

# MASSACHUSETTS LAW REVIEW

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# MASSACHUSETTS LAW REVIEW

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# CIVIL SANCTIONS REVISITED: THE UNFINISHED BUSINESS

By Mel L. Greenberg and Shane Kiggen



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## INTRODUCTION

Whatever happened to the movement to employ civil sanctions as “part of an effort to reduce delays and expenses in litigation, and to dam the flood of litigation that is threatening to inundate the courts?”<sup>1</sup> One recalls the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure and cognate state rules reflecting the growing concern about the increased court delays and abuses that attended the civil litigation boom.<sup>2</sup> One of this article’s authors was among those Massachusetts state court trial judges who advocated limiting discovery and using more vigorously state Rule 11 and General Laws chapter 231, section 6F, as suggested in a 1989 article.<sup>3</sup> It is unclear whether such efforts stemmed the tide or produced objective standards about the classes of cases and litigants to which sanctions should apply. In this article, the authors review the significant developments in the Massachusetts decisional and statutory law in the seventeen years since publication of that previous article.

Our conclusions can be briefly summarized as follows: Sections 6F and 6G of General Laws chapter 231 and various rules of court<sup>4</sup> contain an arsenal of protective and monetary sanctions for bringing frivolous actions and engaging in pretrial stonewalling activities.<sup>5</sup> Implementation of those sanctions by judges and lawyers, however, has not kept pace. This is a curious denouement which, as will appear, may be explained by the traditional reluctance to depart from

the American tradition which never adhered to the “loser pays” rule applicable in British civil law.<sup>6</sup> Moreover, it is unclear whether more frequent resort to sanctions would meet the goal of reducing delay and expense. Indeed, it may be argued that the statutory satellite sections 6F and 6G of chapter 231 and Rule 11 proceedings may actually multiply the costs of litigation. Be that as it may, the scope and purpose of this article is to catalogue the Massachusetts law and provide judges and practitioners a guide through the thicket.

## I. RULE 11 AND THE OVERBLOWN COMPLAINT

Massachusetts’ liberal pleading rules have spawned a fair number of pleaders, both lawyers and pro se litigants, who measure their cause by the length of the complaint or counterpleading, rather than by its substantive content. Overblown, meandering complaints not only waste the time and resources of the court and opposing counsel, but often lay bare groundless and even purposefully vexatious lawsuits. On the other hand, a long complaint with detailed allegations, if fairly answered, may serve to narrow the issues as well as better inform the court.

Rule 11(a) of the Massachusetts Rules of Civil Procedure strives to prohibit filing civil complaints for an ulterior or illegitimate purpose by subjecting the filer to sanctions.<sup>7</sup> Modeled after the less stringent pre-1983 version of its federal analogue, Massachusetts’

1. Robert L. Carter, *The History and Purposes of Rule 11*, 54 *FORDHAM L. REV.* 4, 4-9 (1985). See also William W. Schwarzer, *Sanctions Under the New Federal Rule 11 – a Closer Look*, 104 *F.R.D.* 181, 186-97 (1985) (discussing policies underlying the changes).

2. *FED. R. CIV. P.* 11 advisory committee notes (as amended in 1983).

3. See generally Mel L. Greenberg, *Sanctions: In Search of Standards*, 74 *MASS. L. REV.* 155 (1989).

4. *MASS. R. CIV. P.* 11(a); Opinion of the Justices, 365 *MASS.* 730, 753 (1974). See also *MASS. R. APP. P.* 25; Opinion of the Justices, 365 *MASS.* 844, 873 (1974).

5. In addition, Rule 1 of the Massachusetts Rules of Civil Procedure mandates that these rules “shall be construed to secure the just and speedy and inexpensive determination of every action.” *MASS. R. CIV. P.* 1; Opinion of the Justices, 365 *MASS.* 730, 730-31 (1974).

6. See *Batson v. Neal Speice Assoc., Inc.*, 805 F.2d 546, 550 (5th Cir.1986); see also H.G. HANBURY & D.C.M. YARDLEY, *ENGLISH COURTS OF LAW* 147 n.5 (5th ed. 1979).

7. *MASS. R. CIV. P.* 11(a); see *Vittands v. Sudduth*, 49 *MASS. APP. CT.* 401, 406-07 (2000).

Rule 11(a) requires that a lawyer (or an unrepresented party) sign every pleading and states that “[t]he signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is a good ground to support it; and that it is not interposed for delay.”<sup>8</sup> Since the Massachusetts rule remains virtually identical to the pre-1983 version of its federal counterpart,<sup>9</sup> our courts follow the construction given to that previous version of the federal rule.<sup>10</sup>

The leading Massachusetts case on Rule 11(a) is the Supreme Judicial Court’s (“SJC”) 1998 decision in *Van Christo Advertising, Inc. v. M/A-COM/LCS*.<sup>11</sup> In that case, the court held that Rule 11(a) requires a signing attorney to have a “subjective good faith belief that the pleading is supported in both fact and law.”<sup>12</sup> “Good faith,” the court explained, “includes, among other things, an absence of design to defraud or to seek an unconscionable advantage.”<sup>13</sup> The court specified that since the standard is subjective, Rule 11(a) does not impose on attorneys any obligation to engage in “some pre-filing inquiry,” which is required under the federal counterpart.<sup>14</sup> Nevertheless, the court stated that the rule does not excuse an attorney’s “willful ignorance of facts and law which would have been known had the attorney simply not consciously disregarded them.”<sup>15</sup>

Prior to *Van Christo*, Massachusetts courts had construed Rule 11(a) as incorporating an objective standard of good faith.<sup>16</sup> Accordingly, the subjective standard of good faith enunciated in *Van Christo* appeared to portend a significant change in the application of the rule. In practice, however, objective factors continue to play an important role. Specifically, the inquiry into a signing attorney’s subjective belief frequently centers on the nature and extent of that attorney’s pre-filing inquiry into the legal and factual grounds for his or her pleadings. In *Van Christo*, for example, the court determined that the filing attorney acted in good faith because she

supported her assertion with a “detailed[] explanation of the steps she took prior to filing the complaint,” including interviewing the plaintiff’s employees, reviewing a similar action against the defendant for similar alleged conduct and researching the law.<sup>17</sup> Likewise, in *Vittands v. Sudduth*,<sup>18</sup> the Appeals Court affirmed a denial of fees sought under Massachusetts Rule 11(a) in part because the signing attorney’s affidavit recited the steps the attorney took prior to filing the complaint.<sup>19</sup> Conversely, in *Psy-Ed Corporation v. Klein*,<sup>20</sup> the signing lawyer’s inability to detail any meaningful pre-filing inquiry figured prominently in the court’s decision to assess sanctions. Commenting on the signing attorney’s affidavit, the court stated: “[n]owhere is there any factual description of what [the attorney] actually did to verify the information that formed the basis of his serious allegations.”<sup>21</sup>

The most significant aspect of the *Van Christo* decision concerned the availability of attorney’s fees as a sanction for Rule 11(a) violations. The text of Massachusetts’s Rule 11(a) does not explicitly provide for the assessment of attorney fees,<sup>22</sup> and prior to *Van Christo*, Massachusetts courts had not assessed counsel fees as a sanction for violating Rule 11(a). But relying on the construction of pre-1983 federal Rule 11, the *Van Christo* court departed from the then-prevailing understanding of the Massachusetts rule, holding that when a court determines that a signing attorney lacks the requisite good-faith belief that the pleading he or she files is supported in both fact and law, Rule 11 permits the imposition of attorney’s fees and costs as a sanction.<sup>23</sup>

While Massachusetts’s Rule 11 has remained unchanged since its adoption in 1976, the comparable federal rule has been amended three times, in 1983, 1993 and 2007. The most extensive revisions, however, occurred in 1983<sup>24</sup> and 1993<sup>25</sup> (The 2007 revisions were limited to grammatical changes, the addition of the requirement

8. MASS. R. CIV. P. 11 (a). Rule 11(a) continues: “For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.” *Id.* A motion to strike “redundant, immaterial, impertinent, or scandalous matter” is also available under MASS. R. CIV. P. 12(f).

9. *Van Christo Adver., Inc. v. M/A-COM/LCS*, 426 Mass. 410, 414 (1998).

10. *Id.*

11. 426 Mass. 410 (1998).

12. *Id.* at 416.

13. *Id.* at 416-17.

14. *Id.* at 417.

15. *Id.*

16. Before *Van Christo*, the Massachusetts Appeals Court provided, in *Bird v. Bird*, 24 Mass. App. Ct. 362 (1987), the authoritative construction for Rule 11(a). In that case, the Appeals Court stated that “Rule 11(a) requires ‘good ground’ to support a pleading” and that “[the] criterion has been thought to require reasonable inquiry.” *Id.* at 368 (citing *Nemeroff v. Abelson*, 620 F.2d 339, 350 (2d Cir. 1980); *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass’n*, 365 F. Supp. 975, 982-83 (E.D. Pa. 1973); *Helfant v. La. & S. Life Ins. Co.*, 82 F.R.D. 53, 56-57 (E.D.N.Y. 1979); Fed. R. Civ. P. advisory committee notes (as amended in 1983). See generally D. Michael Risinger, *Honesty in Pleading and its Enforcement: Some “Striking” Problems with the Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).

17. *Van Christo*, 426 Mass. at 417-19.

18. 49 Mass. App. Ct. 401 (2000).

19. *Id.* at 412-13.

20. 62 Mass. App. Ct. 110 (2004).

21. *Id.* at 116.

22. See also, MASS. GEN. LAWS ch. 231 § 6F (2007).

23. *Van Christo Adver., Inc. v. M/A-COM/LCS*, 426 Mass. 410, 416 (1998).

24. Federal Rule 11, as amended in 1983, provides, in part:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

FED. R. CIV. P. 11 (as amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1 1987).

25. Federal Rule 11, as amended in 1993, provides, in part:

*Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order, directing payment to the movant of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.

FED. R. CIV. P. 11(c)(2) (as amended in 1993).

of providing an e-mail address, and other small changes not relevant here.)<sup>26</sup> To alleviate abuses of the federal docket,<sup>27</sup> the 1983 amendment incorporated an objective standard of good faith<sup>28</sup> and explicitly provided for the assessment of counsel fees as a sanction against the opposing counsel or party.<sup>29</sup> The United States Court of Appeals for the First Circuit interpreted the 1983 amendment's objective standard as requiring an inquiry not into what the attorney actually believed but into what he or she should have known after reasonable inquiry.<sup>30</sup> By applying in *VanChristo* the pre-1983 less stringent subjective standard, it may be inferred that, in the absence of information to the contrary, the SJC concluded that Massachusetts practitioners were conscientious in assessing their client's interests prior to instituting litigation. In any event, the *VanChristo* court left it to the Standing Advisory Committee on the Rules of Civil Procedure to review Rule 11(a) in the future.<sup>31</sup>

The 1983 amendments to the federal rule produced several serious problems. For example, instead of streamlining federal litigation, the 1983 amendments created a virtual "cottage industry"<sup>32</sup> of collateral litigation that inundated the already overburdened federal docket. As Professor Georgene Vairo noted,

[f]rom 1938, when the Federal Rules of Civil Procedure were adopted, to 1983, there were only a handful of reported Rule 11 decisions. During the first three and a half years after 1983, when Rule 11 was amended, 688 Rule 11 decisions were published.... By the end of 1990, over 3,000 cases had been reported.<sup>33</sup>

Furthermore, many commentators expressed concern that amended Rule 11 was being invoked disproportionately against plaintiffs,<sup>34</sup> particularly those who advanced novel civil rights claims,<sup>35</sup> producing an undesirable "chilling effect."<sup>36</sup>

In the wake of such criticisms, federal Rule 11 was again amended in 1993.<sup>37</sup> The 1993 version retained an objective standard of

good faith<sup>38</sup> but incorporated several important changes aimed at levelling the field between plaintiffs and defendants and stemming the flood of Rule 11 motion practice. First, the advisory committee altered the certification with respect to factual allegations, in an effort to "equalize the burden of the rule on plaintiffs and defendants."<sup>39</sup> Second, convinced that the prospect of obtaining attorney's fees had contributed to the explosion of Rule 11 litigation, the committee made important changes to the nature of sanctions that are imposed for a Rule 11 violation: whereas, under the 1983 version, sanctions were mandatory upon the finding of a Rule 11 violation, under the current formulation sanctions are available only in the court's discretion.<sup>40</sup> Moreover, the committee stressed that the court not only has discretion in deciding whether to impose sanctions for a violation but also has broad discretion in determining the type of available sanctions.<sup>41</sup> Monetary sanctions, when appropriate, should ordinarily be paid to the court as opposed to the opponent.<sup>42</sup> Finally, and perhaps most significantly, the 1993 amendments to federal Rule 11 added a "safe harbor" provision that allows a party to correct or withdraw a potential Rule 11 violation before the imposition of sanctions.<sup>43</sup>

## II. THE SPECIAL PROBLEM OF THE PRO SE LITIGANT

In all the trial courts there are a small number of pro se civil litigants.<sup>44</sup> While most state statutes and constitutions protect access to the courts by the unrepresented, this class of litigation consumes a disproportionate amount of the time and resources of trial judges and opposing counsel. Bending the rules to accommodate the citizen-litigator is common practice. In deference to most lay litigants, lawyers and judges allow broad latitude in permitting the filing and arguing of procedurally and substantively infirm motions and other requests by some pro se parties.<sup>45</sup>

But there are limits. The right of self-representation does not include "a license not to comply with relevant rules of procedural and

26. Jeffrey S. Parker, *Postponing the 2007 "Restyling" Amendments to the Federal Rules of Civil Procedure: A Letter to Members of the Judiciary Committees of the House and Senate* (George Mason Univ. Law and Econs. Research Paper Series, Working Paper No. 07-33, 2007), available at [http://www.law.gmu.edu/assets/files/publications/working\\_papers/07-33.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/07-33.pdf); Edward A. Hartnett, *Federal Courts, Practice & Procedure: Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 178 (2006).

27. See Federal Rules of Civil Procedure, 97 F.R.D. 165, 196-97 (1983).

28. The 1983 Amendment added the following language: "to the best of the signer's knowledge ... formed after reasonable inquiry" FED. R. CIV. P. 11 (emphasis added) (as amended in 1983).

29. See FED. R. CIV. P. 11 advisory committee notes (as amended in 1983).

30. *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 604-06 (1st Cir. 1988). The court held that Rule 11 sanctions under federal practice are not precluded merely because a claim has sufficient merit to survive a motion to dismiss or motion for summary judgment. Rather, they are justified when there is so little basis for a pleading that a party or attorney who made reasonable inquiry into the facts and law should not have signed it. *Id.* at 606.

31. *Van Christo Adver., Inc. v. M/A-COM/LCS*, 426 Mass. 410, 423 (1998).

32. See, e.g., Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 479 (1991).

33. *Id.* at 480.

34. See THOMAS E. WILLGING, *THE RULE 11 SANCTIONING PROCESS* 67-81 (1988); AMERICAN JUDICATURE SOCIETY, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 56 (1989).

35. See, e.g., Melissa L. Nelken, *Sanctions Under Amended Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1339-43 (1986); Note, *Plausible Pleadings: Developing Standards*

*for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 632 (1987) (arguing that courts have applied amended Rule 11 too broadly as a tool for docket management and that they have thus, in many cases, undermined its value).

36. See Nelken, *supra* note 36 at 1332.

37. FED. R. CIV. P. 11(as amended in 1993).

38. Substitution of "nonfrivolous" for "good faith" was not intended to produce a more rigorous standard. FED. R. CIV. P. 11 advisory committee notes.

39. See FED. R. CIV. P. 11 advisory committee notes.

40. Rule 11 provides, in part: "If, after notice and a reasonable opportunity to respond, the court determines that [a violation has occurred], the court may ... impose an appropriate sanction." FED. R. CIV. P. 11(c)(emphasis added) (as amended in 1993).

41. Rule 11 provides, in part:

[T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty to the court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the attorney's fees and other expenses incurred as a result of the violation.

FED. R. CIV. P. 11(c)(2) (as amended in 1993).

42. See FED. R. CIV. P. 11 advisory committee notes.

43. A motion for sanctions under Rule 11 "shall be served as provided in Rule 5, but shall not be filed or presented to the court, unless within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." FED. R. CIV. P. 11(c)(1)(A).

44. ANNUAL REPORT OF THE TRIAL COURT OF MASSACHUSETTS (1992).

45. Cf. *Brown v. Commonwealth*, 424 Mass. 1019, 1019 (1997) (pro se filing may be liberally construed, but pro se litigants are bound by same rules of

substantive law.<sup>46</sup> A pro se litigant is bound by the same rules of procedure as are litigants with counsel,<sup>47</sup> but the reality is that trial judges often hold lay litigants to a lower standard. Whether the motive arises out of some over-expansive sense of fairness or a fear of criticism is not clear, but the result is the same: too many repetitive and frivolous lawsuits linger in the system for too long.

Several precedents assist the perplexed trial judge or opposing counsel in setting limits in these circumstances. In particularly egregious cases, such as a pro se plaintiff's repeated pursuit of baseless claims in bad faith, the court may enjoin that litigant from filing further proceedings without prior judicial approval. For example, in *Rudnick v. Department of Massachusetts Attorney General*<sup>48</sup> and *Gordon v. United States Department of Justice*,<sup>49</sup> the United States Court of Appeals for the First Circuit sustained perpetual and blanket injunctions against the plaintiffs unless they satisfied a pre-filing requirement of demonstrating that they had a meritorious case.<sup>50</sup>

In subsequent cases, though, the First Circuit has been more circumspect in upholding such sweeping filing bans on pro se litigants. In *Pavilonis v. King*,<sup>51</sup> the pro se plaintiff had filed five similarly worded, yet separate civil rights actions, all expressing general, vituperative attacks against various persons and officials connected with administering the Boston public schools.<sup>52</sup> When the plaintiff moved for an appointment of counsel, these cases were referred to a federal magistrate, who opined that several of the complaints were duplicative and were "completely devoid of any information that would assist the defendants ... [in] answer[ing] [and] were 'completely violative of Rule 8 of the Federal Rules of Civil Procedure' and 'appear[ed] frivolous.'"<sup>53</sup> The magistrate dismissed two complaints and recommended that the plaintiff be restrained from filing new actions without permission of a district court judge.<sup>54</sup> The district judge approved such an order, and thereafter denied the plaintiff permission to file two further motions connected with the previous proceedings and dismissed all her remaining complaints.<sup>55</sup>

In passing on the trial court's actions, the First Circuit had little difficulty upholding the dismissals pursuant to Rule 8 of the Federal Rules of Civil Procedure, but it suggested that whether the plaintiff was properly enjoined from filing additional pleadings or new lawsuits without permission of the court was, indeed, a closer question.<sup>56</sup> Although the appellate court ultimately rejected the plaintiff's argument that enjoining litigation is unconstitutional per se, it

nevertheless found that her suit was brought without malice or intent to harass.<sup>57</sup> Accordingly, it interpreted the injunction to require only that Pavilonis satisfy a district judge that her pleadings were sufficiently plain and definite under Rule 8 to warrant response.<sup>58</sup> Although upholding the district court in *Pavilonis*, the First Circuit emphasized that litigiousness alone will not support such a sanction absent a showing that the actions were brought with an ulterior harassment motive or in bad faith.<sup>59</sup> The court also discouraged trial judges from applying such controls without a request by the harassed defendants.<sup>60</sup>

Most recently, in *Cok v. Family Court of Rhode Island*,<sup>61</sup> the First Circuit again evinced a cautious approach. In *Cok*, a pro se plaintiff embroiled in post-divorce litigation twice attempted to remove her case from the state family court to federal court.<sup>62</sup> The State of Rhode Island and its family court moved for summary dismissal or, alternatively, remand.<sup>63</sup> The matter was referred to a magistrate-judge who, after concluding that the matter had been improperly removed under section 1446 of chapter 28 of the United States Code, determined that the motion for remand should be granted.<sup>64</sup> The district court upheld the remand order, and the plaintiff appealed.<sup>65</sup> At the hearing on the motion to reconsider the remand order, the district court enjoined the plaintiff from "attempting the pro se removal of any matters from state family court, or from filing any actions in the trial court without the prior approval of a judge of the court."<sup>66</sup>

On appeal, the First Circuit vacated the injunction.<sup>67</sup> While affirming the federal courts' discretionary powers to regulate the conduct of abusive litigants,<sup>68</sup> the First Circuit held that the district court should have afforded Cok notice of the contemplated injunction and an opportunity to oppose the order.<sup>69</sup> Moreover, the First Circuit expressed concern about whether the circumstances warranted the imposition of such a sweeping injunction, stating: "injunctions restricting court access across the board in all cases are very much 'the exception to the general rule of free access to the courts.' They should be issued only when abuse is so continuous and widespread as to suggest no reasonable alternative."<sup>70</sup> The court, however, signaled greater willingness to sustain limited injunctions narrowly tailored to curtail the pro se litigants' improper conduct.<sup>71</sup>

Although federal case law is fairly well-developed, there are relatively few Massachusetts appellate decisions devoted to this topic.

procedure as are litigants with counsel); *Mmoe v. Commonwealth*, 393 Mass. 617, 620 (1985) (although some leniency is appropriate in determining whether pro se complaint meets the requirements of Massachusetts Rules of Civil Procedure, the rules are binding on pro se litigants).

46. *Farretta v. California*, 422 U.S. 806, 834-35 n.46 (1975).

47. See *id.* at 835-36; *Int'l Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 847 (1983); see also *Kornatowski v. Family Mut. Sav. Bank*, 388 Mass. 1011, 1011 (1983) (rescript).

48. 362 F.2d 337, 338 (1st Cir. 1966).

49. 558 F.2d 618, 618 (1st Cir. 1977).

50. *Id.* at 618.

51. 626 F.2d 1075 (1st Cir. 1980).

52. *Id.* at 1076.

53. *Id.* at 1077.

54. *Id.*

55. *Id.*

56. *Id.* at 1078-79.

57. *Id.*; see also *Gifford v. Westwood Lodge Corp.*, 24 Mass. App. Ct. 920, 922-

23 (1978) (rescript) (summary judgment against pro se plaintiff affirmed).

58. *Pavilonis*, 626 F.2d at 1079.

59. *Id.*

60. *Id.*

61. 985 F.2d 32 (1st Cir. 1993).

62. *Id.* at 33.

63. *Id.*

64. *Id.* at 33-34.

65. *Id.* at 34.

66. *Id.*

67. *Cok*, 985 F.2d at 34.

68. *Id.*

69. *Id.* at 35.

70. *Id.* at 36 ("Injunctions restricting court access across the board in all cases are very much 'the exception to the general rule of free access to the courts.'" (quoting *Pavilonis v. King*, 626 F.2d 1075, 1079 (1st Cir. 1980)).

71. *Id.*



This is hardly surprising, given the predilection of many state trial court judges to tolerate some egregious types of pro se litigation. One example, however, is found in *Griffith v. Griffith*.<sup>72</sup> In an alimony action, the defendant chose to conduct his own defense to his former wife's complaint for modification of their divorce decree.<sup>73</sup> At the modification trial, the hearing deteriorated frequently into irrelevant quarrelling and frustrated exchanges between the judge and the pro se defendant.<sup>74</sup> On appeal, the defendant complained of the trial judge's unfairness in conducting a summary and biased proceeding immediately after a pretrial conference.<sup>75</sup> The Appeals Court noted that the "[m]anagement of a trial in which a litigant appears pro se draws heavily on the patience, skill, and tact of the presiding judge."<sup>76</sup> Noting that it is important for trial judges to offer the appearance of impartiality, the Appeals Court nonetheless upheld the lower court's decision as warranted on the evidence.<sup>77</sup> The case is an apt illustration of the importance of setting limits on pro se litigants with "p[er]chant[s] for straying into considerations that [are] not legally relevant," and that are confusing, obfuscating or tend to prolong trials.<sup>78</sup>

### III. DISCOVERY ABUSES AND THE RULE 37 SANCTIONS

Abuses of the discovery process run the gamut from stonewalling and delaying tactics to burdensome and excessive discovery to deliberate concealment of information or willful refusal to obey orders of the court. Rules 26(c) and 37(a) (2) A - E and 36(b)(2) A - E, of the Federal Rules of Civil Procedure provide the basis for protecting against and penalizing discovery abuses, including overzealous use of discovery and noncompliance with and attempts to thwart

discovery requests.<sup>79</sup> The rules clearly provide sufficient authority and tools to sanction abuse, but they must be utilized to be effective.<sup>80</sup> Available state court sanctions likewise vary: Rule 37 of the Massachusetts Rules of Civil Procedure, like its federal counterpart, permits the court to impose costs and attorney's fees, to hold parties or counsel in contempt, to prohibit an offending party from introducing or contesting certain evidence, to strike pleadings, to grant a new trial, or even to dismiss claims.<sup>81</sup> While fundamental rules of due process limit the range of available sanctions in some circumstances,<sup>82</sup> the variety is more than adequate to control discovery abuses.

#### A. Types of Abuse

##### 1. Excessive Discovery

This tactic has many common characteristics, the most familiar of which is the filing of an exorbitant set of interrogatories. In an attempt to deal with this problem, the current Rule 33 of the Massachusetts Rules of Civil Procedure stakes out a compromise position between its federal counterpart, which neither limits the "sets" nor the total number of interrogatories that may be filed, and previous Massachusetts legislation, which limited both.<sup>83</sup> While the current Massachusetts rule does not proscribe the "sets" of interrogatories a party may file, it does provide that no party shall "as of right," serve more than thirty interrogatories.<sup>84</sup> Any attorney who knows that he cannot do his client interrogational justice below the limit should move for leave to file additional interrogatories.<sup>85</sup> Rule 33 requires a showing of "good cause" as a prerequisite to obtaining the necessary permission. Good cause requires moving counsel to show that the

72. 24 Mass. App. Ct. 943 (1987).

73. *Id.* at 943.

74. *Id.* at 944.

75. *Id.*

76. *Id.* (citing *Oko v. Rogers*, 125 Ill. App. 3d 720, 723-24, 466 N.E.2d 658, 660-61 (1984)).

77. *Id.* at 945.

78. *Griffith*, 24 Mass. App. Ct. at 945.

79. See WRIGHT, MILLER & MARCUS, 8 FED. PRAC. & PROC. § 2005 (2d ed. 2009); WRIGHT, MILLER & MARCUS, 8B FED. PRAC. & PROC. § 2289.(2d ed. 2009).

80. Current federal Rule 26(c) provides in part:

[T]he court ... may make any order which justice requires to protect a party of person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions ... ; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. FED. R. CIV. P. 26(c).

81. See MASS. R. CIV. P. 37(b)(2) that permits, for failure to comply with discovery orders:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the

purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; (E) Where a party has failed to comply with such an order under Rule 35(a) requiring him to produce another for examination, such orders as listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

Similarly, current federal rule 37 provides parties with, among other things, means to compel disclosure or discovery by moving "for an order compelling an answer, or a designation, or an order compelling inspection in accordance with [such] a request," when the opposing party has failed to comply. FED. R. CIV. P. 37(a)(2). If such a motion is granted, the "party or deponent whose conduct necessitated the motion" will be required by the court to pay the "reasonable expenses incurred" by the party obtaining the order. FED. R. CIV. P. 37(a)(4).

82. See *infra* section III C.

83. JAMES W. SMITH & HILLER B. ZOBEL, 6 MASS. PRACTICE SERIES, RULES PRACTICE § 33.3 (2d ed. 2006).

84. In calculating the total number of interrogatories a party has filed, Massachusetts commentators have suggested that counsel and the courts should apply a common sense standard. For example, the "routine 'identification' interrogatory, asking name, address, date of birth, and the like, should be regarded as one interrogatory." See SMITH & ZOBEL, *supra* note 83 at 489.

85. *Id.* at 489-90.



case is sufficiently complex to warrant employing such additional weaponry and that the additional interrogatories are reasonable.<sup>86</sup>

Counsel faced with excessive interrogatories and requests may be tempted to respond in kind. But instead of sending the opponent a mirror-image set, counsel would be better off simply objecting to the proffered set as burdensome and seeks a protective order.<sup>87</sup> Trial judges, sensing that the war of interrogatories may well be won with early intervention, are typically favorably disposed to this approach.

Excessive use of depositions may also needlessly exhaust the time and resources of the court and opposing counsel. When anticipating a problem under Rule 30 of the Massachusetts Rules of Civil Procedure, counsel should seek judicial intervention pursuant to Rule 26 of the Massachusetts Rules of Civil Procedure.<sup>88</sup> In exercising control over needless discovery, the trial judge must be particularly sensitive to preventing harassment or other use of discovery as a means to gain unfair advantage.

Occasionally, a case arises in which the judge must intervene to resolve legitimate competing interests by limiting the scope of inquiry at deposition. One example is *In the Matter of Roche*.<sup>89</sup> In a proceeding before the Commission on Judicial Conduct, Roche, a news reporter who had participated in preparing an investigative report concerning judicial misconduct, was cited for contempt after refusing to reveal certain confidential sources.<sup>90</sup> The reporter sought a protective order from the single justice, arguing that in supervising discovery the justice “was obliged to consider the effect that compelled discovery would have on ‘the values protected by the First Amendment, [even] though [these values were] entitled to no constitutional privilege.’”<sup>91</sup> The SJC agreed that this was an appropriate concern, but found no error in the contempt order and compelled Roche to be deposed fully.<sup>92</sup> The court held that “[i]n exercising control over requested discovery a judge or administrative tribunal must be particularly sensitive to preventing exposure ‘for the sake of exposure,’ or any other use of discovery as a means of harassing a ... potential witness by forcing needless disclosure of confidential relationships.”<sup>93</sup> The court said that a trial judge ruling

on the reasonableness of discovery requests must take into account considerations of efficiency and economy.<sup>94</sup> As Justice Byron White stated in *Herbert v. Lando*,<sup>95</sup> referring specifically to the Federal Rules of Civil Procedure, “discovery provisions ... are subject to the injunction of Rule 1 that they be construed to secure the just, *speedy*, and *inexpensive* determination of every action.”<sup>96</sup> The *Roche* court concluded by stating that, in superintending the scope of discovery requests, the single justice (or trial judge) is entitled to plenary power and broad discretion.<sup>97</sup>

## 2. Stonewalling

Stonewalling connotes an obstructionist tactic typified by pro forma answers, such as “objection is made to the interrogatory as being vague, ambiguous, and not reasonably calculated to lead to the discovery of admissible evidence.” Deposition practice generates many other examples. In *Campana v. Board of Directors of the Massachusetts Housing Financing Agency*,<sup>98</sup> an unlawful termination suit brought by a former employee of the defendant agency, the court found that the trial judge did not abuse his discretion in awarding plaintiff attorney’s fees incurred as a result of the agency’s refusal to admit, pursuant to Rule 36 of the Massachusetts Rules of Civil Procedure, facts establishing the plaintiff’s status as a veteran and his term of creditable service, where the parties ended up stipulating to these facts on the first day of trial.<sup>99</sup> Finding that the defendant’s unwarranted denial of the request to admit did not promote economy and effective judicial administration, the court suggested that Rule 37 of the Massachusetts Rules of Civil Procedure “affords a judge broad discretion to impose whatever sanctions are just in order to ensure that the discovery process operates efficiently.”<sup>100</sup>

In another illustration, *Roxse Homes Ltd. Partnership v. Roxse Homes Incorporated*,<sup>101</sup> the SJC upheld a trial judge’s order, pursuant to Rule 37(b), entering a judgment (for specific performance) against the seller of real estate after the seller had failed repeatedly to respond to the opposing party’s requests for production of documents and had clearly violated the judge’s orders in aid of those requests.<sup>102</sup> The court noted that, “[s]ince January 1, 1984, sanctions under Rule 37(b) need not be based on a willful failure to comply.”<sup>103</sup>

86. *Id.* at 490.

87. See *Monogram Models, Inc. v. Industro Motive Corp.*, 492 F.2d 1281 (6th Cir. 1974), cert. denied, 419 U.S. 843 (1974). In *Monogram Models Inc.*, the court held that if a party feels that the interrogatories are objectionable, he must either move for a protective order or state his objections; otherwise he risks being sanctioned for not responding on a timely basis. *Id.* at 1287-88.

88. Mass. R. Civ. P. 26 (c) states in part:

Upon motion by a party or by the person from whom the discovery is sought, and for good cause shown, the court... may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions ... ; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

89. 381 Mass. 624 (1980).

90. *Id.* at 625. These sources were relevant to the judge’s defense in the misconduct proceeding. *Id.* at 626.

91. *Id.* at 636 (quoting *Herbert v. Lando*, 441 U.S. 153, 180 (1979) (Powell, J. concurring)).

92. *Id.* at 638.

93. *Id.* at 636-37 (quoting *Watkins v. United States*, 354 U.S. 178, 200 (1957)).

94. *Id.* at 637.

95. 441 U.S. 153 (1979).

96. *Id.* at 177.

97. *Roche*, 381 Mass. at 638.

98. 399 Mass. 492 (1987).

99. *Id.* at 502-03.

100. *Id.* at 503 (quoting *Corsetti v. Stone Co.*, 396 Mass. 1, 26 (1985)); see also *Wansong v. Wansong*, 395 Mass. 154, 157-58 (1985) (upholding imposition of sanctions, including dismissal of plaintiff’s complaint for divorce, in a case arguably not involving stonewalling but nonfrivolous assertion of a constitutional privilege against self-incrimination).

101. 399 Mass. 401 (1987).

