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DEVELOPMENT AND CONSTRUCTION LAW PRACTICE GROUP (REAL ESTATE)

CARDINAL CHANGE DOES NOT SET ASIDE WAIVER OF CONSEQUENTIAL DAMAGES

BY SAKIB A. KHAN

When development and construction projects hit major disputes, counsel often must assess the recoverability of consequential or delay damages at the outset. Waivers of consequential and delay damages are now commonplace in construction contracts and are generally enforceable under Massachusetts law. *See Costa v. Brait Builders Corp.*, 463 Mass. 65, 78 (2012); G.L. c. 30 § 39O. In high-stakes cases, parties may expend considerable resources researching exceptions and attempting to correspondingly construe facts. Theories to set aside waivers of damages excite both the creative lawyer and the damaged client.

Generally, to set aside a contract provision, counsel looks to theories of recovery for conduct outside the normal bounds of the contract, such as breach of the implied covenant of good faith and fair dealing (*See, e.g., Anthony's Pier Four Inc. v. HBC Assoc.*, 441 Mass. 451 (1991)), "whipsaw" (*See, e.g., Farina Bros. v. Comm.*, 357 Mass. 131 (1970)), or "true breach" (*See, e.g., Thomas O'Connor & Co. Inc. v. City of Medford*, 16 Mass. App. Ct. 10 (1983)). In that vein, if the work of the contract changed so substantially as to drastically and fundamentally change the nature of the bargain (i.e., a "cardinal change," *see Cert. Power Sys. Inc. v. Dominion Energy Brayton Point LLC*, 2012 WL 384600, *61 (Mass. Super. Ct. Jan. 3, 2012)), then arguably the terms of the old contract should no longer apply to the new bargain.

In *Turner Constr. Co. v. M.J. Flaherty Co.*, 34 Mass. L. Rptr. 171 (Mass. Super. Ct. Mar. 8, 2017), Judge Mitchell Kaplan, sitting in the Business Litigation Session of the Superior Court, rejected precisely that argument, ruling that, "Proof of a breach of contract [due to a cardinal change] would not be a basis for the court to write a new subcontract for the parties that did not include any limitation on consequential damages." *Id.* at *3.

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Judge Kaplan's decision implies that although a cardinal change would set aside the price terms of the contract ("the party performing the work should be given the opportunity to recover the fair value of its labors."), it would not set aside general conditions type requirements, such as limitations on damages.

Accordingly, the exceptions to enforceability of damages waivers under Massachusetts law continue to generally require unconscionable or bad faith behavior, as exemplified in *Anthony's Pier Four Inc. v. HBC Assoc.*, 441 Mass. 451 (1991) or *Farina Bros. v. Comm.*, 357 Mass. 131 (1970). ■

TREATING NON-COMPLIANT GOVERNMENTAL STRUCTURES AS 'PRIOR LAWFUL NON-CONFORMING' STRUCTURES UNDER THE MASSACHUSETTS ZONING ACT

BY MICHAEL K. MURRAY AND MARTIN R. HEALY

Should state structures that failed to conform with applicable municipal zoning when built, but were nonetheless lawful when built as a result of state governmental immunity from local zoning constraints, be treated as "prior lawful non-conforming" structures within the meaning of Section 6 of the Zoning Code? In a triumph of the pragmatic over the theoretical, *Gund v. Planning Board of Cambridge*, 91 Mass. App. Ct. 813, rev. denied, 478 Mass. 1102 (2017), answers that question in the affirmative.

When the commonwealth decided that it no longer needed the iconic Edward J. Sullivan Courthouse and jail ("courthouse") and that the excess property (22 stories and 280 feet high towering over the neighborhood) should be disposed of for private use, a developer that had signed a purchase and sales agreement to acquire the courthouse sought a special permit for a mixed-use project pursuant to the Cambridge ordinance that applied to the expansion of "prior lawful nonconforming structures" and the first paragraph of G.L. c. 40A, § 6, second sentence ("[p]re-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood"). The Cambridge Planning Board, acting as the city's special permit granting authority, granted the requested relief, and neighbors of the structure appealed. The Land Court upheld the special permit in *Hill v. Cambridge Planning Board,* Land Court Misc. #14-488217 (Foster, J. May 19, 2015). The Appeals Court affirmed in *Gund v. Planning Board of Cambridge*, 91 Mass. App. Ct. 813, rev. denied, 478 Mass. 1102 (2017).

When it was constructed, the courthouse exceeded the otherwise allowable floor-to-area ratio (FAR), but as a state building was protected against application of local zoning constraints as a result of state governmental immunity. When the state use ended, and the state sought to sell the building to a private developer for private use, the basis for state governmental immunity ended, giving rise to the question of whether the courthouse should be treated as "illegal," thus requiring a variance to maintain the FAR violation, or as a "prior lawful nonconforming" structure that could be re-used and modified under a special permit. The planning board concluded that the courthouse constituted a preexisting nonconforming structure as defined in the zoning ordinance, which could be expanded by a showing that the change was not substantially more detrimental to the community than was the existing nonconformity, and granted the special permit. On appeal, the Land Court granted partial summary judgment to the developer on the narrow issue of whether the courthouse constituted a preexisting nonconforming structure.

The Appeals Court noted that, "While a general goal of zoning is the eventual elimination of nonconforming uses in structures," Section 6 of the Zoning Act and "many local by-laws or ordinances provide protection to

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lawful conforming uses and structures," and that, "[W]here, as here, a zoning ordinance largely parroted the protections contained in Section 6, we said that the 'by-law unequivocally reject[ed] the concept that nonconforming uses or structures must either fade away or remain static.'" 91 Mass. App. Ct. at 815-16 (*quoting Titcomb v. Board of Appeals of Sandwich,* 64 Mass. App. Ct. 725, 730 (2005). The Appeals Court rejected the plaintiffs' argument that, because the courthouse did not comply with the FAR limitations that applied at the time the courthouse was built, the courthouse was not a preexisting nonconforming structure, and therefore was not entitled to protection under the second sentence of Section 6 or the local ordinance. The Appeals Court relied, in part, on *Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450 (1986), in which the Appeals Court ruled that a use that was permissible because of the application of a governmental immunity was "nonconforming in fact." The *Gund* court held that there is "no meaningful distinction in terms of the protections afforded nonconforming structures in the zoning ordinance between a structure that becomes nonconforming because of a subsequently enacted stricter ordinance and one that becomes nonconforming because of a loss of statutory immunity." 91 Mass. App. Ct. at 818.

The Appeals Court rejected the plaintiffs' argument that *Mendes v. Board of Appeals of Barnstable,* 28 Mass. App. Ct. 527 (1990) — which held that a use that exists because of a variance issued by a local planning board is not a preexisting nonconforming use under Section 6 — compels a different result. Instead, the court reasoned that, "[A] use or structure that is immune from local zoning regulations because it is owned by the government cannot be equated to a use or a structure that can be allowed because it meets the strict criteria for a variance," and that a "structure lawful because it is immune from zoning regulations is closer to structures that were constructed prior to zoning regulations being adopted." 91 Mass. App. Ct. at 818-19.

