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Chapter 3: Civil Practice and Procedure

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CHAPTER 3

Civil Practice and Procedure

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§3.1. Long Arm Jurisdiction. In the *Survey* year the Supreme Judicial Court has again construed the reach of the Massachusetts Long Arm Statute.[1] In *Droukas v. Devers Training Academy, Inc.*,[2] the plaintiff filed suit in the commonwealth against the defendant, a Florida corporation, alleging personal jurisdiction on the grounds that the defendant had transacted business in the commonwealth [3] and contracted to supply merchandise in the commonwealth.[4]

The plaintiff, Droukas, had read the defendant's advertisement for the sale of marine engines in a magazine distributed in Massachusetts. He then telephoned the defendant in Florida, ordered two engines, and subsequently mailed the defendant a check for the purchase price.[5] The defendant, in turn, wrote to the plaintiff confirming the sale and later sent further correspondence concerning the engines to the plaintiff in Massachusetts.[6] The engines were finally shipped to the plaintiff accompanied by a bill of lading which bore the legend "charges to be collect." In the complaint, the plaintiff alleged that upon receipt he found the engines to be defective.[7]

The Court noted that it had already construed the Massachusetts Long Arm Statute to provide jurisdiction over the person to the limits allowed by the Constitution of the United States.[8] To be within these

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§3.1. [1] G.L. c. 223A.
[2] 1978 Mass. Adv. Sh. 1175, 376 N.E.2d 548.
[3] G.L. c. 223A, § 3(a).
[4] *Id.* § 3(b).
[5] 1978 Mass. Adv. Sh. at 1177, 376 N.E.2d at 549-50.
[6] *Id.*, 376 N.E.2d at 550.
[7] *Id.* n.2. The plaintiff asserted that the defendant had represented the engines to be in perfect condition, but that they had been damaged by salt water prior to shipping. The defendant, on the other hand, claimed that plaintiff's agent had inspected the engines and purchased them in "as is" condition. *Id.*
[8] *Id.* at 1178, 376 N.E.2d at 550 *quoting* "Automatic" Sprinkler Corp. of America v. Seneca Foods Corp., 361 Mass. 441, 443, 280 N.E.2d 423, 424 (1972).

limits the plaintiff must demonstrate that the defendant had certain minimum contacts with the forum state [9] and had purposefully availed itself of the privilege of conducting business within the forum state.[10]

The Court first addressed the issue of whether the defendant had transacted any business within the commonwealth. It found from the record that the defendant corporation did not maintain an office in Massachusetts, that none of its officers or agents had previously done business in Massachusetts, and that it did not appear that the defendant had entered into any contracts within the commonwealth other than that which was the subject of this action.[11] From these facts the Court ruled that there were insufficient contacts for the assertion of jurisdiction under chapter 223A, section 3(a): the sale was "an isolated transaction, with slight effect on the commerce of the Commonwealth . . ." [12] and was not the result of the defendant's purposefully availing itself of the privilege of conducting activities within Massachusetts.[13] The Court reviewed pertinent decisions of other jurisdictions,[14] but concluded that the question of what activities constitute the transaction of business in any given case must be decided on the particular facts involved.[15] In the instant case, in view of the nature of the defendant's activities and the alleged legal injury which was claimed to have arisen from them, the Court concluded that the defendant had not transacted any business in the commonwealth within the meaning of chapter 223A, section 3(a).[16]

The Court next addressed the question under section 3(b) of whether the defendant had contracted to supply services or things in the commonwealth. It determined that the essential consideration here was the practical question of where the services or things were to be sup-

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[9] *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *See also* Saporita v. Litner, 371 Mass. 607, 358 N.E.2d 809 (1976); Ross v. Ross, 371 Mass. 439, 358 N.E.2d 437 (1976); and "Automatic" Sprinkler Corp. of America v. Seneca Foods Corp., 361 Mass. 441, 444, 280 N.E.2d 423, 425 (1972).

[10] *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[11] 1978 Mass. Adv. Sh. at 1180, 376 N.E.2d at 551.

[12] *Id.* at 1181, 376 N.E.2d at 551.

[13] *Id.*

[14] *Id.* at 1181-84, 376 N.E.2d at 551-52 *citing* Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965); Quartet Mfg. Co. v. Allied Traders, Ltd., 343 F. Supp. 1302 (N.D. Ill. 1972); Geneva Industries, Inc. v. Copeland Constr. Co., 312 F. Supp. 186 (N.D. Ill. 1970); Morgan v. Heckle, 171 F. Supp. 482 (E.D. Ill. 1959); Tabor & Co. v. McNall, 30 Ill. App. 3d 593, 333 N.E.2d 562 (1975); Willis v. West Ky. Feeder Pig Co., 132 Ill. App. 2d 266, 265 N.E.2d 899 (1971); A. Millner Co. v. Noudar, LDA, 24 A.D.2d 326, 266 N.Y.S.2d 289 (N.Y. 1966); and Jump v. Duplex Vending Corp., 41 Misc. 2d 950, 246 N.Y.S.2d 864 (N.Y. 1964).

[15] 1978 Mass. Adv. Sh. at 1184, 376 N.E.2d at 552-53.

[16] *Id.* at 1184-85, 376 N.E.2d at 553.

plied, rather than the more academic problem of locating the "place of contracting."[17] The contract did not specify which party was to bear the responsibility of delivering the engines in Massachusetts. Instead, the bill of lading merely stated that the shipping charges were to be paid by the plaintiff "collect."[18] The Court therefore assumed that the contract was intended to be a shipping contract; i.e., that the seller's only obligation was to make transportation arrangements with an independent carrier and to deliver the goods to the carrier.[19] Accordingly, the Court held that the defendant's responsibility for delivery of the engines was concluded when it delivered the goods to a carrier in Florida. Therefore, the defendant had not contracted to supply "things" in Massachusetts,[20] and the Court did not have jurisdiction over the defendant under section 3(b) of chapter 223A.

