preemption, in the absence of a determination that no regulation should exist.<sup>147</sup> Finally, the Court held

that the structure and framework of FBSA does not convey a “clear and manifest” intent implicitly to preempt all state common law relating to boat manufacture.<sup>148</sup> Nor does legislative history indicate such an intent even if FBSA were to be interpreted as expressly occupying the field with respect to state positive laws and regulations.<sup>149</sup>

A practical effect of the *Geier* decision regarding the preemptive nature of the National Traffic and Motor Vehicle Safety Act of 1966<sup>150</sup> and Federal Motor Vehicle Safety Standard 208<sup>151</sup> is seen in *Heinricher v. Volvo Car Corp.*<sup>152</sup> There the injured plaintiff alleged that the Volvo in which he was riding was defective because it lacked a three-point lap-shoulder harness in the center rear seats, although all other seats in the car were equipped with that three-point protection.<sup>153</sup> The Massachusetts Appeals Court, in affirming summary judgment for the defendants, held that a state court action which would foreclose to manufacturers the choice of safety options offered by Standard 208 is preempted.<sup>154</sup> The court observed that sustaining plaintiff’s cause of action would establish a rule that, to avoid liability in Massachusetts, a manufacturer *must* install three-point lap-shoulder harnesses in the rear center seat of all its vehicles in clear conflict with the options authorized by Standard 208.<sup>155</sup>

## C. Federal Communications Act

*Pinney v. Nokia, Inc.*<sup>156</sup> is a 2-to-1 decision of the United States Court of Appeals for the Fourth Circuit that is worth noting here because the Supreme Court denied certiorari, and the decision represents the application of a federal statute to new technology. In this litigation consisting of five class actions, the plaintiffs alleged that the defendants’ cell phones, which are actually low-level radio transmitters, emitted dangerous levels of radiation and that the defendants negligently and fraudulently marketed them without headsets.<sup>157</sup> The plaintiffs sought compensatory damages in sufficient amount to buy a headset for each class member who lacked one and reimburse every class member who had already bought one. They also sought to provide all class members who have cell phones that are not headset compatible with headset compatible ones.<sup>158</sup> The district court dismissed all five class actions on the ground that their state law claims are preempted by the Federal Communications Act of 1934 (“FCA”).<sup>159</sup>

After a lengthy discussion to the effect that four of the actions should have been remanded to the state court as lacking federal subject matter jurisdiction,<sup>160</sup> the court considered the fifth action, in which there was diversity jurisdiction. The court addressed separately each of the three theories under which Congress preempts state law. First, the court

136. *Id.* at 592-94 (Stevens, J., dissenting).

137. 537 U.S. 51 (2002).

138. 46 U.S.C. §§ 4301-4311 (2000).

139. *Sprietsma*, 537 U.S. at 473.

140. *Id.*

141. *Id.* at 63.

142. 46 U.S.C. § 4311(g) (2000).

143. *Sprietsma*, 537 U.S. at 63.

144. *Id.* at 67.

145. *Id.*

146. 529 U.S. 861 (2000). For a fuller discussion of *Geier*, see Kenney, *Product Liability in Massachusetts Enters the Twenty-First Century*, *supra* note 1, at 85-86.

147. *Sprietsma*, 537 U.S. at 67.

148. *Id.* at 69 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)).

149. *Id.* at 69-70.

150. 49 U.S.C. §§ 30101-30169 (2000).

151. 49 C.F.R. § 571.208 (2007).

152. 61 Mass. App. Ct. 313 (2004).

153. *Id.* at 313-14.

154. *Id.* at 314.

155. *Id.* at 319.

156. 402 F.3d 430 (4th Cir.), *cert. denied*, 543 U.S. 175 (2005).

157. *Id.* at 439, 440.

158. *Id.* at 440-41.

159. 47 U.S.C. §§ 151-615 (2000).

160. *Pinney*, 402 F.3d at 441-51.

found no express preemption.<sup>161</sup> It noted the language of section 332(c) (7)(B)(iv) of the FCA, which states that “[n]o state or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions if the facilities comply with the FCC’s RF [radiofrequency] radiation standards.”<sup>162</sup> The court found that the section was directed toward states’ zoning or land use authority, and that portable cell phones were not “personal wire service facilities” within the meaning of the prohibition.<sup>163</sup> The court also found that state regulation of wireless telephone specifications would not constitute a barrier for personal communication service (“PCS”) providers to enter the commercial mobile service market under section 332(c)(3)(A), because, without regard to the scope of the term “barrier,” PCS is a market for wireless services, provided by a network of base stations.<sup>164</sup> Wireless telephones, on the other hand, only access the network of coverage, and do not of themselves provide the actual coverage.<sup>165</sup> Second, the court found that the FCA did not implicitly preempt state law regarding cell phones. It determined that the act limits its preemptive federal RF radiation standards to the facilities providing the wireless services, and not to cell phones.<sup>166</sup> Finally, the majority found support<sup>167</sup> for its position in the saving clause of the FCA<sup>168</sup> and the saving clause of the Telecommunications Act of 1996.<sup>169</sup>

#### D. Federal Insecticide, Fungicide and Rodenticide Act

Acknowledging that the current version of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”)<sup>170</sup> has been in effect for over three decades, the Supreme Court, in *Bates v. Dow Agrosciences LLC*<sup>171</sup> addressed the preemptive effect of the statute in keeping with the Court’s role of resolving conflicts among various judicial interpretations of the act. A group of Texas peanut farmers in 2000 used Dow’s new pesticide (“Strongarm”) on their fields, the soils of which had a pH level of 7.2 or above.<sup>172</sup> Severe damage resulted to their peanut crop.<sup>173</sup> Pursuant to FIFRA, the United States Environmental Protection Agency (“EPA”) registered Strongarm with its label, which stated, in part, “use of Strongarm is recommended in all areas where peanuts are grown.”<sup>174</sup> The plaintiffs, in alleging that Dow should have known that Strongarm would stunt the growth of peanuts planted in soil with pH of 7.0 or greater, brought claims sounding in strict liability, negligence, fraud,

breach of warranty and violation of Texas’s Deceptive Trade Practices Act.<sup>175</sup> The district court dismissed the claims on the ground that they were preempted by the provision in FIFRA to the effect that states “shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.”<sup>176</sup> The United States Court of Appeals for the Fifth Circuit affirmed the preemption on the proposition that success on these state law claims would result in a judgment against Dow which, in turn, would induce it to alter its Strongarm label in violation of the mandate of section 136v(b) of FIFRA.<sup>177</sup>

In the background discussion leading to the Court’s decision, Justice Stevens, writing for the majority, in addition to outlining the historical development of FIFRA and the history of litigation against manufacturers of poisonous substances, noted that the EPA two decades ago had stopped evaluating efficacy claims on the pesticide labels it approved.<sup>178</sup> Therefore, it never passed on the accuracy of the statement in the Strongarm label recommending its use “in all areas where peanuts are grown.”<sup>179</sup> In reaching its holding of no preemption, the Court observed that the prohibition in section 136v(b) applies only to *requirements* that are rules of law, statute or judge-made, which must be obeyed, while an occurrence that merely motivates an optional decision, such as voluntarily modifying a label, is not a requirement.<sup>180</sup> Thus an event such as a jury verdict is not a requirement<sup>181</sup> (because it simply provides motivation to change the label), nor is the fact that Dow voluntarily exposed itself to contractual liability by including an express warranty on its label.<sup>182</sup>

The Court drew a sharp distinction between the absolute prohibition found in *Cipollone v. Liggett Group, Inc.*<sup>183</sup> and the prohibition against labeling or packaging appearing in section 136v(b) of FIFRA. The Court applied a “parallel requirements” reading to section 136v(b) in holding that a state law labeling mandate is not preempted if it is equivalent to and fully consistent with FIFRA’s requirements. It need not incorporate the FIFRA language.<sup>184</sup> In remanding the case, the Court left it to the court of appeals in the first instance to determine whether the state’s common-law duties for labeling and packaging, which constitute “requirements,” are equivalent to FIFRA’s misbranding standards.<sup>185</sup> In dissenting, Justices Thomas and Scalia held that, to the extent that

161. *Id.* at 453.

162. *Id.* at 454.

163. *Id.* at 454-55.

164. *Id.* at 456.

165. *Id.*

166. *Id.* at 456-58.

167. *Id.* at 458.

168. 47 U.S.C. § 414 (2000) (providing that “[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies”).

169. Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (providing that the act “shall not be construed to modify, impair or supersede Federal, State or Local law unless expressly so provided”).

170. 7 U.S.C. §§ 136-136y (2006).

171. 544 U.S. 431 (2005).

172. *Id.* at 435.

173. *Id.*

174. *Id.*

175. *Id.* at 435-36.

176. 7 U.S.C. § 136v(b) (2006).

177. *Bates*, 544 U.S. at 448-49.

178. *Id.* at 437-40.

179. *Id.* at 435.

180. *Id.* at 443, 445.

181. *Id.* at 445.

182. *Id.* at 444.

183. 505 U.S. 504 (1992). *Cipollone* addressed the prohibitions in the Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. § 1333 (2006), and in the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1340 (2006), against any state requirement or prohibition based on smoking or health with respect to the advertising or promotion of any federally-labeled cigarettes. For a fuller discussion of *Cipollone*, see Kenney, *Product Liability in Massachusetts Approaches the Millennium*, *supra* note 1, at 111-12.

184. *Bates*, 544 U.S. at 447.

185. *Id.* at 453-54.

Texas law of warranty, unlike FIFRA, imposes liability for statements on the label, Texas law is preempted.<sup>186</sup>

### E. Protection of Lawful Commerce in Arms Act

In another preemptive strike, in 2005 Congress passed and the president signed the Protection of Lawful Commerce in Arms Act.<sup>187</sup> The act, in recognizing the rights of citizens lawfully to own firearms and in protecting manufacturers, distributors, dealers and importers of firearms from litigation for harm resulting from criminal or unlawful use of firearms which functioned as designed and intended, embodies a sweeping prohibition against new “qualified civil liability actions” brought in either state or federal court. It also calls for the immediate dismissal of any qualified civil liability action pending on the date of enactment.<sup>188</sup>

A “qualified civil liability action” is defined as any civil or administrative action or proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines or penalties or other relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.<sup>189</sup> A “qualified product” is defined as a firearm (as defined in subparagraph (A) or (B) of 18 U.S.C. §921(a)(3)), including any antique firearm or ammunition or a component part of a firearm or ammunition that has been shipped or transported in interstate or foreign commerce.<sup>190</sup> Excepted from the prohibition are actions (1) brought against a transferor convicted under 18 U.S.C. §924(h) or a comparable state felony law, by a party directly harmed by the conduct for which the conviction ensued; (2) brought against a seller for negligent entrustment or negligence per se; (3) where a manufacturer or seller knowingly violated a state or federal statute applicable to the sale of the product and the violation was a proximate cause of harm for which relief is sought; (4) for breach of contract or warranty in regard to the purchase of the product; (5) for death, physical injuries or property damage resulting directly from a defect in the design or manufacture of the product when used as intended in a reasonably foreseeable manner, *except* that when the discharge of the product was a volitional act which constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or (6) when commenced by the attorney general to enforce the provisions of 18 U.S.C. chapter 44 or 26 U.S.C. chapter 53.<sup>191</sup> The act goes on to prohibit the sale or transfer of firearms except under certain limited circumstances without

providing a secure gun storage or safety device, and it prohibits, not surprisingly, except under three very limited circumstances, the manufacture or import of armor-piercing ammunition.<sup>192</sup>

Although at the time of this writing, apparently no case has reached a federal appellate court, in view of the act’s extremely broad proscription and specifically articulated exceptions, one can expect that its preemptive reach will be found to be very broad indeed. This supposition is supported by language in the act to the effect that contemplated or commenced liability actions against manufacturers and suppliers of firearms are based “on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law.”<sup>193</sup> In summary, the purpose of the act is to prohibit lawsuits for harm caused solely by the criminal use of a properly functioning product, to prevent unreasonable burdens on interstate commerce, to preserve the constitutional rights of both individuals and manufacturers and distributors regarding gun ownership, to preserve and protect the separation of powers doctrine and to exercise congressional power under the Full Faith and Credit Clause.<sup>194</sup>

### F. Medical Devices Act

In a case seeking damages under New York common law for injuries resulting from the rupture of a heart catheter during surgery, the United States Supreme Court has held that, unlike general labeling duties, the rigorous device-specific pre-market process of the Federal Food and Drug Administration, which approved the catheter for distribution and use, constitutes a “requirement” under the Medical Devices Act of 1976,<sup>195</sup> thereby preempting the state common law action for negligence, breach of warranty and strict liability.<sup>196</sup> The Court relied upon the majority opinion in *Medtronic, Inc. v. Lohr*<sup>197</sup> for this conclusion.<sup>198</sup> While the federal manufacturing and labeling requirements at issue in *Lohr* were applicable across the board to almost all medical devices and therefore did not preempt common law actions,<sup>199</sup> the *Lohr* majority went on to state that device-specific requirements would result in preemption of conflicting state requirements.<sup>200</sup> In *Riegel*, the Court found pre-market approval to be such a device-specific requirement.<sup>201</sup> Again citing *Lohr*, the Court reiterated that state “common law actions for negligence and strict liability do impose ‘requirements’ and would be preempted by federal requirements specific to a medical device.”<sup>202</sup> The Court further noted that state remedies for violation of Food and Drug Administration regulations are not subject to preemption under

186. *Id.* at 455 (Thomas, J., dissenting).

187. Pub. L. 109-92, 119 Stat. 2097 (2005) (codified at 15 U.S.C. §§ 7901-7903 (2006)).

188. 15 U.S.C. §7902(b) (2006).

189. *Id.* §7903 (5)(A).

190. *Id.* §7903 (4).

191. *See id.* § 7903 (5)(A)(vi).

192. Child Safety Lock Act of 2005, Pub. L. 109-92, §§ 5-6, 119 Stat. 2099-2103. The act should be consulted for more detail than is included in the foregoing summary.

193. 15 U.S.C. § 7901(a)7 (2006).

194. *Id.* § 7901(b). As is obvious from its terms, the statute does not proscribe a common law cause of action in negligence against a homeowner for failing to secure in her home unloaded firearms owned by another when one was taken without authority by the gun owner’s son, who had a history of violence and mental instability known to the homeowner, and who had full access to the home. The son subsequently used the gun to fatally wound a police officer during a foot

chase. *See* *Jupin v. Kask*, 447 Mass. 141 (2006).

195. 21 U.S.C. § 360(k)(a) (2000) (“...no state...may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.”).

196. *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008) (Scalia, J. opinion of the Court).

197. 518 U.S. 470 (1996). For a full discussion of *Medtronic, Inc. v. Lohr*, see Kenney, *Product Liability in Massachusetts Enters the Twenty-First Century*, *supra* note 1, at 86-87.

198. *Riegel*, 128 S. Ct. at 1006-07.

199. *Id.* at 1006.

200. *Lohr*, 518 U.S. at 501.

201. *Riegel*, 128 S.Ct. at 1007.

202. *Id.*

federal law because those remedies parallel rather than conflict with federal requirements.<sup>203</sup>

Justice Ginsburg, in a strong dissent, noted that the Medical Devices Act does not contain any federally mandated compensatory scheme in substitution for state common law damage actions, despite the existence of many state lawsuits pending at the time of enactment in 1976.<sup>204</sup> Justice Ginsburg further noted that a similarly rigorous federal process for approval of new drug applications has not been held by lower courts to preempt state court actions.<sup>205</sup>

#### IV. Punitive Damages

Punitive damages can be awarded in Massachusetts only when expressly authorized by statute.<sup>206</sup> In a product liability context, the two principal bases for such an award are (1) in wrongful death actions, in an amount of not less than \$5,000, where the defendant was grossly negligent or acted maliciously, willfully, wantonly, or recklessly<sup>207</sup> and (2) in willful *and* knowing violation of the consumer protection statute, in an amount up to three times, but not less than two times, the amount of the actual damages plus costs and reasonable attorneys fees.<sup>208</sup>

After facing a number of appeals which raised the question of whether an award of punitive damages in a particular case passes constitutional muster, the United States Supreme Court, in *BMW of North America, Inc. v. Gore*<sup>209</sup> began to establish due process guidelines for determining the constitutionality of such awards. In *Gore*, the plaintiff learned that his new BMW, which was slightly damaged in manufacture or distribution, had been repainted before he bought it as a new car. In his fraud suit against BMW, the plaintiff was awarded \$4,000 in compensatory damages and \$4 million in punitive damages, the evidence having shown that since 1983, BMW sold 953 of such vehicles nationally, including 14 in plaintiff's home state of Alabama.<sup>210</sup> The Alabama Supreme Court reduced the punitive damage award to \$2 million.<sup>211</sup> In

determining that the \$2 million award was constitutionally excessive, the United States Supreme Court established a three-guidepost test to measure the appropriateness of punitive damage awards. The test requires an examination of (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to the actual harm inflicted; and (3) the sanctions (civil or criminal penalties) that the defendant would face for similar misconduct.<sup>212</sup> Noting that BMW's conduct was lawful in 25 other states (although not in Alabama), the Court first held that the Alabama court could not punish BMW for conduct which was lawful where it occurred and which had no impact upon Alabama citizens.<sup>213</sup> The Court went on to determine that the damage award failed all three guideposts.<sup>214</sup> First, BMW did not act with reckless disregard for the health and safety of others. The damage to Gore was principally economic in nature and there was no evidence of bad faith. Second, the punitive damages award exceeded by over 500 times the award of compensatory damages. Third, the punitive damage award was substantially greater than the maximum fines and penalties (\$2,000 in Alabama) for comparable misconduct.<sup>215</sup>

The next significant decision on the subject came in 2001, with *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*<sup>216</sup> In marketing its multifunctional tool, Cooper used photographs depicting a tool purporting to be its own, but, in fact the pictured tool was a Leatherman tool that Cooper had modified by eliminating the Leatherman identifying features. A jury awarded Leatherman \$50,000 for this false advertising, and assessed punitive damages at \$4.5 million, finding that Cooper acted with malice and in reckless disregard of Leatherman's rights. The United States Court of Appeals for the Ninth Circuit concluded that the district court did not abuse its discretion in refusing to reduce the punitive damages award.<sup>217</sup>

With only Justice Ginsburg holding out for an abuse of discretion standard of review, the Supreme Court held that, in reviewing awards

203. *Id.* at 1011.

204. *Id.* at 1015 (Ginsburg, J., dissenting).

205. *Id.* at 1017-19. While a fuller discussion of the case is beyond the scope of this article, another aspect of federal preemption, here by executive agreement, appears in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). California enacted a statute, the Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (West 2005) ("HVIRA"), requiring any insurer doing business in California to disclose information about all policies sold in Europe between 1920 and 1945 by the company or anyone "related" to it under threat of loss of license. The statute was in response to the fact that before and during the Second World War, Nazi Germany confiscated the value of the proceeds of many Jewish life insurance policies. After the war, many class actions against insurers doing business in Germany were filed in United States courts. Consequently, Germany and the United States entered into the German Foundation Agreement whereby all such claims would be handled by the International Commission on Holocaust Era Insurance Claims. Threatened with enforcement of the California statute by the state insurance commissioner, the plaintiffs filed this action to challenge the constitutionality of the California statute. A majority of the Court, consisting of the chief justice and Justices O'Connor, Kennedy, Breyer and Souter, held that HVIRA interferes with the president's conduct of foreign policy pursuant to his authority to enter into executive agreements with other countries and is therefore preempted. Despite the common goal of the state and federal governments, the means of achieving it clearly are in conflict, so the state statute must yield. Justices Stevens, Scalia, Ginsburg and Thomas dissented, on the basis that HVIRA seeks information only, and does not impose a duty to pay any claims, nor does

it authorize litigation of any claim. Therefore, in their view, not only is the state statute not expressly preempted by the German Foundation Agreement, but no implied preemption exists either, because the mere disclosure of information does not frustrate the mechanism of claims resolution chosen by the president.

