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Corrections

In The Knight Decision: The "2 Percent Floor" Applies to Trust in Vol. 10 #2, the third sentence in the first paragraph under Background Section 67 section has the “(1)” incorrectly placed. The sentence should read as follows: “Accordingly, miscellaneous itemized deductions include, but are not limited to, itemized deductions other than (1) interest deductions; (2) deductions for taxes; (3) certain casualty, theft and loss deductions; (4) charitable deductions; and (5) deductions for medical and dental expenses.”

Cover illustration by David Grotrian

Views expressed in Section Review do not necessarily reflect official positions of the Massachusetts Bar Association unless so stated. MBA positions are adopted by vote of the association’s House of Delegates or Executive Management Committee.
Is a plaintiff’s perception of discrimination sufficient for liability to attach?

By Sonia L. Skinner

The case law summarized below indicates that the answer to the question posed by the title of this article is, no. It should be noted that statutory protection is available to a plaintiff who alleges that his/her employer presumes him/her to be disabled. In all other cases, various courts have held that a plaintiff alleging discrimination must have evidence in addition to his or her subjective belief of the existence of discriminatory animus. The following is a summary of some of the cases that illustrate how courts have dealt with claims of discrimination buttressed solely by the plaintiff’s subjective belief.

In the cases that follow, none of the plaintiffs presented direct evidence of discrimination (a rather Herculean task); instead, they relied on circumstantial evidence to prove their respective cases. Plaintiffs relying on circumstantial evidence of discrimination must follow the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *McDonnell Douglas* provides that a plaintiff: (1) bears the burden of establishing a *prima facie* case of discrimination; (2) the burden of production then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action; and (3) once the defendant has met its burden, the presumption of discrimination disappears and the plaintiff must establish that the defendant’s asserted reason for the adverse action is not the real reason, but is a pretext for discrimination. *Clark v. Tisch*, No. 86 C 9527, 1991 WL 235235, 11 (N.D. Ill. Oct. 29, 1991) (internal citations omitted).

Race discrimination

In *Clark*, the plaintiff alleged that the postal service failed to promote him because he was African-American and over 40 years old. Mr. Clark alleged that his employer’s actions constituted violations of Title VII of the Civil Rights Act of 1964, 49 U.S.C. § 2000e, and the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 et seq. Clark had worked for the postal service for thirty two years and applied for the position of Regional Recruitment Specialist. He was interviewed but was not selected for the position. He believed that his previous experience as a recruiter qualified him for the position. He concluded that since he had worked in recruiting for 10 years unlike the other candidates, the only reason he was not recommended for the job was either his race, his age or both. *Clark*, 1991 WL 235235, at 3. The trial court directed that “[t]he factual inquiry in a race discrimination case is whether the defendant intentionally discriminated against the plaintiff. That is to say, did the defendant in this case intentionally treat Clark less favorably than the other candidates because of his race?” *Id.* at 12. The parties agreed to a bench trial.

During the bench trial, Clark testified that at the time of the interview, he did not feel he was the victim of discrimination. *Id.* at 6. Members of the review committee testified that an applicant’s performance on the interview was very important and that it was rated 95 percent of the committee’s determination. *Id.* at 4. Three members of the review committee made the following contemporaneous notations about Clark’s interview performance: “[H]e seemed to have little idea as to how to set up a regional program”; “[P]lanning to handle a region job may not be real strong”; and, “[N]eeds to do more work in expansion of answers to overall issues, i.e. career paths, reorganization.” *Id.* at 5. Additionally, the position was determined to be “much broader in scope” than the position Clark held previously and was a management level position. *Id.* In contrast, the committee members were unanimous in testifying that the successful candidate gave strong, comprehensive answers to all their questions. *Id.* at 6.
Civil Litigation

After hearing all the testimony, the court concluded in its Findings of Fact and Conclusions of Law that “[Mr.] Clark failed to obtain the job because he performed poorly at his interview, failing to convince the committee members that he possessed the managerial skills and organizational vision they were looking for in this new position.” Id. at 12. The court did not assign much weight to Clark’s perception of discrimination: “... even a perception of race discrimination, no matter how widespread ... does not mean that racial discrimination actually occurred in the case of plaintiff Clark.” Id. at 9.

In Austin v. Progressive RSC, Inc., 265 Fed.Appx. 836 (11th Cir. 2008), Monticello Austin sued his employer, alleging that it discriminated against him on the basis of his race when it failed to promote him to the position of client server operations analyst III (“CSOA”). He filed suit alleging claims of discrimination under 42 U.S.C. § 1981 and the Florida Civil Rights Act, Fla. Stat. Ann. §§ 760.01–760.11. Austin alleged that when he was hired for the CSOA II position, he was told that he would be promoted to a CSOA III position within a year. He concluded that Progressive’s failure to promote him, coupled with his being the only African-American in his unit, proved that his race was a determining factor in that decision. The court allowed Progressive’s motion for summary judgment, after which Austin filed a timely notice of appeal.

Austin had the burden of “establish[ing] a prima facie case of discriminatory failure to promote by showing that: (1) he is a member of a protected class; (2) he was qualified and applied for the promotion; (3) he was rejected despite his qualifications; and (4) other equally or less qualified employees who were not members of the protected class were promoted.” Id. at 844 (quoting Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1089 (11th Cir. 2004)).

The parties did not dispute that a promotion from CSOA II to CSOA III required an employee to demonstrate to the satisfaction of his or her manager consistent performance of level III work in the course of daily duties.” Id. at 838. Austin testified that his technical knowledge was a level III or IV “because he believed it,” but he could not give any specific examples. Id. at 841. He also testified that he had a “gut feeling” that Progressive had failed to promote him due to race discrimination, though he lacked specific proof. Id. The defendant proffered evidence that Austin was not qualified for the CSOA III position. Javier Vinces, Austin’s manager, testified that though Austin’s performance evaluations indicated that he meet expectations, he had not consistently met core objectives. Id. at 840. Vinces also testified that Austin’s transfer to another facility was cancelled because he lacked the ability to support the facility on his own. Id. Additionally, the summary judgment record showed that “from 1998 through the time Austin filed his claims [2005], no employee at Riverview [the site where Austin worked] had been designated CSOA III.” Id. at 839. Progressive asserted that Austin had failed to establish that he was qualified for the position or that similarly situated employees had been promoted to that position. In affirming the grant of summary judgment, the appellate court concluded, “the only evidence presented by Austin to demonstrate that he was qualified for promotion consisted of his own opinion, which is insufficient without more.” Id. at 845.

Gender discrimination

In Cody v. Gold Kist, Inc., 276 Fed. Appx ’906, (11th Cir. 2008), the plaintiffs, four current employees of the defendant, filed suit against it, alleging gender discrimination in violation of Title VII, 42 U.S.C. § 2000e et seq. The plaintiffs alleged failure to promote and disparate pay claims against Gold Kist. The plaintiffs’ claims arose out of findings compiled in a task force report released by Gold Kist. The report reviewed and compiled the problems identified by Gold Kist employees, the potential causes of these problems and recommended solutions. The plaintiffs argued at trial that the report constituted conclusive proof of discrimination. Gold Kist moved for summary judgment, which was granted. The trial court concluded that the report was not conclusive proof of discrimination but instead constituted circumstantial evidence of discrimination which could be used to support plaintiffs’ individual claims under the McDonnell Douglas framework. The plaintiffs filed a timely appeal.

The Eleventh Circuit, after reviewing the trial testimony, observed that the plaintiffs did not rebut Gold Kist’s assertion that “[t]he task force’s findings were a list of problems identified by employees, their potential causes, recommended solutions and a timetable for implementing those solutions.” Id. at 907. It affirmed the trial court’s grant of the defendant’s summary judgment motion because it concluded that “the [r]eport does not rise to the level of an admission of discrimination; rather, it constitutes evidence of employee perceptions of gender-related problems.” Id.

Reverse race discrimination

In Lawrence v. Univ. of Tex. Med. Branch at Galveston, 163 F.3d 309 (5th Cir. 1999), the plaintiff, Kathy Lawrence, a Caucasian, sued her employer, alleging that she was not promoted due to reverse discrimination. Lawrence was a nurse in the Radiology Department and had held that position for several years. The Radiology Department expanded and a position was created for a nursing supervisor. Lawrence applied for the position and was interviewed, but was not selected. Since Lawrence felt entitled to the position, she filed a grievance and requested, but did not receive, a hearing. She then filed suit in state court alleging breach of contract, intentional infliction of emotional distress, due process violations and employment discrimination. Once her employer removed the action to federal court, she
amended her complaint to allege race discrimination pursuant to 42 U.S.C. §§ 1981, 1983 and 2000d. The defendant responded that Lawrence was not offered the nursing supervisor position because she was not the most qualified candidate. The court granted the defense motion for summary judgment, after which Lawrence appealed.

The Fifth Circuit Court of Appeals observed “[i]n this employment discrimination case our focus is on whether a genuine issue exists regarding whether the defendant intentionally discriminated against the plaintiff. It is therefore necessary for Lawrence to present evidence — not just speculation and conjecture — that the defendants discriminated against her on the basis of her race.” Lawrence, 163 F.3d at 312. After reviewing the record, the court concluded that Lawrence had failed to raise a genuine issue of fact that the defendant’s proffered reason for its action was pretext. Id. at 313. The court provided perspective when it opined “… Lawrence’s subjective belief that she was not selected for the new nursing supervisor position based upon race or age is … insufficient to create an inference of the defendants’ discriminatory intent. Indeed, ‘a subjective belief of discrimination, however genuine, [may not] be the basis of judicial relief.” Id. (quoting Elliott v. Group Med. & Surgical Serv., 714 F.2d 556, 567 (5th Cir. 1983)).

Disability discrimination

In Davis v. Sailormen, Inc., 281 Fed. Appx 958 (11th Cir. 2008), Danita Davis sued Sailormen Inc., a franchisee of Popeyes, under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, et seq., alleging that because one of its managers regarded her as disabled, she was denied a job. Davis applied for the position of cook at the Merritt Island Popeyes. At birth, Davis’ right hand did not have a thumb and her right arm is shorter and smaller than her left arm. During the interview for the cook position, Davis alleged that the manager stated that he was unsure whether he could hire her because she did not think she could handle the lifting component of the position. Davis did not get the job. “To prevail on a perception theory of disability discrimination, [Ms.] Davis must show: ‘(1) that the perceived disability involves a major life activity; and (2) that the perceived disability is substantially limiting and significant.” Id. at 960 (quoting Rossbach v. City of Miami, 371 F.3d 1354, 1360 (11th Cir. 2004)). Major life activities are “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” 29 C.F.R. § 1630.2(i). Sailormen Inc. moved for summary judgment and the motion was granted.

On appeal, the Eleventh Circuit understood but rejected Davis’ contentions stating that even if the tasks associated with the cook position of maneuvering, scrubbing, heavy lifting, etc., are considered major life activities; at the time [the interviewer] made the comment, he was referring to the tasks associated with the cook job for which Davis had applied and not with her ability to perform these tasks in daily life. Davis, 281 Fed Appx at 960. The court determined that Ms. Davis failed to meet her burden of showing that the defendant considered her “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes” Id. at 960, see 29 C.F.R. § 1630.2(j)(3)(i) and affirmed the trial court’s ruling.

Age discrimination

In Elliott v. Group Med. & Surgical Serv., 714 F.2d 556 (5th Cir. 1983), the plaintiffs, six former employees over the age of 40, sued their former employer, alleging that it had discriminated against them on the basis of their age when it terminated their employment under the guise of a management reorganization and replaced each of them with younger employees. The plaintiffs filed suit under the ADEA. The defendant countered that the plaintiffs, all executives, were discharged due to a corporate reorganization that was designed to increase management efficiency. At trial, the jury returned a verdict in favor of the plaintiffs. The defendant appealed.

On appeal, the Fifth Circuit acknowledged “[i]n age discrimination cases the relevant inquiry is whether the plaintiff has produced evidence from which a trier of fact might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.” Id. at 562. In reviewing the sufficiency of the plaintiffs’ proof, the court noted that in discrimination cases, “the plaintiff retains the burden of persuasion on the whole case.” Id. at 564 (quoting Tex. Dept of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981)). The defendant contended that the evidence was insufficient to support the jury verdict.

After reviewing the evidence and testimony, the appellate court concluded “we have recognized that generalized testimony by an employee regarding his subjective belief that his discharge was the result of age discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate nondiscriminatory reason for his discharge.” See Houser v. Sears, Roebuck & Co., 627 F.2d 756 (5th Cir. 1980). The appellate court acknowledged “when [each plaintiff] was questioned directly concerning the company’s stated reasons for his dismissal, none seriously disputed either his awareness of or the objective truth of the company’s stated ground of dissatisfaction with him, maintaining only that it was inadequate to warrant his termination.” Elliott, 714 F.2d at 566 (emphasis in original). In light of the plaintiffs’ trial testimony, the appellate court reversed the jury verdict and remanded the matter for entry of judgment consistent with its findings.

Discrimination due to erroneous presumption of plaintiff’s membership in protected class

In Butler v. Potter, 345 F.Supp.2d 844 (E.D. Tenn. 2004), the plaintiff, Jesse Butler, a Caucasian male, filed a complaint with the EEOC against the postmaster general of the U.S. Postal Service, alleging that he was the victim of national origin and sex discrimination. Butler alleged that, as a mail carrier, he was not selected for certain positions that became
available during his recovery from heart surgery, though he admits that the employees selected had more seniority. He further alleges that when he returned to work, he requested a truck or light duty as an accommodation to his continued recovery and instead was given the most difficult route. Butler alleged that his employer perceived him to be of either Arabic or Indian descent. He filed a second complaint in which he alleged race discrimination under Title VII, 42 U.S.C. § 2000e, retaliation, disability discrimination and a failure to accommodate his disability under the Rehabilitation Act, 29 U.S.C. § 791. “In order to prove a prima facie case of disability discrimination, the plaintiff must show that he is disabled, that is, that he (1) had a physical or mental impairment which substantially limits one or more major life activities, (2) had a record of such impairment, or (3) was regarded as having such an impairment.” Id. at 852 (quoting Timm v. Wright State Univ., 375 F.3d 418, 423 (6th Cir. 2004)). Butler alleged that he suffered from a major depressive disorder that affected certain major life activities, including his ability to concentrate on his job. He also alleged that his employer perceived him to be disabled. The postmaster general moved for summary judgment on all of Butler’s claims. The court granted summary judgment on the disability claim because the postmaster general did not perceive him to be disabled, as required under the Rehabilitation Act. Id. at 852.

