



The Commonwealth of Massachusetts

REPORT
OF THE
ATTORNEY GENERAL

FOR THE
Year Ending June 30, 1991



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To the Honorable Senate and House of Representatives:

*I have the honor to transmit herewith the Report of the Department
of the Attorney General for the fiscal year ending June 30, 1991*

Respectfully Submitted,

SCOTT HARSHBARGER
Attorney General

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL
SCOTT HARSHBARGER

First Assistant Attorney General
John T. Montgomery

CHIEF OF STAFF
Donald L. Davenport

Assistant Attorneys General:

Richard Allen
Thomas Alpert
Cynthia Amara 4
Dorothy Anderson
Linda Andros 52
Barbara Anthony 12
Frederick Augenstern
Thomas Barnico
Judith Beals
Steven Berenson 5
William Berman 24
Patricia Bernstein
Ann Berwick 21
Despena Billings 50
Edward Bohlen
Mark Bourbeau
Ruth Bourquin
Howard Brick 26
Matthew Brock
Maureen Brodoff 79
Richard Brunell 76
James Bryant 28
David Burns 12
Andrea Cabral 31
Susan Carnduff 12
Eric Carriker
James Caruso, Jr.
R. Michael Cassidy
Apollo Catala 71
Ellen Caulo 13
Karen Cheeks-Lomax 77
John Ciardi 12
Eleanor Coe 31
Richard Cole 15
Stephen Colman 71
Mary Connaghton
Kevin Connelly 9

Peter Coppinger 31
Pierce Cray 15
Kevan Cunningham 70
Maurice Cunningham 19
William Daggett 25
Richard Dalton 51
Alice Daniel 70
Leslie Davies
Edward DeAngelo 14
George Dean
Paula DeGiacomo
Ian DeWaal 51
Carol Dietz
Daniel Dilorati 71
Lawrence Donnelly
Raymond Dougan 68
Juliane Dow 6
Mary Beth Downing
Edgar Dworksy 24
Deborah Ecker 9
Stanley Eichner
Judith Fabricant
Joy Fallon 19
Jennifer Ferreira 9
Allan Fierce 81
George Fisher 16
Freda Fishman 29
Gerald Fitzgerald 71
Lawrence Fletcher-Hill 57
Stacy Fortes 32
Patrick Gable 72
Rosemary Gale 25
Carl Giesy
Dwight Golann 12
William Gottlieb
William Green 71
Leslie Greer

Daniel Halston 30	William Mitchell 9
Sydney Hanlon 61	William Mitchell
Natalie Hardy	Eric Mogilnicki 71
Nancy Harper	John Montgomery 12
Jon Hartmere 71	Kathleen Moore 71
Tobin Harvey 70	Sarah Morison
Ladonna Hatton 12	Susan Motika 23
Sandra Hautanen 76	Patrick Moynihan 72
Martin Healy	Mark Muldoon
Lisa Heinserling	Timothy Mullen
James Highham 75	Alexander Nappan 13
Virginia Hoefling	Jerrold Oppenheim
David Hofstetter	Donna Palermino
Philip Holmes 31	Howard Palmer
Pamela Hunt 12	William Pardee
Tung Huynh 59	Margaret Parks 12
David Jackson	Nadine Pelligrini 74
Marcia Jackson 14	Anthony Penski
Cheryl Jacques 12	Mary Phillips
Stephen Jonas 70	Carmen Picknally, Jr.
Edmund Joyal, Jr. 56	Jill Plancher 80
Diane Juliar 12	Stephen Poitrait
Michele Kaczynski	William Porter 2
John Karagounis 71	Ann Powers
Gerald Kelly	Jane Rabe 82
Michael Kogut 29	T. David Raftery
Marek Laas	Edward Rapacki 12
Raymond Lamb 53	Robert Ritchie
Pablo Landrau	Deirdre Robbins
Jon Laramore	Susan Roberts 67
Luis Lavin 3	Carmen Rodriguez 71
William Lee 12	Abbe Ross
Judy Levenson	Hilary Rowen
Beth Levi 6	Malcolm Russell-Einhorn 55
Martin Levin 20	Linda Sable 24
Lisa Levy 76	Peter Sacks
David Li 57	Judith Saltzman
Stephen Limon 12	Thomas Samoluk 24
Timothy Linnehan 62	Ernest Sarason, Jr.
Diane Lund 14	Richard Savignano
Melanie Macaronis 71	Mark Schmidt 71
Margaret Malek 10	Pasqua Scibelli
Michael Marks 79	Arlie Scott
Michael Mascis 62	Michael Sentance 69
William Matlak	Robert Sikellis 6
Suzanne Matthews 58	Natalea Skvir 71
Lawrence McCarthy 71	Myles Slosberg 23
Karen McGuire 8	Eric Smith 17
Susan McHugh	Joanne Smith 6
Paul McLaughlin 17	Mark Smith
Mary McLaughlin 28	Donna Sorgi 75
William McVey	Joanna Soris
Elizabeth Medvedova 22	Amy Spector 27
Gary Mena 71	Marie St. Fleur 14
James MilKey	Paul Stein 80
Daniel Mitchell 9	Edmund Sullivan 1

Walter Sullivan 12
 Michael Sullivan 18
 Mark Sutliff
 Evelynne Swagerty
 James Sweeney
 Pamela Talbot
 Jane Tewksbury 12
 Robert Thoutte 18
 Edward Toro
 John Traficonte 60
 Frances Tucker 71
 Gwendolyn Tyre
 Margaret Van Deusen 10

John Van Lonkhuyzen 24
 Susan Wall 76
 George Weber
 James Whitcomb 29
 James White, Jr. 65
 Douglas Wilkins
 Countess Williams 54
 Steven Wright 78
 Andrew Zaikis
 Margaret Zaleski 63
 Judith Zeprun 67
 Peter Zuk 71
 Samuel Zurier 54

*Assistant Attorneys General Assigned To
 Division of Employment Security:*

Brian Burke 12
 Michael Cullen 11
 John Drewry 57
 William Luzier 71

Maria Galvagna
 Kathleen Pendergast 53
 Neal Steingold 66

APPOINTMENT DATE

TERMINATION DATE

1. 07/23/90
 2. 08/13/90
 3. 08/20/90
 4. 08/27/90
 5. 09/04/90
 6. 09/10/90
 7. 09/11/90
 8. 10/01/90
 9. 11/05/90
 10. 11/19/90
 11. 12/03/90
 12. 01/17/91
 13. 01/22/91
 14. 02/04/91
 15. 02/11/91
 16. 02/13/91
 17. 02/19/91
 18. 02/25/91
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 27. 04/24/91
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 29. 05/06/91
 30. 05/09/91
 31. 06/03/91
 32. 06/10/91

50. 07/13/90
 51. 07/27/90
 52. 08/08/90
 53. 08/10/90
 54. 08/17/90
 55. 08/23/90
 56. 08/24/90
 57. 08/28/90
 58. 09/11/90
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 60. 09/21/90
 61. 09/28/90
 62. 10/26/90
 63. 11/13/90
 64. 11/14/90
 65. 11/30/90
 66. 12/21/90
 67. 01/01/91
 68. 01/02/91
 69. 01/03/91
 70. 01/15/91
 71. 01/16/91
 72. 01/29/91
 73. 02/11/91
 74. 02/19/91
 75. 02/21/91
 76. 03/01/91
 77. 03/15/91
 78. 03/29/91
 79. 05/01/91
 80. 05/22/91
 81. 06/25/91
 82. 06/28/91

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
JUNE 30, 1991

<u>ACCOUNT</u>	<u>ACCOUNT NAME</u>	<u>APPROPRIATION</u>	<u>EXPENDITURES</u>	<u>ADVANCE</u>	<u>ENCUMBRANCES</u>	<u>BALANCE</u>
0810-0000	Administration	\$12,018,103.00	\$12,006,534.37	\$ 0.00	\$ 0.00	\$ 11,568.63
0810-0014	Public Utilities Auth. by CH. 1221 1973	489,631.00	472,694.12	0.00	0.00	16,936.88
0810-0015	Seabrook Litigation Adm. & Exp.	304,827.00	58,999.23	0.00	0.00	245,827.77
0810-0017	Judicial Proceedings, relevant to Fuel Charge	75,005.24	74,995.64	0.00	0.00	9.60
0810-0020	Criminal Tax Unit	177,524.00	177,391.11	0.00	0.00	132.89
0810-0021	Medicaid Fraud Control Unit	1,304,732.00	1,301,934.34	0.00	0.00	2,797.66
0810-0031	Local Consumer Aid Fund	617,636.00	616,160.06	0.00	0.00	1,475.94
0810-0033	Local Consumer Aid Fund Reimbursement	247,885.41	95,231.00	0.00	0.00	152,654.41
0810-0035	Antitrust Div. Adm.	348,646.00	345,991.04	0.00	0.00	2,654.96
0810-0201	Insurance Auth. by Ch 266, 1976	390,816.00	390,476.37	0.00	0.00	339.63
0810-0338	Auto Insurance Fraud by Ch 338, 1990	25,000.00	5,444.81	0.00	0.00	19,555.19

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<u>ACCOUNT</u>	<u>ACCOUNT NAME</u>	<u>APPROPRIATION</u>	<u>EXPENDITURES</u>	<u>ADVANCE</u>	<u>ENCUMBRANCES</u>	<u>BALANCE</u>
0810-0410	Forfeited Funds	243,121.15	230,465.78	0.00	0.00	12,655.37
0810-0414	Forfeited Funds	16,155.24	0.00	0.00	0.00	16,155.24
0810-1010	Expert Witness and Litigation Service Alloc. (4400-1012)	588,500.00	326,387.74	0.00	0.00	262,112.26
0810-1031	Victim/Witness Discretionary Allocation of 0840-0105	129,566.00	111,483.00	0.00	0.00	18,083.00
0810-7872	Asbestos Property Litigation (Alloc of 1102-7872)	593,322.19	565,597.09	0.00	0.00	27,725.10
Schedule 2	Totals	17,570,470.23	16,779,785.70	0.00	0.00	790,684.53
	Totals	352,570.02	85,183.44	0.00	0.00	267,386.58
	Grand Totals	\$17,923,040.25	\$16,864,969.14	\$ 0.00	\$ 0.00	\$1,058,071.11

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DEPARTMENT OF THE ATTORNEY GENERAL
GRANTS AND TRUSTS
RECEIPTS AND DISBURSEMENTS
JULY 1, 1990 to JUNE 30, 1991

	<u>ACCOUNT NUMBER</u>	<u>BALANCE JULY 1, 1990</u>	<u>RECEIPTS</u>	<u>DISBURSEMENTS</u>	<u>BALANCE 6/30/91</u>
Attorney General Trust Fund	0810-6614	\$ 80,732.18	\$ 0.00	\$ 0.00	\$ 80,732.18
Water Pollution Control Program	0810-6630	0.00	0.00	0.00	0.00
Air Pollution Control Program	0810-6631	2,458.21	17,802.00	16,331.96	3,928.25
Hazardous Waste Enforcement	0810-6647	33,813.74	10,028.16	33,809.22	10,032.68
Anti-Drug Abuse Act 1986	0810-6648	35,016.42	0.00	35,016.42	0.00
Narcotic Div.-Asset Forfeiture	0810-6649	170,000.00	0.00	0.00	170,000.00
Coastal Zone Management Program Implementation	0810-6661	2,693.47	0.00	0.00	2,693.47
Pesticide Regulation Program Enforcement Activities	0810-6662	27,856.00	0.00	27,856.00	0.00
TOTALS		<u>\$352,570.02</u>	<u>\$27,830.16</u>	<u>\$113,013.60</u>	<u>\$267,386.58</u>

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DEPARTMENT OF THE ATTORNEY GENERAL
SUSPENSE FUNDS
RECEIPTS AND DISBURSEMENTS
JULY 1, 1990 to JUNE 30, 1991

NAME	ACCOUNT #	BALANCE JULY 1, 1990	RECEIPTS	DISBURSEMENTS	BALANCE 6/30/91
Thomas C. McMahon v. Nyanza	0810-6732	\$ 3,679.42	\$ 0.00	\$ 0.00	\$ 3,679.42
Century Auto Appraisers, Inc. R. B. Stone & Peter Slate	0810-6862	6,800.00	0.00	0.00	6,800.00
Eric Bartlett d/b/a Bartlett Assoc. & Fix., Co.	0810-6885	2,000.00	0.00	0.00	2,000.00
Bruce Ledbury d/b/a Cars International	0810-6887	11,286.60	0.00	0.00	11,286.60
Aetna Finance d/b/a Itt Thorp Co.	0810-6902	1,251.38	0.00	0.00	1,251.38
Andrews Paint Co., FG Andrews	0810-6905	1,295.50	0.00	0.00	1,295.50
North Shore Roommates Service	0810-6915	1,088.39	0.00	0.00	1,088.39
Diamond Chevrolet	0810-6917	7,396.00	0.00	0.00	7,396.00
Rusty Jones, Inc.	0810-6919	2,263.00	0.00	0.00	2,263.00
Business Education	0810-6921	162,298.81	0.00	0.00	162,298.81
Economy Auto Sales	0810-6925	7,136.60	0.00	0.00	7,136.60
Womens World Health Spa	0810-6930	20,000.00	0.00	0.00	20,000.00

NAME	ACCOUNT #	BALANCE JULY 1, 1990	RECEIPTS	DISBURSEMENTS	BALANCE 6/30/91
Lee Auto	0810-6941	\$ 3,302.00	\$ 0.00	\$ 0.00	\$ 3,302.00
William Wolff	0810-6943	517.55	0.00	0.00	517.55
Miller Furniture	0810-6944	6,000.00	750.00	0.00	6,750.00
Tijuana, Goldstein et al	0810-6946	0.00	3,775.50	1,785.79	1,989.71
Ray's Auto Body	0810-6947	23,500.00	0.00	0.00	23,500.00
Hertz	0810-6950	4,725.45	0.00	141.43	4,584.02
Missions of Mercy (M.O.M.)	0810-6952	1,865.00	0.00	0.00	1,865.00
Outdoor World, Inc.	0810-6953	140,000.00	0.00	131,011.02	8,988.98
European Health Spa	0810-6954	0.00	23,000.00	23,000.00	0.00
Boston Basics	0810-6955	0.00	12,500.00	15,000.00	0.00
Beverly Enterprises	0810-6956	0.00	91,048.14	0.00	91,048.14
Michael Collins	0810-6957	0.00	200.00	0.00	200.00
TOTALS		\$406,405.70	\$131,273.64	\$168,438.24	\$369,241.10

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF INCOME
For Fiscal Year Ended
June 30, 1991

<u>Account Number</u>	
0801-40-01-40	Fees, Filing Reports, Charitable Organizations \$ 281,350.00
0810-40-02-40	Fees, Registrations, Charitable Organizations 46,220.00
0801-41-02-40	Fines & Penalties, Civil Actions 586,399.92
0810-62-01-40	Reimbursement for Services, Cost of Investigations - Civil 407,088.40
0801-62-02-40	Reimbursement for Services, Cost of Investigations - Consumer 7,851.00
0801-62-03-36	Local Consumer Aid Fund-Reimburse For Service 129,187.40
0801-65-09-36	Fuel Assessment 75,005.24
0801-67-67-40	Reimbursement, Indirect Cost Allowances 364,281.00
0801-67-01-40	Reimbursement, For Service 1,254,223.00
0801-68-04-36	Forfeitures 205,092.80
0801-69-99-40	Miscellaneous 1,324,177.21
	Total Income <u>\$4,680,875.97</u>

CIVIL BUREAU

Under Attorney General Harshbarger's administration the Civil Bureau was combined with the Government Bureau on July 1, 1991. The Bureaus were combined to provide consistent, professional and effective defense of the Governor, Legislature, state agencies, and state employees within the limited resources provided the Attorney General's Office. This annual report represents the activities for the Civil Bureau prior to this reorganization.

CONTRACTS DIVISION

The Contracts Division assists the Attorney General in carrying out his 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: litigation in which the Commonwealth is a party involving contract issues; advice and counsel to state agencies concerning contract matters; and review of certain other contracts for approval as to form.

A. LITIGATION

The Contracts Division represents the Commonwealth, its agencies and officers in all civil actions involving contract 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, M.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 claims arising from the interpretation of employment contracts, leases, statutes, rules, regulations and surety bonds.

Construction contract disputes generally fall into two separate categories. The first category is bid protests, in which bidders for a subcontract or general contract dispute the results of the competitive bid prior to the award of the contract. The second category involves claims for extra work or additional compensation under a construction contract due to delays in the construction process, differing site conditions and the like.

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 the fiscal year, Division attorneys successfully resisted all such efforts.

Government contract disputes are complex litigation involving multiple parties, including architects, consulting engineers, subcontractors, suppliers and sureties. Actual trials of these matters typically involve lengthy hearings

before the Court or Court appointed Masters. As a result, the Contracts Division has initiated alternative dispute resolution processes which provide a simplified, expedited substitute for formal litigation. Such alternative dispute resolution processes have better protected state agencies, saved taxpayer dollars and provide prompt and fair resolution of disputes for those doing business with the Commonwealth.

The Contract 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 contracts. In both cases, the Contracts Division generally appears as counsel in any litigation commenced.

Under the supervision of the Attorney General, the Contracts Division continues to plan for resolution of disputes arising out of the Five 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.

Forty-one (41) new actions were commenced during the fiscal year and forty-eight (48) files were closed. Of the forty-eight (48) cases that were closed, the Commonwealth recovered one million one-hundred thirty-six thousand dollars (\$1,136,000) in affirmative litigation and realized a savings of one million eight-hundred sixty-five thousand dollars (\$1,865,000) in defensive litigation.

As of June 30, 1991, there were approximately two-hundred two (202) cases pending in the Division, representing a total dollar exposure to the Commonwealth of approximately one-hundred million dollars (\$100,000,000.) The Division is also postured to handle substantial affirmative contract litigation, where appropriate.

B. ADVICE AND COUNSEL TO STATE AGENCIES

The Division advises state agencies and officials with regard to contract matters on a daily basis. Such 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 concerned 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 advice and assistance from the Department of Public Works, Metropolitan District Commission, Secretary, of Transportation, Board of Regents of Higher Education, Mental Health, Mental Retardation, Environmental Management, Water Resources, State Lottery Commission, Public Welfare and Division of Capital Planning and Operations.

C. CONTRACT REVIEW

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 one week of its submission to the Division. During the fiscal year, the Division received for approval as to form a total of 389 contracts. 80 contracts were rejected and later approved after consultation with the agency involved to attend to matters of contract form.

The Division and the Comptrollers Office met to coordinate and establish a uniform contract form for all 03 service contracts with the Commonwealth. Agency use of these new forms has resulted in substantially fewer rejections.

INDUSTRIAL ACCIDENT DIVISION

There were 15,695 First Reports of Injury filed during fiscal year 1991 for state employees with the Division of Industrial Accidents. Of the lost time disability cases, the Division reviewed and approved 3,015 new claims for compensation and numerous claims for resumption of compensation. In addition, the Division disposed of 142 claims by way of lump sum agreements and 209 by payment without prejudice.

The Division appeared for the Commonwealth on 1,782 formal assignments before the Department of Industrial Accidents. The Division also appeared before the Superior Court concerning enforcement of orders pursuant to M.G.L. c. 152 § 12(1), and before the Appeals Court on appeals from decisions of Industrial Accident Review Board pursuant to M.G.L. c. 152 § 12(2). The Division also is responsible for defending the Commonwealth in "line of duty" and "assault pay" cases pursuant to G.L.C. 92 § 63B and G.L.C. 30 § 58. 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 eligibility for compensation.

Total disbursements by the Commonwealth for state employee's Industrial Accidents claims, including accepted cases, Board and Court decisions and lump sum settlements, between July 1, 1990 to June 30, 1991 are as follows:

General Appropriation to Division of Industrial Accidents

Incapacity Compensation	\$48,306,687.13
Medical Payments	11,489,071.42
Attorney Fees	1,277,173.13
Penalties	57,603.32
Total Disbursement	<u>\$61,150,536.00</u>

The Division is also responsible for pursuing the Commonwealth's subrogation claims. Pursuant to M.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 party's negligence.

Under chapter 152 §65, the Division has the responsibility of defending the Workers Compensation Trust Fund against claims for reimbursement made under chapter 152 § §37 and 37A. The Workers Compensation Trust Fund and related sections encourage employment of handicapped and disabled workers. The Fund relieves the insurer from the burden of paying compensation for an employee's disability due to the combined effect of a previous injury and one received later.

Pursuant to G.L. c. 33, §§13-11A, the Chief of Industrial Accident Division represents the Attorney General on the Civil Defense Claims Board. The Claims Board reviews and processes claims for compensation of unpaid civil volunteers who were injured in the course of their volunteer duties.

During the last fiscal year, the Division, in conjunction with the Criminal Bureau, has begun to aggressively identify and investigate suspected cases of fraud by state workers in connection with their workers' compensation claims. This is a coordinated effort to eliminate abuse within the workers compensation system.

REAL ESTATE DIVISION

The Real Estate Division represents the Commonwealth and its agencies on a variety of matters involving real property interests of the Commonwealth. The vast majority of these involve defense of petitions for the assessment of damages resulting from land acquisition by the Commonwealth, by eminent domain, pursuant to G.L. c. 79. The Commonwealth's agencies acquire land for a variety of purposes, including rights of way for highway roads, land for state colleges, land for recreation and park purposes, landfills, agricultural and conservation restrictions and easements. The Division deals primarily with the Department of Public Works, the Metropolitan District Commission, the Department of Environmental Management, Department of Environmental Protection, the Department of Food and Agriculture, the Department of Fisheries & Wildlife and Environmental Law Enforcement and the Division of Capital Planning and Operations.

Additionally, the Division is sometimes asked to testify before the Governor's Council prior to its approving payment of land damage cases settled by the Department of the Attorney General.

Informal advisory services on eminent domain and other property related questions are rendered to practically every state agency, city and town and county.

Chapter 79 of the General Laws prescribes the procedure in eminent domain cases. Under Chapter 79, when property is taken, the taking agency makes an offer to the owner based on its determination of the fair and reasonable damages for the taking. The owner has the right to accept this award as a "pro tanto", only, reserving the right to a jury trial in the Superior Court on the proper amount. If the verdict is higher than the "pro tanto", then the pro tanto amount is subtracted from the verdict, and the taking

agency pays the balance, with 10% interest from the date of the taking to the date of the judgment.

If occupied buildings are situated on parcels acquired by eminent domain, the occupants become tenants of the Commonwealth and are obligated to pay rent. Rent collection of D.P.W. cases is handled by a Special Assistant Attorney General who is assigned fulltime to the Department of Public Works (DPW).

Sixty-one (61) land damages cases were disposed of, twenty (20) by trial before juries in Superior Courts throughout the Commonwealth and forty (40) by settlements and two (2) dismissals. The disposition of these cases resulted in a savings to the Commonwealth of approximately \$13,500,000.00.

The Real Estate Division also has the responsibility of protecting the Commonwealth's interest in all petitions for registration of land filed in the Land Court. During the past fiscal year, more than 277 registration cases implicating Commonwealth rights were disposed of in the Land Court.

The Commonwealth has become involved in problems caused by filling and dredging along the shoreline and other areas developed by beach associations, especially on the Cape and Islands. When dredging involves placing material on the shore, private access rights to and from the beaches are altered.

Many rental agreements, pro tanto releases, general releases, deeds, taking orders, and their conveyance documents relating to transfers from or to any of the state's departments or agencies must be reviewed and approved as to form by the Real Estate Division.

During the past fiscal year, several new cases involving takings for the Central Artery/Third Harbor Tunnel Project have been brought. In May, the Division settled the first of these cases, involving the former Rapid Service Press Building (owned by the Pine Street Inn), at the intersection of the Central Artery and West Broadway Street Bridge in South Boston. Additional cases are expected as the project progresses.

At the end of the fiscal year, the Division had pending over 250 land damage cases, involving exposure to the Commonwealth in potential liability of over \$194,000,000.00.

TORTS DIVISION

The Torts Division defends tort and civil rights cases brought against the Commonwealth and its employees. Most of these cases arise under the Massachusetts Torts Claims Act, M.G.L., C. 258, and federal and state civil rights statutes.

As the result of an increasing number of cases which are being brought against the Commonwealth as well as staff reductions and turnover over the past two years, in January 1991 the Torts Division consisted of five trial attorneys with responsibility for over 1800 cases, the Attorney General immediately commenced a program to hire additional attorneys and to evaluate the open case files. In May 1991 the Attorney General requested and obtained from the Chief Justice of the Superior Court a 60-day stay of judicial proceedings in all of the Division's cases in order to complete the case review and to prepare active cases for trial. By the end of fiscal year

1991, the Division had approximately 1000 open cases and a staff of 11 attorneys.

CRIMINAL BUREAU

The Criminal Bureau is comprised of eight divisions: Public Integrity, Narcotics, Division of Employment Security, Criminal Investigations, Medicaid Fraud Control Unit, Environmental Strike Force, Special Prosecutions/White Collar Crime, and the Special Investigations Unit.

During the 1991 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 attorney's.

NARCOTICS DIVISION

In the fiscal year ending July, 1991, the Narcotics Division successfully prosecuted and convicted large-scale drug traffickers in Middlesex, Suffolk, Norfolk, Worcester and Barnstable counties, most of whom are currently serving minimum/mandatory sentences in state prison. Although the majority of these cases involved charges of cocaine trafficking or marijuana smuggling, the division recently has witnessed a dramatic rise in cases involving the importation and distribution of other dangerous drugs such as heroin and PCP.

In addition to violations of the Controlled Substances Act, the Narcotics Division of the Criminal Bureau recently has expanded its focus to encompass investigations of other forms of organized criminal activity, including arson, gaming, loan sharking, receiving stolen property ("fencing") and prostitution.

The eight Massachusetts State Police officers assigned to this division concentrate their investigations on organized and disciplined criminal enterprises whose activities span county lines, and therefore may exceed the reach of local law enforcement authorities. State Police officers assigned to the Attorney General's Narcotics Division frequently work in cooperation with local police departments and with law enforcement officers assigned to the offices of the eleven District Attorneys.

Most of the Criminal Bureau's 42 Assistant Attorneys General handle a caseload which includes prosecutions in the Narcotics and Organized Crime area. These cases are supervised by an Assistant Attorney General, and Chief of the Division who oversees both investigations and pending prosecutions.