Finally, the Appeals Court stated that, "[W]hen the court house loses its governmental immunity, nothing in the zoning ordinance or the statutory scheme suggests that the planning board should look back to when the structure was constructed to determine whether it complied with the then-existing zoning ordinance from which it was immune at the time. Nothing in the statutory scheme suggests that we should treat the court house as if its governmental immunity had never existed." *Id.* at 819. ■

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DISPUTE RESOLUTION

DIVORCE MEDIATION 101: MUSINGS AND MEDITATIONS

BY CYNTHIA RUNGE

I have learned that, no matter what thorny issues come up in the middle of a divorce mediation, if the parties are talking, then my best course of action is generally to sit back, listen and stay focused on guiding the parties through the issues. Although no one divorce is exactly like another, there are certain situations and quandaries that the divorce mediator may eventually encounter or reflect on. Below are some common examples.

'CAN'T YOU JUST TELL US WHAT TO DO?'

A mediator can help parties brainstorm options when they get stuck, or can provide them with legal information or outside resources to help them decide what to do. What gets tricky is when the parties "want" the mediator to weigh in on what they should do. It can be very seductive to think that you, the mediator, know the answer. In truth, the reality is that the mediator doesn't know the whole story of what is going on with either party, which is one of the reasons it is so important to keep our opinions out of the mix, not to mention that giving legal advice is not the mediator's role anyway. Nonetheless, the distinction between legal information and legal advice can sometimes seem indistinct.

EXPLORING OPTIONS

When people decide to mediate their divorce, they are expecting their mediator to lead them through the process. They need to know a variety of things about their divorce process, e.g., what needs to be in the agreement, what color paper the forms have to be on, how long it will take, and so on. These are, of course, all things about which mediators can inform the parties. However, even if you are clear with the parties about what you can and cannot do as their mediator, there are still some areas that are "gray" instead of black or white.

As noted above, when some parties get stuck, they may ask the mediator to give them advice or tell them what to do. In such a case, a mediator might try to help the parties move forward by saying, "I've seen some people in your situation do X, whereas some people have opted for Y or Z," without letting on which choice the mediator thinks is best. This

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type of brainstorming is sometimes used in an attempt to help the parties generate options. However, if not carefully executed, this type of brainstorming could leave the parties feeling as though the mediator has given them legal advice, especially if one option appears to be emphasized over another. In such situations, it is important to stay mindful of how you present factual and legal information to the parties so that you clearly remain neutral. At that point, the parties can obtain legal advice about the options they are considering from their respective counsel.

WHAT TYPE OF CASE IS APPROPRIATE FOR MEDIATION?

Many experienced divorce mediators draw on their legal knowledge and trial experience (if they have this experience) to help inform their mediation practice. Of course, we also rely on our intuition and gut responses. For example, if I were to receive a call from someone inquiring about mediation and the caller told me that he or she wanted to pursue mediation because he or she did not want to "rock the boat" or "cause the other party to get mad," I would likely wonder if this case would be appropriate for mediation, depending on what else was said and/or the overall context of the conversation. For this reason, I think it is always important to screen for domestic violence when doing any mediation intake. It is amazing what you can learn if you simply ask. I am not going to say that that mediation is absolutely out of the question if a relationship involves domestic violence, but there are many advocates who would strongly disagree with using it as a dispute resolution process, due to the inherent power imbalance between the parties. In the event you decide to go forward with a mediation in such a case, you will need to think through how you will do so in a way that will protect everyone's safety.

IS MEDIATION APPROPRIATE ONLY FOR LOW-CONFLICT DIVORCES?

I've heard some divorce colleagues joke that mediation involves people sitting around singing "Kumbaya." When I hear this, I think back to what an experienced North Andover litigator, collaborative attorney and mediator, Sean O'Leary, said at a recent peer mediation meeting: "It is much harder to settle a case than it is to litigate." I couldn't agree more. It takes an abundance of empathy and patience to help parties deal with their emotions and sort through their finances and fears so that you can help them resolve their divorce. I realize that sometimes a party has no other option but to litigate, and that some cases must be resolved by a judge. However, for those parties that have the choice, I frequently remind them, "Litigation is a form of dispute resolution; it is just the least effective."

In sum, mediation can accommodate high-conflict cases, parties who are hurt and angry or who have endured trauma or betrayal. Many divorce mediators know of the amazing work of Bill Eddy to attest to the effectiveness of mediation in high-conflict cases. Mediation works best with participants who want to retain control over the process and who want to resolve their dispute in a way that makes sense for the parties and their family.

WHAT IF ONE OF THE PARTIES IS NOT BEING TRANSPARENT?

In some ways, this scenario is similar to the person who wants to try mediation because she or he doesn't want to "rock the boat." For example, over the years, I have occasionally heard some folks say that they don't need to exchange financial information, because they "trust each other" and/or they "want to stay friends." While this is certainly heartwarming, the parties still need to exchange financial information. But how can mediation help these parties? As part of the mediation process, the mediator explains that the court is going to require the parties to submit financial statements to the court and to each other. If the parties have respective counsel, the attorneys are going to want to see this information as well. Exchanging financial information in a mediation context is probably the least stressful way to do so. Lastly, the parties need to have complete financial transparency in order to make sure that the court will approve their agreement.

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FINAL THOUGHTS

As divorce mediators, we try to balance our roles as neutrals while guiding people through the emotional and often financial turmoil of divorce. By sharing our thoughts and experiences with fellow colleagues, we all learn and grow. For me, coming back to the basics, whether in mediation or in life generally, is always grounding. I hope that some of these vignettes resonate with you or cause you to consider your own experiences with divorce mediation in a useful way. ■

COLLABORATIVE ADVOCACY: A BRIDGE LINKING CONFLICT ENGAGEMENT AND CONFLICT RESOLUTION

BY MICHAEL ZEYTOONIAN

There is a recurring question that arises in the dispute resolution (DR or ADR) community's regular practice of taking stock, seeing how we can best provide our services and how to educate the public on these options available for resolving disputes:

If it makes so much sense to utilize DR approaches like early mediation, collaborative law, or ombuds services, why aren't more people choosing these processes rather than engaging in the adversarial, expensive, prolonged, painful and often damaging alternative of litigation?

In his thought-provoking book, *Beyond Neutrality*, Bernard Mayer, a leading DR professional, asks the same question: If these dispute resolution approaches are so good and work so well, why aren't more people choosing them?

