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THE MASSACHUSETTS “SMART GROWTH” EXPERIMENT: CHAPTER 40R

by Mark Bobrowski*



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INTRODUCTION

Massachusetts has faced an affordable housing shortage in recent years. To alleviate that shortage, the Massachusetts legislature in 2004 established, as part of the fiscal 2005 state budget,¹ a new housing production tool to promote “smart growth.”² This measure, now codified as chapter 40R of the Massachusetts General Laws, constitutes a novel experiment in urban planning and housing production. Chapter 40R takes an “opt in” approach: municipalities may elect to adopt a zoning overlay district for the development of housing in an area of existing concentrated development or near

an existing transit station.³ Taking the bait makes a municipality eligible to receive various financial incentives.⁴ Chapter 40R also has rewards for the development community. When a municipality rezones in partnership with a particular developer, the contemplated project may proceed “as-of-right” to receive building permits.⁵ The statute prohibits special permit or discretionary decision-making.⁶

Chapter 40R has a most unusual legislative history. In 2003, a policy paper was published by the Commonwealth Housing Task Force (“Task Force”) convened by The Boston Foundation, a coalition of representatives from business, labor, higher education, local government, housing advocacy and environmental groups, real estate developers and several elected and appointed officials.⁷ The report, entitled *Building on Our Heritage: A Housing Strategy for Smart Growth and Economic Development*,⁸ recommended that “the state provide financial and other incentives to local communities that pass smart growth overlay zoning districts (hereinafter “SGOD”) that allow the building of single-family homes on smaller lots and the construction of apartments for families of all income levels.”⁹ The 2003 Task Force report estimated that implementing such a strategy would likely produce over 30,000 new housing units over the next decade.¹⁰

The Task Force emphasized the need for such housing because, it alleged, “[h]ousing in Greater Boston is characterized by rapidly escalating prices and increasing rents.”¹¹ The Task Force’s conclusions have been annually echoed in *The Greater Boston Housing Report Card: An Assessment of Progress on Housing in the Greater Boston Area*.¹² For example, the 2006-2007 *Report Card* indicated that in only 30 of 161 study area cities and towns would the median single-

* Professor Bobrowski is indebted to his research assistant, Matthew G. Feher, for his invaluable contributions in the preparation of this article.

1. St.2004, c. 149, § 92, eff. July 1, 2004. References to the statute, MASS. GEN. LAWS ch. 40R, §§1 – 14 (2006), and its accompanying regulations, promulgated at 760 C.M.R. 59.00-59.08 (2005), will appear throughout this article.

2. The statute, at section 1, defines “smart growth” as

a principle of land development that emphasizes mixing land uses, increases the availability of affordable housing by creating a range of housing opportunities in neighborhoods, takes advantage of compact design, fosters distinctive and attractive communities, preserves open space, farmland, natural beauty and critical environmental areas, strengthens existing communities, provides a variety of transportation choices, makes development decisions predictable, fair and cost effective and encourages community and stakeholder collaboration in development decisions.

MASS. GEN. LAWS ch. 40R, § 1 (2006).

3. MASS GEN. LAWS ch. 40R, §2 (2006)(definition of “eligible locations”).

4. Indeed, in 2005, the legislature sweetened the chapter 40R “pot” by adopting chapter 40S, St.2005, c. 141, eff. Nov. 22, 2005, which addresses the cost of educating the children of a 40R project. MASS. GEN. LAWS ch. 40S, §§1-4 (2006). See the discussion of chapter 40S in Part I (B) *infra*.

5. MASS. GEN. LAWS ch. 40R, §11 (e)(2006).

6. See *id.* § 3.

7. According to its website, The Boston Foundation is

one of the oldest and largest community foundations in the nation, with assets of almost \$900 million. In 2007, the Foundation and its

donors made more than \$92 million in grants to nonprofit organizations and received gifts of \$90 million. The Foundation is made up of some 900 separate charitable funds established by donors either for the general benefit of the community or for special purposes.

The Boston Foundation, Financial Information, <http://www.bf.org/AboutTBF/AboutTBFDetail.aspx?id=102> (last visited Dec. 8, 2008).

8. BARRY BLUESTONE, EDWARD C. CARMAN, AND ELEANOR WHITE, BUILDING ON OUR HERITAGE: A HOUSING STRATEGY FOR SMART GROWTH AND ECONOMIC DEVELOPMENT (The Boston Foundation) (Oct. 30, 2003) (hereinafter “2003 Task Force Report”). Mr. Bluestone is the Stearns Trustee Professor of Political Economy, Director of the Center for Urban and Regional Policy, and Dean of the School of Social Science, Urban Affairs, and Public Policy at Northeastern University in Boston. Mr. Carman is the president of Concord Square Planning & Development Company, Inc., a Boston-based real estate development and consulting company. Ms. White is co-founder and president of Housing Partners, Inc., a Watertown-based, full-service national affordable housing consulting firm that serves both the public and private sectors.

9. 2003 Task Force Report 2.

10. The Task Force assumed that in order to develop that many new affordable and market-rate housing units, zoning for 50,000 units must be in place. 2003 Task Force Report 4.

11. 2003 Task Force Report 7.

12. See, e.g., BARRY BLUESTONE AND BONNIE HEUDORFER, THE GREATER BOSTON HOUSING REPORT CARD 2006-2007: AN ASSESSMENT OF PROGRESS ON HOUSING IN THE GREATER BOSTON AREA (Center for Urban and Regional Policy at Northeastern University) (Oct. 2007) (hereinafter “Report Card”).

family home be affordable to a family earning the median household income of that community.¹³ For first-time home buyers, there were no such communities.¹⁴ In 2001, Boston had been the third most expensive home buying market in the nation; by 2007, it had slipped (or improved) to the fifteenth most expensive.¹⁵

The Task Force blamed much of the affordability problem on a lack of production.¹⁶ After sifting through several possible causes for this shortfall, the Task Force focused on overzealous local regulation:

The predominant reasons [for a lack of production] [are] the lack of zoning for building single-family homes on small lots and the construction of apartments. One can travel throughout Massachusetts and find few places where such zoning exists as of right. The result is that the process of obtaining local zoning approvals is a time consuming and expensive task that carries significant risk. The barriers to entry from zoning are so substantial that the housing markets in the greater Boston area are unable to clear (that is, to come into balance) without excessive price increases.¹⁷

Why have the commonwealth's communities acted so aggressively to prevent new residential growth? The Task Force blamed the Massachusetts tradition of home rule.¹⁸ Housing brings with it school-aged children. Municipalities rely on the property tax to fund education.

Census data and other surveys show that a typical four bedroom single family home will have at least one

school-aged child per house. Often there will be several in each home. It costs, on average, nearly \$8,000 per year to provide public-school education for each child. The property taxes on single-family homes, particularly those that are less expensive, often are not sufficient to cover the school costs for the children from that home, especially when the costs of other town services are provided.¹⁹

According to the Task Force, municipalities have reacted by using the home rule power to make the construction of new residential units very difficult.²⁰ Apartment development is generally subject to the requirement of a special permit (or not allowed at all).²¹ Large lot zoning discourages the development of affordable single family homes.²²

With these problems getting extensive media discussion,²³ then Senate President Robert Travaglini incorporated the Task Force's proposed new housing production tool into the Senate's version of the fiscal 2005 state budget.²⁴ The Senate Ways and Means Committee budget proposal released in May 2004²⁵ included language establishing the smart growth program, and the full Senate subsequently voted after lengthy debate to endorse it as part of its budget blueprint.²⁶ While the House of Representatives did not include the program in its competing version of the budget, then House Speaker Thomas Finneran agreed to include the chapter 40R framework during conference committee deliberations.²⁷ The full legislature endorsed the conference committee report, and Governor Mitt

13. Report Card 7 (2006 data).

14. *Id.* at 7-8 (2006 data).

15. *Id.*

16. The Task Force cited a 2002 study from the Center for Urban and Regional Policy at Northeastern University to the effect that the amount of production in the 1990s "lagged the increase in households by 41%." 2003 Task Force Report 8.

17. *Id.*

18. The 1966 adoption of the Home Rule Amendment, MASS. CONST., art. LXXXIX "effected substantial changes in the legislative powers of the General Court and the cities and towns." Opinion of the Justices, 356 Mass. 775, 787 (1969). Section 6 of article 89 delineates the powers of a municipality:

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has the power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city to town by its charter.

MASS. CONST. art. LXXXIX, § 6. Section 7 of article 89, MASS. CONST. art. LXXXIX, § 7, specifies certain exceptions to this grant of authority. "Taken together, these two sections repudiate the conception that all powers lie in the State except those expressly delegated to cities and towns." *Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 363 Mass. 339, 358 (1973). In short,

[m]unicipalities are now free to exercise any power or function, excepting those denied to them by their own charters or reserved to the State by §7, which the Legislature has the power to confer on them, as long as the exercise of these powers is not inconsistent with the Constitution or laws enacted by the Legislature in accordance with §8.

Id. Where the legislature has not occupied the field, or where existing statutes grant broad powers to municipalities to regulate a specific subject, the Home Rule Amendment adds another independent source of police power for municipal action. *Cherkes v. Town of Westport*, 393 Mass. 9, 11 (1984); *Sturges v. Town of Chilmark*, 380 Mass. 246, 253 n.11 (1980). The Zoning Act (MASS. GEN. LAWS ch. 40A, §§1-17 (2006 & Supps. 2007 & 2008) most notably, may

be used in conjunction with the Home Rule Amendment to fashion innovative land use regulation. *Rayco Inv. Corp. v. Bd. of Selectmen of Raynham*, 368 Mass. 385, 392 (1975).

19. 2003 Task Force Report 8-9.

20. The *Report Card* also laments that some municipalities have used Home Rule powers to impede or prevent the development of market rate and affordable housing. Report Card 7. The Rappaport Institute concurs. See EDWARD L. GLAESER, JENNY SCHUETZ, AND BRYCE WARD, REGULATION AND THE RISE OF HOUSING PRICES IN GREATER BOSTON (Rappaport Institute for Greater Boston) (Jan. 5, 2006) 6-9. Edward Glaeser, Professor of Economics at Harvard University, estimates that the cost of permitting housing in Massachusetts is the highest in the country. *Id.* at 31-35.

21. "Over the years, most communities have found ways to eliminate from their zoning maps any areas that allow apartment construction as-of-right." 2003 Task Force Report 9.

22. As the Task Force noted, "[t]he larger the lot size, the more expensive the land per house." *Id.*

23. *E.g.*, Brenda Buote, *Restrictive zoning faulted for home costs*, BOSTON GLOBE, GLOBE NORTH, Jan. 15, 2006, at S1; Edward Glaeser, *Balancing housing options*, BOSTON GLOBE, Sept. 3, 2006, at D9; Edward Glaeser, *Housing changes key to city's future*, BOSTON GLOBE, June 10, 2007, at D3; Scott S. Greenberger, *Housing slowdown blamed on local rules*, BOSTON GLOBE, Jan. 1, 2006, at A1; Editorial, *Where's the Housing?*, BOSTON GLOBE, May 24, 2006, at A10.

24. See Senate Bill 2401 (2004).

25. Section 103 of Senate Bill 2400 (2004).

26. There was no hearing, however, as is customary, with regard to chapter 40R. This is because chapter 40R was proposed in what is known as an "outside section" of the budget bill. These "outside sections" are typically statutory amendments, or new legislative proposals, merely added at the end of the budget bill without much debate or public process. See Senate Bill 2401 (2004). Because the bill was simply redrafted by the Senate Committee on Ways and Means to include such, no public hearing was afforded to chapter 40R. Since 2004, the number of "outside sections" to budget bills has decreased sharply, affording a more open, public legislative process.

27. See House Bill 4850 (2004).

Romney signed the budget plan, including chapter 40R, on June 25, 2004.²⁸

According to the most recent Task Force information for March 2008,²⁹ 7,324 units of affordable and market-rate housing in 21 cities and towns have been zoned and approved under chapter 40R.³⁰ The largest approved 40R development is located in Brockton and could provide as many as 1,100 new affordable and market-rate units.³¹ Another three communities have filed chapter 40R applications with the commonwealth's Department of Housing and Community Development ("DHCD")³² with the potential to create around 1,800 additional units of housing. Ten additional communities have applied for, or received, "Priority Development Fund" planning grants for chapter 40R activity which may develop anywhere between 1,800 and 2,250 units. Thus, since its adoption in 2004, over 11,000 units of affordable and market-rate housing are in the pipeline — 65 percent of which have already been approved, with the balance in various stages of the approval process.³³

28. See St. 2004, c.149, §92.

29. CONCORD SQUARE PLANNING & DEV. CO., INC., INVOLVEMENT OF MASSACHUSETTS MUNICIPALITIES' IN CHAPTER 40R: SMART GROWTH ZONING AND HOUSING PRODUCTION (Mar. 2008).

30. The cities and towns include Amesbury, Belmont, Boston, Bridgewater, Brockton, Chelsea, Dartmouth, Grafton, Haverhill, Kingston, Lakeville, Lunenburg, Lynnfield, Natick, Northampton, North Andover, Norwood, Plymouth, Reading and Westfield. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

31. According to the City of Brockton's 2007 awards application to the American Planning Association, Massachusetts Chapter, this major downtown redevelopment project is "one of the first large-scale, multi-nodal 40R Districts" demonstrating "the potential of 40R to promote adaptive reuse and new infill development within an urban core." The zoning densities within the Brockton district offer "densities between 8 units/acre to 80 units/acre, as well as mixed-use and adaptive reuse."

32. DHCD oversees the chapter 40R program and must approve projects as "eligible." See 760 C.M.R. 59.05(2) (2005).

33. Telephone conference with Ted Carman, President of Concord Square Planning & Dev. Co., Inc., in Boston, Mass. (Mar. 12, 2008). These results put chapter 40R production on pace to eventually eclipse the rate of affordable and market-rate housing production under the state's affordable housing statute, chapter 40B of the General Laws, which has produced 48,289 total units (54 percent of which are affordable) in 884 developments since its inception nearly 40 years ago. BONNIE HEUDORFER, UPDATE ON 40B HOUSING PRODUCTION, (Citizens Hous. & Planning Assoc.) (Mar. 2007). See the discussion of chapter 40B in *infra* Part II A.

34. Report Card 65, noted that "[t]he first generation of 40R districts obtained the necessary zoning approvals in relatively short order, cutting months off the time typically required for approval, and to date no community has turned down a district when it came to a town meeting (or city council) vote." Since that observation, only the Town of Hingham has rejected a proposed 40R district.

35. In fact, the timing of this article was delayed (and the article potentially rendered moot) by the commonwealth's lack of funding for chapter 40R, which persisted for nearly two years. Prior to the enactment of the final fiscal 2007 supplemental appropriations act, St. 2007 c. 140 (the so-called "2007 close-out budget"), the Smart Growth Housing Trust Fund (the so-called "40R Trust") was oversubscribed by over \$4 million, according to the DHCD. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008). But the 2007 close-out budget authorized the transfer of \$15 million to be targeted mostly to the 40R Trust fund to ensure that communities that have adopted chapter 40R will receive promised incentive payments. St. 2007 c.140, § 16. The act also dedicates up to \$10 million to the 40R Trust from the Bay State Competitiveness Investment Fund. St. 2007 c.140, § 58. The \$15 million transfer is from MassHousing (derived from repaid State Housing Assistance for Rental Production, or SHARP, loans) to the DHCD to fund 40R incentive payments, planning, technical assistance and an employer-assisted housing program. St. 2007 c.140, § 16. The act also calls

The Boston Foundation has trumpeted these accomplishments of chapter 40R.³⁴ Indeed, chapter 40R has produced some notable success stories. It is time³⁵ to assess the chapter 40R experiment and to fine tune its opportunities. This article will accept that challenge.³⁶

I. OVERVIEW OF CHAPTER 40R'S KEY PROVISIONS

A. Basic Requirements

The chapter 40R system is based on a series of required zoning amendments and attendant rewards.³⁷ If a municipality opts into the program, the statute requires the community to allow for the development of housing as-of-right at a fixed density.³⁸ The municipality retains only a limited power to conduct "plan review"³⁹ and to impose design standards.⁴⁰ The statute prescribes the following minimum housing density requirements with respect to a SGOD:

- at least 20 units/acre for multifamily dwellings of four or more dwelling units;⁴¹

for a transfer of SHARP loan repayments for these purposes on an annual basis. *Id.* Furthermore, the state legislature's Joint Committee on Housing favorably reported legislation in the 2007 session that would create an automatic funding mechanism, not subject to appropriation, for the 40R Trust to fund the various incentives cities and towns are in line to receive if they adopt a SGOD. H.R. 160, § 1, 2007 Leg., 185th Sess. (Mass. 2007). Specifically, the legislation would direct income taxes collected from residents within the SGOD to the 40R Trust. *Id.* § 5. The legislation has been reintroduced in the current legislative session. See H.R. 197, 2009 Leg., 186th Sess. (Mass. 2009) and S. 86, 2009 Leg., 186th Sess. (Mass. 2009). See *infra* Part III.

36. The author has worked on several of the 21 enacted 40R districts. In 2005, Norwood's St. George Smart Growth Overlay District became the first to be approved by DHCD and adopted by town meeting. The author represented the Karsten Company of Weymouth, the proponent of the zoning change. On the development side, the author has also represented Fisherville Redevelopment LLC, the proponent of the Grafton smart growth district. On the municipal side, the author has represented Dartmouth, Haverhill, Easton, Northampton, Hingham, Pittsfield, and Gardner, and consulted with a few other cities and towns.

37. This overview is not intended to be a detailed description of the statute or the regulatory scheme in support. For a more comprehensive explanation of chapter 40R's internal workings, see Jay Wickersham, *Understanding Chapter 40R: The New Smart Growth Zoning Overlay District Program*, Apr. 2005, <http://thevillageatlincolnpark.com/understandingChapter40R.pdf> (last visited Dec. 8, 2008). Attorney Wickersham, of Noble & Wickersham LLP, Cambridge, Mass., was the consultant engaged by DHCD to prepare the chapter 40R regulations.

38. MASS. GEN. LAWS ch. 40R, §6(a)3 (2006).

39. "Plan review" is conducted by the "Approving Authority" pursuant to 760 C.M.R. 59.04(1)(f) (2005). The Approving Authority may be any "unit of municipal government designated...to review projects." Many towns have designated the planning board to serve in this capacity. Haverhill has designated its city council. Dartmouth has created a new entity, the "Plan Approval Authority," composed of one member each of the board of selectmen, zoning board of appeals, and planning board.

40. In this regard, chapter 40R's decision-making process mirrors the "site plan approval" process common in zoning by-laws and ordinances. In *Y.D. Dug-out Inc. v. Bd. of Appeals of Canton*, 357 Mass. 25 (1970), the Supreme Judicial Court ("SJC") defined its understanding of site plan review as "regulation of a use rather than its prohibition...guid[ing] us in interpreting the [by-law]...as contemplating primarily the imposition, for the public protection, of reasonable terms and conditions...." *Id.* at 31. The Appeals Court has focused on this pronouncement to distinguish site plan review from the special permit process. See *Prudential Ins. Co. v. Bd. of Appeals of Westwood*, 23 Mass. App. Ct. 278, 283-84 n.9 (1986); *Auburn v. Planning Bd. of Dover*, 12 Mass. App. Ct. 998, 1000 (1981). Site plan review can only be used to shape a project. On the other hand, in the special permit process, the full range of discretion is available to the granting authority.

41. MASS. GEN. LAWS ch. 40R, §6(a)3 (2006).

- at least 12 units/acre for dwellings with two or three dwelling units;⁴² or
- at least 8 units/acre for single-family dwelling units.⁴³

These density requirements are virtually nonnegotiable.⁴⁴ The district must be situated in an “eligible location.” An “eligible location” is defined as an area near a rapid transit or commuter rail station,⁴⁵ an area of concentrated development,⁴⁶ or a “highly suitable” location otherwise acceptable to DHCD.⁴⁷ This requirement is discussed in greater detail below.

Of course, chapter 40R’s chief goal is the production of housing, particularly affordable housing. While commercial and industrial uses are permissible,⁴⁸ the local zoning ordinance or by-law must

provide for residential uses that cater to families, individuals, persons with special needs or the elderly.⁴⁹ The statute requires that not less than 20 percent of the residential units constructed in projects of more than 12 units be affordable.⁵⁰ The proposed SGOD may not exceed 15 percent of the total land area in the city or town unless an exception is approved by DHCD.⁵¹ Furthermore, the total land area of all approved SGODs may not exceed 25 percent of the total land area in the municipality.⁵²

The procedures to adopt a chapter 40R district borrow from the Zoning Act. Before submitting an application for a SGOD, the chief executive official of the municipality must hold a public hearing.⁵³ Upon submission of the application,⁵⁴ DHCD has 60 days to make a

42. One of the great mysteries of the statute is the “townhouse” limitation to two- or three-dwelling units per dwelling. This limitation forces a typical townhouse of four dwelling units to meet the higher multifamily standard of 20 units per acre, often causing significant design problems. Placing five fourplex structures on a developable acre is a tight fit. The legislature should consider amending this provision to allow for townhouses of two to four dwelling units at the 12 per acre density requirement.

43. See MASS. GEN. LAWS ch. 40R, § 6(a)(3) (2006), and 760 C.M.R. 59.04(1)(d) (2005).

44. Any municipality of less than 10,000 in population, for hardship shown, may be approved with lower densities than provided in the statute. See MASS. GEN. LAWS ch. 40R, § 6(f) (2006), and 760 C.M.R. 59.04(3) (2005). Further, the regulations allow a reduction in the density requirements if a municipality demonstrates that hardship occurs because of poor soils, lack of water or the project is highly inconsistent with the existing community. See *id.* DHCD has not approved, to date, a single request for an SGOD at a reduced density. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

45. The term Eligible Location is defined as

(1) an area near a rapid transit or commuter rail station, or a bus or ferry terminal, plus any qualifying Adjacent Area; (2) an area of concentrated development, including a city or town center, an existing commercial district, or an existing rural village district, plus any qualifying Adjacent Area; or (3) another highly suitable location, in each case that qualifies under the criteria set forth in 760 CMR 59.04(1)(a). If a portion of a parcel of land falls within an Eligible Location, then all of such land, to the extent of its legal boundaries, may also be deemed an Eligible Location.

760 C.M.R. 59.02 (2005); see also 760 C.M.R. 59.04(1)(a)(1) (2005).

46. An “Area of Concentrated Development” is defined as the following:

A city or town center or an existing commercial district shall be presumed to qualify as an Area of Concentrated Development if:

a. it is currently served or scheduled to be served (as shown by sufficient documentation) within five years of the application by public sewer(s) and/or private sewage treatment plant(s);

b. at least fifty percent (50%) of the total land area within the proposed District is either Substantially Developed Land or Underutilized Land; and

c. the primary current use (or, in the case of Underutilized Land, the primary current zoning) of land and/or buildings in the District is commercial (including retail, office, or industrial businesses) or mixed use. Land designated as a commercial center under M.G.L. c.40, §60 shall be presumed to qualify as an Area of Concentrated Development. In areas that are not sewered or scheduled to be sewered, an existing rural village district shall be presumed to qualify as an Area of Concentrated Development if:

i. it contains part or all of the land area located within one-half mile distance from the principal road intersection or other center point of the district;

ii. it contains two or more of a town hall, post office, public library, public school, or public safety facility, or it contains an existing village retail district; and

iii. at least fifty percent (50%) of the total land area within the proposed District is either Substantially Developed Land or Underutilized Land.

760 C.M.R. 59.04(1)(a)(2) (2005).

47. “Highly Suitable Location” is defined as the following:

The Department shall presume that a location is highly suitable if it has been identified as an appropriate locus for high-density housing or mixed-use development in a local comprehensive plan, community development plan, area specific plan, regional policy plan, or other plan document, in each case adopted or updated after a public planning process no more than five years prior to its submission under 760 CMR 59.00, or if it has been designated as a development district under M.G.L. c. 40Q. Otherwise, the Municipality must provide satisfactory evidence that designation of an area, by virtue of its existing or Planned Infrastructure, existing or Planned transit or other transportation access, existing underutilized facilities, and/or location, is consistent with the statutory goals for smart growth set forth in M.G.L. c.40R, §1 and 760 CMR 59.00.

760 C.M.R. 59.04(1)(a)(3) (2005).

48. “Mixed Use Development” is defined as

a. Project containing a mix of some or all of multi-family residential, 2- and 3- family residential, or single-family residential uses, together with commercial, institutional, industrial, or other non-residential uses, so long as the applicable residential densities set forth in 760 CMR 59.04(1)(d)1 through 3 apply to the Mixed-Use Development Project.

760 C.M.R. 59.02 (2005); see also 760 C.M.R. 59.04(1)(d) (2005).

49. See 760 C.M.R. 59.04(1)(g) (2005).

50. Section 2 of chapter 40R defines Affordable Housing as that which is affordable to persons earning less than 80 percent of the area median income, and subject to an affordability restriction of at least 30 years. The DHCD has been reluctant to approve a 40R measure which requires more than 20 percent of the units in a “for sale” development to be affordable, arguing that this discourages production. Telephone conference with Donald J. Schmidt, DHCD chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008). However, when 25 percent of the units are affordable in a rental project, the DHCD will count all of the units—market rate and affordable—towards the municipality’s 10 percent goal in the subsidized housing inventory (“SHI”) maintained by DHCD, which matches the treatment of rental projects permitted pursuant to chapter 40B. For this reason, a municipality may draft a SGOD that requires 25 percent of rental units to be affordable. The benefits of 40R over 40B are discussed in Part II. A, *infra*.

51. See MASS. GEN. LAWS ch. 40R, § 6(a)(9) (2006), and 760 C.M.R. 59.04(1)(b) (2005).

52. See MASS. GEN. LAWS ch. 40R, § 6(a)(10) (2006), and 760 C.M.R. 59.04(1)(c) (2005).

53. See 760 C.M.R. 59.05(1) (2005). The initial hearing concerns the application, not just the zoning ordinance or by-law. It is intended to assure DHCD that the application was not submitted in a vacuum, without prior public knowledge and participation.

54. The elements of the application are set forth at 760 C.M.R. 59.03 (2005).

preliminary determination of whether the city or town is eligible for the financial incentives offered in return for SGOD acceptance.⁵⁵

Once issued a letter of preliminary eligibility, the municipality must amend its zoning in accordance with chapter 40A.⁵⁶ The planning board must hold a public hearing and make a recommendation to the town meeting or city council.⁵⁷ Enactment is by a vote of two-thirds of the local legislature.⁵⁸ DHCD must then grant final approval⁵⁹ before the commonwealth makes the “one time” zoning incentive payment.

B. Municipal Incentives

After enactment of the SGOD and the DHCD’s final approval thereof, cities and towns are entitled to receive incentive payments.⁶⁰ These “one time” zoning incentive payments vary according to project size:

Up to 20 units:	\$10,000
Between 20-100 units:	\$75,000
Between 101-200 units:	\$200,000
Between 201-500 units:	\$350,000
Over 500 units:	\$600,000 ⁶¹

The payment is based on the potential new units created under chapter 40R, less the number of units that could have been created as-of-right under existing zoning.⁶²

Cities and towns are also eligible to receive a density bonus payment of \$3,000 for each unit of new housing upon issuance of a building permit.⁶³ This is the so-called “bonus payment.”⁶⁴ In larger

SGODs, the potential windfall to communities easily tops \$1 million.⁶⁵ Those communities that adopt SGODs also receive priority during state consideration in awarding discretionary grant programs, such as Community Development Action grants and Public Works Economic Development grants.⁶⁶

The original concept of chapter 40R in 2003 included payments for the education of the school-aged children who become residents of a project within a SGOD.⁶⁷ This provision was deleted from the final version of the law. However, in 2005, chapter 40S was adopted by the legislature.⁶⁸ Chapter 40S payments are available only to those cities and towns with a chapter 40R smart growth district.⁶⁹ Such municipalities may receive “smart growth school cost reimbursement” from the commonwealth.⁷⁰ The reimbursement

shall be equal to the positive difference, if any, between: (i) total education cost for eligible students, and (ii) the sum of local smart growth revenues for education plus additional Chapter 70 aid. The Department of Education shall add the smart growth school cost reimbursement amounts to each district’s required net school spending, as defined in Chapter 70. For purposes of the net school spending calculation, the Department shall allocate a municipality’s smart growth school cost reimbursement among the districts to which it belongs in proportion to the number of eligible students from the municipality attending each district.⁷¹

To date, no municipality has qualified for chapter 40S payments.⁷²

55. See MASS. GEN. LAWS ch. 40R, § 4(a) (2006), and 760 C.M.R. 59.05(2) (2005).

56. MASS. GEN. LAWS ch. 40R, § 3 (2006).

57. Such amendment must take place within three years of the DHCD determination of preliminary eligibility. See 760 C.M.R. 59.05(3) (2005).

58. See MASS. GEN. LAWS ch. 40A, § 5 (2006 & Supp. 2008).

59. See MASS. GEN. LAWS ch. 40R, § 4(b) (2006), and 760 C.M.R. 59.05(4) (2005).

60. See MASS. GEN. LAWS ch. 40R, § 9(a) (2006), and 760 C.M.R. 59.06(1) (2005).

61. See MASS. GEN. LAWS ch. 40R, § 9(a) (2006), and 760 C.M.R. 59.06(1) (2005).

62. The total projected number of units of new construction is used in calculating the payment. See MASS. GEN. LAWS ch. 40R, §§ 8, 9 (2006).

63. See MASS. GEN. LAWS ch. 40R, § 9(b) (2006), and 760 C.M.R. 59.06(2) (2005). Again, this payment is for net new units only. It is important to note that the establishment of a 40R district does not require the developer to build out the project at the full density authorized by the SGOD. Where the SGOD allows a hypothetical density of 100 dwelling units and the developer chooses to build only 80 units, the municipality will receive a bonus payment of \$3,000 for each of the 80 units, assuming all are net new units. There is no consequence to the developer’s choice to forego the 20 units not built.

64. The DHCD did not make any bonus payments until the end of 2007. However, bonus payments have now been made to several communities, including Haverhill, North Reading and Norwood. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

65. A word of warning: municipalities must repay to the DHCD all money paid if within three years “no construction has been started.” The clock starts ticking on the date the commonwealth makes the “one time” payment. See MASS. GEN. LAWS ch. 40R, § 14 (2006). Obviously, the statute is too new for an example of repayment. Sure to be troublesome is the statutory standard “no construction has been started.” See generally, MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW § 5.02[13](2d ed. 2002) for

treatment of the like standards in Mass. Gen. Laws c. 40A, §§6 and 9 (2006). The DHCD’s regulations, at 760 C.M.R. 59.07(1)(f) (2005), do attempt some useful clarification.

66. See MASS. GEN. LAWS ch. 40R, § 9(c) (2006).

67. See 2003 Task Force Report 3. It is worth noting that the fiscal 2005 state budget merely directed DHCD, in consultation with the department of education and the department of revenue, to study the impact on schools that chapter 40R development would cause. See St. 2004, c. 149, §367.