In order to limit what might otherwise have been very troublesome *dicta*, the Court concluded by stating that, even if it had found that the defendant had contracted to supply two marine engines in Massachusetts, this isolated act, without other significant contacts, would not meet the requisite constitutional standards for the assertion of personal jurisdiction in Massachusetts.[21]

§3.2. **Personal Jurisdiction: Relief from Default Judgment: Necessity of Counteraffidavits.** A plaintiff seeking to obtain personal jurisdiction over an out-of-state defendant should resort to the Long Arm Statute[1] rather than rely on "last and usual" service[2] which he has reason to believe may be defective. Conversely, an out-of-state defendant who has a default judgment entered against him as a result of improper "last and usual" service may find relief under Mass. R. Civ. P. 60(b). In *Farley v. Sprague*,[3] the Supreme Judicial Court sanctioned a motion for relief from judgment as a means to set aside a default judgment based on improper service. The Court also re-emphasized the importance of filing counteraffidavits in relation to motions to dismiss,[4] for summary

[17] *Id.* at 1185, 376 N.E.2d at 553.
[18] *Id.* at 1186-87, 376 N.E.2d at 553.
[19] *Id.* at 1187, 376 N.E.2d at 553. *See* 1A UNIFORM LAWS ANNOT., U.C.C., comment 5 to § 2-503 (1976); and J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 5-2, at 142-43 (1972).
[20] 1978 Mass. Adv. Sh. at 1187, 376 N.E.2d at 553-54.
[21] *Id.* at 1188, 376 N.E.2d at 554.

§3.2. [1] G.L. c. 223A.
[2] Mass. R. Civ. P. 4(d)(1) provides that service of process upon an individual may be made ". . . by delivering a copy of the summons and of the complaint to him personally; or by leaving copies thereof at his last and usual place of abode. . . . " Thus "last and usual" service remains available notwithstanding the revision of former G.L. c. 223, § 31.
[3] 1978 Mass. Adv. Sh. 385, 372 N.E.2d 1298.
[4] Mass. R. Civ. P. 12(b).

judgment [5] and for relief from judgment.[6] Absent counteraffidavits, "the allegations in the uncontroverted affidavits of the moving party" [7] are likely to be taken as "true for the purposes of the particular motion." [8]

The plaintiff sued to recover for work and materials allegedly supplied pursuant to a building contract for the defendant's premises.[9] The summons and complaint were served at the "last and usual place of abode" in Boston but were returned to plaintiff's attorney by the defendant's financial advisor, together with a letter stating that defendant was a legal resident of Florida.[10] The plaintiff filed two "military affidavits" [11] which stated that the defendant was not in the military, but resided at 442 Seaspray Avenue, Palm Beach, Florida. A default judgment and execution were then issued.[12]

The defendant's first knowledge of the judgment came when the plaintiff mailed notice of the same to the defendant at his Florida address.[13] The defendant filed a motion under Mass. R. Civ. P. 60(b)(4) and (6) for relief from judgment, supported by two affidavits. The motion was grounded on lack of proper service and lack of jurisdiction [14] and was supported by affidavits stating that the defendant had not resided in Massachusetts since 1933.[15]

The superior court denied the motion and was affirmed by the Appeals Court.[16] The Appeals Court noted that the judge below did not state his reasons for denying the motion for relief from judgment and ruled that since the judge could have disbelieved the defendant's affidavits, his decision could not be held to be in error.[17] The Supreme Judicial Court acknowledged that this accorded with governing precedent prior to the enactment of the Massachusetts Rules of Civil Procedure,[18] but held that on the basis of federal precedents [19] and the Massachusetts cases

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[5] Mass. R. Civ. P. 56.
[6] Mass. R. Civ. P. 60(b).
[7] 1978 Mass. Adv. Sh. at 390, 372 N.E.2d at 1301.
[8] *Id.*
[9] *Id.* at 385-86, 372 N.E.2d at 1299.
[10] *Id.* at 386, 372 N.E.2d at 1299.
[11] *See* Mass. R. Civ. P. 55(b)(4).
[12] 1978 Mass. Adv. Sh. at 386-87, 372 N.E.2d at 1299.
[13] *Id.* at 387, 372 N.E.2d at 1299.
[14] The defendant entered a special appearance only to file the motion. *Id.*
[15] 1978 Mass. Adv. Sh. at 387, 372 N.E.2d at 1300.
[16] 1977 Mass. App. Ct. Adv. Sh. 348, 360 N.E.2d 1073.
[17] *Id.* at 349, 360 N.E.2d at 1074.
[18] 1978 Mass. Adv. Sh. at 389, 372 N.E.2d at 1300. *See* Macera v. Mancini, 327 Mass. 616, 621, 99 N.E.2d 869, 872 (1951) and Deluca v. Boston Elev. Ry., 312 Mass. 495, 500, 45 N.E.2d 463, 466 (1942).
[19] The court noted that in two recent decisions it was held "[t]he adjudged construction theretofore given to those Federal rules is to be given to our rules, absent compelling reasons to the contrary." 1978 Mass. Adv. Sh. at 390, 372

which have interpreted and applied the Massachusetts Rules of Civil Procedure in accord with federal precedent,[20] the judge was required to accept the uncontroverted affidavits of the defendant in deciding the motion for relief from judgment.[21] Speaking of the analogous case of summary judgment,[22] the Court clearly stressed,

> . . . the importance, and in some cases the necessity, for opposing affidavits. The party failing to file an opposing affidavit in such a situation cannot rely on the hope that the judge may draw "contradictory inferences" in his favor from the apparently undisputed facts alleged in the affidavit of the moving party.[23]

The Court concluded its opinion with the observation that the defendant's motion sought only vacation and setting aside of the default judgment entered against him, and not that the action be dismissed.[24] The Court mentioned, without passing on the question, that the plaintiff's conduct might have "demonstrated something short of good faith" in carrying his action to the default judgment stage when he had reasonable cause to know that the defendant did not reside in Massachusetts.[25]

§3.3. Jurisdiction and Venue Under Chapter 180A. The first reported Massachusetts case decided under the Uniform Management of Institutional Funds Act [1] resolved pertinent questions of jurisdiction, venue,

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N.E.2d at 1301, *citing* Rollins Environment Services, Inc. v. Superior Court, 368 Mass. 174, 179-80, 330 N.E.2d 814, 818 (1975) and Nichols Ass'n v. Starr, 4 Mass. App. 91, 93, 341 N.E.2d 909, 910 (1976). *See* 1978 Mass. Adv. Sh. at 390-91, 372 N.E.2d at 1301 for federal cases cited.

