LeClairRyan Accountant and Attorney Liability Newsbrief

Fall 2016

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Massachusetts Amends Equal Pay Act

by Matthew M. O'Leary

Massachusetts recently amended its pay equity statute, which substantially enforces the protections of the Massachusetts Equal Pay Act. These changes will go into effect in July 2018. The prohibitions against discriminating on the basis of gender in the payment of wages remain in place. As described below, the amended statute is intended to promote salary transparency, prohibit employers from asking candidates for employment about their salary history, and provide incentives for employers that conduct salary reviews.

The amended Massachusetts pay equity law prohibits employers from asking applicants about prior earnings or using prior earnings as a benchmark in setting compensation. The law allows employers to ask about salary information, including contacting an applicant's former employers seeking salary information, only after an offer of employment with compensation has been negotiated and made to the applicant. The law states an employer cannot stop employees from asking about other employees' wages, or disclosing their own wages. In order to protect confidential information of other employees, however, there is no obligation of an employer, to disclose other employees' wages. These changes are aimed at establishing a workplace environment where employees can talk about wage gaps and compel employers to make changes.

The law also provides that differences in pay between employees are lawful when justified by merit, seniority, geography, travel requirements, and/or education, training or experience to the extent they are reasonably related to the particular job in question and consistent with business necessity. The amended statute encourages employers to perform salary evaluations to detect disparities between employees' pay. It establishes a new affirmative defense for employers where they will not

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be liable if they have undertaken, in good faith, a pay disparity analysis and have taken reasonable steps to address pay equity issues. To qualify for this defense, the pay disparity study must meet certain criteria, and the statute directs the Attorney General to issue forms that employers may use for the pay disparity study.

The amended law extends the statute of limitations for bringing claims against employers for a discriminatory compensation decision from one year to three years, and also states employees do not need to file a claim with the Massachusetts Commission Against Discrimination but can proceed directly to court. The statute allows for class action litigation, stating that employees may proceed on behalf of themselves and other "similarly situated" employees. The damages for a violation of the statute remain the same. A plaintiff can receive the amount of underpayment, plus liquidated damages, and reasonable attorneys' fees and costs.

Employers need to take steps to ensure they comply with the new amendment. Employers should amend application forms and properly train employees responsible for hiring to ensure applicants are not asked about their former or current salary. Employers should consider conducting a pay disparity study in order to take advantage of the new affirmative defense described above. Employers who do conduct such a study may want to hire an attorney in order to advise them and, potentially, to have the study protected from disclosure by the attorney-client privilege.

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Revisiting Cyber Insurance: Are You Covered?

by Stephen M. Faraci

Increasingly, companies are looking to insurance to help manage their cybersecurity risks and defray losses sustained from data breaches. Losses can range from reputational damage, business interruption, and professional fees for computer forensic services and attorneys to handle regulatory inquiries or lawsuits. In the event of a data breach or other cyber incident, recent rulings suggest that traditional insurance policies, like a company's Commercial General Liability Policy (CGL), may provide coverage, or, at the very least, a defense to lawsuits spawned by cyber events.

How do you know if you are covered under traditional policies? First, carefully review the language of traditional insurance policies, such as CGL policies, to see if a data breach or the release of personally identifiable information (PII) fits within the policy's definition of a covered event. Even if it looks like the language is broad enough to include data breaches or other errors that result in the release of PII, it still may not be enough. Some courts have delved into the parties' intent and declined to find coverage where the parties did not clearly intend to cover cyber incidents. Other courts have strictly interpreted the language in the policy, finding coverage regardless of whether the parties anticipated cyber events at the time the policy was issued.

Coverage cases are highly fact specific. Coverage may not only depend on the language in a policy, but it may also turn on the overall attitude of the courts toward the intended scope of coverage for cyber events. This uncertainty suggests that a company should reconsider cyber insurance, if it has not already purchased such a policy. While cyber insurance policies are still non-standard, with coverage varying from company to company, it is far more likely that a court will find coverage under a cyber insurance policy specifically intended to deal with cyber events than general language in a traditional CGL policy.

Rather than roll the dice on coverage under traditional lines of insurance, it may be time to focus on specific cyber insurance coverage as a part of your company's comprehensive cyber risk management strategy. Be proactive. Consult with experts on your existing coverage and understand what policies are available in the market. Don't wait until an incident to learn the scope of your coverage because it may not be as broad as you originally thought.