68. St.2005, c. 141, eff. Nov. 22, 2005. Again, the inspiration was the Commonwealth Housing Task Force. Its May 2005 report, *Chapter 40R School Cost Analysis and Proposed Smart Growth School Cost Insurance Supplement*, called for supplemental payments to “cover any net education costs incurred by the community for public school students living in Smart Growth Districts, after taking into consideration increased property tax and excise tax revenues.” The 2005 report advocated for this supplemental payment because its authors feared that chapter 40R SGODs would not be enacted if the school costs loomed over the local legislatures. See page 3 of the *School Cost Analysis*, available at <http://www.tbf.org/uploadedFiles/SchoolsHousingFINALrev.pdf> (last visited Dec. 8, 2008).

69. MASS. GEN. LAWS ch. 40S, § 2 (2006).

70. See *id.*

71. *Id.* Note that Mass. Gen. Laws chapter 70 governs school funds and state aid for public schools.

72. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008). Moreover, using the formula prescribed by the statute, it is unlikely that municipalities in the upper half of the commonwealth’s municipal profiles would qualify. In order to verify that accurate information would be provided to one local legislature (which shall remain nameless) the author caused the chapter 40S formula to be applied in four contexts: (1) 75 percent market rental/25 percent moderate income; (2) 80 percent market rental/20 percent low income; (3) 60 percent market rental/40 percent low income; and (4) 50 percent market rental/50 percent low income. Only the last option resulted in chapter 40S payments and the payments did not erase an overall deficit in school costs. *Caveat oppidum!*

II. FAVORABLE ASPECTS OF CHAPTER 40R

A. A Positive Alternative to Chapter 40B

Chapter 40R represents an alternative to housing production under chapter 40B of the General Laws.⁷³ Chapter 40B, first adopted in 1969, prescribes a streamlined procedure for the issuance of comprehensive permits.⁷⁴ It is specifically intended to help developers avoid the long delays associated with proposals for affordable housing.⁷⁵ More importantly, the statute “confers on boards of appeals and the Housing Appeals Committee the power to override local ‘requirements and regulations,’ including zoning ordinances or by-laws, which are not ‘consistent with local needs.’”⁷⁶

Although chapter 40B has produced plenty of affordable and market rate dwelling units, it has perhaps inspired more in the way of suburban hostility.⁷⁷ One of chapter 40B’s chief defects is the absence of municipal control over appropriate siting. In order to apply for a comprehensive permit, the applicant needs only a “project eligibility letter” from a subsidizing agency.⁷⁸ The subsidizing agencies have routinely issued project eligibility letters for greenfields as well as brownfields, for forested hillsides as well as village centers.⁷⁹ Chapter 40B does not screen applicants for “eligible locations.”⁸⁰

If chapter 40R fosters “smart growth,” no component of the statute is smarter than the requirement of an “eligible location.” As discussed earlier, the statute requires 40R projects to be at an “eligible location”⁸¹ and defines that term⁸² as:

- (1) areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals;
- (2) areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns, and existing rural village districts; or
- (3) areas that by virtue of their infrastructure, transportation access, existing underutilized facilities, and/or location make highly suitable locations for residential

or mixed use smart growth zoning districts.⁸³

Cities and towns must vote, by a two-thirds majority, to amend the ordinance or by-law to accept this eligible location and allow for residential development as-of-right. The approval of a chapter 40R district is tantamount to a referendum on the acceptability of the proposed development; its location, design and potential impacts are key questions in the debate. Because 40R’s eligible locations are so “smart,” the hostility associated with inappropriate 40B siting is generally missing from this debate. Bad projects fall by the wayside, usually long before the vote of the local legislature. Smart projects are welcomed by a supermajority of local voters or not welcome at all.

Some chapter 40B projects are easily transformed into 40R projects. For example, Midway Realty, LLC, of Dartmouth, Massachusetts proposed a 308-unit project located at the long dormant site of an old amusement park, known locally as Lincoln Park.⁸⁴ The board of selectmen gave approval to the 40B application under the “Local Initiative Program” (“LIP”),⁸⁵ often referred to as a “friendly chapter 40B.” When chapter 40R became an option, the 40B application was shelved and the town meeting approved a SGOD for the same project. The difference? As a chapter 40B project, Dartmouth received only the reward of creating affordable housing. As a 40R project, Dartmouth received a one-time payment of \$350,000 and is eligible for up to \$924,000 in bonus payments.⁸⁶ This \$1.274 million represents considerable relief in a time of municipal budget crisis.

For municipalities, it is crucial that chapter 40R affordable dwellings “count” toward the chapter 40B affordable housing goal of 10 percent of total housing stock.⁸⁷ As is the case with rental projects under chapter 40B, rental projects developed under chapter 40R will also count 100 percent of the dwelling units, where at least 25 percent of the dwelling units are restricted for occupancy by moderate-income households, or 20 percent of the dwelling units are restricted for occupancy by low-income households.⁸⁸

For developers, chapter 40R has two key advantages over chapter

73. MASS. GEN. LAWS ch. 40B §§ 1-30 (2006).

74. *Milton Commons Associates v. Board of Appeals of Milton*, 14 Mass. App. Ct. 111, 115 (1982).

75. *Id.*; see also *Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 363 Mass. 339, 347 (1973).

76. *Id.* at 355. This is not the place for a comprehensive overview of chapter 40B. For a thorough discussion of the statute, see BOBROWSKI, *supra* note 65, ch. 18.

77. For example, a recent citizen’s petition to repeal chapter 40B gathered more than 31,000 signatures, but fell short of the 66,539 signatures required to put the measure before the voters. Supporters claimed that the petitions contained signatures hailing from 90 percent of the commonwealth’s 351 cities and towns. State House News Service, Dec. 19, 2007.

78. See 760 C.M.R. 56.04(2) (2008).

79. The author has served as legal counsel to zoning boards of appeal in more than 30 communities in the review of dozens of 40B projects, from downtown Haverhill to the forests of Holliston.

80. To be fair, there has been some recent progress by subsidy sources in screening chapter 40B projects. The DHCD has adopted “Sustainable Development Principles” to inform its decision making, including the issuance of project eligibility letters. Effective January 1, 2006, MassHousing has linked its support of project eligibility to the DHCD’s Principles.

81. See MASS. GEN. LAWS ch. 40R, § 6(a)(1) (2006) and 760 C.M.R. 59.04(1)(a)(1) (2005).

82. See MASS. GEN. LAWS ch. 40R, § 1 (2006) and 760 C.M.R. 59.02, 59.04(1)(a)(1) (2005).

83. The Romney administration determined that all state hospitals qualified as highly suitable locations. Several were approved as chapter 40R sites: Lakeville, Reading and Northhampton. It remains to be seen if the Patrick administration will follow suit. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

84. For more details, see *The Village at Lincoln Park*, <http://thevillageatlincolnpark.com/> (last visited Dec. 8, 2008).

85. See 760 C.M.R. 56.00(2008).

86. The breakdown: \$350,000 from the one time payment and \$924,000 if each of the proposed 308 dwelling units is permitted.

87. Under chapter 40B, a developer may seek to override local zoning in a community where less than 10 percent of its annual housing stock is not affordable to households earning no more than 80 percent of area median income, so long as the development proposed under the comprehensive permit plan contains not less than 25 percent of the units for affordable housing. The DHCD maintains the housing subsidized inventory (“SHI”) showing the progress of each city and town toward the 10 percent housing goal. DHCD, Chapter 40B Subsidized Housing Inventory (SHI) as of September 9, 2008, <http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm> (last visited Dec. 8, 2008).

88. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

40B. First, there is no profit limitation. Under chapter 40B, the developer of a “for sale” project is limited to a profit, as developer, of not more than 20 percent of total project development costs.⁸⁹ The developer of a 40B rental project is limited to a return on invested equity of not more than 10 percent per year.⁹⁰ Both rental and for sale projects face a tough “cost certification” when the last unit is sold or rented.⁹¹ This audit has been the source of enormous recent controversy.⁹²

Under chapter 40R, profit is not limited at all. Thus, there is no cost certification provision in the local regulatory agreement.⁹³ Without a profit limitation, the developer is under no obligation to share a project “pro forma” with the approval authority, as is the custom in chapter 40B projects. The developer is free to pay market price for the locus, even if the value is inflated by potential chapter 40R development. This also runs counter to practice under chapter 40B. It will certainly have the effect of making a chapter 40R development site easier to sell once the zoning has been enacted by the city or town.

A second advantage to developers is the generous appeal provision of chapter 40R. Section 11 of chapter 40R first establishes jurisdiction for judicial review in the usual venues.⁹⁴ Then, chapter 40R departs significantly from the Zoning Act:

Review shall be based on the record of information and plans presented to the approving authority ...

(g) A complaint by a plaintiff challenging the approval of a project under this section shall allege the specific reasons why the project fails to satisfy the requirements of this chapter or other applicable law and allege specific facts establishing how the plaintiff is aggrieved by such decision. The approving authority’s decision in such a case shall be affirmed unless the court concludes the approving authority abused its discretion ... in approving the project

(h) A plaintiff seeking to reverse approval of a project under this section shall post a bond in an amount to be set by the court that is sufficient to cover twice the estimated: (i) annual carrying costs of the property owner, or a person or entity carrying such costs on behalf of the owner for the property, as may be established by affidavit; plus (ii) an amount sufficient to cover the defendant’s attorneys fees, all of which shall be computed over the estimated period of time during which the appeal is expected to delay the start of construction. The bond shall be forfeited to the property owner in an amount sufficient to cover the property owner’s carrying costs and legal fees less any net income received by the plaintiff from the property during the pendency of the court case in the event a plaintiff does not substantially prevail on its appeal.⁹⁵

These provisions of section 11 contain powerful incentives for developers to use chapter 40R. Review by the court is based on the record produced at the approval authority. Thus, the local decision is reviewed by the court using the same procedures as those prescribed under chapter 30A of the General Laws, the commonwealth’s Administrative Procedures Act.⁹⁶ Unlike zoning trials pursuant to an appeal under section 17 of chapter 40A, there is no *de novo* review. Instead, once the local record has been assembled and transmitted to the court, a motion for judgment on the pleadings is decided without trial.⁹⁷

Moreover, the chance of an appeal by an alleged “aggrieved person” is, to say the least, highly unlikely. The bond and penalty provisions of section 11 of chapter 40R are so stiff as to be a developer’s dream.⁹⁸ The requirement of a bond to cover *twice* the annual carrying costs and *twice* the estimated attorney’s fees is without parallel in the Zoning Act,⁹⁹ the Subdivision Control Act¹⁰⁰ or the Administrative Procedures Act.¹⁰¹

89. For a thorough discussion analyzing the economics of a homeownership project under chapter 40B, see *Rising Tide, LLC v. Lexington Zoning Bd. of Appeals*, Mass. Housing App. Comm. No. 03-05 (June 14, 2005).

90. For a thorough discussion analyzing the economics of a rental project under chapter 40B, see *Bay Watch Realty Trust v. Marion Bd. of Appeals*, Mass. Housing App. Comm. No. 02-28 (Dec. 5, 2005). The Housing Appeals Committee prefers the “Return on Total Cost” (“ROTC”) to the Internal Rate of Return (“IRR”) approach to this measurement. See, e.g., *Paragon Residential Props., LLC v. Brookline Zoning Bd. of Appeals*, Mass. Housing App. Comm. 04-16 (Mar. 26, 2007); *8 Grant Street, LLC v. Natick Zoning Bd. of Appeals*, Mass. Housing App. Comm. 05-13 (Mar. 5, 2007).

91. The cost certification is imposed in the regulatory agreement required by both DHCD and MassHousing. The Housing Appeals Committee has endorsed the recommendations found in Edith Netter, *Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to MGL Chapter 40B*, published by the Massachusetts Housing Partnership (Nov. 2005) for the conduct of the cost certification. See http://www.mhp.net/uploads/resources/local_40b_v3_low_res.pdf (last visited Dec. 8, 2008). See also *Paragon Residential Props., LLC v. Brookline Zoning Bd. of Appeals*, Mass. Housing App. Comm. No. 04-16 (Mar. 26, 2007) (homeownership); *8 Grant Street, LLC v. Natick Zoning Bd. of Appeals*, Mass. Housing App. Comm. 05-13 (Mar. 5, 2007) (rental).

92. Connie Paige, *Report bolsters town — IG: 40B developer padded profits*, BOSTON GLOBE July 6, 2008, at 1; Connie Paige, *Inspector general blasts Billerica condo project: Profits excessive*, BOSTON GLOBE, Dec. 20, 2007, at 8; See, e.g., Christine McConville, *Towns urge crackdown on housing law violators*, BOSTON GLOBE, Oct. 11, 2006, at B1;

93. This does not eliminate the need for a regulatory agreement. The developer must promise that future resales of the affordable units will satisfy the standards

for affordability set forth in 760 C.M.R. 56.00 (2008).

94. “Any court authorized to hear appeals under G.L. c. 40A, §17 shall be authorized to hear an appeal from a decision under this section by a party who is aggrieved by such decision.” MASS. GEN. LAWS. ch. 40 R § 11(f) (2006). General Laws chapter 40A, section 17, in turn, provides for an appeal

to the land court department, the superior court department in which the land concerned is situated or, if the land is situated in Hampden county, either to said land court or, superior court department or to the division of the housing court department for said county, or if the land is situated in a county, region or area served by a division of the housing court department either to said land court or superior court department or to the division of said housing court department for said county, region or area, or to the division of the district court department within whose jurisdiction the land is situated except in Hampden county.

MASS. GEN. LAWS ch. 40A, § 17 (2006).

95. MASS. GEN. LAWS ch. 40R, § 11 (2006).

96. See MASS. GEN. LAWS ch. 30A, § 14 (2006) and Mass. Superior Court Standing Order No.1-96.

97. See generally, Mass. Superior Court Standing Order 1-96: Processing and Hearing of Complaints for Judicial Review of Administrative Agency Proceedings.

98. As to the constitutionality of this provision, see *Damaskos v. Bd. of Appeal of Boston*, 359 Mass. 55, 62-64 (1971).

99. See MASS. GEN. LAWS ch. 40A, § 17 (2006).

100. See MASS. GEN. LAWS ch. 41, § 81BB (2006).

101. See MASS. GEN. LAWS ch. 30A, § 14 (2006).

B. A Flexible Planning Tool

One of chapter 40R's greatest assets is shielding projects from "spot zoning" attack.¹⁰² Spot zoning arises "where a zoning change is designed solely for the economic benefit of the owner of the property receiving special treatment and is not in accordance with a well considered plan for the public welfare."¹⁰³ In effect, "spot zoning" occurs where a suspect area has been singled out for treatment less onerous than that imposed upon nearby, indistinguishable properties.¹⁰⁴

"Spot zoning" is illegal on constitutional grounds.¹⁰⁵ "Spot zoning" has also been repeatedly held to violate the uniformity requirement contained in chapter 40A, section 4.¹⁰⁶

Chapter 40R allows for the rezoning of small parcels without the risk of a "spot zoning" challenge.¹⁰⁷ This presents opportunities to create small SGODs or small subdistricts within SGODs. For example, the Karsten Company of North Weymouth proposed a multifamily development in Norwood on the site of the former Saint George Roman Catholic Church after purchasing the property from the Archdiocese of Boston. The proposal called for 11 units in the former church, two in the former rectory and two in the former convent.¹⁰⁸ The property contained only 34,398 square feet. Norwood's zoning by-law limited development in this General Residence District to two units per lot with a minimum lot area of 10,000 square feet. A rezoning pursuant to chapter 40A could be challenged as "spot zoning;"¹⁰⁹ rezoning under chapter 40R could not.

Similarly, subdistricts *within* the SGOD are bulletproof by virtue of the DHCD regulations. An example is found in Haverhill's Downtown SGOD. Haverhill's emphasis is vacant or underutilized

buildings. The parcels on which these buildings are located constitute the subzones shown on the Downtown SGOD map.

Each subzone represents a potential multifamily project otherwise requiring special permit approval from the city council. For example, the Archdiocese of Boston owns the land comprising Subzone B. The Archdiocese has plans to rehabilitate the empty building and develop a 57-unit multifamily dwelling. The subzones are small, but they have high densities.

The density requirement for the subzones was derived by dividing the size of the existing building¹¹⁰ by the acreage of the parcel. The resulting subzone area and density requirements are shown on the Haverhill SGOD chart.

Subzone	Developable Acres	Density (Units/Dev. Acre)
A	2.306	220
B	1.832	120
C	1.192	65
D	26.512	20
E	3.777	12

The DHCD regulations promote the creation of such subzones. With few exceptions, existing downtowns can be subzoned in this manner, even at lower densities. For example, Pittsfield's chapter 40R map shows nine subzones, the largest of which has 2.98 developable acres.¹¹¹ The largest project contemplated for any subzone will contain 107 units. Like Haverhill, all of the subzones are potential multi-family projects otherwise requiring special permit approval

102. The test for "spot zoning" was succinctly stated in *Leahy v. Inspector of Bldgs. of New Bedford*, 308 Mass. 128 (1941):

A city council is empowered to amend a zoning ordinance when the character and use of a district or the surrounding territory have become so changed since the original ordinance was enacted that the public health, morals, safety and welfare would be promoted if a change were made in the boundaries or in the regulations prescribed for certain districts; but mere economic gain to the owner of a comparatively small area is not sufficient cause to involve an exercise of this amending power for the benefit of such owner.

Id. at 132-33. Where "spot zoning" is alleged, the challenger has the burden of proof. "To sustain that burden they must prove facts which compel a conclusion that the question whether the amendment falls within the enabling statute is not even fairly debatable." *Crall v. City of Leominster*, 362 Mass. 95, 103 (1972). The court has characterized this burden as "heavy." *Id.*

103. *Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 363 Mass. 339, 362 (1973). On the other hand, where a change from residential to commercial "serves to increase the town's tax base and...increase the availability of retail services and employment opportunities," no spot zoning had occurred. *Rando v. Town of N. Attleborough*, 44 Mass. App. Ct. 603, 606 (1998).

104. *Leahy v. Inspector of Buildings*, 308 Mass. 128, 134 (1941). The court now favors a balancing test to assess a "spot zoning" challenge. Changes to the neighborhood or area are certainly relevant and important facts, but they are not controlling. *Raymond v. Comm'r of Pub. Works of Lowell*, 333 Mass. 410, 413 (1956). "It is not [even] necessary to find a substantial change in the locus to support a change in its zoning classification." *Cohen v. City of Lynn*, 333 Mass. 699, 704 (1956). Similarly, economic benefits accruing to a singled-out parcel do not require a finding of "spot zoning," where there are also benefits to the general public. *Raymond v. Bldg. Inspector of Brimfield*, 3 Mass. App. Ct. 38, 42 nn.3 & 4 (1975); see also *Fabiano v. City of Boston*, 49 Mass. App. Ct. 281, 286 (2000). Nor is the size of the parcel controlling. *Town of Marblehead v. Rosenthal*, 316 Mass. 124, 126 (1944) ("The invalidity of 'spot zoning' depends upon more than the size of the 'spot.'"); see also *Lanner v. Bd. of Appeal of Tewksbury*, 348 Mass. 220, 229 (1964); *Raymond v. Bldg. Inspector*, 3 Mass. App. Ct. at 42. In assessing "spot zoning" challenges, it is quite proper to consider the effect of the zoning change on the municipality as a whole. *Lanner*, 348 Mass. at 228-29;

Cohen, 333 Mass. at 704; *Rando*, 44 Mass. App. Ct. at 606. This is especially important where the growth of the municipality has been addressed by a plan. *Rosko v. City of Marlborough*, 355 Mass. 51, 53 (1968); *Durand v. Superintendent of Pub. Bldgs. of Fall River*, 354 Mass. 74, 77 (1968). In fact, the failure to study the effect of a zoning change using conventional planning techniques may result in invalidation of the amendment. *Nat'l Amusements v. City of Boston*, 29 Mass. App. Ct. 305, 310-11 (1990).

105. Any exercise of the zoning power to effect a private benefit constitutes a denial of equal protection under the United States and Massachusetts Constitutions. *Bd. of Appeals of Hanover*, 363 Mass. at 362 n.15; see also *Sinn v. Bd. of Selectmen of Acton*, 357 Mass. 606, 611 (1970).

106. "Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted." MASS. GEN. LAWS ch. 40A, § 4 (2006). See *Schertzer v. City of Somerville*, 345 Mass. 747, 751 (1963); *Shapiro v. City of Cambridge*, 340 Mass. 652, 658 (1960); *Canteen Corp. v. City of Pittsfield*, 4 Mass. App. Ct. 289, 293 (1976).

107. 760 C.M.R. 59.04(1)(d) (2005) states that "[a] District may contain two or more sub-districts, zoned separately for single-family, 2- and/or 3-family, and/or multi-family residential uses, or with varying allowable densities for the same residential use, so long as each sub-district individually meets the applicable minimum allowable density requirement set forth in 760 CMR 59.04(1)(d)1. through 3." This constitutes an exemption from "spot zoning."

108. The author served as counsel to the Karsten Company. These facts are taken from the application to the Norwood Planning Board.

109. See, e.g., *Beal v. Bldg. Comm'r of Springfield*, 353 Mass. 640, 644 (1968) (three lots comprising 0.4 acres held "spot zoning"); *Smith v. Bd. of Appeals of Salem*, 313 Mass. 622 (1943) (one-half acre lot was "spot zoned").

110. DHCD will allow a unit size of 1,000 square feet to be used in this calculation to estimate the yield of dwelling units. However, some reasonable space—here 20 percent—was subtracted for necessary common space in the building, for elevators, halls, utility rooms, and the like. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

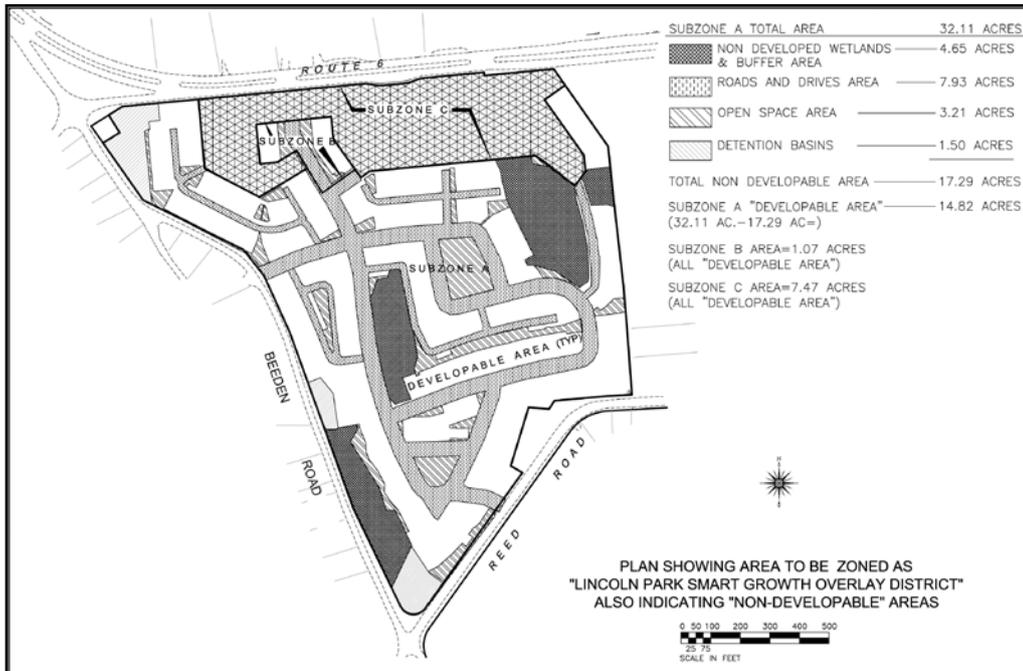
111. The author served as counsel to the city in the preparation of this map.

from the city council.¹¹²

In addition to providing relief from a “spot zoning” challenge, chapter 40R rewards creative map-making. At first blush, the density requirements of the statute appear daunting, if not overwhelming. With a minimum density requirement of 20 dwelling units per acre for multifamily projects,¹¹³ many municipalities reject even the notion of investigating a SGOD. But, the density requirement is

result is a developable area of 15.95 acres. This yields a multifamily density of 308 dwelling units, a far cry from the 800 dwelling units the overall tract acreage would otherwise predict.

In fact, the mapping of the chapter 40R district need not follow property boundaries. Consider the Fisherville SGOD in Grafton. Subzone A, on the north side of Route 123A, is a multifamily subzone, with a required density of 25 dwelling units per acre.¹¹⁶ The



property boundary lies across the Blackstone River to the west of the 40R district boundary. By carving the chapter 40R district back to a 10-acre tract, two acres of which are wetlands, the density requirements of the statute were satisfied by placing 200 dwelling units and a restaurant in this subzone. Subzone B, south of Route 123A, addresses a second, 10-acre parcel. However, the subzone consists of only four acres, two of which are subtracted because of wetlands, rights of way, or stormwater management. The two remaining developable acres will support 40 dwelling units and 40,000 square feet of commercial space, with a density of 20 dwelling units per acre. The excess property may be restricted by covenant or by the existing underlying zoning.

based on the net developable area.¹¹⁴ This allows even a large tract to be whittled to a manageable result.

Consider the Lincoln Park SGOD of Dartmouth. The total tract size is 40.65 acres, 7.47 of these acres are reserved exclusively for commercial development.¹¹⁵ The right-of-way of the various internal roadways contains 7.93 acres. Wetlands and steep slope areas occupy 5.94 acres. 1.59 acres are set aside for stormwater management. Ten percent of the tract, or 1.77 acres, is reserved as open space. The net

Finally, chapter 40R allows for the flexible use of a waiver provision. Zoning by-laws or ordinances adopted pursuant to chapter 40A cannot be “waived.” Variances are possible pursuant to section 10 of the statute, but only where the very difficult statutory criteria are met.¹¹⁷ The special permit process may be used to “deviate” from otherwise applicable dimensional requirements.¹¹⁸ The land court has ruled that a waiver is not permissible under site plan review.¹¹⁹ Under chapter 40R, the DHCD and

112. Information taken from the Pittsfield chapter 40R application.

113. MASS. GEN. LAWS ch. 40R, § 6(a)3 (2006).

114. “Developable Land” is defined as all land within a District that can be feasibly developed into residential or Mixed-Use Development Projects. Developable Land shall not include: Substantially Developed Land; or
 (a) Open Space;
 (b) Future Open Space;
 (c) the rights-of-way of existing public streets, ways, and transit lines;
 (d) land currently in use for governmental functions (except to the extent that such land qualifies as Underutilized Land); or
 (e) areas exceeding one-half acre of contiguous land that are:
 1. protected wetland resources (including buffer zones) under federal, state, or local laws;
 2. rare species habitat designated under federal or state law;
 3. characterized by steep slopes with an average gradient of at least 15%; or
 4. subject to any other local ordinance, by-law, or regulation that would prevent the development of residential or Mixed-Use

Development Projects at the As-of-right residential densities set forth in the Smart Growth Zoning.

760 C.M.R. 59.02 (2005).

115. The author served as counsel to the town. These facts are taken from the application to DHCD.

116. The author served as counsel to Fisherville Redevelopment Corporation, the landowner. These facts are taken from the application to DHCD.

117. Variances may only be issued by the permit granting authority where owing to circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.

MASS. GEN. LAWS ch. 40A, § 10 (2006).

118. See *Emond v. Bd. of Appeals of Uxbridge*, 27 Mass. App. Ct. 630 (1989).

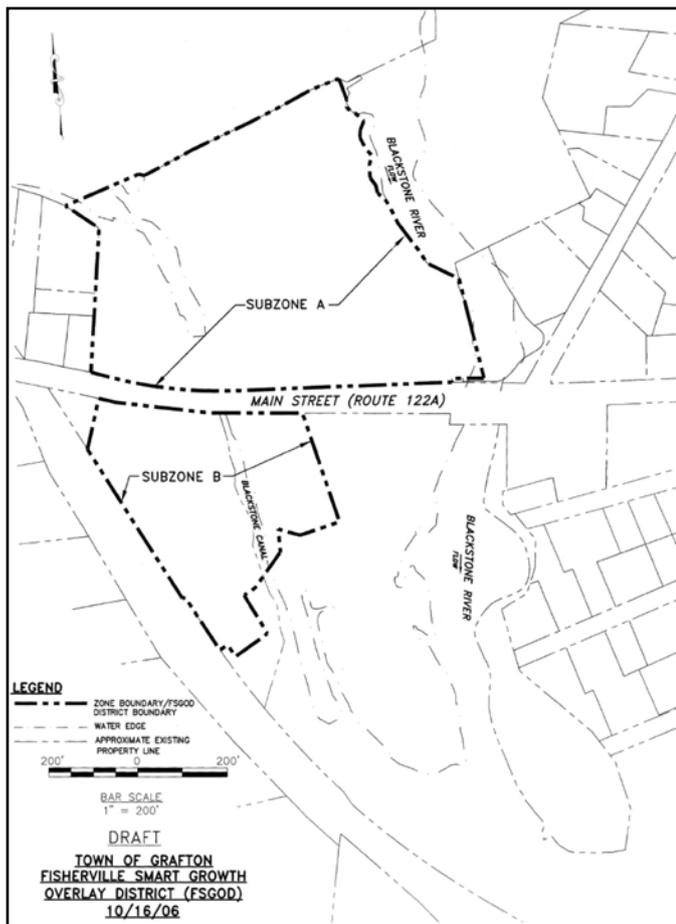
119. See generally *Aloha Found. v. Zoning Bd. of Appeals of Norwood*, 4 LCR (Landlaw) 199, 202 (Mass. Land Ct. 1996).

III. CRITIQUE OF CHAPTER 40R

Chapter 40R has been a useful vehicle for housing production. Certainly, the Haverhill, Brockton, Kingston and Pittsfield SGODs will foster “smart growth” housing in — by anyone’s definition — the right place. These projects will bring apartment dwellers to downtowns with newly renovated train stations, and they will serve as the catalyst for the next wave of downtown revitalization in these aging cities.

But chapter 40R has also promoted random development of sites that barely meet “smart growth” standards. For example, the Lunenburg Tri-Town SGOD authorizes the construction of 204 dwelling units at the site of a still-operating drive-in movie theater.¹²² DHCD approved the site as a suitable location and the town meeting amended the zoning by-law to accommodate the proposal.¹²³ Does that make it “smart growth”? There are undoubtedly dozens of sites in Massachusetts more consistent with smart growth principles than this 10-acre site in Lunenburg, which is somewhat distant from employment centers and a train station.

The benefits of chapter 40R may be random, but they are hardly inconsistent with the DHCD’s random efforts at statewide planning. Unlike many nearby states,¹²⁴ Massachusetts does not have a cadre of state planners producing transportation, economic development and land use visions for the commonwealth’s regions and municipalities. In fact, the DHCD has no staff currently performing this planning function.¹²⁵ Chapter 40R would be a better tool if it did. True “smart growth” priority sites — identified by DHCD planners with the commonwealth’s goals and objectives in mind — would be better targets for our limited resources. A vote to re-zone Lunenburg’s Tri-Town SGOD deserves some reward. Priority sites — those key to the DHCD’s regional economic, housing and transportation goals and objectives — deserve even more reward. Municipalities taking on prioritized sites might receive some form of augmented or guaranteed payments or a boost in competing for discretionary funds.¹²⁶



the office of the attorney general¹²⁰ have routinely approved SGODs containing a broad waiver clause.¹²¹

120. Pursuant to MASS. GEN. LAWS ch. 40, § 32 (2006), the office of the attorney general must approve all by-laws from the commonwealth’s towns. Cities are exempt from this requirement.

