O'Connor Carnathan and Mack LLC

SESSION WATCH

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Summarizing opinions from Oct. 1, 2019 through Dec. 31, 2019

FEATURED DECISION:

Galloway v. SimpliSafe, Inc.,

2019 Mass. Super. LEXIS 1219 (Dec. 18, 2019) (Davis, J.).

Failure to Pay Sunday Premium Pay to Call Center Representatives Violated Wage Act

Plaintiffs, Customer Support Representatives working for defendant SimpliSafe, Inc. ("SimpliSafe"), brought a putative class action alleging that SimpliSafe violated the Wage Act by failing to pay premium pay for Sunday work or overtime for certain employee hiring events. Plaintiffs work at SimpliSafe's Massachusetts call center, which is open seven days a week. SimpliSafe moved for summary judgment on all claims, and Plaintiffs cross-moved with respect to their Wage Act claim.

With respect to SimpliSafe's motion, the court first rejected SimpliSafe's argument that only the Massachusetts Attorney General's Office may enforce violations of the Sunday pay statute. The court then rejected SimpliSafe's argument that it was not required to pay Sunday pay because it was not a "store or a shop" under the statute. The court stated that it was beyond dispute that SimpliSafe sold home security systems from the call center via telephone and that "[n]othing in the Sunday Pay Statute . . . mandates that a 'store or shop' possess a 'storefront' or a 'physical space open to the general public'" or that the seller physically keep goods on the premises. Rather, the statutory language means that the sale must take place within the premises. Accordingly, the court denied SimpliSafe's motion and allowed Plaintiffs' motion with respect to Sunday premium pay.

The court agreed with SimpliSafe, however, that it has no legal obligation to compensate prospective employees for time spent attending one of SimpliSafe's "growth sessions," which are a mandatory part of its hiring process. The court stated that it was undisputed that the attendees at those sessions are not "employees" of the company and noted that Plaintiffs' argument would require employers to compensate job candidates for all steps in the hiring process. ■

Wright v. Balise Motor Sales Co.,

2019 Mass. Super. LEXIS 593 (Oct. 25, 2019) (Sanders, J.).

Commissioned Employees Must Be Separately Compensated for Overtime

Plaintiffs, former car salesmen for defendant Balise Motor Sales Company ("Balise"), brought a putative class action alleging violation of the Massachusetts Overtime Statute, G.L. c. 151, § 1A. Balise regularly required Plaintiffs to work more than 40 hours per week. Plaintiffs were paid by commission, and their wages took the form of a weekly draw. Instead of making separate payments for overtime, Balise credited the draws and commission payments toward any owed overtime compensation. Plaintiffs alleged that this practice violated the Overtime Statute. Balise moved for judgment on the pleadings, seeking a determination that its payment method was lawful because the total amount paid to its employees was sufficient to cover any overtime owed.

The court denied the motion and held that the payment method violated the Overtime Statute. The court relied heavily on a recently-issued opinion from the Supreme Judicial Court ("SJC") in *Sullivan v. Sleepy's, LLC*, in which the SJC held that commissioned salespeople must be separately compensated for overtime. The court stated that the SJC in *Sleepy's* "made it clear that employers may not retroactively allocate payments made for one purpose to a different purpose."

The court rejected Balise's argument that the *Sleepy's* holding should not be applied retroactively, explaining that *Sleepy's* did not create a novel rule, did not reflect a dramatic shift in the law, and did not contradict or overrule prior precedent. The court further stated that it "would make little sense for the SJC to hold that the Legislature intended a certain result when it enacted the Overtime Statute years ago and then for this Court to limit the *Sleepy's* holding so that it applied prospectively only." ■

Armstrong v. Beaton, *2019 Mass. Super. LEXIS 1197 (Oct. 17, 2019) (Davis, J.);* Conservation Law Found. v. Beaton, *2019 Mass. Super. LEXIS 1216 (Dec. 17, 2019) (Davis, J.);* Armstrong v. Theoharides, *2019 Mass. Super. LEXIS 1230 (Dec. 31, 2019) (Davis, J.).*

