



# Rhode Island Bar Journal

Rhode Island Bar Association Volume 66. Number 3. November/December 2017

**Trade Secrets Law in Rhode Island and Massachusetts: Three Important Differences, and One Big New Similarity**

**The U.S. Supreme Court Rules on Divorce and Military Disability Benefits**

**Is the Real Estate Title Company Tail Wagging the Real Estate Transaction Dog?**

**Book Review: *Evicted***





## Articles

- 5 **Trade Secrets Law in Rhode Island and Massachusetts: Three Important Differences, and One Big New Similarity**  
*Christopher R. Blazejewski, Esq. and Jessica G. Kelly, Esq.*
- 13 **The U.S. Supreme Court Rules on Divorce and Military Disability Benefits**  
*Marc J. Soss, Esq.*
- 17 **Is the Real Estate Title Company Tail Wagging the Real Estate Transaction Dog?**  
*John M. Boehnert, Esq.*
- 21 **Back to the Big Apple – American Bar Association Delegate Report – Annual Meeting 2017**  
*Robert D. Oster, Esq.*
- 23 **BOOK REVIEW *Evicted* by Matthew Desmond**  
*Nicole P. Dyszlewski, Esq.*

## Features

- |   |  |
|---|--|
| 3 #Millennials  | 31 USI Health Insurance Informational Sessions                               |
| 4 Letter to the Editor  | 31 RI Association for Justice Appoints New Officers and Honors Award Winners |
| 8 Remembering Wise Words  | 31 Probate Court Listing on Website  |
| 9 5 Movement Snacks for Your Body and Mind                            | 32 Casemaker Tip: Browsing Statutes  |
| 14 Good Business for Good Lawyers                                     | 33 Lawyers on the Move   |
| 14 Online Attorney Resources (OAR)                                    | 33 Help Us Reach 1000 List Serve Members!                                    |
| 22 Publish and Prosper in the Rhode Island Bar Journal                | 34 SOLACE  |
| 25 Thanks to Our CLE Speakers   | 35 In Memoriam   |
| 27 Continuing Legal Education   | 37 Online Attorney Directory   |
| 28 Speakers Bureau Attorney Discusses Discrimination in the Workplace | 42 Caption This! Contest   |
| 28 Soliciting Bar Member Response to Proposed Animal Law Committee    | 42 Updating Your Attorney Directory Photo Is a Snap!                         |
| 29 VLP Honor Roll   | 42 Advertiser Index  |

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# #Millennials



Linda Rekas Sloan, Esq.  
President  
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**As young attorneys, you may believe you are not able to help others, that you lack the experience to be a positive influence on others. You may wonder how you can help others when you are still figuring things out yourself. But the fact is, you know more than you think.**

Fill in the blank:

All \_\_\_\_\_ are lazy, unprofessional, entitled, narcissistic and disloyal.

- a. Millennials
- b. Gen Z's
- c. Gen X's
- d. Young Lawyers

I have always had a soft spot for young lawyers. It seems like it was only yesterday that I was one (yes, I am delusional), so I think I can relate. Everyone has a favorite judge – the judge who goes out of their way to make you look good when your clients are in the courtroom, the judge who understands that you have a tough position to argue, and the judge who still remembers what it was like in private practice. Similarly, my favorite lawyers are the ones who remember what it was like when they were starting out and freely give advice, guidance and encouragement to younger lawyers. So, I try to always keep that at the forefront of my mind.

That is why I get really discouraged when I hear comments like, “There is nothing you can do to attract young lawyers to your committee/seminar/event. They are just not interested.” CHALLENGE ACCEPTED. By gosh, I am going to get young lawyers to attend our hallmark Annual Meeting in June. We tried giving out full-size Snickers candy bars. We had a smoothie station. We had ice cream and homemade waffle

cones. We offered free admission (without CLE credit) for new admittees. So guess how many new admittees attended last year? Two. TWO! I felt like an utter and complete failure. WHY?!

WHAT AM I DOING WRONG?! Am I so old now that I can't relate?! Am I like mom-jeans? I think I'm young and hip but am I really not? Should I have avocado toast, craft beer, lattes and PlayStation instead?

What is different about young lawyers today? What's the secret?!

It is that millennials, young lawyers... fill in the blank ... are very similar to every other generation. They are just like us... except, younger.

Universally, what young lawyers want is to be taught what they do not know so they can grow. They do not just want to be told what to do. They want to understand why. They want to improve the world around them by solving social problems. When they speak they want to be heard and valued. And they want guidance on how to be successful from people who have already walked the path. No big surprise.

What they do NOT want, is to hear:

“I had to do it the hard way so you should too!”

“You need to pay your dues and suffer years of long hours and unengaging grunt work, and your potential reward, if you survive, is future greater earning potential.”

Just because we did it that way does not mean it should continue. That type of thinking is a losing mentality.

On average, millennials leave their employers after only two years on the job. Just imagine how incredibly frustrating it must be to do dull work, feel unacknowledged, feel like you make no impact and work where you see no opportunity for growth. Sound familiar? If we are honest with ourselves, we have all felt some version of this at one point.

How can the Bar Association help?

As young attorneys, you may believe you are not able to help others, that you lack the experience to be a positive influence on others. You may wonder how you can help others when you are still figuring things out yourself. But the fact is, you know more than you think. You have been blessed with a career in law. There are millions of people in this world who, because of their financial and social circumstances, are barely getting by each day. Reflect on that, take it to heart, and when you come to terms with the fact that others helped shape you, I am asking you to pay what you have been given in this world forward. Consider, for example, volunteering to take one case through the Bar Association's Volunteer Lawyer Program. You have the flexibility to choose a case in a practice area of interest to you.

One of our biggest needs is for attorneys to take family law and domestic violence cases.

I know you are saying, “I don’t even know how to find the Family Court!” I have a solution for that too. In 2018, the Bar Association, in collaboration with Rhode Island Legal Services, will offer the second Partners Overcoming Domestic Violence comprehensive training and mentoring program. It is an intensive clinic, complete with mock hearings at the Family Court that will give you the resources and experience to handle a family law case. You will even walk away with your own mentor, someone you can call on for advice, guidance and encouragement, someone who remembers what it was like when they were starting out.

So often, we get all worked up trying to figure out how to engage minorities, women, the older, the younger and so on. As it turns out, human beings are pretty much alike. People want to be part of a winning organization they can be proud of. They want to do a good job, be treated fairly, and work at something that is fulfilling. They want to feel like partners in the company they work for – part of

the team and not just hired hands. That is what young lawyers want too. When you engage their hearts and minds as well as their hands, young lawyers will grow, learn, contribute more, and be worth more. Remarkably simple.

So, I am letting go of my goal of getting young lawyers to the Annual Meeting. Instead, I offer you the opportunity to make a difference – the opportunity to change one person’s life by taking a case from our Volunteer Lawyer Program. I offer you the training and guidance necessary to handle not only that case but future cases in your career. That one case might just change your life too. You will grow, learn, contribute, and become more valuable as an attorney. It is the right thing to do in our learned profession, and I promise you it will be rewarding.

Did I mention we have fresh waffle cones at the Annual Meeting? ♦

## Letter to the Editor

In response to Attorney John A. Tarantino’s *The Story of My Health and Fitness Journey* published in the September/October 2017 issue of the *Bar Journal*.

“Less is More...So I Say” – R.J. Resmini

No one has asked me to talk about health, but: I am 75 years old and continue to try civil cases. I appear on the Motion Calendar, depositions, Supreme Court, Memorandums, actively practice in Massachusetts, and still work at home following my leaving the office. I never take a sick day, and although I’m 75, no naps.

Never worked out a day in my life. Eat absolutely everything. For breakfast I have donuts and an iced coffee. Lunch, rarely, if ever. I do not conserve on the salt. Cholesterol and high blood pressure? I take medication. Glucose is acceptable, and before I go to bed every night I eat three candy bars and drink my only daily liquid – Coca-Cola (not diet) – no water. Never smoked or drank.

Athletically, I compete in golf on a regular basis and arm wrestle on occasion.

I am constantly prodded to watch what I eat, to exercise and other things in order to conform to the traditional idea of good health and maintenance. I resist.

Do I listen? Yes. Do I follow? Absolutely not. You have two choices: Go John’s way or my way.

I choose the Resmini way. Best of health to all of us. With death my retirement.

And to my good friend John, best regards; you will not see me at the gym.

## RHODE ISLAND BAR JOURNAL

### Editorial Statement

*The Rhode Island Bar Journal* is the Rhode Island Bar Association’s official magazine for Rhode Island attorneys, judges and others interested in Rhode Island law. The *Bar Journal* is a paid, subscription magazine published bi-monthly, six times annually and sent to, among others, all practicing attorneys and sitting judges, in Rhode Island. This constitutes an audience of over 6,000 individuals. Covering issues of relevance and providing updates on events, programs and meetings, the *Rhode Island Bar Journal* is a magazine that is read on arrival and, most often, kept for future reference. The *Bar Journal* publishes scholarly discourses, commentary on the law and Bar activities, and articles on the administration of justice. While the *Journal* is a serious magazine, our articles are not dull or somber. We strive to publish a topical, thought-provoking magazine that addresses issues of interest to significant segments of the Bar. We aim to publish a magazine that is read, quoted and retained. The *Bar Journal* encourages the free expression of ideas by Rhode Island Bar members. The *Bar Journal* assumes no responsibility for opinions, statements and facts in signed articles, except to the extent that, by publication, the subject matter merits attention. The opinions expressed in editorials are not the official view of the Rhode Island Bar Association. Letters to the Editors are welcome.

### Article Selection Criteria

- The *Rhode Island Bar Journal* gives primary preference to original articles, written expressly for first publication in the *Bar Journal*, by members of the Rhode Island Bar Association. The *Bar Journal* does not accept unsolicited articles from individuals who are not members of the Rhode Island Bar Association. Articles previously appearing in other publications are not accepted.
- All submitted articles are subject to the *Journal*’s editors’ approval, and they reserve the right to edit or reject any articles and article titles submitted for publication.
- Selection for publication is based on the article’s relevance to our readers, determined by content and timeliness. Articles appealing to the widest range of interests are particularly appreciated. However, commentaries dealing with more specific areas of law are given equally serious consideration.
- Preferred format includes: a clearly presented statement of purpose and/or thesis in the introduction; supporting evidence or arguments in the body; and a summary conclusion.
- Citations conform to the Uniform System of Citation.
- Maximum article size is approximately 3,500 words. However, shorter articles are preferred.
- While authors may be asked to edit articles themselves, the editors reserve the right to edit pieces for legal size, presentation and grammar.
- Articles are accepted for review on a rolling basis. Meeting the criteria noted above does not guarantee publication. Articles are selected and published at the discretion of the editors.
- Submissions are preferred in a Microsoft Word format emailed as an attachment or on disc. Hard copy is acceptable, but not recommended.
- Authors are asked to include an identification of their current legal position and a photograph, (headshot) preferably in a jpg file of, at least, 350 d.p.i., with their article submission.

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# Trade Secrets Law in Rhode Island and Massachusetts: Three Important Differences, and One Big New Similarity



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**Rhode Island law also specifically provides that the court may compel parties to take affirmative acts to protect trade secrets, and requires the court to use reasonable means to preserve the secrecy of a trade secret during litigation.**

Knowledge is power, especially in the knowledge economy. Establishing power in the marketplace often means using and protecting your knowledge. While some information is publicly available and widely disseminated, other knowledge is secret, and can only be obtained with intense study, hard work, and time.

In the business context, confidential and proprietary knowledge is a trade secret. Trade secrets can take many forms, including customer lists, pricing information, manufacturing processes, membership lists, product specifications, financial data, recipes, supplier information, purchasing histories, and strategic plans, among many others. Acquiring and using confidential information is often the key for individuals or businesses to differentiate themselves in the competitive global market.

Disputes concerning trade secrets are inevitable. Those who have secret information will fight to keep and protect it, while others may try to appropriate secret information for their own use. Trade secret disputes can arise in a variety of contexts, such as when an employee leaves to join her employer's direct competitor, or when a business's supplier or manufacturer is acquired by a competing company. Smart businesses will go to great lengths to preserve the confidentiality of their proprietary information and the goodwill and market power it engenders. Smart competitors will go to great lengths to obtain trade secrets a business fails to properly protect and keep confidential.