One reason for not choosing these faster, less expensive and less damaging DR processes is that people are not aware of how well some of these processes fit many dispute situations. DR professionals encourage people in disputes to first do an assessment of their dispute situation before they choose a lawyer and a course of action, to help ensure that people use the right DR process for their situation. This is really solid advice as a first step before hiring anyone. Unfortunately, most people skip this step and opt for litigation before they have thought about their options and whether litigation is right for their case. This failure to assess their situation is a

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major factor in why people choose to litigate, or why DR or ADR processes are not being chosen as much as they should be used.

Mayer focuses on another reason for the disconnect and poses a challenging question: Should DR professionals be focused on *conflict resolution* only or embrace the broader scope of *conflict engagement*? At the point that someone is hiring a lawyer or considering neutrals, he or she may still want to or need to stay engaged in the dispute, and is not thinking about resolving it — at least not yet. Some people aren't yet emotionally ready for resolution or even negotiating, and that will impact their choice of who they hire or what course they take. Their focus at this early stage is likely on winning, achieving justice or fairness, getting their "day in court," having their say, being heard by the other side, and so on, but not yet on resolving the dispute. Litigation offers them the opportunity to continue the fight. It responds to their emotional need to stay engaged in the conflict. The other processes of DR, Mayer suggests, may be jumping too quickly to the goal of resolution and negotiating toward a solution, when those involved in the conflict are not yet ready for that and are not yet even thinking about that. They are still in "crisis mode," as Israeli lawyer Michal Kaempfer pointed out in her recent presentation during the Massachusetts Bar Association Dispute Resolution Section's annual DR Symposium in May in Boston. They have not moved into "problem-solving mode." It may be destructive, damaging to relationships, expensive and time consuming, but litigation gives the parties that are not yet ready to negotiate a vehicle that responds to their emotional need to continue to engage in the conflict.

Unlike traditional-style (post-discovery/pre-trial) late mediation, collaborative law (CL) can provide a vehicle for productively engaging in the dispute as long as it is necessary. The CL process provides a vehicle for continuing the conflict but requires that the engagement be done through collaboration, working through the conflict together as is needed, rather than fighting to see who wins at trial or outlasts the other in brinkmanship. The CL process doesn't necessarily move the parties right into considering options for resolution. In fact, by design, it doesn't and shouldn't get to the consideration of options for resolution until it has fully explored all the interests and needs of the parties. These needs may very well include the need to continue to engage in the conflict.

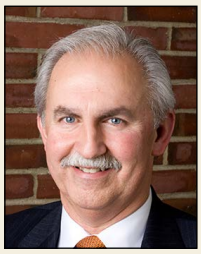
It may sound inconsistent at first glance, but it is very possible to collaborate with the party with whom one is engaged in conflict. If we consider conflict as a natural part of relationships, then working through the conflict within the structure of a collaboration is a part of that relationship's continuum. The parties may need to continue to disagree, challenge each other and advocate for their interests, but can do so in a way that is consistent with the rules of engagement of CL — honoring the principles of civility, trust and respect for every person involved, and committing to stay in the sandbox and not leave or threaten to leave. There is an established term for this wonderful principle — respectfully disagreeing — and it is a form of communicating (and collaborating) that we would do well to revive and restore everywhere, in the halls of government, schools, the workplace, families, religious communities, community and civic organizations, and the legal profession.

CL can provide a vehicle for continuing to engage in the dispute as long as it is necessary and in ways that are productive and don't restrict our efforts. CL gives us a vehicle to use and a structure that protects the parties, so that we don't necessarily or unconsciously bypass the continuing conflict and go right to resolution. Mayer recognizes that DR professionals have a bias toward problem solving and resolving matters that may pull us to skip over any further conflict engagement that may be necessary for "Getting to [a better] Yes." Mayer encourages neutrals and DR practitioners not to limit ourselves to only the pursuit of resolution, going as far as to suggest that we change our role from that of *conflict resolution professionals* to *conflict engagement professionals*. "Conflict engagement is not committed to any one function (like resolution), but implies helping people accomplish whichever of these tasks they are struggling with," says Mayer. "If we embrace the whole trajectory and the multiplicity of ways in which we can assist people throughout the course of conflict, we can begin to think of ourselves as conflict specialists, and think of our task as helping people to engage in conflict powerfully and wisely. Engaging in conflict is our consistent and overriding purpose."

Both litigation and collaborative law offer parties in a conflict a vehicle for engaging in the conflict until they reach the point where they are ready to consider options for resolving the matter. One key difference is that in CL, the parties decide how they will get to resolution and what that resolution will be, while in litigation, that decision is made by someone else. Another key distinction is that in litigation, because resolution is a byproduct and not the intended goal (winning at trial), and because it is adversarial, by the time the parties get to resolution, many of those options for resolution have become casualties of the litigation and are no longer available. CL not only keeps those options still intact, but works to expand the options for resolution, which is its intended goal (reaching the best resolution).

Years ago, when I shared with a fellow litigator colleague and friend of mine that I was considering shifting my approach in my employment and business law practice from litigation to collaborative law and mediation, his response was that they will never catch on because, "Those approaches are so un-American." He may have been right, practically or monetarily speaking.

But I think about the principles that collaborative law is built on: trust, civility, respectful advocacy, minimal civil procedural restraint, open and transparent exchange of all relevant information, giving parties their voice and providing a forum for all to be heard, productive use of independent neutral experts, a working collaboration of all involved, self-determination in both process and ultimate decision-making for resolution, and creative problem solving. And I ask: What could be more American? Beyond that, isn't CL an honorable reflection of human evolution when it comes to how we engage in and resolve conflict? ■



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GETTING THE ARBITRATION THAT YOU WANT: APPEALS?

BY CONNA WEINER

As a former inside counsel, I am well aware that commercial arbitration sometimes gets a bad rap for seeming to be no less expensive or lengthy than a court proceeding, and, well, arbitrary. Unfortunately, the accuracy of these criticisms often is inadequately explored — negative views of arbitration are sometimes based upon one-off adverse examples, and there are many proactive steps that parties and arbitrators should take to make business arbitration the efficient and fair process that it can be. Important steps in this regard are set forth in an article I co-wrote with United Technologies Litigation Chief Steven Greenspan: "Reassessing Commercial Arbitration: Making It Work for Your Company," published in ACC Docket, Association of Corporate Counsel, March 2017, pp. 53-61.

Here I briefly address what some practitioners find particularly alarming: the narrow grounds available under the Federal Arbitration Act (FAA) for vacation of an arbitration award. *See* 9 U.S. Code § 10. Since most arbitrations are governed by the FAA, a commonly held view is that parties will be stuck with a "runaway" arbitration award if they agree to arbitration. Judicially created exceptions that are only available in some jurisdictions based upon "manifest disregard for the law" — sometimes justified as a gloss on the vacation ground in the FAA based upon an arbitrator exceeding his or her powers — provide insufficient comfort. (For a general discussion, *see* Liz Kramer's "Arbitration Nation" blog.)

