



The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1989



the Honorable Senate and House of Representatives:

I have the honor to transmit herewith the Report of the Department
e Attorney General for the year ending June 30, 1989.

Respectfully submitted,

JAMES M. SHANNON
Attorney General

T. David Raftery
 Jamin Raskin 70
 Robert Ritchie 21
 Susan Roberts
 Carmen Rodriguez

Margaret Zaleski
 Reed Zars
 Judith Zeprun
 Peter Zuk
 Samuel Zurier 7

*Assistant Attorneys General Assigned To
 Division of Employment Security*

Maria Galvagna⁵
 William Luzier

Maria Moynihan
 Neal Steingold ²

Budget Director
 Patrick J. Moynihan

Chief Clerk
 Edward J. White

Fiscal Affairs Manager
 Elizabeth M. Connolly

APPOINTMENT DATE

TERMINATION DATE

1. 8/3/88
 2. 9/6/88
 3. 9/26/88
 4. 10/3/88
 5. 10/11/88
 6. 10/12/88
 7. 10/17/88
 8. 11/14/88
 9. 11/17/88
 10. 11/21/88
 11. 11/28/88
 12. 12/12/88
 13. 12/16/88
 14. 1/3/89
 15. 1/9/89
 16. 2/13/89
 17. 2/27/89
 18. 3/6/89
 19. 3/20/89
 20. 3/31/89
 21. 5/15/89
 22. 6/5/89
 23. 6/12/89

50 7/12/88
 51 7/15/88
 52. 7/29/88
 53. 8/10/88
 54. 8/26/88
 55. 8/31/88
 56. 9/23/88
 57. 9/28/88
 58. 10/10/88
 59. 10/21/88
 60. 10/28/88
 61. 11/11/88
 62. 12/30/88
 63. 1/3/89
 64. 1/31/89
 65. 2/14/89
 66. 3/8/89
 67. 3/24/89
 68. 3/29/89
 69. 4/10/89
 70. 4/21/89
 71. 4/28/89
 72. 5/1/89
 73. 5/5/89
 74. 5/12/89
 75. 5/24/89
 76. 5/26/89
 77. 6/2/89
 78. 6/23/89
 79. 6/29/89
 80. 6/30/89

DEPARTMENT OF THE ATTORNEY GENERAL
SUSPENSE FUNDS

RECEIPTS AND DISBURSEMENTS
JULY 1, 1988 to JUNE 30, 1989

ACCOUNT #	BALANCE JULY 1, 1988	RECEIPTS	DISBURSEMENTS	BALANCE 6/30/89
Thomas C. McMahon v. Nyanza	3,679.42	---	---	3,679.42
J.T. Gearese d/b/a King B Auto	10,500.00	---	10,500.00	--
Chrysler Corp.	10,000.00	---	10,000.00	--
Patrick Ciampo & Howard Johnson	7,106.25	---	---	7,106.25
a/k/a Edward Miller				
Robert Wilcox d/b/a				
Roberts Auto	1,000.00	---	1,000.00	
Wm M. Johnson III & JG Salvage	2,646.84	---		2,646.84
Steven Sesser Construction Co.				
Wonder Construction Co.	380.00	---	380.00	--
Paul Solas, T. William Solas				
d/b/a Center Rehabilitation	1,817.71	---	1,817.71	--
Allen C. Keene, et al.	2,842.63	---	2,842.63	--
Fiore Depot Motors, Inc.	12,700.00	---	12,700.00	--
Janet Strom Enterprises, et al.	487.00	---	487.00	--
Bennett St. Auto Sales, Inc.	4,996.46	---	4,996.46	--
Dean St. Auto Sales, Inc &				
Kenneth Troiani	8,547.79	---	8,547.79	--
Stephen Hanparian d/b/a Comm.				
Tow & Repair	1,261.00	---	1,261.00	--
Majestic auto Buyers, Inc.	9,500.00	---	9,500.00	--
Olympic Auto Sales	10,002.25	---	10,002.25	--
Festino Fuel, Inc. Joseph &				
Vicent Festino	1,000.00	---	1,000.00	--
H.J. Wassar Co., Inc.	149.00	---	149.00	--
Century Auto Appraisers, Inc.				
RP Stone & Peter Slate	6,800.00	---	---	6,800.00
Boston Bullion Ltd., et al.	2,400.00	---	2,400.00	--
Porter Chevrolet	2,245.05	---	2,245.05	--
American Income Life	5,456.02	---	5,456.02	--
Pamalone Music School Inc				

NAME	ADDRESS	DATE	AMOUNT	REMARKS
Maria Monge d/b/a J&R Auto Repair & Used Cars	19,500.00	--	19,500.00	
Feel Fit Health Center Ltd. & Edward P. Matter	270.44	--	270.44	
G.A. Mulloy, Inc. d/b/a Car Wholesaler	.48	--	---	.48
Alfred J. Fabrit & Brian R. Dimetress	12,320.00	--	12,320.00	
Eric Bartlett d/b/a Bartlett Assoc. & Fix., Co.	2,000.00	--	--	2,000.00
Bruce Ledbury d/b/a Cars International	11,286.60	--	--	11,286.60
Ozzella Dodge Sales	21,000.00	--	21,000.00	
Franklin Lama	1,000.00	--	1,000.00	
US Savings Subaru	.63	--	.63	
Vurhoc Ins. Rest. Acct	4,778.30	--	4,778.30	
Yenom Auto Sales, Inc., et al.	9,000.00	--	9,000.00	
Aetna Finance d/b/a Itt Thorp Co.	1,302.08	--	50.70	1,251.38
Leland Powers School Settlement	5.79	--	--	5.79
Andrews Paint Co., FG Andrews	495.50	600.00	--	1,095.50
Cabot Mtg. Corp	375.75	--	--	375.75
Alex O'Neil	250.00	--	250.00	
Theodore Nader d/b/a Nadar Auto	2,500.00	--	2,500.00	
Falmouth Auto	.02	--	.02	
Robertson & Gray, Inc.	2,000.01	--	2,000.01	
Hodgen Rest Homes	9,505.97	--	9,505.97	
North Shore Roommates Service	1,088.39	--	--	1,088.39
Diamond Chevrolet	7,396.00	--	--	7,396.00
Charlie Construction	891.38	--	891.38	
Rusty Jones, Inc.	2,263.00	--	--	2,263.00
FIC Assoc./Carter Green Condos.	19,455.03	--	19,455.03	
Business Education	116,298.81	46,000	--	162,298.81
O'Henry's Used Cars	9,000.00	--	--	9,000.00
Forest Mtg. Group	50.00	--	--	50.00
Mall Auto Sales	15,000.00	--	--	15,000.00
Economy Auto Sales	7,136.60	--	--	7,136.60
Wilmington Sales & Lowell Ford	132,651.58	--	132,651.58	

DEPARTMENT OF THE ATTORNEY GENERAL

SUSPENSE FUNDS

RECEIPTS AND DISBURSEMENTS

JULY 1, 1988 to JUNE 30, 1989

ACCOUNT #	BALANCE JULY 1, 1988	RECEIPTS	DISBURSEMENTS	BALANCE 6/30/89
Thomas C. McMahon v. Nyanza	3,679.42	---	---	3,679.42
J.T. Geanese d/b/a King B Auto	10,500.00	--	10,500.00	--
Chrysler Corp.	10,000.00	--	10,000.00	--
Patrick Ciampo & Howard Johnson a/k/a Edward Miller	7,106.25	---	---	7,106.25
Robert Wilcox d/b/a				
Roberts Auto	1,000.00	--	1,000.00	
Wm M. Johnson III & JG Salvage	2,646.84	--		2,646.84
Steven Sesser Construction Co.				
Wonder Construction Co.	380.00	--	380.00	--
Paul Solas, T. William Solas d/b/a Center Rehabilitation	1,817.71	--	1,817.71	--
Allen C. Keene, et al.	2,842.63	--	2,842.63	--
Fiore Depot Motors, Inc.	12,700.00	--	12,700.00	--
Janet Strom Enterprises, et al.	487.00	--	487.00	--
Bennett St. Auto Sales, Inc.	4,996.46	--	4,996.46	--
Dean St. Auto Sales, Inc & Kenneth Troiani	8,547.79	--	8,547.79	--
Stephen Hanparian d/b/a Comm. Tow & Repair	1,261.00	--	1,261.00	--
Majestic auto Buyers, Inc.	9,500.00	--	9,500.00	--
Olympic Auto Sales	10,002.25	--	10,002.25	--
Festino Fuel, Inc. Joseph & Vicent Festino	1,000.00	--	1,000.00	--
H.J. Wassar Co., Inc.	149.00	--	149.00	--
Century Auto Appraisers, Inc.				
RP Stone & Peter Slate	6,800.00	--	--	6,800.00
Boston Bullion Ltd., et al.	2,400.00	--	2,400.00	--
Porter Chevrolet	2,245.05	--	2,245.05	--
American Income Life	5,456.02	--	5,456.02	--
Pampalone Music School, Inc.,				

Auto & Rosco Auto Parts, Inc.	0810-6880	7,449.25	--	7,499.25	--
Maria Monge d/b/a J&R Auto Repair & Used Cars	0810-6881	19,500.00	--	19,500.00	--
Feel Fit Health Center Ltd. & Edward P. Matter	0810-6882	270.44	--	270.44	--
G.A. Mulloy, Inc. d/b/a Car Wholesaler	0810-6883	.48	--	--	.48
Alfred J. Fabrit & Brian R. Dimetress	0810-6884	12,320.00	--	12,320.00	--
Eric Bartlett d/b/a Bartlett Assoc. & Fix., Co.	0810-6885	2,000.00	--	--	2,000.00
Bruce Ledbury d/b/a Cars International	0810-6887	11,286.60	--	--	11,286.60
Ozzella Dodge Sales	0810-6888	21,000.00	--	21,000.00	--
Franklin Lama	0810-6893	1,000.00	--	1,000.00	--
US Savings Subaru	0810-6894	.63	--	.63	--
Vurhoc Ins. Rest. Acct	0810-6896	4,778.30	--	4,778.30	--
Yenom Auto Sales, Inc., et al.	0810-6898	9,000.00	--	9,000.00	--
Aetna Finance d/b/a Itt. Thorp Co.	0810-6902	1,302.08	--	50.70	--
Leland Powers School Settlement	0810-6904	5.79	--	--	1,251.38
Andrews Paint Co., FG Andrews	0810-6905	495.50	600.00	--	5.79
Cabot Mig. Corp	0810-6906	375.75	--	--	1,095.50
Alex O'Neil	0810-6908	250.00	--	250.00	375.75
Theodore Nader d/b/a Nadar Auto	0810-6910	2,500.00	--	2,500.00	--
Falmouth Auto	0810-6911	.02	--	.02	--
Robertson & Gray, Inc.	0810-6913	2,000.01	--	2,000.01	--
Hodgen Rest Homes	0810-6914	9,505.97	--	9,505.97	--
North Shore Roommates Service	0810-6915	1,088.39	--	--	1,088.39
Diamond Chevrolet	0810-6917	7,396.00	--	--	7,396.00
Charlie Construction	0810-6918	891.38	--	891.38	--
Rusty Jones, Inc.	0810-6919	2,263.00	--	--	2,263.00
FIC Assoc./Carter Green Condos.	0810-6920	19,455.03	--	19,455.03	--
Business Education	0810-6921	116,298.81	46,000	--	162,298.81
O'Henry's Used Cars	0810-6922	9,000.00	--	--	9,000.00
Forest Mig. Group	0810-6923	50.00	--	--	50.00
Mall Auto Sales	0810-6924	15,000.00	--	--	15,000.00
Economy Auto Sales	0810-6925	7,136.60	--	--	7,136.60
Wilmington Sales & Lowell Ford	0810-6927	132,651.58	--	132,651.58	--

	ACCOUNT #	BALANCE JULY 1, 1988	RECEIPTS	DISBURSEMENTS	BALANCE 6/30/89
Home Mtg Corp.	0810-6929	109,334.72	--	109,334.72	--
Womens World Health Spa	0810-6930	20,000.00	--	--	20,000.00
Casey Chevrolet	0810-6931	3,500.00	--	--	3,500.00
Charlesbank Dry Cleaning	0810-6932	97.26	--	97.26	--
Village Truck	0810-6934	3,068.82	--	--	3,068.82
Second Chance Cars	0810-6936	500.00	--	--	500.00
Dura Bulb Lighting Prod.	0810-6938	27.78	--	27.78	--
Lee Auto	0810-6941	3,202.00	1,600.00	1,500.00	3,302.00
Polaris-Burlington	0810-6942	140.87	--	140.87	--
William Wolff	0810-6943	--	26,000.00	25,482.45	517.55
Miller Furniture	0810-6944	--	3,000.00	--	3,000.00
Wellesley Toyota	0810-6945	--	7,175.90	2,157.90	5,018.00
Tijuana, Goldstein et al.	0810-6946	--	20,000.00	--	20,000.00
Ray's Auto Body	0810-6947	--	24,500.00	1,000.00	23,500.00
Topa Builders	0810-6948	--	18,000.00	18,000.00	--
TOTALS		662,756.98	146,875.90	485,746.18	323,886.70

DEPARTMENT OF THE ATTORNEY GENERAL

GRANTS AND TRUSTS

RECEIPTS AND DISBURSEMENTS

JULY 1, 1988 to JUNE 30, 1989

	ACCOUNT NUMBER	BALANCE JULY 1, 1988	RECEIPTS	DISBURSEMENTS	BALANCE 6/30/89
Attorney General Trust Fund	0810-6614	80,727.18	--	--	80,727.18
Water Pollution Control Program	0810-6630	78,331.45	16,384.53	94,715.98	--
Air Pollution Control Program	0810-6631	15,522.58	5,862.34	21,384.92	--
Anti-Trust Enforcement Program New England Bid Monitoring Project	0810-6643	152.17	--	152.17	--
Hazardous Waste Enforcement	0810-6647	18,819.15	40,661.47	39,135.81	20,344.81
Anti-Drug Abuse Act 1986	0810-6648	100,000.00	80,000.00	99,904.00	80,096.00
Coastal Zone Management Program Implementation	0810-6661	2,693.47	--	--	2,693.47
Pesticide Regulation Program Enforcement Activities	0810-6662	27,856.00	--	--	27,856.00
TOTALS		324,102.00	142,908.34 2	225,292.88	211,717.46

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
JUNE 30, 1989

	<u>ACCOUNT NAME</u>	<u>APPROPRIATION</u>	<u>EXPENDITURES</u>	<u>ADVANCE</u>	<u>ENCUMBRANCES</u>	<u>BALANCE</u>
0810-0000	Administration	16,190,490.68	16,165,987.89	--	--	24,502.79
0810-0014	Public Utilities Auth. by CH. 1221 1973	508,038.20	507,990.42	--	--	47.78
0810-0015	Seabrook Litigation 3 Adm & Exp.	391, 540.40	384,630.08	--	--	6,910.32
0810-0017	Judicial Proceedings, relevant to Fuel Charge	75,000.02	74,999.80	--	--	.22
0810-0020	Criminal Tax Unit	135,623.50	130,307.07	---	--	5,316.43
0810-0021	Medicaid Fraud Control Unit	1,591,241.17	1,508,152.46	---	--	83,088.71
0810-0031	Local Consumer Aid Fund	733, 623.80	732,925.48	---	--	698.32
0810-0033	Local Consumer Aid Fund Reimbursement	17,304.35	130,901.84	-		186,402.51
0810-0035	Antitrust Div. Adm.	428,253.00	414,319.48	-	-	13,933.52
0810-0201	Insurance Auth. by Ch 266, 1976	407,027.70	406,909.46	-	-	118.24
0810-0410	Forfeited Funds	69, 645.00	44,867.43	-	-	24,777.57

<u>ACCOUNT</u>	<u>ACCOUNT NAME</u>	<u>APPROPRIATION</u>	<u>EXPENDITURES</u>	<u>ADVANCE</u>	<u>ENCUMBRANCES</u>	<u>BALANCE</u>
0810-1031	Victim/Witness Discretionary Allocation of 0840—0105	145,942.20	134,792.91	--	--	11,149.29
	Totals	<u>20,993,730.02</u>	<u>20,636,784.32</u>	-	-	<u>356,945.70</u>
	Schedule 2 Totals	324,102.00	112,384.54	-	-	211,717.46
	Grand Totals	<u><u>21,317,832.02</u></u>	<u><u>20,749,168.86</u></u>	<u><u>--</u></u>	<u><u>--</u></u>	<u><u>568,663.16</u></u>

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF INCOME
For Fiscal Year Ended
June 30, 1989

<i>Account Number</i>	
0801-40-01-40	Fees, Filing Reports, Charitable Organizations
	\$244,815.01
0801-40-02-40	Fees, Registrations, Charitable Organizations
	49,595.00
0801-41-02-40	Fines & Penalties, Civil Actions
	1,075,698.26
0801-62-02-40	Reimbursement for Services, Cost of Investigations - Consumer
	295,082.10
0801-62-03-36	Local Consumer Aid Fund-Reimburse For Service
	267,084.82
0801-65-09-36	Fuel Assessment
	75,000.02
0801-67-67-40	Reimbursement, Indirect Cost Allowances
	347,446.00
0801-67-01-40	Reimbursement, For Service
	1,129,961.00
0801-68-04-36	Forfeitures
	69,645.00
0801-69-99-40	Miscellaneous
	143,726.19

COMMONWEALTH OF MASSACHUSETTS

In accordance with the provisions of Section 11 of Chapter 12 and of Chapter 32 of Chapter 30 of the General Laws, I hereby submit the Annual Report for the Department of the Attorney General. This annual report covers the period from July 1, 1988 to June 30, 1989 and is the first report I have filed as the Attorney General of the Commonwealth of Massachusetts.

One of my top priorities for 1989 was to strengthen our environmental law enforcement effort. To that end my office, along with the Executive Office of Environmental Affairs, created and will coordinate a 34-member Environmental Crime Strike Force. The strike force, which went into action in May 1989, uses prosecutors, scientists, investigators, and police officers to target high-priority threats to public health and natural resources. The focus is on cases involving drinking water supplies, wetlands, illegal dumping and toxic discharges to sewage systems. The Massachusetts Strike Force, one of the largest in the country, is statewide in its scope and cuts across agency lines.

By pooling the resources of the Executive Office of Environmental Affairs, the Department of Environmental Quality Engineering, the Division of Fisheries and Wildlife, the MDC, the Massachusetts Water Resources Authority and my department we expect the prosecution of environmental crime in Massachusetts will be more effective. Because prosecutors will be involved in the earliest stages of a probe stronger prosecution can be brought.

Of the many environmental cases we've brought this year one is particularly noteworthy for its farreaching implications. Responding to growing evidence that chlorofluorocarbons or CFCs, are destroying the stratospheric ozone layer, the Environmental Protection Division brought the first case by a state to stop the release of these man-made chemicals. In a landmark settlement, a Hyannis company agreed to a phase-out of CFC emissions by the end of 1988. The company will also pay a \$700,000 fine, the highest civil penalty ever assessed in a Massachusetts environmental case.

The settlement provides legal approaches for other states to consider. The federal Environmental Protection Agency has defaulted on this issue by releasing rules to control CFC production only through market restrictions, and then scheduling the effective date of the rules to the uncertain time when the international ozone treaty is ratified. CFC emissions are explicitly exempt from federal air regulations and those of many states. Massachusetts, however, never granted this exemption, so the compounds are regulated like other chemicals in this category and require a permit.

Many states have the legal authority to bring similar actions under their Clean Air Acts, but some may have to amend existing statutes and regulations to regulate ozone depleting substances.

Fighting drugs remains my highest priority. Currently we have six lawyers handling narcotics cases. And the return of the state troopers has bolstered our efforts considerably. The Narcotics Unit I created at the start of my administration has led to the arrest of 88 alleged cocaine traffickers, charges against 20 more defendants for various drug violations, the seizure of approximately 90 pounds of cocaine and sizeable amounts of other narcotics. Most of these arrests have yielded guns - including machine guns and high-

powered rifles. We have had 11 convictions after trial, guilty pleas by 12 defendants and over 70 defendants are now under indictment.

But it has become obvious that aggressive enforcement of existing laws is not enough. Drug traffickers today are highly organized and well financed. If we're going to put sophisticated drug cartels out of business, our drug laws must recognize that drug dealing is a big business, aggressively marketed on the streets, in schools, and in the workplace. The consequences of conviction must be powerful enough to deter highly lucrative activity. At the present time they are not.

To remedy this situation, I have filed the Massachusetts Narcotics Enforcement Act of 1989 and refiled the anti-racketeering bill. A key provision is narcotics forfeiture which would take the proceeds of drug dealing and use it to fund investigators and prosecutions. Criminals too often serve their time and return to their riches. The legislation would also double the time a convicted dealer would have to serve before becoming eligible for parole.

I would also like to make note of the enormous success of the Victims' Compensation and Assistance Division, which I created in 1987. The division processed more claims and paid out more compensation dollars (\$3.5 million) than ever before in the history of the program. In addition, counselling, referral and creditor intercession for victims and survivors of violent crime were increased dramatically.

The performance of each bureau within the department continues to be characterized by commitment, vigilance and skill. A detailed account of the year's progress follows.

CIVIL BUREAU

The Civil Bureau defends state employees and the Commonwealth in civil actions. Much of the work of the bureau's four divisions - Industrial Accidents, Contracts, Eminent Domain, and Torts - involves the protection of the Commonwealth against monetary damages.

INDUSTRIAL ACCIDENTS

The Industrial Accident Division serves as legal counsel to the Commonwealth in all worker's compensation cases involving state employees. Pursuant to G.L. c. 152, § 69A, the Attorney General must approve all payments of benefits and disbursements for related medical and hospital expenses in compensation cases. In contested cases the division represents the Commonwealth before the Department of Industrial Accidents and appellate matters before the Appeals Court and the Supreme Judicial Court.

Recent amendments to G.L. c. 152 have considerably overhauled the process of filing and litigating claims. Specifically, the reforms have created an expedited scheduling requirement, designed to process claims from filing to hearing in 90 days. Also, a new mandatory appearance has been added to the process requiring a conciliation stage for all claims. The purpose of the conciliation is to promote settlement of claims before they go to dispute resolution. Another requirement of the recent amendments is a new 14 day time frame in which the insurer has to approve or deny all claims or be penalized.

The amendments have created four new Board locations within the Department of Industrial Accidents. In addition to the Boston office, there are now Board locations in Lawrence, Fall River, Worcester and Springfield. Accordingly, the staff of the division appears at these locations.

In response to these amendments, the division has continued to appear before the Worker's Compensation Advisory Council in an attempt to further clarify specific sections of the act that pertain to the Commonwealth.

The division's efficiency in implementing the various amendments to Chapter 152 is reflected in the increased number of processed payments and resolved claims. There were 17,718 First Reports of Injury filed during Fiscal Year 1989 for state employees with the Division of Industrial Accidents - a decrease of 232 over fiscal year 1988. Of the lost time disability cases, the division reviewed and approved 4,010 new claims for compensation and 50 claims for resumption of compensation. This represents an increase of 805 claims this fiscal year. In addition, the division disposed of 49 claims by way of lump sum agreements, and 43 by payment without prejudice.

The division appeared for the Commonwealth on 2,647 *contested formal assignments before the Department of Industrial Accidents*, an increase of 349 over the previous fiscal year. The division also appeared before the superior court concerning enforcement of orders pursuant to G.L. c. 152 § 12(1) and before the Appeals Court on appeals from decisions of Industrial Accident Review pursuant to M.G.L. c. 152 § 12(2).

This fiscal year the division acquired responsibility for "Line of Duty" or "Assault Pay" cases pursuant to G.L. c. 92, § 63B and G.L. c. 30, § 58. Line

of Duty and the Assault Pay provisions act as the compensation scheme for police officers who are injured on the job. Previously these cases had been handled by the Government Bureau. In addition to evaluating new cases, the division continually reviews the accepted cases to bring the medical reports up to date and to determine present disabilities and eligibility for compensation.

Total disbursements by the Commonwealth for state employees' Industrial Accidents claims, including accepted cases, board and court decisions and lump sum settlements, and statutorily awarded attorney fees and penalties for the period July 1, 1988 through June 30, 1989 were as follows:

*General Appropriation to Division of
Industrial Accidents*

Incapacity Compensation	\$34,416,025.00
Medical Payments	7,754,018.00
Attorney Fees	549,592.78
Penalties	<u>74,714.79</u>
TOTAL DISBURSEMENT	\$42,794,350.57

A comparison to this year's and last year's figures show several trends. While the number of reported injuries declined by 232, the number of people who filed claims increased by 805. This increase of 805 claims plus the increase of disputed claims, along with new cost of living increases, attorneys' fees, penalties, and higher average weekly rates, accounts for the additional \$12.5 million expended over last year.

The division is also responsible for pursuing the Commonwealth's subrogation claims. Pursuant to G.L. c. 152 § 15, the division is entitled to seek recovery from third party tort-feasors. The recovery under § 15 includes compensation and medical bills paid to a claimant as a result of a third parties negligence. In Fiscal Year 1989 the division recovered \$120,240.53 in liens against third party tort-feasors, overpayments, and charge backs.

Under chapter 152 § 65 the division has the responsibility of *defending the Worker's Compensation Trust Fund against claims for reimbursement* made under G.L. c. 152 §§ 37 and 37A. The trust fund, and related sections, encourages employment of handicapped and disabled workers. The fund relieves the insurer from the burden of compensating employee disability due to the combined effect of the previous injury and one received later.

Pursuant to St. 1951, c. 547, *amended by St. 1955, c. 607, §§ 1,2, further amended by St. 1956, c. 560, §§ 1,2, the Chief of the Industrial Accident Division represents the Attorney General as a sitting member on the Civil Defense Claims Board.* The Claims Board reviews and processes claims for compensation of unpaid civil volunteers who were injured during the course of their volunteer duties.

During Fiscal Year 1989, division attorneys were asked to assist workers in private industry who were having problems with compensation claims against private industry and their insurers. Every effort was made to assist these employees or refer them to appropriate persons or agencies.

This year, in order to make expenditures more accountable, the legislature mandated that the Public Employee Retirement Administration (P.E.R.A.)

charge back to the agencies some of the costs of the compensation system. Previously these costs had been directly appropriated. The resulting reduced funds for lump sum settlements has proved detrimental to managing the case load. Hopefully, the legislature will re-examine, in the next fiscal year, the charge back program and lump sum settlements in general.

CONTRACTS

The Contracts Division assists the Attorney General in carrying out statutory and traditional duties in the broad area of the Commonwealth's contractual relationships of all descriptions. In that role, the Contracts Division has primary responsibility in three areas:

- A.) Litigation in which the Commonwealth is a party involving contract issues;
- B.) Advice and counsel to state agencies concerning contract matters; and
- C.) Review of contracts for approval as to form.

A. LITIGATION

The Contracts Division *represents the Commonwealth, its agencies and officers in all civil actions involving contracts and contract-related disputes*. This includes claims made against the Commonwealth as well as affirmative claims initiated by the Commonwealth. In contract actions against the Commonwealth, G.L. c. 258, section 12 is the controlling statute and the Attorney General represents the Commonwealth in the superior court in all such disputes. A majority of the cases being handled by the division concern public building, state highway, and public works construction disputes. Other representative matters involve employment contracts, leases, statutory and regulatory construction, and disputes regarding construction bonds.

Construction contracts disputes generally fall into two separate categories:

- 1.) Bid protests in which bidders for a sub-contract or general contract dispute the results of a competitive bid prior to the formal award of the contract; and
- 2.) Claims for extra costs or additional compensation under a construction contract due to delays in the construction process, differing site conditions or remedies provided by statute.

In bid disputes, protesting parties often seek temporary restraining orders or preliminary injunctions in the superior court to delay the commencement of construction until the bid dispute is resolved. The Attorney General vigorously opposes such delays which have the potential for tremendous excess costs to the public. During Fiscal Year 1989, division attorneys successfully resisted all such efforts.

Claims under construction contracts for work already begun are complex litigation generally involving multiple parties, including architects, consulting engineers, sub-contractors, materialmen, and sureties. Actual trials of these matters involve lengthy hearings before the court and court-appointed masters. As a result, the Contracts Division has begun to consider alternative dispute resolution processes which may provide a simplified, expedited substitute for

formal litigation. Such alternative dispute resolution processes have potential to better protect state agencies, save taxpayer dollars, and provide prompt and fair resolution of disputes for those doing business with the Commonwealth.

The Attorney General has placed renewed emphasis on instituting affirmative claims against parties owing funds to the Commonwealth. Such claims could involve an architect or engineer who provided inferior services to the public or major utilities which have delayed public construction by failing to relocate their pipes, poles, and conduits.

The Contracts Division advises the Attorney General in matters referred for litigation from the Department of Labor and Industries to enforce orders made by that agency under its authorizing legislation in architect selection and bid protest matters. Likewise, the Contracts Division advises the Attorney General in matters referred for litigation from the Inspector General, as the Attorney General is the sole agency authorized by law to accept referrals from the office of Inspector General for civil action to redress instances of waste, fraud and abuse in government. In both cases, the Contracts Division would generally appear as counsel in any such litigation.

Under the supervision of the Attorney General, the Contracts Division has begun advance planning for resolution of disputes arising out of the \$4 billion dollar Central Artery and Third Harbor Tunnel project. This has included consultation with the Executive Office of Transportation and Construction, the Department of Public Works and other interested agencies.

During the fiscal year 54 new actions were commenced and 43 files were closed. As of June 30, 1989, there were 172 pending cases in the division representing a total dollar exposure to the Commonwealth of \$68,565,938. Likewise, the division is handling affirmative claims on behalf of the Commonwealth in excess of \$10 million dollars.

On a daily basis, the division *receives requests for legal assistance from state agencies and officials*. Problems involve formation of contracts, performance, bidding procedures, bid protests, contract contents, contract interpretation, and other miscellaneous matters. The most frequent requests received during the fiscal year concern indemnification clauses in contracts, procedural matters in employment contracts, and advice in advance of anticipated construction contract litigation.

The Contracts Division also receives requests for assistance in purchasing matters for goods and services, as opposed to construction. Division attorneys counsel the state Purchasing Agent, interpret regulations and attend informal protest hearings. A similar role is played with respect to the Department of Public Works, Metropolitan District Commission, Secretary of Transportation, Board of Regents of Higher Education, Mental Health, Mental Retardation, Youth Services, Environmental Management, Water Resources, State Lottery Commission, Public Welfare, and Division of Capital Planning and Operations.

The Division *reviews many state contracts, leases and bonds submitted by state agencies*. All contracts are logged in and out, and a detailed status record is maintained. The average contract is approved within 48 hours of its submission to the division. During the fiscal year, the Contracts Division received for approval as to form a total of 545 contracts. Seventy-nine contracts were rejected and later approved after consultation regarding contract form with the agency involved.

EMINENT DOMAIN

The Eminent Domain Division *represents the Commonwealth in the defense of petitions for the assessment of damages resulting from land acquisition by eminent domain*. The Commonwealth acquires land for a variety of purposes, including land for state colleges, recreation and parks, flood control, easements, and rights of way for roads. The division deals primarily with the Department of Public Works, the Metropolitan District Commission, the Department of Environmental Management, State Colleges, the Armory Commission, the Department of Food and Agriculture, the Department of Fisheries & Wildlife and Environmental Law Enforcement, The Department of Environmental Protection, and the Division of Capitol Planning and Operations.

The division also *provides legal advice to the Real Estate Review Board* to assist in settling damage claims on takings of government-owned land for highway purposes, and in some instances, the division is called upon to testify before the Governor's Council prior to their granting approval for the payment of land damage cases settled by the Office of the Attorney General.

Informal advisory services on eminent domain questions are rendered to practically every state agency and many cities and towns. Agencies with eminent domain or real estate questions either write or call the division for consultation and advice. The division also appears before legislative committees to give advice on legislation of importance to the Department of the Attorney General as well as other state agencies.

Chapter 79 of the General Laws prescribes the procedure in eminent domain proceedings. Under Chapter 79, when property is taken, the taking agency makes an offer of settlement known as a *pro tanto*, which makes available to the owners an amount the taking agency feels is fair and reasonable but reserves to the prior owners the right to proceed, through the courts, to recover more money. In the event of a finding by the court or jury, the *pro tanto* payment is subtracted from the verdict and the taking agency pays the balance, with 10 percent interest from the date of the taking to the date of the judgment. During Fiscal Year 1989, approximately 66 land damage cases were disposed of in the various superior courts throughout the Commonwealth. The disposition of these cases resulted in a savings to the Commonwealth of more than \$13 million.

If occupied buildings are situated on parcels acquired by eminent domain, the occupants remaining become tenants of the Commonwealth and are obligated to pay rent under a lease agreement or for use and occupancy. The problem of rent collection is handled by a Special Assistant Attorney General who is assigned to the Department of Public Works on a full-time basis. The Special Assistant Attorney General is under the direct supervision of the Right of Way Bureau with review supervision front the Eminent Domain Division. The attorney's primary function is to represent the Department of Public Works in all matters related to state-owned property being leased or rented to the general public. This includes negotiating settlements, closing out uncollectibles, filing suit to enforce the payment of rent, as well as taking action in eviction matters. In those cases wherein rent is owed to the Commonwealth and there is a land damage case pending, the Eminent Domain Division trial attorney handles both matters at the time of trial. During the past fiscal year, 17 rent cases were closed

out and approximately \$136,132 was collected and turned over to the State Treasurer.

This division has also represented a number of agencies in litigation related to the agencies' leases, such as a commercial landlord seeking to evict an agency for non-payment of rent, or when a dispute arises over lease terms. With ever tighter agency budgets, such actions are on the increase.

The Eminent Domain Division also has the responsibility of protecting the Commonwealth's interests in all petitions for registration of land filed in the Land Court. In each case, a determination must be made as to whether or not the Commonwealth, or any of its agencies or departments, has an interest which may be affected by the petition. If such a determination is made, no decree issues without the division being given a full and complete opportunity to be heard. Some of these issues are tried to a conclusion while others are amicably agreed upon and the rights of the Commonwealth are protected by stipulation.

Land Court matters involve the full-time activities of an Assistant Attorney General. Its jurisdiction covers every type of land transaction from foreclosure and tax takings to determination of title absolute as well as all the equity rights arising therefrom.

The Eminent Domain Division is involved in almost every petition to confirm or register title. The involvement requires the determination of all interests in state highways, the preservation of the taking lines, the determination of drainage and other easements, and the assurance that the decree is entered subject to all of the above.

Further, the Land Court has jurisdiction to determine the nature and extent of riparian and littoral rights.

Title and boundary disputes in intertidal lands in particular are increasing in number each year as well as disputes regarding the use of intertidal lands by their owners. The division closely monitors these disputes in order to protect public rights in tidelands and in access to beaches.

The title registration process continues to present new and diverse issues. Alleged private ownership of railroad Rights of Way raise serious questions as to whether the Rights of Way are fully abandoned and as to the effect of private ownership on the Commonwealth's interest in preserving public rail transportation corridors. The Secretary of Transportation has power under a statute of questionable validity, to overrule the issuance of local building permits which affect former railroad rights of way and a challenge to said statute is likely to take place in the context of a Title Regulation Case.

The Commonwealth has become involved with problems due to filling and dredging that have taken place along the shores and areas developed by beach associations, especially on the Cape and Islands. Dredging has been done with the material dredged being placed upon the shores, changing private access rights to and from the beaches.

More than 290 cases involving the Eminent Domain Division were disposed of in the Land Court in Fiscal Year 1989.

Most rental agreements, *pro tanto* releases, general releases, deeds of grants and conveyance, and documents relating to land under the control of the state's departments or agencies must be reviewed and approved as to form by the Eminent Domain Division.

The division continues to assist the Department of Food and Agriculture to

expedite and to carry out the mandates of Chapter 780 of the Acts of 1977, known as the Agricultural Preservation Restriction Act. This act helps to preserve the limited farm land remaining in Massachusetts by providing a method whereby the farmers receive compensation for the so-called "developmental rights" in their land without destroying its productive capacity and value as farm land. A deed is then filed in the appropriate county registry wherein the land use is restricted in perpetuity to farming and agricultural uses. Since the inception of this program in 1977, more than 25,000 acres of farm land have been permanently protected in Massachusetts.

The most important case brought to a conclusion this past fiscal year was *Commonwealth of Massachusetts vs. Samuel Skinner*, Secretary of Transportation, et al, United States District Court, Civil Action No. 89-0151.

In January 1989, the Eminent Domain Division, in cooperation with the Government Bureau, filed this suit on behalf of the Department of Public Works against the United States Secretary of Transportation and the Federal Highway Administration (FHWA). The suit sought to (1) recover \$1,462,680.45 in federal funds due the Commonwealth as reimbursement for costs incurred by the Commonwealth in highway right of way acquisition cases in which eminent domain takings and litigation had occurred; and (2) resolve long standing disputes over the respective roles of the Massachusetts Department of Public Works (DPW), the Department of the Attorney General, and FHWA under the relevant federal programs. The complaint concerned various cases involving eminent domain settlements and awards made in the period from the late 1970's through the early 1980's, and for which the FHWA had refused to reimburse the Department of Public Works.

In addition to reimbursement, our complaint sought an interpretation of the effect of federal regulations and state law on the Attorney General's respective rights and obligations in litigation arising from highway takings; and an injunction preventing FHWA from failing to reimburse the Commonwealth in the future.

The settlement of this 14-year-old controversy produced an agreement wherein the Federal Highway Administration agreed to reimburse the Commonwealth \$1.2 million (or 86.8 percent of the monies sought) on these old cases, and to recognize for the first time the full scope of the role and powers of the Attorney General under Massachusetts law in controlling and settling litigation regarding highway cases. The FHWA also agreed, for the first time, to a streamlined mechanism to resolve future disputes.

The Massachusetts Department of Public Works, as well as the Metropolitan District Commission, predict an extremely heavy workload for Fiscal Year 1990. The Department of Environmental Management is still deeply committed and involved in the Heritage State Park projects in Lowell, Lynn, Holyoke, North Andover, Lawrence and Fall River. These ambitious undertakings are expected to cost in excess of \$100 million and can be expected to result in extensive litigation for this division.

Many of these takings by DEM, MDC, and Fisheries & Wildlife involve cases in less developed areas of the state, where numerous title problems abound (such as South Beach on Martha's Vineyard), making litigation of these matters among the most complicated in the division's history.

The recent DEM taking (in September 1989) at Mt. Greylock in the

Berkshires has already spawned not only a land damage suit, but one presenting complex "inverse condemnation" claims as well.

This division expects that during the upcoming fiscal year and in the future we will be called on to defend increasing numbers of similar cases involving claims of "inverse condemnation" or "regulatory takings" - claims that state officials or agencies, through actions or through regulation, have in effect "taken" property rights without official taking orders and without awarding constitutionally required compensation. These concepts are well recognized and frequently applied by the federal courts and courts of other states, but have not to date been successfully brought in Massachusetts, although our Supreme Judicial Court has recognized the concept.

Currently, the Eminent Domain Division along with the Environmental Protection Division, is defending such a "regulatory takings" suit brought by owners of several houses in Chatham. The homes washed into the sea due to erosion from wave action, after DEP allegedly improperly denied the owners permission to build necessary stone seawalls to protect them.

As the real estate market continues to tighten, the likelihood of efforts by developers to protect anticipated profits, or even stave off financial ruin, creates the probability that we will continue to see an increase in such "regulatory takings" or "inverse condemnation suits".

