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Public Institution Litigation in the First Circuit

BY SANDRA L. LYNCH†

Introduction

From busing in Boston to the building of new jails to cleaning up Boston Harbor, federal courts have shaped the lives of Massachusetts citizens in significant ways. How and why did our federal courts become so involved? This article discusses these two questions and describes some of the major cases.

A prophetic footnote in a Depression-era Supreme Court opinion foretold greater involvement by federal courts when normal political processes had failed to protect certain groups:

[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.¹

Increasingly, the federal courts have protected the rights of individuals against government institutions and have forced the government to comply with the law.

Numerous commentators have attempted to characterize the involvement of federal courts in institutional change. It has been said that until the 1960s, the federal courts had rarely told either federal or state governmental bodies what they must do.²

In the past two decades, however, civil litigation increasingly has involved new procedural and remedial characteristics. It is said that litigation has shifted from a private, two-sided, remedially restricted system to a public, multi-polar, flexible forum for resolving issues of public law and social grievance.³

Courts now issue affirmative injunctions requiring structural changes in government institutions. "[A]n ab-

dication in one branch impels a correlative performance in another.... Here is a new, affirmative conception of checks and balances." When the other branches of government do not act, and when rights have been found to be violated, the courts have "no alternative but to take a more active role in formulating appropriate relief." Rights without remedies are hollow rights.⁴

Critics have branded this correlative duty of action "judicial activism," a purported usurping of powers that are constitutionally reserved to the democratically elected branches. In truth, public sector litigation at times has required courts to exercise what have traditionally been viewed as executive or legislative functions. In promulgating a decree, the court makes a "legislative" choice to expend funds on the particular remedy, and not on competing concerns.⁵ Similarly, a court may become involved in administrative details: Where, for example, should the tainted sludge from the harbor be put?

However, these criticisms insufficiently appreciate the fact that other branches of government may defer, either intentionally or ineptly, hard or unpopular choices to the courts. For example, the Legislature may have believed that there was no constituency for funding prisons and jails, and so confinement conditions were allowed to deteriorate until they offended constitutional standards. Boston Harbor became the toilet for greater Boston's sewage because of the inability of local communities and the state to work out alternatives. The failure of the legislative and executive branches to address public problems often causes public sector litigation to be brought.

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1. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

2. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266 (1983) (hereinafter, Horowitz, *Institutions*).

3. Eisenberg and Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980). The article notes that decrees are often administrative, affirmative and prospective, and reduce considerably the defendant's discretion in managing the institution. This necessitates continued judicial involvement in the running of an institution, and the implementing or, if necessary, modifying of a decree. The court also monitors compliance with a decree and issues warnings to and sanctions against recalcitrant government bodies. Thus, adjudication becomes part of the larger sys-

tem of public regulation, and the judge becomes an administrator of remedial compliance. *Id.*

4. Horowitz, *Institutions*, *supra* note 2, at 1286. There are, of course, cases which defendants, intransigent institutions or government officials, would like to lose. For example, a judicial decree may be a weapon used against the legislature to augment financial appropriations in a certain area. *Id.* at 1294.

5. Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 274 (1981).

6. *Id.*

7. Blurring of the lines of demarcation between judicial and legislative responsibilities does not occur only in the context discussed in this article. The United States Supreme Court decision in *City of Richmond v. Croson*, 109 S.Ct. 706 (1989), may be viewed as having an underlying premise that a legislative body may enact otherwise impermissible race-based remedial laws provided it acts in a judicial fashion by making specific evidentiary findings of discrimination and narrowly tailors the remedy. Ironically, the judicial model has thus become the model for legislative action.

The onset of public institution litigation has spawned complex concerns. Critics have decried judicial activism. Some critics have sought to impose judicial restraint through searches for the "original intent" of the Constitution. But charges of judicial overreaching often are unfair. Indeed, the decisions of the courts of the First Circuit provide lessons of a different sort: of abdication of responsibility by other branches of government; of hard decisions being forced onto the courts because elected officials preferred it that way; and of the difficulty facing any court in trying to achieve an effective remedy that can overcome bureaucratic resistance or inertia.

During the last several decades, federal courts have been integrally involved in the public institutions of the Commonwealth of Massachusetts and of the City of Boston. They have been called upon to resolve disputes about the hiring of minority police and firefighters; to improve deplorable conditions in mental health facilities; to relieve overcrowded jails; to desegregate the Boston public schools; to ensure fair housing; and to clean up the open sewer that was Boston Harbor.⁸ Reluctant at times to intervene before the public institutions have been given every chance to resolve these problems, federal judges, both trial and appellate, have acted in these cases with restraint and courage, with ingenuity and savvy, and have created a legacy, not only of expanded federal remedial law, but also of better conditions for the citizens of Massachusetts. The following areas illustrate how the federal courts have improved the quality of life in this Commonwealth.

Public Employment

Federal court orders have significantly shaped the hiring practices for both police and firefighters in Massachusetts communities. As Judge Coffin noted in the police-hiring case, "[T]his case epitomizes the classic, clumsy and yet unavoidable attempt to rectify, through the courts, long standing though not consciously intended discriminatory selection policies in public employment in a northern community."⁹

The plaintiffs in *Castro v. Beecher* challenged under 42 U.S.C. § 1981 and § 1983 the police hiring and recruiting practices of the Boston Police Department, the Directors of Civil Service and the Massachusetts Civil Service Commission. The plaintiffs were six black and two Hispanic-surnamed Boston residents who alleged discrimination in the dissemination of information about

employment opportunities, in the use of an irrelevant education requirement, in the one-hundred yard swimming requirement, in a five-foot seven-inch minimum height requirement, and in the imposition of a discriminatory written examination.¹⁰

United States District Judge Charles E. Wyzanski, Jr., found that of those applicants taking the 1970 civil service entrance examination, the pass rate was 65% for whites, 25% for blacks and 10% for Hispanics.¹¹ The court found that the 1970 examinations were not significantly job related and gave a discriminatory advantage to white persons whose primary language was English and who had been trained and educated in the mainstream of American society.¹² Judge Wyzanski ruled that the entrance examination was not "rationally or empirically significantly related to the capacity of applicants to be trained for or to perform a policeman's job."¹³ Although Judge Wyzanski did not find any evidence of discriminatory intent, he held that evidence of intent was not necessary to prove an equal protection violation.¹⁴ The court enjoined issuance of certificates of eligibility based on these examinations or any examination which was not significantly job-related. Finally, the court laid down guidelines which would prima facie accredit new entrance examinations as non-discriminatory and job-related. The district court did not, however, order preferential hiring for Hispanic-surnamed and black applicants.

On appeal, the First Circuit affirmed the district court's ruling that there was an equal protection violation, noting that there was a significant discrepancy between the black population of Boston in 1970 (16.3%) and the black population on the police force (2.3%).¹⁵ It upheld the order to develop a new examination and remanded the case, instructing the district court to create a preferential hiring plan in order to remedy the continuing effects of past discrimination.

On remand, the district court voiced its frustration with the public agencies. When the Massachusetts Civil Service Commission, despite the plain warning from the district and appellate courts, persisted in over-emphasizing "paper and pencil capacities," Judge Wyzanski wrote that the problem in Massachusetts was obvious. When faced by an "obdurate" agency,

[t]he only practical alternative, as a last resort, is for this court to act in this situation the way courts have acted with respect to obdurate local school boards which would not in the spirit and letter of the Constitution carry out the Constitutional

8. The roles of the state judiciary in such public institution cases, as well as the federal judges elsewhere in the First Circuit, are worthy of comment, but those topics lie beyond the scope of this article.

9. *Castro v. Beecher*, 459 F.2d 725, 727 (1st Cir. 1972).

10. *Castro v. Beecher*, 334 F. Supp. 930, 934-35 (D. Mass. 1971), *aff'd*, 459 F.2d 725 (1st Cir. 1972).

11. *Id.*, 334 F. Supp. at 942.

12. *Id.* at 943-44.

13. *Id.* at 942. The court upheld as significantly job related the five-

foot seven-inch minimum height requirement, the use of a one-hundred yard swimming test and the requirement of a high school diploma or equivalent. It also ruled that the recruiting had been conducted adequately. *Id.* at 938-41.

14. *Id.* at 935. This case preceded *Washington v. Davis*, 426 U.S. 229 (1976), which, in circumstances similar to *Castro*, held that the use of a police entrance exam with a discriminatory impact could not be held to violate equal protection absent a showing of discriminatory intent.

15. 459 F.2d at 728.

command to give due process and equal protection to children who were on racial grounds denied educational opportunity. In those cases courts have appointed receivers.... But, after all, that is what federal courts have often done when other forms of administering justice under law have failed.... Enough, and more than enough, time has been allowed to the local authorities to set their houses in order.¹⁶

The district court ultimately went beyond the scope of its original decision and enforced a consent decree which called for the preferential hiring of minorities and the maintenance of separate civil service lists.¹⁷ The consent decree has retained its basic structure, and is still in force under the supervision of United States District Judge Andrew A. Caffrey.

In December 1975, the decree specified only two groups from which future certifications of eligibility would be made. These groups provided for a one-to-one (minority to non-minority) ratio in Boston and Springfield and a one-to-three (minority to non-minority) ratio elsewhere.¹⁸ In 1981, Judge Caffrey amended the decree for the police force and the fire department because of a new and unforeseen condition, that is, the approval of Proposition 2½, which was expected to entail a significant number of firings in both forces.¹⁹ The court held that it possessed the power to amend the decree where a refusal to do so would eradicate progress made with respect to minority hiring. The amended decree forbids the Police Commissioner from reducing the number of minorities below a certain percentage.²⁰ This amendment overrode a state statute which provides for a strict seniority system in layoffs.²¹ The court of appeals affirmed.²²

The federal court's involvement has not ended. In September 1989, white plaintiffs who had passed examinations and had been passed over for Boston police and Boston firefighter positions in favor of black and Hispanic-surnamed candidates sued city officials in fed-

eral court, asserting that the consent decree impermissibly discriminated against white persons by making selection decisions based on race.²³

Institutions for the Mentally Retarded

In 1972, a class action suit was brought on behalf of mentally retarded residents of the Belchertown State School. The plaintiffs alleged that conditions at the school were so inadequate that they violated the residents' constitutional right of due process and statutory right to treatment.²⁴ As in the hiring cases, federal court involvement in this lawsuit challenging the conditions at an institution for the mentally retarded included the enforcement of a consent decree. But unlike the hiring cases, the consent decree in the mental retardation cases was not preceded by a finding of liability. At least initially, the public institution litigation in this case fostered a cooperative effort among the legislative, executive and judicial branches of government.

Soon after the suit was brought, United States District Court Judge Joseph L. Tauro, accompanied by various state and federal officials, took a view of conditions at Belchertown.²⁵ As a result of what officials saw, Governor Dukakis and then Attorney General Francis X. Bellotti "made a judgment that the level of care did not reach [a] constitutional level of care; and, as a result, concluded that 'the case would be indefensible.'"²⁶

The state defendants worked hard with the plaintiffs and the court to fashion comprehensive remedial programs for the institutions. In July 1977, at an open court hearing, various state officials, including Governor Dukakis and then Attorney General Bellotti, signed interim consent decrees. At that hearing, then-Speaker of the Massachusetts House of Representatives, Thomas McGee, responded to the court's invitation to speak by stating, "[W]e are committed to the job that you want done; the people involved want done, and we'll do it."²⁷

16. Opinion of March 22, 1973, printed in *Castro v. Beecher*, 365 F. Supp. 655, 666 (D. Mass. 1973).

17. A similar remedial decree was imposed after a liability finding with respect to hiring practices in the fire departments of Boston and other cities and towns. *NAACP v. Beecher*, 371 F. Supp. 507 (D. Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). United States District Judge Frank H. Freedman held that the use of a civil service entrance examination in the hiring process violated title VII rather than the fourteenth amendment. 371 F. Supp. at 509.

18. *Castro v. Beecher*, Consent Decree, December 1975, ¶¶21-23.

19. *Castro v. Beecher*, 522 F. Supp. 873, 877 (D. Mass. 1981), *aff'd sub nom.*, *NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982), *vacated as moot*, 461 U.S. 477 (1983).

20. *Id.*

21. G.L.M. c.31, §99.

22. *NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982) [subsequent history omitted].

23. *Fagan v. City of Boston*, No. 89-2076-N (D. Mass.), and *Mackin v. City of Boston*, No. 89-2025-N (D. Mass.). These suits may have been prompted by the recent United States Supreme Court ruling that white firefighters in Birmingham, Alabama, could challenge the al-

legedly discriminatory promotional practices of that city despite the fact that the city's promotional decisions were made in accordance with, and in reliance on, a consent decree entered in United States District Court, and even though the white firefighters had failed to intervene in this earlier employment discrimination action. *Martin v. Wilks*, 109 S. Ct. 2180, 2188 (1989).

24. The complaints alleged deprivation of the plaintiffs' due process rights to minimally adequate care and treatment, and their rights under certain federal and states statutes, including §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, and G.L.M. c.19 and c.123. During the next three years, actions were brought on behalf of residents at four other state institutions. In each suit, various state officials with responsibility for the operations of institutions for the retarded were named as defendants. By an order of the court, the cases were consolidated. The history of the cases is set forth in *Ricci v. Okin*, 537 F. Supp. 817 (D. Mass. 1982).

25. Views were later taken at the other institutions as well.

26. *Massachusetts Ass'n for Retarded Citizens v. King*, 668 F.2d 602, 604 (1st Cir. 1981) (quoting then Attorney General Francis X. Bellotti).

27. *Ricci v. Okin*, 537 F. Supp. at 820.

However, it was not until 1978—after a year of “prolonged negotiations,” “innumerable meetings” and skillful steps by the trial judge—that the final personnel decree setting an acceptable level of staffing was signed.²⁸ According to Judge Tauro, “The final version of the decree was the culmination of a thorough, complex, and cooperative process.”²⁹ In the decree, approved by the court in August 1978,³⁰ the defendants agreed to comply with the personnel standards for care and treatment set forth in title XIX of the Social Security Act.³¹

With the change in administration from Governor Dukakis to Governor King, it became necessary for the court to become involved in enforcing the terms of the decree. In June 1981, the defendants notified the court that they intended to decrease the staffing level at the state schools by 408 positions. The plaintiffs would not agree to the planned reductions. Although the personnel decree provided that the parties bring such disagreement to the court’s attention for resolution, the defendants stated that they did not believe the court’s approval was required before the adjustments could be instituted. The court rejected this contention, however, and denied the defendants’ requested staff cut. It stated that such a cut would violate the “clear and unambiguous” requirement of the personnel decree that the defendants comply with federal statutory and regulatory standards.³² The court did, however, permit a cut of 84.5 positions, and specified exactly which positions could be cut.³³ In doing so, the court affirmed the role it had assumed in protecting the mentally retarded against the failings of the political process:

Today’s fiscal problems do not alter the fact that these decrees are essential to insure that there will be no return to the “indefensible” conditions of the past. The retarded have no potent political constituency. They must rely on the good will of those of us more fortunate than they, and the Constitution which controls the manner in which all of us must meet our varied responsibilities.³⁴

Finally, in 1986, the court observed that “[t]he filth, squalor and unsafe conditions that once characterized these institutions no longer exists,”³⁵ and it concluded that it could withdraw from extended involvement with institutions for the mentally retarded.

As a condition of the withdrawal, it ordered the governor to establish an Office of Quality Assurance to “en-

sure that all class members receive the services to which they are entitled under the consent decrees, and that the Commonwealth comply with all federal and state laws, rules, regulations and standards that are applicable to these class members.”³⁶

Charles Street Jail

In 1973, the federal court was drawn into remedying conditions at the Charles Street Jail.³⁷ Charles Street Jail inmates sued the Sheriff of Suffolk County, the master of the jail, the Commissioner of Correction, the mayor, and Boston City Council members, contending that the conditions of the jail contravened the eighth and fourteenth amendments to the Constitution.³⁸

The Charles Street Jail has been used continuously since 1848.³⁹ It originally was built to house one inmate per cell, but by the mid-1970s two inmates were regularly housed per cell.⁴⁰ Most inmates at the time of the suit (85%) were pretrial detainees who had not been convicted of the crime for which they had been arrested.⁴¹ After viewing the jail during an overnight stay, United States District Judge W. Arthur Garrity, Jr., called the conditions in the jail a “soul-chilling inhumanity.”⁴² Judge Garrity ruled that conditions at the Charles Street Jail were unconstitutional, in that they violated the presumption of innocence and the detainees’ right of due process.⁴³

Judge Garrity’s decision confronted directly the traditional “hands-off” doctrine which had prohibited federal courts from interfering with the operation of state and county correctional institutions.⁴⁴ The court permanently enjoined the defendants from housing two inmates in a cell after November 30, 1973 and from housing any inmate awaiting trial at the Charles Street Jail after June 30, 1976.⁴⁵ The court also ordered that visiting hours be expanded, that detainees be allowed out of the cell for four hours each day, that physical examinations be available, and that progress reports be filed by the defendants.⁴⁶

The defendants did not appeal. However, the district court postponed the order prohibiting incarceration of pretrial detainees at Charles Street Jail, first until July 1, 1977, and then until November 1, 1977, because the defendants could not arrange replacement facilities.⁴⁷ On November 2, 1977, the district court ordered the City

28. *Id.* at 821.

29. *Id.*

30. *Id.*

31. 42 U.S.C. §1396a.

32. 537 F. Supp. at 829.

33. *Id.* at 837–38.

34. *Id.* at 836.

35. *Ricci v. Callahan*, 646 F. Supp. 378, 379 (D. Mass. 1986).

36. *Id.* at 381.

37. *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 685 (D. Mass. 1973), *aff’d*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974).

38. 360 F. Supp. 676.

39. *Id.* at 679.

40. *Id.*

41. *Id.* at 685.

42. *Id.* at 684.

43. *Id.* at 686.

44. In 1972, the Supreme Court had highlighted a new principle: “[F]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all ‘persons’ which include prisoners.” *Cruz v. Beto*, 405 U.S. 319, 321 (1972), *quoted in Inmates of Suffolk County*, 360 F. Supp. at 684.

45. 360 F. Supp. at 691.

46. *Id.*

47. *See Inmates of Suffolk County Jail v. Kearney*, 573 F.2d 98, 99 (1st Cir. 1978).