When ruling on Butler’s race discrimination claim, the court observed: “Title VII protects those persons that belong to a protected class … and says nothing about protection of persons who are perceived to belong to a protected class.” Id. at 850 (emphasis in original) (internal citation omitted). The court granted the defendant’s motion for summary judgment on the claims of perceived race or national origin and observed “[n]either party has cited any controlling authority which would permit a claim for perceived race and/or national origin discrimination and this Court is unaware of any such precedent.” Id.

Butler’s final claim was for retaliatory harassment, alleging that his employer discriminated against him after he filed complaints with the Equal Employment Opportunity Commission. As a plaintiff alleging retaliatory harassment, Butler had the burden to prove “(1) that he engaged in activity protected by Title VII; (2) that the exercise of protected rights was known to the defendant; (3) that the defendant thereafter took adverse employment action against the plaintiff; or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. Id. at 853 (quoting Akers v. Alvey, 338 F.3d 491, 497 (6th Cir. 2003)). The court refused to dismiss Butler’s retaliatory harassment claim because while the defendant asserted that he could not make out a prima facie case, it failed to proffer a legitimate non-discriminatory reason for its actions.

Conclusion

The results summarized in the foregoing cases illustrate that plaintiffs who file discrimination claims should support their presumption of discrimination with objective facts and subsequently establish a fact issue that the defendant’s proffered reason for the adverse employment action is a pretext for discrimination. A putative plaintiff’s subjective opinion may be heartfelt, but will not suffice. The Fifth Circuit Court of Appeals encapsulated the prevailing opinion about a discrimination plaintiff’s presumptions when it declared that “a subjective belief of discrimination, however genuine, [may not] be the basis of judicial relief.” Lawrence, 163 F.3d at 313 (quoting Elliott, 714 F.2d at 567).

It should be noted that the foregoing rulings have implications outside of the employment arena as discrimination claims arise in many contexts, including housing, education and air travel.
Companies that do business with the federal government operate in an ever-intensifying regulatory and enforcement environment. The temperature is about to be turned up again with the onset of a new Federal Acquisition Regulation ("FAR") that will add an "integrity reporting" requirement. Federal contractors and subcontractors will be expressly mandated to timely disclose to their government contracting officers any known violation of federal law relating to their contracts. Failure to so disclose could be cause for suspension or debarment. This impending new rule follows closely on the heels of FAR requirements that took effect at the end of 2007 requiring contractors and subcontractors working on federal projects of sufficient size and duration to implement compliance and ethics programs within their organizations.

Of course, determining whether or not a violation of law has actually occurred — and therefore whether a disclosure obligation exists — is easier said than done. It is therefore imperative for contractors doing business with the federal government, to commence internal investigations that are thorough, independent and protected by the attorney-client privilege immediately upon becoming aware of an allegation of internal wrongdoing. Equally as important for all federal contractors — indeed, for all but the smallest businesses, of any kind — is to put in place effective internal compliance programs that detect and deter violations of law.

I. FAR rules for contractor codes of business ethics and conduct

Recently approved Federal Acquisition Regulations, made effective on Dec. 24, 2007, require contractors and subcontractors performing certain federal contracts to:
(i) have a written code of business ethics and conduct;
(ii) provide a copy of said code to each employee;
(iii) institute an accompanying compliance training program; and
(iv) display anti-fraud hotline posters in common work areas and worksites.

See FAR 52.203-13 and FAR 52.203-14.

These business integrity measures are mandatory for government contracts that exceed $5 million and have periods of 120 days or more.

A. Elements of new proposed rule

Following the earlier DOJ recommendation, the councils published FAR Case 2007-006 “Contractor Compliance Program and Integrity Reporting” in the Federal Register on Nov. 14, 2007. See 73 Fed. Reg. 28407. The “compliance program” part of the rule would require contractors to establish and maintain internal controls to detect and prevent fraud in connection with the award or performance of government contracts or subcontracts. The "integrity reporting" part of the rule would impose a mandatory disclosure requirement on government contractors and subcontractors who become aware of violations of federal criminal law. The mandatory disclosure requirement is necessary, according to the DOJ, because few companies voluntarily report suspected instances of federal criminal violations relating to contracts or subcontracts. See 72 Fed. Reg. 64020.

To implement the DOJ request, the councils proposed modifying FAR Subpart 9.4 (governing the grounds for debarment or suspension of government contractors) to include, as punishable offenses, “knowing failure to timely disclose” either (i) an overpayment on a government contract or (ii) a violation of federal criminal law in connection with the award or performance of a contract or subcontract. See 72 Fed. Reg. 64022. The councils also proposed inserting the following clause into the (recently enacted) Code of Business Ethics requirement at FAR Subpart 52.203-13: “The Contractor shall notify, in writing, the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal law ....” See 72 Fed. Reg. 64022 (emphasis added).

This does not mean that it is required or advisable for a contractor to report every alleged violation of law that comes to its attention to the government. On the contrary, for a contractor to responsibly determine whether or not it has "reasonable grounds to believe" that a violation of law has actually occurred, it must exercise due diligence and internally investigate the facts and circumstances of the alleged events at hand, and to seek legal advice as to whether the most likely set of facts form a reasonable basis to believe a violation of law occurred. Ideally, contractors should utilize outside counsel both to lead the internal investigation — to ensure independence, thoroughness, and protection of the attorney-client privilege at least until the time a disclosure decision is made — and, of course, to furnish the legal advice.

But just as it is important for contractors not to succumb to skittishness or governmental pressure and disclose every allegation of wrongdoing, it is critical that contractors not ignore violations of law that could be occurring in their own organizations, or to turn a blind eye to fraud or other wrongdoing in their midst. Implementing robust internal controls and compliance programs — programs that are even more robust, in most cases, than the minimum Code of Business Ethics elements set forth in the FAR — is cost-effective insurance against the type of cor-
porate inattention that can allow internal wrongdoing to fester and grow.

B. Even violations of the civil false claims act may be subject to mandatory disclosure

On May 16, 2008, the councils published public comments and suggested changes to the first proposed rule in the Federal Register.2 See 73 Fed. Reg. 28407. Among the recommendations, the DOJ proposed to increase the scope and stringency of the mandatory reporting requirement by requiring contractors to report violations of the civil False Claims Act (31 U.S.C. 3729-3733) in addition to criminal violations. See id. The proposal would make knowing failure to report such civil violations a cause for debarment or suspension under FAR Subpart 9.4. See 73 Fed. Reg. 28408.

As with the proposed FAR rule about mandatory reporting of criminal violations, “evidence of knowing failure [by contractors] to timely disclose civil False Claims Act violations in connection with government contracts” could result in debarment or suspension from government work pursuant to FAR Subpart 9.4. See 73 Fed. Reg. 28409. And as with the proposed rule about criminal violations, FAR Subpart 52.203-13 would be modified to require contractors to notify the OIG and the government contracting officer whenever contractors have reasonable grounds to believe a civil violation has occurred. See id. The review standard would be by preponderance of evidence of a knowing failure to report. See id.

On November 12, 2008, the Federal Register published the final “integrity reporting” rule, and made it effective December 12, 2008. One noteworthy revision from the language of the proposed rule: the much-criticized “reasonable grounds to believe” standard triggering the disclosure obligation was changed to a “credible evidence” standard instead. The disclosure applies to all federal contracts, not just those exceeding $5 million and 120 days in duration. In sum, the final rule requires any federal contractor or subcontractor to disclose to the relevant federal agency’s Office of Inspector General credible evidence of (a) federal criminal law violations involving fraud, conflict of interest, bribery or gratuities; (b) violations of the civil False Claims Act; or (c) significant overpayment on the contract.

III. Conclusion

Criminalizing federal contractors’ failure to disclose violations of criminal and even civil laws ratchets up an already intensive enforcement apparatus for those who do business with the federal government. Some contractors may thus shy away from federal work altogether, and some may be inclined against their better judgment to report every allegation of wrongdoing to the government. Neither is a wise approach. Instead, contractors can both honestly prosper in their federal work and faithfully execute all of their duties under their federal contracts — especially these forthcoming disclosure duties — by implementing an effective compliance program and exercising the judgment to promptly commence a through, independent and attorney-client privileged internal investigation upon becoming aware of an allegation of wrongdoing.

End notes

1. The FAR defines a “commercial item” as “any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than for governmental purposes, and (i) has been sold, leased or licensed to the general public; or, (ii) has been offered for sale, lease, or license to the general public.” FAR 2.101.

2. FAR Case 2007-006 now officially contains “2nd Proposed Rule” in its title. Note that only new proposed changes were republished in the May 16, 2008, Federal Register
On Dec. 10, 2007, the Massachusetts Supreme Judicial court handed down a decision that, in a single brushstroke, significantly expanded the scope of a physician’s duty beyond the traditional obligation towards his or her patient. In *Coombes v. Florio*, 450 Mass. 182 (2007), a deeply divided Court held that a physician owes a duty of reasonable care to everyone foreseeably put at risk by the physician’s failure to warn of the side effects of his or her treatment of a patient. Although the majority decision, authored by Justice Roderick L. Ireland, with Justices Francis X. Spina and Judith A. Cowin joining, is striking in its expansion of the scope of a physician’s duty, the various dissenting opinions are equally notable for the depth of divisions expressed by the Court. This article examines the majority and dissenting opinions, and the case’s likely impact on medical malpractice litigation and health care delivery by Massachusetts physicians.

**Background**

The facts that give rise to the *Coombes* case are tragic. On March 22, 2002, 9-year-old Kevin Coombes was struck and killed by an automobile when the driver, David Sacca, lost consciousness while behind the wheel. The cause of the accident was never determined. At the time of the accident, Sacca was 75 years old and had been diagnosed with a number of medical conditions, including asbestosis, chronic bronchitis, emphysema, high blood pressure and metastatic lung cancer that had spread to his lymph nodes. He was under the care of multiple specialists. Dr. Roland Florio was Sacca’s primary care physician and was responsible for coordinating all of the medications prescribed to Sacca.

The medications that Sacca was taking at the time of the accident include Oxycodone, Zarxolyn, Predinsone, Flomax, Potassium, Paxil, Oxazepam and Furosemide. Florio failed to warn Sacca that these drugs carried potential side effects including drowsiness, dizziness, light-headedness, fainting, altered consciousness and sedation. He further failed to warn Sacca not to drive a motor vehicle while taking these medications. Prior to the accident, Sacca did not report any of the aforementioned side effects to Florio and did not report any trouble operating an automobile.

The plaintiff brought a lawsuit alleging that Florio negligently failed to warn Sacca of the known potential side effects of the medications prescribed to him, and failed to warn him not to drive, which ultimately resulted in the death of Coombes. The trial court granted summary judgment in favor of Florio on the grounds that there was no doctor-patient relationship between Florio and Coombes, and thus Florio owed Coombes no duty. The plaintiff appealed and the Supreme Judicial Court took the case on its own motion. The trial court granted summary judgment in favor of Florio on the grounds that there was no doctor-patient relationship between Florio and Coombes, and thus Florio owed Coombes no duty. The plaintiff appealed and the Supreme Judicial Court took the case on its own motion.
judgment, concluding that a duty could be found between Florio and Coombes, and remanded the case to the trial court for further proceedings.

The majority opinion (Ireland, with Spina and Cowin joining)

The Court began its decision by clarifying the nature of plaintiff's claim. Noting the lack of a physician-patient relationship between Florio and Coombes, the Court observed that plaintiff is unable to bring a medical malpractice claim. Instead, the claim proceeds under ordinary principles of negligence. Under general principles of tort law, the linchpin of a negligence claim is the presence of a duty flowing from the defendant to plaintiff. A duty may be found when the risk of harm is recognizable or foreseeable to the actor. The Court determined that there is a foreseeable risk of an automobile accident caused by driving under the influence of prescription medication with side effects that cause diminishment of a patient's mental capacity. By this reasoning, the Court found that the physician defendant "owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." Coombes at 187 (quoting Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (1976)). Consequently, in the majority opinion, the Court held that the physician owes a duty of reasonable care to everyone foreseeably put at risk by his failure to warn of the side effects of his treatment of a patient.

The Court furthermore specifically declined to limit liability for a doctor's duty to warn to situations where the drugs in question were used in the presence of the physician, as other jurisdictions have done. See, e.g., Cheeks v. Dorsey, 846 So.2d 1169, 1173 (Fla.Dist.Ct.App. 2003); Lester v. Hall, 126 N.M. 404, 406-407 (1998). The rationale behind the reluctance to keep the scope of liability narrow is that the burden involved is not heavy. The Court reasoned that the duty to third parties does not require anything further than what would satisfy the duty that the physician already owes to his or her patient under existing Massachusetts tort law. Cottam v. CVS Pharmacy, 436 Mass. 316 (2002), an informed consent case, sets out a physician's duty to provide appropriate warnings about side effects when prescribing medication. Furthermore, the physician's duty does not extend to third parties with respect to decisions regarding which medication to prescribe.

Acknowledging a concern that its decision could negatively impact rates for medical malpractice insurance, as well as the number of statutes enacted by the Legislature that limit the liability of physicians in order to keep malpractice insurance rates down, the Court left to the Legislature the task of determining whether to impose further limits on the scope of a doctor's liability.

The dissenting opinions (Greaney, concurring in part, dissenting in part; Marshall dissenting; Cordy dissenting)

Justice John M. Greaney concurred in part and dissent ed in part, finding that when a physician has knowledge of a danger that may be posed to others by a patient's decision to operate a motor vehicle under the influence of a prescribed medication and fails to warn the patient of the risks involved, the imposition of a limited liability to others is appropriate, in the interests of preventing the tragedy that occurred in the Coombes case from happening again. Greaney does, however, take issue with the "extraordinary" creation of a precautionary duty previously unknown in common law, and one which goes beyond the relief requested in the case.

Greaney's dissent is based upon a disagreement with the majority's conclusion that the proffered relief is based upon principles of ordinary negligence, rather than settled medical malpractice law. He observes that this outcome leads to the imposition of a sweeping legal duty of care on the part of physicians to virtually everyone who may come in contact with one of his or her patients. He particularly takes issue with the equation by the majority of the prescribing of medications to "unreasonably dangerous" conduct, similar to the reckless storage of firearms, which creates a general affirmative duty of care to others. Greaney suggests that such a stance intrudes upon the traditional physician-patient relationship. He finds that a physician should not, in ordinary circumstances, be held legally responsible for the safety of others, on the highway or elsewhere, based on medical treatment afforded a patient.