As well, with increased public attention (as well as increased regulation) devoted to hazardous waste issues, many land damage cases now being filed involve potential questions of the effect on a property's value of the presence or absence of some sort of hazardous waste, with the result that these cases require increased need for more extensive preparation by division attorneys and substantial agency expense for complex engineering or other expert evaluation.

The Massachusetts Executive Office of Transportation and Construction is in the process of developing the primarily federally-funded project to depress the Central Artery and construct a third harbor tunnel. This project is now underway. The project will likely result in an increase in law suits particularly those for so-called "special and peculiar damages" against the Commonwealth, and create serious relocation problems for residents of the North End as well as the many businesses located in close proximity to the Central Artery Corridor. The Central Artery project has already led to a case involving the largest *pro tanto* award in the state's history: \$48 million, for the 150 Causeway Street building. We are advised that the plaintiff will seek an additional \$30 million in damages in this case.

One can readily see that the workload of this division can be expected to increase dramatically as we enter the last decade of this century. We look forward to and will accept all challenges presented.

TORTS

The Torts Division handles primarily tort and civil rights suits brought against the Commonwealth and its employees, the investigation and preparation of reports for the district courts on Petitions for Compensation to Victims of Violent Crimes, Contributory Retirement Appeals Board (CRAB) cases, and collection cases.

With the creation of a new division for the handling of Petitions for Compensation to Victims of Violent Crimes in Fiscal Year 1989 all new cases are now assigned to the Victims of Violent Crime Division (VC).

Collections cases are handled by both Torts Division attorneys and attorneys assigned to the Civil Bureau on a bureau-wide basis. CRAB cases are distributed among all Civil Bureau attorneys.

At the close of Fiscal Year 1989, the division had 1,131 open cases and under review 66 claims against the Commonwealth where the Attorney General acts as executive officer. New cases filed this year totalled 341. A total of 255 cases were closed in FY 1989.

Aggressive defense of all cases filed during Fiscal Year 1989 resulted in 94 cases settled without trial. Dismissals or summary judgments on behalf of the Commonwealth were obtained in 148 cases and 16 cases were tried.

As in previous fiscal years the critical problem of the unavailability of funds to settle claims prior to trial has remained a major issue. When liability cases can be settled prior to trial, there is generally a substantial saving for the Commonwealth.

CRIMINAL BUREAU

The Criminal Bureau is comprised of six divisions: Public Integrity, Narcotics, Victim Compensation, Division of Employment Security, Criminal Appellate Division and Special Prosecutions.

During the 1989 fiscal year, the bureau prosecuted a wide variety of cases developed by its own investigations division, as well as those referred by other government agencies or the district attorneys.

In May 1989, Attorney General James Shannon and Governor Michael Dukakis established the Environmental Crime Strike Force, designed to use prosecutors, scientists, investigators and police officers to target high-priority threats to public health and natural resources. The Strike Force is coordinated by the Department of the Attorney General and the Office of Environmental Affairs and specializes in major cases that involve threats to drinking water supplies, harm to wetlands, illegal dumping and toxic discharges to sewage systems.

The Strike Force has a steering committee composed of the Chief of the Attorney General's Criminal Bureau, Chief of the Attorney General's Public Protection Bureau, Chief of the Attorney General's Environmental Protection Division, the Assistant Secretary for Law Enforcement of the Executive Office of Environmental Affairs and the Deputy Commissioner of the Department of Environmental Quality Engineering.

PUBLIC INTEGRITY DIVISION

Fiscal Year 1989 reflected continued progress in the Attorney General's efforts to investigate and prosecute crimes involving public corruption. During the 12-month period between July 1, 1988 and June 30, 1989, the Public Integrity Division indicted approximately 20 individuals and one corporation for a broad array of offenses, including: larceny, procurement fraud, bribery, conflict of interest, tax evasion, forgery, uttering, CORI violations, perjury, insurance

fraud, and conspiracy. In addition, eight defendants pleaded guilty to public corruption offenses and several were incarcerated.

Cases that were disposed of during Fiscal Year 1989 included the following:

A supervisor in the Department of Revenue pleaded guilty to charges of larceny, tax fraud, tax evasion and conflict of interest following indictments in June and October, 1988. He received a five-and-1/2 to eight-year sentence to State Prison, probation, and was ordered to pay restitution to the Commonwealth in the amount of \$155,000.

A former state college president pleaded guilty to eight indictments including forgery, larceny, conflict of interest and tax fraud charges. He received concurrent state prison terms of seven to 10 and three to five years.

Two employees of the Lynn Housing Authority were indicted for their participation in a scheme to solicit and receive bribes in connection with the granting of public housing certificates. Both individuals pleaded guilty to all such charges. One defendant was sentenced to serve 60 days in the House of Correction while the other received a suspended sentence.

A contractor and a supplier pleaded guilty to participating in a scheme to defraud the Metropolitan District Commission in connection with the supply and servicing of traffic signal equipment.

An "03" consultant to both the Department of Personnel Administration and the State Office of Minority and Women Business Assistance was indicted and later pleaded guilty to stealing money from the Commonwealth. She received a lengthy term of probation and was ordered to pay fines and restitution.

In addition to the foregoing disposed-of cases, a number of new indictments were obtained during Fiscal Year 1989 including:

The former Chief of Staff to the Speaker of the House of Representatives, the Speaker's Business Director, and a State House photographer were charged with a total of 19 indictments stemming primarily from their involvement in schemes to defraud the Commonwealth and to receive bribes and illegal gratuities. The charges also included allegations of perjury before the State Ethics Commission.

The former Executive Director of the Massachusetts Criminal Justice Training Council was indicted on eleven separate charges including larceny, submission of false claims, bribery, conspiracy, tax fraud, and several violations of G.L. c. 268A and 268B. He was charged along with a registered lobbyist, who also served as a consultant to the Training Council. In addition, a former State Representative was indicted for allegedly stealing money from the Commonwealth pursuant to a series of "no-show" consulting contracts with the Training Council. The three men face a total of 20 indictments.

A Springfield businessman was indicted for giving a cash bribe to the Executive Director of the State Office of Minority and Women Business Assistance.

An Essex County Probation Officer was charged with receiving unlawful gratuities, larceny, and violations of the CORI statute. These offenses were alleged to have been committed while he was employed by the Probation Department.

A landscaping corporation and its two principal owners were charged with submitting fraudulent documents and stealing money in connection with a series of contracts for roadside spraying with the Department of Public Works. In addition, a DPW employee was charged with violating the state's conflict of

interest statute for actions in supervising the performance of such contractual services.

A bookkeeper was indicted for embezzling state funds from a Plymouth-based non-profit corporation that provided treatment services to mentally retarded men and women.

An employee of the Department of Personnel Administration was charged with larceny, forgery, and uttering in connection with the theft of money from that state agency.

A Department of Revenue employee was also indicted on larceny, forgery and uttering charges stemming from a scheme to steal income tax refund checks.

A Department of Public Works supervisor was charged with participating in a "no-show" scheme.

All of the foregoing cases were investigated by financial investigators and/or State Police and Metropolitan Police officers assigned to the Attorney General's Criminal Bureau. The civilian investigators brought years of federal law enforcement experience to the division from the FBI and the IRS. At the close of the fiscal year, a substantial number of ongoing investigations were active.

In addition to the investigative resources on staff in the Criminal Bureau, the Public Integrity Division worked closely with representatives of several other state agencies including: the State Ethics Commission; the Office of Inspector General; the Criminal Investigations Bureau and the Office of Internal Affairs of the Department of Revenue; the Office of Campaign and Political Finance; and the State Auditor's Office. The division continued to maintain working relationships with federal, county and local law enforcement agencies.

Throughout most of the year, the division was staffed with five attorneys and secretarial and paralegal assistance.

The volume and variety of charges brought and guilty pleas obtained during Fiscal Year 1989 marked the successful evolution of the Attorney General's commitment to establish a prosecutorial unit with the exclusive mission to investigate and prosecute public corruption offenses.

NARCOTICS

During the period between July 1, 1988, and June 30, 1989, 72 defendants were arrested in 31 cases. Police officers assigned to the division seized approximately 55 pounds of cocaine, and quantities of phensyclidine ("PCP" or "angel dust"), lysergic acid dymethyline ("LSD"), and marijuana. In addition, they seized approximately \$104,884.50 in cash believed to have been involved in narcotics transactions. Of that sum, \$61,884.50 has been ordered forfeited to the Commonwealth.

VICTIM COMPENSATION

The Victim Compensation and Assistance Division was established by Attorney General Shannon in 1987 to administer the Victims' Compensation Program pursuant to the Massachusetts Victim of Violent Crime Compensation

Act of 1968, G.L. c. 258A. Under the Act, the Commonwealth reimburses victims or their dependants for out of pocket losses, including medical expenses, lost wages, counselling, funeral expenses and loss of support caused by personal injury or death which results from violent crime.

The division's mission is two-fold: first, pursuant to G.L. c. 258A, this division is charged with investigating all claims for compensation, and with representing the Commonwealth before the District Court on cases involving claims for compensation. Second, the division's staff of Victim Advocates provides counselling and referral services to victims and their families, to assist them with the myriad problems facing victims of violent crime.

The investigation function requires that the division's staff verify the facts of the claim through contact with law enforcement, social services, health care providers, funeral homes and employers. The division employs two full-time investigators for this purpose.

In the area of victim advocacy, the division staff provides counselling and support to victims throughout the process of recovery. This support includes such things as helping to make funeral arrangements for families who have lost children as the result of homicide and finding emergency housing for elderly victims who no longer feel safe in their homes after being beaten and robbed.

In its representation of the Commonwealth in the District Court, the division's legal staff prepares reports and recommendations for payment of victims' compensation claims, and in many cases assists *pro se* claimants to present their claims in court. The legal staff also presents the Commonwealth's case for non-payment where the claimant does not meet the eligibility requirements of G.L. c. 258A.

Following is one example of the impact the Victim's Compensation and Assistance Program has had on victims in Fiscal Year 1989.

Mary Doe was struck by a hit and run driver and suffered extensive injuries. She eventually lost her job as the result of her physical inability to return to work.

Because she lost her job, and consequently her health care benefits, she was forced to forego necessary medical attention. When her claim was received by the division, she was in imminent danger of losing a leg unless she was immediately fitted with a rehabilitative brace. Unfortunately, there was only one source for such a brace in the Commonwealth, and that source required prepayment of all costs.

Upon learning of the victim's situation, an advocate in the division informed the staff of the facts of the claim, and it was deemed a priority. The advocate contacted the brace provider, and persuaded him to immediately equip the victim with the needed brace. As *quid pro quo*, the advocate assured the provider that the case would be given priority throughout the approval process.

A division attorney requested an expedited hearing with the Court, at which the attorney, victim and advocate explained the special circumstances to the judge. The judge immediately issued a Finding and Judgment, which was hand carried to the Treasurer for payment. As the result of receiving the brace, the victim's leg was saved.

STATISTICS - FY 1989

The division opened 504 claims for compensation, as follows:

<u>ASSAULTS</u>	<u>HOMICIDE</u>	<u>SEXUAL ASSAULT</u>	<u>OUI</u>	<u>OTHER</u>
308	83	55	6	2

The division closed 706 claims for compensation, as follows;

<u>ASSAULTS</u>	<u>HOMICIDE</u>	<u>SEXUAL ASSAULT</u>	<u>OUI</u>	<u>OTHER</u>
470	113	87	3	83

<u>MALE</u>	<u>FEMALE</u>	<u>AGE 0-17</u>	<u>18-64</u>	<u>65+</u>	<u>UNKNOWN</u>
225	481	60	615	29	2

DISPOSITION OF CLOSED CASES:

Compensation awarded:	504
Denied/Dismissed:	202

FUNDING AND EXPENDITURES FY 1989

The Victim's Compensation Program received \$3,139,189 in Commonwealth funds in Fiscal Year 1989. In addition, the program received \$353,000.00 in a grant under the Federal Victims of Crime Act for Federal Fiscal Year 1989. The information on disbursements of state and federal funds in Fiscal Year 1989 was as follows:

DISBURSEMENTS

<u>Payee</u>	<u>Amount</u>	<u>Number of Payments</u>
Claimants	\$2,645,527.13	545
Attorneys	175,440.03	126*
Physicians	99,300.80	144*
Hospitals	422,631.67	174*
Funeral	4,872.40	4*
Other	<u>149,400.98</u>	<u>192*</u>
Total	\$3,497,173.01	

*Direct payment to service/care providers.

<u>Victim Age</u>	<u>Amount</u>	<u>Number of Payments</u>
0 - 17	\$242,220.11	65
18-64	3,179,722.52	460
65 +	73,410.38	19
Unkn.	<u>1,820.00</u>	<u>1</u>
Total:	\$3,497,173.03	545

CRIME INFORMATION

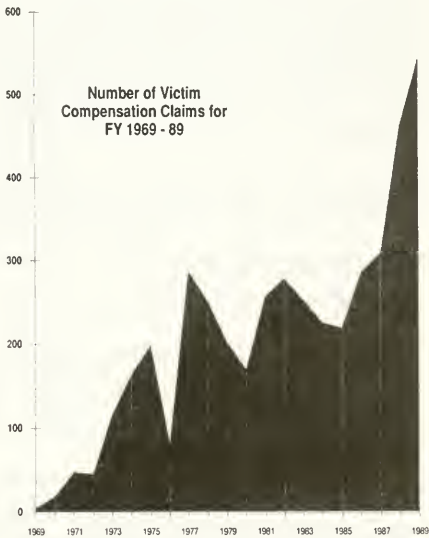
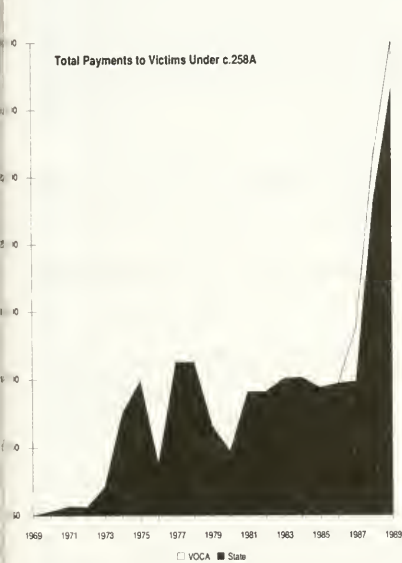
<u>Crime</u>	<u>Amount</u>	<u>Number of Payments</u>
Assaults	\$2,349,368.05	460
Homicide	883,898.73	89
Sexual Assault	172,065.45	63
Other	<u>91,840.78</u>	<u>32</u>
Total	\$3,497,173.01	545

PAYMENTS BY COUNTY

<u>Name</u>	<u># of Judgments</u>	<u>Total Paid Compensation</u>
Barnstable	18	108,828.86
Berkshire	3	7,506.92
Bristol	40	187,865.85
Dukes	3	2,118.28
Essex	46	330,306.48
Franklin	1	20,385.05
Hampden	23	133,437.34
Hampshire	5	10,887.40

Middlesex	120	682,087.67
Nantucket	1	278.00
Norfolk	46	311,169.51
Plymouth	17	142,958.02
Suffolk	179	1,270,413.74
Worcester	43	288,929.89
TOTALS	545	\$3,497,173.01

The following charts and graphs illustrate the growth in the Victims Compensation Program since Attorney General Shannon created the Division:



Compensation of Victims of Violent Crime

Fiscal Year of claims	Number of claims	TOTAL Expenditure	Federal VOCA	State
1969	4	\$991		\$991
1970	18	\$29,451		\$29,451
1971	47	\$64,977		\$64,977
1972	45	\$59,930		\$59,930
1973	116	\$206,963		\$206,963
1974	163	\$749,984		\$749,984
1975	198	\$987,997		\$987,997
1976	81	\$372,467		\$372,467
1977	287	\$1,124,972		\$1,124,972
1978	251	\$1,122,644		\$1,122,644
1979	202	\$656,616		\$656,616
1980	169	\$469,033		\$469,033
1981	256	\$907,679		\$907,679
1982	278	\$905,270		\$905,270
1983	252	\$1,004,272		\$1,004,272
1984	225	\$1,010,825		\$1,010,825
1985	219	\$935,303		\$935,303
1986	285	\$966,486		\$966,486
1987	308	\$1,368,747	\$387,000	\$981,747
1988	462	\$2,647,018	\$321,000	\$2,326,018
1989	545	\$3,497,173	\$353,000	\$3,144,173
TOTALS	4,411	\$19,088,801	\$1,061,000	\$18,027,801
20 YEAR AVERAGE	210	908,991	353,667	858,467
FY87-89 AVERAGE	438	2,504,313	353,667	2,150,646

EMPLOYMENT AND TRAINING DIVISION¹

The purpose and intent of the Attorney General's Employment and Training Division of the Criminal Bureau is to provide the Department of Employment and Training with whatever legal assistance and representation is necessary to effect criminal enforcement. This division also handles many appellate matters which arise from decisions granting or denying unemployment compensation benefits to individual claimants, in addition to other agency related litigation.

The Employment and Training Law is highly complex and its language is technical as well as legal. Under the law, employers with one or more employees become subject to G.L. c. 151A, and are expected to comply with its provisions. The efficient and economical administration of the employment security program in Massachusetts depends in large measure on the cooperation and compliance of well-informed employers throughout the Commonwealth, for it is they who pay the entire cost of its operations. The Employment Security Program also insures individuals who become unemployed through no fault of their own a weekly benefit check if they meet the requirements of the law.

FUNCTIONS, ACCOMPLISHMENTS AND OBJECTIVES OF THE EMPLOYMENT AND TRAINING DIVISION.

I. Prosecution of Employers For Failure To Pay Employment Security Taxes.

Whenever an employer fails to comply with the law and does not file the necessary reports required or pay the taxes owed to the Department of Employment and Training, that employer may become the subject of prosecution by this division.

The Assistant Attorneys General make every effort to fully inform the employers of their rights and obligations under the law. As a result, some initially intransigent taxpayers, when faced with the prospect of criminal prosecution, decide to pay their taxes, making pursuit of criminal process against these persons impractical. Otherwise, rigorous enforcement is pursued.

During the fiscal year ending June 30, 1989, 1,216 employer tax cases were handled by this division. On July 1, 1988, 1,152 cases were on hand; 64 additional cases were received during the fiscal year; and 187 cases were closed, leaving a balance of 1,029 employer tax cases on hand as of June 30, 1989.

Applications for criminal complaints were brought in the Boston Municipal Court, charging 68 individuals with 693 counts of nonpayment of taxes, totaling \$1,271,581.81 in monies owed the Commonwealth's agency by the delinquent employers. The Boston Municipal Court issued complaints against 56 individuals for 574 counts of nonpayment of taxes totaling \$1,102,942.10. In addition, during the fiscal year ending June 30, 1989, this division obtained three convictions on employer tax cases and the court found facts sufficient to warrant a finding of guilty in an additional 21 cases.

During the fiscal year ending June 30, 1989 \$704,438.29 in overdue taxes was collected. Monies collected were deposited to the Massachusetts Unemployment Compensation Fund.

II. Prosecution of Claimants Fraudulently Collecting Unemployment Benefits

Whenever an individual is found to be collecting unemployment benefits while gainfully employed and earning wages, the matter is referred to the Attorney General's Division for consideration of prosecution. Criminal complaints are brought only when the facts surrounding the offense have been investigated and the criminal intent substantiated by the evidence obtained. Complaints are sought against offenders in the jurisdiction where the crime is committed, which is the jurisdiction where the local office from which the claimant applied for benefits is located.

During the fiscal year ending June 30, 1989, 673 fraudulent claims for unemployment benefits were handled by this division. On July 1, 1988 there were 612 cases on hand; 61 additional cases were received during the fiscal year; and 65 cases were closed, leaving a balance of 608 fraudulent cases on hand June 30, 1989.

Applications for criminal complaints were brought in various courts of the Commonwealth holding jurisdiction over the offenses involved, charging 43 individuals with 801 counts of larceny totaling \$135,169.00 in unemployment insurance collected from the Commonwealth's agency. The courts issued complaints against 37 individuals for 628 counts of larceny totaling \$109,397.00. In addition, during the fiscal year ending June 30, 1989, this Division obtained 12 convictions on larceny cases and the court found facts sufficient to warrant a finding of guilty in an additional 21 cases.

During the fiscal year ending June 30, 1989, \$163,552.15 was collected in restitution from the fraudulent claimants, all of which has been restored to the Unemployment Insurance Fund of the Massachusetts Department of Employment and Training.

III. Actions Brought By Or Against The Commissioner Of The Department Of Employment and Training.

During the fiscal year ending June 30, 1988, actions brought by or against the Commissioner of the Massachusetts Department of Employment and Training numbered 31. On July 1, 1988, 28 cases were on hand, and three additional cases were received during the course of the fiscal year.

Seven cases filed in the Supreme Judicial Court or the Appeals Court of the Commonwealth were handled by the Attorney General's Employment and Training Division during the fiscal year ending June 30, 1989. Two cases were on hand July 1, 1988. Five additional cases were received, increasing the total of cases on hand to seven. Three of the cases were argued and closed reducing the balance of cases on hand to four. Of the three cases argued, the court upheld the position of the Commissioner in one case; the court dismissed one case for the plaintiff's failure to timely prosecute; and one case was voluntarily dismissed without costs and with prejudice.

IV. Other Activities.

During the fiscal year, this division received the resources to initiate an aggressive enforcement program directed at individuals who default on their legal obligations in criminal matters prosecuted by the division. This program has proved to be highly successful.

In addition, a special investigation yielded several defendants who were charged with forgery, uttering false documents, and receiving stolen property after several missing unemployment compensation checks were fraudulently negotiated in communities north of Boston. Jail terms were part of the disposition in those cases.

EMPLOYMENT AND TRAINING DIVISION
(Statistical Report)

FISCAL YEAR ENDING JUNE 30, 1989

Cases On Hand July 1, 1988		
Employer tax cases -	1,152	
Employee fraudulent claims cases -	612	
Appellate cases,		
(On appeal from Board/Review Decisions) -	2	
D.E.T. Commissioner Actions,		
(Brought by or against the Commissioner) -	<u>28</u>	1794
Additional Case Referrals:		
Employer tax cases -	64	
Employee fraudulent claims cases -	61	
Appellate cases		
(On appeal from Board/Review Decisions) -	5	
D.E.T. Commissioner Actions,		
(Brought by or against the Commissioner) -	3	<u>133</u>
Total <u>Cases On Hand</u> During Fiscal Year:		1927
Cases Closed:		
Employer tax cases -	187	
Employee fraudulent claims cases -	65	
Appellate cases,		
(On appeal from Board/Review Decisions) -	3	
D.E.T. Commissioner Actions,		
(Brought by or against the Commissioner) -	1	256
Cases Remaining On Hand June 30, 1989		
Employer tax cases -	1029	
Employee fraudulent claims cases -	608	
Appellate cases,		
(On appeal from Board/Review Decisions) -	4	
D.E.T. Commissioner Actions,		
(Brought by or against the Commissioner) -	30	1,671
<u>Total Monies Collected:</u>	\$867,990.44	
From Employers - \$704,438.29		
From Employees - \$163,552.15		

Criminal Complaints Brought:

- Tax Cases: Application was made for 68 complaints involving 693 counts brought against 50 employer accounts for delinquent taxes totaling \$1,271,581.81. The court issued 56 complaints involving 574 counts against 40 employer accounts for delinquent taxes totaling \$1,102,942.10.
- Larceny Cases: Application was made for 43 complaints involving 801 counts brought against 43 individuals for collecting benefits fraudulently in the amount of \$135,169.00. The courts issued 37 complaints involving 628 counts against 37 individuals for collecting benefits fraudulently in the amount of \$109,397.00.

CRIMINAL APPELLATE DIVISION

The Criminal Appellate Division handles appeals from cases prosecuted by the Criminal Bureau and represents the Commonwealth in criminal matters in federal court (including the United States Supreme Court). The division also handles a wide range of post-conviction litigation including federal habeas corpus actions challenging state convictions; civil rights suits brought by incarcerated persons, petitions for annual review of inmates confined as sexually dangerous persons at the Treatment Center at Bridgewater; and supervisory powers litigation in the Supreme Judicial Court.

The division provides formal opinions to the Governor in the rendition of fugitives from justice, files amicus curiae briefs in significant appellate cases, and contributes to policy and legislative matters concerning law enforcement.

There were 297 pending cases in the division at the conclusion of Fiscal Year 1989. These cases predominantly involved the defense of federal habeas corpus petitions attacking state criminal convictions and appeals therefrom, and the defense of state correctional authorities and other state officials and judges who had been sued in the course of their official duties.

The number of new cases handled by the Criminal Appellate Division was 171.

In the United States Supreme Court, the Criminal Appellate Division continued to prevail. It wrote the brief in *Massachusetts v. Morash* in which the Commonwealth sought and obtained reversal of a decision of the Supreme Judicial Court which had held that an employer was not subject to state criminal prosecution for nonpayment of earned but unused vacation time because such a prosecution was preempted by federal law. The division also co-authored the brief in *Massachusetts v. Oakes* in which the Commonwealth sought and obtained reversal of a decision of the Supreme Judicial Court which had vacated a

defendant's conviction on the ground that the underlying Massachusetts pornography statute was facially overbroad as a matter of federal constitutional law. The United States Supreme Court reinstated Oakes' conviction and remanded the case to the Supreme Judicial Court for a determination as to whether the statute was overbroad as specifically applied to Oakes.

Of the 15 cases in which briefs were submitted in the United States Court of Appeals for the First Circuit, eight cases were argued.

Eleven cases were argued in the Supreme Judicial Court including *Globe Newspaper Co. v. Blackbourne* in which the division was successful in arguing that autopsy reports of the Commonwealth's Medical Examiner are not public records. The division prevailed in *In re: John Doe-Grand Jury Investigation* in which the Supreme Judicial Court reversed a superior court decision and held that the state immunity statute is constitutional. Also successfully defended were the 1988 amendments to the Controlled Substances Act against constitutional challenge. *Commonwealth v. Cedenno*.

Nineteen briefs were filed by the division in the Massachusetts Appeals Court; nine were argued.

The division also successfully opposed fourteen petitions brought in the Supreme Judicial Court, pursuant to G.L. c. 211, §3. The petitions seek to invoke the power of the court to exercise its superintendency powers over the inferior courts.

In the federal district court the division defended more than 60 federal habeas corpus petitions challenging the constitutionality of state court criminal convictions.

The division continued to represent the Commonwealth in cases involving annual review of inmates confined as sexually dangerous persons at the Bridgewater Treatment Center. During the fiscal year, 22 petitions by those inmates were disposed of in Superior Court bench trials.

The Criminal Bureau also processed the rendition of fugitives from justice. Demands from both law enforcement officials of the Commonwealth and Governors of other states were examined, and the number of opinions rendered on the legality of each demand rose to 275 in Fiscal Year 1989.

SPECIAL PROSECUTIONS DIVISION

During Fiscal Year 1989, the Special Prosecutions Division functioned as two units: Tax/Major Frauds Unit and Environmental/General Crimes Unit.

TAX/MAJOR FRAUDS UNIT

Continuing the initiative begun in Fiscal Year 1989 when the tax prosecution unit was formed by agreement between the Attorney General and the Commissioner of the Department of Revenue, this unit enjoyed its most productive year thus far.

The disposition of 49 criminal tax cases during Fiscal Year 1989 resulted in the largest total of fines imposed since the unit was formed. The record amount of \$709,415 in fines included the highest corporate fine imposed thus far on a corporate tax defendant (\$150,000) and the highest fine imposed on an individual defendant (\$125,000). Seven defendants received jail sentences with the longest sentence being 10 months in the House of Corrections.

Prosecution of fraud cases covered several schemes and scams including the following: a state welfare case worker was convicted after setting up bogus AFDC accounts and then receiving the money; two persons were convicted who filed false medical insurance claims and defrauded Blue Cross/Blue Shield; a conviction was imposed on a person guilty of extortion over a 19 year period; a "stock market" hoax led to the conviction of the person who engineered it and a law professor who embezzled clients funds was also convicted.

Indictments were also brought in cases involving commerical bribery, larceny and forgery.

ENVIRONMENTAL CRIMES/GENERAL CRIMES UNIT

Fiscal Year 1989 saw the formation of the Environmental Crimes Strike Force. The joint effort employs the resources of the Attorney General, the Department of Environmental Protection, the Department of Fisheries, Wildlife and Environmental Law Enforcement and the Metropolitan District Commission. Its stated goal is to target and develop high-priority cases in the areas of hazardous waste and materials, solid waste and air and water pollution.

Dispositions of cases already pending involved a corporate defendant convicted of the illegal release of hazardous material. The defendant received the largest fine (\$125,000) ever imposed in Massachusetts in a state criminal environmental case.

The illegal transportation of hazardous waste led to the conviction of a second corporate defendant as well as the individual who participated in the illegal act.

Indictments were also brought for violations of the state's solid waste, hazardous waste and wetlands protection statutes as well as the Clean Waters Act.

The General Crimes Unit found itself handling cases which included every type of crime that can be prosecuted. For example, General Crimes received and handled those cases referred by the district attorneys' offices for reasons of conflict. Among such cases referred and prosecuted by this office were vehicular homicide, assault and battery and rape cases.

Other cases received were referred by a number of sources including state agencies and departments, citizen complaints, local police departments and other bureaus and divisions within the Attorney General's Office. Among such cases handled were forgery, uttering, larceny and commercial bribery.

MEDICAID FRAUD CONTROL UNIT

The Attorney General established the Massachusetts Medicaid Fraud Control

Unit (MFCU) in 1978 to investigate and prosecute Medicaid fraud, patient abuse and fraud in the administration of the Medicaid program. The Commonwealth's Medicaid program is administered by the Department of Public Welfare (DPW).

In Fiscal Year 1989, the Medicaid Fraud Control Unit continued to be one of the most productive and successful units in the nation. MFCU is a white collar criminal prosecutorial team whose mission is to investigate and pursue health care provider fraud and protect elderly nursing and rest home residents from physical and financial abuse.

The unit prosecutes both institutional health care providers and ambulatory providers such as dentists, doctors, psychiatrists, laboratories, pharmacies and transportation companies. MFCU also prosecutes instances of physical abuse to patients residing in the Commonwealth's 750 licensed long-term care facilities.

During Fiscal Year 1989, the unit opened 69 new cases, initiated 18 prosecutions and obtained 19 convictions. As a result of these convictions, defendants paid \$204,125 in restitution, \$165,715 in fines and \$107,500 in costs and damages. In addition to those sums, the unit's efforts resulted in an additional \$252,700 in Medicaid program recoveries as well as costs, penalties and damages of \$470,750. Finally, through MFCU endeavors, over \$31,000 in personal needs allowance monies was returned directly to nursing and rest home residents. A Medicaid provider's conviction of a program related offense, such as filing false claims or larceny, results in permanent exclusion from the program. The majority of MFCU prosecutions were initiated through special grand jury. Fiscal Year 1989 saw the selection of the thirteenth such special grand jury impaneled to investigate allegations of Medicaid fraud and other serious crimes.

In Fiscal Year 1989, MFCU completed several noteworthy cases and continued to experience success with its inventive investigative initiatives. In the dental provider area, MFCU's innovative "open mouth review" strategy resulted in the successful completion of six cases and \$180,500 in restitution, fines, costs and damages. An "open mouth review" is a collaborative effort between the unit and the Department of Public Welfare. A team, comprised of MFCU personnel, including a registered dental hygienist, and DPW dental consultants examine, chart, and photograph preselected Medicaid recipient's teeth. The results of the review are compared to the billings to determine whether or not the provider is fraudulently billing.

In one of these cases, a dentist repeatedly billed for expensive repair work allegedly performed on recipients' fractured front teeth when, in fact, he was only filing down and buffing their teeth. The dentist pled guilty to filing Medicaid false claims and larceny, received a lengthy period of probation, paid \$15,000 in restitution and \$12,500 in fines.

In the medical transportation area, MFCU prosecuted two cases which resulted in over \$160,000 in restitution, fines, cost and damages. In one of those cases, which involved a week-long trial, MFCU introduced evidence that a taxi company was stealing from the Medicaid program by vastly overstating the miles recipients were transported. Following the jury's guilty verdict, the judge imposed \$13,000 in restitution and fines amounting to \$78,000 for filing Medicaid false claims and larceny.

The unit conducted an investigation of a medical doctor and his counseling center based on an allegation that unsupervised therapists used the doctor's Medicaid provider number to bill for individual, one-hour long therapy sessions

when the doctor never saw the patients. This fraudulent scheme resulted in significant overpayments made by both Medicaid and Medicare. In resolution of this matter, guilty pleas for filing Medicaid false claims and larceny were entered and restitution, fines and costs of \$92,500 were paid by the defendant.

Abuse, mistreatment and neglect in the Commonwealth's long-term care facilities remained a unit priority. Since the enactment of the Patient Abuse Statute, 1980 G.L. c.265, §38, designed to provide protection to the most vulnerable segment of the state's population, the MFCU has aggressively investigated and prosecuted caregivers who mistreat and physically assault nursing and rest home residents. During the past year, the unit convicted a registered nurse, a licensed practical nurse and an orderly for patient abuse.

In addition to the imposition of suspended jail sentences, probation, fines, and penalties, each defendant was barred from working in any capacity in the health care industry for their probationary period.

Personal needs spending allowance is the amount of money every nursing and rest home resident is permitted to keep each month before the remainder of their resource check is applied to their room and board. This monthly stipend can be spent by the patient in any way he or she chooses. As noted above, the MFCU secured favorable resolutions in three cases which resulted in patients' directly recovering over \$31,000 in personal spending monies.

In Fiscal Year 1989, the unit also entered into two notable civil settlements which resulted in hundreds of thousands of dollars being returned to DPW. One case involved a marketing scheme in which a pharmaceutical company offered points redeemable for free airline tickets to Massachusetts physicians who prescribed a new hypertension drug. The outcome of the unit's investigation into this company's questionable program was a settlement agreement whereby the company agreed to stop the program and pay DPW the amount of \$195,000. The second significant settlement was reached by the unit and a chain of pharmacies which had improperly charged the Medicaid program a higher institutional price for a medical supply product which it purchased from wholesalers at a reduced rate. The pharmacy chain agreed that the cost savings it realized should have been passed on the DPW and refunded \$95,000 in overpayments.

¹ By virtue of Chapter 236 of the Acts of 1988, the Massachusetts Division of Employment Security is now known as the Department of Employment and Training, and the Director is now known as the Commissioner. Paralleling this change, the unit formerly denominated the Employment Security Division is now the Employment and Training Division.

PUBLIC ADVOCACY BUREAU

During Fiscal Year 1989 the Public Protection Bureau was restructured into two bureaus: the Public Advocacy Bureau, and the Public Protection Bureau. The divisions included in the Public Advocacy Bureau are Public Charities, Utilities, Insurance, and Antitrust. The bureau brings affirmative litigation on behalf of the public and represents the public in insurance and utility rate hearings. The bureau also represents state agencies and boards that are involved in the public interest.

DIVISION OF PUBLIC CHARITIES

The Attorney General represents the public interest in the proper solicitation and use of all charitable funds. The Attorney General is authorized to "enforce the due application of funds given or appropriated to public charities within the Commonwealth and prevent breaches of trust in the administration thereof." G.L. c. 12, sec. 8. The Division of Public Charities is established by G.L. c. 12, sec. 8B to carry out the Attorney General's responsibilities in this area.

The Attorney General's enforcement role extends to a wide range of charitable activity in order to protect charitable donors from diversion and waste of funds, and to ensure that the beneficiaries of charitable funds receive the intended benefits. Through the Division of Public Charities, the Attorney General takes enforcement action (1) to ensure that charitable funds held by trustees and charitable organizations are used properly and (2) to protect the public from deceptive and fraudulent fundraising practices. In addition, the Attorney General is an interested party in the probate of each estate in which there is a charitable interest and in legal actions to modernize the provisions of philanthropic bequests.

To further protect the public interest in this area, the Division of Public Charities registers over 25,000 charitable organizations and approximately 188 fundraisers operating in Massachusetts. A charitable organization is one which is nonprofit and whose purpose is to benefit a portion of the public; in addition to philanthropic organizations, examples of public charities include nonprofit hospitals, schools, social service providers, and cultural organizations. As well as registering and obtaining financial reporting by charitable organizations and fundraisers, the Attorney General is the defendant in all proceedings brought in the Supreme Judicial Court to wind up the affairs of a charitable organization.

In the year ending June 30, 1989, the division's work in carrying out this array of responsibilities involved four main areas:

- (a) registering and receiving financial information from charities and fundraisers to assure accountability for charitable funds;
- (b) participation as an interested party in numerous estates and trusts in which there is a charitable interest;
- (c) enforcement of the due application of funds by charitable corporations; and
- (d) litigation to protect the public from fraudulent or deceptive solicitation, and from misapplication of donated funds.

A. CHARITABLE ACCOUNTABILITY

Central to the Attorney General's responsibilities in seeing to the due application of charitable funds is the enforcement of laws requiring accountability by charities and fundraisers. The enforcement of accountability requirements is essential to prevent misuse of charitable funds and to promote the well-being of charities by fostering in individual donors and in the general public a trust and support of all public charities.

1.) *Registration of Charities Under G.L. c. 12. § 8E*

All public charities, with the exception of religious organizations and certain federally chartered organizations, must register with the division.

In cooperation with the Secretary of State, the division receives the Articles of Organization of newly filed G.L. c.180 non-profit corporations. The division reviews the articles to determine if the nonprofit is a public charity. If it is a public charity, information about the charity is entered on the computer, and the organization is sent annual reporting material.

As part of the division's compliance project, every new organization registered with us receives a packet of information about its registration obligations. This packet includes a copy of our General Laws booklet, the division's two guides ("Questions Commonly Asked To The Division Of Public Charities" and "Guide To The Registration And Filing Requirements Of The Division Of Public Charities"), and appropriate forms. The packet also puts the organization on notice that it is required to obtain a certificate from the division if the organization will be soliciting charitable funds.

This year 2,874 new charitable organizations' articles were reviewed, determined to be charitable, and entered into the computer. Over 25,000 charities are registered with the division.

2.) *Annual Financial Reporting By Charities Under G.L. c.12. § 8F*

All registered charities must submit annual financial reports to the division. The registrations and financial reports are public record and public viewing files are kept.

Annual filings must be accompanied by a \$25 fee. The division is responsible for the collection and processing of fee checks. This year we received a total revenue of \$299,925 in fees paid to the Commonwealth for annual filings.

3.) *Issuance Of Certificates To Charities That Fundraise*

Under G.L. c. 68, § 19, every charitable organization which intends to solicit funds from the public, except religious organizations, must apply to the division for a solicitation certificate before engaging in fundraising. Upon receipt, the division reviews the application for compliance with statutory requirements. Unless there is a problem with the application, all certificates are issued within a 10-day statutory period.

This year, 3,650 certificates were issued and \$36,500 in certificate fees were received and processed.

4.) *Registration Of Professional Solicitors And Fund Raising Counsel*

Under §§ 22 and 24 of G.L. c. 68, all persons acting as professional solicitors or professional fundraising counsel for soliciting charitable organizations must register annually with the division. Solicitors must also file a surety bond in the amount of \$10,000. All fundraisers must also file with the division a copy of each fundraising contract which they sign with any charitable

organization.

