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THE FEDERAL CORPORATE TRANSPARENCY ACT

BY DAVID A. PARKE

The Federal Corporate Transparency Act (the Act), codified at 31 USC 5336, was enacted Jan. 1, 2021. Once this Act becomes effective, it will create new reporting requirements for many small business entities and other companies covered by the Act. The Act is intended to address the use of shell companies for money laundering, terrorist financing and other crimes, by requiring corporations, limited liability companies and other entities subject to the Act to identify those individuals who are the significant beneficial owners of the entities.

The Act will become effective after final regulations are promulgated by the Financial Crimes Enforcement Network (FinCEN). On Dec. 7, 2021, FinCEN issued proposed regulations, with commentary, regarding the beneficial ownership reporting requirements. Comments on the proposed regulations were due by Feb. 7, 2022. According to the preamble to the proposed regulations, this was the first of three rulemakings under the Act. FinCEN will also issue proposed regulations concerning access to the beneficial ownership information, and the existing customer due diligence rule applicable to financial institutions.

There are civil and criminal consequences for violation of the Act. Although reporting companies subject to the Act are required to file the reports under the Act, FinCEN commented that responsible individuals may also have liability.

When the Act goes into effect, a "reporting company," as defined in the Act, must report to FinCEN information regarding its individual "beneficial owners," and the individual "applicants" who formed the company, as well as changes to such information. The database of information maintained by FinCEN would be confidential and used for law enforcement and similar purposes.

According to its comments, FinCEN expects that tens of millions of entities may need to report under the new Act. The Act applies to newly formed and existing corporations, limited liability companies and other entities created by filing with a secretary of state, unless exempt under the Act. The Act lists 24 types of entities that are exempt from the reporting requirements. According to FinCEN's comments, "reporting companies" would likely include Massachusetts limited partnerships, registered limited liability partnerships and Massachusetts business trusts, unless exempt.

The Act also pertains to entities created or registered under the laws of a Native American tribe as well as foreign entities registered in the United States. This article will focus on entities created by filing with the secretary of state.

The 24 exemptions include public companies, governmental authorities, banks, credit unions, certain brokers and dealers in securities and investment companies and investment advisors, insurance companies, certain registered public accounting firms, public utilities and certain pooled investment vehicles. Also exempt are tax-exempt organizations described in IRC Sec. 501(c) and tax-exempt organizations under IRC Sec. 501(a). The Act also exempts an entity with an operating presence in the United States that employs more than 20 employees on a full-time basis in the United States, and that in the previous year filed federal tax returns showing more than $5 million in gross receipts or sales. The Act also exempts a dormant entity under certain conditions — the entity must have been in existence for more than one year, not be engaged in an active business, not have any assets, not be owned by a foreign person, not have had a change of ownership within the prior 12 months, and not have sent or received funds more than $1,000 within the prior 12 months.

The Act will require the reporting of information regarding both an "applicant," who is an individual who files the application to form the entity, and any "beneficial owners" of the entity. The Act and proposed regulations recognize two alternative components as to who might be regarded as a beneficial owner. One is an individual who owns or controls 25% or more of the ownership interests. The other is any individual who exercises "substantial control" over the entity.

The Act excludes certain individuals from its definition of "beneficial owner": i) a minor child, if information regarding the parent or guardian is reported; ii) a nominee, intermediary, custodian or agent on behalf of another individual; iii) an individual acting solely as an employee of an entity whose control is derived solely from his or her employment status; iv) an individual whose only interest is through a right of inheritance; or v) a creditor who does not exercise substantial control or own 25% or more of the ownership interests.

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Where beneficial ownership is determined by reference to an individual's ownership interest, the proposed regulations recognize that ownership may include a variety of interests, including convertible interests, and that an individual may exercise control by various means, including through a trust.

Where beneficial ownership is determined based on "substantial control," the Act and proposed regulations indicate that individuals in substantial control include:

- senior officers (which the proposed regulations say include the president, treasurer, secretary, general counsel, CEO, CFO and COO)
- anyone who has authority over appointment or removal of a senior officer or majority or dominant minority of the board of directors (or similar body)
- anyone with substantial influence over important matters affecting the reporting company, like:
  - the scope of business of the company, including the sale of its principal assets
  - reorganization, dissolution or merger of the company
  - major expenditures, issuance of equity, incurrence of significant debt, or approval of the operating budget
  - selection or termination of business lines or geographic focus
  - compensation schemes and incentive programs for senior officers

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- entry or fulfillment of significant contracts
- amendment of substantial governance documents and significant policies and procedures.

FinCEN commented that based on the breadth of the "substantial control" requirement, FinCEN expects that there would be at least one individual who is a beneficial owner under the "substantial control" component of the definition.

The information to be reported concerning individuals who are applicants or beneficial owners must include:

- name, date of birth, and residential or business address (the proposed regulations call for residential address, except in the case of company applicants who file the organizing documents in the course of their business)
- unique ID number from an identification document (such as a driver's license or passport), and FinCEN identifier.

An individual may obtain a unique FinCEN identifier and a reporting company may use an individual FinCEN identifier in lieu of information otherwise required about the individual.

Under the proposed regulations, the deadlines for reporting are in some cases shorter than the periods that could have been allowed by the Act. Under the proposed regulations, newly formed reporting companies must report within 14 days after formation; a reporting company created before the effective date of the final rule must report within one year after the effective date; and a reporting company must update any information regarding beneficial owners within 30 days after a change in such information.

The actual reporting requirements and deadlines will depend on the final regulations. In any event, many entities will, in the near future, be subject to new and ongoing reporting requirements under this Act. ■

STRUCTURAL FAILURE: IT SERVICES AGREEMENTS AND LITIGATION RISK

BY CHRISTOPHER J. CUNIO, NICHOLAS D. STELLAKIS AND FLORIAN UFFER

It is a business's worst nightmare. After the business transaction is negotiated, formalized and executed, after the celebrations are over and work begins, the parties' relationship hits the wall. The business matter is now in the hands of the litigators, who immediately spot why the dispute arose — terms that were overlooked in the formalization of the deal. In this article, the authors, consisting of two litigators and a transactional attorney, consider lessons learned from real-life disputes involving complex information-technology services agreements.

A thorough and well-drafted agreement is the best tool to prevent and resolve the inevitable disputes that occur in business relationships. It sets forth the essential rules for the parties and often provides the matrix for resolving disputes. But sometimes important provisions are neglected, either because the parties (i) did not foresee the particular problem that arose, (ii) provided incomplete rules to govern such a problem, or (iii) included everything essential to govern the dispute but did so in a disjointed way.

In this article, we discuss complex commercial services agreements and the peculiar pitfalls they present. These pitfalls stem from their structure and the complex subject matter they envision, a subject matter that, as a result of the exponential evolution of technology, becomes more and more intricate as new and untested technology components are incorporated. At their highest level, these agreements often involve some form of a master agreement that sets forth the general legal terms governing the parties' relationship. This is the legal backbone for the deal. Below the master agreement are "statements of work," which are the main technical component of these agreements. SOWs typically include deal-specific terms and detail the deliverables to be provided, the scope of work, the vendor's performance standards, payment and deliverables schedules, and the parties' project-specific responsibilities. Critically, SOWs either incorporate the master agreement by reference or are themselves incorporated into the master agreement. Often, parties also enter into service-level agreements, which lay out the metrics by which the vendor's performance is measured and provide for remedies or penalties should service levels not be achieved. While there are other technical building blocks to commercial services agreements, their introduction is not necessary for the purposes of this article.

SOWs, SLAs and other technical documents are the embodiment of the contemplated business deal, as they govern the services' implementation and the parties' day-to-day obligations. They are therefore heavily negotiated, and rightly so. But what often gets second-class treatment is what holds it all together: the master agreement. When a dispute arises, the terms of the master agreement can be critical. The parties can be burned not only when they fail to understand those terms and how they relate to the technical documents, but also when the master agreement omits important terms. This article describes some examples, drawn from the authors' experience, where a party overlooked the master agreement to its detriment and where the master agreement omitted terms important in litigation.[1]

The ultimate lesson here is not just one for the parties. It is for deal counsel as well. Bringing in a litigator as an adjunct to the agreement-drafting process can in many situations help the parties understand the rules that will govern a dispute that might arise and help deal counsel foresee what additional provisions are advisable to minimize pain in the event of a dispute.