Greaney does find that a physician has a duty to warn the patient of potentially dangerous side effects of a medication. The duty arises, however, solely within the context of the physician-patient relationship, and is owed strictly to the patient. Nevertheless, the violation of that duty, within the framework of the standard of care principles of medical malpractice law, may, in certain circumstances, result in liability in negligence to others who are foreseeably injured as a direct result of the violation.

Chief Justice Margaret H. Marshall offers a particularly assertive dissent to the majority opinion, and also disagrees with Greaney's more nuanced take. Marshall holds the line regarding the expansion of a physician's duty, and takes the position that the Superior Court properly granted summary judgment on the grounds that Florio owed no duty to the decedent.

In particular, Marshall disagrees with the majority's assertion that Cottam imposes a blanket duty to warn a patient of the adverse side effects of medication. Noting that Cottam was an informed consent case, Marshall underscores the language of the opinion that leaves to the physician the decision to warn their patients on occasions when they find it to be necessary and relevant. Rather than offering a strict rule to warn as a matter of course, the Cottam decision defers to the physician's reasoned judgment on whether a warning is necessary. By reconfiguring the Cottam decision in this fashion, Marshall suggests that the majority is interfering with the physician-patient relationship, with deleterious results. She states, "The physician's concern for a patient's ability to assess information about needed and appropriate treatment would be forced to compete with concern for an amorphous, but widespread, group of third parties whom a jury might one day
determine to be ‘foreseeable’ plaintiffs.” Coombes at 203.

Cordy’s dissent echoes that of Marshall. Cordy acknowledges that the Court has, under limited circumstances, recognized a duty where an unreasonably dangerous condition involves the foreseeable negligent conduct of an intermediary. He disagrees that such a situation is presented when a physician prescribes a medication for a patient. He distinguishes the normal scenario involving an inherently dangerous situation, one requiring a stock warning, and the process of communication involved in the physician-patient relationship, in which the patient is the sole focus and the advantages and risks of a particular treatment are discussed and weighed. Cordy expresses concern that a doctor’s advice and judgment will be greatly affected by the majority holding, raising the specter that the patient will now simply be handed a printout of all possible side effects and be asked to read and sign as a substitute for a discussion more tailored to the physician’s judgment about the patient’s particular situation and needs.

Cordy cites other policy concerns as well. He states, “it is hard to imagine a plaintiff’s attorney failing in negligence cases to sue not just the negligent party who caused the injury but also his or her doctor,” increasing costs and threatening the confidentiality of the treatment records called into question by the third party. Coombes at 212.

Analysis

The Coombes decision does not change the scope of the physician’s duty to the patient vis-à-vis informed consent discussions prior to prescribing medications. What it does change is the scope of persons that physicians are liable to as a result of the physician’s interactions with his or her patients. Under previous Massachusetts law, third parties such as Coombes were not included in the potential scope of a physician’s liability because there was no physician-patient relationship. This decision expands that scope to include third parties injured as a result of a physician’s failure to warn a patient not to drive while impairing medications.

The Cottam decision, prominently discussed by the Court, focuses on the information a patient is entitled to with respect to prescription medications and includes reference to a physician’s judgment in that regard. Ireland quotes language directly from the Cottam opinion, underscoring that physicians are obligated to inform patients of side effects they deem “necessary and relevant” for patients to know in making an informed decision. Coombes at 188 (quoting Cottam v. CVS Pharmacy at 321). In the Coombes case, it is unrebutted that Florio failed to issue a warning against driving immediately prior to the events in question. Whether a warning was necessary and relevant, however, is the question that remains at issue. At trial, expert testimony will be needed to address this question. With respect to the determination of liability, the Coombes case will proceed in Superior Court like any other medical malpractice case, with an inquiry as to whether the standard of care required such a warning.

In terms of medical malpractice law, the basic tenets regarding the standard that physicians are held to are undisturbed. In addition to the obligations set out in Cottam as discussed by the Court, a physician has, and continues to have, a duty to his or her patient to comply with the standard of care expected of the average physician practicing in that specialty at the time and under the circumstances. See, e.g., Brune v. Belinkoff, 354 Mass. 102 (1968). A physician also owes his or her patient the duty to disclose all significant medical information that is material to an informed decision by the patient on whether to proceed with the proposed treatment. See, e.g., Precourt v. Frederick, 395 Mass. 689 (1985); Harnish v. Children’s Hosp. Med. Ctr., 387 Mass. 152, 155 (1982). Accordingly, the duty that a physician owes to his or her patient remains unchanged.

An important question is whether the majority opinion’s language about side effects involving mental impairment will create a de facto standard of care regarding warnings on those side effects in connection with driving. Ireland states in his opinion, “When the side effects in question include drowsiness, dizziness, fainting or other side effects that could diminish a patient’s mental capacity, this warning serves to protect the patient from, for example, the foreseeable risk of an automobile accident.” Coombes at 188. From a liability standpoint, physicians prescribing medications with the aforementioned side effects would be prudent to keep in mind their obligation to provide a warning about driving, if they find it to be necessary and relevant for the patient. The same considerations require a careful documentation of the advice and instruction rendered.

There will likely be some increase in the number of cases filed against physicians as a result of the Coombes decision. Physicians may become unwilling participants in automobile accidents as parties undertake discovery to determine whether the influence of prescription medication was a factor in causing the accident. If so, the Legislature will need to step in with protective legislation in order to avoid an increase in malpractice insurance rates and an exodus of physicians from the commonwealth.

Conclusion

It remains to be seen what the outcome of the Coombes case will be in Superior Court. Time will also tell whether there is an appreciable increase in the cases being filed on behalf of third parties against physicians. In the mean time, physicians should be counseled against practicing defensive medicine as a result of this decision, because the nature of their duty to patients with regard to prescribing medications remains unchanged.
Lawyers May Now Cite Unpublished Appeals Court Decisions for Their Persuasive Value

By Stephanie J. Mandell

While preparing an appellate brief, have you ever researched Massachusetts case law and found a decision that would support your position, only to realize that it is an unpublished opinion issued pursuant to Rule 1:28? Until recently, the long-standing policy of the Massachusetts Appeals Court prevented practitioners from citing unpublished decisions in their appellate briefs. However, in *Chace v. Curran*, 71 Mass. App. Ct. 258, appeal denied, 451 Mass. 1103 (2008), the Appeals Court modified its policy so that practitioners may now cite Rule 1:28 summary decisions issued after Feb. 25, 2008 (the date of the *Chace* opinion) for persuasive value, but not as binding precedent. The Appeals Court's departure from its longstanding policy aligns Massachusetts with several states and the federal judiciary in allowing the citation of unpublished decisions in appellate briefs. The new policy will benefit appellate practitioners and parties by allowing them to draw the panel's attention to an unpublished opinion which is analogous to their own situation.

The history of Rule 1:28

When the Appeals Court was created in 1972 as an intermediate appellate court, it consisted of six judges and every decision of the court was published. As the number of appeals increased (doubling from 439 appeals in the 1974 court year to 876 appeals in the 1975 session), so too did the burden on the court and the pressure to decide appeals in a timely manner. To address this increasing number of appeals, the Appeals Court adopted Rule 1:28 in 1975. The Supreme Judicial Court approved Rule 1:28 pursuant to its authority under Mass. Gen. Laws ch. 211A, § 13, which allows the Appeals Court to adopt rules regulating its practices and procedures, subject to the approval of the SJC.

Rule 1:28 established a summary disposition procedure which permitted the Appeals Court to expeditiously dispose of civil appeals without oral argument and without filing a detailed written opinion, so long as the appeal presented no substantial question of law. In a 1976 decision, the SJC explained and affirmed the appropriateness of the Appeals Court's summary disposition procedure in the face of objections from both the Massachusetts Bar Association and the Boston Bar Association concerning the propriety of affirming trial court decisions without oral argument. See *Sabatinelli v. Travelers Ins. Co.*, 369 Mass. 674 (1976).

Since 1975, Rule 1:28 has been amended three times. The first amendment in 1978 authorized the use of Rule 1:28 to reverse or modify, rather than just affirm, trial court decisions in civil cases. The 1978 amendment also expanded the scope of cases appropriate for summary disposition by authorizing its use not only where there is no substantial question of law presented, but also where "some clear error of law has been committed which has injuriously affected the substantial rights of an appellant." These changes increased the Appeals Court's efficiency as a greater number of civil cases could be resolved through the Rule 1:28 summary disposition procedure.

The next two amendments, in 1980 and 1998 respectively, broadened the reach of Rule 1:28 to include criminal appeals. The 1980 amendment authorized the court to dispose of criminal cases summarily in unpublished opinions, however not without first allowing oral argument. The 1998 amendment eliminated the need for oral argument in criminal cases, thus allowing the court to treat civil and criminal appeals equally.
In its present form, Mass. R. App. P. 1:28 provides:

At any time following the filing of the appendix (or the filing of the original record) and the briefs of the parties on any appeal in accordance with the applicable provisions of Rules 14(b), 18 and 19 of the Massachusetts Rules of Appellate Procedure, a panel of the justices of this court may determine that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant and may, by its written order, affirm, modify or reverse the action of the court below. The panel need not provide an opportunity for oral argument before disposing of cases under this rule. Any order entered under this rule shall be subject to the provisions of Rules 27 and 27.1 of the Massachusetts Rules of Appellate Procedure.

Rule 1:28 decisions are generally less detailed — ranging from one sentence to a few paragraphs or pages — because they are authored for the direct benefit of the parties rather than for public consumption. The purpose of Rule 1:28 continues to be the disposition of appeals that do not contain novel issues of law by way of a short memorandum or decision, thus allowing judges to devote greater time and energy to cases that pose more difficult legal questions.

Prior policy against citing unpublished decisions

In a 1985 decision, the Appeals Court established the policy that its unpublished decisions were not to be relied upon or cited as authority in unrelated cases. See Lyons v. Labor Relations Commn., 19 Mass. App. Ct. 562, 566 n.7 (1985). The court’s reasoning at the time included: (1) summary decisions may not fully disclose case facts or the panel’s rationale for the decision; (2) unlike published opinions, the entire court did not consider summary decisions; and (3) the practice of permitting the citation of unpublished decisions as precedent in unrelated cases had not been adopted by several federal circuit courts. See id. The Lyons decision effectively banned practitioners from citing unpublished opinions in their appellate arguments, even where an unpublished opinion was on point. Over the next two decades, on numerous occasions, the Appeals Court acknowledged this policy in discussing certain appellate arguments that cited an unpublished decision as the supporting authority.

Citation of unpublished decisions permissible as of Feb. 25, 2008

The Appeals Court modified its longstanding prohibition against citing unpublished decisions in footnote 4 of Chace v. Curran, 71 Mass. App. Ct. 258, rev. denied, 451 Mass. 1103 (2008). In doing so, the Appeals Court noted that Rule 1:28 decisions “have become far more widely available and now routinely appear in the results of electronic research.” This fact provided “[the] opportunity to announce a modification of the prohibition set out in Lyons.” Id. at 260, n.4. Although the Appeals Court acknowledged the continued existence of many circumstances that supported the old policy, the court determined that any issues raised by these circumstances could be dealt with effectively by allowing citation of the decisions for their persuasive value only. Id. What does this mean? Binding precedent is “[p]recedent that the court must follow,” while persuasive precedent is “[p]recedent that a court may either follow or reject, but that is entitled to respect and careful consideration.”

The Appeals Court will now carefully consider such unpublished decisions issued on or after Feb. 25, 2008, but has discretion about whether to follow the analysis of those opinions. A practitioner citing Rule 1:28 decisions must include the full text of the decision in the addendum to his or her brief.

Differences between published and unpublished decisions

There are three differences between the Appeals Court’s published and unpublished opinions: the manner in which they are reviewed and edited by the court, their availability as a research tool to practitioners, and, until now, the court’s policy prohibiting the citation of its unpublished decisions in appellate briefs.

1. Review and edit procedures

After the filing of briefs, every appeal is screened for a determination as to whether the case requires oral argument and is assigned to a panel of three judges. Those cases that do not require oral argument are decided by the panel solely on the briefs and the record appendix. For both argument and non-argument cases, one judge of the panel is randomly assigned to write the decision for the appeal. After reviewing the submitted material (and hearing oral argument where one is scheduled), the panel will discuss the case and agree on the result, the reasoning and whether the decision should be published.

If, in their deliberations, the panel determines that the appeal presents no substantial question of law, then the panel may decide to issue an unpublished decision pursuant to Rule 1:28. The judge assigned to author the decision will prepare a draft 1:28 memorandum and circulate it to the other two panel members for comments and approval. The draft memorandum then continues through the court’s internal editing process, in which a law clerk, staff attorney, staff editor and secretary assist the authoring judge in polishing it. The final decision is entitled “Memorandum and Order pursuant to Rule 1:28,” and is not signed by the authoring judge. The decision is mailed to the parties, and the reporter of decisions publishes a daily list of cases decided under Rule 1:28; the list includes the name of each case, the Appeals Court docket number and the actual disposition (e.g., “judgment affirmed” or “judgment vacated”), but not the text of the decision.

By contrast, if the panel determines after deliberation that there is a reason to publish the decision, then it goes through a full-court review process. After the authoring judge circulates the draft opinion to the panel members and it is approved
by them, the authoring judge circulates the draft opinion to each member of the court for review and comment. The panel addresses the comments and suggestions of its colleagues before forwarding the draft through the court's internal editing process, as described above. Published opinions identify the author and are sent to the Office of the Reporter of Decisions to be prepared for publication with head notes, tables of cases, and indexes. The final opinion is published in the official bound volumes of the Massachusetts Appeals Court Reports and online at Office of Reporter of Decisions, www.massreports.com. The Appeals Court does not send copies of the decision to the parties, but rather gives them telephonic notice on the morning that the decision issues. For a two-week period of time, slip opinions for all published opinions can be downloaded free of charge from Office of Reporter of Decisions, www.massreports.com.

