INSIDE: 2019 IN-HOUSE LEADERS

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Juries warming to bias and retaliation claims

#MeToo, voir dire seen as part of big-verdict bonanza

By Kris Olson

Prior to 2017, the number of million-dollar verdicts in employment discrimination and retaliation cases in Massachusetts over the previous two decades could more or less be counted on one hand, according to plaintiffs' attorney Elizabeth A. Rodgers.

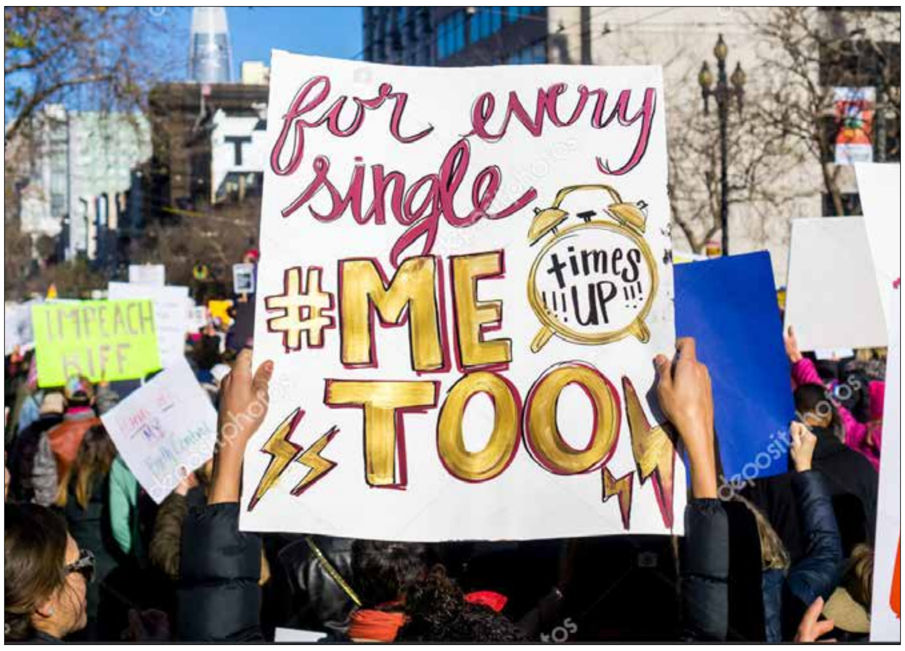
Then, the floodgates opened. Since 2017, juries have awarded at least nine seven-figure verdicts, headlined by the $28 million sum awarded last May to a Haitian-American nurse who sued Brigham and Women's Hospital for bias and retaliation.

To explain the trend — if it indeed is one — attorneys point to a number of possible causes, from changes in court procedure to changes in politics and culture.

Attorney voir dire

In 2014, the Legislature opened the door to attorneys and self-represented parties examining prospective jurors. Experiences of lawyers and judges with the new form of voir dire helped refine the procedure, leading to new Superior Court Rule 6, which took effect in September 2017.

Though voir dire has no doubt benefited both sides in employment cases to some degree, one theory is that attorney voir dire has been particularly helpful to the plaintiffs' bar. Jurors who would have been disinclined to render a large verdict — or side with the plaintiff at all — are now being weeded out.



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Attorney voir dire helps tease out jurors' views on certain matters that are going to be important to the case, says Newton Center's Matthew J. Fogelman, who in late 2017 secured a verdict of $1.2 million for James Beresford in an age discrimination suit tried in Norfolk County.

Beyond basic matters, like whether they understand the difference between preponderance of the evidence and beyond a reasonable doubt, perhaps no issue is

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IN-HOUSE WITH …

DAMON P. HART
LIBERTY MUTUAL INSURANCE

For Damon P. Hart, employment law has always been about the people it impacts.

At Liberty Mutual Insurance, he's responsible for about 45,000 such people across all 50 states and in some 30 countries. That means an almost limitless variety to the work he handles as senior vice president and deputy general counsel for the insurer, overseeing employment and benefits matters that affect its employees all over the world.

But that can be a "double-edged sword," Hart says, noting that along with the variety comes unpredictability, which makes the job both rewarding and challenging.

Hart joined Liberty Mutual in 2016 after nearly 15 years practicing employment law at Boston firms. And though he liked working in the law firm setting, he says he feels most at home "embedded with the client," where he is able to bring his leadership and strategic thinking ability to bear in a business context.

Hart balances his full plate at Liberty Mutual with his passion for coaching youth basketball on weekends and his work with the National Bar Association and the Home for Little Wanderers.

He recently sat down with New England In-House's Matthew Cove.

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Q. *How has your experience as an employment lawyer at firms informed your work here?*

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Benefits of 'biz to biz' arbitration questioned

Are clients really getting cheaper, quicker results?

By Pat Murphy

A recent U.S. District Court decision has brought to the front burner the question of whether arbitration actually delivers on its promise of providing a means for the cost-effective and speedy resolution of business disputes.

In *CellInfo, LLC v. American Tower Corp.*, Judge William G. Young in Boston ruled on the applicability of a binding arbitration clause to a trade secrets dispute between two companies in the wireless communications industry.

At issue in the case was the meaning of an arbitration clause in a consulting services agreement. After chiding the parties and their "big law" attorneys for drafting a contract rife with ambiguity, Young concluded that it was for the arbitrator to decide in the first instance whether the arbitration clause allowed the plaintiff to seek injunctive relief in federal court.

But Young had more to get off his chest about the perceived benefits of arbitration. He concluded his opinion with a five-page commentary about what he described as the "myth" that arbitration is cheaper and faster than civil litigation in federal court.

"So long as one party wants speed, federal courts in Massachusetts clearly outpace arbitration," Young wrote.

U.S. District Court Chief Judge William E. Smith in Rhode Island agrees — with one caveat.

"We can accommodate parties' desire for speedy resolution of their dispute in a fashion that is pretty consistent with what they get out of arbitration," Smith says. "Where we have a problem is controlling the cost of discovery."

Boston commercial litigator Stephen D.

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Pleadings deemed sufficient in FCA retaliation claim

By Barry Bridges

In a split decision, a three-judge panel of the 1st U.S. Circuit Court of Appeals has reiterated that the pleading standard for a retaliation claim under the federal False Claims Act differs from the standard applicable in a suit alleging an actual false claim.

The FCA prohibits any person from "knowingly present[ing] or caus[ing] to be presented, a false or fraudulent claim" to the federal government and also bars an employer from retaliating against an employee who acts to prevent FCA violations.

MCCORMACK Sees ruling as 'pendulum swing'

A U.S. District Court judge granted the defendants' motion to dismiss Thomas Guilfoile's retaliation complaint, finding the plaintiff did not put forth sufficient facts to show that he was engaged in protected conduct within the meaning of the FCA.

But writing for the panel's majority, Judge Kermit V. Lipez disagreed and vacated the dismissal, noting the "crucial" difference in the standards.

"Put colloquially, rather than plausibly pleading the existence of a fire — the actual submission of a false claim — a plaintiff alleging FCA retaliation need only plausibly plead a reasonable amount of smoke — conduct that could reasonably lead to an FCA action based on the submission of a false claim," Lipez wrote.

Retaliation plaintiffs need not meet Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements for cases pertaining to fraud, the judge added.

The 45-page decision is *Guilfoile v. Shields, et al.*

Retaliation standard

FCA practitioner Louise A. Herman said the ruling's value lies in its reaffirmation of the distinction between what is required to be put forth in a retaliation claim versus an action alleging a false claim.

"It appears the lower court held the plaintiff to a more stringent standard, which is not required in a retaliation case," the East Providence lawyer said. "Retaliation claims in general are brought under a variety of statutes, none of which require the Rule 9(b) standard of particularity."

With Rule 9(b) requiring a party to spell out the who, what, where, when and why of an alleged fraud, Herman said an FCA plaintiff often will plead with as many examples as possible of the false claims that were made to bolster that specificity requirement.

"But for retaliation it is different. It's just like any other complaint that needs to satisfy the *Twombly* plausibility standard," she said, referring to the U.S. Supreme Court's 2007 ruling in *Bell Atlantic Corp. v. Twombly.*

Herman added that the District Court judge apparently also required the plaintiff to show materiality, which the 1st Circuit emphasized in its opinion is required neither in a retaliation claim nor under the Anti-Kickback Statute following an amendment in 2010.

"With violations of the AKS, you don't need to show materiality whether the claim involves retaliation or concerns the underlying violation," Herman said. "And if you make out a claim under the AKS, it is a per se claim under the FCA. The two statutes intersect."

Thomas J. Enright of Cranston, Rhode Island, said he thought the decision provided necessary clarity with FCA and other types of retaliation claims.

He pointed to the Rhode Island Whistleblowers' Protection Act, which protects employees who "reasonably believe" that a violation of the law "has occurred or is about to occur."

"The court in this case expressly rejected bare allegations of a 'reasonable belief' in the illegality of the employer's alleged conduct," Enright said. "Instead, in this case, as with all whistleblower retaliation claims, the court will look behind the allegation and examine the facts relevant to the reasonableness of the employee's subjective belief."

In the end, Enright said he thought the majority got it right.

"Employees are one of the best sources of information related to illegal conduct by businesses, and they must feel comfortable alerting their employers or relevant third parties of potential illegalities," he said. "Holding them to too high a standard will deter whistleblowing, and anti-retaliation provisions must be read broadly for those protections to have any effect."

David P. McCormack of the Boston law firm Sugarman viewed the holding from a broader plaintiff's perspective in federal court.

"Setting aside the particulars, this decision is important in a fundamental sense: It is a pendulum swing back in the correct direction of standards relating to pleadings," McCormack said.

Over the years, courts and legislatures have added more and more obstacles for plaintiffs to survive a motion to dismiss without the benefit of discovery, he added.

"The 1st Circuit seems to have taken a more common sense approach where it was clear that the plaintiff had pleaded sufficient facts to withstand a motion to dismiss," he said.

According to McCormack, motions to dismiss are often allowed by courts based on technical arguments requiring a word-for-word parsing of the complaint. When those decisions are appealed, parties can spend years litigating the sufficiency of the pleadings rather than the actual merits of the case.

The plaintiff-appellant's counsel, Paul W. Mollica of Chicago and Tammy T. Mar-

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Lawsuit over ‘imprudent’ 401(k) investments OK’d

U.S. Supreme Court showdown possible

By Pat Murphy

Former employees of Putnam Investments can proceed with an ERISA class action against their former employer and other plan fiduciaries based on allegations that they suffered losses as a result of the investment options selected for their 401(k) plan, the 1st U.S. Circuit Court of Appeals has decided.

U.S. District Court Judge William G. Young granted a defense motion for summary judgment dismissing the plaintiffs’ claim that the defendants engaged in prohibited transactions in violation of ERISA. Young further found that the plaintiffs failed to prove that any lack of care in selecting the plan’s investment options resulted in losses to the plan.

But a unanimous 1st Circuit panel concluded that Young improperly placed the entire burden of proof on the issue of causation on the plaintiffs. Noting a circuit split on the issue, the panel found that such claims are to be analyzed under a burden-shifting framework.

“[W]e align ourselves with the Fourth, Fifth, and Eighth Circuits and hold that once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent,” Judge William J. Kayatta Jr. wrote on behalf of the court.

In addition, the 1st Circuit concluded that the plaintiffs could go forward with a claim alleging that the defendants violated §1106(b)(3) because Putnam received fees from the funds in which the plan invested.

The 50-page decision is *Brotherston, et al. v. Putnam Investments, LLC, et al.*

Supreme Court-bound?

Boston’s James R. Carroll, who represents the defendants, did not respond to requests for comment.

However, Carroll filed a defense motion requesting that the 1st Circuit stay its mandate in *Brotherston* to allow the defendants to file a petition for a writ of certiorari with the U.S. Supreme Court.

“Appellees’ petition will present a substantial question for the Supreme Court — whether the plaintiff or the defendant bears the burden of proof on loss causation under ERISA §409(a),” Carroll wrote.

Kayatta granted the requested stay on Oct. 29, giving the defendants 90 days to file their petition.

The plaintiffs are represented by James H. Kaster of Minneapolis. Kaster said *Brotherston* is a significant decision in favor of plan participants on the issue of loss, one that prevents the recognition of a standard that many in the defense bar

GOOGLE MAPS

view as an insurmountable obstacle to recovery.

