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SESSION WATCH

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F E A T U R E D D E C I S I O N :

Siew-Mey Tam v. Fed. Mgmt. Co.,

2020 Mass. Super. LEXIS 24 (Jan. 31, 2020) (Davis, J.).

Plaintiff Ordered to Pay $75,000 to Defendant as Sanction for Submitting False Affidavit

Plaintiff Siew-Mey Tam ("Tam") filed a putative class action against defendant Federal Management Co. ("Federal") and others alleging that Federal improperly classified her as a salaried, exempt employee and violated G.L. c. 151, § 1A by failing to pay overtime compensation. Plaintiffs initially succeeded in certifying the case as a class action, relying in part on an affidavit submitted by Tam. The court subsequently allowed Federal's motion to decertify the class upon finding that Tam made numerous materially false and misleading statements in her affidavit.

Federal then moved for summary judgment. In opposition to that motion, Tam submitted a second affidavit that repeated many of the factual misstatements from her first affidavit. She also submitted a 32-page errata sheet that sought to substantially revise her deposition testimony to reconcile it with her affidavits. The court allowed Federal's summary judgment motion, finding that Federal had properly classified Tam as an exempt employee.

Federal then filed a motion for sanctions against Tam pursuant to G.L. c. 231, § 6F, which the court denied. Although the court stated its belief that Tam submitted testimony that was at least "recklessly inaccurate," it did not believe that § 6F was designed to address that type of conduct and could not determine whether the classification claim was not advanced in good faith. The court raised the possibility that Federal could bring a sanctions motion on another basis.

Federal accordingly brought a renewed motion for sanctions pursuant to Mass. R. Civ. P. 56(g) and the inherent powers of the court. Federal sought to recover the attorneys' fees incurred in relation to summary judgment. The court allowed the motion and inferred that misstatements in the affidavits stemmed solely from "Tam's strong desire to delay the entry of summary judgment." Therefore, in light of the "serious and repeated nature" of Tam's misconduct, the court ordered Tam to pay Federal $75,000 within 21 days of its order. ■

City of Springfield v. Purdue Pharma, L.P.,

2020 Mass. Super. LEXIS 39 (Feb. 21, 2020) (Sanders, J.).

Court Has Personal Jurisdiction Over Arizona-Based Corporate Executive in Opioid Litigation

The City of Springfield ("City") commenced suit against a number of entities and individuals, including John Kapoor ("Kapoor"), whom it alleged played a role in the City's opioid epidemic. Kapoor is a resident of Arizona and chief executive office of Insys Therapeutics, Inc. ("Insys"), which sold an opioid mouth spray called Subsys. The City alleged that Kapoor and Insys marketed Subsys for off-label uses, and that Kapoor and other Insys executives engaged in illegal activities in order to promote such off-label use. Kapoor was eventually convicted of mail and wire fraud in federal court. Kapoor moved to dismiss the City's complaint for lack of personal jurisdiction and failure to state a claim, arguing that the complaint failed to allege that he personally participated in any conduct directed at Massachusetts.

The court denied the motion. With respect to personal jurisdiction, the court found that Kapoor's federal conviction established key jurisdictional facts which could not be relitigated, including that Kapoor committed intentional misrepresentations and other acts that reached into Massachusetts and caused injury in Massachusetts. The court noted that the misconduct at issue in the federal case was "nationwide in scope."

The court also rejected Kapoor's argument that the complaint failed to draw a causal nexus between his conduct and the injury alleged. The court relied on allegations in the complaint that Kapoor personally helped to devise and implement illegal schemes to further Subsys' off-label use and that he knew that the resulting increase in Subsys prescriptions would contribute to the opioid epidemic in the City. ■

City of Boston v. Purdue Pharma, LP,

2020 Mass. Super. LEXIS 2 & 40 (Jan. 3 & Feb. 10, 2020) (Sanders, J.).

Municipal Cost Recovery Rule Did Not Bar Claims Alleging Public Nuisance

The cities of Boston and Springfield ("Cities") brought suit against various defendants, including opioid manufacturers ("Manufacturer Defendants"), based on their role in the opioid epidemic. The Cities asserted claims including, among others, public nuisance and violation of Chapter 93A. The Manufacturer Defendants moved to dismiss.