2. Access to published and unpublished decisions

Published opinions may be found in various print and online search engines, including the official version of the Massachusetts Appeals Court Reports and the Northeastern Reporter, as well as the Web sites of the Reporter of Decisions, Lexis, Westlaw, Massachusetts Lawyer’s Weekly and the Massachusetts Bar Association. Unpublished opinions have historically not been as easy to locate. This has been changing, however. Now the public has access to many Rule 1:28 decisions through free online databases, Westlaw, Lexis and the official Reporter of Decisions. As of May 29, 2008, all of the Appeals Court’s Rule 1:28 decisions since Feb. 25, 2008, are posted at Office of Reporter of Decisions, www.massreports.com.

Survey of the national landscape

Appellate courts in numerous states, in addition to Massachusetts, have recently revisited their unpublished citation policies. While it is difficult to obtain data on the policies of individual states (as some states have relevant court rules, while others rely on statutes or case law on the subject), this author compiled data through a combination of Internet research, reviewing rules and statutes and placing telephone calls to the courts in certain states. There is no obvious trend. It appears that 30 states, plus the District of Columbia, forbid citation to unpublished opinions in unrelated cases. Twenty states, including Massachusetts, allow citation of unpublished opinions either as binding precedent or for their persuasive value. Five states have conflicting practices. Where the trend will go is difficult to predict. For example, in December, 2007, the Arkansas Supreme Court rejected a proposed amendment that would have allowed citation to unpublished opinions as precedent. However, in April, 2008, Hawaii amended its Rules of Appellate Procedure to permit citation for persuasive value (effective July 1, 2008).

While states vary in their approach to this issue, the federal courts clearly allow citation of unpublished decisions. In 2006, the U.S. Supreme Court adopted Rule 32.1 of the Federal Rules of Appellate Procedure, which permits citation of unpublished federal judicial opinions that were issued on or after Jan. 1, 2007. That rule provides, in relevant part, that “[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like . . .” if those decisions were issued after Jan. 1, 2007. Fed. R. App. P. 32.1. Unless the unpublished opinion is available in a publicly accessible electronic database, the party must file and serve a copy of that opinion on the court and all parties. Expanding upon the federal rule, the U.S. Court of Appeals for the First Circuit issued its own local rule, permitting citation to unpublished dispositions of its court regardless of the date of issuance. See 1st Cir. R. 32.1.0.

Conclusion

On the same day that the Appeals Court issued the Chace decision, it submitted a request to the SJC Rules Committee for an amendment to Rule 1:28 or to Appellate Rule 16 (g). The proposed amendment details the official steps to be followed when citing unpublished opinions and requires that copies of those opinions be appended to the addendum of appellate briefs. For now, unpublished decisions from the Appeals Court issued after Feb. 25, 2008, may be cited for persuasive value in appellate briefs filed in the Appeals Court. Whether unpublished decisions can be cited in briefs submitted to the SJC remains to be determined. Practitioners having an opinion on this issue or other appellate issues should express that opinion by contacting the MBA Appellate Court Bench-Bar Committee through the MBA’s Web site.

End notes

3. See also Mass. Gen. Laws ch. 211A, § 9 (as inserted by St. 1972, ch. 740, § 1) which states: “In the determination of causes, all decisions of the appeals court shall be given in writing, except as otherwise provided herein, and the grounds for each decision shall be stated and filed in the cause in which rendered. The court may, in appropriate cases, enter a proper order, direction, judgment or decree for the further disposition of a case without stating the reasons therefore, or may cause a rescript containing a brief statement of the grounds and reasons for the decision, to be filed therein. Opinions and rescripts of the appeals court shall be published by the reporter of decisions.”
5. This same year, in 1978, the Appeals Court expanded to 10 judges. See Mass. Gen. Laws ch. 211A, § 1, amended by St. 1978, ch. 478, § 104.
8. However, the court also identified other federal circuits that permitted citation of unpublished decisions, even if disfavored
or limited to certain circumstances.


11. Pursuant to Mass. Gen. Laws ch. 211A, § 1 and Mass. Gen. Laws ch. 211A, § 16 the court currently consists of twenty five statutory judges (a chief justice and twenty-four associate justices) and several retired appellate justices who have been “recalled” to serve as justices of the Appeals Court.


14. States expressly permitting citation as precedent: Delaware, Ohio and Utah.

15. States with rules or case law that expressly or implicitly permit citation for persuasive value: Alaska, Connecticut, Georgia, Hawaii, Iowa, Kansas, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Tennessee, Texas, Vermont and Virginia.

16. Florida (unwritten decision from another court may not be cited; party may cite unpublished decisions of the same court, although not precedent, and the court may consider it), Kentucky (unpublished opinions not to be used as binding precedent, but unpublished decisions of the appellate court may be cited for consideration if there is no published opinion on point), North Carolina (citation specifically disfavored, but permitted if no published opinion would serve as well), Oklahoma (may not be cited in unrelated civil cases, but may be cited in criminal cases when no published opinion would serve as well), Texas (may not be cited in criminal cases, but may be cited in civil cases although no precedential value).

Chapter 93A and Post-Employment Conduct

By Marc C. Laredo and Lisa J. Cooney

It is well established, under Manning v. Zuckerman, 388 Mass. 8, 12-14 (1983), that Massachusetts General Laws Chapter 93A, the Massachusetts Unfair and Deceptive Trade Practices Act, generally does not apply to disputes between employers and employees or among members of the same legal entity. The law in Massachusetts is far less clear, however, as to whether and when a Chapter 93A claim will survive when it concerns conduct or events that occur after the employment relationship has ended, particularly when that conduct involves anti-competitive conduct by a former employee and/or that employee's new employer.

This article provides an overview of Manning v. Zuckerman and discusses the various employment-related contexts under which the “Manning Rule” applies. It then focuses on whether and when Chapter 93A claims are sustainable both by and against former employees (and their new employers), when the objectionable conduct occurs after the termination of the employment relationship. Finally, the article highlights the lack of, and need for, clear appellate authority in this area.

Background of Manning v. Zuckerman

A threshold requirement to asserting a Chapter 93A claim is proof of unfair or deceptive acts or practices occurring in “trade or commerce.” Mass. Gen. Laws ch. 93A, § 1. In Manning v. Zuckerman, 388 Mass. 8, 12-14 (1983), the Supreme Judicial Court held that Chapter 93A does not cover disputes between employers and employees that arise out of the employment relationship, reasoning that such claims are essentially private in nature and employers and employees are not engaged in trade or commerce with each other. Similarly, the Court held, employment agreements between the employee and the company do not constitute trade or commerce.


Consistent with the reasoning set forth in Manning, Chapter 93A claims have generally failed even when the conduct that forms the basis of the claim occurred before the employment relationship was actually established. See Sargent v. Ternaska, 914 F. Supp. 722, 731-32 (D. Mass. 1996), aff’d on other grounds, 108 F.3d 5 (1st Cir. 1997); Whelan v. Intergraph Corp., 889 F. Supp. 15, 20-21 (D. Mass. 1995)

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(plaintiff did not state cause of action for violation of Chapter 93A based on statements made during recruitment process; DeAngelis v. Weston Assoc. Mgmt. Co., 2008 WL 1799966, at *4 (Mass. Super. April 7, 2008) (intentional misrepresentation concerning compensation during hiring process arose out of an employment relationship, precluding Chapter 93A claim against employer);*Farrington v. DeAngelis,* 2000 WL 1273868 (Mass. Super. April 14, 2000). The inquiry, noted the *Sargent* court, is not when the alleged misconduct took place, but, taken as a whole, whether the allegations arose out of the employment relationship or contract. *Sargent,* 914 F. Supp. at 732. The *DeAngelis* court also found germane to the analysis that the employee did not suffer any damages as a result of the pre-employment misrepresentation until he refused other employment opportunities and the defendants refused to pay him the promised compensation, both of which occurred after the employment relationship had been established. *DeAngelis,* 2008 WL 1799966, at *4. However, in *Brown v. Cloverleaf,* 1998 WL 1247998 (Mass. Super. July 27, 1998), the court denied a motion to dismiss the plaintiff's Chapter 93A claim which was based on conduct, in addition to breaching promise to hire plaintiff, that caused plaintiff to close his business, turn over his client list and sell his equipment at below market value.

**Applying Chapter 93A to post-employment conduct**

**Claims by and against the former employee**

Consistent with the reasoning set forth above, employees generally have not had much success in suing their former employers under Chapter 93A for claims that arise when the plaintiff was technically no longer employed, but still directly relate to actions taken during the employment relationship. For example, in *Peadery v. Metabyte Corp.,* 866 F. Supp. 39, 41 (D. Mass 1994), the plaintiff sued his former employer when it refused, after he was no longer employed, to pay him a bonus provided for in his employment contract. The employee included a Chapter 93A claim, arguing that he was no longer an employee when he was denied the bonus and, thus, the *Manning* Rule did not apply. *Id.* at 44. The Court disagreed and dismissed the Chapter 93A count, noting that the claim for the bonus rested “on the very Agreement” that created the employment relationship and stressing that *Manning* does require that the employment relationship be ongoing for the “bar” to apply. *Id.; see also Sargent,* 914 F. Supp. at 732 (awarding summary judgment on Chapter 93A claim based on post-employment failure to tender the plaintiff financial interests provided for in his employment contract).

The more difficult question arises when the claim involves a former employee’s “post-employment” use of the employer’s trade secrets or solicitation of the company's customers, often at the behest of, and for the benefit of, the new employer. The Massachusetts Appeals Court has issued two somewhat contradictory decisions involving claims by employers against former employees grounded in this scenario. In *Peggy Lawton Kitchens Inc. v. Hogan,* 18 Mass. App. Ct. 937, 940 (1984) (rescript), the court ruled that plaintiffs were entitled to bring a Chapter 93A claim against a former employee who stole a secret recipe and used it in forming a competing business. Distinguishing *Manning,* the court held that the conduct did not arise out of the employment relationship because the defendant was no longer employed when he misappropriated the confidential information and no post-employment agreement had been signed. *Id.* In *Informix v. Rennell,* 41 Mass. App. Ct. 161, 163 (1996), however, the court reached a different result, ruling that Chapter 93A did not apply where the employee engaged in post-employment conduct that violated a non-competition agreement executed as part of the employment relationship. *See also Professional Staffing Group, Inc. v. Champigny,* 2004 WL 3120093 (Mass. Super. Nov. 18, 2004) (discussing conflict between *Peggy Lawton Kitchens* and *Informix*).

In the decade since *Informix,* there have been no Massachusetts appellate decisions directly addressing this issue and, as a result, employers and employees have little guidance as to whether Chapter 93A applies to these types of “post-employment” claims. The Superior Court decisions on this topic demonstrate this uncertainty. In some cases, Chapter 93A claims arising out of the alleged violation of contractual post-employment restrictive covenants have been dismissed. *Harvard Translations, Inc. v. Heuberger,* 1999 WL 967569 (Mass. Super. Sept. 9, 1999) (disclosure of trade secrets); *Burgess v. McLaughlin Transp. Sys., Inc.,* 1998 WL 374914 (Mass. Super. June 10, 1998) (solicitation of employer's customers). In other cases, similar claims have survived. In *The Descartes Sys. Group, Inc. v. Celarix, Inc.,* 2001 WL 721493 (Mass. Super. June 20, 2001), the court allowed the Chapter 93A claim to proceed, because the evidence showed that the employee did not improperly acquire the company's trade secrets until after his employment had ended. See *Id.* at *2 n.4 (noting, however, that a Chapter 93A claim based on the employee's use of trade secrets obtained during employment would fail); *see also Cambridge Internet Solutions, Inc. v. The Avicon Group,* 1999 WL 1959673 (Mass. Super. Sept. 21, 1999) (noting former employee's breach of fiduciary duty may cause him to incur Chapter 93A liability).

Two other Superior Court decisions have allowed Chapter 93A claims to proceed against the former employee based on the argument that the employee, while engaging in the unlawful competitive conduct, was acting not solely as an employee, but as an agent of the employee's “soon-to-be” new employer. *JRB Medical Associates v. Moran,* 2008 WL 2121002, at *1 (Mass. Super. May 1, 2008), involved allegations that two of the plaintiff's former employees misappropriated trade secrets for the benefit of their new employer. Noting that the *Manning* Rule does not “immunize a former employee from all c. 93A claims brought by his former employer,” the court divided the defendants' misconduct into two categories. *Id.* at *2. First, the defen-
dants misused the plaintiff’s confidential information obtained during their employment, which, the court stated, was based on the employment relationship and was barred by Chapter 93A. See Oceanair, Inc. v. Katzman, 2002 WL 532475 (Mass. Super. Jan. 22, 2002); Intertek Testing Servs. NA, Inc. v. Curtis-Strauss LLC, 2000 WL 1473126 (Mass. Super. Aug. 8, 2000); see also Co-worx Staffing, supra (determining Chapter 93A did not apply to claim that new employer induced former employee to violate non-compete); William Gallagher Assoc. Ins. Brokers, Inc. v. Everts, 2001 WL 1334763 (Mass. Super. Sept. 6, 2001) (granting summary judgment on Chapter 93A claims against former employee and new employer).

However, other cases have indicated that a Chapter 93A claim against the new employer in this context could be appropriate. See Acorida Northeast, Inc. v. Academic Risk Resources & Ins., LLC, 2005 WL 704870 (Mass. Super. Jan. 5, 2005) (noting in a footnote that the new employer’s conduct in “moving in” to take over the plaintiff’s business in the face of non-solicitation covenants “smacks of unfairness” and would support Chapter 93A claim); Junker v. Enes, No. 00-2098C (Mass. Super. Sept. 5, 2002) (ruling Chapter 93A applied to dispute between former and current employers, because it arose between two discrete business entities). Further, in Network Systems Architects Corp. v. Dimitruk, 2007 WL 4442349 (Mass. Super. Dec. 6, 2007), the court, relying on Peggy Lawton Kitchens, refused to dismiss a Chapter 93A claim asserted against the new employer on the misappropriation of the plaintiff’s trade secrets, noting that the claim did not arise from any employment relationship, even though the defendant had the opportunity to acquire the plaintiff’s trade secrets as a result of the employee’s access to those secrets during his employment.

Conclusion

While Chapter 93A generally does not apply to actions arising out of the essence of the employment relationship, the potential for a viable Chapter 93A claim increases when the conduct involves post-employment conduct or anti-competitive behavior. Compelling arguments can be made both for and against the applicability of Chapter 93A in these circumstances. On one hand, an argument could be made that stealing trade secrets or engaging in anti-competitive behavior is the type of conduct that Chapter 93A was designed to address, especially if it occurs outside the confines of a single entity. On the other hand, one could argue that, at least in this scenario, the unfair act or practice would not have taken place but for the underlying (and prior) employment relationship. What is clear is that the lack of recent appellate court decisions addressing these issues has led to inconsistent results in the Superior Court. Further appellate guidance in this area would certainly be welcome and helpful for employers, employees and practitioners.

