September 2024: A Snapshot of Cases Shaping the Law Over the Years

By Peabody & Arnold on September 30, 2024

Over our firm's long history, our attorneys in various practice groups have helped shape the law of insurance, business, contracts, products, civil rights, entertainment, healthcare and more. In the earlier years, the firm performed legal work relative to the first office tower in Boston (the Key Building) and handled two famous mergers: in 1925, the merger of the State Street Deposit Trust Company and the National Union Bank of Boston to become the State Street Bank and Trust Company (now State Street Corporation); and then the 1970's merger between Boston Hospital for Women and the Peter Bent Brigham Hospital to later become Brigham and Women's Hospital.

Here is a small snapshot of our more recent and interesting matters that we've handled for our valued clients over the past 125 years:

***AIG Prop. Cas. Co. v. Rosenthal*, No. 22-CV-11401-ADB, 2024 WL 1075157 (D. Mass. Mar. 12, 2024)**

Tamara Smith & Lincoln Rose

In an insurance coverage declaratory judgment action relating to a boating accident, Tamara and Lincoln defeated the Insured's summary judgment motion and succeeded on a cross-motion for summary judgment for the Insurer on the basis that the Insured had breached the terms of his insurance policy, including the cooperation provisions, by failing to sit for an examination under oath. Lincoln and Tamara further defeated the Insured's request to be allowed to cure.

***Matter of Foster*, 492 Mass. 724, 215 N.E.3d 394 (2023)**

Allen David & Kristyn K. St. George

Allen David and Kristyn K. St. George successfully repelled an Assistant Bar Counsel's attempt to convince the MA SJC that an attorney from the AGO's criminal division had violated Mass. R. Prof. C. 8.4 (c) in a complicated matter relating to the prosecution of a state drug laboratory chemist.

***Katz v. Belveron Real Est. Partners, LLC*, 28 F.4th 300 (1st Cir. 2022)**

John (Jack) O'Connor & Kristyn M. Kelley

A real estate investor brought an action against the purchaser of the investor's interest in affordable

housing property, the purchaser's agent, the entity whose affiliate acquired half of the purchased interest, and the entity's vice president of operations, asserting claims for fraud, civil conspiracy, breach of fiduciary duty, unjust enrichment, tortious interference with contract or business relations, and violation of the Massachusetts Consumer Protection Act. On appeal, the First Circuit affirmed the District Court for the District of Massachusetts's decision to grant Defendants' motions for summary judgment.

***Alexandre v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 514 F. Supp. 3d 375 (D. Mass. 2021), *aff'd sub nom. Alexandre v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 22 F.4th 261 (1st Cir. 2022)**

Tamara Smith & Lincoln Rose

In an ERISA action claiming that National Union Fire Insurance Company of Pittsburgh, PA improperly denied an Insured's claim for accidental death benefits following the death of her husband, Tamara and Lincoln defeated the Insured's summary judgment motion and succeeded on a cross-motion for summary judgment for the Insurer on the bases that the ERISA plan administrator properly used his discretion to determine that the beneficiary had committed suicide, that the presumption against suicide was inapplicable, and that substantial evidence supported denial of coverage pursuant to policy's "intentional self-inflicted injury" exclusion under the law of the First Circuit. The plaintiff filed a petition for writ of certiorari to the United States Supreme Court, arguing a "circuit split" and asking SCOTUS to review the lower court's decision. Tamara and Lincoln filed an opposition. SCOTUS denied the plaintiff's petition for further review, leaving intact the First Circuit's ruling that National Union correctly disclaimed benefits under the applicable policy and law.

***Mentis Scis., Inc. v. Pittsburgh Networks, LLC*, 173 N.H. 584, 586, 243 A.3d 1223, 1226 (2020)**

Robert McCall & John (Jack) O'Connor

On appeal of an order of the Superior Court dismissing the plaintiff's claims for damages representing the cost of recreating lost data and lost business and negligence against the defendant, Robert McCall and John O'Connor persuaded the Supreme Court of New Hampshire to affirm because the damages sought were consequential and the limitation of liability clause precluded the plaintiff from recovering consequential damages. In addition, the economic loss doctrine barred the plaintiff's negligence claim.