The court denied the motion. The court rejected the Manufacturer Defendants' argument that the Cities' claims conflicted with FDA approval of the sale of their prescription opioids. The court stated that the Cities' complaint did not seek to remove opioids from the market or change opioid labeling; rather, the Cities alleged that the Manufacturer Defendants engaged in conduct inconsistent with the product labels, for example by minimizing addiction risk. The court also rejected the argument that the prescribing doctors broke the chain of causation, explaining that the chain of causation is not broken where the prescribing decision is "affected by the deceptive and misleading conduct of the manufacturer." The court further found that the Cities adequately alleged a public nuisance claim because they identified conduct that significantly interferes with public health and safety.

With respect to the Chapter 93A claim, the court rejected the argument that the Cities were not engaged in trade or commerce. The court explained that determining whether a public entity engaged in trade or commerce turns on whether it was acting in a purely business context. Although it was a "close" question, the Cities established standing under Chapter 93A by arguing that their

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direct purchases of opioids through their self-funded health care plans for city employees constituted trade or commerce.

The court also rejected the argument that the municipal cost recovery rule barred the Cities from recovering damages. The municipal cost recovery rule is a common-law rule providing that the cost of public services for protection from safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose conduct created the need for the service. The court held that the rule did not bar recovery where private parties created a public nuisance, as the Cities alleged.

In a separate decision, the court also denied a motion to dismiss brought by defendant retail pharmacies ("Pharmacies"). The complaint alleged, among other things, that: (1) the Pharmacies operate as distributors of opioids to their stores; (2) the Pharmacies are obligated to prevent the diversion of prescription opioids into illegal markets by monitoring and reporting suspicious orders; (3) the Pharmacies had evidence of prescription diversion but failed to live up to their reporting obligations; (4) the failure to prevent diversion was due to the Pharmacies' internal policies, such as financial incentives for pharmacists to write more prescriptions; and (5) the Pharmacies failed to adequately train their pharmacists and technicians with respect to handling opioid prescriptions. The court rejected the Pharmacies' conflict preemption argument, explaining that the Pharmacies could comply with both federal regulations and the common law standard of care alleged in the complaint. ■

N. Am. Catholic Educ. Programming Found., Inc. v. Clearwire Spectrum Holdings II, LLC, *2020 Mass. Super. LEXIS 45 (Feb. 24, 2020) (Sanders, J.).*

Plaintiffs Barred from Litigating Claims They Failed to Raise During Arbitration

Plaintiffs entered into contracts with defendants Clearwire Spectrum Holdings II, LLC and Clearwire Legacy, LLC (collectively, "Clearwire"), pursuant to which plaintiffs granted Clearwire access to a portion of their wireless spectrum. Defendant Sprint Spectrum L.P. ("Sprint") subsequently acquired Clearwire and began to use portions of the spectrum for its own use. Plaintiffs alleged that Clearwire breached the parties' agreement by failing to obtain plaintiffs' written consent to Sprint's use of the spectrum. Plaintiffs brought suit and sought equitable relief.

Two of the named plaintiffs filed a demand for arbitration pursuant to an arbitration clause in the parties' agreement, though the arbitration demand asserted different claims than the Superior Court complaint and the Superior Court case remained open. The arbitration clause required the parties to pursue any damages remedy in arbitration. Defendants asserted various counterclaims in arbitration that included issues raised by plaintiffs' Superior Court complaint. The panel of arbitrators held a multi-day evidentiary hearing and issued a final award finding that plaintiffs had unreasonably withheld their consent to the arrangement between Clearwire and Sprint. Defendants moved for judgment on the pleadings in the Superior Court, arguing that the arbitration decision had preclusive effect under the doctrines of res judicata and collateral estoppel. Plaintiffs argued that the parties "contracted around" the doctrine of res judicata by agreeing to a dispute resolution provision that permits claim splitting.

The court allowed defendants' motion. The court found that the defendants did not acquiesce to claim splitting – they moved to stay the Superior Court case when plaintiffs filed for arbitration – and the parties' dispute resolution clause did not constitute an explicit agreement to contract around res judicata. There was nothing in that clause to suggest that the arbitration would not have preclusive effect if decided first. In addition, plaintiffs could not dispute that the claims they wished to pursue in Superior Court could have been brought in the arbitration. The court, applying New York law, explained that "[w]here one action asserts a breach of a particular contract and then the second action seeks additional recovery for breach of the same contract, the courts have generally considered those . . . claims to be part of the same 'transaction' for res judicata purposes." ■