As discussed in the ACC Docket article cited above, there are many things that practitioners should do in connection with structuring their arbitration and arbitrator selection to ameliorate arbitration risks. Beyond that, however, attorneys should be aware of and explore with their clients at least two additional options:

1. OPTIONAL ARBITRATION APPEAL PROCEDURES

The major alternative dispute resolution providers — the American Arbitration Association (AAA), JAMS and the Institute for Conflict Preservation and Resolution (CPR) — are well aware that attorneys sometimes avoid arbitration altogether because of the appealability concern. Starting with CPR in 1999, and followed by JAMS in 2003 and the AAA in 2013, each has adopted optional appellate rules — with varying procedures and standards of review — pursuant to which parties can agree in their arbitration clauses or later to provide for an appeal to a panel of senior arbitrators and avail themselves of an expanded standard of review by that panel on a reasonably expedited time frame. The rules, along with other model clauses and forms, are readily available on the provider websites, www.cpradr.org, www.adr.org and www.jamsadr.com. Under the JAMS procedures, the arbitration appeal panel applies the same standard of review that the first-level court in the jurisdiction would apply to an appeal from a trial court decision. CPR and the AAA also permit expanded review of the factual and legal errors. Many attorneys may not be aware of these optional rules, but should be since it could impact their decision to pursue arbitration. Arbitrators should consider helping to raise awareness of this option with practitioners by mentioning it when they speak and write about the arbitration process.

2. THE FAA IS NOT THE ONLY GAME IN TOWN

In *Hall Street Assoc. LLC v. Mattel Inc.,* 552 U.S. 576 (2008), the U.S. Supreme Court held that the FAA barred courts from honoring parties' agreements to have courts review an arbitration decision for legal error where the FAA applied. The court explicitly noted, however, that the FAA "is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." *Id.* There are a number of options here. Carefully and expressly adopting in an arbitration clause a state arbitration statue that permits expanded judicial review beyond the grounds permitted by the FAA — and assuming the dispute has sufficient jurisdictional contacts with the state if that is required — may secure expanded judicial review of an award, for example. New Jersey is one such state (New Jersey Arbitration Act, N.J. Stat. § 2A: 23B-4c) and there are others, including Texas and California. *Nafta Traders Inc. v. Quinn,* 339 S.W.3d 84, 98-101 (Tex. 2011) ("We hold that the FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the [Texas Arbitration Act]"); *Cable Connection Inc. v. DIRECTV Inc.*, 190 P.3d 586 (Cal. 2008) (parties may structure their agreement to allow for judicial review of legal error under California Arbitration Act). An excellent summary of the potential terrain left open by *Hall Street* — with appropriate cautionary notes concerning the changing landscape — is available in "Writing Arbitration Clauses to Get the Arbitration You Want," Merril Hirsh and Nicholas Schuchert, Law360, Aug. 9, 2016 https://merrilhirsh.com/writing-arbitration-clauses-to-get-the-arbitration-you-want/. "As *Hall Street* suggests," the authors note, "the Federal Arbitration Act is not the only game in town" and the current state of play is certainly worth exploring in your jurisdiction. ■

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CIVIL LITIGATION

THE DIMINISHED UTILITY OF ANTI-SLAPP MOTIONS

BY MATTHEW A. KANE AND PAYAL SALSBURG

Massachusetts' so-called "anti-SLAPP" statute, G.L. c. 231, § 59H, presents a constitutional puzzle. The statute bars strategic litigation against public participation (SLAPP), i.e., a claim or "lawsuit[] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Before the Supreme Judicial Court's decision in *Blanchard v. Steward Carney Hospital Inc.*, 441 Mass. 141 (2017), the statute required a court, on motion, to dismiss claims that the moving party demonstrated were "based on" petitioning activity, unless the non-moving party proved that the petitioning activity underlying the claim was a "sham," i.e., "devoid of any reasonable factual support or any arguable basis in law," and caused harm to the non-moving party. This was the framework adopted by the SJC in *Duracraft v. Holmes Prods. Corp.,* 427 Mass. 156 (1998). As the SJC has long acknowledged, however, that valid petitioning activity can cause harm, too. In such a case, the injured party's constitutional right to seek redress in the courts is no less important than the constitutional rights of the petitioning party.

In an effort to rebalance these competing constitutional interests, and, implicitly, to resolve potential constitutional infirmities within the statute itself, the SJC in *Blanchard* augmented the anti-SLAPP framework announced in *Duracraft* by adding a third test. The SJC held that, following a moving party's threshold showing that a claim is "based on" petition activity, a nonmovant who is unable to demonstrate that the harmful petitioning activity underlying its claim was a sham, previously the only path to defeat an anti-SLAPP motion under *Duracraft*, might nevertheless still defeat an anti-SLAPP motion if it proves that the challenged claim was "not brought primarily to chill the movant's legitimate petitioning activity." Such claims are not "based on" petitioning activity, according to the SJC's reinterpretation of the statutory language. To make this showing, the nonmoving party must prove to the motion judge, "with fair assurance," that the primary motive underlying the claim was not to interfere with the moving party's petitioning rights, but rather to seek redress for harm caused by allegedly unlawful conduct. The motion judge is directed to apply this "primary purpose" test based upon "the totality of the circumstances," including "the course and manner of the proceedings," pleadings and affidavits. A necessary but not sufficient factor in this analysis is demonstration that the challenged claims are "colorable."

This augmented framework has significantly limited the utility of the anti-SLAPP statute. First, the "primary purpose" test has proven difficult (and, for litigants, expensive) to apply. One motion judge noted in his decision on an anti-SLAPP motion that the "parties have filed extensive affidavits and counter-affidavits, supplemented by voluminous exhibits, to support their arguments about the plaintiff's primary motivation for filing its abuse of process claim. The sheer weight of the papers filed in this regard undermines the notion that the anti-SLAPP statute is being used in this instance as a quick remedy to frivolous litigation."

Further, the "primary purpose" test implicates yet another constitutional concern — the potential to infringe on a claimant's right to have their legal claims heard by a jury. *Blanchard* can fairly be read to invite the motion judge to weigh competing evidence and to determine issues of credibility in its application of the "primary purpose" test — even if it results in the final adjudication of legal claims without a jury. In *Tut Liu v. Royal Care Inc.,* an employment discrimination case, the employer asserted counterclaims for abuse of process and tortious interference with advantageous relations based on allegations that the employee and a former HR consultant "systematically designed and executed a plan that included fabricating stories about" the employer to portray it as "racist" and "criminal." The motion judge granted the anti-SLAPP motion of the employee and HR consultant, dismissed the counterclaims, and invited an application for attorneys' fees under the statute. Applying the "primary purpose" test, the motion judge ruled that, "[T]he idea that [the HR consultant], employed on an interim basis, who left on professional and positive terms, would collude with [employee] to portray [employer] as racist and impermissibly discriminatory … for the purpose of creating a basis for a lawsuit is simply not believable and not supported by any credible evidence." But *Tut Liu* appears to be an outlier. Most courts have demurred on fact questions, preferring to deny the anti-SLAPP motion and defer fact questions for resolution at trial. For example, in *America's Test Kitchen Inc. v. Kimball*, the court denied an anti-SLAPP motion because, "If a jury were convinced that [movant] asserted baseless claims … in order to hinder [movant's] ability to compete against [movant], it could find that [movant] committed the tort of abuse of process." If the court must evaluate the nonmovant's subjective intent, it follows that anti-SLAPP motions are now significantly harder to win.

