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The renovation of the John Adams courthouse included restoration of the beutifully gilded plaster ceiling. The gilt was restored using period methods. Rather than gold leaf, aluminum was applied to the plaster which was then painted with tinted lacquer. This archway near the entrance to the Appeals Court provides a great example of this technique. Photo by Roger L. Michel Jr.

Editor's note:
In Volume 93, no. 4 of the Massachusetts Law Review, *the e-mail address for one of the authors was incorrect due to a typographical error. The correct address for Marc Perrone is perrone.marc@gmail.com.*

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A Practical Approach to Arbitration Under the Massachusetts Statute, G.L. c. 251

By James E. Grumbach

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A. Introduction

As the expense of courtroom litigation has soared, fueled significantly by relentless discovery, parties turn to arbitration in hope of a faster, fairer and more cost-effective path to the resolution of their disputes. Notwithstanding frequent importation to arbitration of the impedimenta of courtroom litigation (*e.g.*, voluminous discovery, motion practice, and parades of expert witnesses), the parties retain significant control over how an arbitration will be conducted and so are still in a position to control its costs. For example, the parties can determine whether there will be one arbitrator or a panel of three, impose limits on discovery, agree to relax the rules of evidence (particularly as to authentication of documents), etc. Counsel, in drafting an arbitration clause, would do well to take significant care, therefore, in determining not just what types of disputes are subject to arbitration, but how the arbitration will be conducted, as well.. For civil matters in Massachusetts, the underlying statutory framework for arbitration is set out in General Laws c. 251, and that is the focus of this article.

Arbitration may be used to resolve a limitless range of disputes and, perforce, take many forms depending on the subject matter of the controversy.. Certain arbitrations are specialized, and peculiar to their fields. Examples are controversies arising out of construction; securities transactions and employment disputes; fire insurance claims involving disputes as to valuation (known as "references") under G.L. c. 175 §§99-101H; and automobile property damage claims. Such arbitrations are governed by their own rules, which are not detailed in this overview. Additionally, many arbitration agreements mandate that disputes must be determined by specific arbitration organizations or arbitrators, and governed by rules promulgated by specific organizations.[2] In other situations, parties agree after a dispute has arisen to refer it to arbitration; and certain arbitrations are governed by arbitration clauses that do not specify an organization or a set of governing rules. Such Massachusetts arbitrations are governed either by the Federal Arbitration Act ("FAA"),[3] if they involve certain aspects of interstate commerce; international arbitration law; or G.L. c. 251, the Uniform Arbitration Act for Commercial Disputes. Chapter 251 provides the default mode for the governance of arbitrations in Massachusetts. This overview focuses on G.L. c. 251 and its interface with the FAA.[4]

B. G.L. c. 251 and Matters Discussed in the Statute

The Massachusetts legislature, in G.L. c. 251, adopted the Uniform Arbitration Act for Commercial Disputes ("UAA" or "Statute"). The Statute recognizes and encourages the use of arbitration agreements, and of awards rendered in connection with arbitrations.[5] The Statute governs all Massachusetts arbitrations except certain labor arbitrations involving collective bargaining agreements, which are governed instead by G.L. c. 150C.[6] The Statute also provides guidance as to the procedural aspects of arbitrations, the means of confirming and objecting to awards, and appeals from awards.

Under the terms of the Statute, written agreements to arbitrate are both enforceable and irrevocable.[7] If an agreement to arbitrate exists, a party may bring a proceeding to compel arbitration.[8] All doubts will be resolved in favor of arbitration. *Kingstown Corp. v. Black Cat Cranberry Corp.*, 65 Mass. App. Ct. 154 (2005); *Town of Watertown v. Watertown Munic. Employees Assn*, 63 Mass. App. Ct. 285 (2005); but cf. *Commerce & Industry Ins. Co. v. Bayer Corp.*, 433 Mass. 388 (2001) (court found no arbitration agreement in a "battle of the forms", where purchase orders contained an arbitration provision, but sales invoices provided that conflicting language in buyer's forms were not accepted).

There is a presumption in favor of arbitrability. For example,

1. The author gratefully acknowledges the support, and editorial assistance, of Hon. Rudolph Kass (ret.) and Jerry Cohen, Esq., in preparing and finalizing this article.

2. These organizations include, among others, the American Arbitration Association ("AAA"), the American Institute of Architects ("AIA"), and the Center for Public Resources ("CPR"). International disputes are often governed by the United Nations Commission on International Trade Law (UNCITRAL).

3. 9 U.S.C. §§1 (2010) *et. seq.*

4. This article is accompanied by an article entitled *Judicial Involvement in Arbitrations and in the Review of Arbitral Awards*, written by John H. Henn, Esq., which focuses significantly on the FAA.

5. Mass. Gen. Laws ch. 251 §1 (2010).

6. *Id.*

7. *Id.*.

8. *Id. at* §2.

in a case in which a written employment agreement provided for both arbitration of disputes and indemnification of the chief executive officer, the CEO was discharged and the parties then entered into a written severance agreement. The court ruled that the CEO was still entitled to enforce his rights to both arbitration and indemnification under the employment agreement, due to language in the employment agreement providing that both the arbitration and indemnification provisions would survive the termination of employment.[9] A party may waive the right to arbitrate by failing to demand arbitration until after it has participated without objection in a court action.[10]

The Statute envisions both single arbitrator proceedings and multiple-arbitrator panels.[11] The court has the power, if an arbitration agreement does not specify an arbitrator, to appoint a particular arbitrator.[12] Whether the "side" arbitrators in a three arbitrator panel are partisan or impartial is a matter for agreement of the parties.

Non-parties to the arbitration agreement may not be compelled to arbitrate.[13] However, in *Travelers Cas. and Sur. Co. of America, Inc. v. Long Bay Management Co.*,[14] the Appeals Court allowed a surety, which was not a party to the arbitration agreement, to compel arbitration against a general contractor on a performance bond. The court reasoned that the bond incorporated the construction contract by reference, thereby implicitly making the surety a party to the contract.

Discovery is limited to document requests and entry upon land for inspection, pursuant to M.R.C.P. 34.[15] The arbitrator may cause the issuance of subpoenas for the hearing, and may permit depositions to be taken as to witnesses who cannot testify at the hearing.[16] At the hearings, the parties have the "right to be heard, to present evidence material to the controversy and to cross-examine witnesses".[17] Failure to provide such procedural due process rights provides a basis for overturning an arbitration award.[18] However, the due process right is limited, and courts have upheld awards despite claims that the arbitrator refused to accept evidence not submitted according to the arbitrator's instructions.[19]

Unless the parties agree otherwise in advance, the arbitrator's award must provide for payment of the arbitrator's fees and expenses, as well as other expenses incidental to the arbitration; however, the arbitrator may *not* award counsel fees unless the arbitration agreement so provides, or a statute governing the dispute allows for recovery of attorneys' fees.[20] *Softkey, Inc. v. Useful Software, Inc.*,[21] involved an arbitration agreement which provided that legal and arbitration fees were to be borne by the party determined to be liable; and if complete liability was not assessed against either party, then the parties' respective liability was to be considered. The court in *Softkey* upheld the arbitrator's award of attorney's fees, based on his calculation of the extent to which each party prevailed in relation to its reasonable expectations.[22]

In *Dukas v. Yiu,*[23] the arbitrator heard the evidence, closed the hearing and requested applications for attorneys' fees with the final submissions. After the submissions, he rendered an award for the contractor, together with collection costs, attorney's fees and the arbitration costs, and noted that he had made no award for attorney's fees, since no evidence had been submitted on the issue. The court denied the plaintiff's request to assess attorney's fees, ruling that the matter was within the sole province of the arbitrator, and there had been a failure of proof.

In *Floors, Inc. v. B.G. Danis of New England, Inc.*,[24] the court upheld the Superior Court's confirmation of an arbitration award but limited the allowance of attorney's fees to those incurred in the Superior Court seeking recovery on a payment bond under G.L. c. 149 §29, and not to legal fees incurred in the arbitration, where neither the arbitration agreement nor the arbitrators' award provided for the recovery of such legal fees. In *LaRoche v. Flynn*,[25] the parties entered into an arbitration agreement after the commencement of litigation. The arbitrator entered an award in favor of defendant, and the court confirmed the award, and also awarded attorneys' fees and costs. The Appeals Court overruled the award of attorneys' fees and expenses, as outside the scope of G.L. c. 251 §10.[26]

The *LaRoche* court did allow for recovery of expenses incurred in a discovery dispute (for refusal to admit to the genuineness of signatures), upon the motion judge's determination that the plaintiff did not have reasonable grounds to believe it might prevail on the issue, and the discovery dispute had predated entry into the arbitration agreement.[27] Although an arbitrator may include pre-award interest in an award, a judge should not add pre-award interest; interest runs

9. Restaurant Consulting Services, Inc. and Aspeon, Inc. v. Mountzuris, 253 F. Supp. 45 (D. Mass. 2003).

10. Home Gas Corp. of Massachusetts, Inc. v. Walter's of Hadley, Inc., 403 Mass. 772 (1989)(participation in proceeding); Hanslin Builders Inc. v. Britt Development Corp., 15 Mass. App. Ct. 319 (1983), app. den. 388 Mass. 1105 (motion to dismiss and motion to stay, but no motion to compel arbitration, followed by trial).

11. Compare Mass. Gen. Laws ch. 251 §§ 3 and 4 (2010).

12. Mass. Gen. Laws ch. 251 § 3 (2010).

13. Constantino v. Frechette, 73 Mass. App. Ct. 352 (2008)(nurses not entitled, either as third-party beneficiaries or agents, to rely on arbitration agreement between their employer nursing home and a patient); Brothers Building Co. of Nantucket v. Yankow, 56 Mass. App. Ct. 688 (2002)(award exceeded arbitrator's authority to extent it granted relief against entity related to one of parties, based on "alter ego" theory); Unisys Fin. Corp. v. Allan R. Hackel Org., Inc., 422 Mass. App. Ct. 275 (1997), rev. den. 424 Mass. 1109; Rae F. Gill, P.C. v. DiGiovanni, 34 Mass. App. Ct. 498 (1983), rev. den. 415 Mass. 1106.

14. 58 Mass. App. Ct. 786 (2003).

15. Mass. Gen. Laws ch. 251 § 7(e) (2010).

16. Mass. Gen. Laws ch. 251 § §7(a) and (b) (2010).

17. Mass. Gen. Laws ch. 251 § 5(b) (2010).

18. Ritson v. Atlas Assur. Co., Ltd., 272 Mass. 73 (1930)(reference award under fire insurance policy invalid as party not given notice of right to attend and present evidence); Second Soc. of Universalists in Town of Boston v. Royal Ins. Co., 229 Mass. 294 (1918)(reference award invalid when not made in good faith or after reasonable opportunity by both parties to be heard); Hague v. Piva, 61 Mass. App. Ct. 223 (2004)(court vacated award, in case involving claim by attorney against client for unpaid fees, where client defended on basis of excessive fees and also filed counterclaim; Massachusetts Bar Association Fee Arbitration Board, which is not empowered to hear counterclaims of malpractice, refused to hear evidence as to the counterclaim).

19. Parekh Const., Inc. v. Pitt Constr. Corp., 31 Mass. App. Ct. 354 (1991); Restaurant Consulting Services, Inc. and Aspeon, Inc. v. Mountzuris, 253 F. Supp. 45 (D. Mass. 2003).

20. Mass. Gen. Laws ch. 251 §10; Drywall Systems, Inc. v. Zvi Construction Co., 435 Mass. 664 (2002); Floors, Inc. v. B.G. Danis of New England, Inc., 380 Mass. 91 (1980); Baxter Health Care Corp. v. Harvard Apparatus, Inc., 35 Mass. App. Ct. 204 (1993).

21. 52 Mass. App. Ct. 837 (2001).

22. *Id.* at 838-841.

23. 2009 WL 3430291 (Mass. App. Div.)(Swan, J.).

24. 380 Mass. 91 (1980).

25. 55 Mass. App. Ct. 419 (2002).

26. *Id.* at 420-423.

27. *Id.* at 421-422.

from the date of the award until it is satisfied.[28] Only an arbitrator can award pre-judgment interest, even if litigation predates the arbitration agreement.[29] Post-award interest is calculated on the entire amount of the award, that is, a combination of principal (verdict) and pre-judgment interest.[30]

An arbitration award is to be in writing and signed by the arbitrator.[31] The time for rendering an award may be limited, either by the arbitration agreement or by court order.[32] An award may be modified or changed by the arbitrator, upon application of a party, within 20 days after delivery of the award; the opposing party has 10 days to object to the application.[33] The grounds for such modification are sharply limited.[34] Upon application of a party, a court is required to confirm an arbitration award, unless a timely application has been made to modify, correct or vacate the award.[35] An arbitration award has the conclusive effect of a judgment, and bars subsequent actions under principles of issue preclusion, even occasionally when the opposing party was not a participant in the arbitration proceeding.[36]

A court has limited power to modify, correct or vacate an arbitration award, provided that a party applies for relief within 30 days of delivery of the award or, in certain cases, within 30 days after such party learns or should have learned of such grounds.[37] An award may only be *corrected* or *modified* in the event:

- of evident miscalculation or misdescription;
- the award is outside the scope of the submission; or
- the award contains an error of form, not going to the merits.[38]

In *Dadak v. Commerce Ins. Co.*,[39] the Appeals Court narrowly construed "evident miscalculation" in the context of an underinsurance arbitration, refusing to modify the award, where the arbitrator accepted one party's view in interpreting a policy provision allowing for a reduction of damages due to the "amount paid under a workers' compensation law", and more than half of the amount received from workers' compensation had been paid to the injured worker's employer to satisfy its lien. In *Connecticut Valley Sanitary Waste Disposal, Inc. v. Zielinski*,[40] the arbitrators issued an award, both parties sought clarification or modification, and the arbitrators held additional hearings, resulting in a modified award. The court held that the modification was improper, and the arbitrators did not have authority to take additional evidence, where the error was not due to "evident miscalculation" but to incomplete presentation of evidence from a party.[41]

An award may be *vacated* only for the following reasons:

- corruption, fraud or other undue means;
- partiality, prejudicial misconduct or corruption in the arbitrators;
- the arbitrators exceeded their powers;
- the conduct of the hearing substantially prejudiced a party; or
- there was no arbitration agreement (and an objection was raised at the time of the hearing).[42]

The court in *Massachusetts Board of Higher Education/Holyoke Community College*[43] overturned an arbitrator's award, as exceeding his authority, where he determined that an applicant for a position of assistant professor at a community college was better qualified than the chosen candidate, and ordered the college to either hire her or pay her the full salary as long as the position existed. The court held that specific appointment determinations, including in higher education, are non-delegable, yet it ruled in the applicant's favor, awarding lesser money damages, rather than reversing the award entirely, in light of the college's procedural violation in hiring.[44] In the absence of objection, the scope of the arbitrators' authority may be extended beyond that agreed by the parties in their submission.[45] Courts are generally leery of overturning awards, even in the event of bias or other misconduct.[46]

A number of cases have construed, and enforced, the restrictions upon post-award motions. A leading case is *Quirk v. Data Terminal Systems, Inc.*,[47] holding that a superior court judge erred in correcting a clerical error in an award, where the motion to correct the award was filed *120 days* after delivery of the award. The SJC strictly construed the *30-day* requirement set out in G.L. c. 251 §13(a) for confirming or modifying an award. The Statute provides for courts to enter judgment upon an award and to enforce such a judgment.[48] The Statute permits a limited right of appeal, from various *court orders* pertaining to the arbitration process and the award, but not from the award itself.[49]

The Statute discusses venue, applications (*i.e.*, motions) and other jurisdictional matters.[50] The Appeals Court, in *Abraham-Copley Square Ltd. Partnership v. Badaoui*,[51] ruled that except for

28. Reilly v. Metropolitan Prop. & Liab. Ins. Co., 412 Mass. 1006 (1992).

29. Hiltz v. Whited, 2008 WL 4916676 (Mass. App. Div.).

30. Connecticut Valley Sanitary Waste Disposal, Inc. v. Zielinski, 436 Mass. 263 (2002).

31. Mass. Gen. Laws ch. 251 § 8(a) (2010).

32. Mass. Gen. Laws ch. 251 § 8(b) (2010).

33. Mass. Gen. Laws ch. 251 § 9 (2010).

34. *Id.* .

35. Mass. Gen. Laws ch. 251 § 11.

36. TLT Constr. Corp. v. A. Anthony Tappe and Assocs., Inc., 48 Mass. App. Ct. 1 (1999).

37. Mass. Gen. Laws ch. 251, §§ 12(b) and 13(a) (2010).

38. Mass. Gen. Laws ch. 251, § 13(a) (2010).

39. 53 Mass. App. Ct. 302 (2001).

40. 436 Mass. 263 (2002).

41. *Id.* at 265-269.

42. Mass. Gen. Laws ch. 251, § 12(a) (2010).

43. Massachusetts Bd. of Higher Education/Holyoke Community College v. Massachusetts Teachers Association/Massachusetts Community College/National Educ. Ass'n, 79 Mass. App. Ct. 27, 31-36 (2011).

44. *Id.* at 34-38.

45. Drywall Systems, Inc. v. Zvi Construction Co., 435 Mass. 664 (2002) (court enforced award including treble damages and attorneys' fees in commercial dispute, where arbitration agreement provided for arbitration of "any controversy for claim … arising out of or related to" the contracts between the parties); Augenstein v. Ins. Co. of N. Amer., 360 N.E.2d 30 (1977) (where referees were only to determine "amount" of insurance loss under a given policy, award upheld as to occurrence of loss as well, since referees were required to make such determination as integral part of award); Barletta v. French, 34 Mass. App. Ct. 87 (1993) (court will not overturn award for going beyond scope of arbitration absent "clear evidence" that arbitrators, notwithstanding a party's objection, decided issues outside the "'arena of arbitration'").

46. Doherty v. Phoenix Ins. Co., 224 Mass. 310 (1916)(party may not remain silent and delay in challenging an arbitrator for bias or other misconduct; rather, such a claim must be timely, and before the award is entered); Barnstead v. Ridder, 39 Mass. App. Ct. 934 (1996)(refusal to overturn award based on bias alleged in affidavit, where assertions of bias were "so thin that any challenge to the award must fail").

47. 394 Mass. 334 (1985).

48. Mass. Gen. Laws ch. 251, § 14 (2010).

49. Mass. Gen. Laws ch. 251, § 18 (2010).

50. Mass. Gen. Laws ch. 251, §§ 15-17 (2010).

the provisions of G.L. c. 251 §§2 and 2A—to seek an order to proceed to arbitration, or to stay an arbitration where there is no agreement to arbitrate, where jurisdiction is expressly limited to the Superior Court—"any court of competent jurisdiction" will suffice, and hence the District and Municipal Courts have jurisdiction over other aspects of arbitration, including confirming an award. *Cybulski v. Vaiani*[52] held that the venue provision of G.L. c. 251 §17 limits only an "initial application" for judicial review of an award, to the county where the arbitration occurred or the adverse party resides. Where litigation was commenced in a different county; the parties entered into a post-litigation arbitration agreement; and following the award, one party sought to confirm the award and the other party sought to vacate it, the county where the litigation was commenced (and had never been dismissed) was the proper venue to hear the two opposing motions, and confirm the award and resulting judgment.

C. Matters not clearly established by the Statute

The Statute is also notable for what it fails to address. For example, no guidance is offered for the selection of an arbitrator, including any reference to the level of expertise required. This differs from the analogous provision in the collective bargaining arbitration statute.[53] Chapter 251 similarly provides no guidance as to the method or amount of payment to the arbitrator. There is no mention of pre-judgment security, interlocutory relief or other such remedies often not addressed in arbitration clauses. Further, the Statute fails to directly address several forms of discovery: interrogatories, requests for admissions of fact, and medical examinations. Depositions are not specifically permitted, except for unavailable witnesses, although the statute permits issuance of subpoenas for the attendance of witnesses and the production of records.

The legislature may have intended to preclude further discovery, an interpretation consistent with the goal of quick and inexpensive resolution of disputes. Conversely, the absence of provisions relating to additional discovery may be an oversight, or may indicate a different view of discovery in 1960, when the Statute was originally enacted, than today. As any experienced trial attorney knows, the absence of such discovery may ultimately hamper and prolong proceedings or lead to a less "just" result. Accordingly, parties should request permission to conduct additional discovery, where they can demonstrate to the arbitrator that such discovery will be of material assistance to the proceeding; else, they should attempt to obtain such discovery by agreement.

Statutory limitations upon post-award proceedings appear to have been deliberate. The Statute requires that post-award applications be submitted in a timely manner; that they be limited to situations of clear and blatant bias, misconduct or error not going to the merits; and in certain circumstances, that such applications be presented initially to the arbitrator. Such limitations are akin to post-trial and appellate restrictions in the Massachusetts and Federal Rules of Civil and Appellate Procedure. They enhance the finality and certainty of awards, thereby ensuring both speedy and (relatively) inexpensive resolutions, in line with the purpose of arbitration. However, at least one court has recognized that arbitrations, in reality, may be neither speedy nor inexpensive.[54]

In *Superadio Limited Partnership v. Winstar Radio Productions, LLC*,[55] the SJC upheld an arbitrator's award imposing monetary sanctions (in the amount of $1,000 per day for 271 days, for a total of $271,000) against a party for violation of a discovery order. The party refused to provide documentary evidence in its possession relating to the opposing party's damages, thereby preventing the opposing party from proving its damages. The SJC reasoned that the arbitrator had "broad authority to fashion remedies during arbitration proceedings and to oversee discovery".[56] The AAA rules, which governed the arbitration, provided that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties" and, as to discovery, "[t]he arbitrator is authorized to resolve any disputes concerning the exchange of information". The court noted further that the AAA rules did not limit the arbitrators' power.

A couple of cases have considered multi-stage or other complex alternative dispute resolution clauses. The Appeals Court, in *O. Ahlborg & Sons, Inc. v. Massachusetts Heavy Industries, Inc.*,[57] confirmed an "independent engineer's" report where the aggrieved party failed to avail itself of its right to seek arbitration within 20 days of receipt of the independent engineering report. In *Massachusetts Highway Dept. v. Perini Corp.*,[58] the court considered a series of disputes among contractors and parties involved with the Big Dig. The process began with submitting "claims" to the project director; if the resolution was not satisfactory it then became a "dispute", which was to be submitted to a three-person disputes review board ("Board"). After the contractor submitted its dispute to the Board, the project elected not to renew the Board members' term. The Board continued to review the claim and ultimately entered an award for the contractor. The court held that the question of arbitrability was for the arbitrator, and thereby confirmed the award, concluding that it was not in excess of the Board's authority.

D. Interplay between G.L. c. 251 and the FAA

The accompanying article, entitled *Judicial Involvement in Arbitrations and in the Review of Arbitral Awards*, analyzes many aspects of the FAA. Here, the focus is merely upon the interplay between G.L. c. 251 and the FAA. The FAA is triggered when a dispute between parties to an arbitration agreement involves interstate commerce.[59] State courts have concurrent jurisdiction with the federal courts to enforce the FAA.[60] The FAA is designed to ensure the enforceability of arbitration agreements; where the parties agree that their dispute is to be governed by a particular state's law, then the FAA does not pre-empt that state's arbitration laws.[61] A state may apply its own procedural rules to federal matters unless they are

51. 72 Mass. App. Ct. 339 (2008).

52. 75 Mass. App. Ct. 382 (2009).

53. *See* Mass. Gen. Laws ch. 150C, § 3 (2010) (the court shall submit to the parties "a list of five persons experienced in labor arbitration").

54. Bull HN Information Systems, Inc. v. Hutson, 229 F.3d 321 (1st Cir., 2000).

55. 446 Mass. 330 (2006).

56. *Id.* at 338.

57. 65 Mass. App. Ct. 385 (2006).

58. 444 Mass. 366 (2005).

59. 9 U.S.C. §§1 and 2; St. Fleur v. WPI Cable Systems/Mutron, 450 Mass. 345, 349 (2008).

60. St. Fleur v. WPI Cable Systems/Mutron, 450 Mass. at 348, citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983).

61. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 468 (1989).

pre-empted by federal law.[62] Recently, the United States Supreme Court determined, in a 5-4 ruling authored by Justice Scalia, that a state statute rendering unenforceable contracts which are determined to be unconscionable is pre-empted by the FAA.[63]

E. Additional significant case law

The existence of an arbitration agreement does not deprive a court of jurisdiction to equitably attach property fraudulently conveyed,[64] or to enter preliminary injunctive relief, *Hull Municipal Lightinq Plant v. Mass. Municipal Wholesale Elec. Co.* ("Mass. Municipal I"),[65] pending a determination on the merits by the arbitrator. Denial of a motion to compel arbitration is immediately appealable.[66] An arbitrator may not issue injunctive relief beyond the scope allowed in the arbitration agreement, or in the rules applicable to the arbitration.[67]

An award is not a "judgment" as that term is defined in the Massachusetts Rules of Civil Procedure, with specific reference to the multiple damage provisions of G.L. c. 93A. Hence, an insurer's failure to pay a claim prior to the rendering of an award does not allow for recovery of multiples of the award, so long as the insurer pays promptly upon receipt of the award.[68] However, once a court has confirmed the award, it becomes a "judgment" which is subject to multiplication under chapter 93A.[69] Further, an arbitration panel may award multiple damages so long as they are based on "claims arising out of the same and underlying transaction".[70]

An arbitrator has no power to determine whether a record held by a utility company is exempt from the disclosure requirements of the Public Records Act, G.L. c.66, § 10(b). *Hull Municipal Lighting Plant v Massachusetts Municipal Wholesale Electric Co.* ("*Mass. Municipal II*").[71] In *Mass. Municipal II* the court vacated a subpoena issued by an arbitrator where the supervisor of records had not had an opportunity to determine whether an internal report from plaintiff's attorney, the "Roth Report" -- which contained Roth's analyses, mental impressions, conclusions and opinions -- was discoverable. The Supreme Judicial Court remanded the matter to the Superior Court for further proceedings "once the supervisor of records has decided the questions arising under the public records law".[72] *Mass. Municipal II* may seem surprising at first blush, given the breadth usually afforded to arbitrators' decisions by the courts. However, *Mass. Municipal II* can be read more narrowly, in light of the express language in G.L. c. 66, §10(b) limiting determinations of the scope of the Public Records Act to the supervisor of public records, subject to the review and compliance powers of the Superior Court and the Supreme Judicial Court. Such a narrow reading is supported by footnote 5 of the decision, which cites "the strong public interest" at stake.[73] On the other hand, *Mass. Municipal II* can be read more broadly to endorse restrictive discovery in arbitrations, where only "certain types of discovery" are permitted.[74] Additionally, *Mass. Municipal II* can be read to restrict an arbitrator's powers to those enumerated in G.L. c. 251, with the ultimate authority as to the "scope and conduct of discovery resting with the trial court".[75]

F. Public policy

The enforceability of pre-dispute arbitration agreements in standard form contracts has increasingly been the topic of public policy challenges. Earlier courts rejected the claim that such provisions were unconscionable, contracts of adhesion or against public policy. However, in connection with the enforcement of civil rights or discrimination claims, there is substantial case law allowing recourse to the courts. Under G.L. c. 251, arbitration clauses "shall be valid, enforceable and irrevocable, ***save upon such grounds as exist at law or in equity for the revocation of any contract***."[76] Similar language exists in the FAA.[77] Unconscionability (both substantive and procedural), along with fraud and duress, are recognized grounds for contract revocation.[78]

In 1998 Judge Gertner ruled that mandatory pre-dispute security industry arbitration agreements were unenforceable in Title VII cases, in the context of a claim by a stockbroker seeking recovery against her employer for age and sex discrimination, and sexual harassment.[79] The arbitration agreement was the securities industry registration Form U-4 which all brokers must sign, agreeing to arbitrate "any dispute, claim or controversy" that might arise between the broker and her employer. Judge Gertner's ruling was based upon finding a "structural bias" within the securities industry arbitral system, making it an "inadequate" forum to vindicate federal civil rights.[80] On appeal, the court upheld the judgment, because it ruled that Rosenberg had not been advised of the rules of arbitration before she signed the U-4.[81] In general, however, the court ruled that securities brokers and customers could be compelled to arbitrate civil rights claims against brokerage firms, and that the U-4 arbitration provision is enforceable where relevant information about arbitration is made available before a party signs.[82]

In *Warfield v. Beth Israel Deaconess Medical Center*,[83] the Supreme Judicial Court ruled that the strong public policy prohibiting discrimination, as set out in G.L. c. 151B, would preclude enforcement of an arbitration agreement as applied to a discrimination claim where the agreement did not explicitly state that discrimination claims were to be arbitrated. The court based its decision on both the UAA and the FAA. The court overruled an earlier Appeals Court case, *Mugnano-Bornstein v. Crowell*,[84] enforcing an

62. St. Fleur v. WPI Cable Systems/Mutron, 450 Mass. at 352, citing Howlett v. Rose, 496 U.S. 356, 372 (1990).

63. AT&T Mobility LLC v. Concepcion, __ S.Ct. __, 2011 WL 1561956 (2011).

64. Salvucci v. Sheehan, 349 Mass. 659 (1965).

65. 399 Mass. 640 (1987).