State Parties Permitted to Be Sued Under G.L. c. 214, § 7A

These decisions all stem from a dispute over proposed development on the Boston waterfront. Plaintiffs in the *Armstrong v. Beaton* case are members of a condominium community on Boston Harbor and alleged that defendant RHDC 70 East India, LLC's ("RHDC") planned construction of a 600-foot tall tower will interfere with their parking rights and harm the environment. They also challenged the administrative decisions to approve the City of Boston's "Downtown Waterfront District Municipal Harbor Plan" ("MHP") as ultra vires. In the *Conservation Law Foundation* case, the Conservation Law Foundation ("CLF") also challenged the approval of the MHP, as well as the validity of the applicable regulatory framework. The Plaintiffs in both cases asserted, among others, claims for prevention of environmental damage under G.L. c. 214, § 7A and sought writs of mandamus. Defendants moved to dismiss in both cases.

In a lengthy decision, the court allowed the motions in part. The court first rejected dismissal of the § 7A claims and was unpersuaded by Defendants' argument that there was no damage to the environment as a matter of law because additional administrative approvals needed to take place before the project could proceed. The court also rejected Defendants' argument that they were not appropriate defendants under § 7A, finding they could be plausibly described as project

Continued on page 3

Continued from page 2

proponents. The court agreed with RHDC, however, that it did not have an obligation to provide permanent parking to the condominium members, as the governing document only granted a right to park for a period of years, not in perpetuity.

The court also dismissed plaintiffs' mandamus claims against the state defendants because the plaintiffs sought an order commanding defendants to "undo what already has been done . . . and/or to do it over again in a new and different manner." The court explained that mandamus is "simply not available for such purposes" and is instead used to require a government official to perform a clear cut duty.

Following the court's decision on the motions to dismiss, the Defendants filed motions for reconsideration, which the court denied. The court rejected the state defendants' contention that certain case law immunized them from suit under G.L. c. 214, § 7, explaining that plaintiffs alleged that the state defendants acted in ways that are ultra vires and, therefore, the alleged violations did not involve typical matters of administrative discretion.

The court also denied the *Armstrong* plaintiffs' request for entry of separate and final judgment as to the parking claim that the court dismissed. The *Armstrong* plaintiffs wanted to pursue immediate appellate review because they believed that their parking leases would expire prior to resolution of the remainder of the case. The court held that entry of separate and final judgment was inappropriate because the prospective loss of parking did not present the kind of compelling circumstances to justify a piecemeal appellate adjudication of the dispute. ■

HRE Grove St., LLC v. Raytheon Co.,

2019 Mass. Super. LEXIS 1191 (Oct. 16, 2019) (Sanders, J.).

Recipient of G.L. c. 21E, § 4A Demand Letter May Seek Judicial Declaration of its Obligations

Plaintiff HRE Grove Street, LLC ("HRE") purchased property that had previously been contaminated with certain chlorinated volatile organic compounds ("CVOCs"). HRE did not cause or contribute to the contamination. Defendant Raytheon Company ("Raytheon") formerly owned property adjacent to HRE's property. Raytheon used, stored, and disposed of CVOCs during the time it owned the property and had been working with the Massachusetts Department of Environmental Protection to remediate that contamination. Raytheon eventually took the position that, prior to HRE's purchase, CVOCs had been released at HRE's property and migrated to Raytheon's property. Raytheon sent a demand letter, pursuant to M.G.L. c. 21E, § 4A, to HRE requesting that HRE pay for remediation costs.

HRE then brought suit seeking a declaration that it is exempt from liability or, alternatively, that its liability to Raytheon is several only, not joint and several. Defendants moved to dismiss. Raytheon contended that HRE did not have standing, that there was no actual controversy between the parties, and that HRE failed to join all necessary parties.

The court denied the motion. The court rejected Raytheon's argument that Chapter 21E provides a private right of action only to those who have sent, as opposed to received, a § 4A notice. The court held that there is nothing in Chapter 21E that prevented HRE from seeking a judicial determination of its legal obligations under that statute. The court explained that HRE "need not wait to be sued to bring this action or endure uncertainty regarding Raytheon's threat of litigation." Finally, the court stated that there was no indication that there were other parties who had an independent legal interest that must be decided in order to adjudicate HRE's declaratory judgment claims. The court stated, "[t]hat other entities may somehow be affected by the outcome does not mean they must be joined in this lawsuit." ■