The "primary purpose" test reinterprets the anti-SLAPP statute to better protect the nonmoving party's constitutional right to seek redress for harm in the courts. On the other hand, the test has proven difficult and expensive to apply, and has made anti-SLAPP motions harder to win. As a result, *Blanchard* may, and, for the well-advised client, should, have at least a deliberative — if not chilling — effect on the exercise of the constitutional right to petition. If that exercise might result in harm to another, be warned that the anti-SLAPP statute is a far less reliable shield against resulting claims. ■

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AUTHENTICATING SOCIAL MEDIA EVIDENCE FOR USE AT TRIAL

BY SANDRA L. WARD

With nearly 70 percent of Americans using some type of social media in 2018, obtaining and using social media evidence has become an integral component of a litigation strategy. *Social Media Fact Sheet,* Pew Research Center, Feb. 8, 2018, http://www.pewinternet.org/fact-sheet/social-media/. Personal profiles found on Facebook, Instagram, Twitter and dating sites often provide an abundant source of evidence, especially in the context of personal injury, domestic relations and employment cases. For example, status updates and photos can be used to challenge claims of injuries and mental distress, reveal a litigant's financial status and assets, and create timelines. Social media has become such a common source of evidence that websites for numerous personal injury law firms throughout the country warn of the dangers of posting on social media and encourage litigants to restrict their privacy settings and avoid posting anything online that could be potentially harmful to their claim. In the event that opposing litigants do not heed this advice, and you have acquired revealing information from social media profiles during the course of discovery, your next step is to ensure that you will be able to enter the material as evidence at trial.

As with other evidence, the admission of social media evidence first requires a showing of relevancy. In Massachusetts, relevant evidence is liberally defined as evidence that tends to make a fact of consequence more or less probable than it would have been without the evidence. *Commonwealth v. Schuchardt,* 408 Mass. 347, 350 (1990). Further, evidence is relevant "if in connection with other evidence it helps a little." *Commonwealth v. Tucker*, 189 Mass. 457, 467 (1905). After a preliminary showing of relevancy of a social networking profile or post, a proponent must authenticate the evidence in order to gain admission. *Commonwealth v. LaCorte*, 373 Mass. 700, 704 (1977). Generally, the authentication requirement is satisfied by a showing that there is sufficient evidence to support a finding that the item is "what its proponent represents it to be." *Id.* Circumstantial evidence may be used to demonstrate that evidence is authentic. *Commonwealth v. Tran,* 460 Mass. 535, 546 (2011). For electronic communications, ranging from captures of complete Facebook profiles to printouts of emails and messages exchanged on social networking sites, a proponent must provide sufficient evidence to conclude "that it is more likely than not" that the messages or content were authored by the person whom the proponent claims. *In re: Adoption of Nash*, No. 15-P-1302, slip op. at 3 (Mass. App. Ct. May 12, 2016) (unpublished Rule 1:28 decision); *see also Commonwealth v. Purdy*, 459 Mass. 442, 447 (2011); *Commonwealth v. Oppenheim*, 86 Mass. App. Ct. 359, 367 (2014). The determination is a preliminary question of fact to be decided by the judge. *Renzi v. Paredes,* 452 Mass. 38, 52 (2008). When assessing authenticity, a trial judge must determine whether there is sufficient evidence for a reasonable jury to find by a preponderance of the evidence that the item in question is what the proponent claims it to be. *Purdy*, 459 Mass. at 447; *see also Oppenheim,* 86 Mass. App. Ct. at 366. If the judge finds that this preponderance of the evidence standard is met as to authenticity, and the evidence is otherwise admissible, the social media content should be admitted. *Purdy*, 459 Mass. at 447.

Challenges to the admission of social media evidence in particular are more likely to be based on authentication than relevancy. While authenticity can be more easily shown for public records, social media evidence presents unique authentication challenges, as it is not unheard of for people to create fake accounts under other individuals' names. Between January and March 2018, Facebook alone deleted over 500 million fake accounts. Alfred Ng, Facebook Deleted 583 Million Fake Accounts in the First Three Months of 2018, CNET, May 15, 2018, https://www.cnet.com/news/facebook-deleted-583-million-fake-accounts-in-the-first-three-months-of-2018/. Login information to a site can also be compromised. As a result, in the absence of an agreement as to authenticity, courts in Massachusetts require "confirming circumstances" to demonstrate that electronic evidence is authentic. Mass. G. Evid. § 901(b)(11) (2018). Expert testimony is not required to authenticate the source of electronic communications. *Id.* Attorneys can use the methods discussed below to ensure the social media evidence they have collected is admitted at trial.

1. USING STIPULATIONS AND REQUESTS FOR ADMISSIONS TO ESTABLISH AUTHENTICITY

A stipulation as to the authenticity of a social media profile or post from opposing counsel is the simplest way to have the material admitted. Authenticity of social media evidence can also be established by using requests for admissions under Massachusetts Rules of Civil Procedure Rule 36. Rule 36 allows a litigant to serve on another party a written request for admission of the truth of any matters within the scope of discovery. Mass. R. Civ. P. 36(a). In the case of social media evidence, a lawyer could request an admission of authenticity of the electronic evidence and include with the request a copy of the material to be authenticated, for example, a capture of a Facebook profile or post. After service of requests for admissions, the other party has 30 days to respond to the requests. Under Rule 36(a), the matter is admitted if a response or denial is not served within 30 days after service of the request for admission. If the opposing party admits the profile is authentic, or fails to respond to the requests, the authenticity of the social media evidence would be considered "conclusively established." Mass. R. Civ. P. 36(b).

2. TESTIMONY OF A WITNESS WITH KNOWLEDGE TO IDENTIFY A SOCIAL MEDIA PROFILE

Electronic evidence can be identified through the testimony of a witness with knowledge that the evidence is what the proponent claims it to be. *LaCorte*, 373 Mass. at 704; *see also* Mass. G. Evid. §901(b)(1) (2018). In a civil case, this can be achieved by asking the holder of the account during a deposition or at trial to confirm they maintained the profile and authored the relevant posts. For photographs posted on social networking sites, testimony that a person is the same person depicted in photographs should be enough. Alternatively, a member of the account holder's household who saw the person use the social media account, or make the posts in question, could also testify as to authenticity.