102. *Id.* at 406.

103. *Id.* at 405 (footnote omitted). Prior to its amendment, effective Jan. 1, 1984, Rule 37(b) permitted the imposition of sanctions only when there was a willful failure to obey a court order or direction. *Id.* at 405 n.5. The relevant

The purpose of the 1984 amendment, the court pointed out, was to “increase the compliance with discovery orders, by making it easier for parties to achieve, and judges to award, sanctions for failure to comply with a discovery order.”<sup>104</sup>

Similarly, in *Greenleaf v. Massachusetts Bay Transportation Authority*,<sup>105</sup> a tort action brought by a passenger injured by the door of a train, the Appeals Court upheld a trial judge who defaulted the defendant for its persistent failure, over a period of some twenty months, to comply with a production order for incident reports concerning the doors of the car in question.<sup>106</sup> Setting out the tortuous procedural history leading to the default order, the court concluded that “it constitutes a case study in self-destructive conduct of litigation.”<sup>107</sup> In determining that the sanction invoked was not unduly stern, the court noted that “[i]f certain documents could not be found and if duplication . . . of reports seemed superfluous it was the burden of the MBTA to taken an [sic] initiative and ask for . . . modification. The record is devoid of a single effort by the MBTA to do so.”<sup>108</sup>

The imposition of time standards for the completion of discovery in the Massachusetts courts is a response in part to the problems of delay and stonewalling.<sup>109</sup> Justice Edward Hennessey, noted in response to the question whether sanctions will be imposed on those who fail to take time standards seriously that “there are adequate sanctions built into the rules of court now. This is something for the trial judges to decide as a matter of policy, as they always have. . . . The sanctions that are presently in existence are pretty far reaching.”<sup>110</sup>

### 3. Intentional Concealment

The willful failure to disclose known documents or information after request for them is an especially pernicious type of discovery abuse. Not surprisingly, penalties for engaging in this form of abuse are stern: both Rule 60(b) of the Federal Rules of Civil Procedure<sup>111</sup> and its Massachusetts companion make clear that a party found to have withheld information intentionally after request places a favorable verdict or finding at serious risk.<sup>112</sup>

The leading case in the First Circuit applying federal Rule 60(b) is *Anderson v. Beatrice Foods, Incorporated*.<sup>113</sup> In *Anderson*, the plaintiffs, residents of Woburn, Massachusetts, brought a toxic tort suit, alleging that the defendant corporation’s tannery contaminated their groundwater and caused them serious illness.<sup>114</sup> Following a

section of Rule 37(b)(2) now reads: “In lieu of any of the foregoing orders or in addition thereto, the court *may* require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney’s fees, caused by the failure.” MASS. R. CIV. P. 37(b)(2) (emphasis added).

104. *Roxse Homes*, 399 Mass. at 405.

105. 22 Mass. App. Ct. 426 (1986).

106. *Id.* at 427-28.

107. *Id.* at 429.

108. *Id.* at 430.

109. *Id.*

110. *Special Publication on Time Standards*, MASS. LAWYERS WEEKLY, June 6, 1988, at 10.

111. FED. R. CIV. P. 60(b) provides in part: “On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud, (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.”

112. MASS. R. CIV. P. 60(b).

113. 862 F.2d 910 (1st Cir. 1988).

114. *Id.* at 914.

115. *Id.* at 915.

verdict for the defendant corporation, the plaintiffs filed a post-trial motion to upset the judgment pursuant to federal Rule 60(b) (3), which alleged that during discovery an attorney representing Beatrice Foods intentionally concealed certain groundwater reports concerning whether its tannery operations contributed to the contamination of which the plaintiffs complained.<sup>115</sup> The district court denied the motion, and the plaintiffs appealed.<sup>116</sup>

On appeal from the denial of the post-trial motion, the United States Court of Appeals for the First Circuit explained that such an inquiry proceeds in two steps. The court must first determine whether a party intentionally concealed known documents or information after request or not.<sup>117</sup> To this end, the trial judge must conduct an evidentiary hearing that provides each side with an opportunity to be heard on the record with witnesses to determine whether there was, in fact, a knowing concealment.<sup>118</sup> If the judge finds that a party concealed evidence, the judge must next proceed to determine whether the non-disclosure substantially interfered with the aggrieved party’s ability to proceed fully and fairly at trial.<sup>119</sup> Intentional concealment creates a presumption of substantial interference.<sup>120</sup>

Like its federal counterpart, Massachusetts’s Rule 60(b)(3) includes any wrongful act by which a party or counsel obtains a judgment inequitably as one basis for setting aside a judgment.<sup>121</sup> The fraud covered by Massachusetts’s Rule 60(b)(3) must have prevented the moving party from presenting the merits of the case.<sup>122</sup> But, unlike the federal standard enunciated in *Anderson*, under Massachusetts practice neither fraud nor misrepresentation is presumed and the moving party shoulders the burden of proof by clear and convincing evidence.<sup>123</sup>

### B. Available Sanctions: State and Federal

We have already alluded to some sanctions that are available for discovery abuse under the federal and Massachusetts rules. As in the Rule 11 context,<sup>124</sup> federal Rule 37 has a more rigorous standard than its Massachusetts counterpart. For failure to comply with discovery orders, Massachusetts’s Rule 37(b)(2)<sup>125</sup> and subsection (d)<sup>126</sup> omit the federal rule’s mandatory sanctions and vest in the trial judge discretion not permitted in the federal rules practice.<sup>127</sup>

Despite growing concern over abuse of discovery practice, Massachusetts has eschewed proposals to align its Rule 37 with the

116. *Id.*

117. *Id.* at 925.

118. *Id.*

119. *Id.* at 924.

120. *Id.* at 930.

121. MASS. R. CIV. P. 60(b)(3).

122. *Id.*

123. See reporter’s notes to MASS. R. CIV. P. 60(b)(3).

124. See *supra* Section I.

125. MASS. R. CIV. P. 37(b)(2) in part states: “If a party . . . fails to obey an order to provide or permit discovery, the court in which the action is pending *may* make such orders in regard to the failure as are just. . . .” (emphasis added).

126. MASS. R. CIV. P. 37(d) states in part: “In lieu of any order or in addition thereto, the court *may* require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney’s fees caused by the failure.” (emphasis added).

127. Federal Rule 37 reads in part:

In lieu of any of the foregoing [discretionary] orders or in addition thereto the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable

more stringent federal version.<sup>128</sup> In 1983 the Massachusetts Standing Committee on the Rules of Civil Procedure seriously considered proposals to narrow judicial discretion under Massachusetts Rule 37(b)(2) and (d) but ultimately chose not to follow the federal path for several reasons. First, while the federal requirement is tailored to the individual judge calendar system, the Massachusetts Superior Court uses a circuit assignment of trial judges that does not provide for continuity of the same judge to superintend discovery disputes. Second, the Standing Committee expressed concern that the addition of a new procedural requirement — in this case a number of new sanction hearings — would provide more opportunity to harass the opposition, and to increase expenses and fees that had been criticized under federal Rule 11 practice.<sup>129</sup> Moreover, the Standing Committee reaffirmed its commitment to judicial discretion in the 1994 amendment to Rule 37(a).<sup>130</sup>

Although Massachusetts has opted against mandatory sanctions under Rule 37, it has pursued other avenues. Currently the rules committees of the Massachusetts Bar Association and of the Massachusetts Superior Court are exploring ways in which rule changes may limit discovery abuses.<sup>131</sup> Furthermore, it has become apparent that both the state and federal judiciary are imposing sanctions more vigorously and trial judges are taking a more active role in overseeing discovery. Some implications of this change affect offending counsel in hitherto unexpected ways. For example, trial courts at all levels are manifesting an increased willingness to impose serious sanctions for discovery abuses and to enforce the rules by dismissing or dismantling claims, assessing costs of the opposing parties, ordering contempt<sup>132</sup> and reporting offending counsel to disciplinary agencies.

This latter device, although a measure of last resort for most trial judges, has taken on a life of its own. In Massachusetts, the Board of Bar Overseers is being informed, through published judicial memoranda, of specific discovery abuse by lawyers and parties. One illustration is *USF&G Company v. Cardenuto*,<sup>133</sup> where a federal magistrate report of defendant's former counsel for failing to

comply with an order to file long overdue answers to interrogatories resulted in dismissal of defendant's claim.<sup>134</sup> Vexed by counsel's recalcitrance, and recognizing that the defendant, now represented by new counsel, was not at fault, the magistrate vacated the dismissal, but reported the former counsel's apparent misconduct to the Board of Bar Overseers.<sup>135</sup> In most instances, publication of a memorandum of decision by a trial judge subjects the offending counsel to scrutiny and provides the board with a record of proceedings upon which to initiate some action.

### C. Due Process Limitations

#### 1. Preclusion or Establishment

In the discovery system outlined in both federal and Massachusetts rules, trial judges are granted broad authority to impose fact-appropriate sanctions on discovery abusers. For failure to comply with discovery orders, Massachusetts' Rule 37 permits the trial judge to enter "[a]n order that the matters regarding which the order was made or other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order."<sup>136</sup> Since the imposition of monetary sanctions on discovery abusers fails to provide the discoverer with an adequate remedy, namely the information sought, judges might consider fashioning sanctions in the form of such issue establishment or preclusion orders upon appropriate request. Establishment orders relieve the discovering party of having to prove the contending issue. Preclusion orders prohibit the offending party, as a penalty for non-disclosure, from calling witnesses at trial to prove facts contrary to the opponent's position.

Some federal trial judges have entered preclusion orders where parties have failed to identify or disclose documents or witnesses regardless of whether the conduct is flagrant, repeated, or violates a court order.<sup>137</sup> Massachusetts trial judges, on the other hand, have generally applied this sanction only where the recalcitrant party's conduct is willful and the prejudice to the discoverer is substantial,<sup>138</sup> such as, for example, when an expert witness remains undisclosed after repeated requests and the opponent's claim or defense

expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37.

128. See, e.g., FED. R. CIV. P. 37 (providing that sanctions for abuse of discovery may include assessment of costs and expenses, prohibitions against introduction of evidence, contempt citations, dismissal, or default). A 1983 Advisory Committee note with regard to amendments to Rule 26(b)(1) noted that, on the whole, federal judges have been "reluctant to limit the use of discovery devices." FED. R. CIV. P. 26(b)(1) advisory committee notes; see C. RONALD ELLINGTON, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE 102 (1978) (discussing sanctions only for "flagrant abuses"); Wayne Brazil, *Views From the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, AM. B. FOUND. RES. J. 217, 245-51 (1980) (reporting that judges are generally unwilling to resolve discovery disputes).

Recommendation 9 of the Agenda for Civil Justice Reform states:

Amend the Federal Rules of Civil Procedure to establish clear standards for imposing sanctions upon attorneys who abuse the system. The party whose conduct necessitated the discovery motion would bear the burden of establishing that its position was substantially justified. Sanctions would be automatic in instances where the court finds an unreasonable, vexatious, or abusive discovery practice.

129. See reporter's notes to FED. R. CIV. P. 37(a) (as amended in 1994).

130. Prior to this amendment there was an anomaly in MASS. R. CIV. P. 37(a)

(4). The first paragraph, relating to motions for orders to compel discovery which are granted, says the court may, after opportunity for hearing, require the payment of reasonable expenses, including attorney's fees, 'incurred in obtaining the order.' The second paragraph, concerning such motions that are denied, used the verb 'shall' instead of 'may.' Although the companion Federal Rule uses 'shall' in both paragraphs, the Standing Advisory Committee believes 'may' makes more sense ... *Id.*

131. As of the date of this article, no amendments or changes have been recommended.

132. Disobedience of a discovery order can be either civil or criminal contempt. See *Katz v. Commonwealth*, 379 Mass. 305, 316 (1979); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-65 (1980) (speaking of court's inherent power to hold in contempt); MASS. R. CIV. P. 37 (general discovery sanctions); MASS. R. CIV. P.45 (disregard of subpoena).

133. No. 87-0093-F, slip. op. at \*3 (D. Mass. Feb. 1989) (Ponsor, U.S. Mag.).

134. *Id.*

135. *Id.*

136. MASS. R. CIV. P. 37(b)(2)(A).

137. See, e.g., *Boardman v. Nat'l Med. Enters.*, 106 F.3d 840, 843 (8th Cir. 1997) (upholding district court's refusal to permit testimony of witness not on list prior to trial).

138. See, e.g., *Bresnahan v. McAuliffe*, 47 Mass. App. Ct. 278, 280-81 (1999) (fact that plaintiffs, in answering interrogatories, unintentionally misidentified the hospital where they had received treatment did not preclude them from



depends on knowledge of the expert's undisclosed opinion. Moreover, the SJC has tended to favor appropriately tailored sanctions short of being deprived of a trial on the merits.<sup>139</sup>

In determining the propriety of a preclusion or establishment order, the trial judge considers the following factors: (1) whether the party seeking a preclusion or establishment order has previously obtained an order pursuant to Massachusetts's Rule 26(c) or 26(e) mandating the disclosure of the information or witness sought and establishing a deadline for compliance; (2) whether the moving party has been prejudiced; (3) whether the prejudice can be cured; (4) how important the evidence or the issue is; (5) the existence of good or bad faith on the part of the non-disclosing party; and (6) the potential for abuse if the evidence or issue is not precluded or established.<sup>140</sup>

On the whole, Massachusetts courts have adopted a reading of Rule 37(b) that indulges many abuses before imposing a sanction that removes an issue from trial. Federal Rule 37's warning repeated in Massachusetts Rule 37(b)(2), to impose such sanctions "as are just," and the drastic nature of an order precluding or establishing an issue by judicial fiat have led trial judges to employ this sanction only on the clearest showing that such action is required, although the abolition of the willfulness requirement of the 1983 amendment to Massachusetts Rule 37(b) broadened the scope of abuses subject to sanction. Generally, a trial judge must consider less severe alternatives and discuss them if they elect to dismiss the case for flagrant non-responsive discovery tactics. Dismissal, default, and preclusion orders are authorized only in "extreme circumstances."<sup>141</sup>

Another caveat is that due process mandates that the nondisclosed information triggering preclusion, establishment or dismissal of claims be specifically related or relevant to the particular claim which was at issue in the original discovery order.<sup>142</sup> Thus, before invoking drastic sanctions pursuant to Massachusetts and federal Rules 37(b)(2)(B), the trial judge must provide a thorough due process hearing at which the relevance of the non-disclosed information is discussed.<sup>143</sup> Once having determined the relevance, the trial judge must then measure the non-disclosing party's behavior against

the various factors test. In the event the abuse meets the extreme circumstances test, the sanction of dismissal or preclusion is warranted under due process standards.

## 2. Dismissal

Dismissal of a case or claim is the ultimate remedy for stonewalling, but there are constitutional limitations. It is within the limits of due process to dismiss a complaint because of a party's noncompliance with discovery orders where the failure is not due to an inability to comply.<sup>144</sup> On the other hand, it must be kept in mind that due process considerations place limits "upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."<sup>145</sup> Indeed, the original Advisory Committee Note to federal Rule 37 recognized that there were due process limitations upon the power of the court to dismiss an action without giving a party an opportunity for hearing on the merits,<sup>146</sup> and the United States Supreme Court has said that a substantial constitutional question would be raised if a pleading were stricken for noncompliance with a discovery order with which the party had made a good faith effort to comply.<sup>147</sup> But the drastic sanction of entry of a default judgment has been upheld for willful and deliberate disregard of discovery orders.<sup>148</sup>

Likewise, under Massachusetts Rule 37(b)(2)(c), the appellate courts have upheld dismissal of complaints where the sanction "was occasioned by ... counsel's lack of diligence and apparent failure to take seriously the responsibility of conducting litigation in compliance with the" explicit Rule 26 requirement to permit discovery.<sup>149</sup> In determining whether to default or dismiss claims for failure to comply with discovery orders, the SJC held in *Gos v. Brownstein*<sup>150</sup> that this particular sanction requires careful scrutiny of the conduct and a full hearing before it may be implemented.<sup>151</sup>

The SJC established in *Gos* that it is within the limits of due process to dismiss a complaint because of a party's noncompliance with a pre-trial production order where the failure is not due to an inability to comply.<sup>152</sup> *Gos* was a plaintiff in a malpractice claim

introducing evidence).

139. *Henshaw v. Travelers Ins. Co.*, 377 Mass. 910, 911 (1979).

140. *See Pagtalunan v. Galaza*, 291 F.3d 639, 642-43 (9th Cir. 2002) (five-factor test includes "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits"); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (five-factor test includes: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal would be a likely sanction for non-compliance; and (5) the efficacy of lesser sanctions") (citations omitted); *Hicks v. Feeney*, 850 F.2d 152, 156 (3d Cir. 1988) (six-factor test includes "(1) The extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.").

141. *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1338 (9th Cir. 1985).

142. *See, e.g., Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 591 (9th Cir. 1983) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxities de Guinee*, 456 U.S. 694, 707 (1982)); *Keene v. Brigham & Woman's Hosp., Inc.*, 56 Mass. App. Ct. 10, 16-17 (2002).

143. *See Penthouse Int'l, Ltd. v. Playboy Enter., Inc.*, 663 F.2d 371, 388 (2d Cir. 1981).

144. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209-12 (1958); *Roxse Homes*, 399 Mass. at 405-06; *see supra* note 61.

145. *Societe Internationale*, 357 U.S. at 209.

146. *See R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 586-87 (6th ed. 1990).

147. *Societe Internationale*, 357 U.S. at 210-12.

148. *See, e.g., Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 614 (2d Cir. 1964) (Howard Hughes defaulted for wilfully and deliberately failing to comply with order to appear for deposition).

149. *See, e.g., Partlow v. Hertz Corp.*, 370 Mass. 787, 790 (1976) (upholding dismissal of complaint resulting from failure to answer interrogatories and stating, in part: "The answers which were provided on several occasions were at least evasive. Compliance with the rules of civil procedure is not accomplished if the parties make of answers to interrogatories some kind of game, and in these days of heavily burdened civil dockets the courts are not expected to be subjected to that type of abuse which is evident in this case").

150. 403 Mass. 252 (1988).

151. *Id.* at 257.

152. *Id.* at 255.

who resided in Poland and who failed over a nine-month period of court authorized extensions to appear at her deposition in the United States.<sup>153</sup> At a final hearing on her motion for further extension, the trial judge entered a protective order allowing the extension with the “proviso that the case was ‘to be dismissed if plaintiff is not deposed within (6) months.’”<sup>154</sup> After further extensions and a futile plea by the plaintiff’s counsel aimed at securing her travel expenses to be paid by the commonwealth because of her alleged indigency, the case was dismissed.<sup>155</sup>

In *Gos*, the court decided that “[n]either Fed.R.Civ.P. 37(b) nor Mass.R.Civ.P. 37(b) requires that a party’s failure to comply with a court order be willful before sanctions may be imposed.”<sup>156</sup> The court did, however, comment that

[s]ince due process requirements may limit the sanction of dismissal, where there is an inability to comply, ... it is necessary for an appellate court to know if the judge’s action was predicated on a finding of willfulness, bad faith, or fault, unless it is clear that such a determination was implicit and warranted. Since it does not appear ... whether any such factor was the basis of the court’s action, we remand the case for further proceedings.<sup>157</sup>

#### IV. ATTORNEY’S FEES UNDER MASSACHUSETTS GENERAL LAWS CHAPTER 231, SECTION 6F

Although the traditional rule has been that parties to litigation must bear their own attorney’s fees, Massachusetts has by statute provided for fee awards as a sanction for instituting frivolous complaints or counterclaims.<sup>158</sup> General Laws chapter 231, section 6F,<sup>159</sup>

enacted in 1976, is similar to statutes that have been enacted in other states to sanction parties who assert trivial claims for some improper, ulterior purpose.<sup>160</sup>

Specifically, section 6F prohibits conduct which is “wholly insubstantial, frivolous *and* not advanced in good faith.”<sup>161</sup> The sanctioning process provided by section 6F requires the application of a two-pronged test by the trial judge: first, a determination that “all or substantially all of the [offending party’s] claims ... were wholly insubstantial, frivolous”; and second, that the claims “were not advanced in good faith.”<sup>162</sup> The claim for attorneys fees under section 6F may not be assessed as a counterclaim and may only be assessed after a “finding, verdict, award, order, decree, judgment has been made.”<sup>163</sup> All Massachusetts trial courts, except the district court, are included in the statutory scheme.<sup>164</sup>

In contrast, North Dakota compels the losing party to pay attorney’s fees for a frivolous claim even if brought in good faith – but under an objective and rigorous standard.<sup>165</sup> The statutory standard in North Dakota is whether there is such a “complete absence of actual facts or law” that no reasonable person could believe that the claim would be adjudicated in his favor.<sup>166</sup> The prevailing party must have alleged the frivolous nature of the claim in the responsive pleading to recover.<sup>167</sup>

Several states have devised other means to deal with the subject of post-verdict sanctions for frivolous claims. Indiana has not passed a statute directly on point, but its courts have drawn on the inherent equitable power of its courts to allow attorney’s fees to be taxed if the action is asserted or defended in bad faith.<sup>168</sup> Vermont’s Rules of Civil Procedure provide that if service or filing occurred in an untimely manner and if the action was vexatiously commenced, the court may award reasonable attorney’s fees as costs.<sup>169</sup>

153. *Id.* at 253-54.

154. *Id.* at 253.

155. *Id.* at 254.

156. *Gos*, 403 Mass. at 256.

157. *Id.* at 257 (citation omitted).

158. The traditional rules have permitted fee shifting in five limited instances. (1) As costs in accordance with statutory provisions or court rules. *See, e.g.*, MASS. GEN. LAWS ch. 93A, § 9(4) (2006); *Boynton v. Tarbell*, 272 Mass. 142, 144-46 (1930); *Floors, Inc. v. V.G. Danis of New England, Inc.*, 7 Mass. App. Ct. 356, 358-60 (1979), *aff’d*, 380 Mass. 91 (1980). (2) As damages, in certain circumstances where the fees flowed directly from the alleged wrongdoing. *See, e.g.*, *Hartford Accident & Indem. Co. v. Casassa*, 301 Mass. 246, 254-56 (1938); *M.F. Roach Co. v. Town of Provincetown*, 355 Mass. 731, 732-33 (1969). (3) In accordance with some statutory provisions under which the allowance may not be clearly categorized at all. *See e.g.*, *Commissioner of Insurance v. Mass. Accident Co.*, 318 Mass. 238, 241-43 (1945). (4) Pursuant to a valid contractual provision or stipulation. *See e.g.*, *Everett Credit Union v. Allied Ambulance Serv., Inc.* 12 Mass. App. Ct. 343, 347-50 (1981). And (5) by the successful SLAPP litigant under MASS. GEN. LAWS ch. 231 §59H (2006). *See Office One, Inc. v. Lopez*, 437 Mass. 113, 126 (2002) (“We read this language to mean that attorney’s fees and costs are mandatory for successful special motions, and the amount of the award need not be limited to legal work incurred in bringing the special motion itself. This interpretation is consistent with the Legislature’s intent to enact broad protection for petitioning activities and serves as well the statute’s specific goal of resolving ‘SLAPP’ litigation ‘quickly with minimum cost.’”) (quoting *Duracraft Corp. v. Holmes Prod. Corp.*, 427 Mass. 156, 161 (1998) (quoting preamble to 1994 House Doc. No. 1520) (footnote omitted)). The SJC in *Bournemouth Hospital, Inc. v. Massachusetts Commission Against Discrimination* summarized the case law and noted that in the absence of specific legislation or extraordinary circumstances, an award of attorney’s fees in generally not appropriate. 371 Mass. 303, 311-13 (1976).

159. MASS. GEN. LAWS ch. 231 § 6F (2000) provides:

Upon motion of any party in any civil action in which a finding, verdict, decision, award, order, or judgment has been made by a judge or justice or by a jury, ... or other finder of fact, the court may determine, after a hearing, as a separate and distinct finding that all or substantially all of the claims, defenses, setoffs or counterclaims, whether of a factual, legal, or mixed nature made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. The court shall include in such finding the specific facts and reasons on which the finding is based.... If such a finding is made with respect to a party’s defenses, setoffs or counterclaims, the court shall award to each party against whom such defenses, setoffs or counterclaims were asserted ... an amount representing the reasonable counsel fees, costs and expenses of the claimant in prosecuting his claims or in defending against those setoffs or counterclaims found to have been wholly insubstantial, frivolous, and not advanced in good faith.

160. *See Statute Relating to Costs or Attorneys’ Fees at Commencement or at Termination of Action as Controlling*, 96 ALR 1428 (2008 Supplement); *Award of Counsel Fees to Prevailing Party based on Adversary’s Bad Faith, Obduracy, or Other Misconduct*, 31 A.L.R. Fed. 833 (1977).

161. MASS. GEN. LAWS ch. 231, § 6F (2008).

162. *Id.*

163. *Id.*

164. *Isaacson v. Isaacson*, 2000 Mass. App. Div. 233, \*3 (2000).

165. N.D. CENT. CODE § 28-26-01(2) (2006).

166. *Id.*

167. *Id.*

168. *Kikkert v. Krumm*, 474 N.E.2d 503, 505 (Ind. 1985).

169. Vt. R. Civ. P. 3.

The most recent SJC case construing Massachusetts sections 6F, applicable at the trial level, and 6G, applicable at the appellate level, is *Hahn v. Planning Board of Stoughton*.<sup>170</sup> The case had its genesis when 14 Stoughton residents attempted to set aside approval of a subdivision plan by the defendant planning board.<sup>171</sup> A trial judge granted summary judgment for the defendants, refusing simultaneously to allow plaintiff's motion to amend their complaint, stating that the proposed amendment was "immaterial if not frivolous..."<sup>172</sup> With respect to an intervenor-developer's motion for attorney's fees incurred in defending against the motions to amend and to reconsider, the judge ruled, "after extensive hearing — no action taken at this time as I anticipate appeal by plaintiff ... and am reluctant to cause a 'chilling effect' by allowing this motion [pursuant to section 6F]."<sup>173</sup> When reviewing the trial judge's eventual award of counsel fees, the SJC noted, "An award of attorney's fees ... requires a showing that ... claims were not advanced in good faith. Good faith implies an absence of malice, an absence of design to defraud or to seek an unconscionable advantage."<sup>174</sup> Federal Rule 11 imposes sanctions upon actions that are not in good faith, i.e., those "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."<sup>175</sup>

Based on the cited standard, and the extensive record developed by the trial judge, the *Hahn* court upheld the trial judge's assessment of counsel fees which occurred after the Appeals Court affirmed the judgment.<sup>176</sup> The SJC refused to assess further fees under section 6G<sup>177</sup> for the appeals, concluding that the plaintiffs' "frivolous undertaking might be based upon poor judgment, rather than an absence of good faith, insincerity, or ill will."<sup>178</sup>

The SJC recognized that the bad-faith part of the two-prong test under section 6F requires a quantum of evidence sufficient to persuade the trial judge that the claim was pursued with some malicious or improper motive.<sup>179</sup> Often Massachusetts trial judges decide this issue solely by examining the subjective beliefs of the claimant rather than inferring bad faith from the facts. Trial judges are disinclined to conclude bad faith in instances where the claimant holds an honest belief, and accordingly are reluctant to assess the claimant's perceptions.<sup>180</sup> Such consideration skews the statutory test in favor of not sanctioning a party who nevertheless pursues a transparent claim or defense to harass the opponent. Although determining bad faith is distinct from resolving whether the claim

is frivolous and insubstantial, often an improper purpose can be inferred from an attorney's failure to "continually review, examine, and re-evaluate his position ... as the facts come to light."<sup>181</sup>

Thus, in *Cohen v. Hurley*,<sup>182</sup> the Appeals Court upheld the award of fees and expenses to defendants where the plaintiff brought his opposition to a major subdivision proposal knowing that it was objectively groundless.<sup>183</sup> Tracking the requirement of section 6F, the trial judge had concluded that the opposition amounted to a "form of coercion to obtain a collateral advantage."<sup>184</sup> The *Cohen* case underscores that the frivolous nature of a suit may compel the inference that the legal process is being perverted to achieve an improper end such as harassment, as distinct from simply pursuing a weak case to an unsuccessful conclusion.<sup>185</sup>

The other aspect of the test requires the trial judge to determine the substantiality of the claim.<sup>186</sup> It is clear that a claim is not frivolous simply because the issue is novel or unusual.<sup>187</sup> Unlike the disparate tests under federal and Massachusetts Rule 11, the standard is neither wholly subjective nor wholly objective; it implicates both criteria.<sup>188</sup> In *Katz v. Savitsky*,<sup>189</sup> a case dealing with intentional and wrongful interference with contractual rights, the Appeals Court stated upon examination of the pleadings and deposition transcripts: "[i]t is clear from the papers that when the action was brought, neither the plaintiff nor his counsel had ... any reason to believe that any of the defendants was even aware of any contractual relationship [affected by the alleged interference]."<sup>190</sup> The imposition of sanctions in *Katz* was predicated on the Appeals Court's finding that a reasonable inquiry by counsel would have revealed that there was no factual basis for the complaint's allegation that defendants intentionally interfered with plaintiff's contractual rights.<sup>191</sup> Therefore, section 6F permits trial judges to impose sanctions when lawyers or parties fail to conduct a reasonable pre-filing inquiry if they also have an improper purpose or motive for filing.

From a procedural standpoint, some trial judges prefer to defer the decision on the imposition of section 6F sanctions until after any appeal on the underlying case is resolved. Other trial judges address the matter after hearing the post-trial 6F motion, reduce their conclusions to written findings and incorporate the decision into the record for appeal purposes. Either method is appropriate.<sup>192</sup>

General Laws chapter 231, section 6G<sup>193</sup> provides a right of appeal to any party aggrieved by a decision on a §6F motion.<sup>194</sup> However,

170. 403 Mass. 332 (1988).

171. *Id.* at 333.

172. *Id.*

173. *Id.*, Here, the trial judge deferred the hearing on the imposition of counsel fees under section 6F, until the Appeals Court had passed on allowance of the defendants' motion for summary judgment. *Id.* After the Appeals Court affirmed, the matter was remanded to the trial judge for assessment of fees. *Id.* at 339.

174. *Id.* at 337. See BLACK'S LAW DICTIONARY 762 (9th ed. 2009).

175. *Hahn*, 403 Mass. at 337.

176. *Id.*

177. See *infra* Section V.

178. *Hahn*, 403 Mass. at 338.

179. *Id.* at 337.

180. But see *Mass. Adventura Travel, Inc. v. Mason*, 27 Mass. App. Ct. 293, 299, (1989) ("where as here a claim is advanced which is essentially unsupported by evidence, we hold that a subjective belief of a person in his claim may be ruled, in the trial court and on appellate review, not to preclude an award under these sections"). Further appellate review was denied in 405 Mass. 1203 (1989).

181. *Woodfork v. Gavin*, 105 F.R.D. 100, 104, 106 (N.D. Miss. 1985) (footnote

omitted) (interpreting the "improper purpose" requirement in [1983 version of] Fed.R.Civ.P. 11, to be analogous to the bad-faith element of Mass. Gen. Laws ch. 231, § 6F).

182. 20 Mass. App. Ct. 439 (1985).

183. *Id.* at 442.

184. *Id.*

185. *Id.* at 442-43.

186. *Id.* at 441.

187. See *Allen v. Batchelder*, 17 Mass. App. Ct. 453, 458 (1984).

188. See *Mass. Adventura Travel, Inc. v. Mason*, 27 Mass. App. Ct. 293, 299 (1989).

189. 10 Mass. App. Ct. 792 (1980).

190. *Id.* at 797.

191. *Id.* The Appeals Court declined to pass on the question whether plaintiff's counsel should be disciplined under Rule 11(a) but the standards are obviously similar. *Id.* at 797 n.7; see *supra* Section I.

192. *Hahn v. Planning Bd. of Stoughton*, 403 Mass. 332, 336 (1988).