Each registration submittal is reviewed by the division to confirm that it meets the requirements as set forth in the statute. During the fiscal year ending June 30, 1989, a total of 188 registrations were received and approved, resulting in the accrual of fees to the Commonwealth of \$1,880. Of these 188 registrations, 123 were renewals of previous registrations, and 65 were new registrations obtained as a result of increased enforcement of this registration requirement by the division. Of this total of 188, 140 are fundraising counsel and 48 are solicitors.

The division revised the Solicitation Registration form (Form 10A) which all professional solicitors and commercial co-venturers must submit for each solicitation through the year. Form 10A discloses to this office and the public what the solicitation campaign will involve and how much money is expected to be raised. The revisions were made to make sure that this form complies with the requirements established by the United States Supreme Court in its *Riley* decision of 1988. At the same time, the form was strengthened in a manner consistent with *Riley* to help the division ensure that charities and their solicitors are complying with the state's solicitation requirements.

In addition, the division developed and distributed a new financial report form for all professional solicitors and commercial co-venturers (Form 11). This form must be filed at the end of the year for each solicitation campaign, and requires that an accounting be made by the solicitor for all monies actually raised from the public.

Both Form 10A and Form 11 must now be signed by a representative of the charity as well as by the solicitor. This requirement should cause charities to monitor closely the activities of their solicitors.

5.) Administrative Enforcement of Registration and Filing Requirements

In December, because of the outpouring of donations, the division focused its compliance resources on Armenian earthquake relief groups. All organizations reported in the media, plus groups in our computer list, were checked. All charities soliciting for this purpose were brought into compliance. Subsequently, the charities were asked to submit interim financial reports accounting for the contributed funds.

Beginning in January, the division embarked on a priority compliance project to ensure registration and filing compliance by a list of 400 significant and active charities. In this project, a complete compliance review is conducted of each charity's registration file. Deficiencies are brought to the attention of the charity, with followup as necessary until there is compliance.

In total, 1,258 charities were contacted during the year to rectify filing deficiencies.

6.) Litigation to Enforce Registration and Filing Requirements

ADDISON GILBERT FOUNDATION

In September, the division issued a notice of intent to sue to this charity for failure to file the required audit for 1985 and 1986, and for failure to file at all for 1987. Shortly thereafter the charity filed the required documents.

ATTORNEY GENERAL v. DORCHESTER VIETNAM COMBAT VETERANS

The division filed suit on December 13, 1988 against a Dorchester-based

veterans organization for failing to register with the Division of Public Charities. The court approved a stipulated preliminary injunction under which the organization agreed to submit the missing annual registration forms to the Division of Public Charities.

ATTORNEY GENERAL v. NATIONAL AWARENESS FOUNDATION. et al.

On February 3, 1989, the division filed suit against this Washington D.C.-based charitable organization and its solicitor for violations that included soliciting charitable contributions without the required registration. The division obtained a consent judgment from the charity and a stipulated preliminary injunction from the solicitor.

ATTORNEY GENERAL v. A CHILD'S WISH COME TRUE. et al.

On March 27, 1989, the division filed suit against this charity and its professional solicitor. Violations included failing to file the annual financial reports with the division and soliciting charitable contributions without the required certificate. The solicitor agreed to a preliminary injunction, and after a hearing the Superior Court judge entered a preliminary injunction against the charity.

ATTORNEY GENERAL v. OBIE KNOX ELKS LODGE. et al.

On May 17, 1989, the division filed suit against the sponsors of two circuses held in Western Massachusetts as well as their professional solicitor. Violations included soliciting charitable contributions without the required registration. The division obtained preliminary injunctions.

ATTORNEY GENERAL v. HEAVEN'S CHILDREN. INC., et al.

On May 31, 1989, the division filed suit against this organization and its president for failing to comply with the annual reporting requirements. The division obtained a stipulated preliminary injunction enjoining the defendants from soliciting contributions until the organization files an annual financial report for calendar year 1988 and audits for 1987 and 1988.

7.) Enforcement Of Charitable Gaming Laws

The division of Public Charities protects the public from misuse by non-profit organizations of their statutory license to fundraise through charitable gaming activities. The division enforces the Attorney General's Regulations (940 CMR 13.00) relating to the conduct of fundraising Las Vegas Nights (Bazaars) and Raffles. These regulations to enforce the provisions of G.L.c. 271, §7A, the Massachusetts statute authorizing the holding of charitable gambling events by qualifying organizations.

B. ESTATES AND TRUSTS IN WHICH THERE IS A CHARITABLE INTEREST

Under G.L. c.12 § 8G, the Attorney General is an interested party in the probate of all estates in which there is a charitable interest and in all other judicial proceedings affecting charitable trusts.

1.) Review of Wills and Trusts

This year, we received and reviewed 1,877 new wills, 1,544 of which contained charitable bequests. A total of 525 executor accounts and 2,178 trustee accounts were reviewed and approved. The division also reviewed and assented to 112 petitions for sale of real estate and 46 petitions for appointment of trustees.

Ninety-one new probate cases were opened, and the division was involved in 725 actions on existing probate cases, which included petitions for *cy pres* or instructions to modernize or clarify outmoded trust terms. The division reviewed

4,386 other miscellaneous probate matters.

2.) *Public Administration*

The division represents the State Treasurer in the public administration of intestate estates which escheat to the Commonwealth because the decedent had no heirs. During Fiscal Year 1989, \$373,645.37 was received in escheats. This division also handles petitions from public administrators representing heirs in intestate estates who are found after an estate has been administered and are then entitled to a reimbursement of escheated funds.

During Fiscal Year 1989, the division reviewed and approved 64 intestate estates, 10 petitions for sale of real estate and 63 accounts in public administrations.

3.) *Municipal Trusts*

To ensure that charitable bequests left in trust to municipalities in the Commonwealth are duly administered and distributed, the division is conducting a municipal trust project. Updated status reports of the trusts held by municipalities are obtained. Periodically, a sampling of communities are requested to report in more detail the financial status and distributions of the charitable trusts held by them. Improved compliance with trust terms is obtained in appropriate cases.

4.) *Wellesley College v. Attorney General*

In 1873, Henry F. Durant gave land to Wellesley College in trust to be used for college purposes with an additional requirement that the land never be leased for longer than seven years. Wellesley College filed this action seeking court authorization to deviate from the terms of the trust by leasing the vacant land to a developer who will work in conjunction with Harvard Community Health Plan to build a continuing care facility for retired Wellesley faculty and staff.

The statutory role of the Attorney General involved reviewing the facts to assure that the deviation was permissible according to Massachusetts case law. In addition, the Attorney General required the college to give publication notice so that any potentially interested parties could have the opportunity for appropriate input. The Attorney General agreed that the deviation should be authorized, but required that the college take all reasonable steps to utilize governmental housing programs to financially assist potential residents of modest means to obtain housing at the continuing care facility. The court granted the relief in this form.

5.) *Wigglesworth v. Cowles*

The Attorney General and the Trustees of the Stephen Caldwell Memorial Convalescent Home obtained a judgment which prevents an Ipswich convalescent home from reverting to the heirs of the donor.

This case involved an attempt by third generation descendants of Roxana Cowles to force a forfeiture of property bequeathed by Cowles in her will to be used as a nursing home. The will specified that Roxana Cowles' own home was to be used as the nursing home. The trustees accumulated trust funds until the early 1950's, when they had enough money to actually construct a nursing home. Because of structural problems and state licensure requirements, the trustees then razed the house and built a nursing facility that met the health and safety requirements of the time, and which has operated successfully for 30 years.

The heirs contended that even though the trustees could not have successfully fulfilled the testatrix' intent using the old building, and have successfully carried out the purpose of the charitable trust by erecting another suitable building, the

trust fails because the trustees did not use the old building. The Attorney General opposed the heirs' characterization of the trustees' actions as a breach of the terms of the trust that would today trigger a forfeiture of the land and buildings over to the private ownership of the heirs. The court adopted the Attorney General's arguments. The heirs have filed an appeal.

6.) *Crosby et al (Trustees of Curtis Trust) v. Shannon*

This case involves a 53-acre tract of land and four buildings in the Town of Cohasset which were left in trust in the 1920's by George E. Curtis to be used as a home for feeble, deformed, or invalid women. The home has never been established. The trustees have filed a complaint for *cy pres*, asking the court to approve a sale of the property, with the proceeds to be used for grant-making. As a reason for this change, the trustees cite problems with the property and argue that the intent of the testator to establish a home can no longer be realized. The division successfully opposed the immediate granting of the trustees' request by the court, on the ground that a more extensive exploration should be made of alternatives for carrying out the trust as closely as possible to the donor's intent. In December, a state grant was awarded to the town of Cohasset to conduct engineering and architectural studies of the land and buildings in order to determine definitively whether the property is appropriate for use as intended by the donor.

7.) *Isabella Stewart Gardner Museum, Inc., v. Shannon*

The museum, established under the will of Isabella Stewart Gardner, sought court permission to deviate from a term of the will that directs that the fourth floor and attic of the museum shall be set aside as a residential space for the director of the museum. The museum sought to move its administrative offices to the fourth floor and use its first floor administrative space for an expanded conservation laboratory. Because of the museum's unique nature, the museum's proposal was a matter of public controversy. After careful review, the Attorney General agreed that the relief requested by the museum was necessary and appropriate, so long as any alterations of the fourth floor space do not irretrievably prevent the space from use as a residential space in the future. After hearing, the court approved the form of relief proposed by the Attorney General.

C. ENFORCEMENT OF THE DUE APPLICATION OF FUNDS BY CHARITABLE CORPORATIONS

The assets of all charitable corporations in the Commonwealth are considered by law to be held in trust by the corporation for the purposes for which the assets were first obtained. The Attorney General represents the public's interest in the proper use of these assets.

1.) *EOHS Service Providers*

The division is notified by the Executive Office of Human Services when a potential problem within the jurisdiction of the Division of Public Charities is identified in EOHS audits of nonprofit corporations that provide services pursuant to contracts with EOHS agencies.

Investigation of nine such referrals were completed by the division, with action taken as appropriate.

2.) *Dissolutions*

To enforce the public's interest in the disposition of charitable assets, the Attorney General is a party to all voluntary dissolutions of charitable corporations under G.L. c. 180, § 11A. Under a procedure developed with the

Supreme Judicial Court, dissolving charities submit draft dissolution pleadings to our office. The division provides an informational packet of model pleadings and other material to charitable cooperations which request information regarding the correct procedure for dissolution. Following our review, negotiation of necessary modifications and our assent, the pleadings are filed with the Supreme Judicial Court. We review and negotiate the pleadings to ensure that:

- (1) there are adequate grounds for dissolution;
- (2) charitable assets are not diverted to non-charitable uses; and
- (3) any assets remaining after repayment of outstanding debts are transferred, with court approval, either (a) as restricted assets to a charitable corporation with a similar charitable purpose, or (b) as funds restricted to such a purpose to a charitable corporation whose purposes are broader than those of the dissolving charity.

After review of proposed pleadings and negotiation of necessary modifications, the division assented to 17 motions by dissolving charitable corporations for interlocutory orders permitting transfer of assets to other charities for similar charitable purposes, and to 32 final judgments dissolving charitable corporations.

For example, after negotiation and modification, the division assented to the petition of the HCHP Hospital (formerly Parker Hill Hospital) to transfer its remaining restricted funds to the Brigham and Women's Hospital. Another case involved an agreement for a financially troubled visiting nurse association, District Nursing Association of Fall River, Inc. ("Fall River VNA"), to transfer its assets and operations to the Visiting Nurse Association of Southeastern Massachusetts. After extensive negotiations with both parties, our office assented to the transaction, subject to the restrictions that the Southeastern Massachusetts VNA would receive the Fall River assets in trust for the benefit of citizens in the Fall River area. After our office's assent, the Single Justice approved the transfer of assets and, following said transfer, a final judgment of dissolution.

3.) *In Re Saint Mary of the Graces of Watertown*

This action was commenced by Saint Mary of the Graces, Inc. (the "Society") in Middlesex Superior Court as an ex parte proceeding under G.L. c.180, § 11 for dissolution of a non-charitable, nonprofit corporation and distribution of its remaining assets to its members. The division had intervened to prevent distribution to the members of any charitable assets. The Society had operated in large degree as a non-charitable mutual benefit membership group, but a portion of the Society's activities had been dedicated to encouraging religion through an annual festival and parade for promoting devotion to Saint Mary of the Graces. After extensive negotiations, the parties agreed to treat a portion of the assets as held in charitable trust. On November 29, 1988, the court entered a stipulated judgment of dissolution providing for 36 2/3 percent of the society's assets to be distributed to the Sons of Divine Providence in East Boston in trust for the religious purposes of its Madonna Queen National Shrine.

4.) *Vilner Synagogue v. Attorney General*

The Attorney General is made a party to all charitable corporate dissolutions pursuant to c. 180, § 11A. This is a contested dissolution case in which various

entities have come forward to claim the assets of the Vilner Synagogue, one of the last remaining Orthodox synagogues in Boston.

In the summer of 1988, the case was recommitted to a master for recommendation of a plan of distribution. After hearings, the master issued a report recommending that the assets be distributed to the Charles River Park Synagogue.

In October, the Attorney General filed a motion for an order to require Vilner to account for all artifacts, memorabilia, and historically significant documents of Vilner. The Attorney General obtained an injunction ordering Mendel Miller, the chairman and sole remaining member of Vilner, to refrain from dissipating Vilner's assets. The court requested that the accounting proceeding be filed as a separate action (See below).

In November, the Attorney General sought the appointment of a receiver to ensure that all of Vilner's assets will be applied to charitable purposes as originally intended, to sell the synagogue building and to distribute the assets in accordance with the pending dissolution proceedings. On December 20, Attorney Terry Jean Seligmann was named as receiver by the Single Justice.

In February 1989, the Attorney General, the receiver and Charles River Park Synagogue negotiated a joint motion for agreed upon plan of distribution, which was filed in lieu of objections to the master's report. The matter is still pending.

5.) *Shannon v. Mendel Miller*

On December 7, 1988, the division filed this action in the Supreme Judicial Court for Suffolk County, as companion litigation to the dissolution proceeding, *Vilner Congregation v. Attorney General*. As discussed above, the division had asked the sole remaining member, director and officer of the Vilner Congregation to account for Vilner assets which he had not placed before the court for distribution through the dissolution, but Miller declined. The lawsuit seeks a court order to compel such an accounting. The matter is pending.

6.) *Attorney General v. Coalition for Reliable Energy, et al.*

The Attorney General filed a complaint in 1987 alleging that the Coalition for Reliable Energy ("CRE"), its directors and its managing agent (BMc Strategies, Inc.) violated G.L. c. 93A and G.L. c. 12, § 8 by deceiving the public to believe that CRE was a charity promoting all forms of reliable energy, while in fact it was a front for the joint owners of Seabrook designed to promote demand for consumption of nuclear electricity generated by Seabrook.

After the superior court judge denied CRE's motion for summary judgment, CRE filed a motion requesting the judge to exercise his discretion to report his decision for interlocutory appeal. CRE argued that judicial economy would be promoted by appeal, because an appellate finding that CRE's advertisements do not constitute commercial speech would dispose of the Attorney General's G.L. c. 93A claim. The Attorney General argued in opposition that judicial economy would not be promoted by appeal because (1) the issue of commercial speech requires fact-finding of material disputed facts as to whether CRE is an alter ego for the Seabrook owners and whether CRE's advertisements were economically motivated, (2) those same facts also must be tried in order to dispose of the Attorney General's other claims under G.L. c. 12, § 8 and G.L. c. 68, irrespective of the G.L. c. 93A claim, and (3) trial could moot the very issues CRE seeks to appeal.

On July 28, 1988 Judge Walter E. Steele denied CRE's motion. Discovery and preparation for trial are continuing.

7.) *Attorney General v. Boston Basics et. al.*

This is a pending lawsuit filed against David McHollan, Robert Foley, and five corporations controlled by them (four charitable human service providers and one for-profit corporation) for misappropriation of funds. Early in the case, Foley negotiated a consent judgment. However, McHollan moved out of state and could not be located for service of process.

After the development of new leads, McHollan was traced to Tampa, Florida, where he was personally served. McHollan responded by filing a motion to dismiss. In response, the division argued that there was personal jurisdiction because the cause of action arose from McHollan's control and operation of the corporation within Massachusetts, and that there was no insufficiency in service of process because any delay was caused by McHollan's evasion of service. Judge John M. Xifaras denied McHollan's motion.

8.) *Attorney General v. St. Mary's Albanian Orthodox Diocese House, Inc., et al.*

This case involved the issue of whether the Diocese House occupied by the late Bishop of the St. Mary's Albanian Orthodox Diocese was a charitable asset of the church or a personal asset of the Bishop. A member church of the Diocese alleged that the house was bought and maintained solely with donated funds and thus was an asset of the church. Executors for the estate of the late Bishop alleged that the Bishop paid for and maintained the Diocese House with his own funds. The division negotiated a settlement in which a portion of the sale proceeds were paid over to the member church of the Diocese.

9.) *Rockport Lodge v. Attorney General*

Rockport Lodge is a nonprofit vacation home in Rockport for women of low and moderate income. The lodge trustees proposed to close the lodge this summer and filed a *cy pres* petition to transfer the lodge to an organization providing for the needs of the homeless. A group of lodgers opposed these changes and requested that control of the lodge be transferred to them.

The division made extensive efforts to facilitate a compromise resolution which would accommodate the interests of all. After the lodgers developed a plan for operation of the lodge, the trustees transferred control to a new board comprised of lodgers.

10.) *Worcester Hospitals*

Three Worcester-area hospitals, Worcester Memorial Hospital, Inc., Worcester Hahneman Hospital, Inc. and Holden Hospital, Inc., have affiliated with each other in order to save costs at the urging of the Department of Public Health, and plan ultimately to merge or consolidate. After negotiation, our office assented to relief entered by the Worcester Probate Court which would allow each hospital to transfer endowment funds donated for the use and benefit of that hospital to MCCM, Inc., a common parent of each hospital. The assented-to relief will allow MCCM to administer the funds for the benefit of the entire three-hospital system. Our office agreed with the hospitals' assertion that the relief was justified as a deviation from impractical restrictions limiting expenditure of a hospital's endowment for the benefit of that hospital, because the affiliated hospitals each provide different levels of care to the same geographic population and are interdependent upon each other.

D. CHARITABLE SOLICITATION ENFORCEMENT

1.) *Charitable Sweepstakes Information Packet*

In response to numerous inquiries from members of the public, the division prepared and the Attorney General issued an information packet on direct-mail charitable sweepstakes solicitations. The packet contains information on why charities are increasingly engaging in this type of fundraising, how such sweepstakes work, and the reasons that donors should be wary when deciding to participate in such sweepstakes. The packet also includes tips to follow if a person does decide to participate and tells where to get further information on all charities which solicit for funds. At the end of the packet, financial information is provided on nine charities which sent sweepstakes materials to Massachusetts residents in 1988.

2.) *Attorney General v. Jeffrey Young and Matthew Pinkham d/b/a Citizens Against Drunk Driving (CADD)*

Jeffrey Young and Matthew Pinkham were sued by the division in November of 1988 for violating the Massachusetts Charitable Solicitation Act by misrepresenting their for-profit organization to contributors. The two men were sued again in January for failing to honor a preliminary injunction issued in the first case to prevent further violations.

Pinkham and Young were the principals of a for-profit fund-raising company, Loram Marketing, Inc., which was soliciting contributions throughout Massachusetts in late 1988. The Attorney General's original complaint alleged that the defendants solicited charitable funds using the name "Citizens Against Drunk Driving" (C.A.D.D.) and misrepresented that C.A.D.D. was a charitable organization associated with the well-known Mothers Against Drunk Driving (M.A.D.D.) and Students Against Driving Drunk (S.A.D.D.) when in fact, there was no relationship. C.A.D.D. also claimed it sponsored educational programs on drunk driving for young people when it had, in fact, offered no such programs.

Under the terms of a court judgment entered on May 24, 1989 which settled both cases, the defendants agreed to pay civil penalties of \$15,000 to the Commonwealth and a total of \$7,000 (\$1,000 each) to public school systems in seven communities, Arlington, Brookline, Cambridge, Newton, Watertown, Belmont, and Somerville, in which the defendants had heavily solicited. The court judgment further also imposes comprehensive injunctive relief.

3.) *Attorney General v. Boston Society of Young Professionals (BSYP), et al.*

The defendants in this case hosted large dances at various hotels around Boston, ostensibly to benefit various charities. Money was raised through the sale of tickets at the door and through Ticketron.

On January 18, 1989, the Pine Street Inn learned that a BSYP-sponsored "Superbowl Party" was being held at the Quality Inn on January 21. Invitations which were widely disseminated claimed that "a portion of the proceeds to benefit Pine Street Inn." However, the Pine Street Inn had not previously been aware of this event and had not authorized the use of its name. Further investigation by this division revealed earlier events in which charities' names were used without authorization and the charities received little or no money.

On January, 20, 1989, the division obtained a temporary restraining order against further deception and an attachment and escrow of all proceeds of the "Superbowl Party". Under a stipulated preliminary injunction, the defendants

must:

- (1) notify the Attorney General 10 days in advance of the ticket sales to any event which will use a charity's name or purpose;
- (2) provide the Attorney General with the charity's written authorization to use its name;
- (3) secure from the charity its permission to distribute any complimentary or reduced price tickets for an event;
- (4) provide accountings for all events which they have sponsored in connection with a charity's name.

4.) *Attorney General v. Watson & Hughey et al.*

The division filed suit on February 1, 1989 against the Watson & Hughey Company, a Virginia-based fund-raiser; Attorney Robert R. Stone of Washington, D.C.; three national charities and a for-profit organization which used a deceptive sweepstakes solicitation campaign.

The case arose out of sweepstakes letters signed by Attorney Stone which were sent throughout Massachusetts by Watson & Hughey on behalf of the Cancer Fund of America, the Walker Cancer Research Institute, the Pacific West Cancer Fund, and the Social Security Protection Bureau. The complaint alleges that the \$5,000 sweepstakes letters were deceptive, among other reasons, because recipients believed they had won either the \$5,000 prize or another prize of significant value. In fact, the top prize never exceeded \$100 and most winners received the minimum prize of only 10 cents.

The defendants agreed in February to a stipulation under which they would refrain from mailing any further sweepstakes solicitation materials into Massachusetts until a preliminary injunction took effect. The ban on sweepstakes mailings into Massachusetts remained in effect as the fiscal year ended. We continued to coordinate our efforts with those of the Attorney General's offices in the approximately 15 other states which have also sued these defendants.

5.) *Attorney General v. National Awareness Foundation, Robert Lancaster, et al.*

In a complaint filed on February 3, 1989, Creative Communications and its president, Robert Lancaster, were charged with violating Massachusetts law while soliciting on behalf of the National Awareness Foundation, a Washington D.C.-based charitable organization. In a judgment by consent filed simultaneously with the complaint, the National Awareness Foundation agreed to comply with all provisions of M.G.L. c. 68, including all registration and disclosure requirements, in any future solicitations in Massachusetts, and to account to the division for all funds previously raised.

The solicitors had telephoned businesses and asked them to purchase advertisements in the National Awareness Foundation's "All Hugs, No Drugs" workbooks, which donors were told would be distributed to children in local schools. However, no specific arrangements had been made with any local school systems to distribute these workbooks. The solicitors also failed to make mandatory required disclosures such as the fact that they were professional solicitors, and misrepresented to donors that the callers were members of the National Awareness Foundation.

On February 24, 1989, the defendant solicitor agreed to a preliminary injunction prohibiting further solicitation in Massachusetts until he complies

with all the requirements of Massachusetts law, and to account for all money collected in Massachusetts in the name of the National Awareness Foundation.

6.) *Shannon v. A Child's Wish Come True, Inc., et al.*

On March 27, 1989, the division filed a suit against A Child's Wish Come True, plus a professional fundraising company, for violations of the charitable solicitation statute and the annual financial reporting requirements. The fundraising campaign sold trash bags, Christmas wreaths and ad book space, and claimed that proceeds would be used to grant the last wishes of terminally ill children.

The complaint alleged that Child's Wish failed to file annual financial reports with the division and failed to obtain a certificate of registration for fundraising. The complaint also alleged that the fundraisers misrepresented themselves as calling from Child's Wish and as benefitting the National Kidney Foundation.

On March 27, 1989, the court approved a stipulated preliminary injunction against the solicitor prohibiting future statutory violations and requiring its compliance with the reporting and disclosure requirements of c. 68. On April 6, 1989, the judge entered a preliminary injunction against Child's Wish and its president which prohibits them from soliciting in Massachusetts until they comply with G.L. c. 68 and with the consumer protection statute, G.L. c. 93A. The order also requires Child's Wish to provide full financial accountings of all their charitable and fundraising activities in Massachusetts.

7.) *Sonya English d/b/a South Shore Funding*

On April 18, 1989, the Criminal Bureau obtained an indictment by a Plymouth County grand jury against Sonya English d/b/a/ South Shore Funding on three counts of larceny by false pretenses for fraudulently obtaining charitable contributions by misrepresenting that the money was for the American Kidney Fund, the National Kidney Foundation, and A Child's Wish Come True. English was arrested and arraigned the next day in Plymouth County Superior Court and incarcerated at MCI Framingham. The case was identified by and developed in conjunction with the Public Charities Division.

After English was released on bail, the Public Charities Division filed a civil action against her in Suffolk Superior Court. On May 17, 1989, the Division obtained a stipulated preliminary injunction which prohibits English from soliciting charitable contributions and from representing that she is in any way affiliated with a charity. The order also prohibits English from spending any funds which she has solicited and from destroying her fundraising records.

8.) *Attorney General v. Obie Knox Elks Lodge, et al.*

On June 8, 1989, the Attorney General obtained an injunction against the sponsors of two circuses held in Western Massachusetts, as well as the professional solicitor who sold tickets to the events. The defendants were sued on May 17, 1989 for failing to register with the Attorney General's office and misleading the public about the beneficiaries of the ticket purchases.

At the hearing in Suffolk Superior Court, the Obie Knox Elks Lodge #1568 of Holyoke and the Holyoke American Legion Post 25 agreed to an order which enjoins them from conducting any further solicitations in the Commonwealth until each has complied with the registration requirements of Massachusetts law. Each organization also agreed to account for all charitable funds raised in Massachusetts from 1987 through 1989.

At the same time, a temporary restraining order (which became a preliminary injunction) was issued against the solicitor Eastern Productions, similarly stopping it from further solicitations in Massachusetts until the company

registers with the Public Charities Division, and ordering it to make all required disclosures and to refrain from misrepresentations. The solicitors failed to fully disclose that they were professional fundraisers, and led some donors to believe that the callers were either volunteers or members of the Elks or the American Legion. In addition, the solicitors told donors that specific charitable institutions such as Jericho House or the Belchertown State School would benefit from purchases of tickets to this circus, when these institutions had not authorized the use of their names in connection with this fund-raising, and had not agreed to receive any proceeds raised at these circuses.

9.) *Attorney General v. Heaven's Children, Inc., et al.*

On June 8, 1989, the Attorney General obtained an injunction against further solicitation by a Canton-based charitable organization, Heaven's Children, Inc., and its president, Kenneth Singer, until they comply with the financial reporting requirements under Massachusetts law. The defendants were ordered to file an annual financial report for 1988 and audits for both 1987 and 1988 with the Division of Public Charities, and to keep adequate books and records of their financial activities in the future. The defendants were also ordered to refrain from collecting money through Heaven's Children canisters displayed in public locations until the organization has accounted to the Attorney General for the money which it has already raised from the public.

UTILITIES DIVISION

By statute, the Attorney General is the designated representative of Massachusetts ratepayers in utility rate matters. The Utilities Division, staffed by lawyers, financial analysts and an economist, is the primary, and in most instances, the only representative of the consumer interest in gas, electric, and telephone rate cases and related matters within Massachusetts.

The rate cases in which the Attorney General appears are heard and decided by the Department of Public Utilities (DPU). The division also appears in cases on behalf of Massachusetts ratepayers before the Federal Energy Regulatory Commission (FERC). This federal intervention is essential since FERC establishes nearly all of the purchase power rates charged to four of the eight retail electric companies serving customers in the Commonwealth. FERC also has wholesale rate jurisdiction over all of the Massachusetts utility investment in Seabrook, with the exception of the Massachusetts Municipal Wholesale Electric Companies (MMWEC).

During Fiscal Year 1989 the Utilities Division was involved in a wide variety of cases affecting the rates of Massachusetts electric, telephone, and gas ratepayers. The division was heavily involved in litigation involving the impact of Boston Edison Company's management of the Pilgrim Nuclear Power Plant upon its rates. Pilgrim was shut down on April 12, 1986 and Boston Edison Company was not authorized by the Nuclear Regulatory Agency (NRC) to even begin the process of restarting the unit until December 21, 1989. During this period, Boston Edison Company incurred hundreds of millions of dollars of replacement power expenses and invested more than an additional \$200 million in the plant. The DPU rejected the division's 1988 settlement with New England

Telephone Company which would have lowered residential customers' basic phone rates and prevented a rate increase for the next three years. Instead, the DPU issued an order which left NET's current rates in effect, pending further proceedings. A number of motions for reconsideration were pending at the close of Fiscal Year 1989 and it was not then clear what, if any, portion of the \$159 million rate reduction that the Attorney General had advocated would ultimately be adopted by the DPU. The division also continued the Attorney General's policy of intervention in the general base rate cases of every gas, telephone, and electric company, intervening on behalf of ratepayers in 18 cases where companies were seeking rate increases. The Attorney General also continued affirmative litigation efforts. The division took positions in a variety of cases advocating alternatives to baseload power plants construction, focusing on the integration of conservation, cogeneration, and independent power producers in a least cost power planning scheme. The following description of certain cases provides a closer look at the work of the division in Fiscal Year 1989.

UTILITIES DIVISION LITIGATION AND OTHER ADVOCACY IN FISCAL YEAR 1989

As a result of the Attorney General's participation in rate cases decided by the DPU in Fiscal Year 1989, Massachusetts ratepayers saved approximately \$20.6 million in electric rates and \$12.4 million in gas rates. As a result of the Attorney General's participation in the New England Power Company case before the FERC, Massachusetts Electric Company ratepayers saved an additional \$24 million. The specific cases in which the Attorney General was involved in Fiscal Year 1989 are described below.

A. Litigation Before the Department of Public Utilities (DPU)

1. *Electric Rates*

a. *Boston Edison Company (Pilgrim Replacement Power Costs)*

Boston Edison Company has collected in excess of \$200 million from its retail customers for replacement power expenses it has incurred as a result of its Pilgrim Nuclear Power Plant being shut down during the period from April 12, 1986 through January 1989 and operating at less than 100 percent of its rated capacity in the period from January through June 1989. The evidentiary phase of a three year investigation into the cause(s) of the Pilgrim outage began in September 1988 when Boston Edison Company filed testimony and information which it claimed supported a finding that it should be allowed to retain all but \$7.6 million of the monies it has collected because all but 41 days of the outage were caused by prudent management actions. The Attorney General filed the testimony of nationally recognized experts in the field of nuclear power plant operations and NRC regulation in November 1988. The Attorney General's experts concluded that the principal cause of the outage was Boston Edison imprudence in the operation of Pilgrim which resulted in the NRC requiring that the plant remain closed until Edison had demonstrated that it had remedied its chronic management failings at the plant. These experts recommended that the DPU order Boston Edison to refund replacement power charges in the range of \$135 to \$168 million. More than 30 days of evidentiary hearings were held between January and March 1989 and hundreds of thousands of pages of

documents were examined. Briefs were filed in May and July 1989 and the matter was pending before the DPU at the close of Fiscal Year 1989.

b. *Boston Edison Company (Fossil Unit Performance)*

In the annual review of how effectively Boston Edison Company operated its other power plants, the Attorney General urged the DPU to order the company to refund monies it had collected for replacement power expenses necessitated by certain outages at its New Boston and Mystic stations that were caused by imprudent practices concerning the monitoring of the cleanliness of turbine lubrication oil. At the close of Fiscal Year 1989, this case was still pending.

c. *Commonwealth Electric Company (Base Rates)*

Commonwealth Electric Company filed a rate case on June 16, 1988 seeking to increase its base rates by \$23.2 million or about 8.5 percent and to recover a greater proportion of its revenues from its residential electric space heating customers. The Attorney General opposed the company's proposals, arguing: (1) that Commonwealth's revenues should not be increased by more than \$13.8 million; (2) that the department should reduce the amount by which Commonwealth proposed to shift revenue responsibility to residential electric space heating customers; and (3) that the department should penalize Commonwealth for its lack of effort in advancing its least cost power options such as cost effective customer conservation measures. On January 31, 1989, the DPU issued its decision in which it allowed Commonwealth to increase its revenues by approximately \$18 million or 6.7 percent, rejected the Attorney General's arguments concerning the protection of the company's electric space heating customers, and criticized but did not penalize Commonwealth for not advancing its least cost power options.

As a result of a tremendous public outcry, the DPil initiated an investigation into the impact that its decision had on the company's residential electric space heating customers. Four public hearings were held in Commonwealth's service territory during May 1989 and evidentiary hearings were ongoing at the close of Fiscal Year 1989. The Attorney General has participated actively in these hearings and has presented evidence concerning Commonwealth's failure to advise its customers of the possibility that the DPU would phase out its promotional electric space heating rate.

d. *Eastern Edison Company*

Eastern Edison Company filed a rate case on June 14, 1988 seeking to increase its base revenues by approximately \$11.9 million or 6.2 percent and to recover a greater proportion of its revenues from its residential customers. After 15 days of hearings, the Attorney General reached a stipulated settlement agreement with Eastern under which the company would be allowed to increase its base revenues by \$7.5 million or about 4.6 percent. On December 30, 1989, the DPU issued its decision in which it approved the Attorney General's settlement stipulation and accepted some of the Attorney General's arguments concerning the company's proposal to shift revenue responsibility to its residential customers.

e. *Nantucket Electric Company*

Nantucket Electric Company filed two rate cases on August 17, 1988 seeking to increase its revenues by approximately \$1.8 million or 22.8 percent and to recover a greater proportion of its revenues from its residential customers. The Attorney General intervened in this proceeding on behalf of the company's

residential ratepayer and presented the testimony of one of his in-house financial analysts. The Attorney General raised a number of issues concerning the company's power planning process and costs associated therewith, its proposal to shift revenue responsibility to its residential customers, and its failure to pursue conservation as a least cost means to address its power supply deficiencies. These and other issues were addressed in briefs filed by the Attorney General in which he argued that Nantucket's revenues should be decreased by \$68,000. On February 28, 1989 the DPU issued its decision in which it allowed the company to increase its revenues by approximately \$1.2 million or 15.2 percent after rejecting most of the Attorney General's arguments concerning the costs that Nantucket should be allowed to recover from its ratepayers. The DPU also rejected the Attorney General's argument that it should protect the company's residential ratepayers from the sharp increases proposed by the company. In particular, the DPU rejected the Attorney General's arguments regarding the need to recognize the significant post-test year sales growth if the company's post-test year addition of generating equipment was to be reflected in rates and the inappropriateness of forcing Nantucket's ratepayers to pay for the \$756,000 expended by the company in the litigation of this case. On March 20, 1989, the Attorney General filed a motion seeking reconsideration of the DPU's decision on these two issues. That motion was still pending at the close of Fiscal Year 1989.

f. Western Massachusetts Electric Company (Base Rates)

Western Massachusetts Electric Company filed a rate case on December 16, 1988 seeking to increase its base revenues by approximately \$28.4 million or 9.8 percent. Approximately one-half of the requested increase was associated with the fourth step of the five step phase into rates of its more than \$350 million investment in the Millstone Nuclear Power Station, Unit No. 3 which was ordered by the DPU in 1986. In briefs filed in April and May, 1989, the Attorney General argued that the company should not be allowed to increase its base revenues by more than \$11.5 million. On June 30, 1989, the DPU issued its decision in which it accepted many of the Attorney General's revenue requirement arguments and reduced the company's proposed increase by 37 percent, from \$28.4 million to \$18 million.

g. Boston Edison Company (Base Rates)

Boston Edison Company filed a rate case on April 14, 1989 seeking to increase its rates by approximately \$86 million or about 8.4 percent. More than one-half of the proposed increase is attributable to expenditures and investments made at Boston Edison's Pilgrim Nuclear Power Plant during the more than three year outage at that plant. Hearings began in June 1989 and were not concluded at the end of the fiscal year. Important issues had already been raised concerning the prudence of Boston Edison's decision to invest additional monies in Pilgrim given its past performance and the resulting economics of its operation as well as the company's least cost supply efforts that were the subject of pointed criticism by the DPU in its last decision on the company's base rates.

h. Cambridge Electric Light/Commonwealth Electric Companies

In their quarter fuel clause filings dated March 5 and June 5, 1989, Cambridge Electric Light Company and Commonwealth Electric Company both sought to recover from their ratepayers the \$4.8 million and \$11.2 million payments that the respective companies are required to make to their affiliate, Canal Electric Company, in 1989 pursuant to a January 1989 FERC decision allowing Canal

to recover carrying charges on one-half of its more than \$225 million investment in Seabrook Unit 1. The Attorney General intervened in these proceedings and argued that the DPU should not allow the companies to pass these charges through to their ratepayers because they had not made any showing that incurring these charges would reduce the cost to ratepayers for Seabrook power if and when power is ever generated from that plant. In a decision issued on April 13, 1989, the DPU allowed the companies to recover these sums subject to refund at some later date after FERC had ruled on the prudence of their entering into the contract that provided for such charges. In the proceedings related to the June 5 filing, the Attorney General again opposed the recovery of monies to offset these charges, noting that FERC would not be making the determinations that the DPU had decided to await. That motion was pending at the close of Fiscal Year 1989.

i. *Cambridge Electric Light Company*

Cambridge Electric Light Company filed a rate case on May 17, 1989 seeking to increase its base revenues by approximately \$6.1 million or 7.6 percent and to recover a greater proportion of its revenues from its residential customers. The Attorney General intervened on behalf of the company's residential ratepayers. Hearings had not yet begun at the close of Fiscal Year 1989.

j. *Least Cost Planning*

On November 30, 1988, as part of its ongoing rulemaking proceeding concerning future power supplies, the DPU issued proposed new regulations setting forth an integrated power supply planning process which would require bidding for the satisfaction of future power supply requirements and would require explicit consideration of demand side alternatives (conservation and load management). The Attorney General filed comments on the proposed regulations on February 15, 1989 and appeared for questioning at hearings held by the DPU. At the close of Fiscal Year 1989, the DPU had not yet issued its decision concerning the proposed regulations.

k. *Conservation Collaborative*

On July 19, 1988, the Attorney General, together with the Conservation Law Foundation, the Massachusetts Public Interest Research Group, the Massachusetts Executive Office of Energy Resources and all but one of the state's private electric utilities, agreed to participate in a collaborative process to design and implement cost effective conservation and load management programs. A formal agreement was filed with the DPU and on December 23, 1988, the parties submitted to the DPU a "Phase I" report identifying programs that would be considered for adoption and implementation at prescribed levels by each of the individual electric utilities in Phase II of the process. The DPU expressed general satisfaction with the programs identified in the Phase I report and negotiations with individual utilities over the design and funding of particular programs continued through the balance of Fiscal Year 1989.

