



THE MASSACHUSETTS CHAPTER OF THE FEDERAL BAR ASSOCIATION

CHRISTOPHER HART • EDITOR

December 17, 2014

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PRESIDENT'S WELCOME

by Lisa M. Tittlemore, Sunstein, Kann Murphy & Timbers LLP

Greetings to old friends and welcome to new members! I look forward to working with you, and am honored to be President of our chapter this year. We are fortunate to start our fiscal year with many excellent programs and initiatives both in place and in development for the upcoming year.

The Massachusetts Chapter of the FBA is a vibrant and active group empowered to play an active role in achieving the mission of the FBA:

The mission of the Association is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary and the public they serve.

Nationally, the FBA consists of more than 16,000 federal lawyers, including 1,200 federal judges, who work together to promote the sound administration of justice, and the integrity, quality and independence of the judiciary.

See <http://www.fedbar.org/Advocacy/Legislative-Update.aspx>.

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PRESIDENT'S WELCOME

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Locally, the Massachusetts Chapter board is a diverse group, including attorneys who work in government positions, private practice, and universities, and members of the federal judiciary and clerk's offices. Our membership will continue growing and diversifying as we attract practitioners whose cases bring them more and more into federal court.

- Our successful *Breakfast with the Bench* series is continuing as strong as ever, with two programs—featuring Judge Gorton and Judge Woodlock—having already taken place this Fall, and more to come. See articles pages 4 and 6.
- We are working on new programming in substantive areas of the law. In November, we held an extremely popular (complete with a waiting list and overflow seating) brown bag lunch program featuring Immigration Judge Feder. Judge Feder discussed her docket of juvenile “surge” cases. We are fortunate to be able to draw on the support of the national FBA and our federal judiciary for these our events. See article page 10.
- We have numerous other programs in the works, including the CARE/RESTART job interview skills program which was developed by our chapter and most recently run by our “Young Lawyers” Division (YLD) and co-sponsored with the Massachusetts Black Lawyers Association.
- Planning is already underway for our highly regarded and well attended Annual Judicial Reception, which will be held in the Spring.
- We are continuing to develop our expanded geographic footprint with our divisions in Worcester and Springfield, which are active and growing. Currently, they are busy planning a reception to honor Magistrate Judge Neiman,

in light of his retirement. The reception will be held on January 16, 2015 at 3:30 p.m. at the federal courthouse in Springfield.

- We have a role in supporting the new FBA chapters in New Hampshire and Maine, and we look forward to working with our FBA colleagues there and around the United States.
- Our YLD colleagues are extremely active. Their work includes organizing their “Brief Bites” lunch series. Our local law school chapters also continue to expand while they are busy organizing programming, such as the recent panel on “Women in the Federal Courts” run by the New England Law Boston chapter. The Suffolk Law chapter is planning an event with Judge Gelpi in January.

I would like to challenge our chapter to continue to think about and implement programs that foster the important mission of the FBA. During this time when civic discourse can be hijacked by partisan positioning, and the very role of government sometimes seems to be in question, we must continue working on core issues such as filling judicial vacancies, supporting funding for the courts, and ensuring the independence of the judiciary.

Judicial independence is critical to allowing cases to be decided according to the rule of law and judicial discretion. The rule of law stands in contrast to autocracy and oppression. We have an important leadership and educational role to play.

Please contact me with your suggestions and contributions. I look forward to collaborating with you.

Best wishes for the holidays, and here's to an excellent 2015!

UPDATES FROM THE CLERK'S OFFICE

by Robert J. Farrell

MORE CONSTRUCTION? LESS PARKING.

Anyone traveling to Boston's Seaport District, specifically the area immediately surrounding the John Joseph Moakley Courthouse, has seen the upswing in construction activity. The construction is impacting the number and availability of parking spaces. This is a bigger problem for those trying to park during mid-day.

We encourage you to keep these limitations in mind as you plan your arrival at the courthouse. For those with access to the T, there is a subway station (Courthouse Station on the Silver Line) a short walk from the courthouse. (<http://www.mbta.com/>)

NAVIGATING CM/ECF.

Here are some suggestions you may find helpful when using CM/ECF:

UPDATING CONTACT INFORMATION: Please be sure to update your contact information (firm affiliation, street address, phone number and email address) as soon as possible, if you have any changes. To do that, log into CM/ECF, click on Utilities on the blue menu bar, and then on Maintain Your Account (for firm and street address), and/or Maintain Your E-Mail to update your email address.