193. See *infra* Section V for a discussion of Section 6G.

194. MASS. GEN. LAWS ch. 231, § 6G (2006).



the appeal must be filed within ten days of receiving notice of the adverse decision.<sup>195</sup> *Vittands v. Sudduth*<sup>196</sup> makes clear the deleterious consequences that flow from the failure to observe this requirement. In *Vittands*, residents of the Magnolia section of Gloucester, Massachusetts, initiated an arguably vexatious lawsuit to block the development of a neighboring vacant lot.<sup>197</sup> Vexed by this action, Judith Sudduth, trustee for that lot, counterclaimed against the neighbors seeking, among other things, costs under section 6F.<sup>198</sup> On appeal from the denial of Sudduth's claim for costs under section 6F, the Appeals Court held that it lacked jurisdiction to decide the matter because Sudduth had failed to perfect her appeal within the allotted ten-day period.<sup>199</sup>

## V. SANCTIONS FOR ABUSES OF APPELLATE RIGHTS

### A. Sources of Sanctions

There are three sources of statutory authority for sanctions for abuse of appellate rights. First, General Laws chapter 211A section 15 provides for double costs as a sanction for frivolous appeals.<sup>200</sup> It is reserved for those instances where there is no conceivable basis for the appeal.<sup>201</sup> It has also been held that an appeal on a grossly inadequate record was frivolous, entitling appellees to double costs.<sup>202</sup> And factually unsupported appeals alleging insubstantial exceptions for directed verdicts by trial judges usually draw double costs sanctions.<sup>203</sup>

Second, under Rule 25 of the Massachusetts Rules of Appellate Procedure, an appellate court may award damages as well as costs to the prevailing appellee.<sup>204</sup> This sanctioning device is modeled after Rule 38 of the Federal Rules of Appellate Procedure and allows the court, in its discretion, to award damages in the form of reasonable counsel fees against the losing party if it determines that an appeal

was taken frivolously.<sup>205</sup>

The Massachusetts appellate courts may also assess or review under section 6G the imposition of counsel fees for insubstantial claims brought in bad faith,<sup>206</sup> thus granting appellate courts the same authority to make findings of frivolousness and bad faith as section 6F affords trial judges. It has been held that a single justice has the power to award counsel fees under section 6G, where such an award has been denied in the lower court.<sup>207</sup> Likewise, the appellate courts have authority under section 6G to "withdraw or amend any finding or reduce or rescind any award when in its judgment the facts so warrant."<sup>208</sup> The request for fees need not have arisen in the trial court. Section 6G also authorizes the Appeals Court or a single justice of the SJC to determine whether to impose counsel fees when the request "arises in the appeals court."<sup>209</sup> In this instance, review of the decision rests with the full bench of the SJC.<sup>210</sup> As under section 6F, section 6G mandates an award of attorney's fees in the event that an appellate court finds that an appeal is wholly insubstantial, frivolous, or not advanced in good faith.<sup>211</sup>

In *Katz v. Savitsky*,<sup>212</sup> the Appeals Court suggested that appeals from orders by single justices under section 6G be stayed until the appeal on the underlying case is completed or until it is apparent that no appeal will be taken.<sup>213</sup> The possibility always exists that the disposition of an appeal from the judgment at trial may undermine or obliterate the assessment of counsel fees originally imposed by the single justice.<sup>214</sup>

When a case is filed in the Appeals Court, and subsequent to the decision on appeal, a party or counsel may choose to petition for further review to the SJC.<sup>215</sup> Awards of fees based on frivolous applications for further review are not warranted where frivolous applications may have been based upon poor judgment instead of

195. Section 6G reads, in part: "Any party may file a notice of appeal with the clerk or register of the court hearing the motion within ten days after receiving notice of the decision thereon." *Id.*

196. 49 Mass. App. Ct. 401 (2000).

197. *Id.* at 402-03. The superior court judge characterized their suit as "a needless and costly round of legal duelling." *Id.* at 412.

198. *Id.*

199. *Id.*

200. MASS. GEN. LAWS ch. 211A, § 15 (2006) reads:

If, upon the hearing of an appeal or exceptions in any proceeding, it appears that the appeal or exceptions are frivolous, immaterial or intended for delay, the appeals court may, either upon motion of a party or on its own motion, award against the appellant or excepting party double costs from the time when the appeal was taken or the exceptions allowed, and also interest from the same time at the rate of twelve per cent a year on any amount which has been found due for debt and damages, or which he has been ordered to pay, or for which judgment has been recovered against him, or may award any part of such additional costs and interest.

201. See, e.g., *Ripp v. Schlaikjer*, 8 Mass. App. Ct. 898, 898 (1979) (rescript) (double costs imposed after appeal of trial judge's allowance of summary judgment); cf. *Swiss Credit Bank v. First Mortgage Investors*, 6 Mass. App. Ct. 874, 874 (1981) (rescript).

202. *Riegle v. Terrizzi*, 11 Mass. App. Ct. 977, 978, (1981) (rescript).

203. E.g., *Carlton Ford, Inc. v. Oste*, 1 Mass. App. Ct. 819, 820 (1973) (rescript).

204. Rule 25 of the Massachusetts Rules of Appellate Procedure states: "If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee, and such interest on the

judgment as may be allowed by law." MASS. R. APP. P. 25.

205. The federal rule reads: "If a court of appeals shall determine that an appeal is frivolous it may award just damages and single or double costs to the appellee." FED. R. APP. P. 38. The federal statute, 28 U.S.C. § 1912 (2006), allows for similar sanctions in appeals which the appellate court determines are without substance: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court . . . may adjudge to the prevailing party just damages for his delay, and single or double costs."

206. MASS. GEN. LAWS ch. 231, § 6G (2006) reads, in part, as follows:

Any party aggrieved by a decision on a motion pursuant to section 6F may appeal as hereinafter provided. If the matter arises in the superior, land, housing, or probate court, the appeal shall be to a single justice of the appeals court at the next sitting thereof. If the matter arises in the appeals court or before a single justice of the Supreme Judicial Court, the appeal shall be to a full bench of the Supreme Judicial Court. The court hearing the appeal shall review the finding and award, if any, appealed from as if it were initially deciding the matter, and may withdraw or amend any finding or reduce or rescind any award when in its judgment the facts so warrant.

207. See *Karellis v. Karellis*, 61 Mass. App. Ct. 716, 723-24 (2004).

208. *Id.* at 724.

209. MASS. GEN. LAWS ch. 231, § 6G (2008)

210. *Id.*

211. *Masterpiece Kitchen & Bath, Inc. v. Gordon*, 425 Mass. 325, 330 (1997).

212. 10 Mass. App. Ct. 792 (1980).

213. *Id.* at 795.

214. *Id.*

215. MASS. GEN. LAWS ch. 211A, § 10 (2006).

absence of good faith, insincerity, or good will.<sup>216</sup>

## B. Procedure for the Award of Appellate Attorney's Fees

In *Yorke Management v. Castro*,<sup>217</sup> the SJC clarified the procedure for the award of attorney's fees for appellate legal work. A party seeking an award of attorney's fees should request them in his or her brief.<sup>218</sup> If the requesting party prevails and the appellate court determines that an award of attorney's fees is appropriate, that party may then submit a petition for fees along with the necessary back-up material and details as to the hours spent, the precise nature of the work, and the fees requested.<sup>219</sup> The other party should then be given a reasonable time to respond.<sup>220</sup> Subsequent cases applying *Yorke Management* and its progeny have construed a reasonable time to mean approximately thirty days.<sup>221</sup> After the petition and its response have been submitted, the court will refer the matter to a single appellate justice for determination of the amount of the award. If necessary, the single justice may request more data and may set down the matter for hearing before rendering a decision.<sup>222</sup>

But the practice of referring the fee determination to a single justice has proved to be inefficient. All too often parties appeal the single justice's decision, either to dispute the amount of the fee award<sup>223</sup> or to re-argue its propriety.<sup>224</sup> Confronted with the latter situation in *Fabre v. Walton*,<sup>225</sup> the SJC modified the procedure established in *Yorke Management* to avoid a second appeal of the single justice's decision on a party's appeal to a full panel.<sup>226</sup> *Fabre* established that

the determination as to whether, and to what amount, appellate attorney's fees are to be awarded will no longer be a matter left to a single justice in the first instance. Instead, the Justices who heard and decided the appeal will consider the supporting legal arguments and the specific amount to be awarded.<sup>227</sup>

The opposing party will still be afforded "a reasonable opportunity to respond to the submission" and "any party aggrieved by the

order may request reconsideration."<sup>228</sup> In the event that a hearing is needed, the single justice will conduct the hearing and make an appropriate recommendation; however, the full panel will retain the ultimate responsibility for dispensing any award.<sup>229</sup>

The basic holding of the *Fabre* decision — that the full panel, rather than a single justice, will now make the determination as to whether and in what amount counsel fees are to be awarded — is plain. Another aspect of the decision is considerably less clear. *Fabre* cited *Yorke Management* for the proposition that a party seeking fees *must* request attorney's fees in his or her brief.<sup>230</sup> But the language of *Yorke Management* certainly does not support that proposition: it simply states that a party "*should* request [fees]" in his or her brief.<sup>231</sup> Misleading language aside, *Fabre* should not be read as changing *Yorke Management's* procedure in this respect. Needless to say, a party who fails to request fees in his or her brief does not lose the opportunity to request attorney's fees at a later time.

## CONCLUSION

Civil sanctions offer useful tools to diminish excessive burdens and expenses on litigants. Rather than dwelling on the negatives of implementation, an occupational hazard that drives lawyers and judges to abandon the field, review of the various sanctions in this article show how these reforms are merely procedural and are not intended to affect substantive rights in the vast majority of cases commenced in state courts or bar meritorious claims. Rather they seek to improve access to the courts by weeding out frivolous claims and dilatory tactics so that bona fide litigants may vindicate their rights as efficiently as possible. When put to a practical test, the rules and statutes preserve enough judicial discretion to permit fair and just application in appropriate cases. Much of this article was devoted to testing the accuracy of this assertion as applied to the excesses that a robust system of litigation ought to control. The various remedies provide the intellectual tools needed to finish the job.

216. *Hahn v. Planning Board*, 403 Mass. 332, 338 (1988).

217. 406 Mass. 17 (1989).

218. *Id.* at 20.

219. *Id.*

220. *Id.*

221. *T&D Video, Inc. v. City of Revere*, 450 Mass. 107, 115-17 (2007).

222. *Yorke Management*, 406 Mass. at 20.

223. *See, e.g., Stowe v. Bologna*, 417 Mass. 199, 203-04 (1994) (holding that single justice did not abuse discretion in computing amount of reasonable

appellate attorney's fees).

224. *See, e.g., Edgar v. Edgar*, 406 Mass. 628, 630 (1990).

225. 441 Mass. 9 (2004).

226. *Id.* at 10-11.

227. *Id.* at 10.

228. *Id.* at 210-11.

229. *Id.* at 211, n.1.

230. *Id.* at 10.

231. *Yorke Management*, 406 Mass. 17, 20 (1989) (emphasis added).

# THIRD-PARTY STANDING TO CHALLENGE IDENTIFICATIONS IN MASSACHUSETTS

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Ordinarily, a defendant is entitled to obtain suppression of evidence only when he can demonstrate that his own constitutional rights have been violated.<sup>1</sup> This requirement of personal injury is known as standing.<sup>2</sup> While Massachusetts has recognized a few exceptions to this general rule,<sup>3</sup> the question of whether a criminal defendant has standing to challenge the identification of a third

party, including an accomplice, has never been squarely addressed in Massachusetts.

More than thirty years ago, in *Commonwealth v. Fillippini*,<sup>4</sup> the Appeals Court equivocated on this very question: “Although we entertain serious doubts as to [the defendant’s] standing to object to an identification made of his codefendant, we proceed to consider his exception for the reason that the jury may have regarded the challenged identification as corroborative of the testimony of [a key prosecution witness].”<sup>5</sup> In *Fillippini*, the Appeals Court concluded that the evidence introduced was insufficient to establish that the identification procedure was unduly suggestive, and so it found it unnecessary to resolve the standing issue.<sup>6</sup>

The Appeals Court recently had another opportunity to weigh in on the question of third-party standing to challenge identification evidence in *Commonwealth v. Nunes*.<sup>7</sup> The facts of *Nunes* are as follows: On the evening of June 7, 2003, Carmen Boy was attacked as she stood outside the door to her home.<sup>8</sup> After a brief struggle, the attacker succeeded in wresting Boy’s purse from her.<sup>9</sup> He fled on foot, got into what Boy described as a “small, dark car,” and drove off.<sup>10</sup> The purse contained a wallet, cash, and various personal items, including a distinctively decorated mirror.<sup>11</sup> Boy promptly reported

1. See *Commonwealth v. Bryant*, 447 Mass. 494, 497 (2006) (the defendant did not have standing to challenge the seizure of computer files from a law firm, for he did not own the premises from which the files were seized and others had free access to the files); *Commonwealth v. Alvarado*, 420 Mass. 542, 543 n.2 (1995) (the defendant had standing to challenge the codefendant’s arrest because he was charged with constructive possession of the cocaine found on the codefendant at the time of his arrest); *Commonwealth v. Albert*, 51 Mass. App. Ct. 377, 378-79 & n.6 (2001) (the defendant, charged with conspiracy to traffic in cocaine, did not have standing to contest the stop and search of the alleged buyer of the drugs; the defendant did not own the truck in which the buyer was stopped, and police officers intruded on the buyer’s, not the defendant’s, privacy right); *Commonwealth v. Tiexeira*, 29 Mass. App. Ct. 200, 207 (1990) (the defendant had no standing to challenge the trial judge’s conclusion that witnesses did not have a valid self-incrimination privilege; the witnesses’ privilege against self-incrimination was personal to them and could not be asserted by the defendant).

2. Standing generally has been defined as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” BLACK’S LAW DICTIONARY 1442 (Bryan A. Garner ed., 8th ed. 2004). See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §9.1(a), at 489 (3d ed. 2000) (under the personal rights approach to standing, the party seeking relief must have an adversary interest in the outcome of the case and also must show a violation of his own rights).

3. As discussed *infra*, these include situations involving both target standing and automatic standing. See *Commonwealth v. Scardamaglia*, 410 Mass. 375, 378-80 (1991) (leaving open the question whether to adopt target standing under Article Fourteen of the Massachusetts Declaration of Rights); *Commonwealth v. Amendola*, 406 Mass. 592, 601 (1990) (when a defendant is charged

with a crime in which possession of the item seized is an element, he has automatic standing to contest the search).

4. 2 Mass. App. Ct. 179 (1973).

5. *Id.* at 188. The cardinal facts of *Fillippini* are as follows: William Fillippini, Ralph Andrews, and James, John and Arthur Pina were charged in a single indictment with armed robbery while masked in connection with a bank robbery. *Id.* at 180. An eyewitness viewed a photographic array and selected “a photograph of Fillippini as the man she had seen leaving the Rockland Trust Company at the time of the robbery.” *Id.* at 188. The witness had viewed arrays of approximately twenty photographs on four separate occasions, and she believed that some of the photographs, but not that of Fillippini, had been included in more than one array. *Id.* The same witness subsequently made an in-court identification of Fillippini, as well. *Id.* Codefendant Andrews sought to suppress both of these identifications. *Id.* at 187-88.

6. *Id.* at 188. In *Tennessee v. Petty*, 1985 Tenn. Crim. App. LEXIS 3182 (July 19, 1985), the court took the same approach that the Appeals Court adopted in *Fillippini*; viz, it determined that there was no impermissible suggestiveness in the identification procedure without deciding whether the defendant had standing to resolve the point. *Id.* at \*5-\*6.

7. No. 06-P-317, 2007 WL 2409861 (Mass. App. Ct. Aug. 24, 2007) (a summary disposition issued under Rule 1:28 of the Massachusetts Appeals Court Rules for the Regulation of Appellate Practice).

8. *Id.* at \*1.

9. *Id.*

10. *Id.*

11. *Id.*



the robbery to police, and she described her assailant as thin, slightly taller than she, clad in black clothing, and wearing a cap that “comes all the way down and then you can only see the eyes.”<sup>12</sup>

Approximately one hour later, Obdulio Lopez was the victim of a similar attack, which occurred in close proximity to the attack on Boy.<sup>13</sup> Lopez could not provide a good description of his attacker except to say that he was young, of average height, “not that slim not that fat,” wore a black cap and a black sweatsuit, and had “some facial hair” on his upper lip.<sup>14</sup> However, Lopez did get a clear view of the attacker’s vehicle, a dark Toyota Camry sedan, and he recalled five characters – 756 RK – on its license plate.<sup>15</sup> Lopez telephoned police, who immediately responded to the scene of the second assault.<sup>16</sup> While patrolling the surrounding streets, police located a dark brown Toyota sedan with license plate number 7561 RK – nearly an exact match with Lopez’s description – that contained three men, Juan Guevara, Pablo Himatubt and the defendant.<sup>17</sup> Police officers seized a pocketknife from Himatubt that matched the description of the knife used in the attack on Lopez.<sup>18</sup>

Police then contacted Boy and drove her to the spot where the three men were being held. They told her that they had “captured some people” and they wanted her “to see if one of those people could have been the person that did this to [her].” As the men stood handcuffed, with the Toyota parked nearby and in sight, Boy identified the man standing to the right – apparently Himatubt – as the man who had attacked her.<sup>19</sup> At that point, police placed Himatubt, Guevara and the defendant under arrest.<sup>20</sup> A subsequent search of the passenger compartment of the Toyota yielded several items connected to the robberies of Boy and Lopez, including the distinctively decorated mirror that was taken from Boy.<sup>21</sup> Before trial, the

defendant sought to suppress the identification procedures used to implicate Himatubt, and so obtain suppression of the inculpatory (as to the defendant) evidence found in the Toyota and seized incident to Himatubt’s arrest.<sup>22</sup>

Thus, as in *Fillippini*, the defendant in *Nunes* sought to suppress the identification of a codefendant.<sup>23</sup> Unlike in *Fillippini*, however, the court in *Nunes* determined that the identification procedures used by police were, in fact, unduly suggestive, and ordered the contested identification evidence suppressed.<sup>24</sup> To the extent that the defendant in *Nunes* obtained relief, the court might appear, at least at first glance, to have acknowledged the right of a third party to contest identification evidence. However, a close reading of the decision suggests otherwise.

In the first instance, the Appeals Court repeatedly emphasized in *Nunes* that the outcome was driven largely by equitable considerations; viz, that depriving the defendant of standing to challenge his codefendant’s identification would have unfairly benefitted the Commonwealth.<sup>25</sup> The government, the court pointedly observed, had relied heavily on the identification of Himatubt to inculcate the defendant, both in the grand jury proceedings and during the hearing on the defendant’s motion to suppress.<sup>26</sup> The court then went on to suggest that permitting the defendant to challenge the identification was premised on principles of estoppel (or some close cognate), rather than any traditional concept of standing.<sup>27</sup> Further, the court in *Nunes* was plainly troubled by the patently suggestive identification procedures used by police.<sup>28</sup> It may well be that the Appeals Court simply felt compelled to sanction the government for its misconduct, and so brushed aside any defects in the defendant’s standing.<sup>29</sup>

12. *Id.*

13. *Nunes*, 2007 WL 2409861, at \*1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Nunes*, 2007 WL 2409861, at \*3.

20. *Id.* at \*2

21. *Id.*

22. *Id.* at 3. Although the defendant plainly sought to suppress the identification of a codefendant, none of the parties, either at trial or in their briefs on appeal, expressly raised the issue of third party standing. Nonetheless, in view of the nature of the defendant’s claim, the issue was squarely before the Appeals Court however denominated. *Id.*

23. *Id.* at \*2. The Appeals Court noted that the parties disputed whether the defendant or his codefendant was the person who had been identified. *Id.* But the Appeals Court agreed that the motion judge believed that the codefendant, not the defendant, had been identified by the witness. *Id.* at \*3 n.10.

24. *Id.* at \*3-\*5.

25. *See Nunes*, 2007 WL 2409861, at \*2 & n.7, \*5.

26. *Id.* at \*2 n.7.

27. *See Commonwealth v. Gardner*, 67 Mass. App. Ct. 744, 747 (2006).

28. The court noted that the suspects were viewed in close proximity to a vehicle that matched Boy’s description of the getaway car, that they were handcuffed at the time of the identification, and that the man identified by Boy was forced to stand apart from the other suspects. *Nunes*, 2007 WL 2409861, at \*3. Further, the court laid special stress on the fact that Boy’s identification was more an identification of the clothing worn by her attackers than of the men

themselves. *Id.* All of these circumstances, the court concluded, significantly increased the likelihood of a misidentification. *Id.* at \*2-\*5.

Moreover, the holding in *Nunes* was likely also informed by the fact that the showup identification procedure was *unnecessarily* suggestive. *Id.* at \*5. *See Commonwealth v. Martin*, 447 Mass. 274, 279-80 (2006) (unnecessarily suggestive show-up identifications are per se unlawful). It would have been a simple matter for police to remove some of the suspects’ clothing that matched the victims’ descriptions, or to place the suspects along the street so that the Toyota was not visible to Boy during the identification. Stated differently, there was no “good reason” for police to use the identification procedure employed in this case. *See Id.* at 279 (quoting *Commonwealth v. Harris*, 395 Mass. 296, 299 (1985)). The question of *unnecessary* suggestiveness, taking stock as it does of the practical realities of police work, inevitably impacts a reviewing court’s analysis in a case like *Nunes*.

Finally, the Appeals Court also considered the unreliability of Boy’s identification in concluding that police procedures were impermissibly suggestive. *Nunes*, 2007 WL 2409861, at \*2-\*5. While ordinarily the question of reliability would run only to weight, the court in *Nunes* determined that the danger of impermissible suggestiveness is increased – and so the bar for establishing same is lowered – in situations where the basis for a witness’ identification is weak. *Id.* at \*3. For example, where an eyewitness has a limited opportunity to observe an individual at the time a crime is committed, the likelihood that suggestive features of an identification procedure will produce an unreliable result is sharply increased. Here, the motion judge found that Boy had only a fleeting chance to see her attacker and was not even able to identify his race. *Id.* at \*3. In these circumstances, the Appeals Court concluded that the impact of the suggestive elements of the show-up affected Boy’s identification was necessarily significant. *See Nunes*, 2007 WL 2409861, at \*5.

29. *See Commonwealth v. Price*, 408 Mass. 668, 673 (1990) (recognizing vicarious standing in cases involving “serious police misconduct” or “fundamental unfairness”).

In any event, regardless of its motivations or rationale, the court in *Nunes* emphasized that, as in *Filippini*, it would not reach the merits of the standing issue.<sup>30</sup> At best, these two cases merely acknowledge the possibility of third-party standing to challenge identification procedures.<sup>31</sup> The law in Massachusetts, therefore, remains uncertain on this point.

In this regard, Massachusetts is by no means an outlier. The question of whether a defendant has standing to contest a codefendant's identification has not received wide review, and there is a wide divergence of opinion among the few courts that have considered the issue. In *United States v. Jones*,<sup>32</sup> a defendant moved to suppress a plainly inculpatory (to him) identification of a codefendant, asserting "his own due process right to be protected from admission against him of evidence so unreliable that it deprives him of a fair trial."<sup>33</sup> The court determined that the defendant lacked standing to press such a claim, holding that the defendant's "contention, if sound, would vest every participant in an alleged conspiracy with vicarious standing to assert any other participant's Fifth Amendment right to a 'reliable' identification of that other participant, even where (as [here]) that other participant makes no constitutional claim of [his] own."<sup>34</sup>

The court in *Jones* purported to rely on *Romano v. United States*,<sup>35</sup> in which the court held that the defendant's motion to suppress an allegedly suggestive pretrial identification was meritless.<sup>36</sup> However, it is by no means clear that the court in *Romano* rejected the defendant's claim on standing grounds. Moreover, the identification at issue in *Romano* was not that of a codefendant, but that of a percipient witness.<sup>37</sup> Finally, the defendant's claim in *Romano* also differed from the situation in *Jones* in that it arose chiefly as a claim under the Sixth Amendment to the United States Constitution – the identification in question was post-arrest, and so the right to counsel had attached – arguably a distinctly personal right.<sup>38</sup>

Nonetheless, the approach adopted by *Jones* has been followed in at least one other jurisdiction. In *Ohio v. Walker*,<sup>39</sup> an intermediate appellate court concluded that "a participant in an alleged conspiracy [does] not have standing to attempt to suppress [the] identification of a co-conspirator."<sup>40</sup> In reaching this result, the court

in *Walker* reasoned that "[c]onstitutional rights are personal rights which cannot be vicariously asserted," expressly relying on the federal district court ruling in *Jones*.<sup>41</sup> Similarly, in another case from the same jurisdiction, *Ohio v. Shipman*,<sup>42</sup> the court concluded, without discussion or case citation, that since a contested identification "concerned solely identification of [a] codefendant ... [the defendant] has no standing to challenge such identification testimony."<sup>43</sup>

By contrast, in *State v. Miller*,<sup>44</sup> the South Carolina Supreme Court recently concluded that a criminal defendant *did* have standing to contest the lawfulness of a showup identification of a codefendant, where the identification would be used to link the defendant to the crime with which he was charged.<sup>45</sup> The court began its analysis by reciting the general rule prohibiting defendants, in most cases, from asserting the Fourth Amendment rights of another in order to obtain suppression of inculpatory evidence. However, the court then went on to observe that in cases involving alleged suggestive identifications, "[u]nlike Fourth Amendment cases ... the concern ... is not whether one's personal constitutional rights were violated in obtaining the evidence, but whether the evidence obtained is unreliable."<sup>46</sup> Where evidence is deemed fundamentally unreliable, the court reasoned, due process principles would be offended if it were offered as material proof of guilt in *any* criminal proceeding.<sup>47</sup> On this basis, the court in *Miller* concluded that the defendant "has standing to challenge the fairness of the showup identification of [his codefendant]."<sup>48</sup>

Applying similar reasoning, the California Supreme Court likewise determined in *People v. Bisogni*,<sup>49</sup> that a defendant was entitled to seek suppression of an allegedly suggestive showup identification of a codefendant. Specifically, the court held that "whenever the identity of a confederate is essential to prove the defendant's participation in a crime and when ... such evidence effectively destroys the defense offered by the defendant, he has standing to challenge [its] fairness ..."<sup>50</sup> The California Supreme Court, in affording a defendant standing to press a motion to suppress in such cases, relied on essentially the same reasoning as its South Carolina counterpart:

The reason for excluding identification evidence based on an unfairly conducted showup is that such evidence

30. *Nunes*, 2007 WL 2409861, at \*2 & n.8.

31. In the end, much like the situation in *Filippini*, granting the defendant standing availed him nothing. While the court in *Nunes* did suppress the identification evidence, it did not suppress any of the evidence obtained after the arrest of the codefendant – the defendant's real aim. *Id.* at \*5-6.

The Appeals Court held that even if police lacked probable cause to arrest the defendant before the car was searched, there is no question that there was sufficient evidence to arrest Himatubt. *Id.* at \*5. He was found near the scene of the second robbery, inside an automobile that matched Lopez's detailed description of the getaway vehicle, wearing clothing described by both Boy and Lopez, and carrying a knife that matched the description of the weapon used in the attack on Lopez. *Id.* Once Himatubt was placed under lawful arrest, police had authority to conduct at least a cursory search of the passenger compartment of the car without a warrant under either the "automobile exception" to the warrant requirement, or as a search incident to arrest. *Id.*

On the basis of the foregoing, the Appeals Court affirmed so much of the motion judge's order as applied to "the in-court and out-of-court identifications of the defendant by the [victims]," and otherwise reversed the order. *Id.* at \*6. The case was thereafter remanded to the superior court. *Id.* Thus, as in *Filippini*, the defendant achieved a pyrrhic victory at best; the physical evidence obtained during the search of *Nunes*, Guevara and Himatubt, as well as the search of the car, provided compelling evidence of the defendant's guilt.

32. 652 F.Supp. 1561 (S.D.N.Y. 1986).

33. *Id.* at 1572.

34. *Id.*

35. 460 F.2d 1198 (2d Cir. 1972).

36. *Id.* at 1199.

37. *Id.*

38. *Id.*

39. 1987 Ohio App. LEXIS 7312, at \*17 (June 5, 1987).

40. *Id.* at \*17.

41. The court in *Walker* also purported to rely on *Smith v. United States*, 343 F.Supp. 1315 (W.D.Pa. 1972), in which the court, in reviewing a claim of ineffective representation, stated that a motion to suppress aimed at, inter alia, excluding the identification of a codefendant, "would have been a futile gesture." *Id.* at 1318. However, the court in *Smith* did not indicate whether its result was based on the merits or on considerations of standing.

42. 1983 Ohio App. LEXIS 11880 (May 11, 1983).

43. *Id.* at \*3.

44. 626 S.E.2d 328 (S.C. 2006).

45. *Id.* at 331-32.

46. *Id.* at 331.

47. *See id.*

48. *Id.*

49. 483 P.2d 780 (Cal. 1971).

50. *Id.* at 785.

is unreliable as a matter of law and may result in the conviction of innocent persons. Obviously such evidence is equally unreliable when it is directed toward the identity of a coparticipant in a crime as when it relates to the identity of the defendant on trial.<sup>51</sup>

Finally, the Supreme Court of New Jersey also held that a defendant has standing to challenge identification procedures used in connection with the identification of a codefendant. Provided a defendant “is not simply an interloper and the proceeding serves the public interest,” the court stated in *State v. Clausell*<sup>52</sup> that a defendant may challenge third party identifications.<sup>53</sup> In *Clausell*, having found that the “defendant has a substantial personal stake in the admissibility of the identification evidence,” the court permitted the defendant to seek suppression of both the voice and physical identifications of an accomplice.<sup>54</sup>

Examining the approaches adopted by these other jurisdictions, Massachusetts’ law is most closely aligned with the view delineated by the supreme courts of California, South Carolina and New Jersey. Certainly, these decisions comport best with the commonwealth’s traditionally liberal approach to vicarious standing. Indeed, Massachusetts has endorsed, as a matter of state constitutional law, the concept of automatic standing,<sup>55</sup> despite the fact that automatic standing was rejected by the United States Supreme Court nearly thirty years ago in *United States v. Salvucci*.<sup>56</sup> In addition, the Supreme Judicial Court (“SJC”) has left open the possibility of recognizing target standing<sup>57</sup> in Massachusetts, a doctrine which, as noted in *Commonwealth v. Scardamaglia*,<sup>58</sup> has been rejected by both the Supreme Court in *Rakas v. Illinois*,<sup>59</sup> and virtually every other state jurisdiction.<sup>60</sup> Finally, in *Commonwealth v. Price*,<sup>61</sup> the SJC held that “special standing” may be conferred on a defendant to challenge violations of the constitutional rights of another where police conduct is particularly egregious.<sup>62</sup> As the court noted in *Price*, “art. 14 rights extend beyond those stated in the Fourth Amendment in order to protect against improper government conduct.”<sup>63</sup>

Further, the California, South Carolina and New Jersey decisions also have a strong commonsense appeal. There is a fundamental difference in the basis underlying suppression of evidence as a remedy for the violation of a defendant’s privacy right under the Fourth Amendment to the United States Constitution or Article Fourteen of the Massachusetts Declaration of Rights, as opposed to the basis for suppression in cases where identification procedures are deemed unduly suggestive. In the former situation, suppression is wholly unrelated to the quality of the evidence obtained; indeed, in such cases, there is every reason to believe the excluded evidence is altogether reliable. Rather, in these situations, the exclusionary rule

plays a purely normative role, encouraging police compliance with constitutional constraints on governmental authority. This normative effect may not be significantly enhanced by enlarging the range of persons who may seek redress for such violations.<sup>64</sup>

By contrast, in cases involving impermissibly suggestive identifications, the defect runs directly to the basic reliability of the evidence. As the California Supreme Court noted in *People v. Bisogni*, “such evidence is equally unreliable when it is directed toward the identity of a co-participant in a crime as when it relates to the identity of the defendant on trial.”<sup>65</sup> There is no sound reason for drawing a distinction between the two situations. Thus, permitting a defendant to challenge an allegedly defective identification, whether of the defendant or otherwise, can be justified by reference to the traditional probity/prejudice calculus applicable to all evidence.<sup>66</sup>

Despite both its intuitive appeal, and the extent to which it would harmonize with preexisting Massachusetts law, courts in the commonwealth, as noted already, have steadfastly refused to undertake any substantive review of this issue, let alone adopt a rule permitting third-party challenges to identifications. Since the Appeals Court, in both *Fillippini* and *Nunes* simply assumed *arguendo* that the defendant had the right to challenge the identification of a codefendant, any discussion of the matter in these decisions is necessarily *dicta*. It is, perhaps, suggestive of the direction the Appeals Court might take that, at least in *Nunes*, the defendant succeeded in obtaining suppression of the identification of a codefendant. However, since the court specifically refrained from ruling on the matter, any such inference is necessarily speculative.

In view of the amount of attention the general topic of vicarious standing has received in Massachusetts, it is surprising that the question of third-party standing in the context of identification evidence has not been resolved here. Certainly it has not been for lack of opportunity in view of *Fillippini* and *Nunes*. In terms of predicting the rule that might be adopted in some future case, several considerations seem relevant: (1) first and foremost, Massachusetts courts have always taken a liberal approach to the concept of vicarious standing in general, (2) the view favored by the courts of California, South Carolina and New Jersey has strong appeal, framed as it is in terms of reliability and materiality rather than any normative considerations,<sup>67</sup> and (3) while *Nunes* expressly refrained from establishing a rule, the fact that the defendant obtained relief in that case by asserting the rights of his codefendant suggests that the court, at least in some circumstances, sees value in permitting vicarious challenges to identification evidence. Against this backdrop, a gambling lawyer might well roll the dice on a third-party challenge to an allegedly suggestive identification. Whether, in fact, such a claim would prevail must, of course, await further review.

51. *Id.* at 783 (citations omitted).

52. 580 A.2d 221 (N.J. 1990).

53. *Id.* at 234.

54. *Id.*

55. See *Commonwealth v. Amendola*, 406 Mass. 592, 600-01 (1990).

56. 448 U.S. 83, 90-92 (1980).

57. “Target standing” applies to situations in which police intentionally violate the constitutional rights of a third party in order to obtain evidence inculcating the defendant. *Commonwealth v. Kirschner*, 67 Mass. App. Ct. 836, 845 n.9 (2006). In such circumstances, target standing would permit the defendant to assert the rights of that third party in seeking to suppress any evidence recovered. *Id.*

58. 410 Mass. 375, 377-78 (1991).

59. 439 U.S. 128, 133-38 (1978).

60. *Scardamaglia*, 410 Mass. at 378. See also *Kirschner*, 67 Mass. App. Ct. at 845 n. 9 (leaving open possibility of obtaining standing to press motion to suppress on target standing theory).

61. 408 Mass. 668 (1990).

62. *Id.* at 674.

63. *Id.*

64. See, e.g., *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009) (the exclusionary rule need not be applied in situations where normative potential is minimal).