2.) *Gas Rates*

a. *Boston Gas Company*

Boston Gas Company filed a rate case on March 16, 1988 seeking to increase its base revenues by approximately \$15.6 million or about 3.4 percent. This filing was made after the city of Boston filed a petition seeking a decrease in the company's rates. The city of Boston subsequently withdrew from the case. The Attorney General presented the testimony of a financial analyst to address many

cost of service issues and cross-examined the company's witnesses. The Attorney General filed his briefs in July and August 1989 in which he argued that Boston Gas Company's rates should be reduced by approximately \$15 million. On September 30, 1989, the DPU issued its decision in which it allowed the company to increase its revenues by approximately \$3.2 million. The DPU did, however, accept the Attorney General's argument that Boston Gas Company should not be allowed to recover from its ratepayers any of the \$344,000 of charitable contributions it had made during the test year. Boston Gas Company appealed the DPU's decision on its charitable contributions to the Supreme Judicial Court which affirmed the DPU in a decision reported at 405 Mass. 115.

b. Bay State Gas Company

Bay State Gas Company filed a rate case on April 14, 1989 seeking to increase its base revenues by approximately \$18.9 million or 9.1 percent and to recover a greater proportion of its revenues from its residential customers. The Attorney General intervened on behalf of the company's residential ratepayers. This is the first base rate filing by Bay State since 1982. Hearings were not over and the case had not yet been briefed at the close of Fiscal Year 1989.

c. Berkshire Gas Company

Berkshire Gas Company filed a rate case on May 17, 1989 seeking to increase its base revenues by approximately \$5.8 million or 16 percent and to recover a greater proportion of its revenues from its residential non-heating customers. The Attorney General intervened on behalf of the company's residential ratepayers. Hearing had not yet begun at the close of Fiscal Year 1989.

d. Essex County Gas Company

Essex County Gas Company filed a rate case on May 17, 1989 seeking to increase its base revenues by approximately \$2.2 million or 6.8 percent and to recover a greater proportion of its revenues from its residential non-heating customers. The Attorney General intervened on behalf of the company's residential ratepayers. Hearing had not yet begun at the close of Fiscal Year 1989.

3.) *Telephone Rates and Services*

a. New England Telephone Company Revenue Requirements

In a decision issued on March 21, 1989, the DPU rejected a 1988 stipulated settlement which the Attorney General had reached with New England Telephone Company and other parties which would have reduced NET's basic monthly charge for residential customers by 50 cents per month and then frozen NET's rates for three years. NET joined in the stipulated settlement and then later tried to withdraw its assent to and support for this agreement. In its order, the DPU accepted some and rejected some of the Attorney General's arguments in support of his call for a \$159 million reduction in NET's revenues. In particular, the DPU agreed with the Attorney General's arguments that NET's ratepayers should not be forced to pay for its charitable contributions and its promotional advertisements. However, although the DPU agreed with the Attorney General that NET had failed to demonstrate the reasonableness of the charges it incurred in transactions with its affiliated companies, it only ordered NET to fund a full audit of those transactions, but did not deny NET recovery of the \$59 million of these transactions as argued by the Attorney General. The DPU's order did not specify the dollar amount of NET's revenue requirement and numerous issues have been raised with the DPU in motions for reconsideration that were still pending at the close of Fiscal Year 1989.

b. *New England Telephone Company IDS*

New England Telephone Company filed new tariffs with the DPU on October 18, 1988 to govern the provision of a new "Information Delivery Service" through which vendors of prerecorded information could offer to Massachusetts ratepayers on an intrastate basis access to that information on a pay-per-call basis. NET proposed to reserve the discretion to deny billing and collection services to those vendors of information whom it did not approve and offer some of its residential and business customers for a one time fee of \$5 and \$10, respectively, the option of blocking access to all such services from their telephones. A public hearing was held on January 11, 1989, at which many members of the public opposed the offering of so-called "adult" information services. Seven days of evidentiary hearings were held during which the Attorney General cross-examined the company's witnesses. The Attorney General filed his briefs late in Fiscal Year 1989 and on July 31, 1989, the DPU issued its decision in which it adopted most of the Attorney General's recommendations. In particular, the DPU ordered: (1) that NET offer billing and collection services to all information vendors; (2) that NET offer all of its residential and many of its other customers multiple options by which they can free of charge block access to some or all of these services and the group bridging ("talk lines") services; (3) that NET provide access to adult services only to those ratepayers who make a formal request for access; (4) that NET not charge ratepayers for blocking and that IDS services not be offered in those communities where NET's equipment does have the capability of providing blocking service; (5) that NET impose consumer protection requirements on information vendors, including introductory messages and delayed billing to protect against unwanted charges as well as certain restrictions on advertising directed at children.

B. *Litigation Before The Federal Energy Regulatory Commission (FERC)*

1.) *Canal Electric Company*

On three different occasions in Fiscal Year 1989, the Utilities Division opposed the filing at the FERC by Canal Electric Company of contracts with its two affiliated Massachusetts retail electric companies, Commonwealth Electric Company and Cambridge Electric Light Company, setting forth rates to be charged to these two affiliates to recover its more than \$200 million investment in Seabrook Unit 1 if and when that plant goes on line. The division argued successfully in the first two instances that these filings were premature in light of the substantial uncertainty that Seabrook would ever go on line.

In decisions issued in August 1988 and January 1989, the FERC rejected the proposed filings by Canal. The third filing was pending before the FERC at the close of Fiscal Year 1989.

As part of Canal's filing that was the subject of the August 1988 decision by the FERC, it had sought approval of contract terms relating to its billing of its affiliates for costs associated with its investment in transmission lines and educational facilities for the Seabrook Nuclear Power Station. The Attorney General reached stipulated settlements with Canal Electric Company as well as its two affiliated Massachusetts retail electric companies, Commonwealth Electric Company and Cambridge Electric Light Company, with regard to these charges. Commonwealth Electric Company serves retail ratepayers on the Cape and in portions of southeastern Massachusetts. Cambridge Electric Light serves

00 retail ratepayers in Cambridge. The stipulated settlements were entered in cases before the FERC and DPU. P.D. 12

In its January 1989 decision, over the Attorney General's objection, the FERC allowed Canal to begin collecting carrying charges (CWIP charges) on one-half of its more than \$225 million investment in Seabrook Unit 1.

2.) *New England Power Company*

New England Power Company, the wholesale supplier of electric power to Massachusetts Electric Company, filed a rate case on September 30, 1988 seeking to increase its rates by \$96.5 million (\$64 million for Massachusetts Electric Company) and to redesign its rates to more accurately reflect marginal costs. On March 13, 1989, the Attorney General and other parties in the case reached a stipulated settlement agreement with the company concerning the redesign of rates. On May 18, 1989, the parties reached a stipulated settlement agreement under which the proposed increase was reduced by \$36 million (\$24 million for Massachusetts Electric Company) and the company agreed that Massachusetts Electric Company would, as soon as permitted by the DPU, implement and then seek recovery from the DPU for the approximately \$40 million annual expenditures New England Power Company had proposed to make to implement non-dispatchable conservation and load management programs in Massachusetts Electric Company's service territory.

C. LEGISLATION

The Attorney General opposed legislation which would have permitted New England Telephone Company to impose a charge on residential ratepayers for directory assistance calls and to use the funds collected through such charges to fund the costs of providing special services to public safety offices.

ANTITRUST DIVISION

The Antitrust Division investigates and prosecutes cases under federal and state antitrust laws. The division's primary goal is to protect and promote competition so that consumers are offered goods and services of higher quality at lower prices. The following are summaries of significant activities undertaken by the division in Fiscal Year 1989.

Multistate Insurance Antitrust Litigation

In the spring of 1988, the Commonwealth and seven other states filed antitrust actions in the United States District Court for the Northern District of California against a total of more than 30 insurance companies, reinsurers, intermediary brokers, and trade associations. Several months later, 10 additional states filed virtually identical actions. The Massachusetts suit is a class action with the towns of Milford and Hanover named as class representatives. The suits are the result of a two-year investigation led by Massachusetts, California, New York and Minnesota. In the case, treble damages for injuries to public entities are sought, as well as extensive injunctive relief.

The complaints allege that defendants manipulated the market for commercial general liability (CGL) insurance. This is the insurance purchased by most businesses, public agencies, and nonprofit organizations. CGL policies cover liability to third parties for personal injuries and property damage arising from the actions or inactions of the policyholders.

During this fiscal year, extensive pretrial activities have been underway in the case. This activity included a July 28, 1988 hearing before the Multidistrict Litigation Panel sitting in Portland, Maine. Massachusetts was designated to represent all 18 plaintiff states at the hearing. The hearing addressed a motion by certain defendants for (i) consolidation for pretrial purposes of the state cases and the "tag along" suits filed by various private plaintiffs and (ii) assignment of all cases after consolidation to Judge William W. Schwarzer who is the California federal judge already assigned to the state cases. Other pretrial activities undertaken include the negotiation of drafts of several pretrial orders requested by Judge Schwarzer. One such draft submitted to the Court resulted in a September 8, 1988 order that, among other things, stayed all class certification proceedings, set a detailed briefing schedule for FRCP 12 and 56 dispositive motions, and prohibited discovery except narrowly drawn discovery designed to aid in the resolution of the dispositive motions.

In mid-December 1988, various Federal Rule 12 or 56 motions were filed by the defendants. Among other things, the motions seek dismissal or summary judgment on five different grounds: 1) the state action doctrine; 2) standing; 3) subject matter jurisdiction; 4) an alleged absence of any conspiracy; and 5) the McCarran-Ferguson Act which provides a limited exemption from the antitrust laws for certain activities by certain insurers. Judge Schwarzer promptly issued an order indicating he would not permit the "no conspiracy" motions to be submitted at this time.

On April 27, 1989, the plaintiff states filed their one hundred plus page brief in response to defendants' motions and cross filed a motion for summary judgment on state action grounds. In addition, reply briefs were submitted shortly thereafter. A hearing on the motions is set for September 15, 1989.

Other developments in the case include Louisiana's recent joining of the lawsuit bringing the total number of plaintiff states to 19. Furthermore, a defendant in the case, the Insurance Services Office (ISO) announced various changes in its operating policies. ISO specifically has indicated it will no longer issue advisory rates and that it will add public interest representatives to its board of directors. Among the types of relief Massachusetts and other states seek in the case is an order requiring ISO to maintain on its board a majority of public interest members appointed by the court.

Commonwealth v. Cahill, et al.

In this action, filed in August 1988, the Commonwealth alleges that 24 Springfield obstetrician/gynecologists conspired to boycott Blue Shield of Massachusetts in violation of state and federal antitrust laws. The Commonwealth specifically alleges that, between late November 1985 and late January 1986, the 24 doctors sent letters resigning from Blue Shield programs in an effort to pressure Blue Shield into raising its doctor reimbursement rates. In the suit, injunctive relief and imposition of civil penalties is sought against each defendant. Though the case was filed originally in federal court in Springfield, the matter has been reassigned to a federal judge in Boston.

The initial stages of the litigation have entailed the filing of numerous motions by the parties including a motion to dismiss, a motion for a more definite statement, a motion to compel discovery, a motion to certify certain questions to the Supreme Judicial Court, and a motion challenging the Commonwealth's authority to issue nonparty Civil Investigative Demands

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(CIDs). Various of these motions were resolved at a status conference held on March 22, 1989, and at a lengthy hearing held on May 24, 1989.

In addition, on March 22, 1989, the court approved the first settlement in the case. Pursuant to the terms of the settlement, an injunction issued enjoining the settling defendant from violating the antitrust laws, the settling defendant made a payment to the Commonwealth of \$12,500, he agreed to withdraw his letter of resignation from Blue Shield, and he agreed to notify the Commonwealth prior to submission of any future letter of withdrawal. In April and May of 1989, virtually identical settlements were reached with four more defendants. This brings the total recovery in the case to date to \$62,500.

As to the remaining defendants, the case continues. The parties currently are pursuing discovery.

Commonwealth v. Stop & Shop Companies, Inc., et al.

On November 23, 1988, Judge Robert E. Keeton issued a final judgment and order approving a settlement agreement between Stop & Shop and the Commonwealth. The order included an injunction against Stop & Shop. The settlement with Stop & Shop resolves the Commonwealth's claims against a second of three defendant supermarket chains. Earlier, the Commonwealth had settled with Waldbaum, Inc. The litigation continues against First National Supermarkets, Inc. In the suit, the Commonwealth alleges that defendants fixed prices by conspiring to eliminate double coupon payments.

The terms of the Stop & Shop settlement agreement required Stop & Shop to distribute \$3 million in coupons to western Massachusetts households during January, February, and March of 1989. Consumers were able to redeem the \$2 coupons at Stop & Shops or at other participating stores in western Massachusetts. Stop & Shop was also required to issue \$1.6 million in \$1 coupons redeemable at eastern Massachusetts Stop & Shops.

In addition, the settlement agreement required Stop & Shop to donate \$100,000 worth of high protein food to the Western Massachusetts Food Bank. Stop & Shop also paid the Commonwealth \$200,000 in attorneys' fees.

In the continuing case against First National Supermarkets, Inc., the court, following a conference on June 6, 1989, issued an order requiring all discovery to be completed by mid-January, 1990.

Commonwealth v. Matsushita (Panasonic)

On March 15, 1989, Massachusetts joined with the Attorneys General of 49 states in a nationwide antitrust suit against the Panasonic Company. Contemporaneously, the Commonwealth agreed to a nationwide settlement negotiated by the New York Attorney General's office. The proposed settlement will provide consumer refunds ranging from \$17 to \$45 for various Panasonic and Technics brand products including VCRs, camcorders, telecommunication and other equipment. A total of up to \$16 million in refunds will be available nationwide. Of this amount, up to \$553,554 in refunds could be claimed by consumers for purchases of these products made at stores in Massachusetts.

On June 5, 1989, the United States District Court gave preliminary approval to the proposed settlement. Under the terms of the preliminary approval, consumers will be notified of the process for applying for a refund in newspaper advertisements to be published in the fall of 1989. A toll free number will be established to process refund requests. The deadline for submitting a refund claim will be November 2, 1989. In early 1990, a motion will be filed seeking final approval of the settlement. Refunds will be distributed in the spring of 1989 assuming the settlement is finally approved.

Bottle Law Case

On September 26, 1988, the Antitrust Division filed summary judgment papers in its action against 22 soft drink and malt beverage distributors for alleged violations of the Mandatory Beverage Container Deposit Act. In the action, the division alleges that the distributors have failed to segregate bottle deposits in a separate fund held in trust for consumers and instead have commingled deposit funds with their own revenues in violation of the statute. The defendants also filed summary judgment motions. Summary judgment arguments were held on September 27, 1988 before Judge Rouse. At the time of the argument, Judge Barbara J. Rouse requested a list of the proposed questions to report to the Appeals Court.

On June 29, 1989, Judge Rouse granted in part the motions of both sides, contemporaneously reported the issues to the Appeals Court and stayed all further proceedings in the case until the Appeals Court determined the reported matters.

Commonwealth v. Campeau Corporation

Pursuant to a consent decree which was signed by this department and the Campeau Corporation in March of 1988, Campeau agreed that if it acquired Federated Department Stores, it would divest both the Filene's Department Store and Filene's Basement divisions in their entirety. By the terms of the agreement, Campeau was obligated to notify the Commonwealth in advance as to the identity of the proposed purchasers and the department had to approve the sale before it could be consummated. After an extended bidding war with Macy's, Campeau did finally acquire Federated in April of 1988, and in June it notified the department of its intention to sell Filene's Basement to the FBA Corporation, a management group consisting of the President and CEO of the Filene's Basement Division and several equity investors (i.e. a "leveraged buy-out"). Prior to approving the sale, with the assistance of a financial analyst from the Antitrust Division of the Department of Justice, we undertook a review of the terms of the buy-out with particular concern for the amount of debt taken on by the new company, the terms of repayment, and the soundness of their financial projections. We determined that the sale should be approved and notified Campeau of our approval on July 27, 1988.

Commonwealth v. J.F., Inc., et al.

The Commonwealth filed an action under the Massachusetts Antitrust Act in the Hampden Superior Court against seven liquor and convenience stores charging them with price fixing. The action charges the defendants with jointly advertising the prices of alcoholic and grocery products. The complaint alleges that the joint advertising of prices on these items constitutes a *per se* violation of the state antitrust act.

During this fiscal year, the parties have engaged actively in all forms of discovery.

Amicus participation

During Fiscal Year 1989, the Antitrust Division was actively involved in the department's participation in a very significant *amicus curiae* brief to the United States Supreme Court. In 1977, in the case of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court had decided that indirect purchasers could not use federal antitrust law to sue indirect sellers for illegal, passed on overcharges. California and other states allow such suits under their state

antitrust laws. In *California v. ARC America Corp.*, 109 S. Ct. 1661 (1989), the Supreme Court faced the issue of whether these state statutes were preempted by federal law.

In an *amicus curiae* brief filed on November 30, 1988, the department joined with the attorneys general of 34 other states in supporting the position taken by California and three other states that states are free to provide greater consumer remedies than are allowed by federal law. The Antitrust Division actively participated in the preparation of this brief. On April 18, 1989, in a unanimous decision, the Supreme Court agreed with the position taken by the department. The decision recognizes that states have great freedom in devising their antitrust laws. It affirms that federal antitrust laws were intended "to supplement, not displace, state antitrust statutes."

LEGISLATION

The department actively has supported legislation to strengthen the antitrust laws. Efforts in Congress to repeal the McCarran-Ferguson Act have been supported by the department. The McCarran-Ferguson Act exempts the business of insurance from the antitrust laws to the extent such business is regulated by the state and does not involve acts or agreements of "boycott, coercion or intimidation."

In the summer of 1988, Attorney General Shannon testified before the Subcommittee on Antitrust, Monopolies, and Business Rights of the United States Senate's Committee on the Judiciary. The Senate Subcommittee had convened hearings on McCarran-Ferguson repeal. In his testimony, Attorney General Shannon provided an extensive description of the collusive activity by the insurance industry alleged in the Insurance Antitrust litigation (see above).

In the summer of 1989, Attorney General Shannon presented extensive written testimony on H.R. 1663 which would modify the McCarran exemption substantially. This testimony was submitted to the Subcommittee on Economic and Commercial Law of the Committee on the Judiciary of the U.S. House of Representatives. In his testimony, Attorney General Shannon emphasized that the antitrust laws would permit any joint activity by insurers that legitimately produces substantial procompetitive effects and that, therefore, the McCarran exemption for certain joint activities is totally unnecessary. He also emphasized that the McCarran Act produces very little, if any, public benefits to offset the private benefits enjoyed by the insurance industry as a result of the Act's sanctioning of collective activities.

INSURANCE DIVISION

The Insurance Division represents the interests of Massachusetts insurance purchasers in insurance rate setting hearings, consumer protection litigation, and rulemaking proceedings.

The division intervenes on behalf of insurance consumers in complex rate setting hearings before the Commissioner of Insurance. At these hearings automobile insurance rates are established for all insureds in Massachusetts and

non-group and Medicare supplement health insurance rates proposed by Blue Cross and Blue Shield are reviewed.

The division litigates against insurance companies and insurance agents to protect insurance consumers from unfair and deceptive practices relating to all types of insurance products. This year, a significant focus has been the enforcement of mandated health insurance benefits and actions to protect employees whose employer-provided health insurance plans have failed to pay benefits to which employees are entitled.

The division participates in rulemaking hearings concerning insurance products and insurance markets. This year the Insurance Division participated extensively in hearings on the implementation of the automobile insurance reform law and the restructuring of the auto insurance residual market as well as hearings concerning the introduction of new health care delivery systems. The division also routinely participates in legislative hearings concerning proposed laws affecting the interests of insurance consumers.

The actions of the division saved Massachusetts consumers \$590 million this year.

A. RATE SETTING HEARINGS

Auto Insurance Remand Decision Appeal

The Insurance Division filed an appeal in the Supreme Judicial Court from the Insurance Commissioner's 1988 auto insurance rate remand decision, arising from the Supreme Judicial Court's earlier remand of the Commissioner's initial order setting 1987 and 1988 auto insurance rates. The remand decision increased auto insurance rates for 1987 and 1988 by an aggregate of 17 percent for the two years. The appeal alleged that numerous procedural errors at the hearings, as well as substantive error in the remand decision itself, produced a substantial denial of justice and exceeded the Commissioner's authority. The appeal was argued in September 1988, and in November 1988, the SJC affirmed the Commissioner's remand decision.

1989 Auto Insurance Rates

The Insurance Division's efforts during the summer and fall on behalf of consumers regarding 1989 auto insurance rates have saved consumers approximately \$550 million in premiums.

1.) Cost Containment

The extent of insurer compliance with the mandate of Chapter 622 (the cost containment law) was a major focus of the 1989 rate hearings. The Insurance Division presented evidence that Massachusetts insurers failed to control numerous aspects of the costs of auto damage repairs. The Commissioner's decision on 1989 rates blasted the industry position. Relying heavily on the arguments presented by the Attorney General and the testimony of his witnesses, the Commissioner awarded a body shop adjustment of -10 percent of physical damage losses and a fraudulent claim adjustment of -5 percent of bodily injury losses and -1 percent of comprehensive losses. These adjustments represent premium savings to consumers of approximately \$145 million.

2.) Estimation of Losses

The loss projection issue in the 1989 hearing concerned the choice of methodology for trending losses. The insurance industry proposed a new trending methodology which it claimed was "inherently unbiased" but which happened to

produce considerably higher trends than the methodology used by past commissioners. The Attorney General opposed the industry's position and recommended that the Commissioner preserve the existing methodology with some refinements. The Commissioner's decision rejected virtually all of the industry's trending proposals. The savings to consumers on these trending issues are \$170 million.

3.) Profit Allowance

The industry's rate filing would have produced an excessive profit allowance approximately 7.6 percent higher than recommended by the Attorney General. The industry eventually stipulated to a profit allowance using the methodology advocated by the Attorney General. The stipulation produced savings to consumers of about \$125 million.

4.) Safe Driver Insurance Plan

The Attorney General recommended significant increases in the SDIP credits and surcharges in order to reduce the subsidy of bad drivers by good drivers. The Commissioner agreed that the Attorney General's recommendations were actuarially reasonable and adopted most of the Attorney General's surcharge recommendations. The increased credit levels will lower rates for safe drivers by nearly \$50 million in 1989.

5.) Automobile Insurance Act of 1988

The coverage change enacted in Chapter 273 of the Acts of 1986 (the new tort threshold, new minimum deductibles for collision and comprehensive, and changes in uninsured and underinsured coverages) produced a rate savings for 1989 of approximately 7 percent or \$156 million, which all parties agreed to by stipulation.

1988 Medex Rate Hearing

Blue Cross/Blue Shield originally requested a composite increase of 19 percent in its rates for Medex, its Medicare supplementary insurance product. The Insurance Division was able to successfully negotiate a composite increase of only 6.7 percent for Medex subscribers for 1989. This rate reflected the savings from the Medicare Catastrophic Care law. The total savings to Medex consumers from the division's advocacy were \$18 million.

Blue Cross/Blue Shield 1989 Nongroup Request

Blue Cross/Blue Shield filed a request for a 49.4 percent composite rate increase. If allowed by the Commissioner, family premiums would have increased 56.9 percent or \$1,250 a year, and individual premiums would have increased 45.6 percent or \$424 a year, for a total increase in nongroup premiums of \$55 million. The division engaged in extensive discovery and, following commencement of the hearing before the Commissioner of Insurance, reached a settlement for a 38 percent increase in family rates and a 30 percent increase in individual rates, for a composite rate increase of 33 percent effective May 1, 1989.

Almost 24 percentage points of the composite 33 percent rate increase was attributable to legislatively mandated increased hospital and physical reimbursement, new insurance benefits, and a court decision requiring that married couples be permitted to purchase less expensive individual policies rather than family coverage.

The stipulation resulted in savings to consumers of \$19 million.

Automobile Insurance Competition Hearing

In testimony at the annual c. 175E "competition" hearing, the division recommended that the Insurance Commissioner institute a plan for the carefully phased-in introduction of competitive rating to automobile private passenger insurance market. The Attorney General recommended the implementation of "flex" rating bands within which insurers would be permitted to set their own rates for collision and comprehensive coverage, and called for establishing a centralized information exchange to enable consumers to obtain up-to-date information on the lowest available rates.

The Insurance Commissioner did not adopt the Attorney General's recommendation for 1990 auto rates due to the implementation of the many law changes mandated by the auto reform act of 1988. However, the competition decision announced a competition hearing commencing in January 1990 to consider seriously the implementation of competitive rating in 1991.

Safe Driver Insurance Plan

The Attorney General, in conjunction with the Massachusetts Automobile Rating Bureau and the State Rating Bureau, developed a major restructuring of the Safe Driver Insurance Plan (SDIP), the surcharge and credit system which modifies insureds' auto premiums based on individual driving records. The Attorney General has long recommended the adoption of a rate structure which bases rates more on driving experience and less on geography and driver class.

The new SDIP provides a larger credit for each additional year of safe driving. For 1990, the maximum credit of \$250 or more will be earned by drivers who have not been at fault in an accident or guilty of a moving violation in the past six years. In future years, the period for which good drivers will receive credits will be expanded. Drivers with poor driving records will pay higher premiums, commensurate with their higher risk.

B. AFFIRMATIVE LITIGATION

Mandated Benefits

City of Cambridge, et al. v. Attorney General

Blue Cross/Blue Shield and six municipalities filed a declaratory judgment action asserting that municipalities are exempted from compliance with Massachusetts mandated health insurance benefit laws pursuant to Article CXV of the Massachusetts Constitution (Proposition 2 1/2). We have filed an answer and counter claim seeking restitution for employees who have been denied mandated benefits and civil penalties.

Failure to Provide Extension of Health Insurance

The Insurance Division received numerous complaints from members of group health insurance plans concerning failure to extend continuation of coverage as mandated by law. Complaints included failure to provide coverage to divorced spouses and/or dependents of group members, laid-off members, and members whose plan has been terminated by the employer. After the division intervened, the group policy holders and the insurers extended retroactive coverage as required by state and federal law. Medical claims incurred during the period of alleged non-coverage were paid.

Failure to Provide Mandated Health Insurance Coverage

The Insurance Division intervened on behalf of student purchasers of health insurance from an insurer. Claims for mandated benefits and other covered

expenses had remained unpaid for almost one year. Pre-existing condition and coordination of benefits issues were resolved in favor of the students and approximately \$55,000 was recovered.

The Insurance Division also intervened on behalf of members of a professional association who had purchased health insurance policies which excluded certain mandates. After interventions of the Attorney General, the Master Policies were amended to reflect the inclusion of all mandated benefits retroactively to the original effective date of the policy or the mandate, whichever is later. As a result, the policy holders' incurred but unreported claims for mandated benefits during the period will be covered.

Employee Health Insurance

The Insurance Division receives numerous complaints concerning failure to pay claims under employee health benefits plans. The Insurance Division has intervened on behalf of employees where employers have failed to remit insurance to various insurers, after withholding premium contributions from employees paychecks; where employers, and the third party administrators retained by them, have failed to pay claims; and where plants have closed in Massachusetts. The Insurance Division has entered into settlements with insurers resulting in the recovery of \$2,952,975 in overdue premiums and unpaid medical bills. The Insurance Division also secured employees rights under federal COBRA and state insurance coverage conversion law.

Annuities

Commonwealth v. Paine Webber

Commonwealth v. Shearson/Amex

The Commonwealth's liability theory and theory of damages was presented to the judge in this case involving the sale of Baldwin single premium deferred annuities (SPDA's) by defendant stockbrokers. The Attorney General argues that the defendants breached their duty as group policy holders, insurance agents and stockbrokers in failing to inform SPDA holders of the impending financial collapse of Baldwin United. In addition, final computer records were obtained from Metropolitan Life Insurance Company on the Baldwin-United SPDA purchasers which were used for final revision of the LOTUS 1-2-3 damages spreadsheet which were also provided to the court and defendants.

Misrepresentation in the Sale of Annuities

The division resolved two cases in a series where the consumers were sold annuities into which their entire life savings were placed. The consumers had been promised a monthly benefit after a certain date but instead continued to receive premium bills. In each case the policies were cancelled as of the date of issue and refunds totaling \$68,000 were received.

C. REGULATORY HEARINGS

Exclusive Care

The Commissioner of Insurance held a hearing on a proposed agreement between Blue Cross of Massachusetts, Inc. and Medical West Community Health Plan, Inc., under the terms of which Blue Cross subscribers in the Medical East region of Medical West Community Health Plan, Inc., would receive all medical services from or at the direction of an exclusive provider, in

this case Medical West Community Health Plan, Inc. Medical West declared that under the terms of the agreement it would not be operating as an HMO.

The division presented testimony that Medical West was operating as an HMO under the proposed agreement and was therefore subject to all of the requirements of the HMO laws. We also gave extensive evidence of the discriminatory pricing effects of the agreement and testified to the agreement's anti-consumer effect. Adopting the division's position, the Commissioner of Insurance rejected the proposal.

Long Term Care Regulations

Medicare does not provide coverage for most of the long term care needs of the elderly. Thus, many insurance companies have stepped into the breach and have been selling products of varying, and sometime dubious, quality that are supposed to cover nursing home stays and home care. The division participated in a hearing that was held at the division of Insurance on proposed Long Term Care Insurance Regulations. These regulations were proposed in order to guarantee that private long term care insurance products that are offered for sale in Massachusetts provide genuine benefits and do not contain unnecessarily restrictive provisions.

Preferred Provider Arrangements Regulations

In October, the Insurance Division presented testimony to the Insurance Commissioner on proposed regulations governing Preferred Provider Arrangements (PPA's). PPA's are arrangements in which an insurer or other entity contracts with preferred providers of medical services and offers incentives to insureds to use the services of the preferred providers.

At the hearing, the division urged the Commissioner to make the protection of group health insurance members a primary concern in licensing PPA's. The division recommended the addition of provisions in the regulations to assure access to affordable health care, and proposed express protections for insureds in the event of non-payment of the premiums by the employer or group policy holder or of insolvency of the PPA. The final regulation adopted many of the division's recommendations, including requirements that PPA's demonstrate financial resources to guarantee benefits.

Auto Insurance Reform Law Implementation Regulation Hearings

The Insurance Division presented testimony at rulemaking hearings implementing the auto reform law, Chapter 273 of the Acts of 1988. These regulations concerned direct payment to bodyshops, air bag and passive restraint discounts, and pre-inspection of vehicles to deter fraudulent claims on "paper" cars.

As a result of the recommendations in our testimony, the Commissioner's final regulations on direct payment plans included additional consumer protections. In addition, the availability of passive restraint discounts was significantly expanded to apply to automatic seatbelts, and the proposed exceptions to the pre-inspection regulations were tightened to eliminate potential loopholes and thereby be a more effective deterrent to fraudulent behavior.

Minimum Standards of Disclosure for Health Insurance Contracts

The division presented testimony before the Insurance Commissioner in support of an amendment of 211 CMR 42.00 which will eliminate a confusing provision in health insurance policies and prohibit insurers from denying claims under pre-existing condition.

Pregnancy Disability Hearing

The Division of Insurance presented testimony at a hearing held by the Commissioner of Insurance to determine whether the August 10, 1988 Interpretive Bulletin which requires disability insurers to cover normal pregnancies as well as complications of pregnancy should be modified. The division filed testimony which argued that failure to cover normal pregnancy would be contrary to the Non-Discrimination-in-Insurance Regulation and inconsistent with the public policy of the Commonwealth expressed in the Equal Rights Amendment. The division also argued that the costs of providing disability coverage would not be burdensome since most disability policies have waiting periods (the period of disability before benefits can be received is typically 60 or 90 days) which are longer than most normal pregnancy disabilities.

AIDS Testing Regulations

The Insurance Division staff worked with the Attorney General's AIDS Task Force and the Executive Bureau to analyze proposed regulations issued by the Insurance Commissioner regulating the procedures and disclosure requirements associated with insurer HIV testing of consumers. Testimony was presented which supported the Insurance Commissioner's proposed regulations while offering detailed and specific constructive suggestions to strengthen the provisions regarding informed consent and to secure the confidentiality of test results.

Variable Life Insurance Regulations

The division presented testimony on regulations proposed by the Division of Insurance relating to the sale of variable life insurance products in the Commonwealth. The division recommended that the proposed variable life insurance regulations, which would authorize the sale of "flexible premium variable life insurance" contain strict guidelines on (1) qualification of a company for a license to sell variable life insurance products; (2) extensive pre-purchase disclosure to consumers who purchase variable life products; (3) limitation of sales of "flexible premium variable life" only to those individuals who meet certain predetermined indices of suitability; and (4) the operation of so called "separate accounts" where variable life premiums will be invested on behalf of policy holders. The final regulations promulgated by the Commissioner of Insurance contained the consumer protections advocated by the Attorney General.

Automobile Insurance Residual Market Reform Hearings

The division presented testimony at two public hearings before the Insurance Commissioner regarding the proposed reform of Commonwealth Automobile Insurers (CAR), the residual market for auto insurance in Massachusetts. The Attorney General proposed that (1) the current "loss sharing" system be replaced by an assigned risk plan; (2) financial incentives, including revised commission rates, be established to encourage placement of "good risks" in the voluntary market; (3) the implicit class/territory subsidies imbedded in the current rate structure be reformed; (4) the Commissioner adopt objective cession criteria; and (5) the current inequities amount insurers in the allocation of the CAR deficit be abolished. The division opposed the industry sponsored request for introduction of a retrospective rating plan, or "rolling reconciliation," which would permit charging consumers with the cost of future CAR deficits.

In the Commissioner's final report to the legislature, he incorporated several of the recommendations supported by the division, and rejected the industry request for "rolling reconcilliation". In particular, the Commissioner relied on evidence the Attorney General had presented in past rate hearings as to the extent of the inefficiencies in the existing CAR structure, and conclude that the reforms he was adopting would save consumers \$150 million dollars or more in the future.

D. LEGISLATION

A record volume of insurance related legislation was filed this year. The division attorneys analyzed 138 bills. We submitted to the legislature testimony or letters on legislation concerning the insurance industry assessment which funds the Attorney General's insurance division, mass marketed insurance, privacy of medical information in the possession of insurance companies, mental health and alcoholism benefits, sex discriminatory insurance rates, the liability of employers who fail to remit employees' health insurance premiums to insurers, health insurance advocacy funding and contracting by HMO's with pharmacies.

E. CONSUMER COMPLAINTS

The resolutions of individual consumer complaints resulted in savings of approximately \$150,000.

PUBLIC PROTECTION BUREAU

The Public Protection Bureau consists of seven divisions: Complaints, Local Consumer Services, Consumer Protection, Civil Rights, Environmental Protection, Nuclear Safety, and Special Litigation. In May, 1989, the Chief of the Public Protection Bureau became part of the steering committee of the newly formed Environmental Crimes Strike Force. A larger definition of this new unit can be found in the introduction to the Criminal Bureau.

CONSUMER COMPLAINTS

During Fiscal Year 1989, the Consumer Complaint Division opened 4,097 new cases and closed 2,680 cases. As a result of our mediation efforts, we recovered \$328,472.03 in direct refunds and obtained settlements where consumers received goods or services valued at approximately \$212,174.00. The total savings for consumers was \$653,375.20.

In addition, our clerical staff referred 3,973 written complaints to other state agencies or departments, and local consumer programs. We also returned 1,187 complaints to consumers with letters of explanation.

The Attorney General's information line received approximately 109,002 calls during the past year. Of these, 9,613 complaint/inquiry forms were sent to citizens, 19,049 citizens were given information, and 80,340 consumers were referred to other federal, state or local agencies or departments.

In addition to the normal investigating and litigation-generating functions,

the Complaint Division assisted the Architectural Access Board in processing complaints generated by the handicapped community. These complaints involved sidewalks without curb cuts, parking lots without adequate handicapped parking spaces, inaccessible public telephones and buildings not accessible to the handicapped. Our volunteer mediators assisted the board in obtaining the information to complete these complaints and in making site visits to confirm the violation of law.

LOCAL CONSUMER SERVICES

The Local Consumer Services Unit of the Public Protection Bureau is responsible for the administration of the Local Consumer Aid Fund and awards grants to a network of local consumer and face-to-face mediation programs. These community agencies assist citizens throughout Massachusetts in the resolution of consumer problems. The local programs work in cooperation with the Department of the Attorney General in this capacity and also function as a resource to identify repeat offenders of consumer law.

Monies for the operation of these programs are allocated by the General Court to the Local Consumer Aid Fund (G.L. c. 12, §11G).

§11G. Local Consumer Aid Fund: Eligibility for assistance

There shall be established within the department of the attorney general a local consumer aid fund, which may receive and expend monies as may be appropriated to said fund by the general court, as well as additional monies which may be made available from sources other than the General Fund. The purpose of said fund shall be to provide financial assistance to eligible, local or regional agencies which deal with the resolution of consumer problems. The Attorney General shall determine the standards for eligibility in order for such agencies to receive financial assistance. No more than ten per cent of said fund may be expended for administrative purposes.

Added by St. 1977, c. 363A, §51.

In Fiscal Year 1989 a total of \$777,000 was used for grants to 27 local consumer and seven face-to-face mediation programs. During Fiscal Year 1989 \$732,595 was appropriated by the legislature to the Local Consumer Aid Fund. Ten percent, \$73,260, was retained for administrative purposes. An additional \$117,665, earmarked for the LCAF in the settlement of consumer related cases, was used to supplement the legislature's allocation.

FY '89 LCAF	\$732,595
less 10%	<u>73,260</u>
FY'89 available for grants	659,335
+	
\$ from CPD case settlement	<u>117,665</u>
Total FY '90-grant allocation	\$777,000

Local Consumer Programs

In Fiscal Year 1989 there were 27 Local Consumer Programs working in cooperation with the Attorney General's office (see list below). These local programs, usually found in community action programs or city halls handled over 15,395 consumer complaints in Fiscal Year 1989. Through an informal process of telephone mediation the community agencies were able to save consumers about \$4.7 million. Complaints typically involved automobile repairs and sales, home improvement transactions, landlord/tenant disputes and timeshare issues. In addition to their mediation service, the programs also serve as a valuable source for general consumer information and advice.

A breakdown by program of the grant amount, the total number of complaints and amount of savings for consumers is as follows:

	<u>GRANT AWARD</u>	<u>CASE LOAD</u>	<u>SAVINGS</u>
<u>LCP</u>			
Agawam Agawam Consumer Advisory Commission	\$ 5,200	101	\$ 37,470
Arlington Office of Consumer Affairs	\$18,144	268	\$ 43,970
Berkshire Berkshire County Consumer Advocates	\$30,922	357	\$218,861
Boston Mayor's Office of Consumer Affairs & Licensing	\$31,200	1,213	\$491,926
Brockton Brockton Consumer Advisory Commission Advisory Commission	\$23,816	715	\$205,301
Cambridge Cambridge Consumers' Council	\$20,280	705	\$189,297
Cape Cod Consumer Assistance Council, Inc.	\$24,960	940	\$115,015
Fall River Consumer Service Office	\$17,160	506	\$101,828

Hampshire/Franklin Hampshire/Franklin Consumer Protection Office	\$20,800	969	\$392,942
Haverhill Consumer Protection Program	\$21,840	389	\$ 92,744
Lawrence Greater Lawrence Community Action, Inc.	\$20,800	440	\$405,357
Lowell Community Teamwork, Inc. Consumer Protection Program	\$20,280	646	\$ 72,993
Lynn Lynn Economic Opportunity, Inc.	\$19,240	245	\$170,481
MassPIRG/New Bedford Consumer Action Center	\$20,800	432	\$ 97,510
MassPIRG/N.Weymouth Consumer Protection Program	\$26,000	241	\$ 11,983
MassPIRG/Taunton Consumer Action Center	\$20,800	618	\$ 99,169
Medford Medford Consumer Advisory Commission	\$27,456	669	\$352,648
Newton Newton-Brookline Office of Consumer Affairs	\$22,360	306	\$ 54,992
Norfolk Norfolk County District Attorney's Office Consumer Protection Division	\$20,800	390	n/a
North Shore North Shore Community Action Program, Inc.	\$24,336	610	\$ 52,122

Revere Office of Consumer Affairs	\$27,352	1,167	\$278,247
Somerville Somerville Multi Service Center	\$20,072	376	\$105,118
South Middlesex Consumer Protection Office	\$32,165	884	\$ 88,799
South Shore South Shore Community Action Council	\$22,880	749	\$144,465
Springfield Consumer Action Center	\$32,240	517	\$324,911
Worcester Worcester Community Action Council, Inc.	<u>\$47,840</u>	<u>942</u>	<u>\$586,073</u>
TOTALS	\$619,743	15,395	\$4,734,222

Face-to-Face Mediation Program

In Fiscal Year 1989 there were seven full-time Face-to-Face Mediation programs, each operating with one paid staff person and 25-30 trained community volunteer mediators. Mediations involved landlord/tenant or consumer disputes. Referrals came from local consumer programs, small claims courts, landlord or tenant advocacy programs or other community agencies.