121. For example, the Northampton SGOD contains the following provision: 20.14 Decision.

1. Waivers. Upon the request of the Applicant, the Plan Approval Authority may waive dimensional and other requirements of Section 20.0, including the design standards of Section 20.11, in the interests of design flexibility and overall project quality, and upon a finding of consistency of such variation with the overall purpose and objectives of the SG District, or if it finds that such waiver will allow the Project to achieve the density, affordability, mix of uses, and/or physical character allowable under this Section 20.0.

Northampton, Mass., Code § 350-20.14 (2008).

122. The author represented the proponent of the rezoning.

123. See Lunenburg Zoning By-Laws, § 4.13 (2006).

124. E.g., New Jersey and Rhode Island. In 2006, the New Jersey Council on Affordable Housing (COAH) was working with 287 of the 566 municipalities in the state to develop regional plans for affordable housing. An additional 78 municipalities are or were at one time under the jurisdiction of the court. See

State of N.J., Department of Community Affairs, Council on Affordable Housing, <http://www.state.nj.us/dca/affiliates/coah/index.html> (last visited Dec. 8, 2008). In Rhode Island,

[t]he Statewide Planning Program is charged with preparing and maintaining plans for the physical, economic, and social development of the state; encouraging their implementation; and coordinating the actions of state, local and federal agencies and private individuals within the framework of the state’s development goals and policies...as established by Sections 42-11-10 and 12 of the General Laws.

State of R.I., Division of Planning, <http://www.planning.ri.gov/> (last visited Dec. 8, 2008).

125. Telephone conference with Donald J. Schmidt, DHCD Chapter 40R Program Manager, in Boston, Mass. (Aug. 1, 2008).

126. Currently, municipalities vying for discretionary grants (such as Community Development Action Grants and Public Works Economic Development Grants) must participate in the Commonwealth Capital Program which scores municipalities based on the number of local initiatives undertaken to comply with myriad “smart growth” principals. The program’s scorecard could be amended to associate points if prioritized sites are taken on by the host community.

Priority “smart growth” siting by the commonwealth could address another problem: DHCD has not seen many chapter 40R applications from municipalities operating without a private partner.¹²⁷ The reasons for municipal inaction or disinterest are complicated and connected. Municipalities are wary of chapter 40R. The fixed density requirement is a source of concern. Municipalities cite past broken promises by the commonwealth as another source of discouragement.¹²⁸ Accordingly, chapter 40R has worked best where the development is promoted by the private sector, and the municipality has, once educated, agreed to collaborate in the rezoning process. As discussed above, smart growth sites promoted by developers in cooperation with cash-short municipalities are a hit-or-miss proposition.¹²⁹

A priority list of “smart growth” sites would serve notice to municipalities that DHCD will enthusiastically review a proposal for those sites, with or without a private sponsor. Cities and towns need an additional assurance. Because chapter 40R requires repayment after three years in the event no construction is commenced,¹³⁰ a municipality has little or no incentive to rezone its best parcels for smart growth in the absence of a private partner. Some of our cities and towns are cash strapped but transit rich, with nearby housing begging for rehabilitation; in these locations, chapter 40R acts to promote as-of-right residential development where it is best suited. A simple tweak of the repayment provision, extending the “build or else” mandate to six years (or forgiving the mandate altogether for priority sites) could inspire cities and larger towns with downtowns to rezone for residential growth.

Finally, the uncertainty over the promised payments needs to be addressed. All chapter 40R and 40S incentives are funded through the Smart Growth Housing Trust Fund. These incentives are subject to legislative appropriation.¹³¹ One of the greatest impediments to

chapter 40R’s success is the uncertainty and adequacy of the appropriations made to the trust. According to the Task Force, many cities and towns have expressed an unwillingness to participate, not because of any distaste for developing under chapter 40R, but because there is no credible plan for providing 40R and 40S funding in the foreseeable and distant future since the trust is subject to appropriation.¹³²

CONCLUSION

Chapter 40R presents a rare opportunity for municipalities and developers to work in concert toward the common goal of increasing our housing stock. At its best, chapter 40R promotes a public/private partnership with rewards for both sides. Unlike chapter 40B, where confrontation is too often the rule, chapter 40R requires cooperation. Ultimately, the adoption of a chapter 40R SGOD is a referendum on the proposed development project. Two-thirds of the town meeting or city council must be on board for the project to have a future.

When chapter 40R was adopted in 2005, few of the details had been worked out. It remained for the DHCD to fill in the details by regulation in the months after the statute was enacted, and to decide how this tool could be best used. Happily, the DHCD has shown great flexibility and creativity in the implementation of chapter 40R. As the program has matured, the standards have become clearer and more predictable. Municipalities are well-advised to revisit chapter 40R as a possible tool for housing production. In the right place and for the right project, there are enormous advantages. The legislature and the DHCD might wish to clarify some of the more mystifying aspects of the statute. Most importantly, chapter 40R needs to be targeted so that its best features are implemented with regard to selected, not random, development sites.¹³³

127. Only the Haverhill and Brockton applications fit this description. All of the remaining applications were primarily driven by the development side.

128. While chapter 40R can be an effective tool that communities may wish to use to develop much-needed housing, the caveat remains that all incentives paid to chapter 40R communities are subject to the uncertainty of the legislative appropriations process. There have been several occasions where the legislature failed to uphold its statutory obligations. For example, Mass. Gen. Laws chapter 81 requires that 7.5 percent of gas tax collections be returned to cities and towns for transportation-related purposes. While cities and towns had relied heavily on this revenue sharing commitment, the legislature decided to “zero out” the program several years ago, thereby eliminating the nearly \$50 million annually this account provided all communities across the state. This unfulfilled statutory obligation still exists on the books today.

129. Take, for example, Dartmouth’s SGOD. Eighteen months after the adoption of the SGOD, the developer has not proposed housing for the site. Only the commercial component of the development has been approved after review.

130. MASS. GEN. LAWS, ch. 40R, § 14 (2006).

131. See MASS. GEN. LAWS ch. 10, § 35BB (2006).

132. Testimony of Ted Carman on behalf of the Commonwealth Housing Task Force before the Massachusetts legislature’s Joint Committee on Housing (June 4, 2007). As discussed in note 35, *supra*, two bills were filed in the 2007 legislative session to help rectify these deficiencies: House Bill 160 filed by Rep. Kevin Honan of Boston, H.R. 160, 2007 Leg., 185th Sess. (Mass. 2007), and Senate Bill 132 filed by Sen. Harriette L. Chandler of Worcester, S. 132, 2007 Leg., 185th Sess. (Mass. 2007), both of whom were the key state legislators in enacting both chapters 40R and 40S. Neither was enacted by the legislature in the last session. However, both legislators have refiled the measures in the current legislative biennial session that commenced January 2009. See H.R. 197, 2009 Leg., 186th Sess. (Mass. 2009) and S. 86, 2009 Leg. 186th Sess. (Mass. 2009). The legislature should move quickly to signal support for chapter 40R by passing these measures.

133. The same focus needs to be added to chapter 43D, the so-called “expedited permitting” statute, which provides cities and towns financial assistance if they opt to designate sites within the community that ensure a 180-day permitting timeframe. MASS. GEN. LAWS ch. 43D, §§1–16 (2006).

CONFLICT OF LAWS IN MASSACHUSETTS

PART I: CURRENT CHOICE-OF-LAW THEORY

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Introduction

Justice Holmes reportedly suggested that “no generalization is worth a damn, including this one.”¹ This quip might well be applied to the field of conflict of laws, in general and in Massachusetts. For every “rule” one can articulate, there is an exception or qualification, or a creative argument to be made for a different result. Conflicts issues invite imaginative advocacy because of the complexity and generality of the governing principles and the importance of facts in applying those principles to cases. Yet, there *are* general principles that guide the courts in deciding conflicts issues. This two-part article summarizes and explains the basic principles Massachusetts courts have developed for addressing conflict of laws issues. The goal is to provide a starting point for analyzing conflicts problems in cases litigated in Massachusetts.

Perhaps it will be useful to give some basic examples of conflict of laws issues, to put the discussion into perspective. Consider the following cases:

- Two Massachusetts employees of a Massachusetts corporation have an accident driving through Connecticut in the course of their employment. Massachusetts workers’ compensation law would bar the employee/passenger from suing the employee/driver for negligence in the course of employment, but Connecticut law would not.²
- Brox, a Massachusetts contractor, subcontracted certain paving work in Massachusetts to Gordon, a Maine contractor. When a Gordon employee was injured, Brox sought to enforce

a clause in the subcontract requiring Gordon to indemnify it for all claims arising out of the performance of the work. Maine law would nullify the clause, but it was apparently enforceable under Massachusetts law.³

- The Niermans, a Massachusetts couple, booked a reservation through a Massachusetts travel agent to stay in a Hyatt hotel in Texas. While at the hotel, Mrs. Nierman was injured. The Niermans brought suit against Hyatt Corporation in Massachusetts, within the three-year Massachusetts statute of limitations for tort claims, but after the two-year Texas statute had expired.⁴

Each of these cases involves events that have connections to more than one state. Consequently, there is an argument in each case that the law of one state or, of the other should govern the resulting legal claims. In the workers compensation case, for example, it is arguable that Connecticut law should govern — even if the case is heard in a Massachusetts court — because the accident took place in Connecticut. It is also arguable that Massachusetts law should apply, since the employees were employed by a Massachusetts corporation and lived in Massachusetts. In cases like these, that have contacts with several states, courts invoke “choice-of-law” principles to decide which body of substantive law to apply. Every state has a body of such choice-of-law principles. Courts cannot avoid having them, though they might like to: They have to decide cases like these when they arise, so they must develop guidelines for choosing a body of applicable law in order to do so.

* The authors appreciate the able assistance of Marcy Rolerson, J.D. candidate, Suffolk University Law School, Class of 2010, in researching and preparing this article.

1. *Quoted in Robert W. Sellen, Lawyers in Politics*, 13 U. KAN. L. REV. 332, 332 (1964-65) (book review).

2. *See Saharceski v. Marcure*, 373 Mass. 304, 305, 307 (1977).

3. *See City of Haverhill v. George Brox, Inc.*, 47 Mass. App. Ct. 717, 724-5 (1999).

4. *See Nierman v. Hyatt Corp.*, 441 Mass. 693, 694 (2004).

This review of Massachusetts conflicts law will be published in two parts. This part reviews the historical approach of Massachusetts cases to conflicts issues, describes the current choice-of-law methodology applied by Massachusetts courts, and analyzes Massachusetts conflicts case law on several frequently litigated subjects, including torts and contracts. The second part of the article, which will appear in a subsequent issue of the *Law Review*, analyzes special conflicts topics, including statute of limitations problems, choice-of-law and choice of forum clauses, and the difficult distinction between substantive and procedural matters.

I. SOME HISTORICAL BACKGROUND

A. The *First Restatement of Conflicts*

From the late 1800s through the 1960s, most American courts applied the “vested rights” principles of the *First Restatement of Conflict of Laws* (“*First Restatement*”) to decide choice-of-law issues. The underlying premise of the *First Restatement*, championed by Joseph Beale, its reporter, was that rights “vest” — that is, spring into existence — on the occurrence of a legally significant event. Any court, therefore, should apply the law of the place where the right vested.⁵

Under *First Restatement* theory, tort claims “vested” in the state where the injury occurred, so the “*lex loci delicti*,” the law of the place of the injury, applied.⁶ In the hotel injury case described above, *First Restatement* principles dictated application of Texas tort law to the accident, because it took place there. Contracts claims usually vested under the *First Restatement* at the place of making of the contract, again on the theory that the parties’ rights sprang into being at the time and place of making the contract. Thus, no matter which state’s courts decided a case involving the contract, the court looked to the place of making to define the rights of the parties.⁷ Disputes involving performance of the contract generally were governed by the law of the place of performance.⁸ Cases involving real property looked to the law of the state where the property was located.⁹ Interests in movable property were generally governed by the law of the place where the chattel was located at the time the interest was created.¹⁰

B. 1900-1960s: Massachusetts Generally Followed the *First Restatement*

During the first half of the twentieth century, Massachusetts decisions generally followed the *First Restatement* guidelines. In contracts cases, the law of the place of making usually governed the

rights created by the contract.¹¹ Choice-of-law in torts cases typically looked to the place of the injury,¹² and generally followed the *First Restatement* locus-of-the-property rule for property cases as well.¹³

In practice, difficulties with *First Restatement* analysis gave rise to some complex problems. Courts had to characterize issues as matters of tort or contract, issues in a contract case as matters of performance or formation, and to decide close questions concerning where the parties’ rights had vested.¹⁴ In addition, courts sometimes chose not to apply the law dictated by *First Restatement* principles if that law clashed with an important public policy of the forum.¹⁵ Massachusetts courts also distinguished matters of procedure from the substantive rights of the parties, and would usually apply Massachusetts procedural rules even if they applied another state’s substantive law to the suit.¹⁶

C. Since 1960: The “Choice-of-Law Revolution”

The 1960s and 1970s brought a sustained attack on the *First Restatement*, led by conflicts scholars who argued that vested rights theory, designating a single body of law that could govern a multi-state transaction, was rigid and unresponsive to underlying policies of the affected states. Often, *First Restatement* analysis would point mechanically to a state that had little or no interest in the dispute. For example, the rules of contract formation might lead to the conclusion that a contract was formed in New York, because the parties signed the contract there, although all negotiations and contemplated performance took place in Massachusetts. Common sense and party expectations suggest that Massachusetts law would govern, but the *First Restatement* place-of-making rule pointed to application of New York law (at least as to issues of contract formation). Similarly, in a tort case, an airplane manufactured in one state, flying from a second state to a third, might crash in a state that otherwise had no interest in the events. Although the interests of the affected states suggest that issues such as standard of care and the damages recoverable should be governed by the laws of a state with significant connections to the carrier or passengers, the *First Restatement* dictated application of the law of the state of the crash to all substantive issues.

Scholars suggested several alternative approaches to conflicts problems. Professor Brainerd Currie advocated an approach known as “interest analysis,” under which the court would assess the interests of each state involved in the litigation events.¹⁷ If the forum court had an interest in applying its law to an issue, and the other state did not, the forum court would apply its own law. If the forum

5. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 189-90 (3d ed. 2002) [hereinafter RICHMAN & REYNOLDS].

6. See generally RESTATEMENT (FIRST) OF CONFLICT OF LAWS, §§ 377-390 (1934); RICHMAN & REYNOLDS, *supra* note 5, at 189-90.

7. RESTATEMENT (FIRST) OF CONFLICT OF LAWS, §§ 332-340 (1934); RICHMAN & REYNOLDS, *supra* note 5, at 189-90.

8. RESTATEMENT (FIRST) OF CONFLICT OF LAWS, §§ 358-372 (1934).

9. *Id.* §§ 208-239.

10. *Id.* § 255ff. See generally, RICHMAN & REYNOLDS *supra* note 5 at 194-98.

11. *Hyfer v. Metro. Life Ins. Co.*, 318 Mass. 175, 177 (1945); see also *Choate, Hall & Stewart v. SCA Services, Inc.*, 378 Mass. 535, 540 (1979); Edith Fine, *Massachusetts Contract Cases and Problems in the Choice-of-law*, 43 MASS. L. Q. 46, 47 (1958).

12. See, e.g., Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-*

of-Laws Method, 25 U. CHI. L. REV. 227 (1958). For a description of Currie’s approach to interest analysis, see EUGENE SCOLES, PETER HAY, PATRICK BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 26-30 (4th ed. 2004) [hereinafter, SCOLES, HAY, BORCHERS & SYMEONIDES]. See generally Brainerd Currie, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

13. *Holmes v. Dunning*, 260 Mass. 250, 253 (1927) (real property); *Polson v. Stewart*, 167 Mass. 211, 214 (1897) (real property); *Hallgarten v. Oldham*, 135 Mass. 1, 7 (1883) (personal property).

14. See RICHMAN & REYNOLDS, *supra* note 5, at 182-84, 186-88, 193-94, 198-201 (reviewing various “escape devices” courts used to avoid unpalatable results under the *First Restatement* rules).

15. Cf. *Stone v. Old Colony St. Ry.*, 212 Mass. 459, 464-65 (1912) (rejecting argument that court should refuse to enforce contract on public policy grounds). See generally, RICHMAN & REYNOLDS, *supra* note 5, at 188.

16. This perplexing problem continues under modern conflicts analysis.

17. See, e.g., authorities cited *supra* note 12.

court and another state both had an interest in applying their law to the issue, the forum court would again apply its own law, because it had no reason to prefer another state's interests over its own. If the forum state did not have an interest in applying its law to an issue, but another state did, the forum court would apply the law of the other interested state to the issue.

Professor Robert Lefflar argued that courts in making choice-of-law decisions should look to five "choice-influencing considerations." These included predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interest and application of the better rule of law.¹⁸ Other scholars suggested several other approaches and variants on the ones just described.¹⁹

The criticism of the *First Restatement* by the scholars led the American Law Institute to commission a *Restatement (Second) of Conflict of Laws* ("*Second Restatement*"), which was promulgated in 1971. The *Second Restatement* approach, described in more detail below in Parts II(B) and II(C), calls for application of the law of the state with "the most significant relationship" to the particular issue before the court. Many sections specify a presumptively applicable law for particular conflicts issues, "unless ... some other state has a more significant relationship" to the issue.²⁰ For particular types of claims, the *Second Restatement* also specifies contacts to consider in assessing the "significant relationship" issue,²¹ and, in a concession to interest analysis advocates, provides that all this shall be analyzed in light of seven policy considerations listed in section 6.²²

As Part II(A) explains, Massachusetts conflicts decisions since 1960 reflect this retreat from the rigidity of the *First Restatement* toward more policy-based analysis of choice-of-law problems. While the Supreme Judicial Court ("SJC") has not expressly endorsed the *Second Restatement* as the sole basis for choice-of-law analysis in Massachusetts courts, the cases have increasingly applied the *Second Restatement* to analyze conflicts issues.²³

D. The Minimal Role of Constitutional Constraints on State Court Choice-of-law

Several clauses of the United States Constitution restrict the authority of a state court in choosing the substantive law to apply to a

case before it.²⁴ The United States Supreme Court has occasionally rejected application of a state's law to claims where the underlying events and parties bore no relation to the state whose law was chosen.²⁵ However, the Supreme Court has allowed state courts very broad authority to choose the substantive law to govern cases before them. Under *Allstate Insurance Co. v. Hague*, a state court may apply its own law (or, by inference, choose to apply another state's law) to a case if the chosen state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."²⁶

Under *Allstate*, a state may apply its law to a case even though another state has more substantial contacts with the dispute, so long as there is some connection of the case or the parties to the state whose law is applied. Thus, constitutional challenges to a court's choice-of-law will rarely succeed. Instead, parties should usually focus their arguments on reasons why the court *should* choose the law they favor, under common-law choice-of-law principles, rather than arguing that the court is constitutionally required to apply a particular state's law to the case.

II. CURRENT CHOICE-OF-LAW METHODOLOGY IN MASSACHUSETTS

Since the 1970s, Massachusetts courts have rejected the "vested interest" choice-of-law rules dictated by the *First Restatement*, but to date "have not elected by name any particular choice-of-law doctrine."²⁷ Although the SJC has not explicitly adopted the *Second Restatement* in Massachusetts, it has increasingly relied on the *Second Restatement's* flexible, "functional," policy-driven analysis for resolving conflict issues.²⁸ The functional approach requires judges to decide conflicts by "assessing various choice-influencing considerations, including those provided in the *Second Restatement* and those suggested by various commentators."²⁹

A. Background

Massachusetts took its first major step toward adopting the functional approach in 1976 in *Pevoski v. Pevoski*.³⁰ In *Pevoski*, the plaintiff was a passenger in a car driven by her husband that was involved in a three-car accident in New York. Each car in the accident was

18. Robert A. Lefflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282-304 (1966). See generally SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 12, at 52-56.

19. See generally SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 12, at 43-58.

20. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

21. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971) (specifying relevant contacts to be considered in tort cases).

22. *Id.* § 6(2).

23. Since 1965, a fair number of states have moved away from the *First Restatement*. A few adopted interest analysis, a few opted for Lefflar's choice influencing considerations, and a few endorsed variants of these. However, a great many more states have adopted the *Second Restatement*. By 2006, about 23 states had adopted the *Second Restatement* for contracts and torts conflicts, 10-12 continued to apply the *First Restatement*, and other approaches were followed in two to five states. Symeon C. Symeonides, *Choice-of-law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 713 (2007).

24. For an overview of potential constitutional challenges to a court's choice-of-law, see SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 12, at 149-77.

25. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985).

26. 449 U.S. 302, 313 (1981).

27. *Cosme v. Whitinsville Mach. Works*, 417 Mass. 643, 646 (1994).

28. At least one judge has even claimed that Massachusetts has silently adopted the *Second Restatement*. *King v. Williams Indus.*, 565 F. Supp. 321, 324 (D. Mass. 1983) ("*Sub silentio*, the SJC adopted the approach set forth in the *Second Restatement* ss. 145, 146"). This is incorrect. As recent cases have confirmed, the current approach in Massachusetts remains a "functional approach" that is guided by, but not limited to, the *Second Restatement*. See *Shamrock Realty Co., Inc. v. O'Brien*, 72 Mass. App. Ct. 251, 255 (2008) (noting that the court has adopted the functional approach); see also *General Electric v. Lines*, No. 06-3106BLS1, 2008 WL 2908053, at *2 (Mass. Super. Ct., July 10, 2008) ("Massachusetts has adopted a functional choice-of-law approach...The Massachusetts functional approach is explicitly guided by the [*Second Restatement*]."); *One-Beacon Am. Ins. Co. v. Narragansett Elec. Co.*, No. 053086BLS1, 2007 WL 2429724, at *4 (Mass. Super. Ct. Aug. 15, 2007) ("The SJC has decided not to tie Massachusetts conflicts law to any specific choice-of-law doctrine.").

29. *Id.* (quoting *Bushkin Assocs. v. Raytheon Co.*, 393 Mass. 622, 631 (1985)).

30. 371 Mass. 358 (1976).

registered and insured in Massachusetts, and each was operated by a Massachusetts resident. The plaintiff-wife sought to apply New York law which would allow her to bring an interspousal claim. Massachusetts law would not allow the claim. Despite a long tradition of Massachusetts courts deciding torts conflicts based strictly on the “place of the wrong,” the *Pevoski* court refused to apply the law of the place where the tort occurred (New York), and instead applied Massachusetts law.³¹ Without citation to the relatively new *Second Restatement*, the *Pevoski* court reasoned that, under these facts, application of the law of the place of the injury would lead to an unjust result:

[W]e recognize that there also may be particular issues on which the interests of *lex loci delicti* are not so strong. Indeed on the particular facts of a case another jurisdiction may sometimes be more concerned and more involved with certain issues than the State in which the conduct occurred. “... Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as does the issue of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.” In this instance the economic and social impact of this litigation will fall on Massachusetts domiciliaries and a Massachusetts insurer. New York has an undoubted interest in enforcing its traffic laws and in making its highways safe for travel but it has no legitimate interest in regulating the interspousal relationships of Massachusetts domiciliaries who chance to be injured within its borders.³²

In *Pevoski*, the SJC laid the groundwork for a modern era in which Massachusetts courts began to decide conflict issues with a more sophisticated, and at times convoluted, analytical scheme requiring

examination of multiple, policy-based factors.

In 1985, the SJC embraced the functional approach in *Bushkin Associates v. Raytheon Co.*³³ Without adopting a specific doctrine,³⁴ the court in *Bushkin* stated that the “obvious” choice for guidance for future choice-of-law issues would be the *Second Restatement*, which replaced the strictly territorial approach for determining conflicts with a policy-oriented analysis.³⁵ However, *Bushkin* did not limit the factors that the court should use in its analysis to the *Second Restatement*. Instead, the court suggested that the functional approach also allows for taking the factors suggested by Professor Leflar into account.³⁶ Professor Leflar’s five choice-influencing considerations are:

- Predictability of results;
- Maintenance of interstate and international order;
- Simplification of the judicial task;
- Advancement of the forum’s governmental interests;
- Application of the better rule of law³⁷

While adopting the functional approach, the court acknowledged that it can be problematic because the wide flexibility can result in little guidance for anticipating results in other cases.³⁸ However, the court reasoned, occasional inconsistency is preferable to the more rigid rules of the *First Restatement* because the functional approach rejects artificial constructions.³⁹

In the last 30 years, courts applying Massachusetts law have incorporated the functional approach to several practice areas.⁴⁰ Still, the territorial approach remains influential in some areas, like internal business disputes, where the court continues to favor one-factor tests.⁴¹ In some areas of law, the *Bushkin* court’s concern that the functional approach could lead to results that are difficult to reconcile has come to fruition.⁴²

B. *Second Restatement* Basics

The *Second Restatement*, published in 1971, consists of 423 sections. The sections take three forms: first, the “policy” section, section 6, underlies all choice-of-law questions and states that the law

31. See *id.* at 359 (“In this Commonwealth, *lex loci delicti* has been firmly established as the general tort conflicts rule.”); see, e.g., *Brogie v. Vogel*, 348 Mass. 619, 621 (1965); *Goodale v. Morrison*, 343 Mass. 607, 610 (1962); *Murphy v. Smith*, 307 Mass. 64, 65 (1940).

32. *Pevoski*, 371 Mass. at 359-60.

33. 393 Mass. 622 (1985).

34. *Id.* at 631 (“we decide here not to tie Massachusetts conflicts law to any specific choice-of-law doctrine, but seek instead a functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole.”).

35. At the heart of the *Second Restatement* is a list of factors found in section 6(2) which provide the basis for determining which jurisdiction has the most significant relationship to a problem. See *infra* Part II(B) (iii) (discussing each of the section 6(2) factors).

36. *Pevoski*, 371 Mass. at 634. The Leflar factors, which closely parallel the section 6(2) factors under the *Second Restatement*, differ significantly only by including the “better rule of law” as a factor. See *infra* Part II(B) (iii) (providing list of section 6 factors and discussing them). Use of Leflar’s “better rule of law” factors has often been criticized by courts. As a Massachusetts federal district court judge opined in declining to use Leflar’s better rule of law factor: “[T]he Court is reluctant to resolve this case by second-guessing the Connecticut legislature as to the wisdom of enacting such a law, or by second-guessing the decision of the Massachusetts legislature not to enact such a law.” *Alves v. Siegel’s Broadway Auto Parts, Inc.*, 710 F. Supp. 864, 872 n.7 (D. Mass. 1989) (citing *Bi-Rite Enter. v. Bruce Miner Co.*, 757 F.2d 440, 443 (1st Cir.1985)) (noting *Bushkin*’s mention of the Leflar considerations, but opting instead to apply exclusively the criteria of § 6(2) of the *Second Restatement*). In apparent recognition

of the potential pitfalls of using the “better rule of law” factor, Massachusetts courts have avoided relying on it. See *Travenol Labs., Inc. v. Zotal, Ltd.*, 394 Mass. 95, 100 (1985) (deciding case based on *Second Restatement* analysis, but recognizing in dicta that better rule of law analysis could be used when facts create close question).

37. *Bushkin*, 393 Mass. at 634 n.7 (quoting ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* 196 (1977)).

38. *Id.* at 631-32 (“[V]agueness in the formulations applied is probably unavoidable.”).

39. *Id.* at 632 (“Our approach, however, while producing less predictability, rejects artificial constructions. This, after all, was the primary reason for rejecting the traditional *lex loci* approach in favor of more modern methods. It makes little sense to reject one artificial approach only to replace it with another.”).

40. See, e.g., *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622 (1985) (contract action with statute of frauds issue); *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 327 (1983) (wrongful death and warranty action, liability for emotional distress); *Choate, Hall & Stewart v. SCA Servs., Inc.*, 378 Mass. 535 (1979) (contract action, rights of third-party beneficiary); *Saharceski v. Marcure*, 373 Mass. 304 (1977) (tort action, fellow employee doctrine); *Pevoski v. Pevoski*, 371 Mass. 358 (1976) (tort action, interspousal immunity issue).

41. See *Harrison v. NetCentric Corp.*, 433 Mass. 465, 470 (2001) (relying on state of incorporation to determine governing law).

42. See *infra* Part IV (describing problematic cases in a variety of contexts). The court’s concern about arbitrary results is not new, nor limited to outcomes under the functional approach. Even under the inflexible *First Restatement* rules, commentators complained that Massachusetts choice-of-law decisions were “conflicting and confused.” Fine, *supra* note 11 at 46.

of the state with the most significant relationship to the legal issue is the law to use; second, the “topic sections” serve as headings of chapters and provide guidance on broad topics in law (e.g., tort or contract law); and, finally, “issue sections” that provide presumptions or other starting points on discrete legal issues or practice areas.⁴³ Each of the 423 sections in the *Second Restatement* is accompanied by comments, which are intended to be read along with the black-letter law and are useful in understanding how to apply the section.⁴⁴

1. Issue Sections

The most narrowly focused sections in the *Second Restatement* are issue-specific. They account for the majority of the *Second Restatement*'s content and cover narrow areas of law. For example, under the chapter for “Wrongs,” there are issue sections that address defamation, personal injury and wrongful death. These sections are written in several different forms, but most begin by stating a presumption about which jurisdiction's law should apply. In the torts portion of the *Second Restatement*, the majority of sections state a preference for choosing the law of the place of injury, unless some other jurisdiction has a more significant relationship to the particular issue.⁴⁵ Yet other sections provide for application of the law of the place of the defendant's conduct, the domicile of one or both parties, or some other connection.⁴⁶ A few sections simply call for use of the general principles that govern all torts without providing any presumptive choice.⁴⁷

2. Topic Sections

The second level of sections within the *Second Restatement* provides guidance on entire topics of law. They are dubbed “general principle” or “introductory materials” sections by the *Second Restatement*'s reporters and serve to introduce and guide the user through subjects (e.g., torts,⁴⁸ contracts⁴⁹ or property⁵⁰) and provide general rules in that topic area. The tort and contract “general principle” sections provide a series of “contacts” for courts to use in evaluating which jurisdiction has the most significant relationship to a matter. For example, in tort cases, when considering which jurisdiction has the most significant relationship to each issue under consideration, the court is guided by four contacts:

- the place where the injury occurred;
- the place where the conduct causing the injury occurred;
- the domicile, residence, nationality, place of incorporation and place of business of the parties; and
- the place where the relationship, if any, between the parties is centered.⁵¹

These contacts are meant to be evaluated in the context of the section 6 principles that underlie all conflicts analysis.⁵² Put another way, the contacts found in the tort and contract topic sections are, on their own, insufficient to determine which jurisdiction's law applies. Instead, they are helpful as a means of determining whether the issue-specific presumption is rebutted and for identifying the state whose relevant policies may be most strongly affected under the principles of section 6.⁵³

The topic sections of the *Second Restatement* are written in more than one format. While the topic sections for torts, contracts and property begin with a discussion of general principles and guiding contacts, other topic sections begin with introductory materials that provide general guidelines, but do not list “contacts” that must be taken into account.⁵⁴ For this second class of topic sections, those that do not include a list of general principles or contacts, the best approach is to read the introductory information to glean any presumptions or other helpful guidance for how to apply the issue-specific section and its comments in light of the section 6 factors.