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FTCA and Special Limitation Periods - Sometimes a Stitch in Time Saves Nine

by Justin J. Twigg, Esq.

The holding in *S.O. v United States*, 2016 WL 554797 (September 11, 2016), underscores the finality of a statute of limitations and why it is important for an attorney to carefully research and review the statute of limitations applicable to a client's claim. In *S.O.*, the United States District Court for the District of Massachusetts denied a motion for summary judgment due to a genuine dispute as to a material fact concerning the accrual of a cause of action under the Federal Tort Claims Act, 28 U.S.C. §§2671 et seq ("FTCA"), which requires that an administrative notice of a claim must be provided to the proper agency.

S.O. filed suit on July 5, 2012, through her Guardian ad litem and next friend, for injuries arising from her birth against her obstetrician and the hospital. The suit was timely under Massachusetts' three year limitation period of her birth, June 18, 2009. However, it was untimely under the FTCA's two year limitations period.

During her birth, S.O.'s shoulder became caught by her mother's pubic bone, requiring the physician to use force to complete the delivery. S.O. suffered nerve damage as a result. The injury to the shoulder was discussed during a post-partum consult on July 9, 2009. A further consult on December 14, 2009 at the Boston Children's Hospital suggested that the injury appeared to be resolving. Unfortunately, the injury did not resolve and a further consult took place on December 13, 2010. At that time, a physician noted S.O. continued to show no significant active external rotation of her shoulder.

S.O. brought suit on July 5, 2012 against the delivering physician, and the hospital, Good Samaritan Medical Center. S.O. alleged the physician used excess force to complete the delivery. In November, 2014, S.O.'s attorney discovered the physician was an employee of Brockton Neighborhood Health Center, which was federally funded at the time of the delivery. As a result, the United States was substituted as a defendant on May 29, 2015. The United States moved for summary judgment, alleging S.O. had failed to provide notice to the appropriate agency within two years of the date on which she (through her parents or guardian) knew or should have known of the claim.

The United States argued the cause of action accrued shortly after S.O.'s birth because her mother became aware of the injury during a post-partum consult with the physician on July 3, 2009. At that time, the physician prescribed physical therapy. The United States argues the plaintiff was, thus, required to give notice by July 3, 2011, which the plaintiff did not do.

In opposition to the motion for summary judgment, the plaintiff filed affidavits from a board certified pediatric neurologist who opined S.O.'s mother knew or should have known that her daughter's shoulder injury was going to be permanent after the December 13, 2010 clinical visit. An affidavit from a second physician opined the cause of action did not arise until it was known that the nerve injury was permanent. The Court ruled the affidavits created an issue of fact precluding summary judgment. It would be for the jury to decide when the mother knew or should have known about the claim.

Although S.O. prevailed at the summary judgment stage, this case is a reminder for plaintiff's attorneys to perform the necessary due diligence, as soon as possible, to determine which statute of limitation applies to the claims. Numerous factors can affect which statute of limitation applies, including the applicable law, the forum's choice of law doctrine, the nature of the claim, and whether the claim is governed by the FTCA or some other federal law.

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Massachusetts Appeals Court Holds Standard for Attorney Fee Lien After Voluntary Withdrawal Is Objective "Good Cause," Not Lawyer's Subjective Reasons for Terminating Representation

by Ben N. Dunlap, Esq.

In a recent decision (89 Mass. App. Ct. 741 (2016)), the Massachusetts Appeals Court clarified the required standard for an attorney to establish a lien claim following his voluntary withdrawal from representation of a client without the client's consent. The Court concluded "good cause" for withdrawal is an objective test and does not depend on the lawyer's subjective reasons.

The underlying case arose from a dispute between the attorney's client and the client's lender. To defend the lender's claims and press a number of counterclaims, the client entered into a contingent fee agreement with an attorney, who spent nine years conducting "extensive discovery" and opposing two summary judgment motions, eventually prevailing in two separate trials, resulting in an $8 million recovery for the client. The lender appealed, and, after a lengthy appeal process, the judgments in favor

of the client were vacated and the case was remanded for a third trial. During that time, the client repeatedly expressed frustration about the perceived delay, complained about the progress of the case and litigation tactics, and raised questions about the contingent fee agreement. After the client and its attorney were unable to agree on an arrangement for the attorney to handle the third trial, the attorney voluntarily withdrew, citing disagreements about strategy and stating that the client had "hampered" him from "exercising independent professional judgment."