***Ark Underwriting, Inc. v. Lexington Ins. Co.*, No. CV 18-12027-GAO, 2020 WL 7828801, at *1 (D. Mass. Dec. 31, 2020)**

Tamara Smith & Lincoln Rose

In an insurance coverage declaratory judgment action by one insurer against another, Tamara and Lincoln defeated Ark's motion for summary judgment and succeeded on a cross-motion for summary

judgment for Lexington that the latter was not obligated to defend or indemnify claims made in an underlying personal injury suit relating to a worker who was seriously injured in a construction accident. The injured worker was an employee of a masonry contractor, insured by Ark, who had entered into a subcontract with a scaffolding contractor, insured by Lexington. The case involved the frequently-litigated issue of who qualifies as an "additional insured" in the construction and risk-transfer setting. The Court ruled that the "additional insured" coverage under the Lexington policy was limited to a party's potential liability in tort, and did not extend to its breach of any contractual duty. Consequently, Tamara and Lincoln defeated Ark's claim for coverage on the basis of the Lexington policy's exclusion for contract-based claims.

***In re Accutane Litigation*, Docket No. 079958 (August 1, 2018)**

Colleen M. Hennessey

In the wake of the Supreme Court of New Jersey's landmark decision in *In re Accutane Litigation*, 234 N.J. 340 (N.J. 2018), which dismissed 2,000 claims alleging Accutane caused Crohn's disease, the Appellate Division of the New Jersey Superior Court, Colleen M. Hennessey, who served as science counsel in the litigation, achieved a *Daubert* victory, successfully persuading the Appellate Division to affirm the trial court's finding that plaintiffs' expert opinions regarding the alleged relationship between Accutane and ulcerative colitis "slanted away from objective science and in the direction of advocacy," and had rejected scientific norms by elevating lower forms of scientific evidence over the existing epidemiological evidence, which did not support an association, let alone causation, between the ingestion of Accutane and the development of ulcerative colitis.

***Mount Vernon Fire Ins. Co. v. VisionAid, Inc.*, 91 F. Supp. 3d 66, 67 (D. Mass. 2015), *aff'd*, 875 F.3d 716 (1st Cir. 2017); and *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343, 76 N.E.3d 204 (2017)**

James Duane III, Jennifer Burke, & Scarlett Rajbanshi

In an insurer's declaratory judgment action seeking a declaration as to its obligation, if any, under and EPL policy to prosecute a counterclaim insured asserted against a former employee who had sued the insured for wrongful termination, James, Jennifer and Scarlett successfully moved for summary judgment against the insured on the basis that, under MA law, the EPL policy only provided coverage for claims first made against the insured, and that the insured's misappropriation counterclaim against the former employee was neither necessary to defeat his age discrimination claim nor would automatically offset insured's potential liability.

Following summary judgment for an insurer, the First Circuit certified the insurance coverage at issue to the MA SJC for an opinion on whether MA law requires an insurer to prosecute affirmative claims on behalf of its insured. The MA SJC answered all certified questions, importantly holding that an insurer's duty to defend does not extend to the obligation to prosecute counterclaims. The holding of *VisionAid* is has since been widely discussed in the insurance industry and among attorneys representing insurers,

given its clarity and impact on the industry.

***Ceruolo v. Garcia*, 92 Mass. App. Ct. 185, 83 N.E.3d 179 (2017)**

John (Jack) O'Connor

Jack O'Connor successfully defended a defense attorney who notified her liability insurer of a potential claim against her after her clients were subjected to default in a six-figure judgment against them. In the underlying case, the Superior Court dismissed only in part the complaint against the defense counsel's clients, creating uncertainty as to what remained of the claims. Following that order, defense counsel, Peabody & Arnold's client, moved for a more definite statement. Under rule 12(e), this motion should have stayed the answer deadline, but, while the motion was pending, the Superior Court nonetheless issued a default for failure to answer. Later, the Court denied the motion for a more definite statement. The clerk's office then failed to notify defense counsel of these orders. After inquiring with the clerk and learning of the default, defense counsel moved three times to vacate it; the Court denied each motion and assessed a large damages award against the defendants. Jack represented the defense counsel through the course of the appeal from the Superior Court judgment. The Appeals Court reversed the judgment, reasoning that the Superior Court erred both in refusing to remove the default and in refusing to require the filing of an amended complaint as defense counsel had requested. The Appeals Court's decision was a complete victory for the defendants in the underlying suit and, therefore, for the defense attorney Jack represented.