In Fiscal Year 1989 the Department of the Attorney General trained 71 new citizen volunteers to provide mediation services through the Face-to-Face Mediation programs. In that year a total of 825 face-to-face mediation sessions were held; 85 percent resulted in written agreements and 96 percent of the agreements reached were upheld. In addition to settlements through face-to-face mediation, 232 cases were resolved over the telephone by face-to-face staff.

FY'89

The breakdown is as follows:

	FTF Mediation <u>Sessions</u>	Agreements <u>Reached</u>	Agreements not <u>Upheld</u>	Telephone <u>Settlements</u>
Boston	88	75	1	125
Haverhill	112	77	1	5
Lowell	109	90	0	24
Somerville	122	111	2	22
Worcester	99	76	0	24
Cape	220	202	1	11
Brockton**	<u>-75</u>	<u>56</u>	<u>6</u>	<u>21</u>
TOTALS	825	687	11	232

CONSUMER PROTECTION

The Consumer Protection Division brings enforcement actions against individuals and companies which use unfair and deceptive practices in their business operations resulting in injury to consumers. Concentrating on cases in which consumers cannot reasonably obtain relief through their own efforts, the division's caseload consists primarily of large-scale class actions brought on behalf of consumers affected in similar ways by the illegal activities of these businesses.

The division has an aggressive litigation program in several subject areas, including housing, advertising, financial services, nursing homes, automobiles, and retail sales practices. Court decisions are obtained which establish important precedents in the consumer protection area, as new legal theories are developed and advanced by the division. At the same time, the division maximizes the effect of its work with a number of special enforcement and education programs.

The Consumer Protection Division designs its work to achieve the maximum amount of effect with its enforcement resources. The division aggressively pursues its broad program of enforcement litigation, with special emphasis on cases with the following attributes:

(a) the affected consumers are elderly, low income, disabled, or persons who experience cultural and language barriers, i.e., persons who are most vulnerable to unfair and deceptive practices and who find it difficult if not impossible to obtain redress on their own;

(b) the defendant's alleged unlawful practice causes significant harm to essential interests such as health, safety, and housing; and

(c) a large number of consumers are affected by the practice, or else the case will have a major impact on the industry as a whole.

Responsiveness to case handling needs identified by the Complaint Division, the Investigation Division, and the Local Consumer Programs has been emphasized.

The major substantive areas of concentration include:

A. HOUSING

1.) *Poor or Unsanitary Housing Conditions Cases*

Commonwealth v. Joseph Eldridge

The Consumer Protection Division obtained an order from the Boston Housing Court placing approximately 20 apartments owned by South Boston landlord Joseph Eldridge into receivership in order to ensure that numerous state sanitary code violations would be corrected. The receiver was responsible for making sure that Eldridge paid for repairs to fallen ceilings, broken windows, faulty wiring and inadequate heating systems. In addition, the division obtained an injunction against Eldridge requiring him to maintain all of his other residential properties in compliance with the Sanitary Code.

Commonwealth v. Universal Property Associates., Inc.

In another poor housing conditions case, Attorney General Shannon entered into a consent judgment with Universal Property Associates, Inc. (UPA) of Lowell which required the company to repair and maintain its 150 apartments in accordance with the state sanitary code and to pay a civil penalty of \$5,000. UPA rented its apartments which contained serious violations of the sanitary code.

2.) *Lead Paint-Related Litigation*

The Attorney General, through his Consumer Protection and Civil Rights Divisions has begun legal action against three North Shore realtors for discriminating against prospective tenants with children on the basis of the actual or believed presence of lead paint in rental units. Under the Massachusetts Lead Paint Law, landlords are required to delead their properties if they are inhabited by children under age six. Landlords and realtors are believed to engage in widespread discrimination against families with children to avoid the effect of this law.

3.) *Land Sales*

Commonwealth, et al. v. Patten Corporation

Attorney General Shannon and Attorneys General from Maine, New Hampshire, Vermont and New York obtained consent judgments against Patten Corporation, a Fortune 500 land sales company which buys large tracts of land, subdivides the property and then quickly sells the small parcels to urban consumers. The states alleged that Patten misrepresented or failed to disclose material facts to numerous consumers concerning accessibility to their land, land-use restrictions, the availability of utilities, and the ability of the land to support legal sewage disposal systems. Patten agreed to injunctive relief prohibiting it from using bait and switch advertising, high pressure sales techniques, and misrepresenting facts about the land it sells. Patten was also required to establish a consumer complaint resolution system. The company paid \$100,000 in costs to each of the states

4.) *Time-Share Cases*

Commonwealth v. Ocean Club on Smuggler's Beach

The division obtained a consent judgment against the Ocean Club on

Smuggler's Beach, a time-share development in Yarmouth. The judgment prohibits the development from mailing to consumers solicitations in envelopes with a return address purporting to be the "Barnstable County Sheriff's Office, Drug Abuse Information Bureau, County Police Service Center." The judgment also prohibits the time-share company from making any false or misleading representations and required it to pay a \$2,500 civil penalty.

5.) *Home Improvement Contractor Cases*

Commonwealth v. Girouard

Attorney General Shannon obtained a preliminary injunction against two Fitchburg home improvement contractors who accepted substantial deposits for work and then failed to provide the promised services. The injunction prohibited them from failing to perform work under their contracts, from performing services without proper licenses, and required them to return deposits if work is not commenced within five business days of the date scheduled.

Commonwealth v. East Coast Exteriors Inc., et al.

The Attorney General obtained a judgment against East Coast Exteriors, Inc., Massachusetts Window Systems and their owner prohibiting them from failing to honor contractual obligations to install replacement storm windows or to refund consumer deposits. The owner, Edmund J. Byrne, is also prohibited from engaging in the home improvement business until he has paid \$50,000 in restitution to consumers. The judgment imposes a \$50,000 penalty against the defendants.

6.) *HUD Housing Cooperatives*

The Attorney General received complaints regarding the practices of certain HUD-owned or insured housing cooperatives in assessing a fee against tenants who pay their carrying charges after the 11th of the month and charging "transfer" and "painting" fees to tenants who move within the complex or leave it entirely. Such charges are illegal under the Attorney General's landlord-tenant regulations. Sixteen HUD cooperatives in Massachusetts were notified of the restrictions on such practices and, where necessary, have eliminated the charges.

7.) *Water Heater Enforcement Project*

The Consumer Protection Division conducted an investigation to determine whether some landlords were requiring their tenants to rent water heaters from utility companies, in violation of the sanitary code which requires landlords to provide their tenants with water heaters. More than 80 landlords signed agreements to transfer the rental accounts to their own names or buy the water heaters their tenants use.

B. HEALTH CARE

1.) *Nursing Homes*

Attorney General, et al. v. H.E.A. of Massachusetts Inc., d/b/a Jamaica Towers Nursing Home; and Attorney General, et al. v. H.E.A. of Massachusetts, Inc. d/b/a Anlaw Nursing Home

Attorney General Shannon obtained consent judgments against H.E.A. of Massachusetts, Inc., an out-of-state nursing home operator of seven nursing homes in Massachusetts, which requires the company to cease its operations of two of its homes, Jamaica Towers and Anlaw. The Consumer Protection Division had found gross patient neglect and deplorable patient care at these

facilities. In addition, the judgments require H.E.A. to transfer its licenses and interests in all seven homes, to refrain from conducting day long-term patient care in Massachusetts until 1999, and to pay \$146,000 to the Commonwealth as civil penalties and costs.

Shannon v. Associated Group Homes, Inc., et al.

The Attorney General obtained appointment of a patient receiver to assume the operation and management of three intermediate care facilities for the mentally retarded which are owned by Associated Group Homes, Inc. of Danvers. Receivership was necessary because the company was facing insolvency and had begun neglecting patients.

Attorney General, et al. v. Warren LaBorde and Shirley LaBorde d/b/a Evergreen Place Rest Home

Attorney General Shannon obtained an emergency appointment of a patient-protector receiver for the Evergreen Place Rest Home after learning that the owner/operator of the home had sexually abused a number of the facility's elderly or mentally retarded residents. The receivership divested the LaBordes of control of the home and enjoined them from communicating with the home's patients.

Shannon v. Kristen Beth Nursing Home, Inc.

As a result of the Attorney General's intervention, the Bankruptcy Court dismissed Nursing Home bankruptcy proceedings. State court receivers were then appointed to operate these long term care facilities and provide care for its patients.

2.) *Deceptive Advertising of Health Claims*

In The Matter of Campbell Soup Company

The Attorney General, along with the Attorneys General from eight other states, obtained an assurance of discontinuance from Campbell Soup Company prohibiting it from publishing or airing misleading advertisements concerning the health benefits of its soups. The states alleged that Campbell made false claims that some of its soups were high in fiber and good sources of calcium; they also believed that Campbell generally exaggerated the health benefits of its soups. Campbell paid the states a total of \$315,000.

In the Matter of Nestle's Carnation Company

Massachusetts and eight other states also obtained an assurance of discontinuance from Nestle's Carnation Company to stop making unwarranted claims for its new infant formula, Good Start. Nestle's was promoting Good Start as a "hypoallergenic" formula that "effectively resolves symptoms in infants suffering from formula intolerance or milk allergy". In fact, any infant formula, including Good Start, can cause an allergic reaction. Nestle's agreed to pay \$90,000 to the states for their costs in conducting the case.

3.) *Deceptive Advertising of Health Products/Product Safety*

In the Matter of Golden Hearing Aid Center

In the Matter of American Aid Service Company

The Consumer Protection Division entered into two consent judgments against Golden Hearing Aid Center of Worcester and American Aid Service Company of Marlborough prohibiting each of them from misrepresenting themselves as audiologists and from falsifying audiological exam results. The companies had been falsifying exam results in order to induce elderly consumers to purchase unnecessary and overpriced hearing aids.

In the Matter of American Suzuki Motor Corp.

Attorney General Shannon and the Attorneys General of Minnesota, Texas, New York, California, Missouri and Washington entered into an agreement for voluntary compliance in which Suzuki agreed to change its advertising with respect to its multi-purpose passenger vehicle, the Suzuki Samurai. Suzuki marketed the Samurai, especially to the young inexperienced driver, to be interchangeable with a passenger car. The states alleged that Suzuki's advertisements were deceptive because the Samurai is not as safe as a passenger car due to its high propensity to roll over and its failure to meet some important federal safety standards for passenger cars.

Suzuki paid the states \$200,000 in costs and fees to resolve the case.

C. FINANCIAL SERVICES

1.) *Mortgage Brokers*

Commonwealth v. William Wolff

The Consumer protection Division obtained a civil judgment against William Wolff who acted unfairly and deceptively while posing as a mortgage broker. The civil judgment followed Wolff's criminal conviction obtained by the Attorney General's Criminal Bureau on 39 counts of larceny for fraudulently inducing consumers to pay fees for nonexistent financing and apartments. Under the criminal conviction and the civil judgment, Wolff paid \$26,000 in restitution to 49 defrauded consumers.

2.) *Credit Cards*

Citibank v. Iowa

Massachusetts filed a brief *amicus curiae* in *Citibank v. Iowa*, which raises important federal preemption issues. Massachusetts' amicus brief argued that the National Bank Act does not allow out-of-state credit card issuers, such as Citibank, to ignore the consumer protection laws of the states in which they do business.

Commonwealth v. SMI Partnership of Worcester, d/b/a Worcester Centrum

Attorney General Shannon obtained a consent judgment against SMI Partnership, doing business as the Worcester Centrum, for illegally adding a surcharge to credit card transactions. The judgment calls for the Centrum to give 900 free tickets to various Centrum events to inner-city youth, senior citizens, and children with disabilities or chronic illness.

D. AUTOMOBILES

1.) *Commonwealth v. Wilmington Ford et al.*

The Consumer Protection Division sued Wilmington Ford and its principals for systematically violating a 1986 consent judgment. Through the use of testers and consumer complainants, CPD determined that Wilmington violated the judgment provisions relating to:

(a) *advertising* by advertising cars which were not available, failing to disclose material conditions (e.g. instant delivery) imposed upon the sales, and engaging in bait and switch;

(b) *sales practices* by using high pressure sales tactics (not giving consumers enough time to review documents before signing, insisting on instant delivery,

and failing to disclose or abide by the consumers' right to cancel within 24 hours);

(c)*financing practices* by "pre-screening" potential customers (by obtaining their credit reports before a sale had been made) and by poor disclosure of credit/finance terms; and

(d)*repair practices* by failing to repair cars within a reasonable number of attempts.

The division is seeking more than \$1,000,000 in penalties and the closing of Wilmington for 30 days.

2.) *Commonwealth v. Wellesley Toyota Co. et al.*

After nearly five years of litigation, this auto option-packing case came to a conclusion with the entry of a permanent injunction and payment of \$36,700 in restitution. The restitution figure adds to nearly \$2,200 paid by the defendants following the trial of the first phase of the case in February, 1988. One significant feature of the decision is the court's clear shifting of the burden of proof in future complaints to the dealer to show that customers were given the chance to buy cars without unwanted options.

3.) *Commonwealth v. Fall River Motor Sales, Inc.*

The Attorney General filed suit against Fall River Motor Sales, Inc., d/b/a Lynngate Motor Sales for violating a 1985 consent judgment prohibiting violations of the Attorney General's invoice price regulation. The Court entered summary judgment for the Commonwealth in the amount of \$20,000, and ordered the defendant to pay the Commonwealth's costs and attorneys' fees incurred in prosecuting the action. The case is currently on appeal.

4.) *Abrams v. The Hertz Corporation*

A final judgment was entered in the New York State Supreme Court between the attorneys general of Massachusetts, New York, Iowa, Missouri and Texas, and the Hertz Corporation. The action arose after the United States Attorney in Brooklyn indicted Hertz for systemically defrauding auto renters and their third party insurers over a 10-year period in connection with the repair of vehicles damaged while rented. Under the judgment, consumers and insurers will receive restitution for damages sustained. The Commonwealth received \$15,000 for costs of investigation and litigation of this matter.

5.) *Commonwealth v. Rick Starr Pontiac - Cadillac, Inc.*

A consent judgment was entered enjoining the auto dealer from failing to affix all legally required window stickers including the Manufacturer's Suggested Retail Price sticker, the Massachusetts New Car Lemon Law stickers for new cars, and the Federal Trade Commission's Used Car Buyers Guide.

6.) *National Car Rental System, Inc. - Assurance of Discontinuance*

The Attorney General obtained an Assurance of Discontinuance against National Car Rental System, Inc., doing business as National Car Sales, requiring it to fully disclose that the vehicles it sells are former rental vehicles and used cars.

E. RETAIL ADVERTISING SALES AND SERVICES

1.) *Retail Advertising Monitoring Project*

The Consumer Protection Division has continued its enforcement of unfair and deceptive advertising practices by monitoring retailers' compliance with the

Attorney General's retail advertising regulations. The division has obtained approximately 1,000 Assurances of Discontinuance and letter agreements over the past few years, for violations relating to the retailers' use of manufacturer's suggested retail price comparisons, range of price comparisons, and wholesale price comparisons and other violations. In addition, the division notified businesses that run jewelry advertisements in Massachusetts of its enforcement guidelines with respect to price comparison jewelry advertising. As a result many questionable price comparison claims for diamonds and other precious gems were eliminated in time for the holiday shopping season.

2.) *Commonwealth v. IFR Furniture Rentals of Massachusetts*

The Suffolk Superior Court entered a consent judgment ordering the defendant, a large furniture rental company, to comply with advertising requirements of the federal Consumer Leasing Act, to reduce by 40 percent its fees for "insurance waivers," and to implement a more reasonable policy regarding loss of security deposits for early termination of furniture leases.

3.) *Commonwealth v. Furniture Outlet Inc., et al.*

The Attorney General obtained a consent judgment against Furniture Outlet, Inc. and its president which requires them to pay over \$9,000 to consumers for restitution of unrefunded deposits.

The Attorney General's complaint alleged that Furniture Outlet ran numerous one-day furniture sales at various hotels, motels and civic halls throughout New England, but frequently failed to deliver the merchandise, delivered improper or defective merchandise. The complaint further alleged the opening of another furniture business in Massachusetts without (1) disclosing the exact nature of the company's pick-up and delivery, refund, return, repair, cancellation and complaint resolution policies, (2) delivering goods that conform to the samples from which the sale was consummated, and (3) repairing or replacing damaged furniture.

4.) *Commonwealth of Mass. v. Holiday Health Spas*

The Attorney General obtained a consent judgment barring Holiday Health Spas from misrepresenting the opening dates of its health clubs to consumers and from engaging in deceptive pricing and unfair debt collection practices. The judgment also required Holiday to offer consumers various options for restitution. 216 consumers chose to cancel their memberships, resulting in cash payments of \$160,000 and cancellation of \$21,000 in future payments, for a total restitution of \$181,000. An additional 7,495 consumers received six-month extensions of their memberships, with 974 of those consumers also receiving \$10,000 in cash and \$15,000 in credits. Holiday also paid the Commonwealth \$20,000 for the costs of investigation and prosecution of this matter.

5.) *State of Alaska et al. v. U.S. Department of Transportation*

Massachusetts and 26 other states filed suit against the U.S. Department of Transportation (DOT) in the U.S. Court of Appeals, D.C. Circuit. The suit alleges that DOT impermissibly amended an existing regulation so as to permit airlines to advertise airfares without including substantial mandatory taxes, fees and surcharges in the advertised fare. The suit argues that the existing regulation, which requires the additional charge to be included in the advertised fare, is effectively gutted by this amendment allowing the unbundling of the charges. It also argues that the amendment was adopted in violation of the Administrative Procedure Act because no opportunity for notice or comment was afforded the public.

6.) *Commonwealth v. American Business Institute, Inc. et al.* The Attorney General filed a final judgment against this vocational (business) school which had engaged in a series of unfair and deceptive practices, including admitting unqualified students, misrepresenting course offerings, failing to provide teachers for classes, and failing to handle financial aid appropriately (including failing to turn over to students balances due them under their loans). The judgment, which embodies the elements of a stipulation reached earlier in the case, was negotiated after Suffolk Superior Court Judge Murphy referred the case to mediation.

7.) *In Re: Peter Pan Lines*

The Department of Public Utilities and the Consumer Protection Division obtained from Peter Pan Bus lines an agreement whereby the company would rollback its rates totalling \$42,000 in savings. Peter Pan agreed to the fare rollback after this office alleged that the bus line increased its various tariffs without the necessary DPU or Interstate Commerce Commission (ICC) approval.

8.) *In Re: Original Gunit Aquatech Pools*

The Attorney General obtained an Assurance of Discontinuance against Original Gunit Aquatech Pools of Chelmsford ("Aquatech"). The Assurance requires Aquatech to provide detailed disclosures of hourly excavation and backfilling costs not covered by the standard contract and to honor contract and warranty work in a timely manner.

F. CHAPTER 93A AMENDMENT RE: CIVIL INVESTIGATIVE DEMAND

The Massachusetts Legislature passed a bill sponsored by Attorney General Shannon which strengthens and clarifies the Attorney General's powers under the Civil Investigative Demand (CID) provisions of Chapter 93A, the Consumer Protection Act. Targets of CIDs will no longer be permitted to refuse to produce information on grounds that the information constitutes a trade secret. CID targets may only avail themselves of the Rules of Civil Procedure regarding protective orders for any information which they wish to decline to produce. In addition, the amendment clarifies the Attorney General's right to use material obtained through a CID in court pleadings or papers.

CIVIL RIGHTS

The primary focus of the Civil Rights Division in the 1989 fiscal year was enforcement of the Massachusetts Civil Rights Act (MCRA) through injunctions obtained in superior court against acts of racial, religious, ethnic, or homophobic harassment, violence or intimidation. Division attorneys obtained 14 injunctions against 26 individuals, in the municipalities of Boston, Worcester, Somerville, and Quincy, and secured one guilty verdict in a case of criminal contempt of an MCRA order.

The division was also active in discrimination cases involving housing, employment, education, voting, public accommodations and police misconduct. Moreover, division attorneys conducted training sessions, spoke on civil rights at public events, and testified in favor of civil rights legislation.

MAJOR CASE AREAS

1. *Racial, Religious, Ethnic, or Homophobic Harassment, Violence, or Intimidation*

Working in many instances in cooperation with local police departments, division attorneys handled the following matters in fiscal 1989:

Commonwealth v. Wahlberg: A guilty plea was secured from the defendant in a criminal contempt action (anti-Vietnamese violence). The defendant was sentenced to 90 days in Deer Island House of Correction.

Commonwealth v. Walker: A preliminary injunction was obtained in Middlesex Superior Court against a white Somerville man who attacked a black Somerville man outside the Sullivan Square MBTA station. The injunction prohibits Walker from going near the victim or his home and from engaging in any further harassment of Massachusetts residents on the basis of race, color or national origin.

Commonwealth v. Locklear: An MCRA injunction was obtained against a Sudbury woman prohibiting further racial harassment.

Commonwealth v. Jeanetti: Working with the Boston Police Department's Community Disorders Unit, a preliminary injunction was obtained against a Hyde Park man who carried out a continuing campaign of harassment against an Hispanic family in a Boston Housing Authority development. The injunction keeps the defendant away from the victims. The BHA has taken action to evict the defendant.

Commonwealth v. Faretra: A preliminary injunction was obtained against two East Boston men who had chased and beaten an Hispanic man as he and his companions were heading home on the morning of October 2, 1988. The injunction prohibits the two defendants from having contact with the victim and from harassing other people based upon their ethnic background.

Commonwealth v. Desautel: We obtained a preliminary injunction in February 1989 against a Boston man who claims to be a member of the neo-Nazi "skinhead movement." The man attacked and brutally kicked a black Boston resident who was walking in the area near Kenmore Square.

Commonwealth v. Perkins: A temporary restraining order was obtained on March 16, 1989 against a man engaged in a racially motivated assault against two black women who recently moved into the previously all-white Mary Ellen McCormick development in South Boston. The Court issued a preliminary injunction against further harassment or intimidation on May 20, 1989.

Commonwealth v. White: A preliminary injunction was obtained against two black men who engaged in a racially motivated assault against a white resident of the South End.

Commonwealth v. Murphy: On June 27, 1989, a preliminary injunction was obtained against a white male prohibiting further racial harassment of minority tenants at Old Colony Development, South Boston.

Commonwealth v. Hernandez: On June 20, 1989, we obtained a preliminary injunction against one adult and three juveniles who had assaulted a gay man in the Fens.

The court enjoined the four young men from intimidating or threatening the victim or any other person based upon their sexual orientation.

Commonwealth v. Benato, Furtado, and Gallant: On June 29, 1989, we obtained a preliminary injunction against two juveniles and one adult who threatened and harassed a Somerville woman because of her race and national origin. On one particular occasion the defendants were part of a group, members of which sat and stood on the victim's car, stuck numerous wads of gum all over the vehicle, called the victim a "nigger" and threatened to beat her. The victim subsequently moved from her residence but the injunction protects her at her new home as well as protecting all residents of the Commonwealth from similar acts by these defendants.

Commonwealth v. Foley: In January 1989 we proceeded to trial in the criminal contempt prosecution of a former police officer who was charged with violating the terms of a preliminary injunction. The jury found the defendant not guilty.

Commonwealth v. Just: A permanent injunction was obtained against a Somerville woman accused of shouting anti-Semitic epithets and throwing objects at another tenant residing at the Somerville Housing Development. A permanent injunction was issued on April 11, 1989.

Commonwealth v. Forrest: We obtained a preliminary injunction in Norfolk Superior Court against an MBTA employee who had shouted racial epithets and assaulted a Chinese youth at the Braintree MBTA station. The injunction, dated April 21, 1989, prohibits the defendant from further harassment or intimidation of the young man and his family.

Commonwealth v. Difonzo, Marconowski and Salvato: In February 1989 we obtained a preliminary injunction against three Somerville men who participated in the racially motivated harassment and beating of members of a Haitian family in a Somerville park. The injunction prohibits the defendants from knowingly approaching within 100 feet of the victims of their home.

Commonwealth v. Neal: Working with the Worcester Police Department, we obtained a preliminary injunction on July 5, 1988 against two men charged with threatening an Asian couple and destroying their property.

Northeastern University Police Civil Rights Enforcement Training: We taught a section on the use of the civil injunctive relief provisions of the Massachusetts Civil Rights Act at Northeastern's three-day course on civil rights enforcement. The course was attended by senior police officers from numerous Massachusetts police departments and will be offered on a regular basis by Northeastern.

2. *Discrimination in Housing*

Attorney General v. Harold Brown: Discovery is ongoing in this suit against a private landlord, Harold Brown, alleging that Brown's refusal to rent to recipients of federal housing subsidies ("section 8" certificates) violated G.L. c. 151B and also discriminated on the basis of race. The suit was originally filed in October 1983, and in 1987 the Supreme Judicial Court reversed a judgment in our favor and remanded for a determination of whether Brown's reasons for refusing to accept section 8 tenants were legitimate business reasons which may constitute a defense to liability.

Simard v. Residential Care Consortium: An action was brought in the Bristol County Superior Court by the neighbors of a Fall River residential and

educational facility for homeless families, challenging the Fall River Zoning Board's determination that the facility is exempt from zoning regulation because of its educational purpose and its operation by a non-profit educational corporation. We successfully moved to intervene on behalf of the Department of Public Welfare, which funds the facility and others like it throughout the Commonwealth. This was the first case considering the application of the education use exemption to a DPW-funded facility for homeless families. Following our intervention, the neighbors agreed to dismiss the case.

Attorney General v. Havoutunian: We entered into a consent judgment with a Watertown landlord and real estate agency we had sued for racial discrimination in rental housing. The case arose out of a testing program conducted by the Attorney General. Under the terms of the consent judgment, the landlord and agency agreed to conduct an affirmative advertising campaign to reach a goal of renting 30 percent of their units to minority tenants, and to comply with various record-keeping requirements.

Comments on New HUD Housing Regulations: The Attorney General filed comments on the proposed regulations implementing the Fair Housing Amendments Act of 1988, which went into effect in March of 1989. The Act provides new substantive protections against housing discrimination based upon handicap and familial status (families with young children). It also established an extensive administrative enforcement mechanism. Our comments critized HUD's attempt to water down a number of the Act's important provisions.

3.) *Discrimination in Education*

Lynn Public Schools: In January 1989, the Commissioner of Education informed the Attorney General that action might be necessary to protect the rights of minority students in Lynn to equal educational opportunity. In conjunction with the Department of Education we helped facilitate the adoption of an amended school assignment plan which better promotes racial balance in the Lynn Public Schools. We continue to monitor the situation in Lynn.

New Life Baptist Church v. Town of East Longmeadow: During Fiscal Year 1987 the Commonwealth participated in a 14-day federal trial as a defendant intervenor in this case brought by a church challenging the state educational certification process for private schools. After the district court ruled for the plaintiffs, the Commonwealth and the Town appealed, and the U.S. Court of Appeals for the First Circuit reversed on September 7, 1989.

Morgan v. O'Reilly: The division continued to participate in the remedial stages of the Boston school desegregation case and in particular the process by which the Boston School Committee may modify its student assignment plans.

4.) *Discrimination in Employment*

Doe v. Office of Job Corps: We filed suit in April 1989 against the U.S. Department of Labor, challenging the Job Corps' rule of mandatory HIV testing and its exclusion of HIV positive persons from its program. The Job Corps is a residential vocational education program for disadvantaged youths with campus-like centers throughout the United States. Jane Doe entered the Grafton, Massachusetts center and was required to submit to an HIV antibody test. Two weeks into the program she was informed that she had tested positive and within 25 minutes was sent home from the center. We allege that mandatory HIV testing and exclusion of HIV positive individuals discriminates against Job Corps students on the basis of disability and infringes upon their fourth and fifth amendment privacy rights. In addition, the rule, which alters the students'

substantive rights, was implemented without adherence to the notice and comment requirements of the Administrative Procedure Act.

5.) *Discrimination in Voting*

Commonwealth v. City of Everett: After extensive but unsuccessful efforts by the Secretary of State's elections division to secure compliance by Everett with state and federal law requiring that voting places be accessible to persons with disabilities, we filed suit in July 1988. On the day before our Motion for Summary Judgment was to be heard, Everett agreed to bring all of its polling places into compliance with the law. Assisted by the State Office of Handicapped Affairs and the Secretary of State's office, we monitored Everett's construction of ramps and relocation of voting places in compliance with the agreement. When no problems were reported on election day, the action was dismissed.

Similar inaccessibility problems in approximately 15 other cities and towns have been resolved short of litigation.

6.) *Discrimination in Public Accommodations*

Hull Town Meeting: In March 1989 we were contacted by the Office of Handicapped Affairs on behalf of the Hull Handicapped Commission concerning the inaccessibility to people with disabilities of town meetings in Hull. After an access survey of the present inaccessible town meeting location and the proposed accessible location, we informed the Town that the meeting should be moved as a reasonable accommodation of the needs of the Town's citizens with disabilities. The Town responded by agreeing to move this year's general town meeting and all future town meetings to an accessible location.

In re SERTA: The State Office of Handicapped Affairs asked us to evaluate whether we could prevent the purchase of inaccessible buses by the Southeast Regional Transit Authority. Supporting the efforts of the Executive Office of Transit and Construction, we were able to resolve the dispute when SERTA agreed to modify its bus purchase so that all the new buses were equipped with wheelchair lifts.

7.) *Police Misconduct*

Commonwealth v. Adams: In January 1989 we filed suit against 13 Boston police officers for either using excessive force or failing to intervene in the use of excessive force in connection with the arrest of a Boston man after an automobile chase. Our complaint alleges that the man was beaten to the ground by police officers, handcuffed, intermittently beaten over a 10-minute period as he lay on the ground, and beaten again outside the police station. Discovery in progress.

Commonwealth v. Bailey: On September 1, 1988 the division sued three Massachusetts Senate Court Officers who used excessive force, anti-gay and racial harassment, and other illegal procedures to police a political demonstration that took place at the Massachusetts Senate Gallery on January 4, 1988. The case was settled in the fall of 1989.

8.) *Privacy*

Bally v. Northeastern University: In the fall of 1988, the Division filed an *amicus curiae* brief in the Supreme Judicial Court in support of the Superior Court's decision that Northeastern's policy of mandatory drug testing of athletes violates the MCRA by interfering coercively with constitutional and statutory privacy rights.

Massachusetts Citizens for Life v. Department of Public Welfare: The

Division is representing the Department of Public Welfare in resisting a request for identifying information regarding physicians who receive Medicaid reimbursement for abortion services. We are arguing that this information is not public record and if released would lead to harassment and intimidation of physicians and resulting interference with the privacy rights of women seeking abortion services.

9.) *Testimony*

Division attorneys testified before the state legislature urging enactment of: House 3014, "An Act Further Regulating Damages in Housing Discrimination Cases"; House No. 4654, "An Act Relative to Equal Rights Under Law," the so-called "Runyon" bill; and Senate 1583/House 1990, "An Act Establishing the Transportation Access Board." The first two of these bills were enacted into law. The "Runyon" bill (now G.L. c. 90, §102) prohibits discrimination in private contract and real property transactions on the basis of race, sex, national origin, color or creed. It further provides for a "totality of the circumstances" standard of proof, a right to jury trial, punitive damages, and attorneys' fees.

10.) *Trainings, Meetings, and Speaking Engagements*

The division participated in many speaking engagements in Fiscal Year 1989, including: a class on civil rights consisting of Somerville and Cambridge elementary and secondary public school teachers; a series of regional conferences on the civil rights of persons with disabilities, sponsored by the State Office of Handicapped Affairs; a presentation before Zonta International in Springfield, a women's organization, entitled "Fundamental Freedoms"; and participation in the Greater Boston Civil Rights Coalition and the Governor's Civil Rights Task Force.

ENVIRONMENTAL PROTECTION

General Laws c.12, §11D establishes the Environmental Protection Division in the Department of the Attorney General. The division is litigation counsel on environmental issues for all of the agencies of the Commonwealth, principally those within the Executive Office of Environmental Affairs. In this role the division handles all of the Commonwealth's civil litigation to enforce environmental protection programs established by state laws and regulations. The division brings suits to enforce the Commonwealth's regulatory programs governing air pollution, water pollution, wetlands, hazardous waste, hazardous materials, solid waste, water supply, pesticides, waterways and billboards, and it defends administrative decisions made by state agencies that administer environmental programs. In addition, based on the Attorney General's broad authority to protect the environment of the Commonwealth, the division initiates and intervenes in state and federal litigation, and participates in administrative hearings before federal agencies, on issues of significance to the environment.

As a result of its role in environmental enforcement the division receives grant money from the United States Environmental Protection Agency.

During the year, the division recovered through litigation \$2,248,000 in penalties and other payments. In addition, many of the division's cases have resulted in court judgments requiring private parties to undertake cleanups, at

substantial cost, which the Commonwealth would otherwise have had to perform.

AIR POLLUTION

Commonwealth v. Environmental Protection Agency

On February 22, 1989, the Commonwealth filed suit against the United States Environmental Protection Agency (EPA) for failure to approve a state regulation requiring that gasoline sold in Massachusetts in the summer months be less volatile and therefore less polluting.

On June 19, 1989, the Commonwealth, along with New York, Connecticut, and New Hampshire, moved to intervene in a Petition for Review filed by Pennsylvania against the Environmental Protection Agency concerning EPA's promulgation of regulations concerning the volatility of gasoline. EPA's regulations, published in the Federal Register as final agency action on March 22, 1989, rejected a more stringent standard limiting the volatility of gasoline than the one it finally adopted.

Gasoline vapors are a major cause of violations of the national ambient air quality standards for the pollutant ozone. Violations are common throughout the Eastern and Midwestern states during the summer season. Air pollutants, particularly hydrocarbons and nitrogen oxide, and the resulting ozone concentrations are transported long distances from the points of emission. Many of the violations of ambient air quality standards are attributable to emissions of hydrocarbons in upwind states.

Massachusetts, New York, New Jersey, and some other Northeastern states have adopted the stricter gasoline volatility standards rejected by EPA. However, these states' regulations are ineffective against gasoline vapor emissions in upwind states subject to EPA's less stringent standard.

Commonwealth v. Globe Manufacturing Company

In March 1989, a settlement of an enforcement action was filed against Globe Manufacturing Company of Fall River. Globe had paid \$250,000 in July 1988 as a penalty for excess emissions of volatile organic compounds, a major contributor to ozone formation. The March settlement imposed emission limitations for certain chemicals, pending a full plan review by DEQE, which will result in a new permit, and long-term limitations.

Commonwealth v. Packaging Industries, Inc.

In September 1988, a judgment was filed requiring Packaging Industries, Inc., of Hyannis to phase out all use of chloro-fluorocarbons by the end of December 1989 and to pay a \$700,000 penalty under the state Clean Air Act. The company was charged in the complaint with emitting hundreds of tons of the chemicals that deplete the stratospheric ozone layer, without a permit from the Department of Environmental Protection.

Commonwealth v. Scott, et al.

This complaint alleges that the defendants failed to remove friable asbestos from pipes and other locations within an abandoned manufacturing complex in Turners Falls before demolishing a portion of it and failed to notify the Department of Environmental Protection (DEP) of the release of friable asbestos into the surrounding air at the site. The Commonwealth sought civil penalties as well as preliminary injunctive relief. On November 14, 1988, a consent order

was entered on the preliminary injunctive relief. The defendants have agreed to conduct an asbestos abatement project at the site and to remove all asbestos present.

HAZARDOUS WASTE

Commonwealth v. AVX Corporation, et al., (New Bedford Harbor)

The federal district court has issued several decisions in this complex litigation regarding cleaning up contamination of New Bedford Harbor with polychlorinated biphenyls ("PCB's"). The first of three opinions was issued on February 27, 1989 as to whether defendant Belleville Industries, Inc. has a right to a jury trial. The court ruled that the Commonwealth's and the United States' claim for natural resource damages are all triable to a jury as a right under the Seventh Amendment. The second opinion, issued on March 28, 1989, ruled that defendant Aerovox Corporation is liable as defendant Belleville Industries, Inc.'s corporate successor.

The third opinion, issued on April 27, 1989, approved a partial consent decree between the United States and the Commonwealth with defendant AVX Corporation regarding claims for natural resource damages in all respects but two: it required further evidence regarding the covenant not to sue contained in the decree, and it required inclusion in the decree of a provision allowing the plaintiffs to reopen the lawsuit.

Commonwealth v. Battaglia, et al.

On March 21, 1989, Judge Murphy sitting in Suffolk Superior Court issued an order finding the owner and operator of a small tank farm liable for environmental damage caused by leaking underground tanks at 84 Pleasant Street in Attleboro. The Attorney General brought the action in 1985 to close an inactive waste storage facility. The court ordered the defendants to submit a full site assessment by June 9.

Commonwealth v. Cannons Engineering Corporation, (Bridgewater and Plymouth)

On August 3, 1988, the Attorney General along with the Department of Justice filed a Consent Decree in which 42 parties agreed to implement the cleanup remedy at the two sites and to reimburse the Commonwealth for past costs incurred in cleaning up the sites. The value of the cleanup to the Commonwealth is approximately \$600,000. As a result of prior settlements the Commonwealth has already received a total of approximately \$725,000 from responsible parties. A complaint was also filed on August 3, 1988 against the 23 parties who did not settle.

Commonwealth v. Charles George Trucking Co., Inc.

On February 8, 1989, Federal District Court Judge Woodlock granted partial summary judgment to the Commonwealth and the United States, holding the Charles George Trucking Co., Inc., Charles George Sr., and Dorothy George liable for costs incurred by the governments for cleanup of the Charles George Superfund site in Tyngsboro. The court held these defendants liable under the federal Comprehensive Environmental Response, Compensation and Liability Act and the Massachusetts Oil and Hazardous Material Release Prevention and Response Act. The defendants owned or operated the Charles George landfill at the site. It is estimated that more than \$50 million will be spent to complete

required cleanup of the site.

Commonwealth v. Clean Industry, Inc.

On April 12, 1989, the Attorney General filed a consent judgment against Clean Industry, Inc., a hazardous waste transporter in East Boston. Under this judgment, Clean Industry must surrender its transporter license and is permanently enjoined from transporting hazardous waste within the Commonwealth. The judgment also requires the company to pay a penalty of \$27,250. The judgment settles a case in which the Commonwealth alleged repeated violations of the regulations governing the handling of hazardous waste.

