

The Commonwealth of Massachusetts



REPORT

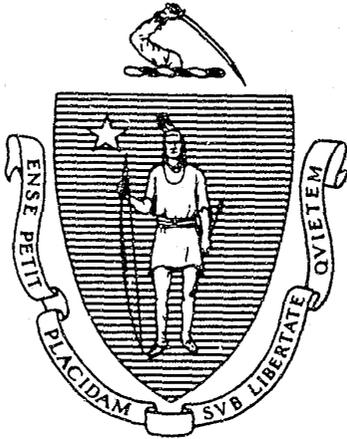
OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1993

155314



PUBLICATION OF THIS DOCUMENT APPROVED BY PHILMORE ANDERSON III, STATE PURCHASING AGENT.

17681-151-1000-2/95

Estimated Cost Per Copy \$3.72

Printed on Recycled Paper



155314

NCJRS

JUL 27 1995

ACQUISITIONS

Commonwealth of Massachusetts

In accordance with the provisions of Section 11 of Chapter 12 and of Chapter 32 of the General Laws, I hereby submit the Annual Report for the Office of the Attorney General. This Annual Report covers the period from July 1, 1992 to June 30, 1993.

Respectfully Submitted,

Scott Harshbarger  
Attorney General

155314

U.S. Department of Justice  
National Institute of Justice

*This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.*

Permission to reproduce this copyrighted material has been granted by  
Massachusetts Office of the  
Attorney General

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

## OFFICE OF THE ATTORNEY GENERAL

*Attorney General*  
SCOTT HARSHBARGER

*First Assistant Attorney General*  
Thomas H. Green

*Chief of Staff*  
Donald L. Davenport

### *Assistant Attorneys General*

Richard Allen  
Thomas Alpert  
Dorothy Anderson  
Barbara Anthony  
Frederick Augenstern  
Thomas Barnico  
Judith Beals  
Thomas Bean<sup>16</sup>  
Steven Berenson  
Edward Berlin  
Anne Berlin  
Cynthia Berliner  
Jean Berke<sup>18</sup>  
William Berman  
Patricia Bernstein  
Ann Berwick  
Mark Bluver  
Edward Bohlen  
Barbara Boden  
David Bookbinder<sup>14</sup>  
John Bowen<sup>20</sup>  
John Bowman  
Howard Brick  
Matthew Brock  
William Brownsberger<sup>7</sup>  
James Bryant  
David Burns  
Andrea Cabral<sup>20</sup>  
Cecilia Calabrese<sup>28, 65</sup>  
John Capin  
Susan Carnduff<sup>57</sup>  
Eric Carriker  
James Caruso, Jr.  
R. Michael Cassidy  
Ellen Caulo<sup>64</sup>  
John Ciardi  
Eleanor Sinnott  
Richard Cole

Mary Connaughton  
Kevin Connelly<sup>53</sup>  
Joanna Connolly<sup>15</sup>  
Scott Cooper<sup>15</sup>  
Peter Coppinger<sup>43</sup>  
Pierce Cray  
Phyllis Crockett  
Michael Cullen  
Maurice Cunningham  
William Daggett  
Leslie Davies  
Scott Davis<sup>29</sup>  
Edward DeAngelo  
George Dean  
Paula DeGiacomo<sup>51</sup>  
Emily Den<sup>8</sup>  
Stephen Dick<sup>5</sup>  
Carol Dietz  
Elizabeth DiTomassi<sup>38</sup>  
Lawrence Donnelly<sup>52</sup>  
Juliane Dow  
Mary Beth Downing<sup>56</sup>  
William Duensing<sup>27</sup>  
Edgar Dworksy  
Deborah Ecker  
Stanley Eichner  
Betty Eng<sup>62</sup>  
Judith Fabricant  
Michael Fabbri  
Jennifer Ferreira  
Freda Fishman  
Stacey Fortes<sup>69</sup>  
Bettye Freeman  
Cynthia Gagne<sup>37</sup>  
Andree Gagnon<sup>8</sup>  
Rosemary Gale  
Nancy Geary  
Dwight Golann<sup>55</sup>

I. Andrew Goldberg<sup>9</sup>  
Richard Goldstein<sup>26</sup>  
Tania Gray  
Thomas Green  
Leslie Greer  
Mary Griffin  
Irene Guild<sup>15</sup>  
Kristin Guyot<sup>30</sup>  
David Hallet<sup>14</sup>  
Daniel Halston  
Joslin Ham<sup>63</sup>  
Natalie Hardy  
Nancy Harper  
LaDonna Hatton  
Bennet Heart<sup>28</sup>  
Lisa Heinzerling<sup>66</sup>  
Virginia Hoefling  
David Hofstetter<sup>60</sup>  
Philip Holmes  
Pamela Hunt  
Elizabeth Hyman<sup>15</sup>  
David Jackson<sup>58</sup>  
Marcia Jackson  
Joyce Johnson<sup>24</sup>  
Diane Juliar  
Michelle Kaczynski  
Gerald Kelly<sup>54</sup>  
Michelle King  
Michael Kogut  
Pamela Kogut  
Viveca Tung Kwan<sup>12</sup>  
Pablo Landrau  
Jon Laramore<sup>51</sup>  
William Lee  
Judy Levenson  
Beth Levi  
Martin Levin  
Stephen Limon

Diane Lund <sup>67</sup>	William Pardee	Susan Spurlock <sup>1</sup>
Margaret Malek	Margaret Parks	Marie St. Fleur
William Matlack	Robert Patten <sup>12</sup>	Carol Starkey <sup>21</sup>
David Marcus <sup>23</sup>	Lora Pellegrini <sup>62</sup>	Kevin Steiling
Thomas McCormick	Anthony Penski	James Stetson
Ellen McGinty	Djuna Perkins <sup>31</sup>	Deborah Steenland
Karen McGuire	Mary Phillips	Edmund Sullivan
Susan McHugh	William Porter	Michael Sullivan
Paul McLaughlin	Anne Powers	Walter Sullivan
Mary McLaughlin	Edward Rapacki	Mark Sutliff
Kristine McMahan	Carol Lee Rawn <sup>20</sup>	James Sweeney
Kevin McNeely <sup>12</sup>	Elizabeth Reinhardt <sup>20</sup>	Diane Szafarowicz
William McVey	Benjamin Robbins <sup>7</sup>	Pamela Talbot
William Meade <sup>21</sup>	Deirdre Robbins <sup>68</sup>	Rosemary Tarantino <sup>19</sup>
Elizabeth Medvedov	Beverly Roby <sup>17</sup>	Neil Tassel <sup>9</sup>
Joyce Meiklejohn	Anthony Rodriguez <sup>32</sup>	Jane Tewksbury
Howard Meshnick	Joseph Rogers <sup>24</sup>	Jean Thompson <sup>22</sup>
Nicholas Messuri <sup>4</sup>	Deirdre Rosenberg <sup>10</sup>	Jeffrey Tocchio
James Milkey	Abbe Ross	Edward Toro
Jonathan Mishara	Stuart Rossman	Margaret Van Deusen
Daniel Mitchell	Linda Sable	John Van Lonkhuyzen
Margaret Monsell <sup>1</sup>	Peter Sacks	Lucy Wall
Sarah Morison	Thomas Samoluk	Beverly Ward
Christopher Morog	Ernest Sarason, Jr.	Rebecca Webb
Madelyn Morris	Pasqua Scibelli	George Weber
Susan Motika	Arlie Scott	Mark Weber <sup>46</sup>
Mark Muldoon	Robert Sherman	James Whitcomb
Timothy Mullen	Robert Sikellis	Douglas Wilkins
Robert Munnely <sup>29</sup>	Jeremy Silverfine <sup>25</sup>	Jane Willoughby <sup>33</sup>
Linda Murphy	Myles Slosberg	Norah Wylie <sup>5</sup>
Alexander Nappan	Eric Smith	Judith Yogman <sup>15</sup>
Kevin Nasca	Joanne Smith	Pamela Young
Michelle O'Brien <sup>1</sup>	Mark Smith	Andrew Zalkis
Jerrold Oppenheim	Johanna Soris	Reed Zars <sup>50</sup>
Donna Palermينو	Amy Spector	Catherine Ziehl <sup>20</sup>

*Assistant Attorneys General Assigned To The Department of Employment & Training:*

Brian Burke  
Elizabeth Ann Foley

Glen MacKinley<sup>27</sup>  
Paula Fox Niziak

Patricia Preziosa<sup>21</sup>

## APPOINTMENT DATE

1. 07/13/92
2. 07/22/92
3. 08/01/92
4. 08/02/92
5. 08/03/92
6. 08/31/92
7. 09/08/92
8. 09/09/92
9. 09/14/92
10. 09/21/92
11. 09/23/92
12. 09/28/92
13. 09/29/92
14. 10/01/92
15. 10/05/92
16. 10/08/92
17. 10/13/92
18. 10/19/92
19. 11/02/92
20. 11/09/92
21. 11/16/92
22. 11/30/92
23. 12/01/92
24. 12/07/92
25. 01/04/93
26. 01/11/93
27. 01/19/93
28. 02/01/93
29. 03/08/93
30. 03/15/93
31. 03/29/93
32. 04/01/93
33. 04/05/93
34. 04/26/93
35. 05/24/93
36. 05/25/93
37. 06/01/93
38. 06/14/93

## TERMINATION DATE

50. 07/01/92
51. 07/03/92
52. 07/04/92
53. 07/07/92
54. 07/10/92
55. 07/31/92
56. 10/04/92
57. 10/19/92
58. 10/23/92
59. 11/27/92
60. 01/15/93
61. 02/05/93
62. 02/26/93
63. 02/28/93
64. 03/13/93
65. 03/19/93
66. 03/26/93
67. 03/31/93
68. 05/07/93
69. 05/14/93
70. 06/18/93

DEPARTMENT OF THE ATTORNEY GENERAL  
STATEMENT OF FINANCIAL POSITION  
FOR FISCAL YEAR ENDED  
JUNE 30, 1993

<i>Account</i>	<i>Account Name</i>	<i>Appropriation</i>	<i>Expenditures</i>	<i>Advance</i>	<i>Encumbrances</i>	<i>Balance</i>
0810-0000	Administration	\$13,061,433.00	\$12,840,551.64	\$ 0.00	\$121,072.36	\$ 99,809.00
0810-0014	Public Utilities Auth. by Ch. 1221 1973	1,500,000.00	984,331.46	0.00	471,567.39	44,101.15
0810-0017	Judicial Proceedings, relevant to-Fuel Charge	73,000.34	0.00	0 00	73,000.00	.34
0810-0021	Medicaid Fraud Control Unit	1,380,132.00	1,321,523.65	0.00	24,486.47	34,121.88
0810-0031	Local Consumer Aid Fund	605,901.00	603,182.74	0.00	2,081.50	636.76
0810-0035	Antitrust Div. Administration	346,385.00	327,151.10	0.00	19,233.90	0.00
0810-0201	Insurance Auth. by Ch. 266, 1976	1,200,000.00	767,210.30	0.00	374,291.11	58,498.59
0810-0338	Auto Insurance Fraud by Ch. 338, 1990	100,000.00	89,624.90	0.00	10,375.10	0.00
0810-0399	Workers' Comp. Fraud by Ch. 399, 1991	195,000.00	116,902.34	0.00	78,097.66	0 00
0810-1031	Victim/Witness Assistance	129,566.00	122,015.31	0.00	0.00	7,520.69

DEPARTMENT OF THE ATTORNEY GENERAL  
STATEMENT OF FINANCIAL POSITION  
INTERDEPARTMENTAL SERVICE AGREEMENTS  
FOR FISCAL YEAR ENDED  
JUNE 30, 1993

<i>Account</i>	<i>Account Name</i>	<i>Appropriation</i>	<i>Expenditures</i>	<i>Advance</i>	<i>Encumbrances</i>	<i>Balance</i>
0810-0020	Criminal Tax Unit Alloc. of 1201-0100 by Ch. 164, Acts of 88	\$ 195,000.00	\$ 172,974.85	\$ 0.00	\$ 300.00	\$ 21,725.15
0810-0420	G.I.C. Benefit Determinations Alloc. of 1108-5200	20,000.00	14,583.30	0.00	0.00	5,416.70
0810-0700	Massport Asbestos Litigation	132,000.00	0.00	0.00	0.00	132,000.00
0810-6630	Water Pollution Control Program	66,255.42	44,616.85	0.00	0.00	21,638.57
0810-6631	Air Pollution Control Program	56,853.11	53,759.87	0.00	0.00	3,093.24
0810-6647	Hazardous Waste Enforcement Alloc. of 2200-9704	16,182.29	9,263.95	0.00	0.00	6,918.34
0810-6649	Narcotics Div. Asset Forfeiture Alloc. of 8600-0009	120,000.00	101,955.31	0.00	0.00	18,044.69
0810-6650	Civil Rights- Southeast Asian Public Safety Alloc. of 4003-0804	42,500.00	36,609.76	0.00	0.00	5,890.24
0810-6652	Elder Abuse Alloc. of 8600-0009	40,000.00	18,742.90	0.00	457.52	20,799.58

DEPARTMENT OF THE ATTORNEY GENERAL  
 STATEMENT OF FINANCIAL POSITION  
 INTERDEPARTMENTAL SERVICE AGREEMENTS  
 FOR FISCAL YEAR ENDED  
 JUNE 30, 1993

PD. 12

Continued

<i>Account</i>	<i>Account Name</i>	<i>Appropriation</i>	<i>Expenditures</i>	<i>Advance</i>	<i>Encumbrances</i>	<i>Balance</i>
0810-7872	Asbestos Property Litigation Alloc. of 1102-7872	\$ 1,375,211.70	\$ 1,115,549.01	\$ 0.00	\$ 106,646.79	\$ 153,015.90
0810-8882	Interior Modifications AGO Charities Office Alloc. of 1102-8882	<u>6,000.00</u>	<u>6,000.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
Schedule 2	Totals	\$ 2,070,002.52	\$ 1,574,005.80	\$ 0.00	\$ 107,404.31	\$ 388,542.41
Schedule 1	Totals	<u>\$18,591,417.34</u>	<u>\$17,172,523.44</u>	<u>\$ 0.00</u>	<u>\$1,174,205.49</u>	<u>\$ 244,688.41</u>
	Grand Totals	<u><u>\$20,661,419.86</u></u>	<u><u>\$18,746,579.24</u></u>	<u><u>\$ 0.00</u></u>	<u><u>\$1,281,609.80</u></u>	<u><u>\$ 633,230.82</u></u>

DEPARTMENT OF THE ATTORNEY GENERAL  
TRUSTS  
RECEIPTS AND DISBURSEMENTS  
JULY 1, 1992 to JUNE 30, 1993

	<i>Account Number</i>	<i>Balance July 1, 1992</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance 6/30/93</i>
Local Consumer Aid Fund	0810-0033	\$227,108.70	\$ 434,414.93	\$ 208,109.20	\$453,414.43
Forfeited Funds (Ch.94C, S.17)	0810-0414	113,825.26	328,984.19	303,825.93	138,983.52
Expendable Trust (Ch.12,S.4a,6a)	0810-0415	135,017.49	9,705.00	87,360.00	57,362.49
Conference and Training (Ch.12, S.4a, 6a)	0810-0416	8,869.28	47,551.50	27,943.93	28,476.85
Attorney General Trust Fund	0810-6614	80,732.18	0.00	0.00	80,732.18
Coastal Zone Management Program Implementation	0810-6661	<u>2,693.47</u>	<u>0.00</u>	<u>0.00</u>	<u>2,693.47</u>
TOTALS		<u>\$568,246.38</u>	<u>\$820,655.62</u>	<u>\$ 627,239.06</u>	<u>\$761,662.94</u>

DEPARTMENT OF THE ATTORNEY GENERAL  
 SUSPENSE FUNDS  
 RECEIPTS AND DISBURSEMENTS  
 JULY 1, 1992 to JUNE 30, 1993

P.D. 12

<i>Name</i>	<i>Account Number</i>	<i>Balance July 1 1992</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance 6/30/93</i>
Thomas C. McMahon v. Nyanza	0810-6732	\$ 3,679.42	\$ 0.00	\$ 0.00	\$ 3,679.42
Century Auto Appraisers, Inc.	0810-6862	6,800.00	0.00	0.00	6,800.00
R.B.Stone & Peter Slate					
Eric Bartlett d/b/a Bartlett	0810-6885	2,000.00	0.00	0.00	2,000.00
Assoc. & Fix, Co.					
Bruce Ledbury d/b/a	0810-6887	11,286.60	0.00	0.00	11,286.60
Cars International					
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 Educational Services, Inc.	0810-6921	99,044.61	0.00	8,160.00	90,884.61
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
Village Truck Sales, Inc.	0810-6934	68.82	0.00	0.00	68.82
Lee Auto Sales	0810-6941	3,302.00	0.00	0.00	3,302.00

DEPARTMENT OF THE ATTORNEY GENERAL  
 SUSPENSE FUNDS  
 RECEIPTS AND DISBURSEMENTS  
 JULY 1, 1992 to JUNE 30, 1993

<i>Name</i>	<i>Account Number</i>	<i>Balance July 1, 1992</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance 6/30/93</i>
William Wolf	0810-6943	\$ 517.55	0.00	\$ 0.00	\$ 517.55
Miller Furniture Outlet	0810-6944	8.54	665.46	207.76	466.24
Tijuana Goldstein Star, et al	0810-6946	2,032.21	0.00	0.00	2,032.21
Ray's Auto Body	0810-6947	23,500.00	0.00	0.00	23,500.00
Abrams et al vs Hertz Corp.	0810-6950	4,584.02	0.00	0.00	4,584.02
Missions of Mercy, Inc.	0810-6952	1,865.00	0.00	0.00	1,865.00
Outdoor World, Inc.	0810-6953	16,474.31	0.00	0.00	16,474.31
European Health Spa	0810-6954	1,532.28	0.00	209.50	1,322.78
Michael Collins	0810-6957	200.00	356.34	0.00	556.34
Joy of Movement	0810-6958	0.00	49,260.36	46,656.90	2,603.46
Stephen J. Favorito	0810-6959	2,083.94	0.00	0.00	2,083.94
Craftmatic/Contour, et al	0810-6960	158,759.55	0.00	139,452.95	19,306.60
Fidelity Trust	0810-6961	0.00	10,490.00	10,490.00	0.00
Trottier	0810-6962	0.00	40,000.00	37,373.75	2,626.25

DEPARTMENT OF THE ATTORNEY GENERAL  
 SUSPENSE FUNDS  
 RECEIPTS AND DISBURSEMENTS  
 JULY 1, 1992 to JUNE 30, 1993

P.D. 12

<i>Name</i>	<i>Account Number</i>	<i>Balance July 1, 1992</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance 6/30/93</i>
Atlantic West	0810-6963	\$ 0.00	\$ 50,000.00	\$50,000.00	\$ 0.00
Valley Furniture, et al	0810-6964	0.00	128,070.19	107,774.64	20,295.55
Home Repair, Inc., et al	0810-6965	0.00	80,000.00	0.00	80,000.00
Raymond A. Noyes	0810-6966	0.00	2,500.00	0.00	2,500.00
Getty Petroleum	0810-6967	0.00	75,000.00	0.00	75,000.00
		<u>          </u>	<u>          </u>	<u>          </u>	<u>          </u>
	TOTALS	<u>\$375,622.84</u>	<u>\$436,342.35</u>	<u>\$400,325.50</u>	<u>\$411,639.69</u>

DEPARTMENT OF THE ATTORNEY GENERAL  
 STATEMENT OF INCOME  
 For Fiscal Year Ended  
 June 30, 1993

<i>Fund</i>	<i>Revenue Source</i>		
010	0521	Fees, Filing Reports, Charitable Organizations	\$ 67,430.00
010	0631	Fees, Registrations, Charitable Organizations	557,465.00
010	2700	Fines & Penalties, Civil Actions	1,111,527.71
010	3537	Reimbursement for Services, Cost of Investigations - Civil	142,800.00
010	3538	Reimbursement for Services, Cost of Investigations	78,600.00
010	5207	Reimbursement, Indirect Cost Allowances	477,335.00
010	5200	Reimbursement, Operation Cost	1,079,744.00
010	6900	Miscellaneous	1,503,876.50
106	2700	Fines & Penalties, Anti-Trust	<u>464,553.10</u>
		<b>TOTAL INCOME</b>	<b><u><u>\$5,483,331.31</u></u></b>

*To the people of the Commonwealth of Massachusetts*

The list of cases, projects, and initiatives outlined in this annual report seems endless: cracking down on fraud statewide; protecting the elderly from financial exploitation; protecting the public's access to affordable health care; focusing on urban issues with a statewide approach; assisting our local police and District Attorneys with their efforts to respond to violent crime, domestic violence, and the violation of our drug laws; working on education reform and the protection of the environment; prosecuting political corruption and civil rights violators; regulating public charities; protecting consumers through enforcement of our antitrust laws and consumer protection laws and regulations; investigating and prosecuting elder abuse and the illegal blocking of women's health clinics; and providing professional legal representation for the Commonwealth and its agencies. Whatever the issue, we are working hard to meet the challenge.

Most important, we have depoliticized the Office of the Attorney General. Our decisions are based on the facts and the law — on the merits, not on the politics. The cornerstone of my administration rests on the premise that the Attorney General's office must be, first and foremost, an outstanding professional law office. Decisions are made, and actions are taken, based solely on the law and clearly articulated policies, without regard to party, politics or favor.

The only standard of performance in my office is professional excellence. And, while the vast power of the office is to be used aggressively and proactively, it must be used in a fair, responsible and balanced manner. To that end, I have appointed women and men of integrity, competence and commitment to positions in my office based on merit and their ability to get the job done.

I believe that it is not enough for the Attorney General to simply perform the traditional duties and responsibilities of the office competently; nor is it enough to defend and initiate lawsuits and to provide legal advice well. Rather, I believe that by using the powers of the office wisely, it is possible to begin to solve the underlying problems from which lawsuits could or did arise. Because our work is based on the principle of professional, non-political decision-making, based on the law and the facts, founded upon dedicated and competent professional and support staff, we have the credibility that permits us to test this belief. This is why:

- we prosecute drugs, gang and gun cases, *and* also devote considerable time and attention to the statewide development of programs and strategies to combat and prevent urban, family, and school violence;

- we prosecute consumer scams and financial exploitation which target older Americans, *and* also conduct training and education programs, advocate for legislative change and seek resources to help prevent victimization from occurring in the first place;

- we represent the public interest in insurance and utility rate-setting cases, *and* also find innovative ways to cut the costs — particularly of fraud and waste — and seek to achieve systemic reform to avoid increases;

we prosecute cases of Medicaid fraud, enforce public charities, consumer protection and antitrust laws, *and* also propose and implement comprehensive plans to change the way health care is delivered in the Commonwealth; and

we defend state executive agencies, *and* also consult with agency heads and general counsel and, where appropriate, seek to influence agency policy-making and actions in ways designed to prevent litigation or expedite settlements in the public interest.

These are just a few of the ways that we have been able to combine effective and aggressive performance of the traditional role of the Attorney General with an expansion of that role into areas of reform and change.

Sincerely,  
Scott Harshbarger

## **CRIMINAL BUREAU**

The Criminal Bureau is comprised of nine divisions: Appellate Division, Special Investigations, Medicaid Fraud Control Unit, Public Integrity Division, Environmental Strike Force, Urban Violence Strike Force, Division of Employment and Training, Economic Crimes Division, Narcotics and Organized Crimes Division.

### **CRIMINAL APPELLATE DIVISION**

This report represents a summary of the activity of the Appellate Division for the period of July 1, 1992 through June 30, 1993.

The Division handled 650 cases during the course of the year. These cases predominantly involved the defense of federal habeas corpus petitions attacking state criminal convictions, state habeas petitions, appeals from Criminal Bureau prosecutions and the defense of district attorneys, state correctional authorities and Treatment Center personnel, and other state officials and judges sued in the course of their official duties. This is 221 more cases than last year, an increase of 51%.

Three hundred fifty two (352) new cases were opened by the Appellate Division in FY 1993. This is a significant (58%) increase from the 222 new cases opened during the previous year. Two hundred eighty two (282) cases were disposed during the fiscal year, a 36% increase over last year.

**SUMMARY:**

	CASES OPENED	TOTAL CASES DISPOSED	CASES HANDLED
A. Federal Habeas	92	90	172
B. Federal Civil	23	15	52
C. State Habeas*	48	43	72
D. State Civil*	67	66	201
E. 211, section 3	32	29	36
F. Criminal*	86	39	113
G. Other	4	1	4
<b>TOTAL</b>	<u>352</u>	<u>283</u>	<u>650</u>

- Includes eleven rendition habeas cases handled by other bureau attorneys
- Includes one forfeiture appeal (Ditomassi)
- Includes three criminal appeals (Cassidy; W. Sullivan)

The following is a comparison of case activity for the Appellate Division for the last three years

	FY <u>1991</u>	FY <u>1992</u>	FY <u>1993</u>
TOTAL CASES OPENED	161	222	351
TOTAL CASES DISPOSED	N/A	206	282
TOTAL CASES HANDLED	N/A	428	649

**APPELLATE BRIEFS FILED**

<i>By Court</i>		<i>By Case Type</i>	
A. U.S. Supreme Court	4	A. Criminal:	19
B. Court of Appeals (First Circuit)	7	B. Federal Habeas	7
C. U.S. District Court (Bankruptcy Appeals)	2	C. Civil/State Habeas	26
D. SJC	13		
E. Appeals Court	<u>26</u>		
	<u>52</u>		<u>52</u>

**RENDITIONS** 176 warrants reviewed; 14 hearings

<i>SAAG Supervision</i>	Treatment Center	50 cases
	Parole Board	65 cases
	Other	9 cases

## I. CASES HANDLED

### A. FEDERAL HABEAS CORPUS

During the fiscal year, the Appellate Division carried a total of 172 habeas corpus cases in the various federal courts, and 90 of these cases were disposed during the year. This only involves cases in which there was an order by the federal court to answer the petition.

We were successful in all but one case. The writ was granted by the District Court in *Scarpa v. Dubois* (Duensing) on the ground that trial counsel did not provide effective representation in this drug trafficking case prosecuted in Suffolk County. We have filed a notice of appeal. Our petition for writ of certiorari in the Supreme Court in *Massachusetts v. Oses*, a habeas case decided last year, was also unsuccessful.

Judge Young selected *Ortiz v. Dubois*, a habeas case challenging the sufficiency of the evidence for felony murder of two Springfield police officers, for oral argument at Boston University Law School. (Geary). We were successful and the case is on appeal.

Seven briefs were filed in federal habeas corpus matters:

#### U.S. Supreme Court

- |                                 |                |
|---------------------------------|----------------|
| 1. <i>Amirault v. Fair</i>      | (Hunt)         |
| 2. <i>Nadworny v. Fair</i>      | (Hatton)       |
| 3. <i>Massachusetts v. Oses</i> | (Hatton; Hunt) |

#### U.S. Court of Appeals

- |                                   |            |
|-----------------------------------|------------|
| 1. <i>Kingsley v. Harshbarger</i> | (Medvedow) |
| 2. <i>Johnson v. Grigas</i>       | (Medvedow) |
| 3. <i>Siegfriedt v. Fair</i>      | (Hunt)     |
| 4. <i>Watkins v. Ponte</i>        | (Sikellis) |

### B. FEDERAL CIVIL CASES

During FY 1993 the Appellate Division handled 52 federal civil matters, 7 of which involved our motions to quash subpoenas in both civil and criminal cases. Fifteen (15) federal civil cases were disposed during the year.

Of particular note is *Cameron v. Tomes* (Medvedow), which raised important questions about a Treatment Center resident's rights to treatment. While the First Circuit upheld the granting of injunctive relief, we were successful in convincing the court to limit the constitutional basis for any right to treatment. We also defended a civil rights action against an Assistant District Attorney in *Waters v. Larkin* (Tassel), and had an evidentiary hearing concerning qualified immunity in a civil rights action against parole officers in *Crooker v. Metallo* (Meade).

### C. STATE CIVIL/HABEAS CORPUS CASES

The Appellate Division handled 61 state habeas cases, 32 of which were disposed during the year.

We also represented various state officials in 201 state civil cases, 67 of which were disposed. Approximately 29 of these cases involved matters in which the investigative files of District Attorneys, the police or the Attorney General were subpoenaed in civil cases. Two public records cases by the *Boston Globe* seeking criminal investigative material, went to trial. (Hatton). In *Commonwealth v. Devaney*, representing the District Attorney for Essex County, we successfully intervened to stay discovery in a civil rights enforcement case to protect the criminal discovery process. (Murphy). In *Dion v. Dion*, we represented all of the District Attorneys who had been subpoenaed to a probate divorce case in an attempt to show the adultery statute was not enforced. After considerable work, the subpoenas were withdrawn (Duensing; Guyot). In *Aymard v. Reilly*, we were successful in preventing a criminal defendant from bringing a civil action to force the District Attorney to enter into a plea bargain in a criminal case (Meade).

#### D. G. L. C. 211. SECTION 3 AND OTHER SJC SINGLE JUSTICE MATTERS

During FY 1993 the Appellate Division handled 36 matters in the single justice session of the SJC which involved the criminal justice system in some way. Twenty nine (29) of these cases were disposed. One case, *Jenkins v. District Court Department and BMC* (Hatton), involves a challenge to the Massachusetts court system's failure to provide those arrested without warrants with a proper judicial determination of probable cause within either 48 or 24 hours. Two cases (*Stevens; Brossard*) involve appeals from petitions seeking to vacate the issuance of domestic abuse 209A orders (Duensing). In another case (*Nettis*) we defended against an attack on the tolling provision of the statute of limitations. (Hatton).

### E. CRIMINAL CASES

*Criminal Appeals*- Briefs were filed in 20 criminal cases.

#### U.S. Supreme Court

1. Galford v. Massachusetts (Hunt)

#### Supreme Judicial Court

1. *Aime v. Commonwealth* (Meade; Hunt)
2. *Commonwealth v. Brogan* (Medvedow)
3. *Commonwealth v. Cintolo* (Sikellis)
4. *Commonwealth v. Cotter* (Medvedow)
5. *In re John Doe Grand Jury Investigation* (Hatton)
6. *Jenkins v. District Court Department & BMC* (Hatton)
7. *Commonwealth v. A. Phillips* (Tassel)
8. *In re Rape Crisis Services of Greater Lowell* and  
*In re Rape Crisis Center of Worcester* (Tassel; Hunt)

9. *In re Rhode Island Grand Jury Subpoena* (Hunt)
10. *Commonwealth v. Wigfall* (FAR Application) (Cassidy)

#### Appeals Court

1. *Commonwealth v. Collazzo. et al.* (Geary)
2. *Commonwealth v. Ferreira* (Duensing)
3. *Commonwealth v. Goggin* (Sikellis)
4. *Commonwealth v. Harkins* (Murphy)
5. *Commonwealth v. C. Phillips* (Tassel)
6. *Commonwealth v. Stockwell-Alpert* (Tassel)
7. *Commonwealth v. Tabaras* (Cassidy)
8. *Commonwealth v. Thompson* (Meade)
9. *Commonwealth v. Trimarchi* (Medvedow)

*Criminal Cases in the Trial Courts* - Division attorneys handled a number of criminal cases in the trial courts:

- |           |   |
|-----------|---|
| Geary:    | <p>4 month rotation to Lowell District Court<br/> <i>Commonwealth v. Ryan</i><br/> <i>Commonwealth v. Katter</i> (with Smith)<br/> <i>Commonwealth v. Aponte/Granano</i><br/> <i>Commonwealth v. Poole</i><br/> <i>Stokes v. Weld</i> (show cause hearing)<br/> <i>Commonwealth v. Flynn</i> (with Bernstein)</p>   |
| Medvedow: | <p><i>Commonwealth v. Turner/Travers</i> (with Sikellis)<br/> <i>Commonwealth v. Cursio</i> (expungement)<br/> <i>Commonwealth v. Barnett</i> (discovery; motion for new trial)</p>   |
| Tassel:   | <p><i>Commonwealth v. Ramos</i> (Rule 29)<br/> <i>Commonwealth v. Builles</i> (post conviction)</p>   |
| Duensing: | <p><i>Commonwealth v. Sequeira</i> (Rule 30)<br/> <i>Commonwealth v. Godfrey</i> (Rule 30)<br/> <i>Commonwealth v. Balboni</i> (expungement)<br/> <i>Commonwealth v. McQuillan</i> (expungement)<br/> <i>Commonwealth v. William</i> (expungement)<br/> <i>Commonwealth v. Stirrip</i> (expungement)<br/> <i>Commonwealth v. Juvenile</i> (Abreu) (expungement)<br/> <i>Commonwealth v. Hibbard</i> (expungement)<br/> <i>Commonwealth v. O'Donnell</i> (expungement)<br/> <i>In re Grand Jury Investigation</i> (with Levin)</p> |
| Meade:    | <p><i>Commonwealth v. Alvarez</i></p>   |
| Guyot:    | <p><i>Commonwealth v. Webster</i> (expungement)</p>   |

*Murphy:* *Commonwealth v. Harkins* (Rule 30)  
*Commonwealth v. Vipraio* (show cause hearing)  
*Hunt:* *Commonwealth v. Schand* (with Cassidy)

#### F. CIVIL AND SDP APPEALS

Briefs were filed in 26 civil (non federal habeas corpus) cases.

##### *U.S. Court of Appeals*

1. *Cameron v. Tomes* (Medvedow)
2. *Crooker v. Metallo* (Meade)
3. *Waters v. Larkin* (Tassel)

##### *U.S. District Court*

1. *In re Heritage Cabinets* (Medvedow)
2. *In re Scott* (Medvedow)

##### *Supreme Judicial Court*

1. *Connery v. Commissioner of Correction and Tolley v. Chairman Parole Board* (Hunt)
2. *Love v. LaTessa* (Sikellis)
3. *Stevens v. Justices BMC* (Duensing)

##### *Appeals Court-Civil:*

1. *Bennett v. 355 Publications* (Geary)
2. *Clegg v. Commonwealth* (Tassel)
3. *Commonwealth v. \$2,083* (Ditomassi)
4. *Commonwealth v. Penta* (W. Sullivan)
5. *Daniels v. Vose* (Guyot)
6. *Desmond v. Quincy District Court* (Geary)
7. *Matchett v. DiPaulo* (Duensing)
8. *Miller v. Fair* (Geary)
9. *Pasquarelli v. Parole Board* (Tassel)
10. *Stewart v. Gittens* (Geary)
11. *Swain v. Tink* (Hunt)

##### *SDP:*

1. *Burnham* (Medvedow)
2. *Lane* (Tassel)
3. *Lund* (Nutting Murphy)
4. *McHoul* (Medvedow)
5. *Ready* (Guyot)
6. *Redgate* (Tassel)
7. *Tate* (Hatton)

#### G. OTHER

The Appellate Division handled 4 cases in Bankruptcy Court in which criminal prosecutions by the Department of Labor and Industries for nonpayment of wages were sought to be stayed pending the outcome of bankruptcy proceedings. Two matters are currently on appeal to the U.S. District Court.

Additionally, Criminal Bureau attorneys appeared in single justice sessions of the appellate courts in 9 cases as follows: Immunity - 2 (Cassidy; Fabbri); Interlocutory Appeal- 1 (McLaughlin); Stay - 3 (Nappan; Rawn); c. 211, section 3 - 3 (Van Lonkhuysen).

## II. BRIEFS FILED

The Appellate Division filed 52 briefs during FY 1993, in the United States Supreme Court (4); First Circuit Court of Appeals (7); United States District Court (bankruptcy appeal) (2); Supreme Judicial Court (13) and Massachusetts Appeals Court (26). Of these, 20 were in criminal cases, 7 in federal habeas corpus matters and 25 in various civil actions or state habeas cases.

Our cases in the Supreme Judicial Court more than doubled from last year. We were successful in *Phillips* (Tassel) which challenged a police officer's discretion to issue either a warning or a civil infraction in motor vehicle cases. The convictions for criminal contempt in two Operation Rescue cases were upheld (*Coter; Brogan*) in the face of numerous claims of error. (Medvedow) The Attorney General successfully intervened in a case involving the enforcement of a *Rhode Island Grand Jury Subpoena* to a Massachusetts witness. (Hunt) We were unsuccessful in *Connerly* and *Tolley*, two cases in which we sought further appellate review and in which the Court declared that the way DOC and the Parole Board have calculated earned good time credits for twelve years violates the legislative intent. (Hunt) And the Court rejected our argument in *Cintolo* in a wage case prosecution brought by the Department of Labor and Industries. (Sikellis)

Joined by the District Attorneys, we filed an amicus brief in *Aime v. Commonwealth*, arguing in support of the constitutionality of the bail statute. (Hunt; Meade) Also joined by the District Attorneys, we were successful in arguing against public access to a grand jury ordered lineup and evidence *In re John Doe Grand Jury* (Hatton). As previously discussed, we defended the District Courts in *Jenkins* against a systemic attack on the Commonwealth's failure to comply with the Supreme Court's requirement of a timely determination of probable cause to make a warrantless arrest (Hatton). In a joint amicus brief with the Department of Public Health and the District Attorneys, in support of the rape crisis counselor privilege, we argued that the *Stockhammer* rule is not constitutionally required, is unworkable and harmful to victims, and should be abandoned. *In re Rape Crisis Services* and *In re Rape Crisis Center* (Hunt; Tassel). Finally, in a case argued this year, the Court upheld a challenge to the forfeiture statute. (*Commonwealth v. One Mercury Cougar*) (Sullivan).

In the Appeals Court we were successful in affirming the conviction in *Commonwealth v. Thompson*, a joint AG-Hampshire DA prosecution for improper asbestos disposal (Meade), and in a number of appeals from narcotics trafficking convictions. We also filed a brief on behalf of the Hampden

District Attorney in a civil obscenity proceeding where the bookstore sought to appeal the denial of its challenge to the constitutionality of the *in rem* civil obscenity statute despite a verdict at trial that the books were not obscene. *Bennett v. 355 Publications* (Geary). We were unsuccessful in our defense of a criminal contempt finding imposed by the Court on an attorney trying a civil case. *In re Stockwell-Alpert* (Tassel)

The Court affirmed the conviction of a man (*Commonwealth v. Dedrick*) who shot two Massachusetts State Troopers. (DeGiacomo)

### III. RENDITIONS

Attorneys from the Criminal Bureau, at the request of the Governor's Office, review the legal sufficiency of applications for Governor's warrants. From July 1, 1992 through June 30, 1993, 176 different cases were reviewed. Thirteen individuals filed petitions for writ of habeas corpus challenging rendition.

### IV. CONFERENCES, TRAINING AND OUTREACH

1. Five division attorneys attended a conference on federal habeas corpus in January, 1993 (Hunt, Hatton, Geary, Duensing, Meade).
2. We sent an attorney (Hunt) to the NAAG Supreme Court Conference.
3. Division attorneys presented programs for criminal bureau training (Hunt, Hatton), and participated in a training program for Assistant District Attorneys (Tassel), and in meetings of the Commonwealth's appellate attorneys group (all).
4. The LEN is produced and edited by LaDonna Hatton.
5. Representing the Attorney General on the Criminal History Systems Board. (Hunt)
6. Nancy Geary participated in the Urban Violence program in Lowell District Court for four months.
7. Two attorneys (Hatton; Tassel) had speaking engagements at high schools.
8. Nancy Geary was a member of the Code Enforcement Task Force.

### V. SAAG CASES SUPERVISED BY APPELLATE DIVISION

#### A. CASES HANDLED BY SAAG (DMH ATTORNEY) AT TREATMENT CENTER

Approximately fifty (50) civil and state habeas cases were handled, under the direction and supervision of the Appellate Division, by a DMH attorney assigned to the Treatment Center. During this year, DMH indicated that it would no longer be able to handle these cases, most of which were transferred to the Appellate Division and the Administrative Law Division.

The DMH attorney continues to handle the annual review hearings pursuant to G.L. c. 123A, section 9. This year there were 20 hearings conducted

(14 resulted in findings that the petitioner remained sexually dangerous, 2 resulted in release either to a concurrent prison sentence or absolute release), and 4 which have not been concluded. There are currently 119 men committed to the Treatment Center. They have a total of 170 section 9 petitions pending (many have more than one pending petition).

Appeals from all cases handled by the DMH attorney are handled by the Appellate Division.

#### **B. CASES HANDLED BY SAAG AT PAROLE BOARD**

A number of civil cases and state habeas corpus/declaratory relief matter are handled, under the direction and supervision of the Appellate Division, by Parole Board counsel. In addition to the 32 cases pending at the beginning of FY 1993, 35 new cases were referred to Parole Board counsel during the year. Twenty-six matters were disposed, and there were 48 cases pending at the end of the year.