ACCEPTANCE AND PAYMENT TERMS

The setting is a dispute arising from a contract to deliver computer and associated management services over multiple years. The subject matter is complex, requiring implementation of new technology and transition from an existing vendor. A dispute arises when the implementation of the promised services is repeatedly delayed, leading the customer to dispute invoices and withhold payment, in turn leading the vendor to declare a breach and demand millions in damages. But the master agreement provides that, as a condition precedent to the vendor's right to send invoices, the vendor is obligated to notify the customer that a particular service had been implemented, which would trigger a period for the customer to test the service and either accept it or reject it. Because the vendor never sent any such notices, and because the sending of the notices was a condition precedent to invoicing, the vendor took nothing but the full brunt of failing to give the master agreement the attention it required.

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THE REMEDY OF CURE

Many factors outside the vendor's control can affect its performance. Vendor form agreements therefore often include a right-to-cure provision, allowing the vendor to avoid being in breach by repairing or replacing any non-conforming deliverables. Vendors sometimes want this to be the customer's sole and exclusive remedy for such non-conformance.

In our example, the customer resists such a remedy limitation — as it should, because the vendor's deliverables are often critical to the customer's business, and the customer will sustain losses while waiting for a vendor to fix a critical deliverable. The parties' relative leverage determines how receptive the vendor is to the customer's revision. The exclusive-remedy language in the master agreement is tweaked in the customer's favor, such as by shortening the cure period or requiring the vendor to furnish substitute deliverables until it provides a permanent fix. The vendor may think that it has retained the safety of the exclusivity of the repair-or-replace remedy,

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but this may not be correct. The vendor may overlook the burdens that these customer-friendly revisions impose on it, burdens that may impede the vendor's willingness or even ability to cure when the vendor is out of compliance (as it almost always is at some time in these complex transactions). The exclusivity of the remedy may thus fail of its essential purpose, M.G.L. c. 106, § 2-719, exposing the vendor to potentially unlimited monetary damages.

Of course, this scenario can unfold differently. The customer, relegating the terms of the master agreement to an afterthought, can agree to a broad, exclusive right to cure and then be stuck waiting for the vendor to repair or replace its deliverable.

In either case, the vendor or customer might have avoided its plight had it consulted a litigator at the deal-making stage.

VENUE; CHOICE OF LAW; SERVICE OF PROCESS

Venue and choice of law are issues familiar to any litigator. It is surprising, then, that these provisions receive so little attention in commercial services agreements. Counsel misses a significant opportunity for their clients if they fail to address venue and choice of law. It is not just that these provisions can be used to the clients' advantage; the absence of these provisions can lead to much time and expense wasted on litigating what could have easily been spelled out.

Litigators are likely less familiar with the need for a provision governing service of process. Commercial services agreements frequently involve foreign entities. Anyone who has had to serve process using the Hague Convention or the laws of the foreign party's country of residence will appreciate how time-consuming and costly these are. The specifics depend on the amount of paperwork required, but service of process through the Hague Convention can easily take longer than three months and usually costs a party more than $5,000, which includes fees for service by a foreign authority and fees for translating every document included with the summons. A well-drafted provision stipulating to jurisdiction and service of process per Federal Rule of Civil Procedure 4(d), however, permits the serving party to sidestep this burdensome process. Indeed, the U.S. Supreme Court clearly stated that "parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even *to waive notice altogether*"[2] (emphasis added). Especially in cross-border transactions, the master agreement should contain such a critical provision.

A BUILDING IS ONLY AS TALL AS ITS FOUNDATION IS STRONG

In conclusion, the complex nature of commercial services agreements requires parties and their counsel to concentrate their efforts on the drafting of the transactions' technical and business components (SOWs and SLAs). But parties cannot lose sight of what might happen if the deal goes awry and therefore must ensure that the general legal terms governing their relationship provide a strong foundation for future success. Indeed, no matter how well-engineered a transaction is from a business and technical perspective, its potential for both parties remains correlated to the strength of its foundation. ■

1. While the authors draw on their experience, the specific fact patterns described herein are composites. In addition, certain details have been omitted, obscured or changed to protect the parties. No fact pattern should be understood to describe any particular case.
2. *Nat'l Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964).

SUPREME JUDICIAL COURT HOLDS LIMITATION OF LIABILITY PROVISIONS UNENFORCEABLE FOR WILLFUL OR KNOWING VIOLATIONS OF CONSUMER PROTECTION ACT

BY ROBERT F. CALLAHAN JR. AND JEREMIAH E. LIGHT

In *H1 Lincoln, Inc. v. South Washington Street, LLC*, 489 Mass. 1 (2022), the Supreme Judicial Court (SJC) of Massachusetts made it clear that defendants who willfully or knowingly violate Massachusetts General Laws Chapter 93A will find no protection in limitation of liability provisions. The ruling clarifies the law on when limitation of liability provisions are enforceable to preclude damages for violations of Chapter 93A.

H1 Lincoln involved a commercial lease agreement where the tenant sought to build and operate a car dealership. Tensions between the parties escalated after the tenant purchased an adjacent parcel that the landlord also sought to acquire. When the tenant sought to develop the parcel, the landlord threatened to withhold approval for the site plan and prematurely terminate the lease to coerce the tenant into selling the parcel to the landlord. This conduct prompted the tenant to sue the landlord for breach of contract and violations of Chapter 93A. The trial court found the landlord liable for several willful and knowing violations of Chapter 93A and awarded the tenant double damages.

On appeal before the SJC, the landlord asserted that the limitation of liability provision in the lease agreement shielded it from "any speculative or consequential damages," including Chapter 93A damages. The SJC rejected the landlord's argument, unanimously holding that limitation of liability provisions "will not be enforced to protect defendants who willfully or knowingly engage in the unfair or deceptive conduct prohibited by the statute."

In holding that limitation of liability provisions are unenforceable where defendants act willfully or knowingly, the SJC departed from the standard previously employed by Massachusetts courts. In the seminal 1990 decision, *Canal Electric Co. v. Westinghouse Electric Corp.,* 406 Mass. 369 (1990), the SJC held that a party could contractually waive Chapter 93A remedies where a Chapter 93A claim is merely duplicative or an alternative theory of recovery for the same wrong underlying a breach of contract claim. In *Canal*, which involved a breach of warranty claim that also served as the predicate wrong for the Chapter 93A claim, the SJC also found that the commercial nature of the particular dispute did not affect the public interest and public policies of Chapter 93A.

In a 1995 decision, *Standard Register Co. v. Bolton-Emerson, Inc.,* 38 Mass. App. Ct. 545 (1995), the Appeals Court developed a bright-line test for enforcing limitation of liability provisions in the Chapter 93A context. Drawing on *Canal* and its own precedent, the Appeals Court held that limitation of liability provisions were unenforceable against Chapter 93A claims "analogous to a tort-based recovery," but enforceable as to Chapter 93A claims "founded on a contract theory." In *Standard Register*, the Appeals Court refused to enforce a limitation of liability provision against a Chapter 93A claim founded on misrepresentations separate from the breach of contract claim.

With this backdrop, the SJC in *H1 Lincoln* "refocused" the enforcement of the limitation of liability provisions in the Chapter 93A context back "on the policies underlying the statute and the distinctions drawn within the statutory scheme." The SJC noted that "the Legislature intended to deter and severely punish — not to condone — defendants who willfully or knowingly engaged in unfair or deceptive acts." The SJC then turned to the dispute at hand and affirmed the award of double damages based on the trial court's finding that the landlord willfully violated Chapter 93A.

By having Massachusetts courts focus on whether defendants willfully or knowingly violate Chapter 93A, the SJC's ruling bars enforcement of limitation of liability provisions that "would do violence to the public policy protected by the statute" and allow commercial parties to willfully and knowingly conduct themselves beyond the acceptable "rough and tumble" of the marketplace. ■

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A PRIMER ON EXPUNGING CRIMINAL RECORDS

BY PETER ELIKANN

Until the criminal justice reform bill of 2018, there was virtually no expungement of criminal records in Massachusetts, unlike a number of states, such as neighboring Connecticut, where expungement can often be automatic after a period of time without even being requested. It has long been possible to eventually get some records sealed in Massachusetts, but sealing is different than expungement. A sealed record is saved and continues to exist and, while hidden from individuals and most employers, it can be accessible to law enforcement agencies, the courts, Probation, and certain state agencies, such as those monitoring adoptions, foster care and child care. On the other hand, an expunged record is intended, through permanent erasure, to wipe any trace of the criminal record off the face of the earth forever, so to speak.