“The defense would have you believe that what you need to prove is that the decisions they made were ‘objectively’ imprudent,” Kaster said. “The court basically looked to the Restatement [(Second) of Trusts] and said you can prove this in several different ways, one of which is to use index funds as a marker for how you judge the performance of imprudently chosen funds.”

Boston ERISA attorney Jonathan M. Feigenbaum said the 1st Circuit made the right call in following those circuits that have shifted the burden of proof on causation to ERISA fiduciaries.

“The burden shifting follows settled trust law,” Feigenbaum wrote in an email. “A beneficiary in seeking certain equitable remedies under trust law theories does not always bear the burden of proving causation for a loss.”

Meanwhile, Providence ERISA attorney Brooks R. Magratten said that putting that burden on the fiduciary was “not a surprising decision,” nor “particularly consequential.”

“When defending a breach of fiduciary duty action, the fiduciary will almost always come forward with evidence tending to prove the lack of causation between an alleged breach and plaintiffs’ loss,” Magratten explained. “The *Brotherston* ruling may make it more difficult for fiduciaries to prevail on a motion to dismiss, but for cases that are litigated on the merits I do not think it will have a significant impact.”

Feigenbaum said *Brotherston* underscores the point that fiduciaries need to vet for “suitability, costs and performance” the retirement investment options offered to employees.

“Also, the fiduciaries must continue to monitor the investment options for performance and costs on a continuous basis against competitive benchmarks,” he wrote.

Putnam 401(k) plan

Putnam is an asset management company in the business of managing and selling mutual funds. Plaintiffs John Brotherston and Joan Glancy participated in Putnam’s defined-contribution 401(k) retirement plan.

Under the 401(k) plan, Putnam employees make contributions to individual accounts and direct those contributions among a menu of investment options. Putnam also contributes to its employees’ accounts.

The plan’s governing documents identify defendant Putnam Benefits Investment Committee as one of the plan’s named fiduciaries. Under the terms of the plan, PBIC is responsible for selecting, monitoring and removing investments from the plan’s investment options, which include Putnam mutual funds.

Between 2009 and 2015, more that 85 percent of the plan’s assets were invested in Putnam funds.

The trial judge found that PBIC did not independently investigate Putnam funds before including them as investment options, nor did the committee independently monitor those funds once in the plan.

In 2015, the plaintiffs filed a class action against Putnam, PBIC and various other Putnam entities. First, the plaintiffs alleged that the fees charged by Putnam subsidiaries to the mutual funds offered in the plan constituted prohibited transactions under ERISA.

In addition, the plaintiffs alleged the defendants breached fiduciary duties by stocking the plan with Putnam investment options.

By agreement of the parties, the plaintiffs’ claims were decided on summary judgment using a “case-stated” procedure. The procedure used in non-jury cases allows the District Court to engage in a certain amount of fact-finding, including the drawing of inferences from facts agreed to by the parties. The judge found against the plaintiffs on all claims after a seven-day bench trial at which only the plaintiffs presented their case.

ERISA claims revived

The plaintiffs’ suit implicated two ERISA provisions prohibiting certain transactions. Subject to certain exceptions, 29 U.S.C. §1106(a)(1)(C) prohibits a fiduciary from causing the plan to engage in a transaction that constitutes a direct or indirect “furnishing of goods, services, or facilities between the plan and a party in interest.”

Section 1106(b)(3) likewise prohibits a fiduciary from receiving “any consideration” from “any party dealing with such plan in connection with a transaction involving the assets of the plan.”

The Putnam 401(k) plan raised a question of liability under §1106(a)(1)(C) because it contracted for services with Putnam subsidiaries. A question of liability under §1106(b)(3) arose because Putnam received service fees charged by Putnam funds in which the plan invested.

Putnam contended and the 1st Circuit agreed that there was no liability under §1106(a)(1)(C) because of a statutory exemption allowing the payment of “reasonable compensation” to parties in interest for services rendered.

The 1st Circuit reached a contrary conclusion as to the plaintiffs’ claim that the defendants were liable under §1106(b)(3).

The defendants claimed a safe harbor under a Department of Labor regula-

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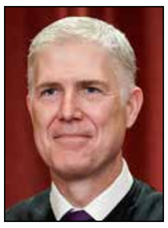
Workers in 1st Circuit case are handed rare ADR win

High court: drivers fall under FAA exclusion

By Pat Murphy

The drumbeat of defeat for plaintiffs fighting arbitration clauses has been put on pause at the U.S. Supreme Court — at least temporarily — with a recent decision allowing a New England truck driver to proceed with his wage class action.

The Supreme Court in *New Prime Inc. v. Oliveira* held that §1 of the Federal Arbitration Act, which exempts "contracts of employment" of certain transportation workers from the act's coverage, applied to a driver's contract with an interstate trucking company under which he was labeled an "independent contractor." The decision in *New Prime* affirmed a decision by the 1st U.S. Circuit Court of Appeals.



GORSUCH
Writes for court in 8-0 decision

"When Congress enacted the Arbitration Act in 1925, the term 'contracts of employment' referred to agreements to perform work," Justice Neil M. Gorsuch wrote for the court in the 8-0 decision. "No less than those who came before him, Mr. Oliveira is entitled to the benefit of that same understanding today. Accordingly, his agreement with New Prime falls within §1's exception [and] the court of appeals was correct that it lacked authority under the Act to order arbitration."

Circuit split resolved

New Prime resolves a split among the circuit courts of appeals.

Boston attorney Hillary Schwab represented the plaintiff, Dominic Oliveira, before the 1st Circuit.

"The Supreme Court's decision is significant because it preserves the right of workers in the transportation industry to pursue relief collectively and on a class basis in the courts when they are not paid in accordance with state and federal wage and hour laws," Schwab wrote in an email.

Providence labor attorney Divya Vasudevan said *New Prime* gives advocates for workers' rights reason for "cautious" celebration.

"Justice Gorsuch applies a textualist, an originalist approach to the phrase 'contracts of employment,'" Vasudevan said. "Although a textualist approach typically results in pro-business or conservative outcomes, this time it yielded a progressive win for workers in the transportation sector, particularly."

Beth R. Myers, president of the Massachusetts Employment Lawyers Association, called *New Prime* a "great win."

Myers attributed the court's unanimous decision to two factors. First, while affecting large numbers of workers in the transportation industry, *New Prime* did not make any broad pronouncements on arbitration in the employment context in general, she said.

"It's not as though the court has made any sweeping changes that are going to affect all independent contractors or all employees," Myers said.

Secondly, the Boston lawyer said the decision came down to an analysis of the language of the exception provided under §1 of the FAA.

"The way that they got there was by strict textual analysis, dissecting the term 'contract of employment,'" Myers said. "When you have justices who are strict constructionists, who analyze legal questions in that way, sometimes it forces them to come out with a decision that is contrary to what everyone expects."

Bucking the trend

History shows that the plaintiffs' bar should not expect success when challenging arbitration clauses at the Supreme Court.

New Prime stands as a marked departure from recent precedent, according to longtime Supreme Court commentator Ronald J. Mann. In a piece for SCOTUSBlog, the Columbia Law School professor described the decision as "anything but business as usual."

"Justice Neil Gorsuch's opinion for a unanimous court rejects a claim for arbitration for the first time in a string of more than a dozen of the Supreme Court's cases stretching back more than a decade," Mann wrote. "Indeed, I doubt the court has rejected such a claim in any previous decision since the turn of the millennium."

Just last year the court issued its landmark decision in *Epic Systems Corp. v. Lewis*. In that case, the Supreme Court ruled that arbitration clauses in the employment contracts of three different employers were enforceable as written, in particular upholding provisions waiving the employee's right to pursue a claim as a member of a class action.

Gorsuch also authored the court's majority opinion in *Epic Systems*, which was a 5-4 decision.

Schwab handed off *New Prime* to Jennifer D. Bennett — an attorney for the Washington, D.C., nonprofit Public Justice — to argue before the Supreme Court.

When she got the case, Bennett thought Oliveira had a "good shot" at prevailing because of the strong textual argument in his favor on the meaning of §1 of the FAA.

That said, Bennett does not downplay the significance of *New Prime*.

"Before this decision, companies thought that there was basically no limit to enforcing arbitration clauses," she said.

No illusions

Justice Brett M. Kavanaugh took his seat on the court three days after oral arguments in *New Prime* last fall and had no part in the decision. The addition of Kavanaugh only solidifies a conservative, pro-business majority on the court.

That is one reason why Myers is under no illusions that *New Prime* marks a change in course for the Supreme Court on the issue of the enforceability of arbitration agreements.

"We're not going to suddenly see a lot of pro-employee, pro-union, or anti-arbitration decisions," Myers said. "This was an isolated case."

Vasudevan likewise rejected any notion that *New Prime* signals a "sea change."

"There's a potential to harness this language to protect the rights of workers, but I also see some hazards as well," Vasudevan said.

Boston labor attorney James A.W. Shaw said ultimately he did not see *New Prime* as signaling a doctrinal shift for another reason.

"The logic of the decision is not inconsistent with the prior arbitration cases, so it's not really a departure," Shaw said. "And it involves an exemption that's in the text of the Federal Arbitration Act itself, so it doesn't really change any underlying policy."

The New England Legal Foundation's Benjamin G. Robbins filed an amicus brief in support of the employer in *New Prime*. Robbins tried to convince the Supreme Court that the FAA's exemption for "contracts of employment" refers only to contracts that establish an employer-employee relationship.

Robbins said he was not surprised by the result, seeing *New Prime* as presenting a "close question" of statutory interpretation.

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Pleadings deemed sufficient in FCA retaliation claim

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zigliano of New York, did not respond to requests for comment. Similarly, the defendant constituent companies' attorneys — Brian J. Leske, Michael J. Sullivan, Walter B. Prince, William A. Worth, David C. Casey and Stephen T. Melnick, all of Boston — did not respond by press time.

Kickback scheme alleged

The plaintiff-appellant, Thomas Guilfoile, was hired in 2013 as president of an "integrated entity" made up of several health care LLCs, joint ventures and holding companies working in concert to provide specialty pharmacy services for chronically ill patients.

The companies process subscriptions, bill insurance, and ensure that patients adhere to medical regimens. Federal insurance programs, including Medicare and Medicaid, are billed for services provided.

The CEO of the combined entities, John Shields, had previously entered into a contract with a consultant, Michael Greene, whereby Greene was paid "referral fees" for steering hospital contracts to Shields.

In fall 2015, Guilfoile notified Shields that he believed the contract violated the federal Anti-Kickback Statute in that Greene was paid to secure contracts with hospitals that resulted in the integrated entity making claims for payment to federal insurance programs.

After some back and forth on the matter, Shields terminated Guilfoile that December. Guilfoile then sent a letter to the board of directors, sharing his concerns that the integrated entity violated the law in paying Greene for referrals of federally insured patients.

In April 2016, Guilfoile brought suit against the integrated entity and Shields, alleging that his firing constituted whistleblower retaliation in violation of the FCA.

However, the District Court dismissed the complaint, finding that Guilfoile failed to adequately plead that he was engaged in "protected conduct," the first element of an FCA retaliation claim.

"Holding [employees] to too high a standard will deter whistleblowing, and anti-retaliation provisions must be read broadly for those protections to have any effect."

— Thomas J. Enright, Cranston, Rhode Island

Pleadings adequate

Based on an examination of the pleading standards and the fact that Guilfoile had not brought a "direct" claim of an FCA violation, the 1st Circuit panel vacated and remanded.

"In a suit directly alleging the submission of a false claim, a plaintiff must sufficiently plead facts supporting the existence of an actual false claim," Lipez wrote. "However, in a suit alleging retaliation under the FCA, a plaintiff must sufficiently plead that he or she was retaliated against based on 'conduct that reasonably could lead to a viable FCA action.'"

With that polestar, the court concluded that Guilfoile's pleadings met the bar.

"The allegations in the complaint, coupled with the reasonable inferences we must draw from them, plausibly pleaded that the claims for payment were, or were going to be, submitted to the government in connection with the Integrated Entity's work with the … hospitals," Lipez wrote.

He added that, "[i]f not for the agreement with Greene, the Integrated Entity would not have been in a position to benefit from the federal health care payments arising from its work with the hospitals."