Appeals from Parole Board cases are handled by the Appellate Division.

#### **C. OTHER SAAG CASES SUPERVISED**

##### *1. Various subpoena matters*

SAAG Kalman - Represented the Hampden District Attorney's Office in motions to quash subpoenas in 9 separate cases.

##### *2. Commutation Hearing of Lisa Grimshaw*

SAAG Dunphy-Farris represented the Commonwealth as an independent SAAG in opposing commutation at hearings before the Advisory Board of Pardons. The Board issued a split 3-3 decision in its recommendation to the Governor

##### *3. Globe Newspaper Co. v. District Attorney (Suffolk Superior Court)*

SAAG Cinquegrana to second seat AAG Hatton in public records case.

### **SPECIAL INVESTIGATIONS UNIT**

During fiscal 1993, the Special Investigations Unit reviewed a total of 18 new matters and initiated full investigations into 4 of those new matters. In addition, 3 ongoing investigations initiated prior to the start of the fiscal year (July 1, 1992) continued into fiscal 1993.

In November 1992, an individual was arrested and charged with possession and distribution of electronic devices illegally modified to allow the user to make toll and long distance telephone calls from public pay telephones without depositing any money, thereby fraudulently obtaining telephone services. State Police purchased a number of those illegal devices from the defendant during an undercover investigation. In April 1993 the defendant pleaded guilty and was sentenced to a term of probation along with a fine and costs.

In December 1992, seven defendants were arrested and charged with multiple counts of selling cocaine in a school zone along with firearms violations after a three month undercover investigation by Chelsea Police. Of the seven arrested, 3 defendants have cases pending in District Court and the remaining 4 defendants were subsequently indicted and their cases were pending at the

close of fiscal year 1993.

In February 1993, former State Senator William Q. MacLean, Jr. was indicted for violating the conflict of interest Law in connection with his financial interests in the deferred compensation program marketed to public employees in Massachusetts through Pilgrim Insurance Agency and a publicly financed elderly housing project in Fairhaven, Massachusetts. MacLean pleaded guilty to both indictments and, in a companion civil action filed by the Attorney General, forfeited \$512,000 to the Commonwealth.

In May 1993, former Massachusetts Attorney General Edward J. McCormack, Jr. and Paul A. Fanning were indicted for violating the conflict of interest laws in connection with another consulting arrangement between Pilgrim Insurance Agency and Fanning. Those cases were pending in Suffolk Superior Court at the close of fiscal 1993.

Also during the spring of 1993, an ongoing undercover narcotics investigation by State Police resulted in the arrests of two defendants on drug distribution charges. In one case, over 200 grams of cocaine was seized during a transaction with an undercover officer. In the other, over 2 pounds of marijuana was seized from the defendant's residence pursuant to a search warrant. Both of those cases were pending at the close of fiscal 1993.

Also during fiscal 1993, SIU attorneys assisted in the preparation and review of 13 search warrants. Two pending multi-defendant cases which were initiated prior to the start of fiscal 1993 continued. In one case, involving 33 defendants resulting from a series of court authorized wiretaps, various defense motions to suppress evidence derived from those wiretaps were argued, briefed and ruled on by the Court which upheld the legality of those wiretaps. In an unrelated case involving 14 defendants also resulting from a series of court authorized wiretaps, evidentiary hearings on defense motions were held during fiscal 1993. both of those cases were also pending at the close of fiscal 1993.

### **URBAN VIOLENCE STRIKE FORCE**

During fiscal year 1993, the Attorney General continued his strong emphasis on combatting urban violence and supporting community efforts to increase the safety and quality of lives in our urban communities. The urban violence initiatives under the auspices of the Criminal Bureau are described below.

### **GANG UNIT INITIATIVE**

During fiscal year 1993, the Criminal Bureau devoted substantial resources to the Gang Unit in the Suffolk County District Attorney's Office. The Gang Unit's goal is to conduct priority prosecution of youthful offenders charged with violent crimes arising out of gang related activity, with a particular emphasis on crimes involving the distribution of drugs and/or the use of firearms. The Gang Unit works with the Boston Police Department Anti-Gang Violence Unit as well as uniformed officers and detectives assigned to Jamaica Plain, Roxbury, Dorchester and Mattapan police districts. As a result of direct indictments and aggressive prosecution of these individuals, our AAGs

assigned to the Gang Unit secured the incarceration of a significant number of major violators which has made a significant contribution to the reduction of gang related violence in the City of Boston.

The statistics set forth below represent a variety of serious offenses, including armed assault with intent to murder, armed assault in a dwelling, armed robbery with a firearm and other dangerous weapon offenses, kidnapping and distribution of drugs.

#### *GANG UNIT INITIATIVE CASE STATISTICS - FY 93*

Number of Defendants	97
Number of Charges	150
Number of Defendants Convicted	73
Number of Defendants Incarcerated	64
Number of Other Dispositions	27
Number of Pending Cases	21

#### *SAFE NEIGHBORHOOD INITIATIVE*

On February 22, 1993, after several months of planning and negotiation, the Office of the Attorney General, the Suffolk County District Attorney, the Boston Police Department and the City of Boston launched the Safe Neighborhood Initiative (SNI) in the Dorchester community of Boston. The Safe Neighborhood Initiative focuses increased law enforcement and prosecutorial efforts within a designated geographical area. The area designated for this project consists of the residential and business areas of Fields Corner, Bowdoin Street, Four Corners and Geneva Avenue. This area was designated as the target area for SNI based on the high incidence of urban crime (gang-related violence and drug distribution), the management of investigative and prosecution efforts within one police district and District Court as well as the level of existing community-based programs and neighborhood crime watch groups.

The primary objective of the law enforcement component of the SNI is to focus efforts on the swift prosecution of major felons and career criminals, gang-related violence, drug distribution as well as other crimes which in recent years have plagued the community. All arrests occurring within the designated area are screened by the Unit within twenty-four hours of arraignment. The Unit is notified of any major felony arrest or investigation prior to arraignment.

Efforts are made to work closely with the Dorchester District Court Probation Department as well as the Probation Department in Superior Court to see that repeat offenders are surrendered to any outstanding sentence or to place first-time offenders on strict conditions of probation. The unit has also made attempts to focus prosecution efforts on reputed gang members regardless of the nature of the offense.

The Boston Police Department has increased police surveillance in certain trouble areas within the SNI target area resulting in an increase in arrests for trespassing, disorderly conduct and drug offenses. The unit has also been represented at approximately six neighborhood group meetings ranging from

business associations to crime-watch meetings.

In addition to the prosecutorial resources committed to the initiative, other resources of the Office of the Attorney General have been used to support the efforts of the SNI. Some of these resources include ongoing Attorney General projects regarding domestic violence, lead paint enforcement, urban environmental threats, building code enforcement and school-based programs such as SCORE.

*SAFE NEIGHBORHOOD INITIATIVE STATISTICS  
February 22, 1993 to June 30, 1993*

- 1. Total cases handled by the Unit .....37
- 2. Total cases indicted by the Unit .....9
- 3. Total cases disposed by the Unit in .....20  
Dorchester District Court
- 4. Total cases disposed by the Unit in .....2  
Superior Court
- 5. Total cases disposed by the Unit .....22

*URBAN COURT STRIKE FORCE*

During fiscal year 1993, the Criminal Bureau assumed oversight authority over the Urban Court Strike Force, the four month rotation program which affords Assistant Attorneys General an opportunity to prosecute cases in urban District Courts. The courts that served as sites for the program during this fiscal year were Lowell, Brockton, Dorchester and Lawrence District Courts. Among the cases tried by the Urban Court Strike Force AAGs were stalking, domestic violence, drug, firearm and dangerous weapon offenses and assaults.

The Criminal Bureau Assistant Attorneys General who were assigned to the urban violence initiatives during fiscal year 1993 are Paul McLaughlin, Marcia Jackson, Linda Sable and Nancy Geary.

**ENVIRONMENTAL STRIKE FORCE**

*I. The Strike Force: Organizational Growth and Change*

The Massachusetts Environmental Strike Force continued to perform as a relatively unique enforcement tool for the investigation and prosecution of the Commonwealth's environmental enforcement efforts. The Attorney General, Secretary of Environmental Affairs, Department of Environmental Protection, and Department of Fisheries, Wildlife, and Environmental Law Enforcement, continued to contribute attorney, technical, and police

resources. With police consolidation, additional police responsibilities were transferred from the Metropolitan District Commission to the State Police.

With the hiring of an additional prosecutor, the legal resources devoted to the Strike Force's efforts grew from three to four full-time criminal prosecutors—more than ever before devoted to environmental enforcement. In addition, the Strike Force expanded its investigative staff with the hiring of a civil investigator whose responsibilities include design and implementation of proactive investigative strategies and increasing access to high technology investigative methods.

## *II. Establishing A Credible Criminal Enforcement Presence*

The most significant accomplishment of fiscal year 1993 was the Strike Force's ability to establish that serious environmental offenses will be treated as crimes by the criminal justice system. Five of its cases resulted in imposition of jail sentences, including the first state prison sentence imposed in an environmental case in a decade, followed by the longest prison sentence ever imposed in an environmental prosecution by the Commonwealth. In addition, the Strike Force successfully sought imposition of bail pending trial, and brought the first forfeiture action under the state Hazardous Waste Management Act. Strike Force case activity included the following:

*Com. v. Wayne Bell:* After pleading guilty to district court complaints charging illegal disposal of hazardous and solid waste in Foxborough, this defendant was fined \$500 and given a 1 year house sentence, suspended for 2 years.

*Com. v. Salvatore Benati, Joseph Lepera, and Eric Schaeffer:* A Middlesex County Grand Jury returned 148 indictments against these defendants for illegal solid waste dumping, larceny, and other crimes committed during the course of a conspiracy which involved dumping junk tires on private properties in a half-dozen Boston area communities. After entering guilty pleas to solid waste and larceny indictments, Lepera was sentenced to 6-10 years in the state prison, the longest sentence ever imposed in a Massachusetts environmental prosecution. Charges against the remaining defendants are still pending.

*Com. v. James Bounakes and Michael Reynolds:* After trial, the two defendants were convicted of multiple indictments for illegal harvesting of shellfish in the contaminated waters of the Taunton River in Somerset. Each was sentenced to 2½-3 years in state prison, the first state prison sentences imposed in an environmental case in a decade, and the first such sentences ever imposed in a prosecution of this kind.

*Com. v. Thomas Bourget:* This Worcester area trucker pled guilty to illegal transportation and disposal of hazardous wastes. He was sentenced to two years in the house of correction, serving two months, with the remainder suspended for three years. In the first action of its kind, the defendant also forfeited three vehicles used to transport the wastes.

*Com. v. Dennison Mfg. Co.:* A Middlesex County Grand Jury returned two indictments against this corporation for illegal disposal of hazardous waste. The company's practice of burning solvent soaked rags resulted in a fire. An employee died while attempting to extinguish the fire. The company pled guilty and paid \$250,000, the largest sum collected by the state to date in a criminal environmental prosecution.

*Com. v. Edna Gilchrist and Bruce Adams:* These defendants, respectively the owner and maintenance man of a Chicopee industrial park, each pled guilty to water pollution charges in connection with the discharge of the industrial park's raw sewage to the Chicopee River. Gilchrist was fined \$5000, Adams \$2500.

*Com. v. Gordon Realty Corp. of Worcester:* A Worcester County Grand Jury returned one indictment against this corporation for illegal transfer of hazardous waste to an unlicensed hauler.

*Com. v. John Lemieux, George Winderlick, Michael Winderlick, Stephen Winderlick, Robert Chapman, and Shawn Martin:* These six South Dartmouth men were found guilty of illegally harvesting shellfish in a contaminated area of the New Bedford harbor. After pleading guilty, Chapman and Martin were each fined \$1000. After trial, Lemieux (a former shellfish warden), G. Winderlick, and S. Winderlick were each fined \$2500. M. Winderlick was placed on 6 months probation.

*Com. v. Robert Silva:* A Suffolk County Grand Jury returned 5 indictments for illegal handling of solid waste, air pollution violations, and operating an unlicensed asbestos business. The defendant allegedly improperly removed asbestos from a multi-unit residence, releasing asbestos at a nearby day care parking lot used by him as a transfer point. Case pending.

*Com. v. Peter Stratford:* In the first joint Strike Force/DA prosecution, this defendant was found guilty, after trial, of a water pollution violation in connection with the discharge of raw sewage to a stream in the Worcester/Auburn area. The Worcester County District Attorney's Office prosecuted the case. The defendant was ordered to pay \$3175 in fines and costs, and ordered to make restitution of approximately \$1400. He was also probation on 1 year probation.

*Com. v. Carl Trant. Trant Equipment & Scrap Iron, Inc., and Valley Holding, Inc.:* These two corporations and their president pled guilty to indictments charging solid waste, hazardous materials, and air pollution violations. Trant was sentenced to two consecutive two year terms in the house of correction, 18 months to serve, the balance suspended for two years. Each corporation was placed on two years probation. Probationary conditions imposed on each defendant included compliance with DEP orders to submit and implement plans to reduce the risk of fire at, and ultimately clean up, defendants' Brimfield property, on which ten million tires had been illegally dumped. Trant's sentence was stayed for six months to give him the opportunity to begin to comply with the DEP orders.

In total, the Strike Force initiated five new cases, bringing 161 indictments against seven defendants. Dispositions were obtained in nine cases, involving eighteen defendants, all of whom were found guilty (seven after trial). Sentences including jail time were imposed on five individuals, with a suspended sentence imposed on one additional defendant, and probation on two others. Fines, penalties, restitution, and forfeiture proceeds totalled \$276,044.22.

### III. *Setting New Directions*

The Attorney General continued his efforts to move environmental enforcement and protection to new levels of effectiveness, detailed in his April, 1993 report, "New Directions in Environmental Protection." These efforts included the filing of new legislation, "The Conscientious Employee Protection Act", designed to protect employees who cooperate with law enforcement in the investigation of job-related legal violations, including environmental violations. The Attorney General co-sponsored the re-filed Environmental Trust Fund and Forfeiture Act, Environmental Endangerment Act, and a bill to strengthen and harmonize existing environmental enforcement provisions.

Beyond efforts to make important substantive and structural advances in the legal framework, the Attorney General continued efforts to enlist the support of local authorities in environmental enforcement. These efforts included: the Environmental Enforcement training, which brought together hundreds of local regulatory officials, such as conservation commissioners and health officials, to learn about and discuss legal and practical issues in environmental enforcement; the Western Massachusetts Environmental Task Force, set up to encourage and assist environmental prosecutions by three western Massachusetts District Attorneys; and the Attorney General's Lead Paint Task Force, comprised of federal, state, and local officials and representatives of the private sector, which issued its Report on issues relevant to the current debate on the enforcement of, and proposed changes to, the lead paint law.

### **CRIMINAL INVESTIGATIONS DIVISION**

The Criminal Investigations Division within the Criminal Bureau provides a very diverse body of investigators to accomplish the bureau's goals and missions.

The Division has a corps of financial investigators with many years experience working in the federal and state tax systems, and others with a wealth of experience in securities and bank fraud investigations.

The State Police Unit assigned to the Criminal Bureau is commanded by Lieutenant Jack Kelly, Sergeant Andy Palombo (Organized Crime and Narcotics), Sergeant Bob Friend (Public Integrity/Economic Crime), and Sergeant Tom Quigley (Special Investigations Unit). During the past year the unit has been involved in many joint investigations with various federal, state and local law enforcement agencies. The number of joint investigations has increased dramatically because the Criminal Investigations Division has become recognized as a place where investigations are handled professionally and credit is shared by all involved. Most significant among these investigations are the following.

The Organized Crime and Narcotics Unit co-ordinated an investigation involving the theft of hundreds of Oriental rugs from residences in a number of municipalities. This investigation was conducted in conjunction with the New Hampshire State Police, FBI, and numerous local police departments. This investigation involved the use of a wire tap and numerous search warrants and successfully destroyed a large inter-state theft ring.

The Public Integrity Division, working with a local police department conducted a three month wiretap investigations that culminated in the arrest of two Holbrook Police Officers and six other individuals that allegedly had been operating a large-scale theft ring in Norfolk, Plymouth and Bristol Counties for many years.

The Special Investigations Unit conducted a narcotics investigation in conjunction with the Waltham Police Department and subsequently arrested an ex-police officer for trafficking in cocaine. This case is one of many that the SIU has developed working in conjunction with local police departments.

Also located within the Criminal Bureau is the Environmental Strike Force Police Unit. The Environmental Strike Force is a multi-disciplinary task force which investigates and prosecutes environmental crime. It is supervised by the Environmental Strike Force Chief, Assistant Attorney General Martin Levin. The police unit is supervised by Lt. Gail Larson of the Environmental Police and staffed by four other Environmental Police Officers and three State Police Officers. Also assigned to the Environmental Strike Force are three other Assistant Attorneys General within the Criminal Bureau, as well as technical personnel from the Department of Environmental Protection.

Investigations conducted by the unit have ranged from hazardous waste violations, to water pollution, air pollution, solid waste, larceny and shellfishing violations. One investigation was initiated as a result of the death of a worker in a fire at a printing company and resulted in hazardous waste charges against the company, and a donation to the State's Environmental Challenge Fund, which cleans up hazardous waste sites. Eight defendants were prosecuted for violation of the state's laws prohibiting the taking shellfish from contaminated areas. Two of the defendants received the first state prison sentence for shellfish violations and are serving 2½-3 years in Cedar Junction.

A lengthy investigation was conducted into an illegal solid waste disposal and larceny scheme involving tires. One defendant received the longest sentence for environmental crimes to date, 6-10 years in state prison. Another investigation involved the service of a search warrant at a trucking facility, and resulted in the first forfeiture of equipment under the state's Hazardous Waste Management Act, and a jail sentence for the defendant.

During FY93 the Criminal Investigations Division accomplished the following:

Investigations	159
Arrests	156
Search Warrants	45
Property Seized	\$141,000
Background Investigations	150

### **ORGANIZED CRIME AND NARCOTICS DIVISION**

Fiscal year 1992-1993 brought with it a continued expansion of the mission and goals of the Organized Crime and Narcotics Division. The Division continued to successfully investigate, prosecute and convict individuals for trafficking in significant quantities of narcotics, principally cocaine, perhaps the

most significant contributing factor to the alarming rise in violent urban crime. Additionally, the division assumed an expanded role in the fight against drug abuse and urban violence by targeting the trafficking in heroin, the sale of handguns and machine guns, and has begun to focus more of our resources towards the investigation of non-traditional organized criminal activity. This expanded role has resulted in the successful prosecution of several criminal organizations that were formed for the express purpose of committing the crimes of burglary, larceny, armed robbery, forgery and arson, among other criminal endeavors, in an organized, disciplined and surreptitious manner. Our efforts have ferreted out not only the perpetrators of the criminal activity themselves, but the often overlooked behind the scene participants that provide an easy avenue for the laundering of goods and money back into the normal flow of commerce. The prosecutorial statistics for the division follow:

Number of arrests:	76
Number of cases initiated:	85
Number of defendants:	76
Number of indictments:	201
Number of cases disposed:	35
Number of trials:	8
Number of pleas:	25
Number of dismissals:	2

A summary of the Narcotics and Weapons seized follows:

Cocaine:	6.6 kilos (approx. 6500 grams)
Heroin:	7.14 oz. (approx. 200 grams)
Percocets:	645 tablets
Marijuana:	27.11 lbs. (approx. 433 oz.)
Handguns:	7
Machine Guns:	2

The nine Massachusetts State Police Officers assigned to the Organized Crime and Narcotics Division continue to focus their attention on organized groups of individuals that are believed to be responsible for a disproportionate percentage of sophisticated criminal activity. Many of these investigations are initiated by, or are conducted in conjunction with, local police departments that lack the resources to dedicate the time necessary to intensive, long term investigations. In addition to contributing our electronic and physical surveillance expertise, this office, and the State Police assigned to it, offers state-wide powers which allow for the comprehensive investigation of criminal activity wherever it may occur in the Commonwealth.

We have endeavored to strengthen our relationship with various state and federal agencies to provide a forum for the prosecution of cases that are appropriate for prosecution on neither the Federal nor the county level for a variety of reasons. To this end, we have developed relationships with, and are currently working cooperatively with, the United States Secret Service, the Bureau

of Alcohol, Tobacco and Firearms, the Federal Bureau of Investigation, the Drug Enforcement Administration, the Special Service Section of the Massachusetts State Police, as well as the New Hampshire and the Rhode Island State Police. This inter-agency cooperative effort has permitted the sharing of increasingly burdened financial and personal resources and has fostered a spirit of cooperation that can only aid in the war on crime. If the goal of the division is to continue to move beyond street level crime and to infiltrate the upper layers of organized criminal activity, we have taken yet another step towards achieving that goal.

In addition to utilizing the criminal forfeiture law, the Division continues to take advantage of existing civil drug forfeiture statutes to deprive narcotic traffickers of the powerful economic motive associated with his/her trade. In fiscal 92-93 the Division's forfeiture unit took the following actions:

A. Civil Forfeiture Actions Filed:

1. Real property:	3
2. Conveyances:	3
3. Monies:	1
total:	7

B. Forfeiture Cases Completed:

1. Real Property:	1
2. Conveyances:	8
3. Monies:	7
total:	16

C. Federal Cases Filed: 3

D. Federal Cases Completed: 2

E. Monies Forfeited:

1. Asset Forfeiture Unit:	\$171,261.54
2. Federal Forfeitures:	\$ 75,690.24
3. other:	\$ 3,521.33
total:	\$250,472.11

In addition to the traditional use of the forfeiture law, we have established a project and taken full advantage of a recent amendment that have as their objectives the targeting of both residences and business used by property owners as a platform for the sale of illegal narcotics.

"Operation Take Back", as it has been named, has as its principal goal the seizure of nuisance property and the return of the property to community based organizations for legitimate purposes which will enhance both property values and the quality of life in the neighborhood where it is located.

"Take Back" is but one segment of the Attorney General's commitment to addressing the issues of urban violence and the effect that such activity has on the quality of life in our cities. The Division's contribution to the Attorney

General's safe neighborhoods initiative in the creation of this project is an example of aggressive and creative law enforcement. It is our hope that even in a depressed real estate market, the Division can still use existing forfeiture laws to help rid neighborhoods of criminal activity inherent in the illegal trafficking of narcotic substances. It will allow the community to "take back" the neighborhood from the unlawful and disruptive element that can transform a safe and comfortable community into a frightening place to live and work. We hope to file our first "take back" forfeiture within the next month.

The Division recently used a recent amendment to the civil forfeiture law when we filed a forfeiture action against a business that was being used to promote the sale of drugs. Contemporaneously with the filing of the complaint the Commonwealth filed a motion for the immediate seizure of the property which was allowed by a superior court justice. The execution of the seizure order effectively closed the establishment and deprived the owner/drug dealer of a sheltered environment from which he could ply his illegal trade.

In summary, the Division, while continuing to focus on traditional areas of law enforcement, has successfully sought to broaden its efforts to implement the Attorney General's initiative to address the issues of urban crime and the quality of life in many of the communities served by this office. The Division intends to continue to forge cooperative relationships with other law enforcement agencies and will aggressively pursue, identify, apprehend and prosecute criminal organizations that hinder progress towards enhancing safe and peaceful communities.

### **PUBLIC INTEGRITY DIVISION**

In 1993, the Public Integrity Division continued to investigate, prosecute and convict those individuals who violated the public trust. The Division investigated and prosecuted a broad array of offenses including conflict of interest, bribery, larceny, tax evasion, forgery, perjury and related offenses.

This year marked one of the first joint state-federal prosecutions of a political corruption case in the Commonwealth of Massachusetts. By pooling resources, the Public Integrity Division and the Public Corruption Unit of the United States Attorney's Office successfully prosecuted and convicted a state representative on bribery and child pornography charges. The conviction resulted in a state prison sentence of ten to twelve years on all charges, one of the largest sentences handed down for such violations.

The Division also detected the embezzlement of approximately one million dollars by a school business manager in the Ashburnham-Westminster Regional School District. The official was sentenced to ten to twelve years in state prison after a jury trial in Worcester County.

The Division successfully investigated and commenced criminal charges against two members of the Holbrook Police Department that were running a fencing operation. The officers were arrested as the result of an undercover sting operation that utilized the services of an undercover cooperating witness who successfully infiltrated the defendants' organization. One former police officer presently stands convicted of conspiring to protect illegal activity in the town of Holbrook.

The Division also successfully prosecuted several other public employees for

embezzlement of state welfare funds. Several of these employees received sentences as substantial as eight to ten years in state prison. The Division also commenced criminal prosecution of over 40 individuals and corporations. Furthermore, the Division obtained convictions on over 20 cases during the same time period. Almost 70% of those convicted received jail sentences, with the majority of those incarcerated presently serving time in state prison.

The Division also coordinated the Attorney General's Public Integrity Advisory Group, which brought together representatives of a wide variety of officials from the various executive branches, independent authorities, state agencies and watchdog groups. This Advisory Group meets quarterly with the Attorney General to discuss issues of common concern regarding waste and abuse in government. The task force member agencies successfully referred a number of cases to the Public Integrity Division. Furthermore, these agencies were successful in pooling their resources to effectively investigate and prosecute cases.

This year also marked one of the first times the Attorney General's Office was able to successfully investigate and prosecute procurement fraud in the Commonwealth. As a direct result of the coordination with outside agencies, the Public Integrity Division was able to target specific private contractors that obtained public contracts at the state and local level. To date, the Public Integrity Division has detected and indicted cases alleging over one half million dollars in procurement fraud within the Commonwealth. Furthermore, the Public Integrity Division has focused on allegations of abuse of minority business enterprises, which have lead to the commencement of criminal charges by the division. The Public Integrity Division expects to continue its focus on abuses of both public contracting and minority businesses.

In 1993, the Division also took an active role in training investigators from other state agencies. Assistant Attorneys General and financial investigators from the Public Integrity Division have provided training sessions on white collar crime to a variety of state agencies, including the Massachusetts State Police, the Criminal Investigation Bureau of the Department of Revenue, and the Division of Employment and Training.

Additional staffing has been provided to the Public Integrity Division in 1993, which reflects the Attorney General's commitment to combat public corruption. The Division presently consists of six full-time attorneys, two financial investigators and six state police officers.

A review of the cases prosecuted by this Division reveals that it was successful in bringing cases at all levels of government in virtually every corner of the state.

#### CASES CHARGED BY PUBLIC INTEGRITY DIVISION

7/92

*Commonwealth v. Katsirubis*  
(candidate for Norfolk County Sheriff)  
20 counts forgery  
12 counts false nomination papers

- 8/92 *Commonwealth v. Valerio*  
(ADA - Suffolk County)  
Criminal Assault & Battery w/Dangerous Weapon.
- 8/92 *Commonwealth v. John McNeil*  
(state representative)  
5 counts bribery
- 9/92 *Commonwealth v. Bunk*  
(Taunton Conservation Commissioner)  
4 counts conflict of interest
- 10/92 *Commonwealth v. Smart/Ellis*  
(Dedham Patrolman's Association)  
3 counts larceny
- 11/92 *Commonwealth v. John McNeil*  
(State Representative)  
Posing Child in a State of Sexual Conduct
- 12/92 *Commonwealth v. Lynch/Enterprise Equipment*  
Procurement Fraud, False Claims, False Entries
- 12/92 *Commonwealth v. Wilson/Smith*  
(Yarmouth Water Department) 34 counts larceny  
2 counts procurement fraud  
2 counts conflict of interest
- 12/92 *Commonwealth v. Caceda*  
4 counts bribery
- 12/92 *Commonwealth v. Sylvia*  
16 counts embezzlement  
4 counts forgery  
4 counts uttering
- 12/92 *Commonwealth v. Vipraio*  
(Franklin Police Department)  
Harrassing Phone calls
- 1/93 *Commonwealth v. Jackson(s)/Gurrier*  
(state employee)  
Larceny, False Claims
- 3/93 *Commonwealth v. Scannell/O'Brien/Sheehan/Rust*  
(Holbrook Police Department)  
Bribery, Receiving Stolen Property, Conspiracy

- 4/93      *Commonwealth v. Procopio*  
(Rehoboth clerk)  
2 counts larceny  
2 counts false written report and embezzlement
- 6/93      *Commonwealth v. Foley et al*  
(Mass Highway Department employees)  
Larceny, False Written Reports
- 6/93      *Commonwealth v. Earls/Sinksen*  
(Manfield Police Department)  
False Claims, Procurement Fraud
- 7/93      *Commonwealth v. Donohue*  
(State employee)  
Larceny, False Claims
- 7/93      *Commonwealth v. Marsh/Bergin/Halligan/Burke*  
(Massport Case)  
Larceny, Procurement Fraud, False Claims, Corrupt Gifts
- 7/93      *Commonwealth v. Fabiano*  
(DET employee)  
Larceny
- 7/93      *Commonwealth v. Cater*  
(DET employee)  
Larceny
- 7/93      *Commonwealth v. Voltaire*  
(DET employee)  
Larceny

Total Defendants Charged During Fiscal Year 1993: 42

*CRIMINAL CASES PENDING FISCAL YEAR 1993*

*Commonwealth v. Quirk(s)*  
(PRIM Board)  
Larceny, False Tax Returns

*Commonwealth v. Cronin*  
(Methuen Housing Authority)  
2 counts Larceny

*Commonwealth v. Matchett*  
(Veterans Services)  
2 counts Bribery

*Commonwealth v. Buker*  
(Police Promotional Exam)  
Forgery, Civil Service Violations

CONVICTIONS FISCAL YEAR 1993

*Commonwealth v. Katter*  
(AWRSD Business Manager)  
Embezzlement of \$1,000,000  
Worcester County  
12-15 MCI

*Commonwealth v. Widell*  
(Housing Authority embezzlement)  
3-5 years MCI, suspended sentence

*Commonwealth v. Bowzer*  
(State employee embezzlement)  
2 years H.O.C.

*Commonwealth v. Elliot*  
(State employee embezzlement)  
3 years probation

*Commonwealth v. McNeil*  
(state representative)  
7-9 MCI, conflict of interest  
10-12 MCI, child pornography

*Commonwealth v. Friedman*  
Tax case  
1 year H.O.C., suspended sentence

*Commonwealth v. Foster*  
(State employee - embezzlement)  
8-10 MCI

*Commonwealth v. Valente*  
(Veteran's services - bribery case)  
2-3 years MCI, suspended sentence

*Commonwealth v. Matchett*  
(Unemployment fraud)  
3-5 MCI

*Commonwealth v. Keough*  
(City Councillor Tax case)  
\$31,250 fine

*Commonwealth v. Jackson. B*  
(State employee - embezzlement)  
2 years H.O.C.

*Commonwealth v. Jackson. S.*  
(State employee - embezzlement - joint venturer)  
4-5 MCI

*Commonwealth v. Sylvia*  
(Embezzlement case)  
2 years H.O.C.  
6 months to serve

*Commonwealth v. Caceda*  
(Bribery to RMV)  
1 year H.O.C.  
30 days to serve

*Commonwealth v. Avilla*  
(former lottery employee - larceny)  
6 months H.O.C.  
2 months to serve

*Commonwealth v. Dalton*  
State employee - embezzlement  
7-10 MCI

*Commonwealth v. LaMarca*  
(State employee - embezzlement - joint venturer)  
3-5 MCI

*Commonwealth v. Valerio*  
(ADA - Suffolk County)  
2 years HOC, Suspended for 5 years

*Commonwealth v. Scannell*  
(Holbrook Police Officer)  
2-3 years MCI

*Commonwealth v. Rust*  
(Holbrook Police Officer - joint venturer)  
3-5 years MCI

Total Convictions Fiscal Year 1993: 20

## ECONOMIC CRIMES DIVISION

### INTRODUCTION

In FY93 the Economic Crimes Division was expanded in order to deal with the heavy caseload of matters referred to the Division. New attorneys, investigators and support staff were added to the Division. At present, eight AAGs are assigned to work exclusively on Division cases.

The Division focuses on three priority areas of attention; insurance fraud, tax crimes and financial crimes, including fraud against the elderly and other vulnerable citizens of the Commonwealth. Accordingly, the division consists of three separate units: the Tax Prosecution Unit, the Insurance Fraud Unit, and the Economic Crimes Unit. The Division works closely with outside agencies and other divisions in the Attorney General's Office to identify, investigate and prosecute appropriate cases.

The Tax Prosecution Unit works on tax evasion and failure to file tax return cases so that fraud upon the Commonwealth can be curtailed, and so that taxpayers who pay their fair share of taxes will know that those who fail to do so will face consequences.

The Economic Crimes Unit worked on investigations and prosecutions of businesses and professionals who steal with a pen, or a false pretense, or a business facade. Emphasis was placed on the prosecution of those who prey upon the elderly and on professionals who abuse a position of trust to embezzle money from unsuspecting victims.

The Insurance Fraud Unit, with assistance from AAGs throughout the office, continued to fight worker's compensation fraud and fraudulent claims involving motor vehicle insurance. As an insurance "cost driver," fraud places a great burden on businesses, customers, homeowners, and drivers throughout the Commonwealth. Everyone who buys insurance has to pay extra for that insurance due to fraud and abuse. The Insurance Fraud Unit fights against those added costs by targeting individuals and businesses who commit fraud.

The accomplishments and work in progress of the three units in the Economic Crimes Division for FY93 include the following:

### INSURANCE FRAUD UNIT

In FY93 the Insurance Fraud Unit investigated and prosecuted an increasingly heavy caseload of matters referred to this office by the Massachusetts Insurance Fraud Bureau and other sources. Cases include charges of worker's compensation fraud, fraudulent claims under motor vehicle policies, fraud and larceny by agents, claims adjusters and "insiders," and larger investigations of fraud by employers, health care providers and repair shop operators.

The Unit now has three full-time prosecutors who handle only cases involving insurance fraud. However, because of the volume of such cases, virtually all AAG's in the division, and a number of AAG's outside the division, have been assigned insurance fraud cases. Because of that assistance the Insurance Fraud Unit has been able to successfully prosecute cases while simultaneously handling a number of complex investigations.

Cases which have been prosecuted to final dispositions include:

On November 10, 1992, a defendant was convicted of larceny and sentenced to serve nine months in prison for staging phony choking incidents in several restaurants. He was also convicted of insurance fraud for filing injury claims alleging that his throat was cut by glass he supposedly choked on. The defendant was sentenced to a five year suspended sentence on this charge, and was ordered to pay \$3,000 in restitution.

On November 2, 1992, a former claims adjuster received a suspended state prison sentence of two and one half to four years for larceny and making false entries in corporate books. The defendant filed false claims with motor vehicle insurers based on fictitious accidents and obtained proceeds for his own use. The court also ordered restitution of \$4,232.

On October 13, 1992, a defendant was sentenced to 30 days in jail, suspended for two years, after he pled guilty to attempted larceny. The defendant claimed to sustain injuries from an accident in which he was driving his taxi cab. He submitted forged wage verification forms and filed a lost wages claim based on the false wage information.

On November 12, 1992, a defendant was convicted in connection with a plot to defraud an insurance carrier by staging an auto theft to obtain benefits to repair damage to the vehicle which was sustained while there was no collision coverage on the vehicle. The defendant was found guilty of conspiracy and concealing a motor vehicle to defraud an insurer. He received a suspended jail sentence and was ordered to pay \$7,700 in restitution.

On June 15, 1993, a defendant was convicted of filing a fraudulent insurance claim, larceny over \$250, and attempted larceny after the defendant, whose motor vehicle insurance policy lapsed before the date of the accident, obtained a new policy and lied about the date of the accident to try to ensure coverage under the new policy. The defendant received a suspended jail sentence and was ordered to pay \$690 in connection with the insurance claim.

On June 7, 1993, a defendant was convicted in Superior Court after he filed a false operator's report of an accident and altered the date on an accident report prepared by a police officer to try to obtain coverage under a new auto insurance policy. The defendant received a suspended sentence but was ordered to pay full restitution and a fine of \$2,000.

On June 2, 1993, a defendant was convicted in district court for concealing a motor vehicle to defraud an insurer, filing a fraudu-

lent insurance claim, attempted larceny and making a false report to a police officer. The defendant was ordered to pay restitution of \$430 and fines totalling \$2,000 and was given a suspended jail sentence with probation supervision.

On April 1, 1993, a defendant was convicted in Superior Court of Insurance Fraud, filing a false worker's compensation claim, filing a false claim against the Commonwealth and two counts of larceny over \$250. The defendant filed simultaneous claims against a private insurer and against the Commonwealth for the same alleged injury. The court denied the Commonwealth's request for incarceration and restitution and placed the defendant on a suspended sentence.

On June 14, 1993, a defendant was sentenced in Superior Court to serve 10 months in jail, with a suspended sentence to follow and restitution of \$700. This defendant was convicted of filing a fraudulent insurance claim and attempted larceny after he filed an injury claim for himself and two non-existent car passengers after a minor motor vehicle accident.

On May 19, 1993, a defendant who was a former claims adjuster for an insurance company was sentenced to 3-5 years at MCI-Cedar Junction for creating fictitious automobile claims payable to his friends. Ten claimants who were charged in the case also resolved their cases, with sentences ranging from pre-trial probation to state prison sentences of 3 to 5 years. Restitution in excess of \$10,000 was ordered to be paid by a number of defendants.

On May 10, 1993, a Superior Court defendant was sentenced to two years in jail, suspended for two years with restitution of \$7,500 and fines of \$3,000. This defendant used the occasion of an automobile accident to try to defraud three other insurance companies by filing identical claims as if he had been in several accidents.

On July 1, 1993, a defendant was convicted in district court of larceny and insurance fraud. The defendant collected total disability benefits and reported at an independent medical exam that she was not able to work. Nevertheless, she began working five days later, told her new employer that she had no physical limitations, and collected benefits for three months while working full time.

In addition, the Insurance Fraud Unit filed charges in Superior and District Courts throughout the Commonwealth. Some of the highlights include the following pending cases:

On November 18, 1992, a defendant was indicted in Middlesex Superior Court on charges of filing fraudulent worker's compensa-

tion claim. The defendant received more than \$66,000 from the Commonwealth and from a private insurer by filing a claim with the Commonwealth and then using the same loss, bills and facts to file a second claim for compensation against a private insurer.

On September 22, 1992, an insurance company claims adjuster was indicted on 52 counts of larceny and making false entries in corporate books in connection with a scheme to issue over \$46,000 to fictitious claimants. The defendant split the proceeds with ten friends, who were also indicted for their roles in the scheme.

On December 15, 1992, two Peabody residents were charged with larceny, insurance fraud, and conspiracy for filing fraudulent insurance claims. The defendants filed automobile accident personal injury claims when they were not passengers in the vehicle at the time of the claimed accident.

On September 22, 1992, a defendant was indicted for larceny, insurance fraud, and attempted larceny for staging a number of auto accidents and then filing claims with different insurance companies. The total claims were in excess of \$18,000. Five associates of this defendant were also indicted for participating in the scheme.

On February 9, 1993, an attorney in central Massachusetts was indicted along with his live-in girlfriend for submitting fraudulent wage verification statements in support of personal injury claims related to motor vehicle accidents. The attorney falsely reported his girlfriend's wages and claimed that he had lost wages as a result of an accident where he had not in fact missed any work.

On March 17, 1993, six defendants were indicted in connection with fraudulent motor vehicle damage claims. The defendants, led by two individuals who operated a repair garage, filed damage claims for vehicles they did not own and which had already been damaged. One defendant was persuaded to cooperate with the prosecution by testifying against other defendants.

On April 20, 1993, a defendant was indicted for larceny, insurance fraud, concealing a motor vehicle to defraud an insurer, and filing a false report with a police officer after he reported his car stolen and received over \$10,000 from his insurer. The car was found to have been hidden at a friend's house.

On March 30, 1993, a defendant was indicted for claiming total disability worker's compensation benefits while he was working. The defendant claimed to be disabled from his job as a security guard but he was found to be working for a different security com-

pany while he was filing his claim and collecting total disability benefits.

On March 9, 1993, a defendant was indicted on 34 counts of larceny, forgery, uttering, and acting as an unlicensed broker after an investigation disclosed that he held himself out to be a licensed insurance broker even though his license had been revoked. The defendant embezzled worker's compensation insurance premiums, forged insurance refund checks, and issued fraudulent bonds in connection with his scheme.

In February 1993, a former insurance sales representative was indicted in two counties for converting over \$40,000 of premiums to his own use. The defendant faces ten counts of larceny over \$250 based on evidence that he took premiums from customers and purported to issue policies, but, instead, deposited the money into his personal bank account and into a fictitious agency account.