65. 4 Cal. 3d at 586. cite to P3d

66. *Commonwealth v. Williams*, 56 Mass. App. Ct. 337, 345 (2002).

67. A nontrivial fact, perhaps, in view of the increased scrutiny the exclusionary rule has received in recent years in some quarters, most notably the Supreme Court. See *Herring v. United States*, 129 S.Ct. 695, 700-02 (2009).



# THE LAW OF HUMANITY: TRACING THE HISTORY OF ANIMAL WELFARE LAW IN MASSACHUSETTS, AND ANTICIPATING THE NEXT STEP

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*The question is not, “Can they reason?” nor, “Can they talk?” but rather, “Can they suffer?”*

-Jeremy Bentham

## INTRODUCTION

On November 4, 2008, Massachusetts voters outlawed greyhound racing in the commonwealth by passing Ballot Question 3.<sup>1</sup> Opponents of the initiative claimed that passage would eliminate 1,000 jobs and cost the commonwealth millions of dollars in revenue.<sup>2</sup> Proponents of the ban alleged that racing greyhounds were kept in small cages for 20 hours per day, were frequently injured, and had tested positive for cocaine.<sup>3</sup> Fifty-six percent of voters chose the welfare of dogs over the employment of their fellow citizens.<sup>4</sup> Anyone involved in betting on the speed or ability of dogs in Massachusetts after January 1, 2010, will be subject to a \$20,000 civil penalty.<sup>5</sup> Section 1 of the initiative, passed by over one and one-half million voters,<sup>6</sup> states:

The citizens of Massachusetts find that commercial dog racing is cruel and inhumane, and as recommended by the Humane Society of the United States, the Animal

Rescue League of Boston, GREY2K USA, and the Massachusetts Society for the Prevention of Cruelty to Animals, declare that it should be prohibited in the commonwealth.<sup>7</sup>

The passage of Question 3 is the most recent step in the ongoing development of animal welfare law in Massachusetts. It is an evolution remarkable in its consistency. For over 150 years, the law has continuously expanded the umbrella of protection afforded to Massachusetts’s animals. That expansion has come via many different avenues: from the voters,<sup>8</sup> from the legislature,<sup>9</sup> and from the judiciary.<sup>10</sup>

The first section of this article will trace the development of animal welfare law in Massachusetts. It will follow the history of the law from the adoption of the state’s earliest animal cruelty statutes, to the passage of Ballot Question 3 in 2008. In this timeframe, the law has steadily transitioned away from viewing animals as mere property, towards a view of animals as beings inherently deserving of protection under the law, apart from any economic value that they might have. As was exemplified by the passage of Question 3, the goal of promoting animal welfare has consistently trumped economic concerns associated with expanding protections for animals. Animal welfare law in Massachusetts has continuously adapted to contemporary realities in our society and new perceptions of what is considered “humane.”

In line with these developments, section two of this article will examine an issue likely to see legal action in the future: farm animal welfare. While one might be surprised at how many industries are touched by the animal welfare laws in Massachusetts, from carnivals<sup>11</sup> to schools,<sup>12</sup> there is a surprising dearth of regulation regarding the treatment of farm animals in the commonwealth. It is an issue gaining momentum in a number of other jurisdictions.<sup>13</sup> Given the growing protections that animals receive under Massachusetts law, it seems that the farming industry is ripe for reform. There are a number of welfare concerns regarding the treatment of agricultural animals, some of which other jurisdictions are beginning to address.

1. Office of the Massachusetts Secretary of the Commonwealth, William Francis Galvin, Elections Division 2008 Information for Voters, [http://www.sec.state.ma.us/ele/ele08/ballot\\_questions\\_08/quest\\_3.htm](http://www.sec.state.ma.us/ele/ele08/ballot_questions_08/quest_3.htm)

2. *Id.* (showing that the information on this website was submitted by the Massasoit Greyhound Association, Inc. to the office of the Massachusetts Secretary of State to be made available to voters).

3. *Id.*

4. See Office of the Massachusetts Secretary of the Commonwealth, William Francis Galvin, Elections Division, *Return of Votes for Massachusetts State Election, November 4, 2008*, <http://www.sec.state.ma.us/ele/elepdf/2008%20Return%20of%20Votes%20Complete.pdf>, at 51.

5. The Office of the Massachusetts Secretary of the Commonwealth, William

Francis Galvin, Elections Division, *2008 Information for Voters: Full Text of Question 3*, [http://www.sec.state.ma.us/ele/ele08/ballot\\_questions\\_08/full\\_text.htm](http://www.sec.state.ma.us/ele/ele08/ballot_questions_08/full_text.htm), (to be codified as MASS. GEN. LAWS ch. 128, s. 14E (2009)).

6. *Supra* note 4.

7. *Supra* note 3.

8. *E.g.*, *supra* note 1.

9. *E.g.*, MASS. GEN. LAWS ch. 272, § 77 (2009).

10. *E.g.*, *Commonwealth v. Tilton*, 49 Mass. 232 (1844).

11. *Knox v. Massachusetts Soc. for Prevention of Cruelty*, 425 N.E.2d 393 (1981).

12. MASS. GEN. LAWS ch. 272, § 80G (2009).

13. See Colorado Senate Bill 201 (2008); 2007 Or. Laws ch. 722 (West 2009);

By following the example of those jurisdictions, and contemplating other changes to the law, Massachusetts can begin to extend to farm animals the protections it affords other animals.

## EVOLUTION OF ANIMAL WELFARE LAW IN MASSACHUSETTS

### Beginnings

Massachusetts enacted America's first law prohibiting animal cruelty.<sup>14</sup> "The Liberties of the Massachusetts Collonie in New England" were compiled by Nathaniel Ward and adopted by the General Court of Massachusetts in 1641.<sup>15</sup> It set forth ninety eight liberties, "[t]he free fruition of such liberties, Immunities, and priveleges as humanity, Civility, and Christianity call for."<sup>16</sup> Two of the liberties were classified as "Off the Bruite Creature." They stated: "No man shall exercise any Tyranny or Cruelty towards any bruit Creature which are usually kept for man's use,"<sup>17</sup> and:

If any man shall have occasion to lead or drive Chattel from place to place that is far of, so that they be weary, or hungry, or fall sick, or lamb, It shall be lawful to rest or refresh them, for competent time, in any open place that is not Corne, meadow, or enclosed for some peculiar use.<sup>18</sup>

Despite this early extension of "liberties" to animals, Massachusetts law would soon revert to a more archaic view of animals lasting for more than 100 years.<sup>19</sup>

Early regulation of animals cannot be truly considered animal welfare law. In the early 19<sup>th</sup> century, treatment of many wild animals was governed by statutory classifications of "useful" animals (deer and some species of birds) in which case the preservation of their numbers was encouraged,<sup>20</sup> or "noxious" animals (wolves, foxes, and wild cats) in which case bounties were placed on their heads, literally.<sup>21</sup>

For the most part, at common law, the protection of domestic animals was nothing more than the protection given to any property owned by another person.<sup>22</sup> This thinking was memorialized in a Massachusetts statute enacted in 1804 criminalizing the malicious killing, maiming, disfiguring, or poisoning of the animal ("beast") of another.<sup>23</sup> The classification of animal protection as a form of protection of property rights was recognized in judicial interpretations of the statute as well. In a prosecution under the 1804 statute, Mary Falvey was indicted for poisoning fourteen of her neighbors' hens with rat poison. In upholding her conviction, the Supreme Judicial Court ruled that "destroying or injuring personal property of another need not specify the means or mode of injury."<sup>24</sup>

Although affording some protections to animals, neither the common law protections nor the 1804 statute should be considered part of the body of animal welfare law because they only criminalized acts towards an animal belonging to another.<sup>25</sup> Clearly, the 1804 statute aims to protect only the property interests of another person. It does not criminalize the poisoning of one's own animal, nor maliciously maiming an unowned stray or wild animal. Animals were given no protection due to the fact that they are living beings, but were protected only because they are property with some economic worth.

### The Introduction of Modern Animal Welfare Laws

The perception of animals in the eyes of Massachusetts law changed dramatically in 1835, when the legislature passed the state's first animal cruelty statute in almost 200 years.<sup>26</sup> Compared to the 1804 law, the 1835 statute represented a monumental shift in how the law viewed animals.

According to the 1835 statute, "Every person, who shall cruelly beat or torture any horse, ox, or other animal, whether belonging to himself or another, shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding one hundred

Ariz. Rev. Stat. § 13-2910.07 (West 2009); West's FLA. STAT. ANN. CONST. ART. 10 § 21 (West 2009).

14. CORNELIUS DALTON, JOHN WIRKKALA & ANNE THOMAS, LEADING THE WAY: A HISTORY OF THE MASSACHUSETTS GENERAL COURT 1629-1980, 11-13, (1984).

15. The Liberties of the Massachusetts Collonie in New England (1641) *available online* at <http://www.winthropociety.com/liberties.php>. [hereinafter Liberties of Massachusetts] Technically, the Massachusetts Bay Colony could not adopt any laws repugnant to those of England, however the colonists were directed by the General Court to "consider them as laws". *Id.*

16. *Id.*

17. Liberties of Massachusetts, *supra* note 15, 92.

18. Liberties of Massachusetts, *supra* note 15, 93.

19. The liberties "Off the Bruite Creature" were not incorporated into "The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts," adopted by the General Court in 1648. *See* Liberties of Massachusetts, *supra* note 15. There was a law "preventing of cruelty to bruit creatures" adopted as Chapter 23 of the Province Laws of 1692, however, that law prevented only the transport of live calves, sheep, or lambs to market by slinging them across the back of a horse or hanging them on the side of a horse. Acts and Resolves of the Province of the Massachusetts Bay, 1692-1780, *available at* [http://www.archive.org/details/actsresolvespubl\\_p17mass](http://www.archive.org/details/actsresolvespubl_p17mass) (last visited February 10, 2010).

20. Rev. Stat. ch. 390, § 53 (1835) (titled "Of the Preservation of Certain Useful Birds and Other Animals" setting forth hunting seasons for deer and various types of birds) (*citing* 1817 Mass. Acts ch. 103 (regarding permissible hunting seasons and locations for certain birds), 1817 Mass. Acts ch. 58 (regarding

permissible hunting seasons for deer), 1821 Mass. Acts ch. 10 (regarding hunting seasons for birds found in salt marshes), 1830, Mass Acts ch. 69 (regarding permissible hunting seasons and locations for certain birds), *and* 1835 Mass. Acts ch. 136 (setting forth penalties for killing plovers out of season and for killing with unusual implements)).

21. Rev. Stat. ch. 390, § 54 (1835) (titled "Of the Destruction of Certain Noxious Animals" ordering town treasuries to pay 15 dollars per grown wolf head presented to the town constable, 5 dollars for the head of every wolf whelp (youth), bear or wild cat, and fifty cents for every fox head presented. When presented with such a head, the constable was ordered to cut off the ears and burn them, then issue a certificate to the individual presenting the head. The individual would present the certificate to the town treasurer who would pay the aforementioned sums. The town treasury would then be reimbursed out of the Commonwealth's treasury) (*citing* 1782 Mass. Acts ch. 39 § 1 (pertaining only to wolves)).

22. *America v. Antinori*, 210 So.2d 443, 444 (1968) (stating "Animals were possessed of no inherent right to protection from cruelty or abuse at the hand of man. However, in a more civilized society, it is now generally recognized that legislation which has for its purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power." (*Citing* 4 Am.Jur.2d Animals, Sec. 27)); *But see* Commonwealth v. Tilton, 49 Mass. 232 (1844), 234-235 (citing common law prohibitions against cock-fighting).

23. 1804 Mass. Acts ch. 131, § 4 (now codified at MASS. GEN. LAWS ch. 266, § 112 (2009)).

24. Commonwealth v. Falvey, 108 Mass. 304, 304 (1871).

25. *Id.*

26. Rev. Stat. ch. 130, § 22 (1835).

dollars.”<sup>27</sup> Gone is the requirement that the animal be owned by another. Animals were now something more than property. There were restrictions for how one could treat an animal that he or she bought and owned. The law essentially put animals in a legal class of their own, distinct from other forms of property.

While a commonplace notion today, the 1835 statute was an early recognition in the law that animals were conscious beings, capable of experiencing cruelty, and worthy of protection from that cruelty. The statute prohibits “torturing” and “beating” an animal. These are acts that might not have an effect on the economic value of an animal; their presence in the statute can only be explained by an appreciation for the capacity of animals to suffer.

Another dramatic change involved the notion of “intent.” The 1804 law prohibited certain “malicious” acts towards an animal, while the 1835 law addressed behavior that is “cruel.” The change is a substantive one. The crime of animal cruelty changed from one of specific intent to one of general intent.<sup>28</sup> In interpreting the statute, the Supreme Judicial Court held, “It need not appear that [the defendant] knew that he was cruel, and that he was willing to be so, but only that he intentionally and knowingly did acts which were plainly of a nature to inflict unnecessary pain, and so were unnecessarily cruel.”<sup>29</sup> It shifts the focus from the human committing the act, to the animal on the receiving end of the cruelty. The protection of animals would be enforced regardless of whether or not the perpetrator recognized that he or she was being “cruel.”<sup>30</sup>

These changes are an extreme departure from the 1804 statute, which criminalized malicious acts towards the property of another. The 1835 law deprived a property owner of the ultimate control of his or her own property. Chapter 130 of the Revised Statutes, where the 1835 animal cruelty statute was located, was titled “Of Offenses Against Chastity, Morality, and Decency.”<sup>31</sup> It was found amongst statutes prohibiting adultery,<sup>32</sup> keeping a house of ill fame,<sup>33</sup> incest,<sup>34</sup> blasphemy,<sup>35</sup> and defacing tombs.<sup>36</sup> Not only did the law recognize cruelty to an animal, even one’s own animal, as a crime, but the law classified it as a crime against chastity, morality, and decency, a far cry from the property-focused law of 1804.

### A Matter of Humanity

Nine years after the legislature enacted the 1835 animal cruelty statute, the Supreme Judicial Court issued a ruling recognizing and advancing the developing legal status of animals. The language used in the 1844 decision of *Commonwealth v. Tilton*,<sup>37</sup> is surprisingly strong given that it comes less than a decade after the passage of the 1835 statute criminalizing cruelty to animals. John Tilton was indicted for violating section 9 of chapter 47 of the revised Statutes,

which prohibited innkeepers from holding unlawful games or sports or keeping implementations of those games.<sup>38</sup> Tilton was prosecuted under the statute due to his possession of several gamecocks used for cock-fighting, under the theory that the birds were “implementations” of unlawful games.<sup>39</sup> He pled guilty but appealed the conviction based on a claim that cock-fighting was not prohibited by the statute. The court upheld Tilton’s plea under the statute and proceeded to issue a strongly worded opinion that went well beyond mere statutory interpretation. The court held that, “we are of opinion, that the game or sport of cock-fighting is unlawful, because it is a violation alike of the prohibitions of a statute, and of the plain dictates of the law of humanity, which is at the basis of the common law.”<sup>40</sup> The court continued in language that seemed to not only prohibit cockfighting in the Commonwealth, but also bull-fighting, and bear-baiting (a sport in which a bear would be tied to a post and dogs would be released to “fight” the bear to the death):

The Rev. Sts. c. 130, § 22, have prohibited cruelty to animals, under penalty of fine and imprisonment. But we think it is prohibited by the principles of the common law, as a cruel and barbarous sport. Lord Ellenborough says, in *Squires v. Whisken*, 3 Campb. 141, that “cock-fighting must be considered a barbarous diversion, which ought not to be encouraged or sanctioned in a court of justice.” See also *Rex v. Howel*, 3 Keb. 510. As being barbarous and cruel, leading to disorder and danger, and tending to deaden the feelings of humanity, both in those who participate in it, and those who witness it, it appears to us to stand on the same footing with bull-fighting, bear-baiting, and prizefighting with fists or dangerous weapons, all of which, we think, would be considered as unlawful games or sports.<sup>41</sup>

The court could have resolved the case based solely on an interpretation of the statute. Instead, the Supreme Judicial Court strongly condemned three cruel practices involving three different species of animal based on common law prohibitions against “barbarous diversions” and invoked the “law of humanity” as a fundamental motivation to provide legal protection for animals.

The *Tilton* decision did not, however, effectively put an end to animal fighting in Massachusetts.<sup>42</sup> Despite the court’s strong language regarding the illegality of cockfighting, the legislature still found it necessary to pass a number of statutes designed to put an end to the practice of forcing animals to fight one another for sport. In these early stages of the development of animal welfare law in Massachusetts, aggressive actions were taken by the legislature to enforce the emerging legal protections of animals. At the time, dogs,

27. *Id.*

28. *Commonwealth v. Magoon*, 172 Mass. 214, 215 (1898).

29. *Id.* at 215.

30. *Id.*; See also *Commonwealth v. Curry*, 150 Mass. 509, (1890) (in which the Supreme Judicial Court upheld the conviction of a man who, due to being intoxicated, inadvertently left his horse unattended in the woods overnight), and *Commonwealth v. Erickson*, 74 Mass. App. Ct. 172, 176-177 (2009).

31. Mass. Rev. Stat. ch. 130 (1835).

32. *Id.* § 1.

33. *Id.* § 8.

34. *Id.* § 13.

35. *Id.* § 15.

36. *Id.* § § 20.

37. *Commonwealth v. Tilton*, 49 Mass. 232 (1844).

38. Mass. Rev. Stat. ch. 47, § 9 (1835).

39. See *Battles Between Birds. What Gives Life to Cockfighting*, BOSTON DAILY GLOBE, March 13, 1889 at 5 (describing the “sport” of cockfighting in which two birds are forced to fight one another and stating that “in at least half of the battles of the cockpit, one or both contestants dies in the pit from wounds received, and a large percentage of the remainder are so crippled that they are mercifully put to death by their owners.”).

40. *Tilton* at 234 (emphasis added).

41. *Id.* at 234-235.

42. See *Battles Between Birds. What Gives Life to Cockfighting*, BOSTON DAILY GLOBE, March 13, 1889 at 5 (stating that “The laws long ago took cognizance of cockfighting and forbade it. It is, nevertheless, a live department of sports today and bids fair to continue so for many years to come.”).



rats, and other animals were forced to fight to the death as a form of entertainment.<sup>43</sup> In 1859, the legislature passed laws not only criminalizing engaging animals in fights,<sup>44</sup> but also prohibiting the promotion of<sup>45</sup> and presence at animal fights.<sup>46</sup> It even went so far as to criminalize being present at a location where preparations were being made for an animal fight.<sup>47</sup> Over the next seventeen years, numerous additional statutes relating to animal fighting were adopted. The sheer volume of legislation that arose in apparent response to animal fighting indicates that the legislature was attempting to aggressively deal with a very real and ongoing enterprise in Massachusetts.

### A Massive Overhaul

In 1868, thirty three years after its initial passage, the Massachusetts's animal cruelty statute underwent a dramatic rewriting with the passage of "An Act for the More Effective Prevention of the Cruelty to Animals."<sup>48</sup> This statute was another consequential transition in the law, affording more protections to animals and further eroding the view of animals as simply property. The 1835 statute, which prohibited only cruelly beating or torturing animals,<sup>49</sup> was replaced by a ten-section act that imposed not only new restrictions as to how animals could be treated, but also imposed new affirmative duties on their owners.<sup>50</sup>

In addition to the prohibitions against cruelly beating or torturing an animal as the 1835 law required, the 1868 statute banned overdriving, overloading, tormenting, depriving of necessary sustenance, and cruelly mutilating or killing an animal. The new statute also outlawed causing or procuring any of the aforementioned acts.<sup>51</sup>

Not only did these changes further the concept that animals are more than pieces of property, but they also appear to have extended special protections to agricultural animals. With the use of language like "overload" and "overdrive," these new protections seem to have been aimed at beasts of burden. The only two animals specifically enumerated in the statute, horses and oxen, were procured and maintained for the purpose of hauling plows, pulling carriages, and other work. The law, therefore, limited the amount of work an owner could derive from his or her animals. Likewise, the prohibition on the cruel killing of animals would presumably apply to the slaughter of livestock, whose primary economic value is based entirely on their slaughter. By protecting animals in the agricultural setting, despite the potential costs, the statutory language is an early example of animal welfare concerns trumping economic interests.

Moreover, the 1868 statute is the first time animal owners were tasked with any affirmative duties under the animal cruelty statute.

Any person who had the charge or custody of an animal, whether they were the owner of the animal or not, was required to provide the animal with proper food, drink, and shelter or other protection from the weather.<sup>52</sup> The statute imposed other ongoing duties on owners by criminalizing the cruel abandonment of an animal. The prohibition on abandonment specifically extended to old, maimed, or disabled animals, which presumably would no longer be of economic use to the owner. In essence, the law imposed an ongoing financial burden on animal owners even after the animals had outlasted their economic usefulness.

Over the years, the commonwealth's cruelty statute has been amended several more times to expand the duties placed on an animal owner. In 1972, the language regarding the abandonment of animals was changed. Prior to that time, it was illegal to "cruelly abandon" an animal,<sup>53</sup> but a 1972 statute amended "cruelly" to "willfully."<sup>54</sup> The change was a recognition that abandoning a domestic animal into the wild was an inherently cruel act, regardless of the age, condition, or type of animal. In 1984, another amendment added, for the first time, a requirement that animal owners provide their animals with a "sanitary environment."<sup>55</sup> This continual addition of protections for animals and duties for owners exemplifies the legislature's willingness to place animal welfare above concerns regarding property rights and financial burdens.

### Wild Animals

Domestic animals are not the only types of animals protected under the law in Massachusetts. Animals in nature have been extended an array of legal protections as well.

In 1887, the Supreme Judicial Court issued an opinion that was important to the development of animal welfare law in several respects. In *Commonwealth v. Turner*<sup>56</sup>, the defendant was convicted of violating the animal cruelty statute by letting dogs loose to attack a fox during a fox hunt. The dogs subsequently dismembered the fox. The defendant, Elmer Turner, challenged the conviction on the grounds that fox hunting was legal and his hunting of one, even with dogs, was therefore permissible. Additionally, since wild foxes had been classified as "noxious" under the 1835 statute, Turner claimed that they were not protected by the animal cruelty law.

The court upheld Turner's conviction in a ruling that explicitly addressed the legal protection of wild animals. The court held that the cruelty statute applied not only to domestic animals, but to wild animals as well.<sup>57</sup> In this respect, the ruling stands for the principle that, even though hunting is legal in the commonwealth, the wild animals being hunted must be treated in a humane manner.<sup>58</sup> In

43. *The Rat Killers' Victory; Vain Effort of Mr. Bergh to Have Them Punished—The Case Tried in the Court of General Session—A Verdict of "Not Guilty"* N.Y. TIMES, February 24, 1871, at 2 (describing the trial of a "dog and rat fighting fraternity" that was acquitted of cruelty charges); and *Humanity and Law*, N.Y. TIMES, May 13, 1868, at 4 (editorial expressing disapproval of the failure to prosecute and convict those engaged in the "pastimes" of "dog-fights, cock-mains, and similar amusements.").

44. 1859 Mass. Acts ch. 158, § 1 (now at MASS. GEN. LAWS ch. 272, § 94 (2009)).

45. *Id.*

46. 1859 Mass. Acts ch. 158, § 2 (now at MASS. GEN. LAWS ch. 272, § 95 (2009)); See also *Case is Postponed. Men Charged with Cockfighting at Watertown to Appear in Court Saturday*, BOSTON DAILY GLOBE, June 19, 1913, at 3 (describing the State's largest cockfighting raid up to that point during which 132 birds were seized, two individuals were charged with the crime of promoting a cockfight, and a number of other defendants were charged with "being present.").

47. 1859 Mass. Acts ch. 158, § 2 (now at MASS. GEN. LAWS ch. 272, § 95 (2009)).

48. 1868 Mass. Acts ch. 212, § 1-4.

49. Rev. Stat. ch. 130, § 22 (1835).

50. 1868 Mass. Acts ch. 212, § 1-4.

51. *Id.*

52. *Id.* (including a caveat that no one shall "unnecessarily" deprive the animal of these essentials).

53. Mass. Rev. Laws, ch. 212, § 70 (1902).

54. 1972 Mass. Acts ch. 46.

55. 1984 Mass. Acts ch. 50.

56. *Commonwealth v. Turner*, 145 Mass. 296 (1887).

57. *Id.* at 300.

58. *Id.*

its decision the court weighed the competing interests of property rights and morality. The court stated that “The [cruelty] statute does not define an offense against the rights of property in animals, nor against the rights of animals that are in a sense protected by it. The offense is against the public morals, which the commission of cruel and barbarous acts tends to corrupt.”<sup>59</sup> With this observation, which drew on the ruling in *Tilton*, the court makes the point that the law protects animals to preserve our own morality. The court’s ruling suggests that animals are not being protected solely for their own benefit but, rather, that it is in the interest of preserving our own humanity and morality that we protect animals.<sup>60</sup>

The passage of Question 3 in 2008 was not the first time that new protections have been given to animals by way of ballot initiative. In 1930, the citizens of Massachusetts passed an initiative limiting the types of leg traps that may be used when hunting animals in the wild.<sup>61</sup> The new law stated:

Whoever uses, sets or maintains any trap or device for the capture of furbearing animals which is likely to cause continued suffering to an animal caught therein, and which is not designed to kill such animal at once or to take it alive unhurt, shall be fined fifty dollars for each offense.<sup>62</sup>

The law is particularly significant in that the voters chose to extend protections *specifically* to wild animals.

The trapping statute was subsequently amended to include a specific prohibition against steel-jawed leg traps or any traps that would “cause continued suffering to an animal.”<sup>63</sup> The Supreme Judicial Court on several occasions, however, had interpreted the statute to permit the use of *padded* leg hold traps despite the fact that those traps were shown to cause suffering to the animals trapped in them.<sup>64</sup> In the 1995 decision of *Massachusetts Society for the Prevention of Cruelty to Animals v. Division of Fisheries and Wildlife*, the Supreme Judicial Court upheld a regulation explicitly permitting hunters in Massachusetts to use such traps.<sup>65</sup> The voters promptly responded one year later by passing a ballot initiative explicitly banning padded leg traps.<sup>66</sup>

In 1990, the legislature passed the State’s Endangered Species Act.<sup>67</sup> It protects specific areas of the commonwealth “in which are

found the physical or biological features important to the conservation of a threatened or endangered species population and which may require special management considerations or protection.”<sup>68</sup> The habitat needs of certain species, therefore, trump economic consideration and the rights of property owners.<sup>69</sup> The act has been applied to stop development that threatens endangered species. For example, in 2002, the superior court permitted the construction of a golf course in Sturbridge to be halted in order to protect the habitat of the four-toed salamander.<sup>70</sup> In 2003, the statute was used to block the building of a home in Salisbury to protect the habitat of the bald eagle.<sup>71</sup> Thus, endangered species of animals have been given some legal claim to the use of property as a habitat so that their species can be preserved, even when that property is otherwise privately owned.

In a state that once classified certain species as “noxious” and promoted their eradication, both domesticated animals and wild animals are today protected from suffering, illustrating the dramatically evolving landscape in the animal welfare laws of Massachusetts.

### Contractions

While the clear pattern in the development of animal welfare law in Massachusetts shows a trend towards more protection for animals, there are some examples of contractions in the law where protections for animals were narrowed. But these contractions have occurred only when the needs of humans have greatly outweighed the welfare concerns regarding animals.

The legislature legalized dog and horse racing in the commonwealth with a comprehensive statute in 1934.<sup>72</sup> The law regulated a wide range of activities at race-tracks including citizenship of employees,<sup>73</sup> licensing of blacksmiths,<sup>74</sup> how the tracks keep their records,<sup>75</sup> and the percentage of company stock that owners can sell.<sup>76</sup> What is striking is that the statute is almost completely devoid of any guidelines or regulation regarding the treatment of the animals at the heart of this industry.<sup>77</sup> It seems counterintuitive today that an industry that revolves around animals engaged in sport would be created with so little protection for those animals. This is especially true given that the commonwealth had been adding and expanding protections for animals since 1835. However, it is telling that the bill

59. *Id.*

60. *Id.*

61. 1930 Mass. Acts ch. 428.

62. *Id.* (trapping of wild animals is now regulated at MASS. GEN. LAWS ch. 131, s. 80A (2009)); *see also* Commonwealth v. Higgins, 277 Mass. 191 (1931) (upholding the conviction of a man under the statute who used leg traps on foxes near his farm). The law does include exceptions for traps set for “vermin” within fifty yards of a building or plot of land to which vermin would be detrimental. It was also later amended to include exceptions for threats to human health and safety. The statute enumerates a number of examples of “theat[s] to human health or safety,” most of which have to do with damage to property caused by beavers or muskrats). *Id.*

63. MASS. GEN. LAWS ch. 131, s. 80A as amended by St. 1974, c. 796, s. 1.

64. Commonwealth v. Black, 403 Mass. 675 (1989) (in which the SJC held that a padded leg trap is not a “steel jawed leg trap” and was therefore permitted under the statute); *Massachusetts Society for the Prevention of Cruelty to Animals v. Division of Fisheries and Wildlife*, 420 Mass. 639 (1995) (upholding a regulation explicitly permitting the use of padded leg traps).

65. *Id.*

66. 1996 Mass. Acts ch. 453.

67. 1990 Mass. Acts ch. 408, § 4.

68. MASS. GEN. LAWS ch. 131A, § 1 (2009) (defining an endangered species as “any species of plant or animal in danger of extinction throughout all or a significant portion of its range including, but not limited to, species listed from time to time as ‘endangered’ under the provisions of the Federal Endangered Species Act of 1973, as amended, and species of plants or animals in danger of extirpation, as documented by biological research and inventory.”).

69. MASS. GEN. LAWS ch. 131A, § 5 (2009).

70. WRT Management Corporation v. Commonwealth of Massachusetts Division of Fisheries and Wildlife, 2002 WL 1293007 (2002).

71. Capolupo v. Massachusetts Department of Environmental Protection, 2003 WL 22925353 (2003).

72. MASS. GEN. LAWS ch. 128A (2009).

73. MASS. GEN. LAWS ch. 128A, § 10 (2009).

74. MASS. GEN. LAWS ch. 128A, § 9A (2009).

75. MASS. GEN. LAWS ch. 128A, § 6 (2009).

76. MASS. GEN. LAWS ch. 128A, § 11C (2009).

77. *But see* MASS. GEN. LAWS ch. 128A, §13B (2009) (setting forth the one exception: the requirement that the animals could not be given drugs to affect their speed).

legalizing horse and dog racing in the commonwealth was passed in 1934, during the Great Depression. It was only during a time of overwhelming financial hardship that the legislature saw fit to create an industry that proponents claim creates thousands of jobs and millions of dollars in revenue,<sup>78</sup> and that relies upon, what opponents would depict as, the suffering of hundreds of animals.<sup>79</sup>

In what could be considered another setback for animal protection, 1957 saw the passage of a statute permitting certain institutions to use stray animals from pounds in scientific experiments.<sup>80</sup> What is notable is that the legislature saw fit to include a lengthy preamble in the bill. It states in part:

The public health and safety require the use of animals in connection with the diagnosis and treatment of human and animal diseases, the advancement of veterinary, dental, medical, biological and related sciences, and the testing, improvement and standardization of biological products, laboratory specimens, pharmaceuticals and drug. Properly conducted scientific experiments on animals are necessary for the welfare of mankind and for the increase of knowledge relating to the causes, nature, prevention, control and cure of diseases of men and animals.<sup>81</sup>

It is remarkable that the legislature deemed such a lengthy justification necessary for permitting experimentation on stray animals. That any justification was needed beyond the “welfare of mankind” is a sign of how significantly attitudes had changed regarding the treatment of animals from the time when they were viewed exclusively as personal property.

Animal protection has almost always advanced in the direction of expanding rights. That expansion often comes at the expense of property rights and economic concerns. However, at times, extreme hardships or serious human welfare concerns have trumped animal welfare concerns.

### Value and Enforcement

As with the specific protections afforded animals, changes in the penalties associated with violating the animal welfare laws in the Commonwealth have similarly developed along a relatively consistent trajectory. This is another area that illustrates the evolving views of society’s interest in protecting animals.

In 1945, the legislature passed a law making anyone who wrongfully kills, maims, or steals the domesticated animal of another liable for triple the animal’s value.<sup>82</sup> This law made animals, by statute,

worth more than the cost of replacement. As society has advanced its capacity to appreciate and tap certain skills and abilities inherent in animals, the law has reflected that development. There are special penalties for harming police horses and dogs<sup>83</sup> as well as service animals.<sup>84</sup> Instead of the historical classifications of animals as “valuable” and “noxious,” the law now seems to recognize domestic animals as being “valuable” or “more valuable.”

Amendments to the penalty provisions of the cruelty statute are an indicator of the law’s evolving view of the value, financial and otherwise, of animals. In 1868, the potential financial penalty for violations was increased from \$100 to \$250.<sup>85</sup> It was increased to \$500 in 1968,<sup>86</sup> to \$1,000 in 1989,<sup>87</sup> and finally to \$2,500 in 2006.<sup>88</sup> In 1986, a provision was added to the cruelty statute for a process for the forfeiture of mistreated animals.<sup>89</sup> While no one would suggest that animals have the same legal protections as humans, it is interesting to note that the statute talks of “forfeiting custody” of animals in similar language used in the child abuse statutes.<sup>90</sup> The statute was amended again in 2006. As the law reads now, when someone is convicted of abusing an animal, the animal’s forfeiture is mandatory.<sup>91</sup> Discretion was taken away from judges, and custody of animals in cruelty cases is no longer looked at on a case-by-case basis.

