MASSACHUSETTS BAR ASSOCIATION

SECTION REVIEW

WWW.MASSBAR.ORG/SECTIONREVIEW

JULY/AUGUST 2024

INSIDE THIS ISSUE

THE END OF AN ERA: ANTICIPATING THE IMPACT OF A POST-*CHEVRON* WORLD IN IMMIGRATION LAW

BY WEIJIA (VICTORIA) MA, SHAWNAM OSMAN AND ABBY SWANSON

In a June 28, 2024, decision in L*oper Bright Enterprises v. Raimondo,* the Supreme Court overturned a 40-year-old precedent established in *Chevron v. Natural Resources Defense Council*. In *Chevron*, the court held that when a federal statute is ambiguous, federal courts should defer to an administrative agency's interpretation of that law as long as the interpretation is "reasonable." The decision to overturn will potentially have consequences for all areas of administrative law, including the field of immigration law.

Lober Bright Enterprises v. Raimondo concerned a National Marine Fisheries Service regulation that requires fishing vessels to pay the salaries of the federal observers they are required to carry. The regulation invoked Congress' Magnuson-Stevens Act, which gave the National Marine Fisheries Service authorization to require these vessels to carry the federal observers. Petitioners, who represented owners of the fishing vessels affected by this interpretation of the Magnussen-Stevens Act, argued for a full overturning of *Chevron* deference, stating that it violated Article III of the U.S. Constitution, and Section 706 of the Administrative Procedure Act, which instructs federal judges to determine all relevant questions of law. In a 6-3 decision, the Supreme Court agreed.

The Supreme Court's decision to overrule *Chevron* could significantly impact the immigration field, leading to an increase in litigation challenging agency decisions from U.S. Citizenship and Immigration Services (USCIS), the Department of Labor, Immigration and Customs Enforcement, and U.S. Customs and Border Protection. Some believe that agency decisions should receive deference rather than strict *de novo* review, as judges are not experts in the immigration law field and are not involved in the political administration making the regulations. Another concern is that the end of *Chevron* could lead to less uniformity in immigration law, as each federal court of appeals might interpret congressional mandates differently. The inconsistent interpretations mean greater opportunity for challenges, as immigrants and employers may seek a court more favorable to their cause. Lack of predictability and more litigation also have downstream cost and resource implications, which could ultimately mean longer case processing times.

There has been concern by those who argue against *Chevron* deference that agencies under different administrations may interpret the laws differently. The inconsistency of the agencies' decisions would leave future rulemaking and rule interpretation unpredictable. However, courts are not exempt from partisan rulings, as we have recently seen.

As a practical example, consider the recent updates to filing fees by USCIS, which cited authority from the Homeland Security Act of 2002, as well as several sections of the Immigration and Nationality Act. If an employer challenges the newly required payment of an Asylum Program Fee for filing of an I-129 H-1B petition, claiming that USCIS misinterpreted the congressional mandate, courts would have formerly applied the *Chevron* doctrine and thus deferred to USCIS' interpretation. Now, each court will have *de novo* review of this question, potentially coming to varied conclusions. Many practitioners believe that non-pure and abstract legal questions, like this one, call for agency deference because it is difficult for the judges to measure the financial conditions of any agency.

When it comes to fighting for the rights of immigrants facing deportation proceedings, many practitioners believe that the Supreme Court's decision to overturn *Chevron* leaves the door open for government agencies to challenge previously binding precedent from the Board of Immigration Appeals (BIA). For example, many of the statutorily protected grounds for asylum are not specifically defined by 8 U.S.C. § 1158 of the U.S. Code. The BIA, the highest administrative body for analyzing and applying immigration laws, has provided its interpretation on some of the ambiguous protected grounds. Under asylum law, individuals seeking protection must show that they fled their home country because they were persecuted based on one or more protected grounds: race, religion, nationality, political opinion, and membership in a particular social group. Although the BIA has provided clarity under some of the more ambiguous protected grounds, such as political opinion and membership in a particular social group, in a post-*Chevron* world, the circuit courts might not give the BIA's interpretations the same level of deference as before.

Looking ahead, Congress still has the power to pass laws with enough specificity to prevent them from being left to the interpretation of courts, so we could see greater pressure to revise existing statutes. However, given the decades that have passed without any significant immigration legislation, it seems likely that existing ambiguities in the statutes will end up before federal judges in the coming years. The extent of the impact of overturning *Chevron* remains to be seen. ■

WEIJIA (VICTORIA) MA is a staff attorney in BAL's Boston office. Her practice focuses on U.S. corporate immigration, helping clients navigate complex immigration laws and regulations.

SHAWNAM OSMAN is an associate attorney at the Law Offices of Johanna Herrero LLC. Her practice focuses on removal defense litigation, family-based immigration, and obtaining favorable results in the Massachusetts Probate and Family Court for Special Immigrant Juvenile Status benefits.

ABBY SWANSON is an associate attorney at Parker Gallini LLP. Swanson works with corporate and individual immigration clients across multiple industries.

HOW IS ANIMAL RESEARCH REGULATED AND THE 2022 MASSACHUSETTS 'BEAGLE BILL'

BY DEB NEWMAN

The "Beagle Bill," which became a state law in 2022, promised to save the lives of tens of thousands of healthy cats and dogs (mostly beagles) who would otherwise be euthanized when no longer needed by research facilities in Massachusetts. Now these animals may be welcomed by rescue organizations for adoption as companions to caring people.

As wonderful as that sounds, thousands of their counterparts, as well as other species, remain behind bars in laboratories run by educational institutions, government entities, scientific enterprises or medical industries. According to federal reports quoted by PETA, Charles River Laboratories, the world's largest breeder of animals for application in experimentation, utilized in one year "16,460 nonhuman primates, 12,531 rabbits, 9,099 dogs, 4,815 guinea pigs, 2,739 hamsters, 2,086 pigs, 207 cats, 16 sheep, and hundreds of thousands of other animals who aren't required by law to be counted."