While disputes are inevitable, the law of

trade secrets is not. Indeed, trade secret laws in Rhode Island and Massachusetts vary in several important respects. With many employers and employees crossing the border to work in Rhode Island and Massachusetts, it is necessary for attorneys

to know the law in both states, in addition to the impact of federal law on trade secret claims.

This article will highlight three important differences all lawyers should know between trade secrets law in Rhode Island and Massachusetts. It will also summarize the big new similarity – the Defend Trade Secrets Act of 2016.

## **1. Rhode Island joins the vast majority of states – Massachusetts goes it (nearly) alone.**

Rhode Island, along with forty-seven other states, follows the Uniform Trade Secrets Act.<sup>1</sup> First published in 1979 and amended in 1985, the UTSA was developed to provide continuity, consistency, and predictability for securing trade secrets and preventing misappropriation. Rhode Island adopted the UTSA in 1986, and now joins nearly all of the states, including most recently Texas in 2013, along with the District of Columbia and several U.S. territories.

Practitioners in trade secret law will find the Rhode Island statute familiar. Rhode Island courts have consistently applied the Uniform Trade Secrets Act to bar trade secret misappropriation through injunctive relief and award aggrieved parties with compensatory and punitive damages and attorneys' fees (see below). While trade secret case law in Rhode Island is not extensive, Rhode Island state and federal courts have so far been in lock-step with other states in applying the UTSA, mostly in cases involving purloined customer lists and product information.

Massachusetts, however, joins just two other states (New York and North Carolina) in declining to adopt the Uniform Trade Secrets Act, instead creating protections against the theft of trade secrets through a hodgepodge of statutory and common law. While out-of-state trade secret lawyers will find many of the precepts similar (such as, for example, the three-year statute of limitations for a trade secrets misappropriation tort claim under M.G.L. c. 260 § 2A), they will find wrinkles in the law nearly everywhere else they look (such as, to continue the example, the four-year statute of limitations for trade secret claims brought under the Massachusetts consumer protection statute, Chapter 93A, § 11).





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## 2. Massachusetts law generally takes the “use it or lose it” approach to trade secrets – but Rhode Island law has not adopted these requirements.

Two fundamental questions in any trade secret dispute law are: (1) is the information a trade secret?; and (2) if so, was the trade secret misappropriated? Rhode Island and Massachusetts take different paths to answering these questions – unlike states following the Uniform Trade Secrets Act, including Rhode Island, Massachusetts law generally provides for a “use” requirement.

### A. Is the information a trade secret?

Rhode Island law defines a trade secret as any information that (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>2</sup> Rhode Island law does not provide that the trade secret must be used, or in continuous use, by an individual or business for it to be a protectable trade secret – just that it has independent economic value, and is subject to efforts to keep it secret.

Unlike Rhode Island law, Massachusetts case law – including a seminal case from the Massachusetts Supreme Judicial Court – requires a party to prove that its trade secret has been in continuous use to be protected. In *J. T. Healy & Son, Inc. v. James A. Murphy & Son, Inc.*,<sup>3</sup> the Massachusetts Supreme Judicial Court, adopting the Restatement of Torts § 757, stated that “[a] trade secret may consist of any formula, pattern, device or compilation of information which is *used in one’s business*, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it [...]. A trade secret is a process or device for *continuous use* in the operation of the business.” Courts applying Massachusetts law have barred or dismissed trade secret misappropriation claims by aggrieved parties who are unable to allege or prove that the trade secret was in continuous use by the business.<sup>4</sup>

Another critical element of proving the misappropriation of a trade secret is proof that the holder of the alleged trade secret took affirmative measures to keep the secret confidential. While there is



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more law in Massachusetts than Rhode Island on this element, Massachusetts is generally stricter when it comes to the efforts a holder of trade secrets must take to keep its proprietary information confidential. For example, Massachusetts requires a holder to “take all proper and reasonable steps to keep it a secret” and to “exercise external vigilance,” which may require “constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it.”<sup>5</sup> Rhode Island courts, on the other hand, simply look to the “nature” of the information the holder seeks to protect,<sup>6</sup> and “how readily ascertainable the information is for a person conducting an independent investigation.”<sup>7</sup>

Employment lawyers and business litigators should be aware of these important distinctions between Rhode Island and Massachusetts law. On the one hand, Rhode Island law may be more useful for businesses seeking to protect its trade secrets, allowing a business to assert a trade secret claim as long as the information is economically valuable and kept secret, without any requirement that the business actually be using the trade secret. On the other hand, Massachusetts law may be more helpful to competitors or former employees in that it allows defendants to defeat a trade secret misappropriation claim by demonstrating that the plaintiff has not made continuous use of its secret, or did not take all proper and reasonable steps, such as constant warnings, to keep it a secret.

#### **B. If the information is a trade secret, was it misappropriated?**

Under Rhode Island law, a trade secret may be misappropriated in two ways. First, a person misappropriates a trade secret by *acquiring* the trade secret when they knew or should have known that the secret was obtained by improper means, such as theft, bribery, misrepresentation, breach of a duty to maintain secrecy, or electronic or other spying.<sup>8</sup> Second, a person misappropriates a trade secret by *disclosing or using* the trade secret when he (1) used improper means to acquire knowledge of the secret; (2) knew or had reason to know that the secret had been acquired by improper means; or (3) knew or had reason to know that it was a trade secret and that

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# Remembering Wise Words



Bruce W. McIntyre, Esq.

Be adaptable.

That is the message that I got from a guidance counselor in high school. Her message then was the career paths you are thinking about now are changing fast, and we will be required to adapt with it.

The same thing is true about being as healthy as you can be given what we know now about genetic disposition and family history. It was not surprising that my daily routine of running after work was not as sustainable as I once thought. The physical wear and tear were catching up with me.

At a New Year's Eve house party a couple of friends invited me to a yoga studio. I have retained a vibrant sense of curiosity and so I went with them. My body by then was like a knot that I was trying to untie with two people pulling at both ends of the rope. During the first class, I had to stop and walk into the hall to get composed. But a voice in my brain was telling me that this is exactly what I needed, and so I went back in. I was completing each class without having to stop within the first month. The next phase of the journey began.

My aches and pains began to ease. Remarkably, I had more energy and stamina and I was paying closer attention to what I was doing every day. In short, I became more focused. And yoga studios were appearing on every corner. I did a little experimenting with different types and disciplines, and settled on the one that was right for me. There is literally a type for everyone from children to seniors. And its closer than you think.

The story does not end there. New flexibility allowed me to do so many more things pain free. Cycling, house repairs, longer walks with my wife and dog, and kicking the soccer ball with the neighborhood kids. I was paying closer attention to what my body was telling me, and backed off some things at the appropriate time.

I was kicking the soccer ball with a few high school aged kids when the chest pressure came. Was I just out of breath from running after the ball? Or was it something else? The family history. I had a cardiology appointment in a few days. In the past I had passed every stress test with flying colors. The cardiologist was insistent. I was going to get a diagnostic cardiac catheterization. At the hospital my wife and I were upbeat. The doctors stopped the procedure and went to speak with my wife. I wasn't going home. They had called for an ambulance to take me to Boston for an emergency triple bypass. No one could believe it. I was paying attention and listening to what my body was telling me.

The old me would have passed off the shortness of breath and tightness as the asthma that I have had all my life. According to my doctors, the old me would be dead. Sudden cardiac death would have occurred.

Yoga taught me to pay attention. It did not promise a disease-free life. Or a life without challenge. But it did teach me to pay attention.

That is what saved my life.

So I'll repeat those wise words: Be adaptable.

knowledge of it had been acquired by mistake or accident.<sup>9</sup> Furthermore, injunctive relief is available for both factual or *threatened* misappropriation under Rhode Island law.<sup>10</sup>

Rhode Island's definition of misappropriation and available injunctive relief opens the door to plaintiffs relying on the inevitable disclosure doctrine. Courts in other jurisdictions adopting the Uniform Trade Secrets Act, such as the widely-cited decision in **PepsiCo, Inc. v. Redmond**,<sup>11</sup> have employed the inevitable disclosure doctrine in enjoining a former employee from working for a direct competitor of her former employer on the basis of a threatened, not actual, misappropriation of her former employer's trade secrets. As stated above, because Rhode Island law does not require actual use of a trade secret to support a misappropriation claim, mere acquisition – without use or disclosure – may be enough to state a claim for misappropriation.

By comparison, Massachusetts courts have issued mixed decisions on whether a defendant must use or disclose a trade secret in order to misappropriate it. The Restatement of Torts § 757, adopted by Massachusetts courts, requires use or disclosure as an element of misappropriation. In **Jet Spray Cooler, Inc. v. Crampton**,<sup>12</sup> the Massachusetts Supreme Judicial Court stated that “[i]f the defendant has acquired the information as a result of a confidential relationship which he enjoyed with the plaintiff, and, if the defendant has used the information without the permission of the plaintiff, then the defendant's use of the information is wrongful, and the defendant is liable to the plaintiff in damages for the wrongful use of the information.” More recently, however, in **LightLab Imaging, Inc. v. Axsun Technologies, Inc.**,<sup>13</sup> the Massachusetts Supreme Judicial Court specifically declined to address whether or not a party must prove actual use of a trade secret by the acquiring party to succeed on a claim for misappropriation.

Nevertheless, the “inevitable disclosure” doctrine, while not yet applied in Massachusetts state court, has been acknowledged and applied by federal courts interpreting Massachusetts law. For example, in **Corporate Tech., Inc. v. Hartnett**,<sup>14</sup> an employer sued its former employee and his new employer – and its direct competitor – for misappropriation of trade secrets, among other claims, for



# 5 Movement Snacks for Your Body and Mind

When people hear that I'm a personal trainer, the conversation goes one of two ways: I either get a detailed recap of their workout routine, or a litany of excuses why they can't exercise. In this issue, we address the most common excuse: lack of time.

As I mentioned in my last article, the cumulative effect of squeezing in 5 to 10-minute movement "snacks" can serve as well as full movement "meals" without the large time commitment. Taking regular breaks may also lead to increased productivity in the workplace. Many studies have shown this, whether the work:break ratio be 5:1, 10:1, or 52:17. So what should you do to maximize your snack time? I'm glad you asked! At right are some "SNACK" ideas for you.

*Note: YouTube.com is a great resource if you're unclear on how to do these movements. You could utilize some of your break time to research and practice these. Also, you don't have to get sweaty for it to count (just saying, and your colleagues may appreciate this).*

So, if you could do these snacks without losing or perhaps gaining productivity, why wouldn't you do it? Although it's not easy, committing to your body and having the discipline to honor that commitment is always worth it! Not to mention the side benefits this routine would have on your practice, your relationships, and general "life momentum!"

*(Note #2: if this isn't feasible, try getting out of bed 30 minutes earlier than normal and "snack" for 20 minutes; bonus points for jumping in a cool or cold shower afterwards!)*

**SNACK #1** – complete as many rounds as possible in 5-10 minutes of:

- > 10 glute bridges (hips to the sky and squeeze your cheeks together)
- > 10 squats (chest and eyes up)
- > 10 pushups (keep elbows close to ribs and lower chest to the floor or desk, etc.)

**SNACK #2** – 3 to 5 rounds of:

- > 10 lateral lunges or Cossack squats
- > 10 tripod transitions (one of my favorite MovNat techniques)
- > 10 pushups (vary hand position)

**SNACK #3** – gymnastics-themed core work for 4-8 minutes of:

- > "arch hold" for 20 seconds, rest 10 seconds,
- "hollow hold" for 20 seconds, rest 10 seconds,
- "arch hold" for 20 seconds...for 4-8 minutes

**SNACK #4** – take the stairs, do 5-10 pushups at the top, do 10 glute bridges or lateral lunges at the bottom, repeat for 5-10 minutes.

**SNACK #5** – check out animal flow on YouTube and practice the "crab reach." This is a great move to offset all the sitting many of us do throughout the day.