Mahoney v. Bernat,

2019 Mass. Super. LEXIS 1198 (Oct. 22, 2019) (Davis, J.).

Interpretation of Unambiguous Contract Unaffected by Party's Subjective Understanding of Deal

Plaintiff Paul E. Mahoney ("Mahoney"), a minority shareholder in Cover Technologies, Inc. ("CTI"), brought suit against two of CTI's directors and majority shareholders, Eugene N. Bernat ("Bernat") and Kenneth A. Foley ("Foley"), its controller, Jan C. Trudell ("Trudell"), and its outside legal counsel, Sabella Hogan P.C. and Edward V. Sabella (collectively, "Sabella"). The complaint contained various claims, including without limitation claims of violation of fiduciary duties and breach of contract. Mahoney alleged that, contrary to the terms of the parties' agreements, he was not compensated by CTI in an amount equal to Foley and Bernat. Foley, Trudell and Sabella moved to dismiss.

The court allowed the motions to dismiss, finding that nothing in the governing agreements required cash distributions to shareholders to be equal. This result was not affected by whether Mahoney personally had a different understanding of the parties' agreement because "contracts . . . cannot be altered by subjective or unexpressed expectations of one party or side."

The court also held that Mahoney's claims against Sabella failed as a matter of law. Sabella represented only CTI, not Mahoney or other individual shareholders. There were no "rare circumstances" that would justify imposing a fiduciary duty on CTI's counsel to protect the interests of individual shareholders. For example, there was no allegation that Sabella engaged in any clandestine effort to undermine Mahoney's position in CTI. ■

Johnson v. Edgar P. Benjamin Healthcare Ctr.,

2019 Mass. Super. LEXIS 1205 (Nov. 20, 2019) (Sanders, J.).

Labor Management Relations Act Did Not Preempt Wage Act Claim

Plaintiffs Goret Johnson ("Johnson") and Natacha Thermitus ("Thermitus") brought suit against The Edgar P. Benjamin Healthcare Center, Inc. ("EBHC"). Plaintiffs alleged that EBHC altered time records of its employees, including Thermitus. Johnson, EBHC's former Human Resources Director, alleged that EBHC terminated her for bringing employees' concerns about the time records to its attention. Plaintiffs asserted Wage Act and common law claims. EBHC moved for summary judgment.

The court denied the motion, finding there were material facts in dispute. The court rejected EBHC's argument that Johnson could not bring a retaliation claim, either under the Wage Act or common law, because she was passing on others' concerns to EBHC instead of exercising her own rights. The court found that Johnson fell within the Wage Act's protection because she "played no part in altering payroll records and repeatedly advocated for the employees, acting as much more than a conduit for their complaints." Similarly, Johnson's assertion of others' rights did not mean she was denied of a common-law remedy.

The court also rejected EBHC's argument that Thermitus' Wage Act claim was preempted by the federal Labor Management Relations Act ("LMRA") because she is a Union employee. The court explained that the LMRA only preempts a state law claim where resolution of that claim depends on the meaning of a collective bargaining agreement ("CBA"), and Thermitus' claims did not call into question the meaning of the CBA to which she was subject. Finally, the court disagreed with EBHC's argument that Thermitus was required to exhaust the CBA's grievance procedure before bringing her Wage Act claim and stated, "a plaintiff is not required to pursue administrative remedies before commencing an action to recover overtime and the other wages." ■

Metal Seal Precision, Ltd. v. Sensata Techs., Inc.,

2019 Mass. Super. LEXIS 1193 (Oct. 30, 2019) (Davis, J.).

Misrepresentation of Motives Behind Bargaining Position Not "Material" for Purposes of Fraud Claim

Plaintiff Metal Seal Precision, Ltd. ("Metal Seal") alleged that defendant Sensata Technologies, Inc. ("Sensata") breached a Memorandum of Understanding ("MOU") which allegedly required Sensata to purchase certain minimum quantities of particular metal components from Metal Seal. Sensata counterclaimed and denied that it ever agreed to purchase a minimum quantity of metal components. Sensata alternatively argued that, to the extent the MOU contained such a requirement, it was unenforceable because it was obtained by fraud. Sensata alleged that Metal Seal induced Sensata to enter into the MOU by falsely representing that its insurer required the contract to include minimum quantities.