End notes


Limited guardianships are perhaps the least understood and least used form of guardianship. When most people, lawyers and laymen alike, think of guardianship, they envision a person appointed to take care of an individual's person and/or their estate. Once appointed, the guardian of the person is given the power to control almost all decisions an individual can and must make in daily life. Similarly, a guardian of the estate is given full control over the individual's finances and daily spending. Because a guardianship is the imposition of an involuntary court-appointed decision-maker, there should be a nexus between the capacity of the ward and those rights which are transferred to the guardian as a result of a court decree with the ultimate policy of maximizing the feasible personal liberties of the ward. This is a limited guardianship.

In order to protect an individual's autonomy, there are several avenues which should be explored prior to the issuance of even a limited guardianship. There are many circumstances where the individual's critical needs can be met or substantial harm to a person's person or property avoided through a variety of protective arrangements and supplemental support service without the need for court intervention. These alternative best preserve an individual's rights. Prior to seeking court assistance, consideration should be given to utilizing health care proxies, durable powers of attorney representative payees, trust accounts and state and local community services for elders and persons with disabilities including social, rehabilitative, protective, homecare, personal, food and transportation services, as well as health insurance and legal advisors (various information clearing houses such as www.MassHomeCare.org, www.800AgeInfo.com and the Office of Elder Affairs or Client Assistance Program — both found at www.mass.gov — are helpful starting points).

Where such alternatives do not adequately assist or protect the individual, a guardianship may be necessary. At this stage, it must be borne in mind that a person who is placed under guardianship of their person and estate (sometimes referred to as a “plenary guardianship”) is stripped of a multitude of rights. This includes the right to make a multitude of daily life choices such as decisions relating to shelter/residence, ownership or management of real estate, the continuation and operation of a business, voting stock, making educational elections, legal issues such as entering into a contract or filing, pursuing or compromising a legal claim, determining inheritance issues, retaining counsel, dealing with finances, the right to travel, and decisions regarding medical care and/or treatment options including end of life decisions. Because of the potential to impinge upon these individual's liberties, a guardianship should not be one size fits all. Simply because a person is incapacitated in one area of his or her life should not mean that he or she is likewise incapacitated in all others. Not only is there a loss of liberty involved in appointing a guardian, but there is a stigma associated with a judicial finding of incompetence, particularly when the term “mentally ill” is applied. A guardianship may be sought for one who is determined to be mentally ill, mentally retarded or physically incapacitated. Although most would agree these are overly-broad categories which should be tailored even further, they do at a minimum recognize that there are different types of disabilities. This recognition must be expanded, not only to allow for other, less stigmatizing categories, but to appreciate that various disabilities differently affect an individual's ability to meaningfully participate in certain human rights decisions.

The limited guardianship is an alternative avenue of providing protection to those who need some assistance but are capable of managing certain areas of their lives. It recognizes and appreciates that individuals with disabilities have different abilities in different areas of life. By restricting the powers given to a guardian, the limited guardianship promotes self-determination.
and autonomy by tailoring the guardianship to allow the retention of rights and decision-making authorities not reposed in the guardian.

Unlike other state statutes, in Massachusetts, our statutes authorizing the appointment of a permanent guardian, namely Mass. Gen. Laws c. 201, §6. 6A, 6B, do not explicitly require, prefer or even expressly authorize the use of limited guardianship. See appendix for a review of other state statutes. Nevertheless, in the seminal case of Guardianship of Bassett, 7 Mass.App.Ct. S6 (1979), the judge having found the proposed ward competent to handle “some but not all of his personal and financial affairs,” ordered a “guardianship plan” be filed which included “a statement of the particular needs, disabilities, and development potential of the ward.” Id. at 60-61. This case made clear that a probate court judge may exercise “powers to appoint a guardian for limited purposes and with specified responsibilities,” Id. at 67, for someone who is found to be “partially incompetent.” Id. at 64. n.9.

Contrast to our permanent guardianship statutes our statute authorizing the appointment of a temporary guardian. Mass. Gen. Law c.201, §14(a) as amended in 1977, requires a temporary guardianship order or decree to “indicate the nature of the emergency requiring such appointment and the particular harm sought to be avoided, and shall state that the temporary guardian so appointed is only authorized to take such actions with regard to the ward as are reasonably necessary to avoid the occurrence of that harm.” (emphasis added). The protection afforded by this provision is the requirement that the court take the least restrictive approach to achieve its goal of protecting the welfare of an individual. Failure to do so may result in the temporary decree being vacated. New England Merchants National Bank v. Spillane, 14 Mass.App.Ct. 685, 690 (1982). Despite the case law and the express directive of our temporary guardianship statute, there is still a failure from the bench and bar to issue tailored or limited guardianship decrees. The simple fact is that plenary temporary and permanent guardianships are ordered routinely despite the fact that the ward retains the capacity to exercise certain basic rights. There are a variety of reasons for this.

There are several presumptions and misconceptions which support the preference for plenary guardianships over limited ones, even when a limited guardianship is arguably more appropriate. A perceived impediment to the full utilization of limited guardianships is the concern that by limiting the powers of the guardian, there is no increase need for court intervention by a guardian who is required to access the court in order to expand his or her authority as the ward’s abilities diminish. In cases where a rapid decline in faculties is anticipated, a limited guardianship may only create a financial and emotional burden on the ward and be an inefficient use of judicial resources. However, this is not true for the many incapacitating conditions and disabilities which are fairly stable or progress slowly. Those individuals under guardianship for the basis of mental retardation may be under a guardianship for the majority of their life with little to no change in their cognitive functioning. Likewise, certain diseases may progress quite slowly over years without further decline. For those severe, chronic disabilities resulting in substantial limitations in self-care, receptive and expressive language, mobility, self-direction or those with a continuous need for individually planned and coordinated services, limited guardianships are not appropriate. For all others it should be a primary consideration.

Another common concern is that a limited guardianship will spawn unnecessary litigation over the exact scope of a guardian’s authority, thereby requiring the guardian to return to court to clarify his powers. This may be particularly true in regards to guardianship over the person’s estate. In this day and age of businesses fearful of liability, a guardian acting in an appropriate, authorized capacity may be stymied in their efforts to fulfill their duties due to a lack of understanding of the guardian’s authority. A valid concern is that the person under guardianship will incur emotional stress from additional court proceedings as well as unnecessary costs and fees associated with the resolution of such misunderstandings. The latter concern is magnified where the guardian is not a family member, but rather, a professional entitled to charge for his or her time.

The answer to this perceived barrier is to craft clear and unambiguous decrees which leave little room for doubt as to the authority of the guardian and the rights retained by the ward. The guardian, ward and all third parties who must rely upon the order should be able to understand and interpret the decree without question. The bench and bar must work together to mitigate the problem by producing guardianship decrees which clearly delineate the limitations on the authority of the guardian or, in the alternative, the decree could specify the areas of decision making retained by the ward. Depending on how a limited guardianship decree is tailored, it could be argued that the powers withheld from a guardian in a limited decree are not automatically reposed in the ward. Therefore, the decree must be conspicuous. For instance, it would be fairly innocuous to expressly reserve in a guardianship decree the ward’s right to vote. The retention of this right made explicit in the guardianship decree would serve to rebut the presumption created by our laws that one under guardianship has lost such rights without impeding the guardian’s duties in the least. See M.G.L. c.51, §51 (voter eligibility requires the voter is “not a person under guardianship”); Guardianship of Hurley, 394 Mass. 554 (1985) (discussing the limited nature of the ward’s guardianship such that he had the ability to, and therefore was entitled to register to vote).

The Probate Court judge’s ability to enter tailored, limited decrees is directly dependent upon the information they are provided by the practitioners. Likewise, the practitioner’s presentation of information will necessarily depend upon the results of the medical evaluation of the individual. Therefore, it is incumbent upon the clinicians providing the medical certificate or the clinical team report to provide an accurate and specific diagnosis. This is es-
sentential. The clinician’s statements not only provide the court with an understanding of the cause of the individual’s problems, but they clarify whether such condition is temporary or permanent, the length of time the condition has existed, and most importantly, and whether the condition can be treated or the effects mitigated with treatment, such as medication, or whether the condition is expected to worsen over time.

In addition to this information, the judge must be provided with information on the individual’s cognitive abilities in such areas as attention, memory, comprehension, reasoning and planning. There should be a specific focus on the person’s ability to receive and evaluate information and make decisions based thereon. Ultimately, the judge needs to be provided with thorough information on the individual’s cognitive and functional strengths and weaknesses which affect their ability to remain in their current situation or environment. Conclusory statements should be avoided, and rather, the evidence supporting the basis for the conclusion or recommendations should be provided to the judge with illustrations. For example, stating that the ward has “limited understanding of finances” does not tell the judge much about the ward’s abilities. Instead, it would be more helpful to the court to say, “The ward understands the concepts of money and purchasing but not investing or saving. She can go grocery shopping by herself but is easily susceptible of being taken advantage. She would give money to anyone who told her they could make her a lot of money if she just gave them a few thousand dollars.” Where it is often difficult to obtain even a clinician’s general and conclusory statements, the need for a statement which clearly differentiates between those things an individual can and cannot do, clearly described for the court, will be an obstacle towards obtaining limited guardianships. To avoid this dilemma, the practitioner or the court system will need to provide the clinician with a checklist or a fill-in-the-blank form to facilitate such statements. Nevertheless, the burden of obtaining such clear clinician statements should not outweigh the individual’s right to retain the right to make decisions of which they are clearly capable.

In addition to the judges being provided with comprehensive evaluations regarding an individual’s abilities, and until a limited guardianship decree is promulgated, it would help the judge to be provided with a proposed limited guardianship decree. While Practice XXXIII, Standards for Computer Generated Forms permits the court to reject any form which fails to comply with the standards of the practice rule, it is likely that the court will accept an alteration of the official court form provided such alterations are made clear on the face of the decree by use of underlining, italicization and/or bolding of the font. The judge must be aware that what is being offered as a standardized form has actually been altered and the judge must expressly accept such alterations.

Finally, serious consideration must be given to implementing periodic review of all guardianships as occurs in other states, such as Connecticut and Pennsylvania. “The goal of effective guardianship is to be able to restore the rights of the individual who, for whatever reason, has had some of them removed by a court after due process. It is true that in many instances, once a guardianship has been initiated by a court, it is in place until the incapacitated person dies. However, an annual review and assessment will monitor the need for maintaining or terminating a guardianship and alert the court to a potential restoration of some or all of the incapacitated person’s rights.” National Guardianship Association. www.guardianship.org/pdf/guardianshipConservatorship.pdf (October, 2007).

Conclusion

The traditional judicial concern of protecting the welfare of a ward must be balanced with the ward’s right to make decisions for themselves and the role of the courts in that decision-making process. A limited guardianship recognizes that a person retains the capacity to make some basic life decisions but not others. The benign purpose of our guardianship statutes can be effectively accomplished without trenching on the individual’s liberties such that a person can be assisted in their life without losing their dignity and self-determination. While the retention of rights by a ward post-decree should be dependent upon the ward’s actual capacity, rather than the attorney representing the petitioner or the individual probate judge hearing the case, until limited guardianships are a mandatory consideration, this will be the case.

The theoretical concepts of a limited guardianship, balanced against the practical realities of a fiduciary fulfilling his or her duties, still support the use of a limited guardianship in many cases. A limited guardianship should be the first choice because convenience and cost-effectiveness should not trump an individual’s decision-making rights. Our courts are empowered to tailor the guardian’s authority to the specific needs of the ward. Attorneys and judges not only have the authority but a duty to specifically consider an individual’s capacity and to respect their abilities by crafting tailored limited guardianship decrees where appropriate.

End notes

1. As a practitioner’s note, where a limited guardianship is in place and the court is asked to clarify the guardian’s authority, a specific finding by the court should be made as to the ward’s ability to make a certain decision.
GUARDIANSHIP PROVISIONS IN THE (MASSACHUSETTS) UNIFORM PROBATE CODE

by Timothy D. Sullivan

This article was first presented at the Nov. 15, 2008 Annual Guardianship Conference presented by the Advanced Legal Studies Department at Suffolk Law School.

This article will review some of the changes to be implemented if the proposed Massachusetts version of the Uniform Probate Code is passed. In many cases, these changes can be implemented by the Probate and Family Court under existing law. Most of the changes are a natural extension of the body of law which already serves the commonwealth.

Article V of the Uniform Probate Code is a modernization of the law of guardianship and conservatorship. The Massachusetts version is the result of many hours of careful review and compromise over several years. These efforts have been led by a committee of dedicated individuals chaired by attorney Raymond Young and shepherded by the reporter, attorney Mark A. Leahy.

The guardianship portion of the Massachusetts Probate Code reflects the progression of the law and societal attitudes. To understand the fundamental changes in it, one must consider how we, as a society, have changed our view of disabled and mentally ill individuals over the last 50 years; and most notably, in the last couple of decades.

Following the tenor of the Americans with Disabilities Act of 1990, the Massachusetts Probate Code looks to abilities rather than disabilities. Rather than marginalizing an individual with compromised ability, the Massachusetts Probate Code seeks to protect the individual’s fundamental human rights and minimize the governmental intrusions imposed on those rights by the Probate and Family Court when protective proceedings are necessary. Language is an important instrument in the way we think. The Massachusetts Probate Code recognizes this and attributes new meanings to old terminology. By definition, the term ‘ward’ is only used for guardianships of minors. Section 1-201(56). An adult in need of services is called an ‘incapacitated person’ or a ‘person in need of services.’

In many ways, Massachusetts courts have led the way in protecting the rights of those individuals whose abilities are compromised due to mental illness or deficiencies. In 1977, the Supreme Judicial Court determined that even a profoundly mentally ill individual retained the right to have his position considered when extraordinary medical treatment was proposed. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728 (1977). With that decision, the Court articulated the concepts of substituted judgment versus best interests and found that at least in certain situations, an individual was entitled to counsel before extraordinary medical intervention. These concepts have evolved through the familiar Rogers line of cases. Rogers v. Commissioner of Department of Mental Health, 390 Mass. 489 (1983).