206. *Flesner v. Technical Commcn's Corp.*, 410 Mass. 805, 813 (1991).

207. MASS. GEN. LAWS ch. 229, § 2 (2006).

208. MASS. GEN. LAWS ch. 93A, §§ 9, 11 (2006).

209. 517 U.S. 559 (1996).

210. *Gore*, 517 U.S. 563-64.

211. *Id.* at 567.

212. *Id.* at 574-75.

213. *Id.* at 571-72.

214. *Id.* at 576-84. See *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 1064 (2007) (in determining reprehensibility of defendant's conduct, jury may consider whether conduct resulted in harm to others than plaintiff, but jury may not use punitive damage verdict to punish defendant *directly* for harm allegedly caused to non-parties, because such a result violates due process clause of United States Constitution). Justice Breyer authored the majority opinion in *Williams*, with dissents by Justices Stevens and Thomas and a dissent by Justice Ginsburg, in which Justices Scalia and Thomas joined.

215. *Gore*, 517 U.S. at 583-84.

216. 532 U.S. 424 (2001).

217. *Id.* at 426, 430-31.

of punitive damages, appellate courts are to apply a de novo standard of review.<sup>218</sup> The majority opinion of Justice Stevens pointed out that, while compensatory damages are intended to redress the wrong suffered by the plaintiff, and are a matter of historical and predictive fact determined by the jury, an award of punitive damages operates as a private fine intended to punish the wrongdoer and deter further wrongdoing, and serve as an expression of a jury's moral condemnation.<sup>219</sup> The punitive nature of these damages brings into play the due process clause of the Fourteenth Amendment, which makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the states.<sup>220</sup> In addition, "the Due Process Clause of its own force also prohibits the States from imposing 'grossly excessive' punishments on tortfeasors."<sup>221</sup> Noting that the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and believing that the *Gore* criteria to be used in making this determination will "acquire more meaningful content through case-by-case application at the appellate level,"<sup>222</sup> the Court concluded that the standard of appellate review of punitive damages awards should be de novo.<sup>223</sup>

Not long after articulating in general terms the guidelines for determining the constitutional due process requirements in awarding punitive damages, the Supreme Court took the opportunity, in *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>224</sup> to establish some criteria for the application of these guidelines. Now, initially the trial court and subsequently, if appropriate, appellate courts, under the de novo review mandated in *Cooper* can measure the jury's punitive damage award against constitutional limitations. A majority of the *Campbell* Court reviewed the *Gore* principles and in the de novo review called for in *Cooper* determined that the punitive damages awarded in *Campbell* were excessive.<sup>225</sup>

*Campbell* involves the refusal of State Farm, in keeping with its allegedly national claims-capping scheme, to settle for the \$50,000 policy limit a claim for death and a second claim for permanent disability arising out of a motor vehicle accident caused by its insured, Campbell.<sup>226</sup> The case went to trial and a judgment against Campbell was returned for \$185,849.<sup>227</sup> State Farm again refused to pay, and refused to prosecute an appeal.<sup>228</sup> Campbell appealed on his own and lost in the Utah Supreme Court.<sup>229</sup> State Farm then paid the entire judgment.<sup>230</sup> Campbell subsequently filed a bad faith claim against State Farm, and was awarded by the jury \$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court reduced to \$1

million and \$25 million respectively.<sup>231</sup> The Utah Supreme Court applied the *Gore* principles to restore the \$145 million punitive damage award.<sup>232</sup>

In a de novo review authored by Justice Kennedy, the Court reversed the decision of the Utah Supreme Court and once again reiterated the purpose of punitive damage awards as distinguished from compensatory damages, citing extensively from *Gore* and *Cooper*.<sup>233</sup> In applying the first *Gore* guidepost, reprehensibility, the Court felt that the amount of the award in part was punishing State Farm for out-of-state conduct which did not harm Campbell.<sup>234</sup> Also, under the third guidepost, the maximum state penalty for the insurer's conduct would be \$10,000.<sup>235</sup>

The key holding in *Campbell*, however, relates to the second *Gore* guidepost, the ratio between the harm or potential harm to the plaintiff and the amount of the punitive damage award. On this point, the Court established a measure as follows:

[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process ... Because there are no rigid benchmarks, ratios greater than those that this court has previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages..., but when compensatory damages are substantial, then even a lesser ratio can reach the outermost limit of the due process guarantee.<sup>236</sup>

Justices Scalia and Thomas dissented, restating their positions in *Gore* that the due process clause does not bear upon punitive damage awards.<sup>237</sup> Justice Ginsburg, in a strongly-worded dissent, felt that State Farm's conduct was more reprehensible than indicated by the majority, that Campbell was particularly vulnerable to State Farm's "overarching underpayment scheme," and that the Court should leave to the states greater flexibility in determining limits for punitive damage awards.<sup>238</sup>

## V. Evidence

### A. Admissibility of Expert Opinions

The SJC has reminded us that expert testimony is not required if the subject matter at issue is within the common knowledge or common experience of the trier of fact.<sup>239</sup> The court, however, continues to support the admission of expert opinion in the discretion of the trial judge, even if the matter may be within the knowledge of the trier of fact, as long as the testimony will assist the factfinder in determining a fact at issue

218. *Id.* at 431; *id.* at 444 (Scalia, J., concurring).

219. *Id.* at 432 (majority opinion).

220. *Id.* at 433-34 (citing *Furman v. Georgia*, 408 U.S. 238 (1972)).

221. *Id.* at 434 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) and *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-55 (1993)).

222. *Id.* at 436.

223. *Id.*

224. 538 U.S. 408 (2003).

225. *Id.* at 428.

226. *Id.* at 413.

227. *Id.*

228. *See id.*

229. *Id.* at 414.

230. *Id.*

231. *Id.* at 415.

232. *Id.* at 415-16.

233. *Id.* at 416.

234. *Id.* at 421-23.

235. *Id.* at 428.

236. *Id.* at 425 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996)). It is of interest to note that, in a case measuring the application of punitive damage criteria under federal maritime common law rather than by constitutional due process principles, a divided court applied the same single digit ratio between punitive and compensatory damages. *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2633 (2008).

237. *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* (Thomas, J., dissenting).

238. *Id.* at 434-37 (Ginsburg, J., dissenting).

239. *Smith v. Ariens Co.*, 375 Mass. 620, 628 (1978).

or in understanding the evidence.<sup>240</sup> In *Commonwealth v. Miranda*, the court cited with approval Proposed Massachusetts Rule of Evidence 702 to the effect that

[I]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.<sup>241</sup>

Because the dividing line between common knowledge and matters requiring expert testimony is not precise, the court affords “great deference” to the trial judge’s discretion.<sup>242</sup> In fact, even should the expert testimony be unnecessary, if the question of whether the expert testimony would aid the jury is close, it is unlikely that prejudice would be found either to the admission or to the exclusion of the expert’s testimony.<sup>243</sup>

## B. Content of Expert Opinions — *Daubert* Criteria

Not unexpectedly, most of the evidentiary issues decided during the period covered by this article deal with the application of the *Daubert* and *Lanigan* criteria<sup>244</sup> to various aspects of expert testimony. First, however, it is worth briefly touching upon certain areas of expert testimony in which the SJC has determined that a full *Daubert* analysis is not necessary, as one or another of these areas could become relevant in a product liability lawsuit. For example, to the extent that an expert’s testimony is based upon his factual knowledge and experience, it generally will not be subject to a *Daubert-Lanigan* analysis. When the expert incorporates scientific fact into his opinion, however, the science may be subject to a *Daubert-Lanigan* analysis.<sup>245</sup>

In other examples, when the subject of the proffered expert testimony is generally accepted, either by the relevant scientific community or by the courts, no detailed *Daubert* analysis is required. *Commonwealth v. Patterson*<sup>246</sup> holds that general acceptance in the relevant community of the theory and process upon which an expert’s testimony is based — here the latent fingerprint identification theory — alone is sufficient to establish the requisite reliability for admission regardless of other *Daubert* factors.<sup>247</sup> Discussing a different aspect of reliability, *Commonwealth v. Murphy*<sup>248</sup> notes that a *Daubert-Lanigan* hearing is not necessary before accepting the opinion of a handwriting expert as to the probability of authorship of a document, because such opinions have long been accepted as reliable in the courts of the commonwealth.<sup>249</sup> The *Murphy* court did note that a *Lanigan* hearing could be requested

if science in the particular field should advance to a point where expert testimony, generally accepted as reliable, is no longer to be so considered.<sup>250</sup>

Turning to a number of cases which the courts have reviewed for compliance with the *Daubert* criteria, one basic decision which the trial judge must make as gatekeeper is whether the expert has a sufficient foundation from the facts of the case upon which to postulate an opinion. In *Smith v. Bell Atlantic*,<sup>251</sup> an employment discrimination case, the plaintiff contended that her post-polio syndrome was worsened because her employer failed to accommodate her handicap. In a proper exercise of her discretion, the trial judge excluded the testimony of plaintiff’s expert psychiatrist, an acknowledged expert on post-polio syndrome, because the expert lacked familiarity with the plaintiff’s day-to-day activities.<sup>252</sup> The Appeals Court noted that in its gatekeeper role, the trial court must consider not only the reliability of the scientific principles and methodology underlying the testimony, but also whether the witness has sufficient knowledge of the particular facts of the case to bring his expertise meaningfully to bear.<sup>253</sup>

One can envision the applicability of this same evidentiary principle to a product liability case. A product manufacturer is not liable for unforeseeable misuse of his product, and he need not design against bizarre, unforeseeable accidents.<sup>254</sup> Therefore, it would seem to be essential that an expert in seeking to relate an alleged defect in the product to the plaintiff’s injury, or, conversely, in defending the product, be aware of the manner in which the product was being used at the time of the injury in question.

On another aspect of the foundation issue, it has long been the law of the commonwealth that an expert witness is entitled to base an opinion on facts or data not in evidence, if the facts or data are independently admissible.<sup>255</sup> The expert, however, is not permitted to testify on direct examination to those facts and data relied upon when they are not themselves in evidence<sup>256</sup> although the facts and data relied upon can be elicited upon cross-examination.<sup>257</sup> As an exception to that rule, where the opposing party insists that such facts and data relied upon be presented on direct examination, by pressing a position that the proffered opinion lacked adequate foundation, and where the opponent clearly intended to elicit the same facts and data on cross-examination, it is not prejudicial error to permit the expert to testify to such specifics on direct examination.<sup>258</sup>

*Hick’s Case*<sup>259</sup> also dealt with the constituents of an adequate foundation for an expert’s opinion. The claimant’s neuro-ophthalmologist

240. *Commonwealth v. Miranda*, 441 Mass. 783, 792-95 (2004) (admissibility of expert testimony of narcotics investigator describing street-level methods of distributing heroin).

241. *Id.* at 793.

242. *Id.*

243. *Id.* at 795.

244. *Daubert v. Merrell-Dow Pharm., Inc.*, 509 U.S. 579 (1993) (adopted in Massachusetts in *Commonwealth v. Lanigan*, 419 Mass. 15 (1994)).

245. *Palandjian v. Foster*, 446 Mass. 100 (2006) (expert testimony regarding physician’s standard of care in medical malpractice action).

246. 445 Mass. 626 (2005).

247. *Id.* at 640.

248. 59 Mass. App. Ct. 571 (2003).

249. *Id.* at 576.

250. *Id.* at 576 n.6 (citing *Commonwealth v. Frangipane*, 433 Mass. 527 (2001), which held proffered testimony regarding neurological aspects of dissociative

memory loss subject to *Daubert-Lanigan* review to determine reliability because literature shows debate on subject; however, no *Daubert-Lanigan* hearing necessary concerning memory problems relating to dissociative memory loss and related mental disorders because qualified medical testimony on subject has been accepted before in Massachusetts appellate courts).

251. 63 Mass. App. Ct. 702 (2005).

252. *Id.* at 717-20.

253. *Id.* (citing PAUL LIACOS, ET AL., MASSACHUSETTS EVIDENCE § 7.7 at 391-92 (7th ed. 1999)).

254. *Back v. Wickes Corp.*, 375 Mass. 633, 640 (2002).

255. *Dep’t of Youth Servs. v. A Juvenile*, 398 Mass. 516, 531-32 (1986); *see also Commonwealth v. Sparks*, 433 Mass. 654, 658-59 (2001).

256. *Commonwealth v. Jaime*, 433 Mass. 575, 577-78 (2001); *Grant v. Lewis/Boyle, Inc.*, 408 Mass. 269, 273-74 (1990).

257. *Grant*, 408 Mass. at 274; *Dep’t of Youth Servs.*, 398 Mass. at 532.

258. *Commonwealth v. McNuckles*, 434 Mass. 839, 856-57 (2001).

259. 62 Mass. App. Ct. 755 (2005).

prof ered testimony that a f u shot which the worker had received was the cause of his optic neuritis. The Appeals Court noted that the reliability of the theory or process underlying the expert's testimony is the ultimate test of its admissibility.<sup>260</sup> The court went on to indicate that factors such as general acceptance in the scientific community, peer review and publication of the theory all are relevant on the issue of its reliability, but are not "indispensable predecessor[s] of admissibility."<sup>261</sup> In *Hick's Case*, it was undisputed that no scientific or epidemiological studies existed which showed a statistical relationship between f u vaccine and optic neuritis.<sup>262</sup> In the absence of such studies, a party may use alternate means to establish that the prof ered evidence is reliable or valid.<sup>263</sup> The expert's methodology thus was found to be valid for two reasons. First, case studies published in ophthalmology journals, including some studies authored by the expert, suggested a causal relationship between the receipt of a f u shot and optic neuritis, aff ording an adequate foundation for his testimony.<sup>264</sup> Second, the expert's methodology also was found to be reliable, because he used a standard scientific technique known as "differential diagnosis," which establishes the cause of a medical problem by eliminating each likely cause until the most probable cause is isolated.<sup>265</sup>

A different foundation issue arose in *Jodoin v. Toyota Motor Corp.*<sup>266</sup> in which the plaintiff, after being struck from the rear while driving her Toyota pick-up truck, sought to correct the counter-clockwise turning of the truck, but as she turned to the right, her truck flipped and rolled over several times, causing her serious permanent injuries.<sup>267</sup> Her contention was that the truck was defectively designed, causing it to be prone to rolling over.<sup>268</sup> Plaintiff's expert was permitted to testify to his reconstruction of the accident, but the prof ered testimony of his testing of an exemplar vehicle was excluded for lack of proper foundation.<sup>269</sup> Without this testimony, the plaintiff was unable to prove her case, so the court granted judgment for the defendant as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure.<sup>270</sup> The trial judge required the plaintiff to establish that the exemplar vehicle was *virtually identical* to the plaintiff's vehicle, and because plaintiff's expert had no personal knowledge of the history of the exemplar vehicle (where it was

purchased and whether it had been changed since its manufacture), he could not establish such virtual identity.<sup>271</sup>

The United States Court of Appeals for the First Circuit reversed the judgment and remanded the case for a new trial because, by requiring virtual identity, the trial judge applied an overly rigid standard and thereby abused his discretion.<sup>272</sup> The opinion explained that, when expert evidence is of ered simply to illustrate a scientific principle, the court merely looks to see whether the test upon which the evidence is premised was properly conducted.<sup>273</sup> Here, however, the jury would likely consider the expert's testing as a reconstruction of the accident, so a stricter standard is required, namely that there be a *substantial similarity* of circumstances between the reconstruction and the original accident.<sup>274</sup> Despite his lack of personal knowledge of the exemplar's history, plaintiff's expert could testify that after a thorough examination of the exemplar he could verify that the load ratings and the tires were the same, that the exemplar's vehicle identification number was similar to that of the plaintiff's truck, and that the exemplar showed no evidence of damage, modifications or accidents.<sup>275</sup> Because the issue on appeal was limited to the characteristics of the truck, and did not involve the characteristics of the test, the court found that plaintiff met the "substantial similarity" standard to permit her case to proceed, subject, of course, to challenges by the defendant upon retrial.<sup>276</sup>

### C. Spoliation of Evidence

Courts have continued during the period covered by this article to address issues involving the preservation of evidence. The SJC has reiterated its position that no separate cause of action exists in Massachusetts for the spoliation of evidence,<sup>277</sup> a view shared by a majority of jurisdictions that have considered the issue.<sup>278</sup> The reasoning behind that position, at bottom, is that allowing a separate action for spoliation would result in sheer speculation. It would require a jury to revisit what a prior jury had already decided and to determine whether something that still cannot be shown, if it had been available, would have changed the original jury's decision.<sup>279</sup> Conversely, if the contents and salient features of the "lost" item can still be shown, then they can be presented in the underlying action and there is no damage from any spoliation.<sup>280</sup>

260. *Id.* at 760 (citing *Commonwealth v. Lanigan*, 419 Mass. 15, 24 (1994)).

261. *Id.* (citing *Lanigan*, 419 Mass. at 25).

262. *Id.*

263. *See Canavan's Case*, 432 Mass. 304, 310 (2000).

264. *Hicks Case*, 62 Mass. App. at 761.

265. *Id.* at 761; *see also* *Commonwealth v. Montanez*, 55 Mass. App. Ct. 132, 144-46 (2002) (expert testimony regarding dissociative trance disorder admissible on re-trial because condition appears as a *research* category in *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000) (although not codified as a *diagnostic* category), and has been subject of peer reviewed articles and two treatises cited by proffering expert, but evidence proffered on retrial must be similar to that in cited treatises, and, if contrary evidence substantially undermines scientific reliability, it remains within discretion of trial judge whether to admit proffered testimony). Compare *Federico v. Ford Motor Co.*, 67 Mass. App. Ct. 454 (2006), where plaintiff sought to offer expert's theory that sudden acceleration of automobile that struck and killed decedent was due to transient electronic signals in cruise control system, signalling throttle to open without pressure on the accelerator. The court affirmed the trial judge's decision that the proffered testimony did not satisfy the *Daubert/Lanigan* criteria because there was no evidence that the theory had been accepted by the relevant scientific community (in fact some studies in evidence rejected the theory). Alternatively, the expert had not tested his theory successfully, having been unable to cause a vehicle to

accelerate spontaneously through the introduction of transient electronic signals, nor was there evidence that the theory had been published or was subject to peer review. Further, the court noted that acceptance of the expert's theory in other jurisdictions, while relevant and interesting, is not binding upon the court.

266. 284 F.3d 272 (1st Cir. 2002).

267. *Id.* at 274.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 279.

272. *Id.* at 281.

273. *Id.* at 278.

274. *Id.* at 278-79.

275. *Id.* at 275.

276. *Id.* at 279-80.

277. *Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 547, 551-53 (2002).

278. *Id.* at 547 & n.9.

279. *Id.* at 551.

280. *Id.* at 551-52.