Part of the equation, Lipez explained, is that a federal health care payment that violates the AKS is a per se false claim under the FCA. And Guilfoile adequately alleged that the payments to Greene were contrary to the AKS, the panel concluded, as the relationship between the integrated entity and Greene had the "hallmarks of a kickback scheme."

Lipez wrote that the facts are "materially indistinguishable" from the scheme in 1989's *United States v. Bay State Ambulance & Hospital Rental Service, Inc.*, which involved a criminal conviction under the AKS in which a person wielded his influence to win an ambulance services contract.

"The type of scheme proven in *Bay State* and alleged in the present case is in the heartland of what the AKS is intended to prevent — the use of payments to improperly influence decisions on the provision of health care that lead to claims for payment to federal health care programs," Lipez said.

Dissenting was Judge David J. Barron, who expressed concern about the "attenuated" nature of the AKS scheme alleged in the complaint and doubted that it could "reasonably lead" to an FCA action.

Barron argued there was too great a distance between the entity's payments to Greene to capture hospital contracts and the submission of claims to federal insurance programs. NEIH

Workers in 1st Circuit case are handed rare ADR win

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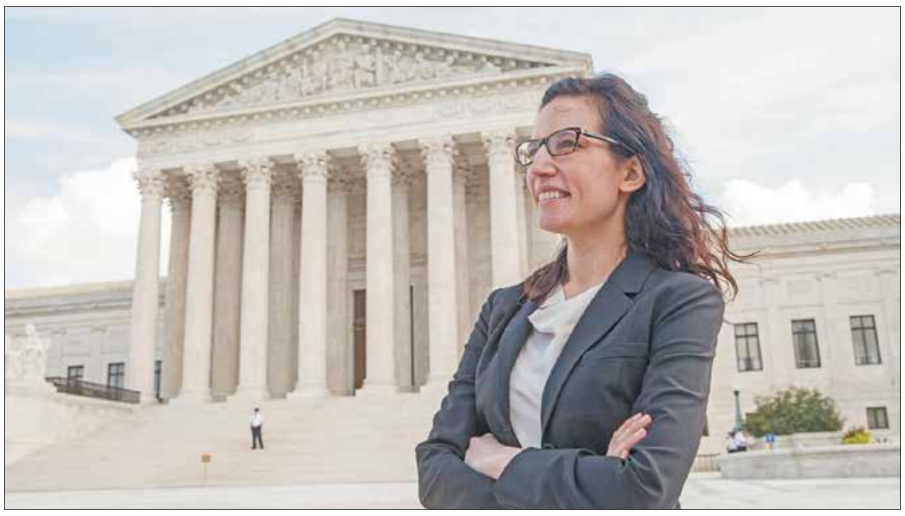
However, he was surprised that it was a unanimous decision.

Robbins also expressed disappointment that the court appeared "dismissive" of his argument that, by specifically exempting the employment contracts of seamen and railroad employees in §1, Congress simply intended to preserve those workers' remedies under the Jones Act and Federal Employers' Liability Act, and did not mean to protect independent contractors.

"Those two statutes are express on their face and only protect the employment relationship," he said.



JUDY G. ROLFE

'Before this decision, companies thought that there was basically no limit to enforcing arbitration clauses,' says Jennifer D. Bennett of the nonprofit Public Justice.

Power to the court

Oliveira was a Massachusetts resident when he drove for New Prime between March 2013 and June 2014.

In March 2016, Oliveira filed his class action in U.S. District Court in Boston. He alleged that New Prime violated the Fair Labor Standards Act and various state wage laws by denying its drivers lawful wages.

New Prime responded by filing a motion to compel pursuant to a mandatory arbitration clause in Oliveira's operator agreement.

The plaintiff contended that the court lacked authority to order arbitration because §1 of the FAA excepts from coverage disputes involving "contracts of employment" of transportation workers like himself.

Judge Patti B. Saris denied the employer's motion to compel in October 2015, and the 1st Circuit affirmed that decision in 2017.

In order to reach the question of whether §1 applied to independent contractors working in the transportation industry, the Supreme Court handed the plaintiff a win on an important threshold issue. New Prime argued that a delegation clause in the parties' contract gave the arbitrator the sole authority to decide the applicability of §1.

But the Supreme Court concluded that a court's authority to compel arbitration under the FAA does not extend to all private contracts regardless of "how emphatically they may express a preference for arbitration."

Gorsuch explained that the FAA's "antecedent" provisions — §§1 and 2 — limit the scope of a court's §§3 and 4 powers to stay litigation and compel arbitration according to the terms of the parties' agreement. While §1 excepts from the FAA's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," §2 provides that the act applies only when the agreement is set forth as "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce."

Accordingly, the Supreme Court in *New Prime* held that it was up to a court in the first instance to decide whether §1's exclusion applies before ordering arbitration.

Shaw saw the court's decision on that issue as a sensible reading of the FAA.

"The exception doesn't appear in the arbitration agreement or under state law; it's an exception that's in the Federal Arbitration Act itself, and so the court reasonably concluded that a court has to decide whether the FAA even applies to these circumstances generally," Shaw said.

Ironically, Kavanaugh's first written decision for the court was issued a week before *New Prime* and also addressed the hot-button issue of arbitration. In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, a 5th Circuit case, a unanimous court held that the parties to an arbitration agreement may agree to have an arbitrator decide not only the merits of a particular dispute, but also "gateway" questions of "arbitrability."

"Therefore, when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless," Kavanaugh wrote.

Though the holding of *Henry Schein* appears on its face to be contrary to *New Prime* on the issue of delegation clauses, Bennett said the two cases can be reconciled. *Henry Schein* involved an action between businesses in which there was no dispute as to whether the FAA applied in the first instance, only a dispute as to the scope of the parties' arbitration clause, Bennett said. NEIH

Mergers & Acquisitions

A Roundtable Discussion

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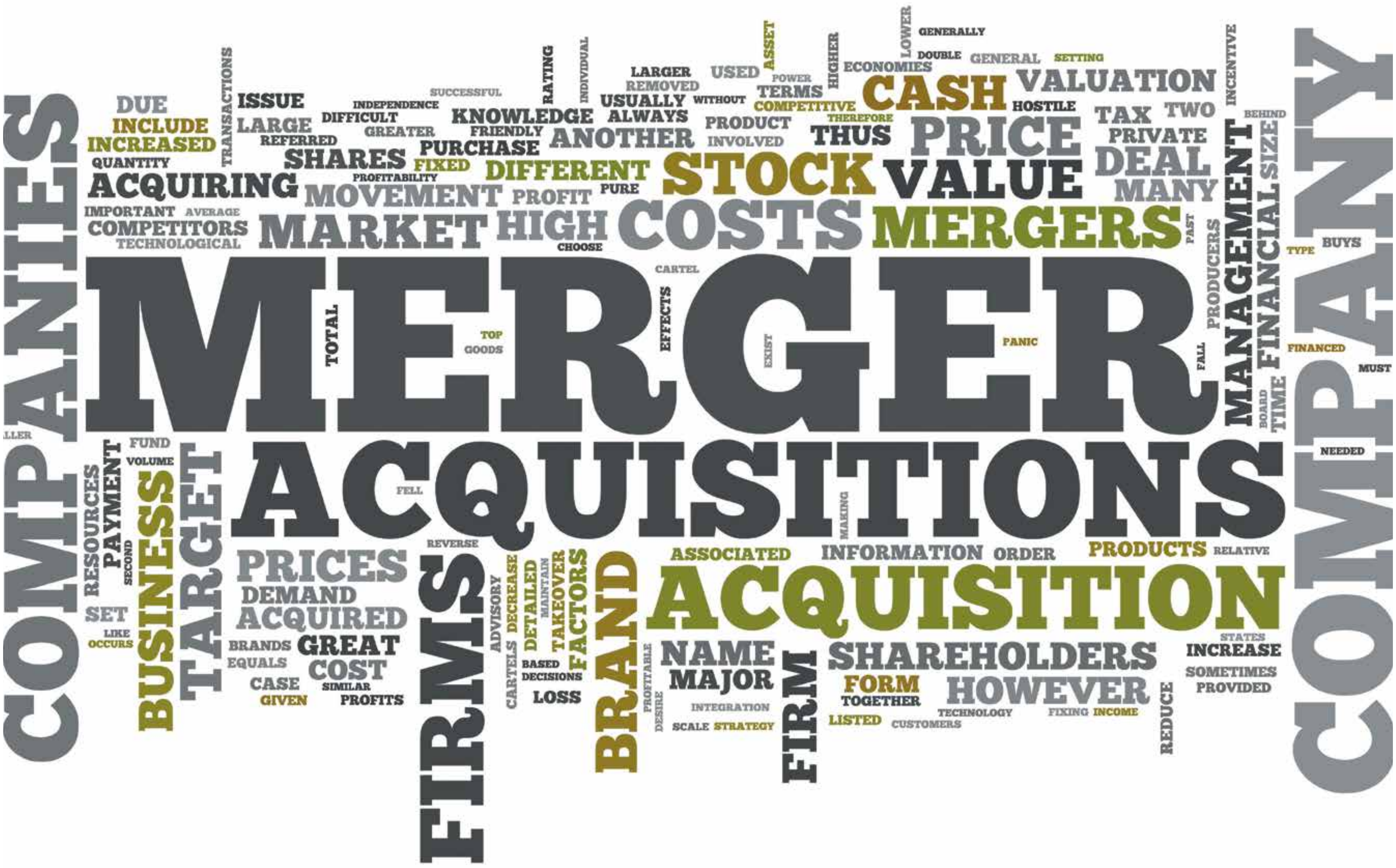

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MICHAEL PHILLIPS, FLOYD ADVISORY: **I'd like to begin with some recent decisions coming out of the Delaware courts, as they often have a significant impact on the M&A landscape. It will be interesting to discuss the impact of some of those key decisions, both from a deal negotiation standpoint as well as any M&A litigation considerations that might come out of those.**

Although it's not the most recent of the court decisions that we'll discuss today, I thought we'd start with last year's Delaware Supreme Court decision in the *Chicago Bridge v. Westinghouse* case. This particular decision provided some interesting insight on the court's view of what types of financial reporting issues are subject to a financial statement representation dispute process as opposed to a purchase price adjustment process. This decision also provided some guidance on the role and scope of accountants, who often serve in a dispute resolution role in these types of matters.

MATTHEW SOLUM, KIRKLAND & ELLIS: *Chicago Bridge* is an important case in the sense that the Delaware Supreme Court reversed a lower court decision and determined that the GAAP compliance issues ought to be raised in the indemnity context in light of the provisions in the agreement that were at issue. The purchase price in that deal was $0. ... The purchase price adjustment post-closing that was being sought was more than $2 billion. So it was a $2 billion issue and the parties went forward to decide whether that issue ought to be submitted to the purchase price adjustment process. The Delaware Supreme Court ultimately said the claim that there was significant GAAP compliance should be raised as part of an indemnity process, if at all, rather than through the purchase price adjustment process.

Among other things, the court looked at the notion that the arbitrator or the decider of that dispute was described as an "expert," not an "arbitrator." I think people who spend time thinking about disputes in the context of buying and selling private companies have really taken a close look at this decision to try and think about how to arrange their potential claims, and the rights and obligations of the parties and how to allocate that as between indemnity and purchase price adjustment processes.

"One of the practical problems with the approach to all of this if you're relying on an indemnity for GAAP compliance, especially in the last few years, [is] how seller-friendly contracts have become."

— Taylor J. Hart, Ropes & Gray

PHILLIPS: Any insights from the finance and accounting perspective of these situations?

WILLIAM SHEA, FLOYD ADVISORY: This is obviously a case that has had some fairly major ramifications on some of the work that we do. In the last year, we've seen this cited in the parties' submissions. It affects the strategy from both the buyer and the seller's perspective on how to present your position when you get to these disputes. Oftentimes, one party may be trying to take a step back. What was the negotiating history? What was the intent here?

What we're talking about is applying the language of the agreement itself. Anything else, any sort of extrinsic evidence, wouldn't necessarily survive into those disputes if you apply the *Chicago Bridge* decision broadly.

From an accounting perspective, what we typically do in our role as advisors to either the buyer or the seller [is] think through the issues and tie them back into the language of the agreement and the consistency of the prior accounting practices.