**Ryan McGowan** is a former engineer who left the construction industry to help people become healthier and more adventurous. His company, Laid-back Fitness, is located in Warwick and is a combination of a fitness center and playground. He recently won the Projo Readers' Choice Award for Best Personal Trainer, and is the co-founder of the Frozen Clam Obstacle Course, a charity obstacle course + cold water plunge on New Year's Day.

allegedly taking confidential information and using it to solicit business from the employer's customers. In entering a preliminary injunction against the employee and competitor, the court stated that "[t]here is a likelihood that Harnett will inevitably disclose confidential information to [competitor] by soliciting business from his former clients and he has already solicited and consummated deals with his former clients."<sup>15</sup> On appeal, while the First Circuit affirmed the holding, it declined to fully embrace the application of the inevitable disclosure doctrine in Massachusetts, stating that "it was likely that Hartnett actually used [former employer's] confidential information to secure business for [competitor]" and that the trial court's "comments about inevitable disclosure, whether or not correct, were therefore harmless."<sup>16</sup>

### 3. Rhode Island law eases the burden to get injunctive relief, punitive damages and attorneys' fees – but Massachusetts has Chapter 93A.

Trade secret practitioners know how critical it is for the law to provide effective mechanisms for stopping and revers-

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ing misappropriation. Following the Uniform Trade Secrets Act, Rhode Island offers powerful tools to combat trade secret theft, including easing the burden on an aggrieved party to get injunctive relief, punitive damages, and attorneys' fees. By comparison, Massachusetts law on trade secrets, which combines various statutory and common law, is a robust, but more complex tapestry of available rights and remedies.

#### **A. Rhode Island and the Uniform Trade Secrets Act**

Rhode Island law makes available broad injunctive relief. The law provides that an aggrieved party may obtain an injunction barring actual – or even threatened – misappropriation of trade secrets.<sup>17</sup> The injunction may be continued *even after the trade secret ceases to exist* for an additional reasonable period of time in order to eliminate commercial advantage that a misappropriating party otherwise would have derived from the misappropriation.<sup>18</sup> Rhode Island law also specifically provides that the court may compel parties to take affirmative acts to protect trade secrets, and requires the court to use reasonable means to preserve the secrecy of a trade secret during litigation.<sup>19</sup>

Rhode Island also furnishes a wide offering of potential damages for trade secret misappropriation under multiple theories. First, Rhode Island law provides that a party may recover not only for actual loss caused by the misappropriation, but also for any unjust enrichment to the misappropriating party, provided that these recoveries do not create a double-recovery windfall.<sup>20</sup> In the alternative, the court may impose on a misappropriator a reasonable royalty payment for the unauthorized disclosure or use of a trade secret.<sup>21</sup> Furthermore, if the misappropriation is willful and malicious, the court may double the award.<sup>22</sup> Rhode Island also offers a robust fee-shifting provision for willful and malicious misappropriation.<sup>23</sup>

State courts in Rhode Island have vigorously applied these provisions. For example, in *MacFarland v. Brier*,<sup>24</sup> the Rhode Island Supreme Court vacated a trial court decision providing only partial compensatory recovery for misappropriation of trade secrets, including customer lists and billing histories, and remanded to the trial court for imposition of a full

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compensatory recovery along with additional punitive damages resulting in a tripling of the recovery amount plus attorneys' fees. The Rhode Island Supreme Court noted that the Uniform Trade Secrets Act, as adopted in Rhode Island, "relaxed the stringent common law standard [for punitive damages] to deal with the intentional and egregious misconduct found in this case."<sup>25</sup>

Rhode Island federal courts have followed suit with the Rhode Island Supreme Court. For example, in *Astro-Med, Inc. v. Plant*,<sup>26</sup> the Rhode Island federal district court imposed double punitive damages along with attorneys' fees for misappropriation of trade secrets, including customer lists, involving "conduct carried on with a conscious disregard for the rights of others." The First Circuit affirmed the trial court decision, including its punitive damages and fee-shifting award, in *Astro-Med, Inc. v. Nihon Kohden America, Inc.*<sup>27</sup>

For attorneys seeking to defend against efforts to recover for alleged trade secret misappropriation, Rhode Island law provides two useful tools. First, the law permits courts to award reasonable attorneys' fees to the defendant if a claim of misappropriation is made in bad faith or if a motion to terminate an injunction is resisted in bad faith.<sup>28</sup> Rhode Island law also allows, in certain exceptional circumstances, for the court to enter an order providing for the *defendant* to pay a reasonable royalty to the plaintiff in lieu of an injunction barring use of an alleged trade secret.<sup>29</sup>

#### B. Massachusetts and Chapter 93A

By comparison, while Massachusetts does not follow the Uniform Trade Secrets Act, the Massachusetts trade secret statute taken together with the Massachusetts consumer protection statute offer robust mechanisms for combating trade secret misappropriation.

First, under the trade secret statute, Massachusetts courts are expressly permitted to enter injunctive relief and may award direct damages (usually lost profits) for the misappropriation of trade secrets, which the courts also have the discretion to double.<sup>30</sup> Indeed, the statute specifically mandates entry of a preliminary injunction, upon petition, "in an action by an employer against a former

*continued on page 38*



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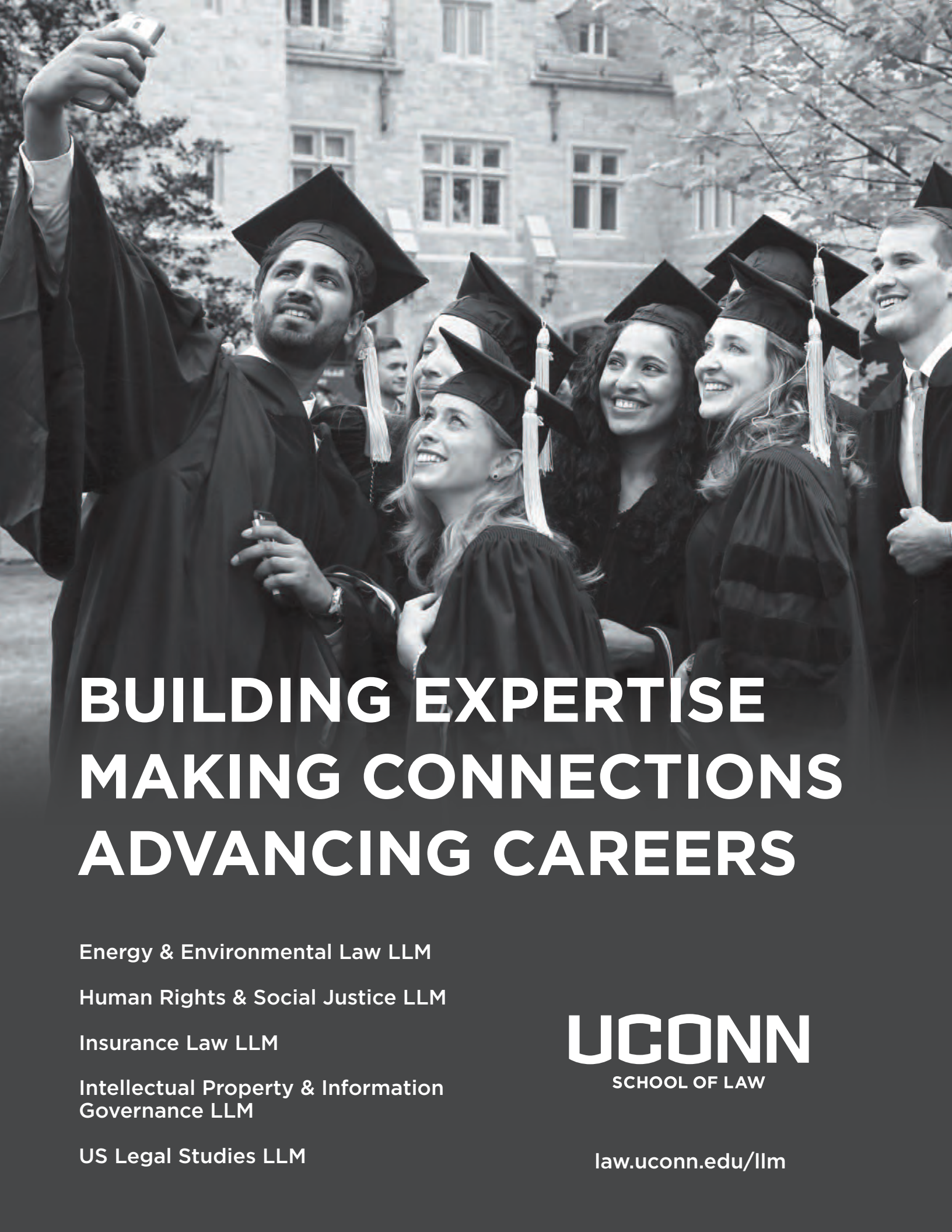
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# The U.S. Supreme Court Rules on Divorce and Military Disability Benefits



Marc J. Soss, Esq.  
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**“..the Court reaffirmed that while a divorce decree might be said to “vest” a divorced spouse with an immediate right to a portion of their former spouse’s military retirement compensation, that interest is contingent and subject to being waived by the former military spouse.”**

The May 15, 2017, U.S. Supreme Court ruling in **Howell v. Howell** is a unanimous victory for disabled U.S. veterans. The U.S. Supreme Court decision upholds federal law and prior rulings that military disability compensation is not divisible in divorce proceedings.

## Case Background

Air Force veteran John Howell and Sandra Howell divorced in 1991 in the community property state of Arizona. The divorce decree awarded Sandra one-half (1/2) of John’s military retirement compensation. In 2005, the Department of Veterans Affairs found John to be partially disabled due to a service-related injury and awarded him disability compensation. In order to receive the disability compensation, non-taxable income, under Federal law 38 U. S. C. § 5305, John was required to waive an equivalent portion of his military retirement compensation, which is taxable income. The election resulted in a \$250 per month reduction in John’s military retirement compensation which equated to a \$125 per month reduction in the amount Sandra would receive.

Sandra then petitioned the Arizona Family Court to enforce the original divorce decree and restore the \$125 per month amount she was no longer receiving. The Family Court concurred with Sandra and “held that the original divorce decree had given Sandra a vested interest in the prewaiver amount of John’s retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver.”

The Arizona Supreme Court affirmed the ruling and held that “federal law did not pre-empt the family court’s order.” The Arizona Supreme Court distinguished the **Mansell** ruling with the **Howell** case based on the fact that the veteran’s waiver in **Mansell** took place before the divorce proceeding while the waiver **Howell** took place after the divorce.

## History of the Law

In **McCarty v. McCarty**,<sup>1</sup> the U.S. Supreme

Court addressed whether a state “could consider any of a veteran’s retirement pay to be a form of community property, divisible at divorce.” The Court concluded that states could not, as it threatened to harm clear and substantial federal interests. As a result, in 1982 Congress passed the Uniformed Services Former Spouses’ Protection Act (“USFSPA”). The USFSPA authorizes states to treat a veteran’s “disposable retired pay” as community property divisible upon divorce.<sup>2</sup> However, it excludes from the definition of “disposable retired pay” any amounts deducted from that pay “as a result of a waiver ...required by law in order to receive” disability benefits.<sup>3</sup>

The first big test of the USFSPA was the case of **Mansell v. Mansell**.<sup>4</sup> **Mansell** involved a California divorce and “property settlement which required Mansell to pay his spouse fifty (50%) percent of his total military retirement compensation, including that portion of his retirement compensation waived so that he could receive disability benefits. Mansell later moved to modify the divorce decree and remove the disability compensation portion of the payment. When the California courts refused to modify the divorce decree, the U.S. Supreme Court did and held that “federal law forbade California from treating the waived portion as community property divisible at divorce.” Justice Thurgood Marshall, in writing the opinion for the Court, eloquently noted that federal law “completely pre-empted the application of state community property law to military retirement pay” and the USFSPA provided a “precise and limited grant of the power to divide federal military retirement pay.”