Another attorney successfully completed the third trial, resulting in a judgment of approximately $27 million for the former client. Its first attorney then filed a notice of attorney's fees lien to recovery the value of his services before his withdrawal. A bench trial on the attorney fee claim followed, and the trial judge ruled the attorney had forfeited his lien by withdrawing from the case "without good cause."

Generally, an attorney who appears for a client in a proceeding is entitled to a lien for his reasonable fees and expenses. When a lawyer who has entered into a contingent fee agreement with a client withdraws from the case before the contingency occurs, the attorney may be paid the reasonable value of his services. But a lawyer who voluntarily withdraws from a case without the client's consent, and without good cause, forfeits a claim to an attorney's lien. Thus, the effect of the withdrawal, and whether it waives the attorney's lien, depends on whether the attorney had good cause to withdraw.

The trial judge determined "good cause" is a subjective test. He found a "breakdown of the attorney-client relationship and the trust that must underlie it," but concluded the attorney did not have good cause because his "subjective motivation" for withdrawing was "financial," which, according to the judge, did not constitute "good cause." The Appeals Court rejected that reasoning, holding

> The proper method for assessing good cause in determining the applicability of the attorney's lien statute in a contingency fee case ... does not involve determining the withdrawing attorney's subjective motivation, something that would be difficult to do with any confidence. Rather, ... the proper inquiry is whether, viewed objectively, the facts demonstrate the existence of good cause for withdrawal.

The Appeals Court determined the trial court's findings regarding a breakdown in trust and in the attorney-client relationship were sufficient to establish objectively "good cause" for the attorney's withdrawal. Accordingly, the case was remanded for a determination of the reasonable value of the attorney's services and entry of judgment granting him a lien.

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Murder She Wrote: First Circuit Affirms That Application of New York Statute of Limitations is Fatal to Author's Claims Against Her Accountants

by Michael T. Grant

In *Cornwell Entertainment, Inc. v. Anchin, Block & Anchin, LLP,* -- F.3d --, 2016 WL 3878159 (1st Cir. 2016) the United States Court of Appeals for the First Circuit affirmed (in part) the trial court's decision that a $51 million jury verdict in favor of well-known crime novelist Patricia Cornwell and against accounting firm Anchin, Block & Anchin, LLP must be set aside based on statute of limitations grounds. The First Circuit followed a 2009 decision by the New York Court of Appeals holding that New York's three year statute of limitations applies to tort-based breach of fiduciary duty claims. The First Circuit did, however, remand the case and allow one theory of liability to proceed.

Cornwell retained Anchin in 2005 to provide business management services to her and her company. In the ensuing years, one of Anchin's principals performed a variety of services for Cornwell, including investment management, preparation of tax returns and management of real estate transactions. The business relationship ended in 2009, and Cornwell commenced suit against Anchin shortly thereafter.

At trial, Cornwell asserted a variety of liability theories against Anchin based on its alleged mismanagement of her investments, shoddy record keeping and careless tax return preparation. Cornwell also asserted that Anchin bungled several real estate transactions which caused Cornwell to miss her deadline to submit her novel, "Book of the Dead." Lastly, Cornwell alleged that Anchin falsely implicated her in a campaign finance crime to the US Department of Justice. Immediately after the close of evidence, Anchin filed a motion for judgment as a matter of law. The trial court reserved its decision on the motion and sent the case to the jury. The jury entered a verdict in favor of Cornwell and awarded her $28.6 million in compensatory damages and $22.4 million in punitive damages. Anchin then renewed its motion for judgment as a matter of law.

The trial court allowed Anchin's renewed motion, finding that New York's three year statute of limitations applied to Cornwell's claims for negligence, breach of contract and breach of fiduciary duty. Consequently, the trial court held,

Cornwell's claims that were predicated on events which took place more than three years before she commenced the lawsuit in 2009 were barred. The trial court additionally held that M.G.L. c. 93A does not apply where the parties otherwise agreed that New York law governed the dispute. Cornwell then appealed the judgment to the First Circuit.