Council to appropriate funds to establish a "constitutionally adequate pretrial detention center" and delayed closing Charles Street Jail until five weeks after the appropriation by the Council.⁴⁸ The City Council appealed and the court of appeals stayed the order.⁴⁹

The City Council finally voted on March 1, 1978, to appropriate \$10 million to correct constitutional deficiencies at the Charles Street Jail,⁵⁰ but by then it was too late. The Sheriff of Suffolk County, the master of the jail and the Commissioner of Correction had already filed a joint report declaring that a new jail should be constructed, and they had established a process for designing a new facility which would regularly report to and receive reports from the plaintiffs. The court of appeals called the City Council's vote to appropriate \$10 million "an ostrich-like wish that the necessity to settle on a site and make available adequate funds would disappear."⁵¹ The court termed the Council's five-year delay to secure basic constitutional rights "unconscionable" and affirmed the order prohibiting the incarceration of pretrial detainees at Charles Street Jail.⁵² The court held that after October 2, 1978, the Charles Street Jail would be closed to any pretrial detainee.⁵³ The court left open the possibility that it would withdraw the order if the City Council outlined a full plan for development of a new facility, including the site, the funding and the target dates for completion of construction, which plan was to be consistent with constitutional standards.⁵⁴

Such a plan was developed and the old jail remained open while a new one was built. Evidently, it was the court's threat of actually closing the jail that spurred the government, after five years of litigation, to take unpopular action.⁵⁵

In the years it took to build the new jail, scheduled to open in early 1990, Charles Street became more and

more crowded, perhaps a result of the mandatory sentencing laws.⁵⁶ Under a "no double-bunking" order, the sheriff has been forced to transport extra Charles Street prisoners to other county jails, often hours away, where they are double-bunked. At times, using an emergency procedure, a superior court judge has been required to decide which inmates to release. Some have thought that the lack of space at the jail has had an adverse effect on law enforcement, particularly in Boston's war against drugs.⁵⁷

Construction of the new jail facility has not ended the federal court's involvement.⁵⁸ As of the date of this article, the new jail is not even completed, but predictions are that it may be too small, and that the parties may have to return to court to determine if the no double-bunking order will govern the new jail.⁵⁹

Boston School Desegregation

The Boston school desegregation case may be the most visible example of both the deficiencies of political processes and the federal court's deep involvement in a public institution. In 1972, parents of black school children, appalled by the conditions of their inner-city schools, sought to remedy violations of their constitutional right of equal protection by bringing suit in federal court. The defendants were the Boston School Committee, the Superintendent of Schools and the Massachusetts Board of Education. Later, the Home and School Association and the Massachusetts Teachers Association intervened.⁶⁰

United States District Judge W. Arthur Garrity, Jr., found that the Boston School Committee had "knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities and [had] intentionally brought about and

48. *Id.* at 99.

49. *Id.* at 98-99.

50. *Id.* at 99.

51. *Id.* at 100.

52. *Id.*

53. *Id.*

54. *Id.* at 101.

55. See generally Coffin, *The Frontier of Remedies: A Call For Exploration*, 67 CALIF. L. REV. 983 (1979).

56. See, e.g., G.L.M. c.94C, §32E.

57. *Drugs and Justice, A System Abandoned*, Boston Bar Association Report of Task Force on Drugs and the Courts, p. 6 (1989). "The result was bizarre. People charged with trafficking cocaine, an illegal drug, were eligible for release to halfway houses, and in some instances to the street, because there wasn't enough room at the Charles Street jail, while people charged with operating under the influence of an illegal drug were kept locked up." *Id.*

58. Enforcement of the order to construct a new jail has not been the exclusive province of the federal courts. Since 1984, the Supreme Judicial Court for Suffolk County, through Justice (now Chief Justice) Paul J. Liacos, sitting as a single justice, also has exercised jurisdiction over actions concerning the Charles Street jail. In October, 1984, with double-bunking continuing, the Attorney General of the Commonwealth sued the sheriff. The sheriff then sued the Mayor, the City Council, and the Commissioner of Corrections. All parties be-

fore the single justice agreed that a new jail had to be built. The City Council had espoused a plan for building a thirteen-story structure to house the 309 prisoners provided for in the consent decree, and for rehabilitating at least part of the existing jail. All other parties favored a seventeen-story plan with 435 cells. Justice Liacos concluded that the thirteen-story plan could be modified to include additional stories, and ordered that the plaintiffs in the federal litigation seek modification of the pertinent federal orders. The Supreme Judicial Court affirmed Justice Liacos's order. *Attorney General v. Sheriff of Suffolk County*, 394 Mass. 624 (1985). After the full bench of the Supreme Judicial Court upheld the single justice's order, Justice Liacos retained jurisdiction over the case. He has continued to monitor problems of overcrowding at the Charles Street jail, approved a change in construction sites, and monitored the planning and construction of the new jail on Nashua Street in Boston.

59. The federal court in Massachusetts also has been involved in remedying conditions at county jails other than the Charles Street Jail. For example, in 1984, prisoners of the Norfolk County Jail brought an action alleging that conditions there violated their constitutional rights. United States District Court Judge Walter Jay Skinner found that certain conditions violated the plaintiffs' constitutional rights and granted a preliminary injunction that set a population cap at the jail. See *Libby v. Marshall*, 653 F. Supp. 359, 360 (D. Mass. 1986).

60. *Morgan v. Hennigan*, 379 F. Supp. 410, 482 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580, 588 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). For further description, see Lynch, *The Boston School Desegregation Case*, 62 MASS. L. Q. 137 (1977).

maintained a dual school system."⁶¹ Having found a violation of the fourteenth amendment, the court was obligated by Supreme Court precedent to order an "effective" remedy.⁶² The normal pattern in school desegregation cases was to require the local school authorities, who have the most knowledge of the demographics, facilities and other aspects of the school system, to propose a desegregation plan and Judge Garrity so ordered.⁶³ However, the Boston School Committee's response was to refuse to provide a plan to the court, preferring to be found in contempt.⁶⁴

As a result, the court then appointed a panel of four distinguished masters to conduct hearings and to attempt to devise a plan. But the masters' efforts at a plan were undercut by the school authorities' provision of inaccurate demographic data. The court modified the masters' plan and adopted it as its desegregation order. The First Circuit repeatedly affirmed the orders of the district court.⁶⁵

The desegregation plan adopted by the court was unique and innovative in its efforts to improve the quality of education. Many of the features of the plan laid the groundwork for the better aspects of the school system of the 1980s. Under the desegregation plan, for the first time the Boston business community became involved in the schools, and business leaders such as Edward G. Phillips of New England Mutual Life Insurance Company devised specific programs of support. Universities were paired with individual Boston schools, and parents became more involved in the operation of the schools.

The School Committee's defalcations did not end with its refusal to submit a desegregation plan. Violence and threats to the students' safety marred the desegregation of particular schools, especially South Boston High School.⁶⁶ After the School Committee refused to take any steps to guarantee the safety of students and rock-throwing mobs surrounded school buses, the federal court intervened and placed South Boston High School into receivership, most likely preventing deaths by doing so. After reviewing the pattern of obstruction, the U.S. Commission on Civil Rights recommended that the entire school system be placed into receivership.⁶⁷

Although the degree of involvement of the federal court in the administration of the Boston schools was unusual, so was the obduracy of the local officials. This

stubbornness posed a singularly difficult remedial problem for the district court: that is, how to disengage from the receivership and return control of the schools to local authorities without permitting these authorities to subvert and circumvent the desegregation plan. The court used a variety of devices. Two experts, appointed to assist the court and given access to school system personnel, provided information about compliance. In late 1982, the court shifted to the Massachusetts Board of Education the responsibility of monitoring compliance and making periodic reports.

On September 3, 1985, the district court issued final orders closing the case⁶⁸ and in September 1987, the First Circuit returned control over student assignments to the Boston School Committee, finding a unitary system had been achieved to the extent possible.⁶⁹ Changes in the method of electing Boston School Committee members, changes in the superintendency, and changes in the political climate in Boston eventually made it possible, more than a decade after the original plan, to return control to the local authorities. Fittingly, the same district court judge who had initiated desegregation was the one who pushed the parties towards disengagement.

Housing

The Boston housing cases,⁷⁰ like the prison and school cases, show that obtaining judicial relief, at times, may be a painfully slow process. They also prove once again that when public officials repeatedly fail to meet their obligations, resort to the lengthy judicial process may be necessary.

Beginning at the end of the 19th century, racial segregation and discrimination in public and private housing was firmly entrenched in Boston. In the 1970s, the black population of Boston was 22% and, by 1980, it increased to 30%.⁷¹ During the same period, the available housing for low-income families with children decreased significantly, leaving only a 3.7% vacancy rate.⁷² The shrinkage in the low income housing market may have been due to "gentrification" of previously marginal housing and to the condemnation of 4,000 units of public housing administered by the Boston Housing Authority.⁷³ Those conditions led United States District Judge Walter Jay Skinner to conclude in 1983, "There is a housing emergency in Boston."⁷⁴

61. 379 F. Supp. at 482.

62. *Id.* at 482.

63. *Id.* at 410 and Lynch, *supra* note 60.

64. For a description of the school committee's actions and of the remedial plan ordered by the court, see Morgan v. Kerrigan, 401 F. Supp. 216, 226 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976).

65. See Morgan v. Kerrigan, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976), and Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). See generally Coffin, *supra* note 55.

66. U.S. Commission on Civil Rights, *Desegregating the Boston Public Schools: A Crisis in Civic Responsibility* (August, 1975).

67. *Id.*

68. Morgan v. Nucci, 617 F. Supp. 1316 (D. Mass. 1985).

69. Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987).

70. There have been numerous housing cases instituted in federal court, not all of which will be discussed here. For example, in May, 1988, the NAACP filed a class action suit against the Boston Housing Authority alleging racial discrimination in the selection of tenants for particular projects. Judge Tauro was actively involved in the parties' efforts to work out a settlement, which was reached after lengthy negotiations on October 4, 1989. Boston Globe, October 8, 1989, p. 29.

71. NAACP v. Harris, 567 F. Supp. 637, 640 (D. Mass. 1983).

72. *Id.*

73. *Id.*

74. *Id.*

Despite laws prohibiting discrimination, the neighborhoods of Boston remained racially and ethnically discrete. The racial and ethnic make-up of public housing projects reflected the composition of their neighborhoods. Boston city government had not created a monitoring system to implement fair housing practices.⁷⁵

In 1977, Congress established a new program under the Housing and Community Development Act⁷⁶ for the funding of urban housing. The Act earmarked \$400 million per year for three years for cities to "take advantage of unique opportunities to attract private investment, stimulate investment in restoration of deteriorated or abandoned housing stock, or solve critical problems resulting from loss of employment or chronic unemployment in the community."⁷⁷ Only cities which had shown a commitment to housing low- and moderate-income citizens and to fund equal opportunities for minority groups could receive Urban Development Action Grant (UDAG) funds. The Act further designated specific state agencies to conduct reviews of applications. The Massachusetts Commission Against Discrimination (MCAD) was designated to review any UDAG applications for compliance with applicable civil rights law.

The City of Boston applied to the Department of Housing and Urban Development [HUD] for \$27.46 million to cover four projects: the Charlestown shipyard, Blue Hill Avenue in Roxbury, the South Boston industrial park and Lafayette Place in downtown Boston. MCAD recommended in February, 1978 that HUD not fund the proposals for UDAG funds without imposing fair housing and employment conditions. HUD, however, ignored this recommendation and approved \$10.48 million grants to the city for the Charlestown and Lafayette Place projects.⁷⁸

In March 1978, two public interest groups filed an administrative complaint against HUD. The complaint disputed HUD's determination that Boston had provided opportunities to minorities and was therefore eligible for a UDAG grant. Alleging that, with respect to the grant of UDAG funding to the Charlestown and Lafayette Place projects, HUD had failed to enforce constitutional and statutory proscriptions against discrimination,⁷⁹ the plaintiffs sought a temporary restraining order and a permanent injunction against disbursement of the UDAG funds. Judge Skinner dismissed the claim, ruling that neither the individual plaintiffs nor the NAACP had standing to challenge the disbursement of

UDAG funds. The First Circuit affirmed in part and vacated in part, holding that individuals who had sought "decent low-cost housing in an integrated neighborhood" without success had standing to sue HUD, and remanded the case to the district court.⁸⁰

On remand, the district court decided the case on the merits.⁸¹ The court took judicial notice that Boston's neighborhoods were racially separate and that Boston had a history of racial discrimination in housing.⁸² The court found that the low-income housing shortage impacted more heavily on black families than on white, and that the city, aware of these facts, had not effectively enforced fair housing requirements.⁸³ The court found further that HUD had not required the city to provide an assessment of special needs of low-income families, in violation of title VIII of the Civil Rights Act of 1968.⁸⁴ Judge Skinner instructed the parties to submit proposed forms of remedy.⁸⁵

The City of Boston gave HUD a minority needs assessment plan and in 1985 the district court found that the filing of the assessment plan cured HUD's violation of its own regulation. The court ruled that the award of further relief under the complaint was not appropriate because Congress had committed agency compliance to agency discretion.⁸⁶ The NAACP appealed to the First Circuit. The court reversed and remanded, holding that a pattern of inaction was not exempted from judicial review under the Administrative Procedure Act.⁸⁷

On remand, the court, attempting a creative remedial approach, ordered mediation under the auspices of the Community Relations Service of the Department of Justice. The parties, however, reported in December 1988 that all attempts to reach a resolution had failed. The district court issued its own remedial order in June 1989.⁸⁸

The court found that there had been no showing that conditions had substantially improved over the previous decade. In fashioning a remedy, the court candidly articulated certain practical constraints:

Prudence requires the acknowledgment of certain political imperatives. The appropriation of funds for urban development is committed to Congress, and the allocation of such funds among the various sections of the country is committed to the discretion of the defendant. Imposition of restrictions that made Boston an unattractive candidate for federal funding may ultimately defeat the laudable purposes which plaintiff seeks to achieve.⁸⁹

75. *Id.* at 641.

76. 42 U.S.C. §5301 *et seq.*

77. H.R. Rep. No. 95-236, 95th Cong., 1st Sess. 9 1977, reprinted in (1977) U.S. Code Cong. & Admin. News, 2884, 2892.

78. NAACP v. Harris, 607 F.2d 514, 517 (1st Cir. 1979).

79. Title I of the Housing and Community Development Act, 42 U.S.C. §5301 *et seq.* and 24 C.F.R. §570.601; title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, the regulations at 24 C.F.R. §§1.1-1.12, title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq.*, and the fifth amendment due process clause.

80. 607 F.2d at 524.

81. 567 F. Supp. 637 (D. Mass. 1983).

82. *Id.* at 641.

83. *Id.*

84. *Id.* at 644.

85. *Id.*

86. NAACP v. Pierce, 624 F. Supp. 1083, 1084-85 (D. Mass. 1985), vacated sub nom. NAACP v. HUD, 817 F.2d 149 (1st Cir. 1987), *limited by* 880 F.2d 603 (1st Cir. 1989).

87. NAACP v. HUD, 817 F.2d 149 (1st Cir. 1987).

88. NAACP v. Kemp, C.A. No. 78-850-S, slip op. at 4 (D. Mass. June 23, 1989).

89. *Id.* at 13.

While the court declined to order HUD to fund particular projects, it did order significant relief. Although there had been no specific findings about suburban opportunities, there had been findings about the lack of safe housing for persons of color in white areas of Boston, and findings that HUD had failed to encourage construction of integrated housing in the city. These findings led to an order compelling HUD to require private landlords of HUD-assisted housing throughout the metropolitan area to market their housing affirmatively to low-income persons in Boston. The court also ordered HUD to impose on the city and state a series of fair housing conditions, designed to enhance access to low-income housing by black households and to remedy housing discrimination. The plaintiffs were thus successful in forcing HUD to impose fair housing obligations on the City of Boston prior to granting the city federal assistance.

Boston Harbor

The Boston Harbor case is another example of a federal court forcing a city and, initially, a federal agency to comply with federal law. The environment, rather than low-income persons or minorities, was the victim in this case. The battle over Boston Harbor has involved the state legislature, the federal government, conservation groups and inhabitants of bayside towns.⁹⁰

In 1983, the Conservation Law Foundation (CLF) charged the Metropolitan District Commission (MDC) and the Environmental Protection Agency (EPA) with violating the Federal Water Pollution Control Act⁹¹ (FWPCA), the discharge permit issued by the EPA to the MDC under the FWPCA, and several EPA compliance orders. The CLF alleged that the MDC, the regional agency responsible for sewage disposal in Massachusetts, was violating the FWPCA and its own permit by dumping improperly treated and raw sewage into the harbor.⁹² In 1985, the United States, at the request of the administrator of the EPA, filed a separate suit against the Commonwealth of Massachusetts, the MDC, the Massachusetts Water Resources Authority (MWRA)⁹³ and the Boston Water and Sewage Commission. This further

litigation may have resulted from a growing perception that the defendants would not voluntarily cooperate in the cleaning of the harbor.⁹⁴ The district court consolidated the CLF and United States cases and granted a motion by the City of Quincy to intervene.⁹⁵ The Town of Winthrop intervened a few months later.⁹⁶

In September 1985, United States District Court Judge A. David Mazzone found the MDC and MWRA to be in violation of the FWPCA, the permit issued by the EPA, and the 1980 administrative order.⁹⁷ The plaintiffs worked with the MWRA to create a long-term, enforceable scheduling order to make sewage discharge comply with the FWPCA. In 1986, the court issued target dates and a scheduling order for construction of a secondary sewage treatment plant.⁹⁸ Under the schedule, the MWRA would build a primary treatment facility on Deer Island. This treatment plant would provide minimal sewage treatment, including removal of solids and chlorination. The remaining sewage would then be pumped into the bay. The facility is scheduled to provide treatment by 1994.⁹⁹

The MWRA provides monthly progress reports which a compliance monitor reviews. The federal court issues a monthly order assessing the progress or lack of progress and directing further steps. If the MWRA cannot comply with an order during a particular month, the MWRA outlines the problem and steps it will take to conform to the schedule as rapidly as possible.