Right to counsel

The Massachusetts Probate Code recognizes that imposing a guardianship, conservatorship or other protective order upon an individual deprives the individual of fundamental rights. Thus, Section 5-106 holds that if an individual subject to guardianship or conservatorship requests counsel, if someone on his or her behalf requests counsel, or if the court determines that he or she may be inadequately protected, the court shall appoint counsel, ‘giving consideration to the choice of the person if 14 or more years of age.’ The court may also appoint a guardian ad litem to investigate the condition of the incapacitated person or person to be protected. This section is consistent with the practice of some divisions of the Probate and Family Court.

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Right to be present at hearing

In addition to counsel, an individual subject to protective proceedings has the right to be present at any hearing in person, to present evidence and to cross examine witnesses. This section does not apply to minors under the age of 14. However, a minor over the age of 14 is entitled to be present unless the court upon written findings determines that it is not in the best interest of the ward to be present. Section 5-106(c)

Division of authority

Advanced directives are a relatively recent development in the law. However, they are broadly accepted. Massachusetts adopted the Uniform Durable Power of Attorney Act in 1981 and Health Care Proxies in 1992. These documents allow an individual to select a person who will be responsible for managing his/her financial affairs and medical care when deemed incompetent. The documents are completely separate. In my experience, it is not unusual for an individual to determine that one person would be best suited to manage his/her financial affairs and another person best suited to make medical decisions in the event of incapacity.

Guardian v. conservator

Under existing law, the court may appoint a separate guardian of the estate and guardian of the person. However, the separation of fiscal and medical responsibilities remains unusual. As a result, when separate guardians (of the person and estate) are appointed, there may be confusion. The Massachusetts Probate Code provides a logical extension of the principles underlying advanced directives. A guardian ‘shall make decisions regarding the incapacitated person’s support, care, education, health and welfare.’ Section 5-309(a). But, a guardian does not manage the finances of the incapacitated individual.

When an incapacitated individual needs help managing property or business affairs, a conservator will be appointed. A “conservator” means a person who is appointed by a court to manage the estate of a protected person.” Section 1-201(8). Clearly separating the fiscal and medical authority with distinctly different titles should relieve the most of the confusion caused by the current (guardian, guardian of the person, guardian of the estate) nomenclature.

In the event that an incapacitated person requires both financial and medical assistance, the court may appoint both. A petition for guardianship and a petition for conservatorship may be filed together. In many cases, the same person will serve in both capacities.

Nomination of guardian/conservator

The Massachusetts Probate Code strongly supports an individual’s right to nominate his/her own guardian. “Unless lack of qualification or other good cause dictates the contrary, the court shall appoint a guardian in accordance with the incapacitated person’s most recent nomination in a durable power of attorney.” Section 5-305. However, the potential for exploitation and undue influence of a susceptible person who has not yet been determined in need of protection is recognized. The Massachusetts Probate Code gives the court substantially more discretion when appointing a conservator. When appointing a conservator,

[f]he following are entitled to consideration for appointment in the order listed: (1) Unless lack of qualification or other good cause dictates the contrary, a person nominated in the protected person’s most recent durable power of attorney; … Section 5-409(a)

However:

The Court, acting in the best interest of the protected person, may pass over a person having priority and appoint a person having a lower priority or no priority. Section 5-409(b)

In the case of minors, there is a balancing of the rights of the parents and the rights of the minor, if over the age of 14:

A parent, by will or other writing signed by the parent and attested by at least 2 witnesses, may appoint a guardian for any minor child the parent has or may have in the future, may revoke or amend the appointment, and may specify any desired limitations to be granted the guardian. Section 5-202(a).

Parental nomination is similarly applied to an adult child who is incapacitated. Section 5-301(a).

However,

The Court shall appoint a person nominated by the minor, if the minor is 14 or more years of age, unless the Court finds the appointment contrary to the best interest of the minor. Section 5-207(a).

Duties of a guardian

Minor

A guardian of a ward [minor] has the powers and responsibilities of a parent regarding the ward’s support, care, education, health and welfare. A guardian shall act at all times in the ward’s best interest and exercise reasonable care, diligence and prudence. Section 5-209(a).

Adult

As the Massachusetts Probate Code focuses on abilities rather than disabilities, the powers of the guardian must be carefully considered by both the court and the guardian.

The court must make specific findings when appointing a guardian. These include findings that the expected procedural due process and notice provisions have been met. They also include findings that the person’s needs “cannot be met by less restrictive means, including the use of appropriate technological assistance.” Section 5-306(8).

“…” A guardian shall exercise authority only as necessary by the incapacitated person’s mental and adaptive limitations, and, to the extent possible, shall encourage the incapacitated person to participate in decisions, to act on his or her own behalf, and to develop
or regain the capacity to manage personal affairs. A guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions, and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence and prudence." Section 5-309(a).

Limitations on authority of a guardian

Massachusetts courts already impose substantial limitations on the authority of a guardian where extraordinary medical treatment, including treatment with anti-psychotics, is necessary. The Massachusetts Probate Code incorporates the Rogers decisions and procedure with Section 5-306A Substituted Judgment. However, the Massachusetts Probate Code goes beyond the Rogers restrictions in two significant areas.

First, "[n]o guardian shall have the authority to admit an incapacitated person to a nursing facility except upon a specific finding by the Court that such admission is in the incapacitated person's best interest." Section 5-309A. Presumably, a Rogers proceeding, or something akin to a Rogers proceeding would be necessary for every admission of an incapacitated person to a nursing home unless that person had a valid health care proxy.

Second, the guardian is not permitted to admit an incapacitated person to a mental health facility or mental retardation facility without going through the commitment proceedings outlined in M.G.L. c. 123. Jurisdiction for committal proceedings is removed from the Probate and Family Court. Even where there are Rogers proceedings, committal proceedings must be pursued in the district court.

Finally, limited guardianships are encouraged and the court may impose any further limitations on the guardianship which it feels are appropriate.

Judicial oversight of a guardian

The Massachusetts Probate Code affords important new protections for the incapacitated individual. Currently, a guardian is appointed and turned loose. Upon appointment, the court washes its hands of the protected person unless there are ongoing Rogers proceedings or somebody with standing brings a complaint.

Under the Massachusetts Probate Code:

A guardian shall report in writing the condition of the incapacitated person and account for funds and other assets subject to the guardian’s possession or control within 60 days following appointment, at least annually thereafter, and when otherwise ordered the Court. A report shall briefly state:

1. the current mental, physical and social condition of the incapacitated person;
2. the living arrangements for all addresses of the incapacitated person during the reported period;
3. the medical, educational, vocational and other services provided to the incapacitated person and the guardian’s opinion as to the adequacy of the incapacitated person’s care;
4. a summary of the guardian’s visits with and activities on the incapacitated person’s behalf and the extent to which the incapacitated person participated in decision making;
5. if the incapacitated person is institutionalized, whether the guardian considers the current treatment or habilitation plan to be in the incapacitated person’s best interests;
6. plans regarding future care; and
7. a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship. Section 5-309(b).

The Court shall establish a system for monitoring guardianships, including the filing and review of annual reports. Section 5-309(c).

Duties of a conservator

A conservator acts essentially as a trustee. The focus on acting solely in the best interest of the incapacitated person is tempered with various provisions allowing the conservator individually, or with court authority, to exercise some level of substituted judgment.

Enumerated duties include:

- A conservator acts as a fiduciary and shall observe the standards of care imposed on a trustee by the Uniform Prudent Investor Act. Section 5–416(a).
- A conservator shall encourage the protected person to participate in decisions, to act in the person’s own behalf and to develop or restore the person’s ability to manage his own estate and business affairs. Section 5–416(b).
- A conservator may be ordered by the court to develop a plan for managing, expending and distributing the protected person’s estate. Section 5–416(c).
- A conservator must inventory the estate within 90 days. The protected person, if over the age of 14, shall be provided a copy of the inventory, as well as any parent or guardian. Section 5–417.
- A conservator must file annual accounts with the court. Section 5–418.
- A conservator of a minor may petition the court to set up a revocable trust extending beyond the minority of the minor. The court must find that the trust is a) in the best interest of the minor, b) the minor and issue of the minor are the only beneficiaries of the trust during the minor’s lifetime, and c) if the trust terminates during the minor’s lifetime, all property will be distributed to the minor. Section 5–407(c).
- A conservator has the kind of broad powers to manage property and pay expenses which one would expect of a trustee. See generally 5–423 Pow-
ers of Conservator in Administration.

- If the estate is ‘ample,’ a conservator of an individual other than a minor may make gifts to charity or to persons which the protected individual wishes to benefit in amounts up to 10 percent of annual income. *Section 5-424.*

A conservator may file what is currently considered a Petition for Estate Plan pursuant to M.G.L. c. 201 §38. The powers that the court may grant here are quite broad (going beyond M.G.L. c. 201 §38). The Massachusetts Probate Code allows a conservator to seek authority from the court to make gifts, exercise powers of appointment, create trusts, change beneficiaries on insurance or annuities, exercise elective share rights, disclaim estates and make, amend or revoke a will. *Section 5-407(d).*

**Judicial oversight of a conservator**

“The Court shall establish a system for monitoring of conservatorships, including filing and review of conservators’ accounts and plans.” *Section 5-418(f)*

**Summary**

Article V of the Massachusetts Probate Code assembles the law of guardianship and conservatorship in a clear and concise manner. It is not so much a departure from current law as it is a progressive restatement.

The most significant change is that of perspective. The Massachusetts Probate Code views people in light of their abilities, rather than their disabilities. Its focus forces all involved to consider the personal and fundamental rights of the protected person. In doing so, consideration is consistently given to limiting the imposition of authority to those areas necessary to protect the individual.

Other areas of change include the adoption of the kinds of protection to incapacitated individuals which the public believes guardianship offers, including financial audits and care plan reviews.

In addition, there are several areas where existing law is ‘cleaned up’ and presented in a more logical and complete manner. (For example, M.G.L. c. 201 §38 is more clearly restated in Section 5-407(d).)

By offering more clear and more complete definitions, these sections may slightly expand the scope of current law. But, they do not change its perspective or intent.

Finally, the law recognizes that in these proceedings the court is removing a person’s fundamental human rights. Therefore, the constitutional rights of notice, hearing and right to counsel are explicitly provided in the statute.
WHEN GOOD THINGS HAPPEN TO BAD PEOPLE: THE SPOUSAL ELECTIVE SHARE

by Maureen E. Curran

In Massachusetts, in order to protect a surviving spouse, if a testator does not provide for his or her spouse in a will, the surviving spouse may “waive the will” pursuant to G.L. c. 191, §15. Depending on the size of the estate and whether the testator died with issue or kindred, the surviving spouse will receive a certain proportion of the estate. As will be discussed below, applying specific facts to the statute can be a logistical nightmare and will create havoc on the testator’s estate plan. Moreover, as the statute contemplates, there are some spouses who do not warrant protection.

To that end, the statute makes an exception when the couple has been “living apart from each other for justifiable cause.” See G.L. c. 209, §36. One can think of a plethora of reasons why couples would be living apart for justifiable cause, yet the statute requires that in order for this statute to take effect, a “probate court” must have previously entered a judgment that a person had been deserted or living apart for justifiable cause. This statute was enacted in 1906, long before the enactment in 1978 of the domestic relations abuse prevention statute, G.L. c. 209A. As a recent case that was pending in Suffolk County Probate and Family Court illustrates, a husband who had physically abused his wife and was prevented from living with his wife pursuant to an existing restraining order from a district court was nonetheless allowed to waive his wife’s will. This case also illustrates that when a court attempts to apply the statute to real life circumstances, its lack of clarity can sometimes result in a windfall for undeserving spouses.

The decedent and the surviving spouse were married in 1985. It was a second marriage for both of them, and the decedent had two children from her first marriage. At the time of their marriage, the decedent was the sole owner of her home where she resided with her two children. The ownership of the property remained in her name alone from the date of purchase in 1981 until her death in 2005. Three and a half years prior to her death, the couple separated. The decedent continued to live in the home with her adult son. The decedent’s daughter lived in her own home with the decedent’s granddaughter.

Seven months prior to her death, the surviving spouse forced his way into the decedent’s home. When the decedent asked him to leave, he told her that “I used to work with locks years ago.” The decedent asked him repeatedly to leave. He left after she gave him a bag of groceries. When the decedent went back to bed, the surviving spouse re-entered the house. The decedent again asked him to leave, and he stated that he was not leaving and this was his house. When the decedent tried to call a friend to assist her in getting the surviving spouse to leave, he became more hostile and abusive. He snatched the phone out of her hand, pushed her into the wall, grabbed her by the neck, and was kicking her with his knee. She finally broke away, ran upstairs, and called 9-1-1 on her cell phone.

The next day, the decedent obtained an abuse prevention order ordering the surviving spouse not to abuse her, not to contact her and to immediately leave and stay away from her residence. The order was extended the following week with an expiration date of Jan. 5, 2006. The decedent died while the restraining order was still in force.

Around the time the abuse occurred, the decedent was diagnosed with melanoma. During her final illness, the decedent — without the assistance of an attorney — prepared her last will and testament. She left her entire estate to be distributed “equitably to her children,” except that her residence was left solely and exclusively in trust for her granddaughter, two other adjoining properties were left to her daughter, and her automobile was left to her son. The surviving spouse was not mentioned in the will.

During the decedent’s final hospitalization, the surviving spouse took her keys and moved back into the decedent’s home without her permission. After her death, the surviving spouse continued to live at the residence with his adult stepson and refused to leave or pay any expenses of the property. He even went so far as to bring his girlfriend to the decedent’s home.

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over the strong objection of her two children. When the decedent’s daughter filed a Petition to Probate her mother’s will, the surviving spouse filed a waiver of the will pursuant to G.L. c. 191, § 15. The decedent’s daughter filed an equity complaint to determine the rights of the parties.

Other than the real property, the estate had minimal personal property at a value of approximately $50,000, most of which was in an account titled “in trust” for the decedent’s daughter. Commenting on the effect of a waiver, 1 Belknap, Newhall’s Settlement of Estates and Fiduciary Law in Massachusetts, § 20:3 (5th ed. 1994), states:

> It is in the havoc which it works on the rest of the will that the devastating effects of the waiver become apparent. Where the testator has set up a complicated framework for distributing the estate, a waiver by the surviving spouse completely upsets it and leaves only shattered fragments to be reassembled by the court.