3. THE CONFIRMING CIRCUMSTANCES REQUIREMENT FOR AUTHENTICATING CONTESTED ELECTRONIC EVIDENCE

In cases where the authenticity of social media evidence is contested, evidence that the social networking profile bears the name of a specific person is not sufficient by itself to authenticate the profile as having been created

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SOCIAL MEDIA
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or authored by the person whose name is on the account. *Purdy*, 459 Mass. at 450 (2011). Instead, the proponent must authenticate the evidence with confirming circumstances or distinctive characteristics. This analysis may be critical in products liability cases, especially where the person who maintained the profile is deceased and unable to testify or otherwise stipulate to authenticity. It can also be used in criminal cases where a defendant does not testify. In addition, this method is available in the event that the authenticity of the social media evidence is refuted, perhaps by claims that a shared computer was used to access the account, the account log-in information was stolen, or the account was created by a third party.

As stated, social networking evidence can be authenticated using circumstantial evidence, such as distinctive characteristics, internal patterns, appearance, and contents and substance. *Purdy*, 459 Mass. at 447-48. Despite a claim that others had used his computer, and a denial that he authored certain emails, in *Commonwealth v. Purdy,* sufficient evidence was found to authenticate emails as having been authored by the defendant where one email contained a photo of him and another included an unusual characterization of the defendant and the services his business offered. 459 Mass. at 450-51. In the context of a Facebook profile, a similar showing could be made by pointing out a specific "About" section and timeline posts with recent photos of the author. Watch for unique language or speech patterns, slang, nicknames and personal references, as well as any other content that can be shown as specific to the author to prove that the profile contains distinctive characteristics making it more likely than not that the person you claim is the account holder is in fact the author of the content. The use of the same screenname among various social media profiles and websites may also be useful in an authentication analysis.

Along with distinctive characteristics, confirming circumstances can also authenticate evidence. *Commonwealth v. Hartford*, 346 Mass. 482, 488 (1963). In the case of letters, confirming circumstances might be an identification of handwriting, or a showing that the correspondence was a reply to a prior letter. *Purdy*, 459 Mass. at 449-50. For social media profiles and other electronic evidence, confirming circumstances can be shown when the content in the profile or message is corroborated by actions by the author. For example, in *Commonwealth v. Foster F.*, the Massachusetts Appellate Court agreed with the lower court's finding of sufficient confirming circumstances that a defendant authored Facebook messages when the author of the messages proposed meeting the victim on a certain day, and did meet the victim as discussed electronically. 86 Mass. App. Ct. 734, 737-38 (2014). Facebook check-ins could be used to authenticate a social networking profile in the same way, by showing that the activities discussed on the Facebook profile matched the real-life actions of the person. In a June 2018 Rule 1:28 decision, the Massachusetts Appellate Court affirmed a determination that text messages were authentic when the sender referenced his recent hospitalization and use of a certain drug, and a witness testified that she had received screen shots of the text messages from a third party and pointed out which messages were sent by whom. *In the Matter of N.F.*, No. 17-P-979, slip op. at 2 (Mass. App. Ct. Jun. 4, 2018) (unpublished Rule 1:28 decision). Similarly, authenticity of a social media profile can be demonstrated by referencing specific details in status updates or other content, especially information that would likely only be known by the person you seek to prove as the author. Prior to trial, consider using depositions to elicit testimony that will allow you to authenticate social media profiles and content through confirming circumstances. For example, you could question the witness about specific activities and posts, employment history or other information contained in the profile.

Social media profiles, where people are prone to sharing revealing personal details, can provide invaluable information during litigation and may be a vital component of your case. If you anticipate challenges to the admission of social media evidence at trial, especially on the grounds of authenticity, plan ahead with a strategy so that the electronic evidence can be used to support your case. Preparation in advance will ensure that you are able to show sufficient confirming circumstances or distinctive characteristics to establish that the social media evidence you seek to introduce is authentic and admissible. ■

COMPLEX COMMERCIAL LITIGATION

MASSACHUSETTS' NEW NON-COMPETE LAW: AN OVERVIEW

BY LINDSAY M. BURKE

After years of fitful attempts, the Massachusetts Legislature finally passed a bill regulating non-compete agreements. Gov. Charlie Baker signed the "Act relative to the judicial enforcement of noncompetition agreements" (MGL c. 149, § 24L) on Aug. 10, 2018, and it took effect on Oct. 1, 2018. The act ushers in a new era in the enforcement of non-competes, and is likely to cause some misunderstandings (and a host of litigation) as employers and employees adjust. This article highlights the most important aspects of the new law.

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'NONCOMPETITION AGREEMENT' DEFINED

The law defines a "noncompetition agreement" as:

"[A]n agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that the employee will not engage in certain specified activities competitive with the employee's employer after the employment relationship has ended[.]"

Even more importantly, perhaps, the act identifies other types of agreements that are not considered "noncompetition agreements," and which will continue to be evaluated under Massachusetts common law. These include:

- Non-competes made in connection with the sale of a business;
- Severance agreements (provided the employee is given seven business days to rescind acceptance);
- Non-solicitation agreements; and
- Non-disclosure agreements.

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'EMPLOYEE' DEFINED

An "employee" is anyone performing any service. The act also specifies that "employee" in this context, and unlike other employment laws, includes independent contractors. Importantly, employers cannot impose non-competes on any of the following categories of employees:

- Employees who are classified as non-exempt under the Fair Labor Standards Act (in other words, hourly employees);
- Undergraduate or graduate students who are engaged in short-term employment;
- Employees who have been terminated without cause or laid off; or
- Employees who are 18 years of age or younger.

THE GARDEN LEAVE REQUIREMENT

The act also requires employers to compensate departing employees with "garden leave pay" during the non-compete time period. *See* "Down the Garden Path." The employer, during the restricted period, must continue paying the former employee an amount defined as "at least 50 percent of the employee's highest annualized base salary paid by the employer within the two years preceding the employee's termination."

Garden leave is required unless the employer and employee agree to some "other mutually-agreed upon consideration." This language may cause confusion because, unlike the 2017 garden leave bills, the act imposes no specific requirements on the value or timing of "other mutually-agreed upon consideration" that could serve as an alternative to garden leave. In fact, one could argue that a hiring bonus is "other mutually-agreed upon consideration," an interpretation that would render garden leave a negotiable contractual provision.