Therefore, the overarching principle in applying spoliation sanctions will continue to be that

consistent with the specific facts and circumstances of the underlying case, sanctions for spoliation are [to be] carefully tailored to remedy the precise unfairness occasioned by that spoliation. A party's claim of prejudice stemming from spoliation is addressed within the context of the action that is allegedly affected by the spoliation.<sup>281</sup>

“As a general rule, a judge should impose the least severe sanction necessary to remedy the prejudice to the non-spoliating party.”<sup>282</sup>

In *Fletcher v. Dorchester Mutual Insurance Co.*, a homeowner's insurer's investigator removed certain electrical components following a fire in a residence in which several persons were injured.<sup>283</sup> The injured persons sued the homeowner. In that action, their motion for relief because of the evidence removal was denied, so they filed a separate action against the insurer and its investigator.<sup>284</sup> In upholding the dismissal of this second action, the SJC held that any remedy for spoliation is to take place in the underlying tort action,<sup>285</sup> in accord with *Kippenham v. Chaulk Services, Inc.*<sup>286</sup> and *Nally v. Volkswagen of America, Inc.*<sup>287</sup> The court indicated that a duty to preserve evidence typically rests upon parties to litigation (or those who expect to be involved) and their affiliates. The court cited two situations as exceptions to the proposition that persons who themselves are not parties to litigation, except as noted above, have no duty to preserve evidence for use by others. First, evidence in the possession or control of a person at the time that he or she receives a subpoena for that evidence must be preserved. Second, a third-party witness may agree to preserve evidence and thereby enter into an enforceable contract.<sup>288</sup>

Three other decisions indicate the extent to which the court will examine the circumstances surrounding the loss of evidence before imposing spoliation sanctions. In *Westover v. Leiserv, Inc.*,<sup>289</sup> a plaintiff was injured when the seat of a chair she was using at the defendant's bowling alley separated from its legs due to an alleged design defect. The bowling alley manager noted the defect, as did the plaintiff's brother, and the manager attempted to preserve the defective chair, but it was discarded in the trash.<sup>290</sup> The manager then preserved several other chairs, which had the same design defect, all of which were manufactured by the third-party defendant, which also manufactured the offending chair.<sup>291</sup> Thus, the alleged design defect was common to a line of chairs, several of which were available for evaluation both by the defendant's experts

and the manufacturer's experts. As a result, the court held that it was error for the trial court to preclude the plaintiff from offering any testimony about the condition of the offending chair. The defendant's motion for summary judgment, therefore, was improperly allowed.<sup>292</sup> The court observed that the manufacturer's preclusion request was incorporated within its motion for summary judgment. The better procedure, according to the court, would have been first to file a motion for sanctions under Rule 37 of the Massachusetts Rules of Civil Procedure and, if granted, then proceed to move for summary judgment.<sup>293</sup>

In *Chapman v. Bernard's, Inc.*,<sup>294</sup> an infant died after becoming wedged between the mattress and side rail of a daybed. Prior to the infant's funeral, his father or uncle broke up and destroyed the daybed.<sup>295</sup> When sued for an alleged design defect, the manufacturer sought spoliation sanctions.<sup>296</sup> The trial judge, in denying the defendant's motion for summary judgment based on spoliation, observed first that destruction of the daybed was not done in bad faith, but in the heat of passion as a reaction to the child's death.<sup>297</sup> The court also noted that the claim was for a design defect, not a manufacturing defect, and examples of the subject model, police photographs of the subject bed and expert testimony all were available on the issue of allegedly defective design.<sup>298</sup> The court recognized that the manufacturer had suffered substantial prejudice on issues of product identity, interrelation of various components of the bed not distributed by the defendant, potential abuse of the bed by the plaintiff, and accident reconstruction.<sup>299</sup> This prejudice, however, did not warrant exclusion of the evidence, in the court's opinion, but at trial might well entitle the defendant to a negative inference jury instruction.<sup>300</sup>

Conversely, the bicycling plaintiff in *Gath v. M/A-Com, Inc.*<sup>301</sup> was severely injured when struck by a large unsecured gate at the edge of the defendant's business premises as it swung out into his path while he was passing along the street.<sup>302</sup> The defendant's manager was immediately aware of the accident and caused the gate's hinges to be adjusted.<sup>303</sup> Plaintiff filed suit within two months of the accident, and a month later, representatives of the defendant, along with the defendant's trial counsel, met at the gate, swung it out onto the street, and immediately decided to remove and replace the gate without advising the plaintiff.<sup>304</sup> A number of witnesses had observed the gate swing out into the street at various times, including two eyewitnesses who saw it swing out and strike the plaintiff.<sup>305</sup> The trial judge precluded the defendant from offering any evidence that the gate had been secured on the day of the accident or that the gate had not been blowing out into the street for a

281. *Id.* at 551.

282. *Keane v. Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 235 (2003).

283. *Fletcher*, 437 Mass. at 545.

284. *Id.*

285. *Id.* at 557.

286. 428 Mass. 124, 126-28 (1998).

287. 405 Mass. 191, 197-98 (1989).

288. *Fletcher*, 437 Mass. at 548-49.

289. 64 Mass. App. Ct. 109 (2005).

290. *Id.* at 112.

291. *Id.*

292. *Id.* at 114.

293. *Id.* at 111 n.4.

294. 167 F. Supp. 2d 406 (2001).

295. *Id.* at 411.

296. *Id.* at 413.

297. *Id.* at 413-14.

298. *Id.* at 413.

299. *Id.* at 414.

300. *Id.*

301. 440 Mass. 482 (2003).

302. *See id.* at 483, 484.

303. *Id.* at 485-86.

304. *Id.* at 486.

305. *See id.* at 484-85.

distance equal to its length.<sup>306</sup> In addition, the judge permitted plaintiff's counsel to question witnesses regarding the gate removal, and to argue negative inferences from its removal.<sup>307</sup> The judge also instructed the jury that they could infer from the loss of the gate that it would have provided evidence unfavorable to the defendant.<sup>308</sup> The defendant, in arguing against spoliation sanctions, claimed that any evidence to be elicited from examination of the lost gate would be cumulative at best and therefore its loss was not prejudicial to the plaintiff.<sup>309</sup> In upholding the sanctions, the SJC noted that a trial judge has broad discretion in making evidentiary rulings, and that the sanctions imposed by the judge were within those recognized in Massachusetts law.<sup>310</sup>

## VI. Practice and Procedure

### A. Federal Jurisdiction Class Actions

In 2005, the Class Action Fairness Act of 2005<sup>311</sup> ("CAFA") was enacted, applicable to all class actions filed after February 18, 2005. The act does not address the prerequisites for filing a class action, but rather expands federal jurisdiction over such actions by easing diversity and removal limitations otherwise applicable to maintaining actions in the federal court. In light of the development of "mass tort" lawsuits and the distribution of products nationally, we may now expect to see an increasing number of product liability cases being litigated in the federal court system. A full discussion of the effect of the various provisions of CAFA is beyond the scope of this article,<sup>312</sup> but a brief summary of the highlights of the act is in order.

Preliminarily, the prerequisites for determining whether a class action is appropriate appear in both the Federal<sup>313</sup> and Massachusetts<sup>314</sup> Rules of Civil Procedure. Under both rules, a class action may be brought only if

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.<sup>315</sup>

A practical application of these principles is illustrated in two federal cases. In *Smilow v. Southwestern Bell Mobile Systems, Inc.*,<sup>316</sup> the United States Court of Appeals for the First Circuit, in applying an abuse of discretion standard to review a district judge's certification of a class, determined that under Rule 23(b)(3) of the Federal Rules of Civil Procedure,<sup>317</sup> common issues both as to liability and to damages predominated over individual damage claims where the plaintiffs, on behalf of all cell phone users who had signed identical contracts with the defendant, alleged that they were improperly charged for incoming calls, even though the number of calls received varied greatly from plaintiff to plaintiff.<sup>318</sup> The court also noted that the claims of most, if not all, class members were too small to vindicate individually, so a class action was appropriate.<sup>319</sup>

*Payne v. Goodyear Tire & Rubber Co.*<sup>320</sup> involved the claims of owners of homes heated by radiant heating apparatus which contained an allegedly defective hose manufactured by the defendant. The court noted that a decision on class certification does not involve an examination of the merits of the underlying dispute, but is limited to determining whether a class action is the most appropriate mode of adjudication, citing *Eisen v. Carlisle & Jacquelin*.<sup>321</sup>

In *Aspinall v. Philip Morris Cos.*,<sup>322</sup> the SJC, in an expansive approach to consumer protection, broadly applied the same prerequisites in favor of purchasers of Marlboro Light cigarettes, which were advertised as being "lowered tar and nicotine," a statement which was allegedly deceptive under the provisions of General Laws chapter 93A, sections 2 and 9. On the issue of damages, the court discounted the defendant's claim that a successful class action requires that each plaintiff prove actual harm, and that such individualization of damages would override the predominance of common issues because, concededly, some plaintiffs did receive lower tar and nicotine.<sup>323</sup> The court pointed out that the plaintiff's claim was one of economic damage, not physical harm, in that each plaintiff paid more for the cigarettes because of the allegedly deceptive advertising than he or she otherwise would have paid. Therefore, they did not receive the benefit of their bargain, because the price of the cigarettes exceeded their true market value. The court held that if benefit of the bargain damages could be proved with reasonable

306. *Id.* at 487.

307. *Id.* at 489.

308. *Id.* at 491.

309. *Id.* at 487.

310. *Id.* at 488.

311. See Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in various sections of 28 U.S.C.).

312. For a fuller discussion of this subject, see Linda Pissott Reig, et al., *The Class Action Fairness Act of 2005: Overview, Historical Perspective and Settlement Requirements*, 40 TORT TRIAL & INS. PRAC. L. J., 1087 (2005).

313. FED. R. CIV. P. 23.

314. MASS. R. CIV. P. 23 (which parrots subsection (a) and a portion of subsection (b)(3) of the federal rule).

315. FED. R. CIV. P. 23(a); MASS. R. CIV. P. 23(a).

316. 323 F.3d 32 (1st Cir. 2003).

317. At the time, subsection (b)(3) of the federal rule provided in part that a class action may be maintained if, in addition to other prerequisites:

the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3) (1998) (amended 2007).

318. *Smilow*, 323 F.3d at 34.

319. *Id.* at 42.

320. 216 F.R.D. 21 (D. Mass. 2003) (Gertner, J.).

321. 417 U.S. 156, 177 (1974). In *Payne*, the Court went on to find that the prerequisites of *numerosity* (of plaintiffs), *commonality* (of questions of law and fact), *typicality* (of claims common to the class) and *adequacy of representation* (absence of conflicts of interest among plaintiffs and qualified counsel representing the class) were satisfied in the case. Even though each individual plaintiff would have to prove individual causation (that his or her damage emanated from the leaky hose) and although the defendant could attempt to present individualized contributory or comparative negligence issues, the Court found that the "predominance" requirement prevailed over such individual causation and affirmative defense determinations. *Payne*, 216 F.R.D. at 28 n.4 (citing *Smilow*, 323 F.3d at 39).

322. *Aspinall v. Philip Morris Cos.*, 442 Mass. 381 (2004). See generally James W. Matthews, *Compensable Injury and the Regulation of Unfair and Deceptive Trade Practices in Massachusetts after Aspinall*, *Hershenow and Roberts*, 90 MASS. L. REV. 64 (2006).

323. For cases illustrating the absence of causal connection between a deceptive act and loss to the consumer, still an essential predicate to recovery under Mass. Gen. Laws ch. 93A, § 9, see *Roberts v. Enter. Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 811 (2006) and *Hershenow v. Enter. Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790 (2006).

certainty, they would be appropriate in this case, but that in any event the plaintiff s would be entitled to statutory damages under section 9(3) of chapter 93A.<sup>324</sup>

Justices Cordy, Ireland and Cowin dissented from the opinion on the basis that studies show that a significant number of smokers do benefit from “low tar and nicotine” cigarettes, so that a conclusion that the “low-tar” group is so small as to be impossible to identify (as found by the majority) is not warranted.<sup>325</sup> In short, the dissent felt that the plaintiff s failed in their burden to establish that the class as a whole was “similarly injured,”<sup>326</sup> and that the class includes identifiable uninjured members.<sup>327</sup>

Under CAFA, a class action filed in the federal court or removed there by the defendant *must* remain in the federal court if the amount at stake is more than \$5 million and if “any member of a class” is a citizen of a state or foreign country different from that of “any defendant.”<sup>328</sup> In addition, the claims of all of the plaintiff s in the class may be aggregated to meet the jurisdictional amount, and the standard requirement in federal cases based upon diversity of citizenship that each individual claim reach at least \$75,000 is waived (except that in “mass actions,” which involve the joinder of claims of at least 100 plaintiff s, the individual \$75,000 jurisdictional amount is retained).<sup>329</sup> CAFA applies only if there are at least 100 plaintiff s in the class, and does not apply if the primary defendants are states, state officials or some government entities.<sup>330</sup> However, the federal court must decline jurisdiction if “greater than two-thirds” of the plaintiff s are residents of the forum state, at least one “significant defendant” is a citizen of the forum state, the principal injuries were sustained in the forum state, and no similar class action has been filed within the prior three years.<sup>331</sup> A “significant defendant” is defined as one from whom significant relief is sought and whose alleged conduct forms a *significant* basis for the claims.<sup>332</sup> As an interesting middle ground, a federal court *may* decline jurisdiction if greater than one-third but less than two-thirds of the plaintiff class reside in the forum.<sup>333</sup>

Removal to federal court is permitted regardless of whether any defendant is a citizen of the forum state, and regardless of whether all defendants assent. Removal steps are not limited to one year.<sup>334</sup> In addition, the same removal provisions apply to mass actions involving 100 or more claims to be jointly tried.<sup>335</sup> Upon application within seven

days of the granting or denial of remand, appellate review of the order is available.<sup>336</sup>

## B. Supplemental Jurisdiction.

Subsequent to the enactment of CAFA, the Supreme Court was faced with an interpretation of 28 U.S.C. §1367, providing supplemental jurisdiction to the federal courts.<sup>337</sup> The Court determined, with Justices Ginsburg, Stevens, O’Connor and Breyer dissenting, that section 1367 authorizes supplemental jurisdiction over the claims of other plaintiff s in an Article III case, even if each claim is for less than the jurisdictional amount of \$75,000 provided in 28 U.S.C. §1332, as long as there is complete diversity and the claim of at least one plaintiff is at or exceeds the jurisdictional *minimum*.<sup>338</sup> The Court acknowledged that the enactment of CAFA in 2005 is not relevant to its interpretation of section 1367, which was enacted in 1990. The Court went on to observe, however, that CAFA does not moot its interpretation of section 1367, because “many proposed exercises of supplemental jurisdiction, even in the class-action context, might not fall within the CAFA ambit. The CAFA, then, has no impact, one way or another, on our interpretation of §1367.”<sup>339</sup> The dissent held to the narrower view that in diversity-only cases, the claim of each plaintiff seeking joinder under section 1367 first must meet the jurisdictional amount required under section 1332.<sup>340</sup>

## Conclusion

The period covered by this article might be seen primarily as one of judicial balancing of competing interests. Federal regulations of products in interstate commerce are balanced against each state’s right to determine the law applicable within its borders. Again, after measuring the burden to be placed upon product distributors, the courts then seek a fair balance between the responsibility assumed and the ends to be accomplished. Similarly, in the trial of product cases, a balance is sought between the rights of proponents and opponents of expert testimony, as well as between the parties in the case of lost evidence. In short, whether in the application of new common law or statutes and regulations or merely in the reiteration of established principles to an endless variety of circumstances, we shall continue to observe the courts’ search for a fair balance between rights and obligations, which, after all, is the essence of all litigation.

324. *Aspinall*, 442 Mass. at 400.

325. *Id.* at 406 (Cordy, J., dissenting).

326. *Id.* at 405-06.

327. *Id.* at 406-07.

328. See 28 U.S.C. § 1332(d)(2) (2006).

329. See *id.* § 1332(d)(11).

330. See *id.* § 1332(d)(5).

331. See *id.* § 1332(d)(4)(A).

332. See *id.* § 1332(d)(4)(A)(i)(II).

333. See *id.* § 1332(d)(3).

334. See *id.* § 1453(b).

335. See *id.* § 1332(d)(11).

336. See *id.* § 1453(c).

337. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

338. *Id.* at 567.

339. *Id.* at 572.

340. *Id.* at 592-93 (Ginsburg, J., dissenting).

# Case & Statute Comments

## Employment Law — Combining Non-Consecutive Periods of Employment to Qualify as an “Eligible Employee” under the Federal Family Medical Leave Act

*Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006)

### Introduction

As an issue of first impression among the courts of appeal, the United States Court of Appeals for the First Circuit resolved the following question: may an employee, who has been currently employed for seven months, add five years of prior employment with the same employer to satisfy the “for at least 12 months” requirement of the Family Medical Leave Act (“FMLA”)?<sup>1</sup> Answering the question affirmatively, the First Circuit concluded that, although the FMLA itself is ambiguous as to whether previous periods of employment count toward the 12-month requirement, regulations promulgated and interpreted by the United States Department of Labor (“DOL”) establish that previous periods of employment may be combined to satisfy the statutory requirement.<sup>2</sup> This comment explores the decision itself and the background and the future of the statute.

### I. Factual and Procedural Background

Kenneth Rucker (“Rucker”) worked as a car salesman for Lee Auto Malls (“Lee”) in Maine for five years.<sup>3</sup> After an approximately five-year break of employment, he rejoined Lee on June 5, 2004 and worked for over seven months, averaging 48 hours per week, before rupturing a disc in his back on January 20, 2005.<sup>4</sup> Due to physical pain, he went on medical leave at various times during the next month and a half, missing a total of 13 days of work at the time Lee terminated his employment.<sup>5</sup>

Rucker filed a complaint in a federal district court in Maine alleging that Lee violated FMLA because it terminated him for taking medical leave to which he was entitled.<sup>6</sup> Lee responded by filing a motion to dismiss, arguing that Rucker did not qualify for FMLA protections because he was not an “eligible employee.”<sup>7</sup> The statute provides, among other things, that an “eligible employee” is entitled to medical leave for “a serious health condition that makes the employee unable to perform the functions of [his or her] position.”<sup>8</sup> “Eligible employee” is statutorily restricted to those employees who have been employed (i) for at least

12 months by the employer and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.<sup>9</sup> Here, it was undisputed that Rucker satisfied the second prong, which requires at least 1,250 hours of service, because he worked over 40 hours each week since rejoining Lee.<sup>10</sup> The crux of the issue was whether Rucker, whose recent term of employment at Lee was only seven months, could add his previous five years of employment with Lee to satisfy the “for at least 12 months” requirement of the first prong of the statute.<sup>11</sup>

In support of its motion to dismiss, Lee first argued that the plain language of the statute did not permit a prior period “remote in time” to be “tack[ed] on” to the current period.<sup>12</sup> Because Rucker had only been employed for seven months, he had not been employed “for at least 12 months.”<sup>13</sup> Lee’s second argument interpreted the DOL promulgated regulation that addressed the 12-month requirement:

The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers’ compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as ‘at least 12 months,’ 52 weeks is deemed to be equal to 12 months.<sup>14</sup>

Lee argued that the second and third sentences of the regulation modify the first sentence, thereby providing the only circumstances under which non-consecutive employment counts towards the 12-month requirement.<sup>15</sup> On the other hand, Rucker contended that the plain meaning of the first sentence clearly supported combining his two periods of employment because they “need not be consecutive months.”<sup>16</sup>

1. *Rucker v. Lee Holding Co.*, 419 F.Supp.2d 1, 2 (D.Me.), *rev’d* 471 F.3d 6, 7-8 (1st Cir. 2006).

2. *Rucker v. Lee Holding Co.*, 471 F.3d 6, 8 (1st Cir. 2006).

3. *Id.*

4. *Id.*

5. *Rucker*, 419 F.Supp.2d at 2.

6. *Rucker*, 471 F.3d at 8.

7. *Id.*

8. 29 U.S.C. § 2612(a)(1)(D) (2000).

9. 29 U.S.C. § 2611(2)(A) (2000); 29 C.F.R. § 825.110(a) (2006).

10. *Rucker*, 471 F.3d at 8-9.

11. *Id.* at 7-8.

12. *Id.* at 9.

13. *Id.*

14. *Id.* (citing 29 C.F.R. § 825.110(b)).

15. *Rucker*, 471 F.3d at 9.