66. Danvers v. Wexler Const. Co., 12 Mass. App. Ct. 160 (1981).

67. Charles Construction Co. v. James Derderian, T'ee, 412 Mass. 14 (1992).

68. Bonofiglio v. Commercial Union Ins. Co., 411 Mass. 31 (1991).

69. Metropolitan Prop. and Cas. Ins. Co. v. Choukas, 47 Mass. App. Ct. 196 (1999), rev. den. 430 Mass. 1105.

70. Gore v. Arbella Mut. Ins. Co., 77 Mass. App. Ct. 518, 534-535 (2010), citing Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664 (2002).

71. 414 Mass. 609, 615 (1993).

72. *Id.* at 617.

73. *Id.* at 614.

74. *Id.* at 615.

75. *Id.* at 617.

76. Mass. Gen. Laws ch. 251 § 1 (2010) (emphasis added).

77. 9 U.S.C. §2 (2010).

78. Miller v. Cotter, 448 Mass. 671 (2007).

79. Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190 (D. Mass. 1998), aff'd on other gds, 170 F.3d 1 (1999).

80. 995 F. Supp. at 207-212.

81. 170 F.3d at 19-21.

82. 170 F.3d at 8-21.

83. 454 Mass. 390 (2009).

84. 42 Mass. App. Ct. 347 (1997).

arbitration agreement in the context of an employee's claim for gender discrimination. In *Warfield*, unlike in *Rosenberg*, the plaintiff was the head of a department, and her employment agreement was drafted and negotiated by counsel for all the parties. The *Warfield* court reasoned that, while in many cases only certain claims are arbitrable and other claims must proceed to litigation, this case involved numerous non-arbitrable claims against various defendants, and all of the claims were "inextricably intertwined", therefore helping to justify the ruling on grounds of convenience and efficiency to the parties.[85] Justice Cowin, in dissent, noted that the arbitration clause was broad, and reflected the parties' intent to arbitrate the dispute.[86]

The *Warfield* court also noted the strong public policy in allowing consumers to bring class actions for violation of unfair or deceptive commercial conduct,[87] citing *Feeney v. Dell Inc.*[88] *Feeney* involved a claimed violation of G.L. c. 93A in Dell's assessment of sales tax on optional service contracts purchased with Dell computers. The *Feeney* court refused, under the FAA, to enforce an arbitration provision which precluded class actions, noting the importance of allowing an effective private consumer remedy, tied to class actions in cases involving small amounts of money, under G.L. c. 93A.[89] In *Marchado v. NECCS Inc.*,[90] the Superior Court (Brady, J.) applied the SJC ruling in *Feeney* to Wage Act claims under G.L. c. 149 §150. The *Marchado* plaintiffs, who worked for a cleaning service, claimed they had been improperly classified as "independent contractors", instead of "employees", and thereby deprived of benefits.[91]

The precise issue decided in *Feeney* is the subject of cases decided by the Second, Third and Ninth Circuits in recent years. *In re American Express Merchants' Litigation*[92] was a dispute between small merchants and a credit card issuer, requiring individual arbitrations, and precluding class action arbitrations. There, the court held the waiver unenforceable.[93] *Puleo v. Chase Bank USA, N.A.*[94] concerned a challenge by consumers to retroactive interest-rate increases by a credit card issuer, similarly requiring only individual arbitrations. The *Puleo* court determined that the issue of whether the provision precluding class action arbitrators was not for the court, but for the arbitrator.[95]

Laster v. AT&T Mobility LLC,[96] like *Dell*, involved the issue of a sales tax imposed at retail value of "free" devices (in *Laster*, it is cellphones and a wireless service plan). The *Laster* court determined the class action waiver to be unconscionable and hence unenforceable under California law, and also determined that the FAA did not pre-empt, either expressly or implicitly, California unconscionability law.[97] In the Supreme Court's recent decision overruling *Laster*, the court (in a 5-4 ruling) determined that California's unconcionability law was pre-empted by section 2 of the FAA, and the strong federal policy favoring arbitration. The law in this area is evolving, and more decisions can be expected in coming months and years.

F. Other Practice Pointers

Certain arbitrations have single arbitrators, while others have panels (tribunals) of three. A tribunal is more expensive and may be more cumbersome and slower. On the other hand, it gives a measure of protection in the event the single arbitrator is not disposed to rule in favor of a particular party. Traditionally, determinations are by consensus, although if necessary a majority decision suffices. However, a particular organization's rules may differ, and attention must be paid to the governing rules. The choice of one or three arbitrators may be subject to negotiation between counsel, and hence it may be a matter to discuss with one's client.

Certain tribunals have three "neutral" arbitrators, where each side chooses a "disinterested" arbitrator and the two arbitrators pick a third arbitrator or umpire. Other variants of arbitration recognize that each party should be able to select a "partisan" arbitrator who is independent but aligned with the party's interests, with the two partisan arbitrators to select a neutral arbitrator. One case discussing such "partisan" arbitration is *Nationwide Mut. Ins. Co. v. First State Ins. Co.*[98] Ethical rules have been promulgated restricting the partisanship in an effort to ensure that the entire panel is truly neutral. For example, the Code of Ethics for Arbitrators in Commercial Disputes provides ethical rules, but in Canon X recognizes that "partisan" arbitrators are exempt from certain obligations normally attendant upon commercial arbitrators.[99]

Normally, evidentiary standards are far looser in arbitrations than at trials. However, there may be cases where either counsel or the arbitrators are more sensitive to the risk of unreliable evidence. Such matters may include hearsay; expert qualifications; use of affidavits in lieu of live evidence; opinions offered by lay witnesses; best evidence; business or public records; etc. Counsel should be prepared to file preliminary motions, seek arbitrators with experience concerning rules of evidence, or take other steps to protect a client's interests.

An increasingly common occurrence is the use of "high-low" agreements. These establish an upper and lower limit to awards, or a cap, so as to reduce each party's risk. Typically, the existence of the high-low agreement (but not the range itself) is disclosed to the arbitrator so as not to influence the arbitrator's award. In a pure "high-low", only the top and bottom are capped; if the arbitrator finds any number inside the range, that amount is awarded. A variation of high-low agreements is "baseball", where each party submits a proposed monetary award, and one of those values is then selected as the award. In one variant, "day baseball", the party valuations are

85. 454 Mass. at 403-404.
86. *Id.* at 404-406.
87. *Id.* at 397-398.
88. 454 Mass. 192 (2009).
89. *Id.* at 200-205.
90. C.A. No. 10-0555 (Norfolk Superior Court).
91. *See* 39 (13) Mass. L. Weekly 1, 25 (11/15/2010).
92. 554 F.3d 300 (2d Cir., 2009).
93. *Id.* at 310-321.
94. 605 F.3d 172 (3d Cir., 2010).
95. *Id.* at 178-188.
96. 584 F.3d 849 (9th Cir.2009), cert. granted sub nom. AT & T Mobility LLC v. Concepcion, 130 S.Ct. 3322 (2010)("Concepcion").
97. *Id.* at 854-859.
98. 213 F. Supp. 2d 10 (D. Mass., 2002).
99. The Code was initially prepared in 1977 by a joint committee of the American Arbitration Association and the American Bar Association. It has been revised and, in 2005, was adopted by CPR. CPR also publishes a Model Rule for The Lawyer as Third-Party Neutral, dating from 2002; and Principles for ADR Provider Organizations, also dating from 2002.

disclosed to the arbitrator, who chooses among the two; in "night baseball", the arbitrator does not know the party values, the arbitrator assigns his own value to the case, and the party value which is mathematically closer to the arbitrator's value is selected.

Often, parties to arbitrations expect that interest and costs will be waived. However, there is no such automatic requirement and, in fact G.L. c. 251 §10 requires that the arbitrator determine who will pay the costs of the arbitration, including the arbitrator's fees. Certain cases begin in court and, prior to trial, counsel opt for arbitration. In such cases, counsel must negotiate as to whether the arbitrator should award pre-judgment interest and statutory or other costs.

Arbitration organizations offer a variety of mechanisms and features to allow parties to choose, or adapt, the proceedings to their particular needs. These different forms of arbitration include measures to simplify or expedite the proceedings, to reduce the expense, to select neutrals skilled in a specific area of the law, etc. For example, some arbitrations have a single neutral whereas others have a panel of three; some organizations offer reduced fees in certain cases, fee waivers, or pro bono arbitrators in appropriate cases; etc. Different organizations, or specific arbitrators, may allow for varying amounts of discovery (also known as "exchange of information"); whether to accept affidavits or other normally inadmissible evidence; limitations as to the right to subpoena non-party witnesses; etc. Practitioners should consult the websites of different arbitration organizations, including the American Arbitration Association, the Center for Public Resources, or a variety of other providers, for specific options.

Finally, in cases involving multiple arbitrators (panels), the panel will often delegate certain duties to one member. This may be the third neutral (the umpire), where that person is chosen by the other two neutrals. It may be the panelist with the most knowledge or experience in a given area, for example, an attorney sitting with two industry members. The designated panelist may write decisions; render rulings on evidence; etc. This typically results in additional compensation for the neutral shouldering the additional work.

Should a panelist die, become disabled or otherwise be unable to complete his duties, what happens next? If the rules under which the arbitration was conducted do not provide the answer, Rule 19(b) and (c) of the Commercial Arbitration Rules of the American Arbitration Association provide a sensible solution to the problem:

"Rule 19(b): In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise."

"Rule 19(c): In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings."

Judicial Involvement in Arbitrations and in the Review of Arbitration Awards

By John H. Henn[1]

An arbitrator for more than 30 years, John H. Henn practices arbitration exclusively. He has 40 years of experience in commercial and business litigation, as an associate and then partner at Foley Hoag. His practice focused on securities, banking and finance related disputes. He currently acts as an arbitrator for the Institute for Conflict Prevention and Resolution, and the American Arbitration Association Commercial Panel among others. A graduate of Harvard College and Harvard Law School, Henn was a long-time editor of the Massachusetts Law Review *and authored many articles on arbitration.*

Introduction

Arbitration is properly understood as an alternative to in-court litigation. However, on occasion, courts do become involved in arbitration proceedings. This typically occurs at one of two times during the life of an arbitration: at its outset, or at its conclusion after an arbitral award has been rendered.

At the outset of an arbitration, a court may be asked to do one or more of three things: (1) compel arbitration; (2) stay further judicial proceedings, if any; and/or (3) provide interim relief (such as a temporary restraining order or an attachment) pending commencement of an arbitration and appointment of an arbitrator (or arbitrators).[2]

At the conclusion of an arbitration, both the Federal Arbitration Act ("FAA") and the Revised Uniform Arbitration Act ("RUAA") expressly provide for a judicial role in confirming, modifying, correcting or vacating an arbitration award. However, the grounds for any option but confirmation are limited—very limited indeed with respect to vacating an award.

Petitions to Compel and Motions to Stay

Both the FAA,[3] and the Massachusetts Uniform Arbitration Act ("MUAA"),[4] provide for a judicial role in compelling arbitration, and in staying in-court litigation over the same issues that are raised in the arbitration.[5]

A. Federal Arbitration Act

Since its enactment in 1925, the FAA has provided for broad judicial authority to enforce arbitration agreements, to order arbitration, and to stay judicial proceedings during the pendency of arbitration.[6] In 1988, the FAA was amended to provide for an automatic right of appeal from certain lower court orders relating to arbitration, including orders denying a petition to order arbitration under § 4 and refusing to stay a judicial proceeding under § 3.[7] The amendment also purported to bar an immediate appeal from the allowance of a petition to order arbitration and/or the granting of a stay until completion of the arbitration.

Specifically, § 16(a)(1) permits an appeal from the following type of orders (without labeling any of them as interlocutory or final):

> "(A) refusing a stay of any action under section 3 of this title [Title 9];
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed;
>
> (C) denying an application under section 206 of this title to compel arbitration;
>
> (D) confirming or denying confirmation of an award or partial award; or
>
> (E) modifying, correcting, or vacating an award."

In addition, § 16(a)(2) permits an appeal from an interlocutory order granting, continuing, or modifying an injunction against an FAA arbitration. This provision is congruent with the general provision of interlocutory appellate jurisdiction over injunctive orders.[8]

As to *when* an appeal may be taken under §§ 16(a)(1) or 16(a)(2)—i.e., *immediately,* as in an interlocutory appeal, or not until after a final judgment has entered—§ 16(a)(3) provides that an appeal may be taken from a "final decision with respect to an arbitration" under the FAA. This provision is congruent with the general provision of plenary appellate jurisdiction over final district court decisions.[9] Hence, the distinction between an interlocutory appeal and a plenary appeal from a final judgment dissolves. An order that is "a final decision with respect to an arbitration" is the functional

1. © John Henn. Valuable assistance for certain portions of this article was provided by Brian Bialas, Esq. (Foley Hoag LLP)—especially for the sections dealing with recent developments concerning "manifest disregard of the law" and "violation of public policy" as grounds for challenging an arbitration award; and also by Bette J. Roth, Esq. (e.g., see note 46 infra).

2. The subject of class actions in relation to arbitration, and judicial involvement in arbitrability decisions pertaining thereto, is beyond the scope of this article. The reader should, of course, note the important recent decision of the U.S. Supreme Court in AT&T Mobility v. Concepcion, U.S.Supreme Court No. 09-893 (decided 4/27/11), as well as the relatively recent Massachusetts decision of Feeney v. Dell, Inc., 454 Mass. 192 (2009).

3. 9 U.S.C. § 1 (2010),

4. Mass. Gen. Laws ch. 251, § 1 (2010),

5. Massachusetts adopted the Uniform Arbitration Act in 1960. It was adopted throughout the states. Massachusetts has not yet enacted the RUAA, now adopted by several states, but presumably it will. Unlike the FAA, the MUAA in Section 2(b) specifically provides for staying an arbitration where there was no agreement to arbitrate, a power necessarily implied but not specified in the FAA.

6. 9 U.S.C. §§ 2-4 (2010)

7. . 9 U.S.C. § 16 (2010).

8. *See* 28 U.S.C. § 1292 (2010).

9. *See* 28 U.S.C. § 1291 (2010).

equivalent of a final judgment for the purpose of determining appellate rights, including the timing of an appeal. Subsequent to the enactment of § 16, courts accordingly have discerned a Congressional intent not only for courts to enforce valid arbitration agreements, but also for courts promptly to review denials of enforcement.[10] Section 16(b) appears to have been intended by Congress to bar *immediate* appeals from orders favoring arbitration.

Section 16(b) specifically addresses *interlocutory* orders and provides that an appeal may not be taken from interlocutory orders:

> "(1) granting a stay of any action under Section 3 of this title [Title 9];
>
> (2) directing arbitration to proceed under Section 4 of this title;
>
> (3) compelling arbitration under Section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is subject to this title."

However, although § 16(b) refers appeals from *interlocutory* orders, the obvious response of a party seeking to appeal an order requiring it to arbitrate and/or staying a judicial proceeding is to claim that the order is not an interlocutory order, but instead is a "final decision *with respect to an arbitration*" (emphasis added) appealable under § 16(a)(3).

This response has proved largely to be correct. In 2000, the Supreme Court in *Green Tree Financial Corp.-Alabama v. Randolph* held that § 16(a)(3) "preserves immediate appeal of any final decision with respect to an arbitration regardless of whether the decision is favorable or hostile to arbitration."[11] *Green Tree* also held that appealability does not depend on whether the order compelling arbitration is "embedded" in a proceeding involving other claims for relief or is issued in an "independent" proceeding in which the only relief requested is an order compelling arbitration.[12] In either case, the order is a "final decision with respect to an arbitration" and is appealable immediately. Similarly, the circuit courts have recognized that appealability does not turn on whether a final decision is contained in a final judgment.[13]

However, since *Green Tree,* in footnote 3, emphasized that the district court had stayed rather than dismissed the judicial action, district court decisions compelling arbitration and merely staying such an action may not be final decisions. Several federal circuit courts have so held.[14]

If there is an appeal, the question arises as to what happens to the underlying proceedings, whether in arbitration or court. At least in the case of the filing of an appeal from the denial of a § 3 application for a stay, there is some case law to the effect that such an appeal should automatically stay an underlying federal district court action pending determination of the appeal.[15] Absent such case law, a party should seek a stay pending appeal in the district court, and, if unsuccessful, seek the same stay in the court of appeals.

With respect to the appeal itself, the standard of review on the issue of arbitrability is de novo. This is the same standard that is applied to appeals from lower court orders confirming or vacating an arbitration award. Moreover, it is congruent with the general de novo standard of review applied to lower court orders granting summary judgment, many lower court orders granting or denying interlocutory relief, and other lower court orders which were based on a written record equally available to an appellate court.[16]

B. Massachusetts Arbitration Act

The MUAA also provides for judicial proceedings, including appellate judicial proceedings, for issuing or reviewing orders agreeing or refusing to compel arbitration and/or staying in-court litigation. Specifically, Section 2 of the MUAA provides for a Superior Court judicial role comparable to that of the federal district court under the FAA—i.e., the Superior Court can enforce arbitration agreements, compel arbitration, and stay any judicial proceedings.

In addition, Massachusetts law provides for an appeal from orders compelling or denying arbitration. Sections 18(a)(1) and 18(a)(2) of the MUAA specifically provide for appeals from orders denying or granting an application to stay arbitration. Although the MUAA does not have a provision comparable to § 16(a)(3) of the FAA (referring to "a final decision with respect to an arbitration"), appellate relief from either type of order is, in fact, available. If the Superior Court denies or compels arbitration in a case where only that relief is sought, that order should result in a final judgment from which an appeal can be taken under Massachusetts General Laws chapter 231, § 113. An order compelling arbitration also might be in a form akin to a preliminary injunction and appealable on an interlocutory basis under Massachusetts General Laws chapter 231, § 118, Second Paragraph. Finally, an order denying or compelling arbitration would, at minimum, be interlocutory and subject to review by a "single justice of the appellate court" under § 118, First Paragraph.[17]

10. *See* Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001); *see also* Perez v. Globe Airport Sec. Services, Inc., 253 F.3d 1280 (11th Cir. 2001), *opinion vacated*, 294 F.3d 1275 (11th Cir. 2002)(appeal dismissed on joint motion of the parties).

11. 531 U.S. 79, 86 (2000).

12. *Id.* at 87-89.

13. Gulf Guar. Life Ins. Co. v. Connecticut Gen'l Life Ins. Co., 304 F.3d 476 (5th Cir. 2002).

14. *See, e.g.,* ON Equity Sales Co. v. Pals, 528 F.3d 564, 569-70 (8th Cir. 2008) (holding that a district court order compelling arbitration and staying proceedings was not a final decision); Sanford v. Memberworks, Inc., 483 F.3d 956, 961-62 (9th Cir. 2007) (holding that a district court order compelling arbitration and stating that the case would be terminated if the arbitration is not completed within twelve months is not a final decision); Dees v. Billy, 394 F.3d 1290, 1292-93 (9th Cir. 2005) (holding that an order compelling arbitration and staying the case is not an appealable final decision even though the Court instructed the case to be administratively closed because such a closure has no jurisdictional effect); Comanche Indian Tribe of Oklahoma v. 49, L.L.C., 391 F.3d 1129 (10th Cir. 2004) (holding that a district court order compelling arbitration and staying proceedings was not a final decision); Mire v. Full Spectrum Lending Inc., 389 F.3d 163, 167 (5th Cir. 2004) (holding that an administratively closed case is not a final ruling because it is the functional equivalent of a stay); Jonesfilm v. Lions Gate Films, Inc., 65 F. App'x 361, 362 (2d. Cir. 2003) (holding that no final decision had been issued because a motion to stay the proceedings had been granted).

15. *See* MicroStrategy, Inc. v. Lauricia, 268 F.3d 244 (4th Cir. 2001).

16. *See* JCI Communications Inc. v. International Brotherhood of Elec. Workers, 324 F.3d 42, 48 (1st Cir. 2003).

17. *See generally* John Henn, "Civil Interlocutory Appellate Review Under G.L. c. 231, § 118 and G.L. c. 211, § 3," in Practice and Procedure Before the

Post-Award Judicial Proceedings

A. Availability of Judicial Review

Both the FAA and the MUAA (as well as the proposed RUAA) provide for the possibility of judicial review of an arbitration award at the request of one or both parties. This review may take place because a party seeks to confirm an award (in order to use judicial process to enforce it), a party seeks to modify or correct an award, or a party seeks to vacate an award.[18]

Under those statutes, such judicial review initially would take place in a trial court, and that court's resulting order would be appealable to an appellate court under the usual appellate jurisdiction over final decisions or judgments (or in federal court, also under § 16(a)(3) of the FAA). Section 13 of the FAA and § 14 of the MUAA expressly provide for entry of a final judgment from a lower court order "confirming, modifying or correcting an [arbitration] award."

In the event a federal trial court order were to vacate an arbitration award, that order would also be a "final decision with respect to an arbitration" under the FAA (§ 16) and appealable immediately. In Massachusetts, such an order would at minimum be subject to appellate review by a single justice under Massachusetts General Laws chapter 231, § 118, and it is likely that the single justice would reserve and report the order to the full appellate court.[19]

B. Availability of Judicial Relief—Generally

Although judicial review is available, the likelihood of obtaining judicial relief turns very substantially on what kind of relief is sought. Confirmation of an award is, under the federal and Massachusetts statutes, the "other side of the coin" from vacatur, modification or correction. That is, courts are required to confirm an award (and then enter judgment upon it) in the absence of grounds for vacatur, modification or correction.[20]

With respect to modification or correction of an award, the respective statutes set forth specific grounds in the nature of correcting material miscalculations or descriptions, correcting non-merits imperfections in form, or modifying awards to exclude matters not submitted to arbitration.[21] Awards so corrected or modified must then be confirmed.[22]

Vacatur, as further discussed below, is quite another matter. The grounds permitted in the respective statutes for vacatur of an arbitration award are very narrow.[23] And there is little room, or apparently no room in federal court, for any judicial expansion of those grounds.

C. The Scope of Judicial Review

The subject of the scope of judicial review in the context of an arbitration award requires paying attention to just what is being reviewed. At the lower court level, it is the award that is being reviewed. At the appellate level, both the award and the lower court decision are being reviewed. But to complicate matters further, the scope of appellate review of the award itself is de novo.[24] That is, the appellate court directly reviews the arbitration award without deference to what the trial court said about the award itself.[25]

1. Judicial Review of the Award Itself

The scope of review of the arbitration award itself is anything but de novo. As noted, confirmation of an award is mandatory, absent grounds specified in the statute for modification, correction or vacatur. And in the usual case, the losing party to an arbitration award seeks not just modification or correction, but vacatur, and no confirmation and resulting judgment at all.

As to vacatur, the First Circuit has colorfully stated that "[j]udicial review of an arbitration award [at the trial and appellate level] is among the narrowest known to the law."[26] For example, "[t]o determine whether an arbitrator has exceeded his authority [a stated ground for vacatur under §10(a)(4) of the FAA] … courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts, and even where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards."[27] Similarly, the Supreme Court has commented with respect to arbitration awards that "improvident, even silly fact finding" is insufficient basis for refusing to enforce an award.[28]

In Massachusetts, "the Legislature has identified extremely limited grounds on which courts may vacate or modify arbitration awards."[29] An arbitration award "may only be set aside if the arbitrators exceeded the scope of their authority or decided the matter based on fraud, arbitrary conduct, or procedural irregularities in the hearing."[30] "The strong public policy favoring arbitration requires [the Court] to uphold an arbitrator's decision even where it is wrong on the facts or the law, and whether it is wise or foolish, clear or ambiguous."[31] Any broader scope of review "would undermine the predictability, certainty, and effectiveness of the arbitral forum that has been voluntarily chosen by the parties."[32] "Unlike our review of factual findings and legal rulings made by a trial judge, we are strictly bound by an arbitrator's findings and legal conclusions."[33]

Single Justice of the Appellate Courts of Massachusetts (Mass. Bar Ass'n 2000).

18. *See* 9 U.S.C. §§ 9-11 (2010); Mass. Gen. Laws ch. 251 §§ 11-13 (2010).

19. *See* Henn, *supra*, note 13.

20. 9 U.S.C. §§ 9, 13 (2010); Mass. Gen. Laws ch. 251, §§ 11, 14 (2010).

21. 9 U.S.C. § 11 (2010); Mass. Gen. Laws ch. 251, § 13 (2010).