Occasionally, the court has had to apply additional pressure to the state. For example, in the spring of 1989, the MWRA sought to relocate its headquarters from Charlestown to Roxbury. The City of Quincy, however, objected to this siting, arguing that if it were required to house a landfill for the solid sewage, it should also have the benefit of housing the headquarters of the MWRA. Judge Mazzone responded that he was watching carefully the delays caused by the legislative fighting: "I told the Authority when I established the schedules that they would not hear from me as long as the deadlines are met. . . . I would not hesitate to use the inherent powers of the court to enforce its judgment."¹⁰⁰ Michael Deland, chief of the EPA's New England office, suggested the

90. *United States v. Metropolitan District Commission*, 16 ENVTL. L. REP. 20621, 20622 (D. Mass. 1985).

91. 33 U.S.C. §1251 *et seq.*

92. In 1979, the MDC filed an application for a waiver of secondary treatment requirements in sewage disposal, under 33 U.S.C. §1311(h). In 1980, the EPA issued an administrative order finding that the MDC had violated its permit from the EPA by not completing a secondary treatment and sludge management facility. Despite a pending waiver, the MDC was ordered to implement a schedule for proceeding with the treatment facilities. The administrative order also allowed a third person to enforce the permit's requirement. In 1983, the EPA tentatively denied the MDC's waiver application, and the MDC filed an amended application for waiver the following year. In 1984, the EPA issued another administrative order citing violation of the permit and the 1980 administrative order. The 1984 administrative order requires the MDC to comply with the 1980 administrative order limits until it constructs facilities and can thereby comply with the permit limits. 16 ENVTL. L. REP. at 20623.

93. The Massachusetts Water Resources Authority succeeded the MDC as an autonomous body in control of the metropolitan sewage system in 1985. The district court held in 1985 that the MWRA would be liable for the MDC's acts despite the MWRA enabling legislation which limited its pollution liability. The court held that the FWPCA preempted the enabling provision, and that due to similarity in purpose the MWRA is subject to successor liability. 16 ENVTL. L. REP. at 20621.

94. *Id.* at 20622.

95. The City of Quincy had previously sued the MDC in Massachusetts superior court but failed to reach an agreement on a schedule to clean up the harbor. 16 ENVTL. L. REP. 20622.

96. *Id.*

97. *Id.* at 20623.

98. *Id.*

99. *Id.*

100. Boston Globe, July 11, 1989, p.8.

MWRA be fined up to \$180,000 a day if cleanup deadlines are missed.¹⁰¹

The delay in implementation of the harbor cleanup has been costly to Massachusetts. The cost of the cleanup is estimated at \$6.1 billion.¹⁰² In 1976, the federal government had offered to pay 75% of the cost of a secondary treatment plant. Fifteen percent more would have come from state funds, leaving only 10% of the total bill to the city to pay. However, that federal grant had a sunset provision and ended in 1987. Since then, the MWRA has been seeking additional federal funding to finance its cleanup efforts.

Conclusion

The cases discussed above lead to some modest observations. First, in these cases there is no evidence of judicial overreaching. In each of the cases, the judiciary at first deferred to the state and local authorities in order to give them the opportunity to remedy the problem identified. In some cases, the district courts, although finding the institutions liable for constitutional violations, were reluctant to issue intrusive remedial decrees until instructed to do so by the First Circuit.

Second, the cases show that public officials have repeatedly been unable or unwilling to address problems, and quite willing to hand the problems back to the courts. Even in the mental retardation cases, where public officials agreed that conditions at the state hospitals

were unconstitutional and unconscionable, public officials did not remedy conditions until shamed into doing so by a court which skillfully focused media attention on the issues and on the parties. The reverse is also true: public officials at times have viewed litigation against them as an opportunity to use the added clout of the court, and its accompanying media attention, to reach results perhaps not otherwise attainable. The Boston Harbor case may be an example of this dynamic.

Third, public institution cases place the courts into difficult situations not only politically but also jurisprudentially. It is not only that federal judges face intransigence from public officials and that the judges do not want to administer public institutions. It is also that, despite the enormous public impact of rulings, the courts are dependent on the information developed through the traditional methods of the judicial process. The traditional methods of case adjudication have significant limits. The success of that litigation often depends on the competence of the parties and counsel and on whether the parties perceive it to be in their interests to present certain facts to the court. The court may be frustrated by the limited information presented to it. The frustration felt by the trial judges is often palpable in their opinions. It has, in some cases, led courts to seek and to use more creative methods of case adjudication, such as special experts and masters.

In the end, and despite these problems, the courts are doing what the Constitution envisioned: acting as "a check" on other branches of government to constrain them from violating the constitutional rights of individuals.

101. *Id.*

102. *Id.*

Anatomy of a Success: BBA and Court Reform

by Sandra L. Lynch



Court reform, a BBA priority, was the most significant legislation enacted in the 1992 session of the Massachusetts legislature. It was a great victory for the BBA.¹ Through legislation, and not through litigation, lawyers brought change to a major institution, the court system, so encrusted it stumbles along.

In a nutshell, the court reform bill should create a more accountable court system which uses its resources more wisely and efficiently and which better serves children and families. "Massachusetts Courts In Crisis," the June 1991 BBA State Court Study Committee Report, asked, "Who's in charge here?" and found that the answer was, "No one." Our court system had almost no accountability, not surprising since there were no clear lines of authority or responsibility. The legislation remedies this, albeit with regrettable limits on the superintendence powers of the SJC.

The BBA said the courts must be given the tools to manage themselves. For the first time in its 300 year history, the court system will now have the power to transfer personnel (both judicial and nonjudicial), cases, and funds. Clerks and other support personnel, the BBA said, must be made subordinate to judges, to end the phenomenon of several different, conflicting bosses in a courthouse. The act does that. Judges themselves, the BBA said, must be disciplined by their Chief Judges and must be evaluated. That accountability is in the legislation.

The court system is failing to meet

the needs of children and families, the BBA said, and we should create a statewide specialized court to meet those needs. With the creation of a new statewide juvenile court and 21 new judgeships, the legislation addresses this.

Recognizing that specialized functions served by particular courts are valuable, the BBA opposed complete unification of the Trial Court, and recognized that streamlining of administration was needed. Again, the BBA view prevailed.

So how did we do it? What can we learn?

The BBA recognized and seized an opportunity. A Fall 1990 *Boston Globe* "Spotlight" series critical of the court system and legislative "prerogatives" focused public attention on the courts. The *Globe* series, though, missed the point that there were deeper, more systemic problems with the court system than a few judges who kept short hours. BBA President Jack Driscoll understood and appointed a committee of experienced trial lawyers to study the court system and recommend changes. *Carpe diem*.

Selection of the leaders of the effort was key to our ultimate success. Robert Popeo of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo headed the committee; his second was Tom Dwyer of Dwyer, Collora & Gertner. Both are extremely astute lawyers respected by the legislative leadership.

Commitment from the BBA leadership proved essential over time. For continuity BBA Vice President Sandra Lynch served on the committee and BBA President-Elect Margaret Marshall was regularly briefed.

The BBA's credibility and impartiality were crucial. We did our homework and knew what we were talking about. The Committee met with more than 100 judges and others before issuing its Report. William McDermott, of Mintz, Levin drafted legislation to carry out the Report's recommendations. Consistent with a bill filed earlier by the Supreme Judicial Court, the BBA bill filled in more of the details.

Involvement of top legislative leadership ultimately led to passage of the bill. The BBA bill was filed and sponsored by House Speaker Charles

Flaherty and Senate President William Bulger. The Governor, in turn, kept the issue on his weekly meeting agenda with legislative leadership.

Sustained effort for more than two years was needed. In 1991, the new BBA President Margaret Marshall picked up the issue, met with top judicial and executive leadership, testified at legislative hearings and continued to work with the media.

The divergence of views on all elements of court reform was initially used to justify failure to act. A Massachusetts Bar Association study had urged the complete unification of the Trial Court and the creation of a citizens' committee to oversee the courts. The court clerks proposed that they be given the power to run the entire system. The BBA disagreed. A major legislative push on court reform had stalled by July of 1992. The issue carried over into the term of a third BBA President.

Court reform, we had been told, was going nowhere for two reasons. First, until everyone involved compromised and worked out a single position, no court reform was possible. Second, there was no constituency for court reform, it was only a lawyers' issue. Neither of these proved to be true.

Recognizing, however, that those in favor of the status quo would use those issues as cover, the BBA took action. Meeting with Chief Justices Liacos, Warner, Fenton and others, the BBA revised its bill to reflect a consensus position among the judiciary as to allocation of power within the system. We met many times with the MBA, with clerks and others. There was much common ground and areas of disagreement were better articulated. The process of inclusion, of listening to many points of view, was important. Exclusion by itself can create opposition. We also recognized that in a democracy, change is in increments and legislation inherently involves compromise.

We deliberately reached out to additional "constituencies" for court reform on three fronts: the media and through it, the public, the business community, and law enforcement. Leaders in each communicated the im-

continued on page 4

Anatomy of a Success

continued from page 2

portance of the issue.² Court reform thus became an important public issue. It was an issue not just of good government, but of more effective government during an era of hard times. It became an issue of accountability of our judges and courts. It became a test of the legislature's ability to act to solve problems, against a slate of few accomplishments.

BBA Presidents and staff met with key legislators, including the Speaker and Senate President, Ways and Means Chairs Patricia McGovern and Tom Finneran, and Judiciary Chair Sal DiMasi. The legislature itself, aware of the increasing need and demand for court reform, felt that it had been unfairly blamed for the ills of the court system and wanted to take action.

What has been called the lack of a "constituency" for court reform proved to be a strength. There was no broad constituency opposing court reform. The disagreements among the groups favoring court reform were easily defined and were fewer than the common areas of agreement. The legislature did not need to be handed a compromise on all points from the concerned groups, and the process was enriched by having a full debate on the differences.

Changing the status quo required enormous effort, more than we initially recognized. But without us, there would be no court reform and we would otherwise have entered the twenty-first century with a court system designed in the seventeenth.

NOTES

1. The BBA was also instrumental in the passage of M.G.L. c. 21E amendments, the estate tax repeal and the sponge tax.

2. To name but a few: editorials from Tom Gagen at *The Globe* and Rachelle Cohen at *The Herald* were helpful. Gerri Denterlein from WBZ Television sparked momentum in November 1992 with a Forum for Justice featuring Chief Justice Liacos, the Governor, Attorney General, and Senate President. Business leaders such as Paul O'Brien of the Vault and the Chamber of Commerce, John Gould from Associated Industries of Massachusetts, and Mike Widmer of Mass. Taxpayers Foundation communicated to political leaders the business community's strong interest in court reform. Attorney General Harshbarger and District Attorneys Tom Reilly and Ralph Martin were instrumental.

Mirror, Mirror on the Wall

by Sandra L. Lynch



Who is the fairest of us all? Certainly not the legal profession, according to the public. The legal profession is right up there in the negative hall of fame. And the Boston Bar Association is right up there as a representative of the profession, pitching to make a difference.

We have been through a particularly bad period as a profession. Searching for an issue other than the economy on which to throw the focus in the 1992 presidential race, one political party deliberately attacked the legal profession. Doing field testing, the Vice President launched some trial attacks on lawyers. When focus groups and polls found the public responsive to the attacks, the President picked up the theme.

Can't get away from the economy as an issue? Then look for a scapegoat. America isn't keeping up, said the two leaders of the free world, because lawyers are a competitive drain on our society. The country, they said, has had a litigation explosion, has more lawyers per capita than anyone else, and mercenary trial lawyers obtain obscenely high verdicts, sending medical costs soaring.

None of that is true.

That truth, however, does not, this time, set us free. For there are three other truths we must address.

First, while lawyers have never been a popular lot, what is new now is that negative attitudes about lawyers are being used for political purposes. The truth is that politicians could not put such attitudes to political use if they were not real and strongly felt. Mean spirited lawyer jokes are now so common, *The Boston Globe* has printed a column of

nothing but (to which the BBA immediately responded).

Second, the political rhetoric and myth making has created a negative perception of lawyers which has its own life. The truth is the perception becomes the reality, regardless of the underlying facts.

The third may be the most important truth. The truth is there are serious problems with the legal system and the legal profession. We recognize we have problems. Surveys of lawyers show that many lawyers believe there are too many unethical lawyers, that there is too much litigation and it is too costly, that legal fees are unaffordable for many, that the legal system needs reform. The best way to improve the image of the profession is for us to take responsibility for solving the problems which we know are there.

While the country has not had a litigation explosion, litigation is, far too often, too costly. The BBA has led the long, tough fight for court reform, a key to greater efficiency. A better managed court system should help to avoid the peculiarly high costs of litigation in Massachusetts caused by the breakdown of our court system.

In addressing the image of the profession, we need to listen better to what our clients want and communicate better with them. The BBA has appointed a Committee on Professional Behavior—Listening and Communicating. That Committee's work is designed to help lawyers on communications issues in

order to improve client satisfaction and our own professionalism. The old adage that people dislike all lawyers but their own may be less true today. Some recent surveys show that the more contact citizens have with the legal system, the less respect they have for it.

To those who say lawyers are only self interested mercenaries, we point to the BBA's Task Force on Public Education Reform, a key issue for the Commonwealth's future. The fourteen public interest projects the BBA sponsors win national awards and public notice for their effectiveness in helping those most in need.

Just publicizing our good works won't turn the tide. Each of the BBA Sections is charged this year with accomplishing public education and outreach projects. The new BBA Long Range Plan outlines eight specific, affirmative strategies to improve the public image of the profession. If we simply react to attacks, and do not take positive steps, we will lose.

The fact that the country will have two lawyers in the White House may help the reputation of lawyers. But we shouldn't breathe a sigh of relief yet. The poor public image of the legal profession will not so easily disappear. The message of the presidential election is that it is time for change, the status quo won't do. The legal profession must heed the message. Where we know we have problems, we must be the ones to make changes, to acknowledge the status quo won't do.

Boston Bar Foundation 11th Annual Dinner Dance

Saturday, February 27, 1993

at The Westin Hotel, Copley Place

7 PM Cocktails, 8 PM Dinner

Dancing to the Steve Lane Band until 12 midnight

The Dinner Dance is a fund-raising event for the Boston Bar Foundation in support of our activities and to celebrate our Outstanding Record of Community Service. To reserve your tickets, call Sandra Gonzalez at 742-0615. Tickets cost \$175 per person or \$1750 for a table of ten.

High Noon in the Courthouse

by Sandra L. Lynch



Brawls, fist fights, the quick pull of a knife, guns brandished, outlaws overpowering law officers—this scene is not the old American Wild West, it is our state courthouses in Massachusetts. But now the Supreme Judicial Court and Chief Administrative Justice Fenton, like Sheriff Matt Dillon, have walked tall and spoken loud and clear. In issuing their Emergency Order of September 10, 1992, they are seizing control of courthouse security, acting before someone does get killed. Gunsmoke and violence will not be tolerated.

Here are but a few of the facts: a husband plunges a knife into his wife's chest during their divorce proceedings in the Fall River Probate Court; a convicted felon waving a gun escapes from the Middlesex Superior Court to a waiting getaway car; police uncover a plot by armed gang members to attack rival gang members inside the Dorchester District Court; two youths with knives are arrested in the Brockton District Court after purportedly entering the court to threaten witnesses in a juvenile hearing; a bomb goes off outside the Brockton courthouse, sending flames two stories high; police are brought in to quell a near riot in the Springfield Juvenile Court. There are now even reports of judges and court officers carrying guns to protect themselves.

In a society in which the leading cause of death of male teenagers is guns, it is not surprising that the violence of the streets has made its way inside the courthouse. Like our schools, our courts have increasingly been asked to address a variety of society's ills. Courthouses

were once referred to as "Temples of Justice." Reality now mocks that reference.

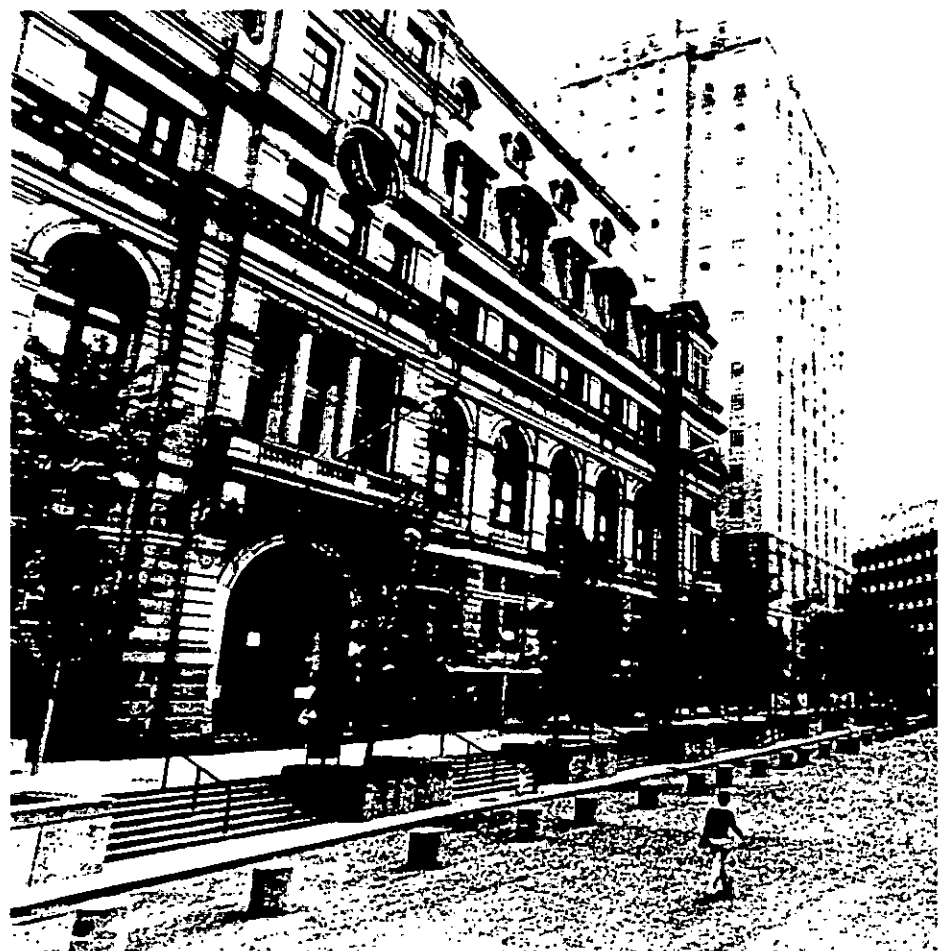
No one should be injured in a courthouse. No one entering a courthouse should fear for his or her physical safety. The wages of such fear are bad enough. But there are other costs as well. For lack of court officers, court sessions have been cancelled, although judges, clerks, courtrooms and parties were ready. This exacerbates the problems of delay and staggering caseloads. Judges have also been faced with going forward with trials on criminal charges against known violent offenders without having any courtroom security available, or dismissing the charges. At least once, the choice was to dismiss the charges.