3. The Policy Section: Section 6

The overarching level of the *Second Restatement* consists of a single section, section 6. Section 6 applies to every choice-of-law issue that arises and requires the application of the law of the “state of the most significant relationship.” To decide which jurisdiction has the most significant relationship, section 6(2) provides a series of policy factors for the court's consideration:

- **The needs of the interstate and international systems.** According to its reporters, this factor is important because choice-of-law decisions should seek to further harmonious relations between states and to facilitate commercial intercourse between them.⁵⁵

43. Under the Second Restatement, the determination of which jurisdiction has a more significant relationship is made on an issue-by-issue basis, not case-by-case. Applying the principle of *dépeçage*, the court must leave open the possibility that different issues within a single case may be governed by the laws of different states once the choice-of-laws analysis has been made. See *Sibley v. KLM Dutch Airlines*, 454 F. Supp. 425, 428 (D. Mass. 1978) (citing *Pevoski* 371 Mass. at 360; *Babcock v. Jackson*, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 285 (1963)) (performing conflicts analysis issue by issue).

44. Unlike the comments accompanying the *First Restatement*, which was the commentary of the reporter alone, the comments accompanying the *Second Restatement* have been endorsed by the American Law Institute and are intended to be read as instructions. Harold P. Southerland, *A Plea for the Proper Use of the Second Restatement of Conflict of Laws*, 27 Vt. L. Rev. 1, 9 (2002) (citing *Second Restatement VIII*).

45. See Patrick Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 Md. L. Rev. 1232 (1997) (describing sections 146 (Personal Injuries); 147 (Injuries to Tangible Things); 156 (Tortious Character of Conduct); 157 (Standard of Care); 158 (Interest Entitled to Legal Protection); 159 (Duty Owed Plaintiff); 160 (Legal Cause); 162 (Specific Conditions of Liability); 164 (Contributory Fault); 165 (Assumption of Risk); 166 (Imputed Negligence); 172 (Joint Torts); 175 (Right of Action for Death); 176 (Defenses); 177 (Beneficiaries: How Damages Distributed); 178 (Damages); 179

(Person to Bring Suit); 180 (Personal Representative to Bring Suit)).

46. *Id.* at 1239-40 (describing sections 150 (Multistate Defamation); 151 (Injurious Falsehood); 154 (Interference with Marriage Relationship); 155 (Malicious Prosecution and Abuse of Process); 162 (Specific Conditions of Liability); 169 (Intra-Family Immunity)).

47. *Id.* at 1240 (describing sections 161 (Defenses); 167 (Survival of Actions); 168 (Charitable Immunity); 170 (Release or Covenant Not to Sue); 171 (Damages); 173 (Contribution and Indemnity Among Tortfeasors); 174 (Vicarious Liability)).

48. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

49. *Id.* §§ 187, 188.

50. *Id.* § 222.

51. *Id.* § 145(2).

52. *Id.* at § 145(1).

53. Southerland, *supra* note 44, at 13 (citing *Second Restatement* § 145(2), cmt. e).

54. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 13 Business Corporations (1971). This section begins with a short narrative that provides the purpose of inclusion of the section and highlights some likely issues.

55. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. d (1971).

- **The relevant policies of the forum.** A court should have regard for the forum-jurisdiction's policies in determining whether to apply its own rule or the rule of another state in the decision of a particular issue.⁵⁶ If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made. On the other hand, the court is under no compulsion to apply the statute or rule to such out-of-state facts since the originating legislature or court had no ascertainable intentions on the subject.
- **The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.** When deciding a question of choice-of-law, the forum should give consideration not only to its own relevant policies but also to the relevant policies of all other interested states.⁵⁷ The forum should seek to reach a result that will achieve the best possible accommodation of these policies. In general, it is fitting that the state whose interests are most affected by the dispute should have its law applied. This factor, together with the preceding factor, incorporates Professor Brainerd Currie's "interest analysis." Currie argued that the law of a foreign jurisdiction should apply only if the local forum had no interest in applying its law. If the local forum had an interest, however, it would apply its own law, even if the other state also had an interest as well. Cases in which both states had an interest are referred to as "true conflicts."⁵⁸
- **The protection of justified expectations.** Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.⁵⁹
- **The basic policies underlying the particular field of law.** According to the section 6 comments, this factor is of particular importance when the policies of the interested states are largely the same but where there are still minor differences between their relevant laws. In such instances, there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved.
- **Certainty, predictability and uniformity of result.** The *Second Restatement's* reporters considered these important values in all areas of the law.⁶⁰ As a result, the *Second Restatement* seeks to discourage forum shopping. Predictability and uniformity of result are of particular importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions.
- **Ease in the determination and application of the law to be applied.** According to the reporters of the *Second Restatement*, this "policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results."⁶¹ However, they reason, the policy does provide a goal for which to strive.

The importance of these factors varies from issue to issue and the *Second Restatement's* accompanying commentary urges courts to give each factor appropriate weight based on the subject matter at issue.⁶² Thus, for example, the protection of the justified expectations of the parties, which is likely an important factor in fields like contracts, property, wills and trusts, is of lesser importance in the field of torts.⁶³

C. Steps in Analysis of a *Second Restatement* Problem

When a case has connections to more than one jurisdiction, the court must determine whether it is necessary to perform a choice-of-law analysis, and, if so, which state's law applies to each issue.⁶⁴ If the same result will occur regardless of which jurisdiction's law applies, no conflicts analysis is necessary.⁶⁵ If a different outcome will result from the application of one state's law over another, the court must use all three levels of the *Second Restatement* in its analysis: issue-specific, topic-specific and section 6.⁶⁶ Consider the following example:

Paul and Daniel both reside in Massachusetts and decide to go hiking together in an area on the Massachusetts side of the border between Massachusetts and New Hampshire. Daniel agrees to drive. While driving, Daniel misses the exit to the hiking area and drives across the border into New Hampshire. After realizing he has missed his turn, Daniel makes an illegal U-turn in an effort to return to Massachusetts and

appear that the ultimate selection of law will affect the outcome"). Some courts and commentators also recommend performing a "false conflicts" analysis at the outset that is designed to determine whether each state has a governmental interest in the outcome of the case. Southerland, *supra* note 44, at 13. However, doing such an analysis as a preliminary step seems unnecessary because faithful application of the three-level analysis (discussed below) reveals whether each jurisdiction has an interest in the application of its own law.

66. Some argue that applying all three "tiers" of the *Second Restatement* is unnecessary and leads to arbitrary results. See, e.g., James A. Meschewski, *Choice-of-law in Alaska: A Survival Guide for Using the Second Restatement*, 16 ALASKA L. REV. 1, 23-29 (1999) (criticizing Massachusetts courts, among others, for applying all three "tiers" of *Second Restatement*). We disagree. As with statutory construction, the *Second Restatement* should be construed to "give effect to all relevant provisions, so that no part will be inoperative or superfluous." See Wolfe v. Gormally, 440 Mass. 699, 704 (2004) (quoting 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992)) (in context of multiple section statute).

56. *Id.* at cmt. e.

57. *Id.* at cmt. f.

58. Andrew T. Guzman, *Choice-of-law: New Foundations*, 90 GEO. L.J. 883, 892 (2002).

59. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. g (1971).

60. *Id.* at cmt. i.

61. *Id.* at cmt. j.

62. *Id.* § 145 cmt. b.

63. *Id.*

64. The *Second Restatement*, which consistently addresses choice-of-law problems issue by issue, clearly adopts the concept of *dépeçage*, that a court conducts a choice-of-law analysis for each issue, not for the case as a whole.

65. Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 332 n.7 (1983) (citing Henderson v. State Farm Mut. Auto. Ins. Co., 51 Wis. 2d 451, 454, 208 N.W.2d 423, 424 (1973) ("[b]efore a conflicts-of-laws problem is presented, it must

crashes into a tree. Paul, sitting in the passenger seat, is seriously injured as a result of the crash and sues Daniel in Massachusetts. New Hampshire retains a guest statute for auto accidents that prevents a passenger in Paul's position from recovering against Daniel unless Daniel was grossly negligent. Massachusetts has no such statute and ordinary negligence rules apply.

In determining what law to apply under the *Second Restatement*, the court should focus on the contested issue. Here, it appears that there is only one: which jurisdiction's law will apply with respect to the rights of a passenger in a car. Next, the court would determine if there will be a different result if the law of one of the jurisdictions applies instead of the other. Here, it appears there would be a different outcome: under New Hampshire law, Paul could not recover, while under Massachusetts law he could. Thus, the court must make a choice of New Hampshire or Massachusetts law.

Having determined that a choice-of-law analysis is necessary, the court would then proceed with an analysis under the *Second Restatement*. First, the court would review the applicable issue-specific section of the *Second Restatement*.⁶⁷ In this hypothetical, the court's conflicts analysis would begin with section 146, which is the issue-specific section applicable to all personal injury actions.⁶⁸ Section 146 provides that the law of the state where the injury occurred applies, unless another state has a more significant relationship. Thus, the law of New Hampshire will apply in this hypothetical because the accident occurred there, unless it can be shown that Massachusetts had a more significant relationship to the incident or the parties.

The analysis then moves to the applicable topic section, which, because it is a torts case, is section 145. Section 145 provides a list of four contacts applicable to guide tort actions, and here two contacts likely point in each direction: the injury occurred in New Hampshire, as did the conduct causing the injury. By contrast, the parties are both domiciled in Massachusetts and that is where their relationship is centered.⁶⁹ Because the section 145 contacts are used in assessing the section 6(2) factors, the court must determine which section 6 factors are applicable. Some factors may be irrelevant under the facts of a case. For example, in this hypothetical, there need not be any analysis of the protection of justified expectations because it is unlikely that the parties foresaw such an incident or had any expectations about the law that would apply. Other factors would likely weigh heavily, like the relevant policies of the forum and the policies of the other interested states in the determination of

the particular issue. Here, Massachusetts has an interest in regulating the conduct of its citizens, as well as the Massachusetts insurer that carried Daniel's automobile insurance policy. By contrast, New Hampshire would have very little interest in the matter because the only relationship New Hampshire had to the accident was that it occurred there (and even then, only because Daniel mistakenly strayed over the state line). Thus, the court would weigh the section 6 factors and likely determine that the presumption in section 146 was overcome and apply the law of Massachusetts.

Massachusetts courts have not consistently used each of the three different levels of the *Second Restatement* when resolving choice-of-law problems. However, a 2008 superior court decision, *General Electric v. Lines*⁷⁰ should serve as an effective model for how courts should approach conflict of laws issues. In *General Electric*, Judge Ralph Gants considered cross-motions for summary judgment in a case in which the plaintiff, General Electric ("GE") claimed the defendants, who were insurers that included Joint Liquidators of Electric Mutual Liability Insurance Company, Ltd. ("EMLICO"), had a duty to defend and indemnify GE pursuant to insurance policies the plaintiff purchased from the defendants. EMLICO was a Massachusetts mutual insurance company, headquartered in Massachusetts, while GE was a New York corporation, headquartered in New York. The insurance policies between GE and EMLICO were silent as to which state's law should govern any disputes between them. GE contended that Massachusetts law should govern; the defendant-insurers contended that New York law should apply.

Judge Gants recognized that three sections of the *Second Restatement* were relevant to the analysis: the issue-specific section 193, which sets forth choice-of-law principles applicable to disputes concerning insurance contracts; the topic section for contracts, section 188; and section 6, as the general statement of policies underlying all rules regarding choice-of-law. He then separately considered each of the three levels of the *Second Restatement*, and found that New York had a more significant relationship to the issue than did Massachusetts. This analysis is notable for the methodical application of the *Second Restatement* to the facts and its proper use of the three-level approach.

Summary

In summary, the basic steps of a choice-of-law analysis are:

- A preliminary determination of whether each issue in a case has connections to more than one jurisdiction; and in the event any issue does, a showing that there will be a different

67. Some commentators have argued that examining the topic-specific section is an unnecessary step. Southerland, *supra* note 44, at 15-16. The rationale is that the topic-specific section reflects the predicted, typical outcome once one examines the appropriate general principles section together with section 6(2). *Id.* However, we think it is more helpful to begin by reading the issue-specific section to learn the presumptive outcome, and then completing the rest of the analysis to determine if the presumption is overcome.

68. It is important for the user of the *Second Restatement* to read the comments following the issue sections. For example, in the above example, the case could be construed as one that should be examined under section 146, which is the "personal injury" issue-specific section. Alternatively, one could view it as a matter involving "defenses" under section 161 because it involves the guest-host statute. Only by reviewing the section 161 comments does one learn that the defenses section only applies to defenses that go to the merits on the plaintiff's claim and not procedural defenses like a guest-host statute.

69. Determining which jurisdiction has the most significant relationship to the issue requires going beyond "simply adding up various contacts." *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622, 632 (1985). Instead, the court should consider the contacts under section 6 by giving weight to them based on their relative importance. *See id.* This issue has caused some confusion among courts that have decided a case based on which jurisdiction has more contacts or factors in its favor, instead of the jurisdiction that has the most *important* factors or contacts in its favor given the specific case. *See, e.g., Estate of Nunez-Polcano v. Boch Toyota, Inc.*, No. 04-2019, 2006 WL 1709680, at *5 (Mass. Super. Ct. May 26, 2006) (stating "[t]hree of the four factors thus weigh in favor of applying Massachusetts law; only the first, the location of the injury, favors Connecticut. The crux of the claim, as discussed, is negligent entrustment. On that issue there can be no doubt that Massachusetts has the most significant interest in regulating the conduct of a rental car company operating within the Commonwealth. Accordingly, the Court will apply Massachusetts law.").

70. No. 06-3106 BLS1, 2008 WL 2908053 (Mass. Super. Ct. July 10, 2008).

result on that issue if one jurisdiction's law is applied over another.

- Assuming the above requirements are met, the analysis next requires application of the issue-specific section. This section will provide a presumption as a starting point, e.g., the law of the place where the property is located will be applied, unless another jurisdiction has a more significant relationship.
- After review of the issue-specific section, the analysis proceeds to the topic section of the *Second Restatement* in which the issue is found. For example, the personal injury issue section is found within the tort topic section. If there is a list of contacts (such as in the torts and contracts topic sections), they must be applied. If there are no contacts listed, the section marked "general principles" or "introductory note" at the beginning of the topic-specific section, together with the accompanying commentary, should be utilized.
- The analysis concludes by applying the factors in section 6(2).

III. SUMMARY OF MASSACHUSETTS CHOICE-OF-LAW BY TOPIC

This section summarizes the application of choice-of-law analysis in several topic areas. It is not intended to be exhaustive, but rather to provide representative cases which facilitate an understanding of the applicable rules.

A. Torts

Until the 1970s, Massachusetts employed a strict, territorial approach to resolving conflict of law issues in tort cases, generally choosing to apply the law of the place where the wrong was committed.⁷¹ Since that time, Massachusetts decisions have rendered the approach significantly more complex.⁷² The place of the wrong typically remains the basis for selecting the law in the majority of cases.⁷³ However, where the place of the wrong is insufficiently connected to the facts underlying the case, the *Second Restatement* sometimes points to another state's law.⁷⁴ Thus, the *Pevoski* court explained, in an automobile accident case, the rules of the road "are determined

quite properly by the State in which these roads are located — by the jurisdiction having the strongest interest in regulating the conduct of drivers on these highways" but the interests of another state may sometimes result in the application of another jurisdiction's law to one or more issues in the case.⁷⁵

When considering where an incident occurred, the court's analysis begins by looking to "the place where the last event necessary to make an actor liable for an alleged tort takes place."⁷⁶ Under the personal injury section of the *Second Restatement*, the law of that place will provide the presumptive law on the personal injury issues in the case. To determine whether the presumption is overcome, the court then evaluates which jurisdiction has a more significant interest using the relevant contacts and factors under sections 145 and 6 of the *Second Restatement*.⁷⁷

When applying the topic-related factors under section 145 of the *Second Restatement*, the domicile of the parties has often been an outcome-determinative contact.⁷⁸ For example, in *Dasha v. Adelman*,⁷⁹ a Massachusetts cancer patient's guardian sued a Maine hospital, a Maine doctor and a Massachusetts doctor for negligence, alleging the patient would not have been subjected to aggressive radiation treatment, which caused severe brain damage, if his condition had been correctly diagnosed while he was being treated in Maine. The patient began treatment in Maine and subsequently moved to Massachusetts, where it was discovered that the patient's physicians in Maine may have misdiagnosed him when he was being treated there. Maine did not have a discovery rule, and the statute of limitations had run at the time the plaintiff's guardian filed suit in Massachusetts. The trial court granted defendants summary judgment, applying the Maine statute of repose for medical malpractice suits. The plaintiffs appealed as to the Massachusetts doctor *only*. The Massachusetts Appeals Court reversed, holding that Massachusetts had a more significant relationship to the remaining parties than did Maine.

The analysis in *Dasha* is consistent with the *Second Restatement* and correctly considered the applicable issue and topic sections together with section 6(2). The court's analysis began by reviewing

71. See, e.g., *Brogie v. Vogel*, 348 Mass. 619, 621 (1965).

72. See, e.g., *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 333 (1983); *Saharceski v. Marcure*, 373 Mass. 304 (1977); *Pevoski v. Pevoski*, 371 Mass. 358 (1976).

73. See, e.g., *Cohen*, 389 Mass. at 333-36 (holding that "in light of choice-of-law principles applicable in tort actions, ... [t]he place where the injury occurred 'is the place where the last event necessary to make an actor liable for an alleged tort takes place,'" and then devoting several pages of text to determining where that event occurred) (citations omitted); *Pevoski*, 371 Mass. at 359 (stating *lex loci delicti* "has provided, and will continue to provide, a rational and just procedure for selecting the law governing the vast majority of issues in multistate tort suits"); see also *Ahmed v. Boeing Co.*, 720 F.2d 224, 226 (1st Cir. 1983) (interpreting *Pevoski* to indicate that "in tort cases Massachusetts generally follows doctrine of *lex loci delicti*"); *Cont'l Cablevision, Inc. v. Storer Broad. Co.*, 653 F. Supp. 451, 454 (D. Mass. 1986) ("while the traditional rule of *lex loci delicti* no longer strictly controls choice-of-law questions in tort suits ... it still provides a useful rule for most multi-state torts") "...[T]he SJC indicated that the *lex loci delicti* rule 'has provided, and will continue to provide, a rational and just procedure for selecting the law governing the vast majority of issues in multistate tort suits.'" *King v. Williams Indus.*, 565 F. Supp. 321, 325 (D. Mass. 1983), *aff'd*, 724 F.2d 240, 241 (1st Cir.), *cert. denied*, 466 U.S. 980 (1984); *Schulhof v. Northeast Cellulose, Inc.*, 545 F. Supp. 1200, 1203 (D. Mass. 1982) ("Essentially, then, *Pevoski* stands for the following propositions of law ... a) *lex loci delicti* would continue as the general tort conflicts rule governing most

issues in multi-state tort suits").

74. See *Pevoski*, 371 Mass. at 359-60 ("there ... may be particular issues on which the interests of *lex loci delicti* are not so strong [and] another jurisdiction may sometimes be more concerned and more involved with certain issues than the State in which the conduct occurred"); see also *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 19 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); *Cohen*, 389 Mass. at 333 ("ordinarily the substantive law governing an action of tort for physical injury is that of the place where the physical injury occurred [but] on the particular facts of a case another jurisdiction may sometimes be more concerned and more involved with certain issues"); *Lou ex rel. Chen v. Otis Elevator Co.*, No. 200100267, 2004 WL 504697, at *4 (Mass. Super Ct. Feb. 13, 2004) ("Massachusetts does not strictly adhere to the doctrine of *lex loci delicti*, especially when 'on the particular facts of a case another jurisdiction may be more concerned about and more involved with certain issues' than the jurisdiction where the injury was sustained.").

75. *Pevoski*, 371 Mass. at 359-60.

76. *Cohen*, 389 Mass. at 333-34 (quoting *Orr v. Sasseman*, 239 F.2d 182, 186 (5th Cir. 1956)); see also *Strogoff v. Motor Sales Co.*, 302 Mass. 345, 347 (1939).

77. *Cohen*, 389 Mass. at 336; see also *Cosme v. Whitinsville Mach. Works*, 417 Mass. 643, 647 (1994) (applying only relevant factors of section 6).

78. See, e.g., *Cosme*, 417 Mass. at 649, 650; *Dasha v. Adelman*, 45 Mass. App. Ct. 418, 426-27 (1998).

79. 45 Mass. App. Ct. 418 (1998).

the contacts the parties had with Maine and Massachusetts, which were split: Maine is where the injury occurred and the plaintiff's place of residence at the time of the injury and the misdiagnosis. Massachusetts is where the conduct causing the injury occurred, the place of the plaintiff's residence for a portion of time between the defendant's failure to diagnose and the discovery of the failure, and the place of the defendant's residence and employment.

With factors under section 145 in equipoise, the court turned to the personal injury section, section 146, and noted that the presumptive law to apply was that of the place where the injury occurred. In completing the third step of the analysis by reviewing the section 6 factor policies, the court focused on the only factors it found applicable: the "relevant policies" of the forum and the other interested state. To analyze the relevant policies of Massachusetts and Maine, the court reviewed the legislative intent behind the medical malpractice laws of both Massachusetts and Maine, and then examined the relationship of the jurisdictions to the parties and the conduct causing the plaintiff's injuries. The court held that Massachusetts law applied, reasoning that the grouping of the domicile of the plaintiff and the defendant's workplace were particularly persuasive in determining the applicable law. Implicitly, the court based its decision on the lack of any governmental interest in Maine applying its law to a claim not involving any Maine defendants, contrasted by a strong Massachusetts policy interest in applying its own law.

Wrongful death actions undergo a similar analysis to other personal injury cases because both section 146 (personal injury) and 175 (wrongful death) call for application of the law of the place of the injury, unless some other jurisdiction has a more significant relationship based on the section 6 factors.⁸⁰ This is, essentially, the same test the *Second Restatement* suggests for all personal injury actions in section 146.

Two cases involving airplane accidents demonstrate the application of the wrongful death section of the *Second Restatement* and the malleable definition of "state where the injury occurred." First, in 1982, the Massachusetts federal district court decided *Schulhof v. Northeast Cellulose, Inc.*,⁸¹ a pre-*Buskin* case involving a midair collision of airplanes over Massachusetts. In *Schulhof*, the plaintiffs were domiciled in New York and all of the defendants were domiciled in New Hampshire. The court concluded that as to the wrongful death actions, a Massachusetts court would apply the law of the state where the injuries occurred unless some other state

had a more significant relationship to the parties and the incident. Massachusetts law was used with respect to the wrongful death and damages issues because the accident occurred over Massachusetts, and that state had a strong interest in regulating conduct within its borders. The court further recognized that although Massachusetts and the *Second Restatement* had both abandoned a sole focus on *lex loci delicti* to all issues in tort cases, they both used it as a default. In *Schulhof*, the court recited the three levels of the *Second Restatement* applicable in the case, but did not fully analyze the section 6(2) factors. Instead, the court recognized that Massachusetts law presumptively applied under section 175 and without explicating the analysis, ruled that the policies of Massachusetts weighed in favor of applying that state's law.

In the second example, *Cohen v. McDonnell Douglas Corp.*,⁸² the plaintiff brought claims for wrongful death and conscious pain and suffering on behalf of his mother's estate when his mother died after learning of the death of one of her sons in an airplane crash.⁸³ The mother resided in Massachusetts; the crash occurred in Illinois.⁸⁴ The mother learned of her son's death through a telephone call to her home in Massachusetts, and she subsequently suffered a heart attack (which was claimed to be causally related to learning the bad news) while in Massachusetts.⁸⁵ In answering certified questions, the SJC first determined that the "incident" giving rise to the claim occurred in Massachusetts.⁸⁶ The court then held that Massachusetts law governed the claim because the mother's injury occurred in Massachusetts (where she was given news of the crash) and no other state was seen as having a greater interest in the litigation.⁸⁷ The court cited to the *Second Restatement*, but did not explicitly apply the three-level analysis. Instead, the court relied on the general rule in tort cases that the law of the place of injury governs and, without saying why, ruled that there were no facts in the case that overcome the presumption.

The courts in both *Schulhof* and *Cohen* decided that the location of the person at the time of the injury dictated the applicable law under the functional approach. While the mechanism of the injury was different in each case (plane crash in Massachusetts versus telephone call to Massachusetts after an airplane crash in Illinois), these cases support the court's strong preference for applying the law of the place of the injury, even when the "place" of the injury requires creative analysis and is likely to be somewhat arbitrary.

80. Section 175 states:

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

See also *Schulhof v. Ne. Cellulose, Inc.*, 545 F. Supp. 1200, 1204 (D. Mass. 1982) (explaining similarities between sections 146 and 175).

81. *Schulhof*, 545 F. Supp. at 1204-07.

82. 389 Mass. 327 (1983).

83. This case was, technically, a breach of warranty of merchantability action because the crash allegedly occurred as a result of defective airline equipment. However, the court treated it as a tort action, reasoning that in the context of

conflicts issues, warranty claims are "in essence tort claims." *Cohen*, 389 Mass. at 333 (citing *Bilancia v. Gen. Motors Corp.*, 538 F.2d 621, 623 (4th Cir. 1976); *Paoletto v. Beech Aircraft Corp.*, 464 F.2d 976, 980-81 (3d Cir. 1972); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 1016 n.9 (5th Cir. 1969); *Uppgren v. Executive Aviation Servs., Inc.*, 326 F. Supp. 709, 716-17 (D. Md. 1971); *McCrossin v. Hicks Chevrolet, Inc.*, 248 A.2d 917 (D.C. 1969)).

84. *Id.* at 329.

85. *Id.* at 342.

86. The court considered the injury in this case to have occurred in Massachusetts because it was an action for bodily injury to her which resulted from learning of injury allegedly inflicted on her son by the defendant. Thus, the state where the last event necessary to make the defendant liable allegedly occurred is the state in which Nellie Cohen learned of the injury to her son and suffered severe emotional distress herself. See *id.* at 338.

87. *Id.*

Summary⁸⁸

In a tort case, the authors suggest that the conflicts analysis begin with a review of the narrow, issue-related *Second Restatement* section relevant to the case found in the *Second Restatement* sections 146-174. Those sections typically provide a presumption as to which jurisdiction's law will apply. Next, the facts are scrutinized within the framework of the contacts identified in section 145. Finally, the relevant policies of the competing states are assessed under the principles set forth in section 6(2).

B. Contracts⁸⁹

Until the 1970s, the law of the place where the contract was made dictated the law that applied.⁹⁰ In 1979, the SJC suggested in *Choate, Hall & Stewart v. SCA Services, Inc.* that it was ready to abandon its "place-of-making" rule in favor of "a more functional approach" for determining the applicable law in contract cases.⁹¹ In *Choate*, the court recognized that the place-of-making rule "can produce awkward or arbitrary results," and that most states had abandoned such one-factor tests.⁹² However, the court chose not to use the case to adopt the functional approach because the same result would be reached regardless of which jurisdiction's law applied.⁹³ In *McKinney v. National Dairy Council*, the federal district court predicted, based on *Choate*, that the SJC would, when squarely confronted with the question, abandon the place-of-making rule in favor of a functional approach.⁹⁴ In light of this prediction, the federal court applied all three levels of a *Second Restatement* analysis to the various conflict of laws issues presented in *McKinney*.⁹⁵

Choate and *McKinney* laid the groundwork for *Bushkin*, in which Massachusetts abandoned the law of the place where the contract was made in favor of a functional approach.⁹⁶ In adopting this method, the SJC expressed concern that it would unavoidably result in some vagueness, but elected to adopt the functional approach to avoid the awkward and arbitrary results of the traditional approach under the *First Restatement*.⁹⁷

To perform a choice-of-law analysis in contract cases, the specific issue-related sections that govern the type of contract at issue (sections 189-221 of the *Second Restatement*) provide a starting point.⁹⁸ The analysis then turns to the topic section for contracts, section 188, which requires the application of the law of the place with the

most significant relationship to the transaction. The following contacts are analyzed to find the most significant relationship in light of the section 6 policies:

- a. the place of contracting;
- b. the place of negotiation of the contract;
- c. the place of performance;
- d. the location of the subject matter of the contract; and
- e. the domicile, residence, nationality, place of incorporation and place of business of the parties.⁹⁹

Thereafter, the court considers the principles enunciated in section 6(2) of the *Second Restatement*.¹⁰⁰ Finally, the *Bushkin* court advised that, having balanced all of the factors, a court should choose "that law 'which would carry out and validate the transaction in accordance with [the] intention [of the parties].'"¹⁰¹

Bushkin provides an example of a single overriding section 6 factor determining the outcome in a case. In *Bushkin*, the court had to decide whether New York or Massachusetts law applied in determining whether to enforce an oral agreement under which the plaintiff claimed he had earned a finder's fee. The New York statute of frauds barred recovery, while Massachusetts law allowed it. The *Bushkin* court found that none of the section 188 contacts determined which jurisdiction's law should apply because there was equal weight on each side. The court then shifted its analysis to the section 6(2) factors and found that only one factor — the justified expectations of the parties — favored one jurisdiction's law over the other. As a result, based on the evidence that the parties would have expected to be bound by the oral agreement, the court applied Massachusetts law because that result promoted "the protection of justified expectations."¹⁰²

In actions involving insurance contracts, courts heavily rely on the location of the "insured risk" when deciding which jurisdiction's law applies. For example, in *Clarendon National Insurance Co. v. Arbella Mutual Insurance Co.*,¹⁰³ the Massachusetts Appeals Court applied the *Second Restatement* three-level approach to a case involving a choice-of-law dispute between two automobile insurers. A car accident occurred in Massachusetts while a Massachusetts resident was driving a car loaned to her by her Rhode Island car dealer and insured under a "garage policy" issued in Rhode Island.

88. Readers interested in choice-of-law considerations for tort cases should also refer to the forthcoming second part of this article, which addresses choice-of-law rules in the context of the statute of repose. Massachusetts courts consider the statute of repose to be a substantive (as opposed to procedural) issue. See, e.g., *Dasha v. Adelman*, 45 Mass. App. Ct. 418, 422 (1998). As a result, the court applies the same choice-of-law analysis that it would if it were determining which jurisdiction's substantive law applied. Because statute of repose matters typically arise in the context of tort, the same type of analysis is employed in repose and tort cases.

89. This section will focus on contracts governed by the common law, and not those governed by the U.C.C. For an excellent summary of the law governing contracts on choice-of-law rules for U.C.C. matters, see HERBERT LEMELMAN, *MANUAL ON UNIFORM COMMERCIAL CODE* §1:2 (2008).