[20] *Nichols*, n.19 *supra* at 93-94, 341 N.E.2d at 910-11 (uncontroverted motion to dismiss for lack of jurisdiction under Rule 12(b)(6) granted and upheld); Olde Towne Liquor Store v. Alcoholic Beverage Control Comm'n, 372 Mass. 152, 155, 360 N.E.2d 1057, 1060 (1977) (uncontroverted motion for summary judgment under Rule 56); Community Nat'l Bank v. Dawes, 369 Mass. 550, 558-59, 340 N.E.2d 877, 882 (1976) (party failing to file counteraffidavit not entitled to benefit of contradictory inferences drawn from apparently undisputed facts in moving party's affidavit).

[21] 1978 Mass. Adv. Sh. at 391-92, 372 N.E.2d at 1302.

[22] Mass. R. Civ. P. 56(e) expressly requires counteraffidavits to show a genuine issue of material fact on some equivalent showing in sworn discovery.

[23] 1978 Mass. Adv. Sh. at 391, 372 N.E.2d at 1301-02 *citing Community Nat'l Bank*, n.20 *supra* and *Nichols*, n.19 *supra* at 94-97, 341 N.E.2d at 911-13. This rule does not, however, apply in criminal cases. *See, e.g.*, Commonwealth v. Bartlett, 1978 Mass. Adv. Sh. 829, 834 n.6, 374 N.E.2d 1203, 1205-06 n.6 where uncontroverted allegations of improper service in the defendant's affidavit were held to be still subject to discretionary judicial disbelief, although in that instance the sentence was vacated and the default removed because the record affirmatively showed an erroneous notice of a pretrial conference.

[24] 1978 Mass. Adv. Sh. at 392, 372 N.E.2d at 1302.

[25] *Id.*

§3.3. [1] G.L. c. 180A, §§ 1-11 (added by Acts of 1975, c. 886).

and notice. In *Williams College v. Attorney General,*[2] the College sought the release of several donors' separate investment restrictions which prevented the college from adding these funds to its consolidated endowment funds.[3] The Berkshire probate court, where the petition was filed, doubted it had jurisdiction to decide the matter,[4] and so it reserved and reported the case to the Appeals Court pursuant to chapter 215, section 13.[5]

The donors of the gifts at issue were all deceased. Unable therefore to obtain the donors' consent to release of investment restrictions, Williams College sought relief under section 9 of chapter 180A. That section permits an institution to apply to a "court of competent jurisdiction" for release of an investment restriction on a gift when the donors' consent cannot be obtained because of death or unavailability, *inter alia.*[6] One question reported to the Court was whether the probate court is a "court of competent jurisdiction" to order a release of a restriction on use or investment.[7] The Supreme Judicial Court ruled that the nature of the relief sought under the statute is equitable, and therefore is within the probate court's equitable jurisdiction as granted by chapter 215, section 6.[8]

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[2] 1978 Mass. Adv. Sh. 1265, 375 N.E.2d 1225.

[3] *Id.* at 1266, 375 N.E.2d at 1227. The common investment policies applicable to the consolidated endowment fund did not extinguish the separate character of the constituent, smaller funds; each was assigned a discrete share in the consolidated fund.

[4] The probate court seems to have raised the jurisdictional issue *sua sponte.* It does not appear to have been urged by the Attorney General. 1978 Mass. Adv. Sh. at 1266, 375 N.E.2d at 1227.

[5] Although the probate judge reserved and reported the case without formally entering a final judgment or interlocutory order, the Supreme Judicial Court found an interlocutory order implied in the probate court's report of the matter. 1978 Mass. Adv. Sh. at 1266-67 n.2, 375 N.E.2d at 1227 n.2.

[6] Section 9 reads in part:

> With the written consent of the donor, the governing board [i.e., the body responsible for the management of an institution or institutional fund] may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.
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> If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to a court of competent jurisdiction for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The Attorney General shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.
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> . . .
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> This section does not limit the application of the doctrine of cy pres.

[7] 1978 Mass. Adv. Sh. at 1267, 375 N.E.2d at 1227.

[8] *Id.* at 1268, 375 N.E.2d at 1228. G.L. c. 215, § 6 confers on probate courts "original and concurrent jurisdiction with the supreme judicial and superior courts

Three other questions reported by the probate court concerned proper venue for an action brought under section 9. One asked whether the Probate Court of Berkshire County is a proper forum to decide questions arising from inter vivos gift instruments made outside the commonwealth and outside the county.[9] One of the gifts was made through a trust instrument made in New York. The Court held that the action was transitory and therefore venue would lie in the county where a party resides or has its usual place of business. Since Williams College has its place of business in Berkshire County, venue in this probate court was proper with respect to the inter vivos trust created in New York.[10] The Court applied this reasoning to a testamentary disposition from an estate probated outside of Berkshire County but within Massachusetts, but since no out-of-state estate was involved in the action, the Court declined to provide an answer for such a situation.[11]

Another venue question asked if the Probate Court for Berkshire County is the appropriate forum for a chapter 180A, section 9, action where the donors and the trust "are strangers to the probate court in the sense that the trust institution, in its formation and operation, and the gifts to it, were all without the judicial aegis of the Berkshire Probate Court."[12] Again the Supreme Judicial Court had no difficulty finding venue appropriate in this case. The Court noted that no other probate court had taken jurisdiction of any case involving the inter vivos gifts; had such a situation arisen, then jurisdiction over the trust would have to remain with the probate court with original jurisdiction.[13] The Court also noted that the testamentary gifts arose from wills which had been probated in the Probate Court for Suffolk County.[14] Under chapter 215, section 7 that court had exclusive jurisdiction over the probate of these wills and administration of the estates. The Court decided that section 7 did not obtain here because "[t]he earlier probate proceedings ended with the final distribution of the property to the college."[15] In reaching this conclusion the Court stressed that the release of investment and use restrictions is a distinct question from the probate of the donors' wills.[16]

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of all cases and matters of equity cognizable under the general principles of equity jurisprudence, and with reference thereto, shall be courts of general equity jurisdiction . . ." except regarding labor injunctions.