The S.J.C. Emergency Order is a good first step. There is, of course, not a perfect equation between court officers and court security. Of the 598 court officers in the Commonwealth, 64 are over age 65. The S.J.C. Order requires that minimum physical ability requirements be established for the position and that all court officers receive training. The management and deployment of court

officers is now up to the Chief Administrative Justice.

As Probate Judge Edward Casey has said, "If society can't protect its citizens in a courthouse, what kind of a state are we in?" We are in a state, as documented in the BBA's 1991 Report, *The Massachusetts Courts in Crisis*, in which there is almost no accountability in the management of the courts and the legislature intrudes excessively. The legislature, through control of court personnel schedules, budgetary line items and political patronage, has often dictated the number of court officers per court, where they are to be located, and who gets the jobs. That scheme impedes accountability and restricts the ability of the courts to transfer personnel as needed. The S.J.C.'s Emergency Order overrides that scheme in order to have better courthouse security.

It is shameful to have a system in which our highest court has to issue emergency orders to override legislation in order simply to be able to manage the courts. It is high noon in the courthouses. And it is high time the legislature enacted court reform.



Of Mice and Men . . . and Women . . . and Children

by Sandra L. Lynch



What is the world we leave our children? It is a world both men and women have tried to shape with the best laid schemes and with good intentions. What of it?

In the 1960s there was eloquent concern that we were moving to two societies—one white and one black. The danger now is that we are moving to two societies—one rich and one poor. That movement has seriously weakened two of the basic functions of American government—our systems of justice and of public education. A stable democracy requires that we strengthen both.

Our Massachusetts state courts are badly in need of managerial reform. They are often unable to handle, much less expeditiously, the cases before them, valiantly though they try. Cases involving children particularly get lost in the cracks, with heartbreaking personal costs. Children do not wait to grow up while courts fail to hear cases of their abuse and neglect. Continuances and delay mean the stability children need is irretrievably lost. This disgraceful condition has prompted a uniquely American and poignant act of faith—a suit filed in the courts against the courts for the failure of the courts to adequately handle the cases of children. In the meantime, those who can afford other methods of dispute resolution simply purchase it on the private market. Private alternative dispute resolution is becoming to the judicial system what Federal Express is to the U.S. Postal System.

Our public elementary and secondary schools fare no better. Presently the state's share of educational costs is at the lowest level in ten years. At the same time, our schools are facing annual enrollment and inflation increases of around 5½%. Massachusetts ranks 43rd in the nation in the level of state aid to elementary and secondary education. As a result, our public schools are unusually reliant on and victims of the local property tax. Our schools are caught between the Scylla of Proposition 2½ and the Charybdis of low state funding. The admirable present efforts at education reform, through legislation or the school financing lawsuit, will and should assist the poorest communities. Such "reform" will be through concepts of "foundation budgets," but most likely capped at levels well below what our good school systems presently spend. How does this reform assist the quality of education in the remaining, often middle class school systems? They must go to the voters for overrides every several years to get adequate funding, running hard just to keep from falling further behind. In the name of "reform," we may just define the lowest common denominator. Excellence has, however, never been defined by the lowest common denominator. In the face of declining quality, those who can afford to will simply purchase education for their children on the private market. And when enough parents do so out of quiet concern, it will be too late to save the public schools.

There is a danger that we will make decisions which suit our present interests and not recognize the consequences for the world we shape for our children. Later generations may view us no more kindly than Churchill viewed Neville Chamberlain, however well intentioned we were. "Peace in our time" may produce chaos thereafter.

Will we leave our children a society in which only the poorest use our courts and our public schools? What will it mean for America when two of the basic components of a stable democracy—a good judicial system and a good public education system—are lost? What will it mean for our profession? As we move toward a two class society, won't lawyers inevitably try to assure that they and their families are among the protected? What does that mean for a profession

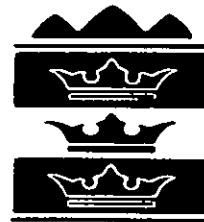
already working harder on average than a decade ago, under pressure about billing rates and efficiency?

Lawyers have a special brief in pushing for court reform, as the BBA has steadfastly done. We should be no less concerned with our public school systems. We are not just lawyers, we are parents and citizens too.

The BBA has formed a Task Force on Public Education, chaired by Robert Fraser, to give us a voice in this most important of public issues—the future of our schools. The BBA's highly successful Task Force on Drugs and Justice significantly influenced our state's response to a major social problem. We seek to do so again. Alexis de Tocqueville observed in the early 1800s:

In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society . . .

Lawyers today should display leadership, so that what our children inherit from us is not the loss of their own futures.



Beyond Plato

by Sandra L. Lynch



Philosophers today explore "Communitarian" concepts, focusing on the quandaries and dissatisfactions of modern life. In particular, they attempt to bridge the discontinuity in practice between the idea of "rights" and the idea of "responsibilities."

One such philosopher, Amitai Etzioni, writes, "No society can function well unless most of its members 'behave' most of the time because they voluntarily heed their moral commitments and social responsibilities." To give a graphic example, as was said after the terrorist bombing of the London subway system, "Civilization is when so few can cause so much havoc for so many."

A paradigm shift is occurring in our society. We are all interrelated. "Communitarianism" is an effort to rethink the paradigm of conflict between the individual good and the collective good which has characterized the last quarter century. Ideas count.

What does this have to do with lawyers? A lot. More than anyone else, lawyers champion the idea of "rights." By that we mean the rights of the individual. Our doctrines define the rights of individuals as being juxtaposed against the community. Our doctrines establish the adversary system as the best method of resolving disputes. But at the same time, we live professionally and represent clients in and among institutions and communities. As the *Boston Globe's* David Warsh says, "We live through institutions and must take them seriously."

The interrelatedness of nature is now

well recognized. We use the term "the environment" and analyze "ecosystems." Appreciating this, our laws require an analysis of the impact on the environment of particular actions. No one would now permit an industrial plant to be built without considering its impact on the local environment, from water and air quality to traffic patterns.

Yet we have been slower to recognize both the interrelatedness of our profession and of the justice system within which we work. To give an example, if 100 new police officers are added, there is applause. We have gotten tough on crime. Few consider that those 100 officers will lead to more arrests, which will lead to more prosecutions and require more public defenders, and will add to the criminal caseload of courts, and will require more space to incarcerate prisoners. Without added resources, other components of the justice system may break down, harming the community. Policy has consequences. The consequences for the justice system of a particular policy choice are, however, rarely recognized.

To continue the point, courts hearing more and more criminal cases, without benefit of added resources, will hear fewer civil cases. That, exactly, is one of the real consequences of the "War on Drugs." The delay in hearing civil cases demonstrably drives litigation costs up for the parties. Clients, faced with higher costs, tell lawyers they cannot afford to compensate the waste occasioned by delay, so they no longer want to pay hourly rates. They want lawyers to engage in "creative" billing arrangements in which lawyers share the risks of delay. Not irrationally, clients want to change a system of billing in which lawyers are compensated for the system's waste to one in which lawyers have an economic incentive to control the waste. Clients also seek to avoid courts wherever possible, making use of standard contract clauses requiring ADR. This in turn fundamentally affects how we practice.

These interrelationships require that we in the profession recognize there is a legal community. Survival of the community requires that we transcend

labels such as prosecution and defense counsel, personal injury lawyer and insurance lawyer, labor and management attorneys, poverty lawyers and "establishment" lawyers. Survival of the community means that we must think of responsibilities as well as rights.

All of this makes the role of bar associations even more relevant and more important. The Boston Bar Association is the common meeting ground for the legal community here. The BBA represents and embodies that community. The interests of that community this year have ranged from unemployment of lawyers to law firms being charged with collective guilt for the crimes of the few. The BBA is the institution which advocates on matters of the judicial system—like court reform and judicial pay raises—which affect us all. It is the institution which recognizes the relationships between the legal community's interests and those of the larger community—such as on education reform legislation and the BBA Summer Jobs Program. The BBA is the institution which debunks political mythologies which prevent there being real solutions to palpably real problems. Examples include the BBA's Truth in Sentencing bill, which debunks the myth that the answer to crime is simply to build even more prison cells. The BBA will need your support in the coming years—please give that support. It is a wise investment.

This is my last President's Page. Thank you for the opportunity to serve.

The "724 Children"

by Sandra L. Lynch



Boston City Hospital is on the front lines of medicine where poverty, violence, and urban life intersect. Our legal services programs—GBLS, CASLS, Cambridgeport Problem Center, and others—are on the front lines of law at this same intersection.

What is it like on the front lines? One study has found that 10% of the children treated in a BCH clinic saw a shooting or a stabbing at home or on the street, *before they were six years old*. Sesame Street's Big Bird must seem unreal to them—he isn't afraid of being mugged in his neighborhood. George F. Will recently described a new urban phenomenon, the "724 Children," or "children kept at home, indoors, seven days a week, 24 hours a day, because of the epidemic of violence." The homes in which they are kept may not be safe in other ways: lead paint, inadequate heat, not enough money to go around for food, clothing and medicine. There may not even be a parent in the home. By the year 2000, there will be 72,000 children in this country, according to estimates, who have lost their mothers to AIDS. And the epidemic of violence does not recognize the sanctuary of the home. The Massachusetts Trial Court judges hear more than a thousand petitions a week under Chapter 209A, or a staggering 52,000 such cases a year.

Health professionals may try to approach this complex of issues through family medicine. But lawyers know that in today's world the law touches just about every problem. Perhaps, as this century waxed new and it was possible to live without much attention to law, but it is surely not possible

to do so as the century wanes. By definition, government, including its benefits and regulation, involves law. Society is protected not through vigilante action, but through the criminal laws. Private disputes are expected to be resolved in court, and not by self-help.

The legal profession is not there for substantial numbers of people who need legal help, especially the poor. Here we are, a generation after the creation of the Legal Services program, after the War on Poverty, and the problem of delivery of legal services to the indigent has not disappeared. Indeed, a worsening of the problem has crept up on us.

New England, since 1990, has been in the worst economic shape since the Great Depression. There has been a loss of 750,000 jobs, or 11% of the job base. There has been a related increase in homelessness and domestic violence. Because of constraints on state budgets, state assistance programs have been cut back. Children, it was said, had to be clothed to meet the New England weather on \$79 a year. At a time of increased need, core legal services for poor people have been severely impacted by funding losses.

Each of the sources of funding for the Greater Boston area legal services programs is shrinking. There are four core programs and they have suffered four body blows. The four core programs are Greater Boston Legal Service (GBLS), Cambridge And Somerville Legal Services (CASLS), Cambridgeport Problem Center (CPC) and Volunteer Lawyers Project (VLP). The four body blows come from the sharp drop in IOLTA funds caused by interest rate reduction, the impact of the 1990 census, loss of state Asylum Representation funding, and shortfalls in United Way funding.

In the mid 1980's, the BBA, trying to address the problem of funding for legal services, petitioned the SJC to create an IOLTA program. The SJC did so by rule. The vast majority of IOLTA funding goes to legal services programs through the Massachusetts Legal Assistance Corporation. During FY '93, MLAC is projecting a decline in IOLTA income of about \$2 million. MLAC is attempting to cushion the

blow by exhausting its reserves, but still anticipates a \$1.8 million cut in basic programs in FY '93.

The Greater Boston area programs are also, ironically, victimized by the prosperity of this area in the late 1980's. For the "1990" census is in fact based on data from that earlier period of prosperity, and does not capture the bust that followed. As a result, funding formulas which operate on census data shift funding away from the "prosperous" Boston area. The programs also lost nearly \$200,000 in vetoed state appropriations for representation of immigrants. And United Way, another funding source, anticipates cuts of roughly 7% to all recipients.

The federal government is unlikely to solve the problem, even if there is an increased appropriation for the Legal Services Corporation (LSC). The distance to catch up is too far. For example, the Reagan cuts of 1982 slashed the GBLS budget by \$1.2 million, to a \$2.1 million level. In 1993, more than ten years later, the GBLS grant from LSC is still \$2.1 million, the 1982 level, notwithstanding population growth and inflation.

As a result, the FY '93 funding for GBLS will be reduced by more than \$500,000. Chelsea, the city with the highest percentage of poor people in the state, will be served by one half-time paralegal, to do work formerly done by two full-time attorneys. CASLS may be forced to cut its staff by a quarter. The other programs suffer similarly.

Congress should be asked to significantly increase LSC funding. MLAC'S request for \$900,000 new funding to combat domestic violence should be supported. When programs seek donations from the private bar, the bar should respond because it is the right thing to do.

Some may say that the legal profession should primarily bear the costs of these programs. But the need to deliver legal services to the indigent is a societal need and tax dollars and IOLTA dollars should be used primarily to support the programs. What will happen if programs are not adequately funded? The human costs will be enormous. There will be costs to

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The "724 Children"

continued from page 2

the profession as well. There will be increased calls for mandatory *pro bono* programs and for enforcement of *pro bono* obligations through ethical rules and disciplinary procedures. There will also be definitions of "*pro bono*" work restricting it to legal services to the poor, no matter how worthy the civil rights, gender equality, or administration of justice *pro bono* effort. The recent attacks on the IOLTA program ignore the practical reality that the needs are there, they are enormous, and someone will bear the cost of meeting those needs or the consequences of not meeting them.

Chapter 4

DAMAGES IN SALE OF GOODS, INSURANCE AND EMPLOYMENT

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Contract damages essentially derive from a promised performance failing to occur as expected and, therefore, attempt to place the plaintiff in as good a position as if the expected performance had transpired as agreed. The contract can be express or implied. The nature of the breach, foreseeability, attempts at mitigation, existence of a liquidated damages clause, statutory limits and similar considerations enter into the determination of what damages are recoverable. Since business and commercial contexts naturally lend themselves to contracts, express or implied, a great deal of law has evolved to govern contractual relationships in a variety of business dealings. This chapter explores contract damages in the areas of sales of goods, insurance coverage and employment.

SALE OF GOODS

Historically, common law principles controlled the assessing of damages for breach of contract in the sale of goods. Today, many of those principles have become refined and codified in the Uniform Commercial Code (UCC). While the UCC is now the dominant authority on damages in the sale of goods, there are still common law and statutory provisions that supplement UCC authority in this area.

Common Law Damages

For breach of contract, the common law damages rule is that the nonbreaching party should be put in the same position as if the contract had been fully performed. *John Hetherington & Sons, Ltd. v. William Firth Co.*, 210 Mass. 8, 95 N.E. 961 (1911).

It is undisputed that, if a party suing for breach of contract has sustained a loss as a result of a breach, and the loss is of such a nature that it was reasonably foreseeable by the parties and follows as a natural consequence and proximate result of the

breach or was actually within their contemplation at the time the contract was entered into, the loss may be recovered in an action for damages. *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 446-448 [82 N.E. 682, 685-86] (1907). *American Mechanical Corp. v. Union Mach. Co. of Lynn, Inc.*, 21 Mass.App.Ct. 97, 101 [485 N.E.2d 680, 683] (1985).

International Totalizing Sys., Inc. v. PepsiCo, Inc., 29 Mass.App.Ct. 424, 430, 560 N.E.2d 749, 753, review denied, 408 Mass. 1105, 563 N.E.2d 692 (1990). One court has characterized this as imposing a "but-for causation rule," analogous to the tort rule. *Evans v. Yegen Assocs., Inc.*, 556 F.Supp. 1219 (D.Mass. 1982).

Direct or general contract damages "flow according to common understanding as to the natural and probable consequences of the breach," that is, those arising naturally "according to the usual course of things, from such breach of contract itself." *Boylston Hous. Corp. v. O'Toole*, 321 Mass. 538, 562, 74 N.E.2d 288, 302 (1947) (quoting *Hadley v. Baxendale*, 9 Exch. 341, 354 (1854)). "Special" damages (or "consequential" damages) are those that "may be presumed to have been in the contemplation of the parties at the time the contract was made by reason of special circumstances known to the parties." *Boylston Hous. Corp. v. O'Toole*, 321 Mass. at 563, 74 N.E.2d at 302 (quotation omitted); see also *Chestnut Hill Dev. Corp. v. Otis Elevator Co.*, 739 F.Supp. 692 (D.Mass. 1990). Some contracts expressly exclude consequential or special damages, see *id.*, but such labels provide little guidance in the highly case-specific determinations of what damages are direct, what are special and what were not foreseeable. Compare *Boylston Hous. Corp. v. O'Toole*, 321 Mass. 538, 562, 74 N.E.2d 288, 302 (1947) (lost rents not direct damages) with *Chestnut Hill Dev. Corp. v. Otis Elevator Co.*, 739 F.Supp. 692 (D.Mass. 1990) (interest carrying charges are direct damages). In order to recover damages, a plaintiff generally must show foreseeability and certainty of damages and an effort at mitigation. See *Knightsbridge Mktg. Servs., Inc. v. Promociones Y Proyectos, S.A.*, 728 F.2d 572 (1st Cir. 1984).

Foreseeability

The damages sought must have been a foreseeable consequence at the time the parties entered into the contract. *Bucholz v. Green Bros. Co.*, 272 Mass. 49, 54, 172 N.E. 101, 103 (1930); *Knightsbridge Mktg. Servs., Inc. v. Promociones Y Proyectos, S.A.*, 728 F.2d at 575 ("where it appears that the loss was the natural, primary and probable consequence of the breach, that the profits arising from the performance of the contract or the loss likely to result from its nonperformance were within the contemplation of the parties" and therefore the damages were foreseeable); *International Totalizing Sys., Inc. v. PepsiCo, Inc.*, 29 Mass.App.Ct. 424, 430, 560 N.E.2d 749, 753 (1990) (damages too remote to have

been within reasonable contemplation of parties), see also *First Pennsylvania Mortgage Trust v. Dorchester Sav. Bank*, 395 Mass. 614, 626, 481 N.E.2d 1132, 1139 (1985) (commercial lender liable for *pro rata* share of construction project losses because parties contemplated sharing in both earnings and risk of failure); *Abrams v. Reynolds Metal Co.*, 340 Mass. 704, 709, 166 N.E.2d 204, 207 (1960).