ADDING CASES OF INTEREST: attorneys may update their accounts to include docket numbers for other cases (in this court's database) that are of interest. Do that by following the instructions above to access the "Maintain Your E-mail" screen. Click on your email address and add the docket number of any case in which you want to receive email notice of case activity. Be sure to click on "Submit all changes" on the left side of the screen. Using the search function to find the proper entry

ADDING SECONDARY EMAIL ADDRESSES: attorneys may add additional email addresses to receive the same notices as the attorney. Follow the instructions above to access the "Maintain Your E-mail" screen but this time click on the link to "add new e-mail address." Additional information on these and other functions in CM/ECF, in the form of e-learning modules, may be found on the court's web at (<http://www.mad.uscourts.gov/training/cmecf-training-info.htm>).

FBA LAW SCHOOL CHAPTERS UPDATE

By Katherine G. Howells, New England Law | Boston

The Law School Chapters had a great fall semester. We are now in the process of establishing new chapters at Northeastern University Law School and Boston University. The already established chapters, New England Law | Boston, Suffolk Law and Boston College have a lot of great events planned for the Spring. The Fall semester was highlighted by a panel event at New England Law | Boston, entitled "Women in the Federal Practice." This event was held on November 10, 2014 at New England Law | Boston. We were fortunate to have Michelle Shaffer, Lisa Maki and Jessica Hedges as our wonderful panelists. New England Law | Boston would like to thank all of our panelists for devoting their valuable time to this event. It was a great success!

The Spring semester is shaping up to be very busy for the Law School Chapters. All chapters will be hosting a Mock-Interview Program with the Young Lawyer Division in January. This program will be very helpful for students as they prepare for On Campus Interviews and the ever-demanding job search. The goal is to not only allow for a mock-interview but also to give constructive feedback on resumes and interview styles. The Law School Committee is excited for this new opportunity to showcase our younger lawyers and we look forward to being a part of more opportunities like this in the future.

Suffolk Law School will be hosting its annual Judicial Panel on January 13, 2015. This annual panel will feature Hon. Gustavo Gelpi as he discusses the Voting Rights Act and Voting Issues in U.S. Territories. More details are to come about this great event, so be sure to keep an eye out. This is an event you won't want to miss!

New England Law | Boston is hosting a panel event on February 5, 2015. This panel will be focused on Intellectual Property Law and will likely be co-sponsored with the Career Services Office as well as the Intellectual Property Law Association at NELB. Lisa Tittlemore has graciously volunteered to be a panelist and we are hoping to compliment her presence with at least two other IP attorneys. This event is expected to be very well attended and is open

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BREAKFAST WITH THE BENCH: HON. DOUGLAS P. WOODLOCK

by Lisa M. Tittlemore, Sunstein, Kann Murphy & Timbers LLP

The FBA's MA Chapter had another terrific installment of its "Breakfast with the Bench" series on Tuesday, November 25, 2014, with Judge Douglas P. Woodlock leading the discussion. Judge Woodlock discussed "*The Future of Aggregate Litigation: Class Actions and MDL Matters.*" The meeting was held, as usual, at the John Joseph Moakley Federal Courthouse, in the Judges Dining Room.

Judge Woodlock observed that these MDL cases are transforming the dockets of the federal courts. Judge Woodlock informed us that 1/3 of all civil litigation pending in the federal courts are MDL ("Multi-District Litigation) matters. While traditionally MDL cases have been focused on areas like anti-trust and securities, currently 90% of these cases are products liability cases. This is a fascinating area for federalism scholars, given the complexity involved in deciding, through the MDL process, cases from numerous states. The complexity arises from various factors: first, federal MDL cases can involve different state law claims; second, given the similarity of cases pending in state courts, cooperation and communication between the state and federal courts handling the cases are often required. In some cases, the federal and state court judges may both sit together on the bench to address certain issues. Judge Woodlock noted that the U.S. Supreme Court has been carving a path to greater restrict class action litigation. As counsel representing plaintiffs are finding class actions a less attractive method for aggregating cases, they are paying greater attention to MDL as an option. Judge Woodlock noted that MDL procedures are also more flexible. Judge Woodlock used the analogy of a balloon: as class actions are squeezed, the number of MDL cases increases. That said, in some cases, MDL cases themselves are class actions. Apparently, the District of Massachusetts is a magnet for sophisticated plaintiffs' counsel who bring numerous cases into this jurisdiction in addition to the Southern District of New York, the Northern District of Illinois, and the Central District of California (among others).