Yet, once it became law, the number of people applying for expungement has been startlingly low. Reasons for that have ranged from insufficient outreach, so the average ex-defendant is not even aware such a thing as expungement exists, to the theory that few people know how to go about the actual application procedure.

However, another difficulty exists. Of those who have, in fact, applied for expungement, it has been reported recently that only 16% have been successful. This can be attributed to the fact that the criteria are so narrow that most applicants do not qualify. Also, by the time the application for those found to be eligible works its way through the process, the granting of it is left to the complete discretion of the judge based on the standard of "the best interests of justice."

Expungement is available in limited circumstances for a limited number of less serious offenses for juvenile offenders and those under the age of 21 after a period of time has elapsed. Additionally, a second kind of non-time-based expungement can be available in a very narrow group of circumstances, including for those adults who were charged as the result of mistaken identity; for those who were innocent; for those charged with offenses that have since been decriminalized, such as possession of marijuana; and for other miscarriages of justice, such as, for example, cases that were dismissed due to the drug lab scandal, police misconduct or fraud. *See* M.G.L. ch. 276 §§ 100E-100U.

The procedure for juveniles, youthful offenders and those under 21 is as follows:

1. A person who, as a juvenile or young adult under the age of 21, has a record of no more than two convictions (multiple offenses arising out of the same incident shall be considered a single offense), including no subsequent convictions (other than for some motor vehicle offenses not exceeding a fine of $50), may file a petition for expungement with the Office of the Commissioner of Probation. The petition is a form provided online. There is no filing fee.
2. In the petition, the petitioner certifies that, to the petitioner's knowledge, the petitioner is not currently the subject of an active criminal investigation by any criminal justice agency.
3. In the case of misdemeanors, the petition may be filed no earlier than three years from the disposition (even including a dismissal), probation or release from incarceration, whichever is later. For a felony, the waiting period is seven years.
4. More than 20 categories of offenses are excluded. Among these are any offenses resulting in or committed with the intent to cause death or serious bodily injury; offenses committed while armed with a dangerous weapon; offenses against an elderly or disabled person; sexually violent offenses; a sex offense involving a child; restraining order violations; operating under the influence; sex offenses by a juvenile; firearms cases; cases centering around safety during divorce proceedings; harassment prevention orders; assault and battery on a family or household member; and almost any crime of violence. M.G.L. c. 276 § 100J.
5. Once filed, the Office of the Commissioner of Probation conducts a vetting process to determine eligibility against all the requirements, including interstate criminal record checks.
6. If one was not convicted or adjudicated for the offense, the commissioner has 30 days to review the petition and, if it appears the defendant may be eligible to expunge his or her records, a copy of the petition is sent to the district attorney (D.A.), who has 30 days to object. If the defendant was convicted, or adjudicated to be delinquent or a youthful offender, the timeline is 60 days, not 30 days.
7. Within 65 days of the objection or no response from the D.A., the commissioner sends the petition to the court that handled the case. If there is an objection from the D.A., the court must hold a hearing within 21 days. If there is no objection by the district attorney, the court has the option to allow the petition based solely on the submitted paperwork or to conduct a hearing.
8. A judge rules on the petition based on the discretionary standard of "best interests of justice." Written findings of fact must be made. The judge may consider how long it has been since the charges were filed, potential hardships if the record is not expunged, the defendant's age when charged, seriousness of the offense, rehabilitation undergone, and community service.
9. Although almost all offenses committed from age 21 or older are ineligible for expungement, there are a very few narrow exceptions for the second kind of expungement — a non-time-based expungement — when there exists "clear and convincing evidence" that the adult offender was charged as the result of mistaken identity; for those who were innocent and charged by fraud or other demonstrable error; for those charged with offenses that have since been decriminalized, such as possession of marijuana; and for other miscarriages of justice, such as fraud or law enforcement misconduct.
10. If the petition is successful, an order is forwarded to the court clerk and the commissioners of both Probation and the Department of Criminal Justice Information Services (DCJIS). The records of the court

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and criminal justice agencies (police, Probation, Department of Youth Services, Department of Children and Families, etc.) for the case must then be destroyed. The law requires the DCJIS to send the expungement order to the FBI and the Department of Justice with a request that they too expunge their records.

11. After expungement, one can legally reply they have "no record" if questioned in any legal proceeding or by any potential employer in any application or interview.

12. Before seeking expungement, one is advised to get numerous certified copies of their record since, if successful, such a record may not exist if it is ever needed by the individual. This is because, while one's statewide criminal record is expunged and notification is sent to the FBI to also expunge their record of it, it has not yet been established whether the FBI can always be relied upon to abide by the state court ruling. Also, if one is not a citizen, they should speak with an attorney on whether to seek expungement. This is because, if the FBI still has the record, it may be incomplete and, for example, the FBI may not know that the charge was dismissed, in which case the defendant would have no way to prove it.

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Critics complain that the current expungement statute as drafted is so rigid in its qualifications that few are eligible for expungement, and so it is anticipated that more legislation will, at the least, be proposed to expand and widen the net for increased eligibility. ■

FAMILY LAW

IMMIGRATION BIAS IN FAMILY LAW PRACTICE

BY HON. GEORGE F. PHELAN, ANNELISE ARAUJO AND DONALD G. TYE

Disclaimer: The opinions expressed herein are those of the authors and do not necessarily reflect nor shall they be attributed to the Massachusetts judiciary, the courts or the legal offices of the authors.

Lawyers and judges who identify as white, cisgender, heterosexual men have long been overrepresented in the family law bar. Meanwhile, immigrants, first-generation Americans, and LGBTQ+ people are appearing before the court more often. The increasing diversity of parties in family court mirrors broader demographic changes in America, and is a positive indicator of equal access to justice.

Still, these shifting dynamics require special attention from family law practitioners, who are more likely than ever to encounter parties with values, experiences and cultural characteristics far different from their own.

The widening cultural gap increases the risk of biases that disadvantage litigants in court, particularly immigrants. Practitioners who fail to account for these differences increase the potential for miscommunication, ineffective legal assistance, inadequate judicial resolutions and appellate scrutiny.

How can we avoid such inequities? The question is rarely asked. When we talk about anti-immigrant bias in family court, we are usually discussing the disadvantages faced by undocumented immigrants. For instance, a judge may find that a mother without legal U.S. residency cannot be a primary caretaker due to the possibility of potential or even imminent deportation, and instead award custody to a less capable parent due to U.S. citizenship or permanent residency. Custody outcomes hinging on immigration status are not necessarily in the child's best interests.

Avoiding this type of bias is critical, but our discussion will focus on a more insidious kind of prejudice, which stems from a lack of familiarity with the immigrant litigants who come before the court. This unconscious bias manifests itself in the professional guidance of lawyers, the rulings handed down by judges, and the administrative hurdles presented by the court itself.

To illustrate how to identify and avoid anti-immigrant bias in family court, we share the following case example — a composite of multiple clients whom we have represented or who have come before our court. After introducing this family, we will share the perspectives of a practicing lawyer, a guardian ad litem and a judge.

THE PARTIES

A husband and wife, both devout Muslims who emigrated from Iran, are seeking a divorce after three years of marriage. They have 2-year-old twins. Both spouses were practicing physicians in Iran. The husband is employed stateside and pays for all the family's expenses. The wife, who speaks only Persian, stays home as primary caretaker to their children. The couple's marriage contract, a feature of many Middle East unions, calls for the husband to pay the wife 300 gold coins.

The husband filed for divorce. The wife, drawing on traditional Muslim views of marriage and the role of women, does not want the relationship to end. She is so invested in the marriage, she wears her wedding dress to every court hearing, hoping to remind her husband why he chose her.

After separating, the husband continues to live at the family's four-bedroom home in a high-income suburb with excellent public schools. The wife moved to a two-bedroom apartment in a less affluent community. The husband has extended family in the United States; the wife's relatives remain in Iran. The wife has conditional permanent residency valid for two years.

The wife has previously alleged verbal abuse by the husband, though police have never been called to the home. The family court is to consider the husband's request for primary custody. The wife is seeking custody, alimony and child support, along with the option to travel with the children and potentially return to Iran full time. The husband contends the wife is able to work as a doctor in the United States, eliminating the need for alimony or for allocation of travel expenses.