90. *Dicker v. Klein*, 360 Mass. 735, 736 (1972) (citing *Burke v. National Shawmut Bank*, 284 Mass. 36, 39 (1933); see also *Fine*, *supra* note 11).

91. 378 Mass. 535 (1979).

92. *Id.* at 540.

93. *Id.* at 541.

94. *McKinney v. National Dairy Council*, 491 F. Supp. 1108, 1112 (D. Mass.

1980).

95. *Id.*

96. *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622, 631 (1985).

97. *Id.* at 631-32.

98. See, e.g., *Clarendon Nat'l Ins. Co. v. Arbella Mut. Ins. Co.*, 60 Mass. App. Ct. 492, 497 (2004) ("When § 193 cannot be used to resolve the choice-of-law issue, the court must determine which state has the most significant relationship to the matter at hand by employing the factors set forth in sections 188 and 6 of the *Restatement*.").

99. *Bushkin*, 393 Mass. at 632.

100. *Id.* In the context of contracts, different cases recommend different priorities and orders for analyzing the various levels of the *Second Restatement*. Confusingly, some decisions also incorrectly recommend using each of the levels only when it would "be helpful" instead of using all three levels together. See, e.g., *Clarendon*, 60 Mass. App. Ct. at 497.

101. *Bushkin*, 393 Mass. at 636 (quoting *Boston Safe Deposit & Trust Co. v. Paris*, 15 Mass. App. Ct. 686, 691 (1983)).

102. *Id.* at 633.

103. 60 Mass. App. Ct. 492, 496-99 (2004).

Coincidentally, the Massachusetts resident was also insured under her own personal automobile policy issued in Massachusetts. The two insurers alleged the other was the primary insurer. To determine which law applied, the *Clarendon* court looked first to the issue-specific section 193, which governs insurance contracts.¹⁰⁴ Section 193 provides the rights created by a contract are determined by the law of the state that the parties to an insurance contract understood to be the principal location of the insured risk.¹⁰⁵ For an automobile policy, the parties usually know beforehand where the vehicle will be garaged and the contract typically will be solicited and delivered in the state of the insured's domicile. The court held Massachusetts law applied because it better served the parties' justified expectations and furthered the purposes of the law of each jurisdiction.¹⁰⁶ When deciding which state possesses the most significant relationship to the transaction, the court allocates the greatest weight to the location of the insured risk, as long as it can be located principally in one state.

Similarly, in *A. Johnson & Co. v. Aetna Casualty and Surety Co.*,¹⁰⁷ the plaintiff sued its insurer seeking indemnification arising out of a hazardous waste cleanup in Maine. The court determined that the substantive law of Maine, the state of disposal, governed this contractual dispute since Maine had a more significant relationship to the dispute than New Hampshire, the state where the waste was generated. The court reasoned that not only was Maine the principal location of the insured risk, but as the site of the toxic waste disposal, Maine had the strongest interest in how the company's policies were interpreted because resolution of those issues would determine how pollution cleanup in Maine would be financed.

Summary

When a conflict of law exists in a contracts case, the analysis begins by consulting the narrow, issue-related *Second Restatement* section (sections 189-221) applicable to the issue in the case (or, if there are multiple issues, the different sections applicable to each

issue). This issue-related section will typically provide a presumptive starting point. Next, the analysis requires a review of the facts under the section 188¹⁰⁸ contacts and application of the policy factors in section 6(2).

C. Corporate

In Massachusetts, disputes involving internal corporate affairs¹⁰⁹ are governed by the law of the state of incorporation.¹¹⁰ While the "state of incorporation rule" appears to run counter to applying the functional approach, the SJC has explained that this single-factor test is consistent with the *Second Restatement*, and is motivated by a desire to "further the interests of 'certainty, predictability, and uniformity of result, ease in the application of the law to be applied and, at least on occasion, protection of the justified expectation of the parties.'"¹¹¹ However, the Massachusetts test appears inconsistent with section 302 of the *Second Restatement*, which requires application of the law of the state with the most significant relationship to the particular internal corporate issue.¹¹²

While section 302 provides that the state of incorporation will typically dictate the applicable law, it requires courts to consider whether, under a section 6 analysis, another jurisdiction has the most significant relationship to the parties.¹¹³ Nonetheless, without an express analysis under section 6, Massachusetts courts have held that the "state of incorporation rule" is the appropriate test even after Massachusetts adopted the functional approach. In *Harrison v. Net-Centric Corp.*, the plaintiff was a former employee of the defendant-close corporation. His employment agreement dictated that in the event his employment with the corporation ended, the corporation had a right to buy back his shares of stock at a nominal cost.¹¹⁴ The plaintiff was terminated and filed suit alleging a breach of fiduciary duty.¹¹⁵ The issue was whether Delaware law, which was the state of the business's incorporation, or Massachusetts law, applied.¹¹⁶ The court, in applying the state of incorporation rule, reasoned that

[a]ll three founders, including the plaintiff, deliberately

104. *Id.* at 496.

105. An insured risk is "the object or activity which is the subject of the matter of the insurance," and the principal location is where that object will be during the term of the insurance policy. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1971).

106. *Clarendon*, 60 Mass. App. Ct. at 500-01.

107. 741 F. Supp. 298, 300 (D. Mass. 1990), *aff'd*, 933 F.2d 66 (1st Cir. 1991); *see also* *City of Haverhill v. Brox*, 47 Mass. App. Ct. 737, 724-25 (1999) (applying Massachusetts law in conflicts dispute involving worker's compensation insurance because Massachusetts was where the employees covered by the policy were working).

108. Section 188 only applies to contracts in which there are no effective choice-of-law clause. Section 187, discussed in Part II of this article, is the topic-related section that provides guidelines for analyzing cases that contain an effective choice-of-law clause.

109. "Internal affairs" are "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." *Harrison v. NetCentric Corp.*, 433 Mass. 465, 470 (2001) (citing *Atherton v. Federal Deposit Ins. Corp.*, 519 U.S. 213, 224 (1997) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982))).

110. *Id.* at 470 ("we adhere to and reaffirm our policy that the State of incorporation dictates the choice-of-law regarding the internal affairs of a corporation") (citing *Wasserman v. Nat'l Gypsum Co.*, 335 Mass. 240, 242 (1957); *Beacon Wool Corp. v. Johnson*, 331 Mass. 274, 279 (1954); *Edwards v. Int'l Pavement*

Co., 227 Mass. 206, 212-13 (1917)).

111. *Id.* at 472 (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §302, cmt. g (1971)).

112. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971). Section 302 states:

(1) Issues involving the rights and liabilities of a corporation, other than those dealt with in § 301 [which addresses corporate relationships with third parties], are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6 [which defines the general rationale behind choice-of-law determinations].

(2) The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.)

See also id. § 302, cmt. b: "local law of the state of incorporation will be applied unless application of the local law of some other state is required by reason of the overriding interest of that other state in the issue to be decided."

113. *Id.* § 302 (2).

114. *Harrison*, 433 Mass. at 466.

115. *Id.* at 469.

116. *Id.*

chose to incorporate in Delaware. By so doing, they ‘determine [d] the body of law that [would] govern the internal affairs of the corporation and the conduct of their directors. . . . The corporation and its shareholders rightfully expect that the laws under which they have chosen to do business will be applied.’¹¹⁷

The *Harrison* court made clear that the decision in *Demoulas v. Demoulas Super Markets, Inc.*,¹¹⁸ a post-*Bushkin* case that applied a functional approach to conflicts involving internal corporate affairs, was a limited exception. In *Demoulas*, a minority shareholder brought a shareholder derivative suit against the controlling shareholders. The plaintiff alleged that the controlling shareholders breached their fiduciary duties and usurped corporate opportunities. The defendant corporation was formed as a Delaware corporation in 1964, but subsequently merged with a Massachusetts corporation in 1982. In *Demoulas*, the court chose to apply Massachusetts law instead of the law of Delaware. The court premised its decision on the trend that “favor[s] a functional approach to resolving choice-of-law issues on the basis of a ‘significant relationship.’”¹¹⁹ Nonetheless, the *Harrison* court subsequently described the *Demoulas* decision as an “exception” and confirmed its endorsement of the single-factor test.

Summary

Despite having nominally adopted the functional approach, Massachusetts courts disfavor applying any law but that of the state of incorporation for matters involving internal corporate affairs. However, the language of *Harrison*, taken together with *Demoulas*, may allow for application of the law of a jurisdiction with a more significant relationship than the state of incorporation in exceptional circumstances.

D. Property

Massachusetts has long held that the law of the place where real property is located governs.¹²⁰ Yet, the *Second Restatement* leaves open the option of applying the law of a state other than the one in which the property is located if that other state has the most significant relationship to the property (whether “movable” or “immovable” property).¹²¹ Under the *Second Restatement*, the situs of the property remains an important consideration in some situations, while less important in others.¹²² In the context of real property, the state where the land in question is situated has an obvious interest in the application of a rule limiting the period during which the power

to alienate the land may be suspended.¹²³ By contrast, the situs may have little interest in the application of a rule limiting the portion of an estate that a testator may leave to charity in a situation where the testator, the testator’s property and the charity involved are all most closely related to another state.¹²⁴

Since the publication of the *Second Restatement*, Massachusetts courts have not applied the law of a jurisdiction other than the one in which real property is located. However, some cases arguably create an exception. For example, in *Bernier v. DuPont*,¹²⁵ the parties disputed which state’s probate court had jurisdiction when a testator mistakenly believed his property was in Massachusetts but a survey after his death revealed that eleven percent of the property (including the house itself in which the decedent lived) was in Connecticut. The court ruled that Massachusetts’ courts had jurisdiction, reasoning that, under the *Second Restatement*, the court can assert jurisdiction “if the relationship of the thing to the state is such as to make the exercise of such jurisdiction reasonable.”¹²⁶

In recent conflicts cases involving property, while the courts have generally arrived at the same outcome contemplated by the *Second Restatement*, the property-related cases rely on the *Second Restatement* less frequently than contract or tort cases. For example, in *Barboza v. McLeod*,¹²⁷ the SJC considered whether California or Massachusetts law applied in determining disposition of a joint account that the decedent opened in California before dying as a domiciliary of Massachusetts. The court did not cite to the *Second Restatement*, instead relying on common law precedent (much of it decided before publication of the *Second Restatement*) in determining that California’s law, as the situs of the deposit, controlled.¹²⁸

In *Bernier* and *Barboza*, the SJC made no effort to apply the section 6(2) factors, or otherwise explain how it balanced the jurisdictions’ competing interests in the case based on the *Second Restatement*. However, the court has occasionally relied more faithfully on the *Second Restatement* in property cases. Thus, in *Russell v. Lovell*,¹²⁹ an 18-year-old plaintiff sought an accounting and distribution of property that was being held by guardians until he reached the age of majority. At the time the guardianship of property was created, the plaintiff was a Massachusetts citizen and the age of majority in Massachusetts was 21. After the guardianship was created, but before filing suit, the plaintiff moved to Vermont, where the age of majority was 18. Despite the fact that the current domicile of the ward was Vermont, the court held that Massachusetts law governed the issue of minority.¹³⁰ Based on the section 6(2) factors involving the relative policy interests of the jurisdictions, the court reasoned

117. *Id.* at 472 (citing *Hart v. General Motors Corp.*, 129 A.D.2d 179, 184-85 (N.Y. 1987)).

118. 424 Mass. 501 (1997).

119. *Id.* at 511.

120. See *Ross v. Ross*, 129 Mass. 243 (1880); see also *Manella v. Brown*, 537 F. Supp. 1226, 1228 (D. Mass. 1982); *Nile v. Nile*, 432 Mass. 390, 401 (2000) (ruling Massachusetts had most significant relationship in probate controversy over decedent’s divorce agreement where divorce agreement was negotiated and executed in Massachusetts, made in settlement of a long-term Massachusetts marriage and required approval of a Massachusetts judge; but where New Hampshire was the situs of the trust, and the residence of the trustees and decedent at the time of his death); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222 (1971).

121. Section 222, which is the general principles section for property, states:

The interests of the parties in a thing are determined, depending

upon the circumstances, either by the “law” or by the “local law” of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6.

122. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222, cmt. c (1971).

123. *Id.*

124. *Id.*

125. 47 Mass. App. Ct. 570 (1999).

126. *Id.* at 575 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 56 (1971)).

127. 447 Mass. 468 (2006).

128. See *id.* at 472-73.

129. 362 Mass. 794 (1973).

130. *Id.* at 796.

that the guardianship “more substantially related to Massachusetts, and its law should apply.”¹³¹ In this respect, the guardians were a Massachusetts citizen and a bank domiciled and doing business in Massachusetts. It was therefore likely that the persons who created the guardianship reasonably expected that Massachusetts law would apply.¹³²

Summary

Massachusetts courts strongly favor applying the law of the situs in property cases. The court has not consistently applied the *Second Restatement* to property problems, and when it has, the analysis has not always fully explained how the various sections of the *Second Restatement* dictated the outcome of the case. However, the court has, at least in spirit, indicated a willingness to follow the *Second Restatement* in property cases by basing decisions on which state has the most substantial relationship to the case.

CONCLUSION

In *Bushkin Associates v. Raytheon Co.*, the SJC abandoned the rigid approach of the *First Restatement* in favor of a “functional approach” to conflict-of-laws problems. The *Bushkin* court did not squarely adopt the *Second Restatement*, but suggested that it would draw on the *Second Restatement* as well as other modern choice-of-law approaches, including Leflar’s five factors. However, since *Bushkin*, most cases have relied on the *Second Restatement* rather than Leflar’s analysis or other current approaches.

The SJC should frankly embrace the *Second Restatement* as the basis for choice-of-law analysis in Massachusetts. Because of the breadth of the policy analysis required by the *Second Restatement*, adopting it will not provide certainty as to the outcome in most cases. However, consistent use of the *Second Restatement* will provide a shared analytical framework for lawyers in approaching choice-of-law problems. Judge Gants’s faithful application of all three levels of the *Second Restatement* in *General Electric v. Lines* should serve as a model. Given the inherent complexity of conflict of laws problems, consistently applying *Second Restatement* analysis provides the best means to encourage uniform, rational results.

The SJC can take a further step toward a rational, predictable choice-of-law jurisprudence by consistently applying all three parts of the *Restatement* to choice-of-law problems. First, where an issue-specific provision of the *Restatement* applies to the issue before the court, that section and its commentary should be considered. Second, the general principles found in the topic sections governing the particular area of law should be applied, in light of the basic policy factors in section 6(2), to determine the state of the most significant relationship to the issue. And third, courts should consciously test the law presumptively applicable under specific sections against the policy factors in section 6(2), to determine whether the presumptive choice is overcome. Faithful application of the three parts of the *Restatement* will not automatically dictate results, but will significantly assist the bar in analyzing choice-of-law problems and predicting results in the courts of the commonwealth.

131. *Id.*

132. *Id.* at 796-97.

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INTRODUCTION

The law of copyright in architectural drawings and works is in many respects undeveloped. Different standards have been applied in determining infringement and in awarding or denying injunctive relief. Much of the confusion may stem from the fact that copyright extends only to “original” works of authorship and does not extend to generic or functional components; and, in the final analysis, an architect’s work frequently is a collection of generic shapes. Further, some cases have found that architects have, perhaps unwittingly, granted licenses or even surrendered ownership of their copyright to purported infringers. This article is intended to identify various of these ill-defined concepts and to alert architects and litigators to matters that may arise in an action alleging violation of copyright in the architect’s work, where copyright exists in architectural drawings or in a constructed building.

1. 17 U.S.C. § 102(a)(5) (2006).

2. 17 U.S.C. § 101 (2006).

3. *Leicester v. Warner Bros.*, 232 F.3d 1212, 1216 (9th Cir. 2000) (applying 17 U.S.C. § 102(b) (1976) and citing PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT 2.15.1 at 2:183 (1999)).

4. The Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 701-06, 104 Stat. 5089, 5133 (1990) (codified at 17 U.S.C. §§ 101-102, 120 (2006)). AWCOPA amended the Copyright Act, § 17 U.S.C.A. 101-804 (Thomson/West 200 5 & Supp. July 2008 & Stat. Supp. Jan. 2009), by adding a definition of architectural works, adding such works to the categories of protectable works and placing certain limits on that protection. The history of the Berne Convention and AWCOPA is discussed at *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 109-10 (1st Cir. 2006).

5. 17 U.S.C. §§ 101, 102(a) (2006) (as amended by AWCOPA). The implementing regulation, 37 C.F.R. § 202.11(d)(2) (2008), defines unprotectable features to include “[s]tandard configurations of spaces and individual standard features, such as windows, doors, and other staple building components.”

Prior to passage of AWCOPA, it was generally understood that constructing a building from copyright protected drawings was not an infringement, because

I. CONSTITUTIONAL AND STATUTORY AUTHORITY

The United States Constitution authorizes Congress to grant authors a limited monopoly in their original writings via article I, section 8, clause 8. Congress has exercised that power to protect an ever-evolving range of writings, including maps, paintings, sculptures, music, dance, photographs, sound recordings, moving pictures and computer software. Prior to the United States’s 1988 accession to the Berne Convention, architectural works and architectural plans were not expressly protected. The latter, however, were generally considered to be protected under statutory language extending copyright protection to pictorial, graphic or sculptural works, which were defined to include diagrams, models and technical drawings.¹

II. COPYRIGHT PROTECTION IN COMPLETED STRUCTURES

Historically, completed structures were classified as “useful article[s]”² and were denied copyright protection.³ The Architectural Works Copyright Protection Act of 1990 (“AWCPA”),⁴ implementing a Berne Convention commitment, added to the classes of copyright protected items “architectural works,” which the act defines as “the design of a building as embodied in any tangible medium of expression, including buildings, architectural plans or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”⁵ The statute granted protection to buildings completed after December 1, 1990,⁶ but also extended to building designs in unpublished drawings created before that date, provided the depicted buildings were constructed by December 31, 2002.⁷ While copyright in a building will prevent another from constructing an infringing structure or creating drawings based upon an existing building, it will not “prevent the making, distributing, or public displaying of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.”⁸

construction itself did not violate any of the owner’s exclusive rights. The remedy under such circumstances was redelivery of the drawings and prohibition of further use of the drawings. *Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274, 280 (6th Cir. 1988). Since 1990, with the passage of AWCOPA, a building itself may be copyrighted, and, as a result, duplication of a copyrighted building (even without use of protected plans) may be halted and subject to a damages recovery. Conversely, copying from two-dimensional plans is prohibited. *Hunt v. Pasternack*, 192 F.3d 877, 880 (9th Cir. 1999).

For a discussion of the consequences when a visual work is incorporated into an architectural work, see generally *Leicester v. Warner Bros.*, 232 F.3d 1212, 1213-19 (9th Cir. 2000).

6. See H.R. REP. NO. 94-1476, at 55(1976) reprinted in 1976 U.S.C.C.A.N. 5659, 5668 (discussing separate copyrights in drawings and structures). Congress deleted “three-dimensional structure” from the definition of architectural work to avoid extending protection to items such as bridges, pedestrian walkways, and dams. H.R. REP. NO. 101-735, at 19, 20 n.101 (1990) reprinted in 1990 U.S.C.C.A.N. 6935, 6950.

7. Judicial Improvements Act of 1990, Pub. L. No. 101-650, Tit. VII, §§704(a), 706, 104 Stat. 5133 -34 (1990).

8. 17 U.S.C. §120(a) (2006).

III. COPYRIGHT PROTECTION IN ARCHITECTURAL DRAWINGS

AWCPA was not intended to affect existing principles of copyright in architectural drawings.⁹ With the passage of AWCPA, however, “[a]n individual creating an architectural work by depicting that work in plans or drawing [sic] will have two separate copyrights, one in the architectural work (section 102(a)(8)), the other in the plans or drawings (section 102(a)(5)).”¹⁰

Copyright, whether in a building or drawings, is said to protect an architect’s “choices regarding the shape, arrangement and location of the buildings, the design of the open space, the location of parking and sidewalks, [and] ... the combination of these individual design elements.”¹¹ The author’s contributions need only “meet [a] low threshold of originality required” to obtain copyright protection.¹² Copyright protection attaches upon creation,¹³ and copyright registration is not required for protection to attach.¹⁴

The Copyright Act grants to a copyright owner the following exclusive rights, among others:

- the right to reproduce the work (the “reproduction right”);
- the right to prepare derivative works (the “adaption right”); and
- the right to distribute copies of the work to the public by sale or rental (the “distribution right”).¹⁵

These rights have been held to be separate and distinct, and they

are severable from one another.¹⁶

A copyright notice, frequently represented by the character “©,” is no longer strictly required to obtain protection.¹⁷ An architect preparing drawings for a particular project, with no intent of distributing the drawings beyond those involved in the project, will not surrender copyright remedies for lack of a copyright notice.

IV. INFRINGEMENT BY REPRODUCTION

In an action claiming copyright infringement, a party must establish (1) ownership of a valid copyright and (2) copying of the protected work.¹⁸ A certificate of copyright registration constitutes *prima facie* evidence of ownership of a valid copyright.¹⁹ In those instances where an architect’s drawings have been reproduced verbatim, or nearly so, without permission, generally the issue is not whether a copying occurred but whether the defendant’s use is permitted.²⁰ The discussion of affirmative defenses at Part IX of this article identifies those issues that are likely to arise in this context.

V. INFRINGEMENT BY CREATING AN IMPERMISSIBLE DERIVATIVE WORK²¹

In those instances when an alleged infringing item is not a verbatim reproduction or nearly so, the copyright owner, after establishing ownership, may demonstrate “copying of the protected work.” Proof of copying through indirect evidence has two components:

9. See H.R. REP. NO. 101-735, at 19. Protection for architectural plans, drawings, and models as pictorial, graphic, or sculptural works under 17 U.S.C. §102(a)(5) (2006) is unaffected by this bill.

10. H.R. REP. NO. 101-735, at 19.

11. John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 186 F.Supp. 2d 1, 10 (D. Mass. 2002), *aff’d*, 322 F.3d 26 (1st Cir. 2003). The *Danielson* court seemingly extends the statutory definition, which is limited to the design of a “building,” to include the arrangement and location of buildings, open spaces, parking and sidewalks.

12. *Id.* at 10 (citing Publ’n Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)). While the author’s work need only meet a low threshold of originality, the drawings nevertheless must achieve some level of definiteness. For instance, in *Attia v. Soc’y of N.Y. Hosp.*, 201 F.3d 50, 58-60 (2d Cir. 1999), the court held that the architect’s sketches, depicting general layout and including an elevated walkway, were merely ideas and not the expression of an idea capable of copyright protection. On the other hand, the drawings need not represent a complete set of construction drawings. See the various cases in the discussion of implied license, Part IX, *infra*, where various preliminary works were subject to copyright protection. In this author’s opinion, the *Attia* court should have applied the traditional test for infringement, see Part V, *infra*, namely, whether the alleged infringer had access to the architect’s drawings and whether the latter drawings were substantially similar to the architect’s drawings. Seemingly, any attempt to convey an idea, through words or pictures, is an expression of that idea and should be capable of protection.

13. *Danielson*, 322 F.3d at 35 n.4. For works created on or after January 1, 1978, the duration of copyright protection is the life of the author plus 70 years. 17 U.S.C. § 302(a) (2006).

14. 17 U.S.C. § 408(a) (2006). It is necessary, however, that registration occur before suit is commenced.

15. *Id.* § 106.

16. See *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3rd Cir. 1984).

17. 17 U.S.C. § 401(a) (2006).

18. *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 605 (1st Cir. 1988).

19. 17 U.S.C. § 410(c) (2006). A property owner’s (or other lay-person’s) participation in the design will not elevate the property owner to the status of author or co-author of the drawings or establish a work-for-hire status. See, e.g., *Warren Freedensfeld Assocs., Inc. v. McTigue*, 531 F. 3d 38, 47-49 (1st Cir. 2008);

Aitken, Hazen v. Empire Constr. Co., 542 F. Supp. 252, 259 (D. Neb. 1982).

20. “Copying” is frequently used as shorthand for the unauthorized exercise of any of the author’s exclusive rights. To constitute a violation, “copying” is not limited to unauthorized reproduction, but includes creating an impermissible derivative work: in those instances where copying is verbatim, “copying” refers to reproduction; in those instances where the works are not identical, “copying” refers to whether the accused work is impermissibly similar to the protected work. See Part V *infra*.

21. The statutory rights of a copyright owner include the exclusive right “to prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106(2) (2006). The Copyright Act defines a derivative work as

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of elaborations[] or other modifications [to a preexisting work] ... is a “derivative work”.

17 U.S.C. § 101(a) (2006). The Notes of Committee on Judiciary corresponding to section 106 explain the following:

To be an infringement the “derivative work” must be “based upon the copyrighted work,” and the definition in section 101 ... refers to “... any ... form in which a work may be recast, transformed, or adapted.” Thus, to constitute a violation of section 106(2) ... the infringing work must incorporate a portion of the copyrighted work in some form ...

Typically, the right of adaption involves recasting a copyright-protected item into another form, such as converting a novel to a motion picture or converting a movie character to a three-dimensional action figure. With AWCPA, crafting plans from a completed building would fall within this language. As applies to architectural drawings, the last sentence of the definition, providing that modifications or elaborations are derivative, is applicable. *Curtis v. Benson*, 959 F. Supp. 348, 352 (E.D. La. 1997); *Arthur Rutenberg Homes, Inc. v. Maloney*, 891 F. Supp. 1560, 1564 (M.D. Fla.1995).

The “right [to create derivative works] often can be more valuable than the right to the original work itself.” *Atari, Inc. v. N. Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 618 n.12 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982). Relative to a completed building, however, 17 U.S.C. § 120(b) (2006) allows the owner of the building to alter the structure without the architect’s consent, presumably so as not to run afoul of the architect’s exclusive right to prepare a derivative work.

(1) substantial similarity and (2) access.²² Direct evidence is rarely available so copying “is generally established by showing that the defendant had access to the copyrighted work and that the offending and copyrighted articles are substantially similar.”²³ The test leaves open a defense of independent creation.²⁴

The infringement analysis frequently is said to require “dissection.” Dissection is intended to remove unprotectable matter, such as items in the public domain or strictly functional items,²⁵ from a comparison of two works. If the similar aspects of two works are those aspects that are unprotectable, no infringement can be found. It is only when the author’s original, creative expression is copied that infringement occurs.²⁶

A leading case on the subject of dissection is *Yankee Candle Co. v. Bridgewater Candle Co.*²⁷ Yankee Candle alleged that Bridgewater Candle infringed its copyright in candle labels.²⁸ The labels of both parties were rectangular in shape and of similar size, with a gold border, white lettering and photographs employing a full-bleed style of photography.²⁹ The district court found, with the approval of the United States Court of Appeals for the First Circuit, that the geometric shape of the label was not protectable; that the gold (border) color was not protectable, primarily because gold is commonly used to signify opulence; and that a photographic style is not protectable.³⁰ After “dissecting” the unprotectable elements of the labels, what was left were the photographs employed in the respective labels; and the photographs themselves were not substantially

similar, even if their subjects were similar.³¹

As relates to architectural drawings, two comments about *Yankee Candle* are warranted. First, the discussion involved a comparison of visual, and not technical, items: the court expressly recognized it was making a comparison of “visual work[s].”³² Second, the case was more in the nature of trademark infringement than copyright infringement. Because, however, Yankee Candle was unable to demonstrate that its labels served as a source designation, it was incapable of establishing that its labels served as a trademark.³³

At least one court, in the context of architectural drawings, has removed standard geometric shapes from the analysis.³⁴ Given that rooms, corridors and doorway openings almost always consist of common geometric shapes, when these items are removed, little is left for protection. A real question exists as to whether dissection is proper in an action for infringement of architectural drawings or works. The Copyright Act expressly provides protection for plans depicting the design of a building. Necessarily, the design consists of walls and openings. Arguably the statutory language precludes dissection, as the language expressly provides protection for the arrangement of spaces.³⁵ As relates to architectural drawings, a dissection analysis appears inappropriate, if not unworkable.³⁶

Whether or not dissection occurs, generally the next question is, “How much borrowing is too much?” The comparison of the respective works has been described as follows: When determining similarity, courts are

22. See *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 33 n.4 (1st Cir. 2001). Much of the confusion in this area of the law may be traced to the dual use of the term “substantially similar”. See *Matthews v. Freedman*, 157 F.3d 25, 27 n.1 (1st Cir. 1998). (“First, if there is no evidence of actual copying, as is usually the case ... a plaintiff may prove that copying occurred by showing access and substantial similarity ... We have described this aspect of substantial similarity as an ‘evidentiary inference.’ ... Second, once copying has been proven, the plaintiff must show that the ‘alleged infringing work is ‘substantially similar’ to the protected expression in the copywritten work.”) See also *Castle Rock Entm’t v. Carol Publ’g Group*, 150 F.3d 132, 137 (2nd Cir. 1998) (“[P]robative,’ rather than ‘substantial’ similarity is the correct term in referring to the plaintiff’s initial burden of proving actual copying by indirect evidence. It is only after actual copying is established that one claiming infringement then proceeds to demonstrate that the copying was improper or unlawful by showing that the second work bears ‘substantial similarity’ to the expression in the earlier work.”).

23. This part of this test, access with substantial similarity, has been described as follows:

Proof by direct evidence of copying is generally not possible since the actual act of copying is rarely witnessed or recorded. Normally, there is no physical proof of copying other than the offending object itself. Copying therefore is generally established by showing that the defendant had access to the copyrighted work and that the offending and copyrighted articles are “substantially similar.”

Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 606 (1st Cir. 1988) (citations omitted). See *Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274, 277 (6th Cir. 1988) (noting that “[a]ccess merely means an opportunity to view the protected material”) (citing 3 M. NIMMER, NIMMER ON COPYRIGHT, § 13.02[A] (1988)).

24. See *infra* n.68 and accompanying text.

25. See *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519-20 (1st Cir. 1996) (copyright law denies protection to forms of expression directed solely at functional considerations).

26. As the court stated in *Concrete Mach.*,

This test provides a workable, flexible framework for copyright infringement analysis. The first step of the analysis accomplishes at least two important goals. As a preliminary matter, the court can “dissect” the copyrighted work to identify those aspects of the expression that are not necessarily mandated by the idea it embodies. At this point, the court can “focus on whether [and to what extent]

the idea is capable of various modes of expression.” By dissecting the accused work and identifying those features which are protected in the copyrighted work, the court may be able to determine as a matter of law whether or not the former has copied protected aspects of the latter. The court can also determine, in at least a general way, those aspects of the work that are protected by the copyright and that should be considered in the subsequent comparative analysis under the “ordinary observer” test. Assuming copying of protected aspects is established, the trier of fact can then assess pursuant to the “ordinary observer” test whether there is substantial similarity between the protected expression and the accused work.

Concrete Mach., 843 F.2d at 608-09 (citations omitted).

27. 259 F.3d 25 (1st Cir. 2001).

28. *Id.* at 32.

29. *Id.* at 32, 34, 40.

30. *Id.* at 34-35, 37.

31. *Id.* at 37 n.7, 42.

32. *Id.* at 34.

33. *Id.* at 44-45.