16. *Id.*

Granting Lee's motion to dismiss, the district court found that Rucker was not an "eligible employee" under the FMLA.<sup>17</sup> The district court concluded that, although the DOL regulation allows brief interruptions of employment, it does not permit complete severance from an employer for a period of years.<sup>18</sup> The district court recognized that "[w]hile [the regulation] accommodates individuals whose employment might be intermittent or casual, it makes no allowance for an employee who severs all ties with the employer for a period of years before returning" to employment.<sup>19</sup>

## II. First Circuit Analysis

Reversing the decision of the district court, the First Circuit analyzed the ambiguous statutory language several ways.<sup>20</sup> The appellate court first looked at the statutory text, and it determined that the phrase "has been employed ... for at least 12 months by the employer" was ambiguous.<sup>21</sup> The court concluded that the statutory language could refer to either the most recent period of employment or all periods of employment by that employer.<sup>22</sup> For instance, the court noted that asking how long an employee "has been employed" at a particular company is an ambiguous question if the employee had more than one period of employment.<sup>23</sup>

The court next considered whether canons of statutory interpretation could eliminate the statutory ambiguity.<sup>24</sup> Rucker argued that Congress's use of different language in parallel provisions meant that Congress intended different meanings.<sup>25</sup> Specifically, Rucker pointed to the difference in the use of the word "previous" between the two provisions: the statutory language of the second section requires at least 1,250 hours "during the previous 12-month period," while the first section does not contain the word "previous" and, therefore, illustrates Congress's intent of employment for any twelve month period.<sup>26</sup> Lee,

on the other hand, argued that the two sections should be read together as a whole.<sup>27</sup> Under Lee's view, the required twelve-months are the same twelve months as the ones referenced in the hourly service provision.<sup>28</sup> The First Circuit recognized how both of these "plain" readings of the statute are plausible, thereby demonstrating the statute's ambiguity.<sup>29</sup>

The court then determined how the legislative history of the statute provided no further assistance in gleaning the statute's congressional intent.<sup>30</sup> The Senate committee report "specifically states that the 12 months in the 12-month requirement 'need not have been consecutive,'" however, the court concluded that "the report provide[d] no further guidance."<sup>31</sup> Also, two proposed bills would have specifically required 12 consecutive months of employment, but because neither bill had been enacted, the court acknowledged the difficulty in concluding that Congress intended to enact the opposite view.<sup>32</sup> Although the two bills would have allowed the months to be "not consecutive," the court pointed out that the problem of how broadly or narrowly to construe the words would still remain.<sup>33</sup>

Lastly, the court deferred to the reasonable interpretation provided by the DOL, the agency to which Congress expressly granted authority to "prescribe such regulations as are necessary to carry out [the FMLA]."<sup>34</sup> Recognizing the substantial deference given to agencies that provide "fair and considered judgment on the matter in question," the court concluded that if the DOL regulation "clearly resolves this case, and is reasonable, that would be the end of the matter."<sup>35</sup> The DOL expressed its interpretation of this regulation in both a regulatory preamble and an amicus brief, which it filed at the request of the First Circuit.<sup>36</sup> Like Rucker, the DOL interpreted the regulation so that the first sentence, which allowed for combining non-consecutive months, was not limited by the following sentences.<sup>37</sup> The DOL also contended that a five-year gap does not preclude an employee from including his prior

17. *Rucker*, 419 F.Supp.2d at 3.

18. *Id.* at 2-3.

19. *Id.* at 3.

20. *Rucker*, 471 F.3d at 9-12.

21. *Id.* at 9-10.

22. *Id.* at 10. *But see* *Bell v. Prefix, Inc.*, 422 F.Supp.2d 810 (E.D. Mich. 2006) (relying on plain meaning of statute to deny employer's motion to dismiss where employee sought to combine two non-consecutive periods of employment: 17 months and six months, which were separated by only three months of unemployment); *see also* *Thomas v. Mercy Memorial Health Center, Inc.*, No. CIV-07-022-SPS, 2007 WL 2493095, at \*3 (E.D. Okla. Aug. 29, 2007) ("The court is not convinced that section 2611 (2)(A)(i) is ambiguous."); *Cox v. True North Energy, LLC*, 524 F.Supp.2d 927, 936-38 (N.D. Ohio 2007) (finding that "the language in s. 2611(2)(A) is clear").

23. *Rucker*, 471 F.3d at 10.

24. *Id.* at 10-11.

25. *Id.*

26. *Id.*

27. *Id.* at 11.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* (citing S.Rep. No. 103-3, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 25).

32. *Id.* (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504-06 (1979)) (declining to infer from rejection of statutory amendment an intent to enact the opposite view).

33. *Id.*

34. *Id.* at 11-13.

35. *Id.* at 11-12 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). The Chevron doctrine provides that a court, when reviewing an agency's construction of a statute, first determines whether "Congress has directly spoken to the precise question at issue." If so, then the court (and agency) "must give effect to the unambiguously expressed intent of Congress." If Congress has not directly addressed the precise issue, "the court does not simply impose its own construction on the statute ... [r]ather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.") (citations omitted).

36. *Rucker*, 471 F.3d at 12.

The preamble mentions three proposed "limitations on a 12-month coverage test" that the agency explicitly considered and rejected: (1) the exclusion of "any employment experience prior to an employee resignation or employer-initiated termination that occurred more than two years before the current date of reemployment"; (2) the "limiting [of] the 12 months of service to the period immediately preceding the commencement of leave"; and (3) the computation of the "12 months of service as computed under bridging rules applicable to [the] employer's pension plans."

*Id.* (citing 60 Fed. Reg. 2180, 2185 (Jan. 6, 1995)).

37. *Id.*

employment to satisfy the 12-month requirement, although the DOL recommended that a five-year break in employment would be the “outer bounds of what is permissible.”<sup>38</sup> The court determined that Rucker pled sufficient facts in his complaint to show that he was, at the time he took leave, an “eligible employee” under the FMLA, thereby reversing the judgment of the district court.<sup>39</sup>

### III. Family Medical Leave Act

Senator Christopher Dodd authored the landmark FMLA statute after decades of fighting for workers’ ability to take unpaid leave due to family or medical needs.<sup>40</sup> By carefully balancing the interests of both the employer and employees, the statute protects only “eligible employees” with up to 12 workweeks of unpaid leave for the birth or adoption of a child; to care for a spouse, child, or parent; for a serious health condition that makes the employee unable to perform his or her job; or to care for a covered service member.<sup>41</sup> Since President Clinton signed the law on February 5, 1993, the FMLA has enabled more than 50 million Americans to “balance the demands of the workplace with the needs of families” without sacrificing their jobs or benefits.<sup>42</sup>

On February 11, 2008, the DOL published a proposal to revise certain regulations pertaining to the FMLA.<sup>43</sup> The proposed amendments are based on the DOL’s experience in administering the law, two studies that it conducted in 1996 and 2001, public comments, and United States Supreme Court and lower court decisions.<sup>44</sup> The proposed amendments include change to the definition of “serious health condition,” employee and employer notice requirements, and retroactive designation of FMLA leave, as well as other provisions. Also included in these proposed amendments, and in response to *Rucker* and the DOL’s subsequent request for information, are changes to the section pertaining to “eligible employee.”<sup>45</sup>

With regard to the eligibility standards that employees must meet to qualify for FMLA leave, the DOL proposes that “although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted.”<sup>46</sup> This five-year recommendation, however, does not change the three-

year record-keeping requirement for employers.<sup>47</sup> The DOL’s proposal states that if an employee relies on a period of employment that predates the employer’s records, it is the employee’s responsibility to show proof of prior employment in order to qualify for FMLA leave.<sup>48</sup>

The DOL also suggests two exceptions to this general five-year rule that would allow for breaks in employment due to an employee’s (1) military obligations or (2) approved absence or unpaid leave, such as for education or child-rearing.<sup>49</sup> In these two situations, regardless of the length of the break in employment, prior employment must be used to determine whether the employee satisfies the “for at least 12 months” requirement.<sup>50</sup> In that same vein, the DOL proposes revisions to the paragraph that addresses the hourly requirement so as to reflect the hours that an employee “would have worked for his or her employer but for the employee’s fulfillment of military service obligations. This revision codifies the protections and benefits afforded by the Uniformed Services Employment and Reemployment Rights Act (“USERRA”).”<sup>51</sup>

The DOL’s proposal also adds a section regarding breaks in employment of more than five years.<sup>52</sup> This section would allow an employer to maintain a policy that, when determining if an employee meets the “for at least twelve months” requirement, it may consider employment prior to a five-year break so long as the employer applies this policy uniformly for all employees with similar breaks in service.<sup>53</sup>

These particular amendments are based on several comments that weighed heavily in the DOL’s policy determinations.<sup>54</sup> The National Partnership for Women & Families contended that “an arbitrary time limit on how long a worker could leave the employment of a particular employer would operate an unfair and disproportionate burden on women workers.”<sup>55</sup> Many women leave work for extended periods of time, for example, to stay home with young children during their formative years.<sup>56</sup> On the other hand, employers, who “overwhelmingly disagreed” with *Rucker* because of potential administrative and record-keeping burdens, suggested that prior periods of employment should never be combined to qualify as an “eligible employee.”<sup>57</sup> The DOL considered other comments such as disregarding prior employment periods if all ties between the employer and employee had been

38. *Id.* at 12-13, n.5 (citing N.J. ADMIN. CODE § 12:56.4.4).

39. *Id.* at 13.

40. Press Release, Brief History of the Family Medical Leave Act and Senator Dodd’s Role in FMLA (Feb. 1, 2007) (on file with author).

41. 29 U.S.C. § 2612(a)(1) (2006), as amended by National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585(a)(2)(A), 122 Stat. 3, 128-31 (2008) (adding subpar. (E)). Notably, Massachusetts also passed the Small Necessities Leave Act, Mass. Gen. Laws 149, § 52D (Supp. 2008) to supplement the federal FMLA and to provide eligible employees additional unpaid leave for specific family obligations. An eligible employee (as defined by the FMLA) is allowed 24 hours of unpaid leave during any 12-month period, in addition to the leave available under the federal act, to

(1) participate in school activities directly related to the educational advancement of [his or her child], such as parent-teacher conferences or interviewing for a new school;

(2) accompany [his or her child] to routine medical or dental appointments, such as check-ups or vaccinations; and

(3) accompany [his or her elderly relative] to routine medical or dental appointments or appointments for other professional services related to the elder’s care, such as interviewing at nursing or group homes.

MASS. GEN. LAWS ch. 149, § 52D(b) (Supp. 2008). Another Massachusetts statute, MASS. GEN. LAWS ch. 149, § 105D (2006), also provides for up to eight weeks of maternity leave over a one-year period.

42. Press Release, Brief History of the Family Medical Leave Act and Senator Dodd’s Role in FMLA (Feb. 1, 2007) (on file with author); see 29 U.S.C. § 2601(b)

(1) (2006).

43. 73 Fed. Reg. 7876 (proposed Feb. 11, 2008) (to be codified at 29 C.F.R. §825) available at <http://www.dol.gov/esa/whd/fmla/>.

44. *Id.* at 7896.

45. *Id.* at 7881-84.

46. *Id.* at 7882.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* In response to another Supreme Court decision, *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002), the DOL proposes further modifications to § 825.110 (c) and (d), addressing and clarifying an employer’s notice to the employee and how an employee’s eligibility is determined “as of the date leave commences.” 73 Fed. Reg. at 7882-83.

52. 73 Fed. Reg. at 7882.

53. *Id.*

54. *Id.* at 7881-82; see also Dept. of Labor, Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg. 69504, 69505 (Dec. 1, 2006); see also Alba Luccero Villa, *First Circuit Ruling Stirs Speculation Over FMLA Changes*, 43 TRIAL 70, 72 (March 2007).

55. 73 Fed. Reg. at 7881.

56. *Id.*

57. *Id.* at 7881-82.

severed, following company policy or state law, or requiring that the 12 months be consecutive.<sup>58</sup>

The DOL's proposal of five years aptly follows its previous recommendation in its amicus brief in *Rucker*, in which it had cautioned that a five-year break in employment would be the "outer bounds of what is permissible."<sup>59</sup> The First Circuit responded, stating that creating a

judge-fashioned rule ... is not our role. We agree with the DOL that there are important policy issues involved here; the point of the *Chevron* doctrine is that the DOL, in the exercise of its statutory authority, must resolve these issues in the first instance. For a court to fashion as a matter of law a limiting rule not fairly contained in the existing regulatory language, but only suggested in an amicus brief, ultimately undermines administrative processes and places policy decision-making power in the wrong institution.<sup>60</sup>

In setting the parameters of such an administrative decision, the First Circuit explicitly recognized the constitutional roles of the court, Congress, and the DOL.<sup>61</sup> By recognizing and adhering to the DOL's role, *Rucker* appropriately encouraged the DOL to amend the ambiguous statute defining "eligible employee."<sup>62</sup>

The DOL's proposal is also timely, as lower courts have begun following *Rucker's* trend and combining limitless breaks in employment.<sup>63</sup> For instance, a federal district court in Michigan concluded that an employee with two non-consecutive periods of employment separated

by almost 20 years qualified as an "eligible employee" under FMLA.<sup>64</sup> A 20-year break in employment dramatically shifts the balance in favor of employees by burdening employers with substantially more record-keeping responsibilities. The DOL's proposal provides much-needed guidance to lower courts and employers.

Furthermore, these amendments to the eligibility requirements are reasonable in several important ways. First, the amendments weigh the employer's administrative and record-keeping concerns by requiring the employee to prove prior employment that predates the three-year record-keeping requirement.<sup>65</sup> Second, the amendments allow employers to exceed the five-year break of employment so long as employers do so uniformly with respect to all employees with similar breaks in service.<sup>66</sup> Lastly, and perhaps most importantly for employees, the amendments appropriately allow for two important exceptions to the five-year break: for military service and an approved absence or unpaid leave, such as for education or raising a child.<sup>67</sup> In these two situations, prior employment — regardless of the length of the break in employment — "must be used" in determining the employee's eligibility for FMLA leave.<sup>68</sup> In carving out these two exceptions, the DOL recognizes that an arbitrary time limit of five years is unfair in certain situations. Overall, these proposed amendments to the "eligible employee" provision are thoughtful and reasonable, reflecting and continuing to balance the concerns of both employers and employees.

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58. *Id.* at 7882.

59. *Rucker v. Lee Holding Co.*, 471 F.3d 6, 13 (1st Cir. 2006) ("The DOL amicus brief states its view that a break in service of over five years would be at the 'outer bounds of what is permissible.'").

60. *Id.* (citation omitted).

61. *Id.*

62. *Id.*

63. *O'Connor v. Bush's, Inc.*, 492 F.Supp.2d 736 (E.D. Mich. 2007); *Thomas v. Mercy Memorial Health Center, Inc.*, No. CIV-07-022-SPS, 2007 WL 2493095, at \*3 (E.D. Okla. Aug. 29, 2007). There has been one First Circuit decision since *Rucker*, *Kansky v. Coca-Cola Bottling Co. of New England*, 492 F.3d 54 (1st Cir. 2007), which involved long term disability benefits rather than FMLA. The court rejected the employee's argument to add his previous 19 months of employment

with the employee's current term of three months so as to preclude a pre-existing condition exclusion clause, which would have allowed him long-term disability benefits. *Id.* The court rested its determination on the express language of the long-term disability plan as well as how the FMLA is inapplicable to its terms. *Id.*

64. *O'Connor*, 492 F.Supp.2d at 742 (denying employer's motion to dismiss where employee has "valid claim" when seeking to combine employment periods separated by nearly 20 years).

65. 73 Fed. Reg. at 7882.

66. *Id.*

67. *Id.*

68. *Id.*

# Criminal Law — Restricting the Use of Jailhouse Informants and Expanding the Right to Counsel

*Commonwealth v. Murphy*, 448 Mass. 452 (2007)

## Introduction

Massachusetts courts have long viewed the testimony of jailhouse informants with a wary, if not skeptical, eye, because of the diaphanous incentive to do or say anything in hopes to curry favor with law enforcement.<sup>1</sup> More recently, Massachusetts and federal courts have wrestled with the government's use of jailhouse "informants at large" — i.e., informants who entered into an "articulated agreement containing a specific benefit" or promise thereof with the government, but were not directed to target a specific defendant.<sup>2</sup> The overriding issue is whether and to what extent the use of jailhouse informants at large strikes at the heart of the constitutional protections guaranteed to persons accused of a serious crime — the right to the aid and advice of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and under Article 12 of the Massachusetts Declaration of Rights. The Massachusetts Supreme Judicial Court ("SJC") addressed this issue in *Commonwealth v. Murphy*,<sup>3</sup> and issued a broad holding that will undoubtedly limit the government's use of jailhouse informant testimony.<sup>4</sup>

It is beyond question that the right to counsel "is a right upon which the essential element of fairness in the administration of justice depends."<sup>5</sup> Massachusetts and federal courts have been notably vigilant in this area and have unequivocally held that prosecutors and police "have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."<sup>6</sup> The right to counsel attaches at or after the time that judicial proceedings have been initiated against a defendant, either by way of formal charge, preliminary hearing, indictment, information, or arraignment.<sup>7</sup> While not all jailhouse informants are government agents, the government "has long been on notice that the use of prison informants risks

treading on the constitutional rights of an accused at a time when the accused is 'particularly susceptible to the ploys of undercover Government agents.'"<sup>8</sup> In *Murphy*, the SJC analyzed the admissibility of a defendant's post-indictment statements made to a jailhouse informant who had previously signed a cooperation agreement with the United States Attorney's Office ("USAO").<sup>9</sup> In reversing the defendant's first-degree murder conviction, the SJC held that under the Sixth Amendment and Article 12,

a jailhouse informant who has an agreement containing a specific benefit or promise thereof *does not have to target an individual defendant specifically to be an agent of the government ... [and] that the jailhouse informant [in *Murphy*] deliberately elicited incriminating statements from the defendant in violation of his right to counsel under the Sixth Amendment ...*<sup>10</sup>

The holding of *Murphy* itself is notable in that it reinforces a crucial right and protection of an accused. *Murphy* is more remarkable, however, in that the SJC's broad language, and willingness to overrule the trial judge's findings, evince an expansive view of the right to counsel resulting in a strict limitation on the use of jailhouse informant testimony. A strict reading of *Murphy* arguably means that for all practical purposes, the use of "cooperating" jailhouse informants in criminal cases in Massachusetts courts, absent unique, fortuitous circumstances for the government, may become a thing of the past.

## I. Facts

Frederick Murphy was convicted of first-degree murder and firearms charges in 1999 for a homicide that occurred in Springfield on August 2, 1993.<sup>11</sup> At trial, the critical evidence against the defendant came from

1. See, e.g., *Commonwealth v. Ciampa*, 406 Mass. 257, 263-64 (1989) (in admitting fact of accomplice's plea agreement into evidence, jury was not properly instructed to weigh accomplice's (or informant's) testimony with care; jury's attention should be focused on incentives that could have influenced accomplice's/informant's testimony; jury should be warned that in presenting accomplice/informant as witness, government does not know whether accomplice/informant is telling the truth; and jury instruction should emphasize that accomplice/informant truthfulness is solely a question for jury to decide). In the United States Court of Appeals for the First Circuit, a jury instruction as to the careful scrutiny of the testimony of an informant or accomplice is required, if requested. Modern Federal Jury Instructions: Criminal §2.07 (2008) (citing *United States v. Skandier*, 758 F.2d 43, 46 (1976); see *United States v. House*, 471 F.2d 886, 888 (1st Cir. 1973)). Massachusetts state courts, however, do not specifically require such an instruction. *Id.* (citing *Commonwealth v. Griffith*, 404 Mass. 256, 265 (1989)).

2. See *Commonwealth v. Murphy*, 448 Mass. 452, 463-65 (2007); *Commonwealth v. Reynolds*, 429 Mass. 388, 394 (1999).

3. 448 Mass. 452 (2007).

4. *Id.* at 463-64, 471-72.

5. *Guerin v. Commonwealth*, 339 Mass. 731, 734 (1959). See generally *Massiah v. United States*, 377 U.S. 201 (1964).

6. *Murphy*, 448 Mass. at 464 (quoting *Maine v. Moulton*, 474 U.S. 158, 171 (1985)).