Lost Profits

Lost profits are a proper element of recovery in a breach of contract action, provided the loss flowed from the breach, was foreseeable and is capable of reasonable proof. *Gagnon v. Sperry & Hutchinson Co.*, 206 Mass. 547, 92 N.E. 761 (1910). While lost profits are often based on existing earning records, that is not the only method available, and proof may be offered through expert testimony alone. *City Welding & Mfg. Co. v. Gidley-Eschenheimer Corp.*, 16 Mass. App. Ct. 372, 451 N.E.2d 734 (1983). *Knightsbridge Mktg. Servs., Inc. v. Promociones Y Proyectos, S.A.*, 728 F.2d at 575-76. Prospective profits need not be shown with mathematical accuracy. *Rombold v. Gosindas*, 351 Mass. 382, 220 N.E.2d 919 (1966).

Certainty

Damages must be established with a reasonable degree of certainty. See *Novel Iron Works, Inc. v. Wexler Constr. Co., Inc.*, 26 Mass. App. Ct. 401, 528 N.E.2d 142, review denied, 403 Mass. 1104, 530 N.E.2d 797 (1988) (lost profits awarded to general contractor not speculative as plaintiff provided detailed evidence as to construction cost). Damages will not be awarded if speculative or not grounded in fact. Cf. *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 385 N.E.2d 1349 (1979) (in a trade secrets case, plaintiff did not prove with sufficient certainty lost profits due to sales of products using trade secrets by the defendant); *MacDonald v. Hawker*, 11 Mass. App. Ct. 869, 420 N.E.2d 923, review denied, 384 Mass. 816, 440 N.E.2d 1172 (1981) (evidence of lost profits against partner in real estate development was too speculative and uncertain).

Mitigation of Damages

A party seeking damages generally must show it took reasonable steps to avoid the loss. See Restatement (Second) of Contracts, § 350 cmt. b. *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 393 Mass. 666, 473 N.E.2d 1066 (1985) (wine buyer's failure to take action to prevent a loss by timely sale of now worthless labels precluded its recovery); *Makino, U.S.A., Inc. v. Meilife Capital Credit Corp.*, 25 Mass. App. Ct. 302, 518 N.E.2d 519, review denied, 402 Mass. 1101, 521 N.E.2d 398 (1988) (refusal to mitigate not unreasonable in light of prior instances).

Interest

The party seeking a damages award in a contract action may also seek interest as damages for the wrongful retention of money or personal property, or in accordance with a contract for its payment. D. Simpson & H. Alperin, 14 *Massachusetts Practice Series* § 383 (2d ed., 1974); *Sterilite Corp. v. Continental Casualty Co.*, 397 Mass. 837, 494 N.E.2d 1008 (1986) (purpose of this prejudgment interest statute is to compensate damaged party for loss of use or unlawful detention of money). Under G.L. c. 231, § 6C, the clerk will add prejudgment interest to the amount of damages awarded. The interest rate will be either the rate specified in the contract or 12 percent per annum from the date of the breach or demand. *Cesco Mfg. Corp. v. Norcross, Inc.*, 7 Mass.App.Ct. 837, 391 N.E.2d 270 (1979). General Laws c. 231, § 6C also provides that if the date of breach or demand is not established, interest shall be added at the contract rate, or if there is no contract rate, at 12 percent per annum from the date of the commencement of the action. *Deerskin Trading Post, Inc. v. Spencer Press, Inc.*, 398 Mass. 118, 495 N.E.2d 303 (1986) (if date of breach or demand is not established, prejudgment interest is to be calculated from date of the commencement of the action). Under G.L. c. 235, § 8, postjudgment interest is to be paid at the same rate as prejudgment interest.

Nominal Damages

Massachusetts law provides for at least nominal damages for a breach of contract. *Holt v. County Broadcasting Corp.*, 343 Mass. 363, 178 N.E.2d 589 (1961); *Bartlett v. Keith*, 325 Mass. 265, 90 N.E.2d 308 (1950).

Liquidated Damages Provisions

A liquidated damages clause, reasonable when agreed to, is enforceable. *Graves Equip., Inc. v. M. DeMatteo Constr. Co.*, 397 Mass. 110, 489 N.E.2d 1010 (1986). It may not be enforced where the amount, in relation to the actual damages, is so disproportionate as to shock the conscience of the court and make it a penalty. *A-Z Servicer, Inc. v. Segall*, 334 Mass. 672, 138 N.E.2d 266 (1956). A court may also refuse to enforce a provision it finds inequitable. *Schrenko v. Regnante*, 27 Mass.App.Ct. 282, 537 N.E.2d 1261, *review denied*, 405 Mass. 1203, 542 N.E.2d 601 (1989).

Emotional Distress Damages

Emotional distress damages are not usually recoverable in breach of contract actions. See *Sullivan v. H.P. Hood & Sons, Inc.*, 341 Mass. 216, 168 N.E.2d 80 (1960).

Punitive Damages

Punitive damages are not allowed in Massachusetts unless authorized by statute. *DeRose v. Putnam Management Co.*, 398 Mass. 205, 496 N.E.2d 428 (1986) (punitive damages not available in breach of contract action).

Fraud or Deceit

In Massachusetts, a plaintiff who successfully proves fraud in the context of making a contract can recover the "benefit of the bargain" as damages for the misrepresentation. See *Redstone v. Goldman, Sachs & Co.*, 583 F.Supp. 74 (D.Mass. 1984) (plaintiff may recover benefit of the bargain in an action for willful misrepresentation); *Rokowsky v. Gordon*, 531 F.Supp. 435 (D.Mass. 1982), *aff'd*, 705 F.2d 439 (1st Cir.), *cert. denied*, 462 U.S. 1120 (1983). If fraud is proved in the sale of personal property, the amount of damages is trebled. G.L. c. 231, § 85J.

Statutory Damages Outside the UCC

Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Magnuson-Moss), 15 U.S.C. §§ 2301-2312, provides consumers with an action for damages due to the "failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1). The amount in controversy must be \$50,000 or higher to be able to bring the suit in federal court. 15 U.S.C. § 2310(d)(3). Otherwise, suit may be brought in state court. 15 U.S.C. § 2310(d)(1)(A). The measure of damages is to be determined by reference to state law. See *MacKenzie v. Chrysler Corp.*, 607 F.2d 1162 (5th Cir. 1979). A successful plaintiff may also obtain attorneys' fees as part of the damages award. 15 U.S.C. § 2310(d)(2). Whether or not a plaintiff may recover damages for emotional distress due to a breach of warranty under Magnuson-Moss is determined by state law. *Wise v. General Motors Corp.*, 588 F.Supp. 1207 (W.D. Va. 1984). Finally, it is unclear whether punitive damages are recoverable under Magnuson-Moss. *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979). Some courts have held punitive damages may be recovered under Magnuson-Moss only if they can be recovered in a breach of warranty action under state law. See, e.g., *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1069 (5th Cir. 1984).

Damages Under the UCC

The general policy of the Uniform Commercial Code as adopted by Massachusetts is to put the aggrieved party in as good a position as if the breaching party had fully performed. G.L. c. 106, § 1-106. Under the UCC, there are two types of remedies—seller's remedies (G.L. c. 106, § 2-703) and buyer's remedies (G.L. c. 106, § 2-711)—for breach of a contract for sale of goods as discussed further below. As the UCC encompasses much more than damages, practitioners may want to review other UCC provisions and their interplay.

Seller's Remedies

General Laws c. 106, § 2-703 sets out six possible remedies of the seller under particular scenarios of breach by the buyer:

- withhold delivery,
- stop delivery by any bailee,
- identify goods notwithstanding breach or salvage unfinished goods,
- resell and recover damages,
- recover damages for nonacceptance or in a proper case the price and
- cancel.

G.L. c. 106, § 2-703(a)–(f).

The UCC sets forth various measures of damages, available in particular situations. The seller, depending on the situation, may choose to

- resell the goods and recover the difference between the resale price and the contract price, G.L. c. 106, § 2-706;
- recover the difference between the market price and the contract price, G.L. c. 106, § 2-708(1); or
- in certain situations, recover the full contract price, G.L. c. 106, § 2-709.

The seller may also be able to recover lost profits if the seller can prove it is a "lost volume" seller. G.L. c. 106, § 2-708(2).

Resale

General Laws c. 106, § 2-706 provides for the resale of goods where a buyer has

- wrongfully rejected a tender of goods,
- wrongfully revoked an acceptance of goods,
- failed to make a payment due on or before delivery or
- repudiated with respect to a part or a whole.

Where the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price together with any incidental damages, less expenses saved in consequence of buyer's breach. G.L. c. 106, § 2-706(1). Sections 2-706(3) and 2-706(4) set out the notice and other requirements for a "commercially reasonable" private or public resale. See *Bevel-Fold, Inc. v. Bose Corp.*, 9 Mass.App.Ct. 576, 402 N.E.2d 1104 (1980) (resale of rightfully rejected stereo units was commercially reasonable). The seller is under no duty to resell the goods. *Equilease Corp. v. D'Annolfo*, 6 Mass.App.Ct. 919, 379 N.E.2d 1130 (1978) (if buyer wrongfully rejects, seller is under no duty to repossess and resell to mitigate damages).

Damages for Nonacceptance or Repudiation

General Laws c. 106, § 708(1) provides a remedy to a seller under certain circumstances. The measure of damages for nonacceptance or repudiation by the buyer "is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages . . . but less expenses saved in consequence of the buyer's breach." The method for determining market price is set forth in Section 2-723. *Cesco Mfg. Corp. v. Norcross, Inc.*, 7 Mass.App.Ct. 837, 391 N.E.2d 270 (1979) (under Section 2-708(a), plaintiff recovers price as reduced by net proceeds from sale of undelivered fixtures and expenses saved, plus incidental damages).

Action for Contract Price

Situations when a seller may recover the contract price as set forth in G.L. c. 106, § 2-709 include those where the buyer has accepted the goods and has not paid the contract price and where the buyer has lost the goods and the risk of their loss has passed to the buyer. G.L. c. 106, § 2-709(1)(a). *Connecticut Inv. Casting Corp. v. Made-Rite Tool Co.*, 382 Mass. 603, 416 N.E.2d 966 (1981) (where buyer did not make effective rejection or revoke acceptance of goods, seller entitled to contract price); *Equilease Corp. v. D'Annolfo*, 6 Mass.App.Ct. 919, 379 N.E.2d 1130 (1978) (buyer wrongfully rejected and seller rightfully may sue for the price of the equipment). Another situation is where the seller who has posses-

sion of goods identified to the contract is unable, after reasonable effort, to resell the goods at a reasonable price or the circumstances reasonably indicate that such effort would be unavailing. See G.L. c. 106, § 2-709(1)(b). Under G.L. c. 106, § 2-709(2), the seller must hold for the buyer any goods that have been identified to the contract and are still in his or her control when suing for the price. If the seller is able to resell the goods, the proceeds from the resale will be deducted from the seller's recovery. See G.L. c. 106, § 2-709. *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 310 N.E.2d 128 (1974) (seller who held machine was suing for contract price and if seller was able to resell the machine, proceeds from the resale would be deducted from the seller's recovery).

"Lost Volume" Seller

A seller may also have an action under G.L. c. 106, § 2-708(2) for lost profits. General Laws c. 106, § 2-708(2) states that when the measure of damages provided for in Section 2-708(1) (market price plus incidental damages less contract price and expenses saved) is inadequate "to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) that the seller would have made from full performance by the buyer" together with incidental damages, due allowances and credits. This section generally applies to a "lost volume" seller, or one who can show that the resale price for goods that the buyer failed to purchase was too low to justify the cost of resale, and therefore the seller has lost a sale or volume of sales due to buyer's failure to buy. Such a seller is entitled to recover lost profits from the sale under G.L. c. 106, § 708(2). See *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865 (1st Cir. 1982) (lost volume seller can collect lost profit, including reasonable overhead); *Jericho Sash & Door Co. v. Building Erectors, Inc.*, 362 Mass. 871, 286 N.E.2d 343 (1972) (formula for lost profits is subtraction of direct cost to seller from contract price); *Cesco Mfg. Corp. v. Norcross, Inc.*, 7 Mass.App.Ct. 837, 391 N.E.2d 270 (1979) (lost profits recoverable if no accessible market for the goods being sold or if no market for the goods without cleaning or fixing them at great cost).

Incidental Damages

Under Sections 2-706, 2-708 and 2-709, a seller may recover incidental damages along with an action for damages. Incidental damages to a seller include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." G.L. c. 106, § 2-710. *Dyecraftsmen, Inc. v. Feinberg*, 359 Mass. 485, 269 N.E.2d 693 (1971); *Cesco Mfg. Corp. v. Norcross, Inc.*, 7 Mass.App.Ct. 837, 391 N.E.2d 270 (1979) (incidental damages for storage and moving awarded to seller).

Unfinished Goods

A seller may also elect to complete the manufacture of unfinished goods identified to the contract or cease to continue to manufacture the goods and resell them for scrap or salvage value if such a determination is commercially reasonable. See G.L. c. 106, § 2-704. If, in the exercise of reasonable commercial judgment at the time the seller learns of the breach, the seller determines that completing the unfinished goods will result in a material increase in damages, the seller does not have to complete the goods. *Cesco Mfg. Corp. v. Norcross, Inc.*, 7 Mass.App.Ct. 837, 391 N.E.2d 270 (1979) (seller's determination not to complete unfinished goods was commercially reasonable). The burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture. See G.L. c. 106, § 2-704(2); Official Comment 2 to § 2-704; A. Stickells, 25 *Massachusetts Practice Series* § 2.141 (2d ed. 1989).

Buyer's Remedies

The buyer's remedies are described in G.L. c. 106, § 2-711. A buyer may cancel the contract under circumstances specified in G.L. c. 106, § 2-711(1). *Menard & Holmberg Rambler, Inc. v. Shea*, 44 Mass.App.Dec. 204 (1970). In addition, the buyer may, along with recovering so much of the purchase price as has been paid,

- purchase goods that "cover" those that were originally contracted for and recover damages under Section 712 or
- recover damages for nondelivery under Section 713.

G.L. c. 106, § 2-711(a)-(b). Where the seller fails to deliver or repudiates, the buyer may also recover the goods under G.L. c. 106, § 2-502 or, in a proper case, obtain specific performance or recover the goods under Section 2-716. G.L. c. 106, § 2-711(2)(a)-(b). *Productora E Importadora De Papel v. Fleming*, 376 Mass. 826, 383 N.E.2d 1129 (1978).

On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (section 2-706).

G.L. c. 106, § 2-711(3).

The basic measure of damages for an aggrieved buyer depends on the circumstances of the breach. If the goods are not delivered or the buyer justifiably revokes acceptance or rejects the goods, the buyer may cover and receive as

damages the difference between the cover price and the contract price. G.L. c. 106, § 2-712. Under such circumstances, a buyer may also receive the difference between the contract price and the market price as the basic measure of damages if the buyer has not covered. G.L. c. 106, § 2-713. If the buyer has accepted the goods, the basic measure of damages is the loss resulting in the ordinary course of events if the claim is for nonconformity of tender, and for a breach of warranty the basic measure of damages is the difference between the goods as warranted and as accepted. G.L. c. 106, § 2-714.

Cover

After a breach under Section 2-711, a buyer may purchase cover goods or enter into a contract for cover as long as such cover is made in good faith and without unreasonable delay in order to substitute goods due from the seller. See G.L. c. 106, § 2-712. The purchase of cover goods must also be "reasonable." *Id.* The buyer may then recover from the seller the difference between the cost of "cover" and the contract price, together with any incidental or consequential damages, less expenses saved in consequence of seller's breach. See G.L. c. 106, § 2-712(2); *Productora E Importadora De Papel v. Fleming*, 379 Mass. 826, 383 N.E.2d 1129 (1978) (buyer covered and was entitled to damages of cover price less contract price). Cover is not mandatory, however, and failure to cover does not prohibit buyer from using any other remedy. See G.L. c. 106, §§ 2-712(3) and 2-712 cmt. 3.

Market Price Less Contract Price

A buyer's measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price, together with any incidental and consequential damages, less expenses saved in consequence of seller's breach. G.L. c. 106, § 2-713. A buyer is only entitled to this measure of damages when it has not covered. G.L. c. 106, § 2-713 cmt. 5; *Productora E Importadora De Papel v. Fleming*, 379 Mass. 826, 383 N.E.2d 1129 (1978) (UCC provides buyer with two alternative remedies, cover and market price less contract price).

Determination of Market Price

General Laws c. 106, § 2-723 provides for the means of determining market price where evidence of prevailing price is unavailable. A. Stickells, 25 *Massachusetts Practice Series* § 2.160 (2d ed. 1989).

Additionally, G.L. c. 106, § 2-724 provides that whenever the prevailing price of a good or commodity regularly traded in an established commodity market is in question, parties may use reports from official publications, trade journals or newspapers or periodicals of general circulation published as reports of such mar-

ket to prove the prevailing price. Parties may use the circumstances of the preparation of such a report to question its weight but not its admissibility. G.L. c. 106, § 2-724.

Accepted Goods

When the buyer does not have an action for damages under Section 2-712 or 2-713, because the buyer has accepted the goods and the time in which he or she can revoke the acceptance has passed, the buyer may have an action under Section 2-714 for nonconformity of tender or a breach of warranty. G.L. c. 106, § 2-714. If a buyer is claiming nonconformity of tender, the buyer may recover damages for "the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." G.L. c. 106, § 2-714(1). Claims for a breach of warranty are measured by "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." G.L. c. 106, § 2-714(2); *Regina Grape Prods. Co. v. Supreme Wine Co.*, 357 Mass. 631, 260 N.E.2d 219 (1970) (seller's breach of express and implied warranties in failing to deliver dry, red wine entitled buyer to damages based on quality of wine and lost profits). Incidental and consequential damages may also be available in addition to damages for nonconformity of tender and breach of warranty. G.L. c. 106, § 2-714(3); *Deerskin Trading Post, Inc. v. Spencer Press, Inc.*, 398 Mass. 118, 495 N.E.2d 303 (1986) (consequential damages sometimes recoverable for a breach of warranty).