AG v. Facebook, Inc.,

2020 Mass. Super. LEXIS 6 (Jan. 16, 2020) (Davis, J.).

No Work Product Protection for Documents Generated as Part of Facebook's Ongoing Investigation into Third-Party Acquisition and Use of User Data

The Massachusetts Attorney General ("AG") filed a petition to compel Facebook, Inc. ("Facebook") to comply with a civil investigative demand pursuant to G.L. c. 93A, § 7, in connection with the AG's investigation into whether certain third-party applications ("apps") improperly acquired or used Facebook users' private information. Facebook is also engaged in its own internal investigation into the same subject and argued that at least some of the information is protected under the work-product doctrine and/or the attorney-client privilege.

The court allowed the petition in part. The court began by explaining that the recipient of a civil investigative demand under Chapter 93A bears a heavy burden to show good cause why it should not be compelled to respond to a request.

With respect to the work-product doctrine, the court found that the internal investigation was not being undertaken by Facebook in anticipation of litigation or for trial. The court relied on Facebook's history of app enforcement efforts as part of its normal business operations and the company's public statements regarding the purposes behind its internal investigation. The court stated that Facebook's internal investigation could be fairly described as "business as usual" and Facebook had undertaken its app investigations because of its commitment and obligation to protect its users' privacy. Therefore, Facebook's internal investigation would have been undertaken regardless of the prospect of litigation, and the fruits of that investigation were not entitled to work-product protection.

The court further held that, even if the materials could qualify for work-product protection, the AG had a substantial need for the materials, which were "fact" work product, because there was no other way for the AG to obtain the material than from Facebook.

With respect to the attorney-client privilege, the court held that Facebook failed to show that all of the internal communications generated in the course of its investigation were privileged. The court explained that the privilege did not extend to any underlying facts or other information learned by Facebook during its investigation, and Facebook could not "conceal such facts from the [AG] simply by sharing them with its attorneys." The court also found Facebook's broad claim of privilege to be "at odds with" Facebook's public statements that it would share the information uncovered during its investigation with its users. ■

Jinks v. Credico United States Llc,

2020 Mass. Super. LEXIS 36 (Mar. 31, 2020) (Salinger, J.).

Joint Employers May Be Held Liable Under Massachusetts Wage and Overtime Statute

Defendant DFW Consultants, Inc. ("DFW") was a sales and marketing company. Defendant Credico (USA) LLC ("Credico") subcontracted with DFW to provide sales services for Credico's clients. The contract between Credico and DFW made clear that Credico had no right to control the work performed by DFW's employees, and Credico did not decide who DFW hired, where, when or how DFW's workers did their work, or how DFW paid its workers.

Plaintiffs Kyana Jinks ("Jinks"), Antwione Taylor ("Taylor"), and Lee Tremblay ("Tremblay") worked for DFW to provide services to Credico. Credico paid DFW, which, in turn, paid Plaintiffs. Jinks and Taylor alleged that they were misclassified as independent contractors rather than employees. All Plaintiffs alleged that DFW and Credico failed to make required minimum wage and

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overtime payments. The parties cross-moved for summary judgment.

The court first held that Credico was entitled to summary judgment in its favor because it was not a joint employer of the Plaintiffs. The court did, however, find that, as a general proposition, joint employers can be held liable under the Wage Act and overtime statute. The court rejected Credico's argument that the use of the singular "employer" in the statutes evidenced an intent that only one employer could be liable and explained, "singular terms in statutes generally encompass the plural." The court also stated that reading the statutes to apply to more than one employer was necessary to achieve the statutes' purpose of protecting employees' right to timely wages.

In determining whether an entity is a joint employer, the appropriate inquiry is whether more than one company had a right to control the employees' work. The court rejected the argument that the common law "right to control" test had been supplanted by the independent contractor test with respect to determining joint employment. In this case, Credico was not a joint employer because it had no right to control Plaintiffs' work.

The court also held that Jinks and Taylor had been misclassified as independent contractors. Both Jinks and Taylor provided services directly to DFW, and those services were part and parcel of DFW's usual course of business.