22. 9 U.S.C. § 13 (2010); Mass. Gen. Laws ch. 251, § 14 (2010).

23. 9 U.S.C. § 10 (2010); Mass. Gen. Laws ch. 251, § 12 (2010).

24. *JCI Communications*, 324 F.3d at 48.

25. Note the focus in the test on the award itself. What the trial court found on matters not in the award—e.g., on a ground for vacatur such as an award procured by fraud—will be a proper focus of appellate review.

26. Maine Cent. R.R. Co. v. Bhd. of Maintenance of Way Employees, 873 F.2d 425, 428 (1st Cir. 1989); *see* E. Seaboard Constr. Co. v. Gray Constr., Inc., 553 F.3d 1, 3 (1st Cir. 2008).

27. Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 330 (1st Cir. 2000).

28. Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (citation omitted; labor arbitration case).

29. City of Lynn v. Thompson, 435 Mass. 54, 62 n.13 (2001).

30. *Id.* (citing Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007 (1990)).

31. City of Boston v. Boston Police Patrolmen's Ass'n, 443 Mass. 813, 818 (2005); *see also* Superadio Ltd. P'ship v. Winstar Radio Prods., LLC, 446 Mass. 330, 337 (2006) (absent fraud, corruption, or other undue means, errors of law or fact are not sufficient grounds to set aside an arbitration award); Mass. Highway Dep't v. AFSCME, 420 Mass. 13, 15 (1995) ("We do not, and cannot, pass on an arbitrator's alleged errors of law and, absent fraud, we have no business overruling an arbitrator because we give a contract a different interpretation.").

32. *Plymouth-Carver,* 407 Mass. at 1007.

33. *City of Lynn*, 435 Mass. at 61.

2. Appellate Judicial Review of Lower Court Orders Concerning an Award

Appellate review of lower court confirmation orders consists in effect of review of whether grounds for modification, correction or vacatur exists. Assuming the lower court found no such grounds to exist, and the objecting party appeals and argues that such grounds do in fact exist, the appellate court then proceeds directly to review the award de novo, and, based on that review, affirms, modifies, or reverses the lower court confirmation (and, ordinarily, judgment). Where the lower court does take some action on an award other than confirmation, the appellate court then must review that action as well as the award itself.

With respect to lower court findings and rulings, whether on pre-award issues relating to arbitrability or post-award issues relating to the award, the scope of appellate review as to the lower court is set forth in *First Options of Chicago, Inc. v. Kaplan*.[34] There, the Supreme Court stated that "courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards," i.e., they should accept findings of fact that are not "clearly erroneous" but decide questions of law de novo.

The First Circuit has interpreted *First Options* as eliminating the "abuse of discretion" standard in reviewing lower court decisions with respect to arbitration, and instead applying a de novo standard for the lower court's legal conclusions and a clear error standard for its factual findings.[35] As a practical matter, however, this standard most frequently comes into play with respect to lower court proceedings on arbitrability, where lower court findings and rulings on whether the parties agreed to arbitrate and if so whether the agreement should be enforced (or, for example, is unconscionable) are essential. In that case, there is by definition no arbitration award to which any deference would be given.

With respect to post-award proceedings, appellate review necessarily focused both on the lower court decision and on the award itself. And while there are express federal and Massachusetts statutory grounds for modifying/correcting an award, or for vacating it, an appellate court can be expected not only to apply the *First Options* standard of review, but to do so mindful of the well-established doctrine described above that the lower court has severely limited power to review the merits of the underlying arbitration and the award that issued. *See* discussion in this article *supra* concerning "Post-Award Judicial Proceedings … ."

C. The Scope of Judicial Review

Whether on review by the district court, or on further review by a court of appeals, review of the arbitration award itself is governed by the FAA, including the specific and limited grounds listed for vacatur. The question of whether the parties could by agreement provide for a broader scope of judicial review of an arbitration award than is set forth in the FAA was answered in the negative by the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[36] confirming the prior view of several circuit courts.[37]

D. Confirmation of Arbitration Awards—Procedure

Under § 9 of the FAA, either party to an arbitration may petition the appropriate court for an order confirming the award as a judgment of the court.[38] Section 9 of the FAA also provides that the parties may specify the court to confirm the award; if no court is specified in the arbitration agreement, the application may be made to the United States District Court in the jurisdiction in which the award was made. Independent grounds for federal question jurisdiction must exist (usually diversity as a practical matter), as neither § 9 nor § 10 creates federal question jurisdiction, and the FAA generally does not do so.[39]

Section 9 provides that, at any time within one year after the award is made, any party to the arbitration may apply to the court so specified for an order confirming the award. The Circuits are split on whether the term "may," as used in that section, should be interpreted as permissive or as imposing a mandatory one-year statute of limitations period for filing motions to confirm under that section. In *Photopaint Technologies, LLC v. Smartlens Corp.*,[40] the Second Circuit held that the FAA imposes a one-year mandatory statute of limitations on filing motion to confirm. In contrast, the Fourth Circuit, in *Sverdrup Corp. v. WHC Constructors, Inc.*,[41] held that § 9's limitations period is not mandatory but permissive. Perhaps the better rule is that "may" is mandatory, but that § 9 should be construed to be subject to equitable tolling. Under such a rule, where the losing party to an arbitration award takes action suggesting compliance with the award and the lack of any need to incur the time and expense of seeking confirmation (e.g., partial performance of an award that required certain actions to be taken over time), the one year period would be tolled and start to run from the time the need for confirmation became apparent.[42]

A district court judgment entered on an arbitration award has the same force and effect as any judgment for purposes of execution and enforcement.[43] As discussed *supra,* however, the scope of appellate review of a district court judgment confirming an arbitration award is very narrow indeed where the ground of appeal is that the award should have been vacated and not confirmed.

A motion to confirm an award should in the normal case be promptly decided. In a rather unusual case, however, the First Circuit held that confirmation of an international award could be

34. 514 U.S. 938, 948 (1995).

35. *See, e.g.,* Prudential-Bache Sec., Inc. v.Tanner, 72 F.3d 234, 237 (1st Cir. 1995).

36. 552 U.S. 576, 585-91 (2008).

37. *E.g.*, Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987 (9th Cir. 2003) (joining the Seventh, Eighth, and Tenth circuits by holding that when Congress has described standards for review, such as in the FAA, the parties—who normally in arbitration have freedom to design their own procedures by agreement—will have no power to alter, expand, or otherwise determine the rules by which the federal courts are to proceed), *cert. dismissed*, 540 U.S. 1098 (2004).

38. 9 U.S.C. § 9 (2010); Mass. Gen. Laws ch. 251, § 11 (2010); *see* RUAA § 22.

39. *See, e.g.*, Rio Grande Underwriters, Inc. v. Pitts Farms, Inc., 276 F.3d 683 (5th Cir. 2001) (FAA not an independent source of jurisdiction, and relief available under Act only when underlying action subject to federal question or diversity jurisdiction); Dominium Austin Partners, L.L.C. v. Emerson. 335 F.3d 152, 158-60 (2d Cir. 2003)(same).

40. 335 F.3d 152, 158-60 (2nd Cir. 2003).

41. 989 F.2d 148, 151 (4th Cir. 1993); s*ee also* Val-U Const. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 581 (8th Cir. 1998).

42. *Cf.* General Elec. Co. v. Anson Stamping Co., Inc., 426 F.Supp. 579, 591-592 (W.D.Ky 2006) (Section 9 does not require a specifically denominated motion to confirm, but only its "procedural equivalent," including opposing a losing party's motion to vacate).

stayed pending the outcome of a related, set-off arbitration proceeding, despite the mandatory "shall confirm" language of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[44] Analogizing the stay request to the FAA, the Court acknowledged the FAA's comparable mandatory language requiring confirmation unless the requirements of § 10 and § 11 are met. The Court stated, however, that "courts routinely grant stays in such cases for prudential reasons not listed in Sections 10 and 11" and held that the court had inherent power to stay confirmation in order to recognize other pending litigation and that Congress, in enacting the FAA and the Convention, did not intend to usurp that power. In *Hewlett-Packard*, the First Circuit also held that a district court order confirming an award is immediately appealable even if it has not been entered on the docket as a judgment as contemplated by § 13. To rule otherwise, the Court stated, would thwart the FAA's pro-arbitration purpose set forth in § 16(a)(1)(D), which is designed to expedite the confirmation of awards.[45]

The MUAA does not contain an internal time limit for seeking confirmation, but it is likely that the Massachusetts six-year limitations period for actions on a judgment would apply. That is confirmed by Drafting Committee Comment 2 to § 22 of the RUAA, the section on confirmation: "The Drafting Committee considered but rejected the [FAA § 9] one year period of time. The consensus of the Drafting Committee was that the general statute of limitations in a state for the filing and execution on a judgment should apply."[46]

Grounds for Vacatur of An Arbitration Award

A. Federal and Massachusetts Arbitration Acts

Section 10(a) of the FAA sets forth the federal statutory grounds for "vacatur" (i.e., for vacating arbitration awards [47]

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[48]

Section 12 of the MUAA sets forth the same four grounds, although the third and fourth grounds are reversed and, in the case of the fourth FAA ground (the third MUAA ground), stops after the words "exceeded their powers." The MUAA also sets forth a fifth ground permitting vacatur when "there was no arbitration agreement" provided that this "issue was not adversely determined in proceedings" to compel or stay arbitration, and the party raising this issue in court raised it as an objection in the arbitration.[49]

Note that a motion to vacate must be served upon the adverse party or the party's attorney within three months after the award is filed or delivered.[50]

B Application of the Four Grounds common to the FAA and the MUAA[51]

1. Corruption, fraud, or undue means (e.g., misconduct)

Challenges on the basis of corruption, fraud, or undue means are rare. Faced with such challenges, federal courts normally employ a three-part test to determine whether an arbitration award should be vacated for fraud or comparable misbehavior under § 10(a)(1): (1) the moving party must prove fraud by clear and convincing evidence; (2) that party must prove that the fraud could not have been discoverable upon the exercise of due diligence prior to or during the arbitration; and (3) that party must prove that the fraud materially related to an issue in the arbitration.[52] For an application of this test, see *Morani v. Landenberger*,[53] where the court denied a motion to vacate where the moving party had claimed fraud, on the grounds that the partial transcript of the arbitration hearing that was available did not contain what were alleged to be attorney misrepresentations made at the hearing.

One question that arises is whether the introduction of perjured testimony mandates a finding that an award was "procured by … fraud."[54] Where the perjury bears directly on issues decided in the award, a court should "[have] no doubt that perjury constitutes fraud within the meaning of the Arbitration Act".[55] In one now quite old case, *Karppinen v. Karl Kiefer Machine Co.*,[56] the court commented that on a motion to vacate, a court should hold an evidentiary hearing on a perjury claim with "great reluctance," and held that such a hearing was not necessary in that case because the claimed perjury did not bear on the outcome of the award. That holding makes sense, as it would be extreme to conclude that every bit of perjury by a witness in an arbitration—e.g., any knowing lie by a witness on however trivial a point—should mean that an award in favor of the party who produced that witness must be vacated. Just as arbitrators themselves use their judgment in determining whether the testimony at issue was a basis for making an award, a court also should use its judgment in determining whether a particular piece

43. 9 U.S.C. § 9 (2010).

44. Hewlett-Packard Co., Inc. v. Berg, 61 F.3d 101, 105-06 (1st Cir. 1995).

45. *Id.* at 104.

46. [Revised] Uniform Arbitration Act (Nat'l Conf. of Comm'rs on Uniform State Laws (2000), at p. 24 (www.law.upenn.edu/bll/archives/ulc/uarba/arbitral1213.pdf).

47. The procedure for seeking vacatur is set forth in Section 12 of the FAA the same section of the MUAA. Each statutory provision includes a mandatory limitations period ("must be served with three months" in the FAA, and "shall be made within thirty days" in the MUAA).

48. 9 U.S.C. § 10(a) (2010)

49. This subject is further addressed in this issue of the Review in the article by James Grumbach, Esq.

50. 9 U.S.C. § 12 (2010); Mass. Gen. Laws ch. 251, § 12(b) (2010).

51. Portions of this Part B dealing with federal statutory vacatur grounds were adapted with permission from, or guided by, Chapter 14 of [Bette] Roth, Wulff & Cooper, *Alternative Dispute Resolution Practice Guide* (Thompson Reuters 2010) and authorities cited therein.

52. Environmental. Barrier Co., LLC v. Slurry Sys., 540 F.3d 598, 608 (7th Cir. 2008).

53. 248 F.3d 1127 (1st Cir. 2000).

54. 9 U.S.C. § 10(a)(1) (2010).

55. *See* Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 n.7 (11th Cir. 1988)(party's expert witness lied about his credentials), citing Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir. 1982).

56. 187 F.2d 32, 35 (2d Cir. 1951).

of perjury (assuming it was proved) means that the award was "procured" by fraud. For example, perjury on the issue of damages by a witness who testified for the defense only on damages should not be a sufficient ground for vacatur in the case of an award that found no liability based on other evidence, and that addressed neither the damages witness' testimony nor the issue of damages.

2. Evident partiality of arbitrator

Both the FAA and the MUAA provide that "evident partiality" of the arbitrator is a ground for vacatur.[57] *Evident* partiality—the key word is "evident"—is difficult to establish.

A showing of evident partiality certainly requires more than a party's mere suggestion of the appearance of bias, as the First Circuit noted in the *JCI Communications* case.[58] In that case, the court held that a delay of the hearing, and the failure to provide the complainant with requested biographical information regarding an arbitrator, did not require vacatur. Similarly, mere personal friendship with one of the parties also should not disqualify an arbitrator,[59] provided, of course, that there was disclosure of the relationship by the arbitrator in question.

Thus, in the words of the *Kiewit* case in the federal district of Massachusetts, a claim of evident partiality must be "direct, definite, and capable of demonstration rather than remote, uncertain or speculative."[60] The Appeals Court decision in *Barnstead v. Ridder*[61] is to the same effect In other words, specific facts must be alleged and proved to show such partiality. Where, however, a party in the lower court made out a prima facie case of partiality, the trial court may at least be required to hold further evidentiary hearings to explore the matter.[62]

There are, of course, more extreme cases where evident partiality was shown. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[63] the Supreme Court reversed a First Circuit decision refusing to vacate an award rendered by "the supposedly neutral member of the panel" where the arbitrator regularly did business with one of the parties and had rendered services on projects involved in the arbitration, yet "never revealed" any of this. In doing so, the majority, in an opinion by Justice Black, came close to suggesting that the standards applicable to determining an arbitrator's partiality should be the same as those applied to judges. The concurring opinion of Justices White and Marshall rejected that suggestion, however, and instead argued that, had the arbitrator disclosed his business connection with one of the parties and left it to the other parties to decide whether to object, the case would have come out differently had those other parties not objected.[64] The latter holding seems to be more sensible in the context of those arbitrations, such as those administered by the American Arbitration Association ("AAA"), where arbitrators make disclosures to the AAA, the AAA informs the parties and receives their objections, and then the AAA decides *itself* whether to remove an arbitrator. It makes sense that in the case of a judge, where there is no independent third party to resolve the question of recusal, a stricter standard should apply.

Subsequent to *Commonwealth Coatings*, courts have sometimes distinguished between "nondisclosure" cases and "actual bias" cases in determining evident partiality. In nondisclosure cases, vacatur has been held to be appropriate where the arbitrator's failure to disclose information "gives the impression of bias in favor of one party."[65] In those instances, a "reasonable impression of partiality" is sufficient to vacate "because the integrity of the process by which arbitrators are chosen is at issue in nondisclosure cases."[66]

Other courts, however, require proof of "specific facts" showing improper motives on the part of the arbitrator.[67] Proof of such specific facts typically includes a showing of some personal or professional relationship, or a financial interest in one of the parties or the outcome of the case.[68] A party seeking vacatur also may identify conduct during the hearing that demonstrates bias by, for example, transcript references or by proof of an *ex parte* communication with another party.[69]

A party who fails to raise a claim of bias against an arbitrator until after an arbitration award has been made may be deemed to have waived the claim. That was the Ninth Circuit's holding,[70] in a case where the party seeking vacatur of an award was held to have waived any claim of evident partiality of an arbitrator chosen by the opposing party where the selection process should have put that party on notice that the arbitrator chosen by the prevailing party could have had some personal or professional connection with the prevailing party. In addition, the losing party did not request any disclosure statement from arbitrator chosen by prevailing party until after an interim award was issued.[71]

57. 9 U.S.C. § 10(2) (2010); Mass. Gen. Laws ch. 251, § 12(a)(2) (2010); *see also* RUAA § 23(a)(2)(2000). Each statute also provides in the same subsection that "corruption" is a ground for vacatur. This circumstance is too rarely alleged to be discussed here.

58. *JCI Communications*, 324 F.3d at 51; *see* Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) (addressing a claim of evident partiality based on arbitrator's business relationship with party); Bernstein v. Gramercy Mills, Inc., 16 Mass. App. Ct. 403 (1983) (same); *see also* Sanders v. Maple Springs Baptist Church, 787 A.2d 120 (D.C. 2001).

59. *See* Montez v. Prudential Sec., Inc., 260 F.3d 980 (8th Cir. 2001)(standard warranting vacatur of arbitration award is not failure to disclose possible bias, but proof of evident partiality).

60. Kiewit v. IBEW, 76 F. Supp. 2d 77, 79-80 (D. Mass. 1999).

61. 39 Mass. App. Ct. 934, 937 (1996).

62. S*ee* Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.304 F.3d 1331 (11th Cir. 2002). (vacating confirmation of arbitral award and remanding for evidentiary hearing)

63. 393 U.S., 145, 146 (1968).

64. *Id.* at 148-51.

65. Woods v. Saturn Distribution Corp., 78 F.3d 424, 427 (9th Cir. 1996); New Regency Productions, Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101 (9th Cir. 2007). *Accord*, Positive Software Solutions, Inc. v. New Century Morg. Corp., 476 F. 3d 278, 279-80 (5th Cir. 2007).

66. *Id.*; *see* HSMV Corp. v. ADI Ltd., 72 F. Supp. 2d 1122 (C.D. Cal. 1999) (vacating arbitration award because arbitrator failed to disclose his law firm represented the owner of one of the parties where the applicable rules and the arbitrator's responsibilities as a lawyer created a duty to investigate).

67. Householder Group v. Caughran, 354 F. App'x 848, 852 (5th Cir. 2009); Al-Harbi v. Citibank, N.A., 85 F.3d 680 (D.C. Cir. 1996); Lifecare Int'l., Inc. v. CD Med., Inc., 68 F.3d 429, 434-35, (11th Cir. 1995), *opinion modified and supplemented*, 85 F.3d 519 (11th Cir. 1996).

68. *See* Turner Fisheries, Inc. v. Seafood Workers Union I.L.A., 19 Mass. App. Ct. 925, 927 (1984) (arbitrator in company-union arbitration not required to disclose prior employment by an unrelated union); *see also* Bernstein, 16 Mass. App. Ct. 403, 413 (1983)(noting that some relationships are insufficient to constitute evident partiality).

69. *See, e.g.*, Nationwide Mut. Ins. Co. v. First State, 213 F. Supp. 2d 10, 18-19 (D. Mass. 2002).

70. Fidelity. Fed. Bank, FSB v. Durga Ma Corp., 386 F.3d 1306, 1311-13 (9th Cir. 2004).

71. *See also* Delta Mine Holding Co. v. AFC Coal Properties, Inc., 280 F.3d 815 (8th Cir. 2001) (party waived issue of evident partiality by not requesting

Note that the FAA does not expressly provide for removal of an arbitrator during the pendency of an arbitration and prior to the award.[72] The MUAA and the RUAA are similar. Indeed, the RUAA, which contains, in § 12, new and detailed provisions about arbitrator disclosure, appears to limit a party's remedy for wrongful failure to disclose to vacatur of an award, as opposed to a pre-hearing or pre-award removal of the arbitrator. Nonetheless, in arbitrations administered by an arbitral forum, such as the AAA, the forum pursuant to its rules and in practice reserves to itself the power in appropriate cases to remove an arbitrator based on a new disclosure (usually made by the arbitrator) arising pre-award in a case where a party, based on that disclosure, objects and seeks an arbitrator's removal, and the disclosure was not previously known or discoverable with due diligence.

3. Misconduct of arbitrators—e.g., for refusing to hear material evidence

The FAA provides in § 10(a)(3) that an award "may" be vacated for misconduct in "refusing to postpone the hearing upon proof of sufficient cause," or in "refusing to hear evidence … material to the controversy," or for other prejudicial misbehavior. When this ground is asserted, it is generally based on a claimed refusal to hear material evidence. Arbitrators almost always exclude some evidence, and are particularly likely to do so in a case that has dragged on so long that the delay threatens one of the basic goals of arbitration: timely resolution of a dispute.

With respect to the specific vacatur ground of refusal to hear material evidence, the FAA's full description of that ground is as follows: "where the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy."[73] The MUAA's provision is similar, though simpler and more emphatic: "the court *shall* vacate if: … the arbitrators … refused to hear evidence material to the controversy.[74] The word *material* is obviously key (the FAA's added word "pertinent" is just a redundancy).[75] In addition, the word *misconduct* must also be considered. It cannot be misconduct to refuse to hear only marginally material evidence.

The Sixth Circuit, for example, has glossed the FAA text in this area to conclude that an award will be set aside only when the failure to admit evidence denies a party a fundamentally fair hearing.[76] In determining what evidence is "material," moreover, arbitrators have broad discretion. In extreme cases, however, such as where the arbitration panel either intentionally refused or was "neglectful" in disregarding evidence central to the entire dispute to such an extent that the fundamental right to be heard is totally blocked, the award may be vacated.[77]

4. Exceeding powers, and failure to make a final and definite award

Section 10(a)(4) of the FAA permits vacatur of an arbitration award where the arbitrators prejudice a party's (or non-party's) rights by exceeding their powers, *or* by so imperfectly executing them that they fail to make a final and definite award upon the subject matter submitted.[78]

An exception to the second part of this general rule arises where the award "finally and definitely" disposes of a separate independent claim which is "subject to neither abatement nor set-off."[79] In *Bull HN Information*, the district court held that part of an arbitration award was final and definite to the extent it conclusively disposed of statute of limitations issues and compensation claims. The court (Collings, M.J.) refused, however, to review the award's ERISA-based determinations, finding that the award "clearly anticipates further proceedings" on that matter. The court also held that the arbitrator had exceeded his authority when he invalidated an agreement the parties had agreed would govern, noting that an arbitrator may not "invalidate the very agreement from which he derives his power."[80]

Whether arbitrators exceeded their powers always turns on specific facts of a particular case and/or the nature of a particular award. It is difficult, therefore, to generalize about how an when courts might intervene where a claim of overreaching is made. However, a usueful illustrative case for vacatur on this ground is *Katz v. Feinberg*,[81] which held that an arbitrator exceeded his authority by deviating from the partnership valuation method stated in the arbitration agreement where the agreement provided that its valuation method and result were not subject to any other proceedings, appeal, or arbitration.[82] Cases to the contrary include *Wonderland Greyhound Park, Inc. v. Autotote Systems, Inc.*,[83] where the court held that the arbitrator acted within his authority by construing the remedial provisions of the contract giving rise to dispute, and *Pike v. Freeman*,[84] where the court held that as long as the arbitrator is even arguably construing or applying the relevant contract he is acting within his authority, regardless of whether the lower court was convinced that the arbitrator committed serious error.

removal of allegedly partial arbitrator).

72. *See, e.g.,* Gulf Guar. Life Ins. Co., 304 F.3d at 490 (stating that "even where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award").

73. 9 U.S.C. § 10(a)(3) (2010).

74. Mass. Gen. Laws ch. 251, § 12(a)(4) (2010).

75. *See* U.S. Life Ins. Co. v. Superior Nat'l Ins. Co., 591 F.3d 1167, 1174-75 (9th Cir. 2010)(vacatur for "refusing to hear evidence" requires showing of prejudice); International Union v. Marrowbone Dev. Co., 232 F.3d 383 (4th Cir. 2000) (court will not set aside arbitration award because arbitrator refused to hear immaterial, cumulative, or irrelevant evidence).

76. *See, e.g.,* Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621 (6th Cir. 2002) (arbitrators not bound by formal rules of evidence and standard for review of arbitration procedures is merely whether party has been denied fundamentally fair hearing).

77. *See International Union*, 232 F.3d at 383.

78. 9 U.S.C. § 10(a)(4) (2010); *see also* Mass. Gen. Laws ch. 251, § 12(a)(3) (2010) (referring only to "exceed[ing] their powers"); RUAA § 23(a)(4). *See* Comedy Club, Inc. v. Improv West Assoc., 502 F.3d 833 (9th Cir. 2007)(injunction against non-parties exceeded authority), *amended and superseded* 514 F.3d 833 (9th Cir. 2008).

79. *See* Bull HN Info. Sys. Inc. v. Hutson, 983 F. Supp. 284, 289 (D. Mass. 1997), and cases cited..

80. *Id.* at 290.

81. 290 F.3d 95 (2d Cir. 2002)

82. *See also* Anheuser-Busch, Inc. v. Local Union 744, 280 F.3d 1133, 169 (7th Cir. 2002) (arbitrator exceeded authority by relying on past practices to conclude that a two-tiered commission rate for drivers did not govern bargaining agreement); Pa. Power Co. v. Local Union No. 272, 276 F.3d 174 (3d Cir. 2001) (arbitrator exceeded scope of arbitration provision and his decision failed to draw its essence from agreement).

83. 274 F.3d 34 (1st Cir. 2001).

84. 266 F.3d 78 (2d Cir. 2001).

C. The Non-Statutory Grounds for Vacatur (If Any)

Prior to 2008, it was widely assumed in cases governed by arbitration law as set forth in the FAA that courts could rely upon at least two grounds for vacatur—manifest disregard of the law, and a violation of public policy—without connecting them to express statutory language in the FAA. In 2008, the case of *Hall Street Associates, LLC v. Mattel, Inc.*,[85] cast considerable doubt upon this assumption. Subsequent to *Hall Street*, many courts have nonetheless relied upon the manifest disregard ground, but it appears they have done so by stating that manifest disregard of the law is simply a case of "arbitrators exceed[ing] their powers"—the express vacatur ground set forth in § 10(a)(4).

As the FAA applies to cases involving a "contract evidencing a transaction involving commerce," the arbitration law as set forth in the FAA applies to many cases in Massachusetts state courts involving arbitrations, especially cases involving commercial arbitrations.[86] "Commerce" is defined as interstate commerce, excluding specified employment contracts.[87] Business and commercial contracts usually involve interstate commerce to some extent, and therefore the governing arbitration law is the FAA, which provides substantive law but not federal jurisdiction.