PHILLIPS: Is there any impact from this decision on deal negotiations?

TAYLOR HART, ROPES & GRAY: One of the practical problems with the approach to all of this if you're relying on an indemnity for GAAP compliance, especially in the last few years, [is] how seller-friendly contracts have become. It's a seller's market. Prices are very high these days. Many of these deals are auction processes where they're very competitive, and the number of deals that are done on a no indemnity basis but could be done with reps and warranties insurance are a pretty significant percentage. If it's a no indemnity deal where you don't have the ability to bring an indemnification claim for GAAP compliance, it makes these issues even more important.

As a result, in a very seller-friendly environment with auction processes, you also have to be mindful of how much you're touching these and other provisions in the contract in light of other competitive bids. So while these issues are certainly a significant focus in any negotiation, I think the practical approach sometimes trumps in light of a competitive environment.

SHEA: Something else this case covers is the applicability of the consistency test versus the bifurcated test. What this decision really focuses on is the use of the consistency test. Meaning, is the ultimate closing calculation [and] final working capital closing statement consistent with the historical calculations, the estimated statement [and] the target? That's the bright line test, versus the bifurcated test when we're also talking about GAAP compliance.

PHILLIPS: Why don't we turn to the recent Delaware Chancery Court decision in *Penton v. Informa*. It's very common that accountants or other professionals may serve in a dispute resolution role in purchase price disputes. This decision establishes some case law on the issue of serving in those dispute resolution roles and whether [you] should be acting as an arbitrator or acting as an expert.

SOLUM: The issue in the case was whether the decider of the dispute could take into account extrinsic evidence — the negotiation history, the drafts of the agreements — to better understand what the parties meant when they used the words they used in the ultimate signed and executed agreement. Here, the parties had a dispute before they went to the purchase price process over whether that extrinsic evidence could be relied upon by the decider in that matter. The party that wanted to exclude that evidence was saying, "Wait a second, the decider is described as an expert, not an arbitrator, and that's meaningful." They wanted to go to court to get an understanding that the decider could not rely on extrinsic evidence.

The judge in the case really went through the case law around expert versus arbitrator in a number of other states to try and understand how states deal with this issue. Although other Delaware decisions had touched on the topic, this was the first real deep dive on whether expert versus arbitrator has an impact on the scope of the matter to be decided. Ultimately, the judge in the *Penton* case decided that it is a meaningful distinction and that the decider in that matter could not rely upon or consider extrinsic evidence.

"The issue ... was whether the decider of the dispute could take into account extrinsic evidence — the negotiation history, the drafts of the agreements — to better understand what the parties meant when they used the words they used."

— Matthew Solum, Kirkland & Ellis

Now people are looking at that distinction and trying to try to assess other issues like, if someone is an expert [and] not an arbitrator, does that mean that they should not be deciding disputes around discovery or what documents ought to be produced? And what does that mean with respect to whether some other ancillary issues, like whether someone can change their position in a purchase price dispute process, can be decided by the arbitrator or decider in the matter?

PHILLIPS: Let's talk about some of those practical implications. As a litigator in these types of disputes, would you have a preference for the person sitting in that dispute resolution role to act as an arbitrator, with a little bit more authority and leeway, or to be more limited as an expert?

SOLUM: It really depends. Oftentimes, the parties jointly empower the arbitrator to decide specific issues: for example, to decide whether the buyer or seller can change their position or to decide whether the buyer of the business who now owns the business ought to produce additional documents to the seller of the business. I think that's a process for negotiation when one is engaging an arbitrator, and having either the word "expert" or "arbitrator" in the purchase price dispute provision will help inform that negotiation.

PHILLIPS: It would be interesting to hear thoughts around serving in that role as an accountant and some of the considerations.

SHEA: We encounter [this] both when we're acting as a neutral or if we're advising the buyer or the seller. There is usually some broad language in the purchase agreement that might have some guidelines on the authority of the decider, but usually there's a negotiation between buyer, seller and the decider on the scope of the decider's review.

Serving in that role, as accountants, we've got to be careful about playing judge. Some

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> "When we see a purchase agreement, nine times out of ten, it has language that says that the accountant serving in that role should serve as an 'expert' and not as an 'arbitrator.'"
>
> **— Michael W. Phillips, Floyd Advisory**

terminology that we use internally is, are we applying or are we interpreting? Certainly when designated as an expert versus an arbitrator, that decider has got to be very careful to be in the seat of applying and not trying to interpret meaning that's not explicit.

And speaking quite frankly, that fits the profile of what the parties want an accounting expert to be doing, given that person's likely expertise and skill set.

A lot of times, it depends on the facts and circumstances of the case itself, but if you've negotiated for an expert role, it's likely because you believe your side or your positions are strongest on plain application of the words of the contract. If you feel like you've got issues where intent was lost in the ultimate draft or the ultimate final product that was agreed upon by the parties, you may want to be looking at an arbitrator and introducing some drafting evidence or intent-of-the-parties type information and positioning your themes that way.

HART: The tough part of that is it can cut both ways and you may not really know which way you want it to be until the dispute comes, which is after you've already negotiated and entered into the contract.

PHILLIPS: You never know when you're drafting what the issues will be eventually. Now that this decision is out there, I think it will cause the firms that serve in these neutral roles to raise the risk flag a little bit more about how they approach these types of engagements.

One of the challenges when we serve in these roles is sometimes the issues aren't truly applying accounting concepts and it's more of trying to interpret the parties' intent. I think we are better suited for the former than the latter.

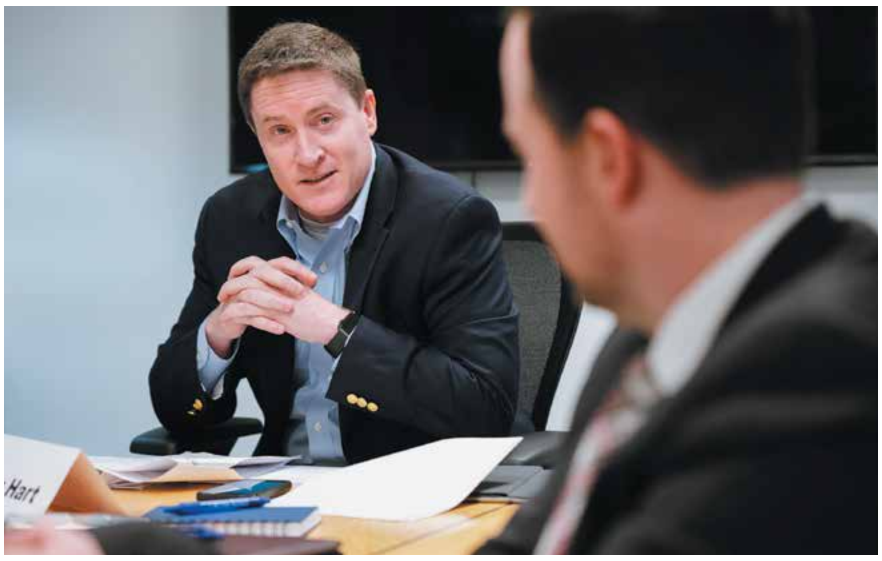
When we see a purchase agreement, nine times out of ten, it has language that says that the accountant serving in that role should serve as an "expert" and not as an "arbitrator." Do you anticipate because of this decision there will be any changes to that standard language?

HART: I think, in light of this case, people will be more thoughtful about the inclusion of that language. But given that it's pretty standard and again, going back to the seller-friendly nature of the market recently, [and] not knowing how it may impact you later in some potential dispute, is this necessarily something that you want to fall on your sword over as part of negotiations in a competitive process? We'll see how that plays out over time. I haven't seen a lot of it yet.

SHEA: I don't mean to belabor this, but I find it interesting that for a long time we've referred to these engagements as arbitrations even if they weren't, in fact, true arbitrations. And I think, at least in the last few months, in my own experience there's a lot more thought that goes into throwing that word around. There are a lot of boilerplate-type engagement letters that these deciders will put out as a first draft and there are some careful markups happening from the legal side to make sure that the role is supposed to be an expert and we're not invoking the idea of an arbitration proceeding in any way, shape or form.

PHILLIPS: Let's move on to the last decision that we'll touch upon, the *Akorn v. Fresenius* decision coming out of the Delaware Chancery Court and later confirmed in the Delaware Supreme Court. This is the first time that a Delaware court has allowed a buyer to terminate a deal altogether based on a material adverse event.

This seems like a big deal, and it was a big deal in this particular case because it was a substantial acquisition, close to a $5 billion deal.



SOLUM: At the Delaware Chancery Court level, the judge determined that there was a material adverse event, a general MAE. He also determined that there was a breach of the representations that rose to the level of an MAE. And then he determined that there was a breach of the operating covenant, meaning that the business would be operated in the ordinary course of all material respects between sign and close.

The case went up to the Delaware Supreme Court, and the Delaware Supreme Court affirmed that there were facts sufficient to support the first two of those conclusions and did not yet address the third because it determined it didn't need to do so.

The trial court opinion is a 247-page opinion. The Delaware Supreme Court was a little bit nicer to practitioners in the sense that it's a terse three-page opinion that one can digest pretty quickly. But it's worth going through the trial court opinion to better understand how a trial court would go about thinking about each of those aspects that I just referred to: a general MAE, breach of rep leading to an MAE, and the operating covenant under the agreement.

In particular, Footnote 740 gives you the scope of the opinion, where the judge at the trial court level went through and assessed a number of the economic metrics associated with his decision. He determined there was no bright line for determining that an MAE or MAC had been triggered but he did go through and assess a number of facts to figure out whether this was the right ultimate finding.

> "People are agreeing to be able to close very quickly. Some say they will close within 30 days or 45 days or sometimes even less."
>
> **— Taylor J. Hart, Ropes & Gray**

PHILLIPS: I imagine this decision has put a scare into some prospective sellers. Have any clients reacted to this?

HART: I don't think there's been a ton of difference in terms of approach so far. But it's very important and something to be thoughtful about in terms of potential approaches, and the opinion is very detailed and does provide a lot of helpful insight as to how the Delaware courts will think about an MAE going forward. I do think that this case was a bit unique in terms of the court being able to find an MAE, where in other deals you wouldn't have these same circumstances.

The reason we have always had MAE provisions in agreements is that a court could find an MAE one day, and now that day has come. And the opinion is instructive as to the things that could rise to an MAE. But I think in this case it was a bit unique.

The opinion is also instructive on other aspects of Delaware law that they refer to in terms of "levels in materiality" and "compliance in all material respects with covenants" and other things that I think make it a very interesting and useful decision.

PHILLIPS: Apart from some of the recent key decisions we've discussed, let's discuss some other trends that you may be experiencing, whether it's in deal negotiations or any other hot topics on the litigation front.

HART: Maybe not specific to litigation but just in terms of approach and some of the issues that we're seeing more often, one of the things [is] the "#MeToo" movement. We have seen where people have been including representations and warranties around past claims or settlements to get at whether there is anything lurking at target companies.

In terms of some of the bigger things that I think we're seeing and the way people are approaching deals, one of them is the competitive nature of [the market]. In many of these auction processes, people are taking various aggressive bidding steps to try and improve their positioning to try and win an auction and be successful in getting the deal.

People are agreeing to be able to close very quickly. Some say they will close within 30 days or 45 days or sometimes even less. There have even been some circumstances where people will close as soon as the conditions for closing are satisfied. With early termination of HSR approval — if that's the only real condition with timing implications — that could mean being forced to close in around two weeks.

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Those things can be attractive to a seller. It obviously shortens the amount of time between signing and closing, gets them to a closing faster, gets them their money faster and reduces the risk of things like an MAE or something happening to the business in between signing and closing.

Another thing we've seen, particularly in the private equity context, is people being pushed to do full equity backstops of the financing instead of having reverse termination fees that provide some protection if the financing doesn't come through. More and more people are getting pushed to consider doing that in auction processes.

Rep and warranty insurance is another significant trend where it's become almost universal in the middle market that just about every deal these days includes some form of rep and warranty insurance. There are different approaches, but sellers are insisting on it in most cases in those deals of a certain size to limit their risk so they can walk away freely, or with minimal amounts at risk.

"Where we've done a lot of work is in pre-deal, 'risk mitigation' settings with real emphasis on the drafting of purchase and sale agreements."