On June 22, 1993, a defendant was indicted for larceny, insurance fraud and filing a fraudulent worker's compensation claim after an investigation discovered him working while collecting total disability benefits. The defendant claimed to be disabled from his job as a truck driver/delivery person. He was caught doing the same type of work while collecting benefits. The total amount of benefits fraudulently obtained was in excess of \$17,000.

In June 1993, a defendant was arrested and charged in District Court after he attempted to bribe a claims adjuster to inflate a damage claim on a motor vehicle. The defendant, who operated a trucking company, repeated the bribe offer to an undercover state police officer who was posing as a second damage appraiser. He faces charges of commercial bribery and attempted larceny.

#### *TAX PROSECUTION UNIT*

In FY93 the Tax Prosecution Unit conducted several long-term investigations of suspected tax law violations. Those investigations have been very time consuming. In order to conduct those investigations, while simultaneously handling an increase in case referrals and prosecutions, additional AAGs throughout the Economic Crime Division have been assigned to prosecute tax cases. Eight cases alleging failure to file income tax returns were referred to the Division in early April and were indicted within ten days.

In FY93 the Tax Prosecution Unit obtained convictions in ten cases involving charges of tax evasion, willful failure to file income tax returns, and failure to pay meals or sales taxes. Five defendants received jail sentences. Other cases resulted in fines totalling \$112,500 and, in one case, restitution to the Commonwealth of \$130,000.

In addition, eighteen cases were indicted, including eight cases charging

individuals with failure to file income tax returns: Among the cases initiated or prosecuted to a disposition by the Tax Prosecution Unit in FY93 are the following:

Conviction of an owner of two sub shops who failed to pay meals taxes he had collected from customers and who subsequently filed false documents with the Department of Revenue. Unpaid taxes totalled \$56,000. The defendant was sentenced to serve 89 days in jail and was placed on probation thereafter.

Conviction of a restaurant and sporting goods store owner for failure to pay over \$130,000 in meals taxes and sales tax he collected. The Court refused to incarcerate the defendant despite the Commonwealth's sentencing recommendation. However, the defendant received a suspended state prison sentence with probation for 5 years, 2000 hour of community service, and payment of all unpaid taxes.

Convicted an attorney and municipal official who failed to file income tax returns for several years. The defendant received a suspended sentence and was ordered to pay a fine of \$25,000.

Convicted a municipal official on five counts of filing false income tax returns and one count of failure to file a return in connection with unpaid taxes of \$38,000. The defendant agreed to cooperate with the Commonwealth in its ongoing investigation and has been ordered to pay a fine of \$31,250.

In four separate cases, convicted four defendants of failing to file income tax returns. One defendant received 7 days in jail. The other defendants received 2 year sentences with four days incarceration and probation. (Recovery of unpaid taxes will be to the D.O.R.)

Indicted an individual for 5 counts of aiding and assisting in the filing of false tax returns after he helped a relative prepare and file false tax returns.

Indicted a canteen truck owner for evading and failing to report almost \$10,000 in meals taxes, representing meals taxes collected on approximately \$200,000 in sales.

Indicted an attorney on 5 counts of failure to file income tax returns. This defendant owed the state over \$20,000 in income taxes on earnings of over \$400,000.

Indicted a husband and wife for failing to file income tax returns on income over \$450,000, earned by their executive recruitment

service. These defendants owed over \$17,000 in taxes.

In two separate cases, indicted two individuals who reside in Massachusetts but worked for an out-of-state company. These individuals failed to file income tax returns for several years and together owed \$11,500 in taxes on income of over \$270,000.

Indicted a self-employed consultant on four counts of failure to file income tax returns. The defendant owed over \$17,000 in taxes on income in excess of \$420,000.

Indicted a used car dealer for filing false income tax returns, based on evidence that he failed to report approximately \$60,000 of additional income during the years for which he filed returns.

### *ECONOMIC CRIMES UNIT*

The Economic Crimes Division also prosecutes all other white collar or financial crimes, in addition to insurance fraud and criminal tax cases. Referrals are made to the Division by state and federal agencies, as well as judges, attorneys, the Board of Bar Overseers, private parties, and police departments throughout the state. The division has been able to develop good professional relationships with such groups as the Governor's Auto Theft Strike Force, the Board of Bar Overseers, The F.D.I.C., and various District Attorney's Offices in Massachusetts. The Economic Crimes Unit consists of three AAGs who handle all referrals to the Division which are not assigned to the Tax or Insurance Fraud Units.

A distressing number of the cases referred to this unit involve claims of fraud committed against the elderly and vulnerable citizens of the Commonwealth. Therefore, the division has made it a priority to prosecute professionals or business people who prey upon the elderly. Several active cases involve attorneys who stole from elderly clients. Another case referred to the unit by the State Banking Commissioner involves a bank manager who took money from accounts of elderly customers. Another case referred to the unit by the State Department of Public Health involves a charge that a case worker stole money from a publicly funded food program that supplied food vouchers to families with young children. In a separate case, a woman was indicted for falsely holding herself out as a physician and administering check-up examinations to unsuspecting patients. Other cases were brought against individuals who use businesses to cheat their customers.

Some of the more notable cases prosecuted by the unit in FY93 include:

In November 1992 fourteen individuals were indicted in Plymouth and Bristol counties on 92 indictments charging larcenies of motor vehicles and construction equipment, receiving stolen property, conspiracy and concealing vehicles to defraud insurers. These defendants stole trucks and construction equipment and resold the stolen vehicles and parts. It is estimated that they were responsible for well over \$1,000,000 in losses.

A woman who falsely held herself out to be a licensed physician was indicted in three counties. The defendant administered examinations to bus drivers to comply with safety requirements and purported to conduct tests for controlled substances. In fact, the defendant was not a physician.

Two women were indicted for running a flim-flam scheme, known as a "pigeon-drop," and targeting elderly women as victims. The defendants took money from several women and disappeared, leaving the victims without their life savings. Indictments are now pending in Norfolk and Bristol Counties.

A bank manager was indicted in Norfolk Superior Court after an investigation revealed that she had systematically taken at least \$117,000 from customer accounts. Several of the account holders were elderly, including one customer who had almost \$60,000 taken from three separate accounts. The defendant was indicted on 32 counts of embezzlement and making false entries in bank records.

A used car dealer and two associates were indicted on multiple counts of larceny and operating an unlicensed used car business. A number of customers paid money for vehicles only to have the vehicles disappear. The defendant operated several bogus dealerships and switched names and locations when customers complained.

A New Jersey man was arrested while trying to take delivery of laptop computers he had ordered using counterfeit bank checks and fake business documents. The defendant was arrested by state police officers assigned to this office and computers valued over \$50,000 were recovered. The defendant now faces indictments in Middlesex and Worcester Superior Courts.

A Brockton man was arrested after he cashed a death benefit check intended for the family of a Boston Police officer who was killed in the line of duty. The defendant also obtained the deceased officer's credit cards and identification and made numerous purchases at stores in the Brockton area.

A Dorchester woman was charged with larceny after she falsified claims records and issued food vouchers to non-existent claimants. The defendant cashed the vouchers herself. The vouchers were intended to provide basic foods to families with young children who did not qualify for other assistance programs.

A Fall River attorney was indicted and subsequently found guilty of larceny, based on evidence that he took \$30,000 from clients to

establish an escrow account and instead used the money for his business expenses.

A Gloucester attorney was indicted in Essex Superior Court after an investigation revealed that he had wrongfully taken approximately \$650,000 from trusts he administered and from funds being managed for elderly clients. In addition, while the indictments were pending the Division received information that the defendant had improperly accepted and cashed an \$895,000 check intended for a trust fund. The defendant was promptly arrested and indicted on the new charges. A trial date is pending.

Another attorney was indicted in connection with the theft of \$1,000,000 from client funds and trusts he administered for elderly clients. The attorney falsified promissory notes and financial records in an attempt to disguise his thefts.

A town employee who took money received for electrical and plumbing permits was charged with larceny over \$250 after an investigation revealed a consistent pattern of missing entries in town registers and missing money.

A woman was indicted for arson and burning insured property after she hired an individual to burn a dwelling in Haverhill in order to collect about \$30,000 in insurance proceeds. A firefighter sustained injuries while fighting the fire.

These cases, and the cases discussed previously in the sections dealing with the Tax Prosecution Unit and the Insurance Fraud Unit, are being prosecuted by a large number of AAG's throughout the office, including Ed Rapacki, Chief of the Bureau, John L. Ciardi, Chief of the Economic Crimes Division, Patricia Bernstein, Chief Prosecutor in the Consumer Protection Division, Mark Smith, Chief of the Public Integrity Division, Carol Starkey, Andy Zaikis, Margaret Parks, James Bryant, Michael Cullen, Jennifer Ferreira, Brian P. Burke, Howard Brick, Nancy Geary, Mary Phillips, Robert Sikellis, Abbe Ross, Bennet Heart, Ed Deangelo, and Jeremy Silverfine. The division was greatly assisted in its investigations by state police troopers assigned to the office and by investigators; Arthur Brown, Ed Noon, Cara Henderson, Phil McLaughlin, Daniel Ciccariello, Peter Darling, and investigators working with Carmen Russo in the Civil Investigations Division.

### **DIVISION OF EMPLOYMENT AND TRAINING**

The following is the Criminal Bureau's Division of Employment and Training's Fiscal Year 1993 Annual Report. This year, as it did last year, the division has achieved an impressive record of productivity.

One hundred and eighty-two cases were referred to the division, two hundred and forty-two cases were disposed, three hundred and thirty-two cases were closed, \$866,488.14 was collected, 129 defaults were removed and 8 deci-

sions were rendered by the S.J.C. and Appeals Courts.

This past year the division worked with a variety of law enforcement agencies in conducting investigations, arrests, and has achieved several successful prosecutions. The agencies include, Department of Corrections, Immigration and Naturalization Services, Inspector General's Office, Department of Labor and Department of Health, Education and Welfare, Department of Public Welfare, Department of Revenue, Department of Labor and Industries, I.R.S. Internal Affairs Division and Criminal Investigations Division, U.S. Coast Guard Intelligence Division, and U.S. Army Intelligence Division. The division received 182 cases referred by D.E.T. This number is 101 cases less than the preceding year. This is not due to the fact that there are less cases to be referred to the division but rather caused by a turnover in personnel at D.E.T. in the Benefit Payment Control Unit. A review of B.P.C.U.'s case load has revealed that 748 cases are being prepared for referral to the division. It is expected that referrals will be on the rise in the near future.

The division has continued to be aggressive and ventured into new areas of investigation, prosecution, and in sentencing. Early in the fiscal year Paula Niziak with the assistance of Mike Federico and investigators from the Inspector General's office, and Health, Education and Welfare executed a search warrant. As a result over eight boxes of incriminating evidence was obtained and opened a pandora's box of possible crimes extending beyond the large amounts of monies stolen from D.E.T.

There have been more trials in the last year than in any other year of recent memory and although there is great disparity in judge's attitudes toward unemployment fraud, the division was successful in obtaining several significant sentences from the district court. Sentences handed down range from two years in the House of Correction, one year to serve with the balance suspended for one year with restitution in the amount of \$7,899.00 to a plethora of CWOFS. The division can point to a large number of cases where individuals were sentenced to 90, 60, or 30 days to serve in the House of Correction.

The division was fortunate to have two new computers and two printer installed this year. The new equipment is appreciated but is far short of automation that was requested and is needed for the division. In the interim, the new equipment will be a source of relief for the support staff who at times were lined up to use the computers.

Attached are the annual statistics for the division.

## COURT APPEARANCES

July, 1992 - June, 1993

	<i>Disposed</i>	<i>Courts</i>	<i>Cases</i>
July, 92	24	37	92
August	25	29	66
September	12	28	61
October	12	28	62
November	10	28	60
December	13	29	63
January, 93	69	32	139
February	14	23	52
March	12	31	56
April	19	28	73
May	12	32	65
June	<u>20</u>	29	<u>71</u>
Totals	<u>242</u>		<u>860</u>

## MONIES COLLECTED

July, 92	60,343.18
August	158,432.99
September	31,667.09
October	87,906.39
November	35,891.53
December	63,315.56
January, 93	74,408.42
February	74,952.30
March	72,328.95
April	64,684.47
May	53,186.31
June	<u>89,320.95</u>
Totals	<u>\$866,488.14</u>

## CASES PENDING AS OF JUNE 30, 1993

	Total
Appeals	13
Criminal Employee Claims	851
Criminal Employer	836
DET/Com. Actions	<u>11</u>
Total Pending Cases	<u>1,711</u>

## CASES REFERRED FROM D.E.T.

	<i>Appeals*</i>	<i>Employee</i>	<i>Employer</i>	<i>DET/Com.</i>
July, 92	2	16	4	1
August	1	24	2	0
September	1	20	14	0
October	0	4	7	0
November	0	10	2	0
December	3	7	4	0
January, 93*	0	12	8	0
February	0	2	0	0
March	0	7	13	0
April	0	0	3	0
May	0	0	5	0
June	0	0	2	0
Totals	<u>7</u>	<u>102</u>	<u>64</u>	<u>1</u>

Total Cases Received: 182

\*Cases referred to Government Bureau as of January, 1993

## CASES CLOSED

	<i>Appeals</i>	<i>Employee</i>	<i>Employer</i>	<i>DET/Com.</i>
July, 92	2	1	0	0
August	0	0	2	0
September	0	2	0	0
October	0	18	1	0
November	1	21	0	0
December	0	16	1	0
January, 93	0	41	11	0
February	0	7	18	0
March	0	0	52	0
April	3	0	36	0
May	2	41	44	0
June	0	6	6	0
Totals	<u>8</u>	<u>153</u>	<u>171</u>	<u>0</u>

Total cases Closed: 332

## MEDICAID FRAUD CONTROL UNIT

### I. 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 mandate of this Unit continues to be criminal prosecution and civil enforcement actions brought against 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 is ranked *sixth largest* in the nation.

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. Health care providers range from large multistate corporations to small family proprietorships and individual professional corporations.

### II. ENFORCEMENT ACTIONS

#### 1. Pharmacies

Massachusetts MFCU once again highlighted pharmacy activities for prosecution and civil enforcement during this reporting period. A representative sample includes:

A Roxbury pharmacy and its owner were convicted on 22 counts of larceny and 23 counts of submitting false Medicaid claims for a period beginning February, 1989 to June, 1991. The defendant pharmacist was charged with submitting \$86,700 in false Medicaid claims during that period. In July, 1992 the defendants pled guilty to the multiple-count Medicaid fraud and larceny indictment. The pharmacy's owner was sentenced to a three to five year suspended state prison term along with a two-year probationary period, 100 hours of community service and \$12,500 fine in addition to full restitution.

Maintaining a commitment to balanced geographic enforcement throughout the state, the Western Regional MFCU prosecuted and convicted another pharmacist on larceny and Medicaid false claim charges. The owner of a pharmacy in West Springfield and his cor-

poration were indicted on a total of 99 counts of filing false medic-aid claims and larceny involving more than \$35,000. On October 2, 1992 the owner was convicted of the false claim and larceny charges and ordered to serve 60 days of a six-month jail sentence along with one year probation and \$6,500 fine. The medicaid scam occurred during the period of February, 1989 to February, 1991.

MFCU entered into a \$300,000 consent judgment pursuant to M.G.L.c. 118E, SS 21E with a Revere pharmacy for alleged viola-tions of the state medicaid laws and regulations. The civil com-plaint alleged that the pharmacy wrongfully received \$100,000 from the state's medicaid program during the period from January, 1988 to December, 1992. In addition, the complaint alleged a breach of contract with the state medicaid program.

The terms of the consent judgment required the pharmacy to pay \$100,000 in restitution and \$200,000 in damages and civil fines to the Department of Public Welfare for payments allegedly received as a result of false statements and representations to the Commonwealth. The pharmacy denied any wrongdoing in this matter and its employees fully cooperated with the Attorney General's MFCU investigation.

MFCU filed a \$1.95 million consent judgment in Suffolk Superior Court against a major national pharmacy chain and entered into a separate settlement agreement with a total value of approximately \$2.25 million. The agreement called for payment of \$1.95 million by the chain to the state Medicaid program as a result of the chain's failure to pass its 10% senior citizen discount to the state during a three year period. An additional \$50,000 was paid to the state to settle a variety of claims, including the manner in which the chain had advertised its senior citizen discount policy. A sepa-rate agreement also reached with the Attorney General's office required the chain to make 135 educational presentations to senior citizen groups and selected elementary schools over the next 12 months.

MFCU and a New Jersey pharmaceutical manufacturer reached an unprecedented civil settlement whereby the manufacturer agreed to distribute 27,000 NitroDur patches free of charge to 9 public hospitals across the state — a \$30,000 savings to the state. MFCU's investigation centered around claims that the New Jersey corpora-tion excluded Medicaid and Medicare patients from the statewide NitroDur pharmacy program which provides nitroglycerin patches worn by angina patients to medicate heart difficulties. The corpo-ration also agreed to ensure that all Massachusetts angina patients who use its NitroDur patch will receive an educational video or written equivalent — including Medicaid and Medicare patients

across Massachusetts.

MFCU identified a medicaid error which resulted in overpayment within the state's medicaid pharmacy program which, upon correction, resulted in a \$1.7 million recoupment to the Massachusetts Department of Public Welfare's Medicaid Program. The MFCU investigation centered around the billing claims process to Massachusetts pharmacies. Due to a computer error discovered during the course of MFCU investigation, pharmacies across Massachusetts were paid a higher amount than allowed during the period dating from 1991 to December 31, 1992. Upon detection, MFCU immediately communicated its findings to the Department of Public Welfare and worked with the single state agency to recover the overpayments.

MFCU investigation revealed that the maximum allowable cost (MAC) indicator which designates the pharmacy's cost for an approved generic or brand name drug was deleted from the computer system resulting in higher payment to the pharmacies. The physician certification override allowed the pharmacies to be paid for the more expensive brand name drugs when, in fact, generic brands were dispensed.

## *2. Transportation*

Transportation services to medicaid recipients also continued to be an area of scrutiny for Attorney General Harshbarger's MFCU as evidenced by the following:

A Quincy chair car owner and his company pled guilty on April 20, 1993 to two counts of larceny over \$250, five counts of failing to file income tax returns and two counts of filing false medicaid claims. The owner was sentenced to serve 30 days of a one-year jail sentence along with two years probation and ordered to pay \$12,000 in restitution to the Department of Public Welfare. MFCU investigators charged that the chair car company billed the medicaid program for services which were never rendered to eligible medicaid recipients. Additionally, the MFCU investigation revealed that the defendant deliberately failed to file individual tax returns during years 1987 and 1991 at a time when he received over \$65,000 from the medicaid program.

On July 31, 1992 a Methuen taxi company owner was convicted on a multi-count indictment for larceny and medicaid fraud involving \$58,500. The owner was sentenced to serve 60 days of a one-year jail sentence and placed on probation for 18 months during a time in which he was ordered to make full restitution. His company was convicted and fined \$6,750 for filing false medicaid claims. The larcenous scheme centered around the owner padding

the mileage for rides his company provided to medicaid recipients and billing individual rides when more than one recipient was being transported.

*Chair Car Transportation Project* - During this reporting period, MFCU also undertook an intense audit and investigation of chair car van transportation providers in the medicaid system. During the course of this exhaustive investigation a total of 62 providers entered into civil settlements with MFCU returning \$714,237.80 to the medicaid program. Massachusetts chair car providers are currently reimbursed at a level of more than \$8 million per year.

That amount is by far the largest component of the medicaid transportation budget. A review of Massachusetts companies by MFCU revealed that many chair car providers are simply not in compliance with applicable regulations. As an example, in order to qualify for chair car services, a recipient must be mobility handicapped or confined to a wheelchair. Many recipients walk on to chair cars. To ensure that those entitled to transportation but capable of less expensive taxi/dial-a-ride, providers were given the responsibility of determining which recipients qualify for chair car services. MFCU investigators found providers were not fulfilling this important function.

### 3. Physician

Massachusetts succeeded in prosecuting and incarcerating two physicians during this reporting period for medicaid fraud and larceny:

A Waltham pediatrician was convicted in August, 1992 on a single count of larceny over \$250 and one count of submitting a false medicaid claim. He was ordered to serve six months in jail and pay nearly \$11,000 in restitution as a result of the convictions. The charge related to false claims for services from July to October, 1988.

MFCU indicted and convicted a North Andover emergency room physician and his clinic on medicaid fraud and larceny charges. The physician was convicted on October 9, 1992 and sentenced to a one-year jail sentence for submitting false medicaid claims totaling \$24,000 for 102 patients during a nine month period. The defendant was convicted for submitting claims for fractured bones and performing open and closed reductions when, in fact, no fractures existed.

In addition to the above criminal prosecutions, MFCU entered into a civil settlement in the amount of \$37,500 with a Needham physician resolving an investigation of alleged improper billing practices for the period of July 1989 to April 1992. The allegations included

billing for expensive psychotherapy visits when a less expensive service should have been billed and billing for services on dates when patients were not seen by the physician.

#### *4. Patient Abuse and Neglect*

Under the direction of MFCU Chief Michael T. Kogut and Director of Investigations James R. White, the Massachusetts MFCU implemented the use of a patient abuse and neglect prosecution team consisting of an Assistant Attorney General and three patient abuse investigators. This team approach has allowed MFCU to maximize its resources in investigating abuse and neglect cases in the Massachusetts long-term care facilities.

Abuse, mistreatment and neglect of patients in Massachusetts long-term care facilities continues to be a priority in Attorney General Harshbarger's Medicaid Fraud Control Unit. The patient abuse and neglect prosecution team approach has worked efficiently in pursuing complaints of abuse and neglect. A sample of patient abuse/neglect and nursing home prosecutions follows:

A 38 year old nurses aide at an East Boston nursing home was convicted of patient abuse and neglect and assault and battery and sentenced to serve 30 days of a one year jail term along with two years probation. At the trial, witnesses testified that the defendant, after being asked to assist another nursing home aide with a resident, struck the victim twice in the upper shoulder and stomach. Witnesses further testified that while the victim was being placed in a wheelchair, the defendant struck the victim three more times during the July, 1992 incident.

A 46 year old former nursing home employee was charged by MFCU and arraigned on one count of patient abuse and one count of assault and battery in March, 1993. The charges stem from the defendant's alleged mistreatment and improper touching of a female patient on June 7, 1992 while administering medication. Witnesses reported the alleged incident immediately to the nursing facility. The defendant was suspended and then terminated from employment.

MFCU investigators assisted by Lexington police located a former nursing home aide after a warrant for his arrest charging him with patient abuse and indecent assault and battery had been issued by Concord District Court. The defendant was arraigned and awaits trial on three counts of patient abuse and three counts of indecent assault and battery. The charges stem from the defendant's employment as a nurse aide at a Lexington facility. Two alleged victims in the complaint were females.

A Worcester man pleaded guilty to a single count of patient abuse in Worcester District Court and was sentenced to three years probation, community service and a \$500 fine as a result of a MFCU

patient abuse prosecution. Investigators alleged that in July of 1992, while providing routine care to a resident of the home, the defendant improperly touched a female resident. The resident reported the incident to another nurse aide after she had ordered the defendant to leave the room. The defendant was terminated from his position when the incident was reported.

MFCU prosecuted a former nursing home owner on four counts of larceny over \$250, one count of perjury by written statement, three counts of making false representation to the Department of Public Welfare and 15 counts of making false statements to obtain unemployment benefits. The former nursing home owner was convicted of embezzling funds belonging to elderly and disabled residents of a Boston nursing home. The charges related to medicaid patients' personal needs allowance funds were required by law to be used only for personal items and services. The defendant was convicted after admitting that the funds had been withdrawn from patient accounts and diverted to the home's payroll account. The remaining charges related to the defendant fraudulently obtaining welfare and unemployment benefits during this time. The defendant obtained general relief benefits and food stamps by representing that she was totally disabled while concealing assets and simultaneous receipt of unemployment benefits.

MFCU investigators charged 2 former employees of a Taunton nursing home with assault and battery and patient abuse on a 91 year old resident. A Bristol County grand jury returned indictments charging counts of patient abuse and assault and battery stemming from an incident which allegedly took place at the nursing home in November, 1992. Allegations center around the defendants' placing a 91 year old resident suffering from senile dementia into a plastic laundry bin and wheeling the resident into an elevator and onto another floor in the nursing home.

MFCU investigators charged a Braintree nursing home employee with patient abuse and assault and battery for incidents which allegedly took place in December, 1992. Investigators alleged that the defendant slapped and pushed two patients suffering from Alzheimer's Disease in separate incidents, in which the two residents involved were ages 85 and 89.

### III. STATISTICAL SUMMARY

	<i>Cases</i>	<i>Indictments</i>	<i>Defendants</i>
Prosecutions Initiated	26	113	90
Prosecutions Resolved	13	18	14

The Unit secured convictions in 11 of the resolved prosecutions (the other 2 cases were continued with a finding after the defendant admitted to sufficient

facts). The Unit identified \$3,254,416.80 in program overpayments and collected \$280,815.17 in restitution. In addition to the overpayments and restitution, an additional \$29,250.00 in fines was assessed upon defendants during the reporting period and \$584,750.00 was assessed for other receivables. The grand total for all categories of assessments and recoveries for the grant period is \$4,149,232.00.

## **FAMILY AND COMMUNITY CRIMES BUREAU**

The Family and Community Crimes Bureau is responsible for policy and program development in four issue areas: children and youth; elders and persons with disabilities; family violence; and victims of crime. In addition, the Victim Compensation and Assistance Division comes under the supervision of the Family and Community Crimes Bureau.

### **THE ELDERLY**

The Attorney General has made protection of elders a top priority. For this reason, the Family and Community Crimes Bureau continues its focus on elder abuse and neglect, consumer fraud, and financial exploitation.

In May of 1993, the Bureau co-sponsored the second annual elder issues conference, "Financial Exploitation of Elders and People with Disabilities: Prevention and Intervention." This event focused on the development of strategies to identify, combat and prevent financial exploitation through public education and communication; multi-disciplinary training; and legislative and legal advocacy.

The Family and Community Crimes Bureau also launched the Elderly Protection Project to provide comprehensive, statewide training to improve the law enforcement community's response to abuse, neglect and financial exploitation. These trainings, funded through a grant from the Massachusetts Committee on Criminal Justice, have involved new police recruits, experienced officers and elder protective services workers.

In April of 1993, the Attorney General conducted a public hearing on the proposed revision of regulations governing long term care facilities under the Consumer Protection Act, G.L. c. 93A. These proposed regulations set forth enhanced rights and protections for elders in several areas, e.g., non-discriminatory access to care, resident rights, and notice of transfer and discharge. These regulations were developed by the Consumer Protection Division in collaboration with the Family and Community Crimes Bureau.

The Attorney General has also been very active in legislative initiatives to develop "assisted living" for elders. This responds to a pressing need — the provision of a supportive living environment for frail elders which will allow them to age in place with dignity and independence. The Family and Community Crimes Bureau has worked cooperatively with private developers, elder advocates, and state agency representatives on pending legislation which will encourage development while at the same time providing important consumer safeguards.

Finally, the Elder and Disabled Issues Task Force has continued to meet throughout this year to address issues such as financial exploitation, institu-

tional abuse, guardianship reform, and legislation.

### **FAMILY VIOLENCE**

The Attorney General, through the Family and Community Crimes Bureau, has continued to develop programs and policies to comprehensively address the problem of family violence.

The Attorney General and the Harvard School of Public Health, sponsored a series of working luncheons, which involved a wide range of professionals actively working in the area of domestic violence. The sessions focused on the most critical issues in domestic violence prevention and protection efforts, such as the medical community's role in identifying and assisting domestic violence victims; guidelines for effective police response; judicial trainings; and family preservation for battered women and their children. The luncheon series culminated in the "Report on Domestic Violence: A Commitment to Action" which poses recommendations for early intervention and prevention; multi-disciplinary solutions, and long term strategies to protect victims and prevent further domestic violence. The luncheon series is continuing with a new focus on guns, violence prevention and public health.

This year also marked the presentation of the Attorney General's second annual Domestic Violence Training Conference. Over 300 police officers attended the October training which focused on new issues which go beyond the legal procedures mandated by Chapter 209A. For example, the conference featured presentations on the new statewide domestic violence registry, the myths and misconceptions about the battering relationship and the effects of domestic violence on children.

Finally, the Family and Community Crimes Bureau began a collaboration with the Dimock Community Health Center to provide comprehensive training later in 1993 on early identification, assessment and intervention by health providers in family violence cases.

### **CHILDREN AND YOUTH**

In 1992, the Attorney General's Office worked to establish collaborative relationships among the Department of Education, local school districts and local law enforcement officials through the Superintendent's Advisory Committee. The Advisory Committee provided a forum for discussion of issues such as violence prevention, education reform, bilingual education, and expulsion policies. The Family and Community Crimes Bureau provided technical assistance and training in areas of mutual concern to law enforcement and the schools. To further support violence prevention initiatives in the schools, the Attorney General expanded the SCORE (Student Conflict Resolution Experts) program to five additional school districts, including Lawrence, Fall River, Springfield, Boston, and Holyoke. In addition, in January, 1993, he sponsored a statewide conference to evaluate Project Alliance, a program which fosters collaboration between local school officials and law enforcement on issues of substance abuse and violence prevention.

The Children's Issues Group, staffed by the Family and Community Crimes

and Government Bureaus, continued to review issues of concern to children's advocates to resolve some issues short of litigation and to foster a better understanding between children's advocates and the Office of the Attorney General. In 1992, the Children's Issues Group worked on reform of student expulsion policies, foster care, and the disposition of care and protection cases in the district courts. The Family and Community Crimes and Government Bureau played a central role in the establishment of the Supreme Judicial Court's Juvenile Justice Commission to address the timely disposition of care and protection cases in a comprehensive and systemic manner.

In the area of juvenile justice, the Family and Community Crimes bureau prepared and presented a statewide educational seminar and manual for prosecutors on the legal implications of the 1991 amendments to the juvenile transfer law. The Family and Community Crimes Bureau played an active role in examining proposals for systemic reform of Massachusetts' juvenile justice system. For example, the Bureau co-authored a "Report of the Boston Bar Association's Task Force on the Juvenile Justice System" which critiqued the 1991 amendments to the juvenile transfer law and set forth an alternative model for reform.

In addition, it made recommendations to a committee of the Supreme Judicial Court for reform of the CHINS (Children in Need of Services) program for children who are unable, because of behavioral problems, to be cared for by their parents or guardians and require substitute care and treatment.

Finally, the Family and Community Crimes Bureau presented the Attorney General's first training program designed for campus police and administrators. The conference included presentations on campus police powers and responsibilities; Criminal Offender Record Information (CORI) and its relationship to school discipline; drug and alcohol abuse; date rape; and hate crimes.

## VICTIMS ISSUES

### *1. Victim Witness Assistance Board*

The Attorney General continued to personally chair the Victim Witness Assistance Board. In 1992, a major reorganization and restructuring of the support agency for the Board, the Massachusetts Office of Victim Assistance (MOVA), was undertaken following a drastic cut in the 1992 fiscal year budget. Under the leadership of Executive Director Heidi Urich, MOVA downsized its staff, consolidated its responsibilities, streamlined its data information systems, and redesigned its oversight of the federal Victims of Crime Act (VOCA) program. By the end of 1992, MOVA and the Board had stabilized and were able to rebuild services for victims and victim programs across the state. With a small increase in the budget in fiscal year 1993 and a grant from the Massachusetts Committee for Criminal Justice, MOVA was able to resume its outreach and training efforts in cooperation with the District Attorneys' victim witness program directors and the VOCA providers in the areas of multi-cultural sensitivity and advocacy services for domestic violence victims.

In addition, in an effort to reach out to citizens in urban communities, the

Family and Community Crimes Bureau and the Executive Bureau participated in the review and promulgation of a citizen handbook regarding civil and criminal legal issues for adults and juveniles.

### **VICTIM COMPENSATION AND ASSISTANCE DIVISION**

The Massachusetts Victims of Violent Crime Compensation Act, G.L. c. 258A, is administered through a court-based process in which victims file claims in the district court where they reside, or where the crime occurred. The Division investigates all such claims, and then prepares and submits to the district court a report and recommendation on whether, and to what extent, the claimant is entitled to compensation. Division attorneys appear in courts throughout the Commonwealth in connection with these claims.

In 1993, the Division received 1,121 claims for compensation, representing a 6% increase over the previous year. Of the 984 cases that were closed, 587 resulted in judgments for the claimant, while 397 resulted in dismissals. Payments to claimants totalling \$2,761,935 were paid in 1993. This amount represents the largest expenditure of funds to crime victims in the Division's history. The largest categories of crime victims obtaining compensation through the Division in 1993 were victims of assault and battery; assault and battery with a dangerous weapon/knife, murder; assault and battery with a dangerous weapon/gun; and rape. Services to victims remained a priority for the Division. Victim advocates continued to provide a range of services and assistance to victims in dealing with the financial impact of crime, including creditor intercession services, and assistance in locating service providers. In 1993, the Division also conducted training programs for victim advocates in District Attorneys offices throughout the State, and participated in special training events on domestic violence, cultural diversity, and other issues.

The Division also continued to update and improve its claims processing. In 1993, the Division implemented a new two-step processing system in which eligibility determinations are finalized before investigative resources are committed to determining the amount of a claim. In addition, the Division implemented a document production requirement for claimants represented by private counsel.

Also in 1993, the Division took steps to clarify the relationship between G.L. c. 118F ("free care") and the victim compensation fund which, pursuant to G.L. c. 258A, is a fund of last resort. The Division notified hospitals of its position that compensation will not be paid if a patient is eligible for free care or other public assistance. The Division also continued to work vigorously for passage of legislation to convert the victim compensation system to an administrative process.

### **PUBLIC PROTECTION BUREAU**

The Public Protection Bureau is comprised of seven divisions: Antitrust Division, Consumer Protection Division, Regulated Industries Division, Civil Rights Division, Environmental Protection Division, and the Civil Investigations Division. Additionally, the Consumer Protection Division contains the consumer complaint section and oversees the local consumer fund which provides grants to local community groups to mediate and resolve con-

sumer complaints at the local level.

The role of the divisions in the Public Protection Bureau is to bring affirmative litigation on behalf of the Commonwealth of Massachusetts, its citizens and businesses in the areas listed above.

The Public Protection Bureau also has a responsibility for the development and implementation of policies dealing with health care and lead and lead poisoning issues.

Bureau personnel also coordinate and staff the Attorney General's innovative program to reduce youth violence — SCORE — Student Conflict Resolution Experts. This program is a school-based mediation program using trained student mediators to resolve disputes among their peers and prevent them from escalating into violence. This unique program has been recognized nationally for its effectiveness in preventing violence and the Attorney General is committed to expanding it to every school in the Commonwealth.

### ANTITRUST DIVISION

The Antitrust Division enforces federal and state antitrust law prohibiting anti-competitive activity. The U. S. Supreme Court has described these laws as the "Magna Carta" of our free enterprise system. Enforcement of these laws protects consumers from the adverse economic effect of price-fixing, boycotts, monopolization and other similar restraints of trade. Enforcement of these law also protects businesses, particularly small businesses by curbing the kind of anti-competitive activity that hampers the ability of a business to compete on an equal basis 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 a negative impact on consumers and businesses in multiple states including Massachusetts. Through the National Association of Attorneys General, the Division coordinates its activities with those of other states and with the activities of federal antitrust enforcers.

#### I. Litigation

##### A. Boycotts

###### *Multistate Insurance Antitrust Litigation*

On June 28, 1993, the United States Supreme Court substantially affirmed the judgment of the Ninth Circuit and allowed the case to proceed. *Hartford Fire Ins. Co. et al. v. California et al.*, 113 S.Ct. 2891 (1993). In this litigation, the Commonwealth and 19 other states have sued leading domestic and foreign insurers, reinsurers, and others for antitrust violations. The complaints allege that the defendants engaged in an illegal boycott to remove certain forms of commercial general liability ("CGL") insurance from the market. CGL insurance covers third party property and personal injury claims. In 1989, the U.S. District Court for the Northern District of California dismissed the complaints for failure to state a claim upon which relief could be granted, but in 1991, the Ninth Circuit Court of Appeals reversed the dismissal.

The Court unanimously held that the complaints had alleged actionable boycotts, although by a 5 to 4 vote the Court eliminated some of the boycott

allegations. The Court also ruled by a different 5 to 4 vote that principals of international comity did not compel dismissal of the foreign defendants. The Court reversed the Ninth Circuit's holding that domestic defendants automatically lost their limited antitrust immunity by conspiring with non-immune foreign defendants.

This Office wrote the brief for the states on the international comity issue. That brief received a U.S. Supreme Court Best Brief Award from the National Association of Attorneys General.

It is anticipated that discovery will commence within the next few months.

#### *Optometrists Investigation*

In March 1993, Central Massachusetts Health Care, an HMO, signed an assurance of discontinuance agreeing to allow optometrists to be included in its provider networks. After reviewing documents procured pursuant to a Civil Investigative Demand, the Office concluded that CMHC's practice of excluding optometrists from its provider networks appeared to be a group boycott in violation of federal and state antitrust laws.

Under the terms of the assurance, CMHC will allow optometrists to accept referrals from primary care physicians and will evaluate each optometrist on the basis of the optometrist's individual education, experience, and capabilities. CMHC also agreed to provide a statement assuring non-discrimination to all optometrists seeking appointments, and to various optometry and ophthalmology associations.

In addition, CMHC agreed to contribute \$50,000 to Daybreak Resources for Women, Inc., a shelter for victims of domestic violence. CMHC also agreed that it would not reduce the eye care benefits it offers its subscribers for two years from the date of the assurance.

#### *Commonwealth v. Cahill. et al.*

In this federal court action, filed by the Division in August 1988, the Commonwealth alleged that twenty-four Springfield obstetrician/gynecologists conspired to boycott Blue Shield of Massachusetts in violation of state and federal antitrust laws. The suit sought injunctive relief and the imposition of civil penalties against twenty-four defendant physicians.

In 1992, the remaining eleven defendants entered into consent judgments with the Commonwealth: enjoining violations of the antitrust laws; containing agreements to withdraw letters of resignation from Blue Shield and to notify the Commonwealth prior to submission of any future letter of withdrawal; and providing a total recovery to the Commonwealth of \$140,000 in money and free medical services to low-income women. In total, the Commonwealth received over \$300,000 in cash payments and free medical services from the twenty four defendants.

#### **B. Mergers**

##### *Burbank Hospital - Leominster Hospital Merger*

In April 1993, the Office resolved antitrust concerns surrounding the merger of Burbank Hospital in Fitchburg, and Leominster Hospital in Leominster.

Pursuant to an agreement between the Attorney General and the two hospitals, the hospitals will increase by \$600,000 over the next four years contributions to community benefit programs for underserved populations, such as children and the indigent. Further, the hospitals are required: (1) to undertake and fund a demonstration project that will study the effects of the merger on prices of services, the achievement of hospital efficiencies and the concerns of managed care providers, and (2) seek public input regarding any closure of emergency care facilities.

#### *Blue Shield - Baystate Merger*

The Attorney General agreed not to make an antitrust challenge to Blue Shield's merger with Baystate Healthcare, a failing HMO serving over 350,000 subscribers in the Commonwealth. Pursuant to the agreement between the Attorney General and Blue Shield, Blue Shield agreed to contribute \$2 million to provide free health insurance to uninsured children unless its operation of Baystate proves financially unsuccessful. Further, for two years, Blue Shield is prohibited from merging with any other health care insurer or HMO if the Attorney General finds the merger adversely affects competition. Blue Shield also agreed to fund a study to determine the causes of Baystate's failure and to aid the Attorney General in monitoring the competitive effects of the new health care financing law, M.G.L. c. 495, by responding to inquiries from the Attorney General within two business days.

### C. Monopolization

#### *Cable Television Anti Trust Case*

In June 1993, the Attorney's General of 40 states filed antitrust complaints against seven of the nation's largest cable television multiple system operators and Primestar Partners, L.P., a joint venture of the defendant MSOs and a subsidiary of the General Electric Co. *The State of New York, et al., v. Primestar Partners, et al.* At the same time, the states filed consent decrees with the defendants that prohibit defendant cable operators from entering into exclusive contracts with programmers that prevent the sale of programming to their competitors, and require that competitors be provided the programming controlled by the defendant cable operators at competitive rates.

The defendants are further prohibited from entering into any agreements to restrict or control access to programming by any other television programming marketer. The decrees also required the defendants to pay \$157,919.13 to the Commonwealth in attorney's fees.

#### *In re Clozapine Antitrust Litigation.*

This case involved a multi-state lawsuit against Sandoz Pharmaceuticals Corp. and Caremark Corp. alleging illegal tying in violation of section 1 of the Sherman Act and monopolization under section 2 of the Sherman Act. The states' antitrust lawsuits were based on Sandoz's and Caremark's marketing of the "new" anti-schizophrenia drug, Clozaril. Sandoz refused to sell the drug unless the buyer also agreed to purchase a package of blood monitoring and blood testing services provided exclusively by Caremark. The Division was part

of the eight member Case Management Committee that initiated and organized the litigation of this case.