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Pictured (from left): Lisa M. Tittlemore, Hon. Douglas P. Woodlock, Clerk Robert Farrell

YLD ANNOUNCES 2014-2015 BOARD

by Stephen I. Hansen, Eckert, Seamans, Cherin & Mellott LLC

The Young Lawyers Division is pleased to announce its new Board for the 2014-2015 year:

Chair: Stephen I. Hansen. Steve is an associate in the litigation department of Eckert Seamans Cherin & Mellott, LLC focusing on mass tort, products liability, and commercial litigation matters. Prior to becoming Chair, Steve served on the YLD board for two years and as the editor for the FBA Massachusetts Chapter newsletter. Steve is a 2010 graduate of Boston College Law School.

Chair-Elect: Andrew Jacobs. Andrew began practicing federal law as an associate in the antitrust group of a large firm and as a district court clerk. Andrew has been active with the SDFL FBA chapter, served on YLD's board, and written articles for the FBA newsletter.

Vice-Chair: Nicole Loughlin O'Connor. Nicole is an Assistant Corporation Counsel with the City of Boston Law Department. Focusing on litigation, Nicole represents the City and its employees in a myriad of civil matters in both federal and state court. Nicole is a 2009 graduate of Suffolk University Law School and a 2006 graduate of the College of the Holy Cross.

Treasurer: Shannon Phillips. Shannon is an Assistant Corporation Counsel in the Litigation Division of the Boston Law Department, a position she has held since her graduation from Suffolk University Law School in 2012.

Secretary: Jennifer Ioli. Jennifer is an associate at Sherin and Lodgen LLP in Boston and a graduate of Northeastern University School of Law.

The new Board looks forward to working with the FBA to sponsor social events, philanthropic activities, and new programming geared at young lawyers.

FBA LAW SCHOOL CHAPTERS UPDATE

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to all students in all chapters.

Finally, there will be an Inter-Chapter Mixer in March 2015. This event is open to all law school chapters, and they have all been working together to plan this event. The mixer is open to all board members as well, including the Younger Lawyers Division. It is our goal that this mixer will provide a unique opportunity to get to know our Bar Association and board members in an informal setting. We hope to see many students, younger lawyers and board members there!

WOODLOCK BREAKFAST

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Judge Woodlock discussed a case that he is handling as through the MDL process, which includes 2,400 separate cases (some of which may be consolidated). He said that he may end up keeping many of these cases, perhaps more than half of them, for final disposition in MA. He observed that this creates interesting resource allocation issues. For example, while his MDL case contains 2,400 separate cases, it counts as 1 case for him in the court's statistics. Fortunately, the impact of the MDL cases is considered in the allocation of hiring for court clerks.

Judge Woodlock was very enthusiastic about discussing the impact that these cases will have on the federal courts, and we had a lively and fully engaged discussion with him. The number of MDL cases now in the federal courts is an issue of importance for all federal court litigators, even those who do not handle these cases, as their effect on judicial resources is something of which we should all be aware.

BREAKFAST WITH THE BENCH: HON. NATHANIEL M. GORTON

by Jennifer Ioli, Sherin & Lodgen LLP



On October 31, 2014, the FBA sponsored a Breakfast with the Bench featuring The Honorable Nathaniel M. Gorton of the United States District Court for the District of Massachusetts. There was a great turnout of local federal practitioners on this cold Halloween morning.

First, Judge Gorton provided a brief history of the FISA Court. It began in 1978, and its activity has evolved over the years, especially since the September 11 attacks. Judges are only appointed for one single term, and the FISA Court does not sit *en banc*; only one judge sits full-time for one week, and each of the eleven judges rotates through the cycle. Three of the eleven judges must be from the Washington, D.C. area. He explained that there is no FISA court “common law,” but there are five attorneys who serve as legal counsel; these attorneys are responsible for ensuring proper execution of the petitions. Judge Gorton explained that not all petitions are granted. The percentage of petitions FISA judges reject is higher than the percentage of Title III wiretap rejections nationwide. However, the judge may allow the petition to be redone. If the petition is redone, when the revised petition returns to the court’s consideration, it must be heard by the same judge who had already reviewed it. He stated that petitions are only effective for short periods of time, and such periods of time may be extended if needed. Judge Gorton ended his remarks on the FISA court by reflecting that he enjoyed his time on the Court, noting that he was impressed with the thoroughness and conscientiousness of the petitions he reviewed. He believes that investigation by the FISA court plays a vital and necessary role in national security.