Metal Seal moved for summary judgment. Metal Seal argued that, even assuming it did misrepresent the reason for its insistence on a minimum quantity requirement, Sensata's claimed reliance was inherently unreasonable and Sensata was not damaged by that representation.

The court allowed Metal Seal's motion, holding that the reason behind Metal Seal's insistence on the minimum purchase requirement was not a "material" fact sufficient to support a fraud claim. The court stated that a party's "statement of the reasons or motives underlying its bargaining position generally are not considered to be 'material.'" Metal Seal's misrepresentation did not alter the substance of what Metal Seal demanded or what Sensata agreed to – in other words, it did not relate to the quantity, quality, or value of the items sold. The minimum purchase requirements were also not hidden from Sensata in any way. Rather, Sensata "understood the purchase requirements . . . and it had a full and fair opportunity to assess those requirements."

The court also noted that both parties were sophisticated business entities negotiating at arm's length, and if Sensata were permitted to undo the agreement, "every contract negotiator who insists upon a 'must have' provision about which he or she actually is flexible could be deemed to have committed fraud." ■

Captivate, LLC v. Datalock Sys.,

2019 Mass. Super. LEXIS 1222 (Dec. 4, 2019) (Sanders, J.).

Jurisdictional Allegations Satisfied Prima Facie Standard

Kenneth Hafen allegedly stole nearly $5 million from his employer, plaintiff Captivate, LLC ("Captivate"), a Massachusetts company, using a sham corporation, DataLock Systems, Inc. ("DataLock"), which billed Captivate for goods and services Captivate never received. Captivate named Hafer's son-in-law, Eric, and his daughter, Katie, as defendants, alleging that they assisted Hafen in the scheme. Both Eric and Katie reside in Florida, and Eric moved to dismiss for lack of personal jurisdiction. Captivate argued that Eric assisted Hafen in collecting money generated from false invoices sent into Massachusetts.

The court denied the motion to dismiss, finding that the factual allegations were not too conclusory. The court applied a "prima facie" standard of proof, explaining that the fact that "an individual defendant disputes the liability that gives rise to the assertion of jurisdiction is not enough to overcome a prima facie showing. Rather, it means only that the final determination of personal jurisdiction must be deferred until trial." ■

Renova Partners, LLC v. Singer,

2019 Mass. Super. LEXIS 1196 (Oct. 10, 2019) (Sanders, J.).

Non-Member Could Not Bring Derivative Claim on Behalf of LLC

Plaintiff Renova Partners, LLC ("Renova") brought suit against defendant Michael Singer ("Singer"), alleging that, while serving as Renova's president, he secretly formed a competing company and usurped a multi-million dollar business opportunity from Renova. Singer asserted counterclaims and brought a third-party complaint against two members of Renova, John Hanselman ("Hanselman") and Norman Pedersen ("Pedersen"), as well as Brightfield Development, LLC ("Brightfield"), a company under common ownership with Renova. Singer alleged breach of contract and breach of fiduciary duty claims, both individually and derivatively on behalf of Renova and Brightfield.

Defendants moved to dismiss. The court denied the motion with respect to the breach of contract and individual fiduciary duty claims. The court rejected Renova's argument that the contract could not be enforced because it was missing certain terms, explaining that "it is not required that all terms of an agreement be precisely specified in order to be enforceable, so long as the parties intended to be bound." Whether the parties intended to be bound presented a question of fact inappropriate for resolution on a motion to dismiss.

The court did dismiss the derivative claim, however. The complaint lacked factual allegations showing that Hanselman or Pedersen breached their fiduciary duties to Renova. With respect to Brightfield, Singer could not bring a derivative claim on its behalf because he was not a member of that limited liability company. Singer also failed to allege that he sought or received authorization to sue or that he was excused from obtaining such authorization. ■

Malebranche v. Colonial Auto. Grp., Inc.,

2019 Mass. Super. LEXIS 1229 (Dec. 13, 2019) (Sanders, J.).

Employer's Failure to Separately Pay Overtime for Commissioned Employees Violated Wage Laws

Plaintiff brought a putative class action against a family of car dealerships alleging violations of the Massachusetts Wage Act and overtime laws. Plaintiff worked as a car salesman for defendant Colonial Nissan of Medford, Inc. ("Colonial"). Colonial paid him a weekly base salary of $300. The remainder of his pay was commission based, but because he sold few cars, there were weeks in which he received no or little commissions and, therefore, the amount he received for those weeks was less than minimum wage. There were also weeks in which plaintiff worked more than 40 hours but did not receive compensation reflecting such overtime work. There were other weeks, however, when plaintiff's commissions were large enough to cover the minimum and overtime wage requirements.