7. *Fellers v. United States*, 540 U.S. 519, 523 (2004). Once an indictment issues, a defendant's right to counsel attaches, even before arraignment on the charge. See *Commonwealth v. Torres*, 442 Mass. 554, 571 (2004).

8. *United States v. Stevens*, 83 F.3d 60, 65 (2d Cir. 1996) ("[T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents.") (quoting *United States v. Henry*, 447 U.S. 264, 274 (1980)).

9. *Murphy*, 448 Mass. at 453.

10. *Id.* at 471-72 (emphasis added).

11. *Id.* at 453.

the testimony of two individuals: (1) Paul Smith, an eyewitness; and (2) Harold Wilson, a jailhouse informant.<sup>12</sup>

The victim, the defendant, and Smith were all from Jamaica.<sup>13</sup> All three knew one another. Specifically, the victim was the defendant's godson, and the defendant brought him to Springfield from New York City.<sup>14</sup> Similarly, the defendant brought Smith, who came to the United States on a visa in 1992, to Springfield from New York City in September 1992.<sup>15</sup> On the night of the murder, Smith was visiting a home on Andrew Street in Springfield where a friend of the victim lived.<sup>16</sup> "At some point after Smith arrived at the friend's house, Smith and the victim began walking to the victim's home."<sup>17</sup> At this time, a man wearing black pants and a black hooded sweatshirt emerged from a driveway at 91 Andrew Street.<sup>18</sup> "Smith started running as the man chased the victim and fired shots. Smith looked back and saw the victim fall."<sup>19</sup>

Smith fled to New York City the next day to consult with relatives in Brooklyn "because he was frightened."<sup>20</sup> Smith's relatives were not around, and Smith testified that he discussed the situation with "a person that [he knew] from Jamaica."<sup>21</sup> At trial, Smith disclosed for the first time (to the prosecution and the defense) that this Jamaican friend in New York was actually an alleged gang member, Derrick Riley, who had some possible drug trafficking ties in the Springfield area, and was potentially involved in the "motive" relating to the homicide.<sup>22</sup> Smith further testified that Riley had told him to return to Springfield and tell the police what he saw.<sup>23</sup> Smith returned to Springfield and gave the police a statement in which he identified the defendant as the shooter.<sup>24</sup>

The other evidence of the defendant's involvement in the homicide came from Wilson, the jailhouse informant, who had a pre-existing plea agreement with the USAO to reduce his sentence on certain federal charges.<sup>25</sup> Pursuant to that agreement, Wilson pled guilty in October 1998, to a number of counts involving federal firearms charges.<sup>26</sup> One of the boilerplate terms of the agreement "was that if the informant provided 'substantial assistance' to the government, in the discretion of the [USAO], a motion could be filed so that the sentencing judge could 'impose a sentence below that which otherwise would be required under the Sentencing Guidelines.'"<sup>27</sup>

The defendant and Wilson (hereafter "the informant") met while they were incarcerated together.<sup>28</sup> At the time of their interactions, the informant had already entered into the plea agreement with the USAO,

and the defendant had already been indicted for the murder and was represented by counsel.<sup>29</sup> The informant testified that the relationship commenced when the informant did a "favor" for the defendant.<sup>30</sup> The details of the favor (which were not disclosed to the jury) were that the defendant passed a "shank" to the informant, who then hid the shank from a correction officer.<sup>31</sup> Subsequently, the defendant asked the informant to communicate an offer for 50 pounds of "weed" to Smith (the eyewitness to the homicide) if Smith did not testify at the defendant's upcoming murder trial.<sup>32</sup> The informant did so (through his girlfriend who was the cousin of Smith's girlfriend) and reported back that Smith was not interested and was scared.<sup>33</sup> "The defendant then started talking to the informant about the victim, whom the defendant called his godson . . . . The informant stated that the defendant claimed to be angry with the victim [over the victim's payment of money to Derrick Riley], so the defendant 'licked' [the victim]."<sup>34</sup> Critically, in a written statement, the informant stated that after the defendant said that he was upset with the victim over his dealing with Riley, the informant asked the defendant "what he did about that."<sup>35</sup> In response, the defendant stated that he "licked" the victim.<sup>36</sup> The informant also noted in the written statement that he was "shocked" at the defendant's response, and the trial judge relied on the informant's "shock" as evidence that the admission was not deliberately elicited.<sup>37</sup>

At trial, the defense claimed that the informant was lying in order to receive a lighter sentence.<sup>38</sup> The informant claimed "that he was never asked directly by any law enforcement officer to engage in conversation with the defendant."<sup>39</sup>

The defendant moved to suppress the defendant's statements to the informant, but, after a pretrial voir dire of the informant, the trial judge found that (1) although there was an agreement with the federal government, there was no agency relationship, and (2) the statements were not deliberately elicited so as to violate the defendant's right to counsel under either the Sixth Amendment or Article 12.<sup>40</sup> The trial judge likewise denied the defendant's renewed argument for suppression at trial and his motion for a new trial on the same issues.<sup>41</sup>

During trial, the prosecutor for the commonwealth told the trial judge that the informant had no deal with her and she was not in a position to reward him.<sup>42</sup> At trial, she also elicited statements from the informant that he had no deal with her.<sup>43</sup> The SJC concluded that this

12. *Id.*

13. Brief of Commonwealth-Appellee at 3, *Commonwealth v. Murphy*, 448 Mass. 452 (2007) (No. 08196).

14. *Id.*

15. *Id.* See also *Murphy*, 448 Mass. at 453-54 (noting that Smith and the victim had made plans to go to a night club earlier that evening).

16. *Murphy*, 448 Mass. at 453-54.

17. *Id.* at 454.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. See *id.* at 454-56 (Riley and the defendant had allegedly been in a gunfight in New York. In addition, Riley "was making all of the Jamaican guys work for him or pay him . . . money." The victim was one of the people paying money to Riley, and this fact upset the defendant). See also Brief of Commonwealth-Appellee at 2, *Commonwealth v. Murphy*, 448 Mass. 452 (2007) (No. 08196) (noting that the defense sought to present evidence that Riley ordered the victim's murder in retaliation for a robbery in Springfield).

23. *Murphy* at 454-56.

24. *Id.* at 454.

25. *Id.* at 455, 457-58.

26. *Id.* at 457.

27. *Id.*

28. *Id.* at 455.

29. *Id.*

30. *Id.*

31. *Id.* at 455 n. 2.

32. *Id.* at 455.

33. *Id.*

34. *Id.* at 455-56.

35. *Id.* at 458.

36. *Id.*

37. *Id.* at 459.

38. *Id.* at 456.

39. *Id.* at 458.

40. *Id.* at 456-57.

41. *Id.* at 457.

42. *Id.* at 458.

43. *Id.*

information was incorrect, because post-trial discovery revealed that the commonwealth did inform the USAO of the informant's cooperation.<sup>44</sup> Additionally, the USAO ultimately filed a motion to reduce the informant's sentence by 50 percent.<sup>45</sup>

## II. Discussion

The SJC probed two critical issues: (1) whether the informant was a government agent under the Sixth Amendment or Article 12;<sup>46</sup> and (2) whether the informant deliberately elicited the defendant's statements.<sup>47</sup>

### A. Informants as Government Agents and the SJC's Rejection of the First, Second, and Eighth Circuits' Bright-Line Test

A defendant's right to counsel under both the Sixth Amendment and Article 12 attaches at the institution of formal criminal proceedings against him.<sup>48</sup> Beginning with *Massiah v. United States*,<sup>49</sup> the United States Supreme Court held that the need for, and thus the right to, the assistance of counsel applies equally in post-indictment extrajudicial settings as at trial.<sup>50</sup> In *Murphy*, the defendant was indicted in July 1998.<sup>51</sup> The defendant's federal and state constitutional rights to counsel had attached before the defendant spoke to the informant while he was incarcerated and awaiting trial on that indictment.<sup>52</sup> "Under the Sixth Amendment, if the government uses an agent deliberately to elicit statements from a defendant absent his counsel, those statements must be suppressed."<sup>53</sup> Thus, the first issue for the SJC to determine was whether or not the informant had become a government agent as a result of his plea agreement with the federal government.

The United States Supreme Court has not fully defined when an agency relationship formally arises in the context of informants.<sup>54</sup> However, in April 1999, the SJC issued its decision in *Commonwealth v. Reynolds*,<sup>55</sup> wherein the court analyzed the denial of a motion to suppress a jailhouse informant's testimony about the admissions made to him by a defendant awaiting trial on murder charges.<sup>56</sup> There, the informant relayed information to his attorney regarding the defendant's admissions, and the attorney then relayed the same facts to the district attorney's office.<sup>57</sup> The informant was in the process of negotiating a plea in an unrelated pending matter in Norfolk County at that time.<sup>58</sup> The commonwealth promised to bring the informant's cooperation to the attention of prosecutors in Norfolk County and the court, if and when requested.<sup>59</sup> Although the informant testified that he had obtained all

the information before calling his attorney, he also testified that he had continuous discussions with the defendant about the defendant's crime.<sup>60</sup> The SJC ultimately found that the record was unclear as to when the informant's attorney secured an agreement with the district attorney's office, and ordered the lower court to hold an evidentiary hearing and make findings of fact to resolve this ambiguity and determine the specific timing of the formation of an agency relationship between the informant and the commonwealth.<sup>61</sup> More importantly, the SJC held that the "promise of the recognition of cooperation is sufficient to form an agency relationship" and the "Commonwealth's promise [to bring the witness's cooperation to the attention of prosecutors and the court] was more than an unencouraged hope to curry favor.... Rather, there was an articulated agreement containing a specific benefit."<sup>62</sup> In other words, the SJC effectively held that an informant at large — i.e., one who made a generalized promise of cooperation with the government in exchange for "[t]he recognition of cooperation" — was a government agent.<sup>63</sup>

The SJC issued its decision in *Reynolds* without the guidance of the decision of the United States Court of Appeals for the First Circuit in *United States v. LaBare*.<sup>64</sup> In *LaBare*, issued in September 1999, the First Circuit — persuaded by the reasoning of the United States Courts of Appeals for the Second and Eighth Circuits that one is not an agent of the government unless a particular defendant is targeted — established a clear standard for the suppression of statements made by defendants to informants, holding that a "cooperation agreement that does not target a particular defendant does not trigger 'a successful *Massiah* objection to information collected' by a jailhouse informant."<sup>65</sup>

In *LaBare*, an informant and federal authorities met and arranged for the informant's "general cooperation" wherein the informant was not to question other inmates, but only to report what they had volunteered to him.<sup>66</sup> The informant entered into a plea agreement with the government, promising to disclose "all that he knows or has heard about violations of federal and state law."<sup>67</sup> At this time, the informant did not know LaBare, and LaBare's name had not been mentioned in the informant's interview with the federal authorities.<sup>68</sup> The First Circuit noted that under strict agency principles, the informant conceivably became a government "agent" when he entered into an agreement to report on future crime-related statements of fellow prisoners, but further noted that "common law agency rules are merely an available and not a controlling touchstone."<sup>69</sup> The First Circuit then adopted a bright-line test, holding

44. *Id.*

45. *Id.* at 458-59.

46. *Id.* at 459-68.

47. *Id.* at 468-71.

48. *Commonwealth v. Rainwater*, 425 Mass. 540, 557 (1997), *cert. denied*, 522 U.S. 1095 (1998); *Commonwealth v. Simmonds*, 386 Mass. 234, 237-38 (1982).

49. 377 U.S. 201 (1964).

50. *Id.* at 204-06.

51. *Murphy*, 448 Mass. at 459.

52. *Commonwealth v. Gaynor*, 443 Mass. 245, 257 (2005).

53. *Murphy*, 448 Mass. at 459 (citing *Commonwealth v. Reynolds*, 429 Mass. 388, 393 (1999)).

54. *Murphy*, 448 Mass. at 460.

55. 429 Mass. 388 (1999).

56. *Id.* at 392-93.

57. *Id.* at 395 n.8.

58. *Id.* at 394 n.6.

59. *Id.* at 394-95.

60. *Id.* at 395 n.8.

61. *Id.* at 394-95.

62. *Id.* at 394 n.7.

63. *Id.* at 392-94.

64. 191 F.3d 60 (1st Cir. 1999).

65. *Commonwealth v. Murphy*, 448 Mass. 452, 460 (2007) (quoting *LaBare*, 191 F.3d at 65); *see also* *Moore v. United States*, 178 F.3d 994, 999 (8th Cir.), *cert. denied*, 528 U.S. 943 (1999); *United States v. Birbal*, 113 F.3d 342 (2d Cir.), *cert. denied*, 522 U.S. 976 (1997).

66. *LaBare*, 191 F.3d at 64.

67. *Id.*

68. *Id.*

69. *Id.* at 65.

that a cooperation agreement that does not target a particular defendant does not create a government-agent relationship within the meaning of *Massiah v. United States*.<sup>70</sup> The court expressed concern with unduly expanding the definition of “government interrogation” and sought to establish clear precedent for lower courts and authorities to follow.<sup>71</sup> It reasoned that:

In the *Massiah* cases, the Supreme Court has sought to draw a line between government-instigated investigations of a defendant in the absence of his lawyer and other means by which the government might come into possession of admissions by the defendant. *Where the government asks a jail mate to report incriminating statements by anyone but has in no way focused the jail mate’s attention on an individual defendant, it is a stretch to describe the jail mate’s inquiries of the defendant as “government interrogation.”* Thus, we think the approach taken by the Second and Eighth Circuits ... is faithful to the main thrust of the *Massiah* precedents. Further, the Second and Eighth Circuit approach gives better guidance to law enforcement authorities on an issue that has no single “right” answer. Our concern with the Third Circuit approach — in which the lack of focus on the defendant is simply “a” factor — is that it leaves the authorities, and the lower courts, somewhat in the dark as to just how to decide such cases. The government enlists jailhouse informers often enough that it is better to have clear ground rules for what they can or cannot do. *Where a jail mate simply agrees to report whatever he learns about crimes from other inmates in general, we think there is not enough to trigger Massiah.*<sup>72</sup>

In *Murphy*, the informant claimed that he was never asked directly by any law enforcement officer to engage in conversation with the defendant,<sup>73</sup> and the cooperation agreement between the federal government and the informant did not include any requirement that he elicit information from the defendant or any other inmate.<sup>74</sup> On the contrary, the agreement stated, among other things, that if the informant provided “substantial assistance” to the government, a motion could be filed, in the discretion of the USAO, allowing the sentencing judge to “impose a sentence below that which otherwise would be required under the Sentencing Guidelines.”<sup>75</sup> Where a jail mate simply agrees

to report whatever he learns about other crimes from other inmates in general, there is not enough to find an agency relationship.<sup>76</sup> Hence, because the defendant was not individually targeted by the informant’s plea agreement with the federal government, the informant was not a government agent under the First Circuit standard. Although the SJC had neither accepted nor rejected the First Circuit bright-line test prior to *Murphy*, it had cited the requirement that the government have a role in the informant’s actions before finding the existence of an agency relationship.<sup>77</sup> While the SJC is not bound by any decision of any federal court other than the United States Supreme Court, the SJC recognized in *Murphy* that it “give[s] great deference to decisions of Federal courts if they seem persuasive.”<sup>78</sup>

Surprisingly, the SJC did not give “great deference” — or any deference — to the First Circuit in this instance, and rejected the bright-line test embraced by *LaBare*.<sup>79</sup> The SJC concluded that the holding in *Reynolds* — i.e., that an articulated agreement containing a “specific benefit” creates an agency relationship — is the standard for determining whether an informant is a government agent because: (1) “nothing in any United States Supreme Court cases requires targeting of a defendant for agency to attach...”; (2) there was a split among the federal circuits on the formation, for constitutional purposes, of a government-agent relationship; and (3) the *LaBare* case, as noted by the First Circuit, was a “close call.”<sup>80</sup> These rationalizations seemingly ignore the First Circuit’s conclusion that “it is a stretch” to describe a jail mate’s inquiries of a defendant as “government interrogation.”<sup>81</sup> Moreover, they wholly ignore the First Circuit’s desire to provide clear and consistent guidance to lower courts and law enforcement, who are otherwise left “somewhat in the dark” as to how to handle such situations.<sup>82</sup>

Critically viewed, the characterization of the informant in *Murphy* as a government agent within the meaning of *Massiah* is arguably a stretch. There was no evidence that the government targeted the defendant or asked the informant to engage the defendant, and there was no evidence that the informant actively encouraged the defendant to speak with him or to reveal his involvement in any crime.<sup>83</sup> At most, according to the informant’s written statement, “after the defendant told him that he was upset with the victim over his dealing with Riley,” the informant asked the defendant “what he did about that.”<sup>84</sup> In response, the defendant stated that he “licked” the victim.<sup>85</sup> The informant was “shocked” by this admission.<sup>86</sup> The issue for the SJC to determine was whether such facts present the type of government overreaching that circumvents the

70. *Id.* at 65-66.

71. *Id.*

72. *Id.* (emphasis added).

73. *Commonwealth v. Murphy*, 448 Mass. 452, 458 (2007).

74. Brief of Commonwealth-Appellee at 39, *Commonwealth v. Murphy*, 448 Mass. 452 (2007) (No. 08196).

75. *Murphy*, 448 Mass. at 457.

76. *LaBare*, 191 F.3d at 65-66.

77. See *Commonwealth v. Reynolds*, 429 Mass. 388, 393 (1999) (if nothing is offered or asked of the informant, his actions will not be attributed to the commonwealth); *Commonwealth v. Gajka*, 425 Mass. 751, 753 (1997) (“In the absence of government encouragement, the defendant’s right to counsel was not violated

by the cellmate’s questioning.”).

78. *Murphy*, 448 Mass. at 462.

79. *Id.* at 459 (SJC was not required to defer to trial judge’s conclusions of law, as reviewing court makes “an independent determination as to whether [an informant] was functioning as a government agent.”).

80. *Id.* at 463 (citing *LaBare*, 191 F.3d at 66).

81. *LaBare*, 191 F.3d at 65-66.

82. *Id.* at 66.

83. *Murphy*, 448 Mass. at 455.

84. *Id.* at 458.

85. *Id.*

86. *Id.* at 459.

protections contemplated by *Massiah*. *Massiah* involved the surreptitious eavesdropping (via radio transmitter) of an indicted defendant by a law enforcement agent.<sup>87</sup> The defendant in *Massiah* was targeted, and the government deliberately instigated an *interrogation* of the defendant and deliberately elicited incriminating evidence from him in the absence of his lawyer.<sup>88</sup> Accordingly, the United States Supreme Court held that Sixth Amendment protections applied, even in the context of indirect and surreptitious interrogations.<sup>89</sup> In *Murphy*, there was far less empirical evidence tending to demonstrate government interrogation. On the contrary, any active “government” involvement occurred prior to the time at which the informant gleaned his information, and, in view of the facts which tended to show that the defendant initiated the relevant conversations, any “interrogation” was negligible if not non-existent. Cynically viewed, the SJC crafted an overbroad interpretation of “agency” under the Sixth Amendment and *Massiah* to discourage the *possibility* of government overreaching, as opposed to *definitive* government overreaching.