Members of this division frequently handle criminal cases which are referred to the Attorney General by local District Attorneys due to potential conflicts. For example, last year the Narcotics Division prosecuted two Boston Police Drug Control Unit officers, Carlos Luna and Hugo Amate, on perjury charges stemming from their false testimony in a homicide case involving the death of their partner.

With the passage in January, 1990 of a new Narcotics Forfeiture law, G.L. c. 94C, §47, the Department of the Attorney General has expanded its

efforts to eliminate the profit motive for narcotics trafficking by seizing the traceable assets of drug dealers. In January, 1991 the Attorney General added two full time Assistant Attorneys General to his Narcotics Division to handle exclusively civil forfeiture proceedings, with the assistance of a full time financial investigator. Since January, 1991 this new Asset Forfeiture Unit has successfully forfeited over four motor vehicles, one aircraft, and over \$150,000 in cash. Forfeiture proceedings are underway for another \$200,000 in cash and six pieces of real property. Members of the Asset Forfeiture Unit provide assistance and training to law enforcement officers and prosecutors throughout the state on legal issues relating to the seizure and forfeiture of assets derived from criminal activity.

SPECIAL PROSECUTIONS/WHITE COLLAR

The Division investigates and prosecutes all categories of white collar offenses and economic crimes. Included among these are frauds affecting financial institutions, embezzlements and larcenies from individuals, businesses or other entities, securities violations, tax offenses, and schemes to defraud public agencies, charities and consumers. Beginning in 1991 an Assistant Attorney General was assigned full time to work with investigators at the Insurance Fraud Bureau developing criminal prosecutions of fraudulent insurance claims, especially those relating to automobile accidents. An overall initiative by the Attorney General calls for greater interaction between bureaus within the office and has resulted in the division working closely with the Public Protection Bureau on civil fraud referrals for which the scheme crosses the line into criminal violations. While all manner of economic crimes are priorities within the division, important attention is paid to the cases in which particularly vulnerable victims are targeted by white collar criminals.

The typical case handled within the Division is a complex economic crime that requires extensive investigative work and often long-term use of the grand jury. Financial investigators assigned to the office work closely with the division's attorneys to formulate investigative strategies, identify and interview witnesses, accumulate documentary evidence and analyze the large volume of information and data that characterize cases prosecuted by the division. In this vein, great emphasis is placed on working with department and agencies of the Commonwealth in joint investigations. A top priority is prosecuting offenses in which the Commonwealth itself is victimized. Other joint efforts include offenses such as securities violations, which fall within the investigative purview of the Secretary of State's Securities Division, and tax offenses investigated by the Department of Revenue. Cooperative investigations are also handled with the State Auditor, the Federal Deposit Insurance Cooperation, the Banking commission, as well as other state, local and federal agencies.

SPECIAL INVESTIGATIONS UNIT

The Special Investigations Unit (SIU) is a newly formed unit within the

Criminal Bureau. SIU consists of prosecutors, police officers, financial investigators and other professionals assigned to develop, investigate and prosecute complex criminal enterprises. By grouping lawyers, investigators and other specialists in a team approach to designated cases, the unit is able to focus and coordinate the collective skills of those professionals on complex or protracted criminal investigations.

In addition to staffing the unit, the focus over the past several months has involved the investigation and prosecution of a major organized crime syndicate.

PUBLIC INTEGRITY UNIT

Fiscal year 1991 reflected continued progress in the Attorney General's efforts to investigate and prosecute crimes involving public corruption.

The Public Integrity Division has indicted several individuals for a broad array of offenses, including conflict of interest, bribery, larceny, tax evasion, forgery, perjury, violation of civil service laws, filing false claims with the Commonwealth and conspiracy.

The division works closely with representatives of other state investigative agencies including the Inspector General's office, the State Ethics Commission, the Department of Revenue, the Office of Campaign and Political Finance and the office of State Auditor. Over the course of the year, the Division has expanded its efforts to coordinate investigative resources. In particular, an employee of the Executive Office of Communities and Development was indicted for embezzling funds intended for a non-profit community service program. The indictment was the product of a joint effort by the Public Integrity Division of the State Auditor's office. In addition, the division maintains working relationships with federal, county and local law enforcement.

Since January, 1991, the Division has been restructured in order to utilize assistant attorneys general from throughout the entire Criminal Bureau. It also has the resources of the Massachusetts State Police and financial investigators available to assist in its investigations.

The focus of the cases prosecuted in the past year has been in two areas: on officials and employees of, state, county and municipal government who have benefitted unlawfully from their positions or who have acted in conflict of interest, and on those vendors conducting business with government agencies and who have acted fraudulently in connection with those transactions.

The variety of charges brought in fiscal year 1991 further underscores the efforts being made to successfully prosecute public corruption offenses.

ENVIRONMENTAL CRIMES STRIKE FORCE

The Massachusetts Environmental Strike Force is a relatively unique enforcement tool used in the investigation and prosecution of the Commonwealth's environmental enforcement efforts. Through the cooperation of the Attorney General, the Secretary of Environmental Affairs, the

Department of Environmental Protection, the Department of Fisheries, Wildlife, and Environmental Law Enforcement, and the Metropolitan District Commission, the ESF brings attorney, technical, and police resources under a single umbrella. The ESF thus provides the legal, scientific, and investigative expertise necessary to identify environmental violations, evaluate their impact on the public health, safety, and the environment, and develop the evidence necessary to assess responsibility.

In 1991, the Attorney General devoted legal resources to this effort unprecedented in the history of the Commonwealth. Three prosecutors from the Criminal Bureau have been dedicated full-time to Strike Force efforts. In addition, nine Environmental and Metropolitan police officers have been stationed in the Criminal Bureau, forming a unitary ESF police force. Finally, an increased emphasis on civil enforcement has resulted in increased resources from the Attorney General's Environmental Protection Division being devoted to ESF cases.

This increase in both resources and inter-departmental coordination reflects the new ESF philosophy to aggressively enforce the environmental law across the board. Not only will effort be spent on pursuit of large corporate offenders, but also on those smaller offenders who, taken together, pose a significant threat to both the public health and environment. The Attorney General is also committed to expanding the "strike force concept" through closer coordination with all federal, state, and local agencies with responsibility for some aspect of environmental protection.

Criminal convictions were obtained in two significant prosecutions in the first half of 1991. One, brought jointly with the U.S. Attorney's office, resulted in a four month federal sentence, and \$125,000 corporate fine, for illegal discharge of asbestos laden water into the Charles River. The other, involving illegal alteration of a wetland, resulted in a thirty day suspended sentence and \$42,000 fine.

CRIMINAL INVESTIGATION DIVISION

The Criminal Investigation Division as a subdivision of the Criminal Bureau was formed when Scott Harshbarger was sworn as Attorney General. The basic management concept giving rise to it's rebirth after four years is the principle of Unity of Command. It's existence provides for direct lines of communication, and facilitates control on investigations by experienced supervisors and accordingly fosters awareness of the principle of responsibility. This enables management to ascertain accountability for each assigned investigation. Also, the fact that the Criminal Investigation Division is now an easily recognizable entity more easily establishes it as the central repository for reports of investigations.

At present the Criminal Investigation Division is subdivided into the Investigative Unit and the Narcotics and organized Crime Unit. These units are staffed by officers of the State Police, civilian investigators, Environmental police, Metropolitan Police and Boston Police. The Division's duties vary from simply receiving and filing complaints regarding criminal activity which are now computerized and cross referenced to electronic surveillance of organized crime figures. Attorney General Harshbarger has

mandated that the Division's actions would have an affect on urban violence through the investigations of organized narcotic trafficking and the coordination of state and local police in multi-jurisdictional matters.

Lastly, the Division acts in a supervisory/advisory capacity over the investigative units of the Medicaid Fraud Control Unit and the Division of Employment and Training Unit.

DIVISION OF EMPLOYMENT AND TRAINING

The Employment and Training Division in the Criminal Bureau provides the Department of Employment and Training (D.E.T.) with legal assistance and representation necessary to enforce the Massachusetts employment law. The Division manages appellate matters arising from decisions granting or denying employment compensation benefits to individual claimants.

The Division prosecutes employers who fail to comply with the law that requires them to pay a quarterly contribution to the Unemployment Compensation Fund as well as prosecute the individuals who collect unemployment benefits while gainfully employed and earning wages or who otherwise collected benefits when it was apparent that they were ineligible.

The Division also represents the Commissioner of D.E.T. in cases brought against him and also on his behalf.

On July 1, 1990, the Division's active case load was 1,776. During the fiscal year 316 new cases were referred to the Division for prosecution. In the same time frame 138 convictions were obtained and 252 additional cases were closed because the courts were satisfied that all debt owed the Commonwealth was paid because of the Division's effort.

Several individuals who were convicted received incarceration. One individual who collected over \$10,000 in unemployment benefits on two false claims was sentenced to two years in the house of correction.

The Division collected a total of \$726,158.18 owed the Commonwealth from employers and employees.

The present active caseload of the Division is broken down as follows:

There are 750 employee fraud cases, 1,014 employer contribution cases, 7 cases in which D.E.T. is suing or being sued and 9 active appeals. In the last year seven additional appeals were argued and closed.

This high volume of cases is handled by the division chief, three A.A.G.'s, and three support staff.

MEDICAID FRAUD CONTROL UNIT

1. INTRODUCTION

The Massachusetts Medicaid Fraud Control Unit (MFCU) was established in 1978 as a result of federal legislation authorizing individual states to investigate and prosecute waste, fraud and abuse within the Medicaid Program. The Massachusetts Unit has been certified annually

since that time and receives 75% of its operating budget from the federal government. The total MFCU budget for fiscal 1991 was approximately \$1.3 million.

Congress continues to fund the Massachusetts Unit because of its commitment to prosecute providers who abuse the system and take advantage of those most vulnerable – the poor and elderly who depend on Medicaid for health care. During the previous 12 months the Massachusetts Medicaid Program administered nearly \$3 billion for over 500,000 recipients.

The focus of this Unit continues to be the investigation and criminal prosecution of health care providers who defraud the Commonwealth's Medicaid Program or who abuse and neglect patients. Investigating and prosecuting Medicaid provider fraud is a major responsibility in Massachusetts, as the state Medicaid program is the largest line item in the state budget. The Massachusetts Medicaid budget ranked *sixth largest* in the nation in federal fiscal year 1991.

MFCU has undergone substantial restructuring in fiscal 1991. A new director was appointed by the Attorney General in May. A newly appointed Director of Investigations and Deputy Director have likewise assumed their duties. The Unit continues to be evaluated with a vision towards health care fraud in the 1990's. Two new prosecutors will be added and a Western Regional office is being formed.

The providers who comprise the Commonwealth's Medicaid Program are a diverse group. Those who receive reimbursement for medical goods and services range from institutions such as nursing homes and hospitals to individual health practitioners such as physicians, psychiatrists, dentists, pharmacists, and psychologists. Also participating are outpatient clinics and home health agencies, ambulance and other transportation companies, laboratories and suppliers of durable medical equipment. Ownership of health care providers range from large multistate corporations to small family proprietorships and individual professional corporations.

II. FISCAL 1991 PROSECUTIONS AND RECOVERIES

During the period of July 1, 1990 to June 30, 1991, 89 cases were opened for investigation and possible criminal prosecution. Of those, MFCU successfully achieved three (3) corporate convictions and ten (10) individual convictions. Criminally, a total of \$163,557 was recovered in restitution, fines and damages. MFCU civil recoveries amounted to \$1,649,608. Recovery of overpayments accounted for \$1,068,888. Recovery of improper placement of personal needs accounts (PNA) at long term care facilities accounted for more than \$220,000, while the remainder consisted of civil damages and penalties.

III. PATIENT ABUSE REFERRALS AND PROSECUTION

MFCU is also charged with the responsibility of investigating and prosecuting patient abuse in Massachusetts long term care facilities. Abuse consists of physical, emotional and financial as well as neglect of our elderly population. During fiscal 1991 over 275 matters were referred to

MFCU. Of those, thirty-seven (37) resulted in criminal investigations. Three (3) have resulted in convictions and nine (9) are awaiting trial.

The Attorney General's office continues to evaluate the Medicaid Unit to be more responsive to abuse in this area. A consistent interdisciplinary approach with the Consumer Protection Division is a major initiative begun in fiscal 1991 to address institutional abuse of the elderly.

IV. SUMMARY CHART (Fiscal 1991)

CRIMINAL ACTIVITY

- A. INDICTMENTS — 12
- B. CONVICTIONS — 7
- C. RECOVERIES — \$163,557

CIVIL ACTIVITY

- A. INDIVIDUAL RECOVERIES — 35
- B. OVERPAYMENTS RECOVERED — \$1,068,888
- C. PNA RECOVERIES — \$ 223,843
- D. CIVIL DAMAGES ASSESSED — \$ 149,068
- E. OTHER PENALTIES ASSESSED — \$ 207,809

TOTAL CIVIL RECOVERY — \$ 207,809

Criminal Appellate Division

There were 250 (two hundred and fifty) cases pending in the division at the conclusion of fiscal year 1991. These cases predominantly involved the defense of federal habeas corpus petitions attacking state criminal convictions and appeals therefrom, appeal from narcotics unit prosecutions and the defense of state correctional authorities and other state officials and judges sued in the course of their official duties. The number of new cases handled by the Criminal Appellate Division was 161 (one hundred and sixty-one).

The division prevailed in the two oppositions to certiorari filed in the United States Supreme Court. In *Carlos Luna v. Commonwealth* the Commonwealth successfully argued against the claim by a police officer under indictment for perjury who claimed he had been coerced into waiving his Fifth Amendment right against self-incrimination when he testified at a pre-trial hearing.

In the United States Court of Appeals for the First Circuit, 17 briefs were submitted and 12 cases were argued. Among the cases in which the division prevailed was *Pearson v. Fair*, in which the First Circuit held the implementation of the sequestration policies at the Treatment Center did not violate the 1974 *King v. Greenblatt* consent decrees. It reversed the \$69,000 attor-

neys fees award to plaintiffs' counsel and remanded the matter to the district court. The division also prevailed in *Mahoney v. Vondergritt* in which the First Circuit ruled that as a matter of federal constitutional law, postverdict inquiries of the jurors after a criminal trial, need only be evaluated under Fourteenth Amendment due process principles rather than under the more stringent Sixth Amendment right to counsel standard. The division also prevailed in *Robinson v. Ponte* in which the Court held that a state court's decision not to make a new rule retroactive (*Commonwealth v. Henson*) is a matter of state, not federal constitutional law therefore preventing a federal habeas court from compelling retroactive application.

Three cases were briefed and argued in the Supreme Judicial Court including *Commonwealth v. Duddie Ford* in which the division successfully argued the validity of convictions against a Westborough car dealership which charged the dealership with eleven counts under the larceny statute and eleven counts of fraudulently obtaining credit from a bank for loans.

Nineteen briefs were filed by the division in the Massachusetts Appeals Court; fourteen were argued. Of the briefs submitted, eleven were direct appeals from convictions by the Attorney General's Narcotics Unit. Among those cases in which the division prevailed was *In Re Grand Jury Subpoena* in which the Court held that a party seeking to quash a grand jury subpoena served upon it, must do so by refusing to produce the documents and being held in contempt, not by way of an interlocutory appeal from the denial of a motion to quash. This case is now, after further appellate review, under advisement in the Supreme Judicial Court.

In the United States District Court, the division defended more than 82 federal habeas petitions challenging the constitutionality of state court criminal convictions.

The Criminal Bureau also reviews, for legal sufficiency, requests for rendition of fugitives from justice. Demands from both law enforcement officials of the Commonwealth and from Governors of other states were examined and 187 opinions were rendered on the legality of these demands.

FAMILY AND COMMUNITY CRIMES BUREAU

I. INTRODUCTION TO THE BUREAU

In January, 1991, Attorney General Harshbarger established a Family and Community Crimes Bureau within the Attorney General's office for the first time. The Family and Community Crimes Bureau is responsible for oversight as well as policy and program development including legislative initiatives and community outreach in four areas: issues affecting children and juveniles; the elderly; domestic violence; and victims of crime. In addition, the Victim Compensation and Assistance Division, previously under the Criminal Bureau, now comes under the supervision of the Chief of the Family and Community Crimes Bureau.

The Family and Community Crimes bureau works closely with the Government Bureau and the Consumer Protection Division of the Public

Protection Bureau in connection with investigations and litigation involving elders, children, and the disabled. In addition, the Bureau works closely with state agencies such as the Executive Office of Elder Affairs and the Department of Education on issues of common concern.

II. SPECIFIC AREAS OF ACTIVITY

A. THE ELDERLY

An issue of critical importance to the Attorney General is the plight of the elderly. It is for this reason that the issues of elder abuse and neglect, economic crimes and consumer frauds perpetrated against the elderly, as well as street and violent crimes committed against elder victims, constitute one of the major foci of the Family and Community Crimes Bureau.

In order to increase our understanding of the victimization of the elderly in all its forms, and to develop effective responses to the problem, we have convened a statewide working group chaired by the Attorney General to address issues confronting our elderly citizens. This multidisciplinary group brings together representatives from other Bureaus within the Attorney General's Office, other governmental agencies, and organizations in the private sector which provide services to or advocate on behalf of elders. The initial task for the elder working group was to identify and prioritize issues affecting the elderly. Multidisciplinary subcommittees will begin meeting in September to devise strategies and develop ways of addressing the issues in each priority area.

Internally, the Family and Community Crimes Bureau works cooperatively with the Consumer Protection Division of the Public Protection Bureau on issues of nursing home abuse and consumer frauds directed against the elderly as well as with the Medicaid Fraud Division of the Criminal Bureau regarding financial exploitation and abuse of elders.

B. LAW ENFORCEMENT AND EDUCATION PARTNERSHIP

The Attorney General's Office, through the Family and Community Crimes Bureau, is working to establish collaborative relationships with other state agencies and systems to reach out to the schools, law enforcement, and communities across the state. Through these relationships, we will offer technical assistance and training in areas of mutual concern to law enforcement and the schools such as drug and alcohol education and violence prevention.

In addition, the Attorney General has established a School Superintendents' Working Group to provide a forum for the exchange of ideas and the discussion of salient issues of concern to educators in the public schools throughout Massachusetts. Plans for FY '92 include the presentation of symposia in collaboration with school superintendents, other law enforcement agencies and the Department of Education on various topics ranging from the issue of confidentiality of student records, discipline policies, and compliance with federal mandates in an era of shrinking budgets.

Finally, through the Attorney General's SCORE (Student Conflict Resolution Experts) program, peer mediation programs have been

established in Worcester and Somerville with plans to expand the program to five cities and the Department of Youth Services in FY '92.

C. DOMESTIC VIOLENCE

As a part of the office's focus on issues of domestic violence, the Attorney General's office is co-sponsoring a luncheon series with the Harvard School of Public Health. The Attorney General chairs the series to which representatives from a variety of disciplines from the media to the legal profession to the provider community are invited. It is hoped that through the series, significant progress can be made in dispelling falsely held myths about domestic violence and in encouraging positive public policy changes.

In cooperation with the Massachusetts Committee on Criminal Justice and the Executive Office of Public Safety, the Family and Community Crimes Bureau participated in the development of domestic violence guidelines for the police pursuant to amendments to the Abuse Prevention Law (G.L.c. 209A) passed by the legislature in 1990.

In FY '92, the Attorney General's office will sponsor its first annual Domestic Violence Training Conference for Police.

D. VICTIMS

Pursuant to statute (G.L.c. 258B), the Attorney General serves as the Chair of the Victim and Witness Assistance Board. The Family and Community Crimes Bureau assists the Attorney General in carrying out his duties as chair of the Board. In FY '91, the Attorney General through the Board, initiated two pilot projects: first, to assess the implementation of the Standards for Victim Witness Services programs across the state and, second, to reestablish a working group of state agency representatives to enhance the collection of victim witness assessments. Unfortunately, both of these projects had to be abandoned when the Board's budget was cut by two-thirds by the Legislature in June, 1991. The major task facing the Board in FY '92 will be to downsize its staff, the Massachusetts Office of Victim Assistance (MOVA), and redefine its mission to reflect the loss of funding and elimination of its responsibility for overseeing the victim witness service programs in the District Attorney's office.

E. CHILDREN'S ISSUES

In a cross-bureau effort with the Government Bureau, a Children's Issues Advisory Group was formed. This group meets periodically to review issues of concern to children's advocates in hopes of resolving some issues short of litigation and to foster a better understanding between the advocates and the Department of each side's respective positions. Some of the issues which have been the focus of the group's meetings are the compliance by local school districts with educational mandates in the face of declining budgets; the investigatory policies of the Department of Social Services; and the treatment policies of the Department of Youth Services. In FY '92, we plan to form a provider advisory group to begin to identify and address

some of the service issues that have arisen as a result of state budget cuts.

In addition, the Family and Community Crimes Bureau has worked with the Government Bureau and the Department of Social Services in regards to issues concerning compliance by other states with the Interstate Compact on Juveniles. A protocol has been established defining the respective roles of DSS and the Attorney General's office in the enforcement of the provisions of the Compact.

Finally, the Family and Community Crimes Bureau has been involved in the coordination of an investigation of some adolescent schools and programs in conjunction with the Government Bureau and the Civil Rights and Consumer Protection Divisions of the Public Protection Bureau.

As an adjunct to the Bureau's focus on children's issues, members of the Family and Community Crimes Bureau participated in a multidisciplinary working group's efforts to draft legislation to address the problems encountered by prosecutors in child abuse prosecutions. As a result of the Bureau's work with this group, an Aggravated Assault and a Criminal Neglect bill have been drafted to protect elders, children, and disabled persons who suffer serious bodily injury as a result of abuse or neglect. It is expected that these bills will be filed in the FY '92 legislative session.

F. URBAN VIOLENCE

The Attorney General has made it a priority of his administration to focus on the issue of urban violence. A number of preliminary steps have been taken by the Family and Community Crimes Bureau to develop strategies for interagency collaborative intervention in an effort to reduce the violence that plagues our urban centers.

The Bureau is in the process of working with the Massachusetts Housing Finance Agency's (MHFA) Inner City Task Force (a group of over 100 individuals representing many different constituencies) to implement a plan for the allocation of resources within the court system to focus on drug trafficking cases from inner city neighborhoods in Boston.

The Attorney General's Office in collaboration with the Massachusetts Committee on Criminal Justice, the Boston Police Department, the Suffolk County District Attorney's Office, and the State Police have submitted a proposal (RFP) to the Bureau of Justice Assistance for a federal discretionary grant to develop city-wide multijurisdictional enforcement strategies to investigate and prosecute drug distribution by organized, urban street gangs.

In furtherance of the Attorney General's commitment to bringing together the energy and resources of the public and private sectors to reduce violence in our communities, plans are underway for the development of a strategy for economic restoration of decaying urban areas through violence reduction.

G. MISCELLANEOUS

Throughout the year, the Family and Community Crimes Bureau has been involved in other related projects. Many of these projects relate to the

review and analysis of pending legislation. In addition to the neglect and abuse legislation noted above, the Bureau has reviewed and redrafted legislation providing for civil injunctions to be brought against unlicensed therapists who sexually abuse their patients and legislation amending the victims of violent crime compensation process from a court-based process to an administrative process.

In addition, the Chief of the Bureau has been involved in several outreach efforts including presentation to various educational and professional groups on such topics as pregnant addicts; the juvenile justice system; and prosecution of an elder financial abuse case.

VICTIM COMPENSATION

In 1968, Massachusetts became one of the first states to compensate victims of violent crime. This program, administered by the victim Compensation and Assistance Division, remains at the forefront of victim advocacy and assistance. The Massachusetts Victims of Violent Crime Compensation Act, G.L. c. 258A, provides financial compensation to victims of violent crime for out-of-pocket losses they sustain as the direct result of personal physical injury or death. Claims for compensation are filed in the district court. An eligible claimant is entitled to receive up to \$25,000 for out-of-pocket expenses such as unpaid medical and counseling bills, lost wages, loss of support, homemaker services, and burial services. Compensation is not available for property loss or for pain and suffering. The division is required to investigate all claims, submit a written recommendation to the court on whether the claimant is legally entitled to receive compensation, and represent the Commonwealth in all court proceedings involving victim compensation claims.

Support and referral services are also an integral part of the division's mission and purpose. Advocacy work on behalf of victims includes: providing crisis intervention and referrals to counseling centers, public agencies, and private charitable organizations; negotiating with creditors to avoid or delay court actions on unpaid bills; negotiating with medical, funeral, and other providers to obtain services for victims at low or no cost.

The division has developed a clinical program using students from area law schools and colleges for assessment and disposition of the division's substantial backlog of cases which were filed before 1990. In addition, the division has filed legislation to reform the victim compensation program, changing it from a litigation based, adversarial process to an administrative agency process which will be victim sensitive, cost effective, and result in efficient disposition of cases.

The victim compensation program is funded through the general revenue and through a grant from the U.S. Department of Justice. In addition, the division received a grant for victim advocacy services from the Massachusetts Victim and Witness Assistance Board. Payments to victims from the Victim Compensation Fund in fiscal year 1991 totaled \$2,785,292.15 representing 715 claims.

PUBLIC PROTECTION BUREAU

Upon taking office in January of 1991, Attorney General Harsbarger restructured the former Public Advocacy Bureau and the Public Protection Bureau into one bureau — the Public Protection Bureau. This bureau brings affirmative litigation on behalf of the public in areas such as civil rights, consumer protection, environmental protection and public charities, additionally the bureau also represents consumers and business in utility and insurance rate hearings.

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. Enforcement of the laws also protects businesses, particularly small business, by reducing anticompetitive restraints in the marketplace. The Division prosecutes violations that principally affect Massachusetts consumers. The Division also joins forces with other states to prosecute violations that have ill effects on consumers and businesses in all states including Massachusetts. Through NAAG, the Division coordinates its activities with other states and with federal antitrust enforcers.

II. MAJOR AREAS OF ACTIVITY

The Division has focused its activities in areas marked by high consumer prices such as health care, petroleum products and insurance.

A. Health Care

The Division has been very active in scrutinizing all aspects of the health care industry, including drug companies, hospitals and medical professionals. In a major action involving the drug industry, the Division and several other states led an investigation which was joined by 22 Attorneys General that resulted in a suit filed in December, 1990 against Sandoz Pharmaceuticals. In the case, the states allege that Sandoz engaged in antitrust violations that have made the price of a new drug for schizophrenia prohibitively expensive. As a result, thousands of patients have been denied access to the drug. The Division serves on the Case Management Committee directing the litigation on behalf of all states.