Plaintiff moved for partial summary judgment on the claims alleging failure to pay premium wages (such as overtime) and failure to pay a minimum wage. The court allowed the motion, finding that defendants' pay arrangement was unlawful even if there were weeks where plaintiff received an amount that satisfied the statutory requirements. The court stated that the Massachusetts Supreme Judicial Court ("SJC") recently held that, with respect to employees paid on a commission basis, employers are required to make a separate and additional payment of overtime beyond any draws or commissions even though the amount the employee received was enough to compensate him for overtime hours worked. Although Colonial's pay arrangement pre-dated the SJC decision, the SJC's holding still applied because it was interpreting a statute – the overtime laws – that was enacted well before plaintiff's employment with Colonial. ■

Genzyme Corp. v. Hanglin,

2019 Mass. Super. LEXIS 1202 (Nov. 19, 2019) (Sanders, J.).

Preliminary Enforcement of Non-Competition Agreement Denied Where Former Employee Did Not Have Access to Confidential Information

Plaintiff Genzyme Corporation ("Genzyme") sought to enforce a non-competition agreement against Defendant Keith Hanglin ("Hanglin"), Genzyme's former Director of Training. As Director of Training, Hanglin trained Genzyme's sales team and developed strategies for marketing Genzyme's products. Hanglin accepted an offer from BioMarin Pharmaceutical, Inc. ("BioMarin"), one of Genzyme's competitors. Genzyme moved for a preliminary injunction and sought an order preventing Hanglin from starting work at BioMarin.

The court denied the preliminary injunction request. The court held that Genzyme had not met its burden of demonstrating a likelihood of success on its claim for breach of the noncompetition agreement because enforcement of that agreement was not necessary to protect Genzyme's legitimate business interests. The court noted that protection of the employer from ordinary competition is not a legitimate business interest.

Genzyme had not shown that Hanglin was in possession of or had access to confidential information, as he was not involved with the science behind developing Genzyme's products. Genzyme also did not demonstrate that it risked losing good will if Hanglin were allowed to work for BioMarin, as Hanglin occupied a back office position at Genzyme and did not interact directly with customers. To the extent any good will was at risk, it was not clear that such good will belonged to Genzyme alone because Hanglin possessed knowledge that he had built up himself over a long career in the industry.

The court further noted that the balance of harms weighed in favor of Hanglin. The delay in finding another job would put Hanglin, as the primary breadwinner for his family, in a difficult position. In contrast, the potential harm to Genzyme in denying the injunction was not significant because Genzyme could not identify any specific confidential information that Hanglin could exploit. ■

Lockley v. Studentcity.com, Inc.,

2019 Mass. Super. LEXIS 1228 (Dec. 29, 2019) (Sanders, J.).

Massachusetts Wage Act Not Applied to Employment Outside U.S.

Plaintiffs Neffie Lockley ("Lockley"), a resident of Colorado, and Michael Senese ("Senese"), a resident of Massachusetts, (collectively, "Plaintiffs") brought a putative class action against Studentcity.com, Inc. ("Student City"), alleging that it violated Massachusetts and Colorado wage and hour laws. Student City employed plaintiffs to perform work at resorts in the Bahamas over their college spring break. Plaintiffs repeatedly worked more than 40 hours per week, but the only compensation they received was a daily stipend of less than $30.