In 2004 there was an important change to the penalty provisions of the commonwealth’s animal cruelty statute. While all previous amendments addressing penalties were aimed only at the financial penalties, for the first time in 169 years, the potential incarceration for violation of the animal cruelty statute was increased. In 2004, animal cruelty in Massachusetts became a felony.<sup>92</sup> Violation of the statute now carries a potential sentence of up to two and one half years in the house of corrections or up to five years in state prison.<sup>93</sup> The penalties associated with violations of the cruelty statute have been regularly increased, reflecting society’s evolving view of the value of animals and the desire to place a premium on the prevention of animal cruelty.

### *Pervasiveness*

Animal welfare law has come to touch many facets of our society. It is an area of law constantly being reexamined and adapted to meet new circumstances. There are surprisingly few corners of modern life not somehow affected by the laws relating to animal protection.

The 1868 amendments to the animal cruelty statute included language directed specifically at the railroad industry. At that time, railroads were rapidly expanding across the country allowing large scale overland industrial transport of goods.<sup>94</sup> One commodity

78. *Supra* note 1.

79. *Supra* note 1.

80. 1957 Mass. Acts ch. 298, § 1 (codified as MASS. GEN. LAWS ch. 49A); *see also Massachusetts Society for the Prevention of Cruelty to Animals v. Commissioner of Public Health*, 339 Mass. 216 (1959) (upholding the statute over the objections of the plaintiff who claimed a property interest in the stray animals that had come into its possession); The statute permitting the use of stray animals for scientific experimentation was repealed in 1983 by 1983 Mass. Acts ch. 631, § 1.

81. *Id.*

82. MASS. GEN. LAWS ch. 272, § 85A (2009).

83. *Id.* § 77A.

84. *Id.* § 85B.

85. 1868 Mass. Acts ch. 212, § 1-4.

86. 1968 Mass. Acts ch. 59.

87. 1989 Mass. Acts ch. 534.

88. 2006 Mass. Acts ch. 434, § 1.

89. 1986 Mass. Acts ch. 337.

90. MASS. GEN. LAWS ch. 119, § 51B (2009).

91. 2006 Mass. Acts ch. 434, § 1 (according to the statute, the animal whose treatment was the basis of the conviction under the statute shall be forfeited to “any society, incorporated under the laws of the commonwealth for the prevention of cruelty to animals or for the care and protection of homeless or suffering animals...”)

92. 2004 Mass. Acts ch. 319, § 4. (Prior to 2004, MASS. GEN. LAWS ch. 266, § 112 criminalizing the willful and malicious killing, maiming, or disfiguring of the “horse, cattle, or other animal of another person,” was a felony. Its specific reference to horse and cattle, and applicability only to animals belonging to others, intimate that the statute is directed at protecting only the property interests in animals).

93. MASS. GEN. LAWS ch. 272, § 77 (2009).

94. JAMES E. VANCE, JR., *THE NORTH AMERICAN RAILROAD: ITS ORIGIN,*



transported via the rails was livestock, and allegations had been made of abject cruelty imposed on the animals being transported in this manner. A letter to the *New York Times*, two years before the 1868 amendments to the cruelty statute, described an eyewitness's journey on a railroad transporting cattle from the stock yards of Chicago to New York City.<sup>95</sup> The author told of animals packed into cars so tightly that they could not move a muscle, and the cattle not being given any food or water for 50 hours. Many of the animals died of exhaustion before making it to New York for slaughter.<sup>96</sup>

To address this problem, the 1868 statute imposed treatment standards on railroads transporting livestock. No animal being transported by a railroad could be confined for more than 28 consecutive hours without receiving at least five consecutive hours of food, water, and rest.<sup>97</sup> The cost of this was to be borne by the animals' owner.<sup>98</sup> The new standard of care represented an early example of the animal welfare laws adapting to new realities and stepping in between the economic interests of industry and the animals affected by those interests.<sup>99</sup>

Legislation addresses the treatment animals in many diverse contexts and circumstances. In 1977, the Massachusetts legislature enacted a statute criminalizing the giving away of live animals as prizes,<sup>100</sup> which resulted in the conviction of a man who gave away a goldfish as a prize at a carnival.<sup>101</sup> The protection of animals reached into the schools in 1979 when the legislature outlawed the dissection of live vertebrates.<sup>102</sup> In 2008, a new industry was nipped in the bud in Massachusetts with the legislature's passage of a bill outlawing the renting of pets.<sup>103</sup>

The legislature has set treatment requirements for animals on trains, animals in nature, and animals in homes. Goldfish, wild foxes, and three-toed salamanders have been afforded protections. Safeguarding animal welfare generally will not be sacrificed on account of economic concerns, whether that means precluding the building of a home on private property, or the dismantling of an entire industry.

The law has developed to impact all areas of our society where animals can be found. Changing societal, technological, and economic developments in each new era bring new challenges and questions about animal welfare to the forefront. The legal reaction to these concerns and the consistent reexamination of the law demonstrates this issue's enduring nature. The commonwealth that adopted the nation's first cruelty law has vigorously regulated the humane treatment of animals in a wide variety of contexts. Dozens of laws are in place to protect animals in the commonwealth from mistreatment and cruelty. However, some animals in the commonwealth have been left behind. One field conspicuously absent from animal welfare regulation is one that accounts for hundreds of thousands of animals in the commonwealth: the farming industry.

## MOVING FORWARD

There are over 7,000 farms in Massachusetts.<sup>104</sup> In 2007, those farms raised over 150,000 chickens, over 20,000 pigs, and almost 50,000 cows.<sup>105</sup> What is remarkable is the lack of regulation regarding the treatment of these animals.<sup>106</sup> While Massachusetts law protects wild foxes<sup>107</sup> and goldfish,<sup>108</sup> animals in schools<sup>109</sup> and animals at carnivals,<sup>110</sup> agricultural animals have very few protections extended specifically to them. Farm animals being transported on trains have more protection under Massachusetts law than those on farms.

Farm animals in Massachusetts *are* protected to a degree under the commonwealth's animal cruelty statute. However, the cruelty statute is as ill-suited to address the animal welfare concerns in the agricultural context as it was in the context of dog-racing. One of the primary criticisms of dog-racing is the same as that of modern industrial agriculture: the size of animal enclosures. The cruelty statute does not regulate enclosure size.<sup>111</sup>

This is a concern being addressed in a number of other jurisdictions and there are a number of models from which to draw upon when considering changes to Massachusetts law.<sup>112</sup> These are changes

EVOLUTION, AND GEOGRAPHY (Johns Hopkins University Press, 1995).

95. Henry Bergh, *Cruelty to Animals: How Cattle are Transported from the West to New York City: Shocking Disclosures*, N.Y. TIMES, November 13, 1866, at 2.

96. *Id.*

97. 1868 Mass. Acts ch. 212, § 1-4; A Federal Law making the same requirements was enacted in 1878. 49 U.S.C. § 80502 (West 2009) (originally found at Section 4386 of the Revised Statutes of 1878).

98. *Id.*

99. The law, however, did not completely eradicate the concerns regarding livestock welfare during rail transport. See *Cattle Quarantine. The Question of Removing It from Waltham. Opinions of Importers and Others to be heard by the Commissioners. Transportation Tortures Endured by the Animals*, BOSTON DAILY, April 16, 1885, at 4.

100. MASS. GEN. LAWS ch. 272, § 80F (2009).

101. *Knox v. Massachusetts Soc. for Prevention of Cruelty*, 425 N.E.2d 393 (1981).

102. MASS. GEN. LAWS ch. 272, § 80G (2009).

103. House Bill 5006 (Ma. 2008); *Man's Part Time Best Friend*, by Sarah Schweitzer, THE BOSTON GLOBE, December 17, 2007 (discussing the plans of a pet-rental company, "FlexPetz," to open a branch in Massachusetts).

104. United States Department of Agriculture, *Census Tables for 2007, available at* [http://www.agcensus.usda.gov/Publications/2007/Full\\_Report/Volume\\_1\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf)

105. *Id.*

106. There was a Massachusetts ballot initiative in 1988 that, had it passed,

would have required that the Commissioner of the Massachusetts Department of Food and Agriculture issue regulations to ensure that farm animals were raised, maintained, transported and slaughtered in a humane manner. Specifically, it required that regulations be adopted ensuring that "(1) Any veal calf confined to a primary enclosure [defined as the crate, cage, stall or other structure in which farm animals are confined or housed] shall be provided a primary enclosure of dimensions sufficient to allow the calf to freely stand up, lie down, groom itself, and turn around and shall be provided with comfortable and appropriate bedding and a diet which is not deficient in any component necessary to maintain the animal in full health. Veal calves shall not be chained, yoked, or tethered while within their primary enclosures except for veterinary care or for a short period of time and for a specific purpose such as feeding. (2) Only procedures which adequately minimize pain and suffering shall be used in the surgical castration or dehorning of livestock. (3) Inhumane methods of suffocating or grinding baby chicks born at hatcheries shall be prohibited." The initiative, Question 3 on the 1988 ballot, was defeated with 66% of voters voting against it, compared to 27% of voters in favor. See Office of the Massachusetts Secretary of the Commonwealth, William Francis Galvin, Elections Division, *available at* [http://www.sec.state.ma.us/ele/elebalm/balmpdf/balm\\_1988.pdf](http://www.sec.state.ma.us/ele/elebalm/balmpdf/balm_1988.pdf). (full text available though the Office of the Secretary of the Commonwealth).

107. *Commonwealth v. Turner*, 145 Mass. 296 (1887).

108. *Knox v. Massachusetts Soc. for Prevention of Cruelty*, 425 N.E.2d 393 (1981).

109. MASS. GEN. LAWS ch. 272, § 80G (2009).

110. MASS. GEN. LAWS ch. 272, § 80F (2009).

111. MASS. GEN. LAWS ch. 272, § 77 (2009).

112. *Infra* text accompanying notes 181-200.

that should be embraced not only by those concerned with animal welfare, but by the farming industry as well. One cannot help but wonder if the dog-racing industry would have preferred enhanced regulation regarding the treatment of their animals, as opposed to being entirely delegitimized in the eyes of many citizens.

### Concerns

Given the way that society and the law have come to view animals and the steps taken to prevent cruelty towards animals, it is startling to consider the practices commonly used on livestock farms. There are dozens of concerns regarding the welfare of various animals in the agriculture industry,<sup>113</sup> but some issues have come to the forefront, several of which other jurisdictions have begun to address.

In regards to chickens, a primary concern is the size of their cages. Generally, chickens are classified as “layers” (hens raised to produce eggs) and “broilers” (chickens raised for their meat). Both types of chickens are kept so closely confined that their natural behaviors are disrupted. “Battery cages” is a term used to describe the cages in which many egg-laying hens spend their lives. Such cages can be as small as twelve by twenty inches and contain up to five hens.<sup>114</sup> Chickens have an instinctual need to nest, scratch the ground, and take “dust-baths.”<sup>115</sup> They are unable to express these activities in any kind of natural way in a battery cage. Chickens raised for meat are kept in pens that are larger than battery cages, yet the broiler pens are also stocked densely with chickens. This compact confinement may contribute to chickens becoming “anti-social” and attacking one another, sometimes resulting in cannibalism.<sup>116</sup> The farms deal with chicken aggression by searing off the beaks of chicks with hot blades and “trimming” their toes.<sup>117</sup>

Another focus of concern is the treatment of veal calves. The calves are often kept in dark enclosures that prevent any movement and are fed nutritionally insufficient diets.<sup>118</sup> Veal calves typically spend the sixteen weeks of their lives confined in crates too narrow for them to move in,<sup>119</sup> and many of the crates do not permit them to

turn around or extend their legs when they lie down.<sup>120</sup> There is no bedding in the crates and the floor is slatted to allow waste to fall to the ground below.<sup>121</sup> Veal calves are fed an all-liquid diet that lacks roughage and has low levels of iron, resulting in the veal calves being anemic.<sup>122</sup> The crates do not permit the calves to satiate instinctual needs to interact with other animals or groom themselves.<sup>123</sup> These conditions result in the calves having exceeding poor welfare during their lives.<sup>124</sup>

There are similar concerns in regards to pig husbandry. The majority of sows (female pigs) raised in the United States are confined to “gestation crates” for most of their lives.<sup>125</sup> Sows are kept separated from one another because they are able to gain more weight in confinement,<sup>126</sup> they can be housed more compactly, and they can be cared for more easily.<sup>127</sup> Economics have driven the size of the sow crates or “stalls” to become as small as possible so that farmers can fit more sows per square foot.<sup>128</sup> As a result, the sows spend the majority of their lives in a two-foot-wide stall.<sup>129</sup> Many of the gestation crates are so small that the animals cannot turn around, lie down, or otherwise adjust their bodies.<sup>130</sup> Pigs, which have a relatively high intelligence compared to other animals, cannot partake in their natural, instinctual behavior such as nesting or interacting with other pigs when confined in such conditions.<sup>131</sup> Their isolation and cramped confines leads to frustration and suffering.<sup>132</sup> As is the case with chickens, pigs raised for their meat as opposed to procreation are often kept in larger enclosures that are tightly packed with animals.<sup>133</sup> It is believed that the density and crowding of the living conditions, along with other factors such as breeding and diet, contributes to abnormal behaviors such as excessive biting of each other’s tails.<sup>134</sup> To address aggression in pigs, many farms remove the teeth of piglets and amputate their tails.<sup>135</sup> Another concern regarding the treatment of pigs relates to weaning methods. On many farms, piglets that, in nature, would be weaned from their mothers at twelve to fifteen weeks after birth are often removed from their mothers between three and four weeks, and sometimes as soon as

113. BERNARD ROLIN, *FARM ANIMAL WELFARE* (Iowa State Press 1995) (other concerns include diet, weaning techniques, and failure to breed out aggression).

114. PETER SINGER, *ANIMAL LIBERATION*, 111 (2 ed. Random House 1990) *citing Poultry Tribune*, November 1986, *but* the United Egg Producers (U.E.P.), an organization that represents egg producers owning more than 95% of the layers in the U.S., requires that any new cage construction allow hens 67 square inches of living space and 1 inch of “trough space” for feeding, United Egg Producers Animal Husbandry Guidelines for U.S. Egg Laying Flocks: 2008 Edition, at 11 *at* <http://docs.google.com/gview?a=v&attid=0.1&thid=1203a7bc71e267e8&mt=application%2Fpdf>

115. C. C. Croney & S. T. Millman, *The Ethical and Behavioral Bases for Farm Animal Welfare Legislation* 85 *J Anim Sci* 556, 560 (2007).

116. J. C. Swanson, *Farm Animal Well-being and Intensive Production Systems* 73 *J Anim Sci* 2744, 2748 (1995).

117. G. S. Davis, K. E. Anderson, & D. R. Jones, *The Effects of Different Beak Trimming Techniques on Plasma Corticosterone and Performance Criteria in Single Comb White Leghorn Hens*, 83 *Poultry Science* 1624-1628 (2004); *and* ROLIN, *supra* note 113, at 120.

118. *Id.*

119. *Id.*

120. C. L. Stull & S. P. McDonough, *Multidisciplinary Approach to Evaluating Welfare of Veal Calves in Commercial Facilities* 72 *J Anim Sci* 2518, 2522 (1994).

121. Stull & McDonough, *supra* note 120, at 2522; *and* ROLIN, *supra* note

113, at 113.

122. Stull & McDonough, *supra* note 120, at 2520

123. ROLIN, *supra* note 113, at 112.

124. ROLIN, *supra* note 113, at 112.

125. Croney & Millman, *supra* note 115, at 559.

126. Croney & Millman, *supra* note 115, at 560.

127. ROLIN, *supra* note 113, at 76.

128. Croney & Millman, *supra* note 115, at 560.

129. ROLIN, *supra* note 113, at 76.

130. Croney & Millman, *supra* note 115, at 560.

131. Croney & Millman, *supra* note 115, at 560; ROLIN, *supra* note 113, at 76, 92.

132. Croney & Millman, *supra*, at 560.

133. ROLIN, *supra* note 113, at 94-95.

134. ROLIN, *supra* note 113, at 94-95 (some tail biting is a natural behavior in pigs. The extent to which it happens in tight enclosures is however, extreme and severe); *but see* American Veterinary Medical Association Task Force on the Housing of Pregnant Sows, *A Comprehensive Review of Housing for Pregnant Sows*, JAVMA, Vol. 227, No. 10 at 1583 (2005) (aggression in pigs has also been linked to the manner in which they are fed on many farms. Pigs are sometimes fed limited amounts of concentrated feed. This is done to reduce the cost of the feed and reduce the amount of waste that the pigs generate. The feeding method, however, can result in increased aggression in pigs, as they are hungry for most of the day.).

135. ROLIN, *supra* note 113, at 95.

five days after birth.<sup>136</sup> This results in abnormal behaviors in the pigs and poor welfare for the rest of their lives.<sup>137</sup>

These are not the conditions on all farms. However, these are common industry practices, long accepted on some Massachusetts farms, and seemingly permissible under Massachusetts law.<sup>138</sup>

### Current Massachusetts Standards

In general, farm animals raised for food in the commonwealth are afforded minimal protections specific to the agricultural environment during their lives. There is a statute that mandates that the slaughter of farm animals be conducted in a humane way. Section 139F of chapter 94 of the Massachusetts General Laws states, “No slaughterer, packer or stockyard operator shall shackle, hoist, or otherwise bring livestock into position for slaughter by any method which shall cause injury or pain, nor bleed or slaughter any livestock except by a humane method.” While the humane slaughter statute aims to prevent unnecessary suffering during the slaughter of farm animals, there are very few protections tailored to prevent cruelty to farm animals during their lives leading up to their slaughter.

There is also a series of statutes, and regulations adopted by the Massachusetts Department of Agricultural Resources, that apply to agricultural animals. Those laws, however, are aimed at maintaining the health and safety of the food supply.<sup>139</sup> There are no provisions in the agricultural laws specifically aimed at ensuring the welfare of the animals.

The statutes and regulations regarding cattle, including veal calves, address issues such as “health certificates,”<sup>140</sup> vaccinations,<sup>141</sup> and tuberculosis testing.<sup>142</sup> These measures are aimed at ensuring that the beef and dairy that the cattle generate is disease-free and safe for human consumption.<sup>143</sup> But no laws establish a minimum enclosure size for cattle. Nor do any regulations direct that cattle be afforded the opportunity to move and lie down. The regulations are wholly silent regarding these aspects of animal welfare.

Laws regarding poultry are similarly silent concerning the treatment of the birds. Regulations adopted by the Massachusetts Department of Agriculture concern disease control<sup>144</sup> and biosecurity.<sup>145</sup> Numerous subsections of the regulations deal with the grading of eggs, including issues such as shell description and yolk quality.<sup>146</sup> There are no regulations indicating how much living space each chicken must be given.

“Swine” are also addressed specifically in statutes and regulations.<sup>147</sup> While, again, most of the law is directed towards disease control,<sup>148</sup> there is some regulation regarding the feeding of pigs. No

one can feed a pig garbage without first getting a license and cooking the garbage for at least half an hour.<sup>149</sup> The laws do not address sow crates or the removal of teeth or the amputation of tails. Pigs are given special protections as food, but not as living beings.

The Massachusetts Society for the Prevention of Cruelty to Animals and the Animal Rescue League of Boston do have some statutory authority over farm animals. Agents of those organizations have been empowered to inspect any places where cattle, horses, mules, sheep, swine, and any other animals are transported, slaughtered, or sold.<sup>150</sup> The stated purpose of the authority is “preventing violations of any law and detecting and punishing the same...”<sup>151</sup> The ability to inspect farms, however, does not enable those organizations to address the aforementioned concerns regarding livestock because the law that they are tasked to enforce is poorly suited to address those concerns. As previously discussed, there do seem to be some provisions in the cruelty statute aimed at agricultural animals. However, those provisions regarding “overloading” and “overworking” animals<sup>152</sup> are more applicable to beasts of burden, which have for the most part been supplanted by mechanization such as tractors. The hundreds of thousands of animals on farms raised for food as opposed to labor are not specifically addressed.

The animal cruelty statute is silent on the issue of enclosure size. The statute prohibits “unnecessary cruelty” towards animals and requires the provision of proper shelter and a sanitary environment.<sup>153</sup> While a broad reading of the statute may indicate a prohibition of the kind of small enclosures used on many farms, the cruelty statute as it stands does not appear to be an effective tool for addressing those concerns. Small enclosures were one of the primary critiques of the dog-racing industry.<sup>154</sup> However, the cruelty statute evidently did not prevent the conditions giving rise to those concerns, and it seems likely that the cruelty statute is similarly an ineffective tool to address those concerns in the context of agriculture.

Although the cruelty statute does prohibit mutilating animals, history has shown that it is ineffective in addressing systematic disfigurement in an industrial context. The mutilation language was added to the statute in 1868.<sup>155</sup> However, the legislature still found it necessary to implement separate statutes to prohibit the docking of horses’ tails in 1894<sup>156</sup> and to prohibit the cutting of dogs’ ears in 1928.<sup>157</sup> The adoption of those statutes shows that the cruelty statute is not an effective means to address widespread practices or procedures such as the removal of the beaks of chickens or the teeth and tails of pigs.

136. ROLIN, *supra* note 113, at 95 (there are some similar concerns regarding early weaning of cows, however, some have argued that the early weaning enables them to interact with humans later in their lives with less stress. ROLIN at 101); and TOM L. BEAUCHAMP, F. BARBARA ORLANS, REBECCA DRESSER, DAVID B. MORTON & JOHN P. GLUCK, *THE HUMAN USE OF ANIMALS* 2d ed. 51 (Oxford University Press 2008).

137. ROLIN, *supra* note 113, at 95.

138. See *Bill would give farm animals more space*, by Jazmine Ulloa, *THE BOSTON GLOBE*, June 4, 2009 (Massachusetts farmer referring to the housing of animals in enclosures that do not allow them room to stand up, lie down, turn around, or extend their limbs as long-accepted practices).

139. See MASS. GEN. LAWS ch. 129 (2009) (titled “Livestock Disease Control”).

140. 330 C.M.R. 4.04 (2010).

141. MASS. GEN. LAWS ch. 129, § 36B (2009).

142. 330 C.M.R. 4.05 (2010).

143. See generally 330 C.M.R. 4 (2010).

144. 330 C.M.R. 5.02 (2010).

145. *Id.* § 5.04.

146. *Id.* § 5.03.

147. MASS. GEN. LAWS ch. 129 (2009); 330 C.M.R. 11 (2010).

148. *Id.*

149. 330 C.M.R. 11 (2010).

150. MASS. GEN. LAWS ch. 129, § 9 (2009).

151. *Id.*

152. MASS. GEN. LAWS ch. 272, § 77 (2009).

153. MASS. GEN. LAWS ch. 272, § 77 (2009).

154. *Supra* note 1.

155. 1868 Mass. Acts ch. 212, § 1-4.

156. 1894 Mass. Acts 461 (this was sometimes done to prevent the tail from becoming entangled in equipment, which can also be prevented by tying up the horse’s tail).

157. MASS. GEN. LAWS ch. 272, § 80A (2009) (typically done to dogs used in fights).



The industrialization of agriculture since World War II<sup>158</sup> has resulted in many animals living in conditions that do not comport with contemporary precepts of what is humane. The laws currently in place in the commonwealth are not designed to address those conditions. The law has not been adapted to confront modern economic motives resulting in inhumane treatment of these animals, as the citizens of Massachusetts have historically done in a number of other contexts.

### Approaches<sup>159</sup>

There has been movement in a number of other jurisdictions regarding the treatment of farm animals. Many of the laws are relatively consistent with one another and they provide valuable templates for potential legislation in the commonwealth.

On the same day that Massachusetts voters outlawed greyhound racing, California voters passed Proposition 2. The purpose of the act was “to prohibit the cruel confinement of farm animals in a manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs.”<sup>160</sup> It reads in part: “a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely.”<sup>161</sup> There are exceptions in the statute for veterinary exams, transportation, research, slaughter (California has a separate humane slaughter law),<sup>162</sup> exhibitions,<sup>163</sup> and for sows for up to seven days prior to their due date.<sup>164</sup> Violations carry penalties of \$1,000 in fines or 180 days incarceration.<sup>165</sup>

The Colorado legislature passed a bill in 2008 addressing some of the issues concerning veal calves and sows.<sup>166</sup> In Colorado, veal calves and sows must be confined in a manner that allows them to stand up, lie down, and turn around without touching the sides of their enclosure.<sup>167</sup> The law contains the same exceptions as those in the California law with the one difference that sows are excluded twelve days prior to their due date. Violations of the statute are considered Class 2 Misdemeanors, and are therefore punishable by a minimum fine of \$250, a maximum of \$1,000 and a minimum incarceration of three months, a maximum of 12 months.<sup>168</sup>

In Oregon, a law was passed that applied only to pigs. Pigs may

not be kept in an enclosure for more than twelve hours per day unless that enclosure permits them to lie down with their limbs fully extended and to freely turn around.<sup>169</sup> It contains the exceptions for exhibition, study, veterinary care, slaughter, and sows seven days prior to their due date. The Oregon law is silent as to veal calves and poultry. Violations are considered Class A Violations. They are therefore punishable by up to \$720 in fines.<sup>170</sup>

In 2006, voters in Arizona passed a law by voter initiative regarding the treatment of sows and veal calves.<sup>171</sup> The language regarding their enclosures is identical to that used in the Oregon law and contains the same exceptions.<sup>172</sup> As a Class 1 Misdemeanor, violations carry up to 6 months of imprisonment<sup>173</sup> or up to \$2,500 in fines.<sup>174</sup>

In another example of animal welfare being addressed directly by the voters, Florida voters passed a ban on gestation crates for sows by ballot initiative in 2002.<sup>175</sup> The law states, in part, “It shall be unlawful for any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely.”<sup>176</sup> The Florida law has fewer exceptions than other jurisdictions: exceptions apply only during veterinary treatment or during the “pre-birthing period,” which is defined as seven days prior to the sows’ due date.<sup>177</sup> Violations (one per pig) are punishable by up to \$5,000 in fines<sup>178</sup> or Florida’s 1<sup>st</sup> Degree Misdemeanor penalty of up to one year imprisonment.<sup>179</sup>

On May 13, 2009, Maine became the sixth state to enact a law regulating the enclosure sizes of farm animals. Effective January 1, 2011, the Maine law states: “A person may not tether or confine a [sow during gestation or calf raised for veal] for all or the majority of a day in a manner that prevents the animal from lying down, standing up and fully extending the animal’s limbs and turning around freely.”<sup>180</sup> The Maine statute includes the exceptions for veterinary care, study, exhibition, transport and slaughter.<sup>181</sup> Like the Florida law, violations of the Maine statute carry a potential penalty of up to 1 year imprisonment.<sup>182</sup>

California, Colorado, Oregon, Arizona, Florida, and Maine have taken measures to address concerns regarding agricultural animals in the last seven years. Massachusetts, too, may soon join the trend of extending protection to its thousands of farm animals.

158. MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA* 66-67 (2006).

159. In addition to developments in American jurisdictions, there has also been extensive legal regulation regarding the treatment of farm animals in foreign countries including the Welfare of Livestock Regulations of 1994 in the United Kingdom codified as Statutory Instrument 1994 No. 2126 and the European Convention for the protection of animals kept for farming purposes found in European Union Official Journal L 323, 17/11/1978 P. 0014 – 0022.

160. The Office of the California Secretary of State available at <http://voter-guide.sos.ca.gov/past/2008/general/title-sum/prop2-title-sum.htm>

161. *Id.*

162. Chapter 6 (commencing with Section 19501) of Part 3 of Division 9 of the Food and Agricultural Code, relating to humane methods of slaughter (CA).

163. The law enumerates fairs, rodeos, and 4H programs as examples. *Id.*

164. The Office of the California Secretary of State, *supra* note 161. (exceptions are included for the time immediately proceeding the delivery of piglets as sows can sometimes crush their young after birth).

165. The Office of the California Secretary of State, *supra* note 161.

166. Colorado Senate Bill 201 (2008) (*see* 2008 Colo. Legis. Serv. ch. 228 (West)).

167. *Id.*

168. COLO. REV. STAT. § 18-1.3-501 (West 2009).

169. Oregon Senate Bill 694 of 2007 *adopted as* 2007 Or. Laws ch. 722.

170. OR. REV. STAT. § 153.018 (West 2009).

171. Arizona Proposition 204 of 2006.

172. ARIZ. REV. STAT. § 13-2910.07 (West 2009).

173. ARIZ. REV. STAT. § 13-707 (West 2009).

174. ARIZ. REV. STAT. § 13-802 (West 2009).

175. WEST’S FLA. STAT. ANN. CONST. ART. 10 § 21 (West 2009).

176. *Id.*

177. *Id.*

178. *Id.*

179. FLA. STAT. ANN. § 828.13, (West 2009), FLA. STAT. ANN. § 775.082 (West 2009).

180. ME. REV. STAT. tit. 17, ch. 42 § 1039 (2009).

181. *Id.*; ME. REV. STAT. tit. 22, ch. 562-A § 2521 (2009) governs the humane slaughter of livestock.

182. ME. REV. STAT. tit. 17, ch. 42 § 1039 (2009); ME. REV. STAT. tit. 17-A, ch. 51 § 1252 (2009).

## Proposals

Many of the practices prevalent in the farming industry, and long accepted on some Massachusetts farms, appear unacceptable when framed in terms of “the law of humanity.” Courts have held that leaving a horse in the woods overnight is cruel<sup>183</sup> and packing cattle into train cars for fifty hours is inhumane,<sup>184</sup> but none has addressed current inhumane conditions in which hundreds of thousands of animals spend their entire lives. The Supreme Judicial Court has ruled that watching a cock-fight “deadens the feeling of humanity” in a person, yet the law permits searing the beak off a chicken and amputating the tail of a pig. If the law views fox hunting in the context of “public morals,” it should do the same for cows, chickens, pigs, and other animals on which we depend for our sustenance.

By adopting laws similar to those enacted in other jurisdictions, Massachusetts can begin to reconcile the protections it affords its farm animals with the way its laws protect animals in other situations. Increasing the minimum enclosure sizes for livestock would have a direct impact on the welfare of thousands of farm animals in the commonwealth. Allowing chickens to spread their wings, veal calves to lie down, and sows to turn around would represent a vast improvement in the lives of these animals. Though they may not seem like very significant changes and would nevertheless constitute imperfect environments for the animals, these simple changes would afford the animals a greater degree of wellbeing during their lives.

In 2009, a bill was introduced in the Massachusetts legislature regarding farm animal enclosure sizes that is similar to the laws passed in other jurisdictions.<sup>185</sup> House Bill Number 815, which would add a new section to Chapter 272 of the General Laws, states:

(a) The purpose of this section, subject to exceptions and commencing January 1, 2015, is to prohibit the confinement of farm animals in a manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs.

(b) Notwithstanding any other provision of law, a person is guilty of unlawful confinement of a covered farm animal if the person tethers or confines any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from:

(1) Lying down, standing up, and fully extending his or her limbs; and

(2) Turning around freely.<sup>186</sup>

The bill explicitly covers veal calves, pigs, and chickens and includes the same exceptions as other states for scientific or agricultural

research, medical examinations or treatment, transportation, during rodeos, fairs, or other exhibitions, and during slaughter (slaughter is covered by Mass. Gen. Laws ch. 94, s. 139D). As with the California law, violations carry fines of \$1,000 or 180 days incarceration.<sup>187</sup>

Making it clear that these conditions are present on Massachusetts farms, a number of Massachusetts farmers have spoken out against the measure. One farmer indicated that he believed that the restrictive confinement of farm animals is not cruel and that he “does not understand why such long-accepted practices are being criticized.”<sup>188</sup>

Some opponents of adopting these types of measures argue that they will increase production costs and, therefore, either reduce the profit margins of livestock farmers or increase the price of food.<sup>189</sup> They are correct. However, the actual impact on food prices may not be as great as some might expect. The European Union estimates that the mandatory adoption of enriched cages<sup>190</sup> for egg laying hens will add a little less than one cent (€ 0.01) to the cost of each egg.<sup>191</sup> A report commissioned by the United Kingdom Department of the Environment, Food and Agricultural Affairs estimates that banning battery cages would increase egg prices by 17.9%,<sup>192</sup> a change that would raise the cost of a \$2.00 carton of eggs to roughly \$2.36. That same report estimates that the elimination of sow crates would increase the price of pork products by about 1.9%.<sup>193</sup> While estimates of price increases vary, additional costs on the farm would translate to relatively modest increases in food prices. This is because only a small percentage of the retail price of food is linked to actual animal husbandry. The majority of the cost of animal products is associated with the slaughter, transportation, packaging, distribution, and marketing of the products.<sup>194</sup>

While those who oppose adoption of these regulations will undoubtedly argue that the legislation will make Massachusetts farmers less competitive, the opposite may actually be true. Studies have shown that the public is willing to pay more for animal products produced in a humane manner.<sup>195</sup> As awareness of these issues increases, that willingness will likely only increase as well. Should Massachusetts fail to adopt these types of measures, consumers could well seek out those generated in other states under more humane conditions.

The adoption of the bill would be a step towards reconciling the protections extended to farm animals with those protections that Massachusetts law already extended for decades towards other animals. There are, however, a number of other measures that could be taken to improve the lives and welfare of farm animals.