The minimum wage claim against DFW could not be resolved on summary judgment due to disputed factual issues. DFW was, however, entitled to judgment on the overtime claim because it fell within the outside sales exemption under G.L. c. 151, § 1A(4). ■

Baldwin v. Connor,

2020 Mass. Super. LEXIS 63 (Mar. 24, 2020) (Salinger, J.).

Court Dismisses 93A Claim Against Alleged Aider and Abettor in Corporate Freeze-Out

The Plaintiffs allege that the Connor Defendants, the majority shareholders of two closely-held companies called Polyvinyl Films, Inc. and Indusol, Inc., froze Plaintiffs out of their roles in those companies as part of a plan to sell the companies and increase the profit to the Connor Defendants. Plaintiffs further alleged that the Connor Defendants hired Defendant Nicholas Kourtis ("Kourtis") to assist in their freeze-out. Plaintiffs asserted claims against Kourtis for civil conspiracy, aiding and abetting breach of fiduciary duty, tortious interference with business relationships, and violation of Chapter 93A. Kourtis moved to dismiss the tortious interference and Chapter 93A claims.

The court allowed the motion. With respect to the tortious interference claim, the court found that the Plaintiffs had not alleged facts plausibly suggesting that Kourtis knowingly induced the Connor Defendants to break off their relationship with the Plaintiffs. The court noted that the complaint alleged that the Connor Defendants retained Kourtis after they already decided to force out the Plaintiffs.

The court held that the Chapter 93A claim failed because Plaintiffs did not allege that they engaged in any commercial transaction with Kourtis. The facts alleged also did not suggest that Kourtis' work took place in a business context. The court stated, "Since the alleged freeze-out could only be accomplished by the Connors, and internal business disputes are not part of trade or commerce within the meaning of c. 93A, the alleged efforts by Kourtis to assist the Connors did not implicate trade or commerce either." The court pointed out that there were no allegations that Kourtis ever owed Plaintiffs a fiduciary duty.

The court further stated that the Plaintiffs did not allege any facts suggesting that Kourtis was engaged in trade or commerce by offering professional services to businesses in the marketplace. The court explained that "[w]orking for a company as an employee or contractor is not the conduct of trade or commerce . . . even if the work allegedly includes participating in a freeze-out scheme that may violate the majority shareholders['] fiduciary duties." ■

Commonwealth v. Venturcap Inv. Grp. V, LLC,

2020 Mass. Super. LEXIS 13 (Jan. 17, 2020) (Davis, J.).

Attorney General Need Not Prove Causation or Loss in Chapter 93A Suit

The Commonwealth of Massachusetts ("Commonwealth"), through the Attorney General, brought an enforcement action against defendants Venturcap Investment Group V, LLC and Venturcap Financial Group, LLC pursuant to G.L. c. 93A, § 4. The Commonwealth alleged that Defendants engaged in unfair and deceptive acts and practices in the sale of used cars by, among other things, structuring sales transactions with consumers that were "doomed to fail," including by approving loan applications where the estimated budget showed consumers would not likely be able to make the required payments. The Commonwealth moved for summary judgment with respect to that alleged practice, and the court allowed the motion.

The court agreed that conduct that encouraged consumers to purchase motor vehicles that were beyond their means violated G.L. c. 93A as a matter of law. The court explained that a ruling that particular conduct violates Chapter 93A is a legal, not a factual, determination and that, in the advertising context, a particular statement is "deceptive" if it has the capacity to entice consumers to purchase a product they would not otherwise have purchased. The court rejected Defendants' argument that the Commonwealth failed to establish causation linking the alleged deceptive conduct to any actual consumer losses, noting that proof of causation or loss is not an element of a Chapter 93A claim brought by the Attorney General under § 4. ■

VBenx Corp. v. Finnegan,

2020 Mass. Super. LEXIS 55 (Feb. 27, 2020) (Salinger, J.).

Decedent's Fraudulently Transferred Property May Only Be Recovered for the Benefit of the Estate

Plaintiff VBenx Corporation ("VBenx") obtained a $1.54 million judgment against J. Brent Finnegan ("Finnegan"), who later died. VBenx then brought suit to collect on the judgment, arguing that Finnegan fraudulently transferred certain property in Wolfeboro, New Hampshire to his wife shortly after the adverse judgment. VBenx sought leave to amend its complaint to add fraudulent transfer claims with respect to additional assets and to add non-statutory and statutory reach and apply claims with respect to the Wolfeboro property. Finnegan's wife opposed the motion on the grounds of futility. VBenx also sought a preliminary injunction barring Finnegan's wife from transferring the Wolfeboro property and seeking to attach over $2.5 million in assets.