1. Manifest disregard of the law

Pre-Hall Street

Prior to *Hall Street*, federal courts such as the First Circuit permitted a claim of vacatur to be based on an arbitrator's manifest disregard of the law without seeking to connect the claim to any particular provision of the FAA. In other words, it appeared that manifest disregard of the law was a judge-created additional ground for vacatur.

In applying that ground, the First Circuit had looked to whether an award was unfounded in reason and fact, was based on reasoning so faulty that no judge could conceivably have made such a rule, or was mistakenly based on a crucial assumption that is concededly not a fact. In the first *Kashner* case, the First Circuit stated: "We have subsumed these common law grounds into a general evaluation of whether a panel has acted in 'manifest disregard of the law.'"[88] The First Circuit's language was adopted from dicta employed by the Supreme Court in *Wilko v. Swan*.[89] At the same time, the court noted that "[t]his standard of judicial review has taken on various hues and colorations in its formulations in this, and other circuits."[90]

Under this standard, the First Circuit further explained that "an award is in manifest disregard of the law if either the award is contrary to the plain language of the contract, or it is clear from the record that the arbitrator recognized the applicable law, but ignored it."[91] "In the parlance of this and other circuits, a reviewing court may vacate an arbitral award if it was made in 'manifest disregard' of the law."[92]

Post-Hall Street

In *Hall Street*, the Supreme Court addressed the question "whether statutory grounds" for vacatur (or modification) may be supplemented "*by contract*" (emphasis added), and held, to the contrary, that "the statutory grounds are exclusive."[93] If the statutory grounds are exclusive, it follows that supplementation on the basis of judge-created extra-statutory grounds is no more permissible than supplementation by contract.

In the second *Kashner* case,[94] involving a second appeal in the case, the First Circuit noted the potential impact of *Hall Street* on the continuing vitality of manifest disregard of the law as a non-statute based ground for vacating an arbitration award. In *Kashner II*, the court was addressing whether the district court's order remanding the case to the arbitrators after vacating the arbitration award violated the court's mandate.[95] The plaintiffs argued that the court's earlier mandate had been undermined by the Supreme Court's subsequent decision in *Hall Street*. "In *Hall Street*, the Supreme Court held that the grounds for prompt vacatur or modification of an arbitral award enumerated in the Federal Arbitration Act (in 9 U.S.C. §§ 10-11) are exclusive and may not be supplemented by contract."[96] The plaintiffs further argued that the court's "holding in the first appeal—that the award must be vacated because the arbitrators manifestly disregarded the law—is in conflict with *Hall Street* because manifest disregard of the law is not explicitly listed as a ground for vacatur in section 10 of the FAA."[97]

After noting that "the continued vitality of the manifest disregard doctrine in FAA proceedings is a difficult and important issue that the courts have only begun to resolve," the First Circuit in *Kashner II* stated that the Circuit has "not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*."[98] The court noted, however, that while *Hall Street* was decided after oral argument in the first *Kashner* appeal but before the court issued its decision,[99] the plaintiffs "failed to take advantage of numerous earlier opportunities to raise the *Hall Street* argument through ordinary procedures," including cross-appealing from the district court's remand order.[100] Consequently, the court refused to recall its earlier mandate and consider the impact of *Hall Street* because the court was not "faced with the sort of grave, unforeseen contingency that would justify the recall of a mandate."[101]

85. 552 U.S. 576 (2008).

86. 9 U.S.C. § 2 (2010).

87. *Id.*at § 1.

88. Kashner Davidson Sec. Corp. v. Mscisz, 531 F.3d 68, 74 (1st Cir. 2008) ("Kashner I")..

89. 346 U.S. 427, 436-37 (1953).

90. Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990).

91. 531 F.3d at 74 (internal quotations and brackets omitted).

92. Gupta v. Cisco Sys., Inc., 274 F.3d 1, 3 (1st Cir. 2001) (quotation omitted).

93. 552 U.S. at 578. Cf. Nafta Traders, Inc. v. Quinn, Texas S.Ct. No. 08-0613 (decided May 13, 2011), slip op. at 10-18 (construing the Texas arbitration act to permit the parties to agree to judicial review of an award for any legal error, and disagreeing with the legal reasoning of Hall Street), and at 23 (holding that in a case governed by both the FAA and the Texas act, the FAA does "not preempt state law that allows agreements to enlarge judicial review of arbitration awards").

94. Kashner Davidson Securities Corp. v. Mscisz, 601 F.3d 19 (1st Cir. 2010) ("Kashner II").

95. *See id.* at 20.

96. *Id.* at 22.

97. *Id.*

98. *Id.*

99. *Id.* at 23 n.5.

100. *Id.* at 23.

101. *Id.* (quotation and brackets omitted); *contra* Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008) (acknowledging "the

The Second Circuit, however, has expressly considered the impact of *Hall Street*. In *Stolt-Nielsen SA v. AnimalFeeds International Corp.*,[102] the court first noted that, "[a]lthough the 'manifest disregard' doctrine was not itself at issue, the *Hall Street* Court nonetheless commented on its origins," and then quoted from the *Hall Street* opinion at some length:

> The *Wilco* [sic] Court remarked (citing *FAA § 10*) that power to vacate an arbitration award is limited, and went on to say that the interpretations of the law by the arbitrators in contrast to manifest disregard of the law are *not* subject, in the federal courts, to judicial review for error in interpretation… . Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were guilty of misconduct or exceeding their powers.[103]

The Second Circuit went on to note that the "[*Hall Street*] Court declined to resolve that question explicitly, noting instead that it had never indicated, in *Wilko* or elsewhere, that 'manifest disregard' was an independent basis for vacatur outside the grounds provided in *section 10 of the FAA*."[104]

The *Stolt-Nielsen* court also remarked that "[s]ome [courts] have concluded or suggested that the doctrine simply does not survive," (quoting *Ramos-Santiago*[105]) and "[o]thers think that 'manifest disregard,' reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in *section 10 of the FAA*, remains a valid ground for vacating arbitration awards."[106] The Second Circuit agreed with the courts that took the latter approach. It stated that earlier dicta from the Second Circuit indicating that manifest disregard of the law is a ground for vacatur entirely separate from those enumerated in the FAA is clearly inconsistent with *Hall Street*, but that the Supreme Court in *Hall Street* also had speculated that the term 'manifest disregard' refers to the Section 10 grounds collectively, or as shorthand for Sections 10(a)(3) or 10(a)(4).[107] Accordingly, the Second Circuit concluded that the *Hall Street* Court "did not, we think, abrogate the 'manifest disregard' doctrine altogether."[108]

The *Stolt-Nielsen* court went on to state that it "view[ed] the 'manifest disregard' doctrine, and the FAA itself, as a mechanism to enforce the parties' agreements to arbitrate rather than as judicial review of the arbitrators' decision": when arbitrators know of a relevant legal principle, appreciate that the principle controls the outcome of the disputed issue, and nonetheless willfully refuse to apply it, the arbitrators have failed to interpret the contract at all. Parties do not agree in advance to submit to an arbitration that is conducted in manifest disregard of the law.[109] Consequently, the court must continue to review arbitration awards for manifest disregard of the law because arbitrators who issue an award in manifest disregard of the law "'exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.'"[110]

In summary, the viability of manifest disregard of the law as a ground for vacating an arbitration award is in some doubt in the First Circuit, but the ground apparently survives in the Second Circuit, albeit now made part of the statutory grounds for vacatur under § 10 of the FAA. It is reasonable to expect the First Circuit to follow that line, if for no other reason than to deal with truly egregious cases where the arbitrator was supplied with the indisputably applicable and governing law, and nonetheless ignored. In this regard, emphasis should be placed on the word "ignored"—which calls for an analysis focused on arbitrator misconduct, rather than an analysis focused on an arbitrator's allegedly defective reasoning. Thus, a reviewing court has no basis for vacating an award merely because it disagrees with an arbitral legal ruling. Rather, the reviewing court must find that the arbitrator knew or was provided with an incontestably applicable legal rule, and ignored it—i.e., disregarded it. If so, the arbitrator would then have been guilty of misconduct and/or exceeded his powers under the FAA, §§ 10(a)(3) and/or (4).

To the extent a case seeking vacatur is filed in a Massachusetts court, and the FAA does *not* provide the substantive law of arbitration, there is very little case law using the term "manifest disregard of the law". One Appeals Court decision appears to tie the term to the statutory provision of § 12(a)(2) of the MUAA allowing vacatur where arbitrators "exceeded their powers." [111] Because the MUAA copied the "exceeded their powers" language of the FAA, it appears likely that if a *Hall Street* argument is raised against a claim of arbitral manifest disregard of the law, the Massachusetts courts would following the apparent direction of the federal courts as discussed *supra*, and conclude that such an argument would fall under the MUAA statutory rubric of "exceed[ing] … powers," rather than under any judge-created ground for vacatur.

2. Awards contrary to public policy

The second prominent non-statutory ground for vacatur of an award is that the award is against public policy. To the extent that ground is deemed extra-statutory in cases governed by the FAA, that ground has been called into question by *Hall Street*. There is no doubt, however, that this ground is well-established in Massachusetts, though applied primarily in employment cases involving public employees.[112]

Supreme Court's recent holding in [*Hall Street*] that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]"); *but see* Kashner II, 601 F.3d at 22 (stating that the *Ramos-Santiago* panel's comment concerning *Hall Street* was only dicta).

102. 548 F.3d 85, 93 (2d Cir. 2008), *reversed on other grounds,* 130 S. Ct. 1758 (2010),

103. *Id.* at 93-94 (quoting Hall Street, 552 U.S. at 584-85) (ellipsis, brackets, and quotations omitted) (emphases in original).

104. *Id.* at 94 (emphasis in original).

105. *See* discussion of *Ramos-Santiago* at note 96 *supra*.

106. *Id.* (emphasis in original).

107. *Id.* at 94-95.

108. *Id.* at 95.

109. *Id.*

110. *Id.* (quoting 9 U.S.C. § 10(a)(4)(2010)). The Second Circuit's decision in Stolt-Nielsen was reviewed by the Supreme Court (under the same case name). *See* 130 S. Ct. 1758. The Supreme Court explicitly declined to decide whether manifest disregard of the law survives *Hall Street* as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth in 9 U.S.C. § 10. *Id.* at 1768 n.3.

111. *See* Mass. Highway Dep't v. Perini Corp., No. 02-P-1365, 66 Mass. App. Ct. 1109, 2006 WL 1473162, *3, *5-*6 (May 30, 2006)(unpublished) ("The project contends that the arbitration panel acted in excess of its authority—in manifest disregard of the law—when it refused to accept as authoritative the project director's … decision … . We conclude that the panel did not act illegally in excess of its authority.").

112. In this context, arbitrators, whose prior "voting" records are available to

Pre-Hall Street

Before *Hall Street*, the First Circuit in cases such as *Tanner,*[113] held that "[a] court may vacate an arbitration award where the arbitration agreement as interpreted would violate public policy." This authority "traces its roots to the common law doctrine that courts may refuse to enforce illegal contracts,"[114] but at the same time, it is not a broad power to set aside arbitration awards.[115] Rather, courts may vacate arbitration awards for violation of public policy only in "situations where the contract as interpreted would violate some explicit public policy that is well-defined and dominant."[116] Consequently, "this exception is narrow."[117] As the First Circuit noted, "[i] n *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), the Supreme Court set out two requirements for overturning arbitration awards on the grounds of public policy."[118] First, the court must ascertain whether the arbitration award creates an explicit conflict with a "well-defined and dominant" public policy determined "by reference to the laws and legal precedents and not from general considerations of supposed public interests"; and second, "the violation of such a policy must be clearly shown."[119]

In *Labor Relations Division of Construction Industries of Mass., Inc. v. Teamsters Local 379,* [120] the First Circuit subsequently held that such a violation of public policy may occur "[w]hen an arbitrator's interpretation of a contract potentially exposes a party to federal prosecution, [requiring] the courts [to] become more active." Thus, the Court went on to note that "[i]nsofar as and only insofar as an arbitrator's findings and conclusions will determine the reach of a federal criminal statute into a dispute with which he is involved, his findings of fact will be reviewed for clear error and his legal conclusions de novo."[121] This less deferential review is necessary because private parties must not be empowered to contract out of a thorough judicial review of their potentially criminal activities and should not be compelled to engage in criminal conduct.

Challenges to an award under the public-policy exception, like challenges that allege "manifest disregard of the law," face potential obstacles. In *Tanner*, the court reviewed whether arbitration awards went against a well-defined and established public policy requiring that securities firms maintain accurate and current books and records.[122] The arbitration panel issued monetary awards in favor of two former executives. The employer then sought vacatur on the ground, *inter alia*, that the arbitration awards violated public policy because the executives failed to record certain transactions in violation of "a dominant public policy demanding accurate books and records." The court refused even to consider "whether these reporting requirements establish an explicit public policy such that the award creates any explicit conflict with other law and legal precedents" because the employer could not show that the executives violated any such policy.[123] The court deferred to the facts as found by the arbitration panel, but because the arbitration panel did not explain its awards, there was nothing for the court to consider that indicated that the executives committed any violation.[124] Accordingly, "[i]n the face of the panel's silence and its awards," the court could not "conclude that the arbitrators, in their fact-finding capacity, necessarily found that there was a recording violation," leaving the employer unable to prove the awards violated public policy.

In contrast to *Tanner*, the Second Circuit, in *Diapulse Corp. of America v. Carba, Ltd.*,[125] addressed an arbitration award that a leading treatise later characterized as "compel[ling] illegal acts,"[126] further noting that the award "swept too broadly and prohibited the manufacture and sale of products similar to the [plaintiff's] device."[127] In *Diapulse*, the plaintiff had manufactured a medical and veterinary device and contracted with the defendant to distribute it.[128] The plaintiff later alleged that the defendant had violated a non-competition provision and the parties arbitrated the controversy pursuant to an arbitration clause. In their award, the arbitrators enjoined the defendant from "engaging in competition with [plaintiff] in the production or sale of its device … or any similar device" and awarded damages and costs. The district court then modified the injunction portion of the arbitration award because it "was permanent in time and unlimited in geographic scope" and thereby "violated the public policy of the United States against unreasonable restraints of trade."[129] The arbitration award was therefore "imperfect in form" and the district court limited the injunction geographically to Switzerland and Germany and temporally to two years from the date of the judgment, confirmed the modified award, and entered judgment.

On appeal, the Second Circuit first determined that the district court's modification of the arbitration award was error because: (1) the district court could not substantively modify the arbitration award, and (2) its modification affected matters at the heart of the controversy. The court then addressed whether the injunctive provisions of the arbitration award should have been vacated as against public policy, concluding that. "[a]lthough contravention of public

the parties, are normally pre-selected by the parties to be on an approved and exclusive list (in contrast to commercial cases). This creates an opportunity for public employers to please the public employees (who vote) by showing some acceptance of the employee's preference for whom to include on the list, and appease other voters by blaming the arbitrator for decisions that displease the public at large. *See* City of Lynn v. Thompson, 435 Mass. 54, 62 (2001), reluctantly upholding an award reinstating a police officer twice found to have cost the city damages in successive cases under 42 U.S.C. §1983 claiming excessive force, even though the arbitrator's reasoning appeared "unsound, poorly reasoned, and otherwise flawed." *See also* Lehr, THE FENCE: A POLICE COVER-UP ALONG BOSTON'S RACIAL DIVIDE (Harper Collins 2009), at 324 & 366 (describing an arbitrator reinstatement of one of the police officers previously found by a federal jury to be among three officers responsible for a widely reported beating and/or cover-up, during a suspect chase, of an African-American fellow officer who wearing plain clothes was part of that chase). *But see* Delta Airlines, Inc. v. Air Line Pilots Assoc., Int'l, 861 F.2d 665, 674-75 (11th Cir. 1988)(affirming the vacatur of an arbitrator's award reinstating a Delta pilot – a private employee—who operated a passenger flight while drunk).

113. 72 F.3d, at 241.

114. Mercy Hospital, Inc. v. Mass. Nurses Ass'n, 429 F.3d 338, 343 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 1939 (2006).

115. *See Tanner* at 241.

116. *Id.* (quotations omitted).

117. *Mercy Hospital*, 429 F.3d at 343.

118. *Tanner*, 72 F.3d at 241.

119. *Id*.

120. 156 F.3d 13, 18 (1st Cir. 1998).

121. *Id*.

122. 72 F.3d at 236.

123. *Id*. at 241 (quotation and brackets omitted).

124. *See id*. at 242.

125. 626 F.2d 1108 (2d Cir. 1980).

126. Martin Domke, et al., *Domke on Commercial Arbitration* (3d ed. 2010) § 39:9.

127. *Id*. § 39:9 n.16.

128. *Diapulse* at 1109.

129. *Id.* at 1110.

policy is not one of the specific grounds for vacation set forth in section 10 of the Federal Arbitration Act, an award may be set aside if it compels the violation of law or is contrary to a well accepted and deep rooted public policy."[130] Further, the court noted that a district court's judgment entered on an arbitration award has the same force and effect as if it had been entered in an action in the court itself, and therefore the arbitration award had to be specific in its terms and detailed in the acts sought to be restrained.

Both parties, the court held, had assumed that the arbitrators' injunction was intended to be everlasting and worldwide in scope, but the court was "not convinced that this was the arbitrators' intent." The court could not determine whether the arbitration award violated public policy "unless the district court is able to place the term 'similar devices,' adequately defined, in its proper temporal and geographic setting," and remanded the judgment to the district court so that the plaintiff could move for the injunctive provisions of the award to be referred back to the arbitrators. The arbitrators were to provide clarification regarding: (1) the definition of the type of device defendant was enjoined from selling; (2) the geographic scope of the injunction; and (3) the duration of the injunction. The court made no determination with respect to whether the award, when and if clarified by the arbitrators, would contravene public policy.[131]

Cases governed by Massachusetts substantive arbitration law (i.e., the MUAA) are discussed under the "Post-*Hall Street*" heading below, as it does not appear that *Hall Street* is likely to change Massachusetts substantive law.

Post-Hall Street

For cases governed by the FAA, the public policy vacatur ground is similarly affected by the *Hall Street* holding "that the grounds for prompt vacatur or modification of an arbitration award enumerated in the Federal Arbitration Act, 9 U.S.C. §§ 10-11, are exclusive and may not be supplemented by contract."[132] So far, however, no court in the First [133] or Second Circuit has squarely addressed whether awards may be set aside as against public policy after *Hall Street,* at least in cases where the FAA applies. It may be that a court in such a case might find that an award that clearly violates an explicit and dominant public policy—at least one that existed at the time the parties entered into the arbitration agreement—is an award where the arbitrators "exceeded their powers" under § 10(a)(4) of the FAA. The argument would be that the parties could not be assumed, absent specific facts on point, to have agreed to give arbitrators the power to make such an award. If a court for public policy reasons could not issue a decision—e.g., one compelling a party to violate the securities or anti-trust laws—then that court cannot enter a judgment confirming an award and thus imposing the same result by judicial order or decree.

For cases governed by the MUAA, whether pre- or post-*Hall Street*, a court in limited circumstances may vacate an arbitration award because the relief it orders offends public policy. So, for example, in *City of Boston v. Boston Police Patrolmen's Assoc.*[134], the court vacated an award rescinding an employee discharge where "continued employment as a police officer would frustrate strong public policy against the kind of egregious dishonesty and abuse of official position in which he was proved to have engaged."[135]

The "public policy exception" appears to have roots in the common law prohibition against the enforcement of illegal contracts.[136] That is, arbitrators who, by their award or relief, effectively order a party to engage in an illegal act are said to have "exceeded their powers" as described by § 12(a)(3) of the MUAA.[137] Obviously, however, the exception goes beyond those roots, for example, in cases such as *City of Boston*, where an arbitrator reinstatement of a public official offends strong public policies concerning the duties of that official's position.

In any event, vacatur on public policy grounds is comparatively rare.[138] For one thing, the public policy vacatur ground does not mean the court can ignore the factual findings of the arbitrator.[139] Further, arbitral legal conclusions are normally un-reviewable.[140] In addition, the public policy vacatur ground focuses on the specific relief awarded by the arbitrator, and only in that context, considers the underlying conduct of the relevant party.[141] Finally, vacatur on the grounds of public policy requires that the specific relief awarded be forbidden by an "explicit, well-defined, and dominant" public policy, not "general considerations" of supposed public interest.[142]

A Postscript on Confidentiality (and Privacy)

One of the particularly salient reasons for choosing arbitration is its supposed provision for confidentiality—and privacy. A dispute resolution out of sight of competitors, media, and government authorities, not to mention the avoidance of possible bad publicity—all provide an attractive benefit to arbitration. However, it is not quite that simple.

In the first instance, it is important to note that, properly speaking, confidentiality and privacy are not identical even though the terms are often used interchangeably. Privacy means that the hearings are private, and a party cannot invite the public or the press (or government authorities) in to observe.[143] As this article deals with judicial involvement, it is sufficient to conclude that any judicial

130. *Id*. at 1111.

131. *Id.* at 1111-12 (where the quoted words in this paragraph appear).

132. *Kashner II*, 601 F.3d at 22.

133. A Westlaw search of First Circuit and First Circuit district court cases for "Hall Street" & "public policy" and "Hall St." & "public policy" returns only one case: *Globe Newspaper Co. v. International Ass'n of Machinists*, 648 F. Supp. 2d 193 (D. Mass. 2009), a case decided prior to *Kashner II*. The district court in *Globe* acknowledged that the First Circuit in *Ramos-Santiago* interpreted *Hall Street* "to mean that 'manifest disregard of the law' is no longer an independently valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act," but declined to decide whether manifest disregard of the law survives under § 301 of the Labor Management Relations Act because "the arbitral award [was] contrary to public policy" under that Act. *Id.* at 197 n.5.

134. 443 Mass. 813, 818 (2005)

135. The public policy vacatur ground may be especially important to retain in employment cases, particularly for public employees, as labor arbitrators (selected from a list pre-approved by the parties) may be unconcerned with any public policy concerns, as was the case in *City of Boston*.

136. *Mercy Hospital,* 429 F.3d at 343, *cert. denied*, 547 U.S. 1111 (2006).

137. Superadio Ltd. P'ship v. Winstar Radio Prod. LLC, 446 Mass. 330, 334 (2006).

138. Bureau of Special Investigations v. Coal. of Pub. Safety, 430 Mass. 601, 604 n.4 (2000).

139. *Mercy Hospital,* 429 F.3d at 344.

140. Lyons v. School Committee of Dedham, 440 Mass. 74, 79 (2003).

141. *Bureau of Special Investigations*, 430 Mass. at 604 n. 3.

142. *City of Boston*, 443 Mass. at 818-19, 823 (citation omitted).

143. The author has read of one exception: where the hearing took place in China during the Cultural Revolution in front of a mass meeting invited by one party, following which the revolutionary masses "applauded the decision

order to the contrary seems most improbable. This is particularly so as most arbitration clauses include an incorporation of the rules of an arbitral forum, which typically provide for privacy (subject to possible statutory limitations).[144]

Confidentiality is another matter, and simply signing up for arbitration does not guarantee the privacy that a party might assume.[145] While the arbitrator(s) and the arbitral forum will keep their files confidential—including discovery papers, hearing evidence, filings, and the award—what the parties do to maintain confidentiality is a matter of agreement (or possibly, court order). "Thus, whatever other confidentiality provisions the agreement of the parties may contain, further language may be required if the parties also wish to guard against unwelcome disclosures of matters relating to the arbitration or award by a party." [146] Any such agreement will, of course, be subject to whatever disclosures may be required by law.

So how might a judge become involved? First, papers from an arbitration may be sought during discovery or at trial in a subsequent judicial proceeding (or arbitral proceeding, for that matter) involving one of the arbitration parties and a third party. Since arbitration does not enjoy the "settlement negotiations" privilege of mediation, it stands to reason that such papers can be obtained from a judge upon a proper showing of good cause, subject to whatever conditions of limited access the judge may impose.[147]

A more interesting, but surely rarer situation arises when one or all of the parties to an arbitration wishes to keep an award confidential, but one of the parties seeks to confirm, modify or vacate it. This may not be possible in certain FAA-governed cases, as awards are required to be part of the filings on a motion to confirm, modify or correct.[148] The FAA's vacatur provisions, however, do not contain that requirement. And the MUAA does not contain any express filing requirement, though it appears customary to attach the award to a motion concerning the award, whatever the relief the motion seeks. Assuming, as appears to be commonplace, the award is attached to a motion seeking some judicial action on an award, a party seeking confidentiality of that award would have to move the court to impound it (and any papers referring to it), based on the court's standards for impoundment of judicial filings.

In some situations, the parties may wish to agree in advance for award confidentiality. For example, where each arbitration party does business in an environment of significant competitors, the confidentiality of the award itself might be a subject the parties would want to consider when negotiating a confidentiality agreement/stipulation, whether as part of a pre-dispute arbitration agreement, or as a stipulation made during the pendency of an arbitration. In such a case, the agreement would have to include a provision that the parties would agree to any request for impoundment in a post-arbitration judicial proceeding concerning the award.

As to a court's involvement, it seems reasonable to conclude that a trial court's inherent power to impound papers for good cause could upon a proper showing extend to an award. That said, courts might in some situations not uphold an agreement between arbitration parties to extend confidentiality to an award, particularly where the agreement was one of several unconscionable provision in a contract of adhesion that had been imposed in a pre-dispute arbitration clause.[149] In the international area, at least, there is also some case law indicating that a party to an arbitration should be able to use the award where necessary to establish facts in a subsequent proceeding again a non-party to the arbitration.[150]

and sang … 'Sailing the Seas Depends on the Helmsman'." Reported in "The Decision of the High Court of Australia in Esso/BHP v. Plowman," Arbitration International (Kluwer Law International 1995 vol. 11, issue 3), 231-234, citing Loeber, 4 East West Trade (1977), at 476.

144. *See* AAA Commercial Arb'n Rule 23 (eff. June 1, 2009)("the arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary"). Like many arbitral forum rules, including those for the International Centre for Dispute Resolution, these commercial rules are available online at www.adr.org.

145. In the international context, *see* Paulsson & Rawling, "The Trouble With Confidentiality," Arbitration International (Kluwer Law International, *supra* note 138), 303. *See also* Collins, "Privacy and Confidentiality in Arbitration Proceedings," 30 Tex. Int'l L. Journ. 121 (1995)(English law and international arbitrations).

146. Hoellering, *How to Draft An AAA Arbitration Clause*, 7 Foreign Investment L. Journ. 141, 152 (1992).

147. The AAA Commercial Arbitration Rules actually consist of a set of Commercial "Arbitration Rules" and of separate "Mediation Procedures." Rule M-10 of the Mediation Procedures expressly provides for confidentiality. There is no comparable provision in the Arbitration Rules.

148. 9 U.S.C. § 13(b) (2010).

149. *See* Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007) (large law firm's new employment contracts, provided to employees on a "take it or leave it" basis, were unconscionable, including the confidentiality clause which was held unconscionable because too broad).