Regarding chickens, for example, requiring nests, perches, and access to “litter” in enclosures (for scratching and bathing), as is required by European Union regulation, would improve their welfare

183. *Commonwealth v. Curry*, 150 Mass. 509 (1890).

184. 1868 Mass. Acts ch. 212, § 1-4.

185. House Bill Number 815 (Ma. 2009) (filed as House Docket 1997 on January 14, 2009).

186. *Id.*

187. *Id.*

188. *Bill would give farm animals more space*, by Jazmine Ulloa, THE BOSTON GLOBE, June 4, 2009.

189. *Id.*

190. “Enriched cages” provide for at least 750 cm<sup>2</sup> per hen, and contain a nest, litter, perch, and clawing board, *see* Communication from The Commission to

The European Parliament and The Council on the various systems of rearing laying hens in particular those covered by Directive 1999/74/EC at SEC(2007)1750 issued on January 8, 2008.

191. *Id.*

192. John McNerny, *Animal Welfare Economics and Policy: Report on a study undertaken for the Farm and Animal Health Economics Division of DEFRA* (2004) at <https://statistics.defra.gov.uk/esg/reports/animalwelfare.pdf>.

193. *Id.*

194. *Id.*

195. David L. Dickinson and DeeVon Bailey, *Meat Traceability: Are U.S. Consumers Willing to Pay for It?*, *Journal of Agricultural and Resource Economics*, 27(2):348-364, 355 (2002)

substantially.<sup>196</sup> The commonwealth could also consider regulating the weaning of mammals as some techniques are recognized to be far more humane and less traumatic to both mother and newborn animals than others.<sup>197</sup> An option for addressing concerns in the veal industry would be to adopt a law similar to that in the United Kingdom that requires that veal calves must be given bedding and fed a diet with adequate iron and roughage. The United Kingdom also provides for a number of other requirements regarding veal calves' diet, their living environment, and their handling to ensure the calves' welfare.<sup>198</sup> Providing bedding materials to sows would result in an improved level of comfort and straw in pig enclosures would improve pigs' welfare as they have a natural proclivity for chewing and manipulating straw.<sup>199</sup> The European Union requires that "pigs must have permanent access to a sufficient quantity of material to enable proper investigation and manipulation activities, such as straw, hay, wood, sawdust, mushroom compost, peat or a mixture of such, which does not compromise the health of the animals."<sup>200</sup> Requiring open partitions (slats or bars) between stalls would allow veal calves and sows to have some level of social interaction and access to outside stimuli, thereby improving their wellbeing.<sup>201</sup> These changes and others may be considered as the public becomes more aware of farm animal conditions and as other jurisdictions begin to examine how to improve farm animal welfare.

Some could make the argument that these types of changes are not reasonable targets for regulation. We do not, for example, dictate what kind of bedding people give to their dogs or how much outside mental stimuli one's cat should receive. However, agricultural animals are not companions or pets, but are typically seen by the farming industry as mere property in a way that society and the law do not. The law generally does not include strict guidelines for the housing and care of family pets, but the family pet is less likely to be kept in the conditions in which farm animals spend their lives. Pet owners are less likely to have economic motives to decrease a pet's living space to the point of discomfort than are livestock farmers who are motivated to produce profits. The law in Massachusetts has routinely stepped in when those economic pressures have led to

inhumane treatment of animals.

Conditions on many farms seem inconsistent with the modern legal trend toward promoting animal welfare and extending the legal protections that animals are given in other contexts. Given the tide of animal welfare law in Massachusetts, and the movement in other jurisdictions, it seems likely that change is inevitable for the farming industry in Massachusetts.

## CONCLUSION

Animal welfare law has evolved in Massachusetts over hundreds of years. That development has almost exclusively come in the form of expanding protections and increasing regulation promoting the wellbeing of animals. The common law view of animals as merely "property" is fading as the opinions of citizens and lawmakers evolves regarding the humane treatment of animals. The legal protection of animals has come from the legislature, from the judiciary, and from the voters directly. Even when economic concerns and property rights are weighed, the welfare of creatures under man's care remains a priority, in many realms of modern life.

However, the state that adopted the nation's first animal cruelty law has failed to sufficiently address an industry that is responsible for the management of hundreds of thousands of animals. The law has not been adapted to contend with the realities of industrial agriculture. Despite regulating many other industries in which animals play only an incidental role, there is a dearth of regulation regarding the lives of animals living on farms in Massachusetts. Many of the practices employed on farms seem inconsistent with the developing legal and social perception of how animals should be treated. The farming industry is ripe for reform. By following the example of other jurisdictions, Massachusetts can begin to reconcile the way that its farm animals are treated with the protections it affords other animals. Concerns regarding the treatment of farm animals can be addressed, as they have been elsewhere, with forward-thinking laws that bring new challenges, but ultimately aim to improve the lives of creatures under our care and comport our treatment of them to the "law of humanity."

196. In addition to minimum cage size and sanitation requirements, the European Union requires that chicken cages be equipped with "a nest," "litter such that pecking and scratching are possible," and "appropriate perches allowing at least 15 cm per hen" per Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens Official Journal L 203 , 03/08/1999 P. 0053 – 0057 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0074:EN:HTML>.

197. Such as gradual weaning for cows and pigs. GRANDIN & JOHNSON, *supra*, at 158-159, 181-182.

198. United Kingdom Welfare of Calves Regulation of 1987 (SI 2021) now in

Schedule 2 of Welfare and Livestock Regulations of 1994 at [http://www.opsi.gov.uk/si/si1994/Uksi\\_19942126\\_en\\_1.htm](http://www.opsi.gov.uk/si/si1994/Uksi_19942126_en_1.htm); see also P. Le Neindre, *Evaluating housing systems for veal calves* 71 *J Anim Sci* 1345-1354 at 1352 (1993).

199. GRANDIN & JOHNSON, *supra*, at 185-188.

200. Per a directive from the Standing Committee in furtherance of the European Convention for the protection of animals kept for farming purpose found in European Union Official Journal L 047, 18/02/2009 P. 0005 – 0013 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:047:0005:01:EN:HTML>.

201. P. Le Neindre, *supra*, at 1352.



# Public Contracting – The Requirement of Certification of an Appropriation

*Bradston Associates, LLC v. Suffolk County Sheriff's Department*, 452 Mass. 275 (2008)

## I. INTRODUCTION

It has long been the law that parties contracting with a city or town will not be able to recover payments allegedly owed if the requirements governing expenditure of the public money have not been satisfied. “Statutory and charter provisions restricting the manner in which municipal funds may be expended serve the salutary functions of placing cities and towns on a sound financial basis and preventing waste, fraud, and abuse.”<sup>1</sup> One of those requirements, Massachusetts General Laws, chapter 44, section 31C, is aimed particularly at public construction projects, and provides for a certification of an appropriation of funds sufficient to support the contract.<sup>2</sup> For the contracts of Suffolk County (and the contracts specifically of the city of Boston), there is a similar statutory provision.<sup>3</sup> In *Bradston Associates v. Suffolk County Sheriff's Dept.*,<sup>4</sup> the Supreme Judicial Court reaffirmed that it would construe such provisions so as to give priority to substance rather than form.

Despite the existence of restrictions on municipalities' authority to contract and to expend public funds,<sup>5</sup> the courts of the Commonwealth have allowed for some flexibility in interpreting applicable statutory rules and have not permitted formalized prerequisites to become an absolute bar to recovery against public contracting entities.<sup>6</sup> In *Bradston*, the Supreme Judicial Court analogized the Suffolk County contracting requirement to section 31C, governing municipal construction contracts. Citing prior cases in which it had held contracts valid despite failures to scrupulously adhere to the requirements of section 31C, the court in *Bradston* rejected the sheriff's contention that even though a contract with the plaintiff had

been properly executed and funded, the sheriff was not liable for any payment by reason of the absence of a certification of such funding by the auditor of the city of Boston.

## II. THE CONTRACTUAL ENGAGEMENT

Following a public bidding process, the sheriff<sup>7</sup> entered into an office space lease and building fit-up agreement with Bradston Associates (“Bradston”).<sup>8</sup> The lease required Bradston to construct certain improvements to the premises within six months of the signing of the lease. It also provided that it would become effective upon execution by both parties, “and upon execution of the City of Boston Standard Contract,” to which the lease would be attached.<sup>9</sup> That standard city contract was comprised of two forms, one of which called for the signatures of Bradston, the sheriff and the city auditor, and set forth the “not to exceed” cost and the budgetary funding source.<sup>10</sup>

After the lease was signed by the sheriff and Bradston, the sheriff sent the mayor a written request for approval, together with a copy of the lease.<sup>11</sup> The sheriff also prepared a standard contract, which listed the total multi-year cost of the lease as \$6,838,580 and identified the funding source as the state “grant-in-aid” funds annually allotted for the sheriff's operations.<sup>12</sup> The funds designated were for fiscal year 2002 and were listed in a line item of that year's state budget.<sup>13</sup> Following receipt of the contract from the sheriff, Bradston signed and returned it on August 23, 2001.<sup>14</sup> The sheriff then sent it to the city auditor for a preliminary review, anticipating its review and approval by the mayor and a final award by the sheriff.<sup>15</sup>

1. *United States Leasing Corp. v. Chicopee*, 402 Mass. 228, 231 (1988).

2. No contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or public work by any city or town costing more than two thousand dollars shall be deemed to have been made until the auditor or accountant or other officer of the city or town having similar duties has certified thereon that an appropriation in the amount of such contract is available therefor and that an officer or agent of the city, town or awarding authority has been authorized to execute said contract and approve all requisitions and change orders. MASS. GEN. LAWS ch. 44, §31C (2008).

3. All contracts made by any department of the city of Boston or by any officer, board or official of the county of Suffolk having power to incur obligations on behalf of said county in cases where said obligations are to be paid for wholly from the treasury of said city, shall, when the amount involved is \$10,000 or more, ... be in writing; and no such contract shall be deemed to have been made or executed until the approval of the mayor of said city has been affixed thereto in writing and the auditor of said city has certified thereon that an appropriation is available therefor or has cited thereon a statute under authority of which the contract is being executed without an appropriation. 1998 MASS. ACTS ch. 262.

4. 452 Mass. 275 (2008).

5. Massachusetts law includes the general provision that:[n]o department financed by municipal revenue, or in whole or in part by taxation, of any city or town, except Boston, shall incur a liability in excess of the appropriation made for the use of such department, ... except in cases of major disaster, ... which poses an immediate threat to the health or safety of persons or property, and

then only by a vote in a city of two-thirds of the members of the city council, and in a town by a majority vote of all the selectmen. MASS. GEN. LAWS ch. 44, §31 (1991).

6. *See Reynolds Bros. v. Norwood*, 414 Mass. 295 (1993) (holding that absence of certification under MASS. GEN. LAWS ch. 44, §31C did not invalidate contract for municipal airport project that had been properly approved and funded); *Lawrence v. Falzarano*, 380 Mass. 18 (1980) (holding that statutory certification was not essential for validity of hospital renovation contract where it was signed by authorized city official and there was an appropriation of more than sufficient funds to support it).

7. In the opinion, the sheriff's department and the sheriff are referred to collectively as the “sheriff.” *See Bradston Associates, LLC v. Suffolk County Sheriff's Dept.*, 452 Mass. 275 (2008).

8. *Id.* at 276.

9. *Id.*

10. *Id.* at 276 n.2.

11. *Id.* at 276.

12. *Bradston Associates, LLC v. Suffolk County Sheriff's Dept.*, 452 Mass. 275, 276 (2008).

13. *Id.* at 276-77.

14. *Id.* at 277.

15. *Id.*

A staff accountant in the auditor's office confirmed "budget authority" for the lease and the availability of funds through the grant-in-aid monies, initialed the contract, and transmitted it to the auditor for her signature.<sup>16</sup> On September 20, 2001, the auditor signed the contract, approving it "as to the availability of an appropriation ... in the amount of \$0.00," something regularly done to speed the contract approval process.<sup>17</sup>

The fiscal year 2002 state budget was not approved until December 1, 2001.<sup>18</sup> It contained a "minimum" of \$75.6 million for grant-in-aid to the sheriff, an amount the parties agreed was adequate to fund the first year of the contract.<sup>19</sup> On December 4, 2001, the mayor gave his written approval to the sheriff's request letter, and the sheriff's chief financial officer subsequently signed the contract on December 12, as the "awarding authority/official."<sup>20</sup> The same staff accountant who initially reviewed the contract then finished processing it, confirming that all required signatures had been obtained and that the source of the appropriation was identified.<sup>21</sup> On January 2, 2002, in accordance with her authorization, she stamped the contract "EXECUTED" and signed it.<sup>22</sup>

During the final processing of the contract, the auditor did not change the appropriation certification from "\$0.00" to the actual funded amount.<sup>23</sup> Regardless, the sheriff and Bradston "understood that the contract had been approved," and Bradston continued to work on the required improvements.<sup>24</sup>

Shortly thereafter, the sheriff announced reductions in his operating budget, and sent a contract termination notice to Bradston.<sup>25</sup> The stated grounds for termination were Bradston's allegedly having violated the lease by failing to complete the required construction within six months of the signing of the lease.<sup>26</sup> In response, Bradston sued for breach of contract, asserting that the six-month period did not begin to run until the date the lease became effective by virtue of the signature of the sheriff's chief financial officer, following the

provision of an appropriation and approval of the contract by the mayor.<sup>27</sup>

### III. LOWER COURT LITIGATION

The sheriff's motion to dismiss was granted by a Superior Court judge, who concluded that termination of the contract was proper when the required improvements had not been completed within six months of the signing of the lease.<sup>28</sup> By an unpublished order issued pursuant to its Rule 1:28, the Appeals Court reversed, ruling that the "signing" date intended to start the six-month clock was uncertain, given the various approval requirements of chapter 262.<sup>29</sup>

Following a remand to the Superior Court and the completion of some discovery, the sheriff moved for summary judgment, on the new ground that the lease had not been executed because the city auditor had not properly certified the availability of an appropriation as required by chapter 262.<sup>30</sup> Her motion was granted and the Appeals Court affirmed.<sup>31</sup> Bradston sought and obtained further appellate review.<sup>32</sup>

### IV. VALIDATION OF THE CONTRACT

The Supreme Judicial Court began its consideration of the dispute by noting its steady line of decisions requiring that those who deal with a municipality "must take notice of limitations ... upon the contracting power of the municipality and are bound by them and cannot recover upon contracts attempted to be made in violation of them."<sup>33</sup> It then followed that statement by citing to a United States Supreme Court opinion for the proposition that "when a contract is entered into by a proper official, and supported by budgetary authority, the government is bound like any other contracting party."<sup>34</sup> Returning to a discussion of Massachusetts authority, it then explained why the principle of compliance with contracting prerequisites is not to be woodenly applied.

16. *Id.*

17. *Bradston Associates, LLC v. Suffolk County Sheriff's Dept.*, 452 Mass. 275, 277 (2008).

18. *Id.* The fiscal year begins on July 1. MASS. GEN. LAWS ch. 4, §7, clause 9<sup>th</sup> (2008).

19. *Bradston*, 452 Mass. at 276-77. The court observed that

[w]hen the government makes multi-year contracts involving continuous expenditures, such as this one, it would be unreasonably restricted if an up-front appropriation for the entire expense was required; thus, we have read prohibitions on contracting in excess of available appropriations to require only an adequate appropriation for the current fiscal year's expenses.

*Id.* at 276 n.4 (citing *Boston Teachers Union, Local 66 v. School Comm. of Boston*, 386 Mass. 197, 208 (1982) and *Clarke v. Fall River*, 219 Mass. 580, 586 (1914)).

More recently, the Appeals Court has applied the "constantly recurring duties" exception to the prohibition against a liability in excess of the applicable appropriation. *Browning-Ferris Industries, Inc. v. Swansea*, 41 Mass. App. Ct. 383, 384-385 (1996) (holding that a lack of sufficient appropriation for multi-year solid waste collection and disposal contract would not relieve town from liability for payment for services performed pursuant to the contract).

20. *Bradston*, 452 Mass. at 277-78.

21. *Id.* at 278.

22. *Bradston Associates, LLC v. Suffolk County Sheriff's Dept.*, 452 Mass. 275, 278 (2008).

23. *Id.* The court noted that it was unclear whether retention of the \$0.00 amount was the result of "inadvertence, negligence, or inadequate procedures," but added that there was evidence that other contracts "were routinely routed and

approved with an appropriation availability of '\$0.00,' including another contract between the sheriff and Bradston that remain[ed] in full effect." *Id.* at n.5.

24. *Id.* Although the court noted that at the time the contract was approved, "work on the improvements was in progress," it did not state when the work had begun. *Id.*

25. *Bradston*, 452 Mass. at 278.

26. *Id.*

27. *Bradston Associates, LLC v. Suffolk County Sheriff's Dept.*, 452 Mass. 275, 278 (2008).

28. *Id.* at 279.

29. *Id.*; *Bradston Assocs., LLC v. Cabral*, 61 Mass. App. Ct. 1116 (2004).

30. *Bradston*, 452 Mass. at 279.

31. *Id.*; *Bradston Assocs., LLC v. Cabral*, 70 Mass. App. Ct. 822 (2007).

32. *Bradston Assocs., LLC v. Cabral*, 450 Mass. 1106 (2008).

33. *Bradston Associates, LLC v. Suffolk County Sheriff's Dept.*, 452 Mass. 275, 279 (2008). (quoting *Marlborough v. Cybulski, Ohnemus & Assocs.*, 370 Mass. 157, 160 (1976) (quoting, in turn, *Duff v. Southbridge*, 325 Mass. 224, 228 (1950))). *See also Sancta Maria Hosp. v. Cambridge*, 369 Mass. 586, 595 (1976) (holding that those who contract with officers or agents of a governmental agency must "see to it that those officers or agents are acting within the scope of their authority."); *White Constr. Co. v. Commonwealth*, 11 Mass. App. Ct. 640, 648 (1981) (holding that persons dealing with a governmental agency "must take notice of limitations upon that agency's contracting power and cannot recover upon a contract which oversteps those limitations.").

34. *Bradston*, 452 Mass. at 280 (citing *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 637, 642 (2005) (where Congress had appropriated sufficient funds for a contract, the government could not avoid its obligation on the basis of "insufficient appropriations"))).

The starting point for the discussion was *Lawrence v. Falzarano*,<sup>35</sup> where the court's task was interpretation of section 31C of chapter 44. Faced, on one side, with a statutory declaration that a municipal construction contract of more than \$2,000 shall not be "deemed to have been made" without certification of a sufficient appropriation by the auditor, and on the other with an actual appropriation of \$1,500,000 but no corresponding certification, it considered the aim of the certification requirement. Finding one of the purposes to be providing contractors with "a ready and reliable means of ascertaining that there is an appropriation sufficient to cover the proposed work and to protect them where the contract carries a certification" but no appropriation actually exists,<sup>36</sup> it determined that the contractor was "an intended beneficiary of the statute," and invalidation of the contract would permit the city to benefit from its own error, contrary to the statutory intent.<sup>37</sup> Therefore, the court ruled in *Lawrence* that "[w]here it is unquestioned that the contract was executed by a proper city official and that a sufficient appropriation existed in fact to cover the cost of the contract ... the contract is not necessarily invalid because it lacks on its face the certification required by ... §31C."<sup>38</sup>

Noting that the *Lawrence* holding had been affirmed in *Reynolds Bros. v. Norwood*,<sup>39</sup> the court stated that chapter 262 "serves much the same purpose for contracts awarded by Suffolk County officials" as section 31C does for municipal construction contracts.<sup>40</sup> Accordingly, it held that where the proper officials have approved a contract and there is a sufficient appropriation to support it, the unexplained absence of an appropriation by the auditor does not invalidate the contract.<sup>41</sup> It found further support for the validity of the contract in the fact that the auditor's office "processed the contract, deemed it executed, and was fully aware of the availability of the appropriation."<sup>42</sup>

Observing that its conclusion was consistent with the auditor's limited role under the governing statute, "a ministerial, nondiscretionary verification of existing budgetary authority,"<sup>43</sup> the court was careful to point out the difference between that role and the role of the mayor. Approval by the mayor, it stated, is not ministerial.<sup>44</sup> Rather, a mayor's signature and approval is required, and he or she may withhold that approval.<sup>45</sup> The court then cited *McLean v. Mayor of Holyoke*,<sup>46</sup> in which it was emphasized that the mayor must have the freedom to exercise "practical wisdom" in administering the city's business.

Finding the contract to be valid, the court was then left with the question of when the six-month construction period had begun to run, and the dependent question of whether the sheriff's termination notice was proper, which had been left unanswered in the proceedings below. As the record demonstrated the existence of disputed material facts regarding the time the six-month period commenced, the court remanded the matter for further proceedings.<sup>47</sup>

## V. CONCLUSION

The outcome in *Bradston* was consistent with the court's prior holdings on when strict compliance with an appropriation certification requirement is required. It represents a further application of a reasonableness rule in a situation where there is no doubt as to the availability of designated funds to support a public contract. As the court observed, where there is no such doubt, and where all other approvals have been obtained, it would "sacrifice substance to form and perpetrate an unfairness" contrary to the statutory intent to allow a public entity to terminate a contract based solely upon the absence of a certification of the existence of those funds.<sup>48</sup>

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35. 380 Mass. 18 (1980).

36. *Bradston*, 452 Mass. at 280 (quoting *Lawrence v. Falzarano*, 380 Mass. 18, 25 (1980)).

37. *Bradston*, 452 Mass. at 280-81 (quoting *Lawrence*, 380 Mass. at 25).

38. *Lawrence*, 380 Mass. at 25.

39. 414 Mass. 295 (1993). *Reynolds* involved a multi-million dollar municipal airport project that had been fully approved and funded, but for which the appropriation certification was lacking. The court held that invalidation of the contract would frustrate the legislative purpose of §31C. See *id.* at 301.

40. *Bradston Associates, LLC v. Suffolk County Sheriff's Dept.*, 452 Mass. 275, 281 (2008).

41. *Id.* at 281-82.

42. *Id.* at 282.

43. *Id.*

44. *Id.* at 282 n.9, quoting *Lumarose Equip. Corp. v. Springfield*, 15 Mass. App. Ct. 517, 519-20 (1983). In *Lumarose*, the court ruled that in the absence of written mayoral approval the actions of the city-purchasing agent purporting to extend certain contracts were insufficient to give life to the contracts.

45. *Bradston Associates, LLC v. Suffolk County Sheriff's Dept.*, 452 Mass. at 282 n.9.

46. 216 Mass. 62, 64 (1913).

47. *Bradston*, 452 Mass. at 283. Interestingly, a few months later the propriety of the sheriff's termination of a similar contract became the subject of another

decision by the Supreme Judicial Court, *Morton Street, LLC v. Sheriff of Suffolk County*, 453 Mass. 485 (2009). In that case, the sheriff entered into a ten-year lease of office space near the West Roxbury District Court. The lease documents incorporated a standard form City of Boston contract and general conditions, which stated that the contract was "subject to the availability of an appropriation therefor," and included a provision authorizing contract termination for "convenience." Following occupancy of the premises for three years, the sheriff sent a termination notice when funding for the fourth year was not made available. Summary judgment was entered in the Superior Court on the basis of the sheriff's arguments that subsections 12(a) and 12(b) of the Uniform Procurement Act, MASS. GEN. LAWS, ch. 30B (2008), provide that performance of a contract in succeeding fiscal years depends on the availability and appropriation of funds, and that unless authorized by a majority vote (of the county commissioners in this instance) a procurement officer shall not award a contract for a term of more than three years. *Id.* When the plaintiff appealed, the Supreme Judicial Court took the case on its own initiative. It affirmed the summary judgment for the sheriff, but on the different ground that "under general contract principles" the sheriff was "entitled to terminate the lease in accordance with [the contract's] unambiguous termination provision." *Morton Street*, 453 Mass. at 490. In a footnote, the court referenced its decision in *Bradston* and observed that in that case the sheriff did not attempt termination of the lease under the provisions of the general conditions of the standard form contract, and commented that "the termination provision that proves decisive here was never addressed in *Bradston*." *Id.* at 490 n.12.

48. *Bradston*, 452 Mass. at 282.



# Criminal Law – An Expert Witness’s Reliance Upon Hearsay Evidence After *Crawford v. Washington*

*Commonwealth v. Nardi*, 452 Mass. 379 (2008)

In *Commonwealth v. Nardi*,<sup>1</sup> a case before the Supreme Judicial Court (“SJC”) for review of the defendant’s first degree murder conviction, the SJC considered the defendant’s article 12 and Sixth Amendment Confrontation Clause challenge to a pathologist’s testimony as to cause of death. That testimony was largely based upon the report of an autopsy conducted by another pathologist who did not testify at trial. The testimony of the second pathologist was introduced by the Commonwealth pursuant to the rule of *Division of Youth Services v. A Juvenile*,<sup>2</sup> which allows an expert witness to base an opinion on hearsay evidence not introduced at trial.<sup>3</sup> The United States Supreme Court’s 2004 decision in *Crawford v. Washington*,<sup>4</sup> however, bars the prosecution from using “testimonial” hearsay where the defendant does not have, and has never had, an opportunity to cross-examine the declarant.<sup>5</sup> Thus, there is a tension between the *Youth Services* and *Crawford* rules. The SJC’s carefully reasoned resolution of that tension in *Nardi* will be much studied in future cases, because the situation of one expert testifying at least in part on the basis of another expert’s test results is a regularly recurring one in Massachusetts criminal trials.<sup>6</sup>

## I. THE FACTUAL AND LEGAL BACKGROUND

The case against Nardi was circumstantial. Nardi was charged with the murder of his fifty-nine year old mother.<sup>7</sup> The defendant

lived with her in a small second-floor apartment in Bridgewater.<sup>8</sup> Their relationship was “stormy.”<sup>9</sup> They argued frequently about money and she was going to ask him to move out.<sup>10</sup> On a day in December, 2002, shortly before she was last seen alive, the mother experienced leg pain and shortness of breath after climbing a flight of stairs.<sup>11</sup> She was told by a friend that she looked like “a heart attack ready to happen.”<sup>12</sup> Over the next two weeks, when several persons called the mother’s apartment, the defendant answered the phone and gave various reasons why his mother was unable to speak to the caller.<sup>13</sup> Near the end of that period, he gave uncharacteristically lavish Christmas gifts to some friends, and had a friend cash a check on which he had forged his mother’s signature.<sup>14</sup> On December 30, 2002, a friend of the mother phoned the police to report her as a “missing person.”<sup>15</sup> The police proceeded to the mother’s apartment.<sup>16</sup> There, they encountered the defendant on the stairwell and asked him where she was.<sup>17</sup> He told them that she was staying with another son in Bourne.<sup>18</sup> He then consented to their request to search the apartment.<sup>19</sup> Inside a bedroom the police found the mother’s decomposing body on the floor covered by a blanket.<sup>20</sup> Forensic examination of the apartment revealed a trail of human blood stains from the kitchen to the mother’s bedroom.<sup>21</sup> A blood stain on the defendant’s left foot yielded a mixture of deoxyribonucleic acid (DNA) matching his mother’s and his DNA profiles.<sup>22</sup> The

1. 452 Mass. 379 (2008).

2. 398 Mass. 516 (1986).

3. As discussed further below, pursuant to *Youth Services*, expert witnesses may base their opinions on: “(1) facts personally observed; (2) evidence already in the record or which the parties represent will be admitted during the course of the proceedings, assumed to be true in questions put to the expert witnesses; and (3) facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion.” *Commonwealth v. Markvart*, 437 Mass. 331, 337 (2002) (emphasis omitted) (quoting *Youth Services*, 398 Mass. at 531).

4. 541 U.S. 36 (2004).

5. The Supreme Court held in *Crawford* that, under the Confrontation Clause of the Sixth Amendment to the United States Constitution, “testimonial” hearsay cannot be admitted at trial against a criminal defendant unless: (1) the declarant is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant. See *Crawford*, 541 U.S. at 53–54. In *Crawford*, the Supreme Court “[l]eft for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.* at 68. The Court did state, however, that the term includes out-of-court “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 52.

6. See *Commonwealth v. Evans*, 438 Mass. 142, 152 (2002) (holding a criminalist’s testimony regarding the results of tests previously performed by other retired criminalist on the knife allegedly used in murder constituted inadmissible hearsay), *cert. denied*, 538 U.S. 966 (2003); *Commonwealth v. McNuckles*, 434 Mass. 839, 855–57 (2001) (holding expert’s testimony relying on analyst’s recorded observations admissible); *Commonwealth v. Sparks*, 433 Mass. 654, 659 (2001) (holding opinion of expert who conducts independent review of empirical data separate and apart from the original analyst admissible); *Commonwealth v. Johnson*, 412 Mass. 368, 374 (1992) (holding testimony of two

medical examiners who had not performed autopsy admissible); *Commonwealth v. Daye*, 411 Mass. 719, 742–43 (1992) (holding ballistics expert’s reliance on facts and data gathered by others did not deprive homicide defendants of their rights of confrontation and cross-examination); *Commonwealth v. Duarte*, 56 Mass. App. Ct. 714, 722–23 (2002) (holding DNA expert was qualified to give expert testimony in rape prosecution about population frequency calculations where she relied on statistics professionally available to her); *Commonwealth v. Hill*, 54 Mass. App. Ct. 690, 696–97 (2002) (holding doctor’s testimony based on DNA analysis of other analyst admissible); *Commonwealth v. Leinbach*, 29 Mass. App. Ct. 943, 944 (1990) (holding the testimony of supervising chemist of suspended chemist who performed the actual tests admissible).

7. *Commonwealth v. Nardi*, 452 Mass. 379, 380 (2008).

8. *Id.*

9. *Id.*

10. *Id.* at 380–81.

11. *Id.* at 381.

12. *Commonwealth v. Nardi*, 452 Mass. 379, 381 (2008).

13. *Id.*

14. *Id.* at 382.

15. *Id.* at 382.

16. *Id.*

17. *Commonwealth v. Nardi*, 452 Mass. 379, 382 (2008).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 382–83.

22. *Commonwealth v. Nardi*, 452 Mass. 379, 383 (2008).

defendant testified that he had awakened to find his mother dead on the kitchen floor in a pool of blood and had placed her body in the bedroom.<sup>23</sup>

A pathologist from the medical examiner's office conducted an autopsy on the mother's body on December 31, 2002, and January 1, 2003.<sup>24</sup> The autopsy revealed that the mother suffered from heart disease, including a slightly enlarged heart, the narrowing of a main artery to the heart, and a hardening of the arteries.<sup>25</sup> The autopsy also revealed injuries to her face and neck, including a small cut on her nose and two bruises near her chin.<sup>26</sup> The pathologist's opinion was that the cause of death was "consistent with asphyxia by suffocation."<sup>27</sup> By the time of trial, however, the pathologist had moved to Florida and was unable to travel due to a medical condition.<sup>28</sup> The parties stipulated to his unavailability.<sup>29</sup>

A second pathologist was called by the Commonwealth to testify about the results of the autopsy and the cause of the mother's death.<sup>30</sup> "In preparation for his testimony, [the second pathologist] reviewed crime scene reports, the autopsy report [the first pathologist] had prepared, [the first pathologist]'s notes and diagrams, photographs taken at and before the autopsy, microscopic tissue slides, and a toxicology report."<sup>31</sup> On the basis of this review, the second pathologist was also of the opinion that the mother's death was "consistent with asphyxia by suffocation."<sup>32</sup> The second pathologist's reliance at trial upon the results of the autopsy performed by the first pathologist was permitted by the rule, first set forth by the SJC in the *Youth Services* case,<sup>33</sup> allowing an expert witness to base an opinion on hearsay not in evidence. As formulated in *Youth Services*, the rule "permit[s] an expert to base an opinion on facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion.... If the facts or data are admissible and of the sort that experts in that specialty reasonably rely on in forming their opinions, then the expert may state that opinion without the facts or data being admitted in evidence."<sup>34</sup>

The "facts or data" that the expert may consider in forming an opinion include the observations of other scientific analysts who conducted examinations of evidence in the case<sup>35</sup> and information about the defendant received from lay persons,<sup>36</sup> but the "expert witness may not, on direct examination, present the specifics of hearsay information on which she has relied in reaching her opinion."<sup>37</sup> The adverse party, however, has a right to elicit those "specifics" on cross-examination of the expert.<sup>38</sup>

23. *Id.* at 384.

24. *Id.* at 383.

25. *Id.* at 386.

26. *Id.* at 383–84.

27. *Commonwealth v. Nardi*, 452 Mass. 379, 383 (2008).

28. *Id.*

29. *Id.* at 383 n.3.

30. *Id.* at 383.

31. *Id.* at 383.

32. *Commonwealth v. Nardi*, 452 Mass. 379, 388–89 (2008).

33. *Division of Youth Services v. A Juvenile*, 398 Mass. 516, 527–32 (1986).

34. *Id.* at 531–32.

35. *See Commonwealth v. McNuckles*, 434 Mass. 839, 855–57 (2001).

36. *See Commonwealth v. Jaime*, 433 Mass. 575, 576–77 (2001) (holding expert witness may base his opinion as to defendant's state of mind on other witnesses' accounts of defendant).