Agencies that address the standard of care nonhuman animals receive at federally funded research establishments include the U.S. Department of Agriculture, which employs only 120 inspectors who are responsible for ensuring compliance for more than 12,000 facilities, and the Public Health Service, which oversees testing at the Food and Drug Administration (FDA) and the Centers for Disease Control and Prevention, and is similarly understaffed and inadequate. The Animal Welfare Act, a federal law that addresses the standard of care for nonhuman animals at research facilities, provides only minimal protection and excludes roughly 95% of the species utilized, such as birds, reptiles, amphibians, fish and, overwhelmingly, rodents.

Mice and rats comprise more than 90% of nonhuman animals used in experimentation, yet none of these sentient and social creatures are afforded even a minimal federal, state or local legal buffer concerning humane treatment. Standards for the conditions and sizes of their cages, what they are fed (or not fed), how they are handled, and the amount of pain to which they must submit may be left, if at all, to the discretion of an administrator, but likely rests with the humans who perform the experiments. In other words, no one but those in direct contact with these animals, and the animals themselves, knows what they endure during their interminable subsistence in captivity. It's hard to imagine the fear and despair for that multitude in each minute of every day.

Although other species used in research are permitted some legal oversight for the "care" they receive, their status as property limits the extent of the safeguards. Most of us are raised to accept the idea of nonhuman animals as commodities meant to service us, with little or no consideration given to the extent they suffer or are exploited. They are used as food, garments, organ mines, bomb sniffers, astronauts and, of course, subjects in countless laboratories. Affording them too much legal protection would compromise the comforts to which we humans are accustomed.

Development of pharmaceuticals, industrial chemicals, food additives and cosmetics is heavily dependent on utilization of nonhuman animals who must endure countless invasive procedures. Testing is done to determine immediate and long-term effects on brain and body; therefore, little regard is paid to the level of harm inflicted, a level intentionally measured and recorded to avert what's recognized as impermissible: potentially unpleasant, intolerable or dangerous reactions in humans. However, about 90% of medicines tested on nonhuman animals ultimately fail in human trials! Just as inexplicably, the Three Rs Principle — which, for more than 70 years, has sought to reduce the numbers of nonhuman animals in testing, refine their treatment, and replace current methods with in vitro protocols and the ethical use of human subjects — has miscarried its objectives.

Non-animal alternatives do exist, and they are often not only faster and less expensive to employ, but also more accurate and effective at predicting how the human body will respond to drugs, chemicals and treatments. But, until passage of the FDA Modernization Act 2.0 in December 2022, the U.S. government mandated that all investigational drugs be tested on nonhuman animals before being advanced to human trials. Now, fortunately, scientifically proven alternatives, such as cell-based assays, 3D tissue cultures, stem cell research, microfluidic chips, computational and mathematical models using metadatabases, and clinical research on human volunteers, are allowed. Yet, despite this myriad of cutting-edge options, the fallacy of a correlation between nonhuman and human outcomes for medicines, and, of course, the continued outcry from advocates, conventional testing remains a widely accepted practice. More humans need to ask why. ■

DEB NEWMAN is president of the newly established nonprofit Speak Up For Animals, whose purpose is to advocate for the welfare and protection of wildlife and companion animals in Swampscott and elsewhere in Massachusetts. Most recently, Newman was at the forefront in the defense of Nahant's coyote population, co-authored Swampscott's Coyote Management Plan, and drafted Swampscott's bylaw on wildlife feeding.

CITED INFORMATION:

https://headlines.peta.org/what-charles-river-laboratories-doesnt-want-you-to-know

https://aldf.org/article/federal-laws-and-agencies-involved-with-animal-testing

https://www.sciencedirect.com/science/article/pii/S2452302X1930316X

https://journals.sagepub.com/doi/10.1177/02611929241241187

https://grants.nih.gov/grants/policy/air/alternatives

ANTI-SLAPP: MEET THE NEW BOSS, SAME AS THE OLD BOSS

BY DEREK B. DOMIAN

On June 5, 2024, the Massachusetts Bar Association's Complex Commercial Litigation Section held a panel discussion on the Supreme Judicial Court's revisiting — yet again — of the analytical framework that has developed around G.L. c. 231, § 59H, commonly known as the anti-SLAPP statute. Brendan Kelley of Conn Kavanaugh Rosenthal Peisch & Ford LLP moderated the panel, which featured Superior Court Justice Rosemary Connolly and Mitchell Perne of Demeo LLP. The topic of conversation: the SJC's recent companion decisions in *Bristol Asphalt, Co. v. Rochester Bituminous Products, Inc.,* 493 Mass. 539 (2024), and *Columbia Plaza Assocs. v. Northeastern Univ.,* 493 Mass. 570 (2024).

The anti-SLAPP statute is a notoriously wooly beast that has confounded efforts by the judiciary to discipline it and by litigants to effectively manage it to predictable outcomes. The statute's purpose is simple and salutary: to protect the constitutional right to petition the government for relief, whether legislative, judicial, administrative or otherwise, by establishing a procedure for obtaining the early dismissal of claims that seek to chill that activity by imposing on it the debilitating cost of expensive lawsuits. These debilitating lawsuits are the target of the statute: SLAPP suits, or strategic litigation against public participation.

Achieving this purpose in practice has proven less simple. One reason is the amount of judicial attention that must be dedicated to the mechanism by which the statute operates: a "special motion to dismiss" the claims that violate the statute. As the SJC recognized in *Bristol Asphalt,* the "special motion to dismiss is strong medicine." 493 Mass. at 555. It offers the moving party a chance of summarily disposing of claims regardless of their merits *and* mandatory attorney's fees if the moving party prevails, all under a presumption in favor of dismissal, unless the opposing party can "prove a negative," i.e., that the underlying petitioning activity is "devoid of any reasonable factual support or any arguable basis in law." The deck is stacked against the opposing party.

Another reason for the statute's difficult application is its broad definition of petitioning activity. The definition goes beyond constitutionally protected petitioning activity to protect speech "even if it involves a commercial motive, with only a limited relationship to issues of public concern." *Id*. at 549. This broad definition will often put competing petitioning rights on both sides of the special motion to dismiss in conflict. The moving party argues that the claims it seeks to dismiss chill its petitioning activity, while the opposing party is forced to defend its own petitioning activity in seeking judicial relief. To boot, the special motion to dismiss automatically stays the case, forcing the trial court to wrestle with the high stakes of a special motion under the mounting pressure to decide the motion before any additional progress can be made in the litigation.