Buyer's Deduction of Damages from Price

A buyer may deduct all or part of the damages resulting from any breach of contract from any part of the price still due under the contract upon notifying the seller of the buyer's intention to do so. G.L. c. 106, § 2-717. *C.R. Bard, Inc. v. Medical Elecs. Corp.*, 529 F.Supp. 1382 (D.Mass. 1982) (buyer's right to deduct damages not limited to breach of warranty claims, but damages are deductible only against price due under same contract, and breach must go to the essence of the transaction).

Incidental and Consequential Damages

The question of what are "incidental" and "consequential" damages is highly fact-specific, whether it is a buyer's or a seller's remedies involved. A buyer's incidental damages include "expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, [for] any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other

breach." G.L. c. 106, § 2-715(1); *Fortin v. Ox-Bow Marina, Inc.*, 408 Mass. 310, 557 N.E.2d 1157 (1990) (plaintiff buyer of defective boat allowed to recover sales tax paid as an element of incidental damages); *Bevel-Fold, Inc. v. Bose Corp.*, 9 Mass.App.Ct. 576, 402 N.E.2d 1104 (1980) (seller wrongfully refused to accept bad stereo units sold to buyer; buyer was allowed to recover incidental damages for transportation, storage, care and custody of the goods rightfully rejected).

A buyer's consequential damages are defined at Section 2-715. See *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 393 Mass. 666, 473 N.E.2d 1066 (1985) (lost profits and loss of goodwill are proper consequential damages under G.L. c. 106, § 2-715); *Fortin v. Ox-Bow Marina, Inc.*, 408 Mass. 310, 557 N.E.2d 1104 (1980) (interest on purchase money loan to buyer recoverable as consequential damages upon effective revocation or rejection of acceptance and the seller had reason to know the buyer was financing the purchase).

Lost Profits

Depending on the facts, lost profits may be direct damages or consequential damages. *Matsushita Elec. Corp. of America v. Sonus Corp.*, 362 Mass. 246, 284 N.E.2d 880 (1972) (aggrieved party has right under the UCC to be put in as good a position as if the other party had performed, and this includes the right to recover lost profits).

Courts dealing with claims for lost profits can look to the record of the company in the past to determine the measure of profits lost. See *Hendricks & Assocs. v. Daewoo Corp.*, 923 F.2d 209, 214-15 (1st Cir. 1991) (seller had reason to know of continuous business relationship between buyer and third party and that seller's breach would cause buyer to lose profits on business with third party); *Tele-Wire Supply Corp. v. Wachusett Cablevision, Inc.*, 1986 Mass.App.Div. 30 (cable company recovered lost profits against wire manufacturer even though it was a new business; the nature of cable television lends itself to a precise computation of monthly revenues based upon its experience when it began operations). Mathematical accuracy is not required. See also *Jay Edwards, Inc. v. New England Toyota Distrib., Inc.*, 708 F.2d 814 (1st Cir.), cert. denied, 464 U.S. 894 (1983) (common law proof of profits assessed by comparable business); *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966).

When determining lost profits under the UCC, reasonable overhead costs are to be counted as part of the lost profits. G.L. c. 106, § 2-708(2). Overhead costs must be distinguished from "direct costs," which are directly related to the manufacture of goods. In *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865 (1st Cir. 1982), the court held that wages of testers, shippers, installers and other employees of the seller who directly handled the machine that buyer repudiated are not

part of overhead costs but rather are direct costs of production that must, therefore, be deducted from the contract price to determine the correct amount of lost profits to be awarded.

Goodwill

Loss of goodwill is an element of consequential damages under G.L. c. 106, § 715(2)(b). See *Delano Growers' Coop. Winery v. Supreme Wine Co., Inc.*, 393 Mass. 666, 473 N.E.2d 1066 (1985) (lost goodwill a proper element of consequential damages).

Liquidated Damages

Under G.L. c. 106, § 2-718(1), liquidated damages clauses are valid if

- they set forth an amount that is reasonable in light of the anticipated or actual loss caused by the breach,
- it would be difficult to prove the amount of the loss and
- it would be inconvenient or nonfeasible to otherwise obtain an adequate remedy.

Unreasonably large liquidated damages are void as penalties. *Id.*; see *Security Safety Corp. v. Kuznicki*, 350 Mass. 157, 213 N.E.2d 866 (1966) (a liquidated damages clause requiring payment of 33⅓ percent of contract price is unenforceable when the buyer canceled the contract for fire detection equipment the day after making it).

Punitive Damages

Under the UCC as codified in G.L. c. 106, § 1-106(1), punitive damages are not available except "as specifically provided in this chapter or by other rule of law." Additionally, G.L. c. 106, § 2-302, which deals with unconscionable contracts, provides no guidance as to whether punitive damages or a punitive damages provision in a sales contract is unconscionable.

Fraud Under the UCC

General Laws c. 106, § 2-721 provides the remedies for fraud in a contract for the sale of goods. The remedies include all remedies available under the UCC for a nonfraudulent breach. G.L. c. 106, § 2-721. Rescission or a claim for rescission of the contract as well as rejection or return of the goods are available as remedies and do not preclude a claim for damages. G.L. c. 106, § 2-721.

Limitation of Remedies

A contract, subject to certain limitations, may modify, limit or alter the measure of damages available under Article 2. The contract may provide for remedies in addition to or in substitution for those provided in Article 2. G.L. c. 106, § 2-719(1)(a). A contract may also limit or alter the measure of damages recoverable under Article 2, i.e., by limiting the remedies of the buyer to the return of the goods and repayment of the purchase price or to the repair and replacement of the nonperforming goods or parts. *Id.* Resort to such a modified or limited remedy is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy. G.L. c. 106, § 2-719(1)(b). Additionally, any such limited or modified remedy must be minimally adequate. *See* G.L. c. 106, § 2-719 cmt. 1.

In a significant decision, the Supreme Judicial Court held in *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 406 Mass. 369, 548 N.E.2d 182 (1990), that even though the exclusive remedy of repair or replacement failed of its essential purpose, the limitation of liability provision in the contract, which excluded consequential damages, was still enforceable where other nonconsequential damages constituted a minimum adequate remedy. *See* G.L. c. 106, §§ 2-719(2), 2-719(3). The Court expressly said that the result "might well be different" if the facts showed "wilful dilatoriness or repudiation of warranty obligations by the seller." *Id.* at 376-77, 548 N.E.2d 186-87. It is important to note that the Court in *Canal Electric* also held that a limitation of liability provision was enforceable so as to bar any damages under G.L. c. 93A. *Id.* at 377, 548 N.E.2d at 187. *See also* *Logan Equip. Corp. v. Simon Aerials, Inc.*, 736 F.Supp. 1188 (D.Mass. 1990) (limitation of consequential damages provision in manufacturer's contract with equipment distributor is valid and reasonable allocation of commercial risk and therefore not unconscionable); *Deerskin Trading Post, Inc. v. Spencer Press, Inc.*, 398 Mass. 118, 495 N.E.2d 303 (1986) (contractual limitation of consequential damages to a refund of cost of printing catalogs was not unconscionable); *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 408 N.E.2d 1370 (1980) (termination without cause provision in franchise agreement was not unconscionable). Limitation of consequential damages where personal injury results from consumer goods is *prima facie* unconscionable in contract. *See* G.L. c. 106, § 2-719(3).

INSURANCE CONTRACT DAMAGES

Common Law Claims

Damages are available on common law claims under liability insurance contracts. While practitioners should be aware that special rules exist for damages resulting from breaches of contracts for specialty insurance coverages, such as profes-

sional liability or fire and accident insurance, the following discussion does not extend to these special damages.

Breach of Insurer's Duty to Defend

In Massachusetts, an insurer's duty under a liability insurance policy to defend a claim brought against its insured is independent of, and broader than, the insurer's obligation to indemnify the insured against judgments. Thus, insureds may obtain damages for insurers' breach of their duty to defend claims against the insured. See *Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 545 N.E.2d 1156 (1989) (insurer liable for breach of duty to defend if facts alleged in complaint or known to insurer are reasonably susceptible of stating claim within policy); see also *Milazzo v. Sentry Ins.*, 691 F.Supp. 517 (D.Mass. 1987), *aff'd*, 856 F.2d 321 (1st Cir. 1988) (insurer not liable to plaintiff who obtained default judgment against insured because insurer's refusal was made in good faith and supportable in law).

Generally, an insurer that breaches its duty to defend a claim is bound by the result that the insured obtains in defense of the claim, and thus damages will include the amount owed by the insured. See *Travelers Ins. Co. v. Waltham Indus. Labs. Corp.*, 722 F.Supp. 814, 823 (D.Mass. 1988), *aff'd in part, rev'd in part*, 883 F.2d 1092 (1st Cir. 1989); *Camp Dresser & McKee, Inc. v. Home Ins. Co.*, 30 Mass.App.Ct. 318, 325, 568 N.E.2d 631, 635 (1991) (insurer liable for defense costs as well as settlement costs incurred by insured in defending and settling claim where insurer improperly refused to defend claim brought against insured).

In addition, insureds may recover attorneys' fees resulting from the defense of a claim brought by a third party upon a finding that the claim should have been defended by the insurer. See *Mutual Fire, Marine & Inland Ins. Co. v. Costa*, 789 F.2d 83 (1st Cir. 1986) (insurer's breach of duty to defend, even if only negligent, required plaintiff to incur attorneys' fees in defense of claim); *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass.App.Ct. 648, 477 N.E.2d 146, *review denied*, 395 Mass. 1102, 480 N.E.2d 24 (1985) (court awards reasonable attorneys' fees incurred by insured in defense of third-party claim that insurer should have defended); *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677, 195 N.E.2d 514 (1964). The calculation of prejudgment interest pursuant to G.L. c. 231, § 6C on awards for legal costs begins on the dates on which the insured actually incurred legal expenses in defending himself or herself, not when the insurer first refused to defend or when the complaint was filed. *Sterilite Corp. v. Continental Cas. Co.*, 397 Mass. 837, 841-42, 494 N.E.2d 1008, 1011 (1986).

Recovery of damages assessed against the insured as well as defense costs may depend on the nature of the insured's underlying conduct. See *Andover Newton Theological Sch., Inc. v. Continental Cas. Co.*, 409 Mass. 350, 351, 566 N.E.2d

1117, 1118 (1991) (intentional conduct committed deliberately, with knowledge of its wrongfulness, bars coverage and is therefore not later recoverable by the insured, while intentional, wrongful conduct committed with reckless disregard as to its lawfulness is not so barred). In some cases recovery for damages may be barred, but recovery for defense costs may be allowed. *Compare Andover Newton Theological Sch., Inc. v. Continental Cas. Co.*, 930 F.2d 89, 93 (1st Cir. 1991) (insurer liable for defense costs of suit against insured alleging ADEA violation because even though public policy bars insurance against liability for intentional wrongdoing, public policy does not bar coverage for the costs of defending against claims of such conduct, and because insurance policy itself did not exclude such coverage) with *Boston Hous. Auth. v. Atlanta Int'l Ins. Co.*, 781 F.Supp. 80, 83-84 (D.Mass. 1992) (insurer not liable for defense costs of underlying suit alleging racial discrimination because the "flagrant and intentional interference with the civil rights of racial minorities" in violation of court orders, over the course of many years, falls within the public policy barring the insurability of intentional wrongdoing, in contrast to "the isolated instance of age discrimination at issue in *Andover Newton Theological Sch., Inc. v. Continental Cas. Co.*, 930 F.2d 89 (1st Cir. 1991)").

In accordance with general principles of contract law, Massachusetts courts have not recognized punitive damages or damages for emotional distress for an insurer's breach of its duty to defend under the common law.

Breach of Duty to Indemnify

Insurers who breach their duty to indemnify their insureds generally will be liable for the amount due under the policy. *Carter v. Empire Mut. Ins. Co.*, 6 Mass.App.Ct. 114, 123, 374 N.E.2d 585, 591 (1978). One Massachusetts court has suggested that nominal damages may be available for breach of an insurance contract if the specific amount of damages is unascertainable or will not be suffered until a later time. See *International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.*, 29 Mass.App.Ct. 215, 221, 560 N.E.2d 122, 126 (1990) (citing *DiGregorio v. Commonwealth*, 10 Mass.App.Ct. 861, 407 N.E.2d 1323 (1980) and Restatement (Second) of Contracts § 236 cmt. a (1981)). Although insureds are entitled to recover attorneys' fees for the defense of third-party claims where the insurer has wrongfully failed to defend, in a common law contract claim insureds generally are not entitled to recover attorneys' fees spent in litigating the breach of insurance contract claim against the insurer. See discussion in *Mutual Fire, Marine & Inland Ins. Co. v. Costa*, 789 F.2d 83, 88-89 (1st Cir. 1986).

Breach of Duty of Good Faith in Settlement

Insurers also owe a common law duty of good faith to their insureds in the settlement of claims. See *Peckham v. Continental Casualty Ins. Co.*, 895 F.2d 830 (1st

Cir. 1990); *Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. 184, 158 N.E.2d 338 (1959); see also *Chicoine v. State Farm Mut. Auto. Ins. Co.*, 351 Mass. 664, 223 N.E.2d 510 (1967). This duty requires the insurer to make settlement decisions without regard to policy limits. See *Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. at 187, 158 N.E.2d at 341. Breach of this duty by a bad faith refusal to settle makes the insurer liable to the insured, or to the underlying plaintiff as the insured's assignee, for the entire amount ultimately determined at trial to be owed by the insured. Cf. *Chicoine v. State Farm Mut. Auto. Ins. Co.*, 351 Mass. at 666, 223 N.E.2d at 511; see also *DiMarzo v. American Mut. Ins. Co.*, 389 Mass. 85, 449 N.E.2d 1189 (1983) (insurer's bad faith refusal to settle was violation of G.L. c. 93A and insurer became liable for amount owed by insured in excess of his coverage).

Third-Party Beneficiary Theories

Plaintiffs who have been injured by an insured may seek recovery from the defendant's insurer if the plaintiff can show that he or she was a third-party beneficiary to the insurance contract. See *Baldwin v. Mortimer*, 403 Mass. 142, 144, 526 N.E.2d 776, 777 (1988) (plaintiff must prove that a contract existed and that plaintiff was an intended beneficiary); *Flattery v. Gregory*, 397 Mass. 143, 489 N.E.2d 1257 (1986) (automobile injury victim may sue insurer as third-party beneficiary to insured's automobile policy). Damages in these cases will include the amount due under the policy. *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 196, 435 N.E.2d 628, 633 (1982) (decendent's wife, as third-party beneficiary, may recover in tort or breach of contract against broker for failing to obtain insurance); see also *LaClair v. Silberline Mfg. Co.*, 379 Mass. 21, 393 N.E.2d 867 (1979) (widow's tort damages from employer's failure to comply with workers' compensation act limited to amount that would have been available under act).

EMPLOYMENT CONTRACT DAMAGES

Regardless of whether there exists an actual written employment agreement, the relationship between employer and employee has traditionally been considered contractual in nature. The employee renders services; the employer provides compensation—and in most cases, benefits. In Massachusetts, this relationship is governed by a combination of common law doctrine and statutory regulation, much of the latter designed to ensure equal employment opportunities. Three dominant themes in damages awards involving employment are wrongful discharge, breach of noncompetition covenants and discrimination, all of which are discussed in greater detail below.

Wrongful Employment Termination Claims

Historically, in Massachusetts the influence of the at will employment doctrine meant that either the employer or employee could terminate the employment relationship at any time. The "fairness" of the at will doctrine was based on the premise that both the employer and employee had a mutual power to continue or end the employment relationship "at will." However, as courts began to observe an imbalance of power in favor of the employer, both common law and statutory protection evolved to hold employers to a "covenant of good faith and fair dealing," *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977), and discourage practices that violate public policy, *DeRose v. Putnam Management Co.*, 398 Mass. 205, 496 N.E.2d 428 (1986).

Breach of Implied Covenant of Good Faith and Fair Dealing

Denial of Earned Compensation

In a claim based on denial of earned compensation, an employee may recover damages for the denial of earned compensation reflective of work performed prior to termination. *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977). See also *McCone v. New England Tel. & Tel. Co.*, 393 Mass. 231, 471 N.E.2d 47 (1984); *Gram v. Liberty Mut. Ins. Co.*, 391 Mass. 333, 461 N.E.2d 796 (1984) (*Gram II*); *Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. 877, 438 N.E.2d 351 (1982); *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981) (*Gram I*). Thus, damages are recoverable in order to deny the employer "any readily definable, financial windfall resulting from the denial to [the employee] of compensation for past services." *Gram v. Liberty Mut. Ins. Co.*, 391 Mass. at 335, 461 N.E.2d at 798. However, while damages are recoverable for "the loss of future wages for past services," damages for "the loss of future income for future services" are unavailable. *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. at 672, 429 N.E.2d at 29. Specifically, the discharged employee may recover

- commissions earned from past services. See *Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. at 883, 438 N.E.2d at 355 (commission due from helping defendant obtain interstate charter rights); *Fortune v. Nat'l Cash Register Co.*, 373 Mass. at 102, 364 N.E.2d at 1256 (commissions for sales already made); *Gram v. Liberty Mut. Ins. Co.*, 391 Mass. at 334-36, 461 N.E.2d at 798-99 (renewal commissions on policies already sold, less time expected on servicing renewal policies).

- stock options that have already vested. *See Mompont v. Lotus Dev. Corp.*, Order on Motion to Amend (Magistrate Collins) No. 85-1664-N (D.Mass. Feb. 9, 1987). However, stock options that have not vested are not recoverable.
- earned deferred compensation. *See Kroeger v. Stop & Shop Cos.*, 13 Mass.App.Ct. 310, 321, 432 N.E.2d 566, 572, *review denied*, 386 Mass. 1102, 440 N.E.2d 1175 (1982) ("when an employee is discharged in circumstances involving no misconduct by the employee . . . the employee's deferred compensation benefits should not be forfeited to the extent those benefits have been earned, even though the employee violates a valid post-employment restriction").