***Zabin v. Picciotto*, 73 Mass. App. Ct. 141 (2008)**

Timothy Egan & Robert Gill

The Appeals Court of Massachusetts upheld jury verdicts in favor of attorneys for significant attorney fees following a legal dispute over the proper distribution of settlement proceeds.

***Stewart v. Dutra Const. Co.*, 543 U.S. 481, 484, 125 S. Ct. 1118, 1121, 160 L. Ed. 2d 932 (2005)**

Harvey Weiner, John (Jack) O'Connor, & Frederick Connelly, Jr.

A marine engineer, who was injured when a dredge and scow collided during work forming part of Boston's Central Artery/Tunnel Project, the "Big Dig," sued his employer under, among other statutes, the Longshore and Harbor Workers' Compensation Act (LHWCA), alleging that, as a seaman injured by employer's negligence, he was entitled under the LHWCA to sue the vessel owner as a third party for an injury caused by owner's negligence. After the US District Court for the District of Massachusetts entered summary judgment for the employer on the LHWCA claim, the plaintiff appealed. Although successful before the First Circuit, the Supreme Court reversed.

***Sylvia v. Johnson*, 44 Mass. App. Ct. 483, 691 N.E.2d 608 (1998)**

John (Jack) O'Connor

In a trusts/contract case, Jack persuaded the MA Court of Appeals, Bristol, to reverse a directed verdict of personal liability against a trustee because the contractual claims were foreclosed by a nonrecourse clause in the trust instrument.

***Clark v. Rowe*, 428 Mass. 339, 340, 701 N.E.2d 624, 625 (1998)**

Allen David & Moujan Walkow

On appeal, representing a defendant/respondent attorney against a client's malpractice suit, Allen David and Mouajn Walkow successfully persuaded the MA SJC, in a matter of first impression, to apply comparative fault principles to a legal malpractice claim and uphold the first-instance judgment for the defendant, after it had been found that the client/plaintiff was responsible for seventy percent of the negligence.

***Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. et al. v. City of Bos. et al.*, 418 Mass. 238, 636 N.E.2d 1293 (1994), *rev'd sub nom. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)**

Philip Cronin & Mary Bonauto

A group of Irish-American gays, lesbians, and bisexuals sought to march in Boston's St. Patrick's Day-Evacuation Day Parade, and parade organizers refused. The Superior Court, Suffolk County, J. Harold Flannery, J., granted permanent injunctive relief to the group, and organizers appealed. After finding that not every parade is per se an exercise of First Amendment rights and that this parade was a place of "public accommodation," and upholding the trial court's decisions that the parade organizers had (a) failed to establish the parade was used for expressive purposes and (b) discriminated against the group because based on their sexual orientation, the MA SJC, Liacos, C.J., held (1) that the organizers violated MA public accommodation law, which prohibits discrimination based on sexual orientation in public places, by not allowing the group to march, and (2) that MA public accommodation law did not violate organizers' First Amendment rights. Attorneys Philip M. Cronin of Peabody & Arnold LLP and Mary L. Bonauto of Portland, ME, advocated for the Plaintiffs.

***Palandjian v. Pahlavi*, 782 F.2d 313 (1st Cir. 1986)**

Harvey Weiner & Ellen Loeb

Harvey and Ellen defended the late Princess Ashraf Pahlavi, the twin sister of the former Shah of Iran, against an action for breach of contract, conversion, unjust enrichment, quantum meruit, and breach of fiduciary duty, and pursued an interlocutory appeal on her behalf following the US District Court for the District of Massachusetts' denial of the defendant's motion for summary judgment. The motion concerned whether the duress exception to statutes of limitation under MA law was properly raised by intermediate appeal. Harvey recalls that while defending the Princess's deposition, he was looking out the window of the Churchill room of the *Hotel de Paris* in Monaco and admiring Princess Grace's yacht. Harvey prevailed for the Princess on summary judgement.

***Mikolinski v. Burt Reynolds Prod. Co.*, 10 Mass. App. Ct. 895, 409 N.E.2d 1324 (1980)**

Harvey Weiner & Peter G. Hermes

Harvey and Peter persuaded the Appeals Court of Massachusetts to affirm the trial court's decision to dismiss an action against Burt Reynold's Production Company, which alleged defamation against persons of Polish descent in the 1978 film, "*The End*."