— William F. Shea, Floyd Advisory

PHILLIPS: What's the perspective from the finance and accounting advisory role? Any trends that you're experiencing?

SHEA: This dovetails with the decisions we've been talking about here, how they affect post-acquisition disputes in a lot of cases and the forum for that. One thing that we've seen with some of our clients in the last couple years is going through these post-acquisition dispute processes and the effect on everything. But then it gets to [the question of] how do we do better to avoid the risk in any sort of arbitration or expert determination process, and leaving sometimes substantial economic swings to the whims of those types of processes.

Where we've done a lot of work is in pre-deal, "risk mitigation" settings with real emphasis on the drafting of purchase and sale agreements. We're doing more work up front with clients on defining the standards in these post-closing calculations, going beyond broad-strokes type provisions and really getting into very specific balance sheet rules, and walking through them from a working capital perspective. This creates specific calculation steps that the parties are going to be beholden to to create an apples-to-apples closing statement against the target formulation and the estimated statement put forth at the time of the close.

There, you get into a lot of the themes from the *Chicago Bridge* decision in that apples-to-apples type comparison environment, doing even more to make sure both parties have their eyes open at signing as to, "Here's what you will be doing when you prepare the closing statement." So we avoid that surprise claim post-close from a seller's perspective, once you lose control of the books and records, which, by the way, is another important consideration. We'll often work to make sure we gather the necessary closing package so there is no issue with discovery or access to the books and records if there is a dispute.

PHILLIPS: One trend that we are seeing is we're being asked to get involved in a lot more reps and warranties insurance claims than we have in the past. I think some of that is just that it's a relatively new product. But it would be interesting to hear whether others are seeing more activity in that reps and warranties insurance claims area.

SOLUM: In the last handful of years, the rep and warranty insurance product has become very popular [for] deal practitioners and clients. As a result we're now seeing a shift in the claims. We're seeing more and more activity where buyers are asserting claims against the rep and warranty insurers. And we certainly are seeing that play out in the marketplace. It's certainly a growing trend.

HART: It's also something that is important on the front end when we're going out and working with the broker to get quotes that come back from different insurers. Because of the explosion of the use of it in the last couple years, there are a lot of new entrants to the market, new insurers that have started writing rep and warranty policies. And then there are others who have been in the market for a long time who are very committed to the market.

One of the things we are talking with our clients about when they're evaluating quotes is not just looking at pricing and terms and potential exclusions or areas of heightened underwriting risk but also looking at the insurers themselves and how long they've been in the market, how

"We're now seeing a shift in the claims, we're seeing more and more activity where buyers are asserting claims against the rep and warranty insurers."

— Matthew Solum, Kirkland & Ellis

committed they are to the market to the extent that we have some insight into their claims history and whether they're harder or easier to deal with. That can be really important in terms of who you select because, if you're selecting somebody that's new to the market, they may be more risk averse and have no claims history and so it might be cheaper, but you may end up having a more difficult time placing the policy in the first place, and if you have a claim down the road, then it may be harder to pursue. Some of them are also large players in providing other types of insurance to clients, so those broader relationships can also be a factor.

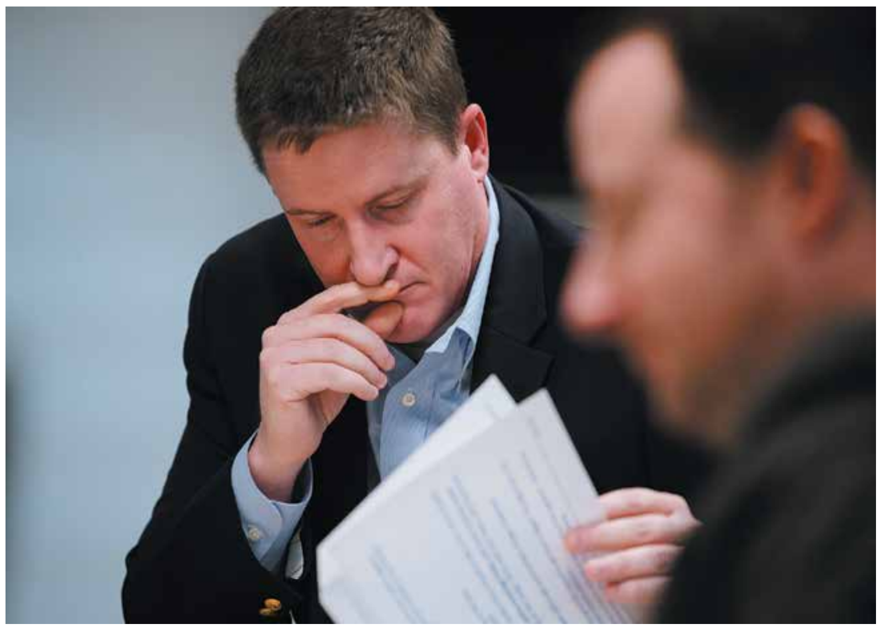
PHILLIPS: Are you finding that some of that information, some of that history is available out there publicly or is it more of kind of working through your channels?

HART: It's more working through the experience that we have with them, as little is publicly available.

PHILLIPS: So in advising buyers when they're making these claims, what are some of the key considerations that they should be thinking through?

SHEA: The product has exploded. I think it's going to be interesting to follow the cycles of this: What the claims history and the payouts might be and whether or not there comes a time where the claim payouts and the ultimate after effect here dries up a bit and what the market response is.

But as far as advising buyers on preparing claims, you've got to tether what you're doing to the audience a bit. Obviously the focus is going to be on first establishing a breach, and the most common when we worked with this is the standard rep to the accuracy of the financial statements.



Establishing that breach and establishing the misstatement of the financial statements and the lasting damage that results from that is obviously very important.

There are certainly valuation considerations at play a lot of times in these because you're going to be looking at potentially falling back on a purchase price. A lot of times we'll deal with where a buyer has priced its deal based on a review of the historical financial statements and is relying on the rep that sellers made to the accuracy of those financial statements and priced the deal off of a trailing period of results. If there are misstatements inherent in those financial statements, then what is the ultimate effect on the multiple burden that was paid at the time of the purchase price?

The key is matching that damage claim directly to the breach. There is the occasional [desire] to establish a change in accounting estimate or accrual processes and bring those into the space where there is a distinction between the damage that was incurred by the buyer and what really should have been handled through a purchase price true-up provision or the working capital process.

That's what we've been working with and doing in that space with our clients who are putting forth these claims against these policies.

PHILLIPS: I think sometimes the easier aspect of the claim is proving the breach. The more challenging aspect is: how were you damaged? That requires a lot of careful consideration up front by the buyer in determining or making a decision as to whether to move forward with the claim in the first place.

SHEA: That's right. It really should be, if you are able to articulate that there is an ongoing loss of value and/or that the process by which the purchase price was determined was materially affected by whatever the established breach was, is [the client] going to make a claim against the purchase price?

Jury selection for harassment cases in #MeToo era

Dawn R. Solowey and Lynn A. Kappelman


SOLOWEY KAPPELMAN

At a time when the #MeToo movement is dominating headlines, everyone is talking about sexual harassment — around the water cooler, around the family table, and online.

Media coverage of harassment is pervasive, and #MeToo posts regularly go viral on social media. Often, the issue is intertwined with partisan and divisive political views.

In this environment, a central task for us as trial lawyers handling sexual harassment cases is to use the jury selection process to help empanel a fair and impartial jury that will hear a specific case with an open mind. Here are our top five strategies for using voir dire to ensure a fair and unbiased panel.

1. Avoid stereotypes based on demographics. People sometimes assume that trial lawyers would choose a jury for a sexual harassment case based largely on demographic information such as gender or age. But that is not a smart or effective strategy.

As a threshold matter, a peremptory strike of a juror that even appears to be based on any protected classification risks a "Batson challenge" under the seminal U.S. Supreme Court case *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. Further, selecting a jury for a sexual harassment case based on demographics is also strategically ineffective.

An effective voir dire goes beyond demographic information to understand what pre-existing views, if any, potential jurors have on the issues, and whether they can neutrally evaluate the evidence to reach a just conclusion.

Rather than assume a set of views based on characteristics like gender or age, it is far smarter and more precise to ask probing questions that get directly at each prospective juror's actual beliefs and biases.

2. Understand the potential juror's view of sexual harassment claims. An effective voir dire will inquire into potential jurors' views about sexual harassment claims and litigation. This step is especially important at a time when sexual harassment lawsuits are so culturally prominent that nearly everyone has an opinion on the issue.

Ask how potential jurors feel about sexual harassment lawsuits and the people who file them. Ask if they believe that all sexual harassment suits have merit. Ask whether they believe that a suit must have merit if it has reached the point of a jury trial; this is a common misconception. Ask if they believe that anyone who brings a harassment suit is entitled to at least some money damages.

If allowed follow-up, ask those potential jurors to explain why they believe as they do. These questions allow you to understand what biases the prospective jurors might have as to harassment suits generally that may compromise their ability impartially to weigh the claims and defenses at issue in a particular case.

3. Inquire as to life experience with sexual harassment. It is also critical to ask what life experience the prospective jurors may have with sexual harassment. Many jurors will have first-hand experience of sexual harassment, and even more will have a family member or close friend who has suffered harassment.

Asking them, sensitively and ideally individually to ensure privacy, to explain that experience, and their feelings about the experience, will give you some insight into what strong beliefs they may hold on the issue. Ask if they reported the harassment and with what results.

But the goal here is not to attempt to strike anyone who has had any experience with harassment, which would be overbroad and completely impractical. Instead, the ultimate question is whether there is anything in the person's life experience that would render that person unable to give fair consideration to a specific sexual harassment claim.

Ask that question directly; for example: "Is there anything about your life experience that would cause you to favor or take the side of the plaintiff just because she is suing for sexual harassment?"

Take great care to show respect for the

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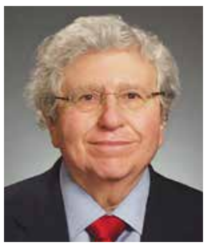
Lynn A. Kappelman and Dawn R. Solowey are partner and senior counsel, respectively, in the Boston office of Seyfarth Shaw. Both are members of the firm's national trial team, which Lynn. Kappelman co-chairs.

Corporate insulation and piercing the veil: an overview



Stephen M. Honig

"Virtue has a veil, vice a mask." — Victor Hugo

Corporations insulate shareholders from liability for entity debts and obligations. That is the historical reason for the corporate form. Insulation is a vital element of a robust commercial system, permitting concentration of capital where funding can be provided without exposing investors to risk beyond specified investment.

Industrialized nations long recognized the need for such protection. New York State's 1811 general incorporation statute, and Great Britain's Limited Liability Act of 1855, led the way in creating almost impregnable walls protecting ownership from enterprise risk.

The important word in that last sentence is "almost."

Major trading countries today permit piercing of the corporate veil, although they do so with different weighting of factors. In the United States, the legal issue is particularly confused, since piercing the veil typically is controlled by the law of the state of incorporation, and our states are inconsistent in defining the triggers for piercing.

Brief history

Business organizations providing protection against shareholder liability existed in Roman times, and in England starting in the 16th century as the Age of Exploration required concentration of capital for lengthy enterprises remote and perilous.

For a time, insulation from liability was obtained only by Royal Charter. Many opposed expanding the grant of corporate charters, claiming that limited liability would prove a shield for fraud.

Need for capital, and a sense that limited liability would permit the less wealthy to invest without fear of total ruin, led to the mid-19th century British adoption of shareholder insulation.

In America, similar trends of commercial pressure and social equality, as well as the desire to halt diversion of capital to European ventures, led to invention of various entities, including limited partnerships, business trusts and joint stock companies.

Obtaining charters from state legislatures proved easier than obtaining a Royal Charter, and states also enjoyed the taxing advantage of attracting limited liability entities.

The evolution of limited liability always was seen as a balancing of risk and benefit. In common law countries, that tension was mediated by the development of case law that attempted to define when liability insulation became so onerous as to justify its abandonment. The analysis assumed that legislatures could not have intended that shareholder insulation was so absolute as to permit fraud.

The tension was litigated through various courts, bringing us to today's patchwork, in which states shuffle various factors to determine when the corporate veil will be pierced.