At the same time, however, the SJC justifiably feared that the bright-line rule requiring targeting of a specific defendant, “would allow the government to circumvent its affirmative obligation to protect rights of the accused by creating...an informant at large.”<sup>90</sup> Clearly, the government’s agreement with the informant, which ofered consideration in exchange for cooperation, created a *substantial ongoing relationship* with the informant to report observations to law enforcement. It is the very creation of this relationship that concerned the SJC. The court recognized that the tactic of using an informant at large manifests a situation whereby the government has acted to deliberately elicit information from a defendant whose constitutional rights to counsel have attached, and who, like the defendant in *Massiah*, is plausibly undergoing a subtle form of interrogation when conversing with an informant acting under an agreement with the government.<sup>91</sup> Although helpful to law enforcement and lower courts from a technical standpoint, the First, Second, and Eighth Circuits’ bright-line test ignores the ongoing and forceful nature of the relationship already forged between the government and informants, and disregards the subtle tactics employed by informants who have every incentive to curry favor with the government, and little incentive to act as mere passive listeners. Put another way, the bright-line test ignores the practical reality that virtually all persons awaiting trial who live, meet, and confer with such cooperating informants could fairly be categorized as government “targets” to some degree. Ironically, however, in this effort to avoid the one-size-fits-all impact of the First Circuit’s clearly defined rule, the SJC effectively adopted a bright-line test of its own, which expansively defines “government agent” in the context of cooperating jailhouse informants. The

SJC’s approach lacks the consistency and guidance of the First, Second, and Eighth Circuits.<sup>92</sup>

Likewise, the *Murphy* approach — i.e. the strict rule that an articulated agreement containing a “specific benefit” mandates a finding of an agency relationship — seems to lack the flexibility proffered by the Third and Fifth Circuit approach, in which the courts consider several factors in order to determine whether the informant is an agent.<sup>93</sup> In *United States v. Brink*, the United States Court of Appeals for the Third Circuit determined that a “paid informant” could be anyone who was ofered compensation, “benefits, preferential treatment, or some future consideration, including, but not limited to, a reduction in sentence, in exchange for eliciting information.”<sup>94</sup> There, the court found that a tacit agreement arguably existed between an informant and the government where the informant had previously cooperated with the government and was trained as an informant, even though at the time he had no instructions to acquire information.<sup>95</sup> The Fifth Circuit in *Creel* proposed a two-pronged test to determine agency: first, whether the informant was promised or actually received a benefit (or led to reasonably believe that he would receive one) in exchange for soliciting information from the defendant, and second, whether the informant acted pursuant to instructions from the state, or otherwise submitted to the state’s control.<sup>96</sup> In the absence of evidence that the state directed or controlled the informant in learning the relevant information — an issue of fact for the trial judge — a finding of agency is not warranted.<sup>97</sup> In the approach adopted by the SJC in *Murphy*, by contrast, the finding of agency was a fait accompli — despite the existence of facts which tended to show that the defendant acted at his own peril and despite the trial judge’s specific findings to the contrary — because of the mere existence of the informant’s general agreement with the USAO.

Perhaps recognizing the far-reaching nature of its holding under the Sixth Amendment, the SJC held that even if its interpretation of the *Massiah* line of cases is overbroad, Article 12 ofered “more protection of the right to counsel than the Sixth Amendment...”<sup>98</sup> Noting that the SJC had previously safeguarded the attorney-client relationship and previously interpreted the Article 12 right to counsel more expansively than the Sixth Amendment, the SJC held that, “[i]n order to give meaning to the government’s affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel,” Article 12 “requires” the court to “protect defendants from ‘informants at large’ where... the informant has an articulated agreement with the government that contains a specific benefit or promise, and then trolls the jail for victims.”<sup>99</sup> In essence, the SJC confirmed that an articulated agreement containing a specific benefit likewise mandates a finding of “agency” under Article 12. In view of the

87. *Massiah v. United States*, 377 U.S. 201, 202-03 (1964). Once a defendant’s right to counsel attaches, law enforcement agents cannot deliberately elicit statements from him in the absence of his attorney. *Kuhlmann v. Wilson*, 477 U.S. 436, 457 (1986); *Massiah*, 377 U.S. at 206. “[T]he primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police investigation.” *Kuhlmann*, 477 U.S. at 459; *accord* *Commonwealth v. Hilton*, 443 Mass.597, 615 (2005).

88. *Massiah*, 377 U.S. at 202-06.

89. *Id.* at 206.

90. *Murphy*, 448 Mass. at 464 (internal quotation marks omitted); *see also* *Commonwealth v. Moose*, 529 Pa. 218, 229, 602 A.2d 1265, 1270 (1992) (“The fact that the Commonwealth intentionally left [the informant] there to harvest information from anyone charged with a crime and awaiting trial is the villainy.”).

91. *Murphy*, 448 Mass. at 464-65.

92. *United States v. LaBare*, 191 F.3d 60, 64 (1st Cir. 1999); *Moore v. United States*, 178 F.3d 994, 1000. (8th Cir. 1999); *United States v. Birbal*, 113 F.3d 342, 346 (2d Cir. 1993).

93. *United States v. Brink*, 39 F.3d 419, 423-24 (3d Cir. 1994); *Creel v. Johnson*, 162 F.3d 385, 393-94 (5th Cir. 1998).

94. *Brink*, 39 F.3d at 423 n. 5.

95. *Id.* at 424.

96. *Creel*, 162 F.3d at 393.

97. *Id.* at 394.

98. *Commonwealth v. Murphy*, 448 Mass. 452, 465 (2007).

99. *Id.* at 467.

SJC's prior willingness to expand Article 12 protections in other cases, this conclusion continued a predictable trend.<sup>100</sup>

## B. The SJC Found that the Informant Deliberately Elicited Statements from the Defendant

The trial judge in *Murphy* found that even if the informant was a government agent, he did not deliberately elicit incriminating statements from the defendant.<sup>101</sup> The SJC held that this ruling was "error" and that the defendant's statements should have been suppressed.<sup>102</sup> Specifically, "[t]aken alone, the informant's questioning of the defendant about what he did about the anger toward the victim was a deliberate elicitation of the incriminating statement that the defendant 'licked' him."<sup>103</sup> The SJC also pointed to two additional factors to support its conclusion that the informant deliberately elicited incriminating information from the defendant. First, the court noted that the informant "did more than just ask a direct question;" rather, it was not until the informant hid a "shank" that the informant and defendant began talking.<sup>104</sup> Second, the court noted that the informant "did not pretend to contact the witness and go to authorities. Instead, he actually did contact the witness. It was only after these two incidents that the defendant began discussing the victim and the informant was able to ask the defendant about his anger toward the victim."<sup>105</sup> The SJC's emphasis on these points — that the informant actually did hide a shank for the defendant and actually did contact the eyewitness (through his girlfriend) — seems counterintuitive at first glance. First, the informant hid a "shank" that the defendant handed off to him.<sup>106</sup> Second, the informant contacted the eyewitness, through his girlfriend, at the defendant's request.<sup>107</sup> Third, on the whole, the evidence tended to demonstrate that the defendant initiated the contact with the informant, and that the informant acted, albeit willingly and responsively, at the defendant's prompting. The facts do not fully support the court's conclusion that through this conduct, the informant "created an environment that lured the defendant into a false sense of trust of the kind considered in *United States v. Henry*."<sup>108</sup> Rather, the facts tended to equally suggest that the informant simply responded to the defendant's overtures. Indeed, the trial judge found as much, and the record seemingly supported that finding.<sup>109</sup>

While the SJC's reasoning is apparent, the holding that the trial judge's findings of fact constituted "clear error"<sup>110</sup> is not so obvious. The evidence in the present case did not necessarily demonstrate that the

informant had "troll[ed] the jail for victims."<sup>111</sup> Rather, the evidence suggested that the defendant repeatedly initiated contact with the informant. Although the SJC seized on the notion that the informant had gained the defendant's trust and effectively lured the defendant into making the incriminating statements, the facts, at most, revealed that a relationship between the informant and the defendant was formed at the defendant's instigation; the defendant trusted the informant; the defendant made various statements to the informant; and the informant asked a single question of the defendant in the course of a conversation that the defendant apparently initiated.<sup>112</sup> Although the informant testified on voir dire, that he interpreted "cooperation" to mean "find out information ... and help get somebody convicted," the evidence adduced in the lower court did not reveal that the informant initiated or instigated conversation or contact with the defendant.<sup>113</sup> Moreover, the trial judge credited the informant's statement that he was "shocked" by the defendant's admission.<sup>114</sup> In short, the trial judge's finding that the informant did not deliberately elicit the incriminating statements from the defendant hardly seems to meet the "clearly erroneous" standard for reversal.

Furthermore, the trial judge's factual and legal conclusions closely resemble the findings in *Kuhlmann v. Wilson*<sup>115</sup> wherein the United States Supreme Court reversed the Second Circuit's finding that a government informant deliberately elicited defendant's statements in violation of the Sixth Amendment.<sup>116</sup> In *Wilson*, a defendant who was seen carrying loose money in his arms while fleeing the site of a robbery and murder, admitted to the police that he had been present during the robbery, gave police a description of the robbers, but denied knowing the robbers.<sup>117</sup> After his arraignment, the defendant was confined in a cell in the Bronx House of Detention — which looked out on the location of the crime scene — with a prisoner named Benny Lee.<sup>118</sup> Unknown to the defendant, Lee had agreed with the government to listen to the defendant's conversations and report back to the government.<sup>119</sup> The defendant initiated conversation with Lee, and narrated the same story that he had previously told to the police.<sup>120</sup> In response, Lee told the defendant that this explanation "didn't sound too good."<sup>121</sup> A few days later, the defendant changed details of his original account, and in a later conversation admitted to Lee that he and two other men had planned and carried out the robbery and committed the murder.<sup>122</sup> The United States Court of Appeals for the Second Circuit held that

100. See, e.g., *Commonwealth v. Mavredakis*, 430 Mass. 848, 858 (2000); *Commonwealth v. Rainwater*, 425 Mass. 540, 553 (1997).

101. *Murphy*, 448 Mass. at 468.

102. *Id.* at 468, 470.

103. *Id.* at 469.

104. *Id.* at 470.

105. *Id.*

106. *Id.* at 455 n.2.

107. *Id.* at 455.

108. *Id.* at 470; see also *United States v. Henry*, 447 U.S. 264, 265, 270-72 & n.8 (1980) (violation of Sixth Amendment right to counsel found where government allegedly engaged informant to be "passive listener", but totality of circumstances showed otherwise, as informant had been paid government informant for more than a year, FBI agent/informant contact was aware that informant had access to defendant and would be able to engage him in conversation without arousing defendant's suspicion, arrangement between informant and agent was on contingent-fee basis, defendant's incriminatory statements were found to be product of conversations arguably initiated or stimulated by informant, and agent's affidavit

revealed that, in his conversations with informant, agent singled out defendant as the inmate in whom agent had special interest).

109. *Murphy*, 448 Mass. at 455-59.

110. *Id.* at 459, 468.

111. *Id.* at 467.

112. *Id.* at 455-56, 458, 468-69.

113. *Id.* at 465, 457-59.

114. *Id.* at 469.

115. 477 U.S. 436 (1986).

116. *Id.* at 460.

117. *Id.* at 439.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 439-40.

122. *Id.* at 440.

the circumstances of the case were indistinguishable from the facts in *United States v. Henry*<sup>123</sup> and that the statements made to the informant were inadmissible under the Sixth Amendment.<sup>124</sup> The Supreme Court noted that the court of appeals focused — to the exclusion of other relevant findings of the lower courts — on the informant’s *one* remark to the defendant that his initial version of events “didn’t sound too good,” and rejected the Second Circuit’s finding that “[s]ubtly and slowly, but surely, [the informant’s] ongoing verbal intercourse with [defendant] served to exacerbate [defendant’s] already troubled state of mind.”<sup>125</sup> Thus, even though the informant targeted the defendant at the request of the government, developed a relationship with the defendant as his cellmate in a cell overlooking the scene of the crime, engaged in conversation with the defendant, and told the defendant that his exculpatory story was not believable, there was no Sixth Amendment violation.

Unlike the informant in *Wilson*, the informant in *Murphy* was not asked by the government to target the defendant, and did not have the same incentive to elicit information from this specific defendant. Yet the mere asking of one question alone by the informant ends the constitutional inquiry under the SJC’s analysis. The SJC’s holding mandates a finding of a Sixth Amendment and Article 12 violation, absent pure passivity by the informant. Indeed, characterizing the informant’s single question of the defendant in this case as “deliberately creat[ing] a situation designed to induce a defendant to make incriminating statements”<sup>126</sup> creates a very strict standard, which should virtually eliminate the use of “cooperating informants.” Under this standard, any time a government entity enters into a general agreement with a person to provide undefined government cooperation in exchange for a general promise of potential consideration, any information gleaned by that person, via any question, could be inadmissible because (a) the person would be an “agent” as discussed in Part I, and (b) the person would be found to have deliberately elicited information. Here again, the significance of the SJC’s broad interpretation of Article 12 and the Sixth Amendment should not be overlooked. Under *Murphy*, virtually any cooperating jailhouse informant, except those who initiate contact with the government after obtaining their information, is a government agent, and any such informant who inquires in any way of a defendant, will presumably be precluded from testifying to any such admissions subsequently made to him. Such an approach goes beyond the United States Supreme Court’s primary concern of “secret interrogation with techniques equivalent to direct police interrogation.”<sup>127</sup> Ironically, the SJC has adopted a standard whereby an informant who claims without foundation or any indicia of reliability that a defendant blurted out an admission, can testify at trial; whereas an informant who actually has

corroborative evidence and indicia of reliability — e.g., the informant in the instant case to whom the defendant had a real and credible basis to conf de — cannot testify at trial.

## Conclusion

The SJC’s reasoning in *Murphy* is consistent with Massachusetts precedent in that it directs courts to view the use of informants with extreme caution, and compellingly reinforces the right to counsel in post-indictment situations. Nevertheless, the broad implications of the holding are as yet unknown, and potentially far-reaching. The “primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation.”<sup>128</sup> To the SJC, *Murphy* presents an example of the subtle techniques that law enforcement may use to continue to investigate crimes and obtain corroborative evidence in serious cases. Yet it hardly seems accurate to label the facts of *Murphy* as the *equivalent* of direct police interrogation.<sup>129</sup> At the same time, there should be little doubt that the government uses informants at large, at least in part, to retrieve information from indicted defendants protected by the Sixth Amendment and Article 12.

From a practical perspective, *Murphy* discourages the use of informants at large. It is difficult to conceive of situations in which an informant who has signed on to “cooperate” with the government in exchange for potential consideration will be allowed to testify against defendants who choose at their own peril to conf de in such persons. Indeed, if the informant in *Murphy* is considered a “government agent” who affirmatively “elicited information” within the meaning of *Massiah*, then the use of jailhouse informants with cooperation agreements will largely become a thing of the past. The *Murphy* rule may have an unfortunate legacy if only informants who claim that a defendant “blurted out” an admission are still allowed to testify against defendants, despite the absence of any corroborating circumstances. Ultimately, the standard adopted by the SJC effectively (1) renders *any* agreement between an informant and the government that promises *any* degree of potential consideration to the informant in exchange for “cooperation” — no matter how small, conditional, or general — as creating an agency relationship; (2) characterizes *any* ensuing conversation between such informants and defendants as “government interrogation,” and thus (3) renders *any* information gleaned by such informants from any defendant inadmissible. Ironically, in its effort to avoid the one-size-fits-all impact of the First Circuit’s bright-line test, the SJC may have adopted a bright-line test of its own, which could result in the exclusion of otherwise admissible and critical evidence.

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123. 447 U.S. 264 (1980).

124. *Kuhlman*, 477 U.S. at 443, 456.

125. *Id.* at 460.

126. *Commonwealth v. Murphy*, 448 Mass. at 469 (2007) (quoting *Henry*, 447 U.S. at 274).

127. *United States v. Brink*, 39 F.3d 419, 422 (3d Cir. 1994) (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (“primary concern of *Massiah* line of decisions

is secret interrogation with techniques equivalent to direct police interrogation”)).

128. *Kuhlmann*, 477 U.S. at 459.

129. *See, e.g., Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 893 (3d Cir.), *cert. denied sub nom. Matteo v. Brennan*, 528 U.S. 824 (1999) (informant’s conduct was not deliberate elicitation, where defendant enlisted informant’s aid in locating a rifle, and informant asked only clarifying questions).

# Corporate Law — The Bases for Piercing the Corporate Veil

*Scott v. NG US 1, Inc.*, 450 Mass. 760 (2008)

“One of the basic tenets of [corporate common law] is that corporations — notwithstanding relationships between or among them — ordinarily are regarded as separate and distinct entities.”<sup>1</sup> Nevertheless, the corporate veil may be pierced to “hold shareholders, including parent corporations of wholly-owned subsidiaries, liable for the torts of the corporation.”<sup>2</sup> The Supreme Judicial Court (“SJC”) has articulated “twelve factors to be considered when a court is faced with the issue of setting aside corporate formalities.”<sup>3</sup> “The twelve factors are to be examined to form an opinion whether the overall structure and operation misleads.”<sup>4</sup>

In *Scott v. NG US 1, Inc.*,<sup>5</sup> the SJC considered whether a corporation could be liable under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act (“Chapter 21E”)<sup>6</sup> for the conduct of its corporate predecessor several decades earlier. Chapter 21E regulates the reporting, investigation and remediation of a release (or threat of release) of oil or hazardous materials in Massachusetts. In applying settled law, the court overruled, in part, an Appeals Court decision that shifted its analysis from the 12 determinative factors for piercing the corporate veil and focused on “public policy and statutory purpose [as] important considerations in the equitable mix.”<sup>7</sup> This case comment describes the Appeals Court’s decision, its implications and the reasons for its reversal by the SJC.

1. *Scott v. NG US 1, Inc.*, 450 Mass. 760, 766 (2008).

2. *NCR Credit Corp. v. Underground Camera, Inc.*, 581 F. Supp. 609, 612 (D. Mass. 1984) (citation omitted); see also *My Bread Baking Co. v. Cumberland Farms, Inc.*, 353 Mass. 614, 618-19 (1968) (analyzing “[t]he circumstances in which one corporation, or a person controlling it, may become liable for the acts or torts of an affiliate or a subsidiary under common control”).

3. *Attorney Gen. v. M.C.K., Inc.*, 432 Mass. 546, 555 (2000).

[T]he twelve factors to be considered when a court is faced with the issue of setting aside corporate formalities include:

(1) common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation’s funds by dominant shareholder; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud.

*Id.* at 554 & n.19; see also *Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 15 (1st Cir. 1985) (describing “general criteria for ignoring the separate corporate existences of a group of corporations under common ownership and control”).

4. *Hewitt v. Bay State Gas Co.*, Nos. 04-P-196 and 04-P-197, 2005 WL 1514343, at \*2 (Mass. App. Ct. June 27, 2005).

5. 450 Mass. 760 (2008).

6. MASS. GEN. LAWS ch. 21E, §§ 1-21 (2006 & Supp. Sept./Oct. 2008). The liability provisions in Chapter 21E at issue in *Scott* provide:

(a) Except as otherwise provided in this section, (1) the owner or operator of a vessel or a site from or at which there is or has been a release or threat of release of oil or hazardous material; (2) any person who at the time of storage or disposal of any hazardous material owned

## I. Chapter 21E

“The intent of the Chapter 21E statute is to reimburse people for cleaning up oil and hazardous waste spills that occurred long ago and are not easily discoverable, and where damages for removal are unclear.”<sup>8</sup> Before the legislature enacted Chapter 21E, “expansive remedies including ... assessment, containment, and removal costs [were] outside the ambit of traditional common law remedies.”<sup>9</sup> The legislature sought “to clarify and improve the commonwealth’s capability for responding to releases of oil and hazardous material and to recover response costs from persons responsible for releases for which it has incurred such costs.”<sup>10</sup>

Chapter 21E is a corollary to the Federal Comprehensive Environmental Response, Compensation, and Liability Act<sup>11</sup> (“CERCLA”), which “reflects Congress’s desire to hold liable those who would attempt to dispose of hazardous wastes or substances under various deceptive guises in order to escape liability for their disposal.”<sup>12</sup> Under both Chapter 21E and CERCLA, “a private right of action is permitted for those who suffer injury but it must be part of a cleanup or response to a hazardous material problem.”<sup>13</sup>

## II. *Scott*

In January 2002, Wayne Scott, trustee of 12 Woodbury Court Trust, purchased property in Salem, Massachusetts (the “Property”) to develop for construction of townhouses.<sup>14</sup> During construction, he discovered coal tar on the Property that migrated from an abutting

or operated any site at or upon which such hazardous material was stored or disposed of and from which there is or has been a release or threat of release of hazardous material; (3) any person who by contract, agreement, or otherwise, directly or indirectly, arranged for the transport, disposal, storage or treatment of hazardous material to or in a site or vessel from or at which there is or has been a release or threat of release of hazardous material; (4) any person who, directly, or indirectly, transported any hazardous material to transport, disposal, storage or treatment vessels or sites from or at which there is or has been a release or threat of release of such material; and (5) any person who otherwise caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or site, shall be liable, without regard to fault ... to any person for damage to his real or personal property incurred or suffered as a result of such release or threat of release....