Second, Judge Gorton discussed attorney voir dire of jurors, in the context of changes to the Massachusetts state rule, which became effective in February 2015. He described his experience as a trial attorney in Texas many years ago, which included an attorney voir dire of each prospective juror. He also mentioned that, as part of his current practice on the bench, he includes attorney-submitted questions in his voir dire of prospective jurors. Judge Gorton emphasized that he may allow counsel to question jurors at sidebar, but that the questions should go to whether the prospective juror can be fair and impartial, rather than focusing on figuring out which “side” the person favors. He also noted that attorneys should be conscious of the questions they would like to ask prospective jurors, as some questions may be off-putting and make the juror experience less pleasant. Judge Gorton also commented that although he does not like attorneys talking to jurors after a trial, he does not forbid it, and would recommend that an attorney confine any such discussions to the jurors’ personal opinions on the attorney’s performance.

The FBA thanks Judge Gorton, Clerk Robert Farrell, and Ginny Hurley for hosting this breakfast, and also those who attended.

PROFILES:

HON. TIMOTHY S. HILLMAN

by Christopher P. Sullivan, Robins, Kaplan, Miller & Ciresi L.L.P.

(This Article originally appeared in the December 2014 issue of the *Federal Lawyer*)

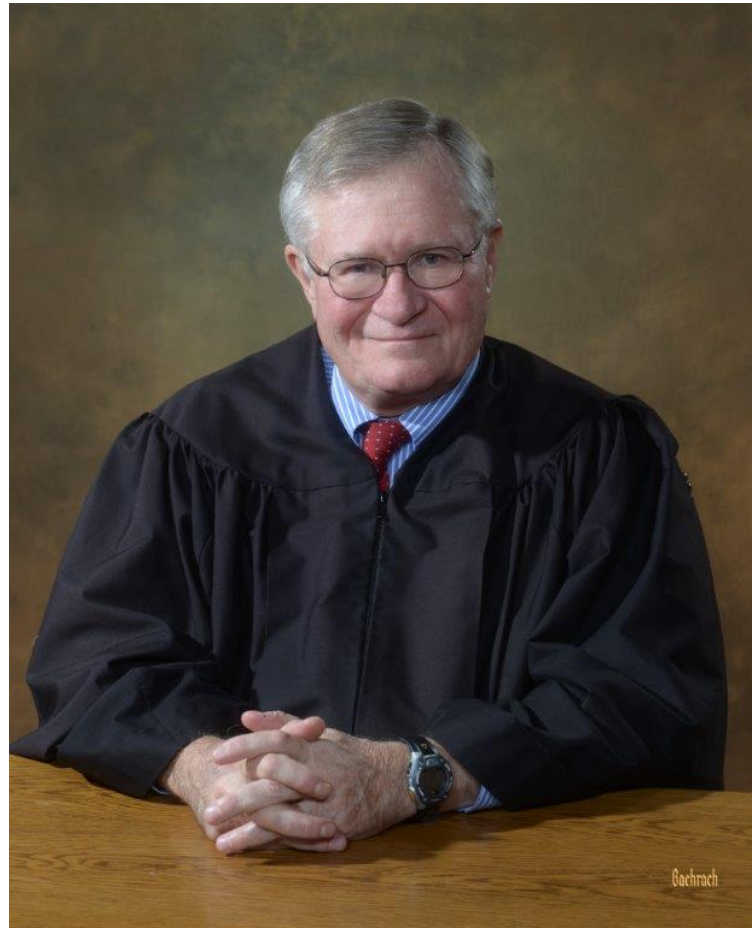
“Judges must remember that what we do on a daily basis is oftentimes a monumental, life-changing event for the litigants. It is extremely important to me that all litigants who appear before me have been given an opportunity to fully represent their position (and feel that they have had that opportunity), and that their cases be decided fairly and according to the law.” –Judge Timothy S. Hillman.

On November 30, 2011 President Barack Obama, on the joint, bipartisan recommendation of Massachusetts Senators John Kerry (D-Massachusetts) and Scott Brown (R-Massachusetts), nominated Timothy S. Hillman to the United States District Court for the District of Massachusetts. The United States Senate confirmed his appointment on June 4, 2012 by a vote of 88-1. Judge Hillman’s nomination was especially significant because of the uniquely bipartisan way in which it came about. Judge Hillman was nominated and confirmed in a year when almost one in ten federal judgeships in the United States stood vacant, due in part to a lack of partisan collaboration.