## U.S. Supreme Court

As a result of different state court holdings on this issue, the U.S. Supreme Court accepted the case. In accepting the case, the Court addressed whether the Arizona state court could resort to semantics, by describing its order as an order requiring John to “reimburse” or to “indemnify” Sandra, to avoid the ruling in **Mansell**. Similarly, the Court reaffirmed that while a divorce decree might be said to “vest”

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a divorced spouse with an immediate right to a portion of their former spouse's military retirement compensation, that interest is contingent and subject to being waived by the former military spouse. The Court concluded that a state court should not be permitted to "subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver." The Court also reaffirmed the 1989 U.S. Supreme Court's ruling in **Mansell** that "the act does not permit state courts to treat retirement pay that has been waived to receive veterans' disability benefits as something that can be divided."

In a decision written by Justice Stephen Breyer, the justices concluded that under federal law, state courts lack the authority to divide up disability benefits, and a state is not permitted to circumvent the restrictions imposed by federal law by ordering one former spouse to reimburse the other for the retirement compensation they no longer receive. As a result, a state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits. The decision further suggested that "state courts can try to account for the possibility that a veteran could later waive some part of retirement pay in favor of disability benefits, or they can recalculate spousal support based on later changes in circumstances." See **Abernethy v. Fishkin**,<sup>5</sup> in which the Florida Supreme Court permitted indemnification to accomplish the parties' "intent to maintain level monthly payments pursuant to their property settlement agreement." As a result, the judgment of the Supreme Court of Arizona is reversed, and the case was remanded for further proceedings not inconsistent with the opinion.

#### ENDNOTES

1 453 U. S. 210 (1981).

2 10 U. S. C. § 1408.

3 § 1408(a)(4)(B)

4 490 U. S. 581.

5 699 So. 2d 235 (Fla. 1997). ♦



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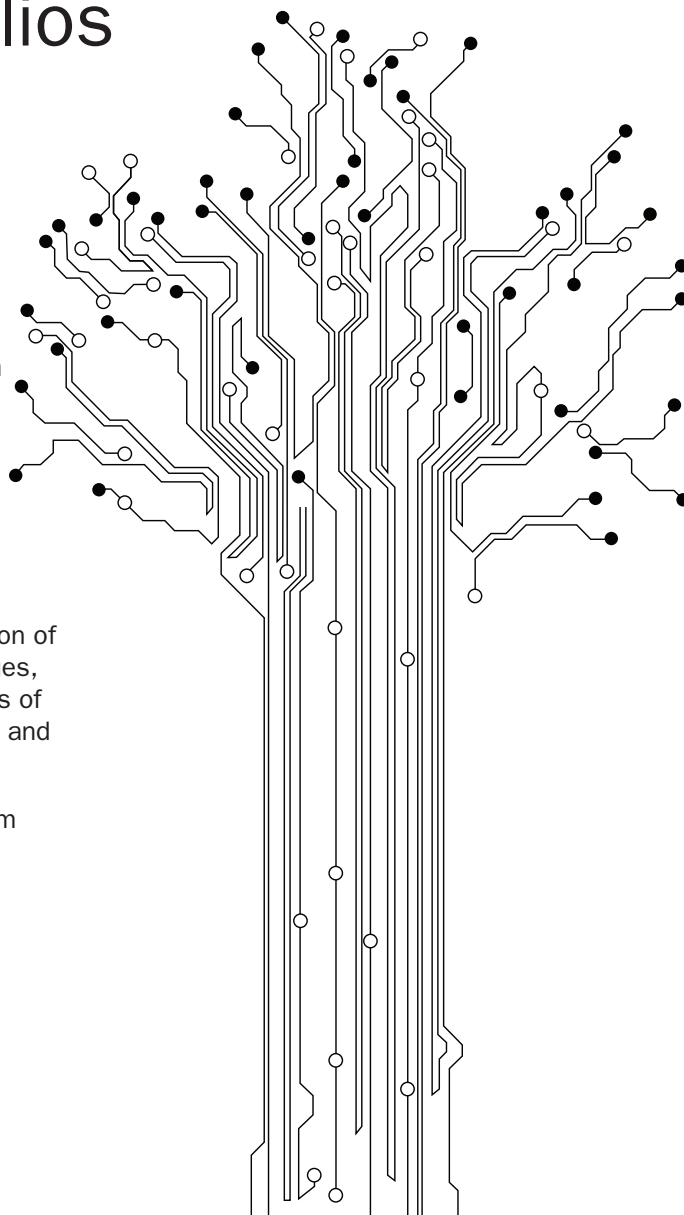
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# Is the Real Estate Title Company Tail Wagging the Real Estate Transaction Dog?



John M. Boehnert, Esq.  
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**“...by seeking to avoid liability here, the title company actually could have increased its exposure to liability at worse, and at best, inconvenienced itself in the transaction.”**

Real estate title insurance companies perform a vital, and indispensable, role in residential and commercial real estate transactions. Without such title insurance, lenders would not grant and fund mortgages. And without the services of expert title counsel, owners may not know exactly what property they were buying and what encumbrances and restrictions existed.

Despite this, title companies are often the guy at the party whose name and particulars no one seems to remember, at least where buyers or borrowers are concerned. While not invisible to buyers and borrowers in the transaction, they tend to be recessive, remaining in the background. However, experienced real estate professionals, lenders, lawyers, and brokers recognize and appreciate the good work they see done by title companies.

I rely on title insurance professionals extensively in my practice, and over the years I have learned a great deal from them, and continue to do so.

Recently I had a learning experience which made me question whether a real estate title company was in fact inserting itself into the transaction.

## The Transaction

At issue was a multi-million-dollar sale of waterfront residential property, being sold by a Rhode Island limited liability company. The seller had a sole member, a non-resident individual, and a non-member manager.

The purchase and sale agreement provided the proceeds of sale were to be paid by cash, certified check, bank check or wire transfer.

The title company insuring the title for the buyer and acting as settlement agent was a well-recognized national company, well-represented by experienced in-house attorneys. The seller signed the insurer's Wire Transfer Instructions form and directed that the proceeds of sale be sent to the sole member's bank account by wire transfer. That is when the trouble started.

## The Problem

The title company refused, citing policy changes arising from some problems the title company apparently had in the past in other

transactions with other parties. The title company insisted that the funds be wired to a capital account of the limited liability company.

The seller objected and reiterated its request for wire transfer to the account of the sole member.

The title company continued to refuse but proposed an alternative; the title company would wire funds to my office account, provided the seller so authorized by resolution, and I could wire to my client. That was not acceptable to me, as in real estate transactions, I use settlement and escrow agents for that purpose.

The response was that under the circumstances, the only way that the title insurance company would wire funds to the sole member's account was if the manager of the seller would provide a resolution so directing. The rationale given for this was that the manager is designated as manager in the Articles of Organization filed with the Secretary of State's Office (an "on record filing") and the manager has filed all annual reports since inception of the company. This was deemed to be "inconsistent" with the Operating Agreement of the company.

I pointed out that the manager filed annual reports for the first three years of the company's existence, which in any event is a ministerial function, and that thereafter the company adopted an Operating Agreement which strictly limited the authority of the manager to largely administrative matters with very little decision-making authority and only over very minor matters. After adoption of the Operating Agreement, all annual reports were filed by legal counsel.

And in fact, the Operating Agreement, which had been certified to the title company by the sole member, specifically prohibited the manager from making any distribution of money other than to the sole member. Moreover, the Operating Agreement expressly provided that net cash from sales or refinancings shall be distributed to the sole member at such time and in such amounts as the sole member deems appropriate in his sole discretion.

In essence, if the seller had given the resolution of the manager as requested, it would have been indicating that the manager had greater





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authority than provided for in the Operating Agreement, which could have raised issues in the future.

Again, we refused the requested resolution.

### Resolution

As a compromise, I offered that the sole member would provide an Authorization and Direction to the title company by resolution providing express instructions for the wire transfer and the ability to rely on such instructions. This was a more specific and more detailed document than the Wire Transfer Instructions form of the title company. This was accepted by the title insurer with the caveat that the manager also issue a resolution confirming the current Operating Agreement. Although the sole member had already certified the Operating Agreement, we agreed as this is a ministerial function within the scope of authority of the manager under the Operating Agreement, although under no circumstances did we see this as necessary.

Problem resolved, but should there ever have been a problem to resolve? In this case, there was a certified Operating Agreement reflecting a sole member with control over the management and affairs of the company and a manager with very little authority, there was a direction from the sole member pursuant to wire transfer instructions to disperse to the account of the sole member, and there was an express provision of the Operating Agreement that distributions of net sales proceeds are to be made to the sole member as he should direct in his sole discretion.

This was not a situation where the manager had authority over disbursements, or where there were multiple members and the funds were going to the account of one member. (And even in the latter case, as discussed below, it would appear imprudent for a title company to attempt to inquire beyond the clear terms of the documents certified to them.) Additionally, it is not the case where an authorization was given before the closing in writing and sought to be changed verbally at the closing.

### Potential Consequences

I am sensitive to the computer fraud and other fraud which can infect commercial transactions, as well as to disputes that can arise among multiple owners when monetary distributions are at issue.



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However, by seeking to avoid liability here, the title company actually could have increased its exposure to liability at worst, and at best, inconvenienced itself in the transaction.

As to the inconvenience, the purchase and sale agreement provided for payment to seller of the balance due at closing by "cash, certified check, wire transfer and/or bank check." All options would appear to be less convenient than a wire transfer (i.e. cash (not really feasible), certified check or bank check (i.e. cashier's check)).

And there were valid reasons for the sole member of the seller to want proceeds by wire transfer. He is an investor and travels internationally. In fact, he was doing so at the time of the transaction, and did not want the delay and inconvenience of dealing with a check when he was out of the country and the check may have been sitting on a desk somewhere for perhaps weeks.

The purchase and sale agreement was not explicit as to who had the right to direct the form of payment. If the seller was found to have this right, the seller could have declared breach of the agreement at the closing if the title company refused to tender proceeds by wire transfer. In Rhode Island, a disclosed agent of a principal can bind the principal by his actions.<sup>1</sup> It would appear that the title company here was acting as the agent of the buyer.<sup>2</sup> If the buyer incurred damages by virtue of the alleged breach, the buyer could have made a claim against the title company for the conduct giving rise to the alleged breach.

Alternatively, assume a title company were to routinely insert themselves in a transaction to inquire and investigate corporate matters beyond the clear terms and conditions of documents certified to them as accurate, in order to avoid potential claim liability. If that title company was subsequently involved in a transaction where they did not engage in such an inquiry, and someone made a claim that disbursement was improper despite what the documents certified to the title company provided, the title company may be faced with an argument that they knew they should make such an inquiry, and therefore had a duty to do so, as demonstrated by their past conduct.

Accordingly, a title company which proceeds on such a basis to avoid a potential claim, and thus the liability, could actually be enhancing potential liability.



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## Denouement

This was kept from becoming a direct buyer and seller dispute or claim of breach or potential breach, and that is in part due to the professionalism of the attorney representing the buyer, who was also seeking to find paths of resolution with the title company.

As for practice pointers here, beyond those that are obvious from the above discussion, perhaps it would not be a bad idea for a seller to add in the purchase and sale agreement that the payment of proceeds to the seller shall be by "cash, certified check, wire transfer and/or bank check as the seller shall direct."

All's well that ends well, and in this particular case the seller freed up funds for other investment opportunities, the buyer got a spectacular summer home on the coast, and everyone parted friends, including (I hope) me and the title company!

## ENDNOTES

1 *Cuddigan v. List*, 177 A. 2d 195 (R.I. 1962).

2 *Baker v. ICA Mortgage Corporation et al.*, 588 A. 2d 616 (R.I. 1991). ♦

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# Back to the Big Apple

## American Bar Association Delegate Report – Annual Meeting 2017

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**Robert D. Oster, Esq.**  
ABA Delegate and Past  
Rhode Island Bar Association  
President

The American Bar Association House of Delegates met on August 14-15, 2017 in New York City. The meeting was action packed just like the city where it was held. As usual, current events in the country overshadowed our deliberations. The Charlottesville, Virginia death and the violence at the demonstration should have shocked us all into the realization that continuing racism and violence are contrary to our core principles as lawyers. The Administration's response to the violence, and the protests over that response played out at a chaotic scene at Trump tower where the President was in residence, a block from the ABA meeting.