Here the “shattered fragments” were profound. Instead of providing for her children and grandchildren as she had intended, the court had to wrestle with the bizarre question of just what is meant by the surviving spouse’s entitlement to the “only the income” during [his] life generated from his one-third share of the real and personal property. Did a one-third income only life estate entitle him to live there, but not rent-free as he alleged, how much credit should he be given toward the fair market rental value of the property, and was he still obligated to share in the expenses of the property? Also, did his interest in the property entitle the surviving spouse to invite his girlfriend to live with him over the objection of the decedent’s children? Was the bank account that the decedent had titled in her own name “in trust” for her daughter part of the estate for spousal waiver pursuant to Sullivan v. Burkin, 390 Mass. 864 (1984)?

As is often the case, especially in low value estates such as this one, the cost of litigating these issues is prohibitive resulting in a settlement. That may explain the scarcity of appellate cases to help determine just how the courts should interpret this statute. One thing is certain in this case. The decedent’s intent was not upheld. Rather than providing for her children and grandchild as she had wished, her abusive husband lived rent free for a year and a half and walked away with a cash payment.

For some years now, there have been discussions and committees dedicated to the task of revising the spousal elective share statute. Everyone seems to agree that it is in need of revision, but there is no agreement as to how it should be accomplished. At the very least this case illustrates that the Legislature should consider expanding G.L. c. 209, § 36 to include prohibiting a surviving spouse who is subject to a G. L. c. 209A restraining order from being able to waive a will.

In addition, the statute must be clearer as to what is meant when there is a surviving spouse and issue and the total value of the estate is greater than $25,000. Normally, a life estate does confer property rights, but what property rights, if any, are conferred by receiving “only the income during [the surviving spouse’s] life of the excess of his or her share of such estate above $25,000”, the personal property to be held in trust and the real property vested in him or her for life”? G. L. c. 191, § 15. Does the statute dictate that the property, unless it is income property, be sold? In its current form, the rights of the surviving spouse and legatees are unclear.

In revising this statute, it should be kept in mind that there could indeed be “justifiable cause” to prohibit a spouse from waiving a will even though the parties are not legally separated. The surviving spouse in the example noted above should not have been rewarded for his bad acts in violation of the testator’s clear intent to the contrary. In addition, if a spouse is allowed to waive a will, the statute must provide the courts with better guidance as to exactly what benefits should be conferred on the surviving spouse and how the court can best “reassemble” the “shattered fragments” of the testator’s intent.

End notes

1. The stated facts were taken from the unchallenged affidavit of the decedent when she was applying for a restraining order.
On June 30, 2008, Gov. Deval Patrick signed into law House Bill 4904, “An Act Relative to Tax Fairness and Business Competitiveness.” H.R. 4904, 185th Gen. Court (Mass. 2008). One of the most important provisions of the bill is the adoption of combined reporting in the commonwealth. Historically, Massachusetts has been a separate filing state where each corporation subject to taxation in Massachusetts files a separate tax return. Proponents of this bill argue that it will help Massachusetts maintain its competitive edge in attracting and retaining businesses. Mass. Study Comm’n on Corporate Taxation, Interim Report, at 13 (2007). Though the impact of combined reporting is difficult to determine and measure, it is clear that multi-jurisdictional taxpayers and tax planners will be significantly affected. Robert Cline, Council on State Taxation, Understanding the Revenue and Competitive Effects of Combined Reporting, at 14 (2008).

The first goal: “tax fairness”

The recent wave of states adopting combined reporting has been largely in response to a number of tax disputes in separate filing states where the taxpayer has taken advantage of a perceived tax loophole. Michael Mazerov, Center on Budget and Policy Priorities, Growing Number of States Considering a Key Tax Reform, at 4 (2007). When elected, Patrick articulated his goal of “closing corporate loopholes” in the Massachusetts tax code, and commissioned the Study Commission on Corporate Taxation to study the Massachusetts tax system and make recommendations. While the panel recommended adopting combined reporting, seven members of the commission, including representatives from the Legislature’s Joint Committee on Revenue, Associated Industries of Massachusetts (“AIM”), and the Massachusetts Taxpayers Foundation, offered a minority dissenting opinion. Bradley H. Jones Jr. et al., Interim Report of a Minority of Members of the Study Comm’n on Corporate Taxation, (2007). Opponents of combined reporting across jurisdictions argue that it is not the simplest and most accurate reflection of activities of entities within a state and that a policy of separate filing entities is preferable. The minority of the study commission points to a letter written by Massachusetts Commissioner of Revenue Alan LeBovidge on April 26, 2004, to the Joint Committee on Revenue expressing concerns regarding the adoption of combined reporting in Massachusetts specifically.

Still other opponents argue that the policy of combined reporting is flawed because “the interaction created an actual or perceived disconnect in the link between the location of measurable, state-specific factors and the attribution of income to a state.” Robert Cline, Council on State Taxation, Understanding the Revenue and Competitive Effects of Combined Reporting, at 4 (2008).

Separate filing mechanics

States that do not mandate combined reporting collect business taxes at an entity level; these are known as separate filing states. Each entity, if it is determined to have nexus in a jurisdiction, without regard to its parents or affiliates, will submit a return based on its taxable income in that state. Those entities that conduct business in multiple jurisdictions will apportion their income based on the percentage of property, payroll and sales that they have in each jurisdiction. Rules for apportioning income vary across jurisdictions and sometimes change with the nature of the business. Robert Cline, Council on State Taxation, Understanding the Revenue and Competitive Effects of Combined Reporting, at 3 (2008).

Separate filing treats each entity as a single taxpayer and is concerned only with the business and income of that taxpayer. Those in favor of separate filing point out that this is a very predictable and fair way to tax the income of entities, where there is a rational connection between the entity and the jurisdictions to which they report. Robert Cline, Council on State Taxation, Understanding the Revenue and Competitive Effects of Combined Reporting, at 2 (2008). Those in favor of combined reporting, on the other hand, argue that this system avails itself to “income shifting” and abu-

Combined reporting mechanics

Unlike separate filing, combined reporting takes into account an entity’s parent and affiliated corporation. The income of the group is combined to find the taxable income of the unitary group; in effect, combined reporting begins by finding the taxable income across all states of the entire business without regard to separate legal entities. Once the nationwide taxable income is calculated, the apportionment factors are applied to the entire group, as opposed to each separate filing entity. A combined return includes all entities that make up the unitary group, regardless of whether each entity has nexus in that combined reporting state. See generally: Robert Cline, Council on State Taxation, Understanding the Revenue and Competitive Effects of Combined Reporting (2008); Michael Mazerov, Center on Budget and Policy Priorities, Growing Number of States Considering a Key Tax Reform (2007).

Application of the apportionment factors to the income of the group, instead of the separate entities, results in multi-jurisdictional taxpayers reporting and paying tax for entities in jurisdictions where they may not have nexus. The Massachusetts Study Commission on Corporate Taxation “believes that combined reporting would modernize the corporate tax structure in the commonwealth and would reduce opportunities for tax avoidance through transactions among affiliated corporations.” Mass. Study Comm’n on Corporate Taxation, Interim Report, at 18 (2007).

Taxpayers that do business in multiple jurisdictions often respond to various state incentives to attract businesses. As a result, a complex organizational structure may have various entities or functions spread across various jurisdictions, and these entities or functions may frequently transact business with one another. Opponents of combined reporting argue that it is unable to distinguish beneficial tax planning from abusive “loopholes.” Robert Cline, Council on State Taxation, Understanding the Revenue and Competitive Effects of Combined Reporting, at 7 (2008).

Defining a unitary business

One of the challenges for combined reporting states has been defining what constitutes a unitary business; that is, what entities should be included in the group whose income will be taxed as a single business. A unitary business is defined in the bill as “the activities of a group of two or more corporations under common ownership that are sufficiently interdependent, integrated or interrelated through their activities so as to provide mutual benefit and produce a significant sharing or exchange of value among them or a significant flow of value between the separate parts.” H.R. 4904, 185th Gen. Ct., § 48 (Mass. 2008) Whether affiliated corporations are “sufficiently interdependent, integrated or interrelated” has historically been the subject of tax controversy in combined reporting states and will likely be an issue in Massachusetts in the future.

The revenue impact

Both supporters and opponents of combined reporting agree that measuring the exact revenue impact of combined reporting is very difficult due to the various factors that effect state tax revenues from year to year. The Commonwealth of Massachusetts estimates an increase in revenue, due only to combined reporting, of $136 million in Fiscal Year 2008 and $226 million in Fiscal Year 2009. Mass. Study Comm’n on Corporate Taxation, Summary of Proposed Tax Loophole Changes (2007), available at www.mass.gov/bb/fy2008h1/bills08/fair.shtml. The projected revenue boost to the commonwealth is the main reason for implementing combined reporting. It remains to be seen whether these predictions pan out.

Add back provisions

In 2003, the commonwealth initially addressed the problem of “income shifting” by multi-jurisdictional taxpayers by enacting the “add back” statute. Mass. Gen. Laws ch. 63, §§ 31I, 31J, 31K (2008). The statute requires entities to “add back” to Massachusetts taxable income certain items that have been deducted for purposes of computing federal taxable income. These items are usually inter-company expenses resulting from loans or licensing agreements between affiliated corporations. 830 Mass. Code Regs. § 63.31.1 (2008). Combined reporting takes into account the income of the entire unitary group but the Massachusetts add back statute may already collect a portion of the revenue expected from the adoption of combined reporting. Robert Cline, Council on State Taxation, Understanding the Revenue and Competitive Effects of Combined Reporting, at 10-11 (2008).

Consider that revenue projections for combined reporting are especially tenuous where the state already has an add back statute. Since the goal of each is to address tax savings corporations derive from inter-company transactions, the add back statute may already be collecting, in large part, the revenue projected for combined reporting.

The second goal: business competitiveness

As the title of the recently passed Massachusetts bill suggests, part of the goal in adopting combined reporting is to enhance the competitiveness of the commonwealth in attracting businesses. Determining and measuring the impact of combined reporting on the commonwealth’s ability to attract business is extremely difficult, as it is impossible to isolate any of the factors that attract businesses to Massachusetts.

Those entities that will be most affected are those that sell products or services in broad national or international markets and have a great deal of “mobile capital.” In most cases, simplicity or consistency in a state tax system is important to a corporation subject to tax in numerous jurisdictions. Frequent or significant statutory changes in the corporate tax system may not necessarily make Massachusetts a more competitive business environment.
The American Jobs Creation Act of 2004 added a new provision to the Internal Revenue Code dealing expressly with the tax treatment of non-qualified deferred compensation plans. The prior rules were a patchwork of common law and statutory provisions, all as interpreted and applied by the government, taxpayers and the courts.

New code section 409A evidences Congress’ concern with the state of the law before 2004. It broadly applies to any plan that provides for the deferral of compensation. Generally speaking, the new rules include: (1) qualification requirements that must be met in order to avoid adverse tax consequences, (2) special funding rules that will trigger automatic current taxation if they are not met, and (3) reporting requirements.

If a nonqualified deferred compensation plan does not satisfy the statutory qualification requirements, a service provider will be taxed currently on all compensation deferred under the plan to the extent (a) it is not subject to a substantial risk of forfeiture, and (b) it was not previously included in income. There is also an excise tax, and there may be a deferral charge. First, the income tax imposed on currently taxable deferred compensation is increased by 20 percent. Second, interest at the underpayment rate plus 1 percent will be imposed on the underpayments that would have occurred had the deferred compensation been includable in the employee’s gross income for the taxable year in which it was first deferred or, if later, the year in which it was no longer subject to a substantial risk of forfeiture.

To avoid these negative tax consequences, each arrangement must, on a per-participant basis, satisfy three specific rules. First, distributions may not occur earlier than one of six specified times. Second, the time and form of payment must be fixed when the compensation is deferred. Finally, if a service provider has an elective right to defer benefits, specific statutory criteria relative to deferral decisions apply.

Code Section 409A has added a new dimension to the drafting of employment agreements. Some guidelines for drafters under the new regime are set forth below.

**Guideline No. 1:** Be on the lookout for any benefits that may involve a deferral of compensation.

A deferral of compensation will exist if an employee has a legally binding right to remuneration in Year 1 that, under the provisions of his or her work arrangement, can be paid in Year 2 or in any later year.

If an employer can unilaterally eliminate a benefit, the employee eligible for that benefit will not have a legally binding right to it. On the other hand, if the benefit is simply forfeitable as a result of events that may or may not occur in the future, the employee will nonetheless hold a legally binding right.

**Guideline No. 2:** Become familiar with deferral arrangements that are clearly outside of the scope of 409A, no matter what.

Some compensation arrangements fall outside of the scope of code section 409A even though they involve an element of deferral. For drafters of employment agreements, there are two particularly useful categories of excluded items.

First, all qualified employer plans are exempt. Certain welfare benefit arrangements are also exempt. These include the perks that employees expect to receive — such as vacation time, sick leave, compensatory time, disability pay and death benefits, as well as health insurance benefits that are excludable from gross income under other code provisions.

**Guideline No. 3:** Inquire about an employee’s stock rights, which may not always be safe from attack under 409A.

The government has also helpfully excluded a number of stock rights from coverage under code section 409A, although not all stock rights are safe.

**Incentive stock options**

So-called incentive stock options and options granted under a code sec-

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tion 409A may apply. However, the regulations provide that involuntary separation pay (not also due if an employee voluntarily quits without cause) is not subject to code section 409A. An involuntary separation may occur if:

- An employer fails to renew an employee’s employment contract when the contract expires, and the circumstances show that the employee was willing and able to enter into a new contract.
- The separation occurs for “good reason” — either (a) applying the safe harbor definition in the regulations, or (b) on the basis of all relevant facts and circumstances.

Under the safe harbor definition of good reason in the regulations, the separation from service must occur during a period not to exceed two years after the initial existence of one or more of six enumerated conditions that arise without an employee’s consent (such as a material diminution in his or her base compensation, or in his or her duties or responsibilities). In addition, the employee must give his or her employer notice of the relevant conditions and an opportunity to remedy the problem (both within the time periods set forth in the regulations). Finally, the separation pay must be identical to that due in the case of an actual involuntary separation from service (taking into account the amount, time and form of payment).