In Nov. 1990, the Division settled a suit alleging that the Directory of Quincy Hospital had urged two hundred Quincy area physicians to boycott a new health insurance product. The new product was a preferred provider health plan designed to reduce consumer insurance premiums. In the settlement, the Commonwealth obtained an injunction and \$10,000 in lieu of civil penalties and costs.

The Division also continues to litigate its case (*Commonwealth v. Cahill*) alleging that 24 Springfield area physicians had threatened to boycott Blue

Shield in order to pressure it into raising its fees to doctors. Thirteen of the physicians have settled their cases to date resulting in a total recovery of \$162,500 and the issuance of injunctive relief that has ended the threatened boycott.

The Division also has moved to increase consumer access to particular types of professional service. For example, the Division has required Boston area hospitals to end any discriminatory practices that limited consumer access to podiatrists. The Commonwealth has alleged that eleven Boston area hospitals had deprived podiatrists of various hospital privileges, solely because they were podiatrists and regardless of individual skill and training. As a result, consumers were unable to have their podiatrist treat them in a hospital setting. The Division filed in Suffolk Superior Court agreements requiring the hospitals to end any discriminatory practices and to each pay \$5,000 in costs to the Commonwealth. The last such agreement was filed on August 16, 1990.

Insurance

On June 18, 1991, the Ninth Circuit Court of Appeals reversed a lower court and awarded Massachusetts and eighteen other states a stunning victory in *In Re Insurance Antitrust Litigation*.

This case has been described as perhaps the most significant antitrust litigation pending in the U.S. The defendants include thirty insurance companies, reinsurers, intermediaty brokers and trade associations.

In the case, the Commonwealth and the other plaintiff states allege that defendants illegally manipulated the market for commercial general liability (CGL) insurance. This is the insurance purchased by most businesses, public agencies and non-profit organizations. CGL policies cover liability to third parties for personal injuries and property damage arising from the actions or inactions of the policyholder.

The Commonwealth's case is a class action with the towns of Milford and Hanover names as class representatives. The lower court had dismissed the states' cases on a number of grounds including the McCarran-Ferguson insurance exemption from the antitrust laws. The Commonwealth played a leading role in preparation of the brief that argued successfully for a reversal of the lower court.

The Ninth Circuit's reversal clears the way for the states to continue their prosecution of the case unless a petition for rehearing is granted or the case is taken by the U.S. Supreme Court.

As part of its plan to monitor insurance related activities, the Division in the past year also continued its litigation to enforce the provisions of the Auto Insurance Reform Act of 1988. *Commonwealth v. Berkshire Auto Body Association, et al.* was filed in August of 1989 as a class action suit in Superior Court against the members of the Berkshire County Auto Body Association and other individual defendants. In the suit, the Commonwealth alleged that defendants engaged in a boycott of the direct payment plan that was enacted in the 1988 Auto Insurance Reform Law. The direct payment plan is designed to expedite insured auto repairs and reduce their costs. This in turn is intended to help reduce insurance premiums paid by consumers.

On May 14, 1991, Attorney General Harshbarger obtained a consent decree in the case enjoining the defendants from boycotting the direct payment plan and requiring a payment of \$8,000. As a result, consumers in Berkshire County will now be able to share in the intended benefits of the direct payment plan adopted by the legislature.

Oil and Gas

Consistent with his efforts to protect consumers especially in relation to essential goods and services, Attorney General Harshbarger filed *Commonwealth v. Packer Oil* on May 7, 1991 alleging that Packer Oil had at times in the past fixed the price of home heating oil on Martha's Vineyard. The case was filed in Superior Court in Dukes County. The Commonwealth seeks the imposition of civil penalties and injunctive relief.

In response to the enormous price increases at the time of the invasion of Kuwait, the Division drafted emergency price gouging regulations. Following public hearings a final regulation was adopted effective December 21, 1990. These regulations prohibit price gouging in the sale of petroleum products.

Consumer Electronics

Attorney General Harshbarger has joined with the Attorneys General of a number of other states to obtain substantial recoveries for consumers in cases filed to challenge anticompetitive practices in the consumer electronic industry.

For example, on March 27, 1991 Attorney General Harshbarger joined in a case against Mitsubishi that will make refunds ranging between \$20 to \$54 available to approximately 11,000 Massachusetts consumers.

Attorney General Harshbarger also joined in a multistate action against Nintendo that will make \$5.00 coupons for Nintendo game cartridges available to some 121,000 consumers in Massachusetts. These cases follow an earlier multistate action against Panasonic in which payments totalling \$268,102 were recovered for the Commonwealth and its consumers.

OTHER SIGNIFICANT ACTIVITIES

On October 1, 1990 the Division argued before the Supreme Judicial Court that twenty soft drink and malt beverage distributors had violated the Mandatory Beverage Container Deposit Act. The Division specifically argued that defendants failed to segregate more than \$100 million in bottle deposits in a separate fund held in trust for consumers, and instead commingled deposit funds with their own revenues in violation of the Act. On February 19, 1991 the SJC ruled that the funds in question were not held in trust for consumers.

Wilmington Ford

The Division joined with the Consumer Protection Division in prosecuting a case alleging that Wilmington Ford had violated a prior court order. The prior order required Wilmington to refrain from various unscrupulous

practices in the sale of automobiles. Attorney General Harshbarger obtained a consent judgment from Wilmington Ford in which it admitted violations of prior court orders and agreed to make civil penalty and other payments totalling \$415,000. This is one of the largest amounts ever recovered by an Attorney General in enforcing consumer protection laws.

Community Outreach

The Division engages in a number of activities designed to increase awareness about antitrust enforcement. Division members regularly participate in educational programs having this purpose. For example, during the past year Division personnel have served as faculty members at the New England Antitrust Conference and made presentations to the Boston Bar Association Antitrust Committee. In addition, in November of 1990, the Division hosted a NAAG Antitrust Seminar attended by Assistant Attorneys General from approximately thirty states.

CONSUMER PROTECTION DIVISION

Judgments, Settlements and Restitution in consumer Protection Division Cases

Civil Penalties (including contempt)	\$421,216
Medicaid Reimbursement from	
Nursing Homes	\$386,915
Consumer Restitution	\$201,621
Local Consumer Program Aid Fund	\$157,524
(including Watson & Hughey)	
Settlements in cash and value	
received from Nursing Homes	\$196,675
Foundations and Training Programs	\$147,976
(including Watson & Hughey)	
Costs/Attorneys' fees	
Total	\$1,611,927

Complaint Section

Direct Refunds	\$78,708
Settlements	\$146,655
Goods/Services	\$127,956
Total	\$353,319

The Consumer Protection Division (CPD) brings enforcement actions against businesses which use unfair and deceptive practices resulting in injury to consumers. Concentrating on cases which are in the public interest and specifically where consumers cannot reasonably obtain relief through their own efforts, CPD's caseload consists primarily of large-scale class actions brought on behalf of consumers affected in similar ways by the illegal activities of business. These activities include sudden business closings, retail advertising and sales, financial services, landlord-tenant and mobile home issues, automobile advertising and repairs, and nursing home services. CPD also drafted regulations and filed comments on legislative and administration matters. Through our Complaint Section we also mediated disputes between consumers and businesses.

Sudden

Unfortunately, in this difficult economic period, businesses may suddenly close their doors stranding consumers who have given them deposits. One of the most widespread closings occurred at the end of March, 1991, the well-known Joy of Movement health clubs abruptly closed their doors in the Boston area, leaving over 7,000 Massachusetts consumers with unfulfilled membership contracts. The Attorney General's Office received many calls from consumers who had received no prior notice of the closings, including those consumers whose membership fees had been solicited and accepted up to the day the clubs closed.

Within 3 days of the closings the Attorney General filed suit against the *Joy of Movement* corporations and their owner president, *Kenneth Estridge*, for violating the state's Consumer Protection Act and the Health Club Services Contracts Act. In order to protect assets for restitution to members, the Department obtained attachments on various corporate and personal properties of the defendants in the amount of \$1.4 million. As a result, the defendants were prevented from further dissipating any of the Joy of Movement assets. During the following 3 months, the defendants tried to unfreeze the corporate and personal assets. Each time, CPD convinced the court to deny the defendants' requests to preserve the assets for restitution.

Before a trial could be held, the Joy of Movement corporations and Kenneth Estridge filed for bankruptcy in federal bankruptcy court. Under the rules of bankruptcy, the Attorney General's suit against the defendants is stayed, pending the outcome of the bankruptcy proceedings. In order to assist consumers who have claims against the Joy of Movement clubs, CPD sent instructions to over a thousand Joy of Movement members who had filed complaints with the Attorney General's office, providing guidance to facilitate their creditor claims. CPD also has intervened in the bankruptcy, and as a major creditor on behalf of consumers, is claiming restitution for former club members in the amount of \$1.4 million.

In another case, a retail meat seller, Mr. Meat, closed its door before consumers were able to use the discount coupons they had purchased. CPD was able to obtain approximately \$22,300 from the company which was distributed to over 380 consumers.

Retail Sales

One area which continues to receive a large number of complaints is retail advertising. The Department therefore revised its Retail Advertising Regulations which became effective on May 1, 1990 (after promulgation on December 14, 1989) and conducted many speaking tours throughout the state to explain the new regulations. In addition, CPD obtained numerous letter agreements from retailers in various industries including home furnishings, travel, food, department stores, jewelry, and clothing, among others, who were in violation of the regulations.

One of CPD's most significant deceptive advertising case arose against *Commonwealth v. Boston Scandals et al.*, a furniture retailer who misrepresented to consumers that it was providing a fifty-percent saving off of furniture prices that it never offered. In a novel form of relief geared to alert prospective purchasers of the unfair and deceptive advertising, the division obtained a temporary restraining order requiring the retailer to post a notice on every piece of furniture for sale which read "*Court Ordered Consumer Warning* None of our goods are 50% off our regular prices as we advertised on TV. Some goods are half the "value price" which is a price we never charged, but other stores *may* or *may not* be charging." Following the temporary restraining order, a preliminary injunction was entered specifying the types of disclosures the retailer must make in its television ads.

In another matter concerning deceptive sales prices, CPD obtained an Assurance of Discontinuance against *The Limited*, a national clothing retailer for advertising a price savings off of prices which never were offered or otherwise made available in Massachusetts.

CPD also filed suit against *Basement Waterproofing Nationwide, Inc. et al.* for misrepresenting the effectiveness of their residential waterproofing services and failing to honor their guarantees. The Commonwealth was granted a temporary restraining order to prevent the defendants from dissipating further any corporate assets and the defendants were preliminarily enjoined from transferring or encumbering corporate assets until they had satisfied consumer claims, from failing to honor certain warranties and guarantees, and from failing to make certain disclosures concerning the effectiveness of their services/products.

A classic example of an unfair or deceptive sales practice occurred in *Commonwealth v. DeCandia et al.*, where the owner of an oil delivery truck used a "wash out tank" which is a device to pump home heating oil back into a truck's main storage tank after the gallonage has been registered through the flow meter and assessed to the consumer's charge slip. After we sued the dealer, he went out of business and we seized, and ultimately destroyed, the device. We obtained a Consent Judgment and civil penalties of \$4,000.

In an innovative action against a cigarette manufacturer, CPD filed an *amicus curia* brief in *Kyte v. Philip Morris*, and the Supreme Judicial Court rendered its decision on July 25, 1990 (405 Mass. 162). Plaintiffs brought suit against Philip Morris for injuries sustained from smoking cigarettes manufactured by the defendant. They asserted several claims against defendants including conspiracy (with the seller-Store 24), breach of implied warranty, and violation of G.L. c. 93A. CPD argued that plaintiffs

had alleged sufficient facts to show that the defendant's marketing and promotional activities were unfair and deceptive, in violation of c. 91A. In addition, we argued such causes of action were not preempted by the Federal Cigarette Labeling and Advertising Act. The majority upheld the G.L. c. 93A claim insofar as it was based upon theory of implied warranty, that the Court said was not preempted. Judge Liacos, concurring in part and dissenting in part, adopted CPD's position that preemption was limited to the adequacy of the federal warning and would not provide "a licensing to lie."

We continued our involvement with nine other states to fight deceptive health claims when CPD obtained an agreement with *CPC International Inc.*, the makers of Mazola Corn Oil products. The Assurance of Discontinuance prohibits CPC International from advertising that Mazola Corn Oil products can lead to a reduction in individuals' cholesterol level without other diet modifications. CPC International also agreed to stop using individual endorsements when the endorser is fictitious and to pay \$10,000 to the Local Consumer Program Fund. In addition to obtaining substantive relief, this arrangement was unique because the states of California, Florida, Illinois, Iowa, Minnesota, Missouri, New York, Texas and Wisconsin coordinated their efforts with the Federal Trade Commission to obtain relief.

The Attorney General also joined 30 other Attorneys General in a Petition to the U.S. Supreme Court for a writ of certiorari to review decisions by the federal district court (W.D. Tex.) and the Fifth Circuit Court of Appeals that state laws pertaining to deceptive advertising, including chapter 93A, are expressly preempted by federal law when applied to fare advertising by airlines in *Morales v. Trans World Airlines, Inc.*; *Attorney General of California v. Trans World Airlines Inc.*

CPD also successfully defended a challenge to the Attorney General's investigatory power by two out-of-state concert ticket sellers who were believed to be in violation of the Attorney General's Retail Advertising Regulations in *Ticketworld and Tickets USA v. The Commonwealth of Massachusetts*. The retailers argued that because they were out of state companies, the Attorney General had no authority to require them to produce documents requested in a civil investigative demand. The Attorney General's investigative authority was upheld on appeal.

Financial Services

Due to their complex nature, financial services transactions can cause economic injury without the consumer being aware of the extent of the injury. CPD, therefore, has become involved in and has initiated numerous cases in this area. For example, in *Greenwood Trust Co. v. Commonwealth*, the owner of Discover Card (Sears Financial Services) brought an action in federal court seeking a declaratory judgment that a Massachusetts statute regulating late charges on credit card accounts was preempted by federal banking law. CPD counterclaimed seeking a judgment that Greenwood is liable for violating Massachusetts banking laws in imposing its late fees. Both sides filed motions for summary judgment and filed three briefs on federal preemption and choice of law issues; there were also six amici briefs

from eight states, VISA/Mastercard, and other interested entities. Judge Young heard oral argument on the cross motions on October 24, 1990 and a decision is pending.

In cooperation with the Securities Division of the Secretary of State, CPD also filed an investment fraud action in *Commonwealth v. Loan Depot*, against a national loan brokerage company and its president *William Camuti*. The Complaint alleged that the defendants obtained more than \$1.7 million in investments in violation of c.93A and the Massachusetts Securities Act by using unregistered brokers to sell unregistered securities which were falsely represented to be fully secured and guaranteed pools of first and second mortgages. The Superior Court judge issued a temporary restraining order prohibiting further sales or transfers of defendants' assets. After defendants had made full restitution in the amount of \$1.77 million, CPD and the defendants entered into a Consent Judgment under which defendants were enjoined from selling securities in the Commonwealth for three years. Defendants also agreed to pay \$156,000 in civil penalties and \$50,000 for costs and attorney's fees.

On December 12, 1990, CPD joined by five other states, filed a *parens Patriae* lawsuit in the Southern District of New York in *New York v. GMAC Mortgage* and its subsidiaries for requiring consumers to pay excessive amounts into their mortgage escrow accounts, in violation of the Real Estate Settlement Procedures Act (RESPA), GMAC's mortgage contracts, and state consumer protection statutes. It was estimated that defendants were illegally holding more than \$60 million in escrow deposits. Since that time, several other states have joined the litigation.

CPD also obtained consent judgments against a mortgage broker, *Coastal Surety Ltd.*, and its owner and *Home Equity Mortgage Co.* after having obtained a preliminary injunction prohibiting defendants from foreclosing upon a consumer's home. Defendants induced homeowners facing foreclosure to transfer their homes to realty trusts created and controlled by the defendants; extended mortgage loans through those trust; and subsequently foreclosed those loans. Defendants failed to disclose that they controlled the trusts, making consumers tenants in their own homes, and that defendants were entitled to 50% of the equity in the homes upon sale or foreclosure. The defendant mortgage company provided a new mortgage upon much more favorable terms; defendants also agreed not to engage in similar practices and to pay civil penalties and costs. CPD also obtained letter agreements with attorneys who had represented the defendants and the trusts and the refund of \$2,500 in attorney's fees to consumers and civil penalties and costs.

We also pursued defendants who advertised "easy" loans which defendants had no intention of securing for the applicants in *Commonwealth v. Paul Scavitto aka Paul Scott*. The defendants charged consumers a loan processing fee, purportedly returnable if the loan was rejected. No loan was ever approved and the processing fees were never returned. CPD obtained a judgment enjoining such practices and compelling the defendants to provide restitution to affected consumers.

In another case in which the defendants took consumers money and provided no services, CPD was also able to obtain a preliminary injunction

enjoining *Bazar-Brazil* and other companies from accepting money for transmission to Brazil and then not sending the money. The injunction, obtained in April, 1991 also froze the company's corporate bond for future distribution to complainants.

CPD also sought to help out funeral homes who had deposited consumers' preneed funds with *Mechem Financial of Massachusetts, Inc.* who had ceased doing business. The money had been inappropriately invested. The defendant had invested the funds in rare coins and CPD obtained an order to sell the coins to reimburse the funeral homes for the loss of consumers funds. To date, over \$85,000 has been obtained. Over six coins will still be sold.

CPD also assisted the Texas Attorney General's Office by bringing a trustee process action in a case against Boston attorney Fred M. Dellorfano and his business, FMD Investment Associates, Inc. in *Commonwealth v. Boston Trade Bank, et al.* An injunction had issued in Texas preventing Dellorfano from removing insurance premiums obtained pursuant to an insurance fraud. Notwithstanding that injunction, some of those funds were transferred to Massachusetts by Dellorfano and deposited with several financial institutions. CPD obtained an injunction preventing the financial institutions from transferring the funds back to Dellorfano. The Texas Attorney General subsequently obtained a large judgement with penalties and the money was returned to the Texas Attorney General for distribution.

Automobiles

Automobile problems continue to be the most frequent subject areas for complaints. One area of repeated problems arises when car dealers use unfair and deceptive sales practices to get consumers to purchase their vehicles. On June 20, 1991, the bureau obtained a Consent Judgment against *Wilmington Ford*, and its principals, *Bernard Ristuccia Sr.* and *Bernard Ristuccia Jr.* the judgment resolved an action for contempt brought against Wilmington for violating a previous order of the court issued December 30 1986. In resolving the contempt complaint, Wilmington Ford admitted that it had violated the previous order by engaging in prohibited sales practices, and the corporate and individual defendants agreed to pay \$415,000. -Of this sum, \$200,000 was paid for civil penalties, \$50,000 for attorneys fees and costs, \$82,500 to the local consumer programs and \$82,500 to a program to aid urban youth in an automobile repair training program.

In another deceptive sales practices case, CPD obtained a judgment against *Walter F. O'Keefe, et al.*, a motor vehicle transmission repair and service franchise which enjoined him from luring consumers with the promise of a free transmission inspection and then telling them a fee would be charged to take down the transmission.

Recently, CPD also enforced the new Used Car Warranty Law by obtaining a consent judgment against *P.F.T. Enterprises d/b/a Thrifty Auto Rentals*, who ignored an arbitrator's award to repurchase the vehicle from the consumer. The dealer was required to pay the arbitrator's award and civil penalties and costs of \$500.

In addition to the above, CPD has continued to enforce the Attorney

General's Motor Vehicle Advertising Regulations in several actions. On January 31, 1991, the Supreme Judicial Court affirmed the finding of contempt against a Lynn auto dealer in *Commonwealth V. Fall River Motors* for violations of a previous consent judgment concerning advertisements of "invoice prices" in violation of the regulations. The court also affirmed the \$20,000 contempt penalty for running one ad three times in the *Globe* (c.93A allows a \$10,000 penalty per violation) and the award of attorney's fees to the Commonwealth for a successful contempt action.

CPD also sued *Charles River Ford* (formerly d/b/a Elbery Ford) for violations of the Advertising Regulations. When the matter drew close to trial, the defendant filed for Chapter 11 bankruptcy. CPD sought an exemption or relief from the automatic stay and obtained a proof of claim in the amount of \$100,000 in lieu of litigating the claim in court which was approved by the Bankruptcy Court. CPD also obtained a Final Judgment with permanent injunctive relief against the dealership and obtained an extensive consent judgment against the owner/president, *Gordon Winchester* in June of 1991. Both Judgments were filed in Suffolk Superior Court.

We also won a summary judgment against *Spensley Chevrolet* and obtained a Consent Judgment against *Ira Oldsmobile* for violations of the regulations.

Environmental Advertising

CPD also participated in the establishment of a task force representing the joint efforts of ten Attorneys General to confront issues raised by the proliferation of advertising with deceptive environmental claims. The group held public hearings on the subject of "green marketing" claims and subsequently published and distributed *The Green Report: Findings and Preliminary Recommendations 1 Advertising*. Then, responding to responsive comments submitted by environmentalists, consumers and industry, the multi-state task force issued *The Green Report II* a revision of its first report that represented the group's reconsidered recommendations for responsible environmental advertising. *The Green Report II* has been distributed to the public and to the Federal Trade Commission for consideration as that agency moves to address the problems of deceptive green marketing claims. In addition, the Green Marketing Force initiated a number of investigations of suspect environmental advertising claims. The investigation into claims made by Mobil Chemical Company regarding the degradability of its plastic Hefty Bags resulted in Massachusetts and six other states filing separate lawsuits against Mobil for deceptive advertising. These suits were settled by a Stipulated Settlement Order separately executed by each state and Mobil, pursuant to which the company agreed to indefinitely discontinue making any biodegradability claims not permitted by FTC for its plastic bags and paid each state \$25,000. The task force also settled a similar settlement with *Chelsea Industries, Inc.* of Brighton, Massachusetts, makers of Good Sense and HandiBag plastic bags. Massachusetts received \$7,500 for the Local Consumer Aid Fund.

Landlord-Tenant and Mobile Home Park Issues

As the economy has declined, the supply of affordable housing in the Commonwealth has both deteriorated in quality and diminished in supply. CPD has taken an active role in efforts to preserve low-income housing for families and elderly citizens. For example, CPD filed suit against the owner and managers of the *Westminster-Willard* (also known as *Mandela*) low-income housing development in Roxbury for their failure to maintain the development in conformance with the state sanitary code, for their numerous unfair landlord-tenant practices in violation of both state and federal law, and for their failure to responsibly pay taxes, mortgages, and utilities, thus jeopardizing the future viability of this important source of affordable housing. CPD obtained injunctive relief that required the landlord to make many repairs, and is now seeking the appointment of a receiver so that the development can be managed responsibly and preserved for the benefit of the tenants.

The deadly health hazard to children of lead paint in housing has been a priority of the CPD this last year, as it has worked with other attorneys in the Public Protection Bureau to enforce the state's Lead Poisoning Prevention and Control Act. CPD has worked with the Department of Public Health to identify violators of the act and to institute legal action against them. In addition, the office has been involved in various state groups in an attempt to marshal funds to help homeowners pay for the costs of deleading, as well as supporting efforts in Congress to create a deleading fund that would benefit Massachusetts.

Mobil home parks, always a vulnerable source of affordable housing, have been put in increasing jeopardy by the failure of park owners to comply with their obligations to their tenants. CPD has dealt with a variety of issues, including failing septic systems and other improper park conditions, unfair and illegal imposition and enforcement of park rules, and numerous bad faith threats of park closings. CPD brought suit against the *City of Peabody Rent Control Board* and nine mobile home parks for their failure to comply with the provisions of the Legislature's rent control enabling act with regard to the imposition of rent increases in those nine parks, and obtained a preliminary injunction blocking recently approved illegal rent increases.

In an attempt to further assist mobile home park residents subjected to unreasonable actions by park owners, and to preserve these parks as a source of affordable housing statewide, CPD is currently working on strengthening statutory and regulatory protections for park tenants. In addition, CPD has made efforts to educate park tenants about their legal rights by speaking to park tenant associations throughout the state.

Health Care Issues

In 1986, CPD and the Torts Division obtained a Judgment against the owner of a medical laboratory that had conducted faulty Pap smear tests. In February 1991, CPD filed the brief on behalf of the Commonwealth in the appeal. In *Commonwealth v. Elm Medical Laboratories, Inc. et al.*, we argued that the court should uphold a jury verdict which held that the defendants had violated G.L. c. 93A in their performance of various

medical tests, primarily the diagnosis of pap smears and the examination of body tissues. We also argued that the lower court was correct granting a directed verdict on the individual defendants claim that DPH had violated their civil rights. In addition, we argued that the trial judge did not abuse his discretion in denying a mistrial because of conduct by the Commonwealth, that the final judgment and civil penalties were warranted, and that the denial of Elm's motion for a new trial based on new evidence allegedly withheld by DPH was not an abuse of discretion. Oral argument is pending.

It is a CPD priority to ensure that the health care needs of the elderly and sick who are institutionalized in the Commonwealth's long term care facilities are protected. To this end, the Attorney General twice obtained the appointment by the Superior Court of a "patient protector receiver" to take over the operation and control of a nursing home in order to protect the men and women living in it. In *Attorney General v. Oxfram Inc. d/b/a The New Pine Grove Villa Nursing Home*, such action was necessitated by the abandonment of a Millbury nursing home by its owner/operator, leaving patients without food or supplies and staff without any funds. In *Attorney General v. Wayne Manor, Inc. d/b/a Wayne Manor Nursing Home, et al.*, the facility's owner, who owed the Commonwealth and vendors approximately \$9M and had obtained protection under Chapter 11 in Bankruptcy Court, continued to squander the financial resources of a Dorchester nursing home until questioned about whether there was sufficient money for the next meal. We therefore intervened in the bankruptcy proceeding, obtained dismissal of the Chapter 11 case and then sought the establishment of a state-court receivership to ensure the health and safety of Wayne Manor's patients. In both cases, as a result of our intervention, the delivery of patient care was quickly brought up to the standards required by state and federal law and the process of attempting to sell transfer the facilities to suitable health care providers was begun.