Not surprisingly, therefore, the SJC has taken several runs at providing a framework for the efficient, balanced and consistent resolution of special motions to dismiss. Its first effort came in *Duracraft Corp. v. Holmes Prods. Corp.,* 427 Mass. 156 (1998), which adopted a construction of the anti-SLAPP statute that excluded its application to claims with a "substantial basis other than or in addition to the petitioning activities implicated." This framework governed special motions to dismiss for 20 years until the SJC adopted an "augmented Duracraft framework" in *Blanchard v. Steward Carney Hosp., Inc.*, 477 Mass. 141 (2017) (*Blanchard I*) and *Blanchard v. Steward Carney Hosp., Inc.*, 483 Mass. 200 (2019) (*Blanchard II*). In the augmented framework, trial courts had to parse claims to isolate the portions that should be dismissed as violating the statute while preserving those portions that did not violate the statute, and opposing parties had a "second path" for defeating special motions to dismiss, namely, showing that its claims were "colorable" and "not raised for the primary purpose of chilling the special motion proponent's legitimate petitioning activity." *Bristol Asphalt,* 493 Mass. at 552. This augmented framework attempted to level the playing field between moving and opposing parties so as to avoid the statute's application to meritorious claims.

But just as the statute's salutary intentions proved difficult to administer, the SJC's evolving efforts to guide its application proved increasingly complicated and burdensome for courts and litigants alike. In *Bristol Asphalt*, the SJC paid another visit to this framework with an eye on simplifying the framework. In the simplified framework, the moving party must "make a threshold showing through the pleadings and affidavits that the claims against it are 'based on' the party's petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." At the threshold, the moving party no longer benefits from the requirement that the trial court parse each claim for dismissible versus non-dismissible portions. If the moving party cannot establish that the claim, in its entirety, is based on petitioning activity alone, it fails at the threshold. In the companion case, *Columbia Plaza,* the elimination of the requirement to parse through claims meant that the special motion to dismiss failed at the threshold. *See* 493 Mass. at 579.

If the moving party fails at the threshold, then the special motion to dismiss is denied. If the moving party makes this showing, the burden shifts to the opposing party to show that the moving party's exercise of its right to petition "was devoid of any reasonable factual support or any arguable basis in law" and "caused actual injury to the special motion opponent." *Bristol Asphalt*, 493 Mass. at 557. This is the only way the opposing party can defeat the special motion to dismiss once the burden shifts to it. It no longer has the benefit of the "second path" that required trial courts to discern the subjective motives of the opposing party in bringing the claims to begin with.

In short, the SJC abandoned *Blanchard I* and *II* in favor of the original *Duracraft*

Continued on page 7

DEREK B. DOMIAN is a litigation director with the Boston office of Goulston & Storrs PC. Domian has conducted numerous trials and appeals in state and federal courts as well as arbitrations and mediations. His practice focuses on complex commercial and real property disputes. Domian sits on and previously chaired the Massachusetts Bar Association's Complex Commercial Litigation Section Council.

INSIDE OR OUT: THE STATE OF THE LAW ON THE CHAPTER 93A INTRA-ENTERPRISE EXCLUSION

BY MATTHEW J. GINSBURG

Chapter 93A's unique features appeal to business litigants looking for a free lunch — that is, all the benefits of litigation with an attorneys' fee award at the end — and business litigators trying to boost clients' return on their investment in a case through an award, or even through the threat, of multiple damages. But defendants have numerous tools in their belt to remove a 93A claim from the litigation equation, and to rebalance the scales. Among these is the "intra-enterprise" exclusion.

At its inception, Chapter 93A was designed to permit the attorney general to address and punish unfair and deceptive acts and practices committed by businesses at the expense of consumers. This remit was soon expanded to provide for private rights of action for consumers in such cases, and then again to allow such actions to be brought by businesses against one another under the statute. The latter, also known as "Section 11" claims, have since become staple fare in Massachusetts business litigation, for at least two reasons. The first is its *sui generis* character, as "the statutory words '[u]nfair and deceptive practices' [in G.L. c. 93A, § 2,] are not limited by traditional tort and contract law requirements." *Nei v. Burley,* 388 Mass. 307, 312–13 (1983). "A plaintiff in a c. 93A case . . . need not prove the existence of a contract, the defendant's intent to misrepresent, or his own reliance on the misrepresentation . . ." *Id.* at 313.[1] The second is that Chapter 93A confers game-changing leverage to a business litigant through two other features: a potent exception to the American Rule in the form of a mandatory award of reasonable attorney's fees; and potential double to treble damages for "willful and knowing" violations of the statute.

To establish a claim under Chapter 93A, plaintiffs must demonstrate an unfair or deceptive practice that falls "within at least the penumbra of some common-law, statutory, or other established concept of unfairness." *Lambert v. Fleet Nat'l Bank,* 449 Mass. 119, 127 (2007), *quoting Wasserman v. Agnastopoulos,* 22 Mass.App.Ct. 672, 679 (1986). Such "unfairness" must have taken place in the course of "trade or commerce," which the courts have defined to include a "commercial relationship" or "business transaction," that occurs within a "business context." *See Szalla v. Locke,* 421 Mass. 448, 452 (1995). Thus, conduct is not actionable under Chapter 93A where it takes place within a "strictly private transaction, where the undertaking is not 'in the ordinary course of a trade or business'" and the transaction is motivated by personal, rather than business, purposes. *See Milliken & Co. v. Duro Textiles, LLC,* 451 Mass. 547, 563 (2008).