THE LAWYERS' VIEW

To avoid unintentional bias, lawyers and guardians ad litem (GALs) must seek to understand their clients' needs, experiences and cultural backgrounds, and develop a tailored approach that accounts for these differences.

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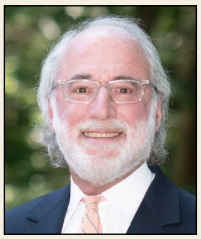

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One common way advocates can fail their clients is by not considering the full scope of their lives. Often, an immigrant litigant's ties to America are only a small part of their story: Many have spouses, children or other close family members back in their home country; they travel home regularly; or they own property abroad. Proceedings that focus predominantly on an immigrant's cir-

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cumstances in the United States — and do not consider the depth and complexity of the links to their home country — will not serve the best interests of the litigant or the court.

Take another look at our case example. One might assume the couple's U.S. citizen children should remain in America with their father, who can provide the necessary economic and educational resources. Superficial impressions about political ideology alone in the country of origin should not be determinative of custody. But the wife's family support in Iran, plus her ability to obtain well-paid employment there, must be weighed heavily. The picture is more complex than it first appears.

Advocates can further reduce inequities in family law practice by identifying their own implicit cultural biases, as well as the potential for negative inferences drawn by judges and court staff. Conclusions based on how a person is dressed, their English fluency or their interactions with their children can easily mislead.

There are some common stereotypes that surface in family court, despite dogged efforts to create an environment free of discrimination and prejudice. One example is the assumption that immigrant parties lack education, income and/or the ability to work; in our case, the nonworking wife has more schooling than the judges and lawyers working on her case. Occasionally, these improper assumptions may come from one of the parties in a case — especially when a difference in immigration status or cultural background creates an imbalance of power.

A litigant's undocumented status is often a flashpoint in family cases. To discern whether a claim is legitimate, family law attorneys should consult an immigration lawyer able to accurately describe the litigant's circumstances and the likelihood as well as timing of imminent deportation.

Lawyer-advocates also must be cognizant of what an immigrant party expects from the family court system. Some immigrants come to the United States from countries where due process is routinely denied and legal protections vary according to a person's gender, wealth or social status. We must educate our clients on their rights and the court's processes.

We must also ensure that GALs are well prepared to serve these populations. GALs are regularly appointed by courts in high-conflict custody cases and often have little experience working with immigrant families. But the work they do demands deep cultural sensitivity and an appreciation of different family models.

Whether the GAL is a lawyer appointed to find facts or a mental health professional assigned to conduct a clinical evaluation, it is essential that the investigation be complete, comprehensive and free of cultural bias. Good test providers should develop their psychometric tools to be fair and valid across cultures. Test items should be written by experts from a broad range of cultural backgrounds and of various nationalities. It isn't enough to simply translate assessments into different languages, because direct translations can miss important cultural nuances.

Again, we turn to our case example. A factfinder who is not culturally sensitive may entertain the bias that an English-speaking household is preferable for the children of the divorcing couple. This view disadvantages the wife, an unquestionably intelligent and capable person who lacks English fluency.

In situations like these, the lawyers and the GAL must work together to understand a litigant's perspective and experience, introducing culturally competent evidence to assist the court in understanding the proper context.

In the U.S. court system, there is a tendency to evaluate cases through the prism of so-called "American" values. Concepts we claim to value highly in our society, such as gender equality, can be used to make unfavorable comparisons to other cultures. This tendency may predispose advocates and judges to draw inaccurate or incomplete conclusions and assumptions about a litigant's own values.

By setting aside our own implicit judgments about the "right" or "wrong" approach to these highly personal subjects, we can learn about our clients, open our minds, and pursue a result that embodies the highest ideals of the family court system.

THE JUDGE'S VIEW

Judges and court staff must also leave aside any preconceptions, evaluating each case through the prism of an immigrant litigant's circumstances and experience and avoiding errant conclusions based on their background.

Family court judges bear the responsibility of evaluating each case fairly. Typically, judges are presented with immigration status as a factor in custody determinations and in cases where violence is present. In many other situations, the judge does not know — and may be procedurally constrained from inquiring about — a litigant's immigration status. If an immigrant's counsel finds it appropriate and relevant, counsel may *sua sponte* identify important cultural considerations relevant to the proceeding, and request that this information be impounded.

Unconscious bias also must be addressed in court-provided services, dispute resolutions, determination of critical factors in a case, and even how we treat and speak to the litigant. Family court judges should champion systemic changes to root out and correct anti-immigrant bias.

For instance: Any temporary protective orders granted should be referred for default review by a country expert, paid for by the court, who should interview the litigant about any cultural or contextual factors bearing upon the case. The results should be available to the family court judge for further hearing within seven days, and any appropriate amendments to the initial order should then be considered.

The country experts should also inform the judge of contextual information such as marriage rights and obligations in the country of origin. Are women regarded as property, and are their movements controlled? How heavily does religion inform the judicial process there? Can other extrajudicial or tribal courts overturn or ignore U.S. court custody orders?

The court has a responsibility to educate itself about the myriad cultural complexities beyond immigration status, but we must consider these crucial factors without allowing bias in the court. Judges must develop a deeper understanding of immigrant experiences and expectations, understanding that some may be skeptical of our judicial process. Additionally, courts must be open to the notion that, despite its resources and safety nets, America might not be the best place to seek resolution of a custody dispute involving immigrant parents.

Returning once more to our case example, we find that the wife, a well-established physician in Iran, does not practice here due to a lack of English-language proficiency. Instead, she is the primary caretaker for her young children. Is that heavy parental lifting more recognized and respected in Iran? Should her request to remove the children with her to Iran be permitted, given her extended family and better employment pros-

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pects there? What should a judge think about why she wears her wedding dress to each court appearance — is she eccentric or relying on a treasured custom?

Information the family court judge does *not* know is critical to the equitable resolution of this dispute. But judges cannot simply search the internet or excavate extrajudicial resources to get informed. Culturally informed GALs and attorney-advocates are critical to a judge's knowledge base. In addition, the judge should encourage and allow motions to appoint cultural experts to testify, and each court should develop a roster of available country experts.

Given that a party's first exposure to family court may be related to domestic violence, judges should insist that restraining order applications be the starting point for expansion of access to interpreter services. This will simplify the process of educating immigrant parties about domestic violence and corollary issues such as custody and support. Specific language translations of these corollary rights should be attached to the restraining order application.

These issues often must be decided under serious time constraints and amid high-volume caseloads. Judges and the court staff who support them must develop the cultural capacity to arrive at the fairest result. In cases of self-represented immigrant litigants, family court judges should appoint a GAL and encourage that the immigrant litigant be informed of cultural issues relative to divorce, custody and domestic violence. If the litigant is represented by counsel, then the judge should order the attorney to present such issues to the court.

By taking these time-intensive but necessary steps, all of us in the family court bar can work together to diminish anti-immigrant bias. ■

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IT IS TIME TO GIVE UNWED FATHERS SOME RIGHTS

BY NANCY A. MORENCY

The rights of a father to his child born out of wedlock, compared to a father who is married to the child's mother, are vastly different. Massachusetts statute provides that an unwed mother has sole custody of the child. An unwed father is therefore required to be proactive and establish paternity and rights to his child. The way the law is written enables a spiteful mother to initially deny a father parenting time and decision-making, even after several years of being a father figure to a child, which is not in the child's best interest.

The father's lack of legal custody and parenting rights to a child born out of wedlock does not typically arise until after the parties separate or another life-changing event occurs that changes the parties' status. While things are good between unmarried parents, no one thinks to acknowledge paternity or obtain a court order. Being on the birth certificate alone is insufficient. However, with more than a quarter of children born out of wedlock in Massachusetts, it is an issue that must not be ignored. A vast majority of the actions for care, custody and support are filed after the parties separate so the father can then establish his rights to his child out of necessity. Whether there is the concern that filing an action with the court may convey a message that the party is looking to terminate the relationship, or because it simply may not be known, the reality is that parties do not seek out an order for parenting rights until there is a problem.

It comes as a shock to unwed fathers when they learn that they have no rights to their child. It's a harsh reality that a father can support, raise, and be involved in the care of their child, but if they aren't married to their child's mother and there is no court order, then they must engage in a legal battle if the parties disagree. This is disruptive to the child on top of the breakdown of the family unit.