The court largely allowed the motion to amend, on the condition that VBenx bring its claims for the benefit of the Estate, which VBenx agreed to do. The court relied on two statutes, G.L. c. 190B, § 3-710 and G.L. c. 230, § 5, and explained that the policy underlying both is that property fraudulently transferred by someone who then dies may only be recovered for the benefit of the estate.

The court rejected Finnegan's wife's argument that the non-statutory reach and apply claim was futile because VBenx could not show that it tried to execute on the judgment against the Estate's assets. In cases involving fraudulent conveyances, a creditor does not need to show a failed attempt to levy upon an execution so long as the creditor alleges that the judgment cannot be satisfied because of a fraudulent transfer of assets.

With respect to the requested injunction, the court entered a preliminary injunction barring conveyance of the Wolfeboro property but otherwise denied the other requested preliminary relief because the Wolfeboro property was adequate to secure VBenx's claims. ■

Suburban Home Health Care, Inc. v. Exec. Office of HHS,

2020 Mass. Super. LEXIS 60 (Mar. 23, 2020) (Salinger, J.).

Contractual Statute of Limitations Inapplicable to MassHealth Administrative Collection Procedure

Plaintiff Suburban Home Health Care, Inc. ("Suburban") provides services to MassHealth clients. In 2005, MassHealth began an audit of payments to Suburban. Nearly eleven years later, in 2016, MassHealth notified Suburban that, based on its review, Suburban had been overpaid by approximately $95,000. Suburban brought suit against the Executive Office of Health and Human Services ("EOHHS") seeking to stop MassHealth from recouping the alleged overpayment. Suburban argued that the six-year limitations period for contract claims barred MassHealth's attempted clawback and that MassHealth was not permitted to offset the alleged overpayments against future amounts owed to Suburban without completing an administrative hearing process to determine whether Suburban was, in fact, overpaid. EOHHS moved to dismiss.

The court granted the motion. As a preliminary matter, the court rejected EOHHS's argument that Suburban had failed to exhaust its administrative remedies, explaining that Suburban could raise its claims in court because they involved pure questions of law. With respect to the merits, although the court found it "troubling" that MassHealth waited so long to recoup money paid out in 2005, it nevertheless held that the contract statute of limitations applies only to civil actions, not administrative collection procedures. In addition, MassHealth's recoupment efforts could not be deemed too late on equitable grounds, as the defense of laches cannot be asserted against a government entity seeking to protect the public interest. The court did note that, if MassHealth commenced a court proceeding to collect from Suburban, that action would be subject to the six year limitations period.

The court further held that MassHealth could apply an offset to future amounts owed prior to completion of the administrative hearing process, as such an offset was expressly authorized by statute. ■

Youssefi v. Direct Energy Bus., LLC,

2020 Mass. Super. LEXIS 44 (Feb. 28, 2020) (Green, J.).

Door-to-Door Energy Salesman Exempt from Overtime Statute

Defendants Direct Energy Business, LLC and Direct Energy Services, LLC (collectively, "Direct Energy") sell electricity to individuals and businesses. Direct Energy's principal offices are in Houston, Texas. Plaintiff Alex Youssefi ("Youssefi") sold the electricity provided by Direct Energy as a door-to-door salesman. While doing so, Youssefi wore a Direct Energy badge and hat, identified himself as a Direct Energy representative, and used a script provided by Direct Energy. Youssefi brought suit against Direct Energy for alleged violation of G.L. c. 149, § 148, c. 151, § 1, and c. 151, § 1A. Direct Energy moved to dismiss.

The court granted the motion with respect to the claim under G.L. c. 151, § 1A because § 1A does not apply to individuals employed as outside salesmen. The court relied on the definition of an "outside salesman" in the Fair Labor Standards Act ("FLSA") because Chapter 151 did not define the term. Youssefi met the FLSA's definition because his primary duty was to make sales and he regularly performed that duty away from Direct Energy's place of business. ■

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Townsend Oil Co., Inc. v. Tuccinardi,

2020 Mass. Super. LEXIS 12 (Jan. 13, 2020) (Salinger, J.).

No Preliminary Enforcement of Non-Competition Agreement Against Former Employee Whose Name Appeared on Competitor's Mailings Sent to Plaintiff's Customers

Plaintiff Townsend Oil Company ("Townsend") sought to enforce non-competition and confidentiality agreements against its former employee, John Tuccinardi ("Tuccinardi"). After Tuccinardi resigned from Townsend, he went to work for a competitor, Devaney Energy, Inc. ("Devaney"), but did not take any customer list with him. After Tuccinardi left, Townsend lost 19 customers to Devaney, though Tuccinardi did not directly solicit any of those customers. Rather, some of the customers transferred their business after seeing Tuccinardi's name on a Devaney mailing.