[9] 1978 Mass. Adv. Sh. at 1269, 375 N.E.2d at 1228.

[10] *Id.*

[11] *Id.* at 1270, 375 N.E.2d at 1228.

[12] *Id.*

[13] *Id.* at 1270-71, 375 N.E.2d at 1229. *See also* G.L. c. 215, § 8.

[14] 1978 Mass. Adv. Sh. at 1271, 375 N.E.2d at 1229.

[15] *Id.*

[16] *Id.*

Lastly, the Court ruled that Williams need only give notice to the Attorney General under chapter 180, section 9, since all the original donors were dead.[17] Moreover, since Williams' action only affected the investment restrictions on the funds, rather than their application and distribution, the more extensive notice requirements mandated for *cy pres* action by chapter 214, section 10B, are unnecessary.[18]

§3.4. Venue and Chapter 93A: Venue Otherwise Proper as an Unfair Act or Practice. In *Schubach v. Household Finance Corporation*[1] the Supreme Judicial Court determined that conduct which is specifically permitted by statute or common law principles may still constitute an unfair act or practice under chapter 93A, section 2(a). In particular, the practice of filing actions in courts great distances from the homes of consumer defendants may constitute such an unfair practice, even though venue would be proper under chapter 223, section 2, of the General Laws.[2]

In this case the plaintiffs, Mr. and Mrs. Schubach, were residents of Holyoke and had executed a loan contract with the defendant, Household Finance Corporation (HFC), at its Holyoke office.[3] When the Schubachs defaulted on their loan payments HFC filed a collection action against them in the Boston Municipal Court.[4] The complaint in the present action alleged that HFC chose a distant forum with the intent and purpose of increasing the Schubach's burden of defending the collection action, thereby obtaining a default judgment or, at least, a more favorable judgment against them. They further alleged that HFC regularly files collection actions at places inconvenient to defendants and claimed such conduct constitutes a violation of section 2 of chapter 93A.[5] HFC answered by filing a motion to dismiss the action pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The lower court denied HFC's motion and reported its interlocutory order to the Appeals Court. The Supreme Judicial Court granted HFC's application for direct appellate review.[6]

The only issue before the Supreme Judicial Court was whether a practice which is permitted under state law[7] could nevertheless be

[17] *Id.* at 1272, 375 N.E.2d at 1229. *See also* note 6 *supra.*
[18] *Id.* n.6, 375 N.E.2d at 1229 n.6.

§3.4. [1] 1978 Mass. Adv. Sh. 1153, 376 N.E.2d 140.
[2] *Id.* at 1159, 376 N.E.2d at 142.
[3] *Id.* at 1154, 376 N.E.2d at 141.
[4] *Id.*
[5] *Id.* at 1154-55, 376 N.E.2d at 141.
[6] *Id.* at 1154, 376 N.E.2d at 140.
[7] G.L. c. 223, § 2, the venue statute for district court actions, allows actions to be brought in the county where one of the parties lives or has a place of business.

unfair under chapter 93A. Relying upon decisions interpreting the Federal Trade Commission Act,[8] the Court ruled that the fact that venue might be proper in a distant and inconvenient forum does not mean that filing an action in such a forum can *never* be an unfair or deceptive act or practice.[9]

§3.5. **Declaratory Judgments.** During the *Survey* year the Supreme Judicial Court twice dealt with the question of whether an action was appropriate for declaratory relief pursuant to chapter 231A. The first of these cases was *Massachusetts Association of Independent Insurance Agents and Brokers, Inc. v. Commissioner of Insurance.*[1] In *Insurance Agents and Brokers* the Court was called upon to determine whether an "actual controversy" existed within the meaning of chapter 231A, section 1 and, if it did, whether the plaintiff had the requisite standing to assert the claim.[2]

The Association had filed this action to challenge the validity of a regulation issued by the Commissioner of Insurance purporting to implement the provisions of chapter 175, section 193R.[3] Thus, since the case involved a dispute over an official interpretation of a statute, and the validity of a regulation promulgated under that statute, the Court determined that a justiciable dispute existed.[4] It noted, however, that "controversy in the abstract" does not entitle a plaintiff to

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[8] G.L. c. 93A, § 2(b), added by Acts of 1967, c. 13, § 1, directs the courts of the Commonwealth to be guided by the interpretations given by the Federal Trade Commission and the federal courts to section 6(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976). The Court in *Schubach* relied substantially on Spiegel, Inc. v. Federal Trade Comm'n, 540 F.2d 287 (7th Cir. 1976) in which the Seventh Circuit upheld an FTC order enjoining Spiegel from its practice of suing defaulting out-of-state debtors in Cook County, Illinois. The *Spiegel* court noted that in Federal Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233 (1972) "the Supreme Court left no doubt that the FTC had the authority to prohibit conduct that, although legally proper, was unfair to the public." 540 F.2d at 292. *See also* Aguchak v. Montgomery Ward Co., 520 P.2d 1352 (Alas. 1974); Barquis v. Merchants Collection Ass'n of Oakland, Inc., 7 Cal.3d 94, 496 P.2d 817 (1972); and Vargas v. Allied Fin. Co., 545 S.W.2d 231 (Tex. Civ. App. 1976).

[9] 1978 Mass. Adv. Sh. at 1159, 376 N.E.2d at 142.

§3.5. [1] 1977 Mass. Adv. Sh. 1871, 367 N.E.2d 796. The plaintiff is a trade association incorporated under G.L. c. 180 with a membership of approximately 3500 licensed brokers and agents.

[2] 1977 Mass. Adv. Sh. at 1873-74, 367 N.E.2d at 799.

[3] Rules and Regulations Regarding Insurance Issued Pursuant to a Group Marketing Plan, Division of Insurance, Reg. 3-74. This regulation proposed to govern group marketing but not mass merchandising plans for selling insurance to the public. This would enable insurance companies to provide to the public through mass merchandising plans while bypassing agents and brokers.