CPD was also able to reach settlement in four "patient protector receivership" cases commenced in prior years. In *Attorney General v. Grover Manor Hospital et. al.*, we received a payment of \$355,000 which finally resolved all claims the state had against the defendants whom had been sued for rendering seriously deficient patient care. This payment followed the closing of the hospital and the transfer, by the receiver and with court approval, of all its patients to suitable beds elsewhere and initial payment by the defendants of \$50,000 in civil penalties and \$550,000 as reimbursement for receivership costs and disallowed rates. A final distribution of \$5,000 was similarly paid in *Attorney General v. Steven S. Inc.*, a case having to do with a nursing home that had delivered substandard care. In a third receivership case to be terminated, a Consent Judgment was entered in *Attorney General v. Human Services Resource Center et al.*, a case instituted in 1986 to protect the residents of three intermediate care facilities for the mentally retarded ("ICF/Mrs") located on Cape Cod. The Judgment permanently enjoins the individual defendant from operating or controlling any type of health care facility, required him to pay \$3,500 in civil penalties, approved the payment of approximately \$31,000 of pre-receivership HSRC funds to the Commonwealth for partial reimbursement

of its expenses and, more important, approved the transfer of the ICF/Mrs to the May Institute, a non-profit health care provider who will henceforth be operating the homes and caring for their residents.

A fourth receivership was finally terminated in *Attorney General v. Warren LaBorde- et al.* This case was instituted when it was discovered that the owner of a small rest home was sexually abusing several mentally ill female residents. The man was immediately prohibited from entering the rest home (although it was adjacent to his personal residence) and a receiver installed to protect the residents. Subsequently, no one was willing to buy the rest home. It was therefore closed this year and the residents transferred to other safe locations. (In a separate action, the provider was prosecuted criminally for his misconduct.)

Several non-receivership cases commenced to protect groups of vulnerable patients and to ensure that they obtained appropriate care and services were also finally resolved this year. In *Commonwealth v. Beverly Enterprises Inc. d/b/a Greycliff on Cape Anne Nursing Home*, Beverly Enterprises, the nations largest nursing home chain agreed to a Final Judgment pursuant to which it paid \$89,000 in lieu of civil penalties to be used to purchase a handicap-accessible van and other items for the nursing home that would otherwise not be available for its patients. The Judgment followed Beverly's long compliance with a Stipulation in Lieu of Injunction which it required it to hire and finance an independent management team to operate and rehabilitate its Greycliff Nursing Home for a period of years. The \$89,000 is deemed collective restitution to the 89 patients living in Greycliff when CPD commenced suit for Beverly's failure to render appropriate care and represents the *first* payment of any kind inuring to the direct benefit of patients subjected to poor care in a Chapter 93A health care related case. Reflecting an innovative way to give restitution to a large group of injured consumers, it was purposefully designed (1) to avoid putting the medicaid eligibility of any single patient at risk by the receipt of money over the permitted limit, (2) to accommodate likelihood that patients living in Greycliff when the case was begun no longer live there now, and (3) to deal with the problem of qualifying intangible damages for a large and varied class.

Commonwealth v. Kelton Corp., d/b/a Braintree Hospital, a suit which arose as a result of several inappropriate patient discharges from the rehabilitation hospital was also settled out of court this year. In a Final Judgment approved by the Superior Court, the defendants agreed to pay the Commonwealth \$4,500 and to abide by current Department of Public Health discharge planning regulations. A Final Judgment was also approved in *Commonwealth v. Otis Hospital et al.*, following the voluntary closure of a chronic hospital in which patient care was so substandard that the Commonwealth alleged it was life-threatening and the safe transfer of its patients to another hospital. The Final Judgment reflects a negotiated settlement whereby the Commonwealth agreed not to litigate further to obtain costs and civil penalties in exchange for the defendants giving up their \$100,000 claim (\$40,000 of which was uncontested) against the Department of Public Welfare for unreimbursed Medicaid expenses. While this settlement did not result in cash flowing into Commonwealth coffers, it

permitted DPW to retain scarce Medicaid funds and use them elsewhere — after the safety of the patients involved was insured.

In *Attorney General v.* an innovative and important milestone was reached. The case involved three intermediate facilities for the mentally retarded ("ICF/Mrs") operated by Associated Group Homes ("AGH"). AGH was not only delivering substandard care but had also virtually run out of money, leading it to acquiesce in the appointment of a receiver to operate the three homes. We alleged in the complaint that AGH's parent, HealthNet, Inc. was in part responsible for the problems that developed. In order to settle the issue of its own liability and obviate the need for trial, HealthNet, through its Assignee for the Benefit of Creditors, agreed to a plan pursuant to which it sold the real estate of two of the three ICF/Mrs to the AGH receiver for a total sum that was approximately \$156,675 less than their market value of the properties. This, in turn, made it possible for the receiver to resell the two homes to a successor health care provider for a sum allowable under Rate Setting Commission reimbursement regulations. The \$156,675 given up by HealthNet represents its costs of settling the case.

The Commonwealth helped formulate, and agreed to, the Plan because it becomes a beneficiary of it in several respects. First, the ICF/MR homes could not be closed because there were no other beds for their residents who were all deinstitutionalized clients of the Department of Mental Health. But the facilities could not stay in receivership indefinitely nor could new buildings be economically built to house the residents. As a result of the plan's implementation, the rehabilitated old homes can remain open, the costs of building replacement facilities are avoided, and the Medicaid rates paid to reimburse the new provider for its property costs in the future will be figured on a basis that is substantially lower than market value, thus scaling down future rate payments. The plan, complex as well as innovative, was subject to court scrutiny and approval: it also received the cooperation of several Commonwealth agencies as well as HealthNet and the receiver. It was effectuated as planned this year and two of the three ICF/Mrs are now out of receivership and being run by a successor health care provider.

Our efforts to protect patients' rights and enforce the Attorney General's Nursing Home regulations without necessarily resorting to litigation continue to be successful. Among other satisfactory dispute resolutions was one concerning a Plymouth, Massachusetts nursing home (*Pilgrim Manor*) owned by a Georgia corporation that had filed a bankruptcy proceeding in Florida. Through informal negotiations with the corporation's counsel, we were able to obtain refunds for private paying patients who had left the facility before the end of the period for which fees had been prepaid and were unable to get back monies paid for services not rendered. As a result of our intervention one family received a refund of \$850 and another a refund of \$1,327.

Finally, in a matter taken to the Appeals Court, a Judgment Following Rescript was issued in our favor, affirming a superior Court order requiring compliance with a Civil Investigative Demand ("CID") sent by the Attorney General to Evan Porter d er House. The CID, a prelitigation subpoena, had been issued to ascertain whether Porter was operating an unlicensed long term care facility in his Newton resident. Porter refused to respond to

the CID and when instructed to do so by the Superior Court, he challenged the enforcement order. Following his unsuccessful appellate challenge, Porter provided some of the documentation requested in the CID. Limited as it was, the documentation nevertheless provided the Attorney General with reason to believe that Porter was in serious violation of Chapter 93A and various other statutes and regulations promulgated to protect residents of long term care facilities. He was consequently put on notice that further court action would soon be taken unless it was made clear that Porter House was being operated within legal limits.

Regulatory and Legislative Activity

CPD has also been involved in a variety of regulatory activity. In response to the dramatic increase in the price of refined fuels following Iraq's invasion of Kuwait, on August 10, 1990 the Attorney General adopted emergency regulations under c.93A prohibiting price gouging in the sale of petroleum products during a market emergency. Pursuant to these new regulations, CPD served numerous Civil Investigative Demands on petroleum producers, wholesalers and retailers. In addition, the Division began regular monitoring of retail prices of gasoline and heating oil. A public hearing was held on November 16, 1990 on the proposal to make the price gouging regulations permanent. The final regulation, drafted by CPD and the Antitrust Division, prohibiting petroleum product price gouging was adopted effective December 21, 1990.

The office has also submitted comments and testimony on both state and federal matters. CPD testified before the State Banking commissioner on its Rules and Regulations Prohibiting Unfair and Deceptive Acts or Practices Involving Consumer Transactions at public hearings on September 14, 1990, and October 29, 1990. The rules reflected our testimony and comments, particularly as to banks' obligation to scrutinize and be held accountable for consumers loans arising from transactions marked by sellers' unfairness, deception or fraud; mortgage brokers activities; mortgage escrow accounts; and the banks' own unfair or deceptive lending practices.

In February, 1991, CPD testified in favor of the three bills in the state legislature. CPD testified in favor of the Telemarketing Bill that would prevent fraud by prohibiting a telemarketer from submitting any charge to a consumer's credit card until they had received a written contract signed by the consumer which would identify the telemarketer by name and address and identify the goods or services being sold, the total price and the date of the transaction. This written contract would help insure that consumers have sufficient information concerning the seller and the terms of the contract to either pursue a complaint or to protect themselves when being charged by a credit issuer for goods or services which they have not received.

The CPD testified on behalf of a Bill that would criminalize certain conduct that is present in most auto brokering transactions. An auto broker is a person seeking to arrange a sub-lease type of transaction between a person having trouble making the payments on his/her card and a person who, because of their own credit problems, cannot purchase a car on credit.

Many of these transactions create problems for the person who provides the car because the person who is using the car stops payments or stops carrying insurance on the car. The secured lender is most often unaware that the car is in the possession of a third party. The bill would make it a criminal offense for the broker to arrange such a transaction unless he/she had first obtained written permission from the secured lender.

CPD also testified in support of the Home Improvement Bill for the fourth year in a row. This bill would require all home improvement contractors to be properly identified through registration with the state and would require that they contribute a nominal sum, to a 'Guaranty Fund' to benefit consumers who are victimized by home improvement contracts that fail to do any work or that fail to complete the job properly.

In March 1991, CPD testified in favor of legislation which would increase civil penalties under Chapter 93A against businesses which target elderly and disabled consumers. If enacted, the bill would allow courts to impose maximum civil penalties of up to \$7,500 against such businesses for each violation of Chapter 93A.

We testified in opposition to legislation which would amend Massachusetts banking laws to allow credit card issuers to impose late charges on their customers. Such legislation, if enacted, would nullify the impact of the pending litigation in *Greenwood Trust v. Commonwealth*, *supra*.

In March, we also wrote a letter in support of H. 2709 - An Act Regulating the Use of All-Terrain Vehicles, which would require *inter alia* that all operators of ATVs be 16 years of age and pass a knowledge and skills test, and that would also ban the sale of three-wheeled ATVs and child-size ATVs.

CPD submitted testimony to the Federal Communications Commission in April 1991, urging the agency to adopt strict regulations governing 900 number telephone services. Proposals included ones for better price disclosure, improved billing and shutoff protections, and special protections for children's 900 number programming.

In April, 1991, the Bureau also testified before a subcommittee of the committee on Banks, Finance and Urban Affairs of the U.S. House of Representatives about the issue of regional redlining, where an out of state bank had cancelled credit card accounts of New Englanders. We offered testimony in favor of a bill that would ban credit discrimination based on geography.

In June 1991, CPD joined with a number of other states in making comments to a different subcommittee of the Committee on Banks, Finance and Urban Affairs urging them to adopt amendments to the Fair Credit Reporting Act. Suggested revisions include improving data accuracy, responding more quickly to requests for reinvestigation of errors, improved privacy rights, and restrictions on preapproved solicitations.

CPD - Charities

With the assistance of CPD, a settlement was reached by the Charities Division in *Attorney General v. Watson & Hughey Company*. Massachusetts and nine other states will share a \$2.1 million payment — the largest ever in a national charitable solicitations case — to settle lawsuits

against the Watson & Hughey Company, a Virginia-based fundraiser, as well as a Washington, D.C. attorney and several national organizations which used them both in deceptive sweepstakes solicitations campaigns. The defendants induced consumers to send donations on the false representation that they were a sweepstakes "winner".

Massachusetts will receive \$125,000 of the settlement, also a record amount. From this sum, local community foundations across the state will receive \$65,476 for care or services for persons with cancer or related diseases or for cancer research and the Attorney General's Local Consumer Aid Fund will receive \$59,524 to support local consumer groups. The defendants also agreed to a comprehensive 30-page consent judgment containing detailed requirements for any future fundraising by Watson & Hughey or these organizations.

LOCAL CONSUMER GROUPS AND MEDIATION SERVICES

Local Consumer/Mediation Services (LCMS) is responsible for the administration of the Local Consumer Aid Fund and the state-wide network of Local Consumer Programs (LCPS) and Face-to-Face Mediation Programs (FTFMPs) supported by that Fund. the LCMS awards grants to local agencies throughout the Commonwealth for the resolution of consumer problems and provides ongoing training and technical assistance to grant recipients. Working cooperatively with the Attorney General, these local programs resolve thousands of complaints through mediation and also identify repeat offenders so that appropriate legal action can be taken by the Consumer Protection Division.

Funding for the local programs is allocated by the General Court to the Local Consumer Aid Fund (LCAF) (M.G.L. c. 12, /11G). In FY '91, \$618,266 was appropriated by the Legislature to the Local Consumer Aid Fund. Ten percent, \$61,827, was retained by the DAG for administrative purposes. An additional \$71,061, earmarked for the LCAF in the settlement of consumer cases, was used to supplement the legislature's allocation, resulting in a total grant expenditure of \$627,500 in 1991.

Complaint Section

During fiscal 1990, the Consumer Complaint Section opened 2,945 cases and closed 1,736 cases. As a result of our mediation efforts, we recovered \$78,708 in direct refunds, obtained settlements where consumers saved \$148,655 and negotiated other disputes where consumers received goods or services valued at approximately \$127,956. The total savings for consumers was \$355,319.

In addition, our clerical staff processed 4,468 written complaints: 341 were referred to other state or local agencies, 440 other states, 1,623 local consumer programs, 963 to divisions within the attorney general's office, 1,070 were returned to consumers, and 31 were Harshbarger correspondence responses.

The Attorney General's Information Line Received 90,144 calls during the past year. 5,746 Complaint/Inquiry Forms were sent to citizens as a

result of their call to the office. 18,115 citizens were given general information, and 66,283 consumers were referred to other federal, state or local agencies or departments.

ENVIRONMENTAL PROTECTION DIVISION

The Environmental Protection Division serves as litigation counsel on environmental issues for various state agencies, particularly those within the Executive Office of Environmental Affairs. 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 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 significant environmental issues. In the first half of 1991 the Special Litigation Unit and the Nuclear Safety Unit were merged into the Environmental Protection Division. Accordingly, the Division is now also responsible for the Commonwealth's asbestos cost recovery litigation and matters arising from the operation of nuclear power plants.

Money Recovered For the Commonwealth Treasury:

Civil Penalties:	2,086,305.70
Hazardous Material Cost Recovery:	1,449,561.77
Asbestos Cost Recovery/Damages:	1,247,214.00
Total:	<u>4,783,081.47</u>

Money Saved the Commonwealth:

Many cases resulted in court judgments requiring private parties to undertake costly cleanups - a savings of millions of dollars for the Commonwealth.

II. State Enforcement.

One of the most important functions of the Division is to bring litigation to enforce the Commonwealth's environmental statutes. Major state enforcement cases handled in the fiscal year include the following, as sorted by subject area.

A. Hazardous Waste:

Commonwealth v. Tewksbury Auto Parts: As a result of a consent judgment obtained in January 1991, the owners of a Tewksbury scrap metal operation charged with the illegal disposal of hazardous waste

will pay \$830,000 in civil penalties and establish a \$1 million escrow fund to cover cleanup costs. In a suit filed in Suffolk Superior Court, the Division had charged Tewksbury Auto Parts, Inc., the operator of an automobile and appliance shredding business, and Tewksbury Metals Inc., the operator of a metal reclamation business, with illegally disposing more than 400,000 cubic yards of waste, much of it hazardous, in a wetland area.

Commonwealth v. Monsanto Corp. The Division obtained over a million dollars in penalties from a consent judgment entered in January 1991. In that case the Commonwealth charged that Monsanto failed to report a release of hazardous materials in violation of G.L. c. 21E. The penalty settled the Commonwealth's claims that the industrial chemical manufacturer illegally released 200,000 gallons of untreated industrial wastewater into groundwater and the Mystic River from its chemical manufacturing complex on Mystic View Road in Everett. The judgment filed in Suffolk Superior Court also required Monsanto to pay an additional \$192,000 to the Massachusetts Environmental Trust in equal \$48,000 installments over the next four years. The Massachusetts Environmental Trust operates as an environmental philanthropy funding projects to restore and improve Massachusetts' marine and coastal environments and promote educational efforts around marine and coastal issues.

B. Water Pollution/Water Supply:

Commonwealth v. Microwave Research Corp., et al: In August 1990, the Division obtained a consent judgment requiring the payment of total penalties of \$175,000 for alleged violations of the Clean Water Act and the Hazardous Waste Management Act. The Complaint filed by the Division alleged that the defendants had discharged industrial wastewater, including metals in a processed solution from their North Andover facility into groundwater without a permit, and that they had also illegally transported and stored barrels of waste in a warehouse in Lawrence, Massachusetts. The final judgment included a permanent injunction prohibiting the successor corporation, Microwave Engineering Corp., from discharging any substances into the groundwater.

Commonwealth v. Eastern Manufacturing Corp.: In September 1990, a consent decree was entered after two years of active litigation. Eastern Manufacturing Corp., a manufacturer of printed circuit boards, agreed to pay a \$50,000 penalty and to comply with a schedule of stipulated penalties for any future violations over the next three years. The corporation also had to build a new wastewater treatment system as a condition of its current permit, at an estimated cost of \$750,000.

Commonwealth v. Seaman Paper Company of Massachusetts, Inc.: A consent judgment was also entered against Seaman Paper Company of Massachusetts, Inc., a manufacturer of recycled paper products, in September 1990. The consent judgment settled the case brought against the company for violating its permit to discharge treated wastewater into the Otter River. Under the terms of the consent judgment the company is required to pay a civil penalty of \$150,000 and to make certain improvements in its treatment plant to bring the plant into full statutory compliance. The judgment also requires the Company to take certain actions to insure that the Otter River is protected while the required improvements are

being implemented.

Commonwealth of Massachusetts v. North Adams: A consent judgment was entered in which the City of North Adams agreed to a schedule to improve the public drinking water supply system to comply with the requirements of the Safe Drinking Water Act.

C. Pesticide:

Commonwealth v. Orkin Exterminating Co., et. al. A consent judgment was obtained in June 1991 requiring the Orkin Exterminating Co., Inc., of Pitts field, to pay a civil penalty of \$23,000. The consent judgment settled claims that the company violated the Massachusetts Pesticide Control Act following an incident in South Lee in which a two-year old girl ingested some poisoned rodent bait that an employee of Orkin had allegedly placed in an unsecured bait box. The consent judgment requires the employee himself to pay a penalty of \$600 and requires Orkin to pay a civil penalty of \$23,000. It also requires Orkin to remove non-tamper-proof bait boxes that may have been previously installed at its customers.

D. Wetlands:

Commonwealth v. Van Wyck: Also in June 1991, a consent judgment was entered in a civil proceeding that was brought against an Essex real estate developer, Peter Van Wyck, that was a companion case to a criminal proceeding that charged Van Wyck with altering various wetlands areas on property he owned without first gaining approvals required by the state Wetlands Protection Act. In the civil proceeding, the consent judgment requires Van Wyck to restore areas that he had altered and to pay a civil penalty of \$75,000 unless he fully complies with the injunctive provisions of the judgment.

III. Cost Recovery/Cleanup:

The Division spends considerable resources on suits to remedy contamination caused by oil or hazardous materials, including contamination caused by oil or hazardous materials, including litigation to recover costs incurred by the Commonwealth when it takes cleanup actions. Major cases handled in the last fiscal year include the following.

U.S. et al., v. AVX et al.: In this case, the Commonwealth and the United States jointly prosecuted Superfund litigation against five defendants for PCB contamination of New Bedford Harbor. The Court established three separate defendant groups, each with a distinct litiagation schedule. The Commonwealth and the United States reached a settlement agreement in principle with the first defendant group, Aerovox and Belleville, for \$12.6 million. The final terms of the agreement were approved by the parties and court. If the judgment is not appealed, it will become final and the monies recovered will reimburse the governments for remedial costs and fund a joint restoration plan for injured natural resources in the harbor. In August 1990, the governments reached an Agreement in principle with defendant AVX for \$66 million. The final terms of the agreement are still in negotiation. An agreement in principle has also been reached with the last defen-

dant group, Federal Pacific Electric Company and Cornell-Dubilier Electronics, Inc., however, the final terms of that agreement are still being negotiated.

Atlas Tack Corporation v. Commonwealth of Massachusetts: In June 1991, the Division obtained a consent judgment that resulted in the Commonwealth receiving more than \$875,000. In this case, Atlas Tack filed suit against the Commonwealth, claiming that it was not liable for the costs of the cleanup of a lagoon containing electroplating wastes at its Fairhaven site. The Commonwealth brought counterclaims pursuant to G.L. c. 21C and c. 21E seeking penalties, cleanup costs and treble damages. The judgment represents cost recovery, interest and penalties.

Commonwealth v. Texaco, et al. In this case, the Commonwealth brought an action against Texaco, and several other defendants in connection with the gas station site from which were releases of hazardous materials and oil in violation of G.L. c. 21E. The Division successfully negotiated a settlement of the matter in the form of a consent judgment under which the Commonwealth will recover \$475,000.

Commonwealth of Massachusetts v. Owens-Corning Fiberglass Corp., et al.: The Division acting through a Special Assistant Attorney General commenced this major property damage action in Suffolk Superior Court. In this case, the Division brought a six hundred million dollar claim against 50 former manufacturers, suppliers and distributors of asbestos. The goal of the lawsuit is to recover for the property damage caused to the state's buildings and facilities due to the installation of the defendants asbestos products.

Johns Manville Bankruptcy: The Division participated through a claims process to recover asbestos property damages from the Manville Property Damage Trust. Sixty-two claims worth a total of \$2,127,358 were filed. The Commonwealth recovered more from the Trust in this claim cycle than any other state in the country.

UNR Bankruptcy: The Division also obtained a recovery of approximately \$400,000 worth of securities and cash from the UNR bankruptcy proceeding in Chicago for property damage caused to Gaebler State Hospital because of the presence of UNR's asbestos products.

IV. *Defensive Cases:*

The Division defends the regulatory and enforcement actions of state environmental officials and agencies. In this fiscal year, the Division defended scores of such claims. These suits ranged from administrative appeals to taking claims to challenges to state environmental regulations.

V. *Intervention in Facility Siting Proceedings:*

The Division intervenes in facility siting proceedings when it determines that such intervention is necessary and appropriate to protect the public health or the environment. Major siting controversies in which the Division participated this year are as follows.

Clean Harbors Incinerator: In Augst 1990, the Division prepared and submitted to DEP significant written comments, including comments from four experts, regarding the unsuitability of the site in Braintree proposed by Clean Harbors, Inc. for the construction of a rotary kiln incinerator to burn hazardous wastes. After evaluating the site, the experts concluded that the

proposed site rated extremely poorly on each of DEP's siting criteria, and the written comments to DEP documented their findings. In September 1990, DEP issued a preliminary determination finding the site to be "an inherently unsuitable location for such a project". The reasons DEP gave for making this determination included many of those the Division had presented in our comments. Shortly thereafter, Clean Harbors announced it was abandoning the project.

Halfmoon Power Plant: In 1990, the Division was granted permission to intervene in *Inter-Power of New York, Inc. - Proposed Powerplant, at Halfmoon, N.Y.*, a proceeding before the New York State Board of Electricity Generation Siting and the Environment. The purpose of the proceeding is to determine whether Inter-Power of New York, Inc., should be allowed to build a 200 megawatt, coal-fired cogeneration facility in Halfmoon, New York. Due to prevailing winds, the Berkshires will suffer the maximum acid-deposition impacts from the proposed facility. The hearing officer assigned to the proceeding issued a recommendation that the plant be sited as a gas plant. That recommendation was rejected by the Siting Board on a vote of 5-2. Thereafter, based upon newly discovered evidence that the air impacts has been understated, the Board revoked its approval and remanded the matter for further proceedings.

Seabrook Nuclear Power Plant: In January 1991, the United States Court of Appeals for the District of Columbia issued its opinion in the case involving the licensing of the Seabrook Nuclear Power Plant. In its decision, *Commonwealth of Massachusetts, v. NRC*, the Court of Appeals upheld a decision by the Nuclear Regulatory Commission (NRC) that concluded that so long as emergency plans for nuclear power plants met certain generic planning requirements, they may be approved without any specific finding that the plans will in fact protect the public in the event of an emergency. In reaching this conclusion, the Court of Appeals deferred to the NRC's interpretation of its regulations. Because of the significant public safety issues at stake, the Division filed a petition for *certiorari* in the United States Supreme Court seeking review of the Court of Appeals decision.

VI. *Amicus Participation:*

The Division participates as *amicus curiae* in matters that affect legal rights of the Commonwealth. In this fiscal year, the Division filed an *amicus* brief in a case in the Supreme Judicial Court which raised the issue of whether private ownership in coastal areas extended to the mean low tide line, the mean extreme low tide line, or the extreme extreme low tide line (the lowest point the tide has ever been known to ebb). The Division filed a brief arguing that private ownership could extend only down to the mean low tide line and that areas extending seaward were owned by the Commonwealth. In a decision issued in February of 1991, the Supreme Judicial Court rejected the extreme extreme low tide line, but did not reach the issue of which of the other two boundaries applied. *Rockwood v. the Snow Inn Corp.*, 409 Mass. 361 (1991).

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 across the spectrum 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 (i) to ensure that charitable funds held by trustees and charitable organizations are used properly, and (ii) 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, more than 28,000 charities are registered with the Division, as well as over 180 fundraisers operating in Massachusetts. A charitable organization is one which is non-profit and whose purpose is to benefit a portion of the public; in addition to philanthropic organizations, examples of public charities include non-profit 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.

TABLE I: Money Recovered
For The Commonwealth Treasury

A. Charitable Registrations, Certificate Fees, And Fundraiser Registrations	\$613,580.00
B. Escheats	\$693,671.12
C. Civil Penalties and Costs	\$106,300.00

TABLE II: Money Recovered And
Saved For Commonwealth Citizens

A. Judgments, Settlements and Restitution in Public Charities Division Matters	\$125,000.00
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A. ACCOUNTABILITY BY PUBLIC CHARITIES

Central to the Attorney General’s responsibilities with respect to charitable funds is the enforcement of laws requiring accountability by public charities.