This case was settled in September, 1992 and was joined by all states in the United States and the District of Columbia. Sandoz and Caremark agreed to pay purchasers of the drug, including state agencies, \$13 million plus attorneys fees and costs. In addition, \$3 million will be paid to the National Organization of Rare Diseases to be used to treat newly diagnosed schizophrenia patients with Clozaril. The defendants also agreed to provide a 15% reduction in wholesale price of Clozaril to at least 2000 patients on social security disability income. The defendants are further prohibited from reinstating the tie between Clozaril and the blood testing services provided by Caremark.

The United States District Court for the Northern District of Illinois approved the settlement on Nov. 24, 1992.

#### D. Other

##### *Commonwealth v. Getty Petroleum Corp.*

In May 1993, the Division filed a consent judgment prohibiting Getty Petroleum Corp. from prescribing the hours or days of operation of its Massachusetts dealers. The Commonwealth alleged that Getty's policy of forcing dealers to stay open certain hours per day and days per week violated M.G.L. c. 93E. The consent decree further requires Getty to train employees to act in compliance with the injunction, as well a pay \$75,000 to the Commonwealth in settlement of the case.

##### *Delaware v. New York*

The case involves a dispute as to which state may take custody of unclaimed intangible property consisting of dividend, interest, and other distributions arising out of security transactions, held by financial institutions. On March 30, 1993, the U.S. Supreme Court ruled that the state of incorporation of the financial institution through whom the funds were invested has the right to escheat funds belonging to beneficial owners who cannot be identified or located. The Court remanded the case to the Special Master for proceedings consistent with its ruling.

The Supreme Court's ruling is likely to be beneficial to states like Massachusetts in which many financial institutions are incorporated. It could result in a recovery by the Commonwealth of millions of dollars in past and future revenues. Since the decision was issued, however, 48 of the intervenor states have filed legislation to overrule the decision.

## II. Legislation

### *S. 120 - An Act to Strengthen Enforcement of the Massachusetts Antitrust Act.*

In December 1992, the Division filed a bill to amend M.G.L. c. 93 to allow the Commonwealth to bring antitrust actions under state antitrust law against sellers of products even when the Commonwealth has not dealt directly with seller. United States Supreme Court precedent prevents the Commonwealth from using federal antitrust laws to collect damages from indirect sellers. The Supreme Court has also held, however, that states may enact state laws that would allow them to collect such damages.

### III. Amicus Briefs

#### *Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Company*

In November 1992, the Office filed an amicus brief in the above mentioned case, arguing that the Public Records Law has not abrogated either the attorney work product rule or the attorney-client privilege as applied to government attorneys. The Supreme Judicial Court decided the case on March 15, 1993 without deciding this particular issue.

### CIVIL RIGHTS DIVISION

The Civil Rights Division continued to actively enforce 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 1993, a total of 16 injunctions against 32 defendants were obtained by the Division involving violence on the basis of race, ethnicity, religion, gender, AIDS status, and sexual orientation. In one case, an injunction was issued against three defendants for violating, through intimidation and coercion, the first amendment rights of the victims. The first statewide injunction ever issued regarding intimidation and threats against a person because of his AIDS (disability) status, was obtained by the Division in May, 1993. The first injunction in Massachusetts against an individual who directly threatened an abortion clinic staff member, was obtained by the Division in April, 1993.

A total of five injunctions with nine defendants involved incidents in Boston. One case arose in Dorchester, one in the North End, one in the South End, one in South Boston, and one in Brookline. The Division also obtained injunctions against defendants in Brockton, Lowell, Northampton, Wellfleet, Dedham, Cambridge, two in Quincy, and three 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 ten-year prison sentence and a maximum fine of \$10,000.00.

### OPERATION RESCUE

After a two week trial in 1991, a permanent injunction was issued against members of Operation Rescue which prohibited the blocking of entrances to clinics which provide abortion services and counseling. The Division is currently drafting and filing a brief as an appellee to this decision. The Commonwealth has charged several members of Operation Rescue with violation of the permanent injunction.

### HOUSING DISCRIMINATION

The Division has filed, prevailed at trial, or settled nine claims of housing discrimination involving allegation of discrimination on the basis of race, marital status, section subsidy status, and gender. In the case of *Commonwealth v. Robert and Florence Dowd*, the court awarded substantial attorney's fees to the

Attorney General. This is the first award of attorney's fees to the Attorney General in a housing discrimination case in which the court applied standards and rates for private attorneys. The decision is now under appeal and a Supreme Judicial Court brief has been prepared and filed.

A Single Justice of the Supreme Judicial Court issued a precedent-setting decision granting summary judgment in favor of the Attorney General and the Town of Barnstable, against the Old King's Highway Regional Historic District Commission, which had filed a lawsuit that had effectively halted construction of a 30-unit housing development for low-income elderly individuals and families in Barnstable.

### *DISABILITY ISSUES*

Since the effective date, January 1992, Title II, of the Americans with Disabilities Act (ADA), Division staff have spent a substantial amount of time conducting presentations and trainings concerning the effect of the provisions of the ADA. On June 7, 1993, the Attorney General announced the formation of the Disability Rights Project within the Division. The establishment of the Project provides a centralized enforcement agency which will ensure compliance with various statutory and constitutional protections for individuals with disabilities. In response to a May 1991 letter from the Attorney General to all cities and towns in Massachusetts, the Division has continued to assist and enforce regulations which guarantee physical access to all programs and activities, including public meetings for residents with disabilities. In the case of *Commonwealth v. Holiday Health Spas*, a comprehensive agreement was entered into in order to insure that in the future individuals with disabilities are not denied membership in or access to the health club or restricted in the full use and enjoyment of its facilities located in Massachusetts.

### *POLICE RELATED MATTERS*

In an effort to promote civil rights, assist the police, and to provide departments with technical assistance, the Division has continued to provide an extensive amount of civil rights training to police departments throughout Massachusetts including the Lowell, Medford and Provincetown departments. The Division also participated in the development of the curriculum and training module for the National Bias Crime Training Program for police officers and victim witness advocates.

The Division also organized and coordinated meetings of law enforcement officials from the Attorney General's Office, the District Attorney's Office, U.S. Attorney's Office, Federal Bureau of Investigations, State Police, the Boston Community Disorders Unit of the Boston Police Department, and Thompson Island staff in response to vandalism, verbal, and physical attacks of individuals associated with the Thompson Island Outward Bound Education Center. The meetings resulted in wide-spread cooperation and the deterrence of further harassment of Thompson Island staff and students.

The Division has continued to investigate allegations of police misconduct, when appropriate, and have worked with departments to take remedial steps when credible evidence is found to substantiate the complaints.

The Town of Chatham adopted new Internal Affairs procedure for its police department, to be publicly disseminated, and organized a Community Advisory Committee, resulting from the Division's investigation and issuance of a special report.

### *MINORITY SET ASIDES*

In two separate cases, the Division continued to defend statewide minority and women set-aside programs from constitutional challenge, which potentially threaten the legality of all statewide minority and women set-aside programs. A motion to dismiss one of the cases was consented to by the plaintiff while the second case remains active.

The Division continued to be an active member of the Governor's Oversight Committee for the Department of Transportation's Minority and Women Set-aside Study.

### *TASK FORCE/OUTREACH ACTIVITIES AND INITIATIVES*

The Division organized and coordinated a Hate Crime Study Group consisting of constitutional and civil rights experts to discuss the susceptibility of the Massachusetts civil rights statutes to constitutional challenge in light of the Supreme Court decision in *R.A.V. v. St. Paul*. On March 16, 1993 a special report was issued which concluded that Massachusetts civil rights laws were enforceable and rest on firm legal foundation.

As a member of the Governor's Hate Crimes Commission the Division participated in drafting regulations and developing training programs for police and advocacy groups that govern reporting, investigating, and prosecuting hate crimes.

The Division organized and held a Mortgage Lending Conference in April, 1993, chaired by the Attorney General, and attended by state and federal regulators, bankers, mortgage bankers, researchers, community leaders, staff of the Attorney General's Office and other mortgage lending experts. In bringing together a broad cross-section of interested industry and community participants, the Attorney General's goal was to develop a comprehensive understanding of the nature and extent of past and present systemic discrimination in residential mortgage lending and to identify specific systemic solutions aimed at eliminating future discrimination in the industry.

In May, 1993 the Chief of the Division acted as a presenter at the Department of Housing and Urban Development National Conference on mortgage lending discrimination, which included publication of a paper prepared by the Division Chief.

The Division Chief participated as an active member of the Supreme Judicial Court Commission on Race and Ethnic Bias in the Courts, including involvement in public hearings.

The Division participated in a comprehensive violence intervention initiative at Hingham High School resulting in major institutional changes. The intervention followed complaints of harassment based on sexual orientation and race.

As a result of a large-scale racial incident at Medford High School, the

Division was extensively involved with ongoing diversity awareness training and police civil rights training.

The Division formally advised the Westfield School Committee to vote against a resolution which would have barred teachers with "accents" from teaching in elementary classrooms. The Division advised the school committee that passing the resolution would be discriminatory, and potentially subject the district to legal action. Consequently, the resolution was defeated by the School Committee in July of 1992.

### CONSUMER PROTECTION DIVISION

The Consumer Protection Division enforces Massachusetts General Law chap. 93A and other consumer protection laws against businesses that engage in unfair and deceptive acts and practices. The Division's caseload primarily consists of actions affecting large numbers of vulnerable consumers who have been harmed by illegal activities, particularly by fraud. Other efforts include regulatory and legislative activities, participating in consumer outreach, and mediating individual complaints through the Consumer Complaint Section and Local Consumer Programs.

#### *MONEY RECOVERED*

RESTITUTION	\$1,870,189.00
CIVIL PENALTIES/COSTS/ATTORNEYS FEES	\$198,512.50
LOCAL CONSUMER AID FUND/"SCORE"	\$423,000.00

#### COMPLAINT SECTION TOTALS:

Direct Refunds to Consumers	\$84,542.02
Amount Saved through Settlements	\$95,591.10
Amount Received in Goods Services	\$108,472.03

#### OTHER:

Mattress Discounters	\$100,000 in mattresses to homeless shelters
Resource Financial	\$25,000 to charity
Beverly Enterprises	\$500,000 in medicaid patient costs

In addition, more than \$8,000,000 in consumer benefits and reduced payments were also made possible through the U.S. Funding, Sears, and Fleet settlements.

## AUTOMOBILE

### USED CAR LEMON LAW CASES

*Commonwealth v. Guardian Leasing and Ronald Felt*

*Commonwealth v. John Paulini, d/b/a Natick Auto Brokers*

*Commonwealth v. Marjorie Venditti, d/b/a Mystic Auto Wholesale*

*Commonwealth v. Dorco, Inc., d/b/a RRR Used Cars*

The Division obtained judgments against four used car dealers for violating the Massachusetts Used Car Lemon Law:

On October 14, the Middlesex Superior Court upheld an arbitration award for \$5,686.87 and a fine of \$500 in the case against Guardian Leasing and Ronald Felt. The dealership is defunct and Felt later filed for bankruptcy.

On November 4, the Division obtained approval of a judgment filed in Middlesex Superior Court against John Paulini, d/b/a Natick Auto brokers. Mr. Paulini had been charged with failing to comply with the order of a state certified arbitrator to repurchase a used car from a consumer under the state's lemon law. Mr. Paulini failed to refund the consumer's money or appeal the decision to the District or Superior Court within the 21-day appeal period. Paulini paid \$3,902 in restitution, a fine of \$500, \$1,250 in penalties, and \$500 for the costs of the action.

Marjorie Venditti, d/b/a Mystic Auto Wholesale, was similarly charged with failing to comply with the order of a state certified arbitrator to repurchase a used car from a consumer. Venditti neither refunded the consumer's money nor appealed the decision. On April 8, the Court awarded the lemon law award of \$4,601.40 with interest of \$374.23, the fine of \$500, civil penalties of \$2,000 and costs of \$712.50.

In another suit, Dorco Inc., d/b/a RRR Used Cars, repurchased the consumer's car after the Division sent Dorco a five-day letter. However, the company did not pay the \$500 fine levied by the Executive Office of Consumer Affairs. In a default judgment entered on February 17, Dorco was assessed the \$500 fine, \$1,000 in civil penalties, and \$1,050 in costs. (McVey)

### AVCAR

*Commonwealth v. Hovey Eordekian, Jr. and Brian Kittredge, d/b/a AVCAR*

In May, the Division entered into consent judgments with Hovey Eordekian, Jr. and Brian Kittredge who allegedly operated a phony business of selling the automobiles of private individuals for a sales commission, without ever turning over the sales proceeds to the owners. The defendants allegedly contacted consumers who had placed ads in newspapers to sell their cars. The consumers were allegedly led to believe that the defendants, operating the business under the name AVCAR, could obtain a higher selling price than the consumer would otherwise obtain. Under the terms of the consent judgment, the two men are permanently enjoined from soliciting, selling, or accepting any fees in the consignment, lease, sale, or brokerage of motor vehicles. Additionally, the judgment also calls for over \$800,000 in restitution, civil penalties, and costs; defendants currently have no assets to make the payments. (M. Sullivan, McVey)

## DEBT COLLECTION

American Coradius and Vengroff, Williams & Associates

*Commonwealth v. American Coradius, Inc.*

*Commonwealth v. Vengroff, Williams & Associates, Inc.*

On November 20, Suffolk Superior Court found that two New York debt collection agencies, American Coradius, Inc. and Vengroff, Williams and Associates, were in contempt of Final Judgments the Division obtained in 1991. The 1991 judgments enjoined each company from engaging in debt collection until they had obtained licenses from the Commissioner of Banks. At the time of the most recent violations, neither company had obtained the required license. The two companies have been ordered to pay additional penalties and costs amounting to 20 times the sum they sought to collect from two consumers. American Coradius paid \$17,500 and Vengroff, Williams and Associates paid \$16,500. (McVey)

## CREDIT CONVERTORS

*(In the matter of Associated Bureaus, Inc., d/b/a Credit Convertors)*

On December 18, the Division reached an agreement with Credit Convertors, of St. Paul, Minnesota, in which they have agreed to refrain from engaging in unfair debt collection practices and from recording conversations with consumers without their consent. In addition, the debt collection agency has agreed to modify and install a new telephone line so that Massachusetts calls will not be recorded in the future and to pay \$15,000. (Kogut, M. Sullivan)

## THREE DEBT COLLECTION AGENCIES

*Commonwealth v. Credit Protection Association, Inc.*

*Commonwealth v. North American Collections, Inc.*

*Commonwealth v. Viking Collections Service, Inc.*

On December 18, the Division reached settlement agreements with three out-of-state debt collection agencies, Credit Protection Association, Inc., North American Collections, Inc., and Viking Collection Services, Inc. The companies collected debts without licenses from the State Banking Commission and Viking violated the Massachusetts' debt collection regulations by contacting a consumer debtor at work more times than is allowed by law. Credit Protection Association and North American Collections each paid \$3,500, while Viking Collection Services paid \$9,000 in penalties and costs for collecting debts without a license. In three separate consent judgments, each company is prohibited from acting as a debt collection agency in Massachusetts until it has been granted a license from the State Banking Commission. (McVey)

**ACADEMY COLLECTION SERVICE, INC.**

*Commonwealth v. Academy Collection Service, Inc.*

On February 18, the Suffolk Superior Court entered judgment against Academy Collection Service, Inc. for being an unlicensed debt collection agency. The company paid \$3,000 in penalties and \$500 in costs. (McVey)

**FAILURE TO DELIVER GOODS AND SERVICES****BRIDGE-WAY REALTY TRUST**

*Commonwealth v. Evelyn M. Trottier, et al.*

On September 9, the Division obtained a Consent Judgment in Suffolk Superior Court permanently enjoining Bridge-Way Realty Trust, an East Bridgewater land developer, from collecting deposits for subdivision lots without obtaining the necessary approvals required under the states Subdivision Control Law. According to the terms of the judgment, defendant Frederick L. Smith, a beneficiary of Bridge-Way Realty Trust, will pay restitution of \$80,000 to consumers who paid deposits for house lots in East Bridgewater. In addition, defendant Evelyn Trottier, individually, and as special administratrix of the estate of Joseph Trottier, will pay \$208,097.50 for restitution to consumers, interest, penalties, fees and costs. (Hoefling, McVey)

**AMERICAN WOMAN**

*Commonwealth v. American Fitness Center, Inc., et al.*

In September, the Division obtained a Final Judgment in Suffolk Superior Court against American Woman, a fitness center, and its president, William Menchaca, who accepted membership due from consumers for his Taunton American Woman health club which he never opened. Mr. Menchaca is barred from owning or operating a health club in Massachusetts for three years and thereafter must give notice to the Division before he resumes owning or managing any health club in the state. In addition, Menchaca paid refunds to consumers in the amount of \$11,025. (Hoefling)

**JOY OF MOVEMENT**

*Commonwealth v. Joy of Movement, et al.*

On October 23, CPD entered into a Consent Judgment with Kenneth Estridge, president and founder of the Joy of Movement health club chain. The Division sued Estridge personally and the Joy of Movement corporations in March, 1991, when they abruptly closed their doors and failed to give refunds to Massachusetts consumers for membership dues paid in advance. Shortly after we filed suit, Estridge and his company filed for bankruptcy thereby preventing us from pursuing his case until the bankruptcy litigation was completed. When Estridge was discharged from bankruptcy, the Division pursued its case against him and negotiated an agreement with him whereby he would pay \$45,000 to partially reimburse consumers who had filed com-

plaints with the office. In addition, Estridge is barred from owning or operating a health club in Massachusetts for three years and thereafter must give notice to the office before he resumes owning or managing any health club in the state. (Anthony, Scott, Hoefling)

#### BERKSHIRE CHALET

*Commonwealth v. Berkshire Chalet Resort Motel — A Condominium, Inc., and Robert F. Hatch*

On March 19, the Division filed a consent judgment in Suffolk Superior Court against the Berkshire Chalet Resort Motel and its principal officer, Robert F. Hatch, for engaging in unfair and deceptive practices in the marketing and operation of the time-share resort located in Great Barrington. The Division received approximately 60 complaints against Berkshire Chalet alleging high-pressure sales tactics, unfulfilled promises regarding vacation exchange programs, and numerous other misrepresentations. The Judgment prohibits Berkshire Chalet and Robert Hatch from marketing, selling, or brokering time-share units in the Commonwealth in the future. In addition to calling for \$10,000 in civil penalties and \$5,000 in costs, the Judgment requires Berkshire Chalet and Hatch to provide relief to Massachusetts consumers who were injured in their purchase of a time-share unit. (M. Sullivan, T. Sullivan)

#### BOSTON SCANDALS

*In re: Scandals, Inc.*

In early May, the Office received scores of complaints against Boston Scandals, a furniture chain, alleging that consumers' deposits on previously-ordered furniture were not being honored. As many as 800 consumers allegedly paid Boston Scandals approximately \$385,000 for furniture not yet delivered. The Office organized a group of consumers to petition the U.S. bankruptcy Court to place Boston Scandal into involuntary bankruptcy. The petition, which was filed on May 14, was initially denied by the Bankruptcy Court judge. A trustee was appointed to review the finances of the company. In addition, the Office has a pending lawsuit against Boston Scandals alleging false advertising of discount prices. (Hardy, Bean, Dworsky, Praik)

#### NEW ENGLAND FINE ARTS INSTITUTE

*Commonwealth v. Matthew R. Brooks d/b/a the New England Fine Arts Institute*

On June 3, the Office filed suit against Matthew R. Brook d/b/a the New England Fine Arts Institute, who promised, in return for substantial fees, to exhibit artwork from all over the country and from Europe in "the largest juried exhibition in the Northeastern United States." By the time the chaotic exhibition took place on Memorial Day weekend, Brooks had accepted hundreds of thousands of dollars in fees but failed to exhibit many of the thousands of accepted works and failed to award prize money to the artists, as promised. Along with the filing of the complaint, the Office obtained a temporary restraining order and preliminary injunction in Suffolk Superior Court

requiring the prompt return of the artwork, the freezing of Brooks' assets, and an accounting of assets and all proceeds from the exhibit. In addition, Brooks is enjoined from sponsoring future art shows. (Weber, Palermino, Matlack, Nasca, Praik)

#### MILESTONE

*Commonwealth v. Milestone Educational Institute, Inc., et al.*

On June 9, the Office filed suit against Milestone Educational Institute, Inc., a Cambridge-based student tour operator, which allegedly took millions of dollars in deposits from students and others around the country without providing the promised trips. Milestone, operating under the name American Leadership Study Group (ALSG) and American Educational Travel, Inc. (AET), shut its doors on June 3 and its owner, Christopher Dumello Kenyon, appears to have moved to Great Britain. As part of the lawsuit, a temporary restraining order and a preliminary injunction were obtained in Middlesex Superior Court freezing the company's assets and prohibiting the defendants from offering travel arrangement services. (Anthony, Bernstein, Berlin, Davies, Szafarowicz, Thomson)

#### FINANCIAL SERVICES

##### GREENWOOD TRUST CO.

*Greenwood Trust Co. v. Commonwealth*

On August 6, the First Circuit Court of Appeals, reversing the Federal district court, ruled that federal law allows Greenwood Trust Co., a Delaware Bank that issues the Discover Card credit card, to impose late charge on its Massachusetts consumers, despite a Massachusetts law which prohibits such late charges. On November 4, the Division filed a petition for a writ of certiorari with the United States Supreme Court asking for the reversal of the Court of Appeals decision. Twenty-six states filed amici briefs, supporting the petition for certiorari. The Attorney General argued that the First Circuit's opinion, if allowed to stand, could have a dramatic impact on states' traditional ability to regulate all consumer lending practices, not just late charges. On January 11, 1993, the U.S. Supreme Court denied the petition for writ of certiorari. (Sarason, Brownsberger)

##### FIRST INVESTORS

*Commonwealth v. First Investors, et al.*

On October 9, Attorney General Scott Harshbarger and Secretary of State Michael J. Connolly sent a letter to the U.S. District Court for the Southern District of New York opposing the proposed settlement of a private federal class action against First Investors Corporation and others. The letter stated that the settlement would undermine the full compensation of Massachusetts consumers through that action. The Commonwealth had filed suit in Suffolk Superior Court against First Investors and other companies and individuals on September 25, 1991. In October 1992, the Court in the Massachusetts action

lifted a stay of discovery, thereby allowing the Commonwealth to proceed towards trial. (Sarason, Willoughby)

#### MANAGEMENT ADVISORY GROUP

*Commonwealth v. Management Advisory Group, Inc., et al.*

On December 16, the Division filed a civil suit in Suffolk Superior Court against Management Advisory Group (MAG), an alleged venture capital finance firm located in Boston. MAG solicited small or new businesses needing investment capital and then failed to provide financing or any financial services. Individuals and businesses paid advance fees for services ranging from \$3,000 to \$39,500, but did not receive any refunds of those fees, even though demands for refunds were made to MAG. The complaint sought permanent injunctive relief, restitution for victims, a temporary freeze of assets, civil penalties, costs, and attorneys' fees. MAG sought a stay of the Commonwealth's action arguing that it was unfair (and unconstitutional) to be required to defend a civil action when to do so would supply information to criminal prosecutors who MAG believed were investigating the matter. The trial court partially granted the stay, and following the Commonwealth's appeal, a single justice upheld the stay but concluded that the trial court's stated reasons for having granted it were not appropriate. The case is now in discovery, in the limited manner permitted by the order. (Kogut, Marcus)

#### WILLIAM J. CAMUTI

*Commonwealth v. William J. Camuti, et al.*

The Division filed a Complaint to Determine Dischargeability against Mr. Camuti in U.S. Bankruptcy Court, alleging that his unpaid judgment debt of \$206,000 in c. 93A civil penalties and costs was not dischargeable under the Bankruptcy Code. The Office had previously sued Mr. Camuti, the Loan Depot, and other corporations in state court for contempt and further penalties under c. 93A for their failure to pay a c. 93A judgment (entered after a securities fraud lawsuit). On the eve of Mr. Camuti's state court trial, he filed his bankruptcy petition. On April 1, U.S. Bankruptcy Court Judge Hillman ruled that c. 93A, § 4 civil penalties are not dischargeable under 11 U.S.C. § 523(a)(7). (Sarason)

#### HEALTH MEDICAL ISSUES

##### SONOTONE HEARING AID CENTERS CORP.

*Commonwealth v. Sonotone Hearing Aid Centers Corp.*

On July 22, a Final Judgment was entered by Judge Cratsley in Suffolk Superior Court against Sonotone Hearing Aid Centers Corp. and its president, Anna Gordon. The order prohibits Anna Gordon from advertising and selling hearing aids and orders the payment of \$29,681 in restitution for 56 consumers and \$10,000 in civil penalties. The Bristol County District Attorney's Office also obtained an indictment against Anna Gordon on 47 counts of larceny. On December 3, Ms. Gordon was sentenced in Bristol Superior Court to

6-10 years in prison with one year to be served beginning December 3, 1993 plus an order to pay \$400 per month in restitution. (Berlin, Dietz, Hardy, T. Sullivan)

#### ELM MEDICAL LABORATORIES

##### *Commonwealth v. Elm Medical Laboratories, Inc.*

On July 27, the Massachusetts Appeals Court upheld a permanent injunction obtained by the Division which prohibits two individuals who formerly supervised Elm Medical Laboratories from supervising a medical lab. The Court agreed with our argument that the laboratory had violated the Massachusetts Consumer Protection Act by improperly and inadequately performing pap smears and other tests, and further agreed that under this law a laboratory is required to disclose to doctors and patients material information about the laboratory's practices that could render its diagnoses inaccurate. The Appeals Court also held that the state is not a person subject to suit under the Civil Rights Act. (McHugh, Matlack)

#### S&B INTERNATIONAL CORPORATION

##### *In the Matter of S&B International Corporation*

On October 8, the Division joined the Attorneys General from 10 other states in a \$33,000 settlement with S&B International Corp., a California-based food manufacturer, which allegedly misled consumers about the monosodium glutamate (MSG) content of some of its seasoning mixes. S&B falsely claimed in radio advertisements and on product labels that its seasoning mixes contained no MSG, when, in fact, they contained hydrolyzed protein. The Attorneys General alleged that when a substance is hydrolyzed to create a hydrolyzed protein using the methods employed by food manufacturers, MSG is created. (McHugh)

#### MOUTHWASH PETITION

On February 25, the Office joined with the Attorneys General of 27 other states in filing a petition with the U.S. Consumer Products Safety Commission proposing that the Commission require child-resistant packaging for mouthwashes containing more than 5 percent alcohol. With some commonly-used brands of mouthwash containing 14 to 26.7 percent alcohol, ingestion of only one ounce of mouthwash containing alcohol can produce serious effects in a child. In the past five years, at least three children have died after ingesting mouthwash. The petition explains that child-proof caps may cost as little as two cents per bottle. (McHugh)

#### CIBA-GEIGY

##### *In the Matter of CIBA-Geigy Corporation*

On March 17, the Division joined the Attorneys General of 10 other states in a \$550,000 multi-state settlement with the New Jersey-based CIBA-Geigy Corporation for false advertising and deceptive trade practices related to its

nicotine patch, Habitrol. CIBA-Geigy allegedly failed to disclose important information about the effectiveness and potential risks of the nicotine patch. Under the terms of the settlement, CIBA-Geigy is required to disclose significant facts about Habitrol in direct-to-consumer advertisements and in a written disclosure statement. The Division obtained \$55,000 for the Local Consumer Programs. (McHugh)

#### MARION MERRELL DOW

##### *In the Matter of Marion Merrell Dow*

On June 9, the Division joined with eleven other states in a settlement with Marion Merrell Dow, Inc. regarding its nationwide consumer advertising campaigns for its antihistamines, Seldane and Seldane-D, and its nicotine patch, Nicoderm. The settlement requires Marion Merrill Dow to include in advertisements important information about the efficacy and potential risks of these prescription drugs. The company has agreed to provide the Seldane and Seldane-D information to the public in a package insert and to include the Nicoderm disclosure in a booklet provided to consumers. Finally, of the \$600,000 to be shared among the twelve states for costs, attorney fees or consumer education funds, \$50,000 will go to the Attorney General's SCORE program. (McHugh)

#### HOME IMPROVEMENT & MORTGAGE CASES

##### U.S. FUNDING

##### *Commonwealth v. U.S. Funding, Inc. of America, et al. Hass v. Chrysler*

In July 1993, Suffolk Superior Court approved a class action settlement of homeowners' claims against U.S. Funding, Inc. of America, a large South Weymouth mortgage company now in bankruptcy. Under the settlement agreement, approximately \$2.5 million in mortgage loans will be forgiven by the present holders of defective mortgages. Class members will also be entitled to other financial compensation from a fund of approximately \$375,000. Some U.S. Funding consumers who lost their homes through foreclosure may also be able to repurchase their homes. U.S. Funding had represented to consumers that the proceeds of refinanced mortgages would be used to pay off the prior debt. Instead, U.S. Funding made only partial or, in many cases, no payment of prior mortgages, leaving consumers with outstanding "unfunded" or "underfunded" loans. At the request of our office, the Court also permanently enjoined Guy Scarpaci, operator of U.S. Funding, from ever acting as a mortgage broker or mortgage lender. (Sarason, T. Sullivan)

##### NATIONAL CREDIT UNION ADMINISTRATION

##### *Commonwealth v. Barnstable Community Federal Credit Union, et al.*

In December, the Division filed an emergency lawsuit against the National Credit Union Administration (NCUA) (successor to Barnstable Community Federal Credit Union), a developer, and one of the developer's companies to try to enjoin the foreclosure of a consumer's home in Mashpee. The consumer

had purchased a home from the developer but never received notice of the foreclosure sale because neither the deed nor the purchase money mortgage from Dacey were ever recorded. Judge Cratsley of Suffolk Superior Court signed a Temporary Restraining Order, but it could not be served in time to stop the foreclosure. The Division then filed a Motion for a Preliminary Injunction which the Court granted thereby enjoining NCUA for 30 days from evicting the consumer or selling the home. (Sarason, Kogut)

#### ATLANTIC WEST FINANCIAL RESOURCES

*Commonwealth v. Atlantic West Financial Resources, Inc. and Robert E. Ciardi, Jr.*

On December 22, the Office obtained a settlement with Atlantic West Financial Resources, Inc. and its president, Robert Ciardi, Jr., regarding its alleged unfair and deceptive mortgage lending practices. The complaint alleged that First Atlantic and Ciardi collected application and rate-lock fees from consumers for mortgages that were either not processed or never closed, and then failed to return these fees to consumers. The consent judgment, filed simultaneously with the lawsuit, requires Atlantic West and Ciardi to pay \$50,000 in restitution to consumers and \$50,000 in civil penalties and costs. In addition, the defendants are enjoined for four years from acting as mortgage brokers and lenders, and from engaging in business activities which involve accepting consumers' money in advance of providing a service. (Talbot, Anderson, Cooper, Ormond, Mozzer)

#### FIRST FIDELITY FINANCING GROUP

*Commonwealth v. First Fidelity Financing Group, et al.*

On January 14, a Consent Judgment was filed in Suffolk Superior Court settling the claims of the Commonwealth against Diane C. Zeiner. The Division alleged that Diane Zeiner and co-defendant Kevin Boulais engaged in unfair and deceptive acts by promising to arrange financing for homeowners facing foreclosure, but never providing that funding. Zeiner agreed to pay \$2,500 to the Local Consumer Aid Fund, and agreed not to engage in offering to finance loans for consumers in the future. Kevin Boulais was also indicted in a criminal action. (Dietz, Szafarowicz)

#### FLEET

*Alabama et al. v. Fleet Mortgage Corp.*

On February 8, the Office joined with the Attorneys General of 25 other states to file, in Federal District Court in New York, a consent decree in which Fleet Mortgage Corporation and Fleet Real Estate Funding Corporation have agreed to stop overcharging on mortgage escrow accounts. Fleet Mortgage and Fleet Real Estate Funding allegedly violated the federal Real Estate Settlement Procedures Act of 1975 (RESPA) which creates a formula that determines the maximum amount a mortgage lender can require a customer to pay. The Massachusetts agreement will result in more than \$4 million in refunds and reduced monthly payments to the company's 26,000 Massachusetts consumers. Nationally, one million mortgage holders will receive approximately

\$150 million in refunds and reduced payments. (Sarason)  
NEWPRO WINDOWS

In early 1993, the Division resolved several consumer complaints from senior citizens in the upper Cape Cod area involving the sales practices of Newpro Windows, Inc. Newpro allegedly engaged in high pressure sales tactics. Three consumers, ranging in age from 72 to 88 years, have received deposits back totaling \$5,694 and have been relieved of contractual obligations amounting to \$28,846 for replacement windows. (McVey, Praik)

#### RESOURCE FINANCIAL GROUP

*In re: Brent Lambert*

On April 8, the Office obtained a consent judgment against Dr. Brent Lambert, the principal shareholder of Resource Financial Group, Inc. which is allegedly one of the worst offenders in the home improvement mortgage scams. Under the consent judgment, which is subject to approval by the U.S. Bankruptcy Court and Suffolk County Superior Court, Dr. Lambert is barred from consumer lending in Massachusetts for 10 years, is required to pay a total of \$100,000 to the Local Consumer Aid Fund in the three years following the close of bankruptcy proceedings, and is required to donate \$25,000 in charitable contributions to aid low-income and elderly individuals. (Weber, Sarason)

#### AETNA d/b/a ITT FINANCIAL

*Agreement by and between Aetna Finance Company and the Attorney General of the Commonwealth of Massachusetts*

On April 22, the Division reached a settlement worth approximately \$250,000 with Aetna Finance Company, doing business as ITT Financial Services. The settlement resolves claims regarding Aetna's potential liability as a lender for the financing of home improvements done by Carefree Building Products, Inc. (against which there is a suit pending). Under the terms of the settlement, consumers will receive cash or loan balance reductions, and may also be eligible for loan rewrites at more favorable interest rates. At least 19 consumers are eligible to benefit from the settlement. (Weber, Sarason, Scott, Gagnon)

#### SEACOAST

*Commonwealth v. Home Repair Inc., formerly Seacoast Industries, Inc., et al.*

On April 30, the Division entered into a consent judgment with Home Repair, Inc., formerly known as Seacoast Industries, its president, Robert Finestone, and its vice president, Todd Finestone, for allegedly engaging in unfair and deceptive acts and practices in the home improvement business, including high pressure sales tactics, misrepresentations related to loan and/or mortgage financing, and shoddy work. The judgment provides \$80,000 in restitution to consumers, bars Robert Finestone from the home improvement business for life, and bars Todd Finestone from the business for four years.

(Sherman, Berlin, Dietz, McVey, Marcus, Woo)

### LEAD PAINT

#### DELUXE DELEADING/TIGER HOME INSPECTION/SHAWN HANCOCK

*Commonwealth v. Daniel C. Robinson d/b/a Deluxe Deleading, Tiger Home Inspection, Inc., and Shawn Hancock*

On January 25, the Division filed suit against Daniel Robinson, a deleading contractor, Tiger Home Inspection, Inc., a home inspection company, and Shawn Hancock, a lead inspector, for allegedly violating the state's lead laws. Two apartment buildings in Lowell were supposedly deleading and brought into compliance with lead abatement regulations during March 1992. In subsequent inspections, however, over 200 alleged violations of the lead law were uncovered, including failure to remove thick layers of lead dust after deleading. The complaint requests restitution and civil penalties, and injunctions prohibiting the defendants from performing lead abatement or inspections.

On February 17, a Final Judgment was entered in Suffolk Superior Court with respect to Shawn Hancock's involvement in the case. In addition to returning his lead inspection license and paying \$1,000 to the Local Consumer Aid Fund, Hancock is permanently enjoined from performing lead inspections. (Anderson, Gagnon, L. Russo)

#### ROBERT STEVENS

*Commonwealth v. Robert Stevens*

On February 16, the Division obtained an Assurance of Discontinuance from Robert Stevens, trustee and landlord of residential properties in the Commonwealth. Under the Assurance, Stevens agreed to comply with lead abatement law and regulations, to have all units in which children under age six reside in compliance within a stated period of time, to provide certain lead abatement documents and notifications to the Office, and to pay \$1,500 to the Commonwealth. (Anderson, Gagnon)

#### KEVIN FRENCH

*Commonwealth v. Kevin French*

On June 21, the Office filed suit in Suffolk Superior Court against Kevin French, a Wilmington lead inspector, for allegedly violating the state's lead laws in connection with the abatement and inspection of two properties in Salem. The complaint alleges that French issued letters of abatement compliance for deleading work done by an unlicensed contractor and for deleading work that did not comply with state lead law. In addition, the Office alleges that French performed deleading without a license and without taking proper safety precautions. The complaint seeks an injunction prohibiting French from performing lead inspections for a period of five years, restitution, and civil penalties. (Anderson, Cooper)

## MOBILE HOMES

### PINE HILL ESTATES MOBILE HOME PARK

*Commonwealth v. George A. Bumila, Sr., et al.*

On August 13, the Division filed suit in Southeast Housing Court against Pine Hill Estates Mobile Home Park in Raynham, for allegedly harassing and intimidating their mostly elderly residents. Some of the allegations in the complaint state that Pine Hill Estates and its owner, George Bumila, attempted to close the park illegally, continually harassed and intimidated park residents, enforced unfair and unreasonable park rules, fixed fuel prices, illegally discriminated on the basis of age, and destroyed Commonwealth wetlands. In addition to injunctive relief, the Attorney General is seeking civil penalties, costs, and attorneys' fees. (Morison, T. Sullivan)

## NURSING HOMES

### BEVERLY ENTERPRISES, INC.

*In the Matter of Beverly Enterprises, Inc.*

Beverly Enterprises, a nation-wide nursing home chain, violated licensure regulations by purchasing five Massachusetts facilities without having obtained necessary approvals. Beverly also "paid" far more for the homes than the facilities' medicaid reimbursable basis could support, indicating that the homes were likely to encounter financial and patient care problems. In addressing the matter, the Division obtained an agreement on September 11 under which Beverly refinanced the sales so that a total of \$5,795,492 of debt was transferred from these homes to others owned by Beverly outside the state, paid approximately \$500,000 of medicaid patient costs, and paid a civil penalty of \$39,000. (Dietz)

### CARLYLE HOUSE

*Commonwealth v. Carlyle, Inc., and Bruce Bedard*

On November 9, the Division filed a Consent Judgment in Suffolk Superior Court settling a case brought against The Carlyle House, a Framingham nursing home, and the facility's owner and administrator. The case involved allegations of Medicaid discrimination and the improper discharge of Medicaid patients. Under the terms of the Consent Judgment, the nursing home is enjoined from various discriminatory acts targeting medicaid patients and from discharging or transferring patients without complying with required discharge procedures. The defendants paid \$22,000 in penalties, plus "damages" of \$500 to each of four former patients, a sum calculated not to put their medicaid eligibility at risk. (Dietz)

### HARVARD MANOR NURSING HOME

*Attorney General and Commonwealth by its Department of Public Health v.*

*Harvard Manor Nursing Home et al.*

On November 23, following the termination of the Harvard Manor Nursing Home's federal Medicaid funding, the Consumer Protection Division intervened to have a patient protector receiver appointed to ensure the patients' health and safety, since federal authorities had determined that patients were not receiving adequate care. In addition, the withdrawal of federal funding had resulted in the loss of 50 of the funds for patients' care. (Dietz)

CLIFF HOUSE NURSING HOME

*Attorney General and Commonwealth by its Department of Public Health v. Cliff House Nursing Home, Inc. and W. Mikolinski, Jr.*

In April, the Division obtained the Court appointment of a receiver to protect the patients at Cliff House Nursing Home, an 87-bed facility located in Winthrop, from the risk of serious physical harm as a result of the facility management's fiscal irresponsibility. The Office requested that the Court require the former operators of the nursing home to account for all monies received and expended by Cliff House since the beginning of the year. (Dietz)

ASSOCIATED GROUP HOMES

*Attorney General and Commonwealth by its Department of Mental Retardation v. Associated Group Homes, Inc., Healthnet, Inc., and R. Hill*

By order of the Court on June 23, 1993, the third (and last) of three intermediate care facilities for the mentally retarded formerly run by Associated Group Homes, Inc., a health care provider that we had placed in receivership some years ago, was transferred out of receivership and became part of the Greater Lynn Mental Health & Retardation Association, Inc. Termination of the Salem facility's receivership had been complicated by rate issues and problems related to the impossibility of relocating its patients in comparable facilities at acceptable costs. These issues were resolved in negotiations, under the supervision of the Superior Court with representatives of Rate Setting Commission, Department of Mental Retardation, and Department of Public Works. (Dietz)

NEW PINE GROVE VILLA NURSING HOME

*Attorney General and Commonwealth by its Department of Public Health v. Oxfram, Inc. d/b/a New Pine Grove Villa Nursing Home and S. Hochhauser*

In June, the Suffolk Superior Court entered a Final Judgment by Default which included an award of \$82,920 in damages against the defendants in this nursing home case. We had obtained the appointment of a receiver for the New Pine Grove Villa Nursing Home when the facility's owner/operator, Hochhauser, tried to resolve his financial difficulties by abandoning the nursing home and all its patients. We worked with the receiver to effectuate the purchase and sale of the heavily mortgaged nursing home to a suitable health care provider. We then obtained the Final Judgment with injunctive relief, penalties, costs, and attorneys fees against Hochhauser. (Dietz)

## RETAIL SALES & ADVERTISING

### GREAT EXPECTATIONS

*Commonwealth v. Greatex of Mass., Inc.*

On July 16, the Division filed an Assurance of Discontinuance in Suffolk Superior Court in which Great Expectations, a Newton-based video dating service, agreed not to engage in high-pressure sales tactics. Great Expectations will also pay \$20,000 to the Attorney General's Local Consumer Aid Fund. The Division had received over 60 complaints that charged Great Expectations with allegedly using various high-pressure sales tactics, such as telling the consumer the price would increase significantly if a contract was not signed immediately, taking consumers to an ATM machine so they could withdraw money to pay for a deposit, and denying refunds to most consumers who joined under these conditions. (Dworsky)

### SEARS AUTO CENTERS

*In the Matter of Sears Roebuck & Co.*

On September 2, the Division joined with the Attorneys General in 43 states in a nationwide settlement with the Chicago-based Sears Auto Center. Sears agreed to distribute \$50 coupons to any Sears customers who had certain items installed in their cars from August 1990 to January 1992. Sears expects that the settlement will affect 41,566 Massachusetts consumers and result in more than \$2 million in restitution. In addition, Sears has agreed to reform certain of its policies in order to avoid abuses in its auto repair practices. (Sherman)

### GENERAL ELECTRIC

*In the Matter of General Electric Company*

On November 9, the Division joined the Attorneys General of 32 states in a settlement with the General Electric Company concerning the claims that the company's "Energy Choice" line of light bulbs represents a new, environmentally sound product. The Attorneys General allege that GE made various misrepresentations about its Energy Choice light bulbs including statements that these light bulbs save energy and that using these bulbs could help eliminate pollution from the atmosphere. In fact, most of the energy savings realized from using Energy Choice incandescents are due to the fact that they are simply lower wattage bulbs, and not because they are significantly more efficient. The agreement required GE to pay \$15,000 to each of the 11 original signatory states, including Massachusetts. (Dietz)

### MATTRESS DISCOUNTERS

*Commonwealth v. Mattress Discounters, Inc.*

On December 9, CPD obtained a settlement from Mattress Discounter's to settle multiple charges of false advertising practices. The settlement, filed in

Suffolk Superior Court, requires that Mattress Discounters pay \$950,000, making it the largest false advertising case settlement ever obtained in Massachusetts. Among the allegations put forth by the Division were that Mattress Discounters inflated prices to offset advertised coupon discounts, sold mattress sets without disclosing that box spring supplied contained no springs, and ran never-ending "sales."