However, the following categories of damages are unavailable:

- lost wages or fringe benefits unrelated to past services. *See Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. at 884, 438 N.E.2d at 356.
- career credits, i.e., "future compensation for future services" based on length of service. *Gram v. Liberty Mut. Ins. Co.*, 391 Mass. at 334, 461 N.E.2d at 798.
- generalized expectation of future orders based on prior accounts. *See Gerald Rosen Co. v. Int'l Tel. & Tel. Co.*, 16 Mass.App.Ct. 929, 450 N.E.2d 189 (1983); *Henderson v. L. G. Balfour Co.*, 852 F.2d 818 (5th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).
- tort damages for injury to professional reputation, disruption of personal life and emotional or physical pain. *See McCone v. New England Tel. & Tel. Co.*, 393 Mass. at 234 n.8, 471 N.E.2d at 50 n.8. *See also Presto v. Sequoia Sys., Inc.*, 633 F.Supp. 1117, 1120-21 (D.Mass. 1986) (dismissing wrongful discharge claim seeking damages for injury to reputation and emotional distress based on exclusivity provision of Workers Compensation Act, G.L. c. 152, § 24) (quoting *Foley v. Polaroid Corp.*, 381 Mass. 545, 548-49, 413 N.E.2d 711, 713 (1980)).

Discharge in Violation of Public Policy

Under limited circumstances set forth in *Wright v. Shriners Hosp. for Crippled Children*, 412 Mass. 469, 472-73, 589 N.E.2d 1241, 1244 (1992), an employee may recover damages for termination in violation of public policy when "asserting a legally guaranteed right," "doing what the law requires" and "refusing to do

that which the law forbids." *Id.*; see also *Hobson v. McLean Hosp. Corp.*, 402 Mass. 413, 522 N.E.2d 975 (1988); *DeRose v. Putnam Mgmt. Co.*, 398 Mass. 205, 496 N.E.2d 428 (1986); *Glaz v. Ralston Purina Co.*, 24 Mass.App.Ct. 386, 389-90, 509 N.E.2d 297, 300, review denied, 400 Mass. 1106, 513 N.E.2d 1289 (1987); *Norris v. Lumberman's Mut. Casualty Co.*, 881 F.2d 1144 (1st Cir. 1989). An employee also stated a claim for redress when he was discharged in retaliation for cooperating with a law enforcement investigation of his employer. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 811, 575 N.E.2d 1107, 1111 (1991). The Supreme Judicial Court has refused to recognize a professional code of ethics or a regulation promulgated by the Board of Registration in Nursing to be a source of public policy sufficient to create an exception to the employment-at-will rule. *Wright v. Shriners Hosp. for Crippled Children*, 412 Mass. at 473-74, 589 N.E.2d at 1244-45.

Specifically, the discharged employee may recover contract damages and tort damages.

Contract Damages

While contract damages appear to be available for a claim of discharge in violation of public policy, it is still unclear what the proper measure of contract damages is. In *DeRose*, the Supreme Judicial Court expressly rejected a jury instruction awarding the plaintiff salary and benefits from the date of termination until the date of trial, less interim earnings, noting "[a] contract at will is not a contract for life or a term of years. Thus, there can be no recovery for future lost wages and benefits based on the contract at will." *DeRose v. Putnam Mgmt. Co.*, 398 Mass. at 211 n.4, 496 N.E.2d at 432 n.4. However, the same court affirmed the jury's award to the plaintiff of \$9,000 for salary and benefits from the time of termination until the plaintiff received a reasonable job offer—an award that could be construed as "future lost wages." See *id.* at 213 n.8, 496 N.E.2d at 433 n.8.

The *DeRose* court additionally held that no punitive damages are recoverable on a discharge-in-violation-of-public-policy claim. *Id.* at 212, 496 N.E.2d at 432.

Tort Damages

Tort damages have never been awarded on a discharge-in-violation-of-public-policy claim in Massachusetts, and the question of their availability has not yet been squarely addressed by the Massachusetts courts. The *DeRose* court noted that tort damages have been permitted in other jurisdictions for violations of public policy, but the court did not award tort damages in that case because the claim was asserted solely on a breach of contract theory. See *DeRose v. Putnam Mgmt. Co.*, 398 Mass. at 212 n.7, 496 N.E.2d at 432 n.7. The Supreme Judicial Court confirmed that the question of whether tort damages are an appropriate remedy

for a discharge in violation of public policy claim "is unanswered in this State." *Hobson v. McLean Hosp. Corp.*, 402 Mass. at 417 n.3, 522 N.E.2d at 978 n.3. See also *Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. at 884 n.7, 438 N.E.2d at 356 n.7 ("We need not decide in what circumstances public policy may require additional damages, or a different measure of damages [beyond contract damages].").

Discharge in Breach of Employment Contract

A breach of contract claim may be based upon

- an express employment contract. See *Kravetz v. Merchants Distribs., Inc.*, 387 Mass. 457, 440 N.E.2d 1278 (1982).
- an implied contract based upon personnel policies and practices. See *Jackson v. Action for Boston Community Dev., Inc.*, 403 Mass. 8, 13, 525 N.E.2d 411, 415 (1988) ("on proper proof, a personnel manual can be shown to form the basis of an express or an implied contract"). *Pearson v. John Hancock Mut. Life Ins. Co.*, 979 F.2d 254 (1st Cir. 1992) (personnel manual).
- the conduct of the parties. *Jackson v. Action for Boston Community Dev., Inc.*, 403 Mass. at 13, 525 N.E.2d at 414-15.
- other writings or regulations. See *Hobson v. McLean Hosp. Corp.*, 402 Mass. at 415-16, 522 N.E.2d at 977 (hospital bylaws may constitute employment contract).

In general, the damages for a breach of contract claim are intended to place an injured party in the same position that he or she would have been in if the contract was performed. See *John Hetherington & Sons, Ltd. v. William Firth Co.*, 210 Mass. 8, 21, 95 N.E. 961, 964 (1911). For the balance of the term or duration of the contract, plaintiff may recover

- lost wages. See *Mahoney v. Hildreth & Rogers Co.*, 332 Mass. 496, 125 N.E.2d 788 (1955); *Dickson v. Riverside Iron Works, Inc.*, 6 Mass.App.Ct. 53, 57, 372 N.E.2d 1302, 1305 (1978) ("[t]he measure of damages recoverable by an employee wrongfully discharged before the expiration of an employment contract is the wages he would have earned under the contract"). The employee is always obligated to mitigate damages, and a back pay award may be reduced if he or she fails to do so. *Black v. School Comm. of Malden*, 369 Mass. 657, 661-62, 341 N.E.2d 896, 900 (1976). The burden is on the employer, however, to prove that the employee failed to mitigate. *Id.* at 661, 341 N.E.2d at 900.

- employee benefits, including insurance, Social Security contributions, vacation and sick pay, severance pay, retirement benefits and profit sharing. However, it should be noted that if an employer pays such benefits generally from a separate fund, rather than from the general assets of the company, or if the employer must exercise discretion in what, if any, benefits to award, claims for such benefits may be preempted by the Employee Retirement Income Security Act of 1974 (ERISA) under 29 U.S.C. § 1144(a). In contrast, if the benefits are payable on a regular basis from the general assets of the employer and are accumulated over time only at the election of the employee, or if the benefits are paid in one lump-sum payment requiring no discretion or administrative scheme on the part of the employer, they are not covered by ERISA and may be recoverable in state court pursuant to the breach of contract claim. See *Massachusetts v. Morash*, 490 U.S. 107 (1989), *rev'g Commonwealth v. Morash*, 402 Mass. 287, 522 N.E.2d 409 (1988); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11-12, 17 (1987). Under ERISA, covered benefits may include "any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization . . . for the purpose of providing . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services" or "provides retirement income to employees, or . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." ERISA, 29 U.S.C. § 1002(1), (2). The Massachusetts Federal District Court recently ruled that the Massachusetts "tin parachute" statute, G.L. c. 149, § 183, requiring severance payments under certain circumstances following a corporate takeover, was preempted by ERISA. *Gray v. Quaker Fabric Corp.*, 1992 U.S. Dist. LEXIS 19915 (D.Mass., Dec. 23, 1992).
- incidental or consequential damages so long as they are "within contemplation of the parties and . . . caused 'directly' by the breach or 'indirectly' by the combined effect of the breach and foreseeable intervening causes." *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F.Supp. 1189, 1195 (D.Mass. 1985), *aff'd and rev'd in part on other grounds*, 855 F.2d 888 (1st Cir. 1988) (en banc) (damages reduced because not direct or foreseeable), *cert. denied*, 488 U.S. 1043 (1989). For example, damages for the "trouble and expense" of finding new employment, see *Dickinson v. Talmage*, 138

Mass. 249 (1885), or moving expenses to the new employment may be recoverable. See *Tufts v. Plymouth Gold Mining Co.*, 96 Mass. 407 (1867). Other compensable damages may include "the loss of identifiable professional opportunities," if proximately caused by the breach. See *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d at 894.

- nominal damages. Even if the plaintiff could not otherwise demonstrate that he or she was entitled to damages, "the defendant would still be liable for nominal damages if the plaintiff can prove that the defendant committed a breach of an employment agreement." *Davidson Pipe Supply Co. v. Johnson*, 14 Mass.App.Ct. 518, 520, 440 N.E.2d 1194, 1195 (1982).

Breach of Covenant Not to Compete

Enforceability of Covenant

The enforceability of a covenant not to compete involves weighing "the reasonable needs of the former employer for protection against harmful conduct of the former employee," with "the reasonableness of the restraint imposed on the former employee and the public interest." *All Stainless, Inc. v. Colby*, 364 Mass. 773, 778, 308 N.E.2d 481, 485 (1974). Moreover, to be enforceable, the covenant must protect one of the following employer interests: trade secrets, confidential information or goodwill. See *New England Canteen Serv., Inc. v. Ashley*, 372 Mass. 671, 674, 363 N.E.2d 526, 528 (1977). A court will not enforce a covenant that is inherently unfair, see *Slade Gorton & Co. v. O'Neil*, 355 Mass. 4, 9, 242 N.E.2d 551, 554 (1968), or one against a physician. See G.L. c. 112, § 12X. Additionally, a court may not enforce a noncompete covenant if "the plaintiff-employer [cannot] prove that it was damaged by the employee's work for another firm." *Wilson v. Clarke*, 470 F.2d 1218, 1222 (1st Cir. 1972) (citing *Richmond Bros., Inc. v. Westinghouse Broadcasting Co.*, 357 Mass. 106, 256 N.E.2d 304 (1970)).

An employer may obtain injunctive relief for breach of a covenant not to compete, including specific performance to enforce the covenant. However, to receive injunctive relief, the employer bears the burden of proving the existence of a legitimate, protected interest. See *Folsom Funeral Serv., Inc. v. Rodgers*, 6 Mass.App.Ct. 843, 372 N.E.2d 532 (1978).

An employer may recover monetary damages for a breach of the covenant. See *All Stainless, Inc. v. Colby*, 364 Mass. at 777-78, 781, 308 N.E.2d at 485, 487. If an injunction was issued, the plaintiff may also recover damages for the period not covered by the injunction. See *Frank D. Wayne Assocs., Inc. v. Lussier*, 16 Mass.App.Ct. 986, 988-89, 454 N.E.2d 109, 112, review denied, 390 Mass. 1104,

456 N.E.2d 469 (1983). The amount of damages, however, may be offset to the extent the defendant can prove he or she lost income pursuant to an overly broad injunction. *All Stainless, Inc. v. Colby*, 364 Mass. at 777, 308 N.E.2d at 485.

In determining the appropriate value of damages to be awarded, a liquidated damages provision may be determinative, so long as the amount provided is not a penalty, *Shapiro v. Grinspoon*, 27 Mass.App.Ct. 596, 603, 541 N.E.2d 359, 364-65 (1989), and constitutes a "reasonable forecast of damages." see *Kroeger v. Stop & Shop Cos.*, 13 Mass.App.Ct. at 322, 432 N.E.2d at 573 ("[t]he very difficulty of establishing the damages inclines us to accept the estimate of damages made by the parties, if not otherwise unreasonable"); *Wilson v. Clarke*, 470 F.2d at 1223 (not awarding amount provided in liquidated damages clause because plaintiff failed to prove it was a "reasonable forecast of damages"). In the absence of a liquidated damages clause, appropriate damages for breach of a noncompete contract may be the value of lost profits to the plaintiff employer. See, e.g., *My Bread Baking Co. v. Jesi*, 350 Mass. 282, 285-86, 214 N.E.2d 53, 55 (1966); *Frank D. Wayne Assocs., Inc. v. Lussier*, 16 Mass.App.Ct. at 988-89, 454 N.E.2d at 111-12. However, the Appeals Court in *Frank D. Wayne* noted that "quantifying the consequences of violating a non-competition clause is a particularly difficult and elusive one," and therefore "mathematical accuracy of proof is not required, and estimates are in order." *Id.* at 988, 454 N.E.2d at 111. Alternatively, damages may be calculated on the basis of unjust enrichment to the plaintiff. See *National Merchandising Corp. v. Leyden*, 370 Mass. 425, 348 N.E.2d 771 (1976).

Claims Under Antidiscrimination Statutes

Massachusetts Equal Employment Opportunity Act

General Laws c. 151B prohibits employment discrimination on the basis of religion, color, race, national origin, sex, age, ancestry, sexual orientation or handicap and requires reasonable accommodation to handicaps and religious practices. In general, pursuant to G.L. c. 151B, § 5, upon a finding of unlawful discrimination, the Massachusetts Commission Against Discrimination (MCAD) is given broad discretion to award damages. In addition to issuing a cease and desist order, the MCAD is authorized "to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay . . . as, in the judgment of the commission, will effectuate the purposes of this chapter." Moreover, G.L. c. 151B, § 9 provides that in a civil discrimination claim, a plaintiff may recover damages or injunctive relief or both.

The Supreme Judicial Court has recognized that G.L. c. 151B, § 5 "represents a significant delegation of discretion and authority by the Legislature to the administrative agency" in awarding damages in enforcement of the antidiscrimination laws. *Bournewood Hosp. Inc. v. Mass. Comm'n Against Discrimination*, 371

Mass. 303, 316, 358 N.E.2d 235, 242 (1976). See also *Buckley Nursing Home v. Mass. Comm'n Against Discrimination*, 20 Mass.App.Ct. 172, 182, 478 N.E.2d 1292, 1299, review denied, 395 Mass. 1103, 482 N.E.2d 328 (1985). Specifically, the Massachusetts courts have interpreted G.L. c. 151B to support awarding a broad array of damages to the aggrieved plaintiff, including back pay, prejudgment interest, front pay, emotional distress, punitive damages, attorneys' fees, liquidated damages, nonmonetary relief and mitigation of damages.

Back Pay

A plaintiff may recover back pay, which includes the employee's past salary and benefits from the time of the discriminatory act until judgment. However, the back pay period may end prior to judgment if the plaintiff rejects "an objectively reasonable offer of reinstatement," by the defendant. *Conway v. Electro Switch Corp.*, 402 Mass. 385, 389-90, 523 N.E.2d 255, 258 (1988). The employee may only continue to accrue back pay damages upon rejecting a reinstatement offer if the employee proves that the rejection was "objectively reasonable." *Brady v. Nestor*, 398 Mass. 184, 189, 496 N.E.2d 148, 151 (1986). However, as instructed in *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), which was adopted by the Supreme Judicial Court, "[a] simple showing that the employee fears further discrimination, without evidence of circumstances making that fear reasonable" is not sufficient to prove that the rejection was objectively reasonable. *Brady v. Nestor*, 398 Mass. at 189, 496 N.E.2d at 151.

Prejudgment Interest

The plaintiff may also receive prejudgment interest on the back pay award accruing from the commencement of the proceeding until judgment. See *College-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination*, 400 Mass. 156, 508 N.E.2d 587 (1987). Under Massachusetts law, interest is calculated from the commencement of the proceeding at a rate of 12 percent per annum for actions in tort. G.L. c. 231, § 6B. See *New York & Mass. Motor Serv., Inc. v. Mass. Comm'n Against Discrimination*, 401 Mass. 566, 583, 517 N.E.2d 1270, 1280 (1988) ("we find no error in the commission's [MCAD] calculation of interest as provided in G.L. c. 231, § 6B"); *College-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination*, 400 Mass. at 170, 508 N.E.2d at 595 (same). See also *Conway v. Electro Switch Corp.*, 825 F.2d 593, 600-01 (1st Cir. 1987) (noting that under Massachusetts law, G.L. c. 231, § 6B, calculation of prejudgment interest begins with commencement of action rather than upon date of plaintiff's termination).

Front Pay

A plaintiff may also recover front pay damages, including lost future earnings and benefits. See *Conway v. Electro Switch Corp.*, 402 Mass. at 387-90, 523 N.E.2d at 256-58. However, front pay damages may be awarded only to the extent they have been proven "with reasonable certainty as attributable to the employer's misconduct." *Id.* at 390, 523 N.E.2d at 258. The plaintiff is not required to make a request for reinstatement as a prerequisite to a claim for front pay. *Id.* As with other damages, the award may be offset by the employee's failure to mitigate damages. *Id.* at 389, 523 N.E.2d at 257. Finally, prejudgment interest may not be added to an award of damages for lost future earnings and benefits. *Id.* at 390-91, 523 N.E.2d at 258.