Townsend sought a preliminary injunction that would prevent Tuccinardi from, among other things, directly or indirectly soliciting any Townsend customer through September of 2021. The court denied the request.

The court began by explaining that courts will not enforce non-competition covenants designed solely to protect an employer from ordinary competition. The court then found that Townsend was unlikely to succeed on its claim that Tuccinardi solicited Townsend's clients. Townsend had not shown that Tuccinardi played any role in the design or distribution of the Devaney mailings listing his name. The court also rejected Townsend's argument that Tuccinardi violated his non-competition agreement every time he took or returned a call from a Townsend customer interested in switching to Devaney. The court stated, "[w]here the customer is doing the seeking, it is not clear that such an interaction violates the contractual prohibition on solicitation." In addition, if a customer switched to Devaney due to personal loyalty to Tuccinardi, that indicated that the goodwill as to that customer belonged to Tuccinardi, not Townsend.

The court also held that the risk of harm to Tuccinardi from granting the injunction far outweighed any harm to Townsend from not granting it. The injunction would effectively put Tuccinardi out of work, while any economic loss suffered by Townsend in losing customers to Devaney would not be very large. ■

Mass. Port Auth. v. Turo, Inc.,

2020 Mass. Super. LEXIS 25 (Jan. 22, 2020) (Davis, J.).

No Need to Establish Irreparable Harm for Preliminary Injunction Based on Trespass

Massachusetts Port Authority ("Massport") brought suit against defendants Turo, Inc. ("Turo"), RMG Motors, LLC ("RMG") and others. Turo provides an online platform for individuals to engage in car-sharing. RMG, a rental car company, uses the Turo platform to rent its vehicles to Turo users. Massport alleged that Defendants conducted for-profit "car sharing" operations at Boston Logan International Airport ("Logan Airport") without the approval of Massport. Massport alleged that Defendants were effectively running a rental car business at Logan Airport without paying the requisite fees and taxes. Massport brought claims for, among other things, trespass and violation of Chapter 93A, and it sought preliminary injunctive relief barring Turo and RMG from continuing to operate at Logan Airport pending resolution of the action.

The court allowed Massport's motion for a preliminary injunction. The court first found that Massport had demonstrated a strong likelihood of success on its trespass claim because it alleged that RMG came onto Massport's property

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to drop off or pick up rental vehicles and Turo facilitated the rental transactions. The court further found that Turo had undeniable knowledge of the trespass because its website touts that hundreds of vehicles, including RMG vehicles, are available for pickup at Logan Airport. In addition, Turo knew that Massport regarded the Turo pickups at Logan Airport as a violation of its rights.

The court explained that it need not determine whether Massport suffered irreparable harm because injunctions based on trespass claims may enter without such a showing. The court stated that Massport was entitled to a preliminary injunction "simply to protect its legal rights . . . as the owner of Logan Airport . . . [n]o proof of irreparable harm is necessary."

The court also found that the balance of harms favored Massport because Defendants' alleged conduct interferes with Massport's ability to maintain overall order and safety on Logan Airport's roadways. Any harm suffered by Defendants "must give way" to the public interest of enhancing public safety at the Airport.

Finally, the court rejected Turo's argument that it is immune from liability under section 230 of the federal Communications Decency Act ("CDA"). Massport's claims went beyond treating Turo as a mere publisher or speaker of information and instead alleged that it substantially assisted RMG's trespass in a variety of material ways. Therefore, the CDA did not provide Turo with immunity. ■

Petrucci v. Esdaile,

2020 Mass. Super. LEXIS 21 (Jan. 9, 2020) (Salinger, J.).

Court Limits Scope of Rescissory Damages Evidence at Trial

Plaintiff Daniel Petrucci ("Petrucci") alleged that Defendants breached the Limited Liability Company Agreement ("Agreement") of Market Maker Solutions, LLC ("MMS"), a Delaware LLC, when they transferred MMS' assets to a new entity, Altenex MA, without fairly compensating Petrucci. Defendants moved in limine to preclude Petrucci from offering evidence of the value of Altenex MA at trial and to exclude proposed expert testimony on rescissory damages based on that value.