34. *Greenberg v. Town of Falmouth*, 77 U.S.P.Q. 2d (BNA) 1777, 1779-82 (D. Mass. 2006).

35. 17 U.S.C. §§ 101, 102(a) (2006). See 136 Cong. Rec. E259, E260 (daily ed. Feb. 7, 1990) (“This provision recognizes both that creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectable individual elements into an original, protectable whole, and that an architect may incorporate new, protectable design elements into otherwise standard, unprotectable building features.”).

36. The House Report perhaps offers some assistance:

A two-step analysis is envisioned. First, an architectural work should be examined to determine whether there are original design elements present, including overall shape and interior architecture. If such design elements are present, a second step is reached to examine whether the design elements are functionally required. If the design elements are not functionally required, the work is protectible. As a consequence, contrary to the Committee’s report accompanying the 1976 Copyright Act with respect to industrial products, the aesthetically pleasing overall shape of an architectural work could be protected under the bill.

H.R. REP. NO. 101-735, at 20-21 (1990) (footnote omitted).

to look at the “total concept and feel” of the designs When comparing the designs, it is not sufficient to dissect separate components and dissimilarities. The original way that the author “selected, coordinated, and arranged the elements” of her work is the focus of the court [I]t is the similarities, rather than the differences, that inform whether the “total concept and feel” of the works and their “aesthetic appeal” is the same³⁷

An accused later work, if not a verbatim reproduction or nearly so, may constitute an unauthorized derivative work. The comparison in the derivative work context has been described thusly: “[T]he derivative work issue ... should turn on ‘the qualitative nature of the taking’ Thus, a work may be found to be a derivative even if it has ‘a different total concept and feel from the original work’”³⁸ Borrowing a small amount of the original, if it is qualitatively significant, may be sufficient to constitute an infringement, even if the full original could not be recreated from the excerpt.³⁹ Specific to architectural drawings, it has been said that “[t]he existence of differences will not negate infringement unless they so outweigh similarities that the similarities can only be deemed inconsequential within the total context of the copyrighted work.”⁴⁰

The United States Court of Appeals for the Tenth Circuit, in *Jacobsen v. Deseret Book Company*,⁴¹ relying on United States Supreme Court precedent and the frequently cited Nimmer treatise,⁴² used the following language to express this concept:

[A]lthough the ... catalogue of differences between [plaintiff’s work] and the [defendant’s work] is accurate, it is largely irrelevant. We realize the five-volume[s] of the defendant’s work contain[] much material not taken from the single-volume [plaintiff’s work]. However, “a taking may not be excused merely because it is insubstantial with respect to the *infringing* work. As Judge Learned Hand cogently remarked, ‘no plagiarist can excuse the wrong by showing how much of his work he did not pirate.’ ... ‘The question in each case is

whether the similarity relates to matter that constitutes a substantial portion of plaintiff’s work — not whether such material constitutes a substantial portion of defendant’s work.” ... Thus we are not concerned with whether the copied material is a substantial part of the [defendant’s work]. Rather, we must consider whether [the defendant] copied a substantial portion of [plaintiff’s work].⁴³

Even this statement may be too limited. As Professor Goldstein explains:

It is axiomatic that a defendant’s liability for copyright infringement turns on how much he has copied from the plaintiff’s work and not on how much original, uncopied expression he has contributed himself. Courts have followed this rule in cases where the defendant included a few lines copied verbatim from the plaintiff’s work in his own much longer work, and in cases in which the defendant did not copy verbatim but rather dipped beneath the surface of the plaintiff’s work to borrow protected narrative, incident or characterization, and then embellished these with his own original expression. The rule in both types of cases is that liability will turn on what the defendant has taken and not on what he has added Just as a defendant’s liability will not be affected by the proportion that the elements taken bear to his work as a whole, so the defendant’s liability should be unaffected by the proportion the elements taken bear to the plaintiff’s work as a whole⁴⁴

It is frequently said that “summary judgment is often inappropriate on the question of substantial similarity.”⁴⁵ Summary judgment is proper, however, “if reasonable minds could not differ as to the presence or absence of substantial similarity of expression.”⁴⁶ This standard has been applied in the First Circuit.⁴⁷

37. *Atkins v. Fischer*, 331 F.3d 988, 993-94 (D.C. Cir. 2003) (citations omitted). The United States District Court for the District of Massachusetts in *Greenberg*, 77 U.S.P.Q.2d(BNA) at 1781 n. 2, discounted the total concept and feel test, because it contemplates a comparison of the works before dissection and not after dissection. If dissection is required, probably the *Greenberg* court is correct. If dissection is not proper, then the “total concept and feel” test would be accurate. See *Shine v. Childs*, 382 F. Supp. 2d 602, 612-13 (S.D.N.Y. 2005).

38. *Mulcahy v. Cheetah Learning, LLC*, 386 F.3d 849, 853-54 (8th Cir. 2004) (citations omitted). The statutory definition of derivative work is set forth at *supra* at note 21.

39. *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986).

40. *Arthur Rutenberg Homes, Inc. v. Maloney*, 891F. Supp. 1560, 1565 (M.D. Fla. 1995) (citations omitted).

41. *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 945 (10th Cir.), *cert. denied*, 537 U.S. 1066 (2002).

42. MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 13.03[A] (Matthew Bender & Co., Inc. 2008) (1963).

43. See *Lotus Devel. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 70 (D. Mass. 1990) (“[A] laundry list of specific differences ... will not preclude a finding of infringement where the works are substantially similar in other respects.”) (internal quotation marks and citations omitted).

44. GOLDSTEIN, *supra* note 3, at 9.3.1. Professor Nimmer has stated that “a

work will be considered a derivative work only if it would be considered an infringing work” 1 NIMMER & NIMMER, *supra* note 42, at § 3.01. Seemingly, then, the test frequently discussed for infringement, “substantial similarity,” addresses those cases where infringement is other than by reproduction. If the respective items are identical, the violation will have been committed by the reproduction; if the items are not identical, the violation is in creating an impermissible derivative work.

45. *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 38 (1st Cir. 2001).

46. *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 n.3 (9th Cir. 1994). See *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2nd Cir. 1995) (summary judgment on issue of substantial similarity).

47. See *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 62 (1st Cir. 1999) (summary judgment may be appropriate even as to items that are not identical); *TMTV, Corp. v. Mass Prods., Inc.*, 345 F. Supp. 2d 196, 214 (D.P.R. 2004) (“Summary judgment is proper in favor of the plaintiff in a copyright infringement case where the similarity between the copy and the original is so similar that reasonable minds could not differ ... plaintiffs are entitled to judgment as a matter of law.”) (ellipsis in original, citations omitted); see also *Intervest Constr. Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008) (“thin” copyright existing in floor plans comparable to compilations, and infringement is easily avoided; summary judgment is preferred for resolving substantial similarity claims in such cases).

VI. PERSONS LIABLE

Infringement may be direct or contributory. “All persons and corporations who participate in, exercise control over, or benefit from the infringement are jointly and severally liable as copyright infringers.”⁴⁸

The acknowledged standard for imposing contributory liability was articulated by the United States Court of Appeals for the Second Circuit in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*⁴⁹: “[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”⁵⁰ This statement of the test for contributory liability has been widely followed.⁵¹

VII. PRELIMINARY AND PERMANENT EQUITABLE RELIEF

At least one court has stated that the statutory provisions providing for preliminary relief trump the common law standards applicable to such requests.⁵² In copyright infringement actions, the United States Court of Appeals for the First Circuit purports to employ the traditional four-part test, although its discussion of the elements applicable in a copyright case tends toward somewhat of a lesser showing:

A plaintiff seeking a preliminary injunction ordinarily must prove that:

- (1) the plaintiff has a likelihood of success on the merits of his claim;
- (2) the plaintiff does not have an adequate remedy at law such that it will suffer irreparable harm without the injunction;
- (3) this harm is greater than the injury the defendant will suffer if the injunction is granted; and
- (4) the injunction will not harm the public interest.⁵³

Moreover, according to the court, “irreparable harm is usually presumed if likelihood of success on the copyright claim has been shown. There is, therefore, no need actually to prove irreparable harm when seeking an injunction against copyright infringement.”⁵⁴

Because copyright protection grants to the owner the exclusive use of a protected item, damages ordinarily are an insufficient remedy. A court reluctant to afford injunctive relief, thus limiting the copyright holder’s remedy to damages, in effect requires a copyright holder to grant a non-consensual license to those usurping his copyright. Further, a copyright holder (perhaps with a limited litigation

budget) may rightly conclude that injunctive relief is the preferred remedy — rather than engage in a protracted battle over net profits. In such instances, reluctance to grant injunctive relief in lieu of damages may have the result of denying copyright protection altogether.

Balance of harms and public policy are discussed at length in *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*:

[T]he issue of public policy rarely is a genuine issue if the copyright owner has established a likelihood of success: Since Congress has elected to grant certain exclusive rights to the owner of a copyright, it is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies and resources which are invested in the protected work.

More important to our decision here is the sometimes questionable relevance of the “balance of hardships” factor to the determination of whether a likely infringer should be preliminarily enjoined. Where the only hardship that the defendant will suffer is lost profits from an activity which has been shown likely to be infringing, such an argument in defense “merits little equitable consideration.” “Advantages built upon a deliberately plagiarized make-up do not seem to us to give the borrower any standing to complain that his vested interests will be disturbed.” Such considerations apply even to a business which is exclusively based on an infringing activity and which would be virtually destroyed by a preliminary injunction. It would be incongruous to hold that the more an enterprise relies on copyright infringement for survival, the more likely it will be able to defeat the copyright owner’s efforts to have that activity immediately halted. We see little reason why an entity should be allowed to establish and continue an enterprise based solely on what is in all likelihood copyright infringement, simply because that is its only business⁵⁵

The Copyright Act provides equitable relief to prevent future infringement, including injunction, impoundment and destruction of infringing materials.⁵⁶ Equitable relief is not limited to those who

48. *Syigma Photo News, Inc. v. High Soc’y Magazine, Inc.*, 778 F.2d 89, 92 (2d Cir. 1985) (citing 3 NIMMER ON COPYRIGHT, § 12.04[A] at 12-34 (1985)(other citations omitted)); see *Arthur Rutenberg Homes, Inc. v. Maloney*, 891 F. Supp. 1560, 1568 (M.D. Fla. 1995) (homeowner who participates in infringement for own benefit is a “direct infringer”). A further consideration relates to the corporate infringer. Because one measure of a plaintiff’s damages is the infringer’s profit, see Part VIII *infra*, the corporate infringer, which may pay handsome salaries but realize little or no profit, presents a potential problem. For this reason, the actual infringers may be worthy defendants.

49. 443 F.2d 1159 (2d Cir. 1971).

50. *Id.* at 1162.

51. *Venegas-Hernandez v. Asociacion De Compositores, Editores De Musica Latinoamericana (ACEMLA)*, 424 F.3d 50, 57-58 (1st Cir. 2005).

52. See *Microsoft Corp. v. Action Software*, 136 F. Supp. 2d 735, 738-39 (N.D. Ohio 2001) (“Because an injunction against activity is authorized by statute, see 17 U.S.C. § 502 (1976) ... , the court need not consider the[] [standard] equitable factors. Simply fulfilling the requirements of the statute or, in other words, fulfilling the first factor for an injunction to issue — showing a strong likelihood of success on the merits — is all that is needed for the Court to issue an injunction.”) (citing *United States v. Microsoft Corp.*, 147 F.3d 935, 943

(D.C. Cir. 1998) (“It is clear that if a statute confers a right to an injunction once a certain showing is made, no plaintiff need show more than the statute specifies.”) (other citations omitted)). This abbreviated approach is called into question in the recent case of *eBay v. MercExchange, LLC*, 547 U.S. 388, 391-92 (2006), discussing permanent injunctive relief in the context of patent law, and *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543-46 (4th Cir. 2007) applying the *eBay* standard to copyright in architectural drawings. See also H.R. REP. NO. 101-735, at 14 (1990)(AWCPA’s provision for injunctive relief is consistent with existing law).

53. *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F. 2d 600, 611 (1st Cir. 1988) (citations omitted).

54. *Id.* at 611-12 (citations omitted).

55. *Id.* 843 F.2d at 612 (citations omitted). In the copyright context, the consideration of public interest sometimes is said to concern whether an injunction will grant a monopoly, harming the public by eliminating competition. *Flag Fables, Inc. v. Jean Ann’s Country Flags & Crafts*, 730 F. Supp. 1165, 1175 (D. Mass. 1989).

56. See, e.g., 17 U.S.C. § 503(b) (2006) (“As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies ... found to have been made or used in violation of the copyright owner’s exclusive rights. ...”).

have committed a copyright violation.⁵⁷ By subjecting “all” copies to the court’s jurisdiction, the statute extends to those in possession of infringing materials.⁵⁸

VIII. DAMAGES

A plaintiff may recover his actual damages and any profits of the infringer not taken into account in computing actual damages.⁵⁹ In this way, if an infringer operates more efficiently and realizes a greater profit than would the owner, the owner is entitled to his damages and the additional profits realized by the infringer. The infringer is not entitled to any benefit from his infringement.⁶⁰

By statute, to establish the infringer’s profits, the owner need only present proof of the infringer’s gross profits; the burden then shifts to the infringer to establish his deductible expenses.⁶¹ The statute provides that the profits recoverable by the owner are “those attributable to the infringement.”⁶² In instances where an infringer merely adds detail to an owner’s work, such as, perhaps, preparing construction drawings from protected preliminary drawings, probably all the infringer’s profits are attributable to the infringement. When the infringer performs some of its own work, such as designing additional buildings or preparing a landscape design, some attribution may be required.⁶³

Because damages may be nominal or difficult to prove, the Copyright Act provides for an award of statutory damages, provided that the copyright is registered prior to infringement.⁶⁴ If infringement occurs prior to registration, neither statutory damages nor attorney’s fees are available for such infringements.⁶⁵ The registration requirement is intended to encourage registration.⁶⁶ Where statutory damages are recoverable, a plaintiff may elect statutory damages any time prior to final judgment.⁶⁷

IX. AFFIRMATIVE DEFENSES

Independent Creation: “Even if [a plaintiff] show[s] copying and substantial similarity] the trier of fact may nonetheless find no copying if the defendant shows independent creation.”⁶⁸ Note that according to this language, the burden rests upon the defendant to

establish independent creation.

Fair Use: 17 U.S.C. §107 permits fair use of a copyright protected work. Fair use includes criticism, comment, news reporting, teaching and research. Ordinarily, a commercial use will not be considered a fair use. This issue is covered well in section 107 and its annotations, and specific limitations on scope of copyright in architectural works are set out at 17 U.S.C. §120.

Express or Implied License: Ordinarily, a transfer of copyright ownership must be made in writing, as per 17 U.S.C. §204(a). A “transfer of copyright ownership” is defined as an “assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or any of the exclusive rights comprised in a copyright ... but not including a nonexclusive license.”⁶⁹ Because an implied license requires no writing and will preclude a finding of infringement (provided the license is not exceeded), it is a frequent subject in copyright litigation.

A copyright owner may grant [a] nonexclusive license[] orally, or [it] may be implied from the conduct which indicates the owner’s intent to allow a licensee to use the work The burden of proving the existence of such a license is on the party claiming its protection, the licensee. Implied licenses are found only in narrow circumstances. ... The touchstone for finding an implied license is intent.⁷⁰

The law of implied license has received attention over the past decade and the United States Court of Appeals for the First Circuit considered the issue at some length in *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.*⁷¹ An implied license will be found only when a copyright owner actually intends to grant a license.⁷² A license will not arise by silence or mistake or inadvertence.⁷³ The burden of proof is on the party claiming the license.⁷⁴ The putative licensee’s expectations, if not shared by the copyright owner, are irrelevant in ascertaining the copyright owner’s intent.⁷⁵ *Danielson* establishes a framework within which to consider the claim of implied license:

57. An “infringer” is defined at 17 U.S.C. § 501 (2006).

58. *Compare Austin v. Steiner*, 207 F. Supp. 776, 780 (D. Ill. 1962).

59. 17 U.S.C. § 504 (2006). When the architect has registered both the drawings and the building, the legislative history provides the following:

The bill’s intention is to keep those two forms of protection separate. An individual creating an architectural work by depicting that work in the plans or drawing [sic] will have two separate copyrights, one in the architectural work (section 102(a)(8)), the other in the plans or drawings (section 102(a)(5)). Either or both of these copyrights may be infringed and eligible separately for damages. [I]n cases where it is found that both the architectural work and the plans have been infringed, courts or juries may reduce an award of damages as necessary to avoid double remuneration

H.R. REP. NO. 101-735, at 19 (1990)(footnote omitted).

60. H.R. Rep. No.94-1476, at 161 (1976) *reprinted in* 1976 U.S.C.A.N., 5659, 5777.

61. 17 U.S.C. § 504(b) (2006).

62. *Id.*

63. For a comprehensive discussion of “elements of profit attributable to factors other than the copyrighted work,” see *John G. Danielson Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 46-50 (1st Cir. 2003).

64. 17 U.S.C. § 504 (2006).

65. 17 U.S.C.A. § 412 (Thomson/West 2005 & Supp. July 2008 & Stat. Supp. Jan. 2009). A careful reading of the statute reveals that it can create the anomalous result that attorney’s fees may be unavailable to a plaintiff yet subject the

plaintiff to the defendant’s claim for fees if the plaintiff is unsuccessful.

66. Because the rights granted by copyright are severable, it may be that attorney’s fees are not available for some infringements but are available for others. For instance, if a defendant committed an infringement by reproduction before registration, statutory damages and attorney’s fees may not be available for that violation; but, if a violation by creating an impermissible derivative work based upon the reproduction commenced later, after registration, statutory damages and attorney’s fees may be available for that violation.

67. 17 U.S.C. § 504(c)(1) (2006).

68. *Grubb v. KMS Patriots L.P.*, 88 F.3d 1, 2 (1st Cir. 1996).

69. 17 U.S.C. § 101 (2006).

70. *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 40 (1st Cir. 2003). Where an architect’s contracts with a developer or owner contemplate reuse, the architect’s remedy reduces to a contract action for the fee. *LGS Archs, Inc. v. Concordia Homes*, 434 F.3d 1150, 1157 (9th Cir. 2006).

71. 322 F.3d 26 (1st Cir. 2003).

72. *Id.* at 40.

73. See *id.* at 40-41 (“The touchstone for finding implied license ... is intent.”) (citing *Johnson v. Jones*, 149 F.3d 494, 502 (6th Cir. 1998) (“Without intent, there can be no implied license.”) (other citations omitted)).

74. *Id.* at 40.

75. See *id.* at 42 (“[defendant’s] suggestion that the appropriate standard is the effect of the architect’s behavior on the subjective perception of the supposed licensee has no basis”).

[T]he existence of an implied nonexclusive license in a particular situation turns on at least three factors: (1) whether the parties were engaged in a short-term discrete transaction as opposed to an ongoing relationship; (2) whether the creator utilized written contracts, such as the standard AIA contract, providing that copyrighted materials could only be used with the creator's future involvement or express permission; and (3) whether the creator's conduct during the creation or delivery of the copyrighted material indicated that use of the material without the creator's involvement or consent was permissible. This is not an exhaustive list of factors to consider, but it provides useful guidance in determining the crucial question of intent.⁷⁶

A review of the major cases discussing implied license is helpful in clarifying the concept. The earliest case frequently cited in discussions of implied license is *Effects Associates, Inc. v. Cohen*.⁷⁷ Cohen, a movie producer, sought the assistance of a special effects firm, Effects Associates, to create special-effects enhancements for his film.⁷⁸ The enhancements were made and incorporated into the film, as the parties intended.⁷⁹ When the full price for the special-effects footage was not paid, Effects Associates brought suit, claiming that its copyright was infringed when the footage was incorporated into the film.⁸⁰

The *Effects Associates* court began by confirming that transfers of copyright ownership must be in writing.⁸¹ The court observed: "Section 204 ensures that the creator of a work will not give away his copyright inadvertently Most importantly, section 204 enhances predictability and certainty of copyright ownership — Congress' [sic] paramount goal when it revised the Act in 1976."⁸²

The court continued:

We note that there is a narrow exception to the writing requirement that may apply here. Section 204 provides that all transfers of copyright ownership must be in writing; section 101 defines transfers of ownership broadly, but expressly removes from the scope of section 204 a "nonexclusive license." The sole issue that remains, then, is whether Cohen had a nonexclusive license to use plaintiff's special effects footage.⁸³

It then concluded:

Effects created a work at defendant's request and handed it over, intending that defendant copy and distribute it. To hold that Effects did not at the same time convey a license to use the footage in [the film] would mean that plaintiff's contribution to the film was "of minimal value," a conclusion that can't be squared

with the fact that Cohen paid Effects almost \$56,000 for this footage. Accordingly, we conclude that Effects impliedly granted a nonexclusive license to Cohen and his production company to incorporate the special effects footage into [the film] and to [the distributor] to distribute the film.⁸⁴

In the end, *Effects Associates* makes really one observation on the subject of implied nonexclusive licenses: Effects Associates agreed to produce footage intended to be incorporated into a motion picture that was intended to be distributed to the public. The case merely confirms that parties may conduct themselves as agreed without risking a copyright violation. Indeed, the court noted that "every objective fact concerning the transaction at issue supports a finding that an implied license existed,"⁸⁵ that is, that the footage was intended to be incorporated into the film and then distributed, without additional compensation and without liability for doing so. Under these circumstances, even if the parties gave no conscious consideration to the copyright issue (and certainly no writing transferring an interest was made), the copyright owner intends that his copyright-protected material may be used without additional compensation, and a license results.

The first case to discuss an implied license in architectural drawings is *I.A.E. Inc. v. Shaver*.⁸⁶ A joint venture undertook to design and construct an airport cargo hangar.⁸⁷ The joint venture contracted with Mr. Shaver for him to prepare schematic design drawings for the hangar.⁸⁸ Mr. Shaver prepared the contract, which was in the form of a letter agreement.⁸⁹ He then prepared schematic design drawings, and the airport approved the design.⁹⁰ The joint venture hired another architect to complete the architectural work, and two days later Mr. Shaver wrote the airport that: "under the circumstances, [we are] no longer in a position to participate or contribute to the development of the ... [p]roject. ... We trust that our ideas and knowledge exhibited in our work will assist the [a]irport in realizing a credible and flexible use Cargo/Hangar facility."⁹¹ This letter included Mr. Shaver's design drawings.⁹²

The United States Court of Appeals for the Seventh Circuit stated the following:

The contract in this case was a letter written by Mr. Shaver. This letter, apparently in confirmation of an earlier telephone conversation, demonstrates that the relationship of independent contractor for the purpose of creating the preliminary drawings for the Airport Project existed between Mr. Shaver and Joint Venture. It defines his role in the Airport Project and specifically his "understanding of the scope of the work:" preparation of the preliminary schematic design drawings, which were 15-19% of the total design work. ... Mr.

76. *Id.* at 41 (citations omitted).

77. 908 F.2d 555 (9th Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991).

78. *Id.* at 555.

79. *Id.*, 558 n.6.

80. *Id.* at 555. The district court initially dismissed the complaint, concluding that the action sounded in contract and did not raise a federal (copyright) question. *Id.* at 556. Because, there was no written assignment of copyright, however, the copyright remained with Effects Associates, unless an implied license was granted. Remand was ordered to make this determination. *Id.* (citing *Effects Assoc., Inc. v. Cohen*, 817 F.2d 72, 73, 74 & n.1 (9th Cir. 1987)).

81. *Id.* at 556 (considering 17 U.S.C. § 204 (1976)).

82. *Id.* at 557 (citations omitted).

83. *Id.* at 558.

84. *Id.* at 558-59.

85. *Id.* at 558 n.6.

86. 74 F.3d 768 (7th Cir. 1996).

87. *Id.* at 770.

88. *Id.*

89. *Id.*

90. *Id.* at 771.

91. *Id.*

92. *Id.*

Shaver's statement that "agreed design parameters can be established initially to permit the Project to proceed in a normal development manner," certainly suggests that he considered his contribution to be in furtherance of the entire Project. In short, his letter was clear, to-the-point, and unambiguous. No other work is listed; no expectation of a further role in the Project is mentioned in the contract. ...

...
... Mr. Shaver's actions and subsequent writing also unequivocally support that conclusion. Mr. Shaver delivered his copyrighted designs without any warning that their further use would constitute copyright infringement. In his March 3, 1993 letter, Mr. Shaver acknowledged that he was no longer a contributor to the Project's development, but that he expected "that our ideas and knowledge exhibited in our work will assist the Airport in realizing a credible and flexible use Cargo/Hangar facility." This statement, accompanied by the delivery of copies of his drawings, certainly constitutes a release of those documents to the Airport for its Project and clearly validates a determination that all the objective factors support the existence of an implied license to use Mr. Shaver's drawings in the construction of the air cargo building.⁹³

Although the court concluded that Mr. Shaver's letter agreement or contract was unambiguous in granting a license, in the end, Mr. Shaver's subsequent conduct removed any uncertainty that might result from a study of the letter agreement and supported the conclusion that Mr. Shaver intended that his designs be put to use without his further involvement.⁹⁴

In *Johnson v. Jones*,⁹⁵ Ms. Jones requested Mr. Johnson's participation in remodeling her home.⁹⁶ While the parties were negotiating the terms of their undertaking, Mr. Johnson prepared a design development program, demolition plans, floor plans and a site plan.⁹⁷ Although contracts proposed by Mr. Johnson provided that his drawings could not be used without his permission, the contracts were never signed.⁹⁸ When the parties reached an impasse, Mr. Johnson was terminated, but his plans were put to use by others in completing the project.⁹⁹ The United States Court of Appeals for the Sixth Circuit stated:

Johnson submitted two AIA contracts, both of which contained express provisions that he would retain ownership of his drawings, and that those drawings would not be used for completion of the Jones house by others, except by written agreement with appropriate compensation. Those contract provisions, although never signed by Jones, speak to Johnson's intent; they demonstrate that Johnson created the drawings with the understanding that he would be the architect in charge of the project. They further demonstrate that Johnson would not have allowed [others] to finish the project using his drawings without a written agreement, and additional compensation.
...

... It is one thing for an architect to allow the owner to hire someone else to build a house from the architect's [completed] plans. It is quite another for the architect to allow a competitor to come in and claim the architect's work as his own.¹⁰⁰

Johnson recognizes that ordinarily an architect does not design a project with the expectation that another will complete the architectural drawings, and presumably this conclusion would prevail even had Mr. Johnson not proposed contracts reserving his rights.

The third court to consider an implied license in architectural drawings was the United States Court of Appeals for the Ninth Circuit in *Foad Consulting Group, Inc. v. Azzalino*.¹⁰¹ Foad, engineers, contracted to provide "final engineering documents" for a proposed 45-acre shopping center project in Arroyo Grande, California.¹⁰² The contract provided for the preparation of multiple maps, drawings and plans for the project and provided that the engineers would process these documents with the city.¹⁰³ Foad was to be paid \$175,000 for these services.¹⁰⁴ After the engineering plans were approved, the owner hired a contractor to construct the project, and the contractor in turn hired a firm to provide architectural and engineering services during construction.¹⁰⁵ The architect obtained various project documents from Foad and used those documents to prepare construction documents.¹⁰⁶ Foad claimed that its copyright in the drawings was violated.¹⁰⁷

The court determined that "the contract [between the parties] gives [the owner] an implied license to use the ... plot plan to build project" and "to hire others to create derivative works using the ... plot plan for the purpose of completing the project"¹⁰⁸

In reaching this conclusion, the court stated:

93. *Id.* at 776-77.

94. Later cases have diminished some of the *Shaver* reasoning. Though the *Shaver* court made much of the fact that a contract limited to preliminary designs was made, later courts indicate that limited-scope contracts or undertakings do not amount to grant of a license. See *Nelson Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 516 (4th Cir. 2002) (finding no license even though "[the architect] was not retained to develop plans for the entire [p]roject and, like the [architect] in *Shaver* created the [d]rawings pursuant to task specific contracts"). *Shaver* also makes much of the intent of the purported licensee: "Joint Venture clearly expected to use Mr. Shaver's drawings for the Project," *Shaver* 74 F.3d at 777, although in *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.* 322 F.3d 26, 42 (1st Cir. 2003), the court makes clear that the licensee's expectation does not create a license. The *Shaver* court further emphasizes that the drawings were intended to be used in construction, as evidenced by the certificate of copyright and Mr. Shaver's delivery of the plans expecting that construction would proceed according to his designs. *Shaver* 74 F.3d at 776, 777 n.10. Use of the designs in construction, however, is merely a statement of the obvious: these designs were prepared as part of an intended construction project. That designs are intended to be put to use in construction simply is not evidence of a license, because all plans prepared as part of a construction project would fall within this category. Other courts have refined this consideration to read, not whether it was intended that the project

would continue, but whether the project would continue without the architect's involvement. See *Nelson Salabes*, 284 F.3d at 515 ("the creator of a protected work must intend that its copyrighted drawings be used on the project for which they were created, independent of the creator's involvement").

95. 149 F.3d 494 (6th Cir. 1998).

96. *Id.* at 497.

97. *Id.* at 498.

98. *Id.* at 498-99.

99. *Id.* at 499.

100. *Id.* at 500-01.

101. 270 F.3d 821 (9th Cir. 2001).

102. *Id.* at 824.

103. *Id.* at 824, 828.

104. *Id.* at 828.

105. *Id.* at 824.

106. *Id.*

107. *Id.* at 824-25.

108. *Id.* at 829, 830.

Given the amount of money [the owner] paid for Foad's services and because part of the agreement was for Foad to help [the owner] with its application to the city [for approval of the project], it would be surprising if the parties had intended for [the owner] to seek Foad's permission before using the plans to build the [approved] project.¹⁰⁹

Regarding the owner's opportunity to adapt Foad's drawings, the court concluded that the contract between the parties permitted the owner's adaptation of the drawings. The contract provided:

In the event that any changes are made in the plans and specifications by client or persons other than consultant, any and all liability arising out of such changes is waived as against consultant and client assumes full responsibility for such changes unless client has given consultant prior notice and has received from consultant written consent for such changes.¹¹⁰

The court held that the contract language, expressly permitting changes, "indicates that the contract granted [the owner] an implied license to hire others to create derivative works using the plot plan for the purpose of completing the project."¹¹¹

In *Foad Consulting*, as in *Effects Associates*, the copyright owner was well paid for its contribution to a larger project, and each completed its component contribution (that is, the artist's work was not to be completed by others, although the work was to be incorporated into a larger project). The parties simply could not have understood that despite payment, use of the completed component parts (without permission) was prohibited.