Before being sworn in as the newest district court judge in the United States District Court in Massachusetts, Judge Hillman spent the prior 23 years as a judge in the Massachusetts State Court system and as a United States Magistrate Judge. Throughout his career, Judge Hillman has demonstrated his strong commitment to fairness, willingness to learn, and unwavering respect for the law, litigating parties and the attorneys who appear before him.

Early Life and Family Influences

Judge Hillman was born the son of World War II naval veterans in Chicago, Illinois in March, 1948. His father served on a U.S. destroyer escort in the Pacific Ocean and his mother served as a nurse for the U.S. Navy. At age 12, Judge Hillman’s family moved to Massachusetts. He returned to the Midwest for college—earning his Bachelor of Arts degree in 1970 from Coe College in Cedar Rapids, Iowa. Judge Hillman returned to Massachusetts after college to attend Suffolk University Law School. He is married to Kay Alverson-Hillman and they have three adult children; a daughter and two sons.



When able to find a few moments of free time, Judge Hillman relishes gardening, carpentry and other hobbies that allow him to work with his hands.

Professional Development and the Bench

Judge Hillman began his lengthy public service career as an Assistant District Attorney in the Worcester County District Attorney’s Office in 1975. Thereafter, he went into private practice and also served as the city solicitor for Fitchburg, Massachusetts which helped him gain municipal law and trial expertise. Later Judge Hillman served as solicitor for the City of Gardner, as well as town counsel for the towns of Lunenburg, Athol and Petersham, all in Massachusetts. In 1991, Judge Hillman was appointed to serve as a Justice on the Massachusetts State District Court. He served as the presiding Justice of the Gardner District Court from 1995 to 1997 and as the presiding Justice of the Worcester District Court until 1998 when Judge Hillman was appointed to the Massachusetts Superior Court. The judges of the United States District Court for the District of Massachusetts appointed him as a United States Magistrate Judge on February 13, 2006.

Judge Hillman presided over almost 1,500 cases before
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PROFILES: JUDGE HILLMAN

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his nomination to the District Court for the District of Massachusetts, and as such, the extent of his judicial knowledge and expertise are unsurpassed. Judge Hillman has shared his knowledge with the next generation of legal professionals by teaching courses on law and psychiatry at the Massachusetts School of Law and courses on trial advocacy at Clark University.

Current Role

Judge Hillman was nominated to fill the vacancy left by Judge F. Dennis Saylor, IV, who moved from Worcester to Boston when Judge Nancy Gertner retired. It was fitting for Judge Hillman to fill a vacancy on the Worcester bench as he spent his entire judicial career presiding over courts in the Worcester area.

The Senate responded to Judge Hillman's nomination with strong bipartisan support for his confirmation. Senator Brown proved to be one of Judge Hillman's strongest supporters in the United States Senate. During Judge Hillman's confirmation proceedings, Senator Brown remarked that "[i]t was clear during [Judge Hillman's] interview that we were immediately impressed by his poise and intellect. Clearly he understands the proper role of a judge and is deeply, deeply committed to achieving justice." Senator Kerry echoed Senator Brown's statements to the assembly, advising the senators that "the President could not have nominated a more qualified person than Judge Hillman. I say that not only for myself but for a broad segment of the judicial community in Massachusetts."

Praise for Judge Hillman did not diminish after his confirmation. Judge Hillman was formally sworn in on September 6, 2013 by the Honorable Mark L. Wolf, then the Chief Judge of United States District Court for the District of Massachusetts. All of the judges from the United States District Court for the District of Massachusetts attended his swearing in ceremony, as did all of the judges from the U.S. Bankruptcy Court in Massachusetts. Many state court judges attended as well. Then Chief Judge Mark Wolf, Judge Dennis Saylor, IV, and Chief Magistrate Judge Leo Sorokin, all from the United States District Court for the District of Massachusetts, Senator Brown and Congressman James McGovern each spoke highly of Judge Hillman at the ceremony, with Judge Sorokin praising his "years of judicial experience, intelligence, judgment, good humor, compassion, and an unwavering commitment to justice

under the law."

Judge Hillman is equally respected by the lawyers who appear before him. Sherrard 'Butch' Hayes, co-founder and partner of Weisbart Springer Hayes, LLP, of Austin, Texas, recently had a case before Judge Hillman. Attorney Hayes said "Judge Hillman has the ability to see deeply into complex issues, focus on the core issues, and speak to them in a considered and clear manner. He is respectful of the parties and lawyers who appear before him, and with his manner sets a great example of civility and professionalism. His courtesy is contagious in the courtroom." Echoing those comments, attorney Christopher A. Kenney of Boston has said that "Judge Hillman's practical experience, even temperament and judicial bearing engender an atmosphere in which the bench and bar work together as officers of the court to 'get it right', protect rights, and promote justice."