The meeting and resolutions touched upon numerous important issues to the Bar. First, I would like to explain the passage of a resolution that I was privileged to work on intensely, and was asked to speak about before the House. Gun violence restraining orders are a reasonable restriction on the Second Amendment rights of individuals to possess guns. I am neither a "gun nut" nor an advocate of abolishing the rights described in the Second Amendment as they have been interpreted by our Supreme Court. There are some reasonable restrictions on the rights of gun owners, and this passed overwhelmingly. It was a privilege to work with leaders in the field to craft and secure passage of a resolution such as this.

In my opinion, the second most important resolution that passed dealt with upgrading discharges of veterans afflicted with PTSD who otherwise had a "less than honorable" discharge. The collateral consequences of this type of discharge relegate the veterans to a life of homelessness and untreated illness. We owe it to our veterans to recognize their service and any disabilities incurred from that service.

Third, the Delegates were addressed by a member of the Turkish judiciary with an impassioned plea for help against the arbitrary detentions, imprisonment and show trials that are taking place in Turkey now. I sought the Judge out at a break, and we discussed his fear for his and his families lives if he returns to Turkey. If we do not defend our sister and brother lawyers around the globe, we are not fulfilling our oath

to defend liberty and promote justice.

Additionally we passed resolutions strongly supporting level funding for the Legal Services Corporation (LSC) where an attempt was made by some members of Congress to defund the services provided by LSC. As a former Chairperson of the Board at Rhode Island Legal Services, I can attest to the fact that the courthouse doors would slam shut on the poor without LSC. Equal access to justice is at the core of our profession and we must continually fight that battle. As Chief Justice John Minton, Chairperson of the Conference of Chief Justices, said in addressing us, "there is a pro se tsunami" taking place in our legal system now, due in large part, to these access to justice issues.

As might be expected, given the national debate on immigration, several resolutions were passed dealing with issues such as the rights of "Dreamers," particularly law school graduates who are faced with deportation and restrictions on taking the Bar exam. Given the huge numbers of people whose lives are affected, there was even a clarion call for civil Gideon rights in this area. The law is a business, but it is more than that. Our profession must support reasonable immigration rules and regulations that take a strong stand on due process of law for undocumented individuals and their families.

We passed many resolutions affecting criminal law and procedure, such as opposing bail for juveniles. To be fair, Rhode Island has been a leader in the treatment of juveniles, and does not impose bail conditions on juveniles. Mandatory minimum sentencing was debated and decried by some as the new "Jim Crow" given its disproportionate impact on minorities.

I could hardly "do justice" here to the number of important issues the ABA discussed and acted on in a column of this size. I am available by telephone or email to further discuss my involvement as your Delegate. The ABA is the natural voice of our profession, and I would encourage all to join if you are not already a member. The committees that I have served on, and continue to serve on, in addition to being a Delegate, include the General Practice and Solo Division, the National Caucus of Bar Delegates,

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the Standing Committee on Gun Violence, the Family Law Section and the Constitution and By Laws Committee – all have added to the enjoyment and development of my practice.

As always, it has been an amazing honor and privilege to serve as your Delegate, and I welcome your comments or suggestions. ♦

## Publish and Prosper in the *Rhode Island Bar Journal*

The *Rhode Island Bar Journal* is one of the Bar Association's **best means of sharing your knowledge and experience with your colleagues.** Every year, attorney authors offer information and wisdom, through scholarly articles, commentaries, book reviews, and profiles, to over 6,000 subscribers in Rhode Island and around the United States. In addition to sharing valuable insights, **authors are recognized by readers as authorities in their field and, in many cases, receive Continuing Legal Education (CLE) credit for their published pieces.** The *Bar Journal's* Article Selection Criteria appear on page 4 of every *Bar Journal* and on the Bar's website at [ribar.com](http://ribar.com).

Aspiring authors and previous contributors are encouraged to contact the *Rhode Island Bar Journal's* Editor Kathleen Bridge by telephone: (401) 421-5740 or email: [kbridge@ribar.com](mailto:kbridge@ribar.com).

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## BOOK REVIEW

### *Evicted*

by Matthew Desmond



Nicole P. Dyszlewski, Esq.  
Research/Access Services  
Librarian, RWU School of  
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**Perhaps it is the detailed descriptions of squalid conditions or Desmond's sense of urgency about his topic, but the book is successful not just as a snapshot of a social justice issue but as a call to action for all of us, especially those of us in the legal community.**

*Evicted*<sup>1</sup> has the power to change the way you think about eviction. More precisely, *Evicted* can get you to start thinking about eviction and then can change the way you think about it. According to the author, "If incarceration has come to define the lives of men from impoverished black neighborhoods, eviction was shaping the lives of women. Poor black men were locked up. Poor black women were locked out."<sup>2</sup> What Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* has been for the mass incarceration phenomenon, *Evicted* should be for housing instability. *Evicted* is an informative must-read.

Author Matthew Desmond, John L. Loeb Associate Professor of the Social Sciences at Harvard University and co-director of the Justice and Poverty Project, brings readers on a journey into poverty in America, generally, and housing in Milwaukee, specifically. Desmond's embedded fieldwork for this project took place in 2008-2009 throughout the city of Milwaukee. The book follows the stories of eight families experiencing housing instability in the private rental market. Black and white families are profiled and some of those studied have children while some of those studied do not.

Matthew Desmond's view of ethnography is that it is "what you do when you try to understand people by allowing their lives to mold your own as fully and genuinely as possible. You do this by building rapport with the people you want to know better and following them over a long stretch of time, observing and experiencing what they do..."<sup>3</sup> Desmond's field research began in a trailer park where he read in a newspaper that the residents were facing a mass eviction and it eventually led him to an inner city rooming house on the North Side of Milwaukee. Desmond, who views poverty as a relationship, describes his goal as writing "a book about poverty that didn't focus exclusively on poor people or poor places"<sup>4</sup> but rather one that showed "a process that bound poor and rich people together in mutual dependence and struggle."<sup>5</sup> The result is a book in which the

author documents and reports the fallout of eviction in the lives of families while also interweaving stories of two landlords. He also intersperses microbursts of policy, history, law, and statistics to help contextualize the narrative for the reader.

*Evicted* strikes the perfect balance of being both well-researched and compelling. The reader does not leave feeling like the author has sacrificed content for storytelling. However, the reader does come away from the book stunned at the vivid depictions of poverty and inequality. Perhaps it is the detailed descriptions of squalid conditions or Desmond's sense of urgency about his topic, but the book is successful not just as a snapshot of a social justice issue but as a call to action for all of us, especially those of us in the legal community.

While poverty and inequality are major themes which run throughout the book, there were several housing-specific issues which may be of interest to the legal community:

1. Despite fair housing laws, the historical landlord practice of discriminating against potential tenants with children is still prevalent.

2. Although data is difficult to obtain on informal eviction rates (evictions which happen outside of formal court proceedings), Desmond discusses informal evictions at length and the consequences of informal evictions on working class American families. One study cited by the author makes the enormity of the informal eviction problem clear, "In other words, for every eviction executed through the judicial system, there are two others executed beyond the purview of the court, without any form of due process."<sup>6</sup>

3. According to Desmond, a majority of tenants facing eviction do not show up to housing court. Even if a tenant does appear, he/she is likely not represented by an attorney. In fact, "in many housing courts across the country, 90 percent of landlords are represented by attorneys, and 90 percent of tenants are not."<sup>7</sup> Desmond also points out that when a tenant is represented by an attorney in housing court, the chance that he/she maintains his/her housing increases dramatically.<sup>8</sup>



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The success of the Rhode Island Bar Association's Continuing Legal Education (CLE) programming relies on dedicated Bar members who volunteer hundreds of hours to prepare and present seminars every year. Their generous efforts and willingness to share their experience and expertise helps to make CLE programming relevant and practical for our Bar members. We recognize the professionalism and dedication of all CLE speakers and thank them for their contributions.



Below is a list of the Bar members who have participated in CLE seminars during the months of September and October.

**John P. Baryllick, Esq.**  
*Of Counsel, FoleyCerilli, PC*

**Nicole J. Benjamin, Esq.**  
*Adler Pollock & Sheehan, PC*

**Leon C. Boghossian III, Esq.**  
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**Lynn E. Riley, Esq.**  
*Cameron & Mittleman, LLP*

**Robert G. Schneider, MD, JD**  
*Westport, CT*

4. Nuisance property ordinance schema may be more harmful than helpful to tenants and community safety. While this topic is sufficiently large to deserve its own book, the author describes how nuisance abatement may be detrimental to tenants by citing a study (his own which is available at <https://www.law.berkeley.edu/files/cs/sl/Desmond.Valdez.Unpolicing.ASR.pdf>) which showed that “in the vast majority of cases (83 percent), landlords who received a nuisance citation for domestic violence responded by either evicting the tenants or by threatening to evict them for future police calls. Sometimes, this meant evicting a couple, but most of the time the landlords evicted women abused by men who did not live with them.”<sup>9</sup> The unintended consequence that nuisance abatement laws possibly work to *increase* housing instability of domestic violence victims is a situation worthy of further study.

5. A recent Yale Law Journal Forum review essay of Desmond's book details the doubt the text casts on the concept of market neutrality. This may be of interest to those who study law and economics.<sup>10</sup>

The above list is just a sampling of legal and sociological issues found in the

pages of *Evicted*. Issues also discussed are the use of public eviction records by landlords to deny housing, the effect of housing instability on children, the effects of the mortgage crisis on the rental market, exploitation of low income individuals, and the possibilities of a universal voucher program. *Evicted* is made rich not just by the diversity of characters in Desmond's narrative but by the diversity of social issues highlighted.

While *Evicted* is very much a story about the people in the private rental housing market in Milwaukee, the author's position appears to be that it is just one example of a pervasive American problem.<sup>11</sup> *Evicted* successfully amplifies the problem but it is also a call to action for the legal community. In Rhode Island, one organization doing this work and worthy of support by our bench and bar is the Rhode Island Center for Justice. According to the organization's website, “Through bi-monthly clinics, Center for Justice staff attorneys provide brief advice, counsel and where appropriate, full legal representation for low-income tenants struggling with substandard conditions issues. The Tenant Advocacy Project is an initiative developed in collaboration with the Community Action Partnership of

Providence (CAPP)...Staff at CAPP, along with community residents, have identified a need for a reliable legal partner to work with families and individuals facing substandard conditions issues.”<sup>12</sup> Regardless of the area of law in which you work, Matthew Desmond's *Evicted* is an eye-opening must-read for members of our legal community.

## ENDNOTES

<sup>1</sup> Matthew Desmond, *Evicted: Poverty and Profit in the American City* (2016)

<sup>2</sup> *Id.* at 98.

<sup>3</sup> *Id.* at 317.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 331.

<sup>7</sup> *Id.* at 303.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 191.

<sup>10</sup> Ezra Rosser, *Exploiting the Poor: Housing, Markets, and Vulnerability*, A Book Review of Matthew Desmond, *Evicted: Poverty and Profit in the American City* (Crown Publishers, New York, 2016), 126 *Yale L.J. forum* 458, 475 (2017).

<sup>11</sup> To try and contextualize this, I submitted a request for eviction statistics from the Rhode Island Court's Community Outreach Office in April 2016. I have not, as of the writing of this, received a response.