The "intra-enterprise" exclusion developed via the tension between the "business context" and "private transaction" context. A series of decisions has thus established that "disputes between parties in the same venture do not fall within the scope of G.L. c. 93A, § 11." *See e.g., Szalla v. Locke,* 421 Mass. 448, 452 (1995); *infra* (collecting cases illustrating this principle). The SJC has applied this rule to claims between employers and employees, to shareholders and others within business corporations concerning internal business disputes, and even to claims by an employee and shareholder of one closely held business against a separate corporation that had the same majority shareholder. *See Manning v. Zuckerman,* 388 Mass. 8, 13–14 (1983) (employee-employer relationship); *Riseman v. Orion Research Inc.*, 394 Mass. 311, 313–314 (1985) (c. 93A inapplicable to claims by corporate stockholder against corporation stemming from dispute as to internal governance of corporation); *Szalla*, 421 Mass. at 452 (finding no commercial transaction as required by c. 93A where "defendant and the plaintiff made a private arrangement to form a business together"); *Newton v. Moffie*, 13 Mass. App.Ct. 462, 469–470 (1982) (c. 93A inapplicable to claims between individual members of same partnership that arise from partnership business); *Selmark Assocs., Inc. v. Ehrlich*, 467 Mass. 525, 550 (2014) (finding that Chapter 93A did not apply to claims by an employee and shareholder of one closely held business against a separate corporation that had the same majority shareholder).

In *Governo Law Firm LLC v. Bergeron*, the SJC held that the intra-enterprise exclusion has limits. *See* 487 Mass. 188, 190–196 (2021). The SJC reiterated that "intracompany disputes are not 'marketplace transactions,' and instead concern 'the ordinarily cooperative circumstances of the employment relationship between an employee and the organization of which he [or she] is a member.'" *Id., quoting Manning,* 388 Mass. at 13. However, in *Governo*, six attorneys of the plaintiff law firm were simultaneously negotiating to purchase the practice from its owner, while allegedly converting firm trade secrets in the form of a "research library, databases, and administrative files," which they then used to compete with the firm following their departure. *See id.* In instructing the jury on Governo's Chapter 93A claim, the trial court had drawn a bright-line distinction between the defendants' conversion of firm property while still employed, which was "irrelevant to the jury's determination of G.L. c. 93A liability," and their use of such materials to compete with the firm following their departure. *Id.* The SJC found error in this instruction, ruling instead that conduct of this sort during employment transcends the parties' relationship through its impact on or expression in the broader "marketplace":

> Where an employee misappropriates his or her employer's proprietary materials during the course of employment and then uses the purloined materials in the marketplace, that conduct is not purely an internal matter; rather, it comprises a marketplace transaction that may give rise to a claim under G. L. c. 93A, § 11.

Id. In light of *Governo*, a case comment published in the *Massachusetts Law Review* in 2022[2] posed the question of what the SJC's decision means for future cases. Would practitioners begin including Chapter 93A claims in all intra-company disputes, pleading "marketplace" effects? Would the courts carefully examine apparently internal disputes to determine whether parties' conduct had extra-enterprise impacts? The answer is beginning

Continued on page 6

MATTHEW J. GINSBURG is co-manager and a member of Ascendant Law Group LLC, a boutique business litigation and bankruptcy firm located in Andover, as well as past chair of the Massachusetts Bar Association's Complex Commercial Litigation Section Council. He has more than 20 years of experience representing individuals and corporate entities of all sizes in commercial, construction, land-use, employment, insurance and intellectual property disputes before courts, arbitrators and administrative bodies, and has tried civil jury matters in the three states in which he is admitted: Massachusetts, New Hampshire and North Carolina.

Inside or Out
Continued from page 5

to emerge, as evidenced in several subsequent decisions from the Appeals Court, Superior Court and U.S. District Court for the District of Massachusetts.

In *Tedeschi-Freij v. Percy L. Grp., P.C.,* 99 Mass. App. Ct. 772, 773, 779 (2021), decided soon after *Governo* in June 2021, the Appeals Court overruled the trial court's entry of summary judgment for the defendant law firm and principal on a Chapter 93A claim brought by a former attorney of the firm, based on the alleged "continued use of [the attorney's] name and [the principal's] misrepresentation that [they] were affiliated after [the attorney's] departure from the firm . . ." *Id.* at 778. The trial court had dismissed the claim as a "dispute between an employer and an employee arising out of the employment relationship," but the Appeals Court reversed, finding that "the claim is that once they were not in the same venture, [the principal] wrongly continued to use [the attorney's] name." *Id.* at 779. Notwithstanding that the claim arguably had its origins in the parties' employer-employee relationship, post-*Governo*, the decisive element for 93A purposes was that much or all of the offending conduct took place after the parties' affiliation had ceased, rendering it within a "business context." *See id.*

A few months later, the Appeals Court (in an unpublished M.A.C. Rule 23.0 decision) "acknowledge[d] the limitations of the intra-venture exception discussed in" *Governo*, but deemed it inapplicable to a claim brought by one shareholder in a dissolved business venture against the three other shareholders and the competing business they left to establish, where there was no "evidence that the individual defendants unlawfully misappropriated or used any 'ill-gotten materials,' or otherwise engaged in other misconduct before they dissolved the venture." *See Petrucci v. Esdaile*, 100 Mass. App. Ct. 1109 (2021). While, as in *Governo*, much of the alleged conduct took place after the shareholders ceased to be affiliated, the court relied heavily on the fact that the plaintiff failed to allege "any facts plausibly suggesting that [the subsequent venture] … engaged in any conduct after the dissolution of [the dissolved venture] that was unlawful or otherwise constituted a c. 93A violation." *See id.*

In a Superior Court decision issued later in 2021 concerning claims by one shareholder in a dental practice against the other and/or the legal entities in which they were the sole shareholders, the court preserved 93A claims despite the fact that all of the defendant's conduct occurred while the parties continued to be affiliated as partners, shareholders, and employees of the practice. *See Russo v. Manzoli,* 2021 WL 6210647, at *4 (Mass. Super. Dec. 14, 2021). The court ruled that the defendant's conduct was not indicative of merely a private dispute, because it affected the practice's "ability to compete in the marketplace" and "step[ped] in the commercial marketplace and out of the intra-corporate context." *See id.* "[Plaintiff's] allegations that [the defendant] used a third-party investment bank in Illinois to improperly force a buyout of [plaintiff's] stock at a price greater than permitted in the stock agreements," his threats "to destroy the practice," and his "raiding [of] the Dental Practice's assets . . . impacted the Dental Practice's patients and ability to compete in the marketplace," thus falling within the purview of Chapter 93A. *Id.* at *4. While this ruling could be viewed as a broadening of *Governo*'s reach to claims that involve ***no conduct*** occurring after the parties ceased to be entwined in a business relationship, the Rule 12(b)(6) motion context meant that the "Court [did] not resolve the fine parsing of facts to determine whether some of the conduct constitute[d] an intra-corporate dispute or a commercial transaction in the marketplace," prior to discovery taking place. *Id.* at *5.