[4] 1977 Mass. Adv. Sh. at 1874-75, 367 N.E.2d at 799.

declaratory relief; the plaintiff must also be able to demonstrate a "legally cognizable injury."[5]

In the instant case, the immediate cause of any alleged injury would be business competition.[6] While such an injury alone is usually not sufficient to confer standing, this is not true where competitors in a regulated industry are challenging a regulation affecting their competitive position.[7] However, even in these relaxed circumstances, it is still necessary to determine, as a precondition to declaratory relief, both that the alleged injury is within the parameters of the statutory concern and that it is the type of injury that is inconsistent with the whole regulatory scheme.[8] In this case, it is clear that the insurance business is a highly regulated industry. Additionally, the Court found that the regulation in question could affect the stated legislative policy of maintaining a reasonable level of competition in the insurance industry.[9]

The Court then addressed the question of the Association's standing. This issue really devolved into two separate components: (1) whether insurance brokers and agents were the appropriate parties to seek relief, and (2) if so, whether the plaintiff corporation could bring the suit on their behalf. As to the first, the Court found that the regulation in question could affect the ability of insurance brokers and, to a lesser degree, agents to obtain adequate and reasonably priced coverage for the public, as well as their ability to compete in the market place.[10]

The second issue involved a determination of whether the plaintiff corporation was the "real party in interest" within the meaning of Mass. R. Civ. P. 17(a). The Court noted that the "real party in interest" requirement was designed to protect a defendant against a multiplicity of suits by similarly situated plaintiffs.[11] In the present case the actions of the plaintiff corporation reflected the interests of at least a majority of its individual members—insurance agents and brokers. Thus, allowing the corporation to sue would serve the ends of judicial economy by avoiding a multiplicity of suits. Indeed, the Court stated, failure to recognize the Association as the real party in interest would probably "disserve the explicit purpose of Rule 17(a)."[12]

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[5] *Id.* at 1875, 367 N.E.2d at 799.

[6] See note 3 *supra.*

[7] 1977 Mass. Adv. Sh. at 1875, 367 N.E.2d at 800.

[8] *Id.* at 1876, 367 N.E.2d at 800.

[9] *Id.* at 1877-78, 367 N.E.2d at 800-1 *citing* G.L. c. 174A, § 2; G.L. c. 175, § 113B; G.L. c. 175A, §§ 2, 4.

[10] 1977 Mass. Adv. Sh. at 1878-79, 367 N.E.2d at 801.

[11] *Id.* at 1880, 367 N.E.2d at 801, *citing* J.W. SMITH & H.B. ZOBEL, RULES PRACTICE § 17.2 (1975).

[12] 1977 Mass. Adv. Sh. at 1881, 367 N.E.2d at 802.

The second case involving a request for declaratory relief decided during the *Survey* year focused on the power of a court to issue declaratory relief in a case which was really not adversarial in nature. In *Babson v. Babson* [13] the factual question to be determined was whether it was the testator's intention, as shown by his will, to obtain the benefit of the maximum federal estate tax marital deduction.[14] The action was brought under chapter 231A, section 2 which specifically authorizes the use of the declaratory provisions contained in section 1 of that Act "to secure determinations of right, duty, status or other legal relations under . . . wills. . . ." The Court noted that section 2 was intended to expand, at the discretion of the Court, prior provisions with regard to the interpretation of written instruments.[15]

In the *Babson* case the plaintiffs were the executors of the will of Paul T. Babson. The defendants were the legatees and beneficiaries under the will, the trustees of trusts established under the will, the Attorney General of the Commonwealth, and the Commissioner of the Internal Revenue Service. Each of the defendants was served with process and given notice of the hearing before the Supreme Judicial Court, but none chose to appear.[16] The Court determined that the fact that the defendants had chosen not to participate did not preclude review under section 1 of chapter 231A.[17]

The Court noted that under existing decisions a controversy can exist even though no direct, immediate interest of a present life beneficiary would be affected [18] and even though all parties urge the same result.[19] In this case the controversy concerning the testator's "intent" had immediate bearing upon the actions of the executors; in particular, what they should do "now" with respect to federal estate taxes. All the interested parties had been given notice and their failure to appear did not alter the adversary nature of the proceeding in that the executors were, nevertheless, seeking a judicial determination of their rights.[20] Finally, the Court's decision would be dispositive of the state law issue

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[13] 1977 Mass. Adv. Sh. 2759, 371 N.E.2d 430.

[14] *Id.* at 2765, 371 N.E.2d at 433-34. The Court made clear that it was not deciding a question concerning the availability of the marital deduction, since that is a matter of federal tax law. However, the Court saw no reason why it could not determine the testator's intention with reference to that deduction. *Id.*

[15] *Id.* at 2766, 371 N.E.2d at 434.

[16] *Id.*, 371 N.E.2d at 435.

[17] *Id.*

[18] *Id.*, 371 N.E.2d at 434 *citing* Billings v. Fowler, 361 Mass. 230, 233-34, 279 N.E.2d 906, 909 (1972).

[19] 1977 Mass. Adv. Sh. at 2766-67, 371 N.E.2d at 434 *citing* Persky v. Hutner, 369 Mass. 7, 8, 336 N.E.2d 865, 866 (1975) and Putnam v. Putnam, 366 Mass. 261, 265-66, 316 N.E.2d 729, 734 (1974).