Notable Achievements

Judge Hillman's smooth nomination and appointment to the District Court was a result of a level of collaboration that, while perhaps uncharacteristic of the present times, was very characteristic of Judge Hillman, himself. During his time on the bench, Judge Hillman has helped establish several model programs geared toward re-integrating offenders into their communities after they have served their sentences. These programs seek to empower ex-offenders to work with the judiciary and supervised release programs to take control of their futures and reduce recidivism rates in meaningful and durable ways. They have positively impacted the Massachusetts courts and surrounding communities by reducing recidivism, promoting public safety, and conserving already scarce funding for supervised release programs. As a testament to their success, these programs have been emulated by other courts around the country.

In 2006, Judge Hillman partnered with the United States Probation office to start a reentry court program: (RESTART) Reentry Empowering Successful Todays and Responsible Tomorrows. RESTART is a voluntary program that aims to support ex-offenders on probation or other form of risk of becoming repeat offenders. Judge Hillman's RESTART program attacks the recidivism rate in Massachusetts through nonconventional, heightened ex-offender supervision. Participants who successfully complete the program through graduation are awarded a one-year reduction to

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HOME DEPOT DATA BREACH CASE NOW IN MASS.

by Stephen Bychowski, Foley Hoag LLP

In September, Home Depot announced that it had suffered a massive data breach, exposing the credit and debit card information of millions of customers that shopped at Home Depot stores from April to September. In the wake of this announcement, at least 44 lawsuits have been brought against Home Depot throughout the U.S. and Canada relating to the breach. As of November 4, Massachusetts can add itself to the list.

Two residents of Massachusetts and one resident of Connecticut filed a class action complaint in the District of Massachusetts on behalf of everyone that used a credit or debit card at Home Depot stores in Massachusetts and Connecticut during the period that Home Depot's security was compromised. The complaint alleges, among other things, that Home Depot was negligent in its efforts to safeguard its customer's credit and debit card information. According to the complaint, the data breach "would not have occurred absent the retailer's failure to comply with" data security standards: "Had Home Depot devoted sufficient resources to maintaining a secure network, hackers would have been unable to exploit flaws in Home Depot's cardholder data infrastructure, and unable to so easily collect customers' credit and debit card information." The complaint also alleges that Home Depot violated the Massachusetts Data Security Law by failing to "provide prompt and direct notice of [the] breach to any affected Massachusetts resident."

The plaintiffs are seeking damages, an injunction requiring Home Depot to correct flaws in its cardholder data environment, and relief relating to the misuse of customers' private information and failure to issue "prompt, complete and accurate disclosures" to the affected customers. The plaintiffs are also seeking reasonable attorney's fees.

Back in September, plaintiffs in other class actions against Home Depot moved to transfer and consolidate the various cases pending throughout the country into one multi-district litigation. On November 24, Home Depot moved to stay the Massachusetts litigation pending resolution of the motion for consolidation and transfer.

Regardless of whether the Massachusetts litigation is transferred as part of a consolidation or stays in Massachusetts, the plaintiffs should expect Home Depot to file a motion to dismiss in short order arguing that the plaintiffs lack standing. The Supreme Court recently held

in *Clapper v. Amnesty International USA* that standing under Article III requires a showing of actual harm or "certainly impending" injury. Thus, the argument goes, victims of data breaches do not have standing because: (1) most class members only allege possible injury that their data might be misused, and (2) even if fraudulent charges do appear on their accounts, banks and credit card companies are quick to reverse the charges, and the class members cannot connect the fraudulent charges to defendant's data breach. While the *Clapper* case involved the NSA wiretapping program, its holding has been repeatedly used to successfully dismiss data breach class actions by consumers. In fact, Home Depot has already moved to dismiss the class action brought in the Northern District of Georgia for lack of Article III standing under *Clapper*.

PROFILES: JUDGE HILLMAN

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the length of their supervised release.

The success of these programs lies, perhaps in part, in the philosophy with which Judge Hillman approaches his role in the courtroom. Judge Hillman firmly believes that litigants must both be and feel they have been full participants in the judicial system. In responding to a question posed by Senator Chuck Grassley (R-Iowa) on the fair treatment of litigants in the courtroom, Judge Hillman advocated that "[j]udges must remember that what we do on a daily basis is oftentimes a monumental, life-changing event for the litigants."