The court allowed the motion. Although it held that Petrucci could seek rescissory damages if he proved the alleged breach of the Agreement relating to the transfer of MMS assets to Altenex MA, those damages "must be limited to the past or present value of those assets." The court explained that rescissory damages for wrongful misappropriation of assets are measured by ascertaining the fair value of the assets to be transferred or restored at the time of judgment. In this case, Petrucci had made no showing that the value or sales price of Altenex MA had any probative value in determining the fair market value of the transferred MMS assets. The court analogized to a situation where a fiduciary misappropriates parcels of land and builds homes on that land, thereby making a profit. In such a scenario, the beneficiary could seek rescissory damages based on the value of the land but could not share in the profits from the new construction.

In the course of its decision, the court also rejected Petrucci's claim that it was a breach of contract for Defendants to dissolve MMS in order to continue in the same line of business through a new entity but without Petrucci. The court relied on the language of the Agreement, which allowed MMS' members to dissolve the company and subsequently engage in business previously conducted by MMS.

The court did find, however, that the Agreement incorporated the concept of "entire fairness" under Delaware law. To the extent that Petrucci alleged that Defendants' asset transfer was not entirely fair because he did not receive his share, he could only assert that claim as a breach of contract, not a breach of the implied covenant or fiduciary duty. Under Delaware law, fiduciary duty and implied covenant claims fail where the alleged misconduct also constituted a breach of contract. ■

Robert Half Int'l v. Simon,

2020 Mass. Super. LEXIS 27 (Jan. 28, 2020) (Salinger, J.).

Court Declines to Extend Contractual Time Period of Restrictive Covenant

Plaintiff Robert Half International, Inc. ("RHI") provides professional staffing services. Defendants Lewis Simon ("Simon") and Keith Elkinson ("Elkinson") worked for RHI and had written employment agreements containing non-competition, non-solicitation, anti-raiding of employees, and confidentiality provisions. Defendants left RHI to work for one of its direct competitors, Complete Staffing Solutions, Inc. ("CSS"). Prior to leaving RHI, Simon e-mailed himself certain of RHI's proprietary client lists, though there was no evidence he had used those lists while at CSS. Since joining CSS, Defendants each solicited at least one RHI client or job candidate. There was no evidence that Defendants solicited any clients they personally worked with at RHI.

RHI sought a preliminary injunction to enforce the restrictive covenants in the employment agreements. RHI also sought to apply part of that injunctive relief to CSS. The court entered a preliminary injunction barring Defendants from soliciting RHI clients with whom they personally worked and barring Simon from using RHI confidential information. The court, however, declined to extend the time frame of the non-solicitation covenant and noted that, where a restrictive covenant has expired, the former employer may only seek money damages for past breaches.

The court did not enter injunctive relief with respect to the non-competition and anti-raiding covenants because it found such relief was not necessary to protect RHI's legitimate business interests. The fact that RHI invested in Defendants' professional development provided no basis for barring them from working for a competitor. The court further stated that any ambiguity in the application of the restrictive covenants must be "construed strongly against RHI" as the drafter of the contracts.

The court also declined to issue an injunction against CSS because RHI was unlikely to succeed on its tortious interference claim. The court found that CSS had a good faith basis for believing that RHI did not have a protectable legal interest in enforcing the employment agreements. In addition, CSS' desire to compete against RHI was not an "improper motive." ■

Chambers v. Tufts Associated HMO, Inc.,

2020 Mass. Super. LEXIS 41 (Feb. 25, 2020) (Salinger, J.).

Two-Year Contractual Limitation Provision in Insurance Contract Deemed Enforceable

Plaintiff Robert Chambers ("Chambers") purchased family health insurance from Tufts Associated Health Maintenance Organization, Inc. ("Tufts"). Chambers alleged that Tufts violated the policy and Chapter 93A by requiring Chambers to pay the entire family, not individual, deductible before obtaining coverage. He also alleged that a provision of Tufts' policy, which required members to undertake an internal "Member Satisfaction Process" before bringing suit and required suit to be brought within two years from notice of an adverse benefit decision, violated Chapter 93A and G.L. c. 175, § 22 because it had the effect of reducing the limitations period to less than two years. The parties cross-moved for summary judgment.