[20] 1977 Mass. Adv. Sh. at 2768 n.5, 371 N.E.2d at 435 n.5.

presented for the Court's own subsequent decisions, as well as further federal tax litigation.[21]

§3.6. **Medicaid Malpractice Actions.** Following its decision in *Austin v. Boston University Hospital* [1] that only those medical malpractice actions filed after January 1, 1976, would be referred to the statutory tribunals,[2] the Supreme Judicial Court was faced with questions concerning the limitations period for such actions [3] and the constitutionality of the statute itself.[4]

In contrast to *Austin*, where the newly created liability of unsuccessful plaintiffs for legal costs and expenses [5] was seen to work a substantive change in the law, the Court in *Cioffi v. Guenther* [6] saw the statute of limitations for medical malpractice actions [7] as affecting only a change in the remedy. Thus, although the new tribunal system is only to be applied prospectively, the new statute of limitations may bar causes of action accruing before January 1, 1976. Section 60D of chapter 231 negates the limitations period prescribed by section 7 of chapter 260 in relation to medical malpractice plaintiffs who are minors. Prior to the enactment of section 60D, such plaintiffs could await their majority before the limitations period would begin to run against them. Under section 60D, however, minor plaintiffs in medical malpractice actions must file a complaint within three years after the cause of action accrues.[8]

In *Cioffi*, the plaintiff was injured in 1971, then being nine years old.[9] His action was brought on December 28, 1976. Section 60D, which was enacted on June 19, 1975[10] went into effect on January 1, 1976.[11] The Supreme Judicial Court ruled that the action, though accruing before

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[21] *Id.* at 2768, 372 N.E.2d at 435.

§3.6. [1] 372 Mass. 654, 363 N.E.2d 515 (1977).

[2] *Id.* at 658, 363 N.E.2d at 518. G.L. c. 231, §§ 60B-E regulate the bringing of malpractice actions against health care providers. Section 60B requires that such actions shall first be heard by a tribunal to be composed of three members: a judge of the superior court, a physician licensed to practice medicine in the commonwealth, and an attorney licensed to practice law in the commonwealth. Under certain circumstances the physician's place may be taken by some other representative from the field of medicine. For a critical review of the malpractice statute *see* Smith, *Torts*, 1975 ANN. SURV. MASS. LAW § 1.8.

[3] Cioffi v. Guenther, 1977 Mass. Adv. Sh. 2631, 370 N.E.2d 1003.

[4] Paro v. Longwood Hospital, 1977 Mass. Adv. Sh. 2353, 369 N.E.2d 985.

[5] G.L. c. 231, § 60B. See note 16 *infra*.

[6] 1977 Mass. Adv. Sh. 2631, 370 N.E.2d 1003.

[7] G.L. c. 231, § 60D.

[8] *Id.* This section, however, allows a minor who is under six years of age to commence his action up until his ninth birthday.

[9] 1977 Mass. Adv. Sh. at 2632, 370 N.E.2d at 1004.

[10] Acts of 1975, c. 362, § 5.

[11] *Id.* § 13.

the enactment and effective date of section 60D, was governed by section 60D's limitation period.[12] The Court therefore directed that the defendant's motion for summary judgment be allowed.[13] The Court noted that statutes of limitation "relate only to the remedy"[14] and may be applied to causes of action preceding statutory changes. The relevant standard used by the Court was whether sufficient time is allowed between the statute's enactment and its effective date to give persons with such causes of action "a full and ample time" to commence their actions.[15] The Court went on to find that the six-month postponement of the statute's effective date was reasonable and was not a denial of justice as applied to a thirteen-year-old minor.[16]

In *Paro v. Longwood Hospital*,[17] the Court rejected a constitutional challenge to section 60B of chapter 231 that was premised on equal protection, due process, and separation of powers grounds. In that case the special tribunal, after a hearing, found for the defendants and required the plaintiffs to post a $2,000 bond [18] before proceeding in the superior court with their action.[19] Plaintiffs' motion for reduction of the bond amount for hardship [20] was denied. The action was dismissed when the plaintiffs failed to file the bond within the thirty days provided by section 60B.[21]

The Court first determined that no fundamental right was at issue and that the plaintiffs would have to demonstrate that the legislative classifications—medical malpractice plaintiffs versus all other plaintiffs and plaintiffs versus defendants—were without a rational basis.[22] The

12 1977 Mass. Adv. Sh. at 2635, 370 N.E.2d at 1006.

13 *Id.*

14 *Id.* at 2633, 370 N.E.2d at 1005 *citing* Mulvey v. Boston, 197 Mass. 178, 181, 83 N.E. 402, 403 (1908).

15 1977 Mass. Adv. Sh. at 2633, 370 N.E.2d at 1005 *citing* Loring v. Alline, 63 Mass. (9 Cush.) 68, 71 (1851).

16 1977 Mass. Adv. Sh. at 2634, 370 N.E.2d at 1005.

17 1977 Mass. Adv. Sh. 2353, 369 N.E.2d 985.

18 G.L. c. 231, § 60B states in part:

> If a finding is made for the defendant the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of two thousand dollars secured by cash or its equivalent with the clerk of the court in which the case is pending, payable to the defendant for costs assessed, including witness and experts fees and attorneys fees if the plaintiff does not prevail in the final judgment. Said single justice may, within his discretion, increase the amount of the bond required to be filed. If said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed. Upon motion filed by the plaintiff, and a determination by the court that the plaintiff is indigent said justice may reduce the amount of the bond but may not eliminate the requirement thereof.

19 1977 Mass. Adv. Sh. at 2355, 369 N.E.2d at 987.

20 See note 16 *supra.*

21 *Id.*

22 1977 Mass. Adv. Sh. at 2356-58, 369 N.E.2d at 987-89.

Court found this burden unmet; the legislature could have concluded that the tribunal and bond requirements would discourage frivolous malpractice claims, and it could have concluded that plaintiffs are more likely than defendants to press frivolous malpractice litigation.[23] Moreover, equal protection does not require the legislature to address the problem all at once. Thus, legislation could be properly aimed at deterring nonmeritorious suits by plaintiffs without also restraining nonmeritorious defenses by defendants.[24]

The due process claim was likewise rejected by the Court. Plaintiffs contended that the statute denied due process to plaintiffs who lose before the tribunal but still wish to try their cases in superior court.[25] They rested this claim on the argument that the bond requirement forces these plaintiffs to purchase justice contrary to article 11 of the Declaration of Rights [26] and denies them the right to a jury trial, contrary to article 15 of the Declaration of Rights.[27] The Court rejected the argument that the bond denies access to the courts, noting that the statute gives the judge discretion in setting the amount of the bond, including a provision for lowering the bond below $2,000 for indigent plaintiffs.[28] Similarly, the Court ruled that the tribunal procedure and bond requirement for unsuccessful plaintiffs does not substantively alter the right to a jury trial.[29]

Lastly, the Court rejected the claim that section 60B violates the separation of powers [30] by interposing a legislative body between plaintiffs and the courts. The medical malpractice tribunals were clearly judicial rather than legislative entities [31] and in any event are not obstructions in a plaintiff's path to the courts; the bond merely provides compensation for the costs of defending nonmeritorious suits.[32] The Court stressed that the statute specifies that the judge, rather than the tribunal, shall set the amount of the bond nonmeritorious plaintiffs must pay before proceeding.[33]

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23 *Id.* at 2359-60, 369 N.E.2d at 989.