The United States Court of Appeals for the Fourth Circuit considered the issue of an implied license in architectural drawings in *Nelson Salabes, Inc. v. Morningside Development, LLC*.¹¹² An owner sought to develop an assisted living facility.¹¹³ By letter agreement, which was never executed, the plaintiff architect agreed to develop a schematic building footprint.¹¹⁴ This undertaking was successful.¹¹⁵ The project proceeded and the architect proposed a second letter agreement, again unexecuted, whereby the architect would provide additional architectural services, develop exterior elevations, and attend a zoning hearing.¹¹⁶ This undertaking too was successful.¹¹⁷ Thereafter, the architect created four architectural drawings depicting building footprints, floor plans and exterior elevations.¹¹⁸ These drawings were incorporated into a development plan and submitted to the local zoning authority, and zoning approval was obtained.¹¹⁹ Later, the architect proposed a further letter agreement whereby it offered to create the design and working drawings for the remainder

of the project.¹²⁰ The letter agreement contemplated that the standard AIA contract, prohibiting the owner's use of the plans without the architect's consent, would be executed.¹²¹ Neither the letter agreement nor the AIA contract was executed.¹²²

The owner's financial circumstances deteriorated and the owner instructed the architect to cease work.¹²³ At the owner's request, the architect sought potential buyers for the project.¹²⁴ The architect located a buyer that ultimately purchased the property.¹²⁵ The buyer, Morningside Development, LLC, hired another to complete the architectural services for the assisted living facility.¹²⁶ The court made the following observations:

Unlike the architect in *Johnson*, [the architect] was not retained to develop plans for the entire [p]roject and, like the architects in *Shaver* and *Foad Consulting*, [the architect] created the [d]rawings pursuant to task-specific contracts. Moreover, as in *Shaver* and *Foad Consulting*, neither of those task-specific contracts contained language prohibiting future use of the architectural drawings without [the architect's] involvement or consent [The architect, however,] never expressed to [the owner] by its representations or conduct that [the owner] could utilize [its] plans without [its] future involvement or express consent Although the project was performed in component parts, the facts . . . demonstrate that [the architect] created the [d]rawings with the understanding that it would participate in the further development of [the project].¹²⁷

Although the project was performed in component parts and none of the drawings or associated writings prohibited the owner's use of the architect's drawings, the court nevertheless determined that evidence of the architect's intent to surrender any of its copyrights was lacking, and the court held that no implied license was granted.¹²⁸

In *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.*,¹²⁹ an owner sought to develop seven acres into a 70-unit condominium.¹³⁰ The property was not zoned for residential use and was subject to a restrictive covenant preventing development as a condominium.¹³¹ The owner sought to obtain amendments to both the zoning requirements and the restrictive covenant, and, in 1987, Danielson prepared a building footprint, a site plan and elevations depicting the proposed condominium, which were to be used in successfully seeking the necessary amendments.¹³² The drawings were in fact employed in seeking the amendments, and the plans became a public record.¹³³ The plans were prepared without a contract, without a copyright notice and without any indication that their future use was prohibited.¹³⁴ After site plans were prepared and employed

109. *Id.* at 828.

110. *Id.* at 830 n.14.

111. *Id.* at 830.

112. 284 F.3d 505 (4th Cir. 2002).

113. *Id.* at 509.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 509-10.

122. *Id.* at 510.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 510-11.

127. *Id.* 516.

128. *Id.* at 516-17.

129. 322 F.3d 26 (1st Cir. 2003).

130. *Id.* at 31.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

in obtaining approval, the architect and owner signed a contract reserving all rights in the architect, and the architect prepared a modified layout and some engineering detail.¹³⁵

Construction began but was halted.¹³⁶ The property sold at foreclosure, and the purchaser used the existing plans to build the condominium project.¹³⁷ Twelve years after the drawings were prepared, the architect registered the drawings with the copyright office.¹³⁸ Notwithstanding that the site plan was prepared and delivered without any reservation of rights, or any contract limiting its use (at the time of delivery), and was permitted to be made a public record, no license was established.¹³⁹

A review of these cases reveals two instances in which a license may be implied. In the first instance, the copyright owner's contribution to a larger project includes the right to use the completed copyright-protected materials in the larger project. In *Effects Associates*, the special effects the owner prepared and delivered, at a cost of more than \$50,000, had value only if they were to be incorporated into a completed motion picture; the effects were delivered intending them to be incorporated.¹⁴⁰ It was unquestionably the intent of the parties that the special effects be used as they were.

Foad Consulting is to the same effect. There, engineers were paid \$175,000 to prepare complete engineering documents relative to an anticipated construction project. The contract between the parties addressed — without prohibiting — that those constructing the project might alter the completed drawings without the engineer's involvement.¹⁴¹ The realities of the relationship, that is, the almost inconceivability that the owner would incur a \$175,000 expense without rights to use the completed drawings to construct the project, coupled with the contract language contemplating others' use of the drawings, led to the conclusion that the owner could use the drawings in construction.

The second instance in which a license will be implied is where there exists unquestionable evidence of intent to grant a license, even if the artist's work requires completion by others. In *Shaver*, the architect, having contracted to prepare a schematic design, delivered

the design while recognizing that his role had concluded and endorsing the further use of his design. The facts of *Shaver* fit neatly within the "narrow circumstances" under which an implied license might be found.¹⁴²

In all other instances, *Johnson*, *Nelson-Salabes*, and *Danielson*, in the absence of concrete evidence of intent to grant a license, none is found. In *Nelson-Salabes*, an architect prepared floor plans and elevations without any reservation of rights and without any contract confirming the architect's continued involvement in the project.¹⁴³ Without, however, any evidence that the architect intended that another would finish his work, no license was created.¹⁴⁴

So, too, in *Danielson*, an architect prepared preliminary drawings without any reservation of rights and without a contract confirming the architect's continued involvement in the project. Those plans became a public record.¹⁴⁵ All this occurred before any discussion of the architect's completion of the project.¹⁴⁶ Because the circumstances were devoid of evidence of intent to grant a license, none was found.¹⁴⁷

Given that delivery of a copy of an item "does not of itself convey any rights in the copyrighted work,"¹⁴⁸ a matter very relevant in the preparation of architectural drawings, and given that the overall statutory scheme is to avoid inadvertent loss of copyrights and that the paramount goal of the Copyright Act is to promote predictability and certainty in copyright matters,¹⁴⁹ the law of implied license should be, and has been, similarly interpreted, finding an implied license only in the most clear of cases. In all other cases, all copyright remains in the owner.¹⁵⁰

It is important to note that even a copyright notice will not defeat an infringer's claim of implied license, because an implied license concedes the author's ownership and instead argues that the author parted with certain of his rights. Despite the limited application of the concept of implied license, architects are well-advised to use language that dispels any implied license, as a copyright notice itself does not do so.¹⁵¹

Limitations: A civil action for copyright violation must be

135. *Id.* at 31-32.

136. *Id.* at 32.

137. *Id.*

138. *Id.* at 33.

139. *Id.* at 42. Although a contract was later negotiated, *id.* at 31, this fact is of little moment: had the owner terminated the architect's participation before a contract was proposed or negotiated, the outcome would not change; even without the proposed contracts there would be no evidence from which to find intent and no license could result. *Id.*

140. See *supra* text accompanying note 85.

141. See *supra* text accompanying note 111.

142. See *Johnson v. Jones*, 149 F.3d 494, 502 (6th Cir. 1998) ("the facts in [*Effects* and *Shaver*] amply demonstrate that the copyright owners intended that their copyrighted works be used in the manner in which they were eventually used").

143. See *supra* text accompanying notes 113-27.

144. See *supra* text accompanying note 128.

145. See *supra* text accompanying note 133.

146. See *supra* text accompanying note 134.

147. See *supra* text accompanying note 139.

148. 17 U.S.C. §202 (2006).

149. *Effects Assocs. Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990).

150. In the cases in which a license was found to have been granted, written

evidence existed, in the form of writings created by the copyright owner, from which the intent of the owner could be gleaned: in *Effects Associates*, a letter agreement; in *Shaver*, a letter agreement and subsequent correspondence; in *Foad Consulting*, a lengthy contract.

151. Some language that architects and engineers have used, perhaps to reserve rights, has been held to grant an implied license. In *Meisner Brem Corp. v. Mitchell*, 313 F. Supp. 2d 13 (D.N.H. 2004), the following language was found to have authorized another's use of protected technical works:

All documents, including Drawings, Specifications, estimates, field noted [sic] and other data, prepared or furnished by [MBC] (and [MBC] independent sub consultants) pursuant to this Agreement are instruments of service in respect of the Project and [MBC] shall retain an ownership and property interest therein whether or not the project is completed. Client may make and retain copies for information and reference in connection with the use and occupancy of the Project by the Client and others; however, such documents are not intended or represented to [sic] suitable for reuse by Client or others on extensions of the Project or on any other Project. Any reuse without written verification or adaptation by [MBC] for the specific purpose intended will be at Client's sole risk and without liability or legal exposure to [MBC] or to [MBC] sub consultants, and Client shall indemnify and hold harmless [MBC] and [MBC] sub consultants from all claims, damages, losses and expenses, including attorneys fees arising out of or resulting therefrom. Any such verification or adaptation will entitle [MBC] to further compensation at

“commenced within three years after the claim accrued.”¹⁵² The issue of accrual generally arises when multiple violations have occurred, some beyond three years and some within three years. The cases are relatively clear on this issue: “Each act of infringement is a distinct harm giving rise to an independent claim for relief.”¹⁵³ A “party does not waive the right to sue for [copyright] infringements that accrue within three years of filing by not asserting related claims that accrued beyond three years.”¹⁵⁴ If any act of “infringement occurred within three years prior to the filing, the action will not be barred even if prior infringements by the same party as to the same work are barred because they occurred more than three years previously.”¹⁵⁵ Applying these principles, in *Boothroyd Dewhurst, Inc. v. Poli*,¹⁵⁶ a magistrate judge, whose finding the court adopted, stated the following:

Plaintiff has identified several ... derivative works ... fall[ing] well within the statutes’ three-year limitations period, [therefore] plaintiff has met its burden of coming forward with facts of record from which a reasonable fact finder could infer that [defendant’s] accused works began infringing on plaintiff’s copyright [outside of the limitations period but] have continued to do so until the filing of the suit.¹⁵⁷

This rule has unique application with respect to architectural drawings. In *Kunycia v. Mellville Realty Co., Inc.*,¹⁵⁸ the plaintiff

rates to be agreed upon by Client and [MBC].
Id. at 15-16. Similar language was employed in *Foad Consulting Group, Inc. v. Azzolino*, 270 F.3d 821 (9th Cir. 2001). See *supra* text accompanying notes 110-11. AIA Document B141 — Standard Form of Agreement Between Owner and Architect, at Article 6, uses the following language:

The Drawings, Specifications and other documents prepared by the Architect for this project are instruments of the Architect’s service for use solely with respect to this project and, unless otherwise provided, the Architect shall be deemed the author of these documents and shall retain all common law, statutory and other rights reserved, including copyright. The Owner shall be permitted to retain copies, including reproducible copies, of the Architect’s Drawings, Specifications and other documents for information and reference in connection with the Owner’s use and occupancy of the Project. The Architect’s Drawings, Specifications or other documents shall not be used by the Owner or others on other projects, for additions to this project or for completion of this Project by others, unless the architect is adjudged to be in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect.

See also *Warren Freedendfeld Assocs., Inc. v. McTigue*, 531 F. 3d 38, 48-49 (1st Cir. 2008) (architectural work does not fit in Copyright Act taxonomy of “work for hire;” therefore, no authorship or sole or co-ownership status of client).

152. 17 U.S.C. § 507(b) (2006).

153. *Stone v. Williams*, 970 F.2d 1043, 1049 (2d Cir. 1992).

154. *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001) (brackets in original, internal quotations marks and citations omitted).

155. *Lennon v. Seaman*, 63 F. Supp. 2d 428, 443 (S.D.N.Y. 1999) (citing 3 NIMMER, §12.05[A]); see also *Baxter v. Curtis Indus., Inc.*, 201 F. Supp. 100, 101 (N.D. Ohio 1962), stating that:

[I]t appears that prior to the 1957 Amendment of Sec. 115(b) the rule as to copyright infringement actions was, that the period of limitation began from the date of the last infringing act.

It is the opinion of the Court that the amendment was not intended to, and did not, change this basic concept. It simply made uniform a three-year limitation dating from the last act of infringement, in place of the multitude of state limitation periods

...

... 17 U.S.C. § 115(b) may limit the period of time in which damages are recoverable in this case, but, by reason of the interpretation

architect complained of the defendant’s wrongful reproduction of his copyright-protected drawings.¹⁵⁹ The defendants countered — and the court apparently accepted — that the act of reproduction occurred more than three years before the commencement of the action.¹⁶⁰ Nevertheless, the court concluded that use of the reproduced drawings within the limitations period was sufficient to bring the plaintiff’s claim for violation by reproduction within the limitations period.¹⁶¹ *Kunycia* stands for the proposition that a violation by wrongful reproduction is not completed on the date of reproduction but continues while the wrongfully reproduced drawings are put to use.

Accrual of the claim depends on the state of the copyright holder’s knowledge. As the court in *Danielson* said, “[a] claim for copyright infringement is generally considered to have accrued when one has knowledge of a violation or is chargeable with such knowledge. A plaintiff is chargeable with knowledge when a reasonably diligent person in the plaintiff’s position would have become aware of the infringement.”¹⁶²

Laches: A succinct discussion of laches is set forth in *Danielson, Inc. v. Winchester-Conant Properties, Inc.*:¹⁶³ “Mere delay on the part of a copyright owner in pursuing an infringement claim will not create a bar on the ground of laches unless such delay is inexcusable and prejudicial to the defendant by reason of his reliance or change of position as a result of such delay.”¹⁶⁴

that the alleged infringement is continuous, the motion to dismiss is denied.

156. 783 F. Supp. 670 (D. Mass. 1991).

157. *Id.* at 694. The United States Court of Appeals for the Seventh Circuit, in *Taylor v. Meirick*, 712 F.2d 1112, 1119 (7th Cir.1983), held that the plaintiff could seek damages for acts of infringement that occurred more than three years before suit was filed, because the defendant’s infringement was a continuing wrong. The Seventh Circuit appears to be the only circuit permitting damages for acts of infringement occurring more than three years prior to the filing of suit. 3 NIMMER & NIMMER, *supra*, note 42, § 12.05.

158. 755 F. Supp. 566 (S.D.N.Y. 1990).

159. *Id.* at 575.

160. *Id.* at 578.

161. *Id.*

162. *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.* 186 F. Supp. 2d 1, 24 (D. Mass 2002), *aff’d*, 322 F. 3d 26 (1st Cir. 2003)(citations and internal quotation marks omitted). *But see* *Warren Freedendfeld Assocs, Inc. v. McTigue*, 531 F. 3d 38, 46 (1st Cir. 2008) (publication of architectural plans does not, as matter of law, put copyright holder on inquiry notice of possible infringement).

163. *Danielson*, 186 F. Supp. 2d 1 (D.Mass. 2002), *aff’d*, 322 F. 3d 26 (1st Cir. 2003).

164. The defenses of estoppel, waiver, merger, and “work for hire” are discussed at the following authorities: *Precious Metals Assocs, Inc. v. Commodity Futures Trading Comm’n.*, 620 F.2d 900, 908 (1st Cir. 1980) (to constitute an estoppel, plaintiff’s actions must “induce another to change his position in good faith”) and *Alan Corp. v. Int’l Surplus Lines Ins. Co.*, 823 F. Supp. 33, 42 (D. Mass. 1993) (waiver is the voluntary and intentional relinquishment of a known right). The party relying upon the alleged waiver carries the burden of proof. *Brennan v. Carvel Corp.*, 929 F.2d 801, 810 (1st Cir. 1991). “The [merger] doctrine aims to prevent the monopolization of facts or ideas that are present in nature; where ownership of the expression would remove such facts or ideas from the public domain, the doctrine disallows copyright. *John G. Danielson, Inc. v. Winchester-Conant & Props., Inc.*, 322 F.3d 26, 43 (1st Cir. 2003) (citing *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 35 (1st Cir. 2001) (“In general, the merger doctrine is most applicable where the idea and the expression are of items found in nature, or are found commonly in everyday life.”).” A “work for hire” is defined at 17 U.S.C. § 101 (2006). If an architect is another’s employee, the work will normally belong to the employer. If the architect is an independent contractor, the work will normally be the architect’s. *Id.*

X. TRIAL

Jurisdiction over copyright disputes is exclusive in the federal courts, as per 17 U.S.C. §101 and 28 U.S.C. § 1338. A plaintiff must register his work with the copyright office before he institutes an action for infringement.¹⁶⁵ This requirement does not change the rule that copyright protection attaches upon creation, but rather is a prerequisite to filing suit. Registration is encouraged because under certain circumstances, failure to register will preclude an award of statutory damages and attorney's fees.¹⁶⁶

17 U.S.C. §301 preempts rights under state law that are equivalent to rights granted under the Copyright Act.¹⁶⁷ Plaintiffs pursuing additional claims must be careful not simply to rely on allegations of copyright violation to support the additional claims. Claims under the Lanham Act¹⁶⁸ and state unfair competition statutes have been held not to be preempted.¹⁶⁹ Presumably, breach of contract claims would be treated similarly.

When actual or statutory damages are sought, the parties are entitled to a jury trial.¹⁷⁰ Attorney's fees are addressed by statute. 17 U.S.C. § 505, provides the following:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.¹⁷¹

Given that copyright emanates from the Constitution, and its

express purpose is "to promote the progress of science and useful arts,"¹⁷² any interpretation that might discourage copyright enforcement should be avoided. Nevertheless, the Supreme Court, in *Fogerty v. Fantasy, Inc.*,¹⁷³ squarely presents the plaintiff with a prospect for a loser-pays outcome. While ordinarily a plaintiff advancing a meritorious claim should not face the sanction of paying a defendant's attorney's fees if unsuccessful,¹⁷⁴ these provisions nevertheless loom.

CONCLUSION

An architect believing that his drawings have been infringed faces many obstacles. When the putatively infringing plans or structure are not identical, a finding that the architect's work was impermissibly employed in another's work rests largely on the subjective determination of the fact finder. Defendants are likely to emphasize even the slightest of differences and claim that the relationship between the parties allows the defendant's use of the drawings (claiming an implied license). Actual damages can be difficult and costly to establish, and statutory damages are available only to those who have been vigilant in protecting their copyright. An attorney making additional claims must be careful not to run afoul of the Copyright Act's preemption provisions. The prospect that the unsuccessful architect may be sanctioned with payment of the defendant's attorney's fees looms. On the other hand, an infringer is subject to potentially substantial penalties, as the Copyright Act is intended to encourage would-be infringers to deal properly with an owner, rather than risk the act's penalties.¹⁷⁵ It is hoped that this article will be useful to attorneys for both sides in counseling their clients and in litigation.¹⁷⁶

165. 17 U.S.C. §§ 411-42 (2006). For a discussion of the consequences of registering a derivative work without registering the underlying original work, see *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 538-39 (4th Cir. 2007).

166. 17 U.S.C.A. § 412 (Thomson/West 2005 & Supp. July 2008 & Stat. Supp. Jan. 2009).

167. See H.R. Rep. No.94-1476, at 132 (1976) ("Section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute.").

168. 15 U.S.C. §§1051-1072 (2006).

169. Various cases have discussed the extent of federal preemption. See, e.g., *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 247 (2d Cir. 1983) ("to the extent that plaintiffs rely on state unfair competition law to allege tort of "passing off," they are not asserting rights equivalent to those protected by copyright and therefore do not encounter preemption") (citing 1 NIMMER ON COPYRIGHT § 1.01[B][1] n.47, § 2.12 n.25 (1983)); *Scholastic, Inc. v. Stouffer*, 124 F. Supp. 2d 836, 847 (S.D.N.Y. 2000) ("reverse passing off claim" not preempted); *Innovative Networks, Inc. v. Satellite Airlines Ticketing Ctrs., Inc.*, 871 F. Supp. 709, 731 n.21 (S.D.N.Y. 1995) ("the Court notes that a state unfair competition claim based upon "passing off" is not preempted by federal copyright law"). In *Danielson*, the United States Court of Appeals for the First Circuit recognized that claims for favorable business exposure lost due to another's copying of an architect's drawings are compensable and are not preempted, though in that case the court concluded that evidence of such was lacking. *Danielson*, 322 F.3d at 46.

170. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352-55 (1998) (discussing actual and statutory damages). Form jury instructions are available in the West publication *Federal Jury Practice and Instruction*. Form instructions are also available online from the United States Court Appeals for the Ninth Circuit at: <http://207.41.19.15/Web/SDocuments.nsf/47f862bfb567c599882567320065e132/8e2e7e553b14f6ea88256f7f0057eebd?OpenDocument> (go to "http://www.ce9.uscourts.gov/"; then follow "Jury Trial Procedure" hyperlink; then follow "Jury Instructions" hyperlink; then follow "4.3 Model Jury Instructions" hyperlink) (last visited Feb. 2, 2009). In representing a plaintiff, it may

be appropriate to ask that the court not use the phrase "substantially similar" as shorthand and instead simply state the standard as gleaned from the caselaw. "Substantial similarity" may overstate the plaintiff's burden. See discussion at Part V *supra*.

171. Application of this statutory language was addressed in *Invesys, Inc. v. McGraw-Hill Cos.*, 369 F.3d 16 (1st Cir. 2004):

Unlike most fee-shifting statutes, section 505 allows attorney's fees to be awarded to defendants on an "even-handed" basis with plaintiffs. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994); *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 140 F.3d 70, 72-73 (1st Cir. 1998). *Fogerty* said that the award rested in "the [trial] court's discretion" and that there was no formula, but that factors that could be taken into consideration included *inter alia* the objective unreasonableness of the losing side's position. 510 U.S. at 534 & n.19, 114 S. Ct. 1023.

172. *Id.* at 19. Art. I, 8, cl. 8.

173. 510 U.S. 517 (1994).

174. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 140 F. 3d 70, 75 (1st Cir.1998).

175. See 8 AM JUR 2d, COPYRIGHT AND LITERARY PROPERTY, 234 ("[T]he purpose of the law is to discourage infringement; by preventing infringers from obtaining any net profit, it encourages any would-be infringer to negotiate directly with the owner of the copyright that he wants to use rather than stealing the copyright and forcing the owner to seek compensation through the courts."); see also *Walker v. Forbes, Inc.*, 28 F.3d 409, 412 (4th Cir. 1994)(law makes clear that there is no gain to be made from taking someone else's intellectual property without consent).

176. Several issues beyond the scope of this article deserve attention in cases of architectural work disputes, such as contract and agency issues, trademark and rights of personality or publicity of eminent architects and their firms, trade secrets, unfair competition, professional responsibility, the moral rights provisions of copyright law (17 U.S.C. § 106A (2006)), and partially preempted state cognates as applicable to works of fine art associated with buildings and grounds projects. See, e.g., *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 132 (1st Cir. 2006).

CASE & STATUTE COMMENTS

Civil Practice — Indemnification Under the Massachusetts Tort Claims Act: Government As Insurer

Maimaron v. Commonwealth, 449 Mass. 167 (2007)

In *Maimaron v. Commonwealth*,¹ the Supreme Judicial Court (“SJC”) found that the commonwealth violated a statutory duty under the Massachusetts Tort Claims Act² (“Tort Claims Act”), to defend an off duty state trooper who was sued for intentionally assaulting, and then arresting, a man outside a bar in Quincy, Massachusetts. The SJC also remanded the case to the superior court for a separate trial on whether the trooper was acting outside the scope of his official duties, and whether he “had acted in a willful, wanton, or malicious manner.”³ Perhaps more noteworthy is the emphasis placed upon the methodology recommended by the court to the governmental employer in a previous case, *Pinshaw v. Metropolitan District Commission*.⁴

In *Maimaron*, the SJC again endorsed the provision of a defense under a reservation of rights and the pursuit of a separate declaratory judgment action, as used in insurance cases, to resolve issues of governmental obligation to indemnify under the Tort Claims Act. The court thus embraced an approach to governmental indemnification which places public entities governed by the Tort Claims Act⁵ on a par with insurance companies, while treating defense and indemnification provisions of the act⁶ as analogous to insurance policy language.

I. THE UNDERLYING CASE

According to an agreement of the parties for purposes of summary judgment, on the evening of November 22, 1995, off-duty State Trooper David Oxner and his friend Stephen Roche went to a lounge in Quincy, where, in the company of Oxner’s wife and a female friend, Oxner had several drinks at the bar. There he met Mark Maimaron, an ironworker, who had consumed approximately

ten beers and who repeatedly confronted Oxner with his inaccurate belief that Oxner was a coworker from his work site, although Oxner repeatedly denied this and told Maimaron that he was a state trooper.⁷

Later that night, after a heated exchange between Maimaron and Oxner in the parking lot outside the lounge, Oxner demanded to see Maimaron’s identification. Maimaron declined and was turning to leave when Oxner hit him on the side of his head and grabbed his shoulder. Fearing for his safety, Maimaron sprayed Mace (which he was licensed to carry) into Oxner’s face and then ran down the street. Oxner chased Maimaron, held out his badge, identified himself as a police officer and told him to stop because he was under arrest. Roche caught up with Maimaron and struck him from behind, knocking him to the ground. Maimaron raised his head, trying to get up, at which point Oxner slammed him down, hitting his head onto the pavement. Quincy police officers arrived in response to a call from Oxner and a bystander. Oxner identified himself as an off-duty officer and told them he had been assaulted by Maimaron with Mace and that an “unknown white male” helped subdue Maimaron by tackling him. Maimaron suffered extensive, permanent injuries, as well as emotional and psychological distress.⁸

Oxner filed charges against Maimaron for assault and battery by means of a deadly weapon and for assault and battery on a police officer. Nevertheless, after an investigation by the United States Attorney’s office, charges were brought against Oxner and a plea agreement with the office of the attorney general was reached. Under the agreement, Oxner pleaded guilty to assault and battery of Maimaron and to filing a false written report by a public officer. Thereafter, a trial board of the state police determined that Oxner had violated

1. 449 Mass. 167 (2007).

2. MASS. GEN. LAWS ch. 258, §§ 1-13 (2006). The act provides for a limited waiver of sovereign immunity for “injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances.” In those instances of negligence where sovereign immunity has been waived, the public employee is clothed with individual immunity. *Id.* § 2. Sovereign immunity is retained as to intentional torts and civil rights violations, leaving public employees exposed to individual liability. The act allows for defense and indemnification with respect to such intentional torts and civil rights violations under circumstances specified in sections 9, 9A, and 13.

3. *Maimaron*, 449 Mass. at 169-70.

4. 402 Mass. 687 (1988).

5. The Tort Claims Act applies to “public employers,” defined as the commonwealth and any county, city, town, educational collaborative, or district, including any public health district or joint district or regional health district or regional health board established pursuant to the provisions of section twenty-seven A or twenty-seven B of chapter one hundred and eleven, and any department, office,

commission, committee, council, board, division, bureau, institution, agency or authority thereof including a local water and sewer commission including a municipal gas or electric plant, a municipal lighting plant or cooperative which operates a telecommunications system pursuant to section 47E of chapter 164, department, board and commission, which exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority, the Massachusetts Turnpike Authority, or any other independent body politic and corporate. With respect to public employees of a school committee of a city or town, the public employer for the purposes of this chapter shall be deemed to be said respective city or town.

MASS. GEN. LAWS ch. 258, § 1 (2006).

6. Separate indemnification provisions are provided for claims and suits for intentional torts and civil rights violations against members of the state police force, *id.* § 9A, other public employees, *id.* § 9, and employees of some cities and towns under a local acceptance provision. *Id.* § 13.

7. *Maimaron*, 449 Mass. at 169.

8. *Id.* at 170-71.

several state police administrative rules and regulations. Oxner was suspended without pay for four months and required to complete ethics training. The Norfolk County district attorney's office subsequently entered a *nolle prosequi* on the criminal complaint Oxner had filed against Maimaron.⁹

Maimaron brought an action in the superior court against Oxner, several other state troopers and the commonwealth under the Tort Claims Act.¹⁰ He also claimed his civil rights guaranteed by state¹¹ and federal¹² law had been violated, claiming that Oxner had committed the intentional torts of assault and battery, malicious prosecution, false arrest and abuse of process in making the seizure and arrest. Oxner sought representation and indemnification from the commonwealth during the course of the underlying litigation, but the commonwealth repeatedly denied his requests.

The commonwealth settled all of Maimaron's claims other than those against Oxner. The commonwealth then declined Oxner's entreaty for a defense in binding arbitration to which Oxner had agreed. The binding arbitration resulted in an award and judgment against Oxner, including attorney's fees, in Maimaron's favor. Unable to satisfy the judgment, Oxner assigned to Maimaron his right to indemnification of the judgment by the commonwealth pursuant to the Tort Claims Act.¹³

II. THE FINDINGS OF THE ARBITRATOR IN THE UNDERLYING CASE

The arbitrator, in addressing the civil rights, assault and battery and false arrest claims, found that Oxner was at all relevant times acting within the scope of his employment as a state police officer and under color of state law. He determined that Oxner, in attempting to arrest Maimaron, was following state police rules and regulations that provide that a state police officer is subject to recall 24 hours a day and is instructed to take immediate enforcement action for violations of law observed. The arbitrator concluded that Oxner violated Maimaron's civil rights under the Fourth Amendment to the United States Constitution by committing the torts of assault and battery and false arrest; that Oxner never intended to injure Maimaron during the arrest; and that Oxner did not act in a "malicious or wanton" manner. On the basis of the arbitrator's findings and conclusions, a superior court judge entered judgment for Maimaron in the amount of \$363,682, together with attorney's fees and costs of \$69,243.52.

III. THE INDEMNIFICATION AWARD

After the assignment of Oxner's indemnification rights under the Tort Claims Act, Oxner and Maimaron each brought separate

actions against the commonwealth, later consolidated. Oxner sought to recover attorney's fees and costs that he incurred defending the underlying action and in pursuing reimbursement of those fees and costs. He alleged that the commonwealth had violated its duty to defend under the Tort Claims Act. Maimaron, as assignee, sought indemnification of the amount of the judgment entered against Oxner in the underlying action, together with interest and the attorney's fees and costs of recovering the same. A superior court judge granted summary judgment in favor of Oxner and Maimaron. The court awarded damages to Maimaron in the amount of \$363,682, together with attorney's fees for litigating the underlying and instant action in the amounts of \$69,243.52 and \$29,951.88 respectively. Attorney's fees were awarded Oxner for litigating the underlying and instant actions in the amount of \$84,879.¹⁴

The judge ruled that the commonwealth had violated its mandatory duty to defend Oxner in the underlying action and, therefore, was bound by the arbitrator's findings. The commonwealth was precluded from arguing that Oxner was not acting within the scope of his official duties or that his conduct was willful, wanton or malicious for purposes of the statutory exceptions to its indemnification obligation.