Judge Hillman's commitment to the community does not end when he walks out of the courtroom or with the RESTART program. His character is best illustrated by an anecdote relayed by attorney Kenneth C. Pickering of Mirick O'Connell in Worcester. Attorney Pickering recalls being in Boston several years ago to meet with a young man who needed some direction in life. After the meeting, attorney Pickering and the young man dropped by the Federal Courthouse to see a criminal case, and happened upon a detention hearing before then Magistrate Judge Hillman. After the hearing, the courtroom clerk motioned them over and informed them that Judge Hillman had invited them back to his chambers. When attorney Pickering explained the purpose of their visit to Judge Hillman, Judge Hillman launched into an abbreviated version of 'scared-straight' without missing a beat; it was wonderful. Judge

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LUNCH WITH HON. ROBIN E. FEDER

by Lisa M. Tittlemore, and Iliana Diaz, Sunstein, Kann Murphy & Timbers LLP

The FBA's MA Chapter held a packed-room "Brown Bag Lunch" seminar on Thursday, November 13, 2014, with Immigration Judge Robin E. Feder leading the discussion, accompanied by Immigration Judge Brenda O'Malley and Court Administrator Robert Halpin.

Judge Feder discussed, in her personal capacity, the juvenile docket of the immigration courts, the impact of the recent surge of unaccompanied minors into the United States on the courts, and how these cases are being processed in Massachusetts. The seminar was held at the John F. Kennedy Building in Boston.

The event was not only well attended, but very informative. Led informally, the event also allowed for a candid discussion with those in attendance. Judge Feder expressed her support for the work of the FBA, explaining that she is the current Chair of the FBA National Immigration Section. See <http://www.fedbar.org/sections/immigration-law-section.aspx> for more information on the Section's activities.

This past July, the U.S. Department of Justice announced new priorities to address the "surge of migrants crossing into the U.S." The announced steps included refocusing immigration court resources. This included the creation of a "surge docket," a new initiative aimed at expediting the legal process for the many thousands of unaccompanied minors being processed in the court system.

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Pictured (from left): Lisa M. Tittlemore, Hon. Robin E. Feder, Michelle Schaffer and Christopher Sullivan

FIRST AMENDMENT DEVELOPMENTS IN THE FIRST CIRCUIT

by Emily Zandy, Day Pitney LLP

On October 20, 2014, in an opinion authored by Judge Howard M. Selya, a unanimous panel of the First Circuit vacated U.S. District Judge Nathaniel Gorton's dismissal of *Van Wagner Boston LLC v. Davey*, No. 13-2087, and remanded the case for review of First Amendment and state law claims.

In this case, Plaintiffs—related companies engaged in outdoor advertising—launched a facial challenge to a state permitting scheme. The scheme, they argued, “grants an official unbridled discretion over the licensing of their expressive conduct and poses a real and substantial threat of censorship.”

The challenged regulations require those seeking to erect billboards or other outdoor signage to obtain a license in advance. The power to award licenses and permits is vested in the Director of the Commonwealth's Office of Outdoor Advertising. Significantly, the Director may withhold a permit and/or license “in his sole discretion, upon a determination that a particular sign ‘would not be in harmony with or suitable for the surrounding area or would do significant damage to the visual environment.’”

In making this determination, the Director “may” consider a non-exhaustive list of factors, including “the physical characteristics of both the proposed sign and the locality,” the “effects on scenic beauty” and “the health, safety and general welfare of the public.” Permits issued under this scheme are for a fixed duration and subject to yearly renewal predicated on the same criteria. Permits may be revoked at any time for cause. Grounds constituting cause for the revocation of a permit include, but are not limited to, “noncompliance with state and federal law,” “the public health, safety, welfare or the environment,” among other considerations. In this way, the Director's “revocation authority is without limitation.”

Plaintiffs, in their Complaint, “sought a declaration that the regulations imposed a prior restraint on, and therefore violated, [their] free speech rights under the First and Fourteenth Amendments.” They further alleged that the regulations violated state laws. In response, the Commonwealth moved to dismiss for lack

of subject matter jurisdiction, and the District Court “obliged,” dismissing Plaintiffs' First Amendment claim for lack of standing and, ultimately, declined to invoke supplemental jurisdiction over Plaintiffs' state law claims.