1. Charitable Organization Registrations and Annual Financial Reporting

All public charities, with the exception of religious organizations and certain federally chartered organizations, must register with the Division. All registered charities must submit annual financial reports. The registrations and the financial reports are public records and public viewing files are kept.

From July 1, 1990 through June 30, 1991, the Division processed 19,132 annual financial reports. Annual filing fees of \$25 per report totalled \$478,300.

During this period, 1340 new charitable organizations were reviewed, determined to be charitable, and registered. Each was sent the Division's packet of information about the Division's registration and filing requirements.

2. Administrative Enforcement of Registration and Filing Requirements

In addition to its ongoing program of contacts to charities whose annual filings are deficient or delinquent, the Division continued its priority compliance project to ensure registration and filing compliance by a list of 500 significant and active charities. Complete compliance reviews were conducted, with follow-up contacts with the charities.

In total, the Division contacted 597 charities to rectify filing deficiencies.

3. 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. Following our review, negotiation of necessary modifications, and our assent, the pleadings are filed by the dissolving charity with the Supreme Judicial Court. We review 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 purpose include but are broader than those of the dissolving charity.

After review of proposed pleadings and negotiation of necessary modifications, the Division assented to 28 motions by dissolving charitable corporations for interlocutory orders permitting transfer of assets to other charities for similar charitable purposes, and to 61 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, with its remaining general assets distributed pro rata to prior creditors.

4. Sales of Corporate Assets

Under amendments to the non-profit corporations act which took effect in April 1990, a charitable corporation must give 30 days advance written notice to the Attorney General before making a sale or other disposition involves or will result in a material change in the nature of the activities conducted by the corporation. G.L. c. 180, §8A(c). The Division developed and publicized a procedure for responding to the notices and a checklist of issues to be resolved upon receipt of such a notice.

The following is an illustrative example of notices received, analyzed and responded to:

St. Luke's Hospital in Middleborough, which was ending operations due to economic conditions, proposed to sell its assets to nearby non-profit hospital for use as an out-patient clinic at the original hospital's site, with trust funds transferred to the purchasing hospital for use in connection with the clinic. Division position: Sec. 8A notice required; court approval required because of the changed purposes to which the hospital's restricted and unrestricted assets will be applied; dissolution required if corporation will not continue to function. After lengthy negotiations, the Division assented to a court petition seeking authorization for the sale and transfer, and the Court approved. Under the agreement, two funds which were subject to gifts over to a hospital in Boston if the first hospital ceased operation in Middleborough were excluded from the transfer.

5. Enforcement of the Due Application of Charitable Funds

The assets of all charitable corporations and other public charities are considered by law to be held by the charitable organization for charitable purposes. Under common law and G.L. c. 12, §8, the Attorney General represents the public's interest in the proper use of these assets. For example:

Fairlawn Rehabilitation Hospital (Fairlawn), a Worcester charitable corporation, informed the Division that it wished to sell its assets and turn over its operations to a for-profit corporation, New England Rehabilitation Services of Central Massachusetts, Inc. ("NERSCM"). After lengthy negotiations about the practicability of fulfilling its charitable purposes and fair market value for Fairlawn's assets, the Division agreed to the sale, conditioned on the recapture by Fairlawn of a portion of any profit realized by NERSCM if it resold the assets for non-hospital uses within a ten-year period. Fairlawn filed a complaint in Worcester probate court seeking approval of the transaction, and permitting Fairlawn to convert to a foundation. The Division assented, and the Court issued an order approving the transaction.

The Fuller Museum of Art (the "Museum") of Brockton approached the Division seeking authorization to borrow funds from the principal

of a restricted, income-only endowment fund. After extensive negotiations about the extent of the Museum's borrowing needs, availability of alternatives to borrowing from endowment, and ensuring prompt payback to endowment, the Division assented to a motion for entry of final judgment allowing the borrowing from endowment of \$250,000 secured by a mortgage on Museum property. The Museum trustees filed a Complaint and the assented-to motion in Plymouth Probate Court, and the Court approved shortly thereafter.

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

Under statutory and common law, 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. In its role of enforcing the due application of charitable funds and preventing breaches of trust, concerns addressed by the Division include:

- a) is the trust functioning (i.e., not dormant)
- b) are the trustees complying with the trust purposes?
- c) are the trustees accounting properly for the trust's funds?
- d) are the trustees adhering to their fiduciary duties of care and loyalty?
- e) because of changed conditions, should the court be asked to modernize the trust provisions through the doctrines of *cy pres* or deviation?

1. *Wills, Trusts, and Probate Matters*

The Division received and reviewed 1760 new wills, 1513 of which contained charitable bequests. As well, 1787 executor and trustee accounts were reviewed and approved along with 1083 final accounts, 716 which were closed. The Division also reviewed, negotiated and assented to the following petitions: 144 petitions for sale of real estate, 13 to terminate trusts, and 74 for appointment of administrators.

Seventy-nine new probate cases were opened, and the Division was involved in 105 actions on existing probate cases, which included petitions for *cy pres* or instructions to modernize or clarify outmoded trust terms or terminate uneconomical trusts. For example, a charitable trust which is for the benefit of the poor had been in existence for 16 years and no charitable expenditures had ever been made. Under a resolution of the case worked out by the Division, the corpus of the trust, approximately \$200,000.00, was turned over to the local Community Foundation so that the purposes of the testator will be carried out expeditiously and economically.

Over 35 small trust funds were transferred to charitable beneficiaries under G.L. c. 203, sec. 25, resulting in more income to charities by reason of elimination of administrative costs. In addition, the Division reviewed 141 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 July 1990 – June 1991, \$693,671.12 was received in escheates, the Division reviewed and approved 52 intestate estates. Forty two estates were closed, and 27 other miscellaneous public administration matters were handled.

3. Litigation

The Attorney General is a party in numerous cases in active litigation in furtherance of his authority to “enforce the due application” of charitable trust funds and to “prevent breaches of trust in the administration thereof”. For example:

The Division negotiated a resolution of a dispute between the town of Rockport and the Smithsonian Institution over the rightful beneficiary of a \$1 million bequest left to Rockport in the will of a town resident. The Division filed an answer supporting Rockport’s position that the bequested funds may be used for renovating an old schoolhouse into a new public library and asked the court to liberally construe the bequest language to carry out the donor’s stated intent to “provide an adequate replacement” for the library. Pursuant to the settlement entered into by the Attorney General, Rockport, and the Smithsonian, the Essex County Probate Court entered a decree stating that the \$1 million may be used for the necessary renovations.

Another case involved the creation of a trust instrument by a bank in Springfield, Massachusetts, the purpose of which was to consolidate approximately 27 charitable trusts totalling \$900,000.00. Consolidation is permitted under a statute G.L. c.203, §. which allows a court to consolidate or terminate trusts if they are uneconomical to administer. The Division worked with representatives of the Bank on the draft provisions of the trust instrument to assure that trust purposes were properly carried out. Memoranda were submitted to the court by the bank and the Division. The Judge allowed the Petition to Establish the Consolidated Trust.

Another example involved a complicated Statutory Estate Plan for the decedent while under conservatorship which set up two trusts totalling about one million dollars which were for her benefit during life and then went principally to designated charities. There were provisions for payment of expenses and equalizing of the trusts after her death. The plans had not been implemented as required and there were several hearings in New Bedford before the Probate Court Judge, which we attended. The Judge first appointed a guardian ad litem and then an accountant to help determine what had to be done. With our assistance, an agreement was reached by all parties resulting in a judgment and final distributions.

D. CHARITABLE SOLICITATION ENFORCEMENT

The Attorney General represents the public interest in the proper solicitation of solicited charitable funds and in the proper use of such funds.

1. *Issuance of Certificates to Charities Who Fundraise*

Under G.L. c. 68, sec. 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 deficiency in the application, all certificates are issued within a 10-day statutory period.

This year, 13,333 certificates were issued and \$133,330 in certificate fees were received and processed.

2. *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 \$10,000.00. All fundraisers must also file with the Division a copy of each fundraising contract which they sign with any charitable organization, and solicitors must later file a financial return regarding each fundraising campaign.

During the fiscal year ending June 30, 1991, a total of 195 registrations were received and approved, resulting in \$1950.00 in fees to the Commonwealth. Of this total, 13 were new registrations for the remainder of calendar year 1990 and 182 were annual registrations for calendar year 1991 (44 solicitors, 123 fund-raising counsel, and 15 commercial co-venturers).

3. *Administrative Enforcement of Registration and Filing Requirements*

In addition to its ongoing program of contacts to charities and fundraisers whose filings are deficient or delinquent, the Division focused its compliance resources on charities formed during the Persian Gulf war for the benefit of the troops and their families, because of the anticipated outpouring of donations for this purpose. The Attorney General issued a public advisory warning Massachusetts residents about potential war-related fundraising scams, and providing information to organizations and the public about the registration and financial reporting requirements. In June 1991, the Attorney General asked all war-related groups to file special interim financial reports, to assure that the donations reach their intended beneficiaries.

4. *Charitable Solicitation Litigation*

The Attorney General takes legal action against charities and fundraisers for unfair or deceptive solicitation practices and to enforce their fiduciary duties with respect to such funds.

a.) *Attorney General v. Watson & Hughey, et. als.*

Massachusetts and nine other states will share a \$2.1 million payment to settle lawsuits against the Watson & Hughey Company, a Virginia-based fundraiser, as well as a Washington D.C. attorney and several national organizations which used them both in deceptive sweepstakes solicitations campaigns.

The financial settlement is the largest ever in a national charitable solicitations case. Massachusetts will receive \$125,000 of the settlement, which is also a record amount for a solicitations case. This \$125,000 will be divided as follows: \$65,476 will go to local community foundations across the state for care or services for persons with cancer or related diseases or for cancer research; the remaining \$59,524 will be paid to the Attorney General's Local Consumer Aid Fund to support local consumer groups. The defendants also agreed to a comprehensive 30-page consent judgment containing detailed requirements for any future fundraising by Watson & Hughey or these organizations. The settlement was reached after months of negotiations led by Massachusetts on behalf of the 10 participating states.

b.) *Commonwealth v. G.M.C. Advertising, Inc. et als.*

The Attorney General filed suit against this Massachusetts solicitor, alleging fraudulent and deceptive tactics to solicit funds on behalf of police unions and associations and other groups. The office also obtained assurances of compliance signed by three statewide police unions which had hired the solicitor.

The defendants were charged with violating the state's charitable solicitation and consumer protection laws during their telephone sale of advertisements to Massachusetts businesses. The suit alleges that GMC employees failed to inform donors of their status as professional, paid fund raisers, as required by Massachusetts law, and made numerous misrepresentations, such as falsely representing that they were either state, registry or local police officers or local city or town officials. The court issued a preliminary injunction which requires the defendants to account for all money raised for the past three years and to provide advance notice to the Attorney General of all future fundraising, and prohibits them from making misrepresentations in the course of fundraising.

c.) *David P. Gargano, D & M Enterprises, American Federation of Police, Vietnam Veterans of America, United Citizens Against Drugs, United Publishing Service, and LAO Enterprises.*

The Division obtained a preliminary injunction against David Gargano and D & M Enterprises which prohibits further violations of Massachusetts law by this solicitor and requires the defendants to account for all charitable monies which they raised within sixty days of the date of the injunction. The Attorney General filed suit against Gargano, and his solicitation company, D & M Enterprises, in June 1990 as a result of solicitations in the state on behalf of three national charitable organizations, the American Federation of Police, the Vietnam Veterans of America, and United Citizens Against Drugs.

The suit was brought because of widespread misrepresentations by the defendants during the solicitations, including claims by the solicitors that they were actually police officers, veterans or local town officials. The solicitors also falsely represented that the campaigns had the support of local police or other groups or officials when such was not the case, and led donors to believe that the charities were local in nature rather than national in scope. As well as filing the complaint against Gargano and D & M, the Attorney General obtained letters of assurance from the three charities involved, and assurances of compliance were signed by the two national solicitors for the charities, United Publishing Service and LAO Enterprises, who hired Gargano to conduct the solicitation campaigns in Massachusetts.

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

Early in the fiscal year, the Division obtained a contempt judgment by consent against Heaven's Children, Inc., a Canton-based charitable organization, and its president, Kenneth Singer, for their failure to comply with an earlier court order prohibiting further solicitation in Massachusetts until they accounted for funds already raised from the public.

The contempt judgment directs Singer to take legal steps to dissolve Heaven's Children and National Awards for the Handicapped, Inc., another organization started by Singer. Singer is also prohibited from direction or control of any Massachusetts charitable organization or any involvement with the solicitation of charitable funds for three years. The judgment further orders Singer to pay a civil penalty of \$25,000 or be subjected to an additional three year ban.

Toward the end of the fiscal year, the Attorney General filed another complaint for contempt against Singer, seeking to halt the solicitation of funds for an upcoming awards event in violation of the earlier court orders. The Court issued a preliminary injunction, requested by the Attorney General, prohibiting the defendants from promoting or soliciting for such events and requiring them to account for any funds which had been raised.

e.) *Attorney General v. Jeffrey A. Young and Matthew Pinkham*

The Division obtained a final judgment against Jeffrey Young and a judgment by consent against Matthew Pinkham in the contempt actions which the Attorney General brought against these solicitors for their violations of judgments previously entered against each of them. Under the new judgments, Young is banned from engaging in any solicitation in Massachusetts for a period of four and a half years while the ban on solicitation by Pinkham is for four years. Pinkham and Young were also fined \$17,500 and \$17,000 respectively, for their violations of Massachusetts law.

The two defendants were originally partners in a charitable-sounding organization, Citizens Against Drunk Driving (CADD), and misled donors into believing that CADD was affiliated with either Mothers Against Drunk Driving (MADD) Or Students Against Driving Drunk (SADD) when such was not the case.

f.) *Attorney General vs. Capricorn Publishing Co. et. als.*

This solicitation case involved fundraising by Capricorn, a professional solicitor, on behalf of the American Postal Workers Union. Employees of Capricorn pretended to be postal workers raising money for terminally ill children. A settlement was reached with co-defendant William Chandler, who agreed to an extensive consent judgment and a fine of \$2500.00. Later, the court approved a consent judgment enjoining Capricorn Publishing Co. Inc., and its sole director and president, William Morgan, from engaging in deceptive fundraising activities. The fundraiser was also ordered to pay the Commonwealth \$15,000.00

g.) *Attorney General v. Stephen Brochu and Brochu & Prodoehl Company*

The Division obtained a judgment by consent against this New Hampshire-based fund-raiser and his company for their violations of the Massachusetts Charitable Solicitation Act. Under this judgment, the defendants agreed to comply with all applicable provisions of Massachusetts law in any future solicitations in the state, to account to the Division for all charitable funds previously raised, to offer refunds to all persons who made contributions as a result of the solicitations, and to pay \$2000 in penalties.

The solicitors, who were selling advertisements in "All Hugs, No Drugs" workbooks of a Washington D.C. based organization, did not disclose their status as professional funds-raisers to all persons whom they contacted and in some cases falsely told donors that they were volunteers for the NAF. In addition, some donors were told that the NAF workbooks would be distributed to children in local schools although no arrangements had been made with any local school systems to distribute these workbooks.

CIVIL RIGHTS

Enforcement of the Massachusetts Civil Rights Act

The Civil Rights Division enforces the Massachusetts Civil Rights Act which authorizes the Attorney General to seek injunctive relief when the exercise of legal rights is interfered with by threats, intimidation, or coercion. In fiscal year 1991, a total of 17 new injunctions against 30 defendants were obtained by the division involving racial, ethnic or anti-gay violence.

A total of 8 injunctions with 12 defendants involved incidents in Boston. Three of the cases arose in the South End, two of the cases arose in Dorchester, one in South Boston, one in Hyde Park and one in Charlestown. The Division also obtained injunctions against defendants in Revere, Northbridge, Pembroke, Salem, Lynn, Haverhill, Milford and in Provincetown.

Any violation of these court orders would constitute a criminal offense punishable by a maximum fine of \$5,000 or a two and one half year sentence in a house of correction. If bodily injury results, the defendants would be subject to a 10 year prison sentence and a maximum fine of \$10,000.

Reproductive Rights

The Attorney General intervened in *Planned Parenthood League of Massachusetts v. Operation Rescue*, Middlesex Superior Court, an action seeking injunctive relief against numerous organizations and individuals who blockade entrances to abortion clinics or who physically invade abortion clinics in order to prevent women from exercising their constitutional right to obtain abortion services.

The underlying civil action, seeking permanent injunctive relief, proceeded to trial in March, 1991 following months of intensive pretrial litigation (including the addition of seventeen new defendants, and multiple interlocutory appeals over patient confidentiality issues and discovery matters). The Attorney General proceeded to trial against forty individual defendants and two organizations. During the three week trial, the Commonwealth presented testimony from twenty two witnesses and introduced over one hundred and thirty exhibits concerning nine separate incidents at locations throughout the Commonwealth.

In October, 1991, the Middlesex Superior Court issued a statewide permanent injunction prohibiting such activity. In the 150 page opinion, the Court stated "Should any of the defendants, or anyone acting in concert with them who has notice of the Court's final order, be found to have violated the terms of the Court's permanent injunction at any time in the future, they will face the full consequences of sanctions authorized by the Massachusetts Civil Rights Act, including the likelihood of a term of incarceration in state prison".

Violation of the permanent injunction is a criminal offense punishable by a maximum sentence of two and one half years in a house of correction and a fine of \$5,000. During 1991, the Attorney General's Criminal Bureau indicted three individuals for violation of the injunction.

The Civil Rights Division provided training to police and coordinated enforcement of the injunction by local police departments and district attorney's offices.

Housing Discrimination

Pursuant to its statutory mandate under the 1989 amendments to G.L. c.151B §5, the Attorney General filed a number of lawsuits in Superior Court on behalf of housing discrimination complainants including cases involving allegations of marital status discrimination, race discrimination and discrimination because of receipt of a housing subsidy.

The Civil Rights Division also has legally intervened to insure, over the opposition of certain members of the community, that a proposed low income-elderly housing project is built at the Lombard Farm in West Barnstable, which is held in a charitable trust.

Sex Discrimination

In response to complaints that numerous Massachusetts hair salons were charging more for women's haircuts than for men's, the Attorney General secured the assistance of the Board of Registration in Cosmetology in notifying all Massachusetts licensees that gender-based pricing is illegal

under Massachusetts law.

The division also prepared and filed before a local liquor commission a legal memorandum supporting the denial of a license for alleged discriminatory conduct by a golf club. This legal position has resulted in obtaining major changes in the policies of a number of golf clubs regarding women's access to facilities and voting rights.

The Civil Rights Division also settled sexual orientation credit discrimination claims against a national consumer credit company, General Electric Capital Auto Lease, Inc. (GECAL). GECAL had allegedly refused to enter into an automobile lease agreement with a lesbian couple, on account of their sexual orientation and marital status.

Under the terms of an "Assurance of Discontinuance" entered into between the Attorney General and GECAL, GECAL agreed to the following: It will not refuse to grant loans to non-spousal cosigners on account of marital status or sexual orientation, that it will place affirmative disclosures on all credit applications in use in Massachusetts stating that Massachusetts law prohibits credit discrimination on the basis of marital status or sexual orientation, it will inform its employees and agents who are involved in reviewing credit applications from Massachusetts that Massachusetts law prohibits credit discrimination on the bases of marital status or sexual orientation, and that loan applications from non-spousal cosigners may not be denied on those basis.

Credit Discrimination Claims

The division intervened in a case in the Massachusetts Commission Against Discrimination in which two black women alleged a supermarket maintained a racially discriminatory policy in the acceptance of checks. A settlement was obtained to issue a consistent, non-discriminatory policy of check cashing and check acceptance.

Disability Issues

The Division has engaged in a comprehensive and ongoing effort to ensure that the new federal and state statutes which prohibit discrimination against people with disabilities are enforced. The Office of the Attorney General convinced the City of Boston to amend their zoning regulations to remove the special permit requirement for group homes. The division also resolved a dispute with the City of Medford regarding physical accessibility to Medford polling areas. It also negotiated an agreement with the Department of Corrections and the Department of Mental Health to insure adequate access by attorneys to patients at Bridgewater State Hospital.

On May 17, 1991, the Attorney General, in a joint letter with the Director of the Massachusetts Office on Disability, sent a letter to all 351 cities and towns in Massachusetts informing them that state and federal law require that all programs and activities, including public meetings, have to be physically accessible to people with disabilities. In response to the letter, a significant number of cities and towns modified their practices and permanently moved their meetings to accessible locations or temporarily relocated until renovations could be completed to create permanently accessible locations. Some of the cities and towns which took such steps

include Southbridge, Provincetown, Malden, Bridgewater, Hamilton, Ashburnham, Natick, Brookline, Swampscott, Hopedale, Webster, Tyngsborough, Wakefield, Harwich and Nantucket.

Police and Correctional Officials

The Civil Rights Division established a new protocol to review all allegations of police misconduct brought to the attention of this office. Each allegation will be carefully reviewed by the Chief of the Civil Rights Division to determine which complaint appear to merit investigation. In fiscal year 1991, numerous complaints were filed with the Civil Rights Division regarding allegations against police or correctional officers. The Civil Rights Division will initiate timely and thorough investigations of allegations of unconstitutional or unlawful conduct on the part of police departments and officers.

Through these investigations, the Attorney General will seek to identify if any of the complained of individual officers or departments have violated the law. At the conclusion of each investigation, the Civil Rights Division will take one of five courses of action:

First, the division notifies the police chief at the conclusion of an investigation if there is no merit to the complaint or the complaint is unsubstantiated. The majority of investigations have led to this result.

Second, if a pattern of illegal conduct by a department is identified, the Attorney General will request that it modify the policies or practices that are deemed to have led to the pattern or statutory or Constitutional Violations. The Division will then work with local police departments, demonstrate the areas requiring change and offer specialized training, specific to the identified needs of the department. It is anticipated that departments will modify their practices and welcome this special training, both to enhance sensitivity to the individual rights of residents and to protect departments and municipalities from civil liability and large damage and attorneys' fee awards.

Third, in the circumstances in which the unlawful conduct is not determined to be criminal in nature, the Civil Rights Division will request that the police chief commence disciplinary proceedings against an officer whom it has determined participated in unlawful conduct, as an alternative to the filing of a civil lawsuit against the individual officer. In this circumstance, the division will supply the police chief its investigative report and its findings and conclusions to assist in the disciplinary process. The division will request that such disciplinary process commence within a month from receipt of the investigative report and be completed within three months of commencement. In general, when thorough, timely disciplinary proceedings have been initiated and completed, the Civil Rights Division will not take any further steps.

Fourth, whenever the facts require it and civil rights statutes permit, the Criminal Bureau, in cooperation with the Civil Rights Division, will criminally prosecute police officers who violate the civil rights of any individual. Two police officers and one correctional officer were indicted in 1991 for alleged civil rights violations.

Fifth, if a department should refuse to provide necessary special training or fail to modify any policies or practices found to be unlawful, or in other

special circumstances, the Attorney General's Office has notified the Police Chiefs that it will contemplate court action. Such civil action would include seeking injunctive relief to mandate training or policy changes or to prohibit certain conduct. It is the Attorney General's expectation that legal action will generally be unnecessary, and will be used only as a last resort.

The Civil Rights Division was involved in training of a significant number of police officers, police supervisors and police chiefs from throughout the state in 1991. Subjects of training include the investigation and prosecution of hate crimes as well as federal and state constitutional and civil rights laws and the civil liability of police officers.

One comprehensive resolution of a complaint resulted from a police action that occurred in Revere on July 1, 1991, in which officers from four different law enforcement agencies entered a three block segment of Revere, inhabited almost entirely by Cambodian immigrants, to serve certain arrest warrants. The police operation, although executed in good faith, aroused anger and fear within Revere's Cambodian community and prompted many complaints to the Attorney General's office. A five-point plan was adopted and implemented to help to mend quickly any damage that was caused, to solidify a relationship of trust and cooperation between the police and the Cambodian community and to guide enforcement operations in the future.

First, the Attorney General's office, in conjunction with the City of Revere and the State Office of Refugees and Immigrants, successfully sought funding from the Federal Office of Refugees Resettlement to establish a full time Outreach Liaison, assigned to the Attorney General's office, to work with the Cambodian community, City of Revere officials and the police.

Second, members of the Civil Rights Division of the Attorney General's office, the Revere city police and the State Police have worked with the community leaders to organize and then participate in community meetings to provide information to members of the Cambodian community about their civil and legal rights, the role of the police in their community, and the differences between the Cambodian and the American systems of criminal justice.

Third, in order to bridge cultural barriers and to more fully understand the cultural and historical background of the Cambodian community, the State and Revere police have invited a liaison from the Cambodian community to participate in training of their police officers as part of their in service training.

Fourth, the Civil Rights Division has acted as a facilitator for the formation of a Southeast Asian Community Advisory Committee to provide a vehicle on an ongoing basis for members of the Southeast Asian community residing in Revere, the Revere police, Revere Human Rights Commission, the Revere political leadership, and the Office of the Attorney General to communicate regularly.

Fifth, the Commissioner of Public Safety, the State Police, and the Revere Police Department have agreed that any large scale police operation of this specific nature and magnitude will be subject to prior review by appropriate prosecutorial offices, including the Attorney General's office, to ensure compliance with existing civil rights laws and standards.

These initiatives have provided assurance to the Cambodian community in Revere of the law enforcement community's sensitivity toward their needs, their understanding of the negative feelings that this operation engendered, and their intention to better communicate and work with them in the future. The Attorney General expects that the steps taken by the Civil Rights Division in this matter also will guide and serve as a model for law enforcement agencies throughout the state.

Employer Interrogation of Employees

In November, 1990, the division settled a case against Christy's Markets, Inc., National Investigation Bureau and several individuals, involving alleged coercive employee interrogation practices. Christy's agreed to specific limitations on its interrogation practices such as limiting questioning to one hour, using only company employees, and making clear that the questioning is voluntary. The National Investigation Bureau also agreed to limit its practices.