The commonwealth appealed and the SJC transferred the case on its own motion to determine whether the commonwealth was obligated, under section 9A of the Tort Claims Act, to defend Oxner in the underlying action and to indemnify Maimaron (as assignee) in connection with the judgment Maimaron obtained against Oxner. The SJC agreed that the commonwealth violated its duty to defend Oxner under the Tort Claims Act, but concluded that summary judgment in favor of Maimaron was "inappropriate on the issue whether the commonwealth was obligated under § 9A to indemnify Maimaron (as assignee) for the underlying judgment because triable issues of fact exist concerning the applicability of the exclusions in § 9A, namely, whether Oxner's conduct had occurred outside the scope of his official duties, and whether Oxner had acted in a willful, wanton, or malicious manner" for purposes of those exclusions as opposed to the purposes of the underlying civil rights and tort violations.¹⁵

IV. DUTY TO DEFEND

The SJC treated the issue of the duty to defend as strictly a matter of statutory construction, finding, as it had previously in *Pinshaw*,¹⁶ that the commonwealth had a mandatory obligation to provide legal representation to state police officers. The result was mandated by the plain language of the first paragraph of section 9A of the Tort Claims Act. "Its language, 'shall provide for the legal representation

million dollars arising out of any claim, action, award, compromise, settlement or judgment resulting from any alleged intentional tort or by reason of an alleged act or failure to act which constitutes a violation of the civil rights of any person under federal or state law; provided, however, that this section shall apply only where such alleged intentional tort or alleged act or failure to act occurred within the scope of the official duties of such police officer.

No member of the state police or an employee represented by state bargaining unit five shall be indemnified for any violation of federal or state law if such member or employee acted in a willful, wanton, or malicious manner.

MASS. GEN. LAWS ch. 258 § 9A (2006).

14. The judgment was amended to add a provision for "interest as provided by law" in response to a motion by Maimaron seeking accrued prejudgment and post-judgment interest.

15. *Maimaron v. Commonwealth*, 449 Mass. 167, 169-70 (2007).

16. *Pinshaw v. Metropolitan District Commission*, 402 Mass. 687, 700. (1988).

9. *Id.* at 171.

10. MASS. GEN. LAWS ch. 258 § 9A (2006).

11. MASS. GEN. LAWS ch. 12 § 11I (2006).

12. 42 U.S.C. § 1983 (2000).

13. The Tort Claims Act provides

If, in the event a suit is commenced against a member of the state police or an employee represented by state bargaining unit five, by reason of a claim for damages resulting from an alleged intentional tort or by reason of an alleged act or failure to act which constitutes a violation of the civil rights of any person under federal or state law, the commonwealth, at the request of the affected police officer, shall provide for the legal representation of said police officer.

The commonwealth shall indemnify members of the state police or an employee represented by state bargaining unit five, respectively, from all personal financial loss and expenses, including but not limited to legal fees and costs, if any, in an amount not to exceed one

of said police officer,' imposes a mandatory obligation ... when (1) a request for legal representation is made by the affected police officer; and (2) a lawsuit is brought against the officer alleging an intentional tort or a violation of civil rights."¹⁷

The SJC rejected the commonwealth's contention that language in the second paragraph of section 9A of the Tort Claims Act¹⁸ conditioned the commonwealth's duty to defend.¹⁹ The focal point of the paragraph is indemnification and to read its exceptions as applying to the mandatory duty to defend "would undermine the statute's purposes"²⁰ of encouraging police service in the face of the frequent occupational hazard of civil rights and intentional tort claims and, indeed, violations.²¹ Once again relying on its decision in *Pinshaw*, the SJC emphasized that the exceptions to the statute "[permit] the Commonwealth, if it is later determined that the police officer acted outside the scope of his official duties or acted in a willful, wanton, or malicious manner, to seek reimbursement of legal expenses."²² The court did not address the largely illusory ability of a governmental entity to obtain such reimbursement from an individual at a later time after having paid defense costs.²³

The SJC also held that the commonwealth had waived an argument that the case was governed by a state police regulation providing that payment of legal fees and litigation costs be made only at the conclusion of the underlying litigation because the argument had not been raised in the trial court. The waiver made little difference as the SJC stated, "to the extent this regulation conflicts with the statute, the statute governs."²⁴

V. DUTY TO INDEMNIFY

Under the Tort Claims Act, the commonwealth is required to indemnify a member of the state police

from all personal financial loss and expenses, including but not limited to legal fees and costs ... arising out of any claim, action, award, compromise, settlement or judgment resulting from any alleged intentional tort or by reason of an alleged act or failure to act which constitutes a violation of the civil rights of any person under federal or state law.²⁵

There are two exclusions: (1) where the alleged act did not occur "within

the scope of the official duties of such police officer"; and (2) where the police officer "acted in a willful, wanton, or malicious manner."²⁶

The superior court judge declined the commonwealth's request to litigate whether either of the two exceptions to indemnification applied. The judge relied upon the rule, applied frequently in insurance cases, that an "indemnitor, after notice and an opportunity to defend, is [if it refuses to defend] bound by material facts established in an action against the indemnitee."²⁷ Focusing upon the materiality of facts found by the arbitrator, the SJC distinguished between the findings material to a determination of liability for civil rights violations under 42 U.S.C. § 1983 in the underlying action and those material to the two exclusions applicable to indemnification under section 9A of the Tort Claims Act. Acting under color of state law for purposes of violating section 1983 was not "precisely parallel" to acting within the scope of employment under the Tort Claims Act, the court said.²⁸ An officer may be acting under color of state law where he is "clothed with the authority of state law"²⁹ under section 1983, even if he is not acting within the scope of his employment, because he may have "misused" or "abused" the authority given to him by the state.³⁰

The scope of employment issue bespeaks a narrower inquiry and, in certain cases, would allow a fact finder to conclude that an officer who is acting under color of state law for purposes of section 1983 is not acting within the scope of his employment for purposes of indemnification under section 9A of the Tort Claims Act. The validity of these latter points is reinforced by Maimaron's concession that he cannot advance an argument of issue preclusion or collateral estoppel.³¹

Although the arbitrator had concluded that Oxner was acting within the scope of his employment and that his conduct was not willful, wanton or malicious, the SJC held that these findings were not necessary to a determination under either 42 U.S.C. § 1983 or General Laws chapter 12, section 11I,³² and that they were not based upon a discussion of the standards governing indemnification exceptions set forth in the *Pinshaw* decision.³³ Findings by the arbitrator that Oxner was subject to recall 24 hours a day, that he displayed his police badge and that he issued an official command to stop in

government may defend and settle under a reservation of rights and later, by separate action, seek a determination as to whether the public employee is obligated to reimburse under one of the exceptions (or, to continue the analogy, exclusions) to the government's obligations.

24. *Maimaron*, 449 Mass. at 174-75. *Cf.* McCoy v. Kingston, 68 Mass. App. Ct. 819, 827-28 (2007) (upholding local policy providing that "no special counsel will be paid unless the Board of Selectmen approves the appointment of that counsel prior to any costs being incurred" in community that accepted section 13 and denying indemnification to employee who engaged private counsel without seeking or obtaining prior approval).

25. MASS. GEN. LAWS ch. 258 § 9A (2006).

26. *Id.*

27. *Id.* at 175 (quoting Miller v. U. S. Fid. & Guar. Co., 291 Mass. 445, 449 (1935)).

28. *Id.* at 178.

29. *Id.* (citing Monroe v. Pape, 365 U.S. 167, 184 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978) (overruling *Monroe* case "insofar as it holds that local governments are wholly immune from suit under § 1983")).

30. *Id.*

31. *Id.*

32. A similar distinction was made in *Sharrow v. State*, 628 N.Y.S. 878 (App. Dir. 1995).

33. *Maimaron*, 449 Mass. at 178-79.

17. *Maimaron*, 449 Mass. at 173 (quoting MASS. GEN. LAWS ch. 258, §9A(2006)).

18. MASS. GEN. LAWS ch. 258 § 9A (2006) ("this section shall apply only where such alleged intentional tort or alleged act or failure to act occurred within the scope of the official duties of such police officer") (emphasis added).

19. *Maimaron*, 449 Mass. at 174.

20. *Id.*

21. *See id.* ("mandatory indemnification 'evidences the Legislature's determination that intentional torts and civil rights violations arise frequently in the scope of police work, and that indemnification of officers against such claims encourages police service'. . . The same applies equally to the duty to defend provision.") (quoting *Pinshaw*, 402 Mass. at 696). Note, however that the SJC recognizes that its decision in *Filippone v. Mayor of Newton*, 392 Mass. 622, 629 (1984), makes little distinction between the mandatory defense provision for state police officers in MASS. GEN. LAWS ch. 258, § 9A and provisions such as MASS. GEN. LAWS ch. 258, § 9, allowing for permissive indemnification of other kinds of public employees. There the SJC stated that such a permissive indemnification policy "would be defeated if the legal expenses of civil rights litigation were to be borne personally throughout years of pretrial activity, trial, and appeal and only later, if at all, reimbursed" by the public employer. *Filippone*, 392 Mass. at 629.

22. *Maimaron*, 449 Mass. at 174.

23. Nor does the court discuss what, if any, remedies the governmental entity might have if settlement emerges as the best and most cost effective manner of defending the lawsuit. Presumably, using the court's analogy of the governmental entity's role to that of an insurer under such statutory provisions, the

seeking to arrest Maimaron, were sufficient to establish that Oxner was acting “under color of State law” under section 1983 and with “threats, intimidation and coercion” under General Laws chapter 12, section 11I, neither of which incorporate an element of scienter.³⁴

Such findings, however, were not sufficient to compel a conclusion that Oxner was acting within the scope of his employment or that his conduct was not “willful, wanton, or malicious” within the meaning of the Tort Claims Act.³⁵ Oxner’s actions under color of state law could be found to have been carried out unlawfully and with excessive force, both abuses of authority capable of bringing Oxner’s “under color of State law” conduct outside the scope of his employment and potentially egregious enough to warrant imposition of punitive damages under both federal³⁶ and state³⁷ law.

The *Pinshaw* case linked the “willful, wanton, or malicious” conduct exclusion with egregious conduct that would warrant imposition of punitive damages, thus providing “a bright line test for precluding indemnification where punitive damages are awarded in the underlying action.”³⁸ Absence of an award of punitive damages, “unlike a verdict awarding them, does not establish facts that are binding in future litigation.”³⁹ The arbitrator’s conclusion that Oxner had not acted willfully, wantonly, or maliciously did not, on the existing record “preclude a finding that Oxner took himself outside the coverage of §9A, when he confronted, and viciously attacked,

34. *Id.* at 179-81 (citing *McKay v. Hammock*, 730 F.2d 1367, 1373 & n.5 (10th Cir. 1984) (explaining state of mind or intent not part of action under 42 U.S.C. § 1983 unless action is based on constitutional provision that itself incorporates element of scienter) and *Redgrave v. Boston Symphony Orchestra, Inc.*, 300 Mass. 93, 98-99 (1987) (Massachusetts Civil Rights Act remedy for deprivation of secured rights occasioned by threats, intimidation, or coercion contains no requirement that defendant’s actions be willful or hostile)).

35. *Id.* at 179.

36. *Id.* at 180 (citing *Pinshaw v. Metropolitan District Commission*, 402 Mass. 687, 697 (1988) (citing *Smith v. Wade*, 451 U.S. 30, 39-40 nn.8, 56 (1983)) (“malice,” “wanton,” and “willful” interpreted as terms which constitute a standard for punitive damages “when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others”)).

37. *Id.*

38. *Pinshaw*, 402 Mass. at 697.

39. *Id.*

40. *Maimaron*, 449 Mass. at 180.

41. *Id.* at 181. It appears, however, that the court’s reliance on *Pinshaw*’s standards would also allow application of the exceptions to indemnification on the basis of an objective standard as to unlawful, excessive or egregious conduct. See *Pinshaw*, 402 Mass. at 698, n.15.

42. This approach has been endorsed in other jurisdictions. In *Dixon v. Holden*, 923 S.W.2d 370, 380-81 (Mo. App. 1996), the Missouri Court of Appeals quoted *Hassan v. Fraccola*, 851 F.2d 602-04 (2d Cir. 1988), and stated in dicta that the “better practice” in interpreting the language of its state legal expense fund statute that “any defense...of any claim...shall be conducted by the attorney general...” would be to read that statute as “allowing little discretion to refuse to defend an employee, and to treat ‘the State’s role, in reviewing the request to defend... much like that of an insurer reviewing a complaint to determine if a defense must be provided.’” Where the attorney general “still has good faith questions as to coverage, he may participate in the trial on behalf of the employee-defendant on a reservation of right basis.” *Dixon*, 923 S.W. 2d at 381; see also *Sharrow v. State*, 628 N.Y.S.2d 878, 880 (App. Dir. 1995) (“[t]he Attorney-General’s role is similar to that of an insurance company which must decide if a defense is owed under its policy”); *Giordano v. O’Neill*, 517 N.Y.S.2d 41, 42 (App. Dir. 1987); *Abrams v. Abrams*, 473 N.Y.S. 2d 931, 934 (Sup. Ct. 1984) (if the complaint contains an allegation that the state employee committed a wrongful act within the scope of his public employment, “a defense must be provided, irrespective of the actual facts or ultimate factual determination...much like that of an insurer reviewing a complaint to determine if a defense must be provided”). The California Tort Claims Act has built the concept of a reservation of rights into its statutory provisions.

Maimaron outside the lounge” by conduct that was “egregious” (and therefore punitive) in the sense described by the *Pinshaw* case.⁴⁰ In sum, the court concluded that both the scope of employment and willful, wanton, or malicious exclusions “involve the need for a fact finder to ascertain Oxner’s state of mind. Summary judgment, when an actor’s state of mind is relevant, is strongly disfavored.”⁴¹

A final observation suggests a desire by the court to reinforce the methodology it had recommended in *Pinshaw*. The commonwealth

should have defended Oxner under a reservation of rights⁴² (and litigated the indemnification issue later), all as explained in *Pinshaw*. ... The Commonwealth also could have sought a declaratory judgment in advance of the arbitration to determine whether it was obligated under § 9A to defend Oxner. This procedure is utilized in insurance cases ... and we discern no reason why the procedure would not have utility in this type of case.⁴³

The possible significance of these words for other governmental entities is worthy of note. Not all such entities are subject to mandatory defense obligations in the circumstances addressed in the *Maimaron* case. For instance, section 9 of the Tort Claims Act provides for discretionary indemnification of other types of employees of the commonwealth and employees of any county, city, town, educational collaborative, and district⁴⁴ and includes exceptions where an employee was not acting within

Government Code Section 825 permits the employing entity to reserve the right to refuse to pay a judgment until it is established that the employee’s acts were in fact within the scope of employment. See Cal. Gov. Code § 825(a) (2008).

43. *Maimaron*, 449 Mass. at 182.

44. The statute provides that

[p]ublic employers may indemnify public employees, and the commonwealth shall indemnify persons holding office under the constitution, from personal financial loss, all damages and expenses, including legal fees and costs, if any, in an amount not to exceed \$1,000,000 arising out of any claim, action, award, compromise, settlement or judgment by reason of an intentional tort, or by reason of any act or omission which constitutes a violation of the civil rights of any person under any federal or state law, if such employee or official or holder of office under the constitution at the time of such intentional tort or such act or omission was acting within the scope of his official duties or employment. No such employee or official, other than a person holding office under the constitution acting within the scope of his official duties or employment, shall be indemnified under this section for violation of any such civil rights if he acted in a grossly negligent, willful or malicious manner. For purposes of this section, persons employed by a joint health district, regional health district or regional board of health, as defined by sections twenty-seven A and twenty-seven B of chapter one hundred and eleven, shall be considered employees of the city or town in which said incident, claim, suit, or judgment is brought pursuant to the provisions of this chapter.

MASS. GEN. LAWS ch. 258, § 9 (2006).

“Public employers” are defined as

the commonwealth and any county, city, town, educational collaborative, or district, including any public health district or joint district or regional health district or regional health board established pursuant to the provisions of section twenty-seven A or twenty-seven B of chapter one hundred and eleven, and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof including a local water and sewer commission including a municipal gas or electric plant, a municipal lighting plant or cooperative which operates a telecommunications system pursuant to section 47E of chapter 164, department, board and commission, which exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority, the Massachusetts Turnpike Authority, or any other independent body politic and corporate. With respect to public employees of a school

the scope of his official duties or employment or “if he acted in a grossly negligent, willful or malicious manner.”⁴⁵ Unlike section 9A, no separate paragraph of section 9 addresses the provision of legal representation. Yet the SJC in *Maimaron* quoted with approval from *Filippone v. Mayor of Newton*,⁴⁶ a section 9 case, stating that

public indemnification of public officials serves in part to encourage public service.... This policy would be defeated if the legal expenses of civil rights litigation were to be borne personally throughout years of pre-trial activity, trial, and appeal and only later, if at all, reimbursed.... At the conclusion of litigation... [i]f an exception to indemnification applies, the public employer might then recover from the official those sums expended for legal services on his or her behalf.

To be sure, this statement was made in support of a voluntary decision to pay for legal defense of a public official. It seems a strong endorsement of provision of a legal defense by a public employer, however, where even the local acceptance provision allowing municipalities to impose upon themselves a mandatory indemnification obligation as to “municipal officers, elected or appointed,”⁴⁷ exempts intentional violation of civil rights from its mandatory provisions.⁴⁸ Presumably, the advancement of litigation costs (and their later recoupment) as set out in the *Filippone* decision, will similarly apply in cases where later indemnification may be denied under the Tort Claims Act because the public employee intentionally violated a plaintiff’s civil rights.

Certainly other jurisdictions seem to draw a distinction between mandatory obligations imposed upon the state and permissive authority granted to local governments. The Supreme Court of New Jersey, for instance, has acknowledged that the New Jersey Tort

Claims Act⁴⁹ draws a bright line between state and local obligations to indemnify, mandating indemnification of “State employees” while “merely encouraging the local public entities to indemnify” local public employees.⁵⁰ The Supreme Court of Michigan has gone so far as to say that a city council’s discretionary decision to deny reimbursement was conclusive and not subject to judicial review, absent a showing that the council had exercised its discretion in an unconstitutional manner, “where the statute empowers [that] governmental agency to undertake a discretionary decision, and provides no limits to guide either the agency’s exercise of that discretion or the judiciary’s review of that exercise.”⁵¹

CONCLUSION

The provisions of section 9A of the Tort Claims Act may be the best place to begin the analogy of government as insurer. It is the strongest of the indemnification provisions appearing in the statute. It affects both the narrowest category of employees — law enforcement — and the largest governmental entity in the commonwealth — the commonwealth itself, perhaps the governmental entity most likely to be self-insured. Unlike some of its counterparts, its provisions read somewhat like an insurance policy, at least in terms of addressing separate duties to defend and indemnify. The analogy may be useful as applied to provisions governing indemnification options of a more discretionary nature applicable to public employees subject to lesser risks in their employment and public employers of a more diminutive size and budget. Room for interpretation still remains open in these areas, however, as cash-strapped communities struggle to balance both their budgets and the need to support good faith actions of public employees in performing their official duties.

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committee of a city or town, the public employer for the purposes of this chapter shall be deemed to be said respective city or town.

Id. § 1.

“Public employees” are defined as

elected or appointed, officers or employees of any public employer, whether serving full or part-time, temporary or permanent, compensated or uncompensated, and officers or soldiers of the military forces of the commonwealth. For purposes of this chapter, the term “public employee” shall include an approved or licensed foster caregiver with respect to claims against such caregiver by a child in the temporary custody and care of such caregiver or an adult in the care of such caregiver for injury or death caused by the conduct of such caregiver; provided, however, that such conduct was not intentional, or wanton and willful, or grossly negligent. For this purpose, a caregiver of adults means a member of a foster family, or any other individual, who is under contract with an adult foster care provider as defined and certified by the division of medical assistance.

Id.

45. *Id.* § 9.

46. *Filippone v. Mayor of Newton*, 392 Mass. 622, 629 (1984).

47. The statute provides that

[a]ny city or town which accepted section one hundred I of chapter forty-one on or before July twentieth, nineteen hundred and seventy-eight, and any other city which accepts this section according to its charter, and any town which accepts this section in the manner hereinafter provided in this section shall indemnify and save harmless municipal officers, elected or appointed from personal financial loss and expense including reasonable legal fees and costs, if any, in an amount not to exceed one million dollars, arising out of any claim, demand, suit or judgment by reason of any act or omission, except an intentional violation of civil rights of any person, if the official at the time of such act or omission was acting within the scope of his official duties or employment.

This act shall be submitted for acceptance to the voters of each town at an annual town meeting in the form of the following question which shall be placed on the official ballot to be used for the election of town officers at said meeting:—“Shall the town vote to accept the provisions of section thirteen of chapter two hundred and fifty-eight of the General Laws which provides that the town shall indemnify and save harmless municipal officers, elected or appointed, from personal financial loss and expense including reasonable legal fees and costs, if any, in an amount not to exceed one million dollars, arising out of any claim, demand, suit or judgment by reason of any act or omission except an intentional violation of civil rights of any person under any law, if the official at the time of such act or omission was acting within the scope of his official duties or employment?” If a majority of the votes in answer to said question is in the affirmative, said provisions shall thereupon take full effect, but not otherwise.

MASS. GEN. LAWS ch. 258, § 13(2006).

48. Under the exception to MASS. GEN. LAWS ch. 258, § 13(2006), indemnification for an intentional violation of civil rights remains a discretionary decision of the public employer under Mass. Gen. Laws ch. 258, § 9(2006) even when a public employer has accepted § 13. The Appeals Court has also recognized that, even where a municipality has imposed mandatory indemnification upon itself for intentional torts of public employees by local acceptance of § 13, the municipality may still impose reasonable procedural requirements to screen the processing of requests for indemnification in order to retain a degree of control over indemnification expenses, or to minimize its own liability.” *McCoy v. Kingston*, 68 Mass. App. Ct. 819, 827-28(2007) (upholding local policy providing that “no special counsel will be paid unless the Board of Selectmen approves the appointment of that counsel prior to any costs being incurred” in community that accepted § 13 and denying indemnification to employee who engaged private counsel without seeking or obtaining prior approval).

49. N.J. Stat. Ann. 59:1-1 to 12-3(2006).

50. *Wright v. State*, 778 A.2d 443, 457-58 (N.J. 2001).

51. *Warda v. City Council of the City of Flushing*, 696 N.W.2d 671,678 (Mich. 2005).

BOOK REVIEW

Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing, by Stephen V. Armstrong and Timothy P. Terrell (Practising Law Institute, 2nd ed., 2003), 420 pages.

I have now had the opportunity to hear both of the authors of *Thinking Like a Writer* speak on legal writing. Their presentations were as inspiring as their book. The preface begins, "This is a different kind of book about legal writing." And so it is. *Thinking Like a Writer* is written, not for writers who need remedial help, but for experienced legal writers who want to import an entirely new level of effectiveness into their written communications.

The book is premised on the notion that legal writers face a difficult challenge: they must explain complex concepts in prose that is simple, clear and direct.¹ Lawyers are taught in law school to "think like lawyers;" i.e. to be precise, exhaustive and logical. However, in pursuing these worthy goals, lawyers can sometimes produce prose that is ponderous and impenetrable.² Armstrong and Terrell suggest a coherent strategy for avoiding this pitfall.

The authors begin by describing the ideal legal reader: smart, attentive and, above all, eager to absorb new information. However, "[n]ot once in your professional life will you find this reader. Never. In fact, the truth is crueler: no one wants to read what you write."³ The book takes sober stock of this reality, and proposes a practical strategy for engaging the reader. "At a document's start ... you face a tough rhetorical challenge: making busy, impatient readers pay attention throughout the document — not grudgingly, not just out of a sense of duty, but because you have shown that they will be deeply rewarded."⁴ To accomplish this tall order, the authors propose an entirely new approach to legal writing.

The basic principle upon which this new approach is based is denominated "Super-Clarity."⁵ The concept of Super-Clarity presupposes that the goal of legal writing is to organize complex material in a way that guides the reader through it, helping the reader to assimilate information on both the micro-scale of sentence and paragraph, as well as the macro-scale of themes, ideas and over-arching concepts.⁶ Super-Clarity is achieved only by understanding how, on a cognitive level, the reader absorbs information. Because readers have trouble grasping dissociated details, a strong sense of theme or pattern is necessary to help readers see how small details fit into a larger picture.⁷ Whenever possible, a writer must structure and sequence information to match the legal analysis, so that form synchronizes with its underlying substance.⁸

The authors present these general concepts under the rubric of four specific principles. These four principles of Super-Clarity apply at all levels of a document, from its overall organization to its sentences. Although the same principle takes a somewhat different

shape when it is applied to a document's overall organization than it does when applied to a sentence, the four principles of Super-Clarity are essentially the same in either case.⁹

Principle One: Readers absorb information best if they understand its significance as soon as they see it.¹⁰

At every turn, a writer must be careful to provide context that helps a reader grasp the relevance of new information.¹¹ By way of metaphor, the information to be communicated is a liquid which, inside the mind of the writer, is held in place by the container, which is the writer's understanding of the significance of the information.¹² To communicate the information, most writers merely dump the information onto the page as quickly as possible.¹³ "For readers, this habit is disconcerting at best, profoundly annoying at worst. Because they have not yet been given the container that allows them to hold on to the information intellectually, they end up drenched rather than enlightened."¹⁴ To provide an appropriate container and so offer adequate context, the writer must (1) provide a focus; (2) make the information's structure explicit; and (3) begin with familiar information before moving to new, unfamiliar information.

Provide a focus.

The legal writer provides a focus for the reader's thinking by giving the reader a topic, a conclusion or a question. At the level of the paragraph, writers seldom have trouble writing a topic sentence.¹⁵ In longer introductions, however, the

focus is often too vague to give readers all the help they need. For a focus to succeed, it must meet a much tougher test than most writers realize: once readers step off the introduction's firm ground into the morass ahead, will they ever be at a loss — even for a moment — to understand why a detail matters?¹⁶

The reader should never merely wander through a sentence, a paragraph, a subsection or a section of a document. Rather, the writer must bring each point into sharp focus at each level of writing so that as the reader travels through the sentence, the paragraph, the subsection and the section, the reader understands both what he is being told and how it fits into the larger themes of the document.¹⁷ In this way, a clear framework makes the reader smarter and, therefore, more attentive.

Make the structure explicit.

The structure must be explicit. Before wading into details, a reader wants the comfort of knowing that a structure lies ahead, not chaos.¹⁸ "If you ask readers to walk into a complex structure the

1. STEPHEN V. ARMSTRONG AND TIMOTHY P. TERRELL, THINKING LIKE A WRITER 3 (2d ed. 2003).

2. *Id.* at 6.

3. *Id.* at 125-26.

4. *Id.* at 126.

5. *Id.* at 13.

6. *Id.* at 24.

7. *Id.* at 14.

8. *Id.* at 14-15.

9. *Id.* at 17.

10. *Id.* at 38.

11. *Id.* at 16.

12. *Id.* at 18.

13. *Id.* at 18-19.

14. *Id.* at 18.

15. *Id.* at 42.

16. *Id.* at 42-43.

17. *Id.* at 43.

18. *Id.* at 23.

organization of which is a mystery, they tend to react in the same way as when they encounter a morass of detail without a focus: They back away and begin to skim.¹⁹ Once a reader resorts to skimming, any hope of conveying nuance or complexity is lost. Moreover, the reader loses any sense of context that might help to refocus his attention.

For this reason, the more complex the subject matter, the more important the structural devices become.²⁰ Road maps should appear, not just at the beginning of a document or a section, but throughout a document.²¹ In addition to road maps, readers also need the comfort of “road signs,” which link back to the initial map.²² For example, if the map was basically a list, the signs may be no more than “first,” “second,” indicating which part of the map is relevant at that moment.²³

Begin with the familiar.

A reader easily becomes confused when unfamiliar information is introduced without context. Therefore, a writer must be careful, where at all possible, to begin with the familiar. “Reading is a complex intermingling of the information the writer provides with what the reader already knows.”²⁴ Some of what readers already know, they have brought to the document; some of what they know, they have learned from what the writer has told them earlier. Again, this principle applies at all levels of writing. At the sentence level, a paragraph is easiest and least stressful to absorb when each new sentence links clearly and specifically to the preceding sentence.²⁵ Familiar words, which the reader just read, should come at the front of the next sentence, where they create the smoothest possible transition.²⁶ At the paragraph, subsection or section level, a new “chunk” of information follows directly from the “old” or “familiar” information that the reader has already absorbed. “If [readers] cannot see the connection immediately, they have then to suspend the new information — put it in parentheses, in effect — until they can figure out how it fits. As a result, they will read less efficiently and more painfully.”²⁷

Principle Two: Readers absorb information best if its form mirrors its substance.²⁸

In other words, the structure of the information should follow the logic of the analysis. Legal writers can be seduced by easy “default” organizational patterns.²⁹ Analysis must be organized specifically around the conclusion, not the history of the writer’s research, the legal framework adopted by opposing counsel, or the like.³⁰

Much legal writing involves the organization of a series of cases within the jurisdiction. Organize cases chronologically only if the analysis unfolds sequentially. More often, the analysis of cases has nothing to do with their sequence because the differences among

them are wholly fact-dependent.³¹ When a writer writes about facts, cases should be organized so as to create a context and also to focus on relevant issues.³² The goal should be to “try to make the legal analysis and result look inevitable.”³³

Principle Three: Readers absorb information best if they can absorb it in pieces.³⁴

“Modern readers have very little stamina. If they see a long passage stretching unbroken to the horizon, they flinch, feel faint, and begin to skim.”³⁵ To avoid taxing the reader, a number of techniques are available: use headings and subheadings; keep paragraphs relatively short; use white space liberally on the page; use numbers, letters or bullet points to break up lists. All of these techniques have the “happy effect” of making the writing look less intimidating and making the page a “friendlier place.”³⁶

Principle Four: Readers pay more attention if you approach your material from their perspective rather than from your own.³⁷

A writer must understand his audience as thoroughly as possible, including “their goals, their expectations, their reading habits, their intellectual framework, and what they already know.”³⁸ An important sub-principle is the advice that a writer should show the reader from the start that the writer will give practical help without wasting the reader’s time.³⁹

The foregoing four principles are the cornerstones of Super-Clarity. Needless to say, Armstrong and Terrell offer much additional specific advice for improving the cogency and comprehensibility of legal writing. For example, the book discusses writing for impact, creating “micro” clarity in sentences, the delicate art of persuasion (a fascinating and important topic worthy of separate treatment), and the differences among writing styles in letters, e-mails, memoranda, briefs and judicial opinions among other useful topics — just to name a few. To make this volume even more helpful, *Thinking Like a Writer* is filled with many examples and excellent before-and-after illustrations.

Without question, the authors of *Thinking Like a Writer* have set themselves an ambitious goal: “to change how you think about communication in writing.”⁴⁰ One the whole, they succeed admirably. Carefully applied, the Super-Clarity system holds tremendous potential for improving legal writing intended for virtually any audience. Indeed, it is one of those rare books that seems to hold useful knowledge on virtually every page. It is highly recommended for any lawyer seeking to improve the quality of his or her written work.

Janet Hetherwick Pumphrey

19. *Id.* at 47.

20. *Id.* at 47-48.

21. *Id.* at 60.

22. *Id.* at 63.

23. *Id.*

24. *Id.* at 25.

25. *Id.* at 27.

26. *Id.*

27. *Id.* at 26.

28. *Id.* at 79.

29. *Id.* at 16.

30. *Id.* at 97.

31. *Id.* at 100-01.

32. *Id.* at 104-05.

33. *Id.* at 104.

34. *Id.* at 16.

35. *Id.* at 113.

36. *Id.* at 117.

37. *Id.* at 17.

38. *Id.* at 128.

39. *Id.* at 130.

40. *Id.* at 9.

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