REASONABLENESS REQUIREMENTS

Any non-compete must be reasonable, meaning it must be:

- *No broader than necessary to protect a legitimate business interest.* "Legitimate business interests" are the employer's trade secrets, other confidential information, and goodwill. Courts will presume that the non-compete is "reasonable" if the employer can show that no other type of restrictive covenant (such as a non-solicitation or non-disclosure agreement) would be enough to protect the employer's legitimate business interest.
- *No longer than 12 months.* The only exception to the 12-month rule is if an employee is shown to have breached a fiduciary duty to the employer, or has unlawfully taken property belonging to the employer. In that case, the restricted period may be tolled for up to two years from the date the employment ended.
- *Reasonable in geographic scope.* If the noncompete is limited to the geographic "areas" in which the employee, "during any time within the last two years of employment, provided services or had a material presence or influence," it will be considered "reasonable." The word "areas" is not defined, and that ambiguity, along with the increasing use of telecommuting and remote work, likely will lead to litigation about this provision.
- *Reasonable in scope of prohibited services.* If the non-compete's "proscription on activities … protects a legitimate business interest and is limited to only the specific types of services provided by the employee at any time during the last two years of employment," this limitation will be presumed reasonable. This is codification of the "janitor rule," in which non-competes were often deemed unreasonable if they were so broad as to prevent a CEO from working as a janitor for a competitor.

TECHNICAL AND ADVANCE NOTICE REQUIREMENTS

In addition to containing a written promise of garden leave or "other" consideration, all non-competes must:

- Be in writing;
- Be signed by both the employer and employee; and
- Expressly affirm the employee's right to consult with an attorney prior to signing.

If the non-compete is presented to an employee when he or she starts work, the employer must present it to them at the time the offer of employment is made, or 10 days before the employment begins, whichever is earlier. If a non-compete is signed after the employment begins, however, it must be "supported by fair and reasonable consideration independent from the continuation of employment." This appears to mean something more than the otherwise-required "garden leave" or "mutually agreed upon consideration." The sufficiency of consideration could be another point of confusion and contention.

THE ACT PERMITS BLUE-PENCILING AND SEVERANCE

Under the new law, courts can "blue-pencil," or edit, overly-broad non-competes, rather than requiring them to declare the non-competes null. Further, should a court declare the non-compete null rather than blue-penciling it, the act provides that only the non-compete portion of the agreement will be severed, and the remainder of the agreement will remain in effect.

VENUE AND CHOICE OF LAW

Under the act, parties must bring non-compete cases in the county where the employee resides or, if the parties mutually agree, in Suffolk County. Any actions in Suffolk County must be brought in the state-level "superior court or the business litigation session of the superior court."

The act gives the state superior court exclusive jurisdiction over any non-compete cases brought in Suffolk County only, and thus appears to prohibit parties from bringing such actions in, or removing them to, the federal court located in that county (though the act imposes no similar restrictions on actions brought in the other 13 Massachusetts counties). It is unclear whether courts will uphold the act's apparent restriction on the right to bring a case in federal court where the action involves a federal claim or diversity of parties.

Finally, choice of law provisions designating another state will be ineffective if the employee is, and has been for the past 30 days, a resident of or employed in Massachusetts at the time of termination.

TAKEAWAYS

The goal of the new non-compete legislation was to reform the use of non-competes to apply only in those instances where a business interest could not be protected using less severe means, and where the employer was even willing to pay for the benefit of keeping the former employee away from competitors. In that regard, it has succeeded. However, another goal was to provide simplicity and clarity in the application and enforcement of non-competes. Whether the act can simplify non-compete disputes, given the ambiguity surrounding reasonable scope, reasonable consideration, and proper venue, is yet to be seen. ■

SJC REMOVES INTENTIONAL BREACH BAR TO QUANTUM MERUIT RECOVERY IN CONSTRUCTION CASES

BY ROBERT F. CALLAHAN JR.

In *G4S Technology LLC v. Massachusetts Technology Park Corp.*, SJC-12397 (Mass. June 13, 2018), the Supreme Judicial Court overruled a "rigid" and outdated rule that automatically barred quantum meruit for a party intentionally breaching a construction contract. The ruling requires trial courts to evaluate a quantum meruit claim in the broader context of the entire construction contract.

G4S Technology arose from a construction project that involved building an extensive fiber optic network in western Massachusetts. As with many large infrastructure projects, the completion of the fiber optic network was delayed and the parties assigned fault to each other. The contractor sued the other party to the construction contract, a state development agency, seeking the withheld portion of the contract value and additional compensation for work required to complete the project. Discovery revealed that the contractor intentionally, and repeatedly, submitted false certifications that it was paying its subcontractors on time. Failing to timely compensate the subcontractors breached the construction contract.

Based on this information, the state development agency moved for summary judgment on the contractor's quantum meruit claim. The motion judge granted summary judgment in favor of the state development agency, holding that the repeated, intentional breaches of contract precluded the contractor from establishing good faith, a prerequisite to quantum meruit recovery. The motion judge relied upon a long line of older decisions enforcing the general rule that intentional breaches of contract are inherently inconsistent with quantum meruit's good faith requirement, thereby barring recovery. This rule was known as the "*Sipley* doctrine," after the 1906 case to which it largely traces its origins.

Leading contract treatises, such as Corbin and Williston, roundly criticized the *Sipley* doctrine as too severe and limiting to a court's ability to craft an equitable resolution. Specifically, the rule placed too much emphasis on "clean hands" without considering whether another party received an unjustified windfall. Despite these criticisms and some distinguishing case law, the court had never overruled *Sipley*, leaving the "rigid" rule in place.

On appeal, the SJC seized the opportunity to finally overrule *Sipley*. While noting that existing case law supported the motion judge's analysis, the SJC reversed summary judgment on the contractor's quantum meruit claim, holding that, "Intentional breaches, even those involving material breaches, alone are not dispositive of the right to equitable relief, at least when such breaches do not relate to the construction work itself."

In place of the *Sipley* doctrine, the SJC prescribed a new, broader equity analysis. *G4S Technology* directs trial courts to consider both parties' entire contract performance, the various contractual breaches and corresponding damage and, "most importantly," the project's value compared to the amount already paid for the work. The SJC summarized the goal of this broader analysis as "balanc[ing] the equities and produc[ing] a just result."

Applying the new analysis to the case before it, the SJC contemplated circumstances affecting the equity analysis, such as if the state development agency wrongfully withheld the remainder of the contract's value or caused construction delays. The SJC also emphasized the need for the trial court to consider the relationship between the construction and the contractor's false certifications and delayed payments to subcontractors. The SJC remanded the case for the trial court to make the necessary factual determinations and reconsider the contractor's quantum meruit claim.