Commonwealth v. Department of the Interior

The Commonwealth and nine other states, as well as the National Wildlife Federation, Public Citizen, and the Environmental Defense Fund, joined in this action, designated by the court as complex, challenging regulations promulgated by the Department of the Interior establishing procedures for the assessment of natural resources damages in hazardous waste cleanup cases. The petitioning states filed a Joint Opening Brief and a Joint Reply Brief on November 18, 1988. Briefing now has been completed and the case was argued on February 22, 1989.

Commonwealth v. Hood Industries, Inc.

In May 1989, Hood Industries paid a civil penalty of \$45,000 for violations of the Massachusetts Hazardous Waste Management Act and the Massachusetts Clean Air Act at its former plant in Wakefield. Hood failed to use air pollution devices to reduce emissions of CFC's and had improperly stored hazardous waste at the plant.

Commonwealth v. Karam, et al.

On April 13, 1989, the Attorney General filed a complaint against owners and operators of a Sunoco station in Weymouth seeking costs incurred by the Commonwealth to clean up gasoline released from underground tanks. The Department of Environmental Protection has already spent \$266,000 and expects to spend another \$250,000. The complaint alleges that a neighboring church has been closed since 1986 because of the high concentration of gasoline and gasoline vapors entering the basement through the groundwater. The complaint also seeks injunctive relief and civil penalties. This case was one of a number of actions taken by the office this year with respect to underground storage tanks. Environmental officials estimate that up to one third of the 75,000 to 100,000 underground tanks in Massachusetts are leaking.

Commonwealth v. Microfab

This case involves an application for administrative expense reimbursement in bankruptcy court for the Commonwealth's costs of cleaning up a hazardous waste site located in Amesbury. In addition to the application, a motion to compel the trustee to perform the cleanup was also filed. An evidentiary hearing was held in February 1989 on the motion to compel at which the Commonwealth presented expert testimony demonstrating that an imminent harm to the public health exists at the site.

Commonwealth v. Peabody International Corp.

On April 3, 1983, the Attorney General settled a case involving an abandoned hazardous waste storage facility in Stoneham. In a previous agreement reached in 1985, Peabody International Corp. and two other parties agreed to close this

facility and to pay a penalty of \$150,000. Since 1985, Peabody International Corp. spent over 1 1/2 million dollars closing the facility, including removing PCB-contaminated oils. In the April 3, 1989 settlement, the Department of Environmental Protection officially certified that the facility has been properly closed, and Peabody agreed to pay an additional \$30,000 penalty to settle the Department's claims that the closure was not timely.

Commonwealth v. ReSolve, Inc.

In this case, a consent judgment with 223 companies that sent hazardous waste to the ReSolve site has been filed in federal court jointly with the EPA. The companies will reimburse DEP for all of its past costs incurred to clean up the site -- \$475,900. In addition, the companies will implement the cleanup remedy for the site, which is expected to cost about \$19 million.

Commonwealth v. Stauffer Chemical, et al.

In January 1989, the Commonwealth, together with the EPA, filed in federal court a settlement with virtually all the parties responsible for the contamination at the Industriplex Superfund site in Woburn. Under the terms of the settlement, the responsible parties -- including Monsanto Co., Stauffer Chemical Co. and the Mark Phillip Trust -- agreed to pay for and perform all the work required to clean up the site. This work includes the placement of a cap over the contaminated soils at the site, the treatment of the plumes of benzene and toluene contamination found in the groundwater and a further groundwater study to determine whether an additional groundwater remedy is needed. Cost of the work is estimated to be \$25,000,000.

MASSACHUSETTS ENVIRONMENTAL POLICY ACT

Commonwealth v. Weymouth S.C. Associates

In this action against a shopping center developer, the Superior Court took oversight to ensure belated compliance with the Massachusetts Environmental protection Act (MEPA) and with state curb-cut laws. Agency approval was granted to the developer for its environmental review and traffic mitigation proposals in the late fall. In November 1988, the defendants installed approximately \$200,000 worth of traffic improvements for which the Attorney General had contended they were liable.

Merchant's Island Trust v. Commonwealth

This action by a private real estate trust sought to enjoin the implementation of an important sewer project in Gloucester. The Attorney General successfully defended against Plaintiff's Motion for a Preliminary Injunction in superior court, and in July 1988 successfully defended the appeal of that ruling before a single justice of the Appeals Court allowing the sewer project to move forward.

Edward H. Linde, et al. v. Commonwealth (Concord Office Park)

This case involves a proposed office complex on Route 2 in Concord, near Walden Pond. In December 1988, the Secretary of Environmental Affairs determined pursuant to MEPA that an environmental impact report had to be done in order to study the traffic impacts of the project.

The developers moved for a preliminary injunction in February claiming that there was no MEPA jurisdiction over the project, because the project does not need any state permit and is being privately funded and undertaken. After a hearing and extensive briefing by both parties, the court ruled in our favor in late March 1989.

Walpole v. Commonwealth and MWRA (Boston Harbor)

The Supreme Judicial Court upheld a superior court order dismissing this challenge to the MWRA's listing of three Walpole sites as possibilities for a residual solid waste landfill. This decision allows cleanup of Boston Harbor to move ahead.

*SOLID WASTE**Commonwealth v. Frank Grasso*

On October 26, 1988, the Attorney General filed a consent judgment in Suffolk Superior Court against Frank Grasso of Agawam. Grasso owns a parcel of land located on Main Street that was formerly used as the town's landfill. Despite the fact that the landfill was closed by the town in 1975, Grasso continued to dump construction debris at the site, including a floodplain area at the site. The Attorney General sued Grasso and won a preliminary injunction against him in January 1986.

The judgment requires Grasso: to remove fill material from the floodplain area in order to restore the flood storage capacity lost since 1975; to close and cap the remainder of the site; and to remove exposed refuse for off-site disposal. Grasso is also permanently enjoined from disposing of any refuse at the site.

Ringbolt Farms Homeowners Association v. Hull and the Commonwealth

In this case, plaintiffs are suing the Town of Hull regarding operation of its landfill. Plaintiffs also sued the Department of Environmental Protection under various federal statutes (including the Resource Conservation and Recovery Act, Subtitle D), for alleged failure to enforce the solid waste law and regulations against the town. The Attorney General filed a Motion to Dismiss and argued that the various federal statutes were never intended to allow private parties to direct state agencies on how to use their limited enforcement resources. On March 2, 1989, U.S. Magistrate Saris issued a 45 page opinion in our favor. Her report and recommendation was adopted by the District Court on March 2, 1989.

*WATER POLLUTION**Commonwealth v. Fairhaven*

In March 1989, a consent judgment was filed settling this case arising out of violations of the Clean Water Act at Fairhaven's sewage treatment plant. Fairhaven has paid a civil penalty of \$12,000, agreed to expand its treatment plant and to resolve its infiltration and inflow problems.

Commonwealth v. Greater Lawrence Sanitary District

The Commonwealth sued the Greater Lawrence Sanitary District ("GLSD") for violating the Massachusetts Clean Water Act and the Clean Air Act at its treatment plant in North Andover. Between September 1987 and December 31, 1988, there were over 1,300 separate water pollution violations at the plant. In addition, the plant was responsible for objectionable odors. Causes for these violations include the following: GLSD's receipt of excess septage while a fourth aeration basin was under construction and alteration of its method for handling septage and sludge without the prior approval of DEP. On numerous occasions, GLSD has also allowed raw sewage to be discharged unnecessarily into the Merrimack River.

Independence Park, Inc. v. Board of Health of Barnstable

On December 7, 1988, the Supreme Judicial Court decided an important environmental case holding that local boards of health have broad authority to condition development projects so as to protect the public health. The Attorney General filed a brief as *amicus curiae* arguing in support of the authority of boards of health to impose stricter requirements in a given case if necessary to protect the groundwater and public health. The SJC agreed that the grandfathering provision at issue did not preclude boards of health from imposing subdivision plan approval conditions that went beyond existing state and local regulations. In so doing, the court overturned a decision issued by the Massachusetts Appeals Court in April of 1988.

Commonwealth v. Lowell

In December 1988, the Attorney General filed a consent decree in federal court settling our litigation against Lowell for violations at its municipal sewage plant and for pollution of the Merrimack River. The city agreed to payment of \$180,000 in civil penalties and also to expedited renovation of its treatment facility. Violation of the remedial schedule or future pollution will subject Lowell to stipulated penalties.

Commonwealth v. Swampscott

In March 1989, the Commonwealth filed a consent decree settling its case against Swampscott for water pollution violations at its sewage treatment works. Under the terms of the consent decree, Swampscott agreed to build a new secondary treatment plant and sludge disposal facility or to connect with the Lynn secondary treatment plant. Swampscott also agreed to pay the Commonwealth a civil penalty of \$13,500.

Commonwealth v. Warren

In a consent decree filed on November 17, 1988 the town of Warren agreed to pay a civil penalty of \$20,000 for violating the Massachusetts Clean Water Act by polluting the Quaboag River. The Town also agreed to build a new secondary treatment plant, to properly staff, maintain and operate the existing plant and to implement a pretreatment program to prevent local industries from discharging wastewater into the new plant that would interfere with its operation.

WETLANDS PROTECTION

Commonwealth v. Cumberland Farms

In July 1988, the Attorney General filed suit against the well-known convenience store chain, alleging illegal alteration of state protected wetlands. The superior court first granted the Attorney General's request for a temporary restraining order, then a preliminary injunction barring the defendant from undertaking or permitting any further filling or clear cutting on its Westborough bakery site.

Commonwealth v. Hillside Associates

This case was filed in 1981, alleging violations of the Wetlands Protection Act. The Attorney General alleged that the property owner had filled or allowed filling of restricted wetlands on its property in Waltham. In May 1989, the superior court approved the entry of a final judgment whereby the defendant will remove a number of piles of solid waste, regrade and replant, and will pay \$139,500 to the Trustees of Reservations to be used for the purchase of otherwise unprotected wetlands.

Commonwealth v. Pyramid Companies

In July 1989, after months of negotiation, the Attorney General filed a complaint and consent judgment in this enforcement action against a national mall developer. The complaint alleged numerous violations of wetlands protection laws and further violations of laws requiring preconstruction approval of sewage and water supply systems. In settling the case, the developer paid \$150,000 in civil penalties and bound itself to delay the opening of its Berkshire Mall site until DEP agreed that it had obtained all necessary agency approvals.

Commonwealth v. Russo. et al.

On February 6, 1989, the Attorney General filed a complaint seeking to enjoin filling of a wetlands near the ocean in Revere. The complaint also asked for an order that the defendants restore the wetland and pay civil penalties. On February 14, the defendants agreed to the entry of a preliminary injunction that prohibits further work in the wetlands and requires the placement of erosion controls.

Commonwealth v. Van Wyck

On October 21, 1988, the Attorney General brought suit against Peter Van Wyck, an Essex developer. The complaint, filed in Suffolk Superior Court, alleged repeated violations of the Wetlands Protection Act. The court granted a temporary restraining order on October 24, 1988, and a preliminary injunction on November 2, 1988. The preliminary injunction prohibits Van Wyck from doing any land alteration on a parcel he owns in Essex unless and until he gains state approval for a comprehensive mapping of the wetlands there, and then only in accordance with any final wetlands permits.

Wilczewski, et al. v. Commonwealth

On May 2, 1989, the Supreme Judicial Court upheld the Superior Court's dismissal of an action against the Department of Environmental Protection because the plaintiffs, citizens of Stoughton did not exhaust their administrative remedies available to them under the Wetlands Protection Act. Plaintiffs had claimed that DEP did not have jurisdiction to consider an appeal of a local order of conditions because the developer had submitted amended plans that differed significantly from the plans reviewed and rejected by the Stoughton Conservation Commission. The SJC upheld the lower court's order on summary judgment and found that the jurisdictional challenge by the plaintiffs did not come within the narrow exception to the requirement of exhaustion of administrative remedies previously outlined by the court.

Commonwealth v. Wordell, et al.

On January 23, 1989, the Attorney General filed a consent judgment in Suffolk Superior Court requiring two South Chatham landowners to pay civil penalties of \$25,000 and to bring their seawall into conformity with state law. The Attorney General filed suit against Jon and Nathaniel Wordell on behalf of the Department of Environmental Protection in 1985. The complaint alleged that in 1981, DEP approved the Wordells' proposal to build a seawall to protect his property, but that the Wordells built the seawall in a way that violated the DEP approval, and the Wetlands Protection Act. The consent judgment requires the Wordells to bring the seawall into compliance by constructing a sloping stone revetment in front of it. It also requires the Wordells to secure a license for the seawall under the state Waterways Act.

NUCLEAR SAFETY UNIT

The fiscal year that began July 1, 1988 was an extremely busy one for the Nuclear Safety Unit. Hearings before the Nuclear Regulatory Commission's Licensing Board continued during July and August 1988 on the adequacy of the emergency plan submitted by the state of New Hampshire for the New Hampshire portions of the Seabrook Emergency Planning Zone (the New Hampshire Radiological Response Plan or "NHRERP"). At their conclusion in August, proposed findings were filed. At the same time, the unit was preparing for the next round of hearings examining the adequacy of the Seabrook owners' substitute utility plan, the Seabrook Plan for Massachusetts Communities ("SPMC") and the performance during the full-participation EPZ-wide emergency exercise held at the end of June 1988. In addition, in September 1988 the Attorney General challenged the onsite preparedness of the Seabrook staff, a regulatory prerequisite for the issuance of a low power license.

In December 1988, the Licensing Board issued its decision, later reversed, approving the adequacy of the NHRERP. The unit appealed that decision within the NRC to the Appeal Board, filing an extended brief in March 1989. After an expedited discovery period, hearings on the SPMC and the June 1988 exercise also began in March 1989 and continued without interruption to the end of June 1989. Also in May 1989, the unit in a proceeding held before a separate licensing board challenged the adequacy of the utility's substitute siren system for Massachusetts.

In May 1989, the Commission finally issued Seabrook a low power license and the unit sought to enjoin low power operation in the Court of Appeals for the District of Columbia Circuit. Failing to enjoin low power operation, the unit monitored that operation in June 1989 and then sought to litigate operational issues when poor staff performance forced the NRC to suspend further low power operations.

SPECIAL LITIGATION UNIT

John Manville - Asbestos Property Damage Claim

In this Chapter 11 bankruptcy proceeding, the Commonwealth filed a \$122 million dollar claim in 1983 against Manville for the cost of removing, repairing and otherwise managing the asbestos-containing products manufactured by them which are present in a large number of the Commonwealth's over 5000 state buildings.

The Department of the Attorney General not only represents the Commonwealth's claim, but also serves as Chair and Chief Negotiator for the State Government Creditors Committee, a group of 35 Attorneys General whose states filed claims in excess of \$5 billion dollars. The Department played a key role in negotiations with Manville, other property damage creditors, other creditors, and the representative of future health claimants. The department negotiated, along with others, the establishment of a property damage settlement trust and prepared a draft of the standards to be used by the trust for payment of property damage claims. After a trial before a panel of three distinguished jurists,

the panelists issued standards very much like those originally proposed by the property damage claimants. The standards will govern the payment of all property damage claims filed against Manville in the Chapter 11.

The department continues to participate in the bankruptcy proceeding and meets regularly with the Property Damage Settlement Trusts trustees and executive director. The Department has assisted in the development of claims proceeding procedures and claim forms, monitored the insurance settlements, and participated in the appeals of the order confirming the Plan of Reorganization. The department worked with the Division of Capital Planning and Operations in field testing the claim forms. In May 1989, the department organized and assisted in the presentation of training for 36 states on the claims process. Plans were made to conduct similar training in Massachusetts for all public entities that filed claims in the procedure. It is anticipated that Manville will have in excess of \$100 million for distribution for claims filed between May 1 and October 31, 1989.

UNR Bankruptcy Claim

On December 30, 1986, the Commonwealth filed a claim in the UNR Inc. Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division. UNR was a former manufacturer of asbestos products which were used in building construction. The Commonwealth's claim is for expenses actually incurred and expenses expected to be incurred in the abatement, including removal, repair and replacement, of all asbestos products in the Commonwealth's public buildings. The claim sought the portion of \$396,000,000, the Commonwealth's total asbestos related claim, which is determined to be UNR's actual liability.

The court bifurcated the trial, and the liability portion was held in October-November 1988. The court found the defendant liable as to the Gaebler State Hospital, and the damages portion of the trial was held the following spring. The Commonwealth awaits the court's determination as to the amount of damages.

GOVERNMENT BUREAU

The Government Bureau has three functions (1) defense of lawsuits against state officials and agencies concerning the legality of governmental operations; (2) initiation of litigation on behalf of state agencies and the Commonwealth; and (3) legal review of all newly-enacted municipal by-laws, pursuant to G.L. c. 40, § 32.

A report of significant activity during Fiscal Year 1989 follows.

Litigation. The Government Bureau defends the Commonwealth and its officials and agencies in litigation in state and federal court, and, in certain cases, before federal administrative agencies. These proceedings typically involve challenges to the validity of governmental decisions, initiatives, regulations, or statutes, and raise important issues of administrative and constitutional law in diverse subject-matter areas.

During Fiscal Year 1989 the Bureau opened 568 new cases and closed 830 cases. The unusually high number of closures resulted, in part, from an effort to obtain dismissals of the bureau's inactive cases.

In the United States Supreme Court,, the Government Bureau successfully represented the Commonwealth in *Massachusetts v. Morash* which unanimously upheld the Massachusetts payment-of-wages against a claim of federal preemption.

Upon the bureau's petition, the court vacated an unfavorable ruling of the United States Court of Appeals for the First Circuit in a case involving the Commonwealth's right to obtain interest on state taxes for the period after the filing of a bankruptcy petition. *Massachusetts v. Gray*. The Government Bureau also filed *amicus curiae* briefs in two cases. *Martin v. Wilks* and *Webster v. Reproductive Health Services*.

In Fiscal Year 1989, the Supreme Judicial Court decided 72 cases in which Government Bureau attorneys represented the Commonwealth. Professional discipline cases continued to be a significant portion of the SJC caseload, and, during the year, the SJC issued several important decisions upholding disciplinary sanctions imposed because of professional misconduct *Alsbati v. Board of Registration in Medicine* (plagiarism and falsely authenticating scientific data); *Wang v. Board of Registration in Medicine*, (conduct calling medical competence into question); *Ishak v. Board of Registration in Medicine*, (sexual misconduct) (Single Justice session); *Cherubino v. Board of Chiropractors* (overutilization of services). See also *Morris v. Board of Registration in Medicine* (remanding sexual misconduct charge for further proceedings); *Hellman v. Board of Registration in Medicine* (vacating discipline for breach of patient confidentiality which the court held to be non-flagrant).

The SJC affirmed a decision of the Department of Public Utilities that certain advertising and charitable contribution expenses can be included in utility rates only if ratepayers receive some direct benefit. *Boston Gas Co. v. Department of Public Utilities*. In *Newspapers of New England v. Bloom*, it upheld impoundment of a search warrant prior to trial. It affirmed the authority of the Architectural Access Board to require handicapped access if a substantial benefit would result. *Pyramid Co. of Hadley v. Architectural Access Board*. The SJC upheld the statute governing election of the Clerk for the SJC for Suffolk County in *Donahue v. Secretary of the Commonwealth*. The court also upheld the Attorney General's action on certification of an initiative petition and a ballot question. *Yankee Atomic Electric Co. v. Secretary of the Commonwealth* and *New England Christian Action Council v. Attorney General*.

The United States Court of Appeals for the First Circuit decided 13 cases in which the Commonwealth or one of its agencies was a party. Noteworthy decisions included *Commonwealth v. Bowen*, in which the First Circuit invalidated the abortion counselling regulations promulgated by the U.S. Department of Health and Human Services. In *Lane v. Commonwealth*, the court affirmed dismissal of copyright violation claims against the Commonwealth. The court upheld the portion of the Massachusetts statute requiring sealing grand jury returns of no bills and struck the statutory provisions sealing proceedings that occur in open court. *Globe Newspapers Co. v. Pokaski*.

The United States District Court for the District of Massachusetts decided 55 cases in which the Government Bureau participated. Significant decisions included *United States v. Commonwealth* (upholding the Commonwealth's remedial plan for the Worcester state hospital), and two cases rejecting complaints of discrimination brought against members of the executive and

legislative branches. Among the many matters litigated by the Government Bureau in the Commonwealth's trial courts were two cases obtaining settlements or judgments totalling \$8.3 million in back taxes, cases involving the constitutionality of G.L. c. 29, § 9C (governing the withholding of allotments) and matters involving prison overcrowding or construction.

By-laws. Town by-laws, home rule charters, and amendments thereto are reviewed and must receive approval of the Attorney General prior to becoming effective. The review function is performed by attorneys in the Government Bureau. During the fiscal year ending June 30, the By-Laws Division reviewed 2,192 by-laws and 16 home rule charter actions from 309 towns. There were 95 disapprovals making an error rate of 4.3 percent for the submittals involved.

The by-laws received this year consisted of 918 general by-laws and 1,274 zoning by-laws. General by-laws pertain to town government and the exercise of municipal power. The zoning by-laws are a continuing exercise of the police power over the use of land. Zoning by-laws generate the most local controversy since they affect what the landowner considers as his constitutional right, *i.e.*, to own, use and enjoy property.

This year saw continued attempts to control or regulate growth, including imposition of development restrictions, overlay districts to protect groundwater sources and sewage or septic tank restrictions.

EXECUTIVE BUREAU

The Executive Bureau is charged with the overall administration and policy of the Attorney's office. In addition, the bureau handles a number of specialized functions, including constituent relations, legislative affairs, and opinions.

ELECTIONS DIVISION

The Elections Division provides legal representation to the Secretary of State and State Ballot Law Commission regarding election related issues, and undertakes civil enforcement of Massachusetts campaign finance laws.

In a letter dated August 4, 1988, the Secretary of State transmitted 14 proposed ballot questions and requested the Attorney General's opinion whether these questions were ones of public policy within the meaning of G.L.c. 53 Section 19. The Attorney General ruled that 13 of these questions were properly considered public policy questions, and drafted each of these into simple, unequivocal and adequate form. The text of the Attorney's opinion is contained *supra*.

Suit was filed challenging the Attorney General's determination that one proposed question was unsuitable for the ballot. The Supreme Judicial Court upheld the Attorney General's determination, ruling that the Attorney General's evaluation of proposed questions is not subject to judicial review absent a showing of bad faith. *New England Christian Action Council, Inc. v. Secretary of the Commonwealth and Attorney of the Commonwealth*, 403 Mass. 671 (1989).

In another case, 11 voters challenged G.L. c. 54 section 155, which establishes that only Suffolk County voters may vote in the election of the clerk for the Supreme Judicial Court for Suffolk County. Appearing on behalf of the Secretary of the Commonwealth, the Elections Division successfully defended the statutory scheme. *Donahue v. Secretary of the Commonwealth*, 403 Mass. 363 (1988).

Connolly v. Secretary of the Commonwealth, 404 Mass. 556 (1989) involved the counting of absentee and paper ballots in the Democratic primary election for the office of Governor's Councillor of the Third District of the Commonwealth. The Supreme Judicial Court upheld the result of a ballot recount, thereby making Robert B. Kennedy the democratic nominee.

The Elections Division is responsible for enforcing compliance with the state's campaign finance law, including taking administrative or legal action against political action committees and candidates who fail to meet Massachusetts' campaign finance report filing requirements. Within the 1989 fiscal year, the Elections Division handled 276 referrals from the Office of Campaign and Political Finance of failures to file campaign finance reports.

WESTERN MASSACHUSETTS

The Western Massachusetts Division of the Department of the Attorney General is responsible for legal matters in the four western counties of Berkshire, Franklin, Hampden and Hampshire. The Western Division, located in Springfield, is staffed by attorneys, investigators and support personnel.

The division litigates a wide range of cases, including tort, contract, eminent domain, worker's compensation, environmental, consumer protection, civil rights, administrative appeals, and victims of violent crimes. The division also prosecutes fraud cases for the Division of Employment Security. The caseload of the division is usually in excess of 1,000 cases.

Similarly, the investigators are responsible for a number of cases. In addition to investigating consumer fraud, investigators work closely with attorneys in developing their cases by interviewing witnesses, reviewing documents and accumulating and compiling potential evidence.

The division also handles consumer complaints and attempts to resolve them short of court action.

OPINIONS

The Attorney General is authorized by M.G.L. c.12, §3, 6, and 9 to render legal advice and opinions to constitutional officers, agencies and departments, district attorneys, and branches of the Legislature. Opinions are given primarily to the heads of state agencies and departments.

The questions considered in legal opinions must have an immediate, concrete relation to the official duties of the state agency or officers requesting the opinion. In other words, hypothetical or abstract questions, or questions which ask generally about the meaning of a particular statute, lacking a factual underpinning, are not answered.

Opinions are not offered on questions raising legal issues which are the subject of litigation or that concern collective bargaining. Questions relating to the wisdom of legislation or administrative or executive policies are not addressed. Generally, federal statutes are not considered and the constitutionality of state or federal legislation is not determined.

Opinion requests from state agencies which report to a cabinet or executive office must first be sent to the appropriate executive secretary for his/her consideration. If the secretary believes the question raised is one which requires resolution by the Attorney General, the secretary then requests the opinion.

There are two reasons for this rule. The first concerns efficiency. Opinions of the Attorney General, because of their precedential effect, are thoroughly researched and prepared. If a question can be satisfactorily resolved more quickly within the agency or executive office--by agency legal counsel or otherwise--everyone is better served. The second reason relates to the internal workings of the requesting agency and its executive office. It would be inappropriate for this department to be placed in the midst of an administrative or legal dispute between these two entities. These rules help to ensure that the agency and its executive office speak with one voice insofar as Opinions of the Attorney General are concerned.

If the agency or executive office requesting an opinion has a legal counsel, counsel should prepare a written memorandum explaining the agency's position on the legal question presented and the basis for it. The memorandum should accompany the request. When an agency request raises questions of direct concern to other agencies, governmental entities, or private individuals or organizations, the Opinion Division solicits the views of such interested parties before rendering an opinion.

The issuance of informal opinions is strongly discouraged. Informal Opinions of the Attorney General are often relied upon as if they were formal Opinions. In a number of instances, this reliance has been seriously misplaced. As a result, the issuance of informal opinions is strictly limited to situations of absolute necessity. It is made explicit that the informal opinions cannot be relied upon as if they were formal Opinions.

Between July 1, 1988 and June 30, 1989, six formal Opinions of the Attorney General were issued with an additional 75 requests considered, evaluated, and declined.

The formal Opinions follow.

September 2, 1988

Number 1

The Honorable Michael Joseph Connolly
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Connolly:

In a letter dated August 1, 1988, you transmitted a series of proposed ballot questions¹ to me and requested my opinion whether these questions are ones of public policy within the meaning of G.L. c. 53, § 19. and, if, so, what simple, unequivocal and adequate form is best suited for presentation of these questions on the November, 1988 ballot. I have analyzed each proposed question in accordance with the Massachusetts Constitution and the General Laws, judicial decisions, and prior Opinions of the Attorney General. For the reasons set forth below, this analysis leads me to conclude that thirteen of the fourteen proposed questions are properly public policy questions appropriate to appear in the form provided herein, on the November ballot.

The right of Massachusetts voters to place questions of public policy on the ballot is based upon article 19 of the Massachusetts Constitution. Article 19 provides in part that "[t]he people have a right . . . [to] . . . give instructions to their representatives . . . " Statutory requirements for the process of submitting to voters questions of public policy are set forth in G.L.c. 53, § 19 through § 22.

Traditionally, a broad view has been taken of what constitutes an appropriate question of public policy. *See* 1982/83 Op. Att'y Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at 84 (1982). This established view is fully appropriate to the public policy question process. At the same time, however, it must not interfere with the Attorney General's statutory duty to review each question for its conformity to the standards established for public policy questions.² The discharge of this statutory duty has in the past required the rejection of proposed questions. *See, e.g.*, 1984/85 Op. Att'y Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at 76 (1984) (rejecting question directing Department of Environmental Quality Engineering to rescind certain licenses for storage and transportation of hazardous waste); 1978/79 Op. Att'y Gen. No. 8, Rep. A.G., Pub. Doc. No. 12 at 114 (1978) (rejecting question asking Legislature to reject changes proposed by a local charter commission).

Prior Opinions of the Attorney General and case law have not precisely defined what constitutes "public policy" and the nature of the concept does not

¹ A total of fourteen questions were submitted, several of which are proposed to appear on the ballot in more than one district.

² In addition to assuring that *only* proper questions of public policy are placed on the ballot, this careful review is essential to protect places on the ballot for proper questions. This arises because of the statutory limit allowing three questions on the ballot in each district. G.L. c. 53, § 21

readily lend itself to an exact definition. See 1966/67 Op. Att'y Gen. No. 33, Rep. A.G., Pub. Doc. No. 12 at 76 (1966) (public policy includes matters of "community common sense and common conscience applied to matters of public morals, public health, public safety, public welfare, and the like"). Generally, it can be said that matters of public policy involve determinations of what governmental action is desirable or necessary for the public interest, as opposed to individual concerns, and as contrasted to statements of fact. *Cf. Borden, Inc. "Commissioner of Public Health*, 388 Mass. 707, 721 (1983) (distinguishing between facts, regulations and public policy), *appeal dismissed*, 464 U.S. 923 (1983), *cert denied*, 464 U.S. 936 (1983).³

It has been determined repeatedly that a proposed public policy question must be of interest to every citizen in the Commonwealth and not be simply a matter of local concern. See, e.g., 1984/85 Op. Att'y Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at 75 (1984). Even when a question appears to affect a small geographic area, if the problem it addresses is one of concern to the Commonwealth in general, the question may be considered one of public policy. See, 1982/83 Op. Att'y Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at 84 (1982). It has rarely been concluded that a matter is solely of local concern. See, e.g., 1974/75 Op. Att'y Gen. No. 11, Rep. A.G., Pub. Doc. No. 12 at 54 (1974) (approving a question concerning the construction of a rapid transit station in a particular town). *But see* 1978/79 Op. Att'y Gen. No. 8, Rep. A.G., Pub. Doc. No. 12 at 114 (1978) (disapproving on grounds of purely local concern a question asking the Legislature to reject changes proposed by a local charter commission).

In addition, the proposed question must be fit for legislative action.⁴ 1978/79 Op. Att'y Gen. No. 8, Rep. A.G., Pub. Doc. No. 12 at 114 (1978). The instruction contained in each public policy question must be consistent with the powers of the Legislature and subject to legislative action or attention. 1984/85 Op. Att'y Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at 76 (1984). Unless the petition concerns a matter appropriately subject to legislative attention or action, it is not properly a public policy question under Massachusetts law. *Id.*

The requirement that the proposed question concern matters fit for legislative action derives directly from the constitutional provision authorizing public policy questions. Article 19, *supra*. See also, *Thompson v. Secretary of the Commonwealth*, 265 Mass. 16, 19 (1928). Indeed, a review of prior public policy questions placed on the ballot reveals that such questions consistently

³ See generally, *Griffin v. United States*, 500 F.2d 1059, 1066 n.16 (3rd Cir. 1974) (decision to approve polio vaccine did not involve public policy determination but a scientific judgment); *McClanahan v. Breedino*, 172 Ind. 457, 88 N.E. 695, 697 (1909) (public policy is a question of law, not of fact).

⁴ See generally, Mass. Const. pt. 2, c.1. and Mass. Const. pt. 2, c.1. § 1, art. 4 (Legislature may "make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions" as long as the matter is not repugnant or contrary to the Massachusetts Constitution).

have proposed specific legislation or resolutions contemplating a particular governmental action. *See e.g.*, 1974/75 Op. Att'y Gen. No. 9, Rep. A.G., Pub. Doc. No. 12 at 53 (1974) (question asking whether representative should vote for a resolution calling on the United States Congress to grant amnesty to Vietnam-era draft resisters); 1974/75 Op. Att'y Gen. No. 16, Rep. A.G., Pub. Doc. No. 12 at 58 (question asking whether representative should vote for bill which would prohibit smoking in public places); 1976/77 Op. Att'y Gen. No. 7, Rep. A.G., Pub. Doc. No. 12 at 90 (1976) (question asking whether representative should vote to support and ratify an amendment to the United States Constitution permitting states to prohibit abortions and affirm the right to life of the unborn).

As stated above, an application of these principles leads me to conclude that thirteen of the submitted questions are public policy questions properly included on the November ballot. Several of these questions have required analysis whether their subject matter is one of local concern or important to all citizens of the Commonwealth. For example, two proposed questions explicitly affect Cape Cod: one proposes a regional planning commission and the other proposes a temporary moratorium on development. Although these questions present matters with a specific geographic scope, they are important to all citizens of the Commonwealth. Both implicate the broad subject of controlling growth and establishing a comprehensive environmental policy for the Massachusetts coastline. *See* 1974/75 Op. Att'y Gen. No. 14, Rep. A.G., Pub. Doc. No. 12 at 57 (1974) (approval of question requesting resolution asking Congress to vote in favor of federal land use controls for Nantucket Sound Islands). Cape Cod's unique value to all persons was recognized in 1961 by the establishment of the Cape Cod National Seashore. 16 U.S.C. § 459b. In addition, many residents of other Massachusetts communities utilize the natural resources of Cape Cod by vacationing or visiting Cape Cod communities. *See* 1968/69 Op. Att'y Gen. No. 5, Rep. A.G., Pub. Doc. No. 12 at 38 (1968) (in determination of public policy, Attorney General may draw inferences from question and rely upon facts of common knowledge, actual or presumed if reasonable). When the broader view is adopted, as has been done in many past Opinions, it is clear that issues affecting the environment of Cape Cod are not simply of local concern, but rather are of interest to every citizen in the Commonwealth. *See* 1974/75 Op. Gen. No. 11, Rep. A.G., Pub. Doc. No. 12 at 55 (1974).⁵

I have determined that one of the proposed questions transmitted by you is not properly an "instruction [. . . [by the people] . . . to their representative[.]" Massachusetts Constitution, Part I, art. 19. This proposed question would inquire of the voter: "In *biological terms*, when does an individual human life begin?" (emphasis in original); and would instruct the voter to answer by selecting one of three choices: "conception," "viability" or "birth," or by writing in a "different biological term." Both the form and the content of this question

⁵Certain other submitted questions similarly address matters that affect specific geographic areas. *See e.g.*, questions on Milford War Memorial, commuter rail lines on the South Shore, the toll-free operation of a portion of the Massachusetts Turnpike, and the establishment of a new city in Boston. None of these questions are of "purely local concern" as that term has been repeatedly construed by past Attorneys General. *See e.g.* 1974/75 Op. Atty. Gen. No. 11, Rep. A.G., Pub. Doc. No. 12 at 55 (1974).

are unprecedented and fatally deficient.⁶ Accordingly, it is my opinion that it would be inappropriate for the submitted question to appear on the November ballot as a public policy question.

On its face, the beginning of life question does not provide a representative with any instruction or direction regarding governmental action. Indeed, it does not indicate whether *any* governmental action at all is contemplated by the proposed question. In addition, the proposed question fails to notify voters what public policy, if any, would be changed or established by a representative seeking to follow their instruction. Providing instruction to a representative is fundamental to properly posing a "question of public policy" under Massachusetts law. *See* discussion, *supra*. The proposed question fails to do this. This purely abstract, descriptive question conflicts with the long legacy of past public policy questions and the unambiguous intent of article 19 and chapter 53, which is to provide instructions to the Legislature.⁷

These failings also destroy the ability of voters to provide instruction through this question. Voters facing this question are not told that they are instructing their legislator, and cannot be certain what public policy, if any, will be affected by their vote. Moreover, voters are instructed to respond through a set of choices that does not allow for affirmatively voting that *no* instruction on this issue should be given. The question's failure to allow voters to reject entirely any instruction to their legislator on the subject of the question appears to be

⁶The text of the proposed question is susceptible to two readings: one requesting the voter to determine a scientific fact, the other requesting that the voter answer the question utilizing scientific terms. It is not necessary to the analysis here to determine which of these meanings is consistent with the intent of the question or is more likely to be understood by the voter. Under either reading the proposed question is not appropriate for placement as a public policy question on the ballot for the reasons discussed *infra*.

⁷While the Attorney General and Secretary of State have the responsibility to draft an approved question in "simple, unequivocal and adequate form" suited to the ballot, this drafting authority necessarily has limits. G.L. c.53, § 19. Implicit in the requirement to draft the *form* of a question is the obligation that the Attorney General and Secretary of State retain the substance of the question, thereby preserving the intent of the proponents and voters who signed the particular petition. To materially alter the substance of the question when drafting it would be contrary to section 19 and would interfere with proponents' right to put an instruction before the Legislature. In addition, revisions that materially change a proposed question would raise serious doubt whether the signature requirements of G.L. c.53, § 19 have been satisfied, since the question is no longer substantially the same as what was originally presented by petition to the voters.

In the case of the proposed beginning of life question, problems with the question cannot be cured by mere draftsmanship. The legal deficiencies cannot be remedied without materially altering the substance of the proposed question, thereby subverting the intent of the proponents and violating G.L. c.53, §19.

unprecedented in the history of public policy questions.⁸

It is my opinion, after careful review, that the proposed beginning of life question does not provide instruction to a legislator on a matter of public policy within the meaning of article 19 and G.L. c. 53. Accordingly, this question is not approved as appropriate for submission to the voters on the November ballot.⁹

For those thirteen questions I have determined to be ones of public policy, it is my responsibility, in conjunction with you, to prepare the questions in a "simple, unequivocal and adequate form" for the ballot. G.L. c. 53, §19. The form that I conclude is proper for each of these questions appears at the conclusion of this Opinion.

It should be remembered that this Opinion does not encompass the additional requirements which must be satisfied before a public policy question may appear on the ballot. Those requirements, as contained in G.L. c. 53, §§19, 20, and 21, involve determinations of fact. As have my predecessors. I note that you, as Secretary of the Commonwealth, are in a better position than I to make the necessary factual determinations. 1984/85 Op. Att'y Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at 77-78 (1984) (Secretary of State maintains past election ballots from each of the relevant districts). Consequently, and in accordance with prior practice, I have made no independent inquiry to determine whether the proposed questions are statutorily defective for any reason other than a failure to qualify as a public policy question in proper form for presentation on the ballot.

⁸A review of past questions reveals no Massachusetts ballot question that offered multiple choices with no opportunity for a voter to reject the entire proposition, except for a question regarding the Vietnam War that was placed on the ballot in 1970 by a Special Act of the General Court. Chapter 588 of the Acts of 1970. This 1970 question is inapposite here because it was not placed on the ballot as a public policy question under article 19 and G.L. c. 53. In analyzing public policy questions, it bears noting that the applicable statutes assume that a question may be "negated". G.L. c. 53, § 22, and militate against multiple choices by requiring that a response receive a majority of all votes cast to be deemed to constitute an instruction. G.L. c. 53, § 22.

⁹ It bears noting that the deficiencies of this question are not necessarily fatal to posing a public policy question that involves a theory of when life begins. The consequences of such a theory could conceivably affect public policy on many important issues, including laws governing abortion, tort liability, homicide, and prenatal care programs. This Opinion does not bar the placement on the ballot of future questions on any of these issues, provided that the question is properly posed to provide instruction to a legislator on a matter of public policy within the meaning of article 19 and G.L. c. 53, § 19.