On appeal, the First Circuit affirmed the trial court's ruling in all respects but one. While the First Circuit agreed that New York's three year statute of limitations applied to Cornwell's breach of fiduciary duty claim, it held that the trial court erred in adopting an argument that Anchin raised for the first time in its renewed motion for judgment as a matter of law concerning Cornwell's claim that Anchin falsely implicated her in a crime within the limitations period. In so holding, the First Circuit reaffirmed the procedural rule that a movant cannot raise arguments in a renewed motion for judgment as a matter of law that were not articulated in the initial motion. The First Circuit also held, as a matter of first impression, that the absence of prejudice to the non-moving party is not an exception to the aforementioned rule. Accordingly, the First Circuit remanded the case for further proceedings on Cornwell's breach of fiduciary duty theory that was not barred by New York's statute of limitations.

Cornwell Entertainment demonstrates that litigants should be ever-mindful of the applicable statutes of limitation and choice of law issues that can serve as procedural foils to substantive claims.

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Supreme Judicial Court Clarifies Rule On Post-Trial Contact With Jurors

by John W. Moran

In *Commonwealth v. Moore*, 474 Mass. 541 (2016), the Supreme Judicial Court of Massachusetts ("SJC") considered the effect of a July 2015 amendment to the rules of professional conduct concerning the permissibility of communicating with jurors after a trial. The SJC held that the amendment to Mass. R. Prof. C. Rule 3.5(c) overturned the longstanding Massachusetts rule prohibiting lawyers from initiating such communications without court approval and supervision. The SJC emphasized, however, that an attorney must give notice to the opposing party before initiating such communications, and that such communications may not include inquiry into the content of jury deliberations or jurors' thought processes. As a practical matter, the decision leaves counsel with a limited and somewhat uncertain scope of permissible inquiry. Thus, Massachusetts lawyers should tread very carefully in initiating any post-trial communications with jurors so as not to run afoul of the professional conduct rules.

In *Moore*, a criminal defendant was tried on four counts of first degree murder and armed robbery. During jury deliberations, the trial court dismissed one juror after it came to light that the juror had conducted independent research into the case, in violation of the court's instructions. The defendant requested that the trial judge declare a mistrial, on the basis that the juror's improper research tainted the entire jury. The infamous massacre at Sandy Hook Elementary School in Connecticut also occurred during jury deliberations, raising further concern that extraneous influences may have entered into jury deliberations. The trial judge refused to declare a mistrial, and the remaining jurors found the defendant guilty of the murder and armed robbery charges.

In July 2015, more than two years after the trial, but while the defendant's appeal remained pending, the SJC adopted an amendment to Rule 3.5(c). Prior to the amendment, the longstanding rule in Massachusetts was that lawyers (and their clients) were prohibited from independently contacting jurors after a trial. Post-trial contact with jurors was permitted only under court supervision, and "only if the court finds some suggestion that there were extraneous matters in the jury's deliberations." The July 2015 amendment to Rule 3.5(c), however, provides that "[a] lawyer shall not ... communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer, either directly or through communications with the judge or otherwise, a desire not to communicate with the lawyer; or (3) the communication involves misrepresentation, coercion, duress or harassment."

Appellate counsel for the defendant in *Moore* interpreted the amended Rule 3.5(c) as overturning the prohibition on juror contact established in the *Fidler* case. Defense counsel sent a letter to the assistant district attorney advising that he intended to contact the jurors who had participated in the defendant's trial. The ADA responded that "[i]t is the Commonwealth's position that post-conviction inquiry of jurors remains prohibited as a matter of law." The Commonwealth then filed an emergency motion

to prohibit inquiry of the jurors. The trial court reported questions of law concerning the amended Rule 3.5(c), which the SJC addressed in its decision.

The SJC began by disagreeing with the Commonwealth's position that attorney-originated communications remained prohibited as a matter of law. The SJC clarified that, in fact, the amended Rule 3.5(c) effectively overrules Fidler to the extent that case prohibited contact with jurors absent court supervision. IThe SJC emphasized, however, that Fidler remain good law in other respects. Specifically, the Court reaffirmed that "inquiry into the contents of jury deliberations and thought processes of jurors and the impeachment of jury verdicts based on information that might be gained from such inquiry" is prohibited. Inquiry into such deliberations remains "prohibited by law," and thus impermissible under the amended Rule 3.5(c).