## II. THE CHALLENGE TO THE SECOND PATHOLOGIST'S TRIAL TESTIMONY

In its 2004 decision in *Crawford v. Washington*,<sup>39</sup> the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment bars the use of "testimonial" hearsay against a criminal defendant unless (1) the hearsay declarant is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant.<sup>40</sup>

In *Nardi*, trial defense counsel lodged an objection to the second pathologist's opinion as to the cause of the mother's death,<sup>41</sup> arguing that because there was "no independent basis for his opinion beyond [the first pathologist]'s written reports," his expressing his opinion violated the rule announced in *Crawford*.<sup>42</sup> The prosecutor responded that the second pathologist would testify to his "own opinion," based upon his "independent assessment" of the autopsy findings, and the judge overruled the objection.<sup>43</sup> On appeal, the defendant pursued his Confrontation Clause challenge to the second pathologist's opinion as to cause of death, arguing that "admitting [the second pathologist]'s opinion regarding the cause of death was tantamount to admitting [the first pathologist]'s testimony without the opportunity to cross-examine him."<sup>44</sup> The SJC disagreed,<sup>45</sup> concluding that the second pathologist's opinion was properly based upon his review of all three types of evidence approved in *Youth Services*.<sup>46</sup>

The court concluded that the case was similar to *Commonwealth v. DelValle*<sup>47</sup>, in which a medical examiner had "testified over objection based on his review of an autopsy report, diagrams, and photographs prepared, eleven years prior to trial, by another medical examiner who was no longer available to testify."<sup>48</sup> There, the court concluded that "the expert's testimony was proper, as it was 'based on the nature and severity of the injuries depicted in the autopsy report and photographs, as well as his own considerable experience as a pathologist."<sup>49</sup>

Applying the same reasoning, the court noted in *Nardi* that the second pathologist "considered a range of materials, including but not limited to [the first pathologist]'s autopsy report, and applied his own expertise (honed over the course of thousands of autopsies) to reach an independent conclusion regarding the cause of [the mother]'s death."<sup>50</sup> "That he reached essentially the same conclusion as to the cause of death as [the first pathologist] is of no consequence."<sup>51</sup>

37. *McNuckles*, 434 Mass. at 857.

38. *Commonwealth v. Markvart*, 437 Mass. 331, 338 (2002); *Jaime*, 433 Mass. at 577–78.

39. 541 U.S. 36 (2004).

40. *Crawford*, 541 U.S. at 53–54, 68.

41. *Commonwealth v. Nardi*, 452 Mass. 379, 385 (2008).

42. *Id.* at 385 n.7.

43. *Id.* at 385–86.

44. *Id.* at 388.

45. *Id.*

46. *Commonwealth v. Nardi*, 452 Mass. 379, 388–89 (2008).

47. *Commonwealth v. DelValle*, 443 Mass. 782 (2005).

48. *Id.* at 791.

49. *Nardi*, 452 Mass. at 389 (quoting *DelValle*, 443 Mass. at 792).

50. *Nardi*, 452 Mass. at 389–90.

51. *Id.* at 390.

The court also compared the case to *Commonwealth v. Daye*,<sup>52</sup> in which an expert bullet lead analyst testified:

that he prepared the bullet lead samples in his own laboratory, and then sent them out for further testing; his testimony was based, in part, on the results of testing conducted by others. [The SJC] concluded that “[n]othing in the record shows that [the expert]’s reliance on facts and data gathered by others not before the court fell outside the [permissible bases of expert testimony established] in [*Youth Services*].”<sup>53</sup>

Relying on *Daye*, the SJC ruled in *Nardi* that the fact that the second pathologist’s “expert opinion on the cause of [the mother’s] death was based, in large part, on findings” by another did “not infringe on Nardi’s right to confrontation concerning this issue.”<sup>54</sup> The second pathologist “testified to his own expert opinion, and did so based on a permissible foundation. He, not [the first pathologist], was the witness testifying to the cause of death, and Nardi was afforded ample opportunity to cross-examine him.”<sup>55</sup> To the extent that the second pathologist had considered the first pathologist’s report in formulating his opinion, this was permissible under *Youth Services*, because the underlying facts or data contained in the autopsy report would “potentially” have been admissible “through appropriate witnesses,”<sup>56</sup> specifically through testimony by the first pathologist.<sup>57</sup>

This latter aspect of the *Nardi* decision is problematic, because it rests on a hypothetical event which will never occur. The facts or data in the autopsy report in *Nardi* were not in fact admissible, because the first pathologist was not available to testify to them. The SJC here construes the *Youth Services* requirement of “independent[] admissibility” of facts and data<sup>58</sup> to include the *past potential admissibility* of facts and data *no longer admissible*. It is within the power of the SJC, as the ultimate authority on Massachusetts evidence law, to construe *Youth Services* in that manner, but it is an open federal constitutional question whether an expert witness’s opinion, grounded in part on *presently* inadmissible hearsay, can withstand a timely *Crawford* challenge based on the defendant’s lack of opportunity to cross-examine the declarant of the underlying hearsay.<sup>59</sup>

### III. THE CHALLENGE TO THE FIRST PATHOLOGIST’S HEARSAY EVIDENCE

On appeal, Nardi also claimed constitutional error in the admission of the second pathologist’s testimony because it recounted hearsay from the first pathologist. The SJC agreed that there was a substantial amount of hearsay in the testimony and carefully itemized it.

The second pathologist had testified to the first pathologist’s findings with respect to the rigidity of the mother’s body and the locations where contusions consistent with trauma were found on the body.<sup>60</sup> The second pathologist had referred repeatedly to a diagram drawn by the first pathologist to mark the locations of that trauma.<sup>61</sup> Finally, the second pathologist had advised the jury directly of the first pathologist’s opinion as to cause of death by stating, when asked for his (the second pathologist’s) opinion on that point, “My opinion is *I agree with* [the first pathologist]’s *assessment and how he certified the death* as ... consistent with asphyxia by suffocation.”<sup>62</sup> The SJC held that “[t]his testimony is plainly hearsay insofar as [the second pathologist] was testifying to, and asserting the truth of, statements recorded by [the first pathologist] in his autopsy report.”<sup>63</sup> The SJC ruled that there was “evidentiary error” in the admission of hearsay from the first pathologist’s autopsy report, because the report did not fall within a “hearsay exception.”<sup>64</sup> Specifically, the Court rejected the Commonwealth’s contention that the autopsy report fell within the “public or official record” hearsay exception, because much of the report reflected the first pathologist’s “exercise of *judgment and discretion*, expressions of opinion, and making conclusions.”<sup>65</sup> For that reason, the judge committed error in allowing the second pathologist to testify on direct examination to the findings in the autopsy report.<sup>66</sup> After concluding that the first pathologist’s findings in the autopsy report met no hearsay exception, the SJC further held that testimony as to those findings violated the Sixth Amendment’s Confrontation Clause, as interpreted by *Crawford* and its progeny.<sup>67</sup> The findings and conclusions contained in the autopsy report constituted “testimonial” hearsay, because a reasonable person in the position of the declarant (the first pathologist) would have anticipated his or her findings “being used against the accused in investigating and prosecuting a crime.”<sup>68</sup>

52. See *Commonwealth v. Nardi*, 452 Mass. 379, 390 (2008).

53. *Id.* at 390 (quoting *Daye*, 411 Mass. at 743) (citing *Youth Services*, 398 Mass. at 532 (brackets in *Nardi*; internal citation omitted)).

54. *Nardi*, 452 Mass. at 390.

55. *Id.* at 388.

56. *Id.* at 389 (quoting *Commonwealth v. Markvart*, 437 Mass. 331, 337 (2002)).

57. *Commonwealth v. Nardi*, 452 Mass. 379, 389 n.11 (2008).

58. See *Division of Youth Services v. A Juvenile*, 398 Mass. 516, 531 (1986).

59. Nevertheless, the SJC has recently reaffirmed its holding in *Nardi*, see *Commonwealth v. Avila*, 454 Mass. 744, 759–63 (2009); see also *Commonwealth v. Hensley*, 454 Mass. 721, 731–34 (2009). The SJC explicitly rejected a claim that post-*Crawford*, an expert cannot testify in a criminal trial to an opinion based upon independently admissible facts or data unless those facts or data are actually “admitted at trial through percipient witnesses in order to satisfy the defendant’s right of confrontation.” *Hensley*, 454 Mass. at 732 n.7. The court noted that other courts had rejected the defendant’s position. *Id.* (citing *United States v. De La Cruz*, 514 F.3d 121, 134 & n.5 (1st Cir. 2008), *cert. denied*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2858 (2009)) (quoting *Crowe v. Marchand*, 506 F.3d 13, 17–18 (1st Cir. 2007)).

60. *Nardi*, 452 Mass. at 392.

61. *Id.*

62. *Commonwealth v. Nardi*, 452 Mass. 379, 392 (2008) (emphasis and ellipsis in original).

63. *Id.*

64. *Id.* at 391–93.

65. *Id.* at 393 (quoting *Commonwealth v. Slavski*, 245 Mass. 405, 417 (1923)) (emphasis in *Nardi*). The SJC exempted from its holding of error elements of the autopsy report which did not involve “judgment or discretion” on the part of the pathologist, such as toxicology test results. *Nardi*, 452 Mass. at 393 (quoting *Commonwealth v. Verde*, 444 Mass. 279, 282 (2005)). This portion of the *Nardi* opinion is of questionable viability, however, in light of the fact that the *Verde* decision, on whose authority it rests, was effectively overruled by the subsequent decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527, 2531–32 (2009).

66. Such findings “may be elicited during cross-examination ... but the decision whether to do so is a strategic one left to the opposing party.” *Nardi*, 452 Mass. at 391 n.13 (quoting *Commonwealth v. Markvart*, 437 Mass. 331, 338 (2002) (ellipsis in *Nardi*)).

67. *Commonwealth v. Nardi*, 452 Mass. 379, 391–92 (2008).

68. *Id.* at 394 (quoting *Commonwealth v. Gonsalves*, 445 Mass. 1, 3 (2005)), *cert. denied*, 548 U.S. 926 (2006).



Despite its ruling as to the presence of evidentiary and constitutional error, the SJC affirmed Nardi's conviction of murder in the first degree. Because the defense objection to the second pathologist's testimony had been limited to the second pathologist's opinion as to the cause of death,<sup>69</sup> the error was reviewed as "unpreserved error" under the strict "substantial likelihood of a miscarriage of justice" standard.<sup>70</sup> The defense could not meet that standard here, because it had relied in part on the first pathologist's findings in the autopsy report as to the mother's heart disease, and those findings "were equally, if not more, important to the defense."<sup>71</sup>

#### IV. CONCLUSION

The SJC's decision in *Nardi* thoroughly examines the implications of the Supreme Court's interpretation of the Confrontation Clause in *Crawford* for expert opinion testimony based, at least in part, on hearsay, as permitted under *Youth Services*. Therefore, *Nardi* will be an indispensable guide to counsel and trial judges in all cases where the Commonwealth intends to present such testimony against a criminal defendant.

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69. *Nardi*, 452 Mass. at 394–95.

70. *Id.* at 394–95. The "substantial likelihood of a miscarriage of justice" standard applies to review of unpreserved error in first degree murder cases, *see* *Commonwealth v. Lennon*, 399 Mass. 443, 447, 448–49 n.6 (1987), without

regard to whether the unpreserved error is, as in *Nardi*, constitutional. *See* *Commonwealth v. Fowler*, 431 Mass. 30, 41 n.19, 42 & n.20 (2000); *Nardi*, 452 Mass. at 394.

71. *Commonwealth v. Nardi*, 452 Mass. 379, 395–96 & n.16 (2008).

# Civil Law – Chapter 93A – Unfair and Deceptive Practices in Mortgage Lending

*Commonwealth v. Fremont Investment and Loan*, 452 Mass. 733 (2008)

In the context of a challenge to the lending practices that lie at the heart of the worst economic crisis in decades, the Supreme Judicial Court (SJC) recently issued a strong endorsement of an updated understanding of unfair business practices under Massachusetts's consumer protection statute, chapter 93A of the general laws of Massachusetts ("the Act").<sup>1</sup> In *Commonwealth v. Fremont Investment & Loan*, ("*Fremont*"),<sup>2</sup> Justice Botsford, writing for a unanimous court, affirmed a preliminary injunction in favor of the attorney general against a subprime lender, finding that loans meeting certain characteristics were structurally unfair under the Act.<sup>3</sup> The SJC agreed that such loans were made on terms the lender knew or should have known were impossible for the borrower to repay absent the illusion of an eternally rising housing market.<sup>4</sup> In so ruling, the SJC turned a deaf ear to the argument that the lower court had utilized hindsight to apply a post-crisis understanding of unfairness to its pre-crisis lending practices.<sup>5</sup>

*Fremont*, however, should not be viewed in isolation. It is significant both for its articulation of unfairness in the context of an out-of-control contemporary business climate, as well as for its place in the larger constellation of actions undertaken by the attorney general to respond to the resulting crisis. This case comment will proceed in three parts. First, the jurisprudential landscape for unfairness under the Act will be reviewed. Second, the *Fremont* decision will be placed in the framework of the attorney general's overall campaign to respond to the foreclosure crisis. Last, the *Fremont* case itself will be analyzed.

## Chapter 93A Standard of Unfairness

As emphasized by the *Fremont* defendant, the attorney general challenged its loan practices on the basis of unfairness only. *Fremont's* disclosure of the terms of its loans under state and federal law was not placed at issue. Nor was the attorney general basing her request for a preliminary injunction on any allegation of misrepresentation or fraud against Massachusetts consumers.<sup>6</sup> The unfairness portion of the Act's proscription on "unfair or deceptive acts or practices," chapter 93A, section 2(a) of the General Laws of Massachusetts, was thus isolated for interpretation.<sup>7</sup>

A complete understanding of the Act's unfairness standard requires

a brief historical detour. Chapter 93A was passed by the General Court and signed into law by Governor Volpe in 1967 as the first of the "little FTC Acts," or state counterparts to the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45 *et seq* (2006). The Act, like its federal counterpart, was "intended as a vehicle to attack marketplace abuses with standards and remedies more powerful than those provided by the common law or by specific regulatory statutes."<sup>8</sup> The legislation accomplished this by doing away with the need to prove such common law elements as scienter, reliance or privity, as well as foregoing specific lists of prohibited conduct in favor of broad, descriptive standards.<sup>9</sup> The unfairness standard is the archetypal example of this legislative choice.

Chapter 93A itself provides no definition of unfairness. Instead, the statute expressly directs courts to consider federal administrative and judicial interpretation of unfair acts and practices under a similar provision in the FTC Act.<sup>10</sup> When Congress created the FTC and drafted its enabling legislation, it was faced with the task of providing guidance on its prohibition of "unfairness." The legislative history reveals that Congress explicitly declined to limit the definition with concrete manifestations of unfairness then within its contemplation.

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.<sup>11</sup>

Nevertheless, unfairness has come to be marked by certain characteristics. In *Federal Trade Comm'n v. Sperry & Hutchinson Co.* ("*Sperry & Hutchinson*"), the United States Supreme Court reviewed a cease and desist order of the FTC against a company accused of suppressing the free and open exchange of trading stamps.<sup>12</sup> At issue was whether the FTC had the authority to prohibit trade practices beyond those that infringed merely the letter or the spirit of the relevant statute.<sup>13</sup> The Court reviewed the history of the FTC Act and subsequent case law to reach its conclusion that the FTC had substantial autonomy to define unfairness.<sup>14</sup>

1. MASS. GEN. LAWS ch. 93A (2008)

2. 452 Mass. 733 (2008).

3. *Id.* at 735.

4. *Id.* at 743.

5. *Id.* at 742.

6. This is not to say that *Fremont's* loan process in Massachusetts was entirely free of fraudulent activity. On January 12, 2009, Nicole Lyder of Lehi Mortgage in Quincy pled guilty to forgery and a slew of other types of fraud in connection with four mortgage loans she brokered on behalf of *Fremont* in 2005. Michelle Hillman, *Mortgage Officer Jailed for Fraud*, BOSTON BUS. J., Jan. 13, 2009, available at <http://boston.bizjournals.com/boston/stories/2009/01/12/daily25.html>.

Ms. Lyder was sentenced to two years in the House of Correction. *Id.*

7. MASS. GEN. LAWS ch. 93A, §2(a) (2008)

8. Dwight E. Golann, *Evolution of Chapter 93A: National and Local Authority*, in CHAPTER 93A RIGHTS AND REMEDIES 1-3 (Margot Botsford ed., 2d ed. 2007).

9. *Id.*

10. MASS. GEN. LAWS ch. 93A, §2(b) (2008).

11. H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.).

12. 405 U.S. 233 (1972).

13. *Sperry & Hutchinson*, 405 U.S. at 235.

14. *Id.* at 246.

[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the [relevant statute].<sup>15</sup>

Significantly, however, the *Sperry & Hutchinson* Court also made note of the FTC's effort to define further the elements of unfairness for the public. It observed that the FTC had recently issued a statement describing the fairness factors to be considered when the practice at issue is neither deceptive nor monopolistic:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).<sup>16</sup>

While the *Sperry & Hutchinson* Court merely noted these factors marginally, their significance has grown over the years as courts have searched out benchmarks for analysis.

The fairness standard employed by the *Fremont* Court is derived directly from this early FTC articulation. In *PMP Assocs., Inc. v. Globe Newspaper Co.* (“*PMP Assocs.*”), the SJC considered whether a newspaper's refusal to publish advertisements from an escort service constituted an unfair business practice.<sup>17</sup> Noting the statute's direction to look to the interpretation of unfairness by the FTC and federal courts, the SJC cited *Sperry & Hutchinson* and its reference to the 1964 FTC Guidance, and adopted those factors as instructive for its own ruling that the newspaper had done nothing wrong.<sup>18</sup> Since *PMP Assocs.*, these factors have been routinely cited by Massachusetts courts faced with the question whether a particular business practice should be considered unfair.<sup>19</sup>

Perhaps most important for the purposes of *Fremont* analysis is the first of the 1964 FTC Guidance considerations—whether the practice is within the penumbra of some common law, statutory or other established concept of unfairness. It is this factor that makes clear that the Act “creates broad new rights, forbidding conduct not previously unlawful under the common law of contract and tort or under any prior statute.”<sup>20</sup> This line of interpretation should put to

rest any claim by a defendant that its conduct is saved from violating the Act because it was otherwise legal. *Sperry & Hutchinson* and its progeny allow for a finding of unfairness for conduct that, “although legally proper, [is] unfair to the public.”<sup>21</sup> So, for instance, the SJC has adjudged as violative of the Act circumstances as far-ranging as: the otherwise proper foreclosure of a mortgage;<sup>22</sup> the collection of utility charges otherwise legal under a rate-setting statute;<sup>23</sup> and the otherwise proper filing of suit in a forum where one of the parties lives or has a regular place of business.<sup>24</sup> None of these defendants were heard to complain that the specific allegations against them were not expressly prohibited prior to the lawsuit. Likewise, it has long been established that the prevalence of a particular business practice across an entire industry is not enough to insulate it from chapter 93A liability.<sup>25</sup>

No less important is the SJC's prior announcement of its intent to focus on the nature of the challenged conduct and the purpose and effect of that conduct, rather than whether the challenged actions fit within some ill-defined category of dastardly behavior.

We view as uninformative phrases such as “level of rascality” and “rancid flavor of unfairness” in deciding questions of unfairness under G.L. c. 93A. We focus on the nature of challenged conduct and on the purpose and effect of that conduct as the crucial factors in making a G.L. c. 93A fairness determination.<sup>26</sup>

This perspective comports with the view that the question of unfairness should be determined by a weighing of the equities between the parties.<sup>27</sup>

In *Fremont*, the defendant's strongest assertion was that the Court could not use hindsight to apply newly constructed standards of unfairness to conduct that occurred during a previous time period. In the defendant's view, such retroactive enforcement would discourage future business in the commonwealth on the basis of unpredictability in the rules of commerce. If there is any lesson to be learned from a review of the Act's history, however, it is that businesses are on notice that there is no precise definition of unfairness to be found. Nor is there any policy underlying the statute that would favor such a limitation. To the contrary, the history of the Act shows that the focus of determining fairness is on the challenged conduct in light of its objective effect, rather than its accordance with some preconceived category. An unfairness defense is thus better served with a justification of the substance of the defendant's actions, rather than an assertion that a novel theory of unfairness is being applied.

15. *Id.* at 244.

16. *Id.* at 244 n.5 (quoting FTC's Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964)).

17. 366 Mass. 593, 593-94 (1975).

18. *PMP Assocs.*, 366 Mass. at 596.

19. See, e.g., *Milliken & Co. v. Duro Textiles, LLC*, 451 Mass. 547, 563 (2008) (reciting factors); *Travis v. McDonald*, 397 Mass. 230, 232 (1986) (noting that 93A claims are within “at least the penumbra” of common law tort or contract principles”); *Ellis v. Safety Ins. Co.*, 41 Mass. App. Ct. 630, 640 (1996) (describing racial harassment as immoral, unethical or oppressive for the purposes of Chapter 93A); *Wasserman v. Agnastopoulos*, 22 Mass. App. Ct. 672, 679 (1986) (interpreting the second *PMP Assocs.* factor as the ethical standard prevalent in the commercial marketplace); *White v. Boston Phoenix, Inc.*, 1 Mass. L. Rptr. 345, 348 (Super. Ct. 1993) (quoting *PMP Assocs.* factors).

20. *Dodd v. Commercial Union Ins. Co.*, 373 Mass. 72, 78 (1977) (citing *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 693 (1975) and *Commonwealth v. DeCotis*, 366 Mass. 234, 244 n.8 (1974)).

21. *Schubach v. Household Finance Corp.*, 375 Mass. 133, 136 (1978) (“*Schubach*”) (quoting *Spiegel, Inc. v. F.T.C.*, 540 F.2d 287, 292 (7th Cir. 1976)).

22. *Kattar v. Demoulas*, 433 Mass. 1, 12-13 (2000).

23. *Lowell Gas Co. v. Attorney General*, 377 Mass. 37, 51-52 (1979).

24. *Schubach*, 375 Mass. at 135-37.

25. See *Commonwealth v. DeCotis*, 366 Mass. 234, 240 (1974).

26. *Massachusetts Employers Ins. Exchange v. Propac-Mass, Inc.*, 420 Mass. 39, 42-43 (1995) (citing *PMP Assocs. Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596 (1975)) (additional citations omitted).

27. *Swanson v. Bankers Life Co.*, 389 Mass. 345, 349 (1983) (“In determining whether an act or practice is unfair, as opposed to deceptive, we must evaluate



It was upon this legal backdrop that the subprime mortgage crisis unfolded in Massachusetts. Faced with the frenzied business climate that had created the conditions for this crisis, the attorney general surely agreed that the definition of unfairness needed to be adaptable to practices that had yet to be expressly proscribed by relevant law. Indeed, in the climate of subprime lending and its accompanying mortgage-backed securities, collateralized debt obligations and credit default swaps, congressional foresight was vindicated-when it comes to business practices that test the boundaries of unfairness, “[t]here is no limit to human inventiveness in this field.”<sup>28</sup>

### Attorney General’s Responses to Financial Crisis

The year 2007 marked the fortieth anniversary of chapter 93A of the General Laws of Massachusetts.<sup>29</sup> In that same year the foreclosure tsunami crested, requiring the attorney general to press the limits of the powers granted her under the Act. The *Fremont* case is but one example of a series of responses. Included among the attorney general’s comprehensive effort was rulemaking under section 2(c) of the Act, investigations and enforcement under sections 6 and 7 of the Act, and litigation under section 4 of the Act. In each instance, the attorney general commemorated the anniversary by extending the Act to its full strength.

#### Rulemaking

With regard to rulemaking, the attorney general targeted two separate aspects of the foreclosure crisis with two sets of regulations pursuant to chapter 93A, section 2(c) of the General Laws of Massachusetts.<sup>30</sup> On June 1, 2007, the attorney general enacted emergency regulations prohibiting foreclosure rescue schemes-predatory scams by which desperate homeowners would transfer ownership of their homes to avoid foreclosure.<sup>31</sup> Next, in September, 2007, the attorney general conducted a series of public hearings around the commonwealth, gathering input on revisions targeted at curbing the core behavior that gave rise to the foreclosure crisis.<sup>32</sup> These changes overhauled the practical rules by which lenders and brokers are required to abide. More importantly, however, the regulations introduced prospective conceptual fairness requirements.<sup>33</sup> Among other things, the regulations explicitly prohibited the species of unfairness litigated under the Act in *Fremont*-loans in which the lender or broker does

the equities between the parties.... What a defendant knew or should have known may be relevant in determining unfairness.... Similarly, a plaintiff’s conduct, his knowledge, and what he reasonably should have known may be factors in determining whether an act or practice is unfair.”

28. H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.).

29. MASS. GEN. LAWS ch. 93A (2008).

30. MASS. GEN. LAWS ch. 93A §2(c) (2008)

31. See 940 C.M.R. 25.01 *et seq.* (2009).

32. See 940 C.M.R. 8.01 *et seq.* (2009). In addition to holding her own hearings on these issues, the attorney general made her voice heard in the federal legislative process during this timeframe, as is apparent in her testimony before the U.S. House of Representatives Committee on Financial Services at a field hearing held at Roxbury Community College. See *Field Hearing on Mortgage Lending Disparities Before H. Comm. on Financial Services*, 110 Cong. (2007) (Statement of Mass. Att’y Gen. Martha Coakley), available at [http://www.mass.gov/Cago/docs/press/2007\\_10\\_15\\_ag\\_mortgage\\_testimony\\_attachment1.pdf](http://www.mass.gov/Cago/docs/press/2007_10_15_ag_mortgage_testimony_attachment1.pdf).

33. Some of these prospective standards are groundbreaking in their own right and may foreshadow future subjects of enforcement by the attorney general. For example, 940 MASS. CODE REGS. 8.06(17) (2009) prohibits mortgage broker compensation structures that create a conflict of interest with the borrower. “Where the financial interest of a mortgage broker conflicts with the interests

not have a reasonable belief that the borrower will be able to repay.”<sup>34</sup>

#### Investigations

Further, the attorney general utilized the powers granted her under chapter 93A, sections 6-7 to conduct a series of investigations. These investigations encompassed entities of all sizes. On the local front, the attorney general pursued an investigation and enforcement action against a Quincy mortgage broker, Lehi Mortgage, in 2007 and 2008.<sup>35</sup> The attorney general concluded that Lehi Mortgage had fraudulently procured mortgage loans by submitting inflated asset and income information to lenders, thereby facilitating loans that would not otherwise have been approved. With regard to entities of a larger scope, such an investigation recently yielded a groundbreaking \$60 million settlement with Goldman Sachs, on the basis of its role in the securitization process as an engine of excess that fueled the foreclosure crisis.<sup>36</sup>

The attorney general’s pursuit of Goldman Sachs’s was not based on any direct interaction with any Massachusetts consumers. Instead, the investigation targeted the investment bank’s bulk purchasing of subprime loans on the secondary market, followed by the bundling and sale of these pools to investors as mortgage-backed securities. Such a settlement represented a novel extension in enforcement beyond the players involved in the origination of loans-mortgage brokers, lenders and the various vendors who enable the closing-to the source of capital that funded these loans-investment banks. The investigation was comprehensive, examining both Goldman Sachs’ role in facilitating unfair loan transactions to consumers, and its behavior in creating the pools and interacting with the investors who bought the resulting securities. By holding Goldman Sachs accountable, the attorney general has recognized the role such entities played in incentivizing and facilitating the underwriting practices that led to the type of loans discussed in the *Fremont* case. Such an extension of liability is significant-simultaneously validating the legal theory that reaches this far up the chain of subprime lending and recognizing the factual causes that led to the subprime crisis in the first place.<sup>37</sup>

#### Civil Actions

Last, the attorney general utilized her authority under section 4

of the borrower (for example, where the broker’s compensation will increase directly or indirectly if the borrower obtains a loan with higher interest rates, increased charges or less favorable terms than those for which a borrower would otherwise qualify), the broker shall disclose the conflict and shall not proceed to process, make or arrange the loan so long as such a conflict exists.” 940 MASS. CODE REGS. 8.06(17) (2009). The SJC expressed its view that such compensation structures may be inappropriate in a *Fremont* footnote. See *Commonwealth v. Fremont Investment and Loan*, 452 Mass. 733, 736 n.8 (2008).

34. See 940 C.M.R. 8.06(15) (2009).

35. See Press Release, Massachusetts Att’y Gen., Att’y Gen. Martha Coakley Files Lawsuit Against Mortgage Broker for Fraudulently Arranging Loans (March 7, 2008), available at [http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2008\\_03\\_07\\_lehi\\_lawsuit&csid=Cago](http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2008_03_07_lehi_lawsuit&csid=Cago).

36. In addition to setting aside \$50 million for affected Massachusetts homeowners and \$10 million for the Commonwealth itself, the settlement terms require Goldman Sachs entities, *inter alia*, to forgive principal and work with other lien holders to either refinance or approve short sales of the affected homes. See Settlement Agreement between Goldman Sachs & Co. and the Att’y Gen. of the Commonwealth of Massachusetts (May 7, 2009), available at [http://www.mass.gov/Cago/docs/press/2009\\_05\\_07\\_goldman\\_settlement.pdf](http://www.mass.gov/Cago/docs/press/2009_05_07_goldman_settlement.pdf).

37. While there is no single, accepted definition of “subprime,” it is generally

of the Act to initiate civil actions against the parties that she deemed most responsible for the crisis in Massachusetts. In addition to the outcome she achieved in the *Fremont* case, discussed at length below, the attorney general was successful in obtaining a preliminary injunction on similar terms against Option One Mortgage Company, another subprime lender operating in Massachusetts.<sup>38</sup> The Option One complaint is also significant because it includes claims under the Massachusetts Anti-Discrimination Act, chapter 151B,<sup>39</sup> alleging that black and Latino borrowers paid more to originate their loans with Option One than did similarly situated Caucasian borrowers.<sup>40</sup> Such claims are consistent both with testimony offered by the attorney general to the U.S. House of Representatives Committee on Financial Services and a series of class action lawsuits filed against various mortgage lenders across the country.<sup>41</sup>

The attorney general's responses to the foreclosure crisis represent the broadest use of the powers afforded her under the Act, from regulation to investigation and litigation. Indeed, the *Fremont* litigation, growing as it did out of an investigation and touching on similar substantive issues as the attorney general's rulemaking, is a prime example of this use.

## Commonwealth v. Fremont Investment & Loan

### *Factual Background*

Fremont Investment and Loan, a subsidiary of the now bankrupt Fremont General Corporation, was headquartered in southern California and operated nationally, with a volume that made it one of the largest subprime lenders in the United States between 2000 and 2007.<sup>42</sup> Although Fremont General had been in business since 1963, its short-term history reflects the arc of the recent housing bubble. Fremont General had \$75.7 million in pre-tax revenue in 2000.<sup>43</sup> By 2004, that revenue exceeded \$600 million.<sup>44</sup> Over that same time period, Fremont General's total equity rose from \$296 million to

understood to refer to lending to borrowers who do not otherwise qualify for credit on the terms prevailing in the prime market, whether because of impaired credit histories or otherwise. The increased credit risk to such borrowers was used by subprime lenders to justify higher fees and/or interest rates in these loans. As noted in *Fremont*, however, "[f]ederal agencies have warned that the subprime lending market creates incentives to inflate interest rates unnecessarily." *Fremont*, 452 Mass. at 736 n.8 (citing BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FEDERAL DEPOSIT INSURANCE CORPORATION, OFFICE OF THE COMPTROLLER OF THE CURRENCY, OFFICE OF THRIFT SUPERVISION, INTERAGENCY GUIDANCE ON SUBPRIME LENDING 5 (March 1, 1999)).

38. *Commonwealth v. H&R Block Inc., et al.*, 25 Mass. L. Rptr. 92, 111 (Super. Ct. 2008).

39. MASS. GEN. LAWS ch. 151B (2008).

40. *Commonwealth v. H&R Block, Inc.*, 25 Mass. L. Rptr. at 99-101.

41. *See, e.g., Miller v. Countrywide Bank, N.A.*, 571 F.Supp. 2d 251 (D. Mass. 2008).

42. According to Fremont's SEC Form 10-K for the fiscal year ending December 31, 2006, Fremont made residential loans in 47 states that year, with the largest proportions occurring in California, Florida and New York. Fremont General Corp., Annual Report (Form 10-K), at 5 (Oct. 8, 2007).

43. Presentation at Fremont General's Annual Meeting of Stockholders, May 18, 2006, available at <http://www.fremontgeneral.com/phoenix.zhtml?c=106265&p=irol-financialHighlights>.

44. *Id.*

45. *Id.*

46. The popular press has amply covered the modern trend in the mortgage

over \$1 billion.<sup>45</sup>

Somewhat unusual among its subprime lending peers, Fremont continued to hold the servicing rights to many of the loans that it originated.<sup>46</sup> This fact would come to play a subtly important role in the litigation. The attorney general's ability to connect blame for the subprime origination practices with the decision to foreclose on the mortgage was made vastly less complicated by the ongoing authority that Fremont retained as servicer for many of its own loans.

Fremont's public demise began when the Federal Deposit Insurance Corporation ("FDIC") opened an investigation into its lending practices and level of capitalization. On February 27, 2007, the FDIC issued a proposed cease and desist order to the company-notifying Fremont that it was engaged in unsafe and unsound banking practices. Chief among the defects identified by the FDIC was an allegation that Fremont was endangering its depositors through its subprime mortgage lending practices, routinely making loans on terms that greatly increased the risk of default. The order required Fremont to cease and desist from loans marked by certain characteristics-many of which would be the same characteristics raised in the *Fremont* case and discussed below.<sup>47</sup> As a result of the FDIC action, Fremont voluntarily shut down its mortgage lending origination business.