In a case subsequently decided in the U.S. District Court for the District of Massachusetts, both the facts and the court's ruling closely tracked those in *Governo*. *See Marion Fam. Chiropractic, Inc. v. Seaside Fam. Chiropractic, LLC,* 2022 WL 1003963, at *11 (D. Mass. Apr. 4, 2022). In that case, the defendant — a departing employee of the plaintiff Marion Family Chiropractic, Inc. — was "alleged to have taken Marion Family's confidential information for use after she left the business to begin practicing at her new venture, Seaside Family." *See id.* The court thus denied the defendant's motion to dismiss the plaintiff's Chapter 93A claim.

Likewise, in *Koch Acton, Inc. v. Koller,* 2024 WL 1093001, at *13–*14 (D. Mass. Mar. 13, 2024), departing employees of an auto dealership group were alleged to have misappropriated customer lists and other protected company information, and used it to establish a separate digital marketing business under the umbrella of a competing auto dealership group. The court found that both the conversion of the information by the former employees and the use of it "in the marketplace" by the new entity they established after departure constituted conduct subject to Chapter 93A liability. *See id.*

In another recent District of Massachusetts decision, the court declined to extend the *Governo* ruling to a dental practice employee who allegedly aided and abetted unfair and deceptive conduct of a departing dentist, who, like the defendants in *Governo*, was alleged to have converted assets of the practice to compete directly with her former employer. *Barnia v. Kaur,* 2024 WL 914780, at *8 (D. Mass. Feb. 1, 2024). The court found it a bridge too far to "expand liability from the managers and executives who are in a position to misappropriate corporate assets and breach their fiduciary duties in the marketplace to at-will employees who observe that misappropriation via their employment." *Id.* The "aiding and abetting" 93A claim was thus dismissed.

In a Superior Court decision not reported in either the Northeast Reporter or in Westlaw, the court drew a distinction between claims the plaintiffs asserted *qua* employees against their employer, and those they might bring as contingent shareholders in the employer, or as principals of a separate entity that provided services to the employer. *See Seaside Psych Health & Wellness LLC, et al. v. Blue Hills Therapeutics Inc., et al.,* C.A. No. 1984CV1632, Suffolk Superior Court (BLS2), Memorandum of Decision and Order on Cross-Motions for Summary Judgment (Ricciuti, J.), Feb. 23, 2023. In *Seaside*, the two individual plaintiffs, Jerald Davis and Christopher Landers, contracted with the defendant licensed home care agency, Blue Hills, to work as executives for Blue Hills and to cover payroll and other costs for Blue Hills through Davis' and Landers' existing home care staffing agency, plaintiff Seaside. In exchange, Seaside would be reimbursed all costs it covered once Blue Hills had integrated Seaside's nurses and began receiving payments for their services from health insurers with which Blue Hills had contracts. Davis and Landers were to receive 50% of the shares of Blue Hills in accordance with a schedule and performance benchmarks to which the parties had agreed. When Blue Hills refused to reimburse Seaside and terminated Davis and Landers without transferring the shares as agreed, the plaintiffs asserted, *inter alia*, Chapter 93A claims against defendant Blue Hills and its existing shareholders, which were challenged on summary judgment. Citing *Governo*, the court ruled that "where a dispute is only

Continued on page 7

Inside or Out
Continued from page 6

partially based in employment, and involves marketplace relations between the parties, *Governo* found that Chapter 93A applied." *Id.* at 11. The court thus dismissed Davis's and Landers' claims only to the extent they were based upon their employment with Blue Hills or on the agreement that described such employment. The court preserved all claims grounded on agreements other than Davis' and Landers' employment agreement — all those based upon Blue Hills' agreement with Seaside or its employees — and stated, "to the extent Plaintiffs contend that Defendants never intended to make them shareholders at all, this theory is an alternative, and viable, claim under Chapter 93A." *See id.,* at 10–11.

In yet another recent District of Massachusetts decision, the court denied the defendants' motion to dismiss based on the intra-enterprise exclusion. *See Garage Sweat LLC v. Factory 14 UK Acquisition IV Ltd.,* 2024 WL 914399, at *6 (D. Mass. Feb. 12, 2024). This case concerned claims by individual members of an LLC and the LLC itself that sold its assets to the defendants. The defendants allegedly breached earn-out provisions in the sale agreement. The individual plaintiffs were contracted as consultants of the defendants following the sale, but were never employees, *per se;* the transaction was an asset sale and not a stock sale in which the selling individuals might have been deemed continuing employees. Despite the plaintiffs' post-transaction consulting arrangement, the court implicitly rejected, *see id.*, the conflation of "consultant" with "employee":

> Here, neither the Founders nor [the selling entity] are or ever were employees of the Defendants. Rather, Plaintiffs are separate entities to Defendants. Plaintiffs sold their business … to [Defendants], and Plaintiffs allege fraud and breach prior to and after the sale. Plaintiffs' Chapter 93A claim therefore occurred in a business context, such that it is not barred by the intra-enterprise doctrine.