<sup>12</sup> Rhode Island Center for Justice, <http://centerforjustice.org> (last visited May 23, 2017). ♦

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**November 2**      **What Starbucks Teaches About Ethically**  
*Thursday*      **Inspired Marketing**  
1:00 p.m. – 2:00 p.m., 1.0 ethics  
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**November 3**      **C-PACE: How a New Tax Assessment**  
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*Also available as a LIVE WEBCAST*

**November 9**      **Recent Developments in Marijuana Laws**  
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12:45 p.m. – 1:45 p.m., 1.0 credit  
*Also available as a LIVE WEBCAST*

**November 11**      **The 2017 Ethy Awards**  
*Saturday*      12:00 p.m. – 2:00 p.m., 2.0 ethics  
**LIVE WEBCAST ONLY**

**November 13**      **Commercial Law 2017 – A Comprehensive**  
*Monday*      **Update on Recent Developments**  
RI Law Center, Cranston  
9:00 a.m. – 1:00 p.m., 4.0 credits + 0.5 ethics  
*Also available as a LIVE WEBCAST*

**November 14**      **The Art of War and Cross Examinations**  
*Tuesday*      1:00 p.m. – 2:00 p.m., 1.0 credit  
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**November 15**      **Limited Scope Representation**  
*Wednesday*      RI Law Center, Cranston  
2:00 p.m. – 4:00 p.m., 2.0 ethics  
*Also available as a LIVE WEBCAST*

**November 17**      **Bridge the Gap**  
*Friday*      RI Law Center, Cranston  
8:30 a.m. – 4:30 p.m.

**November 18**      **The 2017 Ethy Awards**  
*Saturday*      10:00 a.m. – 12:00 p.m., 2.0 ethics  
**LIVE WEBCAST ONLY**

**November 20**      **Lawyers Gone Wild: The Ethical Dangers**  
*Monday*      **of Compulsive Behavior**  
1:00 p.m. – 2:00 p.m., 1.0 ethics  
**LIVE WEBCAST ONLY**

**November 28**      **Criminal Law Practice in Rhode Island:**  
*Tuesday*      **A Practical Skills Series Seminar**  
Rhode Island Law Center  
9:00 a.m. – 3:00 p.m., 5.0 credits + 1.0 ethics

**November 30**      **Top 10 Security Mistakes Most Firms**  
*Thursday*      **are Making**  
Rhode Island Law Center  
12:45 p.m. – 1:45 p.m., 1.0 credit  
*Also available as a LIVE WEBCAST*

**December 5**      **50 Shades of Gray Divorce:**  
*Tuesday*      **The Why and How to Serving Clients**  
over 50 and Navigating Divorce  
Rhode Island Law Center  
12:45 p.m. – 1:45 p.m., 1.0 credit  
*Also available as a LIVE WEBCAST*

**December 6**      **Social Security Disability: Just the Basics**  
*Wednesday*      Rhode Island Law Center  
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## Speakers Bureau Attorney Discusses Discrimination in the Workplace



Speakers Bureau volunteer Richard A. Sinapi, Esq., of Sinapi Law Associates, discussed the topic of discrimination in the workplace, including gender discrimination, sexual harassment, and the *ban the box* issue, with a group of attendees at the Anchor Recovery Community Center in Pawtucket as part of their Employment Readiness Series.

## Soliciting Bar Member Response to Proposed Animal Law Committee

After reviewing a Rhode Island Bar Association member request, the Bar's Executive Committee would like to hear from any Bar members interested in joining, and regularly attending meetings for, a proposed Animal Law Committee. This Committee would seek the participation of all interested members of the Bar, including plaintiff and defense counsel, from both the public and private sectors, in order to benefit such members by providing a collegial forum for members of the legal community to exchange ideas and information of mutual concern, to make recommendations on practices and procedures relating to animal law, to work toward the improvement of this area of law, and to keep the bar informed of developments in these practice areas. At least thirty members must volunteer to serve on the committee which would be formed on an ad hoc basis for at least two years to determine if interest is sustainable. A Chairperson will then be appointed by the President. If the Committee is active for two years, the House of Delegates will consider establishing a standing committee consistent with the Bar's bylaws. Bar members interested in joining the proposed Animal Law Committee are asked to contact Rhode Island Bar Association Member Services Coordinator Erin Bracken by email: [ebracken@ribar.com](mailto:ebracken@ribar.com) no later than November 30th, 2017.

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### AUGUST 2017

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### SEPTEMBER 2017

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The Bar also thanks the following volunteers for taking cases for the Foreclosure Prevention Project and for participating in Ask A Lawyer and Legal Clinic events during August and September.

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John S. Simonian, Esq., *Pawtucket*





## Rhode Island Bar Foundation

Founded in 1958, the Rhode Island Bar Foundation is the non-profit philanthropic arm of the state's legal profession. Its mission is to foster and maintain the honor and integrity of the legal profession and to study, improve and facilitate the administration of justice. The Foundation receives support from members of the Bar, other foundations, and from honorary and memorial contributions.

Today, more than ever, the Foundation faces great challenges in funding its good works, particularly those that help low-income and disadvantaged people achieve justice. Given this, the Foundation needs your support and invites you to complete and mail this form, with your contribution to the Rhode Island Bar Foundation.

### *Help Our Bar Foundation Help Others*

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**Cranston, RI 02920**

**Questions? Please contact Virginia Caldwell at 421-6541**

**or [gcaldwell@ribar.com](mailto:gcaldwell@ribar.com)**

#### Ask A Lawyer

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Kristy J. Garside, Esq.,

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#### Legal Clinic

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John Cappello, Esq.,

*Law Office of John Cappello*

Brian D. Fogarty, Esq.,

*Law Office of Devane, Fogarty & Ribezzo*

Thomas M. Petronio, Esq.,

*Law Offices of Thomas M. Petronio, Esq.*

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**Public Services Director**

**Susan Fontaine at:**

**[sfontaine@ribar.com](mailto:sfontaine@ribar.com) or**

**401-421-7758.**

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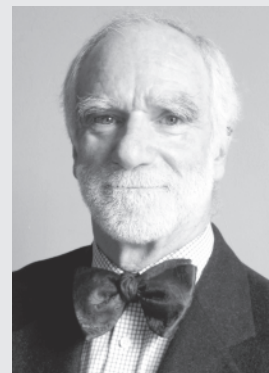
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■

**Investigator**

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**Mediator**



**Nicholas Trott Long, Esq.**

**401-351-5070**

**[nicholas@ntlong.com](mailto:nicholas@ntlong.com)**

**[www.ntlong.com](http://www.ntlong.com)**

## USI Health Insurance Informational Sessions

Mark your calendars! The Rhode Island Bar Association's member health insurance broker, USI, will be hosting two educational meetings, each including a general presentation and one-on-one consultations, regarding medical and dental insurance coverage on the following dates:

**Thursday, December 7th, from 3-5pm**

**Monday, December 11th, from 12-2pm**

Representatives from USI and Blue Cross Blue Shield will be present to advise you regarding any changes for the upcoming year and to answer any questions you may have as you consider your health insurance options. The first hour of each presentation will be dedicated to a general presentation, and the second hour will be reserved for one-on-one consultations. More information regarding the consultations will be circulated closer to the meeting dates. You may also contact our representatives at USI anytime with questions or concerns:

Kelsey O'Donnell  
USI Insurance Services  
Account Manager  
401-558-3117  
Kelsey.ODonnell@usi.com

Debbie French  
USI Insurance Services  
Account Manager  
401-558-3155  
Debbie.French@usi.com

## RI Association for Justice Appoints New Officers and Honors Award Winners

The Rhode Island Association for Justice, an organization representing 400 attorneys who are committed to strengthening the civil justice system by protecting citizens' access to jury trials, honored RI Supreme Court Associate Justice Gilbert V. Indeglia and RI Superior Court Associate Justice Daniel A. Procaccini on Friday, September 15, 2017 at its 31st Annual Awards ceremony that also included the installation of the Association's new officers. The new officers include: President Joseph P. Marasco, President-Elect Ralph R. Liguori, and Secretary/Treasurer Richard A. Sinapi. Justice Procaccini received the organization's Citizen of the Year Award, while Justice Indeglia was presented with the organization's Judicial Merit Award.



New RIAJ President Joseph P. Marasco, Esq. is sworn in by Superior Court Judge Daniel Procaccini.

## Rhode Island Probate Court Listing on Bar's Website

The Rhode Island Bar Association regularly updates the Rhode Island Probate Court Listing to ensure posted information is correct. The Probate Court Listing is available on the Bar's website at [ribar.com](http://ribar.com) by clicking on **FOR ATTORNEYS** on the Home page menu and then clicking on **PROBATE COURT INFORMATION** on the drop-down menu. The Listing is provided in a downloadable pdf format. Bar members may also increase the type size of the words on the Listing by using the percentage feature at the top of the page.

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## Casemaker Tip: Browsing Statutes



Browsing statutes is another great way to research your issue. At times, you may not know the exact citation for the statute that is relevant to your issue. On other occasions, you may want to see the surrounding statutes as well. Instead of searching, we can browse the statutes.

Start by clicking on the jurisdiction you wish to view from the list of states on the homepage. Then click on Statutes. From there you can drill down in the Statute library to find what you need. Clicking on Titles, then on Subtitles, then Chapters and so on. There is a trail at the top of each page indicating what level of the hierarchy you are on. This can help you get your bearings in complicated statutes titles with many layers.

A free member service to all Rhode Island Bar Association attorneys, Casemaker's 24 hour a day, 7 days a week, 365 days a year, online legal research improves lawyers' ability to stay current with the law and provides cost effective client service.

To access Rhode Island Casemaker, connect to the Rhode Island Bar Association website at [ribar.com](http://ribar.com).

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## Lawyers on the Move

**Amy Vignali Coleman, Esq.** is now of counsel at **Marinello Law**, 650 Ten Rod Road, North Kingstown, RI 02852.  
401-757-3968 [avc@cmlawri.com](mailto:avc@cmlawri.com) [marinellolawri.com](http://marinellolawri.com)

**Joseph R. Daigle, Esq.** is now of counsel at **Moonan, Stratton & Waldman, LLP**, 4 Richmond Square, Suite 150, Providence, RI 02906.  
401-272-6300 [jrd@jdaiglelaw.com](mailto:jrd@jdaiglelaw.com)

**Stephen Del Sesto, Esq.** is now a partner at **Pierce Atwood LLP**, 72 Pine Street, 5th floor, Providence, RI 02903.  
401-588-5113 [sdelsesto@pierceatwood.com](mailto:sdelsesto@pierceatwood.com)

**Thomas J. Enright, Esq.** has opened the law firm of **Enright Law LLC**, 696 Reservoir Avenue, Cranston, RI 02910.  
401-526-2620 [tom@enrightlawoffice.com](mailto:tom@enrightlawoffice.com) [enrightlawoffice.com](http://enrightlawoffice.com)

**Christopher E. Hultquist, Esq.** has opened his own practice **Hultquist Law, P.C.**, 56 Pine Street, Suite 200, Providence, RI 02903.  
401-383-6650 [chris@hultquist-law.com](mailto:chris@hultquist-law.com) [hultquist-law.com](http://hultquist-law.com)

**Erica S. Janton, Esq.** is now an associate at **Assalone & Associates, LLC**, 300 Centerville Road, Summit West, Suite 305, Warwick, RI, 02886.  
401-400-4400 [erica@assalonelaw.com](mailto:erica@assalonelaw.com)

**Peter V. Lacouture, Esq.** is now Chair of the Infrastructure and Regulated Industries Section of the American Bar Association.

**Amanda M. Perry, Esq.** is now an associate at **DiOrio Law**, 144 Westminster Street, Suite 302, Providence, RI, 02903.  
401-632-0911 [amperry@dioriolaw.com](mailto:amperry@dioriolaw.com)

The law firm of **Lahti, Lahti, & O'Neill** has become part of **Fletcher Tilton PC**, the Providence office located at 1 Richmond Square, Providence, RI, 02906.  
401-331-0808.

**Stephen J. Queenan, Esq.** is now a senior associate at **Duffy & Sweeney, Ltd.**, 1800 Financial Plaza, Providence, RI, 02903.  
401-455-0700 [squeenan@duffysweeney.com](mailto:squeenan@duffysweeney.com)

**Matthew R. Reilly, Esq.** is now an associate at **Assalone & Associates, LLC**, 300 Centerville Road, Summit West, Suite 305, Warwick, RI, 02886.  
401-400-4400 [matt@assalonelaw.com](mailto:matt@assalonelaw.com)



We congratulate our colleague, Peter Lacouture, for his election as Chair of the Infrastructure and Regulated Industries Section of the American Bar Association.

Pete represents clients in the siting and permitting of large infrastructure projects, and also assists clients with other public utility, zoning, environmental, and land use cases.