Education

The Civil Rights Division filed a brief in the United States Supreme Court in *Boston Teachers Union v. Morgan*, on behalf of the Massachusetts Board of Education in response to the Boston Teachers Union's petition for writ of certiorari seeking review of the final orders issued in the Boston School desegregation case. The Division opposed the School Committee's challenge to a recent U.S. District Court decision retaining jurisdiction and ordering continued compliance with its desegregation orders, until a unitary school system in Boston is achieved. The petition was subsequently denied.

Outreach

The Division continued to participate with a group of Somerville civic, education, social service, law enforcement and housing leaders to discuss problems of racism and racially motivated violence in the city. Topics discussed included the need to communicate the message that civil rights violations are illegal, reviving recreational programming for youth, street outreach to older adolescents, and the dearth of women and people of color in leadership positions in the city.

The division coordinated meetings between Chelsea schools, and community leaders and service providers to address problems of racial harassment and tension between Asian and Hispanic youths in the Chelsea schools.

The division developed a civil rights advisory group to provide input to the Attorney General and the Civil Rights Division about statewide civil rights issues and problems.

Legislation

The division drafted an amendment to the Massachusetts Civil Rights Act (MCRA) to provide the Attorney General the ability to obtain attorneys fees, costs and penalties from violators of the MCRA. The amendment

would create a special fund for future civil rights enforcement from money collected from the Attorney General's civil rights cases.

The Civil Rights Division participated in drafting and testified in support of Chapter 156 of the Acts of 1990, which amended Chapter 93 to include persons with disabilities and the elderly within protected classes of this state's new civil rights statute.

CIVIL INVESTIGATIONS DIVISION

The Civil Investigation Division investigates all non-criminal matters within the Office, both affirmative and defensive, for all divisions within the Public Protection and Government Bureaus (including the former Civil Bureau).

The major duties of Division investigators are: locating and interviewing victims, witnesses, subjects and others; obtaining and reviewing documentary evidence from numerous sources including individuals, corporations, and federal, state, county and municipal agencies and offices; conducting surveillance, background checks and asset checks; analyzing financial records; serving process such as summonses complaints, injunctions and other court orders; and representing the Office at Industrial Accident Board conciliations in Boston, Lawrence, Fall River, Worcester and Springfield.

The major focus in the second half of FY '91 was the consolidation of three pre-existing civil investigation units with the Public Protection Bureau Civil Bureau and Western Massachusetts Office into one Division. Through case management, training and an improved working relationship with Assistant Attorneys General throughout the Office, the Division has assumed an important role in hundreds of investigations in the following major subject areas:

Civil Rights

The Division investigated "hate crimes"; allegations of police misconduct and several other violations of the Massachusetts Civil Rights Act by interviewing the alleged victim(s) and locating and interviewing available witnesses and, when appropriate, these subjects of such investigations. In cases of alleged police misconduct, investigators also obtained and reviewed police reports, court documents and other available evidence.

Public Charities

The Division investigates individuals or organizations who raise funds from the public when allegations are received that Massachusetts laws have been violated. Investigators generally interview the victims, usually businesses, who made donations to a charity based on the misrepresentation of a solicitation and, on several occasions, have worked with local police in locating "couriers" whose actual practice is to pick up such donations. In one case, in conjunction with the Criminal Bureau, various Massachusetts police departments and the New Hampshire Attorney General, a Division investigation led to indictments and civil actions against several individuals and corporations unscrupulously soliciting funds allegedly on behalf of charitable or law enforcement organizations.

Consumer Protection

Investigators continue to perform their traditional role by assisting the Office in bringing c. 93A enforcement actions against businesses and individuals in major consumer problem areas such as automobiles, health spas, travel, retail sales, home improvement and banking/mortgage scams.

Environmental Protection

The Division's role in EPD cases primarily involved locating and identifying assets of potentially responsible parties liable for paying costs incurred by DEP in the clean up of polluted or hazardous waste sites. In several cases, investigators located former employees and officers of defunct companies responsible in part for such environmental violations.

Industrial Accidents

Investigators represented the Office at an average of 350 conciliations per month at five IAB offices throughout the state. Conciliation is the first step of the process whereby the employer (the Commonwealth) and employee attempt to resolve disputes about the worker's compensation claim of a state employee. In addition, Division staff investigated allegations of industrial accident fraud by state employees.

Torts

The Division investigated the deaths of clients in state care, injuries on state property and accidents on state roads or involving state vehicles in order to obtain accurate information relevant to tort actions filed against the Commonwealth.

III. STATISTICS

By subject area within the Public Protection Bureau the Division opened 123 investigations in FY '91, with 85 ongoing investigations as of June 30, 1991. The breakdown by Division is as follows:

	<u>Opened during FY '91</u>	<u>Ongoing as of 6/30/91</u>
Civil Rights	57	39
Consumer Protection	30	22
Environmental Protection	17	9
Public Charities	15	13
Nuclear Safety	1	1
Regulated Industries	2	1
Anti Trust	1	0
	<u>123</u>	<u>85</u>

Throughout FY '91, investigators represented the Office at approximately 4,200 conciliations in Boston, Fall River, Lawrence, Worcester and Springfield.

In addition, staff investigated various aspects of more than 100 tort claims filed against the Commonwealth.

The financial benefits derived by the Commonwealth from such investigations are the savings and benefits which are included in the sections of the annual report by the various divisions to which the Civil Investigation Division provided support.

ELECTIONS DIVISION

The Elections Division is responsible for providing legal representation to the Secretary of State, the Office of Campaign and Political Finance and the State Ballot Law Commission regarding election and campaign finance related issues.

The Division was involved in several elections related litigations during fiscal year 1991. In *Collins v. Connolly*, the Division defended the Attorney General's decision not to certify a proposed referendum question that would have repealed the state's civil rights law regarding sexual orientation. The Supreme Judicial Court held that the Attorney General was correct in not certifying the question because it impacted statutes regarding religion and was, thereby, not a proper matter for a referendum.

In *Capezzuto v. State Ballot Law Commission*, the Division defended the State Ballot Law Commission's determination that 12 signers of an initiative petition regarding recycling had properly signed the petition, satisfying the constitutional requirement of 10 valid signatories. The SJC held, however, that only 9 of the signators had actually had the final draft in their possession and therefore the petition did not meet the constitutional requirements. The Division defended the SJC's decision when the proponents of the petition sought relief in federal court. The First Circuit Court of Appeals upheld the SJC's decision in *Henry v. Connolly*.

The Elections Division, working with the Secretary of State's Office, appeared and filed an *amicus* brief in a case regarding the proper counting of absentee ballots. In *Colten v. City of Haverhill*, the SJC, agreeing with the Attorney General's office that the votes of absentee voters should be counted when they substantially comply with the regulations, decided that election officials may not reject absentee ballots for insubstantial technical defects or for omissions that can be easily rectified.

In *Armstrong v. Connolly*, the Division appeared in Hampshire County Superior Court to ensure that an independent party candidate who had collected the proper number of signatures appears on the ballot in the special general election for the First Congressional District.

The Division is currently litigating a case in Federal District Court, *Polito v. Connolly*, in defense of the state statute that prohibits campaign posters within 150 feet of polling places on election days.

The Elections Division, working with the Government Bureau, initiated suit against the Census Bureau to invalidate the decision to reduce from 11 to 10 the number of Congressional seats that Massachusetts would be entitled to as a result of the 1990 Census. In *Commonwealth v. Mosbacher*, the Attorney General's Office argues that the inclusion of overseas federal employees in the apportionment population and the use of a biased apportionment formula unconstitutionally deprived Massachusetts of its proper

number of Congresspersons.

The Division also prepared to bring suit against over 130 Candidates and treasurers of political committees that had failed to file the required campaign finance disclosure forms with the Office of Campaign and Political Finance. In March 1991, the Division sent warnings to all non-filers asking them to file. Suit will be brought against those who do not file, seeking court orders requiring them to file the reports mandated by state law.

The Elections Division is also responsible for enforcing state statutes that require legislative agents (lobbyists) and their employers to file financial disclosure statements with the Office of the Secretary of State. The Secretary reported five lobbyists and employers to the Elections Division who had failed to file as required. As a result of enforcement actions taken by the Division, all five delinquent parties filed.

PUBLIC RECORDS, FAIR INFORMATION PRACTICES ACT AND OPEN MEETING LAW

The responsibility for the enforcement of the Public Records Law, the Fair Information Practices Act, and the Open Meeting Law belong to the Elections Division.

The Division advised state agencies and the public on the requirements of the Public Records Law and the Fair Information Practices Act. The Division worked with the Supervisor of Public Records in the Secretary of State's Office to resolve disputes regarding the responsibility of public agencies to make documents available to those requesting public records.

The Elections Division was also responsible for advising state agencies and the public on the requirements of the State Open Meeting Law. The Division mediated many Open Meeting Law disputes, including ones involving the University of Massachusetts and the Massachusetts Bay Transportation Authority, without resorting to litigation.

WESTERN MASSACHUSETTS DIVISION

The Western Massachusetts Division of the Office of the Attorney General is responsible for legal matters in the four western counties of Berkshire, Franklin, Hampden and Hampshire. The Division is located in Springfield and is staffed by assistant attorneys general, investigators and support staff. During fiscal 1991, the division was responsible for approximately 500 cases.

The office 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 crime compensation. The division also prosecuted fraud cases for the Division of Employment and Training.

Upon taking office in January, 1991, Attorney General Harshbarger committed to expanding the Western Massachusetts Division and began the process by establishing a Medicaid Fraud Control Unit section in the Division and by appointing an assistant attorney general for consumer protection. Additionally resources were devoted to upgrading the antiquated computer

and word processing equipment.

The future holds out the prospect of additional resources being allocated to the Western Massachusetts Division with the intention of providing the residents of the Western Massachusetts area access to their state government.

GOVERNMENT BUREAU

The Government Bureau has four functions: (1) defense of lawsuits against state officials and agencies concerning legality of governmental operations; (2) initiation of affirmative litigation on behalf of state agencies and the Commonwealth; (3) legal review of all newly-enacted municipal by-laws; and (4) preparation of legal opinions for constitutional officers, heads of agencies, and certain other officials concerning issues arising from the performance of their official duties. During Fiscal Year 1991, significant events occurred in each of these areas.

1. *Defensive Litigation.*

The Government Bureau defends the Commonwealth and its officials and agencies in litigation in state and federal courts, 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 a variety of subject areas.

During Fiscal Year 1991 the Bureau opened 339 new defensive cases and closed 758 defensive cases. The number of closures resulted in part from the final stages of a long-term project to obtain dismissal of inactive cases, and in part from a project, undertaken in the Spring of 1991, to review open files and close those that had reached judgment.

Cases handled by Government Bureau attorneys resulted in 35 reported decisions of the Supreme Judicial Court, 17 reported decisions of the Massachusetts Appeals Court, 3 reported decisions of the United States Court of Appeals for the First Circuit, and 4 reported decisions of the United States District Court. Each of these courts issued other decisions on Government Bureau cases in the form of unpublished memorandum opinions.

State and federal appellate courts also decided six cases in which the Commonwealth was not a party, but in which Government Bureau attorneys had presented its interests by submitting *Amicus Curiae* briefs; these cases included the decisions of the United States Supreme Court in *Rust v. Sullivan*, regarding federal regulations that prohibit clinics receiving federal family planning funds from providing information about abortion, and in *Gregory v. Ashcroft*, which concerned application of the Age Discrimination in Employment Act to mandatory retirement rules for state court judges. In addition, Government Bureau lawyers provided daily consultation, assistance, and supervision to state agency lawyers who handle large numbers of relatively routine cases, primarily at the trial court level.

Significant individual cases decided in Fiscal Year 1991 include the following:

In *German v. Weld*, the SJC upheld a statute mandating furloughs of state employees in order to alleviate the Commonwealth's fiscal crisis. The Court rejected arguments that the furlough was unconstitutional, either as a taking of property without compensation or as a selective tax. The fiscal crisis also gave rise to an SJC decision in *County of Barnstable, et al. v. Commonwealth*, in which the Court declined to order the Commonwealth to pay the counties some fifteen million dollars for the rental of courthouses.

In two cases, the SJC rejected contentions by municipalities that provisions of state law infringed on local mandate restrictions: *City of Cambridge v. Attorney General* (mandated benefits in employer-funded health insurance), and *Boston Water & Sewer Commission v. Metropolitan District Commission* (sewer assessments). The SJC also decided five cases involving disciplinary orders entered by professional licensing boards to protect the public: *D'Amour v. Board of Registration in Dentistry*; *Strasnick v. Board of Registration in Pharmacy*; *Friedman v. Board of Registration in Medicine*; and *Bettencourt v. Board of Registration in Medicine*.

The SJC issued three decisions on questions of taxation: *Globe Newspaper Co. v. Commissioner of Revenue* (invalidating the extension of sales and use tax to machinery and materials used in the manufacture of newspapers); *Commissioner of Revenue v. Molesworth* (regarding the allocation of late payments as between taxes owned and interest and penalties); and *Polaroid v. Commissioner of Revenue* (construing statutory provisions governing the Urban Job Incentive Program). Two cases addressed election issues: *Weld for Governor v. Director of the Office of Campaign and Political Finance* (regarding joint purchase of campaign materials by candidates for Governor and Lieutenant Governor); and *Attorney General v. Town Clerk of Hudson* (regarding the validity of a town recall election).

Litigation in federal court led to three reported decisions of the United States Court of Appeals. In *Inmates of Suffolk County Jail v. Kearney*, the Court upheld an order prohibiting double-bunking at the new Suffolk County jail. The United States Supreme Court has granted certiorari to review this decision, and will hear argument in October of 1991. In *United States v. Metropolitan District Commission*, the Court of Appeals upheld a District Court order banning new sewer hookups pending the transfer of state-owned land to the MWRA for use as a landfill in connection with the Boston Harbor clean-up project. The District court subsequently vacated its order in response to legislative action effecting the transfer. In *Reopell v. Commonwealth*, the Court construed the Vietnam Veteran's Reemployment Rights Act as abrogating the Commonwealth's Eleventh Amendment immunity so as to authorize an award of prejudgment interest.

Noteworthy decisions of the federal District Court include *Equal Employment Opportunity Commission v. Commonwealth*, in which the Court struck down statutory provisions barring public employees over age 70 from accruing credits toward pension benefits. In *Davrod v. Coates*, the federal District Court rejected a federal constitutional challenge to a set of fishery conservation regulations, but struck down one regulation restricting sea-based processing as violative of the Commerce Clause. In *Aetna*

Casualty and Surety Co. v. Commissioner of Insurance, with challenges the Commonwealth's regulatory scheme governing withdrawals from the auto insurance market, the District Court denied a motion to dismiss, rejected abstention and ripeness arguments. In *McNamara v. Dukakis*, after a lengthy evidentiary hearing, the District Court denied a preliminary injunction against planned changes in mental health services necessitated by budget cuts.

Government Bureau litigation at the state trial court level, as well as some new cases in the federal District Court, has reflected the effects of the Commonwealth's fiscal situation. Cases have included challenges to a large variety of budget-related measures, including reductions in services, modifications to contracts with service providers, new regulations designed to reduce or control reimbursements to service providers, lay-offs of employees, changes in eligibility standards for benefit programs, and the imposition of new or increased fees and taxes. Plaintiffs bringin such challenges have included participants in various benefit and human service programs, human services providers, public employees, and businesses affected by fees. Noteworthy cases in this category include *Morales v. Department of Welfare* and *Cole v. Department of Public Welfare* (both resulting in injunctions against proposed modifications in eligibility standards for General Relief); *Massachusetts Coalition for the Homeless v. Department of Public Welfare* (enjoining proposed changes in the emergency assistance program for payment of rent and mortgage arrearages); *Massachusetts Council of Human Services Providers v. Nessen* (denying an injunction against a statutory 1% reduction in human services provider contracts), and *Massachusetts Hospital Association v. Department of Public Welfare* (denying an injunction against the Welfare department's exercise of its new statutory veto power over hospital rates for Medicaid patients).

A second significant category of litigation being handled by Government Bureau attorneys at the trial court level involves challenges to various aspects of the Central Artery/Third Harbor Tunnel Project. Five separate cases have been filed by four groups of plaintiffs, including the City of Cambridge, the Sierra Club, the Charles River Watershed Association, and the Committee for Regional Transportation.

Other noteworthy litigation at the trial court level includes *Washington Legal Foundation v. Massachusetts Bar Foundation* (challenging the Commonwealth's Interest on Lawyers' Trust Accounts program on first and fifth amendment grounds); *Rushworth v. Gnazzo* (challenging the automatic suspension of driver's licenses of persons convicted of drug offenses), and *Boston Police Superior Officers Federation v. Civil Service Commission* (involving the establishment of a civil service list for appointments of lieutenants in the Boston Police Department after a security breach invalidated the results of the original examination).

SJC decisions during the fiscal year in cases handled by Government Bureau attorneys, in addition to those discussed above addresses issues involving child support enforcement (*Department of Revenue v. LaFratta*; *Department of Revenue v. Sorrentino*); hospital reimbursement (*Children's Hospital v. Rate Setting Commission*; *Emerson Hospital v. Rate Setting Commission*); insurance regulation *Massachusetts Auto Body Association*

v. Commissioner of Insurance; Liability Investigative Fund Effort, Inc. v. Medical Malpractice Joint Underwriting Association; and *Aetna Casualty and Surety Company v. Commissioner of Insurance*); implementation of the Commonwealth's program to encourage the development of minority and woman-owned businesses (*Sturdy v. State Office of Minority and Women's Business Affairs*); public employment (*Smith v. McCarthy; Gloucester v. Civil Service Commission*); administration of public employee retirement benefits (*Plymouth County Retirement Association v. Commissioner of Public Employee Retirement*); child welfare (*Care and Protection of Frank*; regulation of subsidized housing *Arlington Housing Authority v. Secretary of Communities and Development*); eligibility for General Relief (*Faretra v. Commissioner of Public Welfare*); guardianship of the mentally ill (*Guardianship of Weedon*); and sovereign immunity (*Ware v. Commonwealth*).

Reported decisions of the Massachusetts Appeals Court in cases handled by Government Bureau attorneys included three involving child welfare (*Custody of Quincy; Adoption of Seth; Adoption of Gwendolyn*); three involving regulation of alcoholic beverages (*Heublein, Inc. v. Alcoholic Beverages Control Commission; Dolphino Corporation v. Alcoholic Beverages Control Commission*); and *A.C. Cruise Line, Inc. v. Alcoholic Beverages Control Commission*); and two involving hospital reimbursement (*Rate Setting Commission v. Baystate Medical Center; Glenbeigh, Inc. v. Rate Setting Commission*). Other Appeals Court decisions included: *Hotel Dynamics v. Architectural Access Board* (construing requirements for handicapped accessibility in the context of the renovation of a hotel); *State Street Bank v. Commissioner of Revenue* (regarding time limits for applications for tax abatements); *Zelesky v. Commissioner of the Division of Public Employee Retirement Administration* (regarding the calculation of disability retirement benefits); *Police Commissioner of Boston v. Civil Service Commission* (regarding jurisdiction of the Civil Service Commission); *Department of Revenue v. Richard Roe* and *Department of Revenue v. Fontaine* (both regarding child support enforcement); *Andonian v. Hutchinson* (upholding the suspension of driver's licenses for habitual traffic offenders); and *United Oil Paintings, Inc. v. Commonwealth* (rejecting a challenge to a statute regulating the sale of art).

2. Affirmative Litigation.

Government Bureau attorneys opened more than fifty affirmative litigation matters in Fiscal Year 1991. The largest single category of affirmative cases involved challenges to the constitutionality of state statutes arising in the context of private litigation; in such cases, Bureau attorneys have intervened or filed amicus briefs to defend the constitutionality of the statutes. A second major category of affirmative cases involved proceedings to enforce agency adjudicatory decisions or to appeal decisions by administrative law judges reversing agency decisions.

Less routine affirmative litigation matters handled by the Bureau in fiscal year 1991 include *Planned Parenthood League of Massachusetts, et al. v. Operation Rescue*, in which the Attorney General joined private plaintiffs in seeking a permanent injunction under the Massachusetts Civil Rights Act to prevent forty named defendants from blocking access to abortion

clinics. The case is now under advisement after a three week trial.

Substantial resources have been dedicated as well to bringing cities and towns into compliance with state and federal laws that prohibit zoning ordinances which discriminate against group homes for the disabled. In fiscal year 1991, Bureau attorneys persuaded the cities of Boston and Woburn to remove or to refrain from enforcing discriminatory provisions. Litigation is pending against the City of Medford, alleging that a zoning code amendment adopted in fiscal year 1991 discriminates against the disabled.

The Government Bureau is regularly called upon to represent the Commissioner of Banks in proceedings before the Supreme Judicial Court involving liquidation of insolvent state chartered banks; at least six such proceedings occurred in fiscal year 1991. In addition, in the Government Bureau initiated proceedings on behalf of the Commissioner of Insurance for receivership of the Monarch Life Insurance Company.

Another major component of the Government Bureau's affirmative litigation program is the prosecution of state claims against the federal government. Activity occurred in fiscal year 1991 in three such cases relating to the operation of the Food Stamp program. *Commonwealth of Massachusetts v. Secretary of the Department of Food and Agriculture*, pending before the United States Court of Appeals for the First Circuit, challenges the federal government's decision to sanction the Commonwealth for operating the Food Stamp Employment and Training program on a volunteers-first basis. A second case pending in the United States District Court challenges the federal government's method of determining error rates in food stamp programs. In a third case, *Waterflow v. Commonwealth of Massachusetts*, Bureau attorneys obtained a judgment declaring unlawful the federal government's policy of requiring states to include funds placed in Plan to Achieve Self Support (PASS) accounts in calculating food stamp eligibility. In fiscal year 1991, Government Bureau attorneys also brought suit against the Census Bureau, alleging that errors in the compilation of census data wrongfully deprived the Commonwealth of a seat in Congress.

3. *Municipal By-Laws.*

Town by-laws, home rule charters, and amendments thereto are reviewed and must be approved by the Office of the Attorney General before they take effect. This review function is performed by attorneys in the Government Bureau. During the fiscal year 1991, the Municipal Law Unit reviewed 1,994 by-laws and 25 home rule charter actions from over 300 cities and towns. There were 103 disapprovals or disapprovals in part, making an error rate of 5.1 percent for the submittals involved.

The by-laws received this year consisted of 923 general by-laws and 969 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 land use. Zoning by-laws tend to generate the most local controversy since they affect the landowner's rights to own, use and enjoy property.

This year saw continuing efforts by municipalities to protect natural resources and the environment by means of overlay zoning districts, hazardous materials use restrictions, and water resource protection provisions.

4. *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 and committees 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 officer requesting the opinion. 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 that are the subject of litigation or that concern ongoing 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 enacted state or federal legislation is not determined.

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

Between July 1, 1990 and June 30, 1991, five formal Opinions of the Attorney General were issued. An additional 62 requests were considered and either resolved informally or declined.

The formal Opinions follow.

August 29, 1990

Number 1

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

Dear Secretary Connolly:

In a letter dated August 2, 1990, 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, 1990 state election ballot. I have previously had occasion to conclude that one of these questions was a question of public policy, and I reaffirm that conclusion now.² As to the remaining questions, I have analyzed each which may appear, in the form provided herein, on the November ballot.

The principles relevant to my review of proposed ballot questions may be simply summarized.³ The term "public policy" as used in G.L. c. 53, § 19, should be construed broadly. See 1986/87 Op. Att'y Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at 55 (1986); 1954/55 Op. Att'y Gen., Rep. A.G., Pub. Doc. No. 12 at 51-52 (1954). Matters of public policy involve determinations of what governmental action is desirable or necessary for the public interest, as opposed to individual concerns. See 1988/89 Op. Att'y Gen. No. 1, Rep. A.G., Pub. Doc. No. 12 at 103 (1988) (slip op. 3). See also 1966/67 Op. Att'y Gen. No. 32, Rep. A.G., Pub. Doc. No. 12 at 76, 77 (1966). Generally, a

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

² In 1988, I concluded that a question which concerned the establishment of a new city out of various wards and precincts of the City of Boston was a public policy question, and I provided an appropriate form for the question to appear on the ballot. See 1988/89 Op. Att'y Gen. No. 1, Rep. A.G., Pub. Doc. No. 12 at 108 (1988). The question has been resubmitted this year for placement on the ballot in the Seventh Suffolk Representative District, and you have made a determination, which is currently under court challenge, that it is barred from the ballot both because it failed to receive a sufficient number of signatures, see G.L. c. 53, § 19, and because it is substantially the same as the 1988 ballot question, see G.L. c. 53, § 21 (prohibiting questions from appearing on a ballot more than once in three years). If a court subsequently determines that the question should be included on this year's ballot, the form of the question which I have previously provided will suffice. See 1988/89 Op. Att'y Gen. No. 1, *supra* (slip op. at 14).

³ For a more detailed canvassing of the relevant law concerning public policy questions, I refer you to my opinion reviewing the ballot questions proposed for the 1988 ballot. See 1988/89 Op. Att'y Gen. No. 1, *supra*.

question of public policy must concern an important public matter in which every citizen of the Commonwealth would have an interest and not be simply a matter of local concern. See 1988/1989 Op. Att'y Gen. No. 1, *supra* (slip op. at 3-4); 1984/85 Op. Att'y Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at 75 (1984); 1982/83 Op. Att'y Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at 84 (1982). Moreover, the instruction contained in each question must be consistent with the powers of the legislature, and the subject matter must be fit for legislative action. See 1986/87 Op. Att'y Gen. No. 2, *supra*, at 55; 1984/85 Op. Att'y Gen. No. 2, *supra*, at 75, 77; 1978/79 Op. Att'y Gen. No. 8, Rep. A.G., Pub. Doc. No. 12 at 114 (1978).