Delaware

American jurisdictions proclaim that piercing should be an extra-ordinary event, and state courts have considered similar lists of elements that justify piercing the veil:

- Is the enterprise under-capitalized either initially or in light of anticipated obligations;
- Are boards the same;
- Are officers the same;
- Do shareholder and company share premises;
- Do they not deal together at arm's length;
- Does the shareholder completely dominate the other;
- Is there confusion in the marketplace over the entity being part of the shareholder;
- Were corporate formalities observed, including keeping of separate financial and corporate records;
- Did the shareholder regularly siphon off cash of the entity;
- Did the shareholder provide or arrange the entity's capital in the form of loans so that the corporation was "thin";
- Did the entities use separate attorneys and professionals;
- Were employees shared;
- Did the shareholder guarantee the debts of the entity; and
- Does the fact pattern smell of fraud or sharp practices by which a counterparty would be misled to economic disadvantage?

Delaware ignores most of these factors. Some of the factors are trivial, just make-weights to justify piercing. What corporate parent does not set up a subsidiary to do business in a particular location or vertical, or to effect an acquisition through a holding company subsidiary, and use the same lawyer, accountant and bank, and install its own board in the subsidiary? Or share employees as needed?

Corporate lawyers, aware of the factors to avoid so as to prevent piercing, eliminate as many as possible, but often ignore those that have business logic.

Many of these factors are irrelevant to injury to a third party. Who cares, for example, if the boards are the same? You care about whether you have been misled or cheated, victimized by a tort, or suffered a breach of contract.

The analysis also is confused by the concept of thin capitalization under the Internal Revenue Code. Insufficient capital, or the advancing of loans by a parent to a subsidiary in less than arm's length fashion, can result in adverse tax consequences. Thin capital in the tax sense is not determinative of a piercing situation in corporate cases, but corporate lawyers may instinctively draw an analytical parallel between tax treatment and an entity liable to be pierced.

In Delaware, piercing the veil is almost impossible. Various factors may be discussed, but you do not pierce the veil unless there has been fraud. The plaintiff must show that the pierced entity is a sham designed to defraud investors and creditors.

The argument that a claim for piercing the corporate veil should not be brought as a corporate action but should proceed in tort, in contract, or under the laws of fraud or agency, is logically defensible but ultimately irrelevant.

Although the courts may discuss capitalization, solvency, corporate formalities, funds siphoning and domination by the shareholder, unless there is fraud there is no piercing.

One cited recent decision refused to effect piercing even though the defendant potentially made fraudulent statements, as such statements were not tied to the manipulation of the corporate form. Further, in Delaware, the piercing claim is heard by a judge, so consistency in result is almost a certainty.

It is not surprising that Delaware has such an approach; the state wants to attract corporate formations, whether opening for a new market or for acquiring through an acquisition subsidiary.

Further, private equity and venture funds are no doubt comforted in making investments in non-pierce-able Delaware entities, where such investors' economic model may seek quickly to extract profit from the entities in which they invested.

I would be remiss not to mention the law in Massachusetts. The issue is regularly litigated and, while Massachusetts courts delineate 12 different factors for piercing, they often focus on whether there has been "abuse."

However, the occasional decision may affix shareholder liability based only on some number of purely mechanical grounds, absent a finding of independent unfairness (see for example *Caruccio v. Alves' Boston TKD, LLC*, Suffolk Superior Court, Sept. 13, 2018). Nowhere is there a clear statement of the equivalent of Delaware's requirement of intended fraud for a piercing of the veil to take place.

Other systems

Piercing the veil is a corporate remedy for something that, fundamentally, is not a direct corporate problem. Piercing arises when a tort has occurred that could be remedied in tort, when a contract has been breached that could be remedied in a contract action, when a corporation has been party to a fraud, or when a corporation is a mere agent of shareholders.

Tort approaches seem to have hold in Canada, Singapore and Australia. Indeed, in Canada, proof to pierce must demonstrate action akin to tortious fraud. Commentators also have noted that you need not invent the concept of piercing when the common law concept of "joint tortfeasor" can hold a party directly liable for arranging a tortious act effected by another.

Of the major trading countries, commentary identifies only China as having a statutory, as opposed to a common law, standard for piercing the veil. China is also identified along with the United States as being most proactive in piercing. Article 20 of the Chinese 2005 Company Law states: "Any of the shareholders of a company who abuses the independent legal person status of the company and the limited liability of the shareholders to evade the payment of the company's debts, thus seriously damaging the interests of the company's creditors, shall bear joint liabilities for the debts of the company." Commentary implies that the abuse requires "subjective intent."

Though Chinese commentary further suggests that undercapitalization can itself constitute abuse, less than 1 percent of successful piercing cases reported in this September's National University of Singapore Working Paper cited insufficient capital; major factors were commingling of funds, fraud or exercise of undue control over the entity being pierced.

Conclusion

The argument that a claim for piercing the corporate veil should not be brought as a corporate action but should proceed in tort, in contract, or under the laws of fraud or agency, is logically defensible but ultimately irrelevant. If these legal arguments are de facto applied in litigation framed as piercing the corporate veil, then we are talking about the same analysis with a different label.

After all, what if anything is the causal role of inadequate capital, congruent boards, executive commonality, commingling of assets, existence of insolvency, or many of the other common United States-cited factors?

Delaware has it right: not much.

The key issue is: Has someone been injured by being misled materially? Aside from outright fraud (including re-incorporation with intent to leave behind the creditors of the predecessor), these other factors do not matter.

If you are a shareholder in another business, but you do not confuse a counterparty into believing it is dealing with or relying on you, the shareholder, why should you not enjoy the insulation from flow-through liability afforded by the corporate form? NEIH

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Bans on salary-history questions: a growing trend

Gary D. Finley

It is a way to gauge expectations. It is frequently a source of stress and strategy for job applicants. It has been a standard part of job interviews since anyone can remember. And now, in Massachusetts, Connecticut and Vermont it is illegal.

The trio of states has joined a list of eight others and at least nine municipalities that prohibit employers from requesting salary history information from job applicants. Massachusetts became the first New England state to pass a salary history inquiry ban as part of its new pay equity statute, which went into effect on July 1, 2018.

Though these various laws differ in their details, all fall under the rubric of pay equity. The general premise is that women and people of color have historically been paid less than the rest of the workforce. As employers are likely to base salary offers on an applicant's salary history, the theory is that continuing to allow prospective employers to ask about salary history (and, presumably to base their offers on that salary history) has the tendency to perpetuate a system of salary disparity based on gender, race, and other factors unrelated to merit.

Massachusetts

The Massachusetts law provides that an employer may not ask about a prospective employee's wage or salary history until after an offer of employment has been made, unless the prospective employee voluntarily discloses the information on his or her own.

The law applies to all employers, regardless of the number of employees they have. Given the new law's broad definition of "wages," it appears employers will be prohibited from asking not only about a candidate's previous salary, but also about other forms of past compensation, such as commissions or benefits. (However, an applicant may be asked whether he or she successfully met assigned sales quotas.)

The Massachusetts statute provides that either the affected individual or the attorney general has the right to sue any employer who violates the provisions of the law related to prohibited salary inquiries. Though an affected individual can recover liquidated (double) damages plus attorneys' fees for "any damages incurred," proving economic damages might be challenging.

Vermont

Vermont's law, entitled "An Act Relating to Inquiries About an Applicant's Salary History," went into effect on July 1, 2018.

The Vermont law specifically prohibits all employers, regardless of size, from seeking information related to past or present compensation from either the prospective employee or any of that individual's current or past employers.

"Compensation" is defined broadly and includes wages, salary, bonuses, benefits, fringe benefits and equity-based compensation.

Vermont employers are also prohibited from requiring a prospective employee's past compensation to meet a minimum threshold, and from determining whether to interview an individual based on his or her salary history. Thus, compensation history cannot be taken into account even if an employer happened to learn that information from a source other than the applicant.

Employers should be aware that there are certain carve-outs to the Vermont law. Specifically, prospective employees are not prohibited from voluntarily revealing past salary information; and, in such instances, employers are not prohibited from confirming the information with past employers, but only after making an offer of employment (complete with a compensation offer).

The Vermont law explicitly protects an employer's right to ask a prospective employee about his or her salary expectations and to provide prospective employees with information about the wages, benefits, compensation, or salary offered in relation to a position.

The Vermont law does not specify an enforcement mechanism.

Connecticut

Though it was enacted approximately two weeks before the Vermont Law, Connecticut's "Act Concerning Pay Equity" did not go into effect until Jan. 1, 2019.

Connecticut's law specifically applies to all employers of one or more individuals and prohibits an employer from inquiring, or directing a third party to inquire, about a prospective employee's wage and salary history.

The Connecticut act defines "wage" as "compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation."

Employers may inquire about a prospective employee's compensation structure, so long as they do not ask the prospective employee about the value of the elements of that compensation structure.

The Connecticut act provides carve-outs for when a prospective employee volunteers salary information and for any federal or state law that specifically authorizes the disclosure or verification of salary history for employment purposes.

Connecticut's law includes a private right of action allowing courts broad freedom to fashion appropriate remedies, including "compensatory damages, attorney's fees and costs, punitive damages and such legal and equitable relief as the court deems just and proper."

Other states and municipalities

Though only these three New England states currently have laws on the books prohibiting prospective employers from inquiring about salary history, similar legislation has been introduced in Maine, New Hampshire and Rhode Island.

The recent New England legislation seems to be a part of a growing national trend. As of this writing, four additional states (California, Delaware, Hawaii and Oregon) and Puerto Rico have enacted similar prohibitions that apply to both public and private entities, while another four states (Louisiana, New Jersey, New York and Pennsylvania) have adopted laws prohibiting public entities from asking applicants for salary history information.

Employers should also be aware that a number of municipalities, including San Francisco, Philadelphia, New York City, and Albany and Westchester counties in New York have passed similar measures that extend to private sector employers.

What employers should do now

Given the recent proliferation of laws prohibiting employers from inquiring about prospective employees' salary history information, employers are encouraged, in conjunction with counsel, to review the relevant laws in all jurisdictions in which they do business. Employers who are comfortable banning salary history inquiries altogether — particularly multi-state employers — may decide that doing so is the easiest way to comply with all such laws.

Whether by choice or because of a legal mandate, employers who no longer ask prospective employees for their salary history as a part of the hiring process must reconsider how to set salaries for new employees.

There are several options. First, because most of these new laws do not prohibit asking prospective employees about their salary expectations, that can provide a viable option for gauging an offer.

Second, employers might use industry data in order to determine fair and competitive salary offers.

Third, an employer might consider that the salary current employees are being paid for the same work provides a good baseline for an offer. However, regarding the third approach, employers in states such as Massachusetts must be able to establish that any salary differences between male and female employees can be justified according to the allowable criteria (e.g., differences in experience or education or merit pay).

But to the extent that an employer continues to find salary history information useful, it should carefully consider the specific prohibitions of each relevant law.

Because the issue is governed by a patchwork of state and municipal laws, each with its own specific prohibitions and exceptions, and because of the ever-increasing number of jurisdictions passing these types of laws, employers should carefully tailor and frequently update their policies and practices. NEIH

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Jury selection for harassment cases in the #MeToo era

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prospective juror's experience and for the person's privacy as you probe these sensitive topics, since a juror may resent an overly invasive question and, if seated, hold it against you and your client.

4. Inquire as to general attitudes about harassment. In addition to personal experience with harassment and views about harassment lawsuits, it is useful to inquire as to attitudes about sexual harassment more generally.

Do they believe that allegations of sexual harassment are always true? Do they believe that all or most of the accused who deny allegations of harassment are lying?

Tailor the questions to the facts of your case. For example, in a case with a male alleged harasser, ask whether they believe that most or all men have engaged in sexual harassment at work. A juror's general biases about sexual harassment can easily infect a juror's view of the plaintiff, defendants and allegations in a specific case.

5. Focus on uncovering jurors biased against your client. The best proposed voir dire will be focused and succinct. You are far more likely to persuade the judge to ask your proposed questions if you present a streamlined set of questions that are clearly focused on the claims at hand.

In drafting such targeted questions, remember that the goal is not to air all views about harassment but to uncover the potential jurors who are biased specifically against your client. Therefore, every question should be focused specifically on rooting out those jurors to set up a for-cause challenge, or to identify those on whom you may want to use your limited peremptory strikes.