Student City moved to dismiss the complaint, alleging that neither the Massachusetts Wage Act nor the corresponding Colorado statute applies to work performed outside of the United States. The court agreed. Courts have interpreted the Colorado statute to only apply to employment in Colorado. The analysis under the Massachusetts Wage Act was less clear because the Massachusetts appellate courts have not directly addressed the issue and the Act has been held to apply to employment in other U.S. states. Nevertheless, the court held that the Wage Act did not apply to Senese's brief employment in the Bahamas: "[j]ust as no foreign country can impose on the United States the terms and conditions of employment that the foreign country would allow within its own borders, Massachusetts does not have the power to legislate the terms and conditions of employment that occurs exclusively within a foreign country." ■

AM Project Norwood, LLC v. Endicott S. Dev. Corp.,

2019 Mass. Super. LEXIS 1203 (Nov. 25, 2019) (Sanders, J.).

Director in Name Only Not Within Scope of Corporate Privilege

Plaintiff AM Project Norwood, LLC ("AM Project"), the majority owner of EW Development, LLC ("EW"), brought suit against defendant Endicott South Development Corporation ("Endicott"), the minority owner of EW, to enforce a provision in EW's operating agreement. Endicott and co-defendant Peter True ("True") counterclaimed based on AM Project's alleged self-dealing.

AM Project and Endicott cross-moved to compel production of documents. AM Project sought to compel, among other documents, production of: (1) communications between True and his accountants prior to litigation; and (2) e-mails between True and his daughter (a shareholder in and director of Endicott) purportedly containing attorney-client communications. Endicott sought to compel production of attorney-client communications between AM Project and its former counsel, Bernkopf Goodman ("Bernkopf"), on the grounds that Bernkopf once represented EW.

The court allowed AM Project's motion. The court rejected Endicott's contention that the accountant communications were covered by the work product doctrine because the accountant testified at her deposition that she was not aware that litigation was imminent when she performed her work. The court also rejected Endicott's argument that True's daughter fell within the corporate privilege, explaining that True's daughter was "completely unaware of her position in Endicott," exercised no responsibilities in the company, and was a "director . . . in name only." There was also no evidence that sharing privileged communications with his daughter was necessary for True to carry out his duties to Endicott and, therefore, True waived the privilege.

The court denied Endicott's motion to compel, on the grounds that Bernkopf's representation of EW was limited in scope, and the communications at issue were exchanged when Bernkopf represented AM Project, not EW. ■

Healy v. G/J Towing, Inc.,

2019 Mass. Super. LEXIS 1225 (Dec. 18, 2019) (Sanders, J.).

Counsel Found Inadequate to Conduct Class Action

Plaintiff brought a putative class action against defendant operators of a Revere towing business, alleging that defendants violated Chapter 93A by charging more than was allowed under a Revere ordinance and related statutes. Plaintiff moved, for the third time, for class certification. The prior two motions had been denied for failure to comply with Rule 9A and because of a deficient proposed class definition.

The court also denied Plaintiff's third attempt. The court held that the proposed description of the class was inadequate. The court further held that plaintiff failed to show that members of the putative class shared common questions of law and fact, noting that plaintiff challenged several different fees which may or may not have been charged against a particular class member. Without a common question that was capable of class-wide resolution, there was "no efficiency in proceeding as a class action."

Finally, the court held that plaintiff failed to show that the class members would be adequately represented. The court stated that plaintiff's counsel, who practice outside of Massachusetts, had "repeatedly demonstrated that they are not competent to conduct this litigation as a class action," such as by failing to appear for scheduled court dates and failing to comply with Rule 9A. The court ordered that the case proceed solely on behalf of the named plaintiff. ■

Hickman v. Riverside Park Enters.,

2019 Mass. Super. LEXIS 1204 (Dec. 2, 2019) (Salinger, J.).

Opinion Letter from Agency Not Entitled to Deference

Earlier in this case, the court found Defendants liable for not paying overtime to employees at the Six Flags N.E. amusement park. The court had found that Defendants operated the park throughout certain "Holiday in the Park" seasons, which meant that the park was open too many days to qualify for the amusement park exemption under G.L. c. 151, § 1A(20). Defendant Riverside Park Enterprises ("Riverside") sent a letter to the Department of Labor Standards ("Department") asking it to declare that the "Holiday in the Park" days should not be included in the exemption calculus. The Department issued a response letter but did not make the declaration Riverside requested. Defendants nevertheless relied on the Department's response letter when requesting that the court reconsider its prior summary judgment decision.