Several of the questions this year require analysis in light of the requirement that public policy questions must involve matters in which every citizen of the Commonwealth would have an interest. In conducting this analysis, I have kept in mind that this requirement should not be applied in a restrictive way. See 1988/89 Op. Att'y Gen. No. 1, *supra* (slip op. at 4); 1984/85 Op. Att'y Gen. No. 2, *supra*, at 75. It has been repeatedly recognized that questions affecting a small geographic area often address problems which are of concern to the Commonwealth in general. See *e.g.*, 1974/75 Op. Att'y Gen. No. 11, Rep. A.G., Pub. Doc. No. 12 at 54, 55 (1974); 1982/83 Op. Att'y Gen. No. 3, *supra*, at 84. Even a question which, viewed narrowly, would be difficult to characterize as of wide concern, should be approved if, viewed in a larger context, it can be articulated in terms broad enough to encompass the general public interest.⁴ See 1984/85 Op. Att'y Gen. No. 2, *supra*, at 75. See, *e.g.*, *id.* (question of where representative district boundaries should be drawn in Allston-Brighton seen to implicate general concern in "how the representative districts of the General Court are drawn"); 1978/79 Op. Att'y Gen. No. 16, Rep. A.G., Pub. Doc. No. 12 at 121 (1978) (question whether a trash incinerator should be built in the town of Amesbury seen as "an important environmental issue" of general interest); 1978/79 Op. Att'y Gen. No. 18, Rep. A.G., Pub. Doc. No. 12 at 122, 123 (1978) (question whether MBTA Red-Line should be extended to Alewife approved because "the

⁴ Indeed, I am aware of only one instance in which a proposed ballot question has been rejected on the ground that it was of purely local concern. That question, however, asked voters whether their legislator should oppose revisions to the Saugus town charter, and it was impossible to articulate any broad statewide concern since the question made no reference to the subject matter of the proposed charter changes. See 1978/79 Op. Att'y Gen. No. 8, *supra*, at 114. Moreover, the Attorney General did not rely solely on that ground in rejecting the question, since the question, as posed, also violated the requirement that ballot questions concern matters fit for legislative action. *Id.*; see *post* at n. 5.

problem of public transportation is one of great concern to the Commonwealth in general").

Four of the questions which I have approved this year deal with specific geographic areas. None, however, may be said to be of purely local concern. One question, for example, proposes a Cape Cod-wide beach parking program. The general interest of Massachusetts citizens in Cape Cod, particularly in the utilization of its coastline resources, is well established. See 1988/89 Op. Att'y Gen. No. 1, *supra*, (slip op. at 6-7). Another question proposes the establishment of a commission to study the feasibility of establishing a new city out of certain wards and precincts of the City of Boston. I have already recognized the public policy status of the formation of such a city, *id.* (slip op. at 7 n. 5), and it follows that the establishment of a commission to study the issue is likewise a matter of public policy. A third question seeks legislation prohibiting the Massachusetts Municipal Wholesale Electric Company from conveying property it owns in Ludlow to the Commonwealth for the construction of the Hampden County Jail. If nothing else, the wide public interest in the siting of corrections facilities, an interest of which I am permitted to take note, see 1968/69 Op. Att'y Gen. No. 5, Rep. A.G., Pub. Doc. No. 12 at 37, 38 (1968), would qualify this as a public policy question. Finally, a fourth question proposes legislation to adopt a charter for Essex County which would abolish the elected offices of commissioner and treasurer. This question, viewed broadly, relates to the composition of county government, a question which is of general interest. See 1976/77 Op. Att'y Gen. No. 7, Rep. A.G., Pub. Doc. No. 12 at 89, 91 (1976) (approving public policy question seeking the abolition of the county level of government).⁵

⁵ I note that in a 1978 opinion, a proposed question was rejected which would have asked, "Should the State Representative be instructed to oppose the Charter Revision changes as proposed by the town meeting and support the development of a charter commission for the town of Saugus?" 1978/79 Op. Att'y Gen. No. 8, *supra*, at 114. Because the question was posed in terms of the process of charter revision by a town charter commission, a process which does not contemplate legislative involvement, the question violated the requirement that a proposed public policy question must concern a matter appropriately subject to some type of legislative action. *Id.* Here, by contrast, the question asks that a charter for Essex County be adopted by legislation, a matter which is on its face fit for legislative action.

The remaining questions I have approved for placement on the ballot are clearly public policy questions under the relevant principles and do not require extended discussion.⁶ I turn then to the two questions which I have determined must be disapproved.

The first question I must disapprove asks:

Should the town of Chelmsford activate a traffic safety operation?

Primary function is to issue traffic tickets as a municipal revenue source.

This question is not necessarily deficient because it concerns only a single town. Viewed generally, it appears to concern traffic safety and municipal revenues, subjects which may be viewed as of state-wide concern. On its face, however, the question, by asking whether "*the town* [should] activate a traffic safety operation" (emphasis added), appears to seek action from town officials rather than action from the state legislature. See 1968/69 Op. Att'y Gen. No. 5, *supra*, at 38 (Attorney General may draw reasonable inferences from the form of the statement of the question in the petition). This view, moreover, is confirmed by information, including news accounts, provided by the proponent of the question, which indicate that the question concerns a budget proposal before the Chelmsford Town Meeting to fund a traffic safety unit of police officers. See *id.* (in reviewing public policy questions, Attorney General may rely on such facts of common knowledge, actual or presumed, in the voting district concerned as may be reasonable). The question, therefore, clearly violates the requirement that public policy questions pursuant to G.L. c. 53, § 19, instruct state legislators on matters fit for legislative action. See 1986/87 Op. Att'y Gen. No. 2, *supra*, at 55; 1984/85 Op. Att'y Gen. No. 2, *supra*, at 76-77; 1978/79 Op.

⁶ Two questions, for example, would instruct legislators to vote in favor of resolutions memorializing the Congress and the President of the United States, and another question would seek in part to require the election of legislative committee chairpersons by the full membership of the Massachusetts Senate. Although these questions do not involve the passage of laws, it is well established that matters fit for legislative action are not limited to the passage of laws and may include both the passage of resolutions, see 8 Op. Att'y Gen. 490, 491-492 (1928), 1984/85 Op. Att'y Gen. No. 2, *supra*, at 77, as well as the ordering of the internal procedures of the legislature, see *id.*; 1978/79 Op. Att'y Gen. No. 14, Rep. A.G., Pub. Doc. No. 12 at 119 (1978). These questions, therefore, clearly meet the requirement that public policy questions concern matters which are fit for legislative action. See 1986/87 Op. Att'y Gen. No. 2, *supra*, at 55; 1984/85 Op. Att'y Gen. No. 2, *supra*, at 76-77; 1978/79 Op. Att'y Gen. No. 8, *supra*, at 114.

Att'y Gen. No. 8, *supra*, at 114.⁷

The second proposed question which I must disapprove asks the voters to provide a definition of when human life begins. A similar question was submitted for my review in 1988, and in the opinion I issued at that time, I discussed at length my reasons for disapproving the question. See 1988/89 Op. Att'y Gen. No. 1, *supra*. The question proposed in 1988 would have inquired of the voter: "In *biological terms*, when does an individual human life begin?" (emphasis in original); and would have instructed the voter to answer by selecting one of three choices: "conception," "viability," or "birth," or by writing in a "different biological term." *Id.* (slip op. at 7).

The question as currently proposed is phrased in substantially similar terms as the 1988 version except that the query as to when life begins is followed by the phrase "so that the Representative from this district may be instructed to vote for legislation that protects human life, insofar as permitted by the United States Constitution."⁸ I need not determine whether the addition of this clause cures certain of the failings I identified with the previous question,⁹ because the current question retains intact from the 1988 version another flaw which clearly bars it from the ballot. As with the 1988 version, this year's question utilizes a multiple choice format which would not allow voters to choose that no instruction on the issue be given. For the reasons discussed in my 1988 opinion, a multiple choice question which fails to allow voters to reject entirely any instruction to their legislator on the subject of the question, is impermissible. see 1988/89 Op. Att'y Gen. No. 1,

⁷ Although the procedure provided by G.L. c. 53, § 19 *et seq.*, is not an appropriate means for voters to advise local officials, citizens wishing to express their views to local officials through the use of the ballot are not without the means to do so. General Laws c. 53, § 18A, provides a method for placing a "nonbinding public opinion advisory question" on the ballot for a regular municipal election in any city or town.

⁸ The full question (including emphasis as in the original) is as follows:

Which of the following *biological terms* most accurately defines when an individual human life begins, so that the Representative from this district may be instructed to vote for legislation that protects such human life, insofar as permitted by the United States Constitution?

To vote on this question, mark a cross X in the square at the right of the answer you select. Only vote for one.

- A. Conception (the moment of fertilization)
- B. Viability (approximately 24-28 weeks into pregnancy, when the fetus can survive outside the womb, with or without artificial aid)
- C. Birth
- D. Write-In: Specify a different biological term _____

⁹ Those failings included the absence from the question either of any indication to the voters of what public policy would be affected by their vote or of any instruction or direction to a legislator regarding some governmental action. See 1988/89 Op. Att'y Gen. No. 1, *supra* (slip op. at 5, 8-9).

supra (slip op. at 9-10 & n. 9), and I conclude on that basis that the question cannot be included on the ballot.¹⁰

For those questions which I have determined to be ones of public policy,¹¹ 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. In keeping with that responsibility, I provide the following form, in which, in my opinion, the questions should appear on the ballot:

Representative Districts: Barnstable, Dukes and Nantucket: Sixth Essex

Shall the Representative from this district be instructed to vote in favor of a resolution memorializing the Congress and the President of the United States to immediately reduce the military budget by ten percent, leading to at least a fifty percent reduction in the next five years, the savings to be spent on civilian needs, especially housing, education, health care, day care, environmental clean-up, infrastructure repair, and the conversion from a military to a peacetime economy?

Representative District: 26th Middlesex

Shall the Representative from this district be instructed to submit a resolution calling upon the United States Congress: 1) to enact reductions in military expenditures each year for the next five years that decrease the total military budget by at least fifty percent from the 1991 to the 1996 budget year; (2) to provide assistance to communities and employers in converting from military to peacetime production; and (3) to reallocate funds from military uses to reduction of the federal deficit and to increased revenue-sharing with state and local governments in support of revitalized programs in health, housing, law enforcement, environmental protection, education, and other pressing domestic needs?

¹⁰ I note that my rejection of the question on this ground was, based on my 1988 opinion, entirely foreseeable. I reiterate the view expressed in that opinion that the requirements for public policy questions do not prohibit a properly posed public policy question that involves a theory of when life begins. See 1988/89 Op. Att'y Gen. No. 1, *supra* (slip op. at 10 n. 9). See, e.g., 1976/77 Op. Att'y Gen. No. 7, *supra*, at 90 (approving 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).

¹¹ I note that G.L. c. 53, § § 19, 20, and 21, contain additional requirements which must be satisfied before a public policy question may appear on the ballot. These requirements involve determinations of fact, which you, as Secretary of the Commonwealth, are in a better position than I to make. See 1984/85 Op. Att'y Gen. No. 2 *supra*, at 77-78. 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 public policy questions in proper form for presentation on the ballot.

Representative District: Seventh Essex. Senatorial District: First Essex

Shall the Senator/Representative from this district be instructed to vote in favor of legislation adopting a charter for Essex County providing for the abolition of the elected offices of county commissioner and treasurer?

Representative District: Seventh Hampden

Shall the Representative from this district be instructed to vote in favor of legislation prohibiting the Massachusetts Municipal Wholesale Electric Company from conveying any of its property in Ludlow to the Commonwealth for the purpose of constructing the Hampden County Jail?

Senatorial District: First Hampden

Shall the Senator from this district be instructed to vote in favor of legislation abolishing the state welfare system?

Representative District: Sixth Suffolk

Shall the Representative from this district be instructed to vote in favor of legislation establishing a commission for the purpose of examining the feasibility of establishing a new city within the boundaries of the following wards and precincts of the City of Boston: ward 4, precincts 3 and 4; all of wards 8, 9, 12, and 14; ward 10, precincts 1, 2, 6, and 7; ward 11, precincts 1, 2, 3, 4, 5, and 6; ward 13, precincts 1, 2, 4, and 5; ward 15, precincts 1, 2, and 5; ward 17, precincts 1, 2, 3, 5, 7, 8, 10, and 12; and ward 18, precincts 1, 2, 3, 4, 5, 6, and 21?

Senatorial District: Fourth Middlesex

Shall the Senator from this district be instructed to vote in favor of requiring the election of committee chairpersons by the full membership of the Senate and allowing the State Auditor and the Inspector General to have access to the records of the Legislature?

Representative Districts: First, Second, Third, and Fourth Barnstable; Barnstable, Dukes and Nantucket

Shall the Representative from this district be instructed to vote in favor of legislation that would create a Cape Cod-wide beach sticker system whereby: (1) Cape Cod towns which elect to participate would share beach parking facilities; (2) Cape Cod-wide beach stickers would be available for optional purchase by any resident who possesses a beach sticker for his or her own town; and (3) the sticker system would be put into effect for a one

year trial period and stickers would be valid for use Monday through Friday only?

Representative District: Fifth Essex

Shall the Representative from this district be instructed to vote for legislation that would permit public policy questions to be posed to the voters in the form of multiple choice questions?

Very truly yours.

JAMES M. SHANNON
ATTORNEY GENERAL

August 29, 1990

Number 2

Daniel S. Greenbaum, Commissioner
Department of Environmental Protection
1 Winter Street
Boston, Massachusetts 02108

Dear Commissioner Greenbaum:

Section 26 of chapter 21 of the General Laws provides that “[no] person may serve as a director [of the Division of Water Pollution Control] who receives, or who has during the preceding two years received, ten percent or more of his income directly or indirectly from persons who are required to obtain discharge permits under section forty-three [of chapter 21].” That statute also provides that “the attorney general upon request may issue guidelines and such opinions as may be necessary to implement this provision.” Pursuant to this latter provision, you have asked, through your general counsel and with the authorization of the Secretary of Environmental Affairs, for my opinion whether the applicant whom you wish to appoint as Director of the Division of Water Pollution Control meets the requirements of section 26. I conclude, based on the facts set forth in the opinion request, that the applicant is not prohibited by section 26 from serving as Director.

The relevant facts, as stated in your opinion request, are as follows. Within the previous two years, the applicant has been employed by a nationwide consultant engineering firm (the engineering firm) with a regional office in Boston.¹ The engineering firm is not itself an entity which is required to obtain a water discharge permit under G.L. c. 21, § 43.² ninety percent of the applicant’s gross personal income. The applicant’s position with the engineering firm was as the “Business Development

¹ I am informed that in recent months the applicant has become employed by the Division of Water Pollution Control, although not, of course, in the position of Director.

² General Laws c. 21, § 43, provides in pertinent part that “[no] person shall discharge pollutants into waters of the commonwealth nor construct, install, modify, operate or maintain an outlet for such discharge or any treatment works, without a currently valid permit issued by the director [of the Division of Water Pollution Control]. No person shall engage in any other activity that may reasonably be expected to result, directly or indirectly, in discharge of pollutants into waters of the commonwealth, nor construct, effect, maintain, modify or use any sewer extension or connection, without a currently valid permit issued by the director, unless exempted by regulation of the director.”

The engineering firm compensated the applicant by means of a fixed salary paid from a general account, and this salary constituted more than Manager – Water Resources” in the “Government Business Development Department.” In addition to other national business development activities, the applicant, as Business Development Manager, directed all phases of business development, marketing, and contract negotiations for current or potential municipal, state and federal government clients in the New England region. These clients included a significant number of Massachusetts governmental entities, and I infer from your letter that some of these entities are required to obtain discharge permits under section 43.³ The applicant’s involvement with a client concerning a specific contract proposal and related contract negotiations, however, terminated once a contract between the client and the engineering firm was executed, and none of the applicant’s time was billed to any client.

The question whether G.L. c. 21, § 26, permits the appointment of the applicant as Director of the Division of Water Pollution Control requires a determination whether the applicant has during the preceding two years received ten percent or more of his income “directly or indirectly” from entities (I shall call them “permit holders”) that are required to obtain water discharge permits. See G.L. c. 21, § 26; and *ante*, at nn. 1, 2.⁴ Since, during the preceding two years, the applicant has received at least ninety percent of his income through his salary from the engineering firm, his appointment as Director is permitted by section 26 if that salary does not constitute the direct or indirect receipt of income from permit holders. I conclude that his

³ “Persons” required to obtain a discharge permits under section 43 include state and local governmental entities. See G.L. c. 21, § 26A (defining “Person” for purposes of G.L. c. 21, §§ 26-53).

⁴ This ten percent rule was added to section 26 in 1973, see St. 1973, c. 546, § 1, in apparent response to the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, which mandated the Administrator of the Environmental Protection Agency to require states desiring to administer their own permit programs for discharges into navigable waters to prohibit their permit granting bodies from including “any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit.” 33 U.S.C. § 1314(i)(2)(D) (1988 ed.). Federal guidelines issued under this provision define “significant portion of income” to generally mean ten percent or more of gross personal income for a calendar year, 40 C.F.R. § 123.25 (c)(1)(ii) (1989). The guidelines, however, do not delineate what constitutes the “direct or indirect” receipt of income, and I am aware of no federal administrative interpretations of this requirement which would aid in my interpretation of the related state statutory requirement.

salary does not constitute such a direct or indirect receipt of income.⁵

To begin, I note that the engineering firm is not itself a permit holder. The salary the applicant receives from the engineering firm, therefore, plainly does not constitute the direct receipt of income from a permit holder. The question then is whether the applicant's salary constitutes an indirect receipt of income from permit holders by virtue of the fact that the engineering firm derives some of its income from permit holders.⁶

What constitutes the indirect receipt of income cannot be deduced from any lexical definition of the term "indirect," taken in the abstract. The term "indirect" is exceedingly general, and as such "may have varying meanings according to the circumstances in which it is used." *Town of Oxford v. Oxford Water Co.*, 391 Mass. 581, 587 n. 4 (1984). See *Quincy City Hospital v. Rate Setting Commission*, 406 Mass. 431, 448 (1990); *International Brotherhood of Electrical Workers v. Western Massachusetts Electric Co.*, 15 Mass. App. Ct. 25, 27 (1982). I must therefore look to the statutory language as a whole and the purpose that can be discerned from it in order to find a meaning that is consistent with the intent of the Legislature. See *Quincy City Hospital v. Rate Setting Commission*, 406 Mass. at 442-443; *Commissioner of Corporations & Taxation v. Chilton Club*, 318 Mass. 285, 288-289 (1945).

The express purpose of section 26 is to prevent the appointment to Director of persons who have in the recent past received substantial income from those whom the Director regulates. It is a conflict of interest provision aimed at ensuring that the person serving as Director shall both be and have the appearance of being dispassionate in executing his or her permit granting duties. Excluding from consideration as Director as person such as the applicant, whose salary is not drawn from any fund attributable to a permit holder client and whose salary is fixed and in no part based on commissions or bonuses derived from securing a permit holder as a client, would not serve this purpose to any significant degree. Although it would,

⁵ In light of this conclusion, I need not determine whether other income (comprising less than ten percent of total income) received by the applicant from private consulting activities during the previous two years constituted the direct or indirect receipt of income from permit holders.

I note, in addition, that you have not asked for my opinion whether the applicant could, consistent with section 26, continue to engage in private consulting activities to the extent that they generated income from permit holders. Your general counsel has informed me, moreover, that the applicant is no longer engaged in and does not intend to engage in any such activities while employed at the Division. I therefore do not address this question, except to note that the ten percent rule of section 26 applies to income received while a person acts as Director as well as to income received during the two years prior to appointment. See G.L. c. 21, § 26. In addition, the state conflict of interest law, G.L. c. 268A, imposes other restrictions on a state employee's receipt of outside income.

⁶ The opinion request does not tell me what percent of the income of the engineering firm was derived from permit holders during the preceding two years. Since the engineering firm does business nationwide, that figure may well be less than ten percent, in which case the applicant would qualify to be Director even under a rule which attributed the percentage of income earned by the employer from permit holders as indirect income to its salaried employees. In any event, in light of my conclusion that the engineering firm's income is not indirectly attributable to the applicant, I do not require this information.

perhaps, not be impossible to view all of an employer's salaried employees as in some attenuated sense indirectly receiving the income received by the employer from permit holders, such a view of the prohibition would sweep too broadly and include employees who did not work with permit holder clients or who would even have reason to know that the employer's clients included permit holders. Not only would such a broad prohibition fail to serve any conflict of interest purpose, it would bar from service as Director many potentially qualified persons and would therefore impede the achievement of another legislative purpose expressed in the additional section 26 requirement that the person chosen to be Director "shall be qualified by training and experience to carry out the duties of the division [of water pollution control]." G.L. c. 21, § 26.

In reaching this conclusion, I take note of the fact that previous Attorneys General as well as the State Ethics Commission have taken a similar approach in interpreting analogous language in the state conflict of interest laws prohibiting state employees from having a "direct or indirect financial interest" in a contract made by a state agency. G.L. c. 268A, § 7. Those decisions have concluded that, where an employer pays an employee with funds which are directly derived from a state contract, the employee has an indirect financial interest in the contract even though the pay is received from the employer and not from the state. *See, e.g.,* Op. Ethics Comm'n Nos. EC-COI-79-5 and EC-COI-79-70 (1979); Conf. Op. Att'y Gen. No. 798 (1978). Where the employee is paid a fixed salary from a general fund not attributable to any specific contract, however, no indirect financial interest has been found. *See* Op. Ethics Comm'n No. EC-COI-81-12 (1981) (an insurance agency employee who sells insurance to agencies of the Commonwealth has no direct or indirect financial interest in those contracts where his salary from the insurance agency is "unrelated to any specific insurance policy which [the employee] may sell"); Op. Ethics Comm'n No. EC-COI-79-86 (1979) (employee of a construction company which contracts with various state agencies does not have a direct or indirect financial interest in those contracts where his "hourly compensation is not directly funded from the company's contracts with the Commonwealth"); Conf. Op. Att'y Gen. No. 810 (1978) (similar).

Similarly, the federal Office of Government Ethics has reached a conclusion like my own in deciding what constitutes indirect compensation for purposes of 18 U.S.C. § 203, which in part prohibits a federal employee from "directly or indirectly" receiving compensation related to representational

services before the federal government. See Op. Off. Gov't Ethics No. 83-19 (1983) (a federal employee who receives compensation from a private corporation which itself earns compensation related to representational services before the federal government, does not directly or indirectly receive compensation based on those services where his compensation from the firm is a fixed salary and not, for example, contingent on the successful securing of a federal contract as a result of the corporation's representational activities).⁷

In sum, I conclude that the applicant's salary from the engineering firm does not constitute the indirect receipt of income from holders.⁸ It is my opinion, therefore, based on the facts you have provided me, that the applicant has not in the preceding two years received more than ten percent of his income directly or indirectly from person required to obtain water discharge permits. You may, therefore, appoint the applicant as Director of the Division of Water Pollution Control consistent with the ten percent rule of G.L. c. 21, § 26.

Sincerely yours,

JAMES M. SHANNON
ATTORNEY GENERAL

⁷ While the examples I have just cited involve the interpretation of statutory provisions which are not identical to section 26, the purposes of these provisions, like that of section 26, is the avoidance of real or perceived conflicts of interest, and the delimitations of the term "indirect" in those contexts are, in my view, relevant here.

⁸ I need not decide whether there are any factual circumstances in which a salaried employee's work with permit holders might be so involved or practically speaking contingent on a permit holder's payments to the employer as to constitute the indirect receipt of income from a permit holder. Here, the applicant's work in developing business with a client ceased at the point when the contract was executed, and his securing of the client's business for the firm did not result in his receipt of any bonuses or commissions.

December 21, 1990

Number 3

Philip W. Johnston, Secretary
Executive Office of Human Services
One Ashburton Place
Boston, Massachusetts 02108

David H. Mulligan, Commissioner
Department of Public Health
150 Tremont Street
Boston, Massachusetts 02111

Dear Secretary Johnston and Commissioner Mulligan:

You have requested an opinion on behalf of the Department of Public Health concerning the meaning of G.L. c. 123, § 35. Specifically, you ask whether "the directors of facilities which provide substance abuse treatment services to individuals who are committed for treatment under Section 35 may release such individuals prior to the expiration of the commitment upon a determination that the release would not result in a likelihood of harm."¹ I conclude for the following reasons that section 35 does permit such an early release.

Section 35 authorizes a district court, upon petition by certain individuals, to commit a person for not more than thirty days upon a finding that "said person is an alcoholic or substance abuser and there is a likelihood of serious harm as a result of his alcohol or substance abuse."² The statute provides that "commitment shall be for the purpose of inpatient care in public or private facilities approved by the department of public health under the provisions of chapter one hundred and eleven B for the care and treatment of alcoholism or substance abuse."³ In the alternative, "[t]he person may be committed to the Massachusetts correctional institution at Bridgewater, if a male, or at Framingham if a female, provided that there are not suitable [DPH-approved] facilities available under chapter

¹ You inform me that the question has arisen "due in part to the recent expansion of services for civilly committed women within the community-based substance abuse system. Such expansion has been undertaken in furtherance of the administration's policy to eliminate the need for women to be civilly committed to M.C.I. Framingham."

² The term "likelihood of serious harm" is defined in G.L. c. 123, § 1, and, to summarize, generally requires a "substantial risk of physical harm" to the person or to others as manifested by evidence of various forms of violent behavior, or "a very substantial risk of physical impairment or injury" as manifested by evidence that the person's judgment "is so affected that he is unable to protect himself in the community."

³ See G.L. #c. 111B, §§ 1 *et seq.* In this opinion, I shall generally refer to these facilities as "DPH-approved facilities."

one hundred and eleven B; and provided further that the person so committed shall be housed and treated separately from convicted criminals." The statute then provides in the following terms for release prior to the end of the commitment period: "A person so committed may be released prior to the expiration of the period of commitment upon determination by the superintendent that release of said person will not result in a likelihood of serious harm."⁴

In your opinion request you seek to focus my attention on the meaning of the word "superintendent" and ask specifically whether the head of a DPH-approved facility is a "superintendent" for purposes of G.L. c. 123, § 35, who is authorized to permit early release. Your question arises because of certain language in the definitional section of chapter 123 which suggests that the head of such a facility is not a "superintendent." That language concerns the general definitions for purposes of chapter 123 of the terms "facility" and "superintendent."