If you represent the defense, ask whether the fact that this is a sexual harassment case causes the prospective juror to feel one way or the other about the company or individual defendants. Ask whether, if the evidence justifies it, the juror could find in favor of the defense just as easily as the plaintiff. Jurors are often surprisingly candid about their biases, especially if strongly held.

Given how many members of the public have personal experience with harassment, or strong views on the subject, the process of empaneling a jury can be more time-consuming in a sexual harassment case than in other types of employment matters.

But following the above five principles offers a focused strategy for empaneling a juror who is ready to hear your case with an open mind. NEIH

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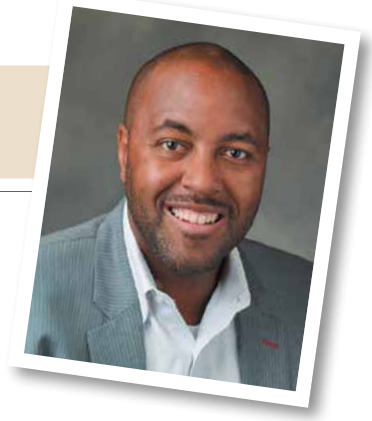

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A. At a firm, when an issue comes up, I have a pretty good sense of how a court's going to view it, what the settlement value of a case might be, which ones to push forward. Having that firsthand knowledge, having been on the field, informs making the call now that I'm more like a coach, calling the plays instead of executing them. It's impossible to know all the changes in all of the laws across every jurisdiction. It's helpful that our outside counsel, when there's a change in the law, send us updates.

We keep some pretty sophisticated metrics about what issues keep coming up. So if we see that we're having ADA issues come up in a certain jurisdiction time and time again, we can meet with our employee relations group and dispense training so we make sure that nothing becomes a systemic issue. Sometimes people just don't understand the policy, and maybe we need to reinforce it.

Q. *What are the most challenging regulatory issues that Liberty Mutual has faced since you arrived?*

A. We haven't seen a lot of issues yet about this, but employers are struggling with what to do with marijuana. It's become legal in a number of states, so what does that look like in the workplace? Obviously, you can't come in impaired, but determining whether somebody is impaired is difficult. I've talked to a number of employment lawyers and colleagues, and we're all struggling from a policy perspective with what that looks like.

I'd be remiss if I didn't mention #MeToo. The law hasn't changed on sexual harassment; what's changed is people are being believed, and people have the courage to come forward. That's an issue that you have to constantly monitor.

And a close cousin is bullying. Almost any serious racial, sexual or sexual orientation harassment case has some element of bullying. Really, it's about creating the kind of environment where you would want to work and making sure everybody that works for us experiences the same positive environment.

Q. *More than 170 GCs and corporate legal officers recently signed an open letter saying they would direct their outside legal spending to firms that commit to diversity and inclusion. Has Liberty Mutual been involved in similar efforts?*

A. We signed on to ABA Resolution 113, and we actually were ahead of the curve because that involves sending a survey to your firms and gathering data. We had already been collecting this type of data on usage on our matters for quite a while. It's very important to us and it's something that we stress.

We have a number of initiatives aimed at increasing the diversity of our outside counsel. Liberty has measured usage of women and people of color for quite a while, so we have metrics to see who's doing well and who's not. I think the whole industry is struggling, and the benefit of this is to see trends and also to send a very clear signal to our outside counsel that this is important to us.

Q. *Do you think measures like the open letter are effective in addressing the problem?*

A. Unfortunately, the problem is really bad. I've been practicing for about 20 years, and over those 20 years, the diversity numbers have not moved much. The percentage of African-American partners went from 1.1 percent to 1.7 percent from 1997 to 2017. No one would accept that as a business result. No one would accept that rate of profit growth over 20 years.

We need to deploy a number of strategies. Last year, we brought in women and diverse attorneys and held a Liberty boot camp to train people so that when we get the retort, "We don't have anyone who's prepared to do your work," we can say, "Well, these people are ready." I think it's going to take all of these things, just like solving any significant business problem — hiring, mentoring, reaching down, getting kids just thinking about law school.

Q. *How would you assess Boston's progress in terms of diversity?*

A. I'll be totally honest: I think Boston thinks of itself as being more progressive than it actually is. I don't think it actually is all that progressive, especially as it relates to race. Boston still has a reputation for being a hard place to practice.

I think part of it is that Boston is a very intellectualized place, with a lot of institutions of higher learning. When you think about what we sell as lawyers and about all of the stereotypes about certain groups of people, it doesn't surprise you that we haven't made our way out of a place where Boston is a tough place for people of color.

There's a lot to overcome, and when you think about the history, it's recent history. When I talk to my son about busing, I say, "These people in these pictures, they're still alive, and the people that were throwing rocks, they're still alive, they're still here." There's a will there to be better, but we're just not there yet.

Q. *In college, you were a forward on the men's basketball team at Holy Cross, reaching the NCAA Tournament in 1993. What lessons did you learn playing basketball that have helped you as a lawyer?*

A. '93 was my freshman year, and we went to the tournament and got a ring, and it was beautiful. My very last game was also in the Patriot League championship, and we lost. The sun came up the next day both times. When I went to the tournament, I had to come back to school and go back to class. Life went on. Same thing my senior year, standing on the court watching the time tick down on my career. Life went on. There's almost always another chance.

I also like that sports is not war. It's not combat. You can have friends that you compete against, and I think the law's the same way. I had a contentious case that went on for multiple years when I was in a firm. I lived in Brookline and I was taking the Green Line. The lawyer on the other side lived in Newton and was about five stops after me. We would fight in court — we went all the way to the SJC — and then ride the train home and talk about our kids and our lives, and that was just beautiful. NEIH

Employee suit over 'imprudent' 401(k) investments can proceed

Continued from page 3

tion, PTE 77-3, which provides a prohibited transaction exemption for employee benefit plans that invest in in-house mutual funds so long as certain conditions are met.

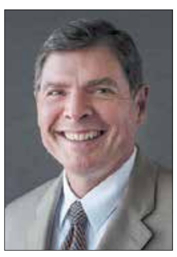
The plaintiffs contended that the defendants could not satisfy a condition that "all other dealings" between their 401(k) plan and Putnam were any less favorable to the plan than dealings between Putnam and other shareholders investing in the same Putnam funds.

According to the plaintiffs, their plan did not benefit from an arrangement offered to third-party plans that invested in Putnam funds under which revenue sharing offset the payment of service fees.

However, the trial judge found that Putnam's discretionary employer contributions to the plaintiffs' 401(k) meant that their plan was treated more favorably than third-party plans that benefitted from revenue sharing.

The 1st Circuit determined that the trial judge erred in his analysis on that point.

"Putnam cannot point to those contributions to offset funds Putnam charges (or withholds from) the Plan in its capacity as a plan fiduciary," Kayatta wrote. "To hold otherwise would be to allow employers to claw back with their fiduciary hands compensation granted with their employer hands."



"The defense would have you believe that … you need to prove the decisions they made were 'objectively' imprudent. The court said you can prove this in several different ways, one of which is to use index funds as a marker for how you judge the performance of imprudently chosen funds."

— James H. Kaster, plaintiffs' counsel

Finally, the panel addressed the dismissal of the plaintiffs' claims that Putnam acted imprudently in selecting plan investment options and breached the duty of loyalty by engaging in self-dealing.

The trial judge found that PBIC breached its fiduciary duty in automatically including Putnam funds as investment options for the plan and then failing to independently monitor the performance of those funds.

The defendants argued, and the lower court judge agreed, that the defendants nonetheless had no liability for breaching the fiduciary duty of prudence because the plaintiffs were unable to show they sustained losses as the result of any such breach.

To show loss in the ERISA context, the 1st Circuit turned to well-established trust principles.

"We … hold that an ERISA trustee that imprudently performs its discretionary investment decisions, including the design of a portfolio of funds to offer as investment options in a defined-contribution plan, 'is chargeable with … the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered,'" Kayatta wrote.

The plaintiffs' expert testified that the 401(k) plan paid a premium of $30 to $35 million to obtain net returns that fell below the returns generated by the passive investment options that could have been offered by PBIC. The 1st Circuit found that evidence sufficient as a matter of law to establish a prima facie case of loss.

The panel observed that the circuits are divided on who bears the burden of proving or disproving causation once a plaintiff has proven a loss in the wake of an imprudent investment decision.

Turning once again to "ordinary trust principles," the panel concluded that the burden-shifting scheme adopted by the 4th, 5th and 8th circuits was the correct approach, rejecting 6th, 9th, 10th and 11th Circuit decisions placing the burden of proof on the plaintiff. NEIH

Benefits of 'B to B' arbitration come under scrutiny

Continued from page 1

Riden says Young made some very good points in *CellInfo*, points that he himself has raised with his corporate clients.

"In dealing with companies, there's a perception that arbitration is always going to be faster, cheaper and more confidential than a federal court proceeding," Riden says. "That's not always right."

Two out of three ain't bad

Matthew J. Ginsburg, chairman of the Complex Commercial Litigation Section of the Massachusetts Bar Association, says Young's opinion adds fuel to what has become a "hot button" issue.

Ginsburg's committee recently co-sponsored a CLE program addressing how transactional attorneys who draft arbitration clauses can do so in ways that achieve the goals of saving time and money in resolving disputes.

"What happens is that clauses get lifted from other agreements that might not suit the parties or their circumstances," the Andover lawyer says. 'No one has thought through how these [clauses] are going to play out."

Bruce I. Kogan teaches dispute resolution at Roger Williams University School of Law.

"Certainly, the perception has always been that arbitration is cheaper, faster and confidential," Kogan says. "My experience is it is usually cheaper but not necessarily faster."

Young wrote in his opinion that the federal court in Massachusetts has often proven to be the better option with respect to the cost and speed factors.

First, Young said that arbitration is expensive. He pointed to a high-profile California case involving the alleged misclassification of drivers for Lyft. The ride-hailing company faces having to pay millions of dollars in up-front arbitration costs in the form of $1,900 filing fees and $750 case management fees for each of the nearly 3,500 drivers in the case.

In *CellInfo*, Young added, the parties had markedly increased their potential arbitration costs by providing for pre-hearing discovery and disposition by a three-arbitrator panel. Under those circumstances, the parties' chosen dispute resolution process becomes "as expensive as the full panoply of federal court litigation," Young wrote.

The judge acknowledged that federal litigation is "expensive as well — too expensive." However, he concluded it was plainly a myth that arbitration is always a bargain by comparison.

Judge Smith agrees with Young with regard to up-front costs.

"There's no question that it costs more to initiate a commercial arbitration than it would be to file a case in federal court because of the expenses associated with both the filing and the cost of the arbitrators," Smith says.

Noting a typical arbitrator might charge $400 an hour, Riden says Young made one of his better points on the issue of up-front costs.

"For arbitration, it's going to cost thousands of dollars up front, and it can cost tens of thousands of dollars just to pay for the arbitration over the course of the case," Riden says. "Compare that to federal court where you put a few hundred dollars on your credit card and you're off to the races."

Cost containment

The "real costs" of federal litigation come in the form of discovery, with trial costs being a secondary factor, Smith says.

"I've spoken to lots of lawyers about this," he says. "What they complain about is the cost of formal discovery. Arbitration greatly reduces that, if it doesn't eliminate it."

Riden acknowledges the popular perception that the costs of discovery in litigation far outweigh the costs of discovery in arbitration. However, he says his experience has shown that the costs tend to be comparable.

"I don't see much of a difference in terms of cost between conducting discovery in federal court as opposed to conducting discovery in arbitration," he says. "You're still going to have to pay for the same forensic experts in both cases."

According to Keith A. Minoff of Springfield, Massachusetts, who serves as an arbitrator in commercial disputes as part of his practice, the cost of discovery in arbitration largely depends on the scope of discovery agreed to by the parties.

"In my experience, it's unusual though not unheard of to take depositions of witnesses prior to the arbitration hearing," Minoff says. "There might be an exchange of documents, but often there are no interrogatories and no depositions, so the costs for discovery would be substantially less in arbitration."

But Ginsburg says he has been involved in the arbitration of cases in which extensive discovery has occurred by agreement of the parties, driving up the cost of the proceeding.

"If parties really want an efficient resolution of disputes, then what they need to do is build into their arbitration clauses limitations," Ginsburg says. "Instead of saying nothing about discovery, they should say, 'There shall be no discovery.'"