Even if the child's father is listed as such on the birth certificate, the father is required to go to court just to have parenting time if the mother is not furthering this paternal relationship. This can then lead to the necessity for urgent hearings to obtain basic parenting rights and can lead to a further deterioration of the parties' relationship that will affect the child.

Conversely, a father who is married to the child's mother has more rights to his child than his unwed counterpart. Under M.G.L. c. 208, a father has equal rights as his wife to their child. It does not seem fair to unwed fathers that a marriage certificate provides greater parenting rights to their child. If the statute provided unwed fathers with the same rights as married fathers, then there would be fewer mothers attempting to assert control over the fathers' rights to their child, slightly easing the burden on the court. Arguably, it is in the child's best interest to not offer an unwed mother this ultimate control.

As times are evolving and there are more unwed parents, the law also needs to evolve. Fathers are an important part of a child's life. It is unjust that a father who has acknowledged paternity or who is listed on a birth certificate has fewer rights than the child's mother. A change in legislation will eliminate the need for urgent hearings in an already overburdened court and give fathers the rights they deserve. It is in the child's best interest for this legislation to change. ■

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HEALTH LAW

THE FEDERAL NO SURPRISES ACT AND THE REGULATIONS GOVERNING OUT-OF-NETWORK PAYMENT

BY PATRICK J. SHEEHAN AND DEBORAH J. WINEGARD

INTRODUCTION

The No Surprises Act ("the Act") was passed with bipartisan support in December 2020. Among other things, the Act prohibits surprise bills for out-of-network cost-sharing and balance billing amounts to individuals covered by group health plans and health issuers of group and individual health insurance coverage (collectively, "Plans"): (1) when patients receive emergency services, including post-stabilization services, from a nonparticipating provider or facility in a hospital emergency department or a free-standing emergency department (42 U.S.C. 300gg-111(a)); and (2) when patients receive nonemergency services from a nonparticipating provider at a participating facility. (42 U.S.C. 300gg-111(b)). The Act does not apply to nonemergency services provided at nonparticipating hospitals.

The regulations implementing the Act took effect Jan. 1, 2022. At the same time, one of the most important aspects of the regulations — the standard by which payment to out-of-network providers under the Act should be determined — has been struck down by one federal court and is being challenged in others. As a result, significant questions remain concerning what the Act and the regulations mean.

HOW ARE OUT-OF-NETWORK PAYMENT RATES DETERMINED UNDER THE ACT AND ITS IMPLEMENTING REGULATIONS?

The Act requires Plans to make a total payment directly to the provider of "the amount by which the out-of-network rate … for such services exceeds the cost-sharing amount…." 42 U.S.C. 300gg-111(a)(1)(C)(iv). The initial payment must be made within 30 days. 42 U.S.C. 300gg-111(a)(1)(c)(iv)(I). If Plans and providers do not agree on the out-of-network payment, the Act establishes an independent dispute resolution (IDR) process. 42 U.S.C. 300gg-111(c). The first step is an initial negotiation period of 30 days. If these negotiations fail to achieve an agreement on the rate, each party is required to submit an offer to the designated IDR entity in a baseball-style arbitration where the IDR entity picks one of the two offers. 42 U.S.C. 300gg-111(c)(5)(A)(i).

The Act did not establish a benchmark for the IDR entity to determine out-of-network payment rates, but rather set out "considerations in determination." The considerations included the "qualifying payment amount" or "QPA," which is the median in-network contract rate for the service in the same geographic region, as well as information in the "additional circumstances" clause. 42 U.S.C. 300gg-111(c)(5)(C)(i). These additional circumstances are: the level of training, experience, and quantity and outcomes measurements of the provider or facility; the market share of the nonparticipating provider or facility or that of the plan or issuer in the geographic region; the acuity of the patient or the complexity of the treatment; the teaching status, case mix, and scope of services of the nonparticipating facility; and a demonstration of good faith efforts (or lack thereof) of the provider and plan or issuer to enter into a network agreement. 42 U.S.C. 300gg-111(c)(5)(C)(ii). The IDR entity is specifically prohibited from considering usual and customary charges or amounts paid by public payers, such as Medicare, in determining out-of-network rates. 42 U.S.C. 300gg-111 (c)(5)(D).

The Departments of Health and Human Services, Labor, and the Treasury have issued two sets of interim final rules under the Act governing, *inter alia*, out-of-network payment rates. Part 1 established how the QPA would be determined, and generally followed the Act's provisions. 86 Fed. Reg., No. 131 (July 13, 2021). Part 2 established the standards to be used by IDR entities. 86 Fed. Reg., No. 192 (Oct. 7, 2021). Even though the Act did not set a benchmark for the IDR entities to use in determining the out-of-network payment rate, the Part 2 regulations attempted to establish a presumption that the qualifying payment amount — the median contract rate — should be used.

Specifically, the interim final rules direct that:

> The certified IDR entity *must* select the offer closest to the qualifying payment amount unless the certified IDR entity determines that credible information submitted by either party under paragraph (c)(4)(i) clearly demonstrates that the qualifying payment amount is materially different from the appropriate out-of-network rate, or if the offers are equally distant from the qualifying payment amount but in opposing directions. In these cases, the certified IDR entity must select the offer as the out-of-network rate that the certified IDR entity determines best represents the value of the qualified IDR item or services, which could be either offer. 45 C.F.R. 149.510(c)(4)(ii)(A). (emphasis added).

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The comments to the rules also indicate that the qualifying payment amount is the presumptive rate: "In selecting the offer, the certified IDR entity *must presume* that the QPA is an appropriate payment amount…." 86 Fed. Reg. 55995 (Oct. 7, 2021). (emphasis added). Elsewhere, the comments state:

> … the certified IDR entity must begin with the presumption that the QPA is the appropriate out-of-network rate for the qualified IDR item or service under consideration. Therefore, in determining which offer to select, these interim final rules provide that the certified IDR entity must select the offer closest to the QPA, unless credible information presented by the parties rebuts that presumption and clearly demonstrates the QPA is materially different from the ap-

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No Surprises Act
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propriate out-of-network rate.

Id. at 55996.

HOW HAS THE ONGOING LITIGATION CHANGED THE RULES?

The provisions of the interim final rules seeking to establish the median contract rate as the presumptive out-of-network payment rate — which would essentially eliminate the additional considerations taken into account by the Act — have been challenged by providers and provider advocacy organizations, including the American Medical Association and the American Hospital Association, in three separate federal lawsuits. The first court to rule on the merits was the U.S. District Court for the Eastern District of Texas, which struck down the challenged rules on Feb. 23, 2022, in a lawsuit brought by the Texas Medical Association (TMA) and one of its physician members.

TMA and its physician member had challenged the rules as inconsistent with the Act. The court agreed:

> Here, the Act is unambiguous. The Act provides that arbitrators deciding which offer to select "shall consider … the qualifying payment amounts … and … information on any circumstance described in [the clause listing all of the factors to be considered.]"
>
> *****
>
> Because the word "shall" usually connotes a requirement, the Act plainly requires arbitrators to consider all the specified information in determining which offer to select.
>
> Nothing in the Act, moreover, instructs arbitrators to weigh any one factor or circumstance more heavily than the others … And here, the Act nowhere states that the QPA is the "primary" or "most important" factor … Nor does the Act impose a "rebuttable presumption." (internal quotations and citations omitted).

Texas Medical Association et al. v. U.S. Dept. of HHS, 6:21-cv-425, 2022 WL 542879 at *7 (E.D. Tex. Feb. 23, 2022.) The court also held that the government's failure to use the notice and comment requirements provided for in the Administrative Procedure Act constituted an independent reason to strike down the challenged rules and that the plaintiffs had standing to challenge the rules. Lastly, the court considered the appropriate remedy and determined that it was to vacate the challenged rules because "the Rule conflicts with the unambiguous terms of the Act in several key respects. This means that there is nothing the Departments can do on remand to rehabilitate or justify the challenged portions of the Rule as written." *Id.* at *14. Motions for summary judgment regarding the same issue are pending in a case brought by the American Medical Association and the American Hospital Association in the U.S. District Court for the District of Columbia and in a case brought by the American Society of Anesthesiologists and two other specialty societies in the U.S. District Court for the Northern District of Illinois.