On appeal, the First Circuit concluded that the “only debatable question regarding Van Wagner's standing involves the first element, that is, whether Van Wagner has sufficiently alleged injury in fact.” Whereas the District Court answered this question in the “negative,” the First Circuit, relying on the Supreme Court's decision in *City of Lakewood*, determined that Van Wagner had sufficiently alleged injury-in-fact. In *City of Lakewood*, in which the Supreme Court confronted a municipal ordinance pursuant to which the mayor was vested with unbridled discretion over the permitting and placement of newsracks on city property, the Supreme Court voiced what the First Circuit termed “two salient concerns about laws that cede unfettered discretion to government officials over expression or conduct.” The Court reasoned that, “for one thing, ‘such schemes may prompt regulated parties to self-censor their speech out of, say, a desire to receive a favorable and speedy disposition on a permit application.’” Similarly, “without clear standards post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.” Significantly, the First Circuit understood these concerns to “[undergird] the Court's conceptualization of injury sufficient to support standing in a way that would allow facial challenges to such licensing schemes to proceed before the twin threats of self-censorship and undetectable content-based censorship take hold.”

In response to the Commonwealth's principal argument that the *City of Lakewood* “doctrine” “applies only after a court finds some evidence that the twin threats of self-censorship and undetectable content-based censorship have materialized,” the Court responded that the Commonwealth had misread the Supreme Court's opinion. *City of Lakewood* by no means requires plaintiffs to identify specific instances of materialized self-censorship or content-based decisionmaking in advance of bringing a facial challenge. The Court further reasoned that the instant regulations go further than those at issue in *City of Lakewood* insofar as the

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FIRST AMENDMENT DEVELOPMENTS

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Director has broad power not only to withhold permits but also to revoke permits previously issued. The Court also dismissed the Commonwealth's argument that Plaintiffs' previously successful attempts to secure permits demonstrate that the threat of censorship is merely theoretical. According to the Court, a "record of success is irrelevant to determining whether [Plaintiffs] [] [continue] to suffer an injury." Finally, the Court rejected the Commonwealth's attempt to argue that what was at issue in this case was commercial speech, such that lesser protections would apply. In response, the Court noted that courts of appeal have "analyzed billboard regulations with an eye to their effect on both the commercial and noncommercial messages that billboards may carry." In fact, Plaintiffs alleged in their Complaint that "one use of billboards and other outdoor signage was to convey noncommercial messages to the public." Crediting this well-pleaded fact, the Court concluded that billboard vendors, like Plaintiffs, are "better regarded as entities that have a commercial interest in protected expression." Accordingly, "any regulation restricting Van Wagner's operation has the potential to impact the availability of channels of communication for noncommercial speech."

In conclusion, the First Circuit concluded that "it follows—as night follows day—that Van Wagner has standing to mount a facial challenge to that regulatory permitting scheme."

PROFILES: JUDGE HILLMAN

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Hillman's outreach and concern made an enormous impression on the young man.

In his 23 years both on and off the bench, Judge Hillman has never lost sight that the law has a direct impact on people's lives or the importance of the litigant participation in the judicial process to the system's ultimate success.

LUNCH WITH JUDGE FEDER

(continued from page 10)

Regarding the "surge," Judge Feder discussed in general terms that most children who present in her court range from birth to about 16 years of age. The majority of the children are natives of Guatemala, El Salvador and Mexico, and, since the surge, also children from Honduras and Ecuador, as well as other places. The children included in her "surge docket" are those cases where entry into the U.S. was via the Southern Boarder.

Of these children, the majorities are female, and some of them are pregnant. There are also some pockets of family units comprised of mothers and their infant children (usually between the ages of five years old and under) who present in her court. Most of the unaccompanied minor children are placed with families, whenever possible, and the others are placed with sponsors until their immigration matters are adjudicated.

To provide a feel for the impact of the "surge," Judge Feder explained that she had 1,100 new cases added to her docket in only the last 14 weeks. This influx has pushed her master docket well into 2017. The Department of Homeland Security determines which cases fall under "surge" category and annotates the Notices to Appear with said description prior to the judges reviewing the matters. Cases identified in this category are prioritized by the individual judges and are usually docketed within 21 to 28 days. In response to questions, Judge Feder reported that she sees no indication that the number of cases are waning.

Although many of the children are finding representation by attorneys, not all of them have done so. Judge Feder welcomes and encourages lawyers to undertake representation of these children. If you have an interest in assisting with finding pro bono representation for these children, please contact the authors of this article.

We thank Judge Feder for leading the discussion and look forward to offering similar programs in the future.

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