With the aforementioned considerations in mind, it is my opinion that the questions I have determined to be properly ones of public policy should appear on the ballot in the following form:

**Representative Districts: 5th Essex and
three other Representative Districts¹⁰**

Shall the Representative from this district be instructed to vote in favor of a resolution calling upon the United States Congress to adopt rules prohibiting members of Congress from accepting speaking fees from business and special interest groups?

Representative District: 7th Worcester

Shall the Representative from this district be instructed to vote in favor of legislation that would transfer the operation of that portion of the Massachusetts Turnpike, between the New York State line and its junction with Route 495 in Westborough, from the Massachusetts Turnpike Authority to the Department of Public Works, and also make that portion toll-free?

Representative District: 10th Worcester

Shall the Representative from this district be instructed to vote in favor of legislation authorizing a war memorial to be located in Draper Park in the Town of Milford, Massachusetts?

Representative District: 2nd Suffolk

Shall the Representative from this district be instructed to vote in favor of legislation that would establish a state holiday in honor of the late President John F. Kennedy to be observed on the day of the state election held in November in every even-numbered year?

**Representative Districts: 1st Barnstable and
four other Representative Districts¹¹**

Shall the Representative from this district be instructed to vote in favor of legislation establishing the Cape Cod Commission, a regional land use planning agency and regulatory body with authority to: prepare a regional policy plan; regulate developments of regional impact; designate districts of critical planning concern, including fragile environmental areas; regulate, in conjunction with the towns, developments within such districts; and foster the preparation, adoption, and implementation of local comprehensive plans consistent with the regional policy plan?

¹⁰ 6th and 9th Essex; 22nd Middlesex District.

¹¹ 2nd, 3rd, and 4th Barnstable; Barnstable, Dukes, and Nantucket District.

**Representative Districts: 1st Barnstable and
four other Representative Districts¹²**

Shall the Representative from this district be instructed to vote in favor of legislation that would impose a temporary moratorium on development on Cape Cod, suspending the approval, endorsement, or recording of land division plans creating additional lots, and suspending the issuance of building permits for construction or reconstruction, with exemptions for construction or improvement of owner-occupied single-family dwellings on single approved lots and other exemptions to be determined by municipal regulatory authorities for public projects and affordable housing; this moratorium to continue for a period of one year or until municipal, county, or state legislation and regulations have been adopted for controlling development and preserving Cape Cod's environment?

**Representative District: 5th Suffolk and
five other Representative Districts¹³**

Shall the Representative from this district be instructed to vote in favor of legislation forming the following wards and precincts of the City of Boston into a new city of the Commonwealth:

Ward 4	Precincts 8,9	Ward 13	Precincts 1,2,3,5
Ward 8	All Precincts	Ward 14	All Precincts
Ward 9	All Precincts	Ward 15	Precincts 1,2,3,5,7
Ward 10	Precincts 5,6,7	Ward 17	Precincts 1,2,3,4,5,6,7,10
Ward 11	All Precincts	Ward 18	Precincts 1,2,3,4, 5,6,21
Ward 12	All Precincts	Ward 19	Precinct 7

Representative District: 11th Middlesex

Shall the Representative from this distiiict be instructed to vote in favor of a resolution calling upon the United States government to support: the principles of self-determination for the Israeli and Palestinian people; the creation of a Palestinian state in the West Bank and Gaza Strip next to Israel; and security for Israel and the Palestinian state?

**Representative Districts: 27th
Middlesex District and two
other Representative Districts¹⁴**

Shall the Representative from this district be instructed to vote in favor of a resolution calling upon Congress and the President of the United States to achieve peace in the Middle East by: demanding that Israel end its violations of Palestinian human rights and its occupation of the West Bank and Gaza;

¹² 2nd, 3rd, and 4th Barnstable; Barnstable, Dukes, and Nantucket District.

¹³ 6th, 7th, 9th, 12th and 13th Suffolk District.

¹⁴ 28th and 29th Middlesex District.

stopping all expenditure of U.S. taxpayers' money for Israel's occupation of the West Bank and Gaza; and favoring the establishment of an independent Palestinian state in the West Bank and Gaza with peace for all states in the region including Israel?

Representative District: 1st Norfolk

Shall the Representative from this district be instructed to vote in favor of legislation to restore commuter railroad service from Boston to the South Shore on the so-called "Old Colony" railroad right of way running adjacent to existing Massachusetts Bay Transportation Authority (MBTA) Red Line tracks?

Representative District: 5th Norfolk

Shall the Representative from this district be instructed to vote in favor of legislation to reactivate the Middleborough, Plymouth and Greenbush Old Colony Commuter Railroad Lines which run through Braintree?

Representative District: 5th Norfolk

Shall the Representative from this district be instructed to vote in favor of authorizing the construction of a temporary or permanent transfer station in Braintree for commuter railroad passengers to board the Massachusetts Bay Transportation Authority (MBTA) trains from the proposed Old Colony commuter railroad?

**Senatorial District: Franklin and Hampshire
nine Representative Districts¹⁵**

Shall the Senator (or Representative) from this district be instructed to vote in favor of a resolution calling upon the United States Congress and the President of the United States to adopt a policy of: preserving outer space as an arena for peaceful, cooperative exploration and scientific discovery among all nations; halting the militarization of outer space and the development, testing and deployment of the Strategic Defense Initiative (so-called "S.D.I." or "Star Wars"); and reinvesting taxpayers' money to support such needs as housing, education, health care and environmental protection?

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

¹⁵ 3rd and 4th Berkshire; 1st and 2nd Franklin; 1st, 2nd and 3rd Hampshire; 5th Hampden; and 8th Plymouth Representative Districts

October 24, 1988

Number 2

Honorable Frank T. Keefe, Secretary
Executive Office for Administration
and Finance
State House
Boston, Massachusetts 02133

John E. Kearney, Chairman
Teachers' Retirement Board
One Ashburton Place
Boston, Massachusetts 02108

Dear Secretary Keefe and Chairman Kearney:

You have requested my opinion as to whether G.L. c. 30, § 25B, which regulates out of state travel at public expense by officers and employees of the Commonwealth, applies to members and employees of the Massachusetts Teachers' Retirement Board (the "Board"). For the reasons set forth below, I conclude that G.L. c. 30, § 25B does apply to the Board.

The statute at issue provides in pertinent part that:

No officer or employee of the Commonwealth may travel out of state at public expense except in accordance with rules and regulations established by the commissioner of administration for the expenditure of funds for travel out of state by employees of the Commonwealth, and except with the prior written approval of his appointing authority, and, *in the case of a department, office, commission, board, or institution within any of the executive offices established by chapters six A and seven upon the prior written approval of the secretary* having charge of such executive office. G.L. c. 30, § 25B. (Emphasis added.)

"A statute is to be interpreted according to the plain and ordinary meaning of its words and their ordinary and approved usage." *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 167 (1984). The plain language of the first clause of § 25B would seem to require that if members and employees of the Board are Commonwealth employees, members of the Board and staff may travel out of state at public expense only in accordance with rules and regulations established by the commissioner of administration.¹ Furthermore, the Executive Office for Administration and Finance ("EOAF") is an executive office established by chapter seven of the Massachusetts General Laws. See G.L. c. 7, § 2. The

¹ I take no position on the advisability or necessity of out of state travel by members of the Massachusetts Teachers Retirement Board or any other department, office, board, commission, or institution.

Teachers' Retirement Board appears to be a board "within" EOAF.² See G.L. c. 7, § 4G.

That section declares certain agencies, including the Teachers' Retirement Board, "to be within the executive office for administration and finance." (Emphasis added.) Accordingly, if Board members and staff are Commonwealth officers or employees, the last clause of G.L. c. 30, § 25B would seem to impose the additional statutory requirement that members and employees of the Board receive the prior written approval of the secretary having charge of EOAF before travelling out of state at public expense.

Various statutes, judicial decisions, and Opinions of the Attorney General, however, which affirm the autonomy of the Board in many respects raise some question as to whether members and employees of the Board are plainly within the purview of G.L. c. 30, § 25B. Nevertheless, based upon my analysis of these authorities, it is my opinion that members and employees of the Board are officers or employees of the Commonwealth for the purposes of G.L. c. 30, § 25B and that the Board is not exempted from the operation of that statute.

I begin with the proposition that the Board, established by G.L. c. 15, § 16 and located within EOAF and the Office of Human Resource Administration, is a state agency. Section 47 of Chapter 199 of the Acts of 1987, which places the Teachers' Retirement Board within the latter office, refers to the Board as an "agenc[y]." Moreover, the Board's status as a state agency is confirmed by the multitude of contacts between the Board and the Commonwealth. The Board is the appointing authority for its staff for the purposes of the civil service law. See 1978/79 Op. Att'y Gen. No. 29, Rep. A.G., Pub. Doc. No. 12 at 161 (1979). The Board is represented in litigation by the Attorney General. e.g., *School Committee of Brockton v. Teachers' Retirement Board*, 393 Mass. 256 (1984). The Board has from time to time, as it is doing in the present case, requested the formal legal opinion of the Attorney General pursuant to the Attorney General's authority under G.L. c. 12, § 3 to render legal advice and opinions to state officers, agencies, and departments on matters relating to their official duties. See, e.g., 1980/81 Op. Att'y Gen. No. 7, Rep. A.G., Pub. Doc. No. 12 at 113 (1980); 1979/1980 Op. Att'y Gen. No. 5, Rep. A.G., Pub. Doc. No. 12 at 104 (1979). One such opinion assumes, without discussion, that the Board is a state agency. See 1978/79 Op. Att'y Gen. No. 29, Rep. A.G., Pub. Doc. No. 12 at 161 (1979).

It can similarly be deduced that members and employees of the Board are officers or employees of the Commonwealth. The Board's enabling statute refers to membership on the Board as an "office." See G.L. c. 15, § 16. Massachusetts cases which have attempted to define the nature of public office or employment have generally focused upon the nature of the duties involved. See e.g., *Arlington v. Board of Conciliation & Arbitration*, 370 Mass. 769, 777 (1976) ["a person may be deemed a public official where he is fulfilling duties which are public in nature, involving in their performance the exercise of some portion of the sovereign power, whether great or small."] (citation omitted)]. See also *Attorney General v. Tillinghast*, 203 Mass. 539 (1909). Although members of

² The Board is also an agency within the Office of Human Resource Administration, which is an office established within EOAF. See St. 1987, c. 199, §47, made effective July 1, 1987 by St. 1987, c. 199, §156.

the Board serve without compensation,³ this factor is not determinative of their status or lack thereof as officers or employees of the Commonwealth. *See, e.g., Kaplan v. Sullivan*, 290 Mass. 67, 69 (1935) ["The nature and importance of the duties imposed on the [Boston Finance Commission] denote that all its members are public officers. The circumstance that the chairman receives a fixed annual salary does not place him on any different footing from his [uncompensated] associates in this respect, although in other conditions it might be entitled to weight." (citations omitted)]. *See also* G.L. c. 268A, § 1 [defining "state employee" for the purposes of the Massachusetts Conflict of Interest Law as "a person performing services for or holding an office, position, employment or membership in a state agency, whether by election, appointment, contract of hire or engagement, *whether serving with or without compensation . . .*" (emphasis added)]; G.L. c. 258, § 1 [defining "public employee" for the purposes of the Massachusetts Torts Claim Act as "elected or appointed, officers or employees of any public employer, whether serving full or part-time, temporary or permanent, *compensated or uncompensated . . .*" (emphasis added)]].

The Board utilizes the commonwealth's payroll procedure and insurance programs for its staff and "with the exception of the Board's executive secretary, the staff of the Board is within the civil service system." 1978/79 Op. Att'y

³ *See* G.L. c. 15, §17. Members are, however, reimbursed "for any expense or loss of salary or wages which they may incur through service on the board." *Id.*

An argument in favor of the non-reviewability of the Board's out of state travel expenses can be derived from this provision, which reads in pertinent part:

The members of the teachers' retirement board shall serve without compensation, *but they shall be reimbursed from the expense fund of the teachers' retirement system for any expense or loss of salary or wages which they may incur through service on the board.* All claims for reimbursement on this account shall be subject to the approval of the governor and council. G.L. c. 15, §17. (Emphasis added.)

However, on its face, reimbursement for expenses pursuant to §17 is subject to the review and approval of the governor. (For repeal of certain statutory duties of the executive council, *see* G.L. c. 6 App., §§1-1 *et seq.*) The provision in §17 for reimbursement of expenses is not logically inconsistent with the requirement that the Board obtain authorization from the secretary of EOAF prior to expending funds for out of state travel.

Furthermore, even if one assumes that G.L. c. 15, §17 vested exclusive authority in the governor and council to review expenses of the Board, that general provision is superseded by the more specific statute relating to expenses for out of state travel subsequently enacted by the legislature. "If a general statute and a specific statute cannot be reconciled, the general statute must yield to the specific statute. This is particularly true where, as here, the specific statute was enacted after the general statute." *Pereira v. New England LNG Co., Inc.*, 364 Mass. 109, 118 (1973). When enacting G.L. c. 30, §25B, the legislature is presumed to have known of the existence of G.L. c. 15, §17 and to have intended that the Board be subject to the specific provisions relating to out of state travel.

Gen. No. 29, Rep. A.G., Pub. Doc. No. 12 at 161 (1979).⁴ In addition, G.L. c. 29, § 27, which, among other things, limits the incurring of expenses by any "department, office, commission and institution" of the Commonwealth to amounts appropriated therefor by the general court, applies to the Board. *See* 1978/79 Op. Att'y Gen. No. 29, Rep. A.G., Pub. Doc. No. 12 at 161 (1979). The administration of the Board is funded by an appropriation of the Commonwealth. *See* St. 1987, c. 199, § 2, Item 1108-4010. *Cf. Gallagher v. Metropolitan District Commission*, 371 Mass. 691, 698 (1977) [referring to *Mitchell v. Metropolitan District Commission*, 4 Mass. App. Ct. 484 (1976) in which the Appeals Court concluded that MDC employees are state employees because, among other things, "[t]he MDC is subject to the laws regulating the administration of Commonwealth agencies. G.L. c. 29, § 1. G.L. c. 30, § 1. It makes its expenditures not with funds of its own but with Commonwealth funds made available to it from the State treasury by periodic appropriations..." (footnote and citations omitted)].

In light of the foregoing involvement with state government and the Board's status as a state agency, I conclude that members and employees of the Board are state officers or employees for the purposes of G.L. c. 30, § 25B. Therefore, unless the Board is exempted by other statutes or case law, its members and staff must comply with the provisions of the out of state travel statute.

In determining whether the Board is exempted from the operation of G.L. c. 30, § 25B despite the status of its members and staff as officers or employees of the Commonwealth, I first consider that portion of G.L. c. 7, § 4G which states:

Nothing in this section shall be construed as conferring any powers or imposing any duties upon the commissioner [of administration] with respect to the foregoing agencies *except as expressly provided by law* G.L.c. 7, § 4G. (Emphasis added.)

The question is whether this proviso insulates the Board from the fiscal control of EOAF with respect to expenditures for out of state travel.⁵ I conclude

⁴ Compare Opinion Letter from John J. McGlynn, Commissioner, Division of Public Employee Retirement Administration, to Joseph Stacey, Chairman, City of Worcester Retirement System (October 22, 1987) (opining that the Worcester Retirement Board is independent of the personnel policies and civil service requirements of the City of Worcester).

⁵ It might be argued that the state agency which does have fiscal and administrative authority over the Board is the Division of Public Employee Retirement Administration ("PERA"). *See* G.L. c. 7, § 50 ("[t]he commissioner of public employee retirement . . . shall have general responsibility for the efficient administration of the public employee retirement systems, under chapter thirty-two"). *See also Everett Retirement Board v. Board of Assessors of Everett*, 19 Mass.App.Ct. 305, 309 (1985) (observing that although municipal retirement boards are not subject to municipal or judicial control, PERA possesses the statutory authority "to discipline an errant board, perhaps through the regulatory power conferred by G.L. c. 32, §21(4)"). Even assuming that PERA's oversight authority extends to fiscal matters, vesting in PERA general responsibility for the efficient administration of the public employee retirement

that it does not. In order to qualify under the "expressly provided by law" exception to G.L. c. 7, § 4G, a statute conferring a power or imposing a duty upon the commissioner with respect to the Teachers' Retirement Board need not mention the Board by name.⁶ Cf. *Mitchum v. Foster*, 407 U.S. 225, 237 (1972) ("in order to qualify under the 'expressly authorized' exception of the [federal] anti-injunction statute [28 U.S.C. § 2283], a federal law need not contain an express reference to that statute"). Rather, express authority can also be conferred pursuant to G.L. c. 7, § 4G by a statute which applies to a class of entities of which the Board is a member. In this case, G.L. c. 30, § 25B applies in pertinent part to a "board . . . within any of the executive offices established by chapters six A or seven . . ." As noted previously, the Teachers' Retirement Board is plainly a board within an executive office created by chapter seven. See G.L. c. 7, §§2, 4G.⁷

I do not question that the Board has a large degree of autonomy over its administration of the teachers' retirement system. See 1978/79 Op. Att'y Gen. No. 29, Rep. A.G., Pub. Doc. No. 12 at 161 (1979). However, this does not by itself exempt the Board or its staff from the requirements of G.L. c. 30, § 25B. A plain reading of G.L. c. 30, § 25B, in conjunction with the other statutes discussed herein, manifests the legislature's intent that members and employees

systems does not preclude the vesting of oversight responsibility with respect to particular activities of the Board in other state agencies. See e.g., G.L. c. 15, §17 (reimbursement for expenses of members of the Board is subject to the approval of the governor); G.L. c. 7, §4G (commissioner of administration has those powers and duties with respect to the Board which are expressly provided by law). PERA itself apparently does not take the position that the Board is exempted from the operation of G.L. c. 30, §25B.

See Letter from Joseph I. Martin, Deputy Commissioner, Division of Public Employee Retirement Administration, to Frank T. Keefe, Secretary, Executive Office for Administration and Finance (May 6, 1988).

I also note in passing that PERA is subject to the commissioner's direction, control and supervision as an agency under EOAF and that EOAF is responsible for the exercise of all powers and the performance of all duties assigned by law to PERA. See G.L. c. 7, §§4, 4A.

⁶ Indeed, it appears that the only explicit references to the Teachers' Retirement Board in the Massachusetts General Laws are contained in the Board's enabling statute, G.L. c. 15, §§16-18, and the Public Pension Law, G.L. c. 32.

⁷ Significantly, G.L. c. 30, §25B by its terms applies "in the case of a department, office, commission, board, or institution within any of the executive offices established by chapters six A and seven" Thus, in contrast to G.L. c. 7, §4 (discussed *infra*), §25B does not distinguish between agencies which are within an executive office and subject to the supervision and control of that executive office on the one hand and agencies which are within an executive office but not subject to the supervision or control of that executive office on the other.

of the Teachers' Retirement Board be subject to the terms of § 25B.

For example, the statute which governs the relationship between EOAF and its component agencies reads in pertinent part:

The governor shall appoint a commissioner of administration . .

Except in the cases of the agencies named in section four G, he shall be responsible for the exercise of all powers and the performance of all duties assigned by law to the executive office for administration and finance to any division, bureau or other administrative unit or agency under said office. He shall be the executive and administrative head of said office, and every division, bureau, section and other administrative unit and agency within said office, other than the agencies named in section four G shall be under his direction, control and supervision. G.L. c. 7, § 4.

(Emphasis added.)

Construed together in the most plausible manner, G.L. c. 7, §§4 and 4G provide that the commissioner is responsible for all powers and duties assigned by law to any agency within EOAF, except for those powers and duties assigned by law to the agencies listed in § 4G. With respect to § 4G agencies, the commissioner may exercise *only* those powers and duties which are specifically assigned to the commissioner and by law made applicable to the agencies listed in § 4G. *See, e.g.,* G.L. c. 30, § 25B.

This interpretation is reinforced by St. 1987, c. 199, § 47, which declares various agencies "to be within and under the supervision and control of the office of human resource administration ..." while other agencies, including the Teachers' Retirement Board, the Civil Service Commission, and the Contributory Retirement Appeals Board, are declared "to be within the office of human resource administration but not under its supervision or control..." Notwithstanding this language, the enactment proceeds to bestow certain powers and duties upon the undersecretary for human resource administration with respect to "the departments, commissions, offices, boards, divisions, institutions and other agencies *within* the office of human resource administration . . ." [*id.* (emphasis added)], including, for example, "the prior review of any contract, agreement or other financial arrangement having a value of five thousand dollars or more entered into by any of *said* departments, . . . boards . . . and other agencies . . ." St. 1987, c. 199, § 47(iii) (emphasis added). In contrast, some other specified powers and duties of the undersecretary expressly apply to "any *such* department, . . . board . . . or agency *other than the civil service commission*" or to any *such* department, . . . board . . . or other agency *other than the contributory retirement appeals board . . .*" St. 1987, c. 199, § 47(iv) (emphasis added). As noted above, both the Civil Service Commission and the Contributory Retirement Appeals Board, like the Teachers' Retirement Board, are within the Office of Human Resource Administration but not subject to its supervision and control. It is thus apparent that the legislature intended general references to "departments ... boards ... and other agencies within the office of human resource administration" (emphasis added) in St. 1987, c. 199, § 47 to include the agencies not subject to the undersecretary's supervision and control. Where another result was intended, the legislature has made this distinction clear. For example, the last paragraph of § 47 provides, among other things, that the

undersecretary "may request and shall receive the assistance of any personnel within any agency within and subject to the supervision and control of the office of human resource administration."

Also consistent with this reading of §.4 and § 4G is the Opinion of the Attorney General which affirmed the Board's authority to appoint its own staff. *See* 1978/79 Op. Att'y Gen. No. 29, Rep. A.G., Pub. Doc. No. 12 at 161 (1979). As that opinion noted:

It would be anomalous for the Legislature to have ordained that the Board's executive secretary . . . be appointed by precisely the same agency [EOAF] from whose direction and control the Board is exempted. Such a suggestion contradicts the clear legislative intent to preserve the Board's autonomy and cannot be accepted. *Id.* at 162-63. (Footnote omitted.)

The autonomy of the Board with respect to personnel decisions has no bearing, however, upon the question presented here. The legislature could legitimately decide that the day to day operation of the Board, including the authority to hire and fire its own staff, was not within the purview of EOAF. To expressly confer upon EOAF the power to regulate out of state travel by the Board is not inconsistent with the legislative intent to have a Board which independently administers the teachers' retirement system.

I conclude that the power to regulate out of state travel at public expense is a power conferred upon the commissioner with respect to the Board that is "expressly provided by law" within the meaning of G.L. c. 7, § 4G.

Arguably, the applicability of G.L. c. 30, § 25B to out of state travel by the Board is drawn into question by the Massachusetts Appeals Court's decision in *Everett Retirement Board v. Board of Assessors of Everett*, 19 Mass.App.Ct. 305 (1985). Upon inspection, however, the Everett case reveals key distinctions between municipal and state retirement systems. The statutory provision at issue in Everett⁸ stated that amounts certified by a municipal retirement board to a mayor or board of selectmen, as the case may be, " *'shall be appropriated and paid ... to the treasurer-custodian'* of the retirement system."⁹ *Id.*, at 306-307. (Emphasis added.) The court in *Everett* concluded that because "a retirement board

⁸ G.L. c. 32, §22(7)(c)(iii).

⁹ Relevant for the purposes of this opinion, of course, is the analogous provision applicable to the Board, G.L. c. 32, §22(7)(b), which states that:

... the board shall certify forthwith to the commissioner of education the amounts necessary to be appropriated and paid for such fiscal year by the commonwealth for the three aforesaid funds [including the expense fund] of the teachers' retirement system, and ... such amounts shall be included in the appropriations for such fiscal year for the department of education . . . G.L. c. 32, §22(7)(b). (Emphasis added.)

established under G.L. c. 32 is independent of the city or town whose employees it serves" (*id.*, at 308), the City of Everett did not have the authority under either G.L. c. 59, § 20A (a "Proposition 2 1/2" measure) or G.L. c. 44, §§ 31, 31A and 32 (provisions of the "Municipal Finance Law") to refuse to appropriate funds for expenses duly certified by the Everett Retirement Board.

The court's reasoning in Everett, however, does not support a finding that the Board is independent of the Commonwealth in the same way that local retirement boards are independent of their host municipalities.¹⁰ As the court noted in that case: "[t]hat the retirement system is independent of the host municipality is underscored by a provision in G.L. c. 32, § 28(3)(b), that for towns with a population of under 10,000, the employees are part of the county retirement system." *Id.* at 308-309. This provision is unique to municipal retirement systems and does not affect the nature of the relationship between the Teachers' Retirement Board and the Commonwealth. "While the statutes creating the four retirement systems have a general resemblance, they differ from one another in various respects." *Davis v. School Committee of Somerville*, 307 Mass. 354, 357 (1940). The court's holding in *Everett* makes clear that municipal retirement boards are not municipal agencies and that employees of municipal retirement boards are not municipal employees. As previously discussed, however, the Teachers' Retirement Board is a state agency and employees of the Board are state employees.¹¹ In addition to the differences between the retirement systems mandated by G.L. c. 32, the Board is subject to a variety of controls not applicable to municipal retirement systems. *See e.g.*, St. 1987, c. 199, § 47(xi) (requiring the undersecretary of human resource administration to "ensur[e] the dissemination by the board of the teachers' retirement system and the board of the state employees' retirement system to the members and beneficiaries of members thereof of information concerning the actuarial status of [those two systems] and of the members' or beneficiaries' rights and obligations under the provisions of [G.L. c. 32]"); St. 1987, c. 199, § 47(xii) (requiring the undersecretary to "ensur[e] the maintenance by the board of the teachers' retirement system and the board of the state employees' retirement

¹⁰ In so ruling, I acknowledge the statement of the Supreme Judicial Court in *O'Connor v. County of Bristol*, 329 Mass. 741, 746 (1953) that "[e]ach of the several retirement systems, state, county, city or town, is in general an independent unit, having its own separate assets and liabilities and is under the jurisdiction of its own separate board." Nothing in this opinion suggests, however, that the Teachers' Retirement Board, as a state agency within EOAF, should not be subject to the provisions of G.L. c. 30, §25B with regard to out of state travel. At the time of the *O'Connor* decision, of course, EOAF did not exist and the Board was contained within the Department of Education. *See* St. 1945, c. 658, §4.

¹¹ It may be that the Board's status as a state agency results in differences between the teachers' retirement system and the municipal retirement systems which are anomalous from the point of view of sound public pension law and administration. However, the resolution of any such anomalies is, of course, the prerogative of the legislature rather than the executive branch.

system of programs of pre-retirement counselling services for the members thereof").

For the foregoing reasons, I conclude that G.L. c. 30, § 25B applies to the Massachusetts Teachers' Retirement Board.

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

March 2, 1989

Number 3

Honorable Arthur M. Mason
Chief Administrative Justice of the Trial Court
New Court House
Pemberton Square
Boston, MA 02108

Dear Justice Mason:

You have requested my opinion as to whether an amendment to G.L.c. 32, S. 65C as set forth in St. 1987, c. 697, S. 100 applies to the pension or retirement allowance of a Trial Court Justice who retired before the effective date of the amendment and is presently sitting as a Recall Justice under G.L.c 211B S. 14.¹

For the reasons set forth below, it is my opinion that the so-called "pop-up" provision provided by the amended statute, G.L.c. 32, S. 65C, does not apply to judges who retired before the effective date of the amendment, January 12, 1988, regardless of whether they have subsequently been recalled.

Chapter 697 of the Acts of 1987 (the "Act") changed a number of the provisions of the retirement laws applicable to public employees. Those changes which are relevant to the subject matter of this opinion concern pension options available to retiring state employees.

Under the prior statutory scheme, judges could elect to receive a reduced pension with the provision that their surviving spouse would receive two-thirds of that reduced pension. If the spouse predeceased the judge, however, the judge would continue to receive the reduced pension allowance. St. 1978, c. 393, S. 15. Section 100 of the Act altered this scheme by providing a "pop-up" provision. Basically, this provision provides that if a judge elects a reduced pension allowance with a survivor benefit for his or her spouse, but the spouse predeceases the judge, the judge will be entitled to a full pension allowance. Two other sections of the Act, S. 42 and S. 99 provide similar "pop-up" options for public employees and veterans, respectively.

Although S. 135 of the Act provided that S. 42 and S. 99 were to apply as of the effective date of the Act, there is no specific provision in the Act regarding an effective date for S. 100. Three interpretations of S. 65C as amended by S. 100 of the Act have been proposed. The first suggestion is that the pop-up provision is not limited to judges retiring after the statute's effective date. Under this view, any retired judge qualifies to elect the pop-up provision at any time. Alternatively, it has been suggested that judges serving under the recall provisions who step down subsequent to the Act's effective date are entitled to the benefits of the "pop-up" provision because this act constitutes a "reapplication" for retirement. Finally, the Division of Public Employee Retirement Administration has taken the position that S. 100 of the Act should be applied only to judges who retire on or after the effective date of the Act,

¹ Chapter 211A, S. 16 is the comparable recall provision for appellate justice. With regard to the question presented, this opinion applies to justices recalled under either provision.

regardless of whether they have been recalled. For the reasons which follow, I conclude that any judge, whether on recall or not, who retired before the effective date of the Act is precluded from electing the "pop-up" provision.

I begin with the controlling proposition that in interpreting the statute we must determine intent primarily from the "natural import in common and approved usage" of the words, considered in reference to conditions at the time of enactment and the objective to be fulfilled; and should give meaning to every word, assuming none to be superfluous. *International Organization of Masters, etc. v. Woods Hole, M.V. & N. S.S. Authority*, 392 Mass 811, 813, (1984). The relevant statutory language reads:

A chief justice, [or] justice.....hereinafter in this section called judged, who is retired or resigns and *who is entitled to a pension* or retirement allowancemay elect to receive, in lieu thereof, a pension or retirement allowance for life at a lesser annual rate with provision that upon his death, leaving as a survivor a surviving spouse, two-thirds of such pension,..... shall be paid to such surviving spouse; provided, however, that if such surviving spouse dies on or after the date such lesser retirement allowance becomes effective and before the death of such member, such member thereafter shall be paid a full retirement allowance..... Such election shall be in writing on a prescribed form and filed with the appropriate retiring authority *at the time of retirement or resignation* or within thirty days thereafter. G.L.c S. 65C (emphasis added).

While a cursory reading of this provision might suggest that judges who have already retired, whether on recall or not, can elect the new pop-up provision, the first sentence read in conjunction with the entire first paragraph compels the opposite result.

As an initial matter, use of the words "who is entitled to a pension" would appear to contemplate those judges who are not yet receiving their pension. Had the Legislature intended to allow previously retired judges to take advantage of the pop-up provision, language such as "and who is receiving a pension" or "and receives a pension" would have been incorporated to indicate the legislative intent to include those judges currently retired. The fourth sentence requires judges to elect an option "at the time of retirement or resignation or within thirty days thereafter". Judges who have retired prior to the enactment of the amendments cannot possibly meet this requirement of the statute. Having already retired they cannot submit their written election under this amended statutory provision "at the time of retirement or resignation or within thirty days thereafter" since that time period has already passed.²

My construction of the "pop-up" clause as available only to those judges who

2 The general statutory scheme of Chapter 32 mirrors the immutability of electing an option before retiring under S. 65C. G.L.c. 32, S. 12(1) allows a retiree to change his or her elected option in three ways; anytime before the State Board of Retirement receives the retiree's written application for retirement; within the fifteen day period after receipt of the application; or before the date the retiree's allowance becomes effective. Under this scheme, the selection of an option is a condition precedent to retiring and cannot be changed after the retirement date.

retire subsequent to the date of its enactment is also buttressed by the canons of statutory construction. Ordinarily, statutes should be construed as having a prospective operation only, unless the statute plainly indicates an intent to operate retroactively. *Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.*, 380 Mass 212, 214 (1980); *Spooner v. General Accident & Fire Assurance Corp., Ltd.*, 379 Mass 377, 379 (1979); see also *Forbes V. United States*, 472 F. Supp. 840, 843 (D. Mass. 1979). Similarly, it is a well-established principle of statutory construction that statutes affecting substantive rights, such as the pension rights of justices, are presumed to be prospective unless a contrary intent is clearly expressed. See *Goldstein Oil CO., v. C.K. Smith Co.*, 20 Mass. App. Ct. 243 (1985) (statute repealing interstate commerce exemption under c. 93A was substantive and should not be applied retroactively).

As noted above, § 135 of the Act provided an effective date for various provisions including §§ 42 and 99, but not § 100. In the absence of any specific indication that the Legislature intended that § 100 be applied retroactively, these traditional principles of statutory construction dictate that the provision should be interpreted prospectively.³

That the Legislature intended prospective application of the amendment is substantiated by the fact that the statute mandates that each option be self-financing. Section 65C requires that on the date of retirement or resignation the value of benefits under each option (65A, 65B, 65C and 65D) be actuarially the same.⁴ Thus, each option must be self-contained and self-financing. Under the prior scheme, a retiree who chose option 65C received a lesser pension than the full pension allowance in order to provide for his or her beneficiary. Of course, this lesser pension amount did not take into account the potential cost of the "pop-up" provision. Under the amended scheme, all other variables remaining

3 Previous interpretations by both the Attorney General and the Legislature support the argument that § 65C should be applied prospectively. St. 1968, c. 699, which replaced the pre-existing version of G.L. c. 32, § 65C, was passed to broaden the class of widows covered by the section to include the widows of special justices. Language contained in that statute, "A chief justice..... or special justice, who is retired or who resigns and who is entitled to a pension for life", remains in force today. The 1968 act is similar to the 1987 amendment to § 65C in that there was no effective date mentioned in the 1968 act. In the absence of any effective date for the statute, the Attorney General interpreted its provisions as prospective only and placed the effective date of the act ninety days following the approval date. 1970/71 Op. Att'y Gen. No. 16, Rep. A.G., Pub. Doc No. 12 at 58 (1970). Id.

4 The pertinent language of the statute reads: "The yearly amount of such lesser retirement allowance shall be determined so that the value, on the date such allowance becomes effective, of the prospective payments to such member and to such surviving spouse shall be the actuarial equivalent of the value on such date of the full retirement allowance; provided, however, that the yearly amount of such lesser retirement allowance shall be decreased to reflect the costs to the system of providing full retirement allowances in accordance with the first sentence of this paragraph." G.L. c. 32, § 65C.

constant, a retiree would receive a lesser amount in choosing option 65C, because the option 65C pension is actuarially determined taking into account the possible higher cost of the "pop-up". Thus, the cost of the "pop-up" is borne by the employees who select the option and in this sense is self-contained and self-financing.⁵

In order to maintain the self-financing aspect of the statute, a retroactive application of the "pop-up" provision to previously retired judges would require a redetermination of their pension allowances. Such a redetermination would be virtually impossible and could lead to cost overruns and violate the self-financing provision, as the entire system is predicated on the immutability of choosing one or another of the particular options.

Calculation of a retiree's pension involves a complicated balancing of many factors including the salary of the retiree, length of service and age of the judge and his or her spouse, if applicable. All of these variables, as well as factors such as interest accumulation and mortality rates, are time-sensitive. It is simply impossible to redetermine a pension in light of a new system where, under a pre-existing determination, part of the accrued pension has been paid out. What appears to be a minor readjustment in the pension calculation could actually affect the stability of the system as a whole and violate the statutorily mandated self-financing provision.⁶

Moreover, the pension system currently supports a large portion of unfunded liability that the Legislature has mandated must be reduced. *See* St. 1987, C. 697. Any additional cost incurred due to the application of the pop-up provision to already retired judges would be inconsistent with that goal.

For all of these reasons I conclude that § 100 of the Act should be construed

5 A hypothetical example is illustrative: A male judge retired before the 1987 amendment might receive a full pension allowance (option 65A) of 100. This same retiree would receive 80 under option 65C and his spouse upon his death would receive two-thirds of 80. If his spouse predeceased him then he would still only receive a pension allowance of 80. His pension would not "pop-up" to the full 100. Under the new "pop-up" scheme the same retiree would receive 100 as his full pension allowance but would now receive 77 under option 65C, taking into account the additional possible "pop-up" cost. If he predeceased his spouse, she would receive two-thirds of 77. If his spouse predeceases him, his pension would "pop-up" and he would receive the full 100. The extra cost of providing this contingency is reflected in a lower pension allowance under the "pop-up" provision.

6 Other sections of chapter 32 make clear both the very limited opportunities for re-entering the state retirement system, opportunities which are spelled out in detail through clear and specific legislation, and the means for doing so. For example, under G.L. c. 32, § 5(1)(g) a retiree elected to public office or appointed to office for a term of years may become an "active member" of the retirement system if the retiree pays back the "total amount of any such allowance received from the date of his retirement to the date of his again becoming a member in service". The other statutory avenue for return to active service is found under G.L. c. 32, § 8(2), which provides for members retired on disability to be reinstated once physically able.

prospectively. An act with an emergency preamble is effective as of the signature date, in this case, January 12, 1988. See *Opinion of the Justices to the Governor*, 368 Mass. 889 (1975). Therefore, any justices retired on or after the effective date would be able to take advantage of the pop-up provision. Any justices retired prior to that date would be precluded from electing the pop-up provision.

The only question remaining concerns the availability of the pop-up clause to retired justices presently serving on recall under either G.L. c. 211B, § 14 or 211A, § 16. It has been suggested that because a retired justice must notify the Massachusetts Board of Retirement after completing recall, this notification serves as a "re-application for retirement", allowing the retired recall justice to elect the pop-up provision. This interpretation, however, both mischaracterizes the status of a recall justice who completes his or her service and would lead to an unreasonable construction where a more sensible one already exists. See *Manning v. Boston Redevelopment Authority*, 400 Mass. 444, 453 (1987); see also *Green v. Board of Appeal of Norwood*, 358 Mass. 253, 258 (1970).

As is noted above, when a judge retires, his or her pension is calculated taking into account a number of variable factors relating to the retirement date including age, options available, and highest average salary for a three year period. When a judge goes on recall status under G.L. c. 211A, § 16, or c. 211B, § 14, the judge waives his or her right to pension benefits in accordance with G.L. c. 32, § 91 and § 90B. The waiver, however, only acts as a temporary suspension of that judge's pension.⁷

The view that a judge's pension status remains static once determined is supported by decisions of the Supreme Judicial Court. *Klapacs v. Contributory Retirement Appeal Board*, 340 Mass. 732 (1960), see *Nippe v. Commissioner of Revenue*, 380 Mass. 431, 433 (1980) ("Once the irrevocable election was made, he had no control over the pension in any way. He could not change the beneficiary, surrender or cancel the pension, assign it, or borrow funds against it."); see also 1961/62 Op. Att'y Gen., Rep. A.G., Pub. Doc No. 12 at 163 (1962). There is nothing about recall status which modifies the immutability of a judge's pension once determined. He or she cannot elect another option under which to retire, change beneficiaries or pick a new retirement date after completing the recall term. Nor are pension benefits readjusted because of a higher age or other determining factor such as salary.⁸

⁷ Chapter 32, § 90B allows waiver "for such period as he may specify....." The justice may "include a provision that shall remain in effect until further notice." Since the terms of recall cannot exceed ninety days, c. 211A, § 16 and c. 211B, § 14, a recall justice could inform the Retirement Board of his or her initiation and completion date at the same time. In any case, the Retirement Board requires official notification from the Chief Administrative Justice of the Trial Court's office before reinstating a justice's retirement allowance.