The landmark settlement provides \$700,000 in restitution to consumers injured by the alleged deceptive sales practices, \$100,000 in mattresses to be donated to the Massachusetts Coalition for the Homeless, \$100,000 for mediation of consumer complaints at 18 local consumer programs, and \$50,000 for the Attorney General's "SCORE" program. In addition, the settlement lists specific forbidden practices. (Anthony, Hardy, Dworsky)

#### KEYES FIBRE

##### *In the Matter of Keyes Fibre Company*

On March 18, the Division joined with the Attorneys General of nine other states in a \$100,000 settlement that requires Keyes Fibre Company to discontinue claims that its "Chinet Disposable Tableware" products are biodegradable, recyclable, and compostable. The states allege that various claims made by Keyes Fibre are misleading because, for instance, the tableware cannot be recycled through curbside recycling programs and can only be composted in composting facilities for paper products that are available to less than one half of one percent of the U.S. population. (Dietz, Griffin, McHugh)

#### EGGLAND'S BEST

##### *Commonwealth v. Egglan's Best, Inc.*

On April 8, the Office filed a false advertising lawsuit against Egglan's Best, Inc., marketers of Egglan's Best Eggs, which targeted cholesterol-conscious and other consumers with the message that they could eat up to 12 eggs per week without raising their cholesterol levels. The lawsuit alleged that advertised claims such as, "Now you can eat real eggs again... and not increase your serum cholesterol," were deceptive and misleading, and that the one short-term study which the company used to support its claims was seriously flawed. In addition to civil penalties, the lawsuit seeks corrective advertising to counteract the false impressions created by the company's advertising campaign. (Anderson, McHugh, Marcus, Ecker, Thomson)

#### CRIMINAL ACTIONS

#### ROBERT MANOUKIAN

##### *Commonwealth v. Robert Manoukian*

In August, a Middlesex Grand Jury returned a total of six indictments against Robert Manoukian who was charged with larceny and forgery in two separate cases. The indictments result from a joint effort by the Consumer Protection Division and the Criminal Bureau. In the first case, Manoukian was indicted on three counts of larceny over \$250. The charges stem from a scam

whereby Manoukian allegedly bilked 84 members of the Ladies Guild of St. George's Albanian Church out of \$15,855. Manoukian allegedly promised round trip bus transportation, overnight accommodations and meals at various restaurants in New York, none of which were delivered. Manoukian refunded approximately \$10,000 to the victims after complaints were made to the Consumer Complaint Section.

#### STEPHEN THIBAUT

##### *Commonwealth v. Steven Thibault*

In December, Stephen Thibault was indicted on twelve counts of larceny over \$250. Thibault was doing business as a kitchen and bath renovator under the name T'BO's, Inc. in the City of Everett. He allegedly stole over \$90,000 in funds solicited over a three year period from customers for work that was never performed and products that were never delivered. The case first came to the attention of the office through the consumer complaint section. It is pending in Middlesex Superior Court. (Bernstein, Sarason, Berlin)

#### CARRIE'S BUS LINES

##### *Commonwealth v. Camacho*

On March 3, Paul Camacho, owner and president of Carrie's Bus Lines and Tours, Inc., was indicted by a Middlesex County Grand Jury on 18 counts of larceny over \$250 and 8 counts of larceny under \$250. Camacho allegedly offered bus tour packages and took payments from consumers for bus transportation and hotel and casino accommodation, but never ran the trips. In most instances, Camacho did not have any confirmed reservations with hotels and casinos for the paying consumers, many of whom were senior citizens. (M. Sullivan, Mozzer)

#### FRANK CAMOSCIO & PAUL YOCAS

##### *Commonwealth v. Camoscio; Commonwealth v. Yocas*

On April 9, Frank Camoscio and Paul Yocas were indicted by a Suffolk County Grand Jury on multiple criminal charges, including unauthorized practice of podiatry after revocation of licenses and possession of a Class E controlled substance. (E. Sullivan, Goldberg)

#### ROBERT LISI and RUSSELL ADAMS

##### *Commonwealth v. Robert Lisi, Russell Adams*

On June 1, a Bristol County Grand Jury indicted Robert Lisi and Russell Adams, two Rhode Island men who allegedly solicited funds for a fraudulent telemarketing operation, on charges of larceny, attempted larceny, and deceptive solicitation practices. Lisi and Adams allegedly contacted private businesses and individuals and falsely represented that contributions would go toward drug education programs in the local schools, fire safety education,

local police and fire departments, and the "McGruff the Crime Dog" campaign of the National Crime Prevention Council. Prosecutors allege that the funds solicited by the defendants were not distributed to any of the educational programs. (Bernstein, Matlack)

CHESTER MCLAUGHLIN, JR.

*Commonwealth v. Chester McLaughlin, Jr.*

On June 3, Chester McLaughlin, a former licensed deleading contractor, pled guilty in Brockton Superior Court to eight counts of larceny over \$250 and three counts of larceny under \$250. McLaughlin, who operated a company called Allfaze Construction, stole more than \$23,000 over a five-year period by promising to provide materials and services to homeowners who were required to remove lead from their property. He never delivered the materials, nor completed any of the work after receiving payments. On June 16, the Court ordered McLaughlin to refrain from deleading contracting for two years and sentenced McLaughlin to two-and-one-half years in the House of Correction, suspended for two years. He was also ordered to pay \$14,821 in restitution and provide 200 hours of community service. (Bernstein, Cooper, Brownsberger, Simmons)

WILLIAM REGO

*Commonwealth v. William Rego et al.*

On June 23, William Rego, Nancy Helger, and Leo Couture were indicted by a Bristol County Grand Jury on various criminal charges in connection with their alleged involvement in a series of fraudulent car sales involving more than \$50,000. The indictments relate to allegations that Rego, who was indicted on 12 counts of larceny over \$250 and two counts of engaging in the sale of a motor vehicle without a license, took money from consumers, but never delivered the vehicles or returned the money. In some cases, Rego did not even own the cars. Helger was indicted on two counts of engaging in the sale of a motor vehicle without a license and Couture was indicted on one count of the same. (Bernstein, Ciardi)

## OTHER INITIATIVES

### RETAIL CREDIT CARD INTEREST RATES

On October 28, as part of National Consumers' Week, the Division released a survey conducted by the Consumer Protection Division of retailer-issued credit card interest rates. The survey showed that almost half of the 23 retailers surveyed charge credit card users between 20 and 23.5 percent interest and none charge less than 18 percent. Attorney General Harshbarger asked that Massachusetts retailers voluntarily lower their credit card interest rates to those comparable with bank-issued credit cards which average between 15.49 percent for gold cards and 17.15 percent for standard cards, more adequately reflecting today's lower cost of funds. (Dworsky)

### CITE YOUR RIGHTS CARDS

In October, the Division released the first set of "Cite Your Rights" cards designed to teach consumers basic consumer rights in the areas of store return policy, defective goods, automobile lemon laws, security deposits, and a half dozen other areas. The National Association of Consumer Agency Administrators (NACAA) recognized Edgar Dworsky for his work in producing the "Cite Your Rights" cards by giving him top honors in the category of print media in a large agency. Distribution of the cards is through the 8400 line and local consumer programs. (Dworsky)

### CONFERENCE FOR ELDERS

On April 23, the Office, in cooperation with the Massachusetts Association of Older Americans, sponsored a consumer awareness conference for elders. The conference, held at Brandeis University, was designed to help elder consumers make more informed buying decisions, identify telemarketing and mail order scams, and learn how to file complaints with the Office's Consumer Complaint Hotline. (Dworsky, M. Sullivan, Praik)

### NAAG CONFERENCE

On May 6-8, the Office hosted the National Association of Attorneys General Spring Consumer Protection Seminar. Some of the topics addressed by various Attorneys General and Assistant AGs were debt collection, bankruptcy, fraud in automobile sales, ethics, and public service announcements.

### REGULATIONS & STATUTES

#### HOME IMPROVEMENT CONTRACTOR LAW

This law regulating home improvement contractors signed December 31, 1991, took effect on July 1, 1992. The law prohibits home improvement contractors from acting as mortgage brokers or lenders in connection with the home improvement contracts they enter into, requires a written contract for any job over \$1,000, requires that contractors register with the Bureau of Building Regulations and Standards, establishes a guaranty fund to provide limited restitution to consumers who have been defrauded by a registered contractor but are unable to collect on a judgment, and provides for criminal penalties for those who fail to obtain a certificate of registration. An additional bill designed to streamline the process for injured consumers to obtain access to the "guaranty fund" currently is in the legislature. (McVey)

#### MORTGAGE LENDER AND BROKER REGULATIONS

The Attorney General's regulations under c. 93A governing mortgage lenders and mortgage brokers were published in May and took effect on August 1, 1992. The regulations require that all brokers and many lenders provide borrowers with standardized copies of the Attorney General's Mortgage Broker and Lender Disclosure forms, which identify the essential features of a

mortgage loan transaction as well as the cost and interest rate for the borrower. The regulations also require that lenders and brokers must take reasonable steps to assure that borrowers, including non-English speaking consumers, understand the loan transaction. Unconscionable rates or other loan terms, advertising ploys such as "immediate approval" and "immediate closings," are prohibited, and the use of other advertising terms such as "bad credit, no problem" and avoid foreclosure are restricted. These regulations were promulgated to prevent future abuses involving second mortgages or refinancing, while creating a level playing field for legitimate businesses. (McHugh, Sarason, Anthony)

#### MOBILE HOME PARK LEGISLATION

An omnibus bill amending the Manufactured Housing Statute was enacted by both the House and Senate in November and was forwarded to the Governor for his signature. Governor Weld sent it back to the legislature with suggested minor amendments. The revised bill passed the House, but died in the Senate at the end of the legislative session. The bill was refiled in 1993.

This important legislation seeks to protect the estimated 35,000 mobile home tenants in Massachusetts, many of whom are elderly. The law would require that park owners who wish to close their park reimburse tenants either the fair market value of their home or pay the relocation costs, give tenants 120 days to sell their mobile homes after they have been evicted, mandate that the park owners give new tenants the option of a five-year lease term, clarify that residents cannot be unreasonably restricted in their choice of vendors of goods and services, and simplify and expand the right of first refusal accorded to a tenant association when a park is to be sold or leased. The Attorney General's Office, in conjunction with Senator-elect Marc Pacheco, drafted the legislation in response to complaints received by the Consumer Protection Division. (Morison, Sherman, T. Sullivan)

UPDATE: On August 13, 1993, Governor Weld signed the bill into law. The bill became effective immediately.

#### LONG TERM CARE FACILITY REGS: PUBLIC HEARING

On April 8, the office conducted a public hearing on a draft of completely revised regulations governing Long Term Care Facilities. Since 1976, 940 CMR 4.00 *et seq* provided a series of rights and remedies to residents of rest homes and nursing homes in the Commonwealth. However, over time the need for modification, revision and expansion of the original regulations became increasingly obvious. The proposed revision of 940 CMR 4.00 *et seq* seeks to address this need by updating the old so-called Nursing Home regulations. (Dietz)

#### CONSUMER COMPLAINT SECTION

During fiscal year 1993, the Consumer Complaint Section opened 2,001 cases for mediation and closed 2,626. In addition, the clerical staff referred

approximately 2,500 written complaints to state agencies, other states, local consumer programs, and divisions within the Attorney General's Office.

A Task Force has been organized to enforce the new Home Improvement Contractor Law. As a result, the Complaint Section has developed protocols, mediated cases, and found a number of contractors to be operating without the proper registration. Over 100 cases, with an estimated value of \$70,000, have been assigned to mediators since the inception of the program.

Finally, approximately eighty college students were recruited and trained to participate in the Undergraduate Internship Program. These interns mediated individual consumer complaints, and monitored and developed cases against companies who displayed patterns of unfair and deceptive practices.

#### LOCAL CONSUMER PROGRAM/FACE-TO-FACE MEDIATION SERVICES

The Local Consumer Program/Face-to-Face Mediation Services are responsible for the administration of the Local Consumer Aid Fund (LCAF). The LCAF supports the state-wide network of nineteen Local Consumer Programs and seven Face-to-Face Mediation Programs through annual grants for the resolution of consumer problems. The Local Consumer Program Coordinator and Mediation Services Coordinator and Assistant Coordinator provide continuing training and technical assistance to grant recipients. The LCPs and FTFMPs, working in cooperation with the Office of the Attorney General, resolve thousands of complaints each year, and also identify patterns of unfair and deceptive acts and practices in the marketplace.

Funding for the local programs is allocated by the General Court pursuant to G.L. c.12 §11G. In fiscal year 1993, \$605,901 was appropriated by the legislature to the LCAF. Ten percent of that figure (\$60,590) was retained by the Office of the Attorney General for administrative purposes. An additional \$155,690, which had been earmarked for the LCAF from settlements of consumer cases, was used to supplement the legislative appropriation, for a total grant expenditure of \$701,000 in 1993.

In 1992, the nineteen local consumer programs handled over 12,000 written complaints, recovering over \$2.5 million for consumers in the Commonwealth. The seven face-to-face mediation programs held 1067 mediations, with 891 agreements made, for a settlement rate of 83%.

In addition to its consumer complaint resolutions, the Mediation Services program has continued to implement its school-based mediation project, Student Conflict Resolution Experts (SCORE). There are now 16 schools taking part in the program, and the Office of the Attorney General has provided \$100,500 in funding to these programs, from settlements in consumer and other cases. In 1992/93, 700 mediations were held in these program; 95% resulted in agreements. Mediation Services also coordinated emergency responses to crises in Medford High, Boston English High, Haverhill and South Boston High. Volunteer mediators responded to these crises using their skills to resolve disputes and facilitate discussion to vent feelings. A number of the disputes involved threats of physical violence and racial issues, and SCORE was extremely effective in defusing the situations, providing a valuable resource to the affected schools.

In June 1993, the Charles Hayden Foundation of New York gave \$75,000 to

SCORE and Metropolitan Mediation Services (MMS) to pilot a 3-year comprehensive violence prevention program at Boston English's High School in Jamaica Plain. (Szafarowicz, Grant, Washburn, and many others)

## ENVIRONMENTAL PROTECTION DIVISION

The Environmental Protection Division (EPD) serves as litigation counsel on environmental issues for various state agencies, particularly those within the Executive Office of Environmental Affairs. EPD handles all of the Commonwealth's civil litigation to enforce environmental protection programs established by state statutes and regulations. EPD brings suits to enforce the Commonwealth's regulatory programs governing air pollution, water pollution, water supply, waterways, wetlands, hazardous waste, solid waste, billboards and pesticides. In addition, EPD is responsible for the Commonwealth's asbestos cost recovery litigation and matters arising from the operation of nuclear power plants. Based on the Attorney General's broad authority to protect the environment of the Commonwealth, EPD initiates and intervenes in state and federal litigation, and participates in administrative hearings before federal agencies on significant environmental issues.

### MONEY RECOVERED FOR THE COMMONWEALTH TREASURY:

Civil Penalties and Payments:	\$3,269,734
Hazardous Material Cost Recovery:	\$3,721,328
Asbestos Cost Recovery/Damages:	\$1,188,072
<b>TOTAL:</b>	<b>\$8,179,134</b>

### 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.

## I. STATE ENFORCEMENT

One of the most important functions of EPD is to bring litigation to enforce state and federal environmental statutes. In the past fiscal year, EPD handled numerous major enforcement cases, including the following:

### A. Air Pollution

*Commonwealth v. CITGO Petroleum Corp.*: EPD obtained a consent judgment that requires air pollution control equipment for CITGO's truck and barge loading operations. In addition, the settlement requires CITGO to pay a total penalty of \$1.7 million. Pursuant to the settlement, CITGO paid \$200,000 to the Massachusetts Environmental Trust, a board administered by the Commonwealth to fund projects to benefit the Massachusetts environment.

*Commonwealth v. Teknor Apex Company*: This case involved a factory in Attleboro that allegedly violated the state's Clean Air Act. As the case progressed, EPD took a multi-media approach that examined all environmental

compliance issues uncovered at the plant. EPD obtained a consent judgment in August, 1992 that required the company to pay an \$850,000 penalty, and to invest over \$2 million in environmental improvements, including the installation of air and water pollution treatment equipment. The judgment also required the company to come into compliance with environmental permitting requirements, to assess potential soil contamination at the site, and to reduce the use of toxics in its manufacturing processes.

*Commonwealth v. Consolidated Rail Corp. (Conrail)*: This case is the first of its kind in the nation to challenge the freight rail industry's practice of continuously idling its diesel locomotives. Unnecessary locomotive idling causes air pollution and creates severe smoke and nuisance problems for those living near train yards. EPD entered into a partial settlement agreement in the case under which Conrail agreed to stop unnecessary idling in warm weather completely, and to reduce its idling in cold weather. As part of the settlement, Conrail also agreed to relocate idling locomotives to areas that reduce their impacts on nearby residents, and to test some innovative technology that could provide an alternative to winter idling. Other issues, including the railroads claim that federal law preempts the Commonwealth's request for additional relief, are still pending.

*Commonwealth v. Findley*: This air pollution case involved a company in bankruptcy. As a result of a settlement approved by the bankruptcy court, the company will bring its emissions of certain toxic pollutants into compliance with the Clean Air Act and pay \$100,000 out of the bankrupt estate.

*Commonwealth v. Brewer Petroleum*: This matter involved the alleged failure of an employee of a gasoline distributor to comply with state air pollution regulations that mandate the use of "vapor recovery equipment" when gasoline is transferred from a tank truck to tanks at service stations. EPD obtained a consent judgment in February, 1993 that enjoined further violations of the regulations and required the defendants to pay \$40,000 in civil penalties. The settlement is also noteworthy in that it required defendants to publish an "open letter" to the gasoline distributor industry notifying it of the terms of the settlement and urging compliance.

## B. Water Pollution/Water Supply

*Commonwealth v. New England Power Company*: New England Power allegedly used an inadequate chlorination system at its Brayton Point facility that caused a large fish kill. EPD obtained a consent judgment in July, 1992 that required the power company to switch to "targeted chlorination" to reduce substantially the use of chlorine. The judgment further required the power company to pay \$500,000, including \$315,000 in penalties, \$100,000 in environmental damages, \$75,000 to the Atlantic States Marine Fisheries Commission for a striped bass management plan, and \$10,000 towards an environmental education project.

*Commonwealth v. Leahy Construction Company*: In July, 1992, EPD resolved a case involving illegal disposal of "septage," the concentrated waste product produced by pumping out septic tanks. EPD obtained a consent judgment that required the defendant to pay \$135,000, including a \$100,000 penalty, \$30,000 for an education project on the hazards of septage, and \$5,000 to the

Town of Holden Conservation Commission.

*Commonwealth v. Amesbury Circuit:* EPD brought suit against an Amesbury manufacturer for allegedly discharging contaminants into the sewer system in violation of water pollution laws. The case was resolved through a consent judgment that required the company to install wastewater treatment/recycling equipment and to pay a \$105,000 penalty.

*Commonwealth v. Duro Industries:* The Commonwealth alleged that the defendant violated state water pollution and hazardous materials laws by pumping the residual chemical contents of a storage tank into the sewer system. The defendant paid a \$40,000 penalty.

*MWRA Cases:* EPD began a new enforcement project with the Massachusetts Water Resources Authority (MWRA). For the first time, EPD initiated litigation on behalf of the MWRA to enforce violations of MWRA's regulations governing the discharge of contaminants into the sewer system that may discharge into Boston Harbor. This project resulted in four consent judgments mandating compliance with MWRA permits and regulations, and requiring payment of a total of \$515,000 in penalties. The cases involved H.B. Fuller Corp. in Wilmington, Regalite Plastics Corporation in Newton, Lapuck Laboratories in Watertown, and Laser Photonics in Bedford.

*Municipal Septage Cases:* A major environmental problem in the Commonwealth has been many towns' use of unlined lagoons for the disposal of septage. EPD and the Department of Environmental Protection initiated an ambitious project to close down unlined lagoons across the Commonwealth. As a result, lagoons in Sandwich, Truro, Wellfleet and Provincetown have been closed. EPD is currently seeking closure of noncomplying lagoons in other towns.

*Commonwealth v. City of Gloucester:* An important part of EPD's work is to ensure that the municipalities of the Commonwealth adequately dispose of the sewage generated by their residents. In close cooperation with the federal government, EPD obtained a consent decree requiring the City of Gloucester to eliminate illegal discharges of raw sewage in north Gloucester by extending its sewer system to this area. The Commonwealth and Gloucester recently agreed to modify the federal court consent decree to allow the city to try to demonstrate that innovative subsurface disposal systems may be used in a portion of north Gloucester as an alternative to extending the sewer system.

### C. Hazardous Waste

EPD brings lawsuits against responsible parties to remedy contamination caused by oil or hazardous materials, including litigation to recover costs incurred by the Commonwealth when it undertakes cleanup actions. Major hazardous waste cases that EPD handled in the last fiscal year include the following:

*PCB Contamination in New Bedford Harbor:* This case was brought to its full conclusion in this fiscal year. Total recovery by the state and federal government is approximately \$110 million. Most of this money will be used for the remediation and restoration of natural resources in New Bedford Harbor.

*Charles George Landfill:* This case involves a heavily contaminated landfill in Tyngsborough. In December, 1992, the state and federal governments lodged a settlement with federal court that provides for payment by a number of defendants of over \$35 million in costs and damages, of which \$12 million will go to the Commonwealth. In July, 1993, the Commonwealth obtained a consent decree with the junior members of the George family to pay \$3.1 million in costs and damages in connection with the landfill.

*Sullivan's Ledge Site:* This Superfund site in New Bedford is on the National Priorities List. The state and federal government obtained a consent decree in 1991 requiring private parties to perform a multimillion dollar cleanup on a portion of the site. In the last fiscal year, the governments reached a similar settlement for the remaining portion of the site.

*Silresim Site:* The Silresim Superfund site in Lowell is a five-acre abandoned chemical waste recycling facility. The Commonwealth and the United States entered a consent decree in April, 1993 that requires 230 defendants to pay \$41 million in a cash-out settlement for remediation of the site.

*McMahon v. Amoco:* This matter involved leaking underground gasoline storage tanks that threatened to contaminate Provincetown's principal wellfield. Under a consent judgment entered this fiscal year, the Commonwealth will receive \$1.8 to \$1.9 million, and Provincetown approximately \$1.2 million, to reimburse them for costs incurred or to be incurred in abating the problem.

*In re: The Circle K Corporation:* Under a settlement filed in bankruptcy court, the Commonwealth will receive approximately \$839,000 to be used toward the cleanup of various sites contaminated by leaking underground gasoline storage tanks.

*In re: Microfab:* In another case involving a bankruptcy, the Commonwealth reached a settlement with the trustee-in-bankruptcy that freed up \$400,000 to be used toward the cleanup of a hazardous waste site in Amesbury.

*Commonwealth v. Karam (a/k/a First Church):* This case involved contamination from underground gasoline tanks that leaked from a gas station into a nearby church in Weymouth. Pursuant to a consent judgment obtained in 1993, the Commonwealth will recover \$700,000 in cleanup costs.

#### D. Wetlands

*Commonwealth v. Scannell:* EPD obtained a permanent injunction barring the defendant from opening "great ponds" on Nantucket, a practice that involves digging trenches between the ponds and the ocean. The defendant had repeatedly engaged in this practice, with attendant destruction of enormous areas of wetlands and wildlife habitat. The court enjoined such action unless all necessary approvals are first obtained.

*Commonwealth v. Dicroce:* The court ruled that the defendant illegally altered several acres of wetlands in Raynham. EPD also obtained a pre-judgment attachment in the amount of \$100,000 to secure the Commonwealth's penalty claims.

#### E. Pesticides

*Commonwealth v. Baptiste:* This case involved an alleged misuse of pesticides

in a cranberry bog that killed fish in a nearby ocean estuary. The consent judgment prohibited use of pesticides on the cranberry bog until the defendant implemented an effective water management plan, and imposed a \$30,000 penalty.

#### *F. Deceptive Environmental Advertising*

Environmental awareness has generated consumer demand for products that have a reduced impact on the environment. Unfortunately, some companies have attempted to take advantage of this development by making deceptive statements about just how "green" their products are. EPD and the Consumer Protection Division have been involved in a multi-state Environmental Marketing Task Force that has issued recommendations for responsible environmental advertising as well as taken enforcement actions against companies engaged in allegedly deceptive advertising. For example, the office reached a settlement with General Electric Company prohibiting advertisement of its "Energy Choice" lightbulbs as saving energy, reducing pollution or otherwise benefitting the environment relative to other bulbs, until the company can substantiate such claims with competent scientific evidence. The settlement also required GE to pay \$165,000.

### II. CLEAN STATE INITIATIVE

During the past year, EPD also focused on Attorney General Harshbarger's clean state initiative. The clean state initiative seeks to ensure that the state's own facilities are in compliance with environmental laws and that any environmental problems at state facilities are addressed promptly. Discussions between the AG's Office and Governor Weld's Office resulted in Governor Weld's issuance of an executive order designed to bring state agencies into compliance. Attorney General Harshbarger will monitor implementation of the executive order.

### III. INTERVENTION IN FACILITY SITING PROCEEDINGS

EPD intervenes in facility siting proceedings when it determines that such intervention is necessary and appropriate to protect the public health or the environment. In the past year, EPD has been involved in ongoing proceedings in opposition to the siting of coal-fired power plants that will produce significant amounts of air contaminants. These proceedings involve the Silver City facility in Taunton and the Eastern Energy facility in New Bedford. In addition, EPD has intervened in the siting of the Interpower facility in Halfmoon, New York because, due to prevailing winds, the Berkshires will suffer the maximum acid-deposit impacts from the proposed facility.

### IV. DEFENSIVE CASES

One of the most important functions of EPD is the defense of lawsuits challenging the regulatory and enforcement actions of state environmental officials and agencies. These cases range from scores of small administrative

appeals that challenge state permit decisions to larger "impact cases" involving, for example, wholesale challenges to state environmental regulations. For example, in this fiscal year EPD prevailed in defenses against challenges to the Commonwealth's tidelands and wetlands protection regulations.

#### V. *AMICUS PARTICIPATION*

EPD participates as *amicus curiae* in matters that affect legal rights of the Commonwealth. This year, EPD filed a number of important *amicus* briefs, including one in a suit in federal court in New York defending states' ability to adopt air pollution regulations requiring low emissions automobiles.

#### 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.

To protect the public interest in this area, more than 8,000 charities are registered with the Division, as well as 199 fundraisers operating in Massachusetts. A charitable organization is one which is non-profit, whose purpose is charitable and which benefits a portion of the public; in addition to philanthropic organizations, examples of public charities include nonprofit hospitals, schools, social service providers, and cultural organizations. As well as registering and obtaining financial reporting by charitable organizations and fundraisers, the Attorney General is the defendant in all proceedings brought in the Supreme Judicial Court to wind up the affairs of a charitable organization.

In addition to enforcement of laws requiring annual reporting by public charities operating in the Commonwealth, the Division focused its activities during the last fiscal year in three primary areas: enforcement litigation and legislative reform to address deception and fraud in charitable fundraising; estate and trust actions to ensure charitable trust funds are appropriately administered and applied; and corporate governance and oversight initiatives to ensure charitable governing boards are carrying out their fiduciary duties of due care and loyalty.

In partnership with the Attorney General's Advisory Committee on Public Charities, the Division has also undertaken a continuing public education campaign. In June 1993, the Attorney General hosted a statewide conference for charity board members and issued "The Attorney General's Guide for Board Members of Charitable Organizations," containing recommendations in key areas of charity stewardship.

#### *SOLICITATION OF CHARITABLE FUNDS*

The Attorney General takes affirmative legal action against charities and

professional fundraisers for unfair or deceptive solicitation practices and to enforce their fiduciary duties with respect to funds raised. In addition to injunctive relief, he may seek restitution of funds intended by the public to benefit a specific charity, or particular charitable purpose, penalties, and fees.

Following are examples of deceptive charitable solicitation cases in which the Division was involved in the last fiscal year:

*BLS Concepts d/b/a Safety Fact/Safety First, Barry Singer, Fleet Associates, James Linehan, and Mitchell Brown*

In May, 1993, the Division brought suit against two professional solicitors alleging that they deceptively solicited charitable funds from the public by falsely representing that: (i) a for-profit New York company, Safety Facts/Safety First, was a charity; and, (ii) that donations to it would benefit Massachusetts school children through distribution of safety education materials in their schools. At the same time, a consent judgment was obtained against defendant Safety Facts/Safety First, permanently banning the corporation from doing business in Massachusetts. Stipulated preliminary injunctions also entered against the remaining defendants and litigation is on-going.

*The Chosen Children Foundation. Inc., Joel Weinstein and Eric Weinstein*

After ordering the officers of this charity for handicapped children to turn control over to a temporary receiver, in February, 1993, the court entered a preliminary order banning its directors from fundraising anywhere in the country, and ordering expedited discovery. In bringing suit against the Foundation and its directors, Joel Weinstein and his son Eric Weinstein, the Division seeks, *inter alia*, to permanently enjoin the Defendants from engaging in deceptive solicitation practices through the pervasive placement of coin collection cans in stores across New England and telephone sales of advertising throughout the country. Misrepresentations made in the course of these solicitations included leading potential donors to believe their donations would support Make-A-Wish, an unconnected and well-established charity, and false representations that monies collected would be used for charitable purposes, when in fact, they were used for personal enrichment.

*Elite Systems, Robert Betti, Jeffrey Young and Howard Kustanovitz*

Following an investigation conducted in conjunction with the Registry of Motor Vehicles, in October 1992, the Division filed a complaint and obtained an agreed-to preliminary injunction prohibiting the defendants in this deceptive solicitation case from engaging in charitable fundraising until further notice. The complaint alleges that the defendants deceived the public by masquerading as inspectors with the Registry, State Fire Examiners office and local fire departments; made coercive suggestions of favorable treatment in return for a donation; and falsely represented that funds raised would be used for charitable purposes, when, in fact, they were used for personal enrichment.

*Association of Retired Police Chiefs. Inc. and Samuel Farrell*

The Division filed suit and obtained a stipulated preliminary injunction

against this allegedly phony police chiefs organization and its president, Samuel Farrell, banning them from soliciting charitable funds during the course of litigation in May, 1993. In its complaint, the Division alleges that Farrell deceived donors by falsely stating that the chiefs organization was comprised of local police officers and that donations would be used to fight domestic and child abuse.

*David Gargano*

In July, 1992, judgment was obtained in this civil and criminal contempt action filed against David Gargano, the ring leader of a fraudulent fund-raising group which raised more than \$200,000 in charitable donations by impersonating police officers and other law enforcement officials. The court ordered Gargano to pay \$100,000 in civil penalties and permanently barred him from engaging in telemarketing activities of any kind in Massachusetts. Concurrently, the Criminal Bureau prosecuted Gargano on larceny and deceptive solicitation charges, to which he pleaded guilty and was sentenced to three-and-one-half years to five years at MCI-Cedar Junction.

*Global Entertainment and Richard Garden*

"The Big Circus" permanently folded its tent in Massachusetts, after a consent judgment was obtained in November, 1992, against a Sarasota, Florida corporation and its owner. In this case, the defendants approached non-profit groups in the Commonwealth, offered to raise funds for them by putting on circuses, and later cancelled the shows after tickets had been sold. In addition to a permanent injunction prohibiting future circus promotions or charitable solicitation campaigns, the defendants agreed to pay restitution to two organizations who sold tickets for the circus in an effort to raise funds.

*David Giovannucci d/b/a Professional Consultants and International Missing Children's Foundation*

In March 1993, the Division filed suit and obtained a consent judgment against David Giovannucci, a professional fundraiser doing business as Professional Consultants, requiring him to pay a \$13,000 fine and prohibiting him from engaging in deceptive fundraising practices in the future. Three police and firefighter unions also signed Assurances of Compliance in this case and paid penalties and/or restitution in settlement of claims that Giovannucci's telemarketers represented themselves as police officers or firefighters and misled the public to believe all of the money donated would be used for charitable or governmental purposes when donations were actually used for union purposes. A preliminary injunction has been obtained against International Missing Children's Foundation, a California based charity on whose behalf Giovannucci was also soliciting, and litigation against this defendant is in progress.

*National Awareness Foundation. Sean O'Leary, O'Leary Enterprises, Marcus Smith, Bruce Derosier, Vincent Marchetti d/b/a Consult Telecommunications.*

In January 1993, the Division brought suit against the National Awareness

Foundation, a Washington D.C. based charity which raises money under the name "Hugs Not Drugs," and obtained a consent judgment imposing a one year ban on all charitable solicitation by NAF in the state and \$15,000 in restitution and fees. In its complaint against this charity and its professional solicitors, the Division alleged the Defendants engaged in deceptive fundraising tactics by falsely implying "Hugs Not Drugs" was a local charity and stating that funds raised would benefit Massachusetts children through distribution of a drug awareness workbook in the local schools when, in fact, those claims were largely untrue. Consent judgments were subsequently obtained against Defendants Bruce Derosier, New Hampshire based Vincent Marchetti d/b/a Consult Telecommunications, and O'Leary Enterprises, Inc. Preliminary injunctions are also in place and litigation is ongoing against the remaining defendants.

*Kenneth Singer and Nationwide Productions. Inc.*

In a judgment obtained in November, 1992, in this civil contempt action, a Stoughton man who was the sole director and employee of Nationwide Productions, Inc. was ordered to pay \$50,000 in civil penalties and was permanently enjoined from engaging in charitable solicitation in the Commonwealth or sitting on the boards of charitable organizations. Among other things, the defendant sold \$100 tickets to an awards dinner ostensibly held as "a tribute to the most neglected segment of our society, the HANDICAPPED," and as a way to provide "ROLE MODELS" to other disabled people," while disguising the true purpose of the event — which was to provide himself with a source of income. This contempt action was prompted by Singer's violation of two prior court orders.

*Suffolk County Corrections Officers Local 419. Jake V. Kinoian d/b/a J.V.K. Enterprises, Kevin Flynn d/b/a Futuretel Communications.*

Court orders requiring a union of corrections officers and their fundraisers to pay \$32,000 to the Attorney General's Local Consumer Aid Fund and prohibiting them from conducting deceptive fundraising campaigns in the future were obtained in March, 1993. The Division's complaint alleged that Suffolk County Correction Officers Local 419 and their professional fundraisers violated the state's charitable solicitation and consumer protection laws during a phone solicitation campaign. The fundraisers misled the public to believe they were corrections officers raising funds solely for the benefit of certain hospital pediatric wards and failed to inform donors that they were paid solicitors.

*United Citizens Against Drugs and Richard Gold et al. d/b/a Massachusetts Charitable Services*

A consent judgment obtained in June, 1993, against Massachusetts Charitable Services, a local fundraising company, banned it from engaging in charitable solicitation in Massachusetts for five years. In a separate consent judgment United Citizens Against Drug (UCAD), a California based charity, agreed to pay \$4,500 to the Attorney General's Local Consumer Aid Fund and to injunctive provisions governing future fundraising. The Division's com-

plaint alleged that Massachusetts Charitable Services, on behalf of UCAD, engaged in deceptive charitable solicitation by falsely representing UCAD as a local charity and by falsely stating that local schools were affiliated with the solicitation and/or would benefit from donations to it.

### *ESTATES AND TRUSTS*

In furtherance of his authority to "enforce the due application" of charitable trust funds and to "prevent breaches of trust in the administration thereof," 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. Accordingly, the Division continued to handle a large volume of cases in this area involving such matters as proposed allowance of accounts, will compromises, sale of real estate, change of purposes or beneficiaries of charitable trusts and bequests, amendment of charitable trusts to meet IRS requirements, and termination of charitable trusts under G.L. c.203, §25. For example:

#### *Baybank South v. Attorney General (Part I)*

Partial summary judgment was obtained in this *cy pres* action arising out of cessation of operations at the Massachusetts Osteopathic Hospital. In granting the Division's motion, the Court found that general charitable donative intent will permit a three million dollar gift establishing the Florence Robertson Trust to be applied *cy pres* at the cessation of hospital operations. Part II of the case will concern selection of a successor beneficiary to receive trust income.

#### *Samuel Colsia Trust*

In April 1993, the Division consented to termination of this trust and distribution of funds to the family after negotiating a settlement for a substantial sum to be distributed immediately for the benefit of disabled persons in the Commonwealth, in lieu of a trust with similar purposes to be established in 40 years.

#### *DeTorrijos. et al. v. Miliora, et al.*

The Division successfully intervened in this civil action, thereby ensuring that charitable assets contained in the Theosophical Society Trust are protected while issues of internal governance are litigated.

#### *Fuller Trust, Inc.*

Established in 1933 under the will of Caroline Weld Fuller, the Fuller Trust's original purpose was to provide housing for women in need of a home at a reasonable expense. In 1988, the Trust's trustees obtained authorization to proceed with development of a life care community, which has yet to be built. In May, 1993, the Probate Court reserved and reported seven questions to the Massachusetts Appeals Court, later lodged by petition in the Supreme Judicial Court of Massachusetts, in this matter concerning trustee expenditure of almost all of the Fuller Trusts liquid assets on pre-development costs, including

sizeable legal fees to the Trustees law firms, to develop the life care community.

Prior to the reservation and report, the Division negotiated a settlement agreement resulting in resignation of two trustees, both lawyers with prominent Boston area firms, and repayment of \$250,000, each, to the Trust. It was the position of the Division that the trustees' actions caused the development of the facility to stall and become more difficult to accomplish. The questions reported concern probate court jurisdiction to review the terms of the settlement agreement.