The court denied the motion for reconsideration, finding that the Department's letter "changes nothing" and was "entirely consistent with" the court's prior decision. The court stated that Defendants' claim that the letter should compel a different result was "based on material misrepresentations as to what the Department actually wrote in its new letter." Further, the court held that, even if the Department's letter said what Defendants claimed, such a letter would not be entitled to any deference because it was simply a communication from the Department's general counsel and not an official action or opinion of the Department. The court explained: "opinion letters by agency staff regarding the meaning of a statute that do not constitute an adjudicatory decision or other official agency action are not entitled to special deference." In addition, the court found that the legal position the Defendants claimed had been adopted by the Department was contrary to the plain language of the amusement park exemption and, therefore, was not entitled to deference. ■

DeNormandie v. JW Capital Partners, LLC,

2019 Mass. Super. LEXIS 1195 (Oct. 1, 2019) (Davis, J.).

Option Contract Deemed Unenforceable Due to Missing Price Term

Plaintiff Philip DeNormandie ("DeNormandie") brought suit against defendant JW Capital Partners, LLC ("JW Capital") seeking to enforce an option to purchase real property known as One Lewis Wharf in Boston (the "Option"). The Option did not state any specific value that DeNormandie would have to pay to acquire One Lewis Wharf, nor did it include a methodology for establishing a purchase price.

The court allowed JW Capital's motion to dismiss, holding that the Option was an unenforceable "agreement to agree" and was missing a material term, the purchase price. In reaching its decision, the court declined to construe the document against either side based on who drafted it, as both parties were sophisticated business people and the document reflected negotiations between both sides. ■

Bertolino v. Fracassa,

2019 Mass. Super. LEXIS 1233 (Dec. 5, 2019) (Sanders, J.).

Control Person Under MUSA May Seek Contribution from Seller of Securities

Plaintiffs invested in a Delaware limited liability company called Kettle Black of MA, LLC ("Kettle Black"), which was formed for the purpose of funding Commonwealth Pain Management Connection, LLC ("CPMC"). Plaintiffs brought suit against Terence Fracassa ("Fracassa"), a principal of CPMC, alleging a violation of the Massachusetts Uniform Securities Act ("MUSA"). The complaint alleged that Fracassa actively participated in the marketing and sale of Kettle Black securities, made materially misleading statements in connection with the sales, and used the funds from the sales to his own benefit.

Fracassa brought third-party claims against Kettle Black for contribution and conversion. The conversion claim was based on Fracassa's allegation that another CPMC manager – who also served as Kettle Black's president – transferred some portion of the money raised from the sale of Kettle Black securities from CPMC back to Kettle Black after litigation had been threatened. Kettle Black moved to dismiss the third party claims.

The court dismissed the conversion claim but not the contribution claim. The court rejected Kettle Black's argument that MUSA does not provide a right of contribution between a seller of securities and a control person. The court explained that the liability between Fracassa and Kettle Black under MUSA is joint and several, which "implies a right of contribution."

The court dismissed the conversion count because there was no allegation that Kettle Black played any part in the transfer of the funds. The court stated that, "having chosen not to sue [Kettle Black's president], Fracassa cannot use the fact that [that individual] also held a position in Kettle Black as a way to bootstrap a claim for conversion against Kettle Black." ■

Saieoff v. Briansky,

2019 Mass. Super. LEXIS 1221 (Dec. 10, 2019) (Sanders, J.).

Allegation of At Issue Waiver of Attorney-Client Privilege Did Not Provide Basis to Compel Responses to Overly Broad Discovery

Plaintiff Syroos Sanieoff ("Sanieoff") brought a malpractice case against his former attorney, defendant Daniel Briansky ("Briansky"), alleging that he failed to advise him of an applicable statute of limitations for enforcement of a promissory note. Briansky argued that Sanieoff's malpractice action was time-barred. Briansky moved to compel discovery of certain communications between Sanieoff and the counsel he retained after Briansky ("Successor Counsel"). Briansky argued that there had been an "at issue" waiver of the attorney-client privilege.