150. *See* Collins, "Privacy and Confidentiality…," *supra* note 145, at 130-132.

Case & Statute Comments

Civil Law – Abolishing the Distinction Between Natural and Unnatural Accumulations of Snow and Ice when Determining Negligence of Property Owner

Papadopoulos v. Target Corp., 457 Mass. 368 (2010)

I. Introduction

Reversing long-standing precedent, the Supreme Judicial Court in *Papadopoulos v. Target Corp.*, abolished the "natural accumulation rule" that protected property owners from liability for personal injuries resulting from naturally accumulated snow and ice on their property.[1] The Supreme Judicial Court streamlined a property owner's obligation so that it is consistent with all other hazards: "a duty to 'act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.'"[2] With snow and ice a daily occurrence for several months each year in Massachusetts, the *Papadopoulos* decision has significant effects on a property owner's liability in Massachusetts. This comment explores the background of the decision, the Supreme Judicial Court's analysis, and the decision's effect on property owners' liability in Massachusetts.

II. Factual and Procedural Background

The case arose from a routine, winter, slip-and-fall accident. In late December, 2002, Emanuel Papadopoulos ("Papadopoulos") was injured when he slipped and fell on ice in the parking lot in front of the Target department store at the Liberty Tree Mall.[3] A snowplow had removed the snow from the parking lot and deposited a pile of snow on a median strip that separated the parking area from the traffic lane next to Target, leaving some remaining snow on the ground by the median's edge.[4] Papadopoulos parked his car in a handicapped parking space next to this median strip.[5] After purchasing items inside the store, and while walking towards his car, Papadopoulos was injured when he slipped on ice frozen to the pavement, which had formed from snow that fell or melted from the snowpile left on the median strip.[6]

Papadopoulos and his wife asserted negligence and loss of consortium claims against Target Corporation and Weiss Landscaping Company, Inc., the contractor hired to remove the snow and ice from the parking area.[7] The defendants filed motions for summary judgment as to all claims, which the Superior Court allowed and the Appeals Court affirmed.[8] Both the Superior and Appeals Courts concluded that because the ice that caused Papadopoulos's injury was a "natural accumulation," as a matter of law, the defendants were entitled to summary judgment.[9]

Papadopoulos successfully sought further appellate review, and the Supreme Judicial Court directed the parties to brief the following question: "whether, in a premises liability action involving a slip and fall on snow and ice, the distinction between natural and unnatural accumulations of snow and ice should continue to be a factor under Massachusetts law in determining whether a property owner or other person responsible for maintaining property has been negligent."[10]

III. Analysis

The Supreme Judicial Court began its consideration of the natural versus unnatural accumulation issue by reviewing the development of common-law rules concerning property owners' premises liability.[11] First, the Supreme Judicial Court discussed the different standards of liability that had applied during the nineteenth and twentieth centuries, based on whether the injured plaintiff was a tenant, an invitee, a licensee, or a trespasser.[12] Next, the court discussed how it abandoned these different statuses during its "reconsideration and reform" period (between 1973 and 1980), and imposed upon property owners a duty to use reasonable care to keep the premises in a reasonably safe condition in view of all of the circumstances, the standard that had applied in cases involving invitees.[13]

An exception to this standard of premises liability developed, however, concerning natural accumulations of snow and ice. In the 1992 case of *Aylward v. McCloskey*, the Supreme Judicial Court first announced a standard of liability for slip-and-fall cases depending on whether the ice or snow was a natural or unnatural accumulation.[14] There, the court held that property owners were liable only

1. Papadopoulos v. Target Corp., 457 Mass. 368, 369 (2010).
2. *Id.* at 383 (*quoting* Young v. Garwacki, 380 Mass. 162, 169 (1980)).
3. *Id.* at 369.
4. *Id.* at 369-70.
5. *Id.* at 370.
6. Papadopoulos v. Target Corp., 457 Mass. 368, 370 (2010).
7. Papadopoulos v. Target Corp., Complaint and Demand for Jury Trial, 2005 WL 6453803 (Mass. Super. Dec. 20, 2005).
8. *Papadopoulos*, 457 Mass. at 370 (*citing* Papadopoulos v. Target Corp., 74 Mass. App. Ct. 1104 (2009) (unpublished)).
9. *Id.*
10. *Id.*
11. Papadopoulos v. Target Corp., 457 Mass. 368, 370 (2010).
12. *Id.* at 370-72.
13. *Id.* at 372.
14. *Id.* at 377 ("The court therefore created in *Aylward*, for the first time in our

for injuries caused by defects existing on their property, and that "the law does not regard the natural accumulation of snow and ice as an actionable property defect, if it regards such weather conditions as a defect at all."[15] The *Aylward* court continued by stating, "To be sure, in circumstances where some act or failure to act has changed the condition of naturally accumulated snow and ice, and the elements alone or in connection with the land become a hazard to lawful visitors, then a defect may exist, creating liability in the owner or occupier."[16] Two years later, the Supreme Judicial Court reaffirmed this holding in *Sullivan v. Brookline*, a case where liability was not imposed solely because the plaintiff failed to produce evidence that the ice was anything but a natural accumulation.[17] In holding that the Town of Brookline had no obligation to remove or to apply sand to the ice, the Supreme Judicial Court reiterated that "naturally accumulated snow and ice on property does not per se constitute a defective condition."[18]

Against this legal backdrop, the Supreme Judicial Court in *Papadopoulos* next observed that the "distinction between natural and unnatural accumulation has sown confusion and conflict in our case law."[19] The Supreme Judicial Court reasoned that the rationale articulated in *Aylward* and *Sullivan*—that a natural accumulation of snow and ice is not a defect requiring a property owner to repair or warn of it—improperly implies that a "dangerous condition on one's property can be a defect only if it is created or caused by the property owner."[20] Instead, the Supreme Judicial Court reinforced that a property owner has a duty to keep the property reasonably safe for lawful visitors, regardless of the source of the danger.[21]

The Supreme Judicial Court also rejected two justifications proposed by contemporary authorities supporting the "natural accumulation rule."[22] The first justification was based on the "open and obvious doctrine," namely, that a hazard created by snow and ice accumulation is as open and obvious to a visitor as it is to a property owner, thus relieving the property owner of a duty to warn because, in essence, a warning would be superfluous.[23] The Supreme Judicial Court rejected this justification, stating that the law should not relieve a property owner from remedying an open and obvious danger when it is foreseeable that a visitor could be physically harmed. Even if snow and ice were viewed as an open and obvious danger, property owners should not be relieved of their duty to use reasonable care in making the property reasonably safe for lawful visitors.[24] As the Supreme Judicial Court recognized, "a hardy New England visitor would choose to risk crossing the snow or ice rather than turn back or attempt an equally or more perilous walk around it."[25]

The second justification for the "natural accumulation rule," which the Supreme Judicial Court also rejected, was based upon the impracticality—if not impossibility—of enforcing the rule due to the Commonwealth's severe winter weather. Like the courts of every other New England state, the Supreme Judicial Court rejected this argument. The court relied upon the following rationale of the Rhode Island Supreme Court:

> We believe that today a landlord, armed with an ample supply of salt, sand, scrapers, shovels and even perhaps a snow blower, can acquit himself quite admirably as he takes to the common passageways to do battle with the fallen snow, the sun-melted snow now turned to ice, or the frozen rain. We fail to see the rationale for a rule which grants a seasonal exemption from liability to a landlord because he has failed to take adequate precautions against the hazards that can arise from the presence of unshoveled snow or unsanded or salt-free ice found in the areas of his responsibility but yet hold him liable on a year round basis for other types of defects attributable to the workings of mother nature in the very same portions of his property.[26]

Lastly, the Supreme Judicial Court recognized how liability based upon the distinction between natural and unnatural accumulation obscured, rather than illuminated, the relevant factors in determining the question of duty.[27] Specifically, the natural and unnatural accumulation distinction shifted courts' focus from analyzing whether the property owner acted reasonably in keeping the property safe to "whether the accumulation of snow and ice was natural or unnatural, which depends on whether the property owner, by its act or failure to act, changed the condition of the naturally accumulated snow and ice so that the unnatural accumulation, either alone or in connection with some other defect on the property, became a hazard to lawful visitors."[28] The court explained the difficulties in analyzing whether an accumulation was natural versus unnatural, especially given how snow and ice change due to traffic, trampling of feet, the passage of time, and the property owners' removal efforts.[29] For instance, in *Sullivan*, the Supreme Judicial Court reversed a jury verdict in favor of the plaintiff who had slipped on an icy entrance ramp to a municipal building because there was "no evidence that the [defendant's] shoveling had actually *created* the ice on the ramp."[30] In contrast, in *Barrasso v. Hillview W. Condominium Trust*, the Appeals Court held that a three-foot wide snowbank created by the defendant's plowing was not a natural accumulation of snow, thereby reversing the trial court's entry of summary judgment in favor of the defendant.[31]

jurisprudence, a standard of liability specific to slips and falls on snow and ice that depended on a fact finder's determination whether the snow or ice was a natural or unnatural accumulation.") (*citing* Aylward v. McCloskey, 412 Mass. 77, 79 (1992)). *See* Sullivan v. Brookline, 416 Mass. 825, 827-28 (1994).

15. *Papadopoulos,* 457 Mass. at 376.

16. Papadopoulos v. Target Corp., 457 Mass. 368, 377 (2010).

17. *Id*. ("The town, the court said, had no obligation to remove or to apply sand to the ice because 'naturally accumulated snow and ice on property does not per se constitute a defective condition.'") (*quoting* Sullivan v. Brookline, 416 Mass. 825, 829 (1994)).

18. *Id.* at 377 (*quoting Sullivan,* 416 Mass. at 829 (*quoting Aylward*, 412 Mass. at 79)).

19. *Papadopoulos*, 457 Mass. at 377-78.

20. *Id*. at 378.

21. Papadopoulos v. Target Corp., 457 Mass. 368, 378 (2010).

22. *Id*. at 378-79.

23. *Id*. at 379.

24. *Id*. at 379-80.

25. *Id*. at 379.

26. Papadopoulos v. Target Corp., 457 Mass. 368, 380 (2010) (*quoting* Fuller v. Housing Auth. of Providence, 108 R.I. 770, 773 (1971)).

27. *Papadopoulos*, 457 Mass. at 380-81.

28. *Id*. at 381-82.

29. *Id*. at 381.

30. *Id*. at 381 (emphasis in original).

31. Papadopoulos v. Target Corp., 457 Mass. 368, 382 (2010) *(citing* Barrasso v. Hillview W. Condominium Trust, 74 Mass. App. Ct. 135, 137-38 (2009)).

IV. Effect of Decision on Property Owners

The Supreme Judicial Court announced that, with regard to snow, ice, and all other hazards, property owners have a duty to lawful visitors to "'act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.'"[32] Further, the court held that its abolition of the natural accumulation rule applies retroactively, as is the case with "changes in the common law brought about by judicial decisions."[33] The court specifically stated that this duty upon property owners "introduces no special burden on property owners" and "does not impose unreasonable maintenance burdens."[34] Property owners, however, now must consider what snow removal efforts are reasonable on their individual property. As to that issue, the court provided the following guidance:

> The snow removal reasonably expected of a property owner will depend on the amount of foot traffic to be anticipated on the property, the magnitude of the risk reasonably feared, and the burden and expense of snow and ice removal. Therefore, while an owner of a single-family home, an apartment house owner, a store owner, and a nursing home operator each owe lawful visitors to their property a duty of reasonable care, what constitutes reasonable snow removal may vary among them.[35]

Imposing such a duty upon property owners does not, in fact, increase their burden when considering state regulations and city ordinances mandating the removal of snow and ice.[36] For example, the City of Boston requires property owners to remove snow, ice, and slush from their sidewalks within three hours of snowfall ending, otherwise they are subjected to a fine.[37] If snowfall ends between sunset and sunrise, property owners are required to complete the removal within three hours of sunrise.[38] A property owner must also clear snow, ice, and slush from either the entire full paved width of the sidewalk or a minimum of forty-two inches, so as not to encumber carriages and wheelchairs.[39] In complying with the Boston ordinance, a property owner is "strictly prohibited" from transferring snow, ice, and slush from private property to any sidewalk or street.[40]

With such strict and time sensitive removal requirements under state and city laws, property owners should already be clearing their sidewalks of snow and ice. The Supreme Judicial Court noted that "[t]he reasonable care standard we impose is less demanding than [state] regulatory requirements,"[41] and the same holds true for the city ordinances. Thus, the effect of *Papadopoulos* does not result in increased demands for snow removal, but rather the loss of a property owner's defense to a negligence lawsuit. Although slip-and-fall plaintiffs must continue to prove the four elements of their negligence claims, a property owner can no longer defend itself with the "natural accumulation rule," likely resulting in fewer summary judgments in favor of defendants. And, without such a defense, the inherent ambiguity surrounding the phrase "natural accumulation" is eliminated, allowing a more straightforward analysis as to whether the property owner acted reasonably in keeping the property safe.

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32. *Papadopoulos*, 457 Mass. at 383 (*quoting* Young v. Garwacki, 380 Mass. 162, 169 (1980)).

33. *Papadopoulos*, 457 Mass. at 384-86 (citations omitted).

34. *Id*. at 383.

35. *Id*. at 384 (*citing* Restatement (Second) of Torts, §343 comment e.17).

36. Papadopoulos v. Target Corp., 457 Mass. 368, 386 (2010) (*citing* 105 Code Mass. Regs. §410.452) (applying requirement under state sanitary code governing human habitation); 527 Code Mass. Regs. §10.03(13)(d) (2009) (requiring clear egress from buildings, free of snow and ice, under state fire code); 780 Code Mass. Regs. §100.3.2 (2008) (requiring all exterior stairways and fire escapes be kept free of snow and ice under state building code)). *See* Boston Code of Ordinances, 16-12.16; City of Boston website, http://www.cityofboston.gov/snow/snowremoval.asp (last visited June 21, 2011) (requiring property owners to remove snow and ice from their sidewalks within three hours after snow ends). *See also* Worcester City Ordinance, ch. 12 §23; City of Worcester website, http://www.worcesterma.gov/dpw/seasonal-information/sidewalk-snow-removal (last visited May 20, 2011) (requiring property owners or occupants with sidewalks bordering any street to remove snow and ice from sidewalks within ten hours after snow ends).

37. *See* Boston Code of Ordinances, 16-12.16; City of Boston Website, http://www.cityofboston.gov/snow/snowremoval.asp (last visited June 21, 2011).

38. *Id*.

39. *Id.*

40. *Id*.

41. Papadopoulos v. Target Corp., 457 Mass. 368, 386 (2010).

Chapter 258E Harassment Prevention Orders—Balancing the Rights of Victims and Defendants

I. Introduction

On February 9, 2010, Governor Deval Patrick signed into law "An Act to Prevent Harassment," making Massachusetts one of the last states to afford meaningful protection to victims of sexual assault, stalking, and harassment who do not have a familial, residential or dating relationship with their aggressors.[1] Both the House of Representatives and the Senate voted unanimously to pass Senate Bill No. 2212 on February 4, 2010. The vote marked the first time in many years that legislation with criminal implications was passed unanimously by both the House and the Senate in the Commonwealth of Massachusetts.

While the Act to Prevent Harassment, codified as Massachusetts General Laws Chapter 258E ("258E"), unquestionably broadened who could qualify to petition for a protective order, it also implemented a standard higher than that required for the issuance of an abuse prevention order. This high threshold was not an arbitrary decision but rather a result of the collaborative efforts of legislators, the trial court department, district attorneys, law enforcement officials, criminal defense attorneys, victims' rights advocacy groups, public defenders, and a private law firm to ensure that the legislation would be implemented appropriately.

Efforts to implement legislation in Massachusetts to protect all victims of harassment, stalking, and abuse began in the late 1980s.[2] In 2000, victim advocate groups responded to the death of Sandy Berfield, an Everett waitress who was killed by a package bomb sent by a customer stalking her, by filing restraining order legislation. Ms. Berfield had previously sought a chapter 209A[3] protection order from the court, but unfortunately, because she had no existing familial or social relationship with the defendant, her restraining order petition was denied.

While similar pieces of legislation have been filed in the past, this article will focus on the bill filed in 2009 and passed in 2010. It will also review and compare similar pieces of legislation, including one bill filed in 2005, and another filed in 2007, whose language is very similar to that contained in earlier drafts of the 2009 legislation. As this article discusses in more detail below, the revised 2009 legislation results from a concerted effort to narrowly tailor the legislation to ensure that it would be properly implemented and not abused.

II. Goals of the Drafters of 258E

With the enactment of General Laws Chapter 209A ("209A") in 1978, Massachusetts was applauded for being one of the first states to address domestic violence and afford protection to its victims.[4] Chapter 209A provides that a victim may petition the court to issue an abuse prevention order against an abusive family or household member, and defines "family and household members" as individuals who: (i) are or were married to one another; (ii) are or were residing together in the same household; (iii) are or were related by blood or marriage; (iv) have a child in common, regardless of whether they have ever married or lived together; or (v) are or have been in a substantive dating or engagement relationship.[5]

Under 209A, a judge can order a defendant to refrain from abusing the plaintiff, to vacate the plaintiff's household, and to stay away from and have no contact with the plaintiff.[6] While 209A has been instrumental in offering protection to countless victims of domestic violence, its protection is limited to victims who have a statutorily defined substantial existing relationship with their abusers. In so limiting its protection, the rigid relationship requirement of 209A has denied protection to thousands of victims, including nearly fifty percent of rape victims and 66 percent of all sexual assault victims.[7]

Before the enactment of 258E, victims who did not satisfy the requirements under 209A had only one other option: filing for a civil injunction in Superior Court. Obtaining a "civil restraining order," however, is time-consuming, expensive, and generally requires the assistance of a lawyer.[8] More importantly, a civil restraining order is not criminally enforceable and therefore does not offer the same protections as a 209A protection order. A perpetrator's continued stalking and harassment of a victim who has obtained a civil restraining order leads only to a contempt of court charge.

It should come as no surprise, then, that the primary goal of the drafters of 258E and its supporters was to close the legal gap created by 209A and provide protection for victims of sexual assault, criminal stalking, and criminal harassment, regardless of their relationship to their perpetrators. In the past, advocates chose not to amend the relationship requirement in 209A, as they were concerned that if 209A was brought to a vote in the legislature, it would not survive.

The drafters of 258E were also aware of concerns of the legislature about the potential for misuse of 258E, and cognizant of the concerns of the legal community that 209A, even with its rigid relationship requirement, had been abused by alleged victims in the past. Notwithstanding that criticism, 209A's relationship requirement did have the effect, sometimes to its detriment, of making a victim pause before taking out a criminally enforceable order against a family member. No comparable deterrent exists in 258E, when a

1. At the time the bill was passed, thirty-nine states had statutes related to either stalking/harassment civil protection orders or sexual assault civil protection orders. *See Rep. Atkins's Educational Resource Materials on Senate Bill No. 1611, "Legislation to Expand Access to Criminally Enforceable Restarining Orders*," Sept. 2009.

2. *See* Mass. Gen. Laws. ch. 265, §43 (enacted 1992).

3. *See* Mass. Gen. Laws ch. 209A (2011).

4. *See* Carolyn Grose, *Judicial Deference or Bad Lawmaking? Why Massachusetts Courts Will Not Impose Municipal Liability for Failure to Enforce Restraining Orders*, 38 Suffolk U.L. Rev. 557 (2005); Sally Engle Merry, *Rights, Religion and Community: Approaches to Violence Against Women in the Context of Globalization*. 35 Law & Soc'y Rev. 39, 50 (2001) (identifying Pennsylvania and Massachusetts as the first two states to adopt restraining order laws).

5. Mass. Gen. Laws ch. 209A, §1 (2011).

6. *See* Mass. Gen. Laws ch. 209A, §7 (2011) (amended 1990).

7. In approximately 34 percent of all sexual assaults, the perpetrators are friends or acquaintances of the victim. In nearly 16 percent of all sexual assaults, the perpetrator is a stranger. *See Rep. Atkins's Educational Resource Materials*, supra note 1.

8. According to the Massachusetts Superior Court Department's website, as of January, 2010, filing fees for a civil injunction were approximately $395.00. *Superior Court Filing Fees*, The Massachusetts Court System, http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/fees.html (last visited Jan. 4, 2010).

victim considers seeking a criminally enforceable order against an acquaintance or a stranger. To compensate for the perceived lack of deterrent, and to alleviate concerns of abuse, the drafters set out to design new legislation that eliminated 209A's relationship requirement while at the same time creating a higher threshold and a higher burden of proof to ensure that only those victims who really needed protection in fact received it. As discussed in more detail later in this article, to accomplish this, the drafters selected the highest legal standard, requiring a showing that the defendant's acts were both *willful and malicious*.

Furthermore, while the drafters did not want to enumerate every type of behavior that would rise to the level of harassment, they were clear as to which conduct did *not* satisfy the high threshold created by the statute. On numerous occasions, Representative Atkins, the House Sponsor, explained that the statute's high threshold was designed to prevent potential abuse by plaintiffs. For example, in an interview immediately following the House's vote to engross Senate Bill No. 2212 on January 28, 2010, Atkins explained that the drafters went to great lengths to "create high thresholds so that the judges would have no doubt in their minds as to who should be getting this and who should not."[9] In the same interview, Atkins also explained that the purpose of the high threshold was to avoid plaintiffs' using the statute for "frivolous" reasons or as a "revenge piece" and so that, for example, "neighbor would not take it out against neighbor."[10] About a month later, in an appearance on WGBH's "The Emily Rooney Show," Atkins again expressed these sentiments, stating that the legislation "took years to pass because … it had to be written so tightly and skillfully, so that it wouldn't be abused, so that neighbor would not take it out against neighbor just because 'you are taking the trash out too early and waking me up and I'm mad at you' or something like that."[11]

The drafters and its supporters were also clear that "bar fights," landlord-tenant disputes, and minor violent crimes would not meet the statute's high threshold. Representative Atkins and Senator Chandler, the Senate sponsor, have consistently stated that the purpose of the legislation is to protect victims of sexual assault and stalking, and victims who qualify pursuant to the statutory definition of harassment in 258E—not parties who were involved in simple altercations.

Others have echoed the sentiments of Representative Atkins and Senator Chandler. For example, House Judiciary Chairman Eugene O'Flaherty, widely known as an advocate for defendants' rights, supported the Bill, confident that "the legislation was drafted properly" and that "safeguards are in place."[12] Representative Will Brownsberger, who also stood in support of the Bill, stated "I'm well aware that restraining orders are abused. I think this bill creates a high standard that defines harassment in a way that's very specific."[13] In April of 2010, after the Act was passed, Massachusetts Lawyers Weekly described the Act as "both noble in its design and appropriate in its scope."[14]

III. Legislative History

On January 14, 2009, Senator Harriette Chandler filed new legislation to expand access to criminally enforceable restraining orders. House Representative Cory Atkins signed on as co-sponsor of Senate Bill No. 1611, entitled "An Act relative to sexual assault and stalking restraining orders," and later became the House sponsor. Senator Chandler, Representative Atkins, and the lead drafter spent countless hours working with defense attorneys to ensure that everyone's rights would be protected under the proposed law. A private law firm offered substantial assistance with drafting and research to ensure that the language of the bill was narrowly tailored to avoid potential abuse. On September 16, 2009, Chandler and Atkins, along with victims advocate groups, stalking victims, and attorneys from a private law firm, hosted an informational forum on the Bill, hoping to educate fellow legislators about their goals and their efforts to address their own concerns of unattended consequences of the bill's passage.[15]

The following day, September 17, 2009, Chandler and Atkins presented the bill at a hearing before the Joint Committee on the Judiciary, during which they were supported by House Representatives Grant, Dykema, Ehrlich, Peake, Khan, Ferrante, Hogan, Provost, L'Italien, and Gregoire, and House Majority Leader Vallee, each of whom either testified or stood in solidarity.[16] The following individuals also testified in support of Bill No. 1611 at the hearing: Martha P. Grace, former Chief Justice of the Juvenile Court; Peter Koutoujian, former State Representative and House sponsor; Kevin Burke, Secretary, Executive Office of Public Safety; Mark Hayes, Captain, Boston Police Department; Marion Keating, Sergeant, Marblehead Police Department; Robert Wile, Detective, Amesbury Police Department, Domestic Violence and Sexual Assault Unit; Susan Finegan, Member, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; Stacy Rodriguez-Rennard, LMHC, Adolescent Clinician, Boston Area Rape Crisis Center; Isa Woldeguiorguis, Jane Doe Inc.; Stephanie DeCandia, Boston Area Rape Crisis Center; Colby Bruno, Victim Rights Law Center; and Susan Charette, Feel Safe Again, Inc.[17]

In the interim between Senator Chandler's filing and the hearing before the Joint Committee on the Judiciary, on June 4, 2009, Governor Patrick filed legislation similar to Bill No. 1611. Entitled "An Act to Protect and Enhance the Rights of Victims and Witnesses of Crime," the Governor's bill sought to protect all victims and witnesses of rape, sexual assault, stalking, harassment, and enticement of children under the age of sixteen by allowing them to seek criminally enforceable protection orders. Like Senate Bill No. 1611, the Governor's bill created remedies for victims who did not have a pre-existing relationship with their aggressors. The Governor's bill proposed amendments to chapter 209A, the domestic violence prevention statute, such as the creation of two new criminal offenses: assault and battery on a household or family member and strangulation or suffocation of a household or family member. Even more

9. *See House Backs Stalking Prevention Bills*, State House News Service, http://www.statehousenews.com/video/10-01-28harassment/video.htm (Jan. 28, 2010).

10. *See id*.

11. *See The Emily Rooney Show: Anti-Stalking Law Interview* (WGBH-TV television broadcast Feb. 25, 2010).

12. House Session, Jan. 28, 2010.

13. *Id.*

14. *Commentary: A Welcome New Law in Mass. Aimed at Stalkers*, Mass. Lawyers Weekly, Apr. 5, 2010.

15. *Legislators Back "Stalking Bill"*, Massachusetts Caucus of Women Legislators Newsletter (2009-3rd Quarter), at 5.

16. *Id*.

17. *Rep. Atkins's Educational Resource Materials*, supra note 1.

telling is the bill's designation as "209A½."

While Governor Patrick's bill was not favorably reported out of the Judiciary Committee, Senate Bill No. 1611 was. In response to feedback, the drafters did a complete re-draft of the proposed bill for the Judiciary Committee, which became Senate Bill No. 2185. The revised bill was entitled "An Act to Prevent Harassment." As discussed in more detail later in this article, Bill No. 2185 created a much higher standard to obtain a harassment prevention order than what was required under the original version, Bill No. 1611. On November 17, 2009, the Senate Ways and Means Committee submitted Senate Bill No. 2212, a revised version of Bill No. 2185, and the Senate voted unanimously (37-0) to engross Senate Bill No. 2212. Senators Chandler and Baddour spoke in support of the bill.