At the end of the fiscal year, the Fuller Trust was in receivership and successor trustees had been presented to the Court for appointment.

#### *Harvey Hanscom Trust*

In this matter, a decedent provided for a trust to accumulate for 25 years and then to be distributed to a college, his alma mater, as a scholarship fund. The trust has grown to over a million dollars, but the college went bankrupt a few years ago. In May 1993, the Division assisted the attorney for the trustees in bringing a petition for instructions prior to the trust's termination date. Division involvement continues, as a number of educational institutions have moved to be admitted as parties, claiming they are the most appropriate recipients of the trust funds.

#### *Henry Kupfer Estate*

Representing the Commonwealth as a specific legatee, the Division joined with counsel for the State of Israel and the United States, residuary legatees, in opposing the claims of two sisters who alleged they were promised the estate of the decedent in return for care and substantial services. In April 1993, a settlement was reached according to which the sisters received sums calculated in quantum meruit with the remainder of the disputed funds going to the legatees.

#### *Lynch. et al. v. Attorney General. et al.*

Judgment was entered on a *cy pres* petition developed in consultation with the Division, allowing the transfer of the 600-acre Ravenswood Park and its endowment, created in 1889 under the will of Samuel E. Sawyer, to The Trustees of Reservations (TTOR). The world's oldest land trust operating on a statewide or regional basis, TTOR manages 72 other open space reservations and wildlife refuges in the Commonwealth.

#### *Estate of Marion Mavrogenis*

In this case, the Division took the lead in the compromise of the will of a decedent who was murdered several years ago. Acting to protect the charitable interest in scholarships established under the will, the Division secured the appointment of fiduciaries in substitution for the individual named in her will, who was convicted of her murder, and negotiated a compromise agreement for allowance of the will. Trust funds presently exceed one million dollars and, as a result of the compromise agreement, award of scholarships began in 1993. As of June 1993, the status of the legacies to those in jail for

the decedent's murder remained unsettled, as their appeals were pending.

*Springfield YMCA/Moses Trust*

The Division negotiated and assented to a *cy pres* petition, which was approved by the court in March, 1993, allowing both income and principal of a trust established for the benefit of the West Springfield YMCA to be used for the Springfield YMCA. The West Springfield YMCA has been closed. The Springfield YMCA was able to resolve serious financial problems with the help of the trust.

*In Re: The Estate of Weltshe*

In June 1993, an order of the Essex Probate Court concluded this contested accounting matter in which the Division alleged that a trustee had charged the estate excessive fees. A voluntary reduction, negotiated by the Division, was allowed. This effectively terminated a charitable trust, with distribution of remaining funds to be made to the Greater Lawrence Community Foundation.

*Worcester City Hospital*

A *cy pres* petition developed in consultation with the Division, on which a favorable judgment was entered, shifted the use of hospital land formerly utilized for operation of an acute-care hospital to use as a general health care facility.

## CHARITABLE CORPORATIONS

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. 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 of all or substantially all of the charity's assets if the 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).

*Bay State Health Care, Inc. v. Attorney General*

Bay State HMO, a registered charitable organization, was failing financially. As a strategy for the HMO's survival, Bay State and the Division of Insurance settled on dissolution of Bay State and a transfer of assets and designated liabilities to Blue Cross-Blue Shield. This Division reviewed the proposed transaction and negotiated changes in it, while keeping communications open with concerned hospitals and other providers. The Division filed an answer and assent stating that the Attorney General concurred with the judgment of Bay State and the Division of Insurance that the proposed transaction was the last and only feasible alternative available for resolving this emergency in a manner that assured uninterrupted service to Bay State's plan members, and that the terms of the transaction were necessary in order to continue this health care coverage without imperiling the financial stability of the transferee, Blue

Cross-Blue Shield. Because time was of the essence, the Division also intervened to oppose attempts, one in Middlesex Superior Court and one in the SJC Single Justice session, to stop the transaction. The SJC Single Justice approved the transaction, and Bay State was dissolved with assets and designated liabilities transferred to Blue Cross-Blue Shield.

*In the matter of the Brookline Firefighters Association*

After an investigation into allegations of deceptive charitable solicitation and misuse of charitable funds by members of this firefighters union, in June 1993, the Division obtained an Assurance of Compliance from the Brookline Firefighters Association. Under this agreement, the union agreed to make restitution in the amount of \$22,205 and to conduct any future charitable fundraising in compliance with Massachusetts law. The restitution will benefit the Brookline Multi-Service Center, an organization serving the elderly of Brookline.

*Burbank/Leominster Hospital*

In June 1993, after lengthy negotiation, the Division assented to a *cy pres* petition merging two hospitals through transfer of control of the two constituent corporations' assets to a new parent corporation. Division approval was predicated on the agreement, upholding the intent of an original hospital trust, that the new corporation will continue to operate an acute care hospital in Fitchburg and/or Leominster.

*Isabella Stewart Gardner Museum v. Attorney General, et al.*

The Gardener Museum sought court approval to alter its premises by building a gallery on the first floor of the museum for periodic exhibits of art works not already owned by the museum. Court approval was necessary because of the provision in Isabella Stewart Gardner's will prohibiting the trustees from moving any art object or bringing in any art objects not already on display in the museum. The museum contended that the space in which it wanted to build the gallery did not fall within the prohibition. After investigation the Attorney General agreed with the allegations of the museum that such a gallery did not violate the provisions of the will and were necessary in order to more effectively carry on the purpose of the museum. Court authorization to build the gallery was granted in August 1992.

*New Bedford Glass Museum v. The Attorney General, et al.*

Voluntary dissolution of this financially-troubled museum involved complicated issues relating to the proper distribution of the museum's glass collection and archival materials. With the Division's guidance, the museum followed a procedure which invoked both trust law and ethical codes governing museum collection management in order to identify proper beneficiaries. The Supreme Judicial Court ordered the collection to be distributed according to the museums plan and dissolved the museum in August 1992.

## SIGNIFICANT DIVISION INITIATIVES

### *"The Attorney General's Guide for Board Members of Charitable Organizations"*

In June, 1993, the "Attorney General's Guide for Board Members of Charitable Organizations," a project of the Division and the Attorney General's Advisory Committee on Public Charities, was published. Intended to help board members of charitable organizations in the exercise of their fiduciary duties, the Guide contains recommendations in key areas of charity stewardship. To date, Charities staff have mailed over 27,000 copies of the Guide, available at no cost to members of the public, and 2,000 copies of a supplemental Board Members packet.

### *Statewide Conference: "Non-Profit boards: Are You Doing The Right Thing?"*

The Guide was presented on June 9, 1993, at a statewide educational conference hosted by the Attorney General for members of charity boards entitled "Non-Profit Boards: Are You Doing The Right Thing?" The conference was attended by an over-capacity 630 participants representing a wide range of organizations from the smallest volunteer charities to the largest hospitals and universities in the state. After a keynote address by the Attorney General, two panels of speakers discussed a variety of topics including "Structure, Development & Function of an Effective Board" and "Monitoring the Organization's Financial Health."

### *Division Administration and Statistics*

Enforcement of laws requiring accountability by public charities is central to Division responsibilities with respect to charitable funds. With the exception of religious organizations and certain federally chartered organizations, all public charities must register with the Division and all registered charities must submit annual financial reports. The registrations and financial reports are public records and public viewing files are maintained. The Division responded to over 2,700 requests to view files in the past fiscal year and, in response, approximately 6,200 files were pulled.

### *Charitable Organizations: Registration and Enforcement*

From July 1, 1992 through June 30, 1993, the Division processed approximately 10,500 annual financial reports and annual filing fees totalled \$550,830.00. During this period, 1,700 new organizations were reviewed, determined to be charitable, and registered. Each was sent the Division's packet of information about the Divisions registration and filing requirements.

As part of an ongoing compliance program, the Division contacted approximately 3,000 charities whose annual filings were deficient or delinquent to rectify filing deficiencies.

### *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 certificate applications 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, 3,814 certificates were received and processed.

#### *Registration of Professional Solicitors and Fund Raising Counsel*

Under §§22 and 24 of G.L. c.68, all persons acting as professional solicitors, professional fundraising counsel, or commercial co-venturers in conjunction with soliciting charitable organizations must register annually with the Division. Solicitors and commercial co-venturers 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, 1993, a total of 199 registrations were received and approved, resulting in \$43,500.00 in fees to the Commonwealth. Registrations were received from 67 solicitors, 112 fund-raising counsel, and 20 commercial co-venturers.

#### *Wills, Trusts, and Other Probate Matters*

During the past fiscal year, the Division received and reviewed 1,950 new wills, 1,824 of which contained charitable bequests. Also, 1,662 executor and trustee accounts were reviewed and approved, along with 877 final accounts, 626 of which were closed. In addition, numerous petitions were reviewed, negotiated and assented to; including 134 petitions for sale of real estate and 73 petitions to terminate trusts.

Also during the year 61 new probate cases were opened; the Division was involved in 48 actions on existing probate cases; and over 261 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.

#### *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 1992 - June 1993, \$226,731.00 was received in escheates. The Division reviewed and approved 118 intestate estates, 182 estates were closed, and 148 other miscellaneous public administration matters were handled.

#### *Dissolutions*

In order to cease corporate existence, charitable corporations must dissolve. To enforce the public's interest in the disposition of charitable assets, the Attorney General is a party to all voluntary dissolutions of charitable corpora-

tions under G.L. c.180, §11A. After review, negotiation of necessary modifications, and assent by the Division, the pleadings are filed by the dissolving charity in the Supreme Judicial Court. After review, the Division assented to 46 motions for interlocutory orders permitting transfer of assets to other charities for similar charitable purposes, and to 88 final judgments dissolving charitable corporations. Also during the fiscal year an Omnibus Petition was filed to dissolve a group of 29 inactive charitable corporations under G.L. c.180, §11B.

TABLE I: *Money Recovered For The Commonwealth Treasury*

- A. Charitable Registrations, Certificate Fees, \$594,330.00 And Fundraiser Registrations
- B. Escheats \$226,731.00

### REGULATED INDUSTRIES DIVISION

The Regulated Industries Division represents consumer interests in regard to two specific industries: insurance and public utilities. Although some of the Division's work is carried on in state and federal courts, most is performed before administrative regulatory bodies: the Massachusetts Department of Public Utilities, the Federal Energy Regulatory Commission, the Federal Communications Commission, and the Massachusetts Division of Insurance. In many of these matters, particularly public utility rate cases, the Division is the only active participant advocating on behalf of Massachusetts consumers.

#### INSURANCE

The division's representation of consumer interests in insurance matters is divided into several distinct categories. The division intervenes in both automobile and health insurance rate setting proceedings. The division also has a consumer protection and insurance enforcement component: through the Office's consumer hotline and direct mail and telephone communications, the division receives many consumer questions and complaints. Through mediation, negotiation and, if necessary, litigation, the division obtains both restitution and injunctive relief for insurance consumers. Finally, the division engages in non-case related work to advance insurance consumer interests, including legislative, educational, and other outreach activities.

#### RATE CASES

##### *1993 Private Passenger Automobile Insurance Rates:*

Beginning with its evidentiary filing in July of 1992, the division challenged the insurance industry's request for an 11.25% increase over the previous year's premiums (\$300 Million, or \$95.00 per car). After several days of evidentiary hearings and responsive briefs by the parties, on December 22, 1992, the Commissioner of Insurance fixed the 1993 average rate at a level 5.2% higher than the 1992 average rate but 58% lower than the increase requested by the insurance industry. The division's intervention resulted in savings to con-

sumers of \$150 million, or \$45.00 per car.

On January 8, 1993, the AIB (Automobile Insurance board) appealed the decision of the Commissioner to the Supreme Judicial Court and on June 8, 1993, the Supreme Judicial Court remanded the case to the Commissioner for recalculation of the cost containment adjustment in accordance with the Court's finding that certain of the Commissioner's assumptions were faulty on review of the decision. In the remand proceeding, the division argued that the Commissioner's original calculation was reasonable, notwithstanding an apparent oversight in the explanation of that calculation and that, therefore, no recalculation was necessary. A decision by the Commissioner was pending at year end.

#### *1994 Private Passenger Automobile Insurance Rates:*

Proceedings concerning 1994 automobile insurance rates began in April of 1993 with the annual hearing called by the Commissioner to determine whether it was necessary be fixed and established 1994 rates in accordance with G.L. c. 175 § 113B. The division participated in these hearings and recommended that market conditions continued to require that rates be fixed and established.

#### *HEALTH CARE RATE ISSUES*

##### *1993 Blue Cross and Blue Shield of Massachusetts Non-Group Health Insurance Rates*

Following hearings held in the summer of 1992 in which the Division participated as the representative of consumer interests, in February, 1993 the Commissioner of Insurance issued her decision establishing Blue Cross' 1993 non-group health insurance rates. As a result of the division's advocacy, the Commissioner reduced the magnitude of the increases proposed by the Blues — 39.6 percent composite increase in premiums for the Managed Major Medical Health Statement insureds and a 49.4 percent composite increase in premiums for Group Conversion insureds — to a 23.6 percent increase for both of insureds. The overall savings as a result of this decision equalled more than \$30 million or approximately \$600 per average insured.

##### *1993 Blue Cross and Blue Shield of Massachusetts MEDEX Insurance Rates:*

On August 3, 1992, BCBS sought a proposed 18 percent increase in the premium rates for its MEDEX Medi-gap insurance products, which are purchased by Massachusetts seniors to cover deductibles, co-payments, and services not covered under the Medicare health insurance program. The division participated in hearings before the Division of Insurance on behalf MEDEX subscribers and challenged various cost projections in the BCBS Filing. In February of 1993, the Commissioner issued a decision reducing the proposed average rate increase to 14.7 percent.

*1994 Blue Cross and Blue Shield of Massachusetts  
Non-Group Health Insurance Rates:*

In April of 1993, BCBS sought a 23.6 percent average increase in the premium rates for its non-group health insurance. Evidentiary hearings began in May, with the division sponsoring the testimony of two experts. Hearings continued through June and a decision was pending at the close of the fiscal year.

*Consumer Protection/Enforcement*

The division also engaged in non-rate case related insurance work during fiscal year 1993 that involved consumer protection issues and/or enforcement of the Commonwealth's insurance laws. Representative matters include:

*City of Cambridge. et al v. Attorney General:*

In October of 1992, the division entered into a consent judgment with Blue Cross and Blue Shield of Massachusetts which was filed with the Suffolk Superior Court concluding this case that was initiated by BCBS and seven municipalities seeking a declaration that Proposition 2½ obviated the need to provide certain "mandated" health benefits to the participants in their health insurance plans. In an earlier decision, the Supreme Judicial Court had rejected this argument. The division asserted that the blues had to provide coverage for chiropractic and infertility treatment and diagnosis on and after July 1, 1988. The terms of consent judgement provide that the Blues must: (1) review and pay valid claims for chiropractic and infertility treatment services rendered to City of Cambridge employees who are insured by BCBS (at the date of signing the Consent Judgments, BCBS had already paid \$74,377.57 of these claims); (2) pay \$20,000 to the Massachusetts Caring for Children Foundation for the provision of primary and preventive health care to children of limited means in the City of Cambridge (the Foundation is a charity that buys health care coverage for school age children who have no health insurance and are not eligible for Medicaid); (3) pay \$20,000 to the Attorney General for the costs of the investigation and litigation; and (4) comply with all mandated health care benefits provisions of M.G.L. c.176A and 176B, not just those applying to chiropractic and infertility treatment, for all the health care programs which it provides or administers for the City of Cambridge.

*Commonwealth v. Poitras ("Massachusetts Lobstermen's Association"):*

The case began in April of 1990, when the Office filed a complaint in Suffolk Superior Court against the Massachusetts Lobsterman's Association (MLA) and several other defendants. The suit alleged that although the defendants were not licensed insurers, they had marketed and sold an accident and health insurance plan to fishermen and others in Massachusetts, refused to pay legitimate claims of close to \$3 million; repeatedly misrepresented the existence of insurance coverage and claim payments; and induced participants to remain in the plan by falsely informing them that prior claims would be paid by a successor administrator if they would pay an additional \$50.00 to the company. In September of 1992, the defendants' motions for summary

judgment were denied. An attachment on MLA's property in Scituate was obtained in addition \$200,000 of MLA funds already held in escrow. Discovery and the resolution of several motions proceeded during the year and a trial date has been set for August.

*Life Insurance and Annuity Product Complaints:*

The division resolved several consumer complaints concerning life and annuity products, including complaints that these products were marketed deceptively as investments and that agents were taking advantage of consumers through the cancellation of existing policies and the use of the cash value proceeds to fund new policies. As a result of the division's investigations and intervention with insurance companies, consumers of General Service Life Insurance Company, Prudential Insurance Company, Metropolitan Life Insurance Company, and Midland National received benefits in excess of \$200,000.

*Misclassification House With Subsidized Tenants:* In response to a complaint that a local insurer had mis-classified buildings with subsidized tenants as public housing units and therefore denied eligibility for lower insurance premiums, the division obtained the insurer's agreement to stop this practice. The division is working with the Division of Insurance on a plan to inform the entire industry as to the appropriate definition of public housing for classification purposes.

*Health Care:* Continuous health insurance coverage, a priority of the Attorney General, motivated the division's involvement with *Thorbahn Insurance Agency* — the administrator of a group plan. Resulting from the Attorney General's intervention, continuous health insurance coverage was achieved for a group of retired seniors whose coverage had been cancelled due to the failure of the administrator to make timely payments. Additionally, the administrator agreed to refund \$66,150 in premiums which had not been timely transferred.

The division addressed *Claddagh Home Health Aid Services*, an employment agency which represented itself as employing registered nurses, when in fact it did not. The division received complaints from concerned individuals regarding care being given by non-registered individuals. The division is presently investigating this company and its operation with investigators from the Civil Investigations Division.

The division initiated several investigations into products aimed at senior citizens. Some of the products analyzed were found to be unauthorized legal insurance plans. Legal insurance plans are required by law to file and follow detailed application and reporting procedures for licensing with the Division of Insurance. *Pre-paid Legal Services* offered such a plan through a senior citizen organization (*American Association of Senior Citizens (AASC)* had previously entered into an Assurance of Discontinuance with the Attorney General's Office). A multi-state Attorneys General Task Force was formed to coordinate action against Pre-Paid Legal. The task force is involved in negotiations with Pre-Paid Legal to reimburse consumers in Massachusetts and other states for the portion of their AASC joining fee that was paid to Pre-Paid.

*Consumer hot-line and paralegal resolution of inquiries and complaints During*

the fiscal year, the division received more than 400 telephone inquiries; 166 written complaints received of which 141 were resolved and 25 complaints are pending; with an estimated \$116,000 in refunds and benefits to consumers.

#### OTHER ACTIVITIES

The division has also initiated a large-scale investigation to assess availability of insurance to urban and low-income areas. Assistant attorneys general have met with individuals to investigate claims of discrimination in the purchase of insurance, industry representatives, insurance agents, community groups, the FAIR plan and industry trade associations. The division is working closely with members of the Civil Rights Division and the Civil Investigative Division on this project, and it is ongoing.

In addition to involvement in rate hearings, the division also took a proactive position in reform through commissions and legislative actions. During the summer of 1992, the Non-Group Commission, including members of the division as designees of the Attorney General, continued to meet to try to reach a consensus as to how to reform the non-group market. The commission had been initiated by the Attorney General because of his concern for rising costs of health care. While the Commission came to some consensus as to the problems that have arisen in the non-group market, consensus was not reached as to a solution. As a result, the division drafted proposed legislation, in December 1992, which was sponsored by the Honorable Carmen Buell and which called for both: (1) market reform of the non-group market in Massachusetts; and (2) a tax credit to make a basic health insurance product more affordable to those most in need. The division assisted the Attorney General in the preparation of his testimony before the legislature supporting this legislation. This legislation is still pending. In the meantime, the division, as part of the Attorney General's Health Care Task Force continues to consider other legislation which might be filed, particularly to ensure a smooth with the anticipated federal health care reform.

During fiscal year 1993, members of the division also participated in the Medigap Commission appointed as a special working group by Consumer Affairs Secretary Gloria Larson. The commission was charged with reviewing the Medicare supplemental (medigap) insurance market in Massachusetts and to make recommendations for needed changes. The Commission issued its report on November 10, 1992, recommending various programs to make medigap more accessible and more affordable while maintaining a choice for consumers among medigap products.

#### CONSUMER ISSUES

A member of the division frequently sits as the Attorney General's designee on the *Boston Committee on Access to Health Care*. This Committee presents a report each year on the level of access to health care in the City of Boston, and offers recommendations to improve access.

This year's report includes recommendations on the free care pool: the range of services covered by the free care pool should include preventive, primary, ambulatory, and inpatient care; the free care pool should be adequately

funded and services should be delivered more cost effectively in the most appropriate setting; there should be increased consumer education about access to care for the uninsured.

The Attorney General stressed the need to support the design of community-institutional partnerships for outreach to the uninsured. Effective projects are those developed through joint needs assessment and which are linguistically and culturally sensitive to the community.

In October of 1992, a member of the division appeared on behalf of the Attorney General before the Commissioner of Insurance during hearings on an industry proposal to sell cancer insurance. The Attorney General presented both written and oral testimony. The Attorney General urged the Commissioner to retain the ban on cancer insurance because it is of little economic value and tends to be marketed in an abusive manner. The ban on these policies is still in effect. The division spent considerable time and effort preparing for the *Insurance and Health sections of the National Association of Attorneys General Conference*. The Attorney General, as chairman of the National Association of Attorneys General's Health and Insurance committee, as well as several Massachusetts Assistant Attorneys General, addressed the assembled representatives on a variety of Insurance and Health related topics.

Members of the division were *Guest Speakers* to several organizations. Some of these activities included speaking at the mid-winter meeting of the Massachusetts Bar Association in January, 1993, on the topic of continuation of health insurance for divorced spouses; at Brandeis University in April of 1993, at a convention for Protection for Elder Consumers, providing an overview of the Regulated Industries Division, and also on the integration of Medicare, Medigap, and health insurance policies; in May of 1993, at Holy Cross to another group of Senior Advocates on the issue of financial exploitation of elders and people with Disabilities; also in May, to the local UAW - 4222 Retirees Chapter regarding retiree health benefits; and in June of 1993, to the "Stroke-Club" at Jordan Hospital in Plymouth, about insurance issues including long-term health care and balance-billing in Medicare.

As stated previously, members of the Division participated in legislative efforts by drafting legislation, providing interpretive legal analysis in response to queries from legislators, and participating in round-table discussions with the health care community. These efforts focussed on Medigap reform, Non-group reform, and access to health care.

## UTILITIES

The Attorney General is the designated representative of Massachusetts ratepayers in utility rate matters pursuant to M.G.L. c.12 § 11E. The Utilities section is the primary, and usually the only, representative of consumer interests in gas, telephone, and electric rate and related matters within the Commonwealth. Most of the rate cases in which the Division appears are both heard and decided by the Department of Public Utilities (DPU). The Utilities section also appears on behalf of Massachusetts ratepayers before the Federal Energy Regulatory Commission (FERC) and Federal Communications Commission (FCC).

The following are examples of the many different cases the division handled

during fiscal year 1992-1993:

**RATE CASES**

In March 1992, *Massachusetts Electric Company (MECo)*, DPU 92-78, filed a request for a \$66 million or 4.8% increase to its base rate revenues. The Division represented ratepayers at 16 days of hearings before the DPU during the four weeks beginning June 4, 1992. In September 1992, the DPU allowed MECo a \$45.6 million or 3.3% increase in its rates.

The Division intervened at the DPU to oppose *New England Telephone's (NET)*, third request in a continuing series of annual increases in basic residential rates, DPU 92-100. The DPU granted the rate increase but also approved a Partial Settlement with the Division which requires NET to increase its efforts to notify low-income consumers of low-cost telephone service options and to limit its efforts to sell extra-cost optional services to such consumers. NET must also seek to place additional pay phones in low-income neighborhoods and notify customers in Dorchester, Roxbury and Mattapan about how to obtain satisfaction of their complaints for poor service.

In April, 1992, *Bay State Gas Company*, DPU 92-111, filed with the DPU tariff schedules of proposed rates and charges designed to increase the Company's annual retail gas revenues by \$20,646,572 or 7% percent. The Division intervened in the case before the DPU on behalf of the ratepayers of the Commonwealth. Eighteen days of evidentiary hearings were held at the Department beginning June 23, 1992. As a result, the DPU issued its order on October 30, 1992, allowing Bay State Gas to file new schedules of rates and charges to produce additional gross revenues of \$11,523,418.

In April 1992, *Boston Edison Company (BECo)*, DPU 92-92, filed a request for an \$87 million or 10% increase to its base rate revenues. The Division represented ratepayers at 23 days of hearings before the DPU during the five weeks beginning June 15, 1992. The DPU accepted a Partial Settlement filed by the Division, BECo and the Division of Energy Resources which avoided any rate increase for the first year, and limited rate increases in the two following years to \$29 million (less than 2.5%). The Settlement also expanded eligibility for residential low income rates and instituted performance incentives for BECo's fossil fuel generating units as well as the Pilgrim nuclear plan.

In June 1992, *Eastern Edison Company (EECo)*, DPU 92-148, filed a request for a \$16 million or 8.2% increase to its base rate revenues. The Attorney General represented ratepayers at 15 days of hearings before the DPU during the four weeks beginning August 24, 1992. The DPU accepted a Partial Settlement filed by the Attorney General and EECo which limited the rate increase to \$8.1 million and further limited the increase to residential customers to 1.1% overall (including demand-side management costs). The Settlement also expanded eligibility for residential low income rates.

In October 1992, the *Berkshire Gas Company* filed a request for a \$2.4 million or 5.45% increase to its base rate revenues, DPU 92-210. The Attorney General represented ratepayers at 12 days of hearings before the DPU during the four weeks beginning December 3, 1992. On March 31, 1993, the DPU rendered its decision on Berkshire Gas Company's request to increase its rates. In its decision, the DPU cut the Company's proposed increase by nearly 50 percent (it allowed an increase of \$1.25 million notwithstanding the fact that the

Attorney General had argued that the DPU should cut Berkshire's rates by almost \$800 thousand) and accepted the Attorney General's argument that the Company should not be allowed to initiate a so-called "weather stabilization adjustment" that would work to increase [what is this  $\epsilon$  (decrease)] its prices when the average temperature in a given period is warmer [and this  $\epsilon$  (colder)] than "normal." Importantly, in reaching its decision, the DPU articulated a new and novel rate-making principle that would bar any challenge to the appropriateness of a company earning a return on and of any investment once it has been included in the "rate based" used to establish rates. This holding is contrary to many years of regulatory practice and the Attorney General sought reconsideration of this decision in a motion filed in April of 1993. No decision has yet been rendered on this motion.

*Cambridge Electric Light Company*, a subsidiary of Commonwealth Energy System which serves the metropolitan Cambridge area, had requested an increase in its electricity rates of \$10.1 million or 9.3 percent, *DPU 92-250*. Such an increase, if allowed, would have raised the monthly bill of a residential customer who used 450 kwh per month by approximately \$4.95. Rate design, intra-company cost allocations, rate of return and efficiency of management were some of the issues under review and subject to discovery. Hearings began in February of 1993 and were completed later that month. The Attorney General's Initial Brief, setting out the position of the Office, was submitted on March 26, 1993. On May 28th, 1993, the DPU rendered its decision, cutting the Company's proposed increase by approximately 30%. The decision did, however, allow an increase of \$7 million notwithstanding the arguments of the Attorney General that the DPU should allow no increase in excess of \$2.1 million, and the DPU's own finding that Cambridge Electric's management was deficient.

On April 15, 1993, *Boston Gas, DPU 93-60*, requested approval of a rate increase of \$61.9 million or 11 percent. Discovery was conducted in April and May. Evidentiary hearings began on June 15 and will conclude on July 23. Our Initial Brief is then due August 20 with a reply brief set for September 14th. The DPU decision will be out by November 1, 1993. Also on April 15, 1993, *Colonial Gas Company, DPU 93-78*, requested approval of a rate increase of approximately \$10.7 million or 7.87 percent (the proposed increase for the Company's Lowell Division is 8.61 percent and 6.8 percent for the Cape Cod Division). Under the Company's proposed inter-class allocation of costs, there would be a 16 percent average increase for the residential non-heating customers in the Lowell service area and a 14.9 percent increase for those in the Cape Cod service area. Four weeks of evidentiary hearings will be held during the period from June 21 through July 16. Our Initial Brief is due August 13 and our Reply Brief on September 8.

On May 15, 1993, *Essex Gas Company, DPU 93-107*, requested approval of a rate increase of approximately \$2.9 million or 7.25 percent. A public hearing was held in Haverhill during an evening in June during which one city representative/ratepayer and one residential ratepayer appeared and stated their opposition to the proposed rate increase. Although we are conducting discovery in this proceeding, a prehearing conference has yet to be held and a procedural schedule has not been established. Evidentiary hearings will likely begin

in mid to late July with briefs to be filed in September.

The Attorney General intervened at the Federal Energy Regulatory Commission (FERC) to oppose the rates proposed by the owners of the *Ocean State II (OSPII)* power plant in Rhode Island. The rates affect Massachusetts ratepayers because OSPII sells power to Boston Edison Company and to affiliates of Massachusetts Electric Company and Eastern Edison Company. The FERC allowed the proposed rates, even though the Petitioners did not satisfy FERC standards on self-dealing (adopted since the inception of the project) which require that projects selling to companies affiliated with owners must show that proposed rates are comparable to rates based on a competitive market.

The Attorney General also intervened at the Federal Energy Regulatory Commission (FERC) to oppose the change proposed by FERC Staff in the allocation of savings and generating costs following the merger of Montaup Electric Company with Newport Electric Corporation. Although the merging companies had contracted to allocate the bulk of savings to Montaup based on its much larger generating capacity, the FERC found that Montaup and Newport must split the savings. This decision has the effect of adding about \$1 million annually to Montaup's costs, most of which will be collected from the ratepayers of Eastern Edison Company.

*The Yankee Rowe decommissioning case, FERC ER92-592-000*, was settled and final approval of the Settlement is pending at the Federal Energy Regulatory Commission (FERC). With regard to decommissioning, this Settlement leaves unresolved the question of the cost that will be borne by ratepayers. Any decision on that issue has been put off until a site plan (green spacing, repowering or low level waste repository plan) has been adopted by Yankee Atomic and approved by the Nuclear Regulatory Commission (NRC). To the extent that the Attorney General is concerned with the path chosen by the Company, the Settlement provides for 40-day confidential preview of Yankee's NRC filing with a three week comment period. This is after public hearings the NRC will require in advance of Yankee's plan formulation.

What the Settlement does provide for is a \$3 million reduction in the \$48.6 million amount of unrecovered investment in the plant including \$21 million in owner's equity. The intervenors generally felt "a degree of discomfort" arguing in favor of keeping this 30 year old nuclear plant open, an argument of dubious merit given the NRC safety rehabilitation costs, seven year license life and current glut of baseload power. It was also a concern that advocating non-recovery of unamortized plant balances would provide a "perverse incentive" to companies considering the closure of plants in the "autumn" of their economic lives. Facing possible nonrecovery of their unrecovered plant investment might provide too stringent a potential penalty and cause utilities to keep uneconomic plants open beyond their useful, safe and economic lives. The bottom line is that the intervenors settlement position can be read as their having a reasonably high degree of comfort with the company's decision to close the plant.

On June 14, 1993, *New England Telephone (NET), DPU 93-125*, filed its third annual rate restructuring proposal in which it seeks to increase the average monthly residential flat rate local service by \$1.96: from \$14.88 to \$16.84 (this is the third such filing since the DPU's 1990 decision mandating that

over the next five to seven years NET increase its average basic monthly service charge for residential customers from \$9 to about \$25). Based upon the past three DPU orders concerning these annual "transitional" filings, we believe that the proposed new rates will be accepted.

#### *ELECTRIC GENERATING UNIT PERFORMANCE REVIEWS*

In July 1992, Nantucket filed its annual generating unit performance data for the twelve month performance period April 1991, to March 1992. The Attorney General represented ratepayers in several days of hearings noting the poor performance of the Company's generating units. The Attorney General opposed replacement power cost charges for two of the Company's outages of its base-load units. One outage (Unit 7) was due to an explosion of unknown cause, and the other (Unit 6) had an extended outage due to a failed rotor repair. A decision from the DPU is pending.

During the first part of 1992, the Attorney General intervened in the review of Boston Edison Company's (BECo's) generating unit's performance for the period from November, 1990 through October 31, 1991, DPU 92-1A. The review, undertaken by the DPU, centered on BECo's most important generating units: New Boston 1 and 2; Mystic 4,5,6 and 7; and the Pilgrim Nuclear Plant. During the process, the Attorney General identified a number of instances in which BECo's performance was evidently imprudent and asked the DPU to translate those episodes of substandard performance into fuel credits to BECo's ratepayers. On April 15, 1993, the DPU issued its decision. As urged by the Attorney General in representation of the Massachusetts consumers, the Department ordered the disallowance of nineteen outage days for the Pilgrim Nuclear Plant, 12 outage days for the New Boston 1 Plant, and nine outage days for the New Boston 2 Plant. BECo has requested that the Department reconsider its ruling and a decision on that request is pending. If the Department's decision remains unchanged, Massachusetts consumers will get a credit of millions of dollars in future billings.

The Attorney General intervened in the DPU's annual performance review of Western Massachusetts Electric Company's (WMECo) generating plants, DPU 92-8C-A. WMECo's nuclear generating units performed poorly in the June 1, 1991 to May 31, 1992 review period. Millstone Units 1, 2, 3, and Connecticut Yankee produced only a fraction of the total electricity they could have generated. (24.9%, 57.7%, 36.5% and 53.6% respectively). WMECo's performance falls far short of the DPU's established goals of 76.5% for the Millstone Units and 84.2% for Connecticut Yankee. Although still in the discovery phase, the Attorney General will seek refunds of replacement power costs charged to customers that resulted from the plants failure to generate. The Attorney General has been continuing discovery and work with his expert consultants (MHB Technical Associates) in the preparation of our direct case in the D.P.U.'s annual performance review. The Attorney General's attention has been focused on the performance of the three Millstone nuclear units which failed to meet DPU established targets during the time period as a result of a string of incidents at the plant that resulted in WMECo incurring approximately \$15 million of replacement power costs. The Company has already agreed not to seek recovery of replacement power costs amounting to \$1.2 million resulting

from an outage at Millstone Unit 1 that was the result of plant operators failing to pass NRC requalification exams. During the last three months of Fiscal 1992-1993, the procedural schedule has been suspended as a result of a discovery dispute concerning WMECo's assertion of privilege. In a decision, issued on June 25, the DPU affirmed an April 23 order of the hearing officer and ruled that there was no "qualified" privilege for "self critical reviews" recognized under existing Massachusetts law and that it could not create any new privileges against disclosure. Settlement discussions are ongoing and we will be seeking substantial refunds. Hearings will be held later during the summer of 1993 if settlement negotiations break down.

#### MISCELLANEOUS

On January 29, 1993, the Department of Public Utilities approved a settlement of the 1993 *Conservation and Load Management ("C&LM") budget for Massachusetts Electric Company, DPU 92-217*, jointly filed by the Company, Conservation Law Foundation, Attorney General, Energy Consortium, Massachusetts Save James Bay, and the Department's Settlement Intervention Staff. The approved settlement sets forth a 1993 C&LM budget, which approximates \$68.4 million.

In a proceeding initiated by the DPU in February, 1993, concerning *New England Telephone (NET), DPU 93-45*, in response to requests by the Regulated Industries Division and others, the Attorney General entered into a settlement agreement with NET under which the Company will be allowed to continue implementation in the 413 LATA of a new seven digit dialing scheme for intra-lata toll calls. In exchange for the Attorney General's assent, NET agreed to conduct an extensive consumer notification advertising scheme, to track consumer complaints concerning this change, provide the Attorney General with a report relative to such complaints no later than December of this year, and to raise no "timeliness" objections if the Attorney General decides early next year to file a motion to reopen the record in this proceeding to reconsider the appropriateness of seven digit dialing prior to its implementation in the 617 and 413 area codes. MCI, Sprint and other toll carriers have opposed NET's continued implementation of seven digit dialing — they favor an eleven digit dialing scheme for all toll calls — and the DPU has not yet reached its decision in proceeding.

On April 30, 1993, the DPU issued a decision rejecting the Attorney General's arguments and approving *Boston Gas Company's proposal, DPU 92-259*, that it be allowed to negotiate special contracts with large gas users. Under the proposal, large users who could switch to a competitive fuel alternative will be allowed to negotiate contract rates lower than those set forth in its filed rates. The Company will be allowed to keep half of the margins, or "profits", on such contracts, instead of refunding the full margins as they are required to do now. On August 14, 1992, *New England Telephone (NET), DPU-Mass-10*, filed for effect January 1, 1993, revisions to its Tariff No. 10 that would introduce Circuit 9 Service, a call management service which, among other features, includes Automatic Number Identification (ANI). The Attorney General on November 30, 1992, filed a letter requesting that the DPU suspend and investigate NET's filing as it relates to privacy issues raised by the provi-

sioning of ANI. The DPU on December 3, 1992, approved the revisions. However, NET must first develop a customer notification program for the DPU's pre-approval before the service is offered. Once service is offered, NET must take certain steps relating to privacy and blocking.

In September 1992, the Attorney General filed with the DPU 14 settlement agreements that were reached with *Customer Owned Coin Operated Telephones (COCOT)* against whom earlier complaints had been filed alleging violations of applicable regulations governing the provision of COCOT service. The agreements provide the funding necessary to ensure future monitoring of the COCOT industry's compliance with applicable laws and regulations. Hearings were held and briefs filed in the cases of three COCOT operators with whom no settlement was reached. No order has yet been issued by the DPU as to acceptance of the settlement agreement terms, or the individual cases that were litigated.

On May 21, 1993, the Attorney General filed comments with the DPU in response to its request for comments on the appropriate standard of review to be applied to economic development rates in general and a "Vacant Space" rate proposed by ComElectric in particular. In those comments, the Attorney General urged the DPU to continue to defer until an appropriate base rate case the question of whether other customers should be required to make up revenues foregone under any economic development rate and argued that such rates should only be allowed after a finding that such rates were, in fact, not likely to lead to future uneconomic use that would hurt all consumers but instead would result in net benefits for all customers. The Attorney General took the position that ComElectric had not provided sufficient information to allow such a finding to be made with regard to its proposed Vacant Space rate and that the DPU should not approve that rate until such information was submitted. A further hearing has been scheduled for July 19.

The division continues action on an older case before the DPU, *Newbay Corporation, DPU 88-265*. On May 26, 1993, the division, representing the Attorney General, filed comments in response to a request for comments by the DPU concerning the standard of review that should be applied by the Department in its consideration of power contracts submitted for DPU approval by municipal utilities. In these comments, the Attorney General took the position that although the DPU does accord substantial deference to some municipal light department decisions, in light of the potential far reaching impacts under the terms of the Clean Air Act Amendments of 1990 of any resource acquisition decision, the DPU should conduct a full "least cost analysis" of proposed municipal power contracts submitted for its approval. A decision on the scope of the proceedings in this five year old case is expected sometime during the summer of 1993. Because it is clear that the five year old power contracts between Newbay Corporation (the developer of a proposed coal fired plant in Rhode Island) and the eleven municipal light department parties in this proceeding (Braintree, Groton, Hingham, Holden, Littleton, Middleborough, Middleton, North Attleboro, Princeton, Shrewsbury, and Taunton) are now patently uneconomic, it is likely that the contracts will be withdrawn and the proceeding terminated if the DPU decides to apply any standard of review that approaches that applied to power contracts with

investor owned utilities.

In June of 1993, the DPU approved the Attorney General's *settlement with Boston Edison Company, DPU 93-37*, under which the Company would be allowed to create and invest up to \$45 million in a wholly owned non-utility subsidiary Boston Energy Technology Group upon the condition that the Company employ specified cost allocation rules for joint utility/non-utility costs. Under the terms of the settlement the DPU will, after briefing to occur later this year, also decide the appropriate terms of a tax sharing agreement between Edison and BETG. The settlement followed two days of hearings in April.

The division, representing the Attorney General petitioned to intervene in a proceeding before the *Nuclear Regulatory Commission concerning BECo's request, NRC 50-293-OLA*, to amend the terms of its operating license for the Pilgrim Nuclear Power Plant so as to allow an expansion of the capacity of the plant's spent fuel pool through the addition of six spent fuel racks. Through written submissions, it is the Attorney General's contention that expanding the pool by more than two racks will increase the possibility of a spent fuel pool accident and increase decommissioning costs and that BECo should use dry cask storage for spent fuel rods while they await transportation to the federal High Level Waste Repository.