Notwithstanding the *TMA v. HHS* decision, the Act remains in effect, meaning that its provisions protecting patients from surprise medical bills when treated for an emergency condition or by an out-of-network provider in an in-network facility continue to apply. The mechanisms of the IDR process themselves were not challenged and likewise remain in effect. On Feb. 28, 2022, the Centers for Medicare & Medicaid Services issued a memorandum stating that, effective immediately, it was withdrawing the guidance documents implementing the vacated rules and that it would be revising these documents in conformance with the court's order. Therefore, the critical issue of how out-of-network payment rates will be determined in the IDR process going forward remains uncertain. ■

HEALTH CARE CLIENTS FACE COMPLICATED, NEW REGULATIONS — AND LEGAL EXPOSURE

BY ANNA GUREVICH AND MICHELLE R. PEIRCE

Health care providers are facing new rules — and legal exposure — due to new state requirements for patient billing that have been effective since Jan. 1, 2022, and impact consumers, providers and payors alike.

These new requirements around patient billing were passed as part of the 2020 health care omnibus bill — "An Act Promoting a Resilient Health Care System that Puts Patients First," — that was signed into law on Jan. 1, 2021, by Governor Charlie Baker (the "Patients First Law").

The requirements for providers went into effect on Jan. 1, 2022, but the Department of Public Health (DPH) is deferring penalties for noncompliance until July 1, 2022.

For the health care community trying to piece together the complex requirements under both the Massachusetts Patients First Law and the federal No Surprises Act, also effective Jan. 1, 2022 (not discussed in this article), the enforcement delay is welcome while the requirements of these laws are clarified and understood. However, your health care clients should be immediately attentive to these new laws and their requirements, or soon face the consequences.

WHAT'S THE ISSUE?

So-called "surprise billing" has been a national issue for years, and refers to the situation where a patient receives an unexpectedly high bill from an out-of-network health care provider or facility because the patient received medical care that was not covered or paid by the patient's health plan, usually because the health care provider did not participate in the health plan participating provider network. For example, a patient might schedule an operation at a hospital and, though the hospital and surgeons' fees are covered and paid by the patient's health plan because the providers are participating providers in the health plan's network, the anesthesiologists' fees are not fully paid by the health plan because the anesthesiologist is not a participating provider — resulting in the separate bill directly from the anesthesiologist. The Patients First Law aims to remove this element of surprise.

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WHAT ARE THE IMPLICATIONS?

In short, Massachusetts health care providers — other than those involved in emer-

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gency services — have new notice and disclosure requirements to patients under the new law.

If an out-of-network provider does not provide the required notices to a patient, the out-of-network provider may not bill the patient for additional amounts that are not reimbursed by the patient's health plan or for which the patient would be responsible with an in-network provider. Without providing the required notices to patients upfront, providers sending such balance bills to patients, sending bills to collection or suing for payment will be in violation of the law and may be subject to DPH fines and penalties of up to $2,500 per violation. As previously mentioned, DPH is deferring penalties until July 1, 2022.

Providers may also be subject to disciplinary action. In recently issued guidance, DPH encourages patients to report noncompliant providers to the appropriate licensing board, creating a real risk of disciplinary proceedings for failing to comply with many requirements of this new law.

On top of regulatory penalties and disciplinary proceedings, there may also be a risk of civil litigation against providers who do not comply, especially due to the complexity of intersecting rules and obligations under the state and federal laws and confusion about the requirements.

WHO DOES THE MASSACHUSETTS LAW APPLY TO?

The Massachusetts law is significant because it applies to individual licensed providers — large and small — as well as facilities like hospitals. Specifically, providers subject to the new requirements include any doctor of medicine, osteopathy, or dental science; any nurse, pharmacist, social worker, chiropractor or psychologist; or an intern, resident, fellow, or medical officer. In addition, the requirements apply to hospitals, clinics or nursing homes and their agents and employees. Thus, even physician practices are subject to these requirements.

WHAT ARE THE NEW REQUIREMENTS?

Providers — other than those involved in emergency services — have new notice and disclosure requirements to patients under the new law. As is evident from the list, these requirements are fairly complicated and may greatly impact your clients' current processes and operations:

1. Before scheduling any care, providers must inform patients whether the provider is in-network or out-of-network with the patient's health plan.
2. If a provider is in-network for the patient, the provider must inform the patient that the patient can request information about the provider's fees.
3. If a provider is out-of-network for the patient, the provider must actually provide the patient with information regarding the provider's fees, inform the patient that the patient will be responsible for amounts not covered by the patient's health plan, and inform the patient that they may be able to find lower-cost care from a provider who is in-network.
4. When a provider refers a patient to another provider, the provider must inform the patient whether the referred-to provider is part of the same provider organization, that it is possible the referred-to provider is not in-network with the patient's health plan, and that, if so, out-of-network rates will apply. The provider must also inform the patient that they have the opportunity to verify if the provider is in- or out-of-network before making an appointment. The patient must also be provided with sufficient information about the provider to be able to find out whether the provider is in-network for them.
5. When a provider directly schedules, orders or arranges for services for the patient with another provider, the provider must, before scheduling, verify whether the referred-to provider is in-network for the patient, and notify the patient if the referred-to provider is out-of-network for the patient, or if it could not be verified whether the provider is in- or out-of-network.

WHEN DO PATIENT NOTICES HAVE TO BE PROVIDED?

The timing and format of notices to patients will differ based on the lead time to the scheduled service, but notice will generally be required at least seven days (if scheduled further in advance), two days (if less than seven days available), or as soon as is practicable (if less than two days available) in advance of the scheduled admission, procedure or service.

WHAT HAPPENS NOW?

Lawyers, advisors and their health care clients will need to make their best efforts to understand and (for providers) to implement the requirements under the Patients First Law immediately, and be aware of similar requirements under the federal No Surprises Act. It is clear that more guidance is needed from federal and state regulators on how the federal and state laws will work together, and this guidance is likely to be coming in the next few months. Regardless of the deferment of enforcement under the Patients First Law until July, that window will close soon, and providers — and facilities — will face regulatory action for failing to comply. Providers are encouraged to implement applicable procedures to meet the new notice and billing requirements as soon as possible in order to minimize the prospect of regulatory scrutiny. ■

HOW TO REPRESENT A HEALTH COACH

BY JOEL ROSEN

Health coaches help clients do what their doctors tell them. Most of them work with diet and exercise issues, although they can help with substance abuse or any other behavior the client wants to change. The discipline is growing fast. There are more than 120,000 coaches in the U.S today doing $7 billion in business.

Coaching is an emerging discipline without a state licensing board or an official national accrediting agency to set standards of practice and ethics. When lawyers help set up a coaching practice — trained as we are to minimize risk — we contractually supply those missing standards and clearly distinguish what a health coach will and will not do. Here are some pointers for creating a provider agreement.

1. EXPLAINING THE SERVICES

A coach is not a licensed professional but helps people follow their providers' advice. As one case defines it, a health coach is a wellness guide and supportive mentor who does not administer medical care but helps clients implement their medical professionals' advice by giving guidance on how to stay active, eat healthfully and control stress. The National Board for Health and Wellness Coaching (NBHWC), a national certifying board, says much the same thing. "As partners and facilitators, health and wellness coaches support their clients in achieving health goals and behavioral change based on their clients' own goals and consistent with treatment plans as prescribed by individual clients' professional health care providers."

While the NBHWC provides a certification, and while the American Medical Association has created three Current Procedural Terminology (CPT) codes (potentially for billing insurance), anyone can hang out a shingle as a health coach, whether they have a certification or not. There are a huge number of training and certification programs, usually online. Some have the backing of a name university, some are approved by the NBHWC, some require some other health care license, some are quick and cheap, some are useless. The courses usually take between two to 12 months, but again, no certification is required to practice in this field.

2. AVOIDING UNLICENSED PRACTICE

Coaches should not practice any discipline that requires a license. This means they should not diagnose diseases or give advice. They cannot hold themselves out as dieticians, nutritionists, psychologists, or practitioners of medicine. Our statutes define the practice of medicine as encouraging "the reliance of another person upon an individual's knowledge or skill in the maintenance of human health by the prevention, alleviation, or cure of disease, and involving or reasonably thought to involve an assumption of responsibility for the other person's physical or mental well-being: diagnosis, treatment…." The key words are diagnosis and treatment. Don't do that. And remember that it is the patient who assumes responsibility for her own well-being. The coach merely supports her.

Often, clients will bring up psychological issues that may be at the root of an eating disorder. The coach can listen patiently but should refrain from speculating on whether there is any relationship between the trauma and the disorder and return as quickly as possible to the behavior the client wants to change. The coach focuses on what the patient is doing. A psychologist can focus on why they are doing it.