***

It may be too early to know the full implications of *Governo* either on practitioners' eagerness to test the bounds of the intra-entity doctrine, or the courts' tendency to interpret disputes as extra- rather than intra-enterprise in nature. Early returns generally suggest a fairly narrow interpretation of *Governo's* nuanced exception for intra-entity conduct that has "marketplace" effects, with just a few decisions indicating a more expansive reading. On the one hand, the courts have shown a clear inclination to follow *Governo's* lead where the facts are substantially similar, such as in *Tedeschi-Freij*, *Marion Family Chiropractic* and *Koch Acton, Inc.*, and the theft and post-affiliation use of trade secrets are present; and to draw the line where deviations from the *Governo* pattern were present, such as in *Petrucci* (no unlawful conversion) and *Barnia* (no expansion to aiding and abetting claim). On the other hand, in *Russo* and *Seaside*, the Superior Court has indicated a willingness to view "marketplace effects" or "marketplace transactions" through a somewhat wider lens, to include the use of outside agencies or forces to influence an internal dispute, or where parties act in dual capacities within the same set of transactions. This may be good news for those on the plaintiffs' side who hope that the cracks *Governo* opened in the exclusion become broader fissures, even if it means their 93A claims survive a motion to dismiss and provide further leverage to negotiate. ■

1. Section 11 claims are particularly attractive as an alternative to fraud, because the plaintiff need not either comply with the heightened pleading standard in Mass. R. Civ. P. 9 or establish the other formal elements of deceit: "[T]he definition of an actionable 'unfair or deceptive act or practice' goes far beyond the scope of the common law action for fraud and deceit," particularly because "in the statutory action proof of actual reliance by the plaintiff on a representation is not required." *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 703 (1975); *Downey v. Wells Fargo Bank, N.A.*, 2014 WL 3510510, at *8 (D. Mass. July 11, 2014) (declining to enter summary judgment in Wells Fargo's favor "on this ground alone").
2. Marc C. Laredo, "The Applicability of Chapter 93A to Intra-enterprise Disputes in the Wake of *Governo Law Firm LLC v. Bergeron* — Where Do We Go From Here?," Massachusetts Law Review, Volume 103, No. 1, Published by the Massachusetts Bar Association, February, 2022.

Anti-SLAPP
Continued from page 4

framework. One more important feature of the simplified framework: the standard of review on appeal is *de novo* review for both stages of the inquiry. The resolution of the questions raised by a special motion to dismiss is to be "based entirely on a documentary record" for which the trial judge receives "no special deference." *Id.* at 560. Time and practice will tell if the *Duracraft* framework got it right from the start, or will require yet more innovation down the road. One thing is for sure, which is the SJC has opted to chisel away the judicially supplied framework to expose more of the actual language from the statute ("based on said party's exercise of its right of petition" and "devoid of any reasonable factual support or any arguable basis in law"). This could be viewed as simplification and clarification. Or it could be viewed as an invitation to the legislature to pay its own revisit to the language of the anti-SLAPP statute. ■

SOLO/SMALL FIRM LAW PRACTICE MANAGEMENT

MEDICAL DOCTORS AND U.S. CITIZENSHIP: HOW DO THEY RELATE? FORM N-648

BY GISELLE M. RODRIGUEZ

The "American Dream" is what some people envision when thinking about life in the United States. What they do not know is that the process of becoming a U.S. citizen is not an easy journey. A long array of legal and procedural aspects has to be navigated very carefully. As some may know, the "middle-man" in becoming a full-fledged U.S. citizen is being a legal permanent resident, otherwise known as a green-card holder. Assuming that derivative citizenship or the consular report of birth abroad processes do not apply, the process of becoming a U.S. citizen is known as "naturalization." Yet, some people have certain medical conditions that do not allow them to read, write, or speak English. This is why Form N-648, Medical Certification for Disability Exceptions, can significantly impact an applicant's path to citizenship.

I will explain why in the sections below:

DEFINING FORM N-648

You might be wondering: How does an applicant know whether they can submit Form N-648 to the immigration service? The answer is not all that simple, especially knowing that the form's approval is actually discretionary (more on that later). An applicant will generally submit this form if they cannot learn or demonstrate knowledge of the English language and/or the subject of civics and U.S. history due to a developmental or physical disability, a mental impairment, or a combination thereof. Approval of this form provides an exemption from the English and civics tests, which are required tests to pass in order to successfully become a naturalized U.S. citizen.

SUBMISSION OF FORM N-648

Form N-648 is generally submitted alongside form N-400, Application for Naturalization. Some officers may have discretion if an applicant does not initially submit it with form N-400, but the safest route is to submit it with the filing of form N-400. One aspect of Form N-648 is the requirement for certification by a licensed medical professional. How? Well, the medical professional must describe the applicant's condition, such as specific diagnoses and how these directly impact the individual's ability to meet the English and civics requirements. The description given by the medical professional will "make or break" the applicant's chance of getting the exemption, and sometimes, even when the applicant is qualified to get the exemption, they may not as a result of the medical professional's poorly written explanation.

BELIEVE IT OR NOT: YOU MAY ENCOUNTER HESITATIONS AMONG MEDICAL PROFESSIONALS IN COMPLETING FORM N-648

In my experience, multiple times for that matter, some medical professionals may hesitate to complete Form N-648, possibly due to unfamiliarity with its implications or concern about the outcome, or even ignorance about the process of becoming a U.S. citizen. It is important to understand that filling out Form N-648 does not guarantee an exemption. The final decision rests with the U.S. Citizenship and Immigration Services officer assigned to the case, but the medical certification provides evidence of the applicant's need for an exemption.

GISELLE M. RODRIGUEZ is the founder of the Law Offices of Giselle M. Rodriguez PLLC, specializing in immigration law with a personal drive rooted in her own family's history of immigration. Educated with a bachelor's in political science and criminal justice from Regis College and a Juris Doctor from the Massachusetts School of Law, she established her practice shortly after being sworn in as an attorney in 2021. Beyond her legal practice, Rodriguez actively engages with over 40,000 followers on TikTok and several thousand on Instagram, using these platforms to educate and advocate on immigration issues and rights.

A CONVERSATION: IMMIGRATION ATTORNEYS AND MEDICAL PROFESSIONALS — AN OBLIGATION

As an immigration attorney, my role is not only to assist my clients in applying for U.S. citizenship, but also to discuss Form N-648 with medical professionals. The immigration world is complex, and I cannot assume that medical professionals will fully understand the ramifications of their actions in completing Form N-648. Completing this form can make a substantial difference for those whose disabilities might impede their ability to fully engage with the naturalization process and journey toward U.S. citizenship. My aim is to provide well-rounded assistance, making sure that all of the required documentation, including Form N-648, is completed to the best of anyone's abilities. ■

COURT-SPONSORED DISPUTE RESOLUTION: HOW THE DEPARTMENT OF INDUSTRIAL ACCIDENTS IS INTEGRATING MEDIATIONS INTO ITS EVERYDAY PRACTICE

BY RYAN BENHARRIS

As claims at the Department of Industrial Accidents (DIA) keep it busy as ever, one new aspect of its litigation process has never been more popular. The DIA, where workers' compensation claims are filed, litigated and settled, instituted court-sponsored mediations several years ago as a way to bring trials down and bring claim resolutions up.