In a DPU *investigation of the Com/Electric Companies' (Commonwealth Electric and Cambridge Electric Light Companies) DSM performance in 1992, DPU 93-15/16*, discovery, hearings and briefing were conducted at a near-record pace with a decision promised at the end of July. The division sponsored an expert witness with DOER and recommended a disallowance and establishment of a milestone/penalty system.

A generic investigation was initiated by the DPU concerning *investor owned electric utility compliance with the terms of the Clean Air Act Amendments of 1990, DPU 93-112*. The division, representing the Attorney General, filed a Comment recommending the Department require each electric utility to file its compliance plans and that the Department review those plans using least-cost principles (in IRM cases where appropriate), including the use of externalities to choose the least-cost resource.

The *DPU Electric Power Division (EPD)* is investigating the question of why NEPOOL, with a 35% reserve margin for summer 1993, will require the use of emergency Operating Procedure No. 4 during August, 1993, in order to maintain operations. The answer appears to be that (once again) NEPOOL scheduled two nuclear maintenance outages in August (and three in September); the DPU will be informally investigating the reasons for this scheduling. The division has provided information at the request of EPD and will continue to participate in this investigation.

### CIVIL INVESTIGATION DIVISION

The Civil Investigation Division conducts investigations primarily for divisions within the Public Protection and Government Bureaus and, on occasion, for the Executive Bureau, Family and Community Crimes Bureau, or in connection with the Criminal 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; conducting surveillance, background checks and asset checks; analyzing financial records and performing other forensic accounting tasks; and testifying in the grand jury and at trial.

In fiscal year 1993, the Division initiated over four hundred investigations in the following major areas:

## **PUBLIC PROTECTION BUREAU**

### *CONSUMER PROTECTION AND ANTITRUST*

Investigators continued to perform their traditional role by assisting the office in bringing M.G.L. c. 93A enforcement actions against businesses and individuals in major consumer areas such as automobiles, health spas, travel, mobile home parks, retail sales, hearing aids and other health related matters, advance fee loan scams and insurance/investment scams affecting the elderly. CID continued to play a major role in the office's HIMS investigation of banks, mortgage companies, brokers and home improvement contractors.

### *CIVIL RIGHTS*

The Division investigated "hate crimes," allegations of police misconduct and other violations of the Massachusetts Civil Rights Act by interviewing alleged victims, witnesses and, where appropriate, subjects of such investigations. In cases of alleged misconduct by police or others in law enforcement, investigators obtained and reviewed police reports, court documents and other available evidence.

### *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. Investigators located former employees and officers of defunct companies responsible in part for such violations, and reviewed, evaluated and analyzed financial documents and prepared ability to pay analysis.

### *PUBLIC CHARITIES*

The Division investigated individuals and/or organizations who raised funds from the public, allegedly in violation of Massachusetts laws. Investigators interviewed victims, usually business people, who made donations to a charity based on the misrepresentation of a solicitor. In some instances, solicitors posed as either law enforcement or other public officials. On several occasions, investigators worked with local police departments, local district attorneys and neighboring state attorneys general in locating "couriers" who picked up donations. The Division's financial investigators reviewed and audited books, records and financial reports of many non-profit organizations.

### *BUREAU PROSECUTOR*

Investigators worked with the new Criminal Bureau prosecutor on several cases which resulted in indictments against several individuals in matters involving Consumer Protection and Public Charities scams.

## GOVERNMENT BUREAU

### TRIAL

The Division played a major role in the investigation of tort actions filed against the Commonwealth which include: the alleged abuse, mistreatment and deaths of clients in state care, alleged wrongful termination of state employees, and personal injuries and other damages which occurred on state-owned property and/or in accidents on state roads or involving state cars. The Division also investigated cases of contract disputes and matters involved in eminent domain proceedings.

### INDUSTRIAL ACCIDENTS

In August, 1992 investigators concluded their representation of the Commonwealth at Industrial Accident Board conciliations in Boston, Lawrence, Fall River, Worcester and Springfield, in accordance with the office's "devolution" of these responsibilities to appropriate state agencies.

## CRIMINAL BUREAU

### WORKERS' COMPENSATION FRAUD

In conjunction with the protocols established by the Attorney General's Task Force to Reduce Waste, Fraud and Abuse in the Workers' Compensation System, the Division continued to investigate allegations that state employees or employees of self insured companies were fraudulently receiving workers compensation benefits.

### STATISTICS

The Division opened 419 investigations in Fiscal Year 93, with 253 investigations ongoing as of June 30, 1993. Case distribution by division and/or bureau is as follows:

	<i>Opened during</i> FY 93	<i>Ongoing as</i> 6/30/93
Consumer Protection and Antitrust	58	48
Civil Rights	20	8
Environmental Protection	30	26
Public Charities	11	9
Regulated Industries	4	3
PPB/Criminal	8	8
Government	8	5
Trial	<u>269</u>	<u>135</u>
Worker's Compensation Fraud	<u>11</u>	<u>11</u>

## GOVERNMENT BUREAU

419

253

The Government Bureau provides representation for the Commonwealth and its agencies and officials in all types of civil litigation, and for employees of the Commonwealth with respect to certain civil claims made against them resulting from the performance of their duties. The Bureau also provides advice and consultation to officials with respect to legal issues arising in connection with their official functions, particularly in instances where such advance consultation may serve to prevent unnecessary litigation.

As in the previous two years, the Bureau in fiscal year 1993 continued and expanded its efforts to develop and maintain close working relationships with agency counsel and to provide them with information and advice on matters of broad common interest. Meetings with all agency general counsel were held in October, 1992 and April, 1993. In October, 1992, we published the first issue of the Agency Counsel Newsletter, containing reports on legal developments in areas of relevance to agencies of the Commonwealth generally. A second issue was published in April, 1993.

The Government Bureau consists of an Administrative Law Division and a Trial Division. In fiscal year 1993 the Bureau continued to implement the previous year's merger of these two divisions, which were formerly separate bureaus. During fiscal year 1993, three attorneys were assigned permanently to work in both divisions, and an increasing number of cases were assigned across division lines, so as to broaden the exposure of the attorneys in both to the full range of cases the bureau handles. In addition, fiscal year 1993 saw increased attention to the development of consistent standards and practices in the handling of cases in the two divisions, particularly with respect to communication and consultation with agency clients and review and approval of written materials and significant case decisions.

Both the Administrative Law Division and the Trial Division initiate affirmative litigation on behalf of state agencies and the Commonwealth. The Administrative Law Division defends suits concerning the legality of governmental operations, particularly those seeking injunctive or declaratory relief. The Division is also responsible for legal review of all newly enacted town by-laws, and for preparation of legal opinions for constitutional officers, heads of agencies, and certain other officials concerning issues arising from the performance of their official duties. The Trial Division defends suits seeking damages or other relief for alleged wrongful acts of government officials or employees, particularly contract-related disputes, real estate matters, torts, civil rights violations, employment disputes and environmental claims. The Trial Division also reviews certain contracts, leases, bonds and various conveyancing documents submitted by state agencies for approval as to form.

### *AFFIRMATIVE LITIGATION*

Despite the substantial demands placed upon Government Bureau attorneys in defensive litigation, the Bureau maintained an active and varied docket of affirmative litigation in fiscal year 1993. Often, these were suits brought on behalf of a state agency to resolve a dispute related to the discharge of the

agency's mission or responsibilities. At other times, the Bureau pursued claims in the name of the Commonwealth to further the interests of Massachusetts citizens generally. A number of significant affirmative cases were concluded in fiscal year 1993, by both judicial decision and settlement.

In *Connecticut, Massachusetts and Rhode Island v. New Hampshire*, an original action filed in the United States Supreme Court, the plaintiff States challenged a property tax assessed by New Hampshire on the owners of the Seabrook nuclear power plant as violating the Commerce Clause and a federal statute because companies doing business in New Hampshire received a separate tax credit. On the eve of oral argument before the Court, the parties reached a settlement under which New Hampshire repealed the unconstitutional portion of the tax, agreed to refund half of the tax collected to date, and lowered the rate of the property tax for the future.

The Bureau obtained decisions in two cases challenging federal agency rulings regarding reimbursement in federally funded programs. In *Commonwealth v. Secretary of Health and Human Services*, the United States District Court held that HHS erred in denying federal reimbursement for certain pension costs in federally assisted programs; after remand to the administrative board, HHS agreed to pay the Commonwealth approximately \$88 million. In *Commonwealth v. United States Department of Agriculture*, the Court of Appeals for the First Circuit rejected the Commonwealth's challenge to a monetary penalty imposed by the Food and Nutrition Service for errors in administering the food stamp program. The Bureau successfully resolved, without litigation, a claim by the United States Department of Education ("DOE") that the Client Assistance Program (CAP) of the Massachusetts Office on Disability violated federal regulations when it refused, on grounds of attorney-client privilege, to provide the names and addresses of its clients to federal auditors; DOE agreed to audit records with information identifying clients redacted and withdrew its notice disallowing federal funding for the CAP program for fiscal years 1988 through 1992.

The Government Bureau also pursued a wide range of affirmative litigation in Massachusetts state courts in fiscal year 1993. In *Board of Education v. Quincy School Committee*, the Supreme Judicial Court rejected the Board's position that the compulsory education statute requires school committees to provide educational services to all students within the ages of compulsory attendance, including those that are excluded from the regular school premises for disciplinary violations. In *Attorney General v. Commissioners of Norfolk County*, the Supreme Judicial Court affirmed a preliminary injunction prohibiting the County from imposing a charge for parking at the courthouse complex in Dedham.

*Commonwealth v. Nationwide Life Insurance Company* was an action filed on behalf of the state Treasurer and thousands of state employees who participate in the Commonwealth's Deferred Compensation Plan. The suit challenged Nationwide's assessment of various charges against Plan funds and its use of a valuation formula which had the potential to reduce substantially the value of participants' accounts. Under a settlement reached in February 1993, Nationwide's contract with the Plan was terminated and Nationwide agreed to return to the Plan the approximately \$677 million in funds invested with it.

Nationwide also agreed not to apply its valuation formula to participants' accounts and to eliminate or substantially reduce the challenged charges. Nationwide also paid approximately \$4 million in cash to the Plan.

Bureau attorneys were particularly involved in initiatives involving housing and public health. An inter-bureau group was convened under the leadership of the Trial Division to explore how best to address widespread code violations in residential rental properties. After obtaining information from the Housing Courts, local housing inspectors, tenant advocates and other governmental agencies, the group has developed a plan for stepped up enforcement activity in target communities.

In fiscal year 1993 the Government Bureau continued to represent, with the Civil Rights Division, various state agencies in matters related to siting group homes for persons with mental illness, mental retardation and AIDS. Bureau attorneys successfully resolved, without litigation, siting disputes in five Massachusetts communities. In *Watros v. Prakas*, the Bureau filed an amicus brief in the Massachusetts Appeals Court in support of the siting of a group home for mentally retarded persons in Winchester, over an abutter's objection, where the Winchester Board of Zoning Appeals approved the project. Bureau attorneys also participated in an inter-agency working group to ensure that portions of the state building code concerning residences for disabled persons are consistent with state and federal fair housing laws.

The Bureau also participated in litigation defending the validity of municipal by-laws and policies, particularly where those policies coincide with the policies or interests of state agencies. In *Take Five Vending, Ltd. v. Town of Provincetown*, Bureau attorneys intervened on behalf of the Attorney General in the successful defense before the Supreme Judicial Court of a Provincetown by-law banning the sale of cigarettes by vending machine town-wide. In *Curtis v. Falmouth School Committee*, the Bureau filed an *amicus curiae* brief in Superior Court on behalf of the Department of Public Health and the Department of Education in support of the constitutionality of Falmouth's decision to make condoms available to students as part of the schools' AIDS prevention program. We also filed an *amicus curiae* brief in *Osgood v. Town of Andover*, an Appeals Court case raising an issue of the effect of failure to notify the Attorney General of a challenge to a by-law.

Bureau attorneys also filed *amicus curiae* briefs in two other cases raising issues of substantial concern to the Commonwealth: In *Massachusetts Water Resources Authority v. Associated Builders and Contractors of Massachusetts/Rhode Island Inc.*, we submitted a brief to the United States Supreme Court arguing that federal labor law did not prohibit a project labor agreement for work on the Boston Harbor clean-up project. The Court's decision, reported at 113 S.Ct. 1178 (1993), upheld the agreement. In *Town of Burlington v. Bedford*, in the Supreme Judicial Court, we argued that a town could not recover for the alleged loss, through a neighboring town's taking, of the "reasonable probability of establishing future access" across another's land.

Bureau attorneys were also involved in inter-bureau initiatives involving the investigation or civil prosecution of violations of the age discrimination and mortgage lending laws and criminal prosecution of insurance fraud.

## THE ADMINISTRATIVE LAW DIVISION

During fiscal year 1993, the Division opened 1,106 cases and closed 859 cases. These numbers reflect a substantial increase in the Division's caseload over the previous year.

### 1. *Defensive Litigation.*

Cases defended by Division attorneys resulted in 33 reported decisions of the Supreme Judicial Court, 8 reported decisions of the Massachusetts Appeals Court, and 13 reported decisions of the United States Court of Appeals for the First Circuit. As well, Division attorneys were involved in many cases in these courts and in the state and federal trial courts that resulted in unpublished decisions.

The Division made substantial progress during fiscal year 1993 in terminating or reducing judicial oversight under consent decrees regarding public institutions. On our motion, the United States District Court terminated the consent decree in *United States v. Massachusetts*, governing Worcester State Hospital. In *Ricci v. Okin* and related cases concerning state schools for the mentally retarded, although the Court of Appeals rejected our appeal of the District Court's extension of its disengagement orders, the District Court subsequently entered an order vacating all prior decrees and substituting one final order that guarantees class members individualized services and outlines procedures for changing the staffing at mental retardation facilities. In *Rufo v. Inmates of Suffolk County Jail*, on remand from the United States Supreme Court, the United States District Court denied the Commissioner of Correction's motion to vacate the consent decree governing the Suffolk County Jail; we have appealed from that denial to the United States Court of Appeals for the First Circuit. The court's denial of the Sheriff's motion to modify the decree to allow for some double bunking is also on appeal, but that appeal has been stayed pending a ruling on the Sheriff's alternative modification motion. In *Cornelius v. Sullivan*, a case involving the timely provision of welfare and social service benefits, the United States District Court denied plaintiffs' motion for contempt, which had been pending for seven years, and dismissed the case.

As the culmination of a decade of litigation handled by this Division involving the validity under the Massachusetts Constitution of the state system for financing public education, the Supreme Judicial Court ruled in *McDuffy v. Secretary of Education* that the Massachusetts Constitution creates a right to a quality education, that the state has the duty to ensure that such education is provided to each child, and that the state had failed to fulfill this duty. In *Arriaga v. Members of the Board of Regents*, another case involving school financing, this time at the higher education level, after the United States District Court declared unconstitutional a retroactive tuition increase imposed on out-of-state students at the Commonwealth's public colleges and universities, we negotiated a settlement in order to avoid state court litigation over the students' breach of contract claims.

The Division spent significant time and resources in fiscal year 1993 defending a variety of state human services programs against statutory and constitu-

tional challenges. In *Williams v. Secretary of Health and Human Services*, the Supreme Judicial Court ruled in the Commonwealth's favor on all counts of the complaint, which sought to force the Department of Mental Health to devote more resources to the homeless mentally ill. In *Corriea v. Department of Public Welfare*, the Supreme Judicial Court concluded that the Superior Court had exceeded its authority in issuing a preliminary injunction entirely revamping procedures for denying or terminating emergency aid for elderly, disabled, and children. In *Healey v. Gallant*, the Supreme Judicial Court ruled that federal law requires the Department of Public Welfare to provide child care to all participants in the MassJobs training program, regardless of the availability of state resources. In *Avanzato v. Commissioner of Public Welfare*, in which plaintiffs claimed that the absence of a clothing allowance from the state's AFDC program violated federal law, the United States District Court granted summary judgment in the Commonwealth's favor on the ground that the federal statute on which plaintiffs relied does not create any rights enforceable under 42 U.S.C. § 1983. In *Norris v. Department of Public Welfare*, a class action challenging the process by which the Department of Public Welfare recovers benefit overpayments, the parties agreed to changes in the challenged procedures, and the case was dismissed by the United States District Court on that basis.

Other significant litigation involved challenges to state statutes and regulations in various areas. In *Massachusetts Wholesalers of Malt Beverages v. Commonwealth*, the Supreme Judicial Court upheld the constitutionality of the 1990 amendment to the Bottle Bill that escheated abandoned deposits to the Commonwealth, but declared unconstitutional the retroactive funding provision requiring bottlers and distributors to place an amount equal to the deposits received in the three months prior to the amendment in a deposit transaction fund. In *American Trucking Association Inc. v. Secretary of Administration*, the Supreme Judicial Court struck down, on Commerce Clause grounds, three fees imposed on interstate motor carriers operating in the Commonwealth. In *Murphy v. Campbell*, the Supreme Judicial Court struck down the requirement that workers' compensation claimants represented by counsel pay a fee to defray the cost of the impartial medical examination. In *Washington Legal Foundation v. Massachusetts Bar Foundation*, the United States Court of Appeals for the First Circuit upheld the constitutionality of the Massachusetts Interest on Lawyers Trust Accounts (IOLTA) program. In *Weaver v. Henderson*, the United States District Court denied plaintiffs' request for a preliminary injunction against State Police grooming regulations prohibiting mustaches; the denial of preliminary injunctive relief was affirmed by the United States Court of Appeals on the ground that plaintiffs were unlikely to prevail on their constitutional claims.

The Division handled a number of cases arising from the Initiative and Referendum process. In *Associated Industries of Massachusetts v. Secretary of the Commonwealth*, *Gilligan v. Attorney General*, *Thompson v. Attorney General*, and *Citizens for a Competitive Massachusetts v. Secretary of the Commonwealth*, the Supreme Judicial Court cleared the way for the appearance on the November 1992 ballot of four laws proposed by initiative petition: one that would impose an excise tax on certain oils and hazardous materials and place the

proceeds in a fund to be used, subject to appropriation, to pay for hazardous waste cleanup and response activities; one that would impose an additional excise tax on cigarettes and smokeless tobacco and would place the proceeds in a fund to be used, subject to appropriation, to pay for health education and protection activities; one that would impose restrictions on packaging and require recycling; and one that would require certain corporations to disclose the amount of state taxes they pay along with supporting data. In an *Opinion of the Justices*, the Justices accepted our arguments that we correctly certified for appearance on the 1994 ballot a proposed constitutional amendment concerning term limits. Later in the year, the proponents of that measure brought an action, *LIMITS v. President of the Senate*, seeking to compel the President of the Senate and a joint session of the Legislature to vote on the proposal; unless one-quarter of the members voted in favor of the proposal before the end of the 1991-92 session, the proposal could not appear on the 1994 ballot. The Supreme Judicial Court held that neither declaratory nor injunctive relief was available against the Senate President or the Legislature and therefore dismissed the complaint.

The Division also represented state agencies and officials in a variety of cases involving state employment policies and practices. In *Alliance. AFSCME/SEIU v. Secretary of Administration*, the Supreme Judicial Court rejected claims by three state employee unions that wage increases set forth in collective bargaining agreements had become contractually binding notwithstanding the Governors decision not to sign the necessary appropriation bills. In *Mackin v. City of Boston*, a reverse discrimination case, the United States Court of Appeals for the First Circuit held that the affirmative action goals of a consent decree, under which certain minority applicants for positions in the Boston Fire Department were to be granted a hiring preference, had not been met and that the decree was an appropriate use of race-conscious judicial relief for past discrimination. In another reverse discrimination matter, *Massachusetts Association of Afro-American Police, Inc. v. Boston Police Department*, the United States Court of Appeals for the First Circuit rejected a union's attempt to block court approval of a settlement of discrimination claims made by the the Massachusetts Association of Afro-American Police concerning the 1991 civil service examination for police promotions. In *EEOC v. Commonwealth*, the United States Court of Appeals for the First Circuit held that a state statute requiring public employees over age 70 to undergo an annual medical exam as a condition of continued employment is and superseded by the federal Age Discrimination in Employment Act. In another age discrimination case, *Gately v. Commonwealth of Massachusetts*, the United States District Court preliminarily enjoined the State Police from mandatorily retiring State Police officers at age 55; the First Circuit declined to stay that injunction pending our interlocutory appeal. In *Robinson v. Teachers Retirement Board*, the Supreme Judicial Court upheld the Board's determination that no interest was available on a retroactive payment of death benefits to a retiree's spouse. In *Aquino v. Civil Service Commission*, the Massachusetts Appeals Court held that the hiring preference given to veterans in provisional civil service appointments does not extend to provisional promotions.

The Division also handled several cases involving access to information. In

*Globe Newspaper Co. v. Chief Administrative Justice of the Trial Court*, the United States District Court struck down as violative of the First Amendment those portions of the Criminal Offender Record Information Law that deny the public access to alphabetical indices of closed criminal cases and that impose civil and criminal sanctions on persons disclosing criminal offender record information that is contained in a record open to the public. In *WBZ-TV v. Executive Office of Labor*, the Supreme Judicial Court held that state law requires that certain licensing hearings held by the Department of Labor and Industries be closed to the public and that such a requirement does not violate the First Amendment. In *Wallerstein v. Board of Bar Examiners*, the Supreme Judicial Court held that the Board of Bar Examiners is not subject to the Fair Information Practices Act.

The Division also handled the following cases involving licensing or permitting decisions: *West Lynn Creamery, Inc. v. Commissioner of the Department of Food and Agriculture* (Supreme Judicial Court upheld the conditional revocation of milk dealers' licenses for failure to comply with a milk pricing order, which the Court found to be constitutional under the Commerce Clause; the milk dealers have petitioned the United States Supreme Court for certiorari); *Catlin v. Board of Registration of Architects* (Supreme Judicial Court affirmed Board's decision to discipline an architect for affixing his seal to drawings not prepared by him); *Palmer v. Board of Registration in Medicine* (Supreme Judicial Court affirmed revocation of physician's license for engaging in sexual relations with a patient); *Municipal Light Co. v. Commonwealth* (Appeals Court affirmed dismissal of complaint brought by nine municipalities and their municipal utility companies seeking damages based on the Commonwealth's opposition to a federal Nuclear Regulatory Commission license for the Seabrook nuclear power plant).

The Division also handled the following tax cases: *Space Building Corp. v. Commissioner of Revenue* (Supreme Judicial Court held that the Commissioner of Revenue need not conduct adjudicatory hearings in deciding requests for tax abatements); *FDIC v. Commissioner* (United States District Court certified for immediate appeal its order denying our motion to remand this multi-million dollar bank excise tax to the Appellate Tax Board); *William F. Sullivan & Co. v. Commissioner of Revenue* (Supreme Judicial Court held that a scrap metal processor was a "manufacturer" for state tax purposes); *Berenson v. Commissioner of Revenue* (Supreme Judicial Court held that persons responsible for collecting certain taxes to be paid by corporations and transmitting them to the Commissioner of Revenue are also responsible for the interest and penalties that have accrued on such taxes); *Koch v. Commissioner of Revenue* (Appeals Court held that taxpayers purported assignment of stock to Delaware corporations must be disregarded for tax purposes; application for further appellate review pending).

Other significant cases handled by the Division that were decided this year include *Mitchell v. Secretary of Administration and Finance*, in which the Supreme Judicial Court upheld the Governor's 1991 transfer of money from the Highway Fund to the General Fund; and *American Bald Eagles v. Bhatti*, in which the United States District Court upheld state regulations governing a deer hunt at the Quabbin Reservoir against a claim that the hunt constituted

an illegal taking under the Endangered Species Act.

## *2. Municipal Law.*

Town by-laws, home rule charters, and amendments thereto are reviewed and must receive the approval of the Attorney General prior to becoming effective. The review function is performed by attorneys in the Municipal Law Unit within the Administrative Law Division of the Government Bureau. During fiscal year 1993, the Municipal Law Unit reviewed 1,670 by-laws and 27 home rule actions from over 300 towns. Eighty-five submissions, 5.1 percent of the total, were disapproved in whole or in part.

The by-laws received this year consisted of 745 general by-laws and 925 zoning by-laws. General by-laws pertain to town government and the exercise of municipal power. Zoning by-laws are a continuing exercise of local police power over the use of land. Zoning by-laws often generate the most local controversy since they affect what landowners consider as their basic constitutional right, i.e., to own, use, and enjoy their property. This year, like last year, saw continuing attempts by municipalities to address pressing environmental concerns, including the enactment of groundwater protection overlay zoning districts, sewage disposal restrictions, and strict stand-alone local wetlands protection by-laws.

In addition to reviewing by-laws, the Municipal Law Unit publishes the semi-annual Municipal Law Newsletter, which provides municipal officials with up-to-date information on developments in the law governing their functions. During fiscal year 1993, issues of the Newsletter were published in November 1992 and May 1993.

## **THE TRIAL DIVISION**

In fiscal year 1993, the Trial Division embarked upon an ambitious program to restructure its operations in order to improve its efficiency and effectiveness in representing the Commonwealth's interests. During the previous year, teams had been assigned to reorganize and coordinate all of the Division's files. The current status of all existing cases was updated and verified. As a result of this major effort, in July, 1992, the Trial Division became the first unit of the Attorney General's Office to be fully integrated on our computerized Management Information System. This achievement allows the Division to share information while closely monitoring and supervising the progress in its cases.

The next step was to consolidate all of the sub-units within the Trial Division in order to create a unified entity. At the beginning of the fiscal year, the Trial Division consisted of four units: Contracts, Real Estate, Torts, and Industrial Accidents. Early in the year, we completed the process begun in the previous year of transferring to state agencies responsibility for appearances before the Industrial Accidents Board and of dissolving our Industrial Accidents Unit. In November of 1992, we combined the Contracts, Torts and Real Estate units to form a single, consolidated Trial Division. The new structure makes more efficient use of available limited resources, increases flexibility, and maximizes productivity. It also allows the implementation of more

uniform practices and procedures throughout the Trial Division.

As of November, 1992, the Trial Division adopted standard procedures for all of its new cases, designed to focus attention on the preliminary stages of litigation, so as to promote early evaluation, preparation, and resolution. Cases opened after that date are assigned to a trial team made up of one or more attorneys, a paralegal and a civil investigator. The team, working together, is responsible for preparing an initial case plan within 60 days, and a further report, including settlement evaluation and trial strategy, within 180 days of assignment. Team efforts are coordinated through the Management Information System. In April of 1992, we also convened a task force to develop settlement guidelines, so as to provide a consistent standard for case evaluation and a standard approach to negotiation.

Our initial reforms and reorganization have been very successful. During fiscal year 1993, the Trial Division closed 577 cases and opened 519 new cases, reducing the overall Trial Division caseload to 1307 cases as of the end of the fiscal year. In addition, after an extensive review of Land Court registration matters, the Division was able to close over one hundred files, reducing the total number of such open matters to below 500.

In the contract area, the Trial Division opened 55 new cases during the fiscal year and closed 46 cases. Judgments against the Commonwealth and settlements in the 46 concluded cases amounted to approximately \$2.5 million less than the plaintiffs had claimed. As of the end of fiscal year 1993, the Trial Division had approximately 150 contract cases pending, representing a total dollar exposure to the Commonwealth of approximately \$50 million.

As in past years, the largest category of contract cases involved construction contract disputes. These included bid protests, in which bidders for a sub-contract or general contract dispute the results of the competitive bid prior to the award of the contract, and claims for cost increases, in which contractors seek additional compensation due to delays, unexpected site conditions and the like.

Significant construction contract or bid protest cases defended by the Trial Division during fiscal year 1993 include *Petricca Construction Co. v. Commonwealth* and *E.T. and L. Construction Company v. Commonwealth*, in which the Appeals Court held that the Commonwealth has statutory authority to reject all bids if it is in the public interest to do so, and that the Commonwealth could consider the price of the bids in determining whether to reject all bids. These cases provide the first judicial interpretations of the term "public interest" in the public procurement area under Massachusetts law.

In other bid protest litigation, *TLT Construction Corporation v. Commonwealth and J.T. Callahan Sons, Inc.*, we successfully defended against a request for a preliminary injunction against the award of an \$11 million construction contract to adapt a school into a courthouse complex in Fall River; the plaintiff, a losing bidder, claimed that the low bidder's Women's/Minority Business Enterprise sub-bidders were not properly qualified to perform the particular work. In the first bid protest case arising from the Central Artery/Third Harbor Tunnel Project, *Bond Brothers, Inc. v. Commonwealth*, the Superior Court held that the Commonwealth properly disqualified the plaintiff from bidding on a

Project contract.

Two older cases claiming breaches of contract were resolved after trial during fiscal year 1993. In *Bonacorso Construction Co. v. Commonwealth*, the plaintiff sought damages of \$1,295,614 for extra work performed and delay in performance of a contract for bridge construction. After a bench trial the court awarded damages of \$57,966. A jury returned a verdict for the Commonwealth in the case of *Frank J. Shields, Inc. v. Commonwealth*, in which a construction contractor sought damages of approximately \$1.1 million for alleged changes in project requirements under a contract with the Massachusetts Highway Department for the reconstruction of twelve intersections in Longmeadow.

The Trial Division this year saw an influx of cases arising from contracts for the provision of human services. In three such cases, Trial Division attorneys successfully defended against requests for preliminary injunctions relating to contract awards or terminations. In *Integrated Service Associates, Inc. v. Baker*, a provider of residential and day program services was denied a preliminary injunction to prevent the Department of Mental Retardation from contracting with new providers after the Department exercised its contractual right to terminate without cause upon 60 days notice. The plaintiff in *Institutes for Health and Human Services, Inc. v. Baker*, an unsuccessful bidder for an incentive-based contract to secure federal revenues for the Department of Social Services, claimed that the contract procurement process was tainted by conflicts of interest and technical violations. Both the Superior Court and the Appeals Court denied requests for a preliminary injunction. In *ABCD v. ORI*, the Superior Court denied the request of a provider of employment services for a preliminary injunction to prevent the Office for Refugees and Immigrants from terminating its contract.

*WesCo Concessions, Inc. v. Metropolitan District Commission* presented a breach of contract claim in a different context; there the food concessionaire at the Franklin Park and Stone Zoos sought \$1.3 million in alleged lost profits after negotiations on a three year contract broke down. The jury awarded damages of \$157,000. The Commonwealth's evidence at trial caused WesCo to file amended meals tax returns.

Other contract-related cases arose from orders of the Department of Labor and Industries ("DOLI") enforcing bid requirements for public contracts. For example, in *Town of Plymouth v. Department of Labor and Industries*, the Superior Court rejected the Town's challenge to DOLI's asserted jurisdiction over a proposed ground lease of town-owned property to a private developer.

In addition to litigation, the Trial Division advises state agencies and officials on contract issues, including questions concerning the 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, procedural matters in employment contracts, and advice in advance of anticipated construction contract litigation. Requests for advice and assistance came from the Massachusetts Highway Department, Metropolitan District Commission, Executive Office of Transportation and Construction, Board of Regents of Higher Education, Department of Mental Health Department of

Mental Retardation, Department of Environmental Management, State Lottery Commission, Department of Public Welfare, and Division of Capital Planning and Operations.

The Trial Division also reviews contracts, leases, and bonds submitted by state agencies for approval as to form. During the fiscal year, the Division received a total of 336 contracts to review, approving 305 and rejecting 31, some of which were later approved after correction of defects in form. The Trial Division consulted with the Comptrollers Office on a new series of uniform contract forms for service contracts, agency use of which reduced the frequency of rejections.

The Trial Division worked closely this year with the legal staff at the Central Artery/Third Harbor Tunnel Project in the development of an alternative dispute resolution mechanism to be included in future Project construction contracts. The terms of the contract provisions are intended to reduce significantly the need for construction contract litigation related to the Project, thus avoiding delays and greatly reducing Project costs.

The Trial Division represented the Commonwealth in a wide range of employment related cases during fiscal year 1993, including cases alleging sexual harassment, wrongful discharge, and other alleged violations of employees' rights. In *Harrington v. Commonwealth*, for example, a terminated employee sought \$120,000 in lost wages and other damages; we obtained summary judgment on the ground that the plaintiff's claim was barred by his failure to seek judicial review of an arbitration decision upholding his termination. In *Propac-Mass. Inc. v. Sarnafil*, we obtained dismissal of a claim against the Workers' Compensation Trust Fund for benefits paid by the plaintiff-insurer to a employee of a company alleged to have fraudulently procured insurance coverage.

Three cases in which the Trial Division represented the Contributory Retirement Appeal board ("CRAB") resulted in appellate decisions during fiscal year 1993. In *Hirshberg v. Newton Retirement Board*, the Appeals Court affirmed CRAB's decision permitting a local retirement board to give an employee less than full credit toward his retirement allowance for years in which he worked part time. In *Adams v. CRAB*, the Supreme Judicial Court affirmed CRAB's decision denying accidental disability retirement benefits to a plaintiff who had failed to prove that her duties exposed her to an identifiable condition that is not common and necessary to all or a great many occupations; the decision clarified this important standard. Finally, in *DeLeire v. CRAB*, the Appeals Court upheld affirmance of CRAB's denial of retirement benefits to the former Revere Police Chief, convicted in the "Exam Scam" case, thwarting his attempt to avoid the application of the pension forfeiture laws by submitting a letter of resignation before action on his application for benefits.

Trial Division attorneys handled diverse matters involving the real estate property interests of the Commonwealth. The vast majority of cases involve petitions for the assessment of damages resulting from land acquisitions by eminent domain pursuant to G.L. c. 79. During the 1993 fiscal year the Division disposed of 50 land damage cases, 16 by jury trial and 34 by settlement. The disposition of these cases resulted in savings to the Commonwealth of approximately \$52 million based on amounts paid compared to amounts claimed.

The Commonwealth's agencies acquire land for a variety of purposes, including roads, colleges, recreation and parks, landfills, agricultural and conservation restrictions, and easements. Agencies involved in such real estate matters include Massachusetts Highway Department, Metropolitan District Commission, the Department of Environmental Management, the 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.

Two eminent domain cases resolved in fiscal year 1993 were of particular significance. *Frank v. Commonwealth* involved the largest claim for damages in any eminent domain case ever brought in Massachusetts. The case arose from the 1988 taking by the Massachusetts Highway Department of the land and building at 150 Causeway Street, Boston, adjacent to the Boston Garden, as part of the Central Artery Project. The plaintiffs claimed damages of between \$90 and \$104 million. The Commonwealth's highest appraiser testified to a value of \$53 million. The trial exposure to the Commonwealth (including interest) was approximately \$80 million above the amount originally awarded by the Highway Department. The jury returned a verdict of \$64 million, resulting in the plaintiff receiving \$24 million over the original payment.

In *New Boston Garden Corp. v. Commonwealth*, owners of the Boston Garden claimed \$52 million in damages from the same 1988 taking of the 150 Causeway Street parcel, contending that the taking extinguished their easement and leasehold rights used for storage and access. Based in part upon an appraisal/engineering analysis prepared by the Central Artery/Tunnel Project, the parties agreed to settle any present and or future claims arising from the demolition of 150 Causeway Street for \$15 million.

Other significant eminent domain cases resolved during the fiscal year included: *Lyon v. Commonwealth*, arising from the Massachusetts Highway Department's taking of land in Concord for the widening of Route 2, which was resolved by a jury verdict of \$54,000, 24% of the \$370,000 claimed; *Wronski v. Commonwealth*, in which the Metropolitan District Commission took approximately 38 acres in Sterling for conservation purposes, which the jury valued at \$725,000 (\$525,000 less than the plaintiff's claim and \$130,000 less than his expert's opinion); *Sciaba v. Commonwealth*, in which the jury valued commercial property in Attleboro taken by the Massachusetts Highway Department at \$36,500 (\$40,000 less than the plaintiff's expert appraisal and \$10,000 above the Commonwealth's appraisal); *Island Auto Realty Trust v. Commonwealth*, involving a taking by the Metropolitan District Commission of property in Lynn, resulting in a jury verdict of \$310,000, approximately \$210,000 less than the plaintiff's claim; *Giarle v. Commonwealth*, arising from a Massachusetts Highway Department taking of commercial property adjacent to the Orient Heights MBTA Station in East Boston, valued by the jury at \$105,000, \$84,000 less than the plaintiffs claim; *Cummings v. Commonwealth*, in which the jury returned a verdict of \$125,000 for strips of land taken by the Massachusetts Highway Department to widen Washington Street in Woburn, for which plaintiffs had claimed \$430,000; *Churchill v. Commonwealth*, arising from the taking of three parcels in Easton for a road and bridge construction improvement project, in which the jury returned a verdict of \$30,000

(\$10,000 above the Commonwealth's expert appraisal and \$88,000 less than the plaintiff's claim; *Ackerley v. Commonwealth*, involving the taking of an advertising billboard by the Massachusetts Highway Department, in which the jury returned a verdict of \$129,000, \$17,000 below the Commonwealth's expert's assessment of \$146,000 (the Court subsequently allowed an additur to raise the damages to \$146,000, still \$46,000 below the plaintiff's claim); *Burnham v. Commonwealth*, in which the Appeals Court affirmed the denial of a request for a new trial made by a plaintiff who, dissatisfied with a jury verdict, sought to challenge the validity of the taking.

A category of cases that is rapidly increasing in volume and exposure involves claims for alleged environmental damage. An example of such a case resolved in fiscal year 1993 is *Town of Ashland v. Trimount Bituminous v. Massachusetts Highway Department*, in which the Town of Ashland sued a maker of asphalt for alleged contamination of a public well. Trimount joined the Massachusetts Highway Department, alleging that state employees who were responsible for testing the asphalt had periodically dumped chemicals used in that process onto the ground. Trimount agreed to dismiss the claim as part of a comprehensive settlement.

Trial Division attorneys also have responsibility for protecting the Commonwealth's interests in all petitions for registration of land filed in the Land Court, and for reviewing as to form rental agreements, pro tanto releases, general releases, deeds, taking orders, and other conveyance documents relating to transfers from or to the Commonwealth as required by statute or requested by a state department or agency.

The Trial Division also defends tort and civil rights cases brought against the Commonwealth and its employees. Most of these cases arise under the Massachusetts Tort Claims Act, G.L. c. 258, and federal and state civil rights statutes. Early in fiscal year 1993 we reviewed existing presentment procedures under Chapter 258 and determined that the process did not appear to be as effective as it could be in resolving cases at the pre-litigation stage. Working with agency counsel the Trial Division prepared new guidelines for presentment practices, encouraging early investigation and, when appropriate, settlement of claims, so as to reduce the need for litigation. We installed a new computer tracking system to monitor the process.

Two tort cases handled by Trial Division attorneys resulted in reported decisions of the Supreme Judicial Court in fiscal year 1993. In *Jean W. v. Commonwealth*, the Supreme Judicial Court announced its intention to abolish the "public duty rule," which it had recognized since 1982 as a bar to claims against governmental entities for harm indirectly caused by negligent performance of functions that serve to protect the public generally, in the absence of a special relationship between the person harmed and the governmental entity. Since the decision the Attorney General's Office has actively participated in the development of legislation to preserve the rule. In *Economy Engineering v. Commonwealth*, the Supreme Judicial Court held that where a strict liability defendant prevails against a negligent defendant for contribution, the contribution statute allows the negligent defendant to have the benefit of any comparative negligence of the original plaintiff.

Other significant tort cases resolved by the Trial Division during fiscal year

1993 included cases arising from motor vehicle collisions, slip and fall incidents, alleged professional malpractice, and other occurrences. Among motor vehicle cases, two resulted in jury verdicts for the plaintiffs: *Costello v. Commonwealth* (\$22,500 awarded to driver of vehicle struck by state police cruiser); and *Eaton v. Commonwealth* (jury found the Commonwealth 60% liable for plaintiff's total damages of \$12,500, suffered when struck by Massachusetts Highway Department truck while standing by side of road). Two cases resulted in jury verdicts for the Commonwealth: *Flannery v. Commonwealth* (jury rejected claim for injuries suffered while plaintiff was under arrest, riding in trooper's cruiser, when cruiser was struck by truck); and *Agganis v. Commonwealth* (jury rejected motorcyclist's claim for injuries suffered when he crashed into drawbridge gate as bridge was being closed). Five motor vehicle cases were dismissed by court order based on legal defects: *Semenza v. Commonwealth* (claim based on skid on icy highway, dismissed for failure to comply with thirty day notice requirement of road defect statute); *Prindle v. Commonwealth* (claim based on inoperative traffic signal, dismissed for lack of compliance with statutory notice requirement); *Paonessa Co. v. Commonwealth* (Appeals Court affirmed dismissal of complaint for contribution for accident resulting from highway construction, based on failure to comply with notice provision of road defect statute); *McCarron v. Commonwealth* (claim of passenger in car struck by second vehicle whose driver claimed to have been blinded by water falling from allegedly defective drain pipe on state highway); and *Khromchenko v. Metropolitan District Commission* (claim of passenger in car that crashed through temporary barrier replacing guardrail on Metropolitan District Commission overpass barred by statute granting immunity for defective guardrails). In *Murphy v. Commonwealth*, the family of a deaf state college student, killed by a train as he crossed tracks, dismissed the claim voluntarily after investigation by the Civil Investigation Division produced conclusive evidence of the decedent's own negligence.