In Massachusetts, the attorney general announced her interest in Fremont during this same time period. Fremont had been the second-largest subprime lender in the commonwealth, but was responsible for a disproportionate share of the predatory lending complaints to her office.<sup>48</sup> In fact, loans originated by Fremont accounted for ten percent of all Boston foreclosures from 2005-2007.<sup>49</sup> By 2007, Fremont was responsible for more foreclosed homes in Boston than any other lender.<sup>50</sup> By the autumn of that year, 20 percent of all the existing Fremont loans in Massachusetts were in default.<sup>51</sup>

In July, 2007, Fremont entered into a Term Sheet Agreement in which it agreed to provide notice to the attorney general prior to

industry to segregate the different functional phases of a mortgage loan. *See, e.g.,* Gretchen Morgenson, *Foreclosures Hit a Snag for Lenders*, N.Y. TIMES, Nov. 15, 2007, at C1. *See also, This American Life: Giant Pool of Money*, (Chicago Public Radio podcast Episode 355), available at [http://thislife.org/Radio\\_Episode.aspx?sched=1242](http://thislife.org/Radio_Episode.aspx?sched=1242). Origination of the loan is often executed by a lending institution working directly with mortgage brokers to sell, underwrite and close a loan in the first instance. Frequently, the loan is then bundled with hundreds or thousands of others and sold in the secondary market. In this scenario, the loan is then owned by a securitization trust and its myriad investors. Such a trust is operated by a trustee, who, pursuant to a contract, hires third-party entities for functions including document custody and servicing. Servicing is the industry name for the function of ongoing interaction with the borrower, including the collection of monthly payments, workout of defaults, and, in many instances, the responsibility for executing foreclosure.

47. Order to Cease and Desist at 3-4, In the Matter of Fremont Investment & Loan, No. FDIC-07-035b, (Fed. Dep. Ins. Corp. March 7, 2007), available at <http://www.fdic.gov/bank/individual/enforcement/2007-03-00.pdf> (listing seven characteristics).

48. *See* Kimberly Blanton, *Subprime Lender Sued Under Predator Law*, BOSTON GLOBE, Oct. 6, 2007, at C10.

49. Brief of Commonwealth of Massachusetts at 7, *Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733 (2008) (No. SJC-10258).

50. *See* CITY OF BOSTON DEP'T OF NEIGHBORHOOD DEV., FORECLOSURE TRENDS 2007, at 3 (2007) available at [http://www.cityofboston.gov/TridionImages/U\\_2007\\_Foreclosure\\_Trends%5B1%5D\\_tcm1-1605.pdf](http://www.cityofboston.gov/TridionImages/U_2007_Foreclosure_Trends%5B1%5D_tcm1-1605.pdf).

51. *Id.*

its foreclosure of any Massachusetts property.<sup>52</sup> The notice period was 90 days, with an allowance for an expedited 45 day period in certain cases.<sup>53</sup> The notice period was to allow the Attorney General to review the underlying loans and negotiate with Fremont on behalf of borrowers whose loans were found to be objectionable.<sup>54</sup> If a negotiation did not result in a successful resolution in the form of a loan modification or refinancing, Fremont was free to proceed with foreclosure after an additional 15-day period during which the attorney general could seek an injunction.<sup>55</sup>

After receiving the loan documentation for 119 owner-occupied loans under the 90-day review process, the attorney general notified Fremont on October 4, 2007 that it objected to foreclosure in each of those cases.<sup>56</sup> The attorney general also informed Fremont that it did not object (with a single exception) to 74 foreclosures submitted under the expedited 45-day review process in which the properties were not owner-occupied and the borrowers had not responded to outreach.<sup>57</sup> Instead of entering into a negotiation process, the attorney general filed a lawsuit seeking injunctive relief in Suffolk Superior Court's Business Litigation Session. Fremont terminated the term agreement shortly thereafter.<sup>58</sup>

### *Superior Court Action*

The attorney general's superior court lawsuit was based on the lending that Fremont had done in Massachusetts between January, 2004 and March, 2007, when Fremont halted loan originations following the FDIC cease and desist order.<sup>59</sup> The primary allegation was that Fremont had routinely engaged in lending practices that ran afoul of chapter 93A, section 2's fairness standard because Fremont knew or should have known that these loans could not realistically be repaid. The attorney general sought two alternative forms of relief. The broader option required Fremont to obtain the written consent of the attorney general prior to executing any foreclosure in Massachusetts.<sup>60</sup> In the alternative, the attorney general proposed a kind of equation, based on her investigator's study of the dominant characteristics in a sample of the subject loan files, by which Fremont would be barred from foreclosing on certain loans considered "presumptively unfair."<sup>61</sup> The Superior Court opinion granting the

preliminary injunction engaged in an extensive discussion of the cocktail of borrower and loan characteristics that, according to the commonwealth, would preordain default and foreclosure.

The first set of these characteristics involved an adjustable rate feature in which a 30-year loan has an "introductory" interest rate for an initial two or three year period, then adjusts upward for the balance of the loan term.<sup>62</sup> For that remaining period of years, the interest would readjust every six months, marked to a market rate of interest, usually the six-month London Interbank Offered Rate ("LIBOR").<sup>63</sup> For instance, a typical loan in this category would have a seven percent interest rate for the first three years of the loan term, followed by a 27 year period in which the interest rate would be reset every six months to a rate of LIBOR plus six percent (the "fully indexed rate"). These loans would usually feature a cap on the amount of the initial interest rate adjustment, as well as a maximum and minimum fully indexed rate. The minimum fully indexed rate was often set at the introductory rate, which insured that the loan would adjust only upward. It was not uncommon for the maximum fully indexed rate to be in the range of 10 to 12 percent. Such an adjustment could lead to dramatic increases in monthly payments at the close of the introductory period, known as "payment shock."<sup>64</sup>

As noted in the Superior Court opinion, these adjustable rate mortgages, or "ARMs," were the primary vehicles favored by sub-prime lenders because the introductory rate, known pejoratively as a "teaser" rate, made the loan appear cheaper at first glance than was actually the case.<sup>65</sup> In addition, the low introductory rate allowed the loan originator to pitch the borrower on the basis of the lower introductory rate, with a corresponding promise that they could refinance before the rate reset.<sup>66</sup> So long as the borrower had equity in the house, such a refinance was feasible. However, where the circumstances were such that a refinance was wholly contingent on equity derived from an artificially inflated and rising housing market, the ability to refinance out of the rate reset was as illusory as the home prices at the top of the housing bubble.<sup>67</sup>

The Superior Court next discussed the debt-to-income ratio used to underwrite these loans. Debt-to-income ratio is a general expression of the portion of a borrower's monthly income that must be

52. Commonwealth v. Fremont Investment & Loan, 23 Mass. L. Rptr. 567, 569 (Super. Ct. 2008) ("*Fremont* Super. Ct. decision").

53. *Id.* At the time of this agreement, Massachusetts's new "Act Protecting and Preserving Homeownership" was not yet effective. See MASS. GEN. LAWS ch. 244, §35A (effective May 1, 2008). This new law requires notice of a 90-day period prior to foreclosure within which all Massachusetts homeowners have a right to cure the default.

54. *Fremont* Super. Ct. decision, 23 Mass. L. Rptr. at 569.

55. *Id.*

56. *Id.*

57. Commonwealth v. Fremont Investment & Loan, 23 Mass. L. Rptr. 567, 569 (Super Ct. 2008).

58. *Id.*

59. *Id.* at 568. During that time, Fremont originated 14,578 loans to Massachusetts residents secured by mortgages on owner-occupied homes. See Commonwealth v. Fremont Investment & Loan, 23 Mass. L. Rptr. 733, 736 (2008). Of those loans, only about 3,000 remained active at the time of the preliminary injunction hearing and Fremont retained servicing rights over 2,500 of those loans. *Id.*

60. *Fremont* Super. Ct. decision, 23 Mass. L. Rptr. at 569.

61. *Id.* Drawing upon the FDIC's cease and desist order, the attorney general defined a loan as "presumptively unfair" if it had the following characteristics:

adjustable interest rate with a low introductory rate of three years or less in which either (a) the combined loan-to-value ratio was ninety percent or higher, (b) the loan was approved on a "stated income" basis, meaning that Fremont essentially accepted the borrower's statement of income without requiring verification, or (c) the loan had a prepayment penalty. *Id.* The attorney general would not object even to a presumptively unfair loan if one of three mitigating factors was present: 1) the borrower consented to foreclosure; 2) the property was vacant and uninhabitable; or 3) the property was a vacant investment property. *Id.* These factors will be discussed in more detail below.

62. *Id.* at 570.

63. *Id.*

64. *Id.*

65. Commonwealth v. Fremont Investment & Loan, 23 Mass. L. Rptr. 567, 570 (Super. Ct. 2008). The Superior Court also observed that Fremont would sometimes employ a 40-year amortization period to suppress the monthly loan payment even further. In this model, a loan with a 30-year term is amortized on a 40-year schedule, meaning that in exchange for lower monthly payments, the borrower is still responsible at the end of the loan term for a balloon payment covering the last 10 years of the amortization, which is the bulk of the principal balance of the loan. *Id.* at 570.

66. *Id.*

67. *Id.*



directed to payments on debt, including the monthly mortgage payment.<sup>68</sup> It is the most elementary method of determining whether a given loan is affordable for the borrower. The Superior Court noted that Fremont's underwriting required a borrower's debt-to-income ratio to be less than 50 percent, (or 55 percent in some cases), with some exceptions.<sup>69</sup>

Key to the Superior Court's reasoning, however, was Fremont's decision to consider only the mortgage payments required during the introductory period when calculating debt-to-income ratio, rather than to base its underwriting on a prediction of what the payments would be after the rate reset.<sup>70</sup> In other words, by ignoring the variable rate period and underwriting many loans right up to the 50 percent debt-to-income threshold, Fremont made certain that the loan would become unaffordable after payment shock set in, absent some increase in the borrower's income.<sup>71</sup> In order to avoid foreclosure in such circumstances, the Superior Court observed that a borrower would be forced to refinance the loan during the slender window of time just before their introductory period ended.<sup>72</sup>

The need to refinance in order to avoid foreclosure gave rise to a discussion of the final set of characteristics-loan-to-value ratio and prepayment penalties.<sup>73</sup> Loan-to-value ratio is a general indicator of the amount of equity in a property. Where a loan amounted to 100 percent of the fair market value of the home, it was a virtual certainty that there would be little or no equity in the home at the close of the introductory period, absent a rapidly rising housing market bestowing its largesse upon the homeowner.<sup>74</sup> More likely, because of the declining housing market that emerged in 2007, homeowners with an initial 100 percent loan-to-value ratio would find themselves "underwater" at the time of the rate reset.<sup>75</sup> In such circumstances, refinance is normally not feasible.

In concert with high loan-to-value ratios, the Superior Court observed that prepayment penalties could make refinancing more difficult. Prepayment penalties assess the borrower a fee for repaying the principle balance prior to the end of the loan term, as is done in a refinance.<sup>76</sup> In some instances, the prepayment penalty extended beyond the introductory period.<sup>77</sup> When the loan featured this type of prepayment penalty on top of the other characteristics discussed by the Superior Court, the homeowner was forced to navigate between the Scylla of payment shock that would occur in the initial loan and the Charybdis of a prepayment penalty that would accompany refinance into a new loan.<sup>78</sup>

Synthesizing all of these characteristics, the Superior Court arrived at a sort of algorithm. It determined that a lender should

reasonably have foreseen default in instances where the payment shock in an ARM was especially problematic because the loan was underwritten using a 50 percent debt-to-income ratio based only on the teaser rate payments.<sup>79</sup> In these circumstances, the only means of avoiding default would be a refinance. Where such loans also had 100 percent loan-to-value ratios at the time of origination or contained substantial pre-payment penalties, the Superior Court deemed them "doomed to default and foreclosure" in the foreseeable circumstances that the housing market took a downturn.<sup>80</sup>

For the principle that unfairness results where a loan is originated on terms that a reasonable lender should have known were likely to result in foreclosure the Superior Court turned to chapter 183C of the General Laws of Massachusetts ("chapter 183C"),<sup>81</sup> the Predatory Home Loan Practices Act.<sup>82</sup> Enacted in 2004, this statute was intended, *inter alia*, to prevent the making of "high cost" loans by lenders interested only in collecting fees up front, unconcerned about the long-term viability of the arrangement.<sup>83</sup> The statute prohibits the making of such loans "unless the lender reasonably believes at the time the loan is consummated that [one] or more of the obligors[] will be able to make the scheduled payments to repay the home loan based upon a consideration of the obligor's current and expected income, current and expected obligations, employment status, and other financial resources other than the borrower's equity in the dwelling which secures repayment of the loan."<sup>84</sup> Fremont's loans were not alleged to fall within the parameters of chapter 183C.<sup>85</sup> Nevertheless, the Superior Court drew upon *PMP Assocs.* and its progeny to discern the making of a loan for profit without regard to the borrower's ability to repay under its terms as within the penumbra of the concept of unfairness expressed in that statute.<sup>86</sup>

The Superior Court thus concluded that loans could be presumed structurally unfair under the Act if they bore the following four characteristics:

1. The loan is an ARM with an introductory period of three years or less;
2. The loan has an introductory or "teaser" rate for the initial period that is at least three percent lower than the fully indexed rate;
3. The borrower has a debt-to-income ratio that would have exceeded 50 percent if the lender's underwriters had measured the debt, not by the debt due under the teaser rate, but by the debt due under the fully indexed

68. *Id.*

69. *Id.*

70. Commonwealth v. Fremont Investment & Loan, 23 Mass. L. Rptr. 567, 570 (Super. Ct. 2008).

71. *Id.*

72. *Id.* at 571.

73. *Id.*

74. *Id.*

75. Commonwealth v. Fremont Investment & Loan, 23 Mass. L. Rptr. 567, 570 (Super. Ct. 2008). "Underwater" or "upside down" refers to circumstances in which a borrower owes more money on the home than it would be worth upon sale.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Commonwealth v. Fremont Investment & Loan, 23 Mass. L. Rptr. 567, 570 (Super. Ct. 2008).

81. MASS. GEN. LAWS ch. 183C (2008).

82. *Fremont Super. Ct. decision*, 23 Mass. L. Rptr. at 573.

83. *Id.*

84. MASS. GEN. LAWS ch.183C, §4 (2008).

85. Commonwealth v. Fremont Investment & Loan, 23 Mass. L. Rptr. 573 (Super Ct. 2008).

86. *Id.* at 572. The Superior Court opinion also observed, in dicta, that Fremont was put on notice of this principle of unfairness by various federal guidance memos released at various times before and throughout the time period at issue. See *id.* at 575 (*citing, inter alia*, UNITED STATES OFFICE OF THE COMPTROLLER OF THE CURRENCY, THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE BOARD, INTERAGENCY GUIDANCE ON HIGH LTV RESIDENTIAL REAL



rate; and

4. The loan-to-value ratio is 100 percent *or* the loan carries a substantial prepayment penalty *or* a prepayment penalty that extends beyond the introductory period.<sup>87</sup>

Understood in terms of the standard for granting a preliminary injunction,<sup>88</sup> the court's lengthy discussion of structural unfairness amounted to a finding that the attorney general was likely to prevail on the merits.<sup>89</sup> The court went on to address the balancing of harms by offering what it characterized as a narrowly tailored process for adjudicating individual foreclosures under its supervision.<sup>90</sup> The order was effectively a modification of the term sheet agreement that existed prior to the lawsuit, but was striking nonetheless on account of the depth of the court's willingness to involve itself in the process.

For loans not bearing the four characteristics, or loans secured either by homes that were not the principal residence of the borrower or by homes that were vacant or uninhabitable, Fremont was required to give the attorney general notice of the foreclosure to provide time to verify these facts.<sup>91</sup> If Fremont wished to foreclose on a loan that bore the marks of structural unfairness, either to test the presumption in the particular circumstances of that loan or because there were mitigating circumstances, (such as underwriting based on unusual assets or a third-party guarantor), it was also required to give the attorney general notice.<sup>92</sup> If the attorney general nevertheless objected to the foreclosure, the parties had a short period to attempt to resolve their differences.<sup>93</sup> In the absence of an agreement, Fremont could foreclose only after getting permission from the court, which would make a final determination on whether a particular loan ran afoul of the Act.<sup>94</sup> The court also warned that in considering whether to allow foreclosure, it would take into consideration any offers made by Fremont to work out the loan default and any possible alternatives to foreclosure.<sup>95</sup>

The Superior Court opinion is more significant for its understanding of the facts in the context of the unfairness standard than it was for its practical effect on the parties. With regard to the effect on Fremont, the Superior Court went to great pains to note that its

decision did not release borrowers from their debt obligations, nor did it conclude that Fremont had engaged in any fraudulent conduct.<sup>96</sup> Rather, "[t]he spirit of this decision is simply that Fremont, having helped borrowers get into this mess, now must take reasonable steps to help them get out of it."<sup>97</sup> The practical outcome of the Superior Court's order was, in effect, a form of judicial foreclosure, whereby both the attorney general and the court would be actively involved in Fremont's loss mitigation process. If nothing else, this structure increased Fremont's incentive to resolve each individual default through a loan modification or other non-foreclosure solution.<sup>98</sup>

### Supreme Judicial Court Decision

Following an unsuccessful interlocutory appeal to a single justice of the Appeals Court,<sup>99</sup> Fremont petitioned to have the matter referred to a full panel of the Appeals Court.<sup>100</sup> The commonwealth responded with a successful application for direct appellate review to the SJC.<sup>101</sup> In a sign of the importance of the case to the public interest, the SJC solicited amicus briefs.<sup>102</sup> The call was met with a robust response, as briefs were submitted by the National Consumer Law Center and the WilmerHale Legal Services Center of Harvard Law School in support of the commonwealth, as well as by a host of industry trade associations and by a legal foundation in support of Fremont.<sup>103</sup>

On December 9, 2008, the SJC handed down a unanimous endorsement of the Superior Court's preliminary injunction.<sup>104</sup> Authored by Justice Botsford, the opinion drew upon chapter 93A's long history of addressing novel business practices alleged to be abusive with a flexible and broad understanding of unfairness. The Court rejected the motif pressed by the defendant — that to accept 93A liability in this context amounted to the use of hindsight to gain clarity of vision, with the effect of poisoning the ongoing business environment in Massachusetts for firms unable to tell where the fairness line was drawn. This battle was joined on four different platforms.

First, the SJC addressed the general conflict between mortgage industry standards and the evolving concept of unfair business practices. The opinion dismissed as inconsequential the Superior Court's

ESTATE LENDING (Oct. 8, 1999)).

87. *Fremont* Super. Ct. decision, 23 Mass. L. Rptr. at 574 (emphasis in original).

88. See *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 616-17 (1980).

89. *Fremont* Super. Ct. decision, 23 Mass. L. Rptr. at 576.

90. The Superior Court noted without analysis that a preliminary injunction sought by the attorney general should be evaluated to determine whether it is in the public interest (citing *Commonwealth v. ELM Medical Laboratories, Inc.*, 33 Mass. App. Ct. 71, 83 (1992)). See *Commonwealth v. Fremont Investment & Loan*, 23 Mass. L. Rptr. 576-77 (Super Ct. 2008).

91. *Fremont* Super. Ct. decision, 23 Mass. L. Rptr. at 576-77.

92. *Id.* at 576.

93. *Id.* at 577.

94. *Fremont Investment & Loan*, 23 Mass. L. Rptr. at 577.

95. *Commonwealth v. Fremont Investment & Loan*, 23 Mass. L. Rptr. 567, 577 (Super Ct. 2008).

96. *Id.*

97. *Id.*

98. It is not unusual for a properly executed loan modification to be beneficial for all parties involved. The homeowner is permitted to stay in the home, theoretically with modified loan terms that make ongoing performance of the loan possible. For the owner of the mortgage, the loan is revived as a performing asset and the cost of foreclosure and resale is avoided.

99. *Commonwealth v. Fremont Investment & Loan*, No. 08-J-118, 2008 WL 2312648, at \*1 (Mass. App. Ct. May 2, 2008).

100. Prior to this appeal, the attorney general had returned to Judge Gants on an emergency motion to expand the scope of the original injunction to restrict the assignment of loans and servicing rights. See *Commonwealth v. Fremont Investment & Loan*, 24 Mass. L. Rptr. 12, 13 (Super. Ct. 2008) ("*Fremont* Single Justice decision"). This motion was prompted by Fremont's announcement that it intended to sell the servicing rights on 290 of the subject loans to Carrington Mortgage Services on April 1, 2008. *Id.* The Superior Court allowed the Carrington sale to go forward, but modified the scope of its original ruling to prohibit Fremont from assigning loans or servicing obligations in the future unless the assignee agreed in writing to be bound by the obligations of the preliminary injunction. *Id.*, at 15-16. This ruling, too, was upheld by the single justice. *Fremont* Single Justice decision, 24 Mass. L. Rptr. at 15-16.

101. *Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733, 735 (2008).

102. *Commonwealth v. Fremont Investment & Loan*, No. SJC-10258, Docket Entry No. 2 (Mass. Aug. 4, 2008) (announcement, soliciting amicus briefs), available at [http://www.ma-appellatecourts.org/display\\_docket.php?dno=SJC-10258](http://www.ma-appellatecourts.org/display_docket.php?dno=SJC-10258).

103. *Id.* at Docket Entry Nos. 15, 16, 18, 21, 23 (various dates).

104. The Superior Court's preliminary injunction was upheld just days after its author, Justice Ralph Gants, was nominated to the SJC by Governor Patrick on Dec. 1, 2008. Justice Gants was confirmed to the SJC by the Governor's

statement that the loans at issue were considered unfair by neither the industry nor the general public at the time they were made.<sup>105</sup> Instead, the SJC directed that the inquiry more properly should focus on the underlying substance—did Fremont have reason to know that the subject loans were likely to default, absent the unrealistic possibility of an infinitely rising real estate market?<sup>106</sup> In so doing, the opinion tacitly endorsed the basic structure of the Superior Court opinion—accepting the four characteristics found to make default likely. Citing, *inter alia*, a 2003 advisory letter from the Office of the Comptroller of the Currency warning against the excesses of predatory lending, the SJC found that Fremont did have reason to know that their loans could be viewed as unfair—it was unreasonable for Fremont to make loans with a disregard for the borrower’s ability to repay in a differing financial climate.<sup>107</sup> Although the federal administrative guidance had focused on lending where the borrower’s ability to repay was disregarded in favor of the foreclosure value of the collateral, the SJC did not read the Superior Court’s opinion to reach that conclusion expressly.<sup>108</sup> Instead, the SJC was tacitly satisfied that the unfairness standard was violated where a lender disregarded a borrower’s ability to pay regardless of that lender’s particular motivation for doing so.<sup>109</sup>

The second platform from which the SJC rejected Fremont’s hindsight argument was in the context of chapter 183C of the General Laws of Massachusetts. Fremont’s most forcefully argued position on appeal was that Judge Gants had effectively rewritten chapter 183C to apply to all mortgage loans made in Massachusetts, rather than just the “high-cost” loans identified in the statute.<sup>110</sup> In Fremont’s view, the legislature could have subjected all Massachusetts loans to the requirement that the lender reasonably believe in the borrower’s ability to repay, but it did not.<sup>111</sup> For the Superior Court to expand the statute’s reach in this manner was argued to be beyond the judicial function.<sup>112</sup> Fremont found support for this assertion in the Superior Court’s own anticipation of this position, in dicta:

Fremont justly may ask why this Court is extending to *all* home mortgage loans this principle [of unfairness].... when the Legislature declared this to be an unfair act only for *high cost* mortgage loans. The reason is that this Court does not believe the Legislature believed this practice to be tolerable for mortgage loans that did not meet the definition of high cost mortgage loans. Rather, this Court believes that the Legislature thought it sufficient to focus on high cost mortgage

loans because it did not imagine that lenders would issue loans with this degree of risk unless they were high cost mortgage loans. What has changed since the Legislature promulgated the Act is the increasing prevalence of mortgage-backed securities, which enabled lenders such as Fremont to assign large quantities of their high-risk mortgages, take a quick profit, and avoid the risks inherent in the loan.... As the mortgage market changes, so, too, must the understanding of what lending conduct is unfair.<sup>113</sup>

In Fremont’s view, this passage was evidence that the Superior Court had usurped the legislature’s prerogative.

However disagreeable the Superior Court’s articulation of its own finding was, Fremont’s appellate argument directly challenges the “penumbra” concept of discerning unfairness that had existed in the field ever since *Sperry & Hutchinson* had unearthed the 1964 FTC guidance on cigarette labeling. The SJC’s response, then, was somewhat expected. “That the Legislature chose in [chapter 183C] to focus specifically on home loan mortgages with different terms and features from Fremont’s is not dispositive; the question is whether [chapter 183C] may be read to establish a concept of unfairness that may apply in similar contexts.”<sup>114</sup> The Court reminded Fremont that it was not interpreting chapter 183C, but rather looking to that statute to discern an established concept of unfairness—i.e., the making of loans by a lender who had reason to know that default is likely. The SJC buttressed its conclusion that such a concept of unfairness was well-known with a handful of citations to both federal and state administrative announcements of the dangers of such lending.<sup>115</sup> Viewed in that light, Fremont’s chapter 183C assertion was deemed unpersuasive.

The SJC next addressed Fremont’s variation on its theme under chapter 93A, section 3 of the General Laws of Massachusetts, which provides:

Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States.<sup>116</sup>

Fremont labored to stretch the meaning of this provision into immunity for any lending practice that was not manifestly illegal.<sup>117</sup> The Court turned away this argument as well, pointing out the difference between practices that are not outwardly illegal and those

Council on Jan. 21, 2009.

105. *Fremont*, 452 Mass. at 742-43.

106. *Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733, 743 (2008).

107. *Id.* at 744-46 & n.20. The OCC advisory letter citation was corroborated by a handful of other state and federal guidance announcements, dating back to 1997. The Court also invoked the March, 2007 cease and desist order from the FDIC, despite its lack of evidentiary value.

108. *Id.* at 745 & n.20, (citing OCC ADVISORY LETTER, GUIDELINES FOR NATIONAL BANKS TO GUARD AGAINST PREDATORY AND ABUSIVE LENDING PRACTICES, AL 2003-2 at 2 (Feb. 21, 2003)).

109. *Fremont*, 452 Mass. at 745-46. Instead of arguing that its practices were not based on the foreclosure value of the collateral, or offering some other justification for its behavior, Fremont took a different tack. In explaining its lending practices, the SJC noted that “Fremont suggested in oral argument that the

loans were underwritten in the expectation, reasonable at the time, that housing prices would improve during the introductory loan term, and thus could be refinanced before the higher payments began.” *Id.*, at 746. Rather than offer some version of business necessity as to why these loans were made, Fremont chose to challenge the standard of unfairness being applied. Fremont thus did not provide a justification for its behavior sufficient to satisfy the Court.

110. *Id.* at 748.

111. *Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733, 748 (2008).

112. *Id.*

113. *Commonwealth v. Fremont Investment & Loan*, 23 Mass. L. Rptr. 567, 574 (Super. Ct. 2008) (“*Fremont* Super. Ct. decision”).

114. *Fremont*, 452 Mass. at 749.

115. *Id.* at 744-46.

116. MASS. GEN. LAWS, ch. 93A, §3 (2008).

that are expressly and affirmatively permitted by law.<sup>118</sup> While there may not have been a statute expressly condemning the challenged lending practices, nor was there any authority expressly permitting them either.<sup>119</sup>

The SJC's understanding of the section 3 exemption was narrow. Recognizing that it was not merely the presence of each of the four characteristics in isolation that made the loans untenable, the Court rejected Fremont's effort to support their lending practices by pointing to authority sanctioning each one individually.<sup>120</sup> Instead, the opinion adopted a requirement defining the challenged practice as combining all four of the characteristics:

To carry its burden under G.L. c. 93A, § 3, of demonstrating that a regulatory scheme "affirmatively *permits* the practice which is alleged to be unfair," Fremont must show that some regulatory scheme affirmatively permitted the practice of combining all of those features. Fremont has not done so. Rather, it cites authority demonstrating, it asserts, that each of the four features was permitted by statute and regulatory authorities. Assuming, without deciding, that Fremont is correct that every feature was affirmatively permitted separately, it was Fremont's choice to combine them into a package that it should have known was "doomed to foreclosure"; the relevant question is whether some State or Federal authority permitted that combination. No authority did.<sup>121</sup>

The foundation for this conclusion was expertly laid by the authors of the preliminary injunction motion at the attorney general's office—by defining the challenged "practice" as loans that encompass all four of the characteristics, the attorney general made certain that resort to the section 3 exemption could not be had. As long as the Court agreed with this characterization of the challenged practice, it was impossible for Fremont to find any declaration of validity or sanction.

Last, the SJC reviewed Fremont's hindsight argument through the lens of the public interest consideration applicable to injunctions sought by the attorney general.<sup>122</sup> In summary fashion, the opinion reviewed the safeguards put in place by the Superior Court to balance the preliminary injunction.<sup>123</sup> The Court determined that no environment of uncertainty was created for mortgage lenders in Massachusetts where the injunction merely created an extra level of scrutiny that Fremont must pass before it foreclosed on loans that

may ultimately be deemed unfair.<sup>124</sup> The opinion observed that the injunction did not prevent Fremont from foreclosing on defaulted loans, nor did it relieve borrowers of their obligation to repay.<sup>125</sup>

Perhaps Fremont's greatest strategic blind spot was its decision to abandon the effort to defend the substance of its business practices. Instead of offering a justification for its business practices,<sup>126</sup> Fremont conceded the basic construct of facts put forth by the attorney general and adopted by the Court at this relatively early stage of the proceedings.

Fremont suggested in oral argument that the loans were underwritten in the expectation, reasonable at the time, that housing prices would improve during the introductory loan term, and thus could be refinanced before the higher payments began. However, it was unreasonable, and unfair to the borrower, for Fremont to structure its loans on such unsupported optimism.<sup>127</sup>

Fremont's choice was to focus on the assertion that the challenged lending practices were not illegal under any statute or regulation, and were widely used throughout the industry. Such an avenue of attack was in deep conflict with the jurisprudential ancestors of *Fremont* and ignored the SJC's directive to "focus on the nature of challenged conduct and on the purpose and effect of that conduct as the crucial factors in making a G.L. c. 93A fairness determination."<sup>128</sup> By ignoring any defense of the value of the underlying business practice itself, Fremont provided an opening for the SJC to respond with the dense body of chapter 93A precedent that permits a wide berth on the guideposts for determining unfairness. The cardinal shortcoming in Fremont's defense was in quibbling with the entire methodology by which unfairness had long been adjudged under the Act, rather than to defend its business practices as fair to consumers.

## Conclusion

On April 17, 2009, Fremont and the commonwealth entered into a final judgment by consent, to become effective pending approval in the bankruptcy of Fremont's parent corporation.<sup>129</sup> Pursuant to the final judgment, Fremont will pay \$10 million to the commonwealth and agree to abide by a foreclosure approval process similar to that originally proposed by the attorney general in its motion for preliminary injunction nearly a year and a half earlier.<sup>130</sup>

The *Fremont* saga is a lesson in the strength of an evolving public interest doctrine in the hands of an active and persuasive

117. *Fremont*, 452 Mass. at 744-46.

118. *Id.* at 750.

119. *Id.* (citing *Fleming v. National Union Fire Ins. Co.*, 445 Mass. 381, 390 (2005)).

120. *Id.* at 750.

121. *Id.* at 750-51, (emphasis in original) (citing *Commonwealth v. DeCotis*, 366 Mass. 234, 239-40 (1974)).

122. *Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733, 751-52 (2008).

123. *Id.*

124. *Id.*

125. *Id.*

126. For instance, the SJC did not so much as mention any Fremont assertion that its lending was not, in fact, based on the foreclosure value of the collateral. That Fremont had no explanation for its trafficking in such risky lending practices, and was otherwise unable to justify placing borrowers in the trap identified by the Superior Court was fatal to its efforts on appeal.

127. *Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733, 746 (2008).

128. *Massachusetts Employers Ins. Exchange v. Propac-Mass, Inc.* 420 Mass. 39, 42-43 (1995).

129. See *Fremont General Corp.*, Current Report (Form 8-K), at 1-2 (April 20, 2009).

130. *Id.*

government advocate. Depending on the viewer's perspective, *Fremont* will be remembered either as an example of the intrusion of the judicial branch into legislative policymaking, or as a thoughtful decision by an engaged judge interpreting the Act to uphold the consumer protection nature in which it was written. In any event, a review of *Fremont* in the context of chapter 93A jurisprudence shows that it does not represent any vast extension of chapter 93A doctrine. To the contrary, it fits squarely within the tradition of cases such as *Kattar*, *Lowell Gas Co.* and *Schubach*, where otherwise legal acts have been condemned for their pernicious effects. Although the decision did not step outside the boundaries of previous case law,

it does represent a strong reaffirmation of the principles of fairness that have undergirded the Act from its very start. In defining unfair business practices, the commonwealth cannot be anchored down to static definitions rooted in past consumer abuses. Rather, unfairness must be adaptable and evolving as the times change, especially in a climate as dynamic as the one that led to the current economic crisis. *Fremont*, then, is merely the latest application of Judge Learned Hand's statement, made in reference to the FTC, that guardians of consumer interests have a duty "to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."<sup>131</sup>

Kevin Costello

131. Federal Trade Commission v. Standard Education Society, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd in part* 302 U.S. 112 (1937).



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