The court found that Tufts was entitled to summary judgment on both of Chambers' arguments. With respect to the deductible, the court found that Tufts acted in accordance with the plain language

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of the policy. The court was not persuaded by Chambers' argument that he never saw the policy before obtaining coverage and instead relied on a coverage summary that he claimed was ambiguous. The court stated that Chambers could have obtained and reviewed the full policy before buying coverage. Further, because the policy itself was unambiguous, the parol evidence rule barred consideration of the summary document.

With respect to the statute of limitations issue, the court explained that G.L. c. 175, § 22 does not apply to HMOs like Tufts. In addition, the court stated that "the imposition of an internal administrative review process does not have the effect of shortening the limitations period for filing a civil action." The court also stated that the two-year limitations period was not unenforceable simply because it was part of Tufts' standard policy and not subject to negotiation by members: "unambiguous insurance policy provisions that have the effect of limiting coverage are enforceable unless they lead to an unconscionable result or violate public policy." ■

PayPal, Inc. v. NantHealth, Inc.,

2020 Mass. Super. LEXIS 14 & 38 (Jan. 23 & Feb. 7, 2020) (Davis & Green, Js.).

Premature Repudiation of Sublease Constituted Material Breach of Contract

Plaintiff PayPal, Inc. ("PayPal") alleged that defendant NantHealth, Inc. ("NantHealth") improperly terminated a sublease between the parties. PayPal alleged that, under the sublease, NantHealth could terminate the sublease if PayPal did not obtain the landlord's consent by a certain date. PayPal further alleged that NantHealth prematurely terminated the sublease before that date on the grounds that PayPal had not obtained the landlord's consent. PayPal asserted claims for breach of the sublease, breach of the implied covenant of good faith and fair dealing, violation of Chapter 93A, and declaratory judgment. PayPal moved for summary judgment on those claims.

The court allowed the motion with respect to the breach of contract claim. The court found that the sublease clearly and unambiguously gave PayPal a certain amount of time to obtain the landlord's consent, and NantHealth terminated the sublease seven days before the agreed-upon deadline.

The court denied the motion with respect to PayPal's other claims. The court found that there was no need or basis to impose additional liability under the implied covenant for conduct it had already found to be a breach of contract. Similarly, the court exercised its discretion to decline to issue declaratory relief on summary judgment where the declaratory relief requested "adds little or nothing of substance to the relief that PayPal is entitled to obtain . . . based upon its other claims." Finally, there were issues of fact concerning whether NantHealth's conduct was "sufficiently reprehensible" to constitute a violation of Chapter 93A.

PayPal subsequently moved for a preliminary injunction seeking to freeze NantHealth's assets and expressing concern that it would not be able to collect on a judgment. The court denied the motion, finding that, although PayPal had established a likelihood of success on the merits, it had failed to demonstrate that denial of the injunction would result in irreparable harm. ■

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Cavallaro v. Wilmer Cutler Pickering Hale & Dorr, LLP,

2020 Mass. Super. LEXIS 46 (Feb. 3, 2020) (Salinger, J.).

Non-Parties Equitably Estopped from Denying They Were Bound By Arbitration Clause

Plaintiffs brought claims for professional malpractice and violation of Chapter 93A arising from a corporate merger that led to federal tax liability. Plaintiffs alleged that they took certain actions in connection with the merger in reliance on the advice of Ernst & Young LLP ("E&Y"). E&Y moved to compel arbitration based on an arbitration clause in its engagement letter with one of the non-party corporate entities involved in the merger. Plaintiffs argued that they could not be compelled to arbitrate because they were not parties to the engagement letter.

The court disagreed with Plaintiffs and allowed E&Y's motion. The court explained that courts, not arbitrators, decide whether an arbitration clause binds non-parties. The court found that Plaintiffs were estopped from denying they were bound by the clause because they had brought suit under the engagement letter. The court stated that the only contract governing E&Y's valuation work, which work formed the basis for all of Plaintiffs' claims, was the engagement letter.

In addition, the court held that Plaintiffs were estopped from avoiding arbitration because they sought and obtained direct benefits from the contract containing the arbitration clause. Specifically, Plaintiffs knowingly accepted the benefit of E&Y's valuation analysis and alleged in their negligence claim that they relied on E&Y's opinions and advice. The court stated, "[h]aving stated negligence claims that expressly require that E&Y's performance under the . . . engagement letter be for their benefit, and that E&Y's duty of care . . . run to them personally, [Plaintiffs] are estopped from denying they are bound by the arbitration clause." ■