The SJC also offered procedural guidelines to practicing attorneys and judges. The SJC stated that "[g]oing forward, on request of any party, the trial judge shall instruct the jury regarding an attorney's right to contact and communicate with jurors after trial and a juror's right to decline to speak with an attorney." The SJC clarified that, although an attorney may initiate post-trial contact with jurors without prior court approval, the attorney must send prior notice of the attorney's intent to counsel for the opposing party at least five business days before contacting any juror. The notice must include a description of the proposed manner of contact and the substance of any proposed inquiry to the jurors, and, where applicable, a copy of any letter or other form of written communication the attorney intends to send. The SJC stated that the "preferred method" of initiating contact is by written letter which includes a statement that the juror may decline any contact with the attorney or terminate contact once initiated. If an attorney seeks to initiate contact through an oral conversation, the attorney still must provide opposing counsel with prior notice of the substance of the intended communication. If, after communicating with a juror, an attorney wishes to secure an affidavit from the juror concerning alleged extraneous influences on the jury deliberation process, the attorney may do so without seeking or obtaining prior court approval, but "any such affidavit must focus on extraneous influences, and not the substance of the jury's deliberations or the individual or collective thought processes of the juror or the jury as a whole."

The *Moore* decision clearly effects a change in Massachusetts law, but the full extent of that change is uncertain. Post-trial contact with jurors remains a precarious endeavor for Massachusetts lawyers. The SJC's continued prohibition on inquiry into the substance of jury deliberations sharply limits the scope of permissible contact. In many cases, it could be difficult to see how a lawyer could explore whether jurors were subject to improper extraneous influences (permissible) without at least touching on the content of discussions between jurors (impermissible). The SJC presumably will define the line between permissible and prohibited inquiry more specifically in future cases. In the meantime, any Massachusetts lawyer considering contacting jurors after a trial is well-advised to initiate such contact with a letter – provided in advance to the opposing party – conforming to the SJC's guidance in *Moore*. It would also be prudent to give the opposing party specific, detailed notice of the questions the lawyer intends to ask jurors, so that any suggestion of impropriety can be brought to the trial court's attention and resolved before the juror contact occurs. A lawyer who contacts jurors after a trial without observing these precautions runs a risk of facing allegations of professional misconduct.

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Right to Enforce Noncompetition and Nonsolicitation Provisions Survives Bankruptcy

by Catherine A. Bednar

In a recent bankruptcy action, *In Re: Carl S. Hurvitz*, U.S. Bankruptcy Court, D. Mass., Case No. 16-11844-MSH (July 20, 2016), the Court addressed the question of whether a transportation logistics and technology company, Blue Grace Franchise, LLC, could proceed with litigation to enforce post-termination provisions in an agreement with its former franchisee, Carl Hurvitz. In order to decide whether to lift the automatic stay imposed to halt creditor actions against a debtor filing for bankruptcy, the Court had to first determine whether Blue Grace's rights to enforce the noncompetition and nonsolicitation clauses constituted dischargeable "claims" within the meaning of the Bankruptcy Code.

Under the franchise agreement, Blue Grace had granted Hurvitz a license to use its technology and services. After Hurvitz failed to make required payments, Blue Grace terminated the agreement. After learning that Hurvitz had become an employee of a competing freight logistics company, Blue Grace filed a state court suit to enforce terms of the franchise agreement prohibiting Hurvitz from competing with Blue Grace or soliciting its customers for a two-year period. Hurvitz subsequently filed a Bankruptcy petition. Blue Grace then challenged whether its lawsuit, which sought only equitable relief and not monetary damages, could be discharged.

The Court looked to the Bankruptcy Code's definition of a "claim", which encompasses a right to equitable relief only if it is an alternative to a right to payment. The Court held that the noncompetition and nonsolicitation terms in the franchise agreement provided only for injunctive relief. In addition, the Court found a liquidated damages provision in the contract dealt solely with lost profits, and did not provide a monetary damages alternative for the noncompetition and nonsolicitation terms. Accordingly, the noncompetition and nonsolicitation clauses were not claims that could be discharged in the bankruptcy proceeding. The Court then lifted the automatic stay, allowing the parties to contest the breach of the provisions in state court.

Business owners can protect their interests by including appropriate, legally enforceable noncompetition and nonsolicitation provisions in their contract. Where such provisions seek strictly equitable relief, they will likely survive even if the other party files for bankruptcy. This rule strengthens noncompetition and nonsolicitation provisions by preventing former employees from escaping their terms merely by filing for bankruptcy.

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