On January 28, 2010, the House of Representatives voted unanimously to engross Senate Bill No. 2212 with certain amendments, including (i) removing jurisdiction from the probate and family courts; (ii) limiting remedies to the enumerated orders; (iii) requiring that a defendant be given notice of any petitions for modification of existing orders; and (iv) defining the term "malicious."[18] Representatives Atkins, O'Flaherty, Jones, Wolf, Brownsberger, Story, Swan, Poirier and Grant all stood in support of Bill No. 2212. Former Representative Koutoujian, a strong supporter of domestic violence initiatives who had previously supported numerous versions of similar legislation, also spoke in support of the bill's passage.

On February 3, 2010, the Senate adopted the amendments proposed by the House. On February 4, 2010, both the House and Senate voted unanimously to enact Senate Bill No. 2212. A few days later, on February 9, 2010, Governor Patrick signed the bill into law. Chapter 258E became effective on May 10, 2010.

Only three days after its effective date, on May 13, 2010, the Senate and House of Representatives enacted three amendments to 258E which the lead drafters prepared.[19] First, section 2 was amended to grant *exclusive* jurisdiction to the juvenile court department where the defendant is under the age of seventeen.[20] Second, section 3(g) was amended to require plaintiffs to disclose all administrative proceedings and disciplinary proceedings involving the parties.[21] Third, section 8 was amended to (i) grant the police the power to arrest an individual who has violated an existing harassment prevention order and (ii) require the police to notify a victim of his/her rights under the statute and to provide the victim with certain services.[22] All of these amendments were approved by the Governor and became effective on May 22, 2010. These amendments are discussed in more detail later in this article.

IV. How does 258E differ from 209A?

To maintain consistency in Massachusetts restraining order law, the drafters utilized 209A as a template for 258E. The purpose of this was two-fold: (1) judges and law enforcement officials understand the legal implications of 209A and how to implement it, and (2) there exists a robust area of case law in Massachusetts on 209A. As a result, 258E is, in many ways, similar to 209A. Nevertheless, there are many notable differences between the statutes, including but not limited to (i) who is eligible for relief; (ii) the forms of relief available; (iii) jurisdiction; and (iv) venue. As discussed in more detail below, in almost every area where 258E differs from 209A, 258E is narrower and provides a higher legal standard to obtain a protection order.

A. Who Can Seek Relief?

1. Relationship between parties

As discussed earlier, 209A limits relief to victims who have been abused or are in fear of imminent abuse by a family or household member, which is defined by the statute.[23] Thus, 209A left a gap for any individual who suffered abuse or harassment from someone other than a family member, roommate or someone with whom they were in a significant dating relationship. Chapter 258E was specifically drafted to fill the gap in the state's abuse prevention law. Accordingly, under 258E, no relationship between the parties is required.

2. Suffering from "abuse" or "harassment"

Both 209A and 258E require a plaintiff to demonstrate that he/she is suffering as a result of actions on the part of the defendant. In order to obtain an abuse prevention order, a 209A plaintiff must show that he/she is suffering from abuse, which the statute defines as "attempting to cause or causing physical harm; placing another in fear of imminent serious physical harm; or causing another to engage involuntarily in sexual relations by force, threat or duress."[24]

By contrast, in order to obtain a harassment prevention order, a 258E plaintiff must demonstrate that he/she is suffering from harassment, which the statute defines as "(i) 3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, *abuse* or damage to property and that does in fact cause fear, intimidation, abuse or damage to property; or (ii) an act that: (A) by force, threat or duress causes another to involuntarily engage in sexual relations; or (B) constitutes a violation of section 13B, 13F, 13H, 22, 22A, 23, 24, 24B, 26C, 43 or 43A of chapter 265 or section 3 of chapter 272."[25] When a plaintiff qualifies for a harassment prevention order, the plaintiff may petition the court to order the defendant to refrain from harassing *and* abusing the plaintiff. [26]

Chapter 258E defines abuse as "attempting to cause or causing physical harm to another or placing another in fear of imminent serious physical harm."[27] Nevertheless, because 258E's definition of harassment includes conduct defined in 209A as "abuse," specifically, "an act that by force, threat, or duress causes another to involuntarily engage in sexual relations," the statute offers protections from abuse similar to those offered by 209A. Despite that similarity, 258E places a much more significant burden on the plaintiff by

18. *See* H. 4443, 2010 House, Reg. Sess. (Mass. 2010).
19. *See* Act of May 22, 2010, St. 2010, ch. 112, §§29-31.
20. Mass. Gen. Laws ch. 258E, §2 (2011) (amended 2010).
21. Mass. Gen. Laws ch. 258E, §3(g) (2011) (amended 2010).
22. Mass. Gen. Laws ch. 258E, §8 (2011) (amended 2010).
23. Mass. Gen. Laws ch. 209A, §1 (2011).
24. *Id.*
25. Mass. Gen. Laws ch. 258E, §1 (2011) (emphasis added). The definition of harassment is discussed in more detail later, in section V, *infra*.
26. *See* Mass. Gen. Laws ch. 258E, §3(a) (2011) ("[A] person may petition the court under this chapter for an order that the defendant (i) refrain from abusing or harassing the plaintiff… .").
27. Mass. Gen. Laws ch. 258E, §1 (2011).

requiring him/her to first prove that the defendant's conduct satisfies the statutory definition of harassment.

B. Available Forms of Relief

Chapter 209A lists available forms of relief, but also grants a judge very broad authority to grant relief outside of the enumerated orders.[28] By contrast, the authority to grant relief under 258E is much narrower, as the statute permits a judge to grant only the forms of relief enumerated in the statute. [29] Earlier versions of the bill did in fact contain the non-exclusive language of 209A, providing that "a petitioner may file a petition requesting protection, *including, but not limited to*, the following orders…."[30] To ensure that relief under 258E was narrowly tailored to meet the specific purpose of the statute, the drafters, working with the House Ways and Means Committee, struck the "including, but not limited to" language of the bill.[31]

Under both 209A and 258E, a judge may order a defendant to refrain from contacting the plaintiff, to stay away from the plaintiff's household or workplace, and to pay the plaintiff restitution for directly-resulting losses.[32] A judge may also order that the plaintiff's address be impounded.[33]

Both 209A and 258E also encourage efforts to address the defendant's abusive or harassing behavior, but, for the most part, these efforts are prompted only when a defendant has violated an existing abuse or harassment order. Under 209A, in granting a protective order, a judge may recommend that the defendant complete a certified batterer's intervention program.[34] Where a defendant has violated an existing 209A order, a judge is *required* to order a defendant to attend such a program as a condition of any probation, unless the judge makes written findings otherwise.[35]

Pursuant to 258E, by contrast, a judge is authorized, but *not required*, to order a defendant to enter and complete an appropriate treatment program as a condition of any probation received for violation of an existing harassment order.[36] As there is no relationship between the parties in the 258E context, it is inconsistent to mandate a certified batterer's intervention program. At an informational session held on September 16, 2009, Senator Chandler provided the example of anger management as a possible court-mandated program.

Unlike 209A, 258E does not permit a judge to make any orders relating to custody and support of minor children.[37] Chapter 258E also does not authorize a judge to order the defendant to vacate the plaintiff's household, as 209A does.[38] Omission of these forms of relief was intentional, as the legislature did not intend that 258E be utilized when a family or household relationship existed between the plaintiff and the defendant, as the appropriate form of relief in that circumstance is for the plaintiff to petition for a 209A order. As Senator Chandler, former Representative Koutoujian (former House Sponsor) and Representative Atkins stated during the September 16, 2009 informational forum, the purpose of 258E was to fill a statutory gap in restraining law, but also to provide a higher standard for obtaining the protection. Representative Atkins noted that individuals who qualified for a 209A order should *not* apply for a 258E order.

Also unlike 209A, 258E does not authorize a judge to order a defendant to stay away from the plaintiff's multiple family dwelling.[39] Earlier versions of the bill, including Senate Bill No. 2185, did provide for this remedy,[40] but this provision was eventually stricken by the legislature in order to prevent abuse by landlords and/or disgruntled tenants. In earlier drafts, the drafters also contemplated giving the Housing Court jurisdiction to preside over 258E matters, but this was purposely struck due to concerns that it was not the appropriate court to hear these matters, and that 258E would be used as a defense in eviction matters.

Perhaps most notable, however, is that, unlike 209A, 258E does not authorize a judge to order a defendant to surrender all firearms, firearm licenses, and FID cards.[41] This, however, was not always the case. Bill No. 1611 included a suspension and surrender of firearms provision that tracked the language of the same provision of 209A almost exactly.[42] This provision was stricken by the Legislature amidst general concerns related to Second Amendment rights, and more specific concerns that individuals could use the statute as a tool of revenge against law enforcement officials whose profession requires them to carry firearms.[43]

C. Procedural Issues

1. Jurisdiction

Unlike 209A, the probate and family courts do *not* have jurisdiction under 258E.[44] Senate Bill No. 2185 did, originally, grant jurisdiction to the probate and family courts.[45] As there is no relationship requirement under 258E, however, the drafters and the legislature specifically removed the jurisdiction granted to the probate and family court. When it was enacted, 258E granted jurisdiction to the

28. "A person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such abuse, *including, but not limited to*, the following orders… ." Mass. Gen. Laws ch. 209A, §3 (2011) (emphasis added).

29. "A person may petition the court under this chapter for an *order that* the defendant… ." Mass. Gen. Laws ch. 258E, §3 (2011) (emphasis added).

30. S. 1611, 2009 Senate, Reg. Sess. (Mass. 2009) (emphasis added); S. 2185, 2009 Senate, Reg. Sess. (Mass. 2009) (emphasis added).

31. *See* H. 4433, 2010 House, Reg. Sess. (Mass. 2010).

32. *See* Mass. Gen. Laws ch. 209A, §3 (2011); Mass. Gen. Laws ch. 258E, §3(2011).

33. Mass. Gen. Laws ch. 209A, §3(g) (2011); Mass. Gen. Laws ch. 258E, §3 (2011).

34. Mass. Gen. Laws ch. 209A, §3(i) (2011).

35. Mass. Gen. Laws ch. 209A §7 (2011).

36. Mass. Gen. Laws ch. 258E, §9 (2011).

37. Chapter 209A permits a judge to order the defendant to pay temporary child support and to grant the plaintiff temporary custody of a minor child. Mass. Gen. Laws ch. 209A, § 3 (2011).

38. *Id.*

39. Compare *id.* with Mass. Gen. Laws ch. 258E, §3 (2011).

40. S. 2185, 2009 Senate, Reg. Sess. (Mass. 2009).

41. Chapter 209A actually *requires* a judge, upon granting an abuse prevention order and finding that the plaintiff demonstrated a substantial likelihood of immediate danger of abuse, to order a defendant to suspend and surrender all firearms and firearms licenses. Mass. Gen. Laws ch. 209A, §3B (2011).

42. S. 1611, §11, 2009 Senate, Reg. Sess. (Mass. 2009).

43. *See* S. 2185, 2009 Senate, Reg. Sess. (Mass. 2009).

44. The district courts, Boston Municipal Court, superior courts, and probate and family courts have jurisdiction to grant a plaintiff an abuse prevention order. Mass. Gen. Laws ch. 209A, §2 (2011).

45. "Proceedings under this chapter shall be filed, heard and determined in the

district courts, Boston Municipal Court and superior courts, and to the juvenile court in cases where either the petitioner or defendant is a minor. [46] Shortly after its enactment and prior to its effective date, 258E was amended to grant exclusive jurisdiction to the juvenile court where the defendant is under the age of seventeen.[47]

2. Venue

A 209A plaintiff may file for an abuse prevention order in any court with jurisdiction over where he or she currently resides, or where he or she was forced to leave to avoid abuse by the defendant.[48] By contrast, 258E limits venue to the plaintiff's current place of residence only.[49] Like jurisdiction, earlier versions of the bill contemplated a much broader grant of venue. Originally, in Senate Bill No. 1611, the petitioner had the option of filing for relief in any venue (1) where the petitioner resided; or (2) where the defendant resided; or (3) where the alleged harassment occurred.[50] Bill Nos. 2185 and 2212 limited venue only to where the plaintiff resides.

D. Ex Parte **Relief and Modification of Existing Orders**

Essentially, a defendant has the same right to be heard under 258E as he or she would under 209A. Both 209A and 258E provide for *ex parte* relief only where the plaintiff can demonstrate a "substantial likelihood of immediate danger of" harassment (or abuse, in the case of 209A).[51] Both statutes also provide for a hearing within 10 days of the court's granting *ex parte* relief so that the defendant may be heard, and both provide that the order shall be extended for a period of no more than one year should the defendant fail to appear to contest extension of the order.[52]

Both 209A and 258E also permit a court to modify an existing order upon motion by either party, but 258E provides for greater protection (generally for the defendant) by requiring that the non-moving party receive "sufficient notice and an opportunity to be heard on the modification."[53] This language does not appear in 209A and was specifically included by the legislature to allow the non-moving party to have sufficient notice and an opportunity to be heard on any modifications. Because the parties to a 258E proceeding do not have a pre-existing relationship, the legislature was concerned that a non-moving party would be less likely to have independent knowledge of any requests for modification.

E. The role of law enforcement

Both 209A and 258E mandate that all law enforcement officers use "all reasonable means" to prevent further abuse or harassment when they have reason to believe that an individual is being harassed or abused.[54] Both statutes enumerate certain actions that an officer must take, including (i) remaining on the scene where the abuse or harassment has occurred (or was in danger of occurring) so long as the officer believes that one of the parties would be in immediate physical danger without the officer's presence; (ii) assisting the victim in obtaining appropriate medical treatment necessitated by the abuse or harassment; (iii) assisting the victim in locating a safe place to stay; and (iv) advising the victim of his or her right to obtain a protective order under the respective statute.[55] In cases where a sexual assault has occurred, 258E also requires an officer to "notify the victim that there are time-sensitive medical or forensic options that may be available, encourage the victim to seek medical attention and arrange for medical assistance or request an ambulance for transport to a hospital."[56]

Chapter 209A also requires law enforcement officials to arrest any individual whom the officer witnesses violating, or has probable cause to believe has violated, a temporary or permanent abuse prevention order.[57] It also requires officers to activate the emergency judicial system to assist a victim when the court is closed for business, and to advise a victim that his or her abuser may be promptly released after posting bail.[58]

Although earlier versions of the bill clearly indicate that the drafters intended that similar provisions be included in 258E,[59] as originally enacted, the statute mistakenly did not grant law enforcement officers the power to arrest.[60] It also did not require officers to activate the emergency judicial system or advise a victim that his or her harasser would be eligible for bail.[61] This was a drafting error resulting from numerous modifications to the legislation and was not purposefully stricken in the original version. Thus, three days after its effective date, the statute was amended to include these vital provisions, and under the statute today, a law enforcement officer *is* required to arrest when he or she has probable cause to believe that an individual has violated a temporary or permanent harassment prevention order.[62]

F. Other notable differences

1. Disclosure of proceedings involving the parties

Both 209A and 258E require a plaintiff to disclose any prior or pending legal proceedings involving the parties.[63] Whereas 209A enumerates the type of proceedings that must be disclosed,[64] the disclosure requirement under 258E is much broader. When enacted,

superior court department or the Boston municipal court department or *respective divisions of the probate and family*, juvenile or district court departments having venue over the plaintiff's residence." S. 2185, 2009 Senate, Reg. Sess. (Mass. 2009) (emphasis added).

46. This change was first made in S. 2212, 2009 Senate, Reg. Sess. (Mass. 2009).

47. Mass. Gen. Laws ch. 258E, §2 (2011) (amended 2010).

48. Mass. Gen. Laws ch. 209A, §2 (2011).

49. Mass. Gen. Laws ch. 258E, §2 (2011).

50. S. 1611, 2009 Senate, Reg. Sess. (Mass. 2009).

51. *See* Mass. Gen. Laws ch. 258E, §5 (2011); Mass. Gen. Laws ch. 209A, §4 (2011).

52. *See* Mass. Gen. Laws ch. 258E, §5 (2011); Mass. Gen. Laws ch. 209A, §4 (2011).

53. Section 3 provides: "The court may modify its order at any subsequent time upon motion by either party; *provided, however, that the non-moving party shall receive sufficient notice and opportunity to be heard on said modification.*" Mass. Gen. Laws ch. 258E, §3(e) (2011) (emphasis added).

54. *See* Mass. Gen. Laws ch. 209A, §6 (2011); Mass. Gen. Laws ch. 258E, §8 (2011).

55. *See* Mass. Gen. Laws ch. 209A, §6 (2011); Mass. Gen. Laws ch. 258E, §8 (2011).

56. Mass. Gen. Laws ch. 258E, §8 (2011).

57. Mass. Gen. Laws ch. 209A, §6(7) (2011)..

58. *Id.*

59. *See, e.g.*, S. 1611, 2009 Senate, Reg. Sess. (Mass. 2009).

60. *See* Mass. Gen. Laws ch. 258E, §8 (2010).

61. *See id.*

62. Mass. Gen. Laws ch. 258E, §8 (2011) (amended 2010).

63. *See* Mass. Gen. Laws ch. 209A, §3 (2011); Mass. Gen. Laws ch. 258E, §3 (2011) (amended 2010).

64. Chapter 209A requires the plaintiff to disclose "any prior or pending

258E required a plaintiff to disclose all prior or pending actions involving the parties. The statute was amended shortly thereafter to elaborate upon and mandate the disclosure requirement, and in its current form, the statute requires a plaintiff to disclose *all* prior or pending actions involving the parties, "including, but not limited to, court actions, administrative proceedings, and disciplinary proceedings."[65] This clearer, broader requirement ensures that a judge hearing a petition under 258E has a full understanding of the relationship between the parties, and helps to avoid potential abuse by plaintiffs. Specifically, the amendment helped to address the concerns of the legislature and one of the drafters that the statute could be misused by parties, such as against members of public boards (*e.g.,* a disgruntled zoning applicant against members of the zoning board); by employees against employers (*e.g.,* a former employee utilizing it as a bargaining tool in negotiations); by tenants against landlords (*e.g.,* to prevent eviction); by neighbors in land disputes (*e.g.,* easement litigation); in academic matters (*e.g.,* disciplinary matters); and in litigation.

2. Referral to mediation

Unlike 209A, 258E does not prohibit a judge from compelling the parties to mediate any aspect of their case.[66] In permitting mediation between the parties, the drafters demonstrated that they were mindful of the importance of conserving judicial resources and the unique and limited scope of 258E. Mediation, however, is likely not advisable in certain cases, including where the basis for the 258E order is sexual assault or stalking.

3. Setting bail on violations

Also unlike 209A, 258E does not restrict clerks and bail commissioners from releasing an arrestee charged with violations of an existing harassment protection order.[67] Like 209A, though, 258E does mandate "reasonable efforts" to inform the victim of the arrestee's release.[68]

V. What Constitutes Harassment?

258E grants protection to victims suffering from harassment. There are numerous versions of similar legislation filed over a period of twenty years that struggled with how best to define harassment in a non-relationship setting. On the one hand, the drafters and its supporters wanted to define harassment in such a way as to grant protection to as many qualified victims as possible. On the other hand, they did not want to define harassment too broadly, so as to encompass behavior which did not rise to a level needing legal protection.

For guidance, the drafters reviewed the other thirty-seven states' harassment prevention statutes, and utilized language from the other states. They also researched the implications and effectiveness of the other state statutes. In particular, Maine's harassment protection statute was very useful.[69] Maine's statute defines harassment as:

- Three or more acts of intimidation, confrontation, physical force or the threat of physical force directed against any person, family or business that are made with the intention of causing fear, intimidation or damage to property and that do in fact cause fear, intimidation or damage to property;
- Three or more acts that are made with the intent to deter the free exercise or enjoyment of any rights or privileges secured by the Constitution of Maine or the United States Constitution; or
- A single act or course of conduct constituting a violation of section 4681; Title 17, section 2931; or Title 17-A, sections 201, 202, 203, 204, 207, 208, 209, 210, 210-A, 211, 253, 301, 302, 303, 506-A, 511, 556, 802, 805 or 806.[70]

Thus, under Maine's statute, a defendant need only intend to cause, and in fact cause, fear, intimidation, or damage to property; no subjective ill will is required.[71] The statute also extends protection to families and businesses. Although the drafters reviewed Maine's statute and incorporated some of its language, the Maine standard simply wasn't stringent enough, and was significantly broader than the purpose of the proposed Massachusetts legislation. As the amendments to the definition of "harassment" in the different Massachusetts bills illustrate, the drafters made a concerted effort to narrowly tailor the statute to ensure that it would not be abused.

An early version of a similar bill, which focused primarily on stalking and sexual assault, proposed amending the state's criminal harassment statute, Massachusetts General Laws chapter 265, section 43A, which, at the time, defined harassment as:

> willfully and maliciously engag(ing) in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress.[72]

In adopting this definition, specifically the requirement of *willful and malicious* conduct, the drafters of this earlier bill demonstrated a belief that the threshold to obtain a protection order should be very high, a principle that the drafters of 258E would embrace throughout the entire legislative process. While this prior bill may have satisfied the goal of creating a high threshold to avoid potential abuse, it also limited protection to only those individuals whose harassers had been convicted of criminal harassment under Massachusetts General Laws chapter 265, section 43A.[73]

Recognizing that many victims of abuse and harassment do not, for one reason or another, seek or participate in the prosecution of their abusers or harassers, Senator Pamela Resor filed Senate Bill

actions involving the parties for divorce, annulment, paternity, custody or support, guardianship, separate support or legal separation, or abuse prevention." Mass. Gen. Laws ch. 209A, §3 (2011).

65. Mass. Gen. Laws ch. 258E, §3 (2011) (amended 2010).

66. *Contrast* Mass. Gen. Laws ch. 209A, §3 (2011).

67. Pursuant to Mass. Gen. Laws c. 276, §57 (2011), when an individual is arrested for violation of a 209A order or for any other offense while a 209A order is in effect, the individual may not be released by a clerk of courts, clerk of a district court, bail commissioner or master in chancery.

68. Mass. Gen. Laws ch. 209A, §6 (2011); Mass. Gen. Laws ch. 258E, §8 (2011).

69. While the majority of the states had harassment protection statutes on the books at the time, Maine was the drafters' natural choice, as Massachusetts and Maine were once part of the same state and therefore have similar state constitutions and case law.

70. Maine Revised Statutes, tit. 5, §4651 (2011).

71. *See id.*

72. *See* proposed "Sexual Assault and Stalking Protective Orders Act," (Mar. 29, 2005) (proposing amendment to Mass. Gen. Laws ch. 265, §43A).

73. *See id.* at §2 ("A petition for a Sexual Assault and Stalking Prevention Order may be filed by any person who is a victim of criminal harassment and whose harasser has been convicted of criminal harassment under this section.").

No. 1002 in 2007, which eliminated the requirement that the harasser have been convicted of criminal harassment.[74] Although, in that respect, Bill No. 1002 somewhat divorced itself from the criminal harassment statute, the first part of its definition of harassment continued to track the language of the criminal harassment statute almost exactly:

> Harassment: the occurrence of one or more of the following: (a) willfully and maliciously engaging in conduct or acts directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer emotional distress; or (b) causing another to engage involuntarily in sexual conduct; or (c) causing another to engage involuntarily in sexual conduct by force, threat, or duress, included but not limited to, incapacitation through chemical restraint, drugs, or intoxication; or (d) engaging in the enticement of a child under the age of 16 under the provisions of chapter 265 section 26C of the Massachusetts General Laws.[75]

These changes in Senate Bill No. 1002 are significant for another reason as well. It is here where the definition of harassment is expanded to encompass actions on the part of a defendant that may constitute sexual assault.[76] From this point forward, drafters of other harassment protection bills viewed the definition of harassment as being broken down into two "branches" – (i) general harassment and (ii) harassment related to sexual assault.

When Senator Chandler filed Bill No. 1611 in 2009, she adopted the definition of harassment contained in Bill No. 1002. Many, especially members of the defense bar, feared that the proposed definitions of harassment and abuse were too broad and vague. They felt that requiring a showing of only one act of willful and malicious conduct essentially cast the net too wide. To respond to these concerns, in 2009, the drafters submitted Senate Bill No. 2185, a revised version of Bill No. 1611 that contained a drastically different definition of harassment:

> Harassment: (i) 3 or more acts of willful and malicious conduct aimed at a specific person done with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property; or (ii) a single act or course of conduct that (A) causes another to engage involuntarily in sexual relations by force, threat or duress; or (B) constitutes a violation of Chapter 265 of the General Laws sections 13B,[77] 13F,[78] 13H,[79] 22,[80] 22A,[81] 23,[82] 24,[83] 24B,[84] 26C,[85], 43,[86] or 43A[87] or section 3[88] of Chapter 272 of the General Laws.[89]

At one point, the drafters did consider including crimes against the elderly, such as assault and battery upon an elderly or disabled person,[90] as part of the definition of harassment. This provision, however, was specifically excluded, as it would permit an elderly plaintiff to obtain a harassment order by demonstrating only *one* act of violence. This omission illustrates the drafters' belief that a simple act of violence, alone, did not rise to the level of harassment sought to be defined by the statute.

While Bill No. 2185 created a higher threshold than that contemplated by Bill No. 1611, the Senate Ways and Means Committee amended the definition of harassment in Senate Bill No. 2212 as follows:

> Harassment: (i) 3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property; or (ii) an act that (A) causes or results in another engaging involuntarily in sexual relations by force, threat or duress; or (B) constitutes a violation of section 13B, 13B½,[91] 13B¾,[92] 13F, 13H, 22, 22A, 22B,[93] 22C,[94] 23, 23A,[95] 23B,[96] 24, 24B,[97] 26C,[98] 43 or 43A of chapter 265 or section 3 of chapter 272.[99]

Although the Committee's revised draft had the effect of expanding the types of criminal behavior that fell within the definition of harassment, at the same time, the revised bill created an even higher threshold and burden of proof. Unlike earlier drafts of the bill, Bill No. 2212 explicitly defined the term "malicious conduct" as conduct "characterized by cruelty, hostility, or revenge."[100] This definition requires subjective ill will and is equivalent to the standard

74. "Initiation of a petition under the statute is not contingent upon going forward with a criminal proceeding nor is it contingent upon ongoing cooperation with law enforcement." S. 1002, 2007 Senate, Reg. Sess. (Mass. 2007).

75. S. 1002, 2007 Senate, Reg. Sess. (Mass. 2007) (emphasis added).

76. In a similar bill filed in March, 2005, sexual assault and stalking were treated as conduct separate from harassment.