Emotional Distress

Emotional distress damages are recoverable under G.L. c. 151B. See *Bournewood Hosp. Inc. v. Mass. Comm'n Against Discrimination*, 371 Mass. at 316, 358 N.E.2d at 242 (retaliation claim); *College-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination*, 400 Mass. at 169, 508 N.E.2d at 594-95 (sexual harassment claim); *Buckley Nursing Home v. Mass. Comm'n Against Discrimination*, 20 Mass.App.Ct. at 181-82, 478 N.E.2d at 1299 (failure to hire claim). While an award of emotional distress damages by the MCAD must be supported by "substantial evidence," *Bournewood Hosp. Inc. v. Mass. Comm'n Against Discrimination*, 371 Mass. at 317, 358 N.E.2d at 243, the standards of recovery for emotional distress damages under G.L. c. 151B are less stringent than recovery in a tort claim for intentional infliction of emotional distress. *Id.* at 317 n.11, 358 N.E.2d at 243 n.11. Moreover, emotional distress damages are recoverable even in the absence of physical injury or psychiatric consultation. See *Franklin Publishing Co. v. Mass. Comm'n Against Discrimination*, 25 Mass.App.Ct. 974, 519 N.E.2d 798 (1988) (awarding emotional distress damages when plaintiff terminated on the basis of her pregnancy). Finally, it should be noted that the Supreme Judicial Court commented in dicta that emotional distress damages, at least in regard to sexual harassment claims, are not precluded based on recovery under the workers' compensation act, G.L. c. 152, § 26. See *College-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination*, 400 Mass. at 169, 508 N.E.2d at 595.

Punitive Damages

Chapter 151B authorizes the award of punitive damages to successful plaintiffs in court actions filed under the statute. See G.L. c. 151B, § 9 ("If the court finds for the petitioner, it may award the petitioner actual and punitive damages"). The statute offers no guidance as to the circumstances that might warrant an award of punitive damages or the factors to evaluate in determining the amount of such an

award. See *Contardo v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 753 F.Supp. 406, 411-12 (D.Mass. 1990) ("[t]he statute provides no criteria for the application of punitive damages other than the admonition that 'this chapter shall be construed liberally for the accomplishment of the purposes thereof'"). The *Contardo* court held that the punitive damages provision applies retroactively to pending cases and awarded punitive damages in the amount of \$250,000. *Id.* at 412.

Attorneys' Fees

Attorneys' fees may be recovered by the plaintiff in a civil action as long as the award is reasonable and no special circumstances exist that would render such an award unjust. See G.L. c. 151B, § 9. Likewise, attorneys' fees are recoverable by the prevailing complainant in MCAD administrative proceedings. See G.L. c. 151B, § 5.

Multiple Damages in Age Cases

In regard to claims of age discrimination, G.L. c. 151B, § 9 now provides for the recovery of "up to three, but not less than two, times [the amount of actual damages] if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice" violated G.L. c. 151B, § 4.

Nonmonetary Relief

In addition to monetary damages, G.L. c. 151B, § 5 specifically provides for reinstatement. Likewise, a plaintiff may bring a civil action for injunctive relief pursuant to G.L. c. 151B, § 9. Additionally, an aggrieved party may seek temporary injunctive relief "at any time to prevent irreparable injury during the pendency of or prior to the filing of a complaint with the commission." G.L. c. 151B, § 9.

Mitigation of Damages

The employee is always obligated to mitigate his or her damages, and a back pay award may be reduced if the employee fails to mitigate damages by seeking new employment. See *Black v. School Comm. of Malden*, 369 Mass. 657, 661-62, 341 N.E.2d 896, 900 (1976); *Buckley Nursing Home v. Mass. Comm'n Against Discrimination*, 20 Mass.App.Ct. at 155-86, 478 N.E.2d at 1301. See also *Assad v. Berlin-Boylston Regional School Comm.*, 406 Mass. 649, 657, 550 N.E.2d 357, 362 (1990) (finding that discharged employee mitigated damages despite accepting lower of two paying jobs because in so deciding plaintiff used professional judgment to consider the quality of the jobs and her "personal career enhancement goals"). Moreover, the Appeals Court has said back pay damages may only be reduced if the employer proves

(a) one or more discoverable opportunities for comparable employment were available in a location as convenient as, or more convenient than, the place of former employment, (b) the improperly discharged employee unreasonably made no attempt to apply for any such job, and (c) it was reasonably likely that the former employee would obtain one of those comparable jobs.

Buckley Nursing Home v. Mass. Comm'n Against Discrimination, 20 Mass.App.Ct. at 185, 478 N.E.2d at 1301 (quoting *Black v. School Comm. of Malden*, 369 Mass. at 661-62, 341 N.E.2d at 900).

Massachusetts Equal Rights Act

Under the Massachusetts Equal Rights Act (MERA), all citizens, regardless of sex, race, color, creed, national origin, age or handicap have the same rights to "make and enforce contracts." G.L. c. 93, § 102(a) (sex, race, color, creed or national origin); § 103(a) (age, handicap). The damages provided under the statute for violations include "injunctive and other appropriate equitable relief, including the award of compensatory and exemplary damages." G.L. c. 93, § 102(b); *see also* G.L. c. 93, § 103(b). Moreover, a successful plaintiff may also recover costs and reasonable attorneys' fees. G.L. c. 93, § 102(d); *see also* G.L. c. 93, § 103(d).

Civil Rights Act of 1964

The Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. *See* Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17. The Civil Rights Act of 1991 amended Title VII to provide for recovery of compensatory and punitive damages in cases of intentional discrimination on the basis of sex, religion or national origin. Prior to the amendments, only equitable relief was available. *See Contardo v. Merrill, Lynch, Pierce, Fenner & Smith*, 753 F.Supp. at 411, in the form of back pay, prejudgment interest, front pay, attorneys' fees, injunctive relief and mitigation of damages. Whether the damages provisions of the 1991 Civil Rights Act will apply retroactively has not yet been decided by the First Circuit. Courts in other jurisdictions are split. *Compare Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992) (refusing to apply jury trial provision of 1991 Civil Rights Act retroactively) with *Davis v. San Francisco*, 976 F.2d 1536 (9th Cir. 1992) (applying expert witness fee provision of 1991 Civil Rights Act retroactively).

Back Pay

Back pay damages are generally awarded "unless special circumstances are present." *Denton v. Boilermakers Local 29*, 673 F.Supp. at 41. Such damages may include wages and fringe benefits such as pension and annuity fund payments, so long as the plaintiff would be entitled to the wages and benefits but for the discriminatory conduct. *Id.* The back pay period will end when the plaintiff "has acquired employment which is more lucrative than the job he lost." *Id.* at 50.

Prejudgment Interest

Prejudgment interest may be awarded "within the discretion of the court" and should be awarded if it is "fair, reasonable and necessary to make the plaintiff whole." *Id.* at 50-51. See *Earnhardt v. Puerto Rico*, 744 F.2d 1, 3 (1st Cir. 1984) (affirming district court's denials of prejudgment interest award on grounds that to award such damages is within the discretion of the fact finder, and may particularly not be warranted when requested by plaintiff "as an afterthought"). Unlike Massachusetts law, the time period for calculating prejudgment interest may commence upon a plaintiff's discharge, rather than upon commencement of the action. *Conway v. Electro Switch Corp.*, 825 F.2d 593, 602 (1st Cir. 1987).

Front Pay

Front pay may also be awarded in the court's discretion under Title VII when reinstatement is "impracticable or impossible." *Denton v. Boilermakers Local 29* at 51. See also *Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985) (ADEA claim). Front pay should be awarded if necessary to return "the plaintiff to the economic situation he would have been in absent the illegal discrimination," but not to "catapult him into a better position." *Denton v. Boilermakers Local 29* at 51.

Compensatory and Punitive Damages and Jury Trial

The Civil Rights Act of 1991 amended Title VII to provide for compensatory and, under certain circumstances, punitive, damages for plaintiffs who prove that the employer engaged in intentional discrimination on the grounds of sex, religion or national origin. The exclusion of race and color was done intentionally, since 42 U.S.C. § 1981 already provides compensatory and punitive damages for racial discrimination. Compensatory damages are defined as "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3) (Supp. 1992). Punitive damages are recoverable only upon a showing that the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1) (Supp. 1992). Congress imposed

caps on the amount of compensatory and punitive damages that can be awarded based on the size of the employer:

- \$50,000 against employers with 100 or fewer employees.
- \$100,000 against employers with 101 to 200 employees.
- \$200,000 against employers with 201 to 500 employees and
- \$300,000 against employers with more than 500 employees.

42 U.S.C. § 19812(b)(3). Either party may demand a jury trial if plaintiff seeks compensatory or punitive damages.

Attorneys' Fees

A prevailing plaintiff may also recover attorneys' fees if, in the court's discretion, such an award is appropriate. *Id.* at 52. A plaintiff is "prevailing" so long as "he has succeeded on any significant issue in litigation which achieves some benefit that he sought in bringing the suit." *Id.* at 54. It should be noted that the Supreme Court determined no attorneys' fees were appropriate for a plaintiff who, though technically a prevailing party, recovered nominal damages of only \$1.00. *Farrar v. Hobby*, 113 S.Ct. 566 (1992). The amount of attorneys' fees awarded generally is determined by multiplying the number of hours spent on the matter, if reasonable, by the reasonable hourly rate. See *Wildman v. Lerner Stores Corp.*, 771 F.2d at 609-14 (ADEA case). Additionally, that fee may be adjusted upward, but "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* at 610 (quoting *Blum v. Stenson*, 465 U.S. 886, 899 (1984)). The 1991 amendments to Title VII allow a court, in its discretion, to include expert fees as part of the attorneys' fees. 42 U.S.C. § 2000e-5(k) (Supp. 1992).

Injunctive Relief

In addition to monetary damages, under Title VII a court may also award injunctive relief, including reinstatement. 42 U.S.C. § 2000e-5(g) ("the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees"). In fact, the First Circuit has even granted reinstatement with tenure to a university professor. See *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990). While the court may also grant injunctive relief enjoining the defendant from further discrimination against the plaintiff, the injunction must be narrowly tailored to affect the plaintiff only. Unless the suit is a class

action, the injunction may not enjoin the defendant from discriminating against a whole class of individuals, such as university faculty. *See id.* at 361.

Mitigation of Damages

Under Title VII, an employee must also mitigate damages, and pursuant to the statute "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g). An employee will be held to have mitigated damages even if he or she does not find a new job, so long as the employee exercises reasonable diligence in the job search. *Denon v. Boiler-makers Local 29*, 673 F.Supp. at 44. Moreover, even if an employee earns monies during the back pay period, these funds may not be deducted if they could have been earned simultaneously with the lost job, i.e., rental income from real estate property. *See id.* at 47-48.

Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) prohibits discrimination on the basis of age. 29 U.S.C. § 623. As with Title VII, a prevailing ADEA claimant may recover back pay. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1021 (1st Cir. 1979) ("amounts owing to a prevailing plaintiff include items of pecuniary or economic loss such as wages, fringe, and other job-related benefits") (citation omitted), and, if appropriate, attorneys' fees. *Wildman v. Lerner Store Corp.*, 771 F.2d 605, 609-14 (1st Cir. 1985), and reinstatement, *id.* at 616. Front pay is also available, although the decision to award front pay in the First Circuit, unlike other circuits, remains within the court's discretion and is not a jury question. *Id.* (where "reinstatement is impracticable or impossible . . . the district court, then, has discretion to award front pay"). In addition, the ADEA claimant may be awarded "liquidated" damages and prejudgment interest.

Liquidated Damages

Under the ADEA, a plaintiff may recover "liquidated," or multiple, damages in the amount of the back pay award if the jury found the ADEA violation to be willful. *See Linn v. Andover Newton Theological School Inc.*, 874 F.2d 1, 6 (1st Cir. 1989) (citing 29 U.S.C. § 626(b)). *See also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-128 (1985) (a violation is willful if the employer either knew or evidenced reckless disregard that its conduct was prohibited by the ADEA, but not if the employer only recognized the potential applicability the ADEA or knew it was "in the picture"). Liquidated damages, as that term is used in the ADEA, is derived from the Fair Labor Standards Act, 29 U.S.C. § 216(b), and really means multiple damages, where an award of back pay is doubled for a willful violation. 29 U.S.C. § 626(b). The First Circuit has concluded that liq-

liquidated damages serve primarily a compensatory function, and only secondarily a punitive one. *Powers v. Grinnell Corp.*, 915 F.2d 34, 41-42 (1st Cir. 1990). As such, the *Powers* court determined that it was proper to consider an award of liquidated damages in refusing to award front pay. Similarly, as discussed below, an award of liquidated damages may also preclude an award of prejudgment interest.

Prejudgment Interest

An ADEA claimant may also recover prejudgment interest on a back pay award. See *Linn v. Andover Newton Theological School Inc.*, 874 F.2d at 6. Additionally, prejudgment interest may not be awarded if the plaintiff failed to present the issue to the jury. See *Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982) (holding that if plaintiff did not request prejudgment interest from jury, he could not subsequently seek it from the judge.) See also *Cordero v. deJesus-Mendez*, 922 F.2d 11 (1st Cir. 1990) (prejudgment interest denied where plaintiff did not present request to jury in 42 U.S.C. § 1983 claim).

Interplay Between Liquidated Damages, Prejudgment Interest and Front Pay

In *Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982), the court concluded that a plaintiff could not recover both prejudgment interest and liquidated damages, because such an award would compensate the employee twice for the same loss, i.e., loss due to delay. More recently, in *Powers v. Grinnell Corp.*, 915 F.2d at 39-42, the court affirmed its holding in *Kolb*. In so ruling, the court rejected the proposition, adopted by two other circuits, that both prejudgment interest and liquidated damages may be recovered simultaneously because the Supreme Court noted in dicta in *Thurston* that individual damages were punitive, and not compensatory. *Id.* at 40-42. See also *Linn v. Andover Newton Theological School Inc.*, 874 F.2d at 7. As there is a split in the circuits, the *Powers* decision may not be the last word on this issue.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against "a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a) (Supp. II 1990). The employment provisions of the ADA went into effect on July 26, 1992. Remedies under the ADA are identical to the remedies available under Title VII, see 42 U.S.C. § 12117(a) (powers, remedies and procedures clause), with one exception. Plaintiffs may recover compensatory and punitive damages under the conditions set forth in the 1991 Civil Rights Act unless the employer proves that it engaged in good faith

efforts to reach a reasonable accommodation of the employee's disability, 42 U.S.C. § 1981a(a)(3) (Supp. 1992).

Additional Considerations

Deducting of Collateral Payments

While there exist decisions to the contrary, both the state and federal courts in Massachusetts favor deducting from a back pay award additional payments to the plaintiff, such as unemployment compensation or Social Security or welfare benefits. In *New York & Mass. Motor Serv., Inc. v. Mass. Comm'n Against Discrimination*, 401 Mass. 566, 581-82, 517 N.E.2d 1270, 1279-80 (1988), the Supreme Judicial Court concluded that the amount of unemployment benefits received by the plaintiff should be deducted from the back pay award, reasoning that to permit the plaintiff to keep his full back pay as well as the unemployment compensation already received, would make him more than whole. *Id.* at 582, 517 N.E.2d at 1280. However, if the back pay award was made within a year of receiving the unemployment compensation, so that the Division of Employment Security (DES) could recover the benefits paid to the plaintiff, the result may be different. See *id.* In contrast, in an earlier Appeals Court decision in *Buckley Nursing Home v. Mass. Comm'n Against Discrimination*, 20 Mass.App.Ct. 172, 183-84, 478 N.E.2d 1292, 1299-1300, review denied, 395 Mass. 1103, 482 N.E.2d 328 (1985), the court relied on the traditional collateral source rule to support its decision not to deduct welfare benefits received by the plaintiff when calculating the back pay award. The court noted that although the failure to deduct the benefits may permit the plaintiff a double recovery, the windfall should fall to the victim rather than the wrongdoer. *Id.*

In *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 119 (1st Cir. 1989), the Court of Appeals for the First Circuit, without significant discussion, concluded that it was not an error to deduct from a back pay award pension benefits received after discharge. Moreover, the district courts that have addressed the issue seem to favor offsetting the benefits from the back pay award. In an apparent reversal of his earlier decision concluding that benefits should not be deducted, *Ryan v. Raytheon Data Sys. Co.*, 601 F.Supp. 243, 254 (D.Mass. 1984), Judge Keeton more recently concluded that the issue should be within the court's discretion and suggested in a later ruling that he would deduct Social Security benefits received from an award of back pay. See *Crosby v. New England Tel. & Tel. Co.*, 624 F.Supp. 487 (D.Mass. 1985). See also *Thurber v. Jack Reilly's Inc.*, 521 F.Supp. 238 (D.Mass. 1981) (Garnty, J.), *aff'd*, 717 F.2d 633 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984) (offsetting money received from unemployment benefits and food stamps to prevent double recovery to plaintiff).

Taxation of Back Pay Damages

Traditionally, the U.S. Tax Court has held that liquidated or punitive damages are "tort-type" damages for personal injuries and thus not taxable income, in contrast to back pay damages for wages, which are taxable. *See, e.g., Thompson v. Commissioner*, 89 T.C. 632, 44 Fair Empl. Prac. Cas. (BNA) 1457 (1987), *aff'd*, 866 F.2d 709 (4th Cir. 1989). *See also Sears v. Atchison, T. & S.F. Ry.*, 749 F.2d 1451 (10th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (assuming back pay award taxable); *Johnson v. Harrison County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 718 (1990) (back pay damages taxable). The Supreme Court upheld the Tax Court's position in *United States v. Burke*, 112 S.Ct. 1867 (1992). Ruling in a case brought under Title VII prior to the 1991 Civil Rights Act amendments, the Court held that a back pay award in the settlement of a Title VII case was taxable. The Court reasoned that Title VII, at least prior to the 1991 amendments, compensated plaintiffs only for economic loss in the form of back pay, and did not compensate plaintiffs for traditional harms associated with personal injury such as emotional distress or other consequential damages. *Id.* at 1873-74. In a footnote, the Court noted that the 1991 Civil Rights Act, which added compensatory damages, including damages for emotional distress, as well as punitive damages, "signals a marked change in [Congress's] conception of the injury redressable by Title VII." *Id.* at 1874 n.12.

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September 28, 1994

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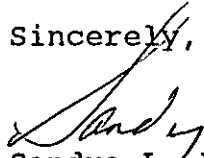
Victoria Radd, Esquire
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Dear Ms. Radd:

One of my partners had a copy of the brief we filed in the U.S. District Court in Planned Parenthood League of Massachusetts v. Bellotti. That brief was also filed in the Court of Appeals for the First Circuit and was accepted by the Court as PPLM's main brief. I sent you yesterday the supplement brief we filed for PPLM in the First Circuit.

I hope you are well.

Sincerely,


Sandra L. Lynch

SLL:DMA
Enclosure

missing
1 MCLE article

Foley, Hoag & Eliot

for your information . . .
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