⁸ In addition, the language of the relevant provisions regarding recall justices echo this interpretation. G.L. c. 211A, § 16 reads "A retired chief justice or

As a final matter, G.L.c 211A, § 16 requires that recall justices receive all other benefits which a regular incumbent receives. It has been suggested that the new pop-up option is one such benefits. This view is not persuasive. Although recall justices are entitled to comparable salary, vacation time, sick leave, and health insurance, they are not in the identical position of a regular incumbent vis-a-vis retirement benefits. Most significantly, recall justices, unlike regular incumbents have no pension deductions taken from their salary and are not considered active members in the retirement system, as noted above.

For all of the above reasons, I conclude that recall judges and non-recall judges who retired prior to January 12, 1988 cannot avail themselves of the newly amended pop-up provision contained in St. 1987, c. 697, § 100.

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

associate justice....." (Emphasis added.) Similarly G.L.c. 211B, § 14 reads "A retired justice of the trial court....." waiver of retirement allowance by public employees as passed by the Legislature was entitled "An Act authorizing certain retired persons and those claiming under them to waive their rights to any portion of their retirement allowance." (Emphasis added.) St. 1955, c. 590, § 1. The plain meaning of this language indicates that only those justices already retired are affected by this section.

April 4, 1989

Number 4

Paula Gold, Secretary
Executive Office of Consumer Affairs
and Business Regulation
One Ashburton Place
Boston, Massachusetts 02108

Roger M. Singer
Commissioner of Insurance
Commonwealth of Massachusetts
280 Friend Street
Boston, Massachusetts 02114

Dear Secretary Gold and Commissioner Singer:

You have requested my opinion pursuant to G.L. c. 12, § 9 whether a used-home warranty product offered by Home Security of America, Inc. ("HSA") constitutes a contract for insurance which may be regulated by the Commissioner of Insurance.¹

Your question is:

Does the contract between Home Security of America, Inc. (HSA) and either the seller or the buyer of a home, under which HSA warrants specified items in the house against "operational failure," constitute a contract of insurance within the meaning of G.L. c.175, § 2?

HSA takes the position that the Plan is nothing more than a warranty and

¹ The Home Security Plan ("the Plan") offered by HSA is a contract which provides coverage on residential real estate for repair or replacement of a list of enumerated items when such items suffer an "operational failure" due to "mechanical breakdown." The Plan is purchased by the seller of the residential real estate, protecting the seller in renewable six month increments until the home is sold, and then covering the purchaser for thirteen months after the sale. When "operational failure" of a covered item occurs, HSA provides indemnification for the cost of repair or replacement, within the specific per item dollar limits and the overall \$10,000 limit of the Plan. Covered items range from the roof to internal wiring, and from appliances such as dishwasher, disposal and furnace, to plumbing. However, if specific builders', sellers' or manufacturers' warranties on covered items still apply, or if the items are covered by insurance policies, then the Plan only provides coverage after these warranties or insurance policies have been exhausted. "Operational failures" caused by lack of maintenance, inspections, cleaning, adjustment or lubrication services are excluded from coverage. Some items over a certain age are excluded from coverage as well.

should not be regulated as insurance.² You have advised me that the Insurance division in the past has characterized similar plans as insurance. For the reasons stated below, it is my opinion that the used-home warranty contract offered by HSA falls within the statutory definition of insurance, set forth at G.L. c. 175, § 2.

I. Current Definition of Insurance

Insurance is defined in the Commonwealth of Massachusetts as follows:

A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest. G.L. c.175, § 2.

This definition is wide in scope and potentially encompasses a broad range of products. A 1959 Opinion of the Attorney General recites five elements which define contracts of insurance:

1. The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest;
2. The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils;
3. The insurer assumes the risk of loss;

² In a memorandum submitted by HSA in conjunction with your request, HSA suggests that a determination that the Plan is insurance would conflict with the position of twenty-three states where it currently markets the Plan. While these statistics are interesting, regulation of insurance is left to the individual states, and we are not compelled to adopt this view. According to HSA's memorandum and copies of correspondence supplied by HSA from various state insurance departments, four states (Arkansas, Connecticut, Kentucky, and Vermont) regulate used-home warranties as insurance and Oregon directed HSA to apply for a certificate to do business as a "home protection insurer" pursuant to ORS 731.164. Also, Maine and Texas regulate used-home warranties as insurance when they are sold by insurance companies. Finally, in New York, used home warranties are subject to regulation as insurance whenever the company selling them is "in the business of insurance," and is offering warranties as a vocation, not merely incidental to another business or activity. *Electronic Realty Associates v. Lennon*, 94 Misc.2d 249, 404 N.Y.S.2d 283, 287—288, *aff'd as mod.*, 67 A.D.2d 997, 413 N.Y.S.2d 728, *lv. to appeal den.*, 47 N.Y.2d 705, 417 N.Y.S.2d 1026 (1979). N.Y. Ins. Law § 1101 (b)(1)(B) (McKinney) [recodification of former N.Y. Ins. Law § 41(3)(b)].

4. Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing similar risks;

5. As consideration for the insurer's promise, the insured makes a ratable contribution to a general insurance fund, called a premium.³

1959 Op. Att'y Gen., Rep. A.G., Pub. Doc. No. 12, at 72 (1959).

The Opinion further states that if a contract contains only the first three elements, it is simply a *risk-shifting* device, and therefore not a contract of insurance.⁴ If it contains the last two elements as well, the contract then becomes a *risk-distributing* device, and would therefore be a contract of insurance.⁵ Although the presence of "risk" is an essential element⁶, it is not

³ This formulation thereby defines a "premium" as a "ratable contribution to a general insurance fund." The term "ratable" is defined as "proportional." *Black's Law Dictionary* (5th ed.). The premium (or "proportional" contribution) measures each insured's distributive share of the risk of all similarly situated insureds plus a proportional share of the expenses of the insurance company, and is paid into a general insurance fund maintained by the insurer. The losses of the policyholders and the expenses of the business are paid from this general insurance fund. W. Vance, *Handbook on the Law of Insurance* § 1 at 4—6 (3d ed. 1951). In Massachusetts, it is not necessary that the contribution be itemized separately from the overall charge of a retail contract. *Attorney General v. C. E. Osgood Co.*, 249 Mass. 473, 476 (1924).

⁴ This Opinion concluded that an independent corporation which marketed used-car warranties to auto dealers, which were in turn given to used-car purchasers by the dealers, was selling insurance in the Commonwealth of Massachusetts. The contracts promised indemnification for pre-approved repairs. The General Court apparently agreed with this analysis and conclusion as it has explicitly added "mechanical breakdown" or "mechanical failure" of automobiles as a peril which can be insured. St. 1980, c.386, § 1, amending G.L. c.175, §54C.

⁵ A concern has been raised that the 1959 Opinion is in conflict with prior Opinions. While the 1959 Opinion does not cite prior Opinions of the Attorney General discussing the definition of insurance, it is in fact fully consistent with them. The 1959 Opinion, as did prior Opinions, identifies contracts as insurance where: the covered peril and consequential loss are not "inevitable," but pose only a "risk" of occurrence within the life of the contract; a "premium" is charged in some fashion for the coverage; the insurer does not provide services itself but rather pays indemnification when the insured suffers a loss; the "insurer" is not an actual seller or manufacturer of goods who is warranting them to be of such quality as to survive wear and tear for a specified period of time; and the "insurer" is not really just providing ongoing (therefore inevitable) inspection and maintenance for equipment.

By way of illustration of these principles, a year-long contract for automobile

alone sufficient to establish a contract as insurance.⁷ Other types of contracts

repairs necessitated by either wear and tear, or from accident, collision or negligence, was considered insurance, 8 Op. Att'y Gen. 40, 41-42 (1926), while a contract of insurance was not created where a seller of apparently new tires warranted the tires would survive ordinary wear and tear for a specified period of time, but specifically excluded accidental damage and made no additional charge or premium for the warranty beyond the cost of the tires. 1940 Op. Att'y Gen., Rep. A.G., Pub. Doc. No. 12 at 39 (1940).

The 1959 Opinion is also consistent with prior opinions which distinguish between insurance contracts and service contracts. For example, when the need for maintenance, service and repairs is an inevitable result of the operation of electrical equipment, a contract which provides for complete and ongoing inspection, maintenance and repair services by the contractor is a service contract, and not insurance. 1 Op. Att'y Gen. 544 (1898).

Finally, the 1959 Opinion also concluded that an independent inspection company's promise to indemnify covered purchasers of automobiles on the occurrence of a designated peril causing a loss, rather than directly perform repairs, would create an insurance contract. This was consistent with a 1918 Opinion which concluded that where an Automobile Association provided indemnification to members who hired their own attorneys, an insurance contract was created, while the direct provision of legal services to members by the association's own attorneys, was not insurance. 5 Op. Att'y Gen. 206 (1918).

⁶ If the contemplated contingency which is required to create a contract of insurance is certain of occurring within the term of the contract, or if the "insurer" can *fully* control and thereby completely avert the contemplated contingency, the "risk" that the contingency will occur during the life of the contract is eliminated insofar as its occurrence is converted to either a certainty or an impossibility. If all risk is thus eliminated, an insurance contract cannot exist.

⁷ HSA asserts that insurance protects against "hazards." The term "risk" has historically been used interchangeably with the term "hazard." "Hazard" has been defined as "risk," or, "the likelihood or probability of loss." See e.g., *Ballentine's Law Dictionary* (3d ed. 1969). See also, *Black's Law Dictionary* (5th ed.). Past Opinions have stated that an essential element of a contract of insurance is "hazard." See, e.g., 8 Op. Att'y Gen. 40, 41 (1926). However, recent formulations define hazard more narrowly as "anything that increases the likelihood of a loss or the possible severity of a loss." B. Smith, J. Trieschmann, & E. Wienen, *Property and Liability Insurance Principles* 21 (1987). In other words, a "hazard" is now defined as anything that enhances the possible risk of a loss or the possible severity of a loss. Consequently, insurance is now seen to protect against "risks."

may protect against "risk" as well, such as a warranty. Where an insurer assumes a "risk" of loss from the occurrence of a designated peril during the life of the insurance contract, a warrantor similarly assumes a risk that a warranted item will fail during the life of the warranty.⁸ However, while both insurance and warranties are "risk-shifting" devices, only insurance also contains the element of "risk distribution." Under the five-part analysis of the 1959 Opinion, the combination of "risk-distribution" with a plan of "risk-assumption" serves to create an insurance contract, assuming the other enumerated factors are also present.⁹

⁸ It has been suggested that an insurer can exercise meaningful control over the "risk" of the contingency that repairs will be needed by performing a precoverage inspection of the insured item or premises. However, the extent of control exercised by the insurer is relevant only insofar as the risk can be totally eliminated. The 1959 Opinion rejected pre-contract inspections as conclusively demonstrating any meaningful indicia of control, likening such assertions to the equally fallacious statement that a medical examination of a person could eliminate the fortuitous event of physical impairment or death. Such inspections only uncover existing conditions, and do not serve as reliable predictors of future failure, even more so where the covered items are imbedded in walls, such as wiring and plumbing, or otherwise hidden from view, such as the motor of a dishwasher. Precoverage inspections will not therefore eliminate the risk of failure during the life of the contract. If a precoverage inspection was deemed sufficient to remove a contract from the definition of insurance, then title-insurance, wherein a title company engages in a full precoverage title search, would also fail to meet the definition of insurance.

⁹ HSA argues that insurance can only protect against "external forces" because "internal forces" are subject to the control of the insurer. Presumably, the point HSA makes is that an insurer can exercise total control over "internal forces" which can potentially cause a loss, thereby eliminating the element of "risk." However, as stated above, even a warrantor assumes a risk of failure during the life of the warranty. HSA cites *Claflin v. United States Credit System Co.*, 165 Mass. 501, 502 (1896) for the proposition that a contract of insurance involves the application of an external force to create a "hazard." The conclusion HSA draws is that the term "hazards" implies the presence only of "external forces." The *Claflin* decision does not support this interpretation. The *Claflin* court neither discusses a distinction between "external" and "internal" force, nor does it conclude that insurance can only exist when an "external force" is involved in creating a hazard [risk]. As discussed in n. 6, *supra*, the term "hazard" neither was formerly nor is presently defined as "external force." Neither does the statutory definition of insurance distinguish between the application of "external" or "internal" force. G.L. c. 175, §2. Such a distinction has explicitly been rejected insofar as "mechanical breakdown" and "mechanical failure" of automobiles, regardless of cause, is a peril which may now be insured against in Massachusetts. G.L. c. 175, §54C. Furthermore, in an analogous situation, life

II. The Plan is a Contract of Insurance

The provisions of the Plan make it clear that it is a contract of insurance.¹⁰ The Plan falls within the statutory definition set forth in G.L. c. 175, § 2: The Plan is an agreement by which the HSA for the consideration of the purchase price, promises to pay money to the seller or buyer of residential real estate, upon the destruction, loss or injury to something in which the purchaser has an interest.

The Plan also falls squarely within the five-point test enumerated in the 1959 Opinion. *First*, the seller, and subsequently the buyer, of the residential real estate own equity in the property and its components, thus creating an insurable interest. *Second*, the seller and the buyer are both subject to risk of loss through the occurrence of the designated peril: "operational failure" of covered components.¹¹ Upon such operational failure, the seller or buyer will be subject to a monetary loss. *Third*, HSA agrees to assume the risk of loss. HSA promises upon the occurrence of a covered "operational failure" to indemnify the seller or buyer for all or part of the cost of repairs or replacement. *Fourth*, the assumption of this risk by HSA is part of a general scheme to distribute actual

insurance insures against death from any cause, whether external or internal. *Commonwealth v. Wetherbee*, 105 Mass. 149 (1870).

¹⁰ It has been suggested that the Commissioner follow the contrary conclusion in the New York decision in *Electronic Realty Associates v. Lennon*, which discusses the narrow New York statutory definition of insurance, and finds the home repair contract being reviewed to be a warranty rather than insurance. See n. 2, *supra*. In contrast, the 1959 Opinion observes that insurance is defined broadly in Massachusetts. Furthermore, Massachusetts case law has rejected one of the principal premises relied on by the *Electronic Realty Associates* court, i.e. : Massachusetts deems it irrelevant whether a particular activity is the chief business of a company or whether it is merely ancillary in determining if the activity falls within the statutory definition of insurance. *Attorney General v. C. E. Osgood Co.*, 249 Mass at 477.

¹¹ HSA claims that there is no "risk" inherent in the Plan because the need for repairs will be inevitable. This argument is contradicted by HSA's own memorandum which states that "since the components are in various states of aging, no one can know with certainty the remaining life of these components." HSA also claims that the required precoverage inspection eliminates the required "risk" that repairs will be needed. However, this inspection is unlike the inspections included in a service contract which trigger necessary maintenance and repairs. As noted above, this inspection serves only as a baseline to exclude pre-existing conditions from coverage, thereby eliminating the inevitability of the need for repairs. In truth, the need for home repairs during the life of the Plan while possible, is entirely fortuitous, thereby creating the "risk" to the insured.

losses upon a group of persons bearing somewhat similar risks: i.e., sellers, and subsequent purchasers of residential real estate to the extent their property and components meet certain age and inspection requirements. *Fifth*, the insured, here either the seller or buyer, pays a premium to a general insurance fund, insofar as they pay a fee to HSA which presumably retains at least part of the premium to cover future losses and expenses.¹²

III. The Plan is Neither a Warranty Nor a Service Contract

HSA is not a warrantor. The 1959 Opinion defines a warranty as an affirmation, or collateral obligation, made by a seller, accompanying a contract of sale, which relates to the character, quality or fitness of the goods. 1959 Op. Att'y Gen., Rep. A.G., Pub. Doc. No. 12 at 74 (1959).¹³ HSA is not the seller of the home and therefore cannot be said to be making a promise in connection with the sale of its goods. It therefore cannot assert that it acts in the shoes of a seller who warrants a home to a buyer. HSA neither built, manufactured nor owned the used home or the covered components, and therefore is in no position to attest to the quality of the materials or workmanship used in manufacturing or building them.¹⁴ In addition, for the reasons discussed in n. 8, *supra*, HSA's precoverage inspection does not enable it to attest to the quality, character or

¹² While HSA did not explicitly state that it retains part of the premium in a reserve fund to cover future claims from policy holders, it must be presumed it does so under ordinary accounting practices. Otherwise, akin to a pyramid scheme, future claims would only be funded out of future sales of new policies, and if such future sales were insufficient, the company would be unable to meet its obligation to pay claims. Regulation of such contracts as insurance by the insurance commissioner can protect the public, in part, by serving to insure that companies such as HSA retain sufficient reserves to cover future losses.

¹³ The 1959 Opinion recites a number of different, but similar formulations of the definition of a warranty. An express warranty is defined in G. L. c. 106, §2-313 (.1) (a) as: "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." *Black's Law Dictionary* (4th ed.) is cited as defining a warranty as: "A statement or representation made by the seller of goods, contemporaneously with and as a part of the contract of sale, though collateral to the express object of it, having reference to the character, quality, or title of the goods, by which he promises or undertakes that certain facts are or shall be as he then represents them.

¹⁴ The home builders' and covered component manufacturers' or sellers' warranties will have most often expired at the time of sale by the homeowner. In those instances where the warranties have not expired, or where other insurance exists, the Plan provides only secondary coverage, placing primary reliance on the existing warranties or insurance. This is remarkably similar to the "coordination of benefits" clause common to insurance contracts.

fitness of the premises.

HSA is also not in a position analogous to a service contractor. HSA does not contract to provide regular inspections or to perform full maintenance of components. HSA performs no repairs itself, but merely authorizes the insured to contract for repairs or replacement, for which it will often provide indemnification (often only partial), or require the insured to exhaust other warranty or insurance coverage. Also, ordinary maintenance is explicitly excluded from coverage. The Plan is therefore not a service contract.

IV. Conclusion

The Plan falls within the statutory definition of insurance and the five-part test in the 1959 Opinion. As insurance, the Plan is subject to the regulation and supervision of the Commissioner of Insurance.¹⁵ Such regulation may serve to protect the public from the purchase of worthless insurance from financially unsound companies or from purchasing actuarially unsound or otherwise questionable insurance products. The Commissioner of Insurance has the expertise and experience to regulate these products. In sum, the Plan constitutes a contract of insurance under Massachusetts law.

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

¹⁵ The regulation of the insurance industry is in the public interest. *Attorney General v. Prudential Insurance Company of America*, 310 Mass. 762, 765 (1942).

May 1, 1989

Number 5

John DeVillars, Secretary of Environmental Affairs
Chairman, Massachusetts Water Resources Authority
Charlestown Navy Yard
100 First Avenue
Boston, Massachusetts 02129

Dear Secretary DeVillars:

The Massachusetts Water Resources Authority ("the Authority") has requested my opinion as to whether a real property transfer to the Authority from the Commonwealth of Massachusetts through its Armory Commission ("the Commission") is governed by sections 40F and 40F1/2 of Chapter 7 of the General Laws or whether these provisions have been superseded by the Authority's Enabling Act, specifically section 26(b) of Chapter 372 of the Acts of 1984 ("the Act"). For the reasons set forth below, I conclude that sections 40F and 40F1/2 of Chapter 7 are controlling, and that section 26(b) of Chapter 372 acts to trigger the procedures contained in these provisions. My view, therefore, is that the Act does not empower state agencies to transfer real property from the Commonwealth to the Authority without following the disposition procedures contained in sections 40E-L of Chapter 7.

There can be no doubt that important public policy objectives are embodied in the Act which established the Authority. The creation of the Authority came as a joint response by the Governor and the General Court to the growing legal, fiscal, and environmental crisis caused by the pollution of Boston Harbor and the Metropolitan District Commission's inability to address the problem adequately.¹

The Authority has argued quite eloquently that its ability to carry out its pressing public mandate may be impeded if it must comply with the requirements of Chapter 7. It contends that section 26(b) of the Act constitutes an exception to the requirements of Chapter 7. I recognize that this may be a desirable construction in light of the Authority's desire to proceed as expeditiously as possible, and I personally concur with the necessity of

¹ The Act, which was passed on an emergency basis, was widely seen as necessary to avoid the imposition of court-ordered remedies and injunctions to comply with federal and state environmental law. As Governor Dukakis noted in his letter of April 19, 1984 to both houses of the Legislature urging passage of House No. 5915: "underlying the deep concern felt by the Commonwealth, its citizens, and its businesses is the very real possibility that if we fail to act in a timely and responsible fashion, a court of law will take action for us." Governor's Message, April 19, 1984, House Report No. 5915.

immediate action to resolve the environmental problems of Boston Harbor. Nevertheless, while the Legislature is free to exempt the Authority specifically from having to comply with the procedures of Chapter 7, I cannot remain faithful to the essential principles of statutory construction and find that it has already done so with the extremely vague and ambiguous language contained in section 26(b). I note also that while the public policy concerns underlying the mission of the Authority are evident, there are other powerful public policy considerations which support a legislative judgment that the Authority must follow the guidelines of the Ward Commission guarding against fraud and abuse.²

A statute, especially where its meaning is unclear, must be read in view of the preexisting legislative scheme governing the same field or subject matter. See, e.g., *Saccone v. State Ethics Commission*, 395 Mass. 326, 334 (1985). A prior statute will not be repealed by subsequent legislative act unless by express words or clear or necessary implication. *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 382 Mass. 592 (1981); *Mayor of Haverhill v. Water Commissioners of Haverhill*, 320 Mass. 63 (1946). Furthermore, "strong terms" in the subsequent statute are necessary to demonstrate the Legislature's intent to repeal or supersede. *Dudley v. City of Cambridge*, 347 Mass. 543 (1964).

Repeal by implication, which is greatly disfavored, will only be recognized where the repugnance or opposition of the later statute to the former is too plain and clear to be avoided. See e.g., *Boston Housing Authority v. Labor Relations Commission*, 398 Mass. 715 (1986); *City of Boston v. Board of Education*, 392 Mass. 788 (1984).

The comprehensive legislative scheme for conveyance of state property is contained in G.L. c. 7, § 39A *et seq* Chapter 7, § 39B provides that the Division of Capital Planning and Operations ("DCPO") shall be responsible for acquisition, allocation, and disposition of real property.³ The Legislature's concentration of exclusive and complete authority in DCPO for the management of the Commonwealth's real property followed a period of intense public concern about the mismanagement of state-owned property which culminated in the formation of the Special Commission Concerning State and County Buildings, popularly known as "the Ward Commission." The Ward Commission's final report, in turn, led to the Legislature's passage of Chapter 579 of the Acts of 1980, which created the new Division of Capital Planning and Operations in

² See discussion, *infra* at 4-5.

³ Section 39B of Chapter 7 states in relevant part that: "Except as otherwise provided in this chapter or any other statute or appropriation act, the deputy commissioner of capital planning and acquisition shall be responsible for the acquisition, allocation, and disposition of the real property" The Legislature thus plainly anticipated occasions where it might implement other schemes for property disposition and acquisition. Here, the Legislature has simply not demonstrated sufficiently its intent to accomplish such a result.

order to centralize and improve the management of the state's real property.⁴ The powers of DCPO's Deputy Commissioner and the state's intricate mandatory procedures for property acquisition and disposition are found in sections 40E-L of Chapter 7.

The Authority's Enabling Act provides generally that all local bodies and state agencies, including "commissions," are authorized to convey "any interest" they may have in non-Article 97 property "to the Authority upon such terms and conditions as *the proper authorities* of such" bodies and agencies "may deem appropriate and without the necessity of any action or formality other than *the regular and formal action* of said public bodies, agencies, instrumentalities, commissions . . ." (emphasis supplied).

This language⁵ does not contain a necessary implication, much less manifest a specific intention, that the meaning of the Act is to displace and bypass the mandatory procedures embodied in Chapter 7 and establish an alternative system of property acquisition for the Authority.⁶

⁴ In the *Final Report to the General Court of the Social Commission Concerning State and County Buildings* (December 31, 1980), the Ward Commission urged that the existing "disorganized statutory and administrative framework" of real property management be replaced by "a central authority that possesses both expertise and adequate resources and that operates within the framework of clear legal structure and systematic guidelines, to manage the allocation, acquisition and disposition of the Commonwealth's real property . . . Id. at 102, 119. These "recommendations . . . [were] embodied in Chapter 579 of the Acts of 1980." Id. at 119.

⁵ Section 26(b) of the Act states in its entirety:

Except with respect to real property acquired or held for purposes described in Article XCVII of the Amendments to the Constitution, all local bodies and all public agencies, instrumentalities, commissions and authorities of the commonwealth, are hereby authorized and empowered to lease, lend, grant or convey to the Authority upon such terms and conditions as the proper authorities of such public bodies, public agencies, instrumentalities, commissions and authorities of the commonwealth may deem appropriate and without the necessity of any action or formality other than the regular and formal action of said public bodies, agencies, instrumentalities, commissions and authorities of the commonwealth any interest in any real or personal property which may be necessary or convenient to effect the purposes of the sewer and waterworks of the Authority.

⁶ Statutes are not to be interpreted so as to declare a radical change in established public policy unless the statutory language manifests a specific intent that such a change be effected. See *Commonwealth v. Germano*, 379 Mass. 268 (1979); *Roberge's Case*, 330 Mass. 506 (1953); *Dexter v. Comm. of Corporations and Taxation*, 316 Mass. 31 (1944). This is especially the case where the prior statute is "of uniform application . . . and designed to safeguard

On the contrary, section 26(b) appears to be a catch-all provision⁷ reserving the power to convey real property interests to “the proper authorities” of a variety of local bodies and state agencies. In the case of property transfers involving state agencies, the Division of Capital Planning and Operations is, by statute, the sole and proper authority for the purpose of disposing of any interest in the Commonwealth’s real property. G.L. c. 7, § 39B. There is simply no other “proper authority” to convey interests in the real property of the Commonwealth.⁸ Thus, when section 26(b) is read in conjunction with sections 40F and 40F1/2 of Chapter 7, it is clear that “the proper authorit[y]” of the

public funds.” See *Mayor of Haverhill*, 320 Mass. at 68 (1946). Far from manifesting any clear intent to break from established public policy here, the statutory language tends toward the adoption of the preexisting “regular and formal” procedures for the disposition of state-owned property.

⁷ The apparent model for section 26(b) is a somewhat parallel provision of the Enabling Act of the Turnpike Authority, section 15 of Chapter 354 of the Acts of 1952. This section states in its entirety:

All counties, cities, towns and other political subdivisions and all public agencies and commissions of the commonwealth, notwithstanding any contrary provision of law, are hereby authorized and empowered to lease, lend, grant or convey to the Authority at its request upon such terms and conditions as the proper authorities of such counties, cities, towns, political subdivisions, agencies or commissions of the commonwealth may deem reasonable and fair and without the necessity for any advertisement, order of court or other action or formality, other than the regular and formal action of the authorities concerned, any real property which may be necessary or convenient to the effectuation of the authorized purposes of the Authority, including public roads and other real property already devoted to public use.

The fact that the enactment of this statutory provision predates the existence of Chapter 7 by some 28 years makes it unlikely that, by adopting this provision’s extremely general language, the Legislature intended specifically to supersede Chapter 7.

⁸ Whatever independent powers the Armory Commission or any other state agency once possessed to convey land were transferred to DCPO by the enactment of Chapter 7. Section 40E of Chapter 7 states that the Deputy Commissioner of DCPO “shall exercise [Chapter 7] powers . . . notwithstanding the delegations which the general court has made pertaining to the acquisition, control, and disposition of real propertyChapter 7 thus categorically transferred to DCPO all existing delegations of authority over the Commonwealth’s real property. Individual state agencies do not have the independent power to acquire or dispose of property they occupy.

Commonwealth for purposes of transferring the land⁹ in custody of the Armory Commission is DCPO.¹⁰

Section 26(b)'s specification that local bodies and state agencies may transfer land to the Authority based on their "regular and formal action" further evinces a legislative intention to require conformance to the mandatory procedures of Chapter 7 in the conveyance of state property to the Authority. The "regular and formal action" of state agencies and commissions intending to convey land by definition refers to those formal procedures contained in sections 40F and 40F1/2 of Chapter 7.

My interpretation of the statute is reinforced by the fact that Chapter 7, § 40E removed from state agencies all title to real property and vested such title in the Commonwealth, giving DCPO the powers of acquisition, disposition, and management over the Commonwealth's land. *See* G.L. c. 7, § 40E. Thus, when the Legislature conferred power upon the "proper authorities" of local and state agencies to convey "any interest in any real or personal property" to the Authority, it could not logically have been referring to state agencies themselves as state agencies, absent specific statutory authority, do not possess the power to transfer any interest in the state's real property.

For all these reasons, my view is that, for real property transfers from the Commonwealth through state agencies to the Authority, section 26(b) triggers the regular procedures of Chapter 7. Given this interpretation, DCPO must comply with the procedures set forth in sections 40F and 40F1/2 of Chapter 7 to accomplish conveyance of real property to the Authority.¹¹ These procedures

⁹ It should be noted here that the word "armory" in section 126 of Chapter 33 includes the land upon which it is built. "There can be no distinction between the armory building and the land to which it belongs. The term 'building' includes the real estate on which it is situated, unless the general meaning is modified by the language of the context. Accordingly, the same rule must be applied to the 'armory land' adjoining the armory as pertains to the structure itself." 1926/27 Op. Att'y Gen., Rep. A.G., Pub. Doc. No. 12 at 139, July 28, 1926. *See also* 1946/47 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 101, June 19, 1947 ("the use of armories . . . by necessary implication includes land devoted to armory purposes...")

¹⁰ Where two statutes relate to the same subject matter, they are to be interpreted in harmony with one another so as to constitute a consistent and intelligible body of law. *See e.g., Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 382 Mass. 592 (1981); *Labor Relations Commission v. Board of Selectmen of Dracut*, 374 Mass. 619 (1978); *Town of Hadley v. Town of Amherst*, 372 Mass. 46 (1977). In determining legislative intent, statutes are not considered in isolation but in relation to each other, and courts must consider the origins, historical development, and language of the statutes. *Pereira v. New England LNG Co., Inc.* 364 Mass. 109 (1973).

¹¹ While under sections 40F and 40F1/2, DCPO must consider the needs of

include the requirement that the Deputy Commissioner notify the House and Senate Committees on Ways and Means and the Joint Committee on State Administration if the disposition of property is for less than five years or submit a request to the General Court for authority to make a conveyance of longer than five years. *Id.* Section 40F1/2 also requires the addition of a reversionary clause and a certification of compliance with Chapter 7 to any instrument conveying real property from the Commonwealth to a public agency for a public use.¹²

Finally, I must direct your attention to section 4(c) (ii) of the Act, which states that “[u]nder this Act . . . no lands devoted to the public use shall be diverted to another inconsistent public use, except in all instances in accordance with the laws and the Constitution of the Commonwealth.” This provision manifests a plain and specific intention by the Legislature to require conformance to the “prior public use” doctrine in the conveyance of land to the Authority.¹³

The essence of this doctrine is that “public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion...” *Robbins v. Department of Public Works*, 355 Mass. 328, 330 (1969). Thus, if and when DCPO (or the Authority,

other state and public agencies, the Act may be read by DCPO to place the Authority ahead of other potential candidates since it expresses a legislative policy recognizing the importance of the Authority's responsibilities.

¹² The reversionary clause transfers property back to the Commonwealth in the event that the state agency is not using it for the express public purpose for which it was granted. The Deputy Commissioner's certification, signed under the pains and penalties of perjury, states that he or she has fully complied with the requirements of Chapter 7. Section 40F1/2 states that “no [disposition agreement] . . . [or] deed, executed by or on behalf of the Commonwealth shall be valid unless such agreement or deed contains” the Deputy Commissioner's certification of compliance.

¹³ Likewise, section 9(c) of the Act explicitly conditions all *disposition* of property by the Authority upon, *inter alia* compliance with “doctrines of law concerned with diversions of lands devoted to public use to other inconsistent public use. . . .”

Even in the absence of these definitive statutory statements, conformance to the “prior public use” doctrine would be required since the Act contains no explicit statement of which land is being transferred and what public use is being changed. *See Opinions of the Justices*, 383 Mass. 895, 905 (1981) (“Where the Commonwealth has proposed the transfer of land from one public use to another, the legislature must be explicit concerning the land involved; it must acknowledge the interest being surrendered; and it must recognize the public use to which the land is to be put as a result of the transfer.”) *See also Board of Selectmen of Braintree v. County Commissioners of Norfolk*, 399 Mass. 507, 510 (1987); *Bauer v. Mitchell*, 247 Mass. 522, 528 (1924), and cases cited.

acting independently) seeks legislative authorization for a permanent transfer of real property from the Commission to the Authority, it can also seek to obtain the specific legislative authorization to change the public use of the property if DCPO determines that such authorization is necessary.

In short, section 26(b) of the Act does not empower state agencies and commissions to transfer real property directly to the Authority but instead triggers the formal procedures contained in Chapter 7. If the Legislature desires to expedite the Authority's acquisition of property by exempting the Authority from Chapter 7 procedures, the Legislature is of course free to do so.

Sincerely,

JAMES M. SHANNON
ATTORNEY GENERAL

June 7, 1989

Number 6

L. Edward Lashman, Secretary
Executive Office of Administration & Finance
State House, Room 373
Boston, Massachusetts 02133

Dear Secretary Lashman:

The Commissioner of the Division of Public Employee Retirement Administration and the Commissioner of Veterans Services have requested my opinion regarding the interpretation of the definition of "veteran" in Massachusetts General Laws c. 4, § 7, cl. 43 in light of recent federal action declaring certain individuals to be veterans for the purposes of federal Veterans Administration benefits. The question presented is:

Whether recent federal legislation conferring veteran status on certain members of the American Merchant Marine for the purpose of all laws administered by the Veteran's Administration, results in Massachusetts recognizing these certain individuals as well, for purposes of the Commonwealth's Veterans Benefits Program?

For the reasons which follow, I conclude that, as a result of this federal action, certain former merchant marines may be considered veterans for the purposes of the Commonwealth's Veterans Benefits Program.

G.L. c. 32 provides certain benefits for veterans that are greater than those provided for other members of contributory retirement systems. *See, e.g.*, G.L. c. 32 §§5(2)(b), 6(l), 56-60. G.L. c. 32, § 1 defines "veteran" in part by reference to G.L. c. 4, § 7, cl. 43.¹ This section provides in pertinent part that a "veteran" shall mean "any person... (a) whose last discharge or release from wartime service, as defined herein, was under honorable conditions and who (b) served in the *army, navy, marine corps, coast guard or air force* of the United States..." (Emphasis supplied.)

It is apparent that clause 43 does not expressly include the merchant marines. However, pursuant to recent changes in federal law,² certain former merchant marines are being issued honorable discharges from the United States Coast Guard, Army, and Navy. A number of these individuals have applied for veterans' benefits through contributory retirement systems. The question is, thus, whether these honorable discharges are sufficient to bring a former merchant marine within the Commonwealth's definition of veteran.

Pursuant to the G.I. Improvement Act, Pub. L. No. 95-202, § 401, 91 Stat. 1449 (1977), the Secretary of Defense has vested authority to make

¹ G.L. c. 115 §1 which establishes the Commonwealth's Veteran's Benefits Program similarly defines "veteran" by reference to cl. 43.

² See discussion, infra at 2-4.

determinations as to whether civilian employment or contractual service rendered by groups to the Armed Forces of the United States shall be considered "active military service" for purposes of all laws administered by the Veteran's Administration. *Id.* at § 401(a)(1). Consistent with authority so provided, the Deputy Secretary of Defense issued a Directive on January 24, 1979 which delegated authority to the Secretary of the Air Force to determine if the service of any such group constituted "active military service." The Directive also authorized the Secretary of the Air Force to establish the "Department of Defense Civilian/Military Service Review Board." The Review Board is charged with researching the involvement of groups who request "active duty" status. The Secretary of the Air Force considers all recommendations from the Review Board and makes a final determination as to whether the service rendered by a group shall be considered "active military service" for purposes of all laws administered by the Veterans Administration.³

On January 19, 1988, the Secretary of the Air Force declared members of the U.S. Merchant Marines who served in active oceangoing service from December 7, 1941 to August 15, 1945, to be veterans, eligible to receive federal Veterans Administration benefits.⁴

This recognition was based on merchant marines' significant record of service delivering cargo to American Armed Forces throughout the world during the Second World War. Six thousand U.S. merchant seamen died and 733 ships were lost as a result of German U-boat attacks. This is a rate that proportionately

³ In making such determinations, consideration will be granted to judicial and other appropriate precedent and "the extent to which (A) such group received military training and acquired a military capability or the service performed by such group was critical to the success of a military mission, B) the members of such group were subject to military justice, discipline, and control, C) the members of such group were permitted to resign, D) the members of such group were susceptible to assignment for duty in a combat zone, and E) the members of such group had reasonable expectations that their service would be considered to be active military service." G.I. Improvement Act, Pub. L. No. 95-202 §401(a)(1)(A).

⁴ The group of members of the Merchant Marine granted approved "active duty" status is comprised of crew members who served satisfactorily during the period of armed conflict, December 7, 1941 and August 15, 1945, as (1) merchant seamen documented by the U.S. Coast Guard or Department of Commerce aboard vessels operated by the Warshipping Administration or the Office of Defense Transportation or their agents in oceangoing service of the United States on foreign, near foreign, intercoastal or coastwide voyages, or as (2) Civil Service crew members of the United States Army Transportation Service in oceangoing service or foreign waters.

exceeded all branches of our armed services, with the single exception of the U.S. Marine Corps.⁵

Merchant marines contracted with three departments within the military during this specific wartime period - the U.S. Coast Guard, Army and Navy respectively. In order to be considered for active duty status, each interested member of the Merchant Marine must make application to one of the above military departments. Upon verification of creditable service, an Honorable Service Certificate/Report of Casualty is provided to each qualifying member of the Merchant Marine.⁶ These discharges are issued by the U.S. Coast Guard, Army or Navy, which are among those branches of the armed services specifically enumerated in clause 43 of G.L. c. 4, § 7. For this reason, this special group of former merchant marines should be viewed as coming within the Commonwealth's definition of "veteran." In order to obtain any veterans benefits available under state law, a merchant marine who has received the Honorable Service/Report of Casualty and accompanying Form DD 214 must document that he has met the further criteria set forth in Clause 43 in the same manner as do other veterans.⁷

In summary, members of the American Merchant Marine who served in armed conflict between December 7, 1941 and August 15, 1945, and who have received honorable discharges from the U.S. Coast Guard, Army, or Navy, are entitled to legitimate veteran status and are eligible to demonstrate their entitlement to any veterans benefits provided by state law.

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

⁵ President of the United States, 1988 National Maritime Day Proclamation as cited in letter from John Gaughan, Maritime Administrator, U.S. Department of Transportation, Maritime Administration to Merchant Marine Veterans.

⁶ The Merchant Marine veteran is also issued a Form DD 214 at the time the Honorable Service Certificate/Report of Casualty is issued. Inclusive dates of each creditable voyage are reflected on this Form. The total "active duty" service shall be the summation of each foreign, near foreign intercoastal or coastwise voyage within the period of armed conflict during World War II. Upon receiving a service certificate, the veteran, in order to obtain any federal benefits, must submit the Form to the Veterans Administration.

⁷ Clause 43 requires, for example, that the recipient of an honorable discharge from wartime service show that he or she served for "not less than ninety days active service at least one day of which was for wartime service" or met other enumerated conditions.

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