MASS. GEN. LAWS ch. 21E, § 5 (2006). The statute also authorizes private actions to recover response costs. See *id.* §§4 and 4A.

7. *Scott v. NG US 1, Inc.*, 67 Mass. App. Ct. 474, 480 (2006), *s.c.*, 450 Mass. 760 (2008).

8. *Town of Weymouth v. James J. Welch & Co., Inc.*, No. CIV. A-90-985-A, 1996 WL 680082, at \*4 (Mass. Super. Ct. Nov. 19, 1996).

9. *Id.*

10. *Garweth Corp. v. Boston Edison Co.*, 415 Mass. 303, 307 (1993) (citing *Nassr v. Commonwealth*, 394 Mass. 767, 773 (1985)).

11. 42 U.S.C.A. §§ 9601 - 9675 (West 2005 & Supp. 2008).

12. *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1065-66 (5th Cir. 1990).

13. *Garweth Corp.*, 415 Mass. at 308.

14. *Scott v. NG US 1, Inc.*, 450 Mass. 760, 763 (2008).

property on Northey Street (“Northey Street Property”).<sup>15</sup> From 1850 to 1890, a gas manufacturer — Salem Gas Light Company (“Salem Gas”) — conducted coal gasification on the Northey Street Property.<sup>16</sup> Salem Gas ended gas production in 1890.<sup>17</sup> “Between 1926 and 1931, North Boston Lighting Properties (“NBLP”), a utility holding company, purchased shares of Salem Gas stock. New England Power Association (“NEPA”) then purchased NBLP stock, so that Salem Gas became a subsidiary of NEPA.”<sup>18</sup> NEPA reorganized in 1947 and transferred its assets and liabilities (including Salem Gas) to New England Electrical Supply (“NEES”).<sup>19</sup> On January 23, 1973, NG US 1, Inc. d/b/a National Grid USA (“National Grid”) became NEES’ corporate successor.<sup>20</sup>

Scott undertook to contain and remove the coal tar from the Property.<sup>21</sup> On September 5, 2002, he filed a lawsuit in Suffolk Superior Court against National Grid, among others, to recover his cleanup costs pursuant to Chapter 21E.<sup>22</sup> The court granted National Grid’s summary judgment motion, concluding that its predecessor-in-interest — NEES — lacked interest in, or control over, Salem Gas when Salem Gas released contaminants on the Northey Street Property.<sup>23</sup>

On appeal, the Appeals Court first addressed Scott’s assertion that NEES should have been treated as a “present operator” of the Northey Street Property or a “person otherwise responsible for the release of hazardous materials” pursuant to Chapter 21E.<sup>24</sup> Specifically, Scott

“argue[d] that the discharge of hazardous materials into the soil at the Northey Street site, and their continued presence there, is equivalent to storage in containers or a lagoon and that, so long as NEES fails to remove the hazardous materials and clean up the site, NEES continues to be an operator of the site.”<sup>25</sup>

The court rejected Scott’s argument, finding “no authority for this broad interpretation of what constitutes a present operator under the statute, and ... declin[ing] to extend its meaning to an entity in NEES’s position that never conducted any activities at the site.”<sup>26</sup> The court then turned to whether NEES “still may be subject to derivative liability for its subsidiary’s contamination of the Northey Street site through the doctrine of piercing the corporate veil.”<sup>27</sup>

15. *Id.*

16. *Id.*

17. *Id.*

18. *Scott v. NG US 1, Inc.*, 67 Mass. App. Ct. 474, 476 (2006), *s.c.*, 450 Mass. 760 (2008).

19. *Scott*, 450 Mass. at 764.

20. *Id.*

21. *Scott*, 67 Mass. App. Ct. at 475.

22. *Id.* at 476.

23. *Id.* at 477. The trial court also denied the defendants’ claims for attorney’s fees and costs under section 4A(f) of Chapter 21E. *Id.* at 489.

24. *Id.* at 478.

25. *Id.*

26. *Id.*

27. *Id.* at 479 (internal quotation marks omitted).

28. *Id.* at 483.

29. *Id.* at 482-83.

### III. Public Policy, Statutory Purpose and Piercing the Corporate Veil

The Appeals Court examined the corporate relationship between NEES and Salem Gas vis-à-vis the broad, remedial statutory scheme of Chapter 21E. The statute’s purpose, the court explained, “recognizes the ongoing nature of the harm caused by releases and that specifically imposes obligations on the party responsible for the continuing harm.”<sup>28</sup> “The reach of the statute, and indeed much of its content, goes far beyond the instant in time when hazardous materials come into contact with the soil.”<sup>29</sup> Thus, the court relied on the purpose of Chapter 21E to expand “the equitable considerations that come into play when applying the statutory objectives to the common-law doctrine of piercing the corporate veil.”<sup>30</sup>

The court took its lead “from the application of CERCLA ... [and] refer[red] to the policies underlying G.L. c. 21E to determine whether injurious consequences flowed from NEES’s control over Salem Gas.”<sup>31</sup> “[I]n weighing the factors that determine whether NEES may remain insulated behind its separate corporate form ... [the court] consider[ed] ... the period when the harm from that release persisted, unabated and unmitigated, to the point where surrounding properties were contaminated as well.”<sup>32</sup> NEES and National Grid responded that “in order to justify piercing the corporate veil, the parent must be in control of the subsidiary at the time the offensive conduct occurred.”<sup>33</sup> The Appeals Court determined, however, that “[t]he reach of the statute, and indeed much of its content, goes far beyond the instant in time when hazardous materials come into contact with the soil, focusing instead on actions and obligations undertaken in the assessment, containment, and removal of those materials.”<sup>34</sup> Even though Salem Gas ended gas production in 1890, the court found that “NEES’s failure to act in order to identify the threat to public safety and to the environment, and to prevent the spread of dangerous contamination at a site formerly operated by its subsidiary, could be construed by a factfinder as an ‘injurious consequence’ of NEES’s control.”<sup>35</sup> Therefore, “both equity and public policy cut against a determination as a matter of law that corporate form and the passage of time protected NEES from the liabilities of Salem Gas, especially when an innocent third party will be left with the expense of the present-day cleanup.”<sup>36</sup> The Appeals Court remanded the case with respect to Scott’s Chapter 21E claims, satisfied that “neither the coal tar on the plaintiff’s property nor responsibility for its cleanup simply disappeared over time.”<sup>37</sup> NEES and National Grid filed applications for further appellate review.<sup>38</sup>

30. *Id.* at 483.

31. *Id.* at 482.

32. *Id.* at 483.

33. *Id.* at 482.

34. *Id.* at 482-83.

35. *Id.* at 484.

36. *Id.* at 485. The Appeals Court also reviewed Scott’s successor liability claims against Boston Gas based on its purchase of North Shore, which had acquired Salem Gas, from NEES. *Id.* at 486. The court “agree[d] with the [superior court] judge that here, the lack of continuity in management, officers, directors and shareholders between North Shore and Boston Gas undercut the justification for transferring Salem Gas’s environmental liability to Boston Gas.” *Id.* at 486-87. The court affirmed, finding that “[t]he judge was correct in ruling that the sale of North Shore to Boston Gas did not constitute a de facto merger or mere continuation of the business, so as to justify the transfer of Salem Gas’s environmental liabilities to Boston Gas.” *Id.* at 486.

37. *Id.* at 485.

38. *Scott*, 450 Mass. at 762.

On appeal to the SJC, “[p]redominant among the issues raised [was] whether a parent corporation first acquiring an ownership interest in a subsidiary corporation decades after the subsidiary both released environmentally hazardous material and sold the contaminated site, without more, may be liable under G.L. c. 21E for later incurred response costs at the site.”<sup>39</sup> Specifically, the court focused almost exclusively on “the question [of] whether NEES — which acquired its interest in Salem Gas decades after both the environmental contamination and sale of the site — is indirectly liable for that release through application of corporate veil piercing concepts.”<sup>40</sup>

“It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries.”<sup>41</sup> As early as 1937, the SJC recognized that “a corporation [was] an entity separate from the stockholders and officers ... except so far as in exceptional cases courts find it necessary to restrict their rights in order to prevent fraud or injustice through the use of corporate forms.”<sup>42</sup> Since then, “Massachusetts has been somewhat more ‘strict’ than other jurisdictions in respecting the separate entities of different corporations.”<sup>43</sup>

Massachusetts courts pierce the corporate veil only “in rare particular situations in order to prevent gross inequity.”<sup>44</sup> These “rare particular situations” include “exceptional cases ... to prevent fraud or injustice through the use of corporate forms.”<sup>45</sup> Such cases involve, for example, “active and direct participation by the representatives of one corporation, apparently exercising some form of pervasive control, in the activities of another and there is some fraudulent or injurious consequence of the intercorporate relationship.”<sup>46</sup> Other examples include “a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting.”<sup>47</sup> “Ultimately, the decision to disregard settled expectations accompanying corporate form requires a determination that the parent corporation directed and controlled the subsidiary, and used it for an improper purpose.”<sup>48</sup>

Early in the *Scott* opinion, the SJC stated that “[n]either Federal (CERCLA) nor State environmental laws displace bedrock principles

of corporate common law.”<sup>49</sup> Likewise in Massachusetts, “the equitable doctrine of corporate disregard differs in no material respect [from the federal common law] ... and nothing in G.L. c. 21E displaces the doctrine’s established scope.”<sup>50</sup> “In the environmental context, as in other contexts, corporate veils are pierced only in rare particular situations, and only when an agency or similar relationship exists between the entities.”<sup>51</sup> The court reaffirmed that “[a] veil may be pierced where the parent exercises some form of pervasive control of the activities of the subsidiary *and* there is some fraudulent or injurious consequence of the intercorporate relationship.”<sup>52</sup>

The Appeals Court in *Scott* had acknowledged that, ordinarily, “[t]he doctrine of corporate disregard [was] an equitable tool that authorizes courts, *in rare situations*, to ignore corporate formalities, where such disregard [was] necessary to provide a meaningful remedy for injuries and to avoid injustice.”<sup>53</sup> The court admonished, however, that “[i]n considering whether equitable principles warrant veil-piercing, there is a tendency to highlight aspects of the relationship between a parent and a subsidiary that evince some unsavory motive or other impropriety in the use of separate corporate forms.”<sup>54</sup> The court distinguished “public policy and statutory purpose [as] important considerations in the equitable mix.”<sup>55</sup>

The Appeals Court relied on the case of *Attorney General v. M.C.K., Inc.* to conclude that “the court may be warranted in carefully scrutinizing [NEES’] corporate form, regardless whether actual fraud has been shown.”<sup>56</sup> Accordingly, the court remanded the case for further proceedings after “tak[ing] into account one of the primary aims of G.L. c. 21E, that the party that caused the environmental contamination should be responsible for the cost of its cleanup.”<sup>57</sup>

In reversing the Appeals Court, the SJC observed that “the statutory purpose of G.L. c. 21E ... is not advanced by doing violence to bedrock principles of corporate law.”<sup>58</sup> The court acknowledged that under Chapter 21E, “a past owner or operator of a site contaminated by oil can be held liable if that person caused a release or threat of a release of oil from the site, or is otherwise legally responsible for it.”<sup>59</sup> The court considered the *My Bread Baking Co.* prongs, particularly Scott’s reliance “on the second prong: confused intermingling with substantial disregard of the separate nature of the corporate entities.”<sup>60</sup> The court reversed the Appeals Court because “[i]n the present case, the environmental releases

39. *Id.* at 761.

40. *Id.* at 765.

41. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotation marks omitted).

42. *Hanson v. Bradley*, 298 Mass. 371, 380 (1937).

43. *My Bread Baking Co. v. Cumberland Farms, Inc.*, 353 Mass. 614, 619-20 (1968).

44. *Id.* at 620 (quoting *M. McDonough Corp. v. Connolly*, 313 Mass. 62, 65-66 (1968)); *see also Gurry v. Cumberland Farms, Inc.*, 406 Mass. 615, 625-26 (1990) (“The rule in the Commonwealth is that corporations are to be regarded as separate entities where there is no compelling reason of equity to look beyond the corporate form for the purpose of defeating fraud or wrong, or for the remedying of injuries.”) (internal quotation marks omitted).

45. *Hanson*, 298 Mass. at 379-80.

46. *My Bread Baking Co.*, 353 Mass. at 619.

47. *Id.*

48. *Scott v. NG US 1, Inc.*, 450 Mass. 760, 768 (2008).

49. *Id.* at 766 (citing *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998)) (internal quotation marks omitted).

50. *Id.* at 767.

51. *Id.* (internal quotation marks omitted).

52. *Id.* (citing *My Bread Baking Co.*, 353 Mass. at 618) (internal quotation marks omitted).

53. *Scott v. NG US 1, Inc.*, 67 Mass. App. Ct. 474, 480 (2006) *s.c.*, 450 Mass. 760 (2008) (quoting *Attorney General v. M.C.K., Inc.*, 432 Mass. 546, 555 (2000)) (emphasis added).

54. *Id.* at 479.

55. *Id.* at 480.

56. *Id.* (quoting *M.C.K., Inc.*, 432 Mass. at 557).

57. *Id.* at 480.

58. *Scott v. NG US 1, Inc.*, 450 Mass. 760, 767 (2008). *Cf.* *John Boyd Co. v. Boston Gas Co.*, 775 F. Supp. 435, 442 (D. Mass. 1991) (“Notwithstanding the noble social purposes embodied in CERCLA, there is nothing peculiar to the problem of hazardous waste disposal that, in the absence of Congressional direction, would justify a policy that would ignore the corporate form altogether in these types of cases.”).

59. *Scott*, 450 Mass. at 765 (quoting *Griffith v. New England Tel. & Tel. Co.*, 414 Mass. 824, 827 (1993)) (internal quotation marks omitted).

60. *Id.* at 768 (internal quotation marks omitted) (“[T]he plaintiff ma[de] no claim of fraudulent or injurious consequence under the first of the *My Bread Baking Co.* prongs....”).

occurred — and the contaminated property was sold — more than 30 years before North Boston purchased its first share of stock in Salem Gas, and before NEES's predecessor ... purchased its first share of stock in North Boston.<sup>61</sup> Thus, "Salem Gas's conduct, ownership, or operation of the Northey Street site ... concluded decades before any alleged pervasive control, with fraudulent or injurious consequence or confused intermingling ... with substantial disregard of the separate nature of the corporate entities."<sup>62</sup>

With respect to the Appeals Court's reliance on *M.C.K., Inc.*, the SJC agreed that "frustration of a statutory scheme, when coupled with pervasive control and confused intermingling of activity and assets, support[s] corporate veil piercing."<sup>63</sup> Yet, "[a]bsent evidence that an agency or similar relationship exists between the entities ... violation by one corporation of its obligations presents no occasion to disregard the corporate form of another corporation."<sup>64</sup> In *M.C.K., Inc.*, "the judge ... thoroughly reviewed the evidence and evaluated each of the twelve factors to be considered when a court is faced with the issue of setting aside corporate formalities."<sup>65</sup> Specifically, "[s]he made careful findings of facts, and was well warranted in concluding, that the facts demonstrated *pervasive control ... [and] confused intermingling of activity and assets ...*"<sup>66</sup> Further, both *M.C.K., Inc.* and *My Bread Baking Co.*, "involved attempts to impose liability on a parent corporation for acts of a subsidiary during the existence of a parent-subsidiary relationship."<sup>67</sup> In *Scott*, meanwhile, the SJC found no "evidence that NEES had any ability to direct or control environmental measures on a site sold decades before, let alone any duty to do so."<sup>68</sup> Instead, "the environmental release occurred — and the Northey Street site was sold — more than 30 years before the parent's predecessor acquired any interest in the subsidiary."<sup>69</sup> The court reinstated the trial court's decision granting summary judgment, persuaded that "[o]n the facts contained in the summary judgment record, this case [did] not present a rare situation ... warranting piercing the corporate veil of NEES to impose indirect liability for the environmental wrongdoing by Salem Gas more than one century ago."<sup>70</sup>

#### IV. Subsequent Case Law

Since the SJC issued its opinion in *Scott* on March 7, 2008, subsequent decisions have reinforced the historically limited application of the corporate veil piercing doctrine. In *Iovate Health Sciences, Inc. v. Allmax Nutrition, Inc.*,<sup>71</sup> the United States District Court for the District of Massachusetts determined that "individual defendants will not be subject to personal jurisdiction in this forum based upon actions undertaken within the scope of their employment [absent] evidence that the[y] ... have not maintained the proper distinction among individuals

and corporations such that one may be viewed as the alter ego of the other ..."<sup>72</sup> In *Shaw v. Yellin*,<sup>73</sup> the Massachusetts Appellate Division reaffirmed that only "[u]nder certain limited circumstances ... including situations in which the corporate form and its protections are being used to accomplish wrongful goals, like fraud, the courts will disregard the corporate form."<sup>74</sup> "In those cases, courts are permitted to use their equitable power to strip the corporate protections from individual shareholders, both as a sanction for the wrongdoing and as a deterrent to future misconduct."<sup>75</sup>

#### Conclusion

In *Scott v. NG US I, Inc.*, the Appeals Court apparently attempted to expand the statutory scheme of Chapter 21E to permit corporate veil piercing even where contamination predated the existence of any parent-subsidiary relationship. The court proposed that the public policy and statutory purpose of Chapter 21E may be dispositive factors in whether to pierce the corporate veil to impose derivative liability. "The implications of the Appeals Court's *Scott* decision [were] potentially wide-reaching and of grave concern to any entity (and to legal counsel advising the entity) contemplating acquiring another company that may have engaged in activities involving hazardous materials or oil in the past."<sup>76</sup> "Most fundamentally, risk avoidance may not [have been] possible even where thorough due diligence [was] performed, such that responsible efforts to protect shareholder investment, corporate capital and other investment based expectations may [have] prove[d] unavailing."<sup>77</sup>

"[B]y construing [*M.C.K., Inc.*] to authorize disregard of corporate form based on general statutory and policy goals, rather than evaluation of the factors in [*My Bread Baking Co.*] the Appeals Court read the [*M.C.K., Inc.*] case broadly."<sup>78</sup> The SJC returned to the *My Bread Baking Co.* veil-piercing factors to decide whether "to disregard settled expectations accompanying corporate form [because] the parent corporation directed and controlled the subsidiary ..."<sup>79</sup> As a result, the court reinforced the requirement that "the injured party ... show some connection between its injury and the parent's improper manner of doing business — without that connection, even when the parent exercises domination and control over the subsidiary, corporate separateness will be recognized."<sup>80</sup> In general, this "assured that the exercise of the control which stock ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary."<sup>81</sup> More specifically, the SJC's *Scott* opinion helped to ensure that the "corporate form may not be pierced to impose liability for actions taken (or not taken) by another entity long before the formation of a corporate relationship."<sup>82</sup>

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61. *Id.* at 771.

62. *Id.* at 769.

63. *Id.* at 769 n.16.

64. *Id.*

65. Attorney General v. *M.C.K., Inc.*, 432 Mass. 546, 555 (2000).

66. *Id.* at 555-56 (emphasis added).

67. *Scott*, 450 Mass. at 771 n.17.

68. *Id.* at 771.

69. *Id.*

70. *Id.* at 774.