Once the involuntary nature of a separation has been determined to exist, two other regulatory conditions must be addressed. First, there is a ceiling on the amount exempt from code section 409A (although being over the ceiling does not disqualify the ceiling amount). The limit is twice the lesser of two amounts:

1. the maximum compensation that may be taken into account under a qualified retirement plan for the year in which the separation from service occurs (for 2008, the limit is $230,000), or, if greater,
2. the employee’s annualized compensation, based upon his or her annual rate of pay for services provided in the year before the year in which the separation from service occurs (an employee’s “annual rate of pay” may possibly include a regular bonus).

In addition, the involuntary separation pay must be paid to the employee no later than his or her second taxable year after that in which the separation from service occurs.

**Other special separation payments**

Other special forms of separation pay may fall outside of the scope of code section 409A, without regard to the circumstances under which they are paid. The following benefits will not be treated as nonqualified deferred compensation, even if they are paid when an employee voluntarily separates from service:

- Reasonable outplacement expenses, reasonable moving expenses directly related to the termination of services, and deductible employee business expenses — if they are due by the end of the employee’s second taxable year after that in which he or she separates from service.
- Reimbursements for medical expenses not covered by health insurance, for a period of time co-terminus with the end of COBRA continuation coverage following the employee’s termination of employment.
- On an elective basis, payments not in excess of the code section 401(k) elective deferral limit for the year in which the separation from service occurs (now $15,500).

**Guideline No. 5:** Become familiar with the short-term deferral rule that can take a lot of benefits off the table, such as bonuses and separation pay not otherwise excluded.

By regulation, short-term deferrals are also exempt from code section 409A. When determining the relevance of this exception, it is important to focus on two things — (a) when benefits are no longer subject to a substantial risk of forfeiture,
and (b) when they are to be paid. Compensation will be deemed not to have been deferred if an employee actually or constructively receives it before the last day of a defined two-and-a-half month period. The relevant two-and-a-half month period ends on the 15th day of the third month following the end of the employee’s (or, if later, the employer’s) first taxable year in which the right to the payment is no longer subject to a substantial risk of forfeiture.

The short-term deferral rule will not apply if a payment may, under the circumstances, be made or completed sometime after the end of the applicable two-and-a-half month period under the terms of the plan as written. On the other hand, if there is no written provision dealing with when a payment is to be made, a payment actually made within the two-and-a-half month period will not be treated as deferred compensation. However, it is recommended that drafters of employment agreements not rely upon this helpful regulatory provision.

The essential problem with the short-term deferral rule is that it requires payment within a certain period of time after benefits cease to be subject to a substantial risk of forfeiture. In many cases, an employee may be entitled to benefits under his or her employment agreement with respect to which there is no substantial risk of forfeiture, but which are due at some point in the future — such as, upon separation of service for any reason. Under these circumstances, the short-term deferral provision will not apply.

Guideline No. 6: If all else fails, know how to satisfy the requirements of 409A.

(a) Make sure you have a good payment trigger.

Under code section 409A, benefits to which the provision applies may be paid only when certain events occur. Four of the enumerated events are likely to be relevant to employment agreements. Death is one of them, as is disability. The definition of disability in the statute and the regulations is a strict one. An employee is considered to be disabled if (i) he or she is unable to engage in any substantial gainful activity as a result of any medically determinable physical or mental impairment that can be expected to end in death or to continue for at least 12 months, or (ii) because of such an impairment, the employee is receiving income replacement benefits for not less than three months under his or her employer’s accident and health plan. The regulations permit a plan to deem an employee to be disabled if he or she has been determined to be totally disabled by the Social Security Administration.

Section 409A compliant payments may also be made upon a change in the ownership or effective control of the employer, or in the ownership of a substantial portion of the employer’s assets. Important to note here is that an employer may wish to define a change of control differently from the way in which it has been defined in the regulations. This effectively means that the employer’s definition may be used for purposes of determining when benefits vest, but not when they can be paid.

In most situations, the most important payment event is “separation from service.” The regulations state that an employee separates from service if he or she dies, retires or otherwise has a termination of employment. For drafters of employment agreements, two aspects of this definition are important to bear in mind:

• The government takes the position that an employment relationship will remain intact while an employee is on a bona fide leave of absence of up to six months, or longer if the employee’s reemployment rights are protected by statute or contract.

• A termination of employment is irrebuttably presumed when an employee’s bona fide level of services permanently falls to no more than 20 percent of the average performed by him or her over the prior 36 months.

To preclude inadvertent terminations of employment within the meaning of the regulations, employment agreements might, for example, preclude an employer from significantly reducing an employee’s hours of service without his or her consent.

(b) Make sure you have a good payment method.

The regulations include a lengthy discussion of the ways in which benefits to which code section 409A applies may be paid. As a general matter, a plan may provide only one time and form of payment upon the occurrence of one of the enumerated permissible payment events. For example, benefits might be paid in the form of a lump sum upon an employee’s separation from service, and in a different manner in the event of a change in the ownership or effective control of his or her employer.

Also, under limited circumstances, the government permits a different time and form of payment when a separation from service occurs (a) during a period of up to two years following a change in control, (b) before or after a specified date, such as attainment of age 65, or (c) before or after both a specified date and a specified period of service under a nondiscretionary formula.

Separation from service is defined to include disability and death. Thus, it appears that benefits due on account of disability or death must be paid in the same manner as benefits due upon separation of service for any other reason. The wording of the regulations leads one to this conclusion, notwithstanding its apparent inconsistency with the statute’s treatment of death and disability as separate payment events.

The regulations provide that when a payment event occurs, a plan can designate, as the payment date, (a) the date of the event, or (b) another payment date objectively determinable and nondiscretionary at the time the payment event occurs.

Methods of payment may also vary. Payments may be scheduled, or may commence or occur in a designated taxable year of the employee. Also, payments may occur during a designated period, so long as (a) it begins and ends within one taxable year of the employee, or does not exceed 90 days, and (b) the employee cannot select
the year of payment. In all cases, the payment schedule and the designated taxable year or payout period must be objectively determinable and nondiscretionary when the payment event occurs. It will normally not be possible to accelerate payments because of anti-acceleration provisions in the statute.

(c) Do not overlook two special provisions dealing with methods of payment.

Two special distribution provisions are of particular relevance to drafters of employment agreements. One deals with reimbursements subject to code section 409A, and the other deals with amounts payable to so-called specified employees following their separation from service.

Reimbursements

An employer will often agree to reimburse an employee for expenses, even after his or her termination of employment. Since it is uncertain when an expense will be incurred, reimbursements not exempt from code section 409A are deferred compensation. Special payment provisions in the regulations permit reimbursements to satisfy the requirements of code section 409A. Among other things, the reimbursement program must define the expenses eligible for reimbursement in an objectively determinable and nondiscretionary manner, and an eligible expense must be reimbursed before the last day of the employee’s taxable year after that in which the expense is incurred.

Specified key employee rule

Another special distribution provision impacts key employees. Every plan of deferred compensation to which the provisions of code section 409A apply must, by its terms, provide that distributions to a so-called specified employee cannot be made before the date that is six months after the employee’s separation from service, or, if earlier, the date of the employee’s death. This provision must appear in the plan immediately before an employee becomes a specified employee.

In general, a specified employee is one who, when his or her separation from service occurs, is a key employee of an employer whose stock is then publicly traded on an established securities market. The statute imports the key employee definition from those code provisions dealing with top-heavy retirement plans.

Guideline No. 7: Re-review the draft agreement to ensure either that 409A does not apply or that all 409A requirements have been met.
CONFUSED ABOUT MEDICAL EXPENSE DEDUCTIONS FOR SPECIAL EDUCATION COSTS? NOT SURPRISING.

By Abbott L. Reichlin

For the tax lawyer in a firm best known for representing parents of special needs students, there have been many opportunities to respond to the question whether the costs of providing special education services for a dependent child are deductible as medical expenses. There have been a surprising number of opportunities to debate the question with recalcitrant tax return preparers.

The problem may stem from a paucity of guidance on the subject, or more likely, on the lack of clarity introduced by the applicable Treasury Regulations. The basic rule, of course, appears in Section 213 of the Internal Revenue Code of 1986, which provides for a deduction for unreimbursed expenses paid (over a floor of 7.5 percent of adjusted gross income) for the "medical care" of the taxpayer or his/her spouse or dependent. Medical care is defined, in pertinent part, as "amounts paid (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body, [and] (B) for transportation primarily for and essential to [such] medical care … "

This does little to answer the ultimate question, so the next step is to look at the regulations, and specifically at Treasury Regulation § 1.213-1(e)(1)(v)(a), which purports to define "medical care" in the context of care in a non-hospital institution, as follows:

Where an individual is in an institution because his condition is such that the availability of medical care (as defined in subdivisions (i) and (ii) of this subparagraph) in such institution is a principal reason for his presence there, and meals and lodging are furnished as a necessary incident to such care, the entire cost of medical care and meals and lodging at the institution, which are furnished while the individual requires continual medical care, shall constitute an expense for medical care. For example, medical care includes the entire cost of institutional care for a person who is mentally ill and unsafe when left alone. While ordinary education is not medical care, the cost of medical care includes the cost of attending a special school for a mentally or physically handicapped individual, if his condition is such that the resources of the institution for alleviating such mental or physical handicap are a principal reason for his presence there.

In such a case, the cost of attending such a special school will include the cost of meals and lodging, if supplied, and the cost of ordinary education furnished which is incidental to the special services furnished by the school. Thus, the cost of medical care includes the cost of attending a special school designed to compensate for or overcome a physical handicap, in order to qualify the individual for future normal education or for normal living, such as a school for the teaching of braille or lip reading. Similarly, the cost of care and supervision, or of treatment and training, of a mentally retarded or physically handicapped individual at an institution is within the meaning of the term "medical care." (emphasis added)

On the one hand, the highlighted sentences appear to provide support for the proposition that the cost of tuition, fees, room and board and transportation for attendance at a "special education" school qualify as expenses for medical care. On the other hand, the caveat that "ordinary education is not medical care" and the examples that are provided to illustrate the type of institution that qualifies as a "special school," i.e., "a school for the teaching of braille or lip reading," have given some taxpayers and their tax return preparers pause. The regulation goes on to make reference to Code Section 262 and the regu-
lations thereunder “for disallowance of deduction for personal, living, and family expenses not falling within the definition of medical care.” At this point, a position of doubt and insecurity may well seem justified.

However, as early as 1978, the Internal Revenue Service cast considerable gloss on the matter in the form of Revenue Ruling 78-340. This ruling considered the case of a child with “severe learning disabilities,” including “congenital impairment in the areas of visual memory and visual matching,” whose disabilities had been determined by “competent medical authorities” to be caused by “a neurological disorder.” The IRS determined that amounts paid for tuition at a “special school” having a “program designed to educate children with severe learning disabilities so that they can return to a regular school within a few years” qualified as expenses for medical care under Code Section 213. These facts constitute a fairly typical scenario involving attendance at a “special education” school.

The IRS has been consistent in its application of the rules developed in Revenue Ruling 78-340. In a series of private letter rulings spanning the years 1978 to 2007, the IRS has determined that expenses of special education constitute deductible expenses in instances in which the fact pattern is similar to that in the revenue ruling, i.e., there is a diagnosis of a neurologically based learning disability or other handicap, leading to a recommendation of and attendance at an institution specially equipped to help the student overcome the handicap. In the few instances in which the IRS has ruled against the taxpayer, the basis for the adverse ruling was factual. In each case, the school program was found to be insufficiently “special” or insufficiently geared to enable the student to cope with a “medical” issue. Of course, private letter rulings are not precedential, but they do provide an indication of the policies and predilections of the IRS.

The Tax Court, on the other hand, has somewhat muddied the waters with a series of decisions in favor of the government in the 1970s and 1980s. Review of these decisions reveals that the adverse rulings resulted from reasoning similar to that in the adverse private letter rulings cited above, i.e., a determination that the educational program, even if recommended by a physician or psychotherapist, was not “special” enough, as exemplified in the following selections:

We have recognized that because of the difficulty of distinguishing personal educational expenses of an emotionally disturbed child from payments for medical care a careful analysis should be made of the evidence not only to determine if the school the child attended is a “special school” but also to determine to what extent the services rendered to the child are educational and to what extent the services are medical care.

This Court has rarely allowed a medical expense deduction for the full cost of a private school education. Although the individual attention, small class size, and strict discipline characteristic of good private schools often are beneficial to students suffering from mental or physical defects or illnesses, the cost of a basic education is still primarily a personal expense, and it does not become a medical expense merely because it is prescribed by a physician. If a private school provides no special services beyond the ordinary educational program offered as a part of its regular curriculum, then the cost of attending the school is not deductible, notwithstanding that attendance may help alleviate a student’s mental or physical defect or disease.

We have construed the regulation to mean that a school is a special school only if the ordinary education it provides is incidental to medical care.

The facts are preeminent in the analysis, and in an early decision, on more favorable facts, the Tax Court did in fact rule in favor of the taxpayer, in a case involving a learning disability stemming not from neurological causes, but rather from an emotional disturbance. The clear conclusion is that if the fact pattern is appropriate, taxpayers and their advisors should not be reluctant to claim a medical deduction for expenses of providing special education to a dependant, including tuition, fees, room and board, transportation and related medical and counseling services.

A more challenging and perhaps more interesting question is whether legal fees expended by parents in their quest to obtain special education services from a city or town can be included in the foregoing compilation of deductible medical expenses. For many years, there was no specific answer from the courts or the IRS, but an analogy could be made to the Gerstacker decision, accepted by the IRS in Revenue Ruling 71-281. In that case, the Sixth Circuit Court of Appeals ruled that legal fees incurred in a guardianship proceeding were deductible as a medical expense as they were required in order to obtain necessary medical care for the ward, specifically commitment to a hospital for treatment of mental illness. By analogy, parents might argue that their legal battle with the municipality is a necessary avenue to obtain special education services, which in turn constitute medical care.

This argument was finally rejected by the Tax Court in 1998 in Lenn v. Commissioner, in which the underlying legal dispute was over reimbursement for special education expenses paid by the parent. The court distinguished the Gerstacker reasoning because the case against the town was not brought to “legitimate or authorize medical treatment,” but was instead brought to determine who would pay for such services. This is a logical and cogent response to the attempt to extend the Gerstacker rationale, but it leaves open the question whether the same argument can be made in the case of destitute parents whose child cannot and will not receive needed services unless the city or town pays for them. This question will have to be left to another day.

End notes
8. Reiff, supra.
9. Sims, supra.
10. VanKirk, supra.