Mr. Lacouture, a member of our Environmental, Energy + Telecommunications Group, was awarded the Ralph P. Semonoff Award for Professionalism by the Rhode Island Bar Association in June 2012. He serves as an honorary Trustee on the Board of the Rhode Island Chapter of The Nature Conservancy.

Congratulations, Pete!

## Help Us Reach 1000 List Serve Members!

Free and available for all actively practicing Rhode Island attorney members, the Bar's List Serve gives you immediate, 24/7, open-door access to the knowledge and experience of over 700 Rhode Island lawyers. Help us grow our online community to 1,000 by joining TODAY! If you are the 1,000th member to join, you will win a 2018 Annual Meeting registration voucher valued at \$250!

Visit [ribar.com](http://ribar.com), and the Members Only section for instructions to join. An acknowledgement will be posted on our news page once we hit 1000 members!



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# Do you or your family need help with any personal challenges?

## We provide free, confidential assistance to Bar members and their families.

Confidential and free help, information, assessment and referral for personal challenges are available **now** for Rhode Island Bar Association members and their families. This no-cost assistance is available through the Bar's contract with **Coastline Employee Assistance Program (EAP)** and through the members of the Bar Association's Lawyers Helping Lawyers (LHL) Committee. To discuss your concerns, or those you may have about a colleague, you may contact a LHL member, or go directly to professionals at Coastline EAP who provide confidential consultation for a wide range of personal concerns including but not limited to: balancing work and family, depression, anxiety, domestic violence, childcare, eldercare, grief, career satisfaction, alcohol and substance abuse, and problem gambling.

When contacting Coastline EAP, please identify yourself as a Rhode Island Bar Association member or family member. A Coastline EAP Consultant will briefly discuss your concerns to determine if your situation needs immediate attention. If not, initial appointments are made within 24 to 48 hours at a location convenient to you. Or, visit our website at [coastlineeap.com](http://coastlineeap.com) (company name login is "RIBAR"). Please contact Coastline EAP by telephone: 401-732-9444 or toll-free: 1-800-445-1195.

*Lawyers Helping Lawyers Committee members choose this volunteer assignment because they understand the issues and want to help you find answers and appropriate courses of action. Committee members listen to your concerns, share their experiences, offer advice and support, and keep all information completely confidential.*

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### Lawyers Helping Lawyers Committee Members Protect Your Privacy

SOLACE, an acronym for Support of Lawyers, All Concern Encouraged, is a new Rhode Island Bar Association program allowing Bar members to reach out, in a meaningful and compassionate way, to their colleagues. SOLACE communications are through voluntary participation in an email-based network through which Bar members may ask for help, or volunteer to assist others, with medical or other matters.

Issues addressed through SOLACE may range from a need for information about, and assistance with, major medical problems, to recovery from an office fire and from the need for temporary professional space, to help for an out-of-state family member.

The program is quite simple, but the effects are significant. Bar members notify the Bar Association when they need help, or learn of another Bar member with a need, or if they have something to share or donate. Requests for, or offers of, help are screened and then directed through the SOLACE volunteer email

## SOLACE

### Helping Bar Members in Times of Need

network where members may then respond. On a related note, members using SOLACE may request, and be assured of, anonymity for any requests for, or offers of, help.

To sign-up for SOLACE, please go to the Bar's website at [ribar.com](http://ribar.com), login to the **Members Only** section, scroll down the menu, click on the **SOLACE Program Sign-Up**, and follow the prompts. Signing up includes your name and email address on the Bar's SOLACE network. As our network grows, there will be increased opportunities to help and be helped by your colleagues. And, the SOLACE email list also keeps you informed of what Rhode Island Bar Association members are doing for each other in times of need. These communications provide a reminder that if you have a need, help is only an email away. If you need help, or know another Bar member who does, please contact Executive Director Helen McDonald at [hmcdonald@ribar.com](mailto:hmcdonald@ribar.com) or 401.421.5740.

# In Memoriam

## **Edward M. Fogarty, Esq.**

Edward M. Fogarty, 69, of Providence, passed away on August 31, 2017. He was the beloved husband of Gail (Higgins) Fogarty for over forty years. Born in Woonsocket, Edward was the son of the late Raymond H. Fogarty and Mary (Hogan) Fogarty. He was a communicant of Saint Sebastian's Church in Providence for over thirty years. A graduate of Providence College and Georgetown University Law Center, Ed was a member of the Washington D.C. and the Rhode Island bars. He was admitted to the District Court of D.C. and Federal District Court in Rhode Island. Ed was admitted to the U.S. Court of Appeals for the D.C. Circuit and to the First Circuit Court of Appeals. He was admitted to many other Courts of Appeals in the United States. He was admitted as an Attorney and Counselor of the Supreme Court of the United States where he filed several briefs, one resulting in a Supreme Court decision in his clients' favor. He was a member of the American Bar Association and served on the national panel of arbitrators for the American Arbitration Association. He also worked as an arbitrator in the R.I. Superior Court. In 1987, he served as Legal Counsel to the Speaker of the R.I. House of Representatives, and as Legal Counsel to the Senate Majority Leader and later to the Senate President, retiring in December 2013. Edward was on the Board of the Lt. Joseph P. Kennedy Institute of Washington D.C. For almost 30 years, Edward was on the Board of Trustees of the Festival Ballet Providence where he served a term as president and most recently served as vice president. Ed was a member of the Sons of Irish Kings where he served a term as Chief Steward. He was a member of the University Club in R.I. and D.C. In addition to his wife Gail, Ed is survived by siblings Elaine Fogarty Pavao (Paul), Patricia Fogarty Pettit (Kevin), Margaret (Peggy) Fogarty Chella (Michael), and Raymond William Fogarty (Phoebe) as well as several nieces and nephews, several great nieces and nephews and five Godchildren.

## **Raymond J. McMahon, Jr., Esq.**

Raymond J. McMahon, Jr., 95, of Pawtucket, passed away August 9, 2017. Born to Raymond J. and Irene McMahon in 1921 and educated at LaSalle Academy, Dartmouth College and Harvard Law School, Raymond served on the prosecution team that investigated Marshal Erhard Milch at the Nuremburg Germany trials in 1946-1947. Milch, a former deputy under Hermann Goering, was later charged and convicted of Nazi War Crimes. He joined the law firm of his father Raymond J. McMahon Sr., a former Pawtucket District Court judge in 1947, and kept an office in Providence until very recently. A longtime member of St. Raymond's Church and Wannamoisett Country Club, he is pre-deceased by oldest son Raymond J. McMahon III and survived by Brian R. McMahon of Bradenton, FL, Patrick J. McMahon of Pawtucket, Kevin J. McMahon of Belleair, FL, and 7 grandchildren.

## **David J. Potkul, Esq.**

David J. Potkul, 54, of Biltmore Lake, NC, passed away. Born in Dover, New Jersey, he is the son of Lorraine Hayducsak and the late Ronald Potkul. David achieved high honor from the University of PA Wharton School and UCLA Law School, and practiced law in California and Rhode Island. In addition to his mother, also surviving is his daughter Katrina Potkul and her mother Karen Potkul of Narragansett, RI; sister Marianna Potkul of Biltmore Lake, NC; brother Dr. R.K. Potkul and wife Lori of Hinsdale, IL; and several nephews and cousins.

## **Hon. Vincent A. Ragosta**

Associate Justice of the Rhode Island Superior Court Vincent A. Ragosta, 93, of Providence, passed away August 9, 2017. He was the beloved husband of Carmela C. (Bruno) Ragosta. He was the son of the late Domenico and Rose (Bottis) Ragosta. A graduate of the University of Rhode Island and Boston College Law School, Judge Ragosta served in the United States Army during World War II. He was deployed to the Pacific Theater, serving in military intelligence in Okinawa. He also attended John Hopkins University and The Citadel. Before his appointment to the judiciary, he enjoyed the private practice of law for nearly three

decades, trying countless jury trials in state and federal courts. He served as Assistant City Solicitor for the City of Providence from 1953 to 1966. From 1953 to 1960, he was the City Prosecutor and was lead trial lawyer for the city. He was appointed by Governor J. Joseph Garrahy as Associate Judge of the Rhode Island District Court in 1978, and elevated to the Superior Court as an Associate Justice in 1988. He was a president of the Rhode Island Arthritis Foundation, a corporator of Rhode Island Hospital, a member of the Aurora Civic Association and a trustee of Scalabrini Villa. He was active in Italian-American social and cultural affairs since the end of World War II, serving as a National Trustee of the Order of Sons of Italy in America. In 1975, the President of the Republic of Italy awarded him the Star of Italian Solidarity with the rank of Cavaliere. He was a recipient of the Lifetime Achievement Award of the Italian-American Hall of Fame, the Verrazzano Day Award and the Distinguished Public Service Award of the Justinian Law Society. Besides his wife, he is survived by his sons Vincent Ragosta, Jr., Esq. and his wife Mimi of East Greenwich, Paul D. Ragosta, Esq. and his wife Debra of Providence, Dominic L. Ragosta, CPA and his wife Tammy of Las Vegas, Nevada and Peter J. Ragosta, RPh and his wife Melinda of South Kingstown. He is also survived by a sister, Evelyn (Cioe) Sepe, 10 grandchildren, 2 step-grandchildren and 6 great-grandchildren. He was the brother of the late Dolores Carpenter.

## **Hon. Walter R. Stone**

Associate Justice of the Rhode Island Superior Court Walter R. Stone, 73, of Bristol, passed away September 22, 2017. He was born in Chicago to Lavinia Stone who died 2 days after his birth. Judge Stone attended Tennessee State University and graduated from Fisk University in 1966 with a B.A. degree. He earned his Juris Doctorate from Case Western Reserve School of Law in 1972. Judge Stone was a U.S. Marine combat veteran during the Vietnam War and recipient of the Purple Heart. After serving as an assistant attorney general for the State



## FLORIDA LEGAL ASSISTANCE



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## In Memoriam

of Rhode Island and also trial attorney for the Office of the Public Defender, he founded the Providence firm of Stone, Clifton and Clifton. He later became a partner in the Providence firm of Adler Pollock and Sheehan PC. Judge Stone was actively involved in local and national efforts to foster diversity in the legal community, and he served on Adler Pollock & Sheehan's Diversity Committee. He was as a long-time legal counsel to the International Boxing Federation. Through his involvement with professional boxing and the sports arm of the African National Congress, he was actively involved in bringing professional sports back to South Africa near the end of apartheid. He also served as Vice Chairman of the Rhode Island Racing and Athletic Commission. Judge Stone was elected a Carter Delegate to the Democratic National Convention representing Rhode Island's First Congressional District in 1976. He was former Chairman of the Rhode Island Black Heritage Society, as well as former Vice Chairman of the Heritage Harbor Museum Board. From 1997 until his judicial appointment in December 2010, he served as Chairman of the Board of Rhode Island Legal Services where he began his career as staff attorney in 1972. In addition to serving on the Roger Williams University Board of Trustees, he was a member of several boards of directors including the American Lung Association, Bannister Nursing Home, Caritas House, Heritage Harbor Museum, Latin Film Festival, Newport Art Museum, Omni Development Corporation, Plan International USA, Progreso Latino, Rhode Island Foundation, Rhode Island Lung Association, Rhode Island Minority Asthma Collaborative, and Rhode Island School of Design Fine Arts Committee. Judge Stone is survived by son Hunter Gardner Stone of New York, and companion Ambassador (Ret.) Alice M. Dear of New York City. He was father of the late Morgan Stone.