Mediations were the brainchild of DIA Senior Judge Omar Hernández as well as several attorneys working with the Massachusetts Bar Association's Workers' Compensation Section Council in 2016. The mediation process was brought in to try to add another dispute resolution step to the workers' compensation litigation practice. Mediations typically take place before the case is tried at an evidentiary hearing.

Both the injured worker and the insurer may voluntarily agree to participate in a mediation that is presided over by a different administrative judge than the one the case is currently assigned to. If the parties agree on the mediation, both attorneys must prepare a short summary of their argument for the administrative judge, who then speaks candidly with all parties about settlement in an effort to avoid a tumultuous hearing over entitlement to benefits.

In my personal practice representing injured workers, I can attest to the fact that my clients overwhelmingly would much rather be part of a process that guides them toward settlement than one that forces them to go through a stressful, oftentimes unpleasant hearing where the risks involved may include a finding that the injured worker's claims for benefits are not compensable. My experience with the tremendous administrative judges who oversee the mediations has been that their own level of experience and expertise in the field much more often than not will lead to an excellent result for my client while, at the same time, yielding a result that is fair for the insurer.

In discussing the mediation process with Judge Hernández, he is exceptionally proud of the process and how well the entire workers' compensation community seems to have truly warmed up to it over the past eight years.

"The judges are dedicated to bringing the parties together, even though it's not on their own cases," Judge Hernández explained. "They want to get these cases done for each other because it increases resolutions and reduces the risks of going to hearing."

One of the most beneficial elements of DIA-sponsored mediation is the fact that there is no fee to use it. "It doesn't cost you anything," Judge Hernández said. "And in utilizing it, written decisions have come down and settlements have gone up. That's what we're all about here — resolving cases."

Prior to DIA-sponsored mediations, mediations typically only took place outside of the courtroom by private mediators and were generally reserved for big-money cases. Now, with it essentially being an integral part of practice at the DIA, no case is too small for mediation, and a lot of people are taking advantage of that.

Nearly all of the 20 administrative judges have backgrounds as trial attorneys in workers' compensation; most of them represented both sides of the bar at some point in their careers. The same goes for the five administrative law judges who hear appeals from the hearings as well as for Judge Hernández himself. The benefit of using the administrative judges as mediators is that they are all experts in the pitfalls and nuances of the workers' compensation system.

"The judges know from their own experience about what the other judge's style is," said Judge Hernández. "And bringing that experience to this forum makes for a trustworthy evaluator of the case."

Judge Hernández indicates that the mediation itself is hyper-focused on settlements rather than on the risk involved with actually trying the case. Mediations often take place during the time between preparing for the hearing and after the injured worker has been seen by a court-ordered impartial medical examiner, so the parties realize that it's the perfect time to get the case settled rather than taking it to trial.

"There's more sense of urgency at that time than any other time during the case," Judge Hernández explained.

For new attorneys or attorneys who don't practice often at the DIA, Judge Hernández warns about being apprehensive to the mediation process. "It's a really good system," he said. "The key to it is to be well prepared and have faith in the judge mediating, regardless of if you think you're too far apart to settle. We've had countless cases that get resolved at mediation because people realize the importance of resolution."

Judge Hernández made it clear that the administrative judges aren't the only ones who are responsible for the overwhelming success of the mediation process. He said the attorneys, especially the ones who regularly practice at the DIA, also share in its success. "I applaud the bar for embracing this and making it successful," he said. "Without the earnestness and the attorneys' dedication to making it work, it wouldn't have gone anywhere."

Of course, not all mediations are successful, and really the only risk is that the parties have to go back to the drawing board and get ready to try their cases at an upcoming hearing. But it's never for a lack of trying, "I tell the judges not to quit even if it seems impossible," Judge Hernández said. "Just keep going."

For more information on the DIA mediation process, interested parties should visit the DIA mediation information page at https://www.mass.gov/info-details/mediations. ■

RYAN BENHARRIS is a partner at the Law Offices of Deborah G. Kohl in Fall River. For more than 18 years, he has represented injured workers in Massachusetts and Rhode Island in claims for workers' compensation benefits. He also has tried hundreds of cases at the Social Security Administration in appeals for Social Security disability benefits. Benharris served as the chair of the Massachusetts Bar Association Workers' Compensation Section Council from 2021 through 2023.

YOUNG LAWYERS DIVISION

MAKING IT UP AS WE GO ALONG

BY ED FERRANTE

One of the most unexpected lessons from graduation and finishing school forever is that it is a lot harder to make friends out of school. In school, you are around people in an environment where everyone is there for a common purpose, and you see them on a regular basis. When you graduate from school, you have to go out of your way to meet people. People are working and have other commitments that prevent them from going out to meet other people. It is easy to fall into a routine of working, commuting, cooking, paying bills, trying to get paid, etc. It is easier to meet people in school since you likely have no family obligations or work obligations.

After graduation, you are on your own. You have to develop your interests and find your own identity outside of your occupation or as a law student. We do not get any training on developing relationships and socializing even though we need to collaborate with others to prepare our cases. It is one of the things that we are expected to know but never learn in school.

In my free time, I take improv classes. Improv has a similar function to law school classes. You go to classes every week. You see the same people over the course of weeks for the same purpose. You get chances to grab lunches and spend time with your fellow classmates outside of class. You perform in front of an audience just like a trial or hearing. There is no homework or outlines for class.

We are told all the time that we need to be quick on our feet, but nobody explains how to be adaptable in court when things do not go according to plan. The only predictable thing about trial is that things will not go according to plan. You can control what you do, but you cannot predict what a jury, a judge, opposing counsel, a witness or your client will do on the day of trial. Opposing counsel might just bring in last-minute evidence that was conveniently found on the day of trial, but the judge decides to let in the evidence, so you will have to work around the evidence. The witness might say something new for the first time ever on the witness statements. Your client may show up late.