Chapter 123 generally regulates the Department of Mental Health, and the definitional section of chapter 123 defines the term "facility" as a facility for "the care and treatment of mentally ill persons" rather than for the care and treatment of alcoholism or substance abuse. A "superintendent" in turn is defined as the head of a facility for the treatment of mentally ill persons.⁵ You are concerned that, if this definition of "superintendent" applies to section 35, then the heads of DPH-approved alcohol and substance abuse treatment facilities would be excluded from the category of "superintendents" authorized to release persons committed for drug and alcohol abuse

⁴ The full text of the relevant portions of section 35 is as follows:

If, after a hearing, the court based upon competent medical testimony finds that said person is an alcoholic or substance abuser and there is a likelihood of serious harm as a result of his alcoholism or substance abuse, it may order such person to be committed for a period not to exceed thirty days. Such commitment shall be for the purpose of inpatient care in public or private facilities approved by the department of public health under the provisions of chapter one hundred and eleven B for the care and treatment of alcoholism or substance abuse. The person may be committed to the Massachusetts correction institution at Bridgewater, if a male, or at Framingham, if a female, provided that there are not suitable facilities available under chapter one hundred and eleven B; and provided, further, that the person so committed shall be housed and treated separately from convicted criminals. A person so committed may be released prior to the expiration of the period of commitment upon determination by the superintendent that release of said person will not result in a likelihood of serious harm. Said person shall be encouraged to consent to further treatment and shall be allowed voluntarily to remain in the facility for such purposes

G.L. c. 123, § 35, fourth paragraph.

⁵ The pertinent definitions are as follows:

"Facility", a public or private facility for the care and treatment of mentally ill persons, except for the Bridgewater State Hospital.

"Superintendent", the superintendent or other head of a public or private facility.

G.L. c. 123, § 1.

treatment facilities would be excluded from the category of “superintendents” authorized to release persons committed for drug and alcohol abuse treatment. You propose, however, that the general definitions contained in section 1 need not apply to section 35 because the context of section 35 requires a different definition.

Accepting, for the purposes of this opinion, your assumption that the definition of “superintendent” contained in section 1 does not include the head of an alcohol and substance abuse treatment facility,⁶ I agree with your proposition that the definitions contained in section 1 need not apply. As you point out, section 1 contains a provision that its definitions apply within chapter 123 “unless the context otherwise requires.” See G.L. c. 123, § 1, first paragraph. The context of section 35 plainly requires that the “superintendent” authorized to release committed persons from DPH-approved facility for the treatment of alcoholism and substance abuse is the superintendent or other head of that facility.

This is because, whatever types of treatment facilities are included in the section 1 definition of facility, section 35, by its express terms, prescribes that the facilities to which it refers are “facilities . . . for the care and treatment of alcoholism or substance abuse.” G.L. c. 123, § 35. The head of such a facility is the only logical “superintendent” who would be in a position to make the determination required by the statute whether the release of the person committed to his or her facility would result in a likelihood of serious harm. On a more basic level, there simply is no “facility for the care and treatment of mentally ill persons” to which section 35 refers whose head could be intended by the term “superintendent.” As between the superintendent of the alcoholism and substance abuse treatment facility to which a person has been committed and the head of some unspecified facility for the treatment of mental illness nowhere referred to in section 35, it is plainly the former which must have been intended by the word “superintendent” in section 35. In sum, therefore, to the extent that the general definitions of section 1 exclude the head of a DPH-approved facility, these definitions would not apply to section 35.

⁶ It might not be impossible to view alcohol and substance abuse treatment facilities as included within the term “facility for the care and treatment of mentally ill persons.” G.L. c. 123, § 1. In light of my conclusion that the general definitions of section 1 need not apply in the context of section 35, see text immediately *post*, I will, for the purposes of this opinion, accept your assumption and refrain from addressing any question concerning the precise scope of the general definitions of “superintendent” or “facility” contained in G.L. c. 123, § 1.

This conclusion, however, does not fully resolve the question whether section 35 authorizes the head of a DPH-approved facility to release committed persons prior to the end of the commitment period. Entirely apart from the concern raised by the definition of "superintendent" in section 1, I discern in the section 35 early release provision an ambiguity which raises the question whether the early release provision applies to all persons committed pursuant to section 35 or whether it applies only to persons committed to the facilities at the Massachusetts Correctional Institutions at Bridgewater and Framingham. If the early release provision applies only to the latter, then the only official to whom the word "superintendent" could logically refer is the superintendent or other head of the Massachusetts Correctional Institutions' facilities, and, in any event, no person committed to a DPH-approved facility would be eligible for application of the early release provision.

The ambiguity to which I refer is in the phrase "[a] person so committed." G.L. c. 123, § 35.⁷ As previously noted, section 35 provides that a court, upon appropriate fundings, may order an alcoholic or substance abuser "to be committed for a period not to exceed thirty days." The statute states that "such commitment" shall be to a DPH-approved facility, but that, if no suitable facilities are available, the person may be committed to the Massachusetts Correctional Institutions at Bridgewater or Framingham "provided that . . . *the person so committed* shall be housed and treated separately from convicted criminals" (emphasis added). The next sentence is the provision concerning early release, and it states that "*A person so committed* may be released prior to the expiration of the period of commitment upon determination by the superintendent that release of said person will not result in a likelihood of serious harm" (emphasis added).

Viewed in isolation, it is unclear whether "[a] person so committed" refers, as did the phrase "the person so committed" in the previous sentence, to persons committed to the Massachusetts Correctional Institutions or whether it refers more generally to any persons committed pursuant to section 35, including those committed to DPH-approved facilities. Viewed in context, however, and in light of its legislative purpose, the phrase must be seen to refer to any persons committed pursuant to section 35.

⁷ Although your opinion request does not specifically seek my interpretation of this phrase, I must do so in order to resolve your question, and I therefore proceed to consider the issue. See Op. Att'y Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at _____ (1985) (slip op. at 8).

Looking first to context, the use in the sentence on early release of the generic term "the superintendent," together with the use of the generic term "the facility" in the subsequent sentence which speaks of encouraging "said person" to remain voluntarily in "the facility," *see ante* at n. 4, suggests that the early release provision refers to commitment to any facility for drug and alcohol abuse treatment, not just the facilities at the Massachusetts Correctional Institutions. Indeed, when elsewhere in section 35 a reference is made specifically to the Massachusetts Correctional Institutions, a more specific term, "separated facilities," is used.⁸

As to legislative purpose, it too leads to the conclusion that the early release provision be interpreted to apply to the release of any committed persons. Under the express terms of section 35, the only basis for the commitment of a alcoholic or substance abuser is that there exist "a likelihood of serious harm as a result of [the] alcoholism or substance abuse." The plain purpose of the early release provision is to avoid a person's continued involuntary commitment once the basis for the commitment has ceased to exist by authorizing someone, *i.e.* "the superintendent," to release the person, without having to return to court for a modification of the commitment order, once the likelihood of serious harm has passed. A reading of the sentence on early release to refer only to persons committed to the Massachusetts Correctional Institutions would leave no method for the speedy early release of other persons committed to DPH-approved facilities. I can conceive of no reason why a speedy, non-judicial method of release would have been made available only to some committed persons who no longer meet the criterion for commitment but not to others.

Finally, although the legislative history is not conclusive, an early draft of section 35, appearing in 1970 House Bill No. 5021, indicates that the early release provision was not conceived as a special provision for the early release only of persons committed to Massachusetts Correctional Institutions. This draft of section 35 (then numbered section 33) contained the same ambiguity as currently appears in the use of the phrase "[a] person so committed." It provided, however, for the early release of such "[a] person so committed" by either "the superintendent of a departmental facility or

⁸ The reference is contained in the fifth paragraph of G.L. c. 123, § 35, which reads as follows:

Nothing in this section shall preclude any public or private facility for the care and treatment of alcoholism or substance abuse, including the separated facilities at the Massachusetts Correctional Institutions at Bridgewater and Framingham, from treating persons on a voluntary basis.

the medical director of Bridgewater State Hospital.” 1970 House Bill No. 5021. The reference to “departmental facility” seems clearly to be to DPH-approved (and also, at that time, Department of Mental Health-approved) facilities since no other “departments” are mentioned in the draft. Early release from DPH-approved (and DMH-approved) facilities as well as from the Massachusetts Correctional Institutions was, therefore, plainly intended. The use in the enacted version of section 35 of the single generic term “superintendent” to refer to the official authorized to permit early release does not suggest an abandonment of that intent but only a belief that the general term was adequate to encompass the heads of all relevant facilities. Indeed, had the final intent been to permit only early release from commitment to the Massachusetts Correctional Institutions, the drafters would have been expected to resort to more specific rather than more general terminology.

In sum, I conclude that the term “superintendent” as used in section 35 includes the superintendent or other head of a DPH-approved facility for the care and treatment of alcoholism or substance abuse, and that section 35 permits the head of such a facility to release a person committed to the facility prior to the termination of the commitment period upon a determination that release would not result in a likelihood of serious harm.

Sincerely yours,

JAMES M. SHANNON
ATTORNEY GENERAL

February 7, 1991

Number 4

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

Dear Secretary Connolly:

You have asked my opinion whether chapter 408 of the Acts of 1990, entitled "An Act to Provide Protection for Endangered and Threatened Species," may be the subject of a referendum petition under Article 48 of the Amendments to the Massachusetts Constitution. Your opinion request arises because a referendum petition calling for the repeal of this law, signed by ten qualified voters, was filed with your office in a timely fashion. For the reasons discussed below, I have concluded that the law in question is an appropriate subject for a referendum petition.

The primary effect of chapter 408 of the Acts of 1990 is to insert into the General Laws a new chapter 131A. In general, the new law provides legal protection for species of plants and animals that it classifies according to degree of endangerment into three categories: "endangered," "threatened," and "of special concern." G.L. c. 131A, § 1, as added by St. 1990, c. 408, § 4. Following standards and procedures set forth in the law, the Director of the state Division of Fisheries and Wildlife is required to list protected species into the prescribed categories and to designate "significant habitats" which contain features important to the conservation of threatened or endangered species. G.L. c. 131A, § 4. Subject to various limitations and exceptions, the law prohibits the possessing, transporting, buying, selling or conduct of certain other activities involving protected species, and it prohibits the alteration of a "significant habitat" without a permit issued by the Director. G.L. c. 131A, § 2, 3, 5. Other provisions relate to such matters as the promulgation of regulations to implement the law, *id.* at § 4, the creation of a right of appeal of decisions of the Director to the Secretary of Environmental Affairs, *id.* at § 4, and the prescription of penalties for violation of the law, *id.* at § 6.

A law that relates to any matter excluded by Article 48 from the referen-

dum process may not be the subject of a referendum petition.¹ I have examined the various provisions of the law and have determined that they contain no excluded matter. Only two issues require a brief discussion.

First, among matters excluded from the referendum process are laws which are inconsistent with the right to receive compensation for private property appropriated to public use. Amendments, art. 48, The Initiative, pt. II, § 2. Chapter 408 provides for restrictions on the alteration of private property which, because of its importance to the conservation of threatened or endangered species, the Director of Wildlife and Fisheries designates as a "significant habitat." G.L. c. 131A, § 2, 4, 5, as added by St. 1990, c. 408, § 4. The law, however, expressly provides that owners of land containing a significant habitat may petition the Director to consider purchasing the habitat, *id.* at § 4, par. 9, and that a landowner aggrieved by the designation of a significant habitat may file an action in court to determine whether the designation constitutes a taking requiring compensation under the Constitution of the United States. *Id.* at § 5(e). The law, therefore, provides for a means of obtaining compensation for any restrictions on the use of a significant habitat that would effectively constitute a taking of property for public use. It does not, therefore, fall within the exclusion. See *Yankee Atomic Electric Co. v. Secretary of the Commonwealth*, 402 Mass. 750, 753 (1988).

Second, Article 48 excludes from the referendum process any law that relates to the "powers . . . of courts." Amendments, art. 48, The Referendum, pt. III, § 2. The questions as to the application of this exclusion to chapter 408 is raised because, as previously mentioned, the law provides for court actions to determine whether the designation of a "significant habitat" constitutes a taking requiring compensation under the Constitution of the

¹ Amendments, art. 48, The Referendum, pt. III, § 2, provides the following exclusions:

No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.

In addition, Amendments, art. 48, The Initiative, pt. II, § 2, sets forth the following additional exclusions:

No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of a[] . . . referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial;

freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

United States, G.L. c. 131A, § 5 (e), as added by St. 1990, c. 408, § 4. The law also criminalizes the unauthorized alteration of “significant habitats” and the conduct of certain activities involving protected species. *Id.* at § 6. In this regard the law prescribes penalties including fines and imprisonment, and it permits a court to order a violator who alters a significant habitat to restore the habitat to its prior condition. *Id.*

In determining whether these provisions operate to place the law within the “powers . . . of courts” exclusion, the test is whether the “main design” of the law relates to the courts and their powers. *Horton v. Attorney General*, 269 Mass. 503, 509, 511 (1929). As the Court explained in *Horton*, “[a] general law covering a subject disconnected with the courts in its main features does not come within the prohibition of . . . art. 48 . . . because, in an incidental or subsidiary way, the work of the courts may be increased or diminished or changed.” *Id.* at 511. *Accord Opinion of the Justices*, 375 Mass. 795, 814-815 (1978); *Cohen v. Attorney General*, 354 Mass. 384, 387 (1968). The main design test has been specifically applied to conclude that the criminalization of certain conduct in and of itself does not trigger the exclusion. See *Commonwealth v. Yee*, 361 Mass. 533 (1972). Similarly, the creation or abolition of rights or remedies which are enforceable in court does alone not implicate the exclusion. See *Massachusetts Teachers Association v. Secretary of the Commonwealth*, 384 Mass. 209, 226 (1981); *Horton*, 269 Mass. at 511. Otherwise, as the Court has observed, the exclusion would be so broad as to encompass “any change in any law that was enforceable in the courts, that is virtually any change in the law at all.” *Massachusetts Teachers Association*, 384 Mass. at 226.

Chapter 408 is plainly “disconnected with the courts in its main features.” *Horton*, 269 Mass. at 511. The law’s main design, in light of its title and principal provisions, see *id.* at 509, is to create a regulatory system administered by the Director of the Division of Fisheries and Wildlife aimed at protecting endangered animal and plant species. The main thrust of the law, therefore, is not directed at the powers of courts, and, although the court-related provisions may operate to increase the work of the courts in some degree, such an increase touches only incidentally on the powers of the courts. *Id.* at 511. Accordingly, chapter 408 does not fall within the powers of courts exclusion.

In sum, I conclude that chapter 408 of the Acts of 1990 does not contain matter excluded from the referendum process and is appropriately the subject of a referendum petition. I have, therefore, in accordance with your further request, provided you with a fair and concise summary of the law for

inclusion on the petitions that you must prepare for use in gathering additional signatures and for inclusion on the ballot should a sufficient number of signatures be filed with your office within the time period allowed by Article 48.

Sincerely

SCOTT HARSHBARGER

SUMMARY OF CHAPTER 408 OF THE ACTS OF 1990

The law provides legal protection for species of plants and animals that it classifies according to three categories as "endangered," "threatened," and "of special concern."

The Director of the state Division of Fisheries and Wildlife is required to list protected species into these categories following standards and procedures set forth in the law. The law provides that no person may take, possess, transport, export, process, sell or buy any protected species. Nor may a common or contract carrier knowingly transport or receive for shipment a protected species.

Certain exceptions are provided. Protected species which enter Massachusetts from out-of-state may be transported, possessed, or sold in accordance with the terms of any necessary state and federal permit. Protected plant species may be possessed, propagated, or sold provided that their source is not taken from the wild. The Director may also permit the use of protected species in certain other circumstances, including for scientific or educational purposes, for propagation in captivity, and, in the case of special concern species, for purposes of falconry. Finally, the Director may also permit the removal, capture, or destruction of protected species to protect human health.

The Director, following standards and procedures set forth in the law, is also required to designate "significant habitats" which contain features important to the conservation of threatened or endangered species. Owners of land designated as a "significant habitat" may appeal that designation to the state Secretary of Environmental Affairs and may petition the Director to consider purchasing the habitat. The law also provides that, in general, no alteration of a significant habitat may commence without a written permit issued by the Director. The Director may issue a permit only if he or she finds that the proposed action will not reduce the viability of the habitat to support the endangered or threatened species population involved.

The law contains certain exceptions and qualifications to the permit provisions just described. Special permitting rules apply to certain vegetation management activities of gas and electric utility companies and to activities for which a final environmental impact report certified by the Secretary of Environmental Affairs has been issued or has been found by the Secretary not to be required. No permit is required for work performed in the normal maintenance or improvement of land in agricultural or aquacultural use. Separate provision is also made for the construction of certain single family houses on land in existence and owned by the person wishing to construct

on January 1, 1991.

Landowners aggrieved by a decision of the Director or by the Director's failure to act under the law may appeal to the Secretary of Environmental Affairs. In addition, a landowner aggrieved by a decision of the Director may file an action in court to determine whether the Director's decision constitutes a taking requiring compensation under the Constitution of the United States.

Finally, the law requires government agencies to use their power to further the purposes of the law, and it requires the Division of Fisheries and Wildlife to adopt implementing regulations following standards and procedures set forth in the law. It also provides criminal penalties for violations of the law including fines and imprisonment. In addition or as an alternative to these penalties, a court may order a violator who alters a significant habitat to restore the habitat to its prior condition.

June 12, 1991

Number 5

Peter Nessen, Secretary
Executive Office for Administration and Finance
State House Room 373
Boston, MA 02133

David A. Haley
Personnel Administrator
One Ashburton Place, Second Floor
Boston, MA 02108

Dear Secretary Nessen and Mr. Haley:

You have asked my opinion as to the interpretation of a provision of G.L. c. 31, § 33 (1988 ed.) that governs the calculation of seniority in connection with layoffs of firefighters. This issue has arisen because fiscal emergencies are causing several Massachusetts cities and towns to lay off firefighters. The civil service laws require layoffs to be implemented according to seniority as calculated under section 33. See G.L. c. 31, § 39. Several cities and towns therefore have sought guidance on the proper interpretation of section 33 from the Personnel Administrator, who is charged with the administration and enforcement of the civil service law and rules. See G.L. c. 31, § 5(a), 77. No interpretation of section 33 can avert the layoffs of firefighters or limit their extent, but a proper interpretation is necessary in order to determine which firefighters must be laid off.

Section 33 sets out numerous rules for calculating the seniority of civil service employees. Various paragraphs of that section apply differing rules for calculating seniority to different categories of employees. These categories are primarily defined according to how the employee came to occupy his or her present civil service position. The third paragraph, for example, applies to (among others) those employees who obtained their positions through an original or promotional appointment, either within a city or town or from one city or town to another. The fourth paragraph applies to (among others) those employees who obtained their positions through a transfer from one city or town to another.

Section 33 also contains a sentence that specifically governs firefighter seniority. The Legislature inserted this provision in the fourth paragraph of section 33. You have asked whether that provision applies only to employees who transferred into their current firefighter positions as described in the fourth paragraph, or whether the provision also applies to employees who obtained their positions as described in the third paragraph or the other paragraphs of section 33. For the reasons discussed below, I conclude that the firefighter provision applies only to those firefighters who transferred into their current positions as described in the fourth paragraph of section 33.

If the firefighter provision had been set off in a separate paragraph of section 33, I would conclude that it was intended to except firefighters from any other conflicting rules set forth in section 33. This would also be true if the provision for firefighters were read in isolation from the paragraph in which

it appears. But every word or phrase of a statute must be read in context, see *Attorney General v. School Committee of Essex*, 387 Mass. 326, 337 (1982), and without overemphasizing its effect on the remainder of the statute. See *Massachusetts Commission Against Discrimination v. Liberty Mutual Insurance Co.*, 371 Mass. 186, 190-91 (1976). The applicability of a sentence of a statute may be unclear when the sentence stands alone, but more clear when the sentence is viewed in its statutory context. See, e.g., *James J. Welch & Co. v. Deputy Commissioner of Capital Planning and Operations*, 387 Mass. 662, 664 (1982). Here, the placement of the provision for firefighters in the fourth paragraph, viewed against the overall structure of section 33, indicates that the Legislature intended that provision to affect only those firefighters who otherwise fall within the terms of that paragraph.

St. 1987, c. 252, which inserted the provision for firefighters into section 33, expressly stated that “[t]he fourth paragraph of section 33” was to be amended by adding the sentence concerning firefighters. It is a basic principle of statutory construction that wherever possible, every word of a statute must be given some meaning; no word should be considered superfluous. *Risk Management Foundation of the Harvard Medical Institutions, Inc. v. Commissioner of Insurance*, 407 Mass. 498, 503 (1990); *International Organization of Masters, Mates & Pilots v. Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984). Here, the Legislature’s explicit decision to place the provision for firefighters in the fourth paragraph indicates an intention to limit the effect of that provision to that paragraph, rather than to section 33 generally.

The placement of the provision for firefighters at the end of a paragraph rather than as a separate paragraph is similar to the effect of punctuation in a statute. “[M]atters of punctuation are not necessarily determinative and should not be allowed to defeat the true purpose and meaning of a statute.” *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 432 (1983); see *Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 409 Mass. 514, 518 (1991). But where, as here, “the true purpose and meaning” of the provision at issue are unclear, “[p]unctuation . . . may be resorted to when it tends to throw light upon the meaning of the language.” *Moulton v. Brookline Rent Control Board*, 385 Mass. 228, 232 (1982) (quoting *Greenough v. Phoenix Insurance Co.*, 206 Mass. 247, 252 (1910)). Punctuation and paragraphing, taken together, may also shed some light on the meaning of a statute. See *Haynes v. Grasso*, 353 Mass. 731, 735 (1968). Because the scope of the firefighter provision is not clear, the insertion of that provision into an existing paragraph rather than as a separate

paragraph is entitled to some weight.

Moreover, in two respects, the special provision for firefighters constitutes an exception to the general approach of section 33, suggesting that the provision should be applied narrowly rather than to the entire section. First, as noted above, section 33 generally makes the choice of the applicable seniority rule turn on how the employee came to occupy his or her current position (i.e., through an original or promotional appointment, a transfer, reinstatement, etc.) rather than on what kinds of duties the position involves. The firefighter provision, however, makes the seniority rule turn on the fact that the employee is a firefighter rather than some other type of employee, and not on how the employee came to occupy his or her position.

Second, section 33 generally permits the employee, once specified conditions are met, to include periods of prior civil service employment and/or absence from the payroll in calculating length of service in the current position. The firefighter provision, in contrast, bars those firefighters to whom it applies from including any prior service in other civil service positions in calculating their length of service for the purpose of a reduction in rank or force.

In these two ways, therefore, the firefighter provision is an exception to the general approach of section 33. The Supreme Judicial Court has held that “[e]xceptions to a general law, whether statutory or constitutional, should be strictly construed.” *Commonwealth v. Germano*, 379 Mass. 268, 272 (1979) (quoting *Commonwealth v. Yee*, 361 Mass. 533, 537 (1972); citing *Baker Transport, Inc. v. State Tax Commission*, 371 Mass. 872, 877 (1977)). A strict construction of the firefighter provision requires applying it only to the paragraph in which it appears.¹

I have also considered the Legislature’s approach to an earlier amendment to section 33. When in 1982 the Legislature amended section 33 to add a provision creating a special rule for layoffs after reemployment, the Legislature chose to set this rule off in a new and separate paragraph (the sixth paragraph) at the end of section 33. See St. 1982, c. 571. This suggests

¹ It might also be suggested that the firefighter provision should apply only within the fourth paragraph because of the rule of statutory construction that the effect of a modifying clause, provision, or exception is confined to the last antecedent unless there is something in the subject matter or dominant purpose that requires a different interpretation. E.g., *Moulton*, 385 Mass. at 230-31 (1982). This is, however, in part a rule of grammatical construction. See *id.* It thus has diminished force where, as here, the exception being construed is not a clause within a sentence but instead is set off in a separate, grammatically complete sentence.

that when the Legislature creates a special rule for the calculation of seniority for layoff purposes and intends that rule to be an exception to the entire remainder of section 33, the Legislature places the special rule in a separate paragraph. The Legislature's 1987 decision to place the firefighter provision in the fourth paragraph thus suggests that the Legislature did not intend the provision to apply generally to section 33. *Cf. Commonwealth v. Galvin*, 388 Mass. 326, 328-30 (1983) (construing statutory provision in light of overall structure of statute).

This interpretation leads to a reasonable result. *See School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 79-80 (1982) (noting that imprecise statute should be given reasonable construction). One of the apparent purposes of section 33 is to reward service with a particular employer.² Under the interpretation reached here, firefighters who transfer from one city or town to another may not include prior service when determining seniority for purposes of reductions in rank or force, but those employees who become firefighters through an original or promotional appointment or a transfer within a city or town may include prior service, as a reward for continuing service to the city or town. This interpretation seems most consistent with the policies embodied in section 33.³

The Legislature could certainly have reached a different conclusion as to the appropriate rule for calculating firefighter seniority. The Legislature could have determined, for example, that the controlling factor for all firefighters should be the length of service to a particular city or town's fire

² This is reflected in the different rules stated in the third and fourth paragraphs regarding how long employees who receive different types of original or promotional appointments or transfers must serve in their new positions before being permitted to count their prior service. On the municipal level, employees who receive appointments or transfers within the same department of a city or town are treated most favorably; employees who request and obtain transfers from one city or town to another are treated least favorably.

³ I recognize that, based on the conclusion I reach here, an employee who became a firefighter through an original or promotional appointment from a position in one city or town to a firefighter position in another city or town would, in accordance with the third paragraph of section 33, be permitted to include the prior service in calculating seniority as a firefighter. This may appear to be in tension with the rule stated in paragraph four for employees who transfer from a firefighting position in one city or town to a firefighting position in another city or town. The Legislature may have concluded, however, that the original and promotion appointments just referred to were sufficiently rare so as not to warrant special attention in section 33. *See generally Commonwealth v. Henry's Drywall Co.*, 366 Mass. 539, 546 (1974) (holding that Legislature may proceed one step at a time, addressing those problems it deems most acute). It is plain that the Legislature adopted a step-by-step approach to the problem of civil service employment changes from one city or town to another. The Legislature chose to establish a special rule for firefighters who changed their employment in this fashion, rather than for all civil service employees in the public safety field or for all civil service employees of cities and towns.

department, rather than the combined length of service to all departments of a city or town. Alternatively, the Legislature could have concluded that firefighting is a unique occupation involving critical skills affecting the public safety, and therefore that total length of service as a firefighter should be the sole criterion for determining firefighters' seniority. But the context, history, and structure of section 33 indicate that the Legislature chose a third option: to make service to a particular fire department determinative only in the limited instances described by paragraph four of section 33.

For these reasons, I conclude that the special provision for firefighters in the final sentence of the fourth paragraph of section 33 applies only to those firefighters who are otherwise within the terms of that paragraph.

Sincerely,

SCOTT HARSHBARGER

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