24 *Id.* at 2360, 369 N.E.2d at 989.

25 *Id.* Plaintiffs also attacked the lack of means to challenge the tribunal's members for partiality and the limited time for discovery prior to a hearing before the tribunal. (The tribunal is to convene fifteen days after the defendant's answer is filed. G.L. c. 231, § 60B.) Because these points were not raised below they were not considered on appeal. 1977 Mass. Adv. Sh. at 2360 n.9, 369 N.E.2d at 989 n.9.

26 MASS CONST. pt. 1, art. XI.

27 *Id.* art. XV. 1977 Mass. Adv. Sh. at 2360, 369 N.E.2d at 989.

28 1977 Mass. Adv. Sh. at 2361-63, 369 N.E.2d at 990. See note 16 *supra.*

29 1977 Mass. Adv. Sh. at 2364, 369 N.E.2d at 991.

30 MASS. CONST. pt. 1, art. XXX.

31 1977 Mass. Adv. Sh. at 2367, 369 N.E.2d at 992.

32 *Id.*

33 *Id.*

Another area left unresolved by *Austin* was settled this year. In *Byrnes v. Kirby*,[34] Judge Freedman agreed with the *Austin* Court[35] that the medical malpractice tribunal and the liability of unsuccessful plaintiffs created by chapter 231, section 60B altered substantive law.[36] Consequently, *Erie*[37] requires federal district courts in Massachusetts to refer malpractice cases to the medical malpractice tribunals created by section 60B.[38] Judge Freedman directed the case to be referred to the superior court for hearing before a tribunal, whose findings were then to be transmitted to the district court.[39]

The Supreme Judicial Court, through *Austin* and *Paro*, has insured the vitality of the medical malpractice action statute. The problem resolved in *Cioffi* has passed as of this writing. The decision of the federal district court in *Byrnes* makes clear that forum shopping will not enable medical malpractice plaintiffs to avoid section 60B's tribunal and bond requirements.

§3.7. **Rule 54(d): Interest and Costs.** Mass. R. Civ. P. 54(d) states in part that "costs against the Commonwealth, its officers and agencies shall be imposed only to the extent permitted by law." In *Broadhurst v. Director of the Division of Employment Security*,[1] the Supreme Judicial Court was called upon to construe this provision of Rule 54(d)[2] in the context of an action to recover unemployment benefits pursuant to chapter 151A, section 42. The district court had ordered the director of the Division of Employment Security to pay the plaintiff a specified sum in unemployment benefits "plus interest and costs."[3] The only issue before the Court on appeal was whether the district court could properly impose "interest and costs" upon the Commonwealth in addition to the unemployment benefits.

The Court first addressed the question of "costs." The plaintiff based its contention that the award of costs was proper on chapter 261, section

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[34] 453 F. Supp. 1014 (D. Mass. 1978).
[35] 372 Mass. at 657, 363 N.E.2d at 517.
[36] 453 F. Supp. at 1019.
[37] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
[38] While *Austin* formally left this question unresolved as a matter of federal law, 372 Mass. at 659, 363 N.E.2d at 518, the Court did outline a referral procedure in case the federal courts found referral necessary. *Id.* at 660, 363 N.E.2d at 519.
[39] 453 F.Supp. at 1020.

§3.7. [1] 1977 Mass. Adv. Sh. 2448, 369 N.E.2d 1018.
[2] The Order under review in this appeal was issued by a judge of the District Court of Hampshire and, therefore, the District/Municipal Courts Rules of Civil Procedure governed the court below. However, the provisions of Rule 54(d) being construed in this case are identical in the District/Municipal Court and Superior Court Rules.
[3] 1977 Mass. Adv. Sh. at 2448-49, 369 N.E.2d at 1019.

1, of the General Laws.[4] That law provides: "In civil actions the prevailing party shall recover his costs, except as otherwise provided." The defendant in turn relied on Rule 54(d).[5] The Court concurred with the defendant's argument that Rule 54(d) removes this case from the broad language of chapter 261, section 1, and, consequently an award of costs against the commonwealth could only be based upon "specific affirmative authority."[6]

The Court then rejected the plaintiff's assertion that section 14 of chapter 261 provided such specific authority for the imposition of costs in that that statute only applies where an action has been instituted by the commonwealth and not when the commonwealth is the defendant.[7] The Court was also unconvinced by the plaintiff's reliance on chapter 261, section 13, which gives a court discretion in imposing costs in proceedings in which no provision for costs is expressly made by law.[8] It concluded that Rule 54(d), section 14, of chapter 261, and common law principles relating to sovereign immunity[9] constitute express provisions of law.[10] The Court, therefore, found the district court's imposition of costs improper.

The Court similarly found the district court's award of "interest" improper. It first noted that chapter 151A which authorizes the filing of a petition for the recovery of unemployment benefits is silent with respect to the question of interest.[11] The plaintiff's reliance on *Woodworth v. Commonwealth*[12] was inappropriate because, unlike the eminent domain action in *Woodworth*, the statutory scheme concerning unemployment benefits at issue in *Broadhurst* did not authorize interest and the present case raised no constitutional due process issues.[13] Nor was this a case involving contractual obligations where the common-

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[4] *Id.* at 2450, 369 N.E.2d at 1020.

[5] *Id.*

[6] *Id.* at 2451, 369 N.E.2d at 1020.

[7] *Id.* at 2452-53, 369 N.E.2d at 1021. G.L. c. § 14 states:

> In civil actions and in proceedings which are instituted by, or in the name of, the commonwealth, and not at the relation, in behalf, or for the use, of a private person, the commonwealth shall be liable for costs as is an individual.