G4S Technology constitutes a change in construction law and requires parties to construction contracts to reassess their litigation risk with respect to equitable claims. For contractors, the decision opens a door to recovery even when they have intentionally breached a construction contract. But given the number of broad considerations trial courts have at their disposal for rendering just resolutions, the demise of the *Sipley* doctrine does not necessarily mean contractors will have an easy road to quantum meruit recovery. ■

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MASSACHUSETTS ADOPTS NEW TRADE SECRETS ACT

BY ANDREW O'CONNOR

After years of debate, effective Oct. 1, 2018, Massachusetts is now the 49th state to adopt a modified version of the Uniform Trade Secrets Act (New York is the final holdout). There are several important changes in the new Massachusetts Trade Secrets Act (MTSA), which replaces the prior iteration of M.G.L. c. 93, § 42, that litigators and corporate counsel should keep in mind.

MORE PARTICULARIZED CLAIMS OF MISAPPROPRIATION OF TRADE SECRETS

The new MTSA aims to dissuade vague claims of misappropriation. The definition of "trade secret" requires that the trade secret comprise "specified or specifiable information." In addition, a complaint must allege "with reasonable particularity the circumstances" of the misappropriation, and a plaintiff must "identify the trade secret with sufficient particularity" prior to taking discovery of the defendant. The definition of "trade secret" also requires that, "at the time of the alleged misappropriation," there were reasonable efforts under the circumstances to keep the information protected, including "reasonable notice." Companies may satisfy the reasonable notice element by requiring employees to sign non-disclosure agreements or employee handbooks acknowledging that certain information is confidential and cannot be disclosed. Taken together, these added requirements highlight the importance of keeping track of all trade secret information and the methods by which such information is kept confidential.

THE 'INEVITABLE DISCLOSURE' DOCTRINE

The "inevitable disclosure" doctrine enables courts to enter preliminary injunctions preventing former employees from working for a competitor because of the nature of their employment, without direct proof or evidence of misappropriation. Prior to the new MTSA, Massachusetts courts had effectively rejected

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NEW TRADE SECRETS ACT CONTINUED FROM PAGE 11

(or at least discredited) the "inevitable disclosure" doctrine. The new MTSA, however, adopts a form of the inevitable disclosure doctrine, stating that, "Threatened misappropriation may be enjoined upon principles of equity, including but not limited to consideration of prior party conduct and circumstances of potential use." This provision is broader than the federal Defend Trade Secrets Act, which may restrict, rather than prevent, new employment. The MTSA's inevitable disclosure principles may become a powerful tool for plaintiffs in Massachusetts, but it remains to be seen how Massachusetts courts will apply them.

AWARD OF ATTORNEYS' FEES

The new MTSA provides for an award of attorneys' fees if the claim was brought or defended in bad faith, a motion to enter or terminate an injunction was made in bad faith, or if willful and malicious misappropriation exists. Attorneys' fees were not available under the previous MTSA, resulting in many plaintiffs filing an additional claim of violation of the Massachusetts unfair competition laws, M.G.L. c. 93A. Because there were often impediments to bringing c. 93A claims against employees or former employees, the availability of attorneys' fees in the new MTSA may provide companies seeking to protect their trade secrets additional tools by which to protect their assets and enforce their rights.

'CUSTOMER DATA' AND 'CUSTOMER LIST' INCLUDED IN DEFINITION OF 'TRADE SECRET'

The new MTSA includes "customer list" and "customer data" in the definition of "trade secret." While the case law previously recognized certain customer data as a trade secret, such as customer lists, purchase preferences and other commercially competitive customer information, the new MTSA may provide more predictability when basing a trade secret claim on customer information.

EVALUATE TRADE SECRETS AND CONFIDENTIALITY PROTOCOLS

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Now is an ideal time for companies to audit their confidential information, including customer information, software, source code, and other information that provides a competitive advantage in the marketplace. This is also a good time to review and update internal security protocols to ensure the information is current and remains confidential. Form non-disclosure agreements and employee handbooks should also be reviewed to ensure they adequately identify trade secret information and the obligation not to disclose. Finally, companies should evaluate their methods of keeping their information protected in order to ensure maximum trade secret protection in the future. ■

YOUNG LAWYERS DIVISION

SO YOU THINK YOU'RE DIVORCED: EVALUATING THE CONSEQUENCES OF FOREIGN DIVORCES IN IMMIGRATION PROCESSES

BY JOSEPH MOLINA FLYNN

Divorce is tricky. For most, divorce is a trying time rife with emotions and controversy. In a typical divorce, there are several issues to be decided: child custody, support, alimony, division of assets and debts. For some, there are far deeper issues to be considered, including whether the divorce is valid for purposes of future immigration proceedings.

Immigration affords United States citizens the opportunity to confer immigration benefits on their spouses. Notwithstanding additional barriers for individuals who entered the country without appropriate documentation, an immediate relative petition can bestow upon an immigrant the benefit of obtaining lawful permanent resident status through the adjustment of status process. But what if either party was previously married? A copy of the document terminating the previous marriage must be submitted to the United States Citizenship and Immigration Service (USCIS).

Divorces in the United States can often be slow and costly. In Massachusetts, for example, the process can take several months or years. Even after the divorce hearing, the nisi period allows for the entry of final judgment only after 90 days from the date of entry of nisi judgment. In other countries, the divorce process is streamlined, and a divorce can be obtained quickly, often in a matter of days. In some countries, the divorce process does not require the appearance of either party, and a divorce may be obtained through a power of attorney.

Immigration processes, even those that may seem simple at first glance, can become complicated when a foreign divorce is involved. USCIS considers a foreign divorce valid "depend[ing] on the interpretation of the divorce laws of the foreign country that granted the divorce and the reciprocity laws in the state of the United States where the applicant remarried." Massachusetts recognizes foreign divorces if "the foreign court has jurisdiction over the cause of the case and over both parties." Because of the jurisdictional requirement, divorces obtained in jurisdictions with no residence requirements are not recognized in Massachusetts. This means that a divorce obtained in a foreign country while both parties resided in the United States is not valid in Massachusetts.

It follows that a foreign national seeking immigration benefits after a divorce obtained in a foreign jurisdiction — whether it is his or her own divorce or the divorce of the United States citizen spouse — must tread carefully. If the divorce was obtained while both parties resided in the United States, then the divorce is not valid. Because the divorce is not valid, any subsequent marriage is not valid. The invalidity of the subsequent marriage will result in a denial of any applications for immigration benefits based on the invalid marriage.

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One must take steps to cure the defect before filing any applications with USCIS. First, a valid divorce must be obtained, whether in Massachusetts or in another competent jurisdiction. The foreign national and the United States citizen spouse must then either remarry or petition the Probate & Family Court to affirm their marriage. Once the marriage is affirmed or the parties are remarried, they may proceed to file their documentation with USCIS.

Family practitioners, while not immigration practitioners, must be mindful of these procedures and advise clients accordingly. Similarly, immigration attorneys should be well-versed in these issues to avoid costly mistakes for clients. ■

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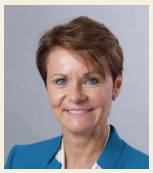

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