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## **Trade Secrets Law**

*continued from page 11*

employee under the provisions of this section for the conversion of a trade secret and where such conversion is in violation of the terms of a written employment agreement between said employer and employee [...] if it is shown that said employee is working in a directly competitive capacity with his former employer in violation of the terms of such agreement and that in violation of the terms of such agreement said employee has used such trade secret in such competition.”<sup>31</sup>

While Chapter 93A generally does not apply to employer-employee disputes, it does apply to trade secret misappropriation in other contexts, including actions between competitors, making available to an aggrieved party injunctive relief, double or treble damages, and attorneys’ fees and costs.<sup>32</sup>

For employees or competitors seeking to resist claims of alleged trade secret misappropriation, it is significant that, unlike Rhode Island, Massachusetts trade secret law does not specifically allow for fee-shifting for claims made in bad faith, or for the payment of royalties in lieu of an injunction. Massachusetts law does generally provide, however, for the court to shift fees upon a specific finding that the claim was “wholly insubstantial, frivolous and not advanced in good faith.”<sup>33</sup>

While Massachusetts statutes and common law may be marshalled to achieve the same results available in states like Rhode Island that apply the Uniform Trade Secrets Act, attorneys more familiar with the UTSA should perform a careful review of the statutes and case law before proceeding.

### **4. The Defend Trade Secrets Act of 2016 will continue to change the legal landscape for protecting trade secrets in Massachusetts and Rhode Island.**

Despite the differences, including the three major ones above, in Rhode Island and Massachusetts trade secret law, trade secret practice in both states have one big new similarity: the Defend Trade Secrets Act of 2016. Trade secret law in Massachusetts and Rhode Island – and across the country – will continue to be impacted by the Defend Trade Secrets Act, passed nearly unanimously by the U.S. Congress and signed into law by President Obama on May 11, 2016. It cre-



ates a private cause of action under federal law for trade secret misappropriation if the trade secret relates to a product or service used in, or intended for use in, interstate or foreign commerce, with no amount-in-controversy threshold. As a result, Massachusetts and Rhode Island practitioners should expect to see an increase in trade secret cases filed in federal – rather than state – court, as parties no longer must meet the requirements of diversity jurisdiction, or some other independent federal claim, to file in federal court.

The Defend Trade Secrets Act models its definitions of trade secret and misappropriation after the Uniform Trade Secrets Act, which will be familiar to trade secret lawyers practicing in Rhode Island, but will be a departure from the definitions applied under Massachusetts law. Like Rhode Island law, the DTSA also provides injunctive relief for both actual and threatened misappropriation, with some limitations (see below). Aggrieved parties may recover regular and punitive damages, with the punitive damages amounting to as much as double the regular damages, plus attorneys' fees.

Lawyers in Massachusetts and Rhode Island should take note of four important features of the DTSA – three in favor of employees, and one in favor of employers.

First, the DTSA grants whistleblower immunity to employees, contractors, or consultants, protecting them from criminal or civil liability for disclosing a trade secret if it is made *in confidence* to a government official or attorney solely for the purpose of reporting a legal violation, or in a employment lawsuit involving claims of retaliation. The whistleblower provisions were designed to balance the private interest of preventing disclosure of confidential proprietary information against the public interest of routing out corruption, fraud, abuse, or other illegal activity.

In the first reported decision applying the DTSA's whistleblower provision, however, **Unum Group v. Loftus**,<sup>34</sup> the Massachusetts federal district court declined to allow an employees' motion to dismiss trade misappropriation and conversion claims on the basis of the whistleblower protections. Attorneys should expect the courts to continue to wrestle with these provisions in employment disputes, business litigation, and *qui tam* actions under state law and the federal False Claims Act, among others.

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Second, employees are shielded against the strongest remedies available under the DTSA unless the employer provides proper notice. Specifically, if employers wish to recover punitive damages and attorneys' fees for trade secret misappropriation against employees, contractors, or consultants under the DTSA, they must provide proper notice of the whistleblower immunity provisions in any new agreements governing the confidentiality and disclosure of trade secret or other confidential information that they enter into with their employees, contractors, or consultants. Employers concerned about protecting confidential proprietary information should consider updating their employment agreements and policies to include the proper notice.

Third, the DTSA offers protections to employees seeking to combat overly-restrictive injunctions barring their future employment. For years, commentators on the Uniform Trade Secrets Act have observed that its definition of misappropriation to not require "use" of trade secrets, in combination with the inevitable disclosure doctrine and the availability of injunctive relief for mere "threatened" misappropriation, could create *de facto* non-compete limitations on workers who never signed a non-compete agreement. To remedy this possible outcome, the DTSA places limitations on the availability of injunctive relief. The court may enter an injunction only if it (1) does not prevent the employee from entering into an employment relationship, (2) imposes restrictions based on evidence of threatened misappropriation, and not merely on information known – but not necessarily misappropriated – by the employee, and (3) does not otherwise conflict with state law prohibiting restraints on trade.

Finally, the DTSA allows, in certain circumstances, for a party to obtain *ex parte* relief in the form of a seizure of property – such as, for example, a computer, a drive, or other electronic device – necessary to prevent further disclosure of trade secrets or the destruction of evidence. In order to invoke this remedy, the plaintiff must meet several stringent requirements – including that the defendant would destroy, move, hide, or otherwise make the trade secret property inaccessible to the court if put on notice – and be able to describe with reasonable particularity the property to be seized and, to the extent reasonable under the circumstances, its location.

## Conclusion

Competing in the knowledge economy means competing in the push and pull of acquiring information, and protecting what you know. All who participate in this tug of war – from employers to employees, to contractors and consultants, to businesses and their competitors – will at some point turn to the law to settle a dispute. Employment lawyers and business litigators looking to advise their clients must be aware of the differences among the law of the states, including Rhode Island and Massachusetts, and the burgeoning federal law under the Defend Trade Secrets Act.

## ENDNOTES

- 1 R.I. GEN. LAWS § 6-41-1 *et seq.*
- 2 R.I. GEN. LAWS § 6-41-1(4).
- 3 357 Mass. 728 (1970).
- 4 See, e.g., *Portfolioscope, Inc. v. I-Flex Solutions Ltd.*, 473 F. Supp. 2d 252 (D. Mass. 2007); *Swartz v. Schering-Plough Corp.*, 53 F. Supp. 2d 101 (D. Mass. 1999).
- 5 *J. T. Healy & Sons*, 357 Mass. at 738; see also *Incase Inc. v. Timex Corp.*, 488 F.3d 46, 53 (1st Cir. 2007); *Karter v. Pleasant View Gardens, Inc.*, No. CV 16-11080-RWZ, 2017 WL 1224543, at \*8 (D. Mass. Mar. 31, 2017).
- 6 *Callaban v. Rhode Island Oil Co.*, 240 A.2d 411, 413-14 (1968).
- 7 *Home Gas Corp. of Massachusetts v. DeBlois Oil Co.*, 691 F. Supp. 567, 574 (D.R.I. 1987).
- 8 R.I. GEN. LAWS § 6-41-1(2) (*emphasis added*). See *Magnum Defense, Inc. v. Harbour Group, Ltd.*, 248 F. Supp. 2d 64 (D.R.I. 2003).
- 9 *Id.*
- 10 R.I. GEN. LAWS § 6-41-2.
- 11 54 F.3d 1262 (7th Cir. 1995).
- 12 377 Mass. 159, 168 (1979).
- 13 469 Mass. 181 (2014).
- 14 943 F. Supp. 2d 233 (D. Mass. 2013).
- 15 *Id.* See also *Lombard Medical Tech., Inc. v. Johannessen*, 729 F. Supp. 2d 432, 442 (D. Mass. 2010).
- 16 *Corporate Tech., Inc. v. Hartnett*, 731 F.3d 6, 14 (2013).
- 17 R.I. GEN. LAWS § 6-41-2(a).
- 18 *Id.* (*emphasis added*).
- 19 R.I. GEN. LAWS § 6-41-2(c); 6-41-5.
- 20 R.I. GEN. LAWS § 6-41-3(a).
- 21 *Id.*
- 22 R.I. GEN. LAWS § 6-41-3(b).
- 23 R.I. GEN. LAWS § 6-41-4.
- 24 769 A.2d 605 (R.I. 2001).
- 25 See also *Baris v. Steinlage*, 2003 WL 23195568, No. C.A. 99-1302 (R.I. Super. Dec. 12, 2003) (*awarding punitive damages and attorneys' fees for misappropriation of customer information*).
- 26 2008 WL 2883769, No. C.A. No. 06-533 ML (D.R.I. July 25, 2008).
- 27 591 F.3d 1 (1st Cir. 2009).
- 28 R.I. GEN. LAWS § 6-41-4.
- 29 R.I. GEN. LAWS § 6-41-2(b).
- 30 M.G.L. c. 93 § 42, 42A.
- 31 M.G.L. c. 93 § 42A.
- 32 M.G.L. c. 93A §§ 9, 11.
- 33 M.G.L. c. 231 § 6F.
- 34 220 F. Supp. 3d 143 (D. Mass. 2016). ♦

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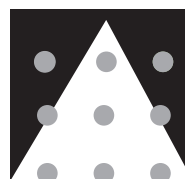


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## Advertiser Index

Ajootian, Charles – 1031 Exchange Services	38
Alliant Title and Escrow – Florida	10
Aon Liability Insurance	back cover
AppraiseRI	11, 15, 19
Arbitrator – Nicholas Trott Long	30
AutoWerks	7
Balsofire & Company, Ltd. – Forensic Accounting, Litigation Support	11
Barrett Valuation Services, Inc.	10
Briden, James – Immigration Law	32
Coia & Lepore, Ltd. – John Cascione	19
Coia & Lepore, Ltd. – Mediation	38
Connecticut Attorneys – Messier Massad & Burdick LLC	28
Dennis, Stephen – Workers' Compensation	15
Economists – EPR	7
Fulweiler LLC – Marine-Related Legal Services	20
Humphrey, Richard – Law Offices	32
Keating, Edward	39
Leone Law, LLC – Anthony R. Leone II	11
Life Insurance – Arlen	41
Marasco & Nesselbush	18
Marinello Law	36
Mathieu, Joan – Immigration Lawyer	6
Mediation & Arbitration – Joseph Keough	19
Mignanelli & Associates, LTD. – Estate Litigation	22
Morowitz, David – Law Firm	24
Ocean State Weather – Consulting & Witness	22
Paradigm Computer Consulting	20
PellCorp Investigative Group, LLC	9
Pfieffer, Mark – Alternate Dispute Resolution	9
Piccerelli, Gilstein & Co. – Business Valuation	37
Purcell, Jim – ADR	37
Real Estate Analysis – Marie Theriault	36
Revens, Revens & St. Pierre – Workers' Compensation	31
Rhode Island Legal Services	18
Robinson & Cole – Congratulations to Peter Lacouture	33
Sciarretta, Edmund – Florida Legal Assistance	39
SecureFuture Tech Solutions	41
Slip & Fall – Henry S. Monti	20
Soss, Marc – Florida Estates/Probate/Documents	36
Technology Lawyers – Barlow Josephs & Holmes	16
UConn School of Law	12
Vehicle Value Appraisals – Green Hill	7
YKSM – CPAs/Business Consultants	6
Zoning Handbook, 3rd Edition – Roland Chase	14

## 7 Tips to Manage Stress

### 1 Set Boundaries

Make taking care of yourself your first emotional priority. You can't avoid stressful situations, but you can make them a smaller part of your emotional life. This means knowing what your hot buttons are and practicing different responses.

### 2 Change the Channel

Bringing the tension home? Break away from your stress by tuning into your favorite TV show, movie or book. Leave your own drama by enjoying someone else's story.

### 3 Detach and Let Go

We all have an idea in our heads about how things are, or how they're supposed to be, and this is what often stresses us out the most. The key is detachment – letting go of the life you expected, so you can make the best of the life that's waiting for you.

### 4 Positive Self Talk

When stressful events happen, positive self-talk seeks to bring the positive out of the negative to help you do better and keep moving forward. The practice of positive self-talk will help you to discover the joy in any given situation.

### 5 Prioritize

Start your day by writing down your top three priorities that you want to accomplish. Put the rest aside. Don't think too far ahead. Stay in the moment. Work on what is in front of you.

### 6 Fight Procrastination

When you are assigned a task, act immediately in some way to create momentum. Break your tasks into manageable sections and plan out how to tackle each subsection. Give yourself a small meaningful reward for each step completed.

### 7 Enjoy the Moment

Slowing down and taking time to savor the moment is a major factor in overall life satisfaction. Consciously enjoying what you are experiencing contributes to health on every level and builds a reservoir of happiness from which we can refill our tank.

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