[8] G.L. c. 261, § 13, as amended by Acts of 1973, c. 1114, § 343 provides in pertinent part:

> In civil actions or other proceedings in which no provision is expressly made by law, the costs shall be wholly in the discretion of the court . . . .

[9] *See* General Electric Co. v. Commonwealth, 329 Mass. 661, 644, 110 N.E.2d 101, 102 (1953) and Glickman v. Commonwealth, 244 Mass. 148, 149-50, 138 N.E. 252, 253 (1923).

[10] 1977 Mass. Adv. Sh. at 2454, 369 N.E.2d at 1021.

[11] *Id.* at 2455, 369 N.E.2d at 1022.

[12] 353 Mass. 229, 231-33, 230 N.E.2d 814, 816-17 (1967).

[13] 1977 Mass. Adv. Sh. at 2456, 369 N.E.2d at 1022.

wealth's liability would be equivalent to that of a private litigant.[14] The Court found that the same principles apply to the imposition of interest as to the imposition of costs, and that the commonwealth has waived its sovereign immunity only to the extent expressly authorized by statute.[15]

§3.8. **Assembly of the Record on Appeal.** In *Superintendent of Worcester State Hospital v. Hagberg*[1] the Supreme Judicial Court significantly lightened an appellant's burden under Mass. R.A.P. 9(c).[2] The plaintiff in *Hagberg* appealed from a decision of the Appellate Division which had reversed a district court civil commitment. The appeal was filed in a timely fashion, but the record was not assembled and the appeal was not docketed within forty days after the notice of appeal.[3] The defendant based her motion to dismiss the appeal[4] on this delay.

In seeking a dismissal of the appeal, the defendant relied on *Westinghouse Electric Supply Co. v. Healy Corp.*[5] In that case the Appeals Court held that Mass. R.A.P. 9(c), when read in conjunction with Mass. R.A.P. 9(a), requires the record to be assembled within forty days on pain of dismissal for noncompliance.[6] The *Westinghouse* court reasoned that while Rule 9 uses the phrase "assembly of the record" rather than "transmission of the record,"[7] Rule 9 "has invested timely assembly of the record with the same procedural significance in our practice that Federal appellate procedure gives to timely transmission."[8]

The Supreme Judicial Court in *Hagberg* did not share this view that the concepts of "assembly" and "transmission" are the same substantively.

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[14] *See* C. & R. Constr. Co. v. Commonwealth, 334 Mass. 232, 233-34, 135 N.E.2d 539, 540 (1956) discussed by the *Broadhurst* Court. 1977 Mass. Adv. Sh. at 2456-57, 369 N.E.2d at 1022. *Broadhurst* involved a statutory claim for unemployment benefits and must therefore be distinguished from an action brought against the Commonwealth under G.L. c. 258 or, as in *C. & R.*, an action based on contractual obligation.

[15] 1977 Mass. Adv. Sh. at 2457, 369 N.E.2d at 1023. In this case, the extent of "waiver" is found in G.L. c. 151A, § 42, which establishes procedures for appeals of decisions of the Division's Board of Review.

§3.8. [1] 1978 Mass. Adv. Sh. 187, 372 N.E.2d 242.

[2] Rule 9(c) reads in full:

> Appellant's Obligation. In addition to complying with the provisions of Rule 8(b), each appellant shall within 40 days after filing the notice of appeal take any action necessary, or reasonably requested by the clerk, to enable the clerk of the lower court to assemble the record, and a single record shall be assembled.

[3] 1978 Mass. Adv. Sh. at 189-90, 372 N.E.2d at 244. The plaintiff-appellant claimed that the delay was caused by errors in the clerk's office.

[4] Mass. R.A.P. 10(c).

[5] 1977 Mass. App. Ct. Adv. Sh. 69, 359 N.E.2d 634.

[6] *Id.* at 84 n.24, 359 N.E.2d at 643 n.24.

[7] *See* F.R.A.P. 11(a).

[8] 1977 Mass. App. Ct. Adv. Sh. at 84, 359 N.E.2d at 643.

The Court stated, "We take this occasion to point out the difference between the Federal rule and our rule: our rule does not require the record to be assembled in forty days. Hence no violation of our rule is shown in the present case."[9] Thus, contrary to the Appeals Court's *Westinghouse* ruling, there is no fixed deadline for assembling the record. The standard is merely "as soon as may be after the filing of the notice of appeal."[10] The *Hagberg* reading of the appellant's obligation is sound in light of Rule 9(c)'s language that the appellant is to "take any action necessary, or reasonably requested by the clerk [within forty days after filing his appeal] to enable the clerk of the lower court to assemble the record."[11]

The rule in *Hagberg* was subsequently applied in *Maurice Callahan & Sons, Inc. v. Outdoor Advertising Board.*[12] Callahan's appeal did not require a transcript nor did the clerk request Callahan to take any action to enable the clerk to assemble the record.[13] The lower court dismissed the appeal in reliance on *Westinghouse*,[14] and was then reversed by the Supreme Judicial Court, which again adverted to the difference from the federal rule. The Court explained, "Our rule requires an appellant to initiate timely assembly of the record, whereas the corresponding Federal rule requires the appellant to cause the record to be assembled in forty days. . . . The delay in this case was in no way attributable to the appellant. . . ."[15]

Thus an appellant who has ordered and secured delivery of the transcript and done whatever else the clerk may reasonably have requested to enable the clerk to assemble the record within forty days after the notice of appeal was filed is now in a safe harbor even if the clerk may not complete assembly of the record within that period.

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[9] 1978 Mass. Adv. Sh. at 190, 372 N.E.2d at 244.
[10] Mass. R.A.P. 9(a).
[11] See note 2 *supra.*
[12] 1978 Mass. Adv. Sh. 2239, 379 N.E.2d at 1094.
[13] *Id.* at 2440-41, 379 N.E.2d at 1095.
[14] See text at notes 5-8 *supra.*
[15] 1978 Mass. Adv. Sh. at 2441, 379 N.E.2d at 1095.