With improv, you have to be on your feet and need to discover where you are going with very little information. You need to know your base reality, which is the characters' relationships to each other and the setting. You have to prioritize listening and react in real time without a script. You do not get any time to think. You have to put on a presentation in front of an audience largely of people you do not know. In court, you have to make a presentation in front of jurors you have never met before. The classes give you multiple times to perform in practices. They also help with public speaking skills. At the end of class, you perform a graduation class in front of an audience of people packed into a theater.

Improv is a great way to meet new friends. Most of them are not lawyers. It is a great way to reach out to non-lawyers and educate people on the law and legal system. You can also get a lay opinion from some of your classmates on your cases to see if your case makes sense to people who could be jurors. You can also share your law stories since we get the most unbelievable stories from court. You can even use your war stories for a monologue to influence what the show will be about.

Life is stressful. It is very easy to burn out, especially in this stressful profession. It is important to keep your sense of humor. It will provide an escape from being a lawyer. You do not need a plan in improv. All you need is your imagination and last-minute ideas. You can perform in a low-stakes environment. There are no negative repercussions if you make a mistake. The worst-case scenario is a joke not landing. No one is going to jail, going bankrupt, losing custody of children, getting evicted, etc. There is always a possibility of missing the mark when you take a risk. Not everything will be a hit, but you can get it most times. You just have to try again. It helps build resilience, which can transfer over to the legal profession. ■

ED FERRANTE was sworn in as a lawyer in 2017. After struggling to find his place in the legal profession, he created his own position in the legal profession. He started the Law Office of Edward M. Ferrante in 2019. He is a member of the Essex Bar Advocates, a private attorney who represents indigent people charged with crimes. He represents people in Salem District Court. Recently, the Committee for Public Counsel Services accepted him for its Mental Health Litigation Division, where he will represent clients when the mental hospital tries to commit them as dangers to themselves and others.

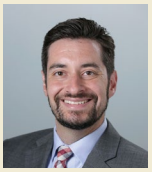
MASSBAR ASSOCIATION

2023–24 LEADERSHIP

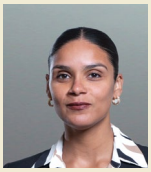
Damian J. Turco
President

Victoria M. Santoro
President-elect

Michael H. Hayden
Vice President



Samuel A. Segal
Treasurer



Shayla Mombeleur
Secretary

Martin W. Healy
Chief Legal Counsel and
Chief Operating Officer

2023–24 SECTION COUNCIL AND DIVISION CHAIRS

ACCESS TO JUSTICE

Nicole Paquin, chair
Law Office of Nicole Paquin
Newton

Jacquelynne J. Bowman, vice chair
Greater Boston Legal Services
Boston

BUSINESS LAW

Steven M. Ayr, chair
Casner & Edwards LLP
Boston

Mason R. Marek, vice chair
Locke Lord LLP
Boston

CIVIL LITIGATION

Michael D. Molloy, chair
Marcotte Law Firm LLC
Lowell

Michelle M. Byers, vice chair
Campbell Conroy & O'Neil PC
Charlestown

CIVIL RIGHTS & SOCIAL JUSTICE

Morgayne E. Mulkern, chair
Suffolk University Law School
Boston

Sean P. Kelly, vice chair
Marcotte Law Firm LLC
Lowell

COMPLEX COMMERCIAL LITIGATION

Kenneth N. Thayer, chair
Conn Kavanaugh Rosenthal Peisch Ford LLP
Boston

Nicholas D. Stellakis, vice chair
Hunton Andrews Kurth LLP
Boston

CRIMINAL JUSTICE

Barry J. Bisson, chair
Bisson Law
Boston

Sabrina E. Bonanno, vice chair
Sweeney & Associates LLC
Quincy

DISPUTE RESOLUTION

Justin L. Kelsey, chair
Skylark Law & Mediation PC
Southborough

Timothy M. Linnehan, vice chair
Executive Office of the Trial Court
Boston

FAMILY LAW

Marc A. Moccia, chair
Kazarosian Costello LLP
Haverhill

Crissa A. Morton, vice chair
Michael I. Flores PC
Orleans

HEALTH LAW

Natale V. DiNatale, chair
Robinson & Cole LLP
Boston

Eunice D. Aikins-Afful, vice chair
Revere

JUDICIAL ADMINISTRATION

Elaina M. Quinn, chair
Administrative Office of the Superior Court
Boston

J. Tucker Merrigan, vice chair
Sweeney Merrigan Law LLP
Boston

JUVENILE & CHILD WELFARE LAW

Hon. Jay Blitzman (ret.), chair
Northeastern University School of Law
Boston

LABOR & EMPLOYMENT LAW

Valerie C. Samuels, chair
Sassoon & Cymrot LLP
Boston

Dennis M. Coyne, vice chair
McDonald Lamond Canzoneri
Southborough

PROBATE LAW

Jennifer Zaiser Flanagan, chair
Mirick, O'Connell, DeMallie &
Lougee LLP, Boston

Laura F. Riccio, vice chair
Fedele & Murray PC
Norwood

PUBLIC LAW

Amanda Zuretti, chair
Bowditch & Dewey LLP
Framingham

Jacqueline A. Welch, vice chair
Eckert Seamans Cherin & Mellott LLC
Boston

REAL ESTATE LAW

Adam T. Sherwin, chair
The Sherwin Law Firm
Boston

John J. Vasapolli, vice chair
Vasapolli & Ricciardelli
Saugus

SOLO/SMALL FIRM LAW PRACTICE MANAGEMENT

David J. Volkin, chair
Law Offices of David J. Volkin
Boston/Mansfield

Laura Keeler, vice chair
Lawyers Concerned for
Lawyers | MassLOMAP, Boston

TAXATION LAW

Ruth A. Mattson, chair
Verill Dana LLP
Boston

Stephen A. Colella, vice chair
Auburndale

WORKERS' COMPENSATION

Justin P. Starr, chair
Morrison Mahoney LLP
Boston

Patrick Francomano, vice chair
Law Office of Patrick Francomano
North Attleboro

YOUNG LAWYERS DIVISION

Batool Raza, chair
Boston Public Health Commission

Nicole J. Cocozza, chair-elect
Prince Lobel Tye LLP
Boston