Clients can control their arbitration costs considerably by providing that the matter is heard by one arbitrator rather than a three-arbitrator panel, Minoff says.

"If you have three people and they're charging $400 dollars an hour, there's $1,200 dollars an hour for every hour of arbitration," he points out. "If you did an eight-hour arbitration, that's nearly $10,000 just for the arbitrators for a day. That's almost $50,000 a week."

According to Ginsburg, all too often the drafters of arbitration clauses include without much thought boilerplate provisions calling for a three-arbitrator panel — when a single arbitrator would satisfy the parties' needs.

"The three-arbitrator panel is just a massive cost-driver," Ginsburg says.

Lengthy arbitrations?

Young wrote that if the parties in *CellInfo* had "genuinely" committed to court adjudication, the case would have been resolved "before arbitration could get off the ground."

So long as at least one of the parties is committed to speed, cases in Massachusetts federal court are "markedly faster," capable of being resolved "5-8 months start to finish," the judge stated.

In the right case, Ginsburg says, it is possible to get an evidentiary hearing before a judge within two to four months. On the other hand, he says he has been involved in arbitrations that went to hearing within two or three months.

But Kogan observes that arbitration clauses in commercial contracts typically designate a forum such as the American Arbitration Association, which has its own set of rules.

"That means there is opportunity for parties to slow things down through the use of procedural devices," he said.

According to Riden, a main benefit of litigation is that a party can start "pulling levers" to get rulings from a judge on dispositive motions much faster than parties can get decisions on the merits from an arbitrator.

"Typically, an arbitrator is not going to issue a decision on the merits in a case until the very end of the dispute," Riden says. "Whereas in a federal or state court case, you ask for dispositive rulings up front or move for a preliminary injunction. Then you will have input from a decision-maker at the outset of a case."

But Minoff takes issue with generalizations that litigation is cheaper and faster than arbitration.

"With arbitration, it varies a lot," he argues. "If there's no issue as to arbitrability and assuming you're using AAA rules, the process for selecting an arbitrator and selecting a venue and dealing with pre-hearing issues can go fairly smoothly."

When parties cooperate, an arbitration hearing can be scheduled "within a few months" of the filing of a demand for arbitration, he says.

Cloak of confidentiality

Young conceded that, even though judges can issue orders to protect sensitive information like trade secrets, arbitration does trump litigation as far as keeping business disputes from the eyes of the public, competitors and customers.

"In arbitration, CellInfo and American Tower can cloak themselves in secrecy; in federal court they cannot," he wrote.

Riden says he typically advises clients to insert arbitration clauses in their contracts when he knows the client cares more about the confidentiality as opposed to the cost of a proceeding.

"Absolute confidentiality can be provided in an arbitration, but it certainly comes at a cost," Riden says.

For business clients that place a priority on confidentiality, there is little that can be done to make the federal courts more attractive, Smith says.

"Our whole system is based on openness and accessibility," he notes.

And while businesses are attracted by the confidentiality afforded by arbitration, another attraction is that arbitration decisions are typically non-appealable by agreement of the parties, Kogan says.

"Usually, 'one and done' is commercially desirable," he says.

Smith commends Young for bringing the issue of arbitration versus litigation to the fore. Not only is it good that attorneys and their clients re-examine arbitration, it is good for judges to reexamine how they can improve their own processes to make courts even more attractive forums for business disputes, he says. NEIH

Juries warming to discrimination, retaliation claims

Continued from page 1

more important to plaintiffs' lawyers than whether jurors would be willing to provide damages for emotional distress, Fogelman says.

"There are a minority of people who do not believe that emotional damages are legitimate," he says.

Springfield attorney Tani E. Sapirstein says she had used panel voir dire only once in an employment case but plans to use it more frequently going forward.

"It is amazing what people will tell you when you engage in discussion," Sapirstein says, recounting that several jurors acknowledged they would have a problem following the judge's instructions on awarding damages for emotional distress and punitive damages.

But Fogelman says voir dire is also helpful to learn whether jurors have personal experiences with discrimination or harassment in the workplace, and whether they have ever been fired or had to terminate someone else's employment.

"We simply didn't have access to that information before," he says.

The 2014 changes in the law also allowed plaintiffs' attorneys to begin suggesting a specific monetary amount for damages to jurors.

That, too, "can be quite helpful in the right case," Fogelman says, though he acknowledges that an attorney doing so "obviously runs the risk of undershooting or overshooting, which could prove to be problematic."

He points to the $28 million verdict a Suffolk Superior Court awarded in May to Brigham & Women's nurse Gessy Toussaint after more than three days of deliberations. Her attorney, Allison A. MacLellan of Dorchester, had suggested that number.

Back in January 2017, Boston attorney Philip J. Gordon suggested a $15 million figure to the jury deciding a case brought against the city of Brockton by Russell Lopes. The plaintiff alleged he was denied a job as a diesel mechanic with the Department of Public Works due to his race. The jury instead awarded $4.05 million.

"Oftentimes, jurors simply don't know" what a reasonable number might be, Fogelman says.

Changes in attitude

The last couple of years have seen prominent men like film producer Harvey Weinstein, Fox News CEO Roger Ailes and "Today" show host Matt Lauer face consequences for particularly egregious examples of sexual harassment, giving rise to the #MeToo movement.

Underlying the #MeToo movement is a newfound empowerment, which may be spreading into other areas of employment law, theorizes Marblehead attorney Mark M. Whitney, who previously practiced at a Boston management-side employment boutique.

Fogelman agrees.

"This is a very volatile climate in which we find ourselves in this country, and to the extent that a jury has found that a company has violated the law, whether it is discrimination, sexual harassment or retaliation, juries are demonstrating their willingness to hold companies accountable for their misconduct," he says.

In March, Jonathan J. Margolis and colleague Beth R. Myers helped win a verdict of over $2 million in a sex discrimination and retaliation case on behalf of Judy Racow, a veteran Winthrop police officer.

Though Margolis says he's not certain #MeToo, specifically, had an effect in Racow's case, he acknowledges there has been more discussion in society about discrimination and its effects.

Rodgers agrees, pointing to the proliferation of dash cam videos, which has helped overcome jurors' resistance to the idea that racism and discrimination are still happening.

Moreover, judges are being trained on implicit bias, and discriminatory arrest and sentencing practices have also increasingly entered the public's consciousness, the Boston lawyer notes.

Whitney says he has detected a trend of people who may later become defendants in employment lawsuits by "following the president's lead," thinking they don't have to be "PC" anymore and instead can be brash and obnoxious in the workplace.

Rise of emotional distress, punitives

Whitney says he came away from a recent seminar hosted by the Massachusetts Employment Lawyers Association struck by the size of jury awards for emotional distress not backed by medical evidence, what some call "garden variety" emotional distress, a term the plaintiffs' bar disfavors.

Jurors are increasingly inclined to accept "soft" testimony about how discrimination or retaliation impacted a plaintiff's family, or mood and outlook on life, he says.

In a blog post about the James Beresford age bias verdict, Whitney theorized that the jury may have been moved by the plaintiff's long, generally spotless history with his employer, Charles River Automotive, and his likability as a witness. Beyond the timing of his termination and being called an "old timer" by the general manager, Beresford seemingly had not put forth the type of "remarkable or particularly shocking evidence" that in the past would have been needed to justify such a verdict, Whitney wrote.

Sapirstein says that discrimination cases — more so than retaliation cases — are "still hard to win." But once a jury becomes convinced that discrimination or retaliation has occurred, the door to the vault seems to be swinging open wider.

Case in point: Last June she convinced a Hampden Superior Court jury to award $1.9 million in damages to Dr. Francis J. Duda, a 73-year-old pediatrician born with cerebral palsy who claimed he had been fired because of his disability and age.

The phenomenon is not limited to Massachusetts, Sapirstein notes, pointing to a recent case in which a jury in Miami awarded $21 million to a hotel dishwasher — a devout Christian missionary born in Haiti — because the hotel had forced her to work on Sundays.

Jurors are increasingly recognizing that discriminating on the basis of gender or race "is a bad way to run a business or government agency," Margolis says.

That acknowledgement may be manifesting itself in a newfound openness to assessing punitive damages, which juries had historically been "hostile" to, Margolis adds.

In the Winthrop police officer's case, the jury awarded Racow $676,000 for emotional damage and twice that — $1,352,000 — in punitive damages. The award for the pediatrician with CP, too, had a large punitive damage component ($1,146,000).

Perhaps an even more striking example of the newfound willingness of juries to award punitive damages came on Oct. 15, 2015, when a panel awarded $10 million to plaintiff Chantal Charles, a senior administrative assistant in Boston's Treasury Department.

Superior Court Judge Elizabeth M. Fahey subsequently ruled that the punitive damages award was excessive and reduced it to $2 million. Charles' attorneys appealed, asking for the jury's punitive damages verdict to be reinstated. They argued before the Appeals Court on Nov. 15 that Fahey used an incorrect threshold standard for remittitur and made legal errors when analyzing the reasonableness of the jury award. A decision in the case is pending.

But Margolis suggests that Fahey's decision is an outlier. Judges seem to be more inclined these days to uphold a punitive damages award, he says.

What to make of fewer filings

Even as jury awards have gotten bigger, however, the number of discrimination charges filed with the Massachusetts Commission Against Discrimination has been on a steady decline, from a peak of around 6,000 filings to 4,150 new complaints in 2002, to 3,082 in 2016, and 2,951 in 2017, according to MCAD's annual reports.

Similarly, Equal Employment Opportunity Commission charges seem to have peaked in FY 2010-2012, and have been down significantly in recent years, particularly FY 2017, when they hit a 10-year low, according to Boston management-side attorney Peter J. Moser.

"To me, this factor — number of filings — would seem to be a better indicator of a change in public opinion than a few plaintiffs-side verdicts," Moser says.

However, the EEOC in October released preliminary data for FY 2018 specific to sexual harassment, which revealed a 12-percent increase in charges filed with the EEOC alleging sexual harassment.

The EEOC also chronicled an increase of more than 50 percent — from 41 to 66 — in the number of harassment lawsuits it had filed in FY 2018, and said that it had recovered nearly $70 million for victims of sexual harassment through litigation and administrative enforcement in FY 2018, up from $47.5 million in FY 2017, a hike of about 47 percent.

And a decrease in sheer number of filings is not necessarily incompatible with the exploding size of verdicts, others note.

No doubt, the increased attention being brought to issues of discrimination and retaliation in the workplace has increased the appreciation of the value of compliance, Whitney says. Companies are now more likely to proactively call and ask for training or give their human resources directors a seat at the table with senior management, and that could explain a reduction in the number of filings, he says.

A decrease in the number of filings is also a "symptom of a strong economy," Whitney says.

If someone can find new work quickly, they are less apt to "sit at home and stew" and come to construe their dismissal as having been based on improper considerations, he says.

If there is an economic downturn and more people are out of work, Whitney says he expects an "explosion of claims." NEIH

Employment awards at a glance

Sept. 28, 2018
Serabian v. SAP America Inc.
$1.9 million (if post-trial motion for automatic trebling of damages granted)
Issue: Failure to pay commission, retaliation
U.S. District Court

Aug. 28, 2018
Roosa v. Central Motors, Inc. of Norwood, et al.
$3.02 million
Issue: Gender discrimination and sexual harassment
Suffolk Superior Court

June 18, 2018
Duda v. Baystate Medical Practices
$1.9 million
Issue: Disability discrimination
Hampden Superior Court

May 24, 2018
Toussaint v. Brigham and Women's Hospital
$28.213 million
Issue: Discrimination and retaliation
Suffolk Superior Court

March 28, 2018
Racow v. Town of Winthrop
$2.028 million
Issue: Gender discrimination
Suffolk Superior Court

Jan. 18, 2018
DaPrato v. Massachusetts Water Resources Authority
$1.2 million
Issue: Retaliation for taking approved medical leave
Suffolk Superior Court

Dec. 22, 2017
Beresford v. Charles River Automotive
$1.2 million
Issue: Age discrimination
Norfolk Superior Court

April 14, 2017
Rinsky v. Cushman & Wakefield, Inc.
$1.275 million
Issue: Age discrimination
U.S. District Court

Jan. 30, 2017
Lopes v. City of Brockton
$4.05 million
Issue: racial discrimination
Plymouth Superior Court

— Kris Olson