It may also be hard to avoid giving nutritional advice, particularly if the patient is on a fad diet the coach thinks may be harmful. A coach can express concerns about the patient's health if she follows a particular regime, but it is always best to recommend speaking with a nutritionist or dietician.

Health coaches may already have licensure in another field like nursing. If that is the case, the provider contract should make it clear that this is a coaching relationship. The coach is merely helping the client implement the recommendations of her treatment team. The coach is not using her nursing skills in this relationship.

Consider drafting a disclaimer and release, in addition to the provider agreement, saying: (a) the coach is not licensed; (b) the client will rely solely on licensed professionals for advice; and (c) the client releases the coach from claims for malpractice or those concerning the rendition of medical services or advice.

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3. BILLING

The provider agreement needs to be very clear about what services will be provided and what they cost, and whether insurance is paying for them or not. Does the coach charge for phone calls? Travel time? Is an hour an hour? Are there charges for missed appointments? How much notice does either party have to provide to terminate the relationship? How are expenses reimbursed? Are there group sessions, and if so, what are the guidelines? Is there a charge for text or email support? The answers will be different depending on the services the coach provides.

4. ETHICS

Coaches and clients need clear boundaries. Some health coaches will go out to meals with clients, accompany them to parties, or even go on trips. Many allow clients to text or email them outside of coaching sessions at any hour. Whether these practices are a good idea or not, they underscore the importance of boundaries. The NBHWC code of ethics hits the high points: record-keeping, confidentiality, professional conduct and conflicts of interest. But anyone who has represented a doctor or psychologist with a boundary violation knows the problems take root in the gray areas. While one can reference this one published code, it would be wise to look at the ethical rules for psychologists, doctors and other professionals and set clear limits that both the client and coach must follow. You should also be very clear about how each person can terminate the relationship, notice periods, and what steps the coach will take to avoid prejudice to the client.

A successful coaching business starts with a good provider agreement that sets clear expectations on both sides. Because there is no licensure for coaches, it is up to the attorney to look at analogous fields to define the relationship between coach and client in this developing field. ■

GRATUITOUS TENANCIES: A CONUNDRUM OF MASSACHUSETTS PROPERTY LAW

BY RYAN P. AVERY

The nightmare scenario of a friend, relative or ex-partner overstaying their rent-free welcome is dramatized in countless movies and many of our favorite childhood sitcoms. In real life, these uncomfortable situations are resolved without the need for legal process through a combination of common courtesy and common sense, if not infinite patience. Exceptions remain, however, as patience, resources and time wear thin. A property owner may be faced with a short deadline for selling, or making their premises suitable for occupancy. A tenant may need to remove their guest in order to avoid financial penalties (if not eviction) under their lease.

If legal process is eventually required to eject a holdover guest, what form should that process take — summary process, as many may assume, or some other civil (or even criminal) proceeding?

These cases involve what our courts have referred to as "gratuitous tenancies," and they live within a gray area of Massachusetts property law. Indeed, gratuitous tenants are typically no more than license holders to residential property, and the nomenclature designating them as some type of tenant sub-class only serves to complicate our understanding of their status. Additionally, the lawful process for ejecting gratuitous tenants from residential premises is far from clear, and requires confirmation by our Appeals Court or the Supreme Judicial Court (SJC).

To understand the status of a gratuitous tenant, it is first important to reacquaint ourselves with the defining features of the landlord-tenant relationship. The relationship between landlord and tenant is a contractual one in which the owner of real estate agrees to grant to the tenant, for a definite or indefinite period of time, the right to exclusive possession of real estate in exchange for the tenant's payment of an agreed-upon consideration, usually in the form of periodic rent.[1] In contrast, a license merely excuses acts done by one on land in possession of another that without the license would constitute a trespass.[2] A license conveys no interest in the land and need not be entered into by contract or supported by consideration.[3]

As suggested above, gratuitous tenancies are not grounded in contract. They involve guest-occupants who initially enter the premises peaceably with permission of one with a right to possession, in order to reside at the premises for a typically unspecified period of time, without the payment of rent or any other consideration. The lack of consideration and the occupant's lack of any right to exclusive possession are the hallmark features of a gratuitous tenancy.[4] Not surprisingly, these relationships are most commonly developed between close friends, relatives and unmarried co-habitants.[5]

The term "gratuitous *tenant*" is therefore a misnomer — "expired license holder," "unlawful occupant" or "holdover guest" would all constitute a more accurate description. The point here is that once a license to occupy has been revoked — and it may be revoked at any time — the status of a gratuitous tenant becomes indistinguishable from a trespasser under common law.

Understandably, the Massachusetts Legislature has determined that the ejection of *any* person from residential premises, irrespective of their status, should be accomplished through considered legal proceedings, without haste or resort to force. Critically, the commonwealth's criminal trespass statute (M.G.L. c. 266 § 120) permitting arrest and removal of trespassers by sheriff, deputy sheriff, constable or police officer does not apply to "tenants *or occupants* of residential premises who, having rightfully entered said premises at the commencement of the tenancy *or occupancy,* remain therein after such tenancy *or occupancy* has been or is alleged to have been terminated … The owner or landlord of said premises may recover possession thereof *only through appropriate civil proceedings."*

The starting point for what "appropriate civil proceedings" may involve is found at Section 18 of Massachusetts General Laws Chapter 184, stating that "no person shall attempt to recover possession of land or tenements in any manner other than through an action brought pursuant to chapter two hundred and thirty-nine or such other proceedings authorized by law." Notably, this language does not restrict itself to recovery of land or tenements from *tenants*. Likewise, Section 1 of Chapter 239 sets forth that summary process may be used to recover possession against both a tenant ("lessee of land or tenements") and any *"person holding [possession] under him* … without right after the determination of a lease by its own limitation *or by notice to quit or otherwise*…" Similar language in Section 1 applies to sellers of real estate (including sellers in foreclosure) and persons holding under them who refuse to surrender the real estate to a buyer. Summary process may also be commenced against any occupant who has made a "forcible entry" as well as any occupant who makes a "peaceable entry," but whose actual possession is "unlawfully held by force" thereafter.

Although the scope of Section 1 is undeniably broad, "summary process is a purely statutory procedure and can be maintained only in the instances specifically provided for in the statute." Indeed, the SJC has recognized that "not every entitlement to possession against an occupant may be the subject of summary process."[6] Suits to eject tenants by the entirety and tenants-in-common are two examples of suits for possession to which our appellate courts have ruled that summary process does not apply.[7]

Does the ejection of a truly gratuitous "tenant" require the commencement of summary process proceedings? Parties to the reported decisions involving gratuitous tenancies in Massachusetts appear to have believed so, as nearly all of these decisions arise out of summary process proceedings in the Trial Court.[8] Unfortunately, the applicable holdings from these cases do not create a cohesive logic for requiring (or even permitting) summary process in the case of gratuitous tenants.

As discussed above, the statutory language of c. 239 § 1 contemplates several scenarios in which a non-lessee may be subject to summary process. The first is when the

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non-lessee is a "person holding under a lessee without right after the determination of a lease by its own limitation or by notice to quit or otherwise." A plain reading of this clause does not readily indicate whether the term "person holding under a lessee" is limited to a sub-lessee, or whether this clause also applies to long-term guests and licensees. However, our Appeals Court appeared to answer this question definitively in *United Co. v. Meehan*, 47 Mass. App. Ct. 315 (1999), where the court held that "*a landlord need not bring a summary process action against a person whose status is only as a guest or visitor of a tenant*," and affirmed the Housing Court's dismissal of a landlord's direct action for possession against the unauthorized occupant of its tenant (the court in *Meehan* also affirmed the Housing Court's award of possession to the landlord against the tenant through whom the gratuitous tenant came into possession of the premises, with the court reasoning that an order to vacate against the tenant necessarily included the removal of any of the tenant's guests).[9]

Section 1 of c. 239 also requires that summary process be utilized in cases involving forcible initial entry as well as cases in which the possession is "unlawfully held by force." However, case law as to the definition of "force" in this context is clear (albeit sparse) that actual force or threat of force is necessary to invoke summary process; a "mere refusal to leave does not constitute forcible detainer."[10]

When read in conjunction, the precedent summarized above suggests that the only proper civil remedy for ejecting a truly gratuitous tenant who does not use or threaten force is to seek equitable relief under a common-law theory of trespass. Although it is clear that property owners pursued the ejection of gratuitous tenants via summary process in at least a handful of cases after *Meehan*,[11] it is difficult to see how any of these actions could have survived a dispositive motion for failure to state a claim under Chapter 239. Moreover, the mere fact that these cases were litigated through summary process without objection did not serve as legal authority for the use of summary process in such matters, as the Appellate Division of our District Court Department expressly noted in *Nealon v. Johnson,* 2013 Mass. App. Div. 38, before vacating the lower court's judgment awarding possession on summary process:

> No party litigated the question of statutory jurisdiction under M.G.L. c. 239, § 1. That implicit ruling was nothing more than the "law of the case … [w]here a legal ruling is merely assumed or implied but not litigated in one case, that ruling is not authority in another case." *Metivier v. Liberty Mut. Ins. Co.,* 1999 Mass. App. Div. 88, 89 n. 3, citing *Nash v. Lang,* 268 Mass. 407, 411 (1929), and *Vigeant v. Postal Tel. Cable Co.*, 260 Mass. 335, 343–344 (1927).