77. Indecent assault and battery on a child.

78. Indecent assault and battery on a mentally retarded person.

79. Indecent assault and battery on a person fourteen years or older.

80. Rape.

81. Forcible rape of a child.

82. Statutory rape.

83. Assault with intent to rape.

84. Assault with intent to rape a child.

85. Enticement of a child.

86. Criminal stalking.

87. Criminal harassment.

88. Drugging persons for sexual intercourse.

89. S. 2185, 2009 Senate, Reg. Session (Mass. 2009).

90. Mass. Gen. Laws ch. 265, §13K (2011).

91. Indecent assault and battery on a child under fourteen during the commission of certain offenses or by a mandated reporter.

92. Commission of indecent assault and battery on a child under the age of fourteen by certain previously convicted offenders.

93. Rape of a child during commission of certain offenses or by use of force.

94. Rape of a child through use of force by certain previously convicted offenders.

95. Rape and abuse of a child aggravated by age difference between defendant and victim or by commission by mandated reporters.

96. Rape and abuse of a child by certain previously convicted offenders.

97. Assault with intent to rape a child.

98. Enticement of a child.

99. S. 2122, 2009 Senate, Reg. Session (Mass. 2009).

100. The bill did not define "willful," and neither does the actual statute. In interpreting the requirement of "willful and malicious" conduct under the state's criminal harassment statute, the Massachusetts Appeals Court has stated that a defendant acts willfully if he intends the act. *See* Commonwealth v. O'Neil, 67 Mass. App. Ct. 284, 290-91 (2006); Memorandum from Hon. Lynda M. Connolly, Chief Justice, to District Court Judges, Clerk-Magistrates and Chief Probation Officers 6 (Apr. 13, 2010), *available at*: http://www.lawlib.state.ma.us/docs/trans1046harassment-prevention-orders-gl-c258e.pdf.

of malice that is required for the crime of willful and malicious destruction of property.[101] Thus, the 258E standard is *higher* than the standard in the state criminal harassment[102] and arson[103] statutes, each of which requires only the "willful doing of an unlawful act without justification or mitigation."[104]

Taking into account these newly-defined terms, with respect to the "first branch" of harassment, Bill No. 2212 required that there be at least three acts, and that *each act* (i) was aimed at a specific person; (ii) was both willful and malicious, characterized by cruelty, hostility, or revenge; (iii) was performed with the intent to cause fear, intimidation, abuse or property damage; and (iv) in fact, caused fear, intimidation, abuse or property damage. This heightened standard, which is what is required under the statute in its current form, represents a compromise between the rights of victims of harassment and those defending against allegations of harassment.

The approach to the "second branch" of harassment was in some ways similar to, and in some ways different from, the approach to the first branch. On the one hand, Bills 2185 and 2212 narrowed the type of sexual conduct that would constitute harassment by (i) requiring that a defendant had used force, threat or duress to force a plaintiff to engage involuntarily in sexual relations and (ii) borrowing from the state's criminal code to enumerate the types of conduct that would unquestionably constitute harassment. Nevertheless, unlike the first branch of harassment, the drafters were simply unwilling to require a plaintiff to suffer *more than one* instance of sexual assault in order to qualify for protection from the court.

The definition of harassment contained in 258E is almost identical to the definition contained in Senate Bill No. 2212, discussed above:

> Harassment: (i) 3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property; or (ii) an act that: (A) by force, threat or duress causes another to involuntarily engage in sexual relations; or (B) constitutes a violation of section 13B, 13F, 13H, 22, 22A, 23, 24, 24B, 26C, 43 or 43A of chapter 265 or section 3 of chapter 272.[105]

The differences between 258E and Bill No. 2212 relate to the last portion of the definition, namely, the types of criminal conduct that constitute harassment under the statute. As enacted, the statute includes only the enumerated criminal provisions contemplated in Bill No. 2185. Specifically, unlike Bill No. 2212, the definition of harassment in 258E does not include acts that would constitute violations of sections 13B½ (indecent assault and battery on a child under fourteen during the commission of certain offenses or by a mandated reporter), 13B¾ (indecent assault and battery on a child under the age of fourteen by certain previously convicted offenders) 22B (rape of a child during commission of certain offenses or by use of force), 22C (rape of a child through use of force by certain previously convicted offenders), 23A (rape and abuse of child aggravated by age difference between defendant and victim or by commission by mandated reporters), and 23B (rape and abuse of a child by certain previously convicted offenders) as falling within the definition of harassment. In reality, the elimination of these few references to criminal statutes is of little substantive effect, as the conduct that would constitute a violation of these statutes would likely either (i) constitute a violation of one of the other enumerated statutes or (ii) qualify as an act that causes another to involuntarily engage in sexual relations through the use of force, threat or duress.

VI. Conclusion

The enactment of chapter 258E in 2010 marked the end of a nearly twenty-five year battle to close the loophole in the Commonwealth's restraining order law. Through a bi-partisan effort, the drafters of 258E were able to strike a delicate balance between the rights of victims and the rights of defendants. The drafters' acknowledgement of the need to compensate for the lack of a relationship requirement resulted in the implementation of a very high standard for issuance of a harassment prevention order, which ensures that relief is granted only to those victims truly in need of protection.

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101. Mass. Gen. Laws ch. 266, §127 (2010).

102. Mass. Gen. Laws ch. 265, §43A (2010).

103. Mass. Gen. Laws ch. 266, §1 (2010).

104. Mass. Gen. Laws ch. 265, §43A (2010); Mass. Gen. Laws ch. 266, §1 (2010).

105. Mass. Gen. Laws ch. 258E, §1 (2011).

Contracts-Breach of Enforceable Agreement and Implied Covenant of Good Faith and Fair Dealing

Targus Group International, Inc. v. Sherman, 76 Mass. App. Ct. 422 (2010)

Near midnight, on a second day of mediation, the mediator, having perhaps fatigued the parties into settlement, drafted a one and a quarter, single-spaced document, entitled "Agreement in Principle."[1] The document contained six paragraphs of business points.[2] Its introductory paragraph recited that the parties –

> "agree in principle to settle all the claims, causes of action and disputes between them arising out of or relating to the acquisition of Roundhouse by the Company on August 31, 2000, on the following terms and conditions:"[3]

A seventh and concluding paragraph read -

> Execution and exchange of final settlement documents and mutual releases in a form satisfactory to counsel, including release of any claims by Sellers for severance or under the Roundhouse Option Plan. The releases shall indemnify, defend and hold harmless Sellers from any claims, causes of action, cross-claims or demands arising out of or relating to the Company's filing of any claims against other Roundhouse selling shareholders.[4]

The parties signed the document, dated July 13, 2004, as did their respective attorneys, and the mediator inscribed his initials.[5]

The scenario above describes a common ending to a successful mediation: the mediator cobbles together a quick, unpolished memorandum of the settlement arrived at that counsel shall, ASAP, gussy up into polished legal instruments.

Targus Group International, Inc. v. Sherman et als.,[6] ("*Targus*"), presented the issue of the "enforceability of a disputed settlement agreement resulting from mediation."[7] The Appeals Court decided that the unpolished agreement signed by the parties at the mediation session disposed of the issues about which they had been contending, and that the agreement was therefore enforceable—even though, subsequently, the parties' counsel had not agreed on the content or form of final settlement documents or mutual releases.[8] In so deciding, the court applied to the rough-cut mediation agreement the analysis and criteria usually discussed in cases dealing with written agreements, such as letters of intent or offers to purchase, that by their terms contemplate the drafting and execution of additional agreements.

Two lines of cases bear on the question of enforceability of mediation agreements. Although it can be traced farther back, the trail of one line of cases begins conveniently with *Rosenfield v. U.S. Trust Co.*,[9] which stated the proposition that language looking to execution of a final written agreement "justifies a strong inference that the parties do not intend to be bound by earlier negotiations or agreements until the final terms are settled."[10] Language looking to a further writing, however, is not determinative. There needs to be an inquiry into whether important business points have been left undecided. Thus, in the *Rosenfield* case, the failure to have agreed on what store-front improvements the defendant U.S. Trust Co. was to make left the parties in a state of "imperfect negotiation."[11] Similarly, in *Tull v. Mister Donut Development Corp.*,[12] failing to have agreed about how improvements were to be financed, the timing of construction, and what guarantees the prospective tenant would furnish placed the proposed landlord and tenant in a status of imperfect negotiations.[13]

The second line of cases holds that if the preliminary agreement covers all material terms, "it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract."[14]

The controversy in the *Targus* case arose out of the purchase in the year 2000 by Targus, a supplier of mobile computing cases and accessories,[15] of 100 percent of the stock of Roundhouse, Inc., a corporation organized by defendants Howard Sherman, Sean Brosmith, and Scott Oshry (the "Sherman Group").[16] Targus paid $79 million and Targus stock to acquire Roundhouse.[17] Once in control of Roundhouse and operating it, Targus claimed that the Sherman Group had not accurately represented Roundhouse's financial condition.[18] Targus brought a claim for damages against the Sherman group.[19] The Sherman Group responded with a backfire claim that Targus had misrepresented its financial condition and, therefore, the value of the stock that had been part of the payment

1. Targus Group Int'l, Inc. v. Sherman, 76 Mass. App. Ct. 422, 423 (2010).
2. The entire agreement is set out as an appendix to this case note.
3. *Targus*, 76 Mass. App. Ct. at 424.
4. *Id*. at 424-25.
5. *Id*. at 425.
6. 76 Mass. App. Ct. 421 (2010).
7. *Targus*, 76 Mass. App. Ct. at 422.
8. *Id*. at 429-31. The Appeals Court (Sikora, J.), affirmed the order of the Superior Court (van Gestel, J.) granting summary judgment to the plaintiff on its breach of contract claim. *Id*. at 438. The defendants filed, but later withdrew, a petition for further appellate review.
9. 290 Mass. 210 (1935).
10. *Id*. at 216. *See* Goren v. Royal Invs., Inc., 25 Mass. App. Ct. 137, 140 n.3 (1987), *rev. denied*, 401 Mass. 1104 (1988), for a collection of cases to the same effect.
11. *Rosenfield*, 290 Mass. at 217.
12. 7 Mass. App. Ct. 626, 630 (1979).
13. *Id*. at 629-31. *See also* Coldwell Banker/Hunneman v. Shostack, 62 Mass. App. Ct. 635, 636-37 (2004); Blomendale v. Imbrescia, 25 Mass. App. Ct. 144, 147 (1987).
14. *Goren*, 25 Mass. App. Ct. at 140. *See* McCarthy v. Tobin, 429 Mass. 84, 87 (1999). *See also* Coan v. Holbrook, 327 Mass. 221, 224 (1951), for a starting point for that second line of cases.
15. Targus Group Int'l, Inc. v. Sherman, record app. 172.
16. Targus Group Int'l, Inc. v. Sherman, 76 Mass. App. Ct. 422, 422-23 (2010).
17. *Id*. at 423.
18. *Id*.
19. *Id*.

for Roundhouse.[20] Those conflicting claims became the subject of mediation and the rough-cut settlement agreement that concluded the mediation.

At the marathon mediation session that culminated in the signing of the "Agreement in Principle" (the "AIP"), the negotiating representatives for Targus were: a director with authority to settle, two accountants, and counsel.[21] For the Sherman Group: Howard Sherman, an accountant, and counsel.[22]

The AIP provided that: 1) the Sherman Group retain 3,000,000 Targus shares but return to Targus the balance of the shares, 781,803, that the Sherman Group had received; 2) the Sherman Group pay $2,500,000 to Targus (the form and time of payment spelled out); 3) the Sherman Group's Targus stock be pledged and escrowed against the Sherman Group's payment obligations; 4) the Sherman Group not have a board seat; 5) the Sherman Group remain passive stockholders but receive audited financial statements; and, 6) Targus release the Sherman group from non-competition restraints, should Targus sell the lines of business to which those restraints applied.[23]

When lawyers for Targus and the Sherman Group began to exchange formally-drafted settlement agreements, disagreements surfaced concerning: 1) the scope of the indemnities Targus was to extend to the Sherman group; 2) whether Targus should release the Sherman Group from the non-competition restrictions; and, 3) the date for the tender by the Sherman Group of a $500,000 note.[24] After three months of negotiation and exchange of drafts, Targus brought its action for specific performance of the AIP or, alternatively, damages on the contract.[25].

Deciding whether a preliminary agreement that contemplates later formal agreements contains "sufficient essential terms for enforcement"[26] involves: 1) an inquiry into the circumstances that underlie the preliminary agreement (in the case of *Targus*, two long mediation sessions and the drafting of the preliminary agreement by a neutral party); 2) an examination of the degree of completeness of the document; 3) a determination of whether the parties intended the preliminary agreement to be a governing document; and 4) an assessment of whether, if the parties perform the reciprocal obligations imposed on them by the preliminary agreement, they can co-exist and operate in their respective fields of endeavor, leaving to another day the details that arose after the mediation.[27]

It is characteristic of the mediation process, as the court observed in *Targus,*[28] that the parties, under the guidance of a mediator, exchange information, size one another up face-to-face, and assess their legal positions with their lawyers and technical experts.[29] If that process culminates in a written agreement that the parties sign, there is force to the court's conclusion that the points agreed upon resolved what the parties thought was of primary importance in their quarrel. In many respects, the mediation agreement resembles the settlement agreement made on the brink of or during trial, which also generally requires follow up in formal documents.[30]

Assuming that the parties desire the mediation agreement to be a complete and enforceable summary of their points of agreement, drafters do well to avoid the label or phrase, "Agreement in Principle." The phrase, borrowed from the world of diplomacy, introduces a tentative note. The better course is to call the preliminary document a "Memorandum of Agreement."

If, in fact, parties desire the preliminary agreement to be just that, *i.e.*, tentative and not binding, they must say so straight out.[31] To do so, however, is to end the mediation in a question mark, generally a less than satisfactory result.

Rudolph Kass

20. *Id*.
21. Targus Group Int'l, Inc. v. Sherman, 76 Mass. App. Ct. 422, 423 (2010).
22. *Id*.
23. *Id*. at 424-25.
24. *Id*. at 425-26.
25. *Id*. at 426 & record app. 21.
26. Targus Group Int'l, Inc. v. Sherman, 76 Mass. App. Ct. 422, 430 (2010).
27. *Id*. at 429-32.
28. *Id*. at 433.
29. *Id*.
30. *See* Basis Tech. Corp. v. Amazon.Com, Inc., 71 Mass. App. Ct. 29, 37 (2008). *See also* Mathewson Corp. v. Allied Marine Indus., Inc., 827 F.2d 850, 851-52 (1st Cir. 1987) (enforcing acceptance of a settlement offer reported to the court during an approximate two-week recess of a trial that had already gone five days.).
31. *See* Goren v. Royal Invs. Inc., 25 Mass. App. Ct. 137, 142-43 (1987), *rev. denied*, 401 Mass. 1104 (1988); Restatement (Second) of Contracts § 21, comment b (1979) ("Agreement not to be legally bound.").

APPENDIX

Agreement in Principle
Targus Mediation
July 13, 2004

Howard Sherman, Sean Brosmith, and Scott Oshry ("Sellers") and Targus Group International ("Company") agree in principle to settle all the claims, causes of action and disputes between them arising out of or relating to the acquisition of Roundhouse by the Company on August 31, 2000, on the following terms and conditions:

1. Sellers retain 3,000,000 Company shares; return the balance of 781,803 shares.

2. Sellers pay Company $2,500,000.00 as follows:
- $500,000 personal note from Sellers payable within 6 months of settlement and personally guaranteed by sellers;
- $2,000,000 upon a liquidity event for Company, not guaranteed, non-recourse.

3. Sellers' stock in Company to be pledged and escrowed against the back end payment obligation; pledge to be clean for filing purposes.

4. Sellers not entitled to a Board seat.

5. Sellers remain passive shareholders, i.e. no communications to Company employees (other than personal communications unrelated to the Company), board or advisers. Sellers shall receive from the Company only audited financial statements so long as they remain shareholders.

6. Company will look into whether it has sold the CD Projects and Glacier Gear lines of business. As to such , if it has sold the businesses not subject to the non-competes, it will terminate the non-competes as to those lines.

7. Execution and exchange of final settlement documents and mutual releases in a form satisfactory to counsel, including release of any claims by Sellers for severance or under the Roundhouse Option Plan. The releases shall indemnify, defend and hold harmless Sellers from any claims, causes of action, cross-claims or demands arising out of or relating to the Company's filing of any claims against other Roundhouse selling shareholders.

S/
For Selling Shareholders

S/
For Targus

APPROVED AS TO FORM AND CONTENT:

S/
Attorneys for Shareholders

S/
Attorneys for Targus

Book Reviews

The Ride, by Brian MacQuarrie (Da Capo Press, 2009), 275 pages

The subtitle of this book, "A Shocking Murder and a Bereaved Father's Journey from Rage to Redemption," is an apt description of the story of Bob Curley and the murder of his ten year old son, Jeffrey. The death of his son places Bob in the center of the highly publicized debate over the death penalty, as he changed from a staunch death penalty supporter to a vocal anti-death penalty advocate. While the book is about one man's conflicting convictions about the death penalty, it also serves as an informative history of the politics surrounding the death penalty in Massachusetts in the late 1990s.

According to MacQuarrie, the story begins in October 1997 in Inman Square in Cambridge, Massachusetts, home of the Curley family: Bob, Barbara, and their three sons, Bobby Jr., Shaun, and the youngest son, Jeffrey, described as a "precocious ten year old."[1] Bob worked at the local firehouse and Jeffrey played around the close-knit, seemingly safe neighborhood. But MacQuarrie writes that living in that same neighborhood were Salvatore Sicari "an unemployed twenty-one-year-old misfit"[2] and his new best friend Charles Jaynes, who "seemed constantly on the prowl for new targets" and whose "appetite seemed insatiable."

On October 1, 1997, Jeffrey stayed home from school because he had not been feeling well the day before. Around noon, Jeffrey asked his mother if he could walk to the local corner store for a sandwich. After some pestering from Jeffrey, Barbara relented and off Jeffrey went.

Outside of the house waited Jaynes and Sicari. Jeffrey bounded into their car after being told by Jaynes that they were going to pick up a new bicycle for him. While in the car, Jeffrey learned that in exchange for Jaynes' generosity, he was expecting a sexual favor from Jeffrey. When Jeffrey refused, Jaynes reacted with a "burst of volcanic fury."[3] Jaynes dragged Jeffrey from the front seat into the back seat of the car. For twenty long minutes, Jeffrey struggled with Jaynes.[4] However, in the end, he died in the back of Jaynes's Cadillac.

Sicari and Jaynes then went to a local hardware store where they purchased duct tape and tarps.[5] They wrapped up Jeffrey's body in the tarps and secured it with the duct tape, purchased a rubber container and a fifty-pound bag of cement, placed Jeffrey's body and the cement into the container, and dumped the container into the Great Works River on the New Hampshire/Maine border.[6]

While Bob held vigil with Barbara and their two other sons, law enforcement officials began their search for Jeffrey. Sicari and Jaynes were both questioned. Sicari confessed and led the police to Jeffrey's body in the Great Works River.[7]

By 3:00 a.m. on October 2, less than 24 hours after Jeffrey's disappearance, Bob, Barbara, and their two other children learned that Jeffrey had been murdered. So began Bob's journey into rage.[8] Bob stated to the media that "For anybody who's opposed to the death penalty, you should have been sitting in our house, feeling what we're feeling."[9] The media coverage of the murder and Bob's statement led to calls for the reinstitution of the death penalty in Massachusetts, notwithstanding that no one had been put to death in Massachusetts since 1947 and the state's highest court had ruled a death penalty statute unconstitutional as recently as 1984.[10]

As described by MacQuarrie, "the drumbeat for capital punishment intensified, and Bob Curley became its undisputed champion."[11] "To Bob, capital punishment was one more layer of protection for struggling blue-collar communities, where the need for two incomes inevitably and unfortunately produced latchkey children."[12] Jeffrey eventually became the poster child for reinstating the death penalty in Massachusetts, and Bob served as the spokesman on behalf of his slain son.

The firestorm involving the death penalty gained momentum in the Massachusetts Senate where a bill to reinstate the death penalty was passed.[13] A similar bill then made its way to the Massachusetts House, where Bob and others knew that it would be opposed by House Speaker Tom Finneran. [14]

For Bob and Barbara Curley, the day of the House vote "held the promise of delayed but righteous justice—if not for Jeffrey, then for future children preyed upon by predators."[15] As the vote was conducted, the results stunned the House chambers. The bill had passed by an 81-79 vote.[16] Nonetheless, the bill was headed to a Senate-House conference committee before a final vote would be conducted.[17]

On the day of the final vote, a second term Representative from Peabody, Massachusetts, John Slattery, decided to change his vote.[18] While Governor Paul Cellucci and other proponents of the death penalty attempted to convince Slattery to stand by his original vote, they failed. The final vote that day in 1997 was 80-80.[19] For Bob, the failure to reinstate the death penalty was devastating.

In the days after the vote, Bob continued to be politically active as a pro-death penalty advocate. However, he grew frustrated that politicians literally were using Jeffrey as a political poster child for the death penalty.[20] That exploitation infuriated Bob, making him want to hide from the public eye.

1. Brian Macquarrie, The Ride 6 (2009).
2. *Id.* at 17.
3. *Id.* at 32.
4. *Id.* at 33.
5. *Id.* at 35.
6. *Id.* at 40, 48.
7. Brian Macquarrie, The Ride 75-76 (2009).
8. *Id.* at 80-81.
9. *Id.* at 91.
10. *Id.* at 91, 103; see Commonwealth v. Colon-Cruz, 393 Mass. 150-171-72 (1984)
11. *Id.* at 93.
12. *Id.*
13. Brian Macquarrie, The Ride 115 (2009).
14. *Id.* at 115-16.
15. *Id.* at 121.
16. *Id.* at 124.
17. *Id.* at 125-26.
18. *Id.* at 130.
19. Brian Macquarrie, The Ride 115 (2009).
20. *Id.* at 137.

Almost a year after Jeffrey's murder, the Curley family had to sit through all nine days of Sicari's trial. The jury deliberated for twenty-two hours over four days before it finally convicted Sicari of first degree murder.[21] He was sentenced to life in prison without the possibility of parole. During the victim impact statements, while Barbara spoke of her heartbreak at the loss of her son, Bob spoke of his "unquenchable anger."[22]

Three weeks later, Jaynes went on trial in western Massachusetts after the trial court judge allowed a request for a change in venue. While the second trial lacked the publicity that had surrounded Sicari's case, the proceedings were no less intense for the Curleys.[23] Sicari refused to testify against Jaynes and, therefore, Sicari's statement of what occurred on the night of Jeffrey's death could not be introduced into evidence.[24] The jury deliberated nearly ten hours over two days before returning a verdict of second degree murder. [25] Sicari was sentenced to the maximum term of life in prison, but the conviction carried a possibility of parole after more than two decades in prison.[26] To Bob, it was just another disappointment and he retreated from the spotlight.

In 1999, the death penalty debate again became a political issue in Massachusetts. Twenty-one new legislators had been elected to serve in the House of Representatives, and that fact energized Governor Cellucci's fight to return the death penalty to Massachusetts.[27] He unveiled his new bill in February 1999 and enlisted Bob's help him.

While Bob joined Governor Cellucci's effort, he was disillusioned with the legal system. The discrepancies in the Sicari and Jaynes's verdicts did not make sense to him. Sicari, the accomplice, would never walk free, but Jaynes, who was convicted of second degree murder, could cling to the hope of parole. In Bob's view "any time you're involved in the court system on any level, it doesn't take long to figure out there's a difference between what's right, what's wrong, the law, justice, who can afford the best lawyer and who can't."[28]

As the House hearing on the death penalty approached, a local Boston cable TV station asked Bob if he would appear on a show with Bud Welch, an anti-death penalty advocate. Welch was a gas station owner from Oklahoma City whose daughter had been killed in the truck bomb explosion outside the Murrah Federal Building on April 19, 1995 caused by Timothy McVeigh. While Welch grieved the loss of his daughter, he nonetheless felt that the death penalty and McVeigh's eventual execution were wrong. In his eyes, "the death penalty teaches hate and that hate begets hate."[29]

Bob initially turned down the invitation but then relented and agreed to appear on the show. This marked a turning point in Bob's journey. Unexpectedly to Bob, Welch acknowledged, accepted, and understood Bob's rage against Sicari and Jaynes, as well as Bob's difficulty with the transition from anonymous citizen to high profile spokesman for a controversial cause. The exchange between the men resulted in a connection that Bob found touching.[30] It also left him grappling with questions about how Welch could have come to his anti-death penalty stance, and what did it say about him as a man that he did not share that same view.[31]

Bob became plagued with second thoughts about the death penalty. Following his meeting with Welch, he began to realize that opposition to the death penalty did not always signal weakness. Bob had always felt that "if you were against the death penalty, you were a wimp."[32] Although he was experiencing a newfound hesitancy about his stance on the death penalty, he remained committed to testifying on behalf of the death penalty bill. He appeared as planned at the State House on the morning of the hearing. As the hearing time neared, Bob was in turmoil. Following his meeting with Welch, the prospect of ranting about capital punishment gnawed at his conscience.[33] He suddenly felt very uncomfortable, and with that feeling, he turned around and walked out of the State House.

In the days following Bob's decision to walk away, Bob saw an article in a newspaper about the upcoming execution of a Massachusetts man and Vietnam veteran, Manuel Babbitt, imprisoned in California for the murder of an elderly woman during a botched robbery. Bob was horrified by Babbitt's story. He felt that he had much in common with Babbitt, as they both had grown up poor prompting each to enlist in the military as a way out. All of the doubts that Bob had led him to the conclusion that the death penalty was "an emblem of inequity."[34]

That conclusion led Bob to the next stage of his journey—resurrection. He placed a call to the group "Murder Victims' Families for Reconciliation" in hopes of bringing attention to Babbitt's plight in California.[35] Babbitt appeared at a clemency hearing shortly before his scheduled execution; however, clemency was not granted. Shortly after the hearing, Bob reached out to Welch in hopes that something could be done to help Babbitt but the California governor approved the execution and Babbitt was executed shortly thereafter.[36]

Bob also continued his efforts at increasing awareness about child safety by creating the Jeffrey Curley Foundation.[37] He lobbied hard for a new law that made Massachusetts the last state in the nation to criminalize possession of child pornography.[38] He also campaigned for the passage of the Jeffrey Curley Bill which required the posting of safety "dos and don'ts" at all public schools and on state-owned property.[39]

In the late spring of 2001, near what would have been Jeffrey's fourteenth birthday, Bob finally reached the conclusion of his journey and decided that he wanted to stop agonizing over his son's untimely death. He contacted a local Boston TV cable news station and informed it that he wanted to make a public statement.[40] Bob told the news reporter that he had changed his mind about capital

21. *Id.* at 148.
22. *Id.*
23. *Id.* at 164.
24. Brian Macquarrie, The Ride 164 (2009).
25. *Id.* at 165.
26. *Id.* at 166.
27. *Id.* at 169.
28. *Id.* at 172.
29. *Id.* at 176.
30. Brian Macquarrie, The Ride 180 (2009).
31. *Id.* at 182.
32. *Id.* at 183.
33. *Id.* at 184.
34. *Id.* at 192.
35. *Id.* at 197.
36. Brian Macquarrie, The Ride 201-01 (2009).
37. *Id.* at 204.
38. *Id.* at 205.
39. *Id.*
40. *Id.* at 207.

punishment. He now spoke of capital punishment "as an attack on the working class, as the ultimate penalty inflicted unfairly on the poor."[41] The news report was carried that day.