71. 549 F. Supp. 2d 127 (D. Mass. 2008).

72. *Id.* at 128.

73. No. 7-ADAMS-40024, 2008 WL 2627637, at \*2 (Mass. App. Div. June 30, 2008).

74. *Id.*

75. *Id.*

76. Christopher B. Myhrum, 2007 Developments and 2008 Prospects Superfund, Chapter 21E and Brownfields, in 2008 ENVIRONMENTAL AND LAND USE LAW CONFERENCE 505, 515 (MCLE, Inc. 2008).

77. *Id.*

78. *Scott v. NG US I, Inc.*, 450 Mass. 760, 769 n.16 (2008).

79. *Id.* at 768.

80. *Id.* at 767.

81. *Id.*

82. *Id.* at 769.

# Book Review

*Freedom for the Thought That We Hate: A Biography of the First Amendment*, by Anthony Lewis (Basic Books, 2007), 221 pages.

In *Freedom for the Thought That We Hate*, Anthony Lewis, longtime observer of the Supreme Court, op-ed regular for the *New York Times*, Pulitzer Prize winner, and visiting professor of journalism at Columbia University, painstakingly traces the history of the freedom of speech and the freedom of the press from the late 1700s to the present. Freedom of the press was at the heart of one of Lewis' earlier works, *Make No Law: The Sullivan Case and the First Amendment*,<sup>1</sup> which focused on *New York Times v. Sullivan*,<sup>2</sup> the Supreme Court's landmark 1964 First Amendment decision. In *Freedom for the Thought That We Hate*, his first new book in 16 years, Lewis returns to the First Amendment, explaining how freedom of speech and freedom of the press, as we know these rights today, were largely dormant for much of American history, fully awakened only within the past century. Lewis traces the common law evolution of these protections, from the earliest 19th century Supreme Court opinions to modern decisions set against the backdrop of the Cold War, Vietnam, and 9/11. In addition, through his unique window into the inner workings of the Supreme Court, Lewis is able to offer interesting and amusing behind-the-scenes anecdotes that help to illuminate the decisional process behind the cases that have shaped this body of law.

The freedoms of speech and of the press that we enjoy in the United States have not always taken their current form. British common law traditionally provided only for freedom from prior restraint on the press.<sup>3</sup> There is no question that this history would have been known to the framers of our constitution.<sup>4</sup> However, historical influences notwithstanding, when the framers set down these 14 words of the First Amendment, what did they mean?<sup>5</sup> Did they intend only to prohibit prior restraints? Or did they envision broader protections? Unfortunately, the historical record is vague on these points. Further compounding our lack of understanding of initial conceptions of the First Amendment is the lack of early case law on the subject. Indeed, the Sedition Act,<sup>6</sup> passed by a Federalist Congress at the behest of President John Adams, arguably a gross infringement on First Amendment rights, was not subject to constitutional challenge while in effect (and was only held unconstitutional 166 years later in the *Sullivan* case).<sup>7</sup> Instead, the American people voiced their objection to the Sedition Act, and

what it represented, by voting Adams and the Federalists out of office in 1800.<sup>8</sup>

The dearth of First Amendment jurisprudence during these early years is doubtless attributable to the simple fact that, until the start of the 20th century, with the notable exception of the Sedition Act, no federal laws were passed that significantly curtailed First Amendment freedoms. Moreover, for much of that time, the Bill of Rights applied only to federal actions, thereby foreclosing any challenges to questionable state laws.<sup>9</sup> However, with the passage of an amendment to the Espionage Act<sup>10</sup> in 1918 at the urging of President Woodrow B. Wilson, which resulted in the prosecution of many Americans for speaking or writing critically about the government or the First World War,<sup>11</sup> the Supreme Court was finally presented with the opportunity to determine whether a federal law passed First Amendment muster.<sup>12</sup> In a series of three cases decided in 1919, the Court unanimously upheld the convictions of several persons charged with violating the act.<sup>13</sup> In one such case, *Schenck v. United States*, Justice Oliver Wendell Holmes Jr. set forth the clear-and-present-danger test for determining whether speech enjoys constitutional protection.<sup>14</sup> According to Justice Holmes's reasoning, the kind of speech or writing punishable under the Espionage Act was not protected by the First Amendment.<sup>15</sup>

The turning point in First Amendment jurisprudence came later that same year in a dissent in *Abrams v. United States*,<sup>16</sup> written (surprisingly, perhaps, in view of his position in *Schenck*) by Justice Holmes and joined by Justice Louis Brandeis.<sup>17</sup> The majority in *Abrams* upheld the conviction of four individuals who had protested United States military involvement in Russia in the wake of the Bolshevik Revolution by throwing pamphlets from the roof of a building in New York City.<sup>18</sup> These pamphlets called for a "general strike" to demonstrate opposition to the government's actions.<sup>19</sup> Justice Holmes, who would become a central figure in the development of the freedoms of speech and of the press, agreed that the federal government was authorized to "punish speech that produces and is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils," but that "nobody could suppose ... that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms."<sup>20</sup> Justice Holmes acknowledged the clear-and-present-danger test, but added the qualifiers "imminent" and "forthwith."<sup>21</sup> With that, he laid the groundwork for the modern interpretation of the First Amendment.

1. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

2. 376 U.S. 254 (1964).

3. ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 2* (2007) [Hereinafter, LEWIS].

4. *Id.* at 6.

5. "Congress shall make no law ... abridging the freedom of speech, or of the press; ..." U.S. CONST. amend. I.

6. Sedition Act of July 14, 1798, ch. 74, 1 Stat. 596 (repealed 1801).

7. LEWIS at 53.

8. *Id.* at xv.

9. *Id.* at 23.

10. Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217.

11. LEWIS at 25.

12. *Id.*

13. *Id.*

14. *Schenck v. United States*, 249 U.S. 47, 50 (1919); see LEWIS at 26.

15. LEWIS at 26.

16. 250 U.S. 616, 624 (Holmes, J., dissenting).

17. LEWIS at 23.

18. *Id.* at 28.

19. *Id.*

20. *Id.* at 28-29 (quoting *Abrams*, 250 U.S. 616, 627-28 (Holmes, J., dissenting)).

Despite the hint in Holmes's dissent in *Abrams* of what was to come, the Court was slow in acknowledging the importance of preserving an individual's right to criticize the government.<sup>22</sup> Prosecutions under the Espionage Act eventually numbered more than 2000.<sup>23</sup> In most instances, Lewis notes, the defendants were palpably not a threat to their country.<sup>24</sup> In addition to the dragnet cast by the Espionage Act, in November 1919 and January 1920, more than 4000 alleged radicals were arrested in the so-called Palmer raids, named after the United States attorney general who ordered them.<sup>25</sup> Again, the courts did nothing.<sup>26</sup> As late as 1951, in *Dennis v. United States*,<sup>27</sup> the Court upheld the convictions of members of the American Communist Party for conspiring to advocate the overthrow of the government.<sup>28</sup> Lewis roundly criticizes the courts for their delayed response to the perceived communist threat.<sup>29</sup>

Finally, after the fall from grace and subsequent death of Senator Joseph McCarthy, the ice began to thaw and the promise of Holmes's dissent in *Abrams* began to be realized. In *Yates v. United States*,<sup>30</sup> decided in 1957, the Court held that by itself, theoretical promotion of violent overthrow of the government was not enough to place speech outside the protection of the First Amendment; rather, the words must be accompanied by an attempt at action to provide a lawful basis for prosecution.<sup>31</sup> Then, in 1969, in *Brandenburg v. Ohio*,<sup>32</sup> the well known Ku Klux Klan case, the Court promulgated a new test for advocacy of violent or unlawful action: the advocacy must have been aimed at "inciting or producing imminent lawless action" and "likely to produce such action."<sup>33</sup> At last, the right to free speech, especially speech directed at the government, had some teeth.

According to Lewis, the right to freedom of the press developed along a similar trajectory as the right to individual freedom of speech. In *Near v. Minnesota*,<sup>34</sup> decided in 1931 (by a 5-4 vote), a fledgling weekly newspaper had been shut down by court order after printing allegations of government corruption. In reversing the lower court's order, the Supreme Court observed that the press was critical in the fight against the "impairment of the fundamental security of life and property by criminal alliances and of ficial neglect."<sup>35</sup> Over time, the press' role in scrutinizing government actions was cemented in such cases as *Grosjean v. American Press Co.*<sup>36</sup> (concerning Governor Huey Long's newspaper tax, levied against critical publications), *New York Times v. United States*<sup>37</sup> (the Pentagon Papers case), and, of course, *Sullivan v. New York Times*.<sup>38</sup> *Sullivan* finally eliminated the concept of seditious libel in the United

States and, after more than a century and a half, declared the Sedition Act of 1798 unconstitutional.<sup>39</sup>

Once the basic reach of the freedoms of speech and of the press were outlined, the Court turned to the even more difficult question of how to weigh those freedoms against important conflicting rights. For example, what happens to the right to a fair trial when jury selection is affected by overwhelming pre-trial publicity?<sup>40</sup> In *Sheppard v. Maxwell*,<sup>41</sup> a case made famous on both the small and big screens as *The Fugitive*, Dr. Sam Sheppard's murder conviction was overturned on fair-trial grounds due to media attention surrounding the trial.<sup>42</sup> Interestingly, the Supreme Court denied certiorari when Sheppard first appealed his conviction, but several years later, on Sheppard's habeas motion, set aside his conviction.<sup>43</sup> Lewis posits that the reason for the Court's change of position was due to the intervening assassination of President John F. Kennedy, Jr., and Jack Ruby's shooting of Lee Harvey Oswald (which Lewis thinks could have been made possible due to the press swarm in the Dallas police headquarters).<sup>44</sup>

The Court also examined the tension between the freedom of the press and individual privacy.<sup>45</sup> A good example of the conflict between these protections is found in *Time, Inc. v. Hill*,<sup>46</sup> decided by the Supreme Court in 1967.<sup>47</sup> In this case, a real-life hostage situation involving the Hill family was used as the basis for a Broadway play.<sup>48</sup> However, the events depicted in the play were far more graphic than the Hills' actual experiences.<sup>49</sup> *Life* magazine photographed the play's actors in the Hills' former house and characterized the play as representing what had actually happened to them.<sup>50</sup> The Hills sued, claiming that the story ran afoul of New York privacy law, particularly insofar as the *Life* story erroneously portrayed the family as having been part of events of which they had not been a part ("false light privacy").<sup>51</sup> The Court denied the Hills' claim,<sup>52</sup> noting that the "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community," and the "risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press."<sup>53</sup>

For his own part, Lewis disagrees with the concept of individual privacy expressed in the *Hill* opinion, preferring the dissenting opinion of Justice Harlan, which proposed that the Hills should have been required to prove that *Life's* editors had been negligent, rather than deliberate or reckless, in their errors.<sup>54</sup> Lewis finds support for his (and Harlan's) view in Justice Stephen Breyer's much later concurrence in

21. *Id.* at 28.

22. *Id.* at 35.

23. *Id.* at 103.

24. *Id.* at 105.

25. *Id.* at 106.

26. *Id.* at 106, 188.

27. 341 U.S. 494, 542 (1951).

28. LEWIS at 120 (discussing *Dennis*, 341 U.S. 494).

29. *Id.* at 115.

30. 354 U.S. 298 (1957).

31. LEWIS at 123 (discussing *Yates*, 354 U.S. 298).

32. 395 U.S. 494 (1969).

33. LEWIS at 124 (discussing *Brandenburg*, 395 U.S. 494).

34. 283 U.S. 697 (1931).

35. LEWIS at 45 (quoting *Near*, 283 U.S. at 719-20).

36. 297 U.S. 233 (1936); see LEWIS at 48.

37. 403 U.S. 713 (1971); see LEWIS at 47.

38. 376 U.S. 254 (1964); see LEWIS at 48.

39. LEWIS at 48.

40. *Id.* at 169.

41. 384 U.S. 333 (1966).

42. LEWIS at 172-73 (discussing *Sheppard*, 384 U.S. 333).

43. *Id.* at 173.

44. *Id.*

45. *Id.* at 62.

46. 385 U.S. 374 (1967).

47. LEWIS at 62 (discussing *Hill*, 385 U.S. 374).

48. *Id.* at 63.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 65.

53. *Id.* at 66 (quoting *Hill*, 385 U.S. at 388).

54. *Id.* at 67.

*Bartnicki v. Vopper*.<sup>55</sup> *Bartnicki* involved a recording of a conversation between two Philadelphia union officials that was given to a local radio station by union opponents and subsequently broadcast.<sup>56</sup> Although his opinion came down in favor of the broadcaster, Justice Breyer nonetheless observed that when people's privacy is secure, they are encouraged to speak more freely.<sup>57</sup> Lewis feels strongly about this issue, noting that the press should not be able to publish private facts regardless of how malicious they are<sup>58</sup> and that it would be a "terrible victory" if First Amendment concerns completely trumped individual privacy.<sup>59</sup>

Despite his misgivings about the balance the Court has struck between freedom of the press and individual privacy, Lewis repeatedly emphasizes the importance of the press as a check on governmental abuses. Further, he observes that the press can only serve in that role effectively to the extent that it remains neutral, and free from governmental interference. Along these lines, he is especially critical of the press after the events of September 11, 2001,<sup>60</sup> observing that the press did not question the Bush Administration's shaky evidence in support of going to war in Iraq,<sup>61</sup> and characterizing the press at that time as "submissive."<sup>62</sup> Lewis hypothesizes that this could have been due to the perceived need for national unity or in order to avoid seeming unpatriotic.<sup>63</sup> This period of alleged submissiveness ended, in Lewis's estimation, with the *New York Times*' exposé of the Administration's secret wiretapping program.<sup>64</sup>

Another source of tension between competing rights examined by Lewis involves the notion of a "press privilege."<sup>65</sup> This issue was addressed most famously in *Branzburg v. Hayes*,<sup>66</sup> decided in 1972, which involved an article that had been written (without naming names) about a group of people in Kentucky who had been producing hashish.<sup>67</sup> Unsurprisingly, state officials wanted to know who these people were.<sup>68</sup> Justice Byron White, on behalf of the Supreme Court, wrote that, although the press has some First Amendment protection, there is no absolute constitutional privilege.<sup>69</sup> Among other impediments to conferring such a right, Justice White cited the difficulty in determining to whom any privilege would extend. Would it cover the "lonely pamphleteer" to the same extent as the "large metropolitan publisher"?<sup>70</sup> While the dissent would have allowed a qualified privilege for grand jury testimony,<sup>71</sup> such a right has never been identified by the Supreme Court.<sup>72</sup> Indeed, *Branzburg* essentially represents the current federal constitutional law on press privilege.

Although this is where the matter stands at the federal level, most states have enacted press shield laws (which, of course, are not effective in federal cases).<sup>73</sup> Lewis observes that a federal shield law would be problematic, pointing to the recent case of Wen Ho Lee, the Los Alamos scientist accused of shipping information to the Chinese in the late 1990's.<sup>74</sup> Lee eventually sued the government for privacy violations arising from the release of information to the press after all but one of the charges against him were dropped.<sup>75</sup> Had there been a federal press privilege, Lewis notes, the reporters subpoenaed would have been dismissed; the names of their sources would have remained a secret; and there would have been no recourse available to Lee for the harmful press coverage.<sup>76</sup> Lewis argues that a "civilized society" should not want to deprive someone whose reputation has been trashed due to false press of any real chance of mending his reputation in court.<sup>77</sup>

In this struggle between the press's interest in having confidential sources and the legal system's interest in obtaining evidence acquired by journalists, Lewis believes the answer will not come from the First Amendment.<sup>78</sup> In perhaps the most notorious recent example of this seemingly inevitable conflict, the Valerie Plame case, journalists Judith Miller of the *New York Times* and Matt Cooper of *Time* magazine were asked to name their sources during an investigation into the leak of the identity of covert CIA agent Valerie Plame Wilson.<sup>79</sup> The two journalists declined to respond, and Miller spent nearly three months in jail before being given authorization by her source, I. Lewis Libby, then-chief of staff to Vice President Dick Cheney, to disclose his name.<sup>80</sup> Judge David Tatel of United States Court of Appeals for the District of Columbia Circuit, who was on the panel that heard the appeal of the contempt orders against Miller and Cooper, proposed (in a concurrence) a qualified privilege for journalists that would weigh the interest in forcing disclosure, taking into account the damage caused by revealing the information, as set against society's interest in news reporting.<sup>81</sup> However, even under this test, Lewis notes that Miller and Cooper likely would not have been entitled to a qualified privilege because the harm occasioned by release of the information (the identity of a covert CIA operative) is likely greater than its news value — a subjective calculus to be sure.<sup>82</sup>

Finally, Lewis addresses the tension between freedom of speech and government's legitimate desire to regulate hate-speech. Lewis observes that the United States is almost alone among Western nations in its legal approach to hate speech. For example, Holocaust denial is a crime in 11 European countries; in Canada and Germany, the display of Nazi

55. 532 U.S. 514 (2001); see LEWIS at 75.

56. LEWIS at 75.

57. *Id.* at 76 (discussing *Bartnicki*, 532 U.S. 514, 537 (Breyer, J., concurring)).

58. *Id.* at 78.

59. *Id.* at 80.

60. *Id.* at 148.

61. *Id.*

62. *Id.* at 150.

63. *Id.*

64. *Id.* at 151.

65. *Id.* at 81.

66. 408 U.S. 665 (1972).

67. LEWIS at 83.

68. *Id.* (discussing *Branzburg*, 408 U.S. 665).

69. *Id.* at 84.

70. *Id.* at 84-5 (quoting *Branzburg*, 408 U.S. at 704).

71. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

72. LEWIS at 86.

73. *Id.* at 91.

74. *Id.*

75. *Id.* at 92.

76. *Id.* at 93.

77. *Id.* at 94.

78. *Id.* at 96.

79. *Id.* at 99.

80. *Id.*

81. *Id.* at 98 (discussing *In re Grand Jury Subpoena*, 397 F.3d 964, 986 (D.C. Cir. 2005) (Tatel, J.)).

82. *Id.* at 99.

paraphernalia is a grave offense.<sup>83</sup> However, in deference to the high value American courts have placed on First Amendment protections, there are generally no such restrictions in the United States. Lewis cautiously disagrees with this approach. In light of such recent events as the Rwandan genocide, which was spurred by radio broadcasts, and religious radicals exhorting their followers to carry out mass bombings, Lewis contends that the government should be able to criminalize speech advocating terrorist violence to an audience whose members are ready to carry out such violence upon suggestion.<sup>84</sup> Then again, perhaps such restraints are already contemplated by *Schenck* and its progeny.

It is apparent upon reading *Freedom for the Thought That We Hate* that this was a labor of love for Anthony Lewis. His personal history with the Supreme Court runs deep, and it is obvious that he has a keen interest in the First Amendment cases that he has followed over the years. This is particularly evident in an anecdote in which we learn the origin of the name of this work, a line from Justice Holmes's dissent in

*United States v. Schwimmer*.<sup>85</sup> “[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate.”<sup>86</sup> Lewis first read this line after Justice Felix Frankfurter, with whom he had been visiting in chambers in 1960, handed him the *Schwimmer* opinion to make a point in their discussion.<sup>87</sup> One thing is clear from a reading of this work: despite past episodes of backsliding by the Supreme Court, and despite current challenges from the Bush Administration, Lewis strongly believes (and, whether you agree with your neighbor's ideas or not, you will concede) that, thanks to the efforts of the judiciary and enterprising lawyers over the past century, “the fundamental American commitment to free speech, disturbing speech, is no longer in doubt.”<sup>88</sup>

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83. *Id.* at 157-58.

84. *Id.* at 166-67.

85. 279 U.S. 644 (1929).

86. LEWIS at 37 (quoting *Schwimmer*, 279 U.S. at 654-55 (Holmes, J., dissenting)).

87. *Id.* at 38.

88. *Id.* at xv.

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