The seeming consensus (at least among our appellate courts) as to the inapplicability of summary process to suits involving gratuitous tenants was thrown for a loop by the unpublished Appeals Court decision of *Thorup v. Hodges,* 94 Mass. App. Ct. 1103 (2018). The plaintiff in *Thorup* allowed the defendant — an aspiring female screenwriter whom the plaintiff "quickly befriended" — to reside in his single-family home while he completed a teaching assignment overseas. The defendant paid no rent or utilities, and in fact received a small stipend from the plaintiff to take care of the residence. Although the appellate panel in *Thorup* did not disturb the Housing Court's finding as to the defendant's status as a "guest" or "licensee," it nevertheless rejected the defendant's argument that the plaintiff lacked standing[12] to bring a summary process action under Chapter 239 § 1, characterizing the difference between tenants and licensees as a matter of "semantics."

To add to the confusion, the panel in *Thorup* explicitly acknowledged the SJC's pronouncement that "*not every entitlement to possession against an occupant may be the subject of summary process*" but subsequently held, just sentences later, that summary process was proper in the case at bar because the complaint alleged "*possession of premises wrongfully* [though apparently not forcibly] *withheld*." At the very least, this holding appears to be impermissibly broad given the Appeals Court's previous rejection of summary process as an appropriate method for removing the guest of a tenant in *Meehan*, as well as the SJC's prior ruling against the use of summary process to effectuate repossession by one tenant by the entirety against the other.[13]

Unquestionably, both *Meehan* and the SJC cases cited throughout this article control over *Thorup* to the extent any conflict exists between them (as appears to be the case).[14] Nevertheless, *Thorup's* persuasive appeal may exceed and eventually overshadow its limited authority, particularly in light of the panel's stated concern that disavowing summary process in the cases of gratuitous tenancies "would tend to frustrate the significant public policy considerations undergirding statutes prohibiting or limiting the use of self-help measures to secure possession of real property." On its face, this argument is a compelling one, especially as eviction moratoriums and COVID-19 housing assistance programs expire across the state. At the same time, there is no authority in Massachusetts to support the proposition that self-help is permitted in any residential context, as such action is almost assuredly prohibited by c. 184 s. 18; nor did the defendant in *Thorup* appear to argue in support of her own eviction through self-help.

Whether or not summary process *should* be the exclusive remedy for ejection of all wrongful possessors, however, is largely irrelevant for purposes of this article. The point here is that clarifying the correct process for ejecting truly gratuitous tenants — summary process or injunctive relief pursued through the regular civil docket — is important and necessary. Nor is this discussion an academic one: as the SJC recognized over 20 years ago, summary process is the *exclusive* means of recovering possession from those particular occupants identified in Chapter 239, barring any other form of equitable relief.[15]

Parties who file suit against truly gratuitous tenants are typically seeking to extricate themselves, as speedily as possible, from unfair if not abusive relationships that are non-commercial in nature. Presently, however, our case law is muddled as to the proper course for such litigation, with reasonable arguments available to support the dismissal of both a summary process action and a common-law action seeking equitable relief (that is, ejection). No plaintiff wants to be in the same position as the landlord in *Nealon, supra* — successfully recovering a judgment of possession only to learn that the procedure utilized to obtain that judgment was invalid. Unfortunately, each case involving "guests in tenants' clothing" may be the next *Nealon* until the status (if any) of gratuitous tenants under Chapter 239 is clarified by our appellate courts. ■

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1. *Belizaire v. Furr,* 88 Mass. App. Ct. 299, 303 (2015) ("There are two essential requirements for the creation of such a tenancy: first, a contractual agreement between the landlord and the tenant, and second, that the tenant

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exclusively occupy the premises.").

2. *See Baseball Publishing Co. v. Bruton,* 302 Mass. 54, 55 (1938).
3. *See id.*
4. *See Belizaire,* 88 Mass. App. Ct. at 303; *see also Lavelle v. Lavelle,* 2012 Mass. App. Div. 150 (any tenancy was of a "gratuitous nature" given the lack of any consideration or right to exclusive possession).
5. *See generally Belizaire*, 88 Mass. App. Ct. 299 (close family friend determined to be gratuitous tenant); *Lavelle,* 2012 Mass. App. Div. 150 (action between mother and son who was initially permitted to reside at premises); *Aloisi v. Kelly,* 2009 Mass. App. Div. 207 (daughter who continued to live on property after father's death).
6. *See Fafard v. Lincoln Pharmacy of Milford, Inc.,* 439 Mass. 512, 514–515 (2003) (counterclaims may not be brought in commercial summary process action, as statute does not authorize them) (citing *Cummings v. Wajda*, 325 Mass. 242, 243 (1950)).
7. *See id.* (statute does not authorize summary process by lessee of one joint tenant by the entirety against the other); *Nealon v. Johnson,* 2013 Mass. App. Div. 38 (Land Court commissioner's summary process action against tenant-in-common not permitted under 239 § 1). Presumably, the proper remedy in both *Cummings* and *Nealon* was a civil action for ouster and/or partition filed in a court of competent jurisdiction.
8. *See generally United Co. v. Meehan,* 47 Mass. App. Ct. 315 (1999); *Thorup v. Hodges*, 94 Mass. App. Ct. 1103 (2018) (unpublished Rule 23.0 decision); *Aloisi, supra* note 5; *Lavelle, supra* note 2; *but see Rinaldo v. Haynes,* 2006 WL 1330861, Worcester Superior Court No. 2006-0286 (March 24, 2006) (plaintiffs pursued repossession via injunction pursuant to M.G.L. c. 184 § 18).
9. 47 Mass. App. Ct. at 320. Given the nearly identical language in c. 239 § 1 applicable to "persons holding under" sellers of real estate, the above holding from *Meehan* could easily be extended to the removal of a seller's guest who refuses to vacate following sale.
10. *Nealon*, 2013 Mass. App. Div. 38 at note 7 (citing *Kiernan v. Linnehan*, 151 Mass. 543, 547 (1890)).
11. *See supra* note 8.
12. Although the *plaintiff's* standing under Chapter 239 may certainly be challenged, it is the *defendant's* status as a non-lessee that appears to be problematic in both *Meehan* and *Thorup.* Whether the issue is viewed as a lack of standing or the plaintiff's failure to state some other element of the statutory claim under Chapter 239 does not appear to be a meaningful distinction in such cases.
13. *See Cummings,* 325 Mass. at 243. *Thorup* similarly calls into question the Appellate Division's ruling in *Nealon*, 2013 Mass. App. Div. 38 (prohibiting the use of summary process to eject a tenant-in-common).
14. *See Chace v. Curran,* 71 Mass. App. Ct. 258, 260 n.4 (2008) (a summary decision pursuant to rule 23.0 or rule 1:28 issued after Feb. 25, 2008, may be cited for its persuasive value, not as binding precedent).
15. *Atty Gen. v. Dime Sav. Bank of New York,* FSB, 413 Mass. 284, note 10 (1992) citing *Weiss v. Levy,* 166 Mass. 290, 293 (1896) (no equitable relief available at common law in cases to which summary process applies, as summary process offers "a plain, adequate, and complete remedy at law").

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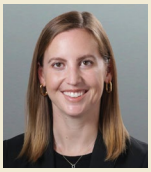

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