Unfortunately, not everyone was so supportive of Bob's change of heart. Barbara questioned how he could forgive the men who killed Jeffrey, and his son Shaun accused him of "flip-flopping, like a politician."[42] Despite the fact that his family, and in some cases, his co-workers, did not support his change of heart, Bob continued on his journey. He began lending his voice to groups that opposed the death penalty and to others that promoted child safety.

According to MacQuarrie, Bob still thinks of Jeffrey constantly:

> He thinks of him when he sees Jeffrey's friends in the neighborhood, driving their cars and walking with their girlfriends. He sees Jeffrey when he passes the local baseball field, where the sound of Little League chatter fills a summer night, and the local ice rink, where he changed Jeffrey's diapers while his other two sons skated during hockey games. He sees Jeffrey when he runs along the Charles River on a beautiful day and recalls the priceless joys of a simple game of catch.[43]

Bob started his journey as a grieving and angry man who was thrust into the public eye after the murder of Jeffrey. He believed in his initial moral convictions about the death penalty. However, at the end of Bob's journey stood a man who was not afraid to question his own convictions in order to ensure that others were protected. His bravery and courage were exemplified in the fact that he always stood up for what he believed in, even if that belief system changed over time. His brief foray into the death penalty spotlight catapulted him from obscurity to unwanted fame. But his voice has always remained profound, powerful, and resonant. After more than a decade after the awful day that changed his life forever, Bob lives by a simple maxim, "I'm gonna do the best I can."[44] Perhaps that is a maxim that we all should live by, regardless of the cause.

Caryn L. Daum

41. *Id.*
42. Brian Macquarrie, The Ride 215 (2009).
43. *Id.* at 250.
44. *Id.* at 252.

The Death of the American Trial, by Robert P. Burns (The University of Chicago Press, 2009), 180 pages.

The Importance of the American Jury Trial And Why its Decline Matters

The jury trial is undoubtedly a core component of our national identity, enshrined in the Bill of Rights and an institution that Americans trust. The jury trial is designed to "find the truth." Evidence, tempered by rules aimed at reliability and tested by cross examination, is presented orally by witnesses with first-hand knowledge. Lawyers add to the courtroom drama with their opening and closing presentations. The judge serves as neutral arbiter with the real decision-making left to the experience and common sense of the lay jury. As Alexis de Tocqueville admiringly observed nearly two centuries ago, the American jury is one of the greatest expressions of democratic citizen participation in the administration of justice.[1] The jury also serves, at least in criminal cases, as a check on government power. America has a national fascination with trials, both real and fictional, as evidenced by their frequent portrayal in the news, movies, and literature.

Nevertheless, trials are becoming increasingly rare in America today. Historically, through the nineteenth and early twentieth centuries, approximately 25 percent of all cases resulted in a trial.[2] By 1938, less than 19 percent of federal civil cases ended in a trial.[3] By 1962, only 11.5 percent of federal civil cases were disposed of by trial (roughly half were jury trials and half bench trials)[4] and each federal judge presided over an average of 39 trials a year (split roughly equally between criminal and civil trials).[5] The decline accelerated notably in the mid-1980s and, by 2002, only 1.8 percent of federal civil cases resulted in a trial[6] and each sitting federal district court judge presided over an average of just 13 trials a year.[7] Even factoring in the notable increase in case filings, the absolute number of trials also is in steep decline, with the actual number of cases resulting in a trial declining 60 percent since the mid-1980s.[8] On the criminal side, the decline is similarly notable, although not quite as pronounced. In 1962, 15 percent of federal criminal cases resulted in a trial; by 2002, only 5 percent of federal criminal cases ended with a trial.[9] At the state level, the trend appears comparable. Indeed, Massachusetts court records show that in 1925, 3,022 civil cases, amounting to over ten percent of civil filings, reached a jury verdict in Massachusetts Superior Courts.[10] By 2005, the number of civil cases reaching a jury verdict in Massachusetts Superior Courts declined to 461, or two percent of all civil filings.[11] Similarly, in 1925, each Massachusetts Superior Court justice tried an average of 94 jury trials a year; in 2000, each justice presided over an average of seven jury trials a year.[12]

The steady decline in the number of cases going to trial raises several interesting questions. First, is the trial on the verge of extinction or does it remain a vibrant part of the system, albeit one used less often than it used to be? Second, why is there such a decline in the number of trials? And third, does it matter?

Robert P. Burns, a professor at Northwestern University School of Law and a scholar of the American trial sets out in his new book, *The Death of the American Trial*, not to establish necessarily that the trial is dead or to explain the reasons for its demise but rather to expound upon the dire ramifications the end of the jury trial has on the legal system and our broader democracy. To Professor Burns, the American jury trial is the ultimate form and expression of democracy and the death of the jury trial is a sign of the decline of American democracy. Citing the late federal Judge William L. Dwyer, Burns suggests that the jury trial is "the canary in the mineshaft of our democracy."[13] To Burns, the trial is at the core of our national character and a bulwark of our democracy and with the death of the trial, a fundamental part of our society disappears.

Professor Burns argues that not only is the jury trial the ultimate embodiment and expression of popular democracy, but the jury trial itself represents an almost platonic ideal essential to the central truth-seeking mission of the justice system. Burns devotes the first chapter of his book to discussing the ideal architecture of the trial. The oral presentation by witnesses and lawyers before the jury, with the drama of the ordeal, is, in Burns's view, the most effective means of obtaining the truth. Non-leading direct examination ensures that the testimony is the witness's and not the questioning lawyer's while testimony of first-hand perception is designed to maximize accuracy. The overlay of the rules of evidence is designed to ensure accuracy, reliability, and relevance of the evidence offered. Cross examination allows the jury to look through the bare narrative of direct examination and identify half-truths, manipulation or bias. Burns also tips his hat to the opening statement and closing argument, noting that openings allow each side to attempt to provide the moral appeal of its case consistent with common sense, set forth what is important about the case and how it should be resolved, while closing arguments appeal to the jury's ability to integrate and interpret the many facts laid out at trial.

Burns also idealizes that because the drama and formality of trial is so engrossing, the jury's decision is unlikely to be arbitrary. The jury, using its collective judgment and experience, is best able to determine what likely occurred, what understanding of those events invokes a more powerful norm, and which result is more consistent with our public identity. Further, according to Burns, the jury empanelled once to hear a specific matter is far better situated than a career judge to make these judgments.

1. Alexis de Tocqueville, *Democracy in America* 258-265 (Harvey C. Mansfield & Delba Winthrop, eds., University of Chicago Press 2000) (1835).
2. Robert P. Burns, The Death of the American Trial, 91 (2009),
3. Burns, *supra* note 2 at 91.
4. Burns, *supra* note 2 at 7.
5. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. Empirical Legal Studies 459-576 (Nov. 2004).
6. Burns, *supra* note 2 at 91.
7. Galanter, *supra* note 5 at 591.
8. Burns, *supra* note 2 at 91.
9. Galanter, *supra* note 5 at 570
10. Peter L. Murray, *The Disappearing Massachusetts Civil Jury Trial*, 89 Mass. L. Rev. 51, 53 (Fall 2004).
11. Task Force on the Vanishing Jury Trial, Boston Bar Association, "Jury Trial Trends in Massachusetts: The Need To Ensure Jury Trial Competency Among Practicing Attorneys as a Result of the Vanishing Jury Trial Phenomenon" Appendix Table 3, at 32 (2006).
12. Murray, *supra* note 10 at 55.
13. Robert P. Burns, The Death of the American Trial, 133 (2009).

The first question, not entirely answered by Professor Burns, is whether the American trial is in fact on its deathbed? Professor Burns clearly is of the view that the American jury trial is all but dead. Yet, Professor Burns does not establish in his book why the trial is dead other than to recite the statistics showing a long-term, steady decline in the number of jury trials. Perhaps, Burns would say that we have dipped below a threshold number of trials so that too few lawyers and citizens participate in them to allow them to serve their central function. Indeed, the Boston Bar Association published a well-known study in 2006 warning that the "vanishing" trial is leaving new generations of lawyers without the skills, confidence or acumen to try cases.[14] Trials, however, still take place. For example, some 500 jury trials still take place in Massachusetts Superior Courts each year, leading the Chief Justice of the Massachusetts Superior Court recently to state that "the trial is alive and well in the Superior Court."[15]

Moving on, and recognizing that while the jury trial may not be extinct, it is on the endangered species list, the next question is why is there a notable long-term decline in the number and percentage of cases that result in jury trials across the country. On the criminal side plea bargaining has exploded as a device for resolving cases. Burns notes that prosecutors and judges may be incentivized to allow broad plea bargaining (elected prosecutors so as to boost their statistics and judges by crushing case loads, the threat of reversal and the publicity of a trial-gone-wrong for elected state judges). The push towards ubiquitous plea bargaining is aided by modern and often draconian sentencing grids which encourage and allow the practice to thrive. On the civil side, anecdotal evidence would suggest that most cases today settle. Parties make calculated decisions on settlement, factoring in rough estimates on likelihood of adverse verdict, likely amount of any verdict, cost of pursuing a case through trial, and the like. Litigants may even be continually encouraged to settle by the presiding judge.[16] Professor Burns, however, refuses to accept that settlement serves as a calculated replacement of the civil jury trial. Instead, he asserts that the percentage of cases, at least in federal court, that settle has declined markedly in recent years.[17] To Burns, the explanation, if any, for the decline of the jury trial lies not in more settlements but rather in the rise of summary judgment and other judicial case management mechanisms designed to clear cases from the docket short of trial.

In Burns's view, in order to understand the trend and long-term shift from jury trial as a primary means of case resolution to judicial case management without trial, one must take a broad view and step back in history to the trial's English roots. In England, the jury is said to be as old as the English state itself. The early jury was "self-informing," meaning jurors were selected because they came from the locality in which the events at issue occurred and acted almost informally in assessing what had transpired and what should be done about it. By the late seventeenth century, the English jury, comprised largely of men of modest property holdings, reached its "heroic age" as a force in the defense of the "precious rights of Englishmen" amidst the significant political and constitutional struggles of that time. The Parliament that emerged after the English Revolution of 1688 strengthened the power of the jury and limited the countervailing ability of the judge to take matters from the jury. It was also firmly established that the jury could, without recourse to it, return a general verdict of acquittal in a criminal case, even if seemingly contrary to the evidence. As such, the jury was able to blunt royal power and its often harsh effects. The jury also was often viewed as able to act as "judge of the law," meaning not only could the jury decide the facts, it could also determine the law as it should be. Burns identifies these more radical strands of thought on the role of the jury as those that had the greatest appeal in the American colonies at the time of the American Revolution.

To understand the jury trial in America, Burns notes that while the role of the English jury, in principle, may have been admirable, trial procedure in England, particularly criminal procedure, at the start of the eighteenth century was "truly awful."[18] On the civil side, the law was largely undeveloped, parties themselves were barred from testifying, and the extremely technical written pleadings effectively reserved civil courts for the landed gentry and wealthy businessmen. It also did not help that the judiciary, which had much influence in the shape and conduct of the trial, was largely aristocratic. In the years before the American Revolution, however, a series of English reforms was initiated that led to the start of the modern adversarial system. Criminal defendants finally were permitted to see the indictment against them, retain counsel, and organize evidence in their defense. By 1836, defense lawyers were allowed, for the first time, to make opening statements (the prosecution always could) and by the end of the eighteenth century, they were permitted to engage in cross examination.[19] Only in 1898 were defendants in English courts allowed to testify under oath.[20]

In Burns's perhaps romantic view, the American colonies, free of the English feudal background and class system took the more "radical" pro-jury aspects of the English system and enhanced them in the crucible of the egalitarianism of the revolution as "the central instrument of governance."[21] Because of the relatively large American property-owning middle class, there was less of a fear that the centrality of the jury system could upset the social order as it threatened the ruling classes in England. During the days leading up to the American Revolution, the American jury also emerged as a leading bulwark against the perceived unfairness of English imperial law. Unable to fight unpopular laws in Parliament, the American jury was used to nullify English legislation. The Declaration of Independence included the denial of jury trial in its indictment against King George III. When the colonies turned to states, the right to jury trial was probably the only right universally secured by all of the respective state constitutions. While the federal constitution enshrines the criminal jury trial in Article Three, the lack of an express guarantee of a jury trial in civil cases was one of the principal reasons cited in

14. *See* Burns, *supra* note 2 at 7.

15. Massachusetts Lawyers Weekly, November 27, 2006.

16. For example, Local Rule 16.4 of the United States District Court for the District of Massachusetts requires the judge to inquire as to the status of settlement and offer assistance in achieving settlement at each case conference.

17. Robert P. Burns, The Death of the American Trial, 84 (2009).

18. Burns, *suprq* note 2, at 45.

19. Burns, *suprq* note 2, at 52.

20. Burns, *suprq* note 2, at 51.

21. Burns, *suprq* note 2, at 49-50 (quoting Stephen Landsman, "The Civil Jury in America: Scenes from an Unappreciated History," Hastings Law Journal 44 (1993), 592 who in turn was quoting William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change in Massachusetts Society, 1760-1830* (Athens: University of Georgia Press, 1994).

oppositions to the federal constitution by the anti-federalists.[22] In the end, the Seventh Amendment followed the states' lead and set forth the right to a jury trial in civil cases.[23]

During the early days of the Republic, the jury not only decided the facts, it also often determined the law under the theory that ordinary citizens were most able to discern natural law and substantive justice. Indeed, well into the nineteenth century, juries were expressly permitted to nullify the law.

While the jury trial and its role in young America in finding just law and deciding cases may have been, in Burns's view, close to ideal, the pendulum swung back in the latter half of the nineteenth century. The growth of the industrial and capitalist system gave rise to a tension between the need for stability and predictability in a rule-based law and the jury's right to do 'justice." Apparently, because juries reportedly tended, for example, to assess contracts on the basis of their inherent fairness rather than on the bargained-for terms contained therein, many came to view the jury as "a drag on the stability of the law." Between 1850 and 1930, with the growth of the elaborate doctrinal structure called "contract law" where there was little before, the need for predictability and certainty led to a changed approach. Burns also suggests that while the needs of finance capitalism in the second half of the nineteenth century fueled the change, the constitutional need to uphold the "pact with the devil" that was slavery before the Civil War also gave an impetus at the outset of this transformative era to make sure that juries, particularly in the north, would follow the law and not their own sense of morality. First, the New England supreme courts and then the United States Supreme Court in 1895 established that judges must instruct on the law and juries must follow it, even in criminal cases (although the general acquittal in criminal cases remains unreviewable even today).[24] Burns, quoting his fellow scholars, refers to this as the "progressive dethronement of the jury."[25] As this dethronement continued, and as the law became increasingly complex, procedures grew to allow judges, rather than juries, to decide cases. The demurrer, which was unavailable at the time of the American Revolution, gained acceptance as did the directed verdict and, eventually, summary judgment. Thus, the "shape of the trial reflected and shaped the enormous political and social change affecting the nation. Trials forged in the crucible of the egalitarianism of the revolutionary generation came slowly to be cabined."[26]

Summary judgment, enshrined in the 1938 promulgation of the Federal Rules of Civil Procedure, is a central culprit according to Burns in the decline of the American trial.[27] Summary judgment places in the judge's hands the critical jury function of assessing evidence and making sense of the story told and of those presenting it. It represents a triumph of "a kind of machine designed to decide the case by stamping the rule of law on an accurate version of the facts" over the practical sense determination of the jury.[28] Summary judgment dispositions have grown from four percent of cases in 1975 to almost eight percent in 2000.[29] In 1975, twice as many cases were resolved through trial as by summary judgment while in 2000, three times as many cases were resolved by summary judgment as by trial.[30] Burns cites a line of Supreme Court cases that paved the way for increased use of summary disposition.[31] While not cited by Burns, more recent Supreme Court decisions raising the Rule 8 bar for what is required to withstand a motion to dismiss challenge at the courthouse door, and analogous state court decisions, may prove to be another nail in the trial's coffin.[32] Burns discerns a powerful, albeit subtle systemic shift, enabled by the rules of civil procedure and court decisions interpreting them, whereby the goal of the judge's work is no longer to ready cases for trial. Instead, Burns explains, judges, whose interlocutory procedural rulings are largely insulated from review, are becoming litigation managers encouraged to dispose of cases (through pretrial dismissal, settlement, "muscle mediation" and the like).

Recognizing, however, that an increase in the percentage of cases disposed of through summary judgment does not alone explain the steep decline of the American trial, Burns goes on to review briefly several of the popularly advanced hypotheses for the decline, although he makes clear that his goal is less to explain the cause of the decline than to set forth the significance of the decline "for our legal order and what it tells us about our broader society."[33]

One theory for the decline is based on a rise in alternate dispute resolution ("ADR"), including, notably, arbitration. Burns, however, dispels this theory, stating that there is inadequate evidence to conclude that the growth in ADR is to blame for the decline of the trial.

Regarding crushing case loads, Burns raises, but largely dismisses the hypothesis that fewer cases go to trial because of a lack of resources. Looking at the federal system, Burns finds that judicial budgets are ever increasing. Burns also considers whether the risks and costs of trial have become too high. Burns finds this a reasonable explanation in certain realms, including securities litigation where threatened verdicts are high enough to make settlement inevitable and in criminal cases where modern sentencing guidelines place potential punishment sufficiently high that plea bargaining becomes the norm. Elsewhere, however, the suggestion that litigants avoid trial because of the costs and risks attendant thereto seems unpersuasive given that the majority of costs are incurred in litigation before trial and jury awards, except in a few notable cases, have not dramatically increased.

In the end, Burns is noncommittal about the cause of the decline of jury trial other than to focus on the shift in approach whereby decision-making is taken from the populist and emotional jury and entrusted to bureaucratic judges in the name of certainty and the "law of rules." The fact that Burns does not seek to understand clearly why the jury trial is in decline is problematic because without understanding why there is a decline, one cannot fully grasp the meaning of the decline or offer any meaningful suggestions to stem the tide.

22. Burns, *suprq* note 2, at 62.

23. Robert P. Burns, The Death of the American Trial, 62 (2009).

24. Burns, *suprq* note 2, at 68..

25. Burns, *suprq* note 2, at 60 (quoting A. W. B. Simpson, "The Horwitz Thesis and the History of Contracts," *University of Chicago Law Review* 46 (1979), 600 quoted in John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) , 216).

26. Burns, *suprq* note 2, at 63.

27. Burns, *suprq* note 2, at 91.

28. Burns, *suprq* note 2, at 91.

29. Robert P. Burns, The Death of the American Trial, 92 (2009).

30. Burns, *suprq* note 2, at 92.

31. Burns, *suprq* note 2, at 92.

32. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) (raising the Rule 8 bar and introducing the plausibility standard); *see also* Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008) (following and adopting *Twombly* at the Massachusetts state level).

33. Burns, *supra* note 2, at 3.

Understanding that the jury trial is vanishing, one might ask "who cares." To the Boston Bar Association and its Task Force on the Vanishing Jury Trial, the decline in the number of jury trials leaves new generations of lawyers unable to think on their feet and unequipped to conduct trials.[34] One might further ask what the loss is if jury trials are a thing of the past. That is, why care if practitioners no longer know how to do something that is not done any more, like writing with quill pens or technical pleading. Of course this view, while it has some logic, is not wholly satisfying because trial still is the endgame of litigation and litigators must be able to approach it with confidence lest they settle every case regardless of merits for fear of the alternative – trial. Burns astutely observes that the decline of the trial circularly fuels an atrophy of trial skills that in turn causes litigators to shy away from trial and simultaneously distorts settlement as lawyers become unable to evaluate the value of cases that never reach jury verdict.

To Burns, the greater loss in the demise of the trial is systemic. The disappearance of the trial would mark the end of the face-to-face encounter, which Burns views as essential to real democracy and the antidote to the spirit of abstraction and forgetfulness of the human dimension of legal questions that can be lost in piles of briefs and records churned out by 'law factories." The death of the trial also means an end to the dramatic oral presentation that is the trial and, in Burns' view, the best way to present and find the truth. The death of the trial also spells the end of the place where a citizen can tell his own story and be heard in a public forum of power. Similarly, it is the end of the public forum in which major questions of the day are addressed. Trials, Burns notes, whether of celebrity defendants or of the tobacco or gun industry, inspire more public debate about race relations or tort law than "hours of issues advertisement or scholarly articles." With cases resolved behind closed doors and often subject to secret settlements, that forum is gone.

Burns states that the elimination of the jury trial also adversely impacts large groups of "recently enfranchised," namely women and minorities, who only began serving on juries in significant numbers some forty years ago.[35] Burns notes that some have gone so far as to wonder whether the broadening of the jury pool to include a full cross-section of society may have fueled a sort of "white flight" that heightened attacks on the trial system altogether.[36]

The death of the trial eliminates the one forum that has traditionally been the place where the written and sometimes harshness of the written law was softened. The end of the jury trial removes the important "antidote" to bureaucratic modes of mechanically applying the rules regardless of context or consequence. It also eliminates one of the most direct forms of citizen participation in government—indeed, perhaps in no other place than the jury is power placed so directly in the hands of the citizenry -- and transfers that power to the elite body of judges and lawyers who resolve cases on the papers or by settlement. Burns closes by predicting that "[t]he death of the trial would create a more bureaucratized world." By using the conditional "would," perhaps Professor Burns is signaling that the trial is not dead yet. Or perhaps, like the canary in the coal mine, it is a thing of the past.

Burns's writing is dense and does not make for light reading. Much of the book seems written more for professors steeped in the theory of trial than for the ordinary reader generally interested in the subject. Conceptually, a key shortcoming of Burns's book is that he does not adequately explore, or reach any conclusion on the reasons why the American trial is in decline. Instead, he devotes his attention to discussing the dire consequences that befall American society and democracy when the jury trial vanished. This approach is limiting because an understanding of the causes of the decline of the jury trial would seem essential to an understanding the effect of that decline. Notwithstanding, however, Burns' book is provocative, well-written and worth reading, particularly for those with any interest in the intersection of law and democracy.

Matthew C. Baltay

34. *See,* Task Force report *supra* note 11 at 13, 15.

35. Burns, *supra* note 2,at 128.

36. Burns, *supra* note 2,at 118-19 (citing Paul D. Butler, *The Case for Trials: Considering the Intangibles,* Journal of Empirical Legal Studies 1 622-24 (2004).

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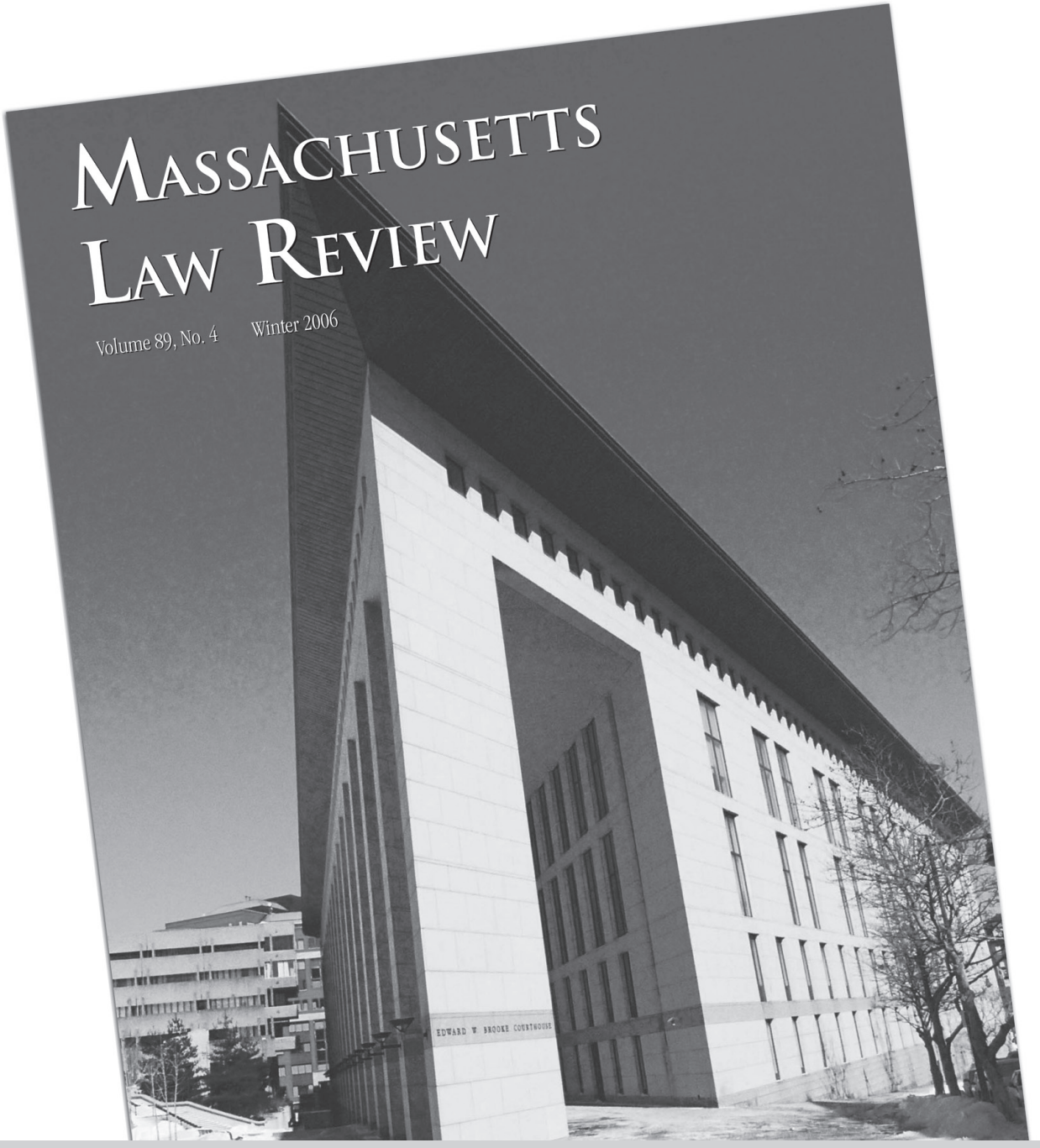

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