The court denied the motion to compel. The court found that the discovery requests were too broad and made before the plaintiff had exhausted other avenues of discovery. The court explained that additional discovery, including depositions and third-party discovery, may make it unnecessary to intrude upon the attorney-client privilege between Sanieoff and Successor Counsel. The court stated that the doctrine of "at issue" waiver does not permit a defendant to intrude into an attorney-client relationship only to locate a statement by a client that may contradict his position in the litigation at issue. ■

Williamson-Green v. Interstate Fire & Cas. Co.,

2019 Mass. Super. LEXIS 1232 (Dec. 12, 2019) (Sanders, J.).

Case Alleging Unfair Settlement Practices Proceeds to Trial

Plaintiff, Michelle Williamson-Greene ("Williamson-Greene"), the administratrix of the Estate of James Williamson, IV, brought suit against Interstate Fire and Casualty Company ("Interstate") for alleged unfair settlement practices. James Williamson, IV had been fatally injured when a crane he was riding in tipped over. His wife brought a wrongful death action against several defendants, including Equipment 4 Rent, Inc. ("E4R"), which had rented out the crane. Interstate was E4R's insurer. A jury awarded $4.3 million in compensatory damages and $5.9 million in punitive damages. Williamson-Greene alleged that Interstate failed to make a reasonable settlement offer even though liability was reasonably clear, thereby violating Chapters 93A and 176D.

Interstate moved for summary judgment, which the court denied. The court explained that, because determinations of reasonableness are inherently fact driven, the question of whether liability is "reasonably clear" is rarely appropriate for summary judgment. In this case, Interstate's internal records showed that, within months of the filing of the wrongful death suit, it viewed E4R's exposure as substantial and initially assessed the injury value of the case at $2.45 million, with E4R facing a likely exposure of 75%. Interstate's independent claims adjuster concluded that Interstate would have to pay the limits of its primary policy and some portion of its excess policy. Nevertheless, Interstate's highest pre-trial settlement offer was $750,000. The court held that these facts prevented the conclusion that Interstate was entitled to judgment as a matter of law. ■

Jackie 888, Inc. v. Tokai Pharms., Inc.,

2019 Mass. Super. LEXIS 1206 (Nov. 25, 2019) (Sanders, J.).

Court Could Not Certify Nationwide Class Absent Class Members Having Minimum Contacts with Massachusetts

Plaintiff brought a putative class action alleging violations of the Securities Act of 1933 in connection with an initial public offering ("IPO") of Defendant Tokai Pharmaceuticals, Inc. ("Tokai"). Plaintiff alleged that Tokai made misleading statements in its IPO's Registration Statement and Prospectus. Plaintiff moved for class certification, which the court denied.

The court held that it could not, consistent with Due Process, certify a nationwide class and thereby exercise personal jurisdiction over out-of-state plaintiffs, where Massachusetts Rule of Civil Procedure 23 does not contain a provision allowing absent class members to opt out. The Massachusetts Supreme Judicial Court previously held that a Massachusetts state court could assert personal jurisdiction over absent class members only if those plaintiffs satisfied the minimum contacts analysis traditionally applied to defendants. The plaintiffs in the Tokai case did not have the requisite minimum contacts, as their only connection to Massachusetts was that they purchased stock from a Delaware corporation headquartered in Massachusetts. The court noted that Due Process applies to more than just property rights and it embraces the right not to participate in litigation or, if one does participate, "to file in the court of one's choice represented by counsel of one's choosing." ■

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Sapir v. Dispatch Techs.,

2019 Mass. Super. LEXIS 1218 (Dec. 2, 2019) (Davis, J.).

Release and Integration Clause Did Not Bar Fraudulent Inducement Claim

Plaintiff Eliran Sapir ("Sapir") alleged that defendant Dispatch Technologies, Inc. ("Dispatch"), a Delaware closely-held company, and two of its directors fraudulently induced him to sell his shares back to the company. The Repurchase Agreement signed by Sapir contained an integration clause and release. Sapir asserted claims for fraudulent inducement, negligent misrepresentation, breach of fiduciary duty, and violation of Chapter 93A. Defendants moved to dismiss all of the claims.

The court denied the motion with respect to the fraudulent inducement claim, noting that Massachusetts law recognizes that neither a release nor an integration clause bars such a claim. The court allowed the motion as to the remaining claims. The release signed by Sapir encompassed the negligent misrepresentation claim, and the fiduciary duty claim failed due to the absence of a heightened duty of loyalty between shareholders under Delaware law. Finally, Chapter 93A did not apply because the dispute was between shareholders and, therefore, was not commercial in nature. ■