Tort cases involving professional malpractice resolved in fiscal year 1993 included: *Powell v. Massachusetts Defenders Committee*, in which the Superior Court applied the "ineffective assistance of counsel" standard to grant summary judgment against a former criminal defendant claiming legal malpractice; *Jones v. Commonwealth*, a medical malpractice claim arising from a surgical procedure performed at the Lemuel Shattuck Hospital, which was dismissed after the plaintiff's failure to post the bond required by the medical malpractice tribunal; and *Weaver v. Commonwealth*, a medical malpractice claim that was resolved by a jury verdict for all defendants, without determination of the disputed issue of whether a defendant physician serving as an intern at a Department of Public Health hospital was an employee of the Commonwealth.

Tort cases raising other types of claims, resolved in the fiscal year, included four cases resulting in jury verdicts for the Commonwealth: *Baker v. Commonwealth* (jury rejected plaintiff's claim for damages arising from broken leg he claimed had resulted from wheelchair accident on state facility ramp, but which investigation disclosed had resulted from later fall on property not owned or controlled by Commonwealth); *Bertucci v. Commonwealth* (jury

rejected claim for damages suffered when plaintiff vaulted over retaining wall into stairwell); *Daif v. Massachusetts Maritime Academy* (jury rejected claim of injury suffered while plaintiff did repairs on Maritime Academy's Training Ship); *Mutawakil, Admx. v. Commonwealth* (jury found no negligence of Commonwealth in death of 6-year-old boy who drowned at Metropolitan District Commission swimming pool while participating in summer camp program sponsored by City of Boston). Four other cases were dismissed by court order: *Koe v. Commonwealth* (claim of guest of student at University of Massachusetts at Amherst alleging negligence in the University's failure to prevent her sexual assault by a male student); *Tarpey v. Department of Public Health* (claim arising from Department of Public Health's alleged negligence in failing to enforce regulations requiring periodic testing of fortification levels of milk at dairy, held barred by "public duty rule"); *Rosada v. Commonwealth* (Appeals Court affirmed directed verdict after plaintiff's opening statement, holding that no reasonable jury could find that Commonwealth's alleged negligence was proximate cause of injuries suffered when plaintiff dove into shallow end of Metropolitan District Commission pool); and *Pesce v. Methuen* (court dismissed claim of negligence arising from issuance of building permits and construction of sidewalk adjacent to plaintiff's property, based on "discretionary function" rule).

### THE 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 eight assistant attorneys general, investigators and support staff. During fiscal 1993, the division was responsible for over 500 cases.

The office litigates a wide range of cases, including tort, contract, eminent domain, workers compensation, environmental, consumer protection, civil rights, administrative appeals and victims of violent crime compensation. The division also prosecutes fraud cases for the Division of Employment and Training and the Insurance Fraud Bureau.

The Western Massachusetts now includes a Medicaid Fraud Control Unit. In addition, assistant attorneys general have been appointed to concentrate in the areas of consumer protection, Insurance Fraud Bureau prosecution, and Victim of Violent Crime compensation. The computer and word processing equipment has been recently upgraded, and the telephone system has been improved.

During the upcoming year, the Western Massachusetts Division will continue to expand its capabilities with the addition of a State Police unit and an assistant attorney general who will specialize in criminal prosecution. The Western Massachusetts Division looks forward to its ongoing role as a full service satellite of the Office of the Attorney General, dedicated to providing the residents of the Western Massachusetts area access to their state government.

## 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.

In fiscal year 1993, the Division was involved in several initiative petition related litigations. In *Associated Industries of Mass. v. Secretary of the Commonwealth*, the Elections Division successfully defended the Attorney General's certification and summary of an initiative petition entitled "An Act to fund cleanup of hazardous waste dumpsites in Massachusetts", as violative of Article 48 of the Amendments to the Massachusetts Constitution. Under Article 48, initiative petitions cannot make a specific appropriation of money from the treasury of the Commonwealth. In rendering its holding, the Supreme Judicial Court stated that some deference is to be given to the Attorney General's judgment concerning the form and content of the summary. The Court further stated that the Attorney General is not required to include the legal citation to specific Federal law involved or the fact that the initiative refers to Federal law "as amended". However, the summary must fairly state the sum and substance of the measure without legal analysis or interpretation. On the same issue, the Elections Division was equally as successful before the Supreme Judicial Court in defending the Attorney General's certification and summary of an Initiative Petition entitled "An Act pertaining to health and tobacco" in *Gillian & another v. Attorney General & another*. The Division successfully defended the Attorney General's certification of "An Act to Promote Packaging Reduction and Recycling" in *Thompson v. Attorney General* where plaintiff challenged the certification on the basis that the operation of the petition was restricted to particular districts or localities and was therefore excluded from the Initiative Amendment Article 48. Although the measure exempts cities and towns in their role as "Packagers", the Court held that it did not relate merely to a particular city or town but addressed a matter of statewide concern in that it regulated the conduct in all geographic areas thus may properly be the subject of an initiative petition. The Division filed an amicus brief in *Opinion of the Justices to the Senate* where the Senate sought a judicial opinion on the constitutionality of an initiative petition to limit the terms of elected federal and state office holders. The amicus defended the Attorney General's summary and certification of the petition and supported the term limit proposal. The Supreme Judicial Court declined to address the constitutionality of provisions in the initiative petition seeking to impose term limits on federal office holders but held that the limitation of terms of state office holders was not inconsistent with the freedom of the elections provision of the Declaration of Rights under the Massachusetts constitution.

In *Citizens For a Competitive Massachusetts et al., v. Secretary of the Commonwealth*, the Division successfully defended the Secretary's decision to place an Initiative Petition on the ballot entitled "An Act to require public reporting of corporate tax information and analysis of certain tax expenditures". Plaintiff sought a declaration that the Petition could not be placed on the ballot contending that Article 48 of the Amendments of the Massachusetts Constitution prohibited the ballot placement because of the failure of the leg-

islative committee on taxation to report on the petition to the general court. The Supreme Judicial Court held that the failure of a single legislative committee to report on an initiative petition by the deadline specified for the legislature to take its roll call vote did not block the Petition from appearing on the ballot. In *Independent Voters Party v. Michael J. Connolly*, plaintiff sought a temporary restraining order to place the names of certain of its Congressional candidates on the state primary ballot. The Division successfully defended against the issuance of the TRO where the candidates were nominated at the plaintiff's convention but failed to file nomination papers containing the appropriate number of signatures. In denying the plaintiff's TRO the court held that the Commonwealth has a legitimate interest in nominating candidates by nomination papers which show that the candidates have a certain modicum of support. In *Independent Voters Party v. Secretary of State*, plaintiffs filed suit against the Secretary seeking placement on the general state election ballot alleging that they were entitled to nominate Congressional Candidates for the general election ballot by caucus. The Superior Court denied the injunction and the Plaintiffs appealed to the Appeals Court. The Supreme Judicial Court ultimately denied the petition pursuant to M.G.L. 211, §3.

In *Limits v. Bulger*, where the joint session of the General Court failed to act on an initiative amendment filed with the Secretary of State and which contained sufficient signatures, the Division won a dismissal of plaintiff's complaint which sought an order compelling the General Court to act on the initiative amendment before the end of the legislative session and a declaration that the Legislature must take action. In dismissing plaintiff's complaint, the Court ruled that the principle of separation of powers expressed in Article 30 of the Declaration of Rights prohibits the Court from intruding into the power and function of another branch of the government. The Division successfully defended against plaintiff's suit in *Lopez v. Secretary of the Commonwealth*. There, plaintiffs were unenrolled voters who voted in the presidential primary and automatically became enrolled in the party whose ballot they selected, pursuant to G.L. c. 53, §37. Plaintiffs were therefore precluded from running as unenrolled candidates for state office because they did not satisfy the statutory disaffiliation period prescribed by G.L. c. 53, §6. Plaintiffs challenged the constitutionality of the automatic enrollment statute alleging that it was void for vagueness and violated their due process and equal protection rights. The Court did not evaluate the Due Process claim under a standard of strict scrutiny since "political candidacy" is not a fundamental right. The Court also found the statute to be rationally related to a legitimate state interest since the statute encourages voters to participate in primary elections. Finally, although the statute has different consequences for unenrolled voters and party voters, the Court ruled that plaintiffs had no equal protection claim.

The Elections Division, working with the Government Bureau advised the Secretary of State on July 24, 1992 that Chapter 105 of the Acts of 1992, "An Act Establishing Congressional Districts", was subject to referendum under Amendment Article 48 of the Massachusetts Constitution.

The Division also brought suit against over 90 Candidates and treasurers of political committees who failed to file the required campaign finance disclosure forms with the Office of Campaign and Political Finance. In January

1993, the Division sent warnings to all non-filers asking them to file. The Elections Division is also responsible for enforcing state statutes that require legislative agents (lobbyist) and their employers to file financial disclosure statements with the Office of the Secretary of State.

### *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 belongs 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 several Open Meeting Law disputes, including ones involving the Millbury School Committee, the Lynn Development Board, the Northbridge Chapter 766 Parents Advisory Committee, the Winthrop School Committee and the Sudbury School Committee, without resorting to litigation.

### *OPINIONS*

The Attorney General is authorized by G.L. c. 12, §§ 3, 6, and 9 to render formal opinions and legal advice to constitutional officers, agencies and departments, district attorneys, and branches and committees of the Legislature. Formal, published opinions are given primarily to the heads of state agencies and departments. Less formal legal advice and consultation is also available. Guidelines to the formal opinions process are available from the Opinions Coordinator, as is information about the informal consultation process. 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.

Formal 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, formal opinions will not be issued regarding the interpretation of federal statutes or the constitutionality of enacted legislation.

Formal 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.

During fiscal year 1993, three formal Opinions of the Attorney General were issued. An additional 64 written requests were considered and either resolved informally or declined.

The formal Opinions appear at the end of this annual report.

July 13, 1992

Number 1.

Thomas C. Rapone  
*Secretary of Public Safety*  
One Ashburton Place, 21st Floor  
Boston, MA 02108

Dear Secretary Rapone:

You have asked for my opinion on two questions concerning the authority of the State Boxing Commission to regulate boxing or sparring matches or exhibitions that are or are claimed to be amateur in nature. You ask whether a match<sup>1</sup> at which an admission fee is charged, or at which promoters, athletes or officials receive payments, should be considered "purely amateur within the meaning G.L. c. 147, § 35 (1990 ed.), so as to exempt participants from the licensing requirements of that statute. You also ask whether the Commission authorized by G.L. c. 147, § 32 (1990 ed.) to assign or approve the choice of officials for amateur matches. Your request arises because the Commission, which is established within the Executive Office of Public Safety, *see* G.L. c. 22, § 12 (1990 ed.), c. 6A, § 18 (as amended by St. 1991, c. 412, § 4), seeks clarification of its authority concerning such matches.

For the following reasons, I conclude that under G.L. c. 147, § 35, the Commission itself must determine in the first instance whether a particular match is "purely amateur" in nature, and that in making this determination the Commission may properly consider any admission fee charged and any payments made to athletes, promoters, or officials. I also conclude that the Commission, in exercising its discretion under G.L. c. 17, § 32 to approve amateur boxing organizations and to issue special licenses for amateur matches, may reserve to itself the power to assign or approve the choice of officials for such matches.<sup>2</sup>

#### I.

G.L. c. 147, § 35 provides that "[n]o person shall act, *except in the case of a purely amateur match or exhibition*, directly or indirectly, as physician, referee, judge, timekeeper, professional boxer or as manager, trainer or second such a boxer, at a boxing or sparring match or exhibition or as a matchmaker therefor, unless licensed by the commission . . ." G.L. c. 147, § 35 (emphasis

<sup>1</sup> Although G.L. c. 147 uses the terms "match," "exhibition," and "bout," this opinion uses only the term "match" with the understanding that exhibitions and bouts are also included.

<sup>2</sup> You have also indicated that a particular boxing organization questions whether the Commission's power to regulate amateur boxing has been preempted by the federal statutes concerning the United States Olympic Committee and associated amateur sports organizations. *See* 36 U.S.C. §§ 371-96 (1988). I do not address this question, in accordance with the practice of prior Attorneys General of declining to render formal opinions on questions of federal law, *e.g.*, 1984-85 *Op. Atty Gen.*, Pub. Doc. No. 12 at 93 (Feb. 4, 1985), and because no specific statutory provision has been identified that might have such preemptive effect.

added). Neither section 35 nor any other provision of chapter 147 defines "purely amateur match or exhibition." You ask whether a match would be considered "purely amateur" if admission were charged, private promoters received a profit, athletes received expense stipends, and/or officials received equipment-rental income in excess of their expenses.

I first note that only participants in "purely amateur" matches are exempt from licensing requirements. This indicates that the exemption extends only to those matches that are completely free of the influences that, in the view of the Legislature, warrant the more stringent statutory provisions applicable to professional boxing. The fact that the statute bars unlicensed persons from participating in matches "directly or indirectly" confirms that the scope of the prohibition is broad and supports a narrow interpretation of the exemption for "purely amateur" matches.

Second, section 35 defines "professional boxer" as "one who competes for a money prize or teaches or pursues or assists in the practice of boxing as a means of obtaining a livelihood or pecuniary gain." (Emphasis added.) This indicates that in determining whether a particular match is "purely amateur," the Commission may properly examine the financial arrangements surrounding the match.

Third, the definition of a "professional boxer" is not limited to those who actually box as a means of obtaining a livelihood or pecuniary gain. It also encompasses a person who "teaches or . . . assists in the practice of boxing" for such purposes. The Commission, as the agency charged with enforcing section 35 and related provisions of chapter 147, has considerable leeway in interpreting these statutes, and the Commission's interpretations are entitled to weight and deference in the courts. *E.g., Cherubino v. Board of Registration of Chiropractors*, 403 Mass. 350, 358 (1988); *Massachusetts Medical Society v. Commissioner of Insurance*, 402 Mass. 44, 62 (1988). The Commission has the discretion, in determining whether a person teaches or assists in the practice of boxing as a means of obtaining a livelihood or pecuniary gain, to examine any payments received by that person in connection with the match in question.<sup>3</sup>

The statutory language just discussed, taken as a whole, indicates that the Commission may examine the full range of financial arrangements made with respect to athletes, promoters, officials, and other persons connected with a match in determining whether the match is "purely amateur." Moreover, other provisions of chapter 147 confirm that the financial arrangements surrounding boxing matches are a legitimate object of the Commission's scrutiny. *See, e.g., c. 147, § 32* (requiring license for match for a prize or purse or at which admission fees are charged directly or indirectly, in the form of dues or otherwise); *c. 147, § 35* (providing that physicians desiring to officiate without charge at amateur matches shall be licensed without charge); *c. 147, § 36* (requiring that fees of referee and other licensed officials be fixed by commission and paid by licensee prior to match); *c. 147, § 43* (prohibiting licensees from having financial interest in boxers in specified circumstances). These provisions indicate that in determining whether a match is "purely amateur," the Commission may properly consider a range of financial issues

<sup>3</sup> My emphasis on the term "professional boxer" should not be taken to suggest that a match that involves no "professional boxer" is *ipso facto* "purely amateur." I express no conclusion on this question, which you have not asked me to address.

going beyond direct compensation to the actual athletes involved.

You have not asked for guidance on whether the Commission should classify any particular match as "purely amateur." Because such a question is likely to involve some factual determinations, it is the duty of the Commission rather than the Attorney General to make this classification.<sup>4</sup>

I conclude, however, that the Commission could, in its discretion, determine that a match at which an admission fee is charged, or from which persons other than the athletes themselves derive income, is not "purely amateur," and thus that the personnel involved must obtain Commission licenses pursuant to section 35.

## II.

Your remaining question concerns the Commission's authority under G.L. c. 147, § 32 and related provisions to assign or to approve the choice of officials for amateur matches. Section 32 provides, in pertinent part, as follows:

No boxing or sparring match or exhibition for a prize or purse, or at which an admission fee is charged, either directly or indirectly, in the form of dues or otherwise, shall take place or be conducted in this Commonwealth except in pursuance of a license granted as hereinafter provided by the state boxing commission . . . *In the case of exhibitions or bouts held in accordance with the rules and regulations of such amateur organizations as may be approved by the Commission, the commission may issue special licenses without the requirement of a bond as provided in section thirty-four or of payment of the annual fee.*

G.L. c. 147, § 32 (emphasis added). Assuming that the Commission classifies as "amateur" a match for a prize or purse, at which an admission fee is directly or indirectly charged, you ask whether the Commission may affect the assignment of officials at such a match.<sup>5</sup>

Section 32 does not expressly confer authority on the Commission to assign or to approve the choice of officials at a particular amateur match. Section 32 does, however, grant the Commission broad discretionary powers in the area of amateur matches: the Commission *may* approve amateur organizations,<sup>6</sup> and the Commission *may* issue special licenses for matches held in accordance

<sup>4</sup> E.g., 1972/73 *Op. Att'y Gen.* No. 46, Pub. Doc No. 12 at 149 (June 20, 1973) (stating that question whether particular games were so similar to beano as to come within provisions of beano statute was for Commissioner of Public Safety rather than Attorney General to resolve).

<sup>5</sup> Your question is not limited to those matches that would be considered "purely amateur" for the purposes of section 35. The Commission might conclude that a match involving some form of prize, purse, or admission fee was "purely amateur," so as to exempt its various participants from the licensing provisions of section 35, yet by reason of the prize, purse, or admission fee, the match itself would still require a license under section 32. I do not reach the question whether an amateur or "purely amateur" match that does not involve a prize, purse, or admission fee nevertheless requires a license under section 32.

<sup>6</sup> It appears that the Commission's role is to approve amateur organizations, not those organizations' rules and regulations. It is a "general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is some thing in the subject matter or dominant purpose which requires a different interpretation." *Bynes v. School Committee of Boston*, 411 Mass. 264, 271 (1991) (quoting *Moulton v. Brookline Rent Control Board*, 385 Mass. 228, 230-31 (1982); *Druzik v. Board of Health of Haverhill*, 324 Mass. 129, 133 (1949)). The phrase "as may be approved by the commission" thus is presumed to modify the last antecedent, "such amateur organizations," rather than "rules and regulations." The insertion of the word "such" prior to "amateur organizations," rather than prior to "rules and regulations," confirms that it is "amateur organizations" to which the modifying phrase applies. The distinction may be of little significance, however, because in considering whether to approve amateur organizations, the Commission may clearly examine those organizations' rules and regulations.

with the rules and regulations of approved amateur organizations.<sup>7</sup> The Commission exercises these discretionary powers in accordance with the overall purposes of the statutes regulating boxing.

The Commission may determine that these statutory purposes are best served by reserving to the Commission the power to assign or to approve the choice of officials at amateur matches. This is an application of the familiar principle that "[d]iscretion to deny completely an application includes the power to grant less than the full privilege." *Fragopoulos v. Rent Control Board of Cambridge*, 408 Mass. 302, 304 (1990) (approving rent control board's issuance of conditional removal permit; citing *Goodwin v. Department of Public Utilities*, 351 Mass. 25, 26 (1966)). Accordingly, the Commission may decline to approve those amateur organizations that are unwilling, in their rules or regulations or by agreement with the Commission, to permit the Commission to assign or to approve the choice of officials. Alternatively, the Commission may approve amateur organizations but decline to issue special licenses for matches held in accordance with the rules and regulations of those organizations unless the Commission, as an express condition of the license or otherwise, retains the power to assign or to approve the choice of officials.<sup>8</sup>

### III.

In sum, I answer your first question by concluding that the Commission possesses the discretionary authority to determine that a match at which an admission fee is charged, or from which persons derive income, is not "purely amateur" within the meaning of G.L. c. 147, § 35. I answer your second question by concluding that the Commission, in the exercise of its discretionary authority under G.L. c. 147, § 32 to approve amateur organizations and issue special amateur match licenses, may reserve to itself the power to assign or to approve the choice of officials at amateur matches.

Sincerely,  
Scott Harshbarger  
*Attorney General*

<sup>7</sup> "The word 'may' in a statute commonly imports discretion." *Turipike Amusement Park, Inc. v. Licensing Commission of Cambridge*, 343 Mass. 435, 437 (1962). "The word 'may' is one of permission and not of command." *Cohen v. Board of Water Commissioners, Fire District No. 1, South Hadley*, 411 Mass. 744, 751 (1992) (quoting *Brennan v. Election Commissioners of Boston*, 310 Mass. 784, 786 (1942)).

<sup>8</sup> This is not to say that the Commission may require officials at purely amateur matches to obtain Commission licenses and pay licensing fees to the Commission. Section 35 expressly exempts such officials from licensing requirements, but this exemption does not bar the Commission from exercising its other powers to regulate the choice of officials, so long as there is no *per se* exclusion of unlicensed persons.

October 26, 1992

Number 2.

The Honorable John E. Fenton, Jr.  
*Chief Administrative Justice*  
Trial Court of the Commonwealth  
Two Center Plaza, Room 540  
Boston, MA 02108

Dear Judge Fenton:

I have been asked for my opinion whether the transfer of the Suffolk County courthouse facilities from the City of Boston the Trial Court of the Commonwealth, pursuant to St. 1988, c. 203, § 15, carried with it the duty to pay workers' compensation to certain courthouse employees who were injured and who began receiving such compensation prior to the date of the transfer. The City has asked the Trial Court to make such payments as of the date of the transfer, and the question has arisen whether chapter 203 obligates the Trial Court to do so. Although only the Supreme Judicial Court may make binding determination on this issue,<sup>1</sup> for the following reasons I conclude that the responsibility for these payments remains with the City.

#### I.

On October 1, 1988, pursuant to chapter 203, all right, title and interest in the Suffolk County courthouses was transferred from the City to the Commonwealth. St. 1988, c. 203, § 15. As part of the transfer, persons who were employed "primarily for the operation and maintenance" of the courthouses were transferred from the City's employ to that of the Trial Court. *Id.* § 21. I am informed that as of October 1, 1988, twenty-four persons whom the City represented as having been employed primarily for the operation and maintenance of the courthouses were receiving workers' compensation payments from the City based on injuries sustained prior to October 1, 1988. Both the City and the Commonwealth are subject to the workers' compensation act and are self-insurers.

#### II.

Section 20 of chapter 203 provides, in pertinent part, as follows:

[1] Expenses, liabilities and income relating to the operation prior to acquisition by the commonwealth of buildings and land transferred pursuant to section fifteen . . . of this act and annual debt obligations with respect to such buildings and land which are due prior to such acquisition shall be borne and receivable by the [City] whether or not billed, incurred or received by [it] prior to such acquisition. [2] Expenses, liabilities and income relating to the

<sup>1</sup> Under St. 1988, c. 203, § 20, the Supreme Judicial Court has the power to determine "[a]ll questions regarding the identification of . . . expenses, liabilities, income, contracts, obligations and monies" to be transferred from the City to the Trial Court. I render this advisory opinion in the hope that the Trial Court and the City will find it unnecessary to request that the Supreme Judicial Court resolve the matter.

operation of said buildings and land after such acquisition and annual debt obligations with respect to such buildings and land which are due after such acquisition shall be borne and receivable by the Commonwealth. [3] All duly existing contracts and obligations of the [City] relating to the operation of said buildings and land which are in effect immediately prior to such acquisition shall be transferred to the Chief Administrative Justice of the Trial Court to be performed in accordance with law.

St. 1988, c. 203, § 20 (bracketed numbers added).

Section 20 thus identifies three categories of rights and duties. First, the City must pay all "expenses" and "liabilities," and must receive all income, relating to the pre-acquisition operation of the courthouses, regardless of when such "expenses" and "liabilities" are due or are billed.<sup>2</sup> Second, the Commonwealth must pay all "expenses" and "liabilities," and must receive all income, relating to the post-acquisition operation of the courthouses. Third, the Chief Administrative Justice must assume all "contracts and obligations" that relate to the operation of the courthouses and that were in effect just prior to the acquisition.

Here, the employees in question were injured during the pre-acquisition operation of the courthouses, so that the second category is clearly inapplicable. The question thus reduces to whether workers' compensation payments to these employees fall within the first category, *i.e.*, "expenses" and "liabilities" which must be borne by the City regardless of when due or billed, or instead within the third category, *i.e.*, "contracts and obligations," which were transferred to and must be performed by you as Chief Administrative Justice.

In approaching this question it is critical to note that the statute uses very different language depending on the nature of the right or duty in question. One group of rights and duties — "[e]xpenses, liabilities and income" and annual debt obligations" — is spoken of as "borne and receivable" by either the City or the Commonwealth. Another group of rights and duties — "duly existing contracts and obligations" is spoken of as "transferred to the Chief Administrative Justice of the Trial Court to be performed in accordance with law." In other words, purely financial duties must be "borne" by and courthouse-related income is "receivable" by, either the City or the Commonwealth, depending on whether they relate to pre- or post-acquisition operations. Other sorts of "contracts and obligations," in contrast, must be "performed" by the Chief Administrative Justice, as distinct from the Commonwealth.

This suggests that the sorts of "contracts and obligations" that are "transferred" to be "performed" by the Chief Administrative Justice were not intended to include purely financial rights and duties — such as the duty to pay workers' compensation, which would involve a payment of money out of

<sup>2</sup> I do not interpret section 20 as providing that the City must pay only those expenses and liabilities "which are due prior to such acquisition." The just-quoted phrase appears immediately following the phrase "annual debt obligations with respect to such buildings and land," and thus is presumed to modify only that latter phrase. See *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 432 (1983) (noting "the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation") (citations omitted). Moreover, the phrase "whether or not billed [or] incurred [by the City] prior to such acquisition" confirms that the critical question is whether an expense or liability relates to pre-acquisition operations, rather than when the expenses or liability must be paid.

the City or State Treasury rather than any "perform[ance]" by the Chief Administrative Justice.<sup>3</sup> The Chief Administrative Justice is made responsible only for those duties, whether imposed by contract, constitution, statute, or regulation, that require some other sort of action to be "performed."

The next section of chapter 203, section 21, buttresses this interpretation. Section 21 provides that where City employees at the courthouses are "transferred to and . . . become employees of the Trial Court," their pension and retirement allowances "shall be paid by the Commonwealth . . ." "Thus, as in section 20, where the Legislature chose to shift purely financial duties, the Legislature shifted such duties to the Commonwealth, not to the Chief Administrative Justice. This is additional evidence that the "contracts and obligations" to be transferred to and performed by the Chief Administrative Justice were not intended to include purely financial rights and duties.<sup>4</sup> Cf. St. 1988, c. 203, § 4 (adding G.L. c. 211B, § 17, authorizing Chief Administrative Justice to charge occupancy fees for use of courthouse facilities, with fee to be paid into general fund of Commonwealth).

It seems clear that a statutory duty to pay workers' compensation benefits could properly be termed a "liability." The Supreme Judicial Court has interpreted the term broadly and appears to view it as broad enough to encompass responsibilities under the workers' compensation act. *Gurry v. Cumberland Farms, Inc.*, 406 Mass. 615, 619, 621 (1990). The term may include a contingent duty to pay money,<sup>5</sup> *Xtra, Inc. v. Commissioner of Revenue*, 380 Mass. 277, 280 (1980), and a duty to pay money because of a judgment. *Boston Elevated Railway Co. v. Metropolitan Transit Authority*, 323 Mass. 562, 568 (1949).<sup>6</sup> The term may include taxes, *id.*, which, like workers' compensation payments, are a creature of statute.

It might be suggested that, notwithstanding the above analysis, the plain meaning of the term "obligations" is broad enough to encompass every sort of legal duty, including the duty to pay workers' compensation. Under this interpretation, the duty to make such payments, as an "obligation," must be "performed" by the Chief Administrative Justice.

No doubt the term "obligations," if it stood alone in section 20, could encompass the duty to pay workers' compensation. But the term "obligations"

<sup>3</sup> I do not mean to suggest that the Chief Administrative Justice acting in his official capacity should be distinguished from the Commonwealth or other purposes, e.g., of immunity from or responsibility to comply with certain forms of judicially ordered relief such as a money judgment. I note the distinction only because the Legislature has used it in chapter 203; the Legislature has identified the Commonwealth as the entity that succeeds to certain financial rights and duties, and the Chief Administrative Justice as the official who succeeds to certain other, non-financial rights and duties. Also, I have not been asked for and do not reach any conclusion regarding what rights and duties other than the payment of workers' compensation might fall within the category of "duly existing contracts and obligations" under chapter 203.

<sup>4</sup> Indeed, if there were any requirement that either the Commonwealth or the Chief Administrative Justice assume responsibility or paying workers' compensation for pre-acquisition injuries, one might expect to find it in section 21, which deals at length with the full range of rights of transferred employees, rather than in section 20, which does not mention employees at all. Moreover, the silence of section 21 on the issue of payment of workers' compensation, especially in light of the express provision that the Commonwealth pay pension and retirement allowances, is another indication that the Legislature did not intend to shift the duty to pay compensation for pre-acquisition injuries. See *Harborview Residents' Committee, Inc. v. Quincy Housing Authority*, 368 Mass. 425, 432 (1975) (noting principle of statutory construction that "a statutory expression of one thing is an implied exclusion of other things omitted from the statute").

<sup>5</sup> Section 20 of chapter 203 itself expressly provides that the City must bear expenses and liabilities relating to pre-acquisition operation of the courthouses. "whether or not billed [or] incurred [by the City] prior to such acquisition." Thus, although at the time of acquisition the exact extent and duration of the City's ongoing duty to pay workers compensation benefits were contingent upon future events and could not be precisely determined, these contingencies do not prevent that duty from constituting a "liability" that remained with the City after acquisition.

<sup>6</sup> I have not been provided with details regarding whether any of the employees at issue here participated in any administrative or judicial proceedings in establishing their claims to compensation. The existence of an administrative or judicial decision requiring payments would support, but is not necessary to, my conclusion that the duty to make such payments is a "liability" within the meaning of section 20.

cannot be read without regard for the terms "[e]xpenses" and "liabilities" appearing twice in this same section 20.<sup>7</sup> If the term "obligations" were read to encompass every duty to pay expenses or to satisfy monetary liabilities, and to place such duties on the Chief Administrative Justice, then the separate and very different provisions under which some "[e]xpenses" and "liabilities" must be borne by the City and others must be borne by the Commonwealth would be rendered entirely superfluous and ineffective. I reject this interpretation as violative of one of the cardinal rules of statutory construction.<sup>8</sup> Instead, I interpret the term "obligations" as not encompassing the duty to pay expenses or to satisfy, monetary liabilities.

It remains to consider whether workers' compensation payments could be considered part of a "contract" to be performed by you as Chief Administrative Justice. The answer to this question lies not in chapter 203 but in the case law governing the nature of workers' compensation payments themselves. The cases indicate that the rights and remedies of employees with respect to workers' compensation payments arise out of G.L. c. 152 and are statutory rather than contractual in nature. See *Ahmed's Case*, 278 Mass. 180, 184 (1932) ("The act thus creates rights and remedies and procedure all its own, not previously known to the common or statutory law.") *Devine's Case*, 236 Mass. 588, 593 (1921) ("The rights of the employee under the act rest neither in negligence nor in contract. They rise wholly out of the workmen's compensation act."); *Opinion of the Justices*, 309 Mass. 562, 568-69 (1941)<sup>9</sup>

Although the employee may be, in some cases, a beneficiary of a contract of insurance between the employer and the insurer, [t]here is no contract between the employee and the insurer. *Ahmed's Case*, 278 Mass. at 183. Here, of course, there is not even a contract between the employer and the insurer, because both the City and the Commonwealth are self-insurers. Accordingly, the duty to pay workers' compensation benefits does not arise out of one of the "duly existing contracts" which section 20 requires you to perform.

### III.

In sum, the words of section 20 of chapter 203, together with the caselaw governing the nature of workers' compensation, lead me to conclude that the duty to pay workers' compensation to courthouse employees for re-acquisition

<sup>7</sup> Every word or phrase of a statute must be read in context, *Attorney General v. School Committee of Essex*, 387 Mass. 326, 337 (1982), and without overemphasizing its effect on the remainder of the statute. *Massachusetts Commission Against Discrimination v. Liberty Mutual Ins. Co.*, 371 Mass. 186, 190-91 (1976).

<sup>8</sup> "An intention to enact a barren and ineffective provision is not lightly to be imputed to the Legislature." *Mitchell v. Secretary of Administration*, 413 Mass. 330, 336 (1992) (citations omitted). "Construing a statute in a way that nullifies one of its provisions is inappropriate if there is a reasonable alternative." *Id.* (quoting *Ben Elman Sons v. Home Indem. Co.*, 411 Mass. 13, 18 (1991)). See also *Bynes v. School Committee of Boston*, 411 Mass. 264, 268 (1991) ("[I]t is an] elementary rule of statutory construction that a statute should not be read in such a way as to render its terms meaningless or superfluous.").

<sup>9</sup> In *Beausoleil's Case*, 321 Mass. 344 (1947), which arose at a time when coverage under the workers' compensation act was optional, the Supreme Judicial Court indicated that if both employer and employee elected coverage, then the act was read into the employment contract and benefits under the act were contractual in nature. *Id.* at 348. This analysis is inapplicable here; although an employee has an election of remedies, see G.L. c. 152, § 24 (Supp. 1991), an employer is now statutorily required to provide workers' compensation coverage. *Beausoleil's Case*, 321 Mass. at 348 n.1; see G.L. c. 152, § 25A (Supp. 1991). This requirement extends to the Commonwealth, G.L. c. 152, § 69 (Supp. 1991), and to those public employers, such as the City, that have previously committed themselves to the provision of coverage in accordance with section 69.

injuries is one of the "[e]xpenses [and] liabilities" to be "borne" by the City, rather than one of the "duly existing contracts and obligations" to be "performed" by you as Chief Administrative Justice.

Sincerely,  
Scott Harshbarger  
*Attorney General*

January 15, 1993

Number 3.

The Honorable John E. Fenton, Jr.  
*Chief Administrative Justice*  
Trial Court of the Commonwealth  
Two Center Plaza, Room 540  
Boston, Massachusetts 02108

Dear Judge Fenton:

I have been asked for my opinion on the proper interpretation of a provision of G.L. c. 32, § 65D(b) (1990 ed.), which governs the rate at which judges contribute to the Judges Retirement Fund. The question arises because of the need to determine the rate applicable to a person who, until his appointment as a judge in 1990, worked continuously since 1974 for a state board whose employees were not subject to any state retirement system. The specific issue is whether such a person should contribute at the rate applicable to persons appointed judges on or after January 2, 1975, or, instead, because he did not contribute to any state retirement system until his 1990 judicial appointment, should be considered to have "entered the service of the Commonwealth on or after January 1, 1938," within the meaning of the statute, and thus contribute at the higher rate applicable to such persons. For the reasons stated below conclude that the appropriate contribution rate is the rate applicable to judges appointed on or after January 2, 1975.

I.

The relevant facts are that, prior to his appointment to the bench, the judge in question was continuously employed from 1974 to 1990 in a full-time position by a state board whose employees are not members of a retirement system. In 1990, the judge was appointed to the Trial Court, and at that time he became a contributing member of the Judges Retirement Fund pursuant to G.L. c. 32, § 65D(a) and (b).<sup>1</sup>

II.

Whereas the general provisions of the public retirement law, G.L. c. 32 §§ 1-28, apply to most other public employees, judges retirement and pensions are

<sup>1</sup> C.L. c. 32, § 65D(a) provides that any judge appointed on or after January 2, 1975, shall be subject to section 65D within 90 days of appointment. Section 65D(b) sets forth the rates of contribution applicable to justices of the Trial Court, and provides that amounts so deducted shall be deposited into a Judges Retirement Fund.

governed exclusively by sections 65A-65G of chapter 32. In particular, section 65D, which applies to all Appeals Court and Trial Court judges appointed on or after January 2, 1975, sets forth the amount of retirement allowance and rates of deduction or such judges, and further provides:

No other retirement provisions shall be applicable to judges first appointed on or after January second, nineteen hundred and seventy-five, except as provided in section sixty-five A in the case of a chief justice or an associate justice of the supreme judicial court.

G. L. c. 32, 65D.<sup>2</sup>

The provision at issue here, governing the amount to be deducted from the salary of Trial Court judges appointed on or after January 2, 1975, is subdivision (b) of section 65D. Section 65D(b) establishes three categories of rates of contribution for judges, from lowest to highest, as follows. For judges "appointed" on or after January 2, 1975, the contribution rate is seven percent of such judges' salaries. For judges who "entered the service of the Commonwealth or a political subdivision thereof" between January 1, 1979 and January 1, 1988, seven percent shall be deducted from the first \$30,000 of salary earned and an additional two percent, or a total nine percent, shall be deducted from salary in excess \$30,000. Finally, for judges who "entered the service of the Commonwealth or a political subdivision thereof" on or after January 1, 1988, eight percent shall be deducted from the first \$30,000 salary earned, nine percent shall be deducted from salary, between \$30,000 and \$45,000, and ten percent shall be deducted from salary in excess of \$45,000.<sup>3</sup>

Section 22(l) (b $\frac{1}{2}$ ) in turn provides for an additional two percent to be deducted from the salaries of any member of any retirement system who entered the service of the Commonwealth or a political subdivision thereof on or after January 1, 1979, from the amount of such salary over \$30,000. The effect of section 22(l) (b $\frac{1}{2}$ ), as incorporated into section 65D(b), is that judges who entered the service of the Commonwealth between, January 1, 1979, and January 1, 1988, are subject to a seven percent deduction from the first \$30,000 earned and a nine percent deduction from that portion of salary in excess \$30,000 .

For the sake of convenience, the three categories of rates of deduction are referred to herein as low or lowest (for judges appointed after January 2, 1975) medium (for judges who entered the service

<sup>2</sup> Section 65A similarly sets forth the amount at retirement allowance and rates of deduction applicable to Appeals Court and Trial Court judges appointed prior to January 2, 1975, and to the chief justice and associate justices of the Supreme Judicial Court (regardless of the date of their appointment)

<sup>3</sup> Subdivision (b) provides: There shall be deducted and withheld from the salary each judge appointed on or after January second, nineteen hundred and seventy-five, a sum equal to seven percent of the salary of such judge. There shall be deducted and withheld from the salary of each judge who entered the service of the commonwealth or political subdivision thereof on or after January first, nineteen hundred and eighty-eight, a sum equal to eight percent of the first thirty thousand dollars salary of each judge, nine percent of such salary between thirty thousand dollars and forty-five thousand dollars and ten percent of such salary in excess of forty-five thousand dollars; provided, however, that any judge who entered the service of the commonwealth or a political subdivision thereof between January first, nineteen hundred and seventy-nine and January first, nineteen hundred and eighty-eight shall be subject to the additional deduction provided or in paragraph (b $\frac{1}{2}$ ) of subdivision (1) of section twenty-two.

of the Commonwealth between January 1, 1979 and January 1, 1988), and high or highest (for judges who entered the service of the Commonwealth on or after January 1, 1988)

The amounts so deducted from judges' salaries are deposited into a Judges Retirement Fund, pursuant to section 65D(b). The amount of retirement allowance to which a judge subject to section 65D is entitled is set forth in subdivisions (c) and (d) of the section and is based on a percentage of the salary earned by the judge at the time of retirement. G.L. c. 32, §§ 65D(c) and (d).

Retirement allowances are paid from the Judges Retirement Fund, supplemented if necessary by funds from the same source from which judges salaries are paid G.L. c. 32, § 65D(h). Judges appointed to the bench before January 2, 1975, are non-contributing members of the judges' retirement system; that is, they do not contribute to the Judges Retirement Fund at all, but they are entitled to receive a retirement allowance, pursuant to section 65A.<sup>4</sup>

The question here relates to the proper rate of deduction under section 65D(b) for a judge who was continuously employed by the Commonwealth in a full-time position (but not as a judge) from 1974 to 1990, and who was appointed as a judge of the Trial Court in 1990. In particular, the question is whether, under section 65D(b), the determinative date for purposes of calculating the amount to be deducted from the judge's salary is the date of his appointment as a judge in 1990 or the date he first was employed by the Commonwealth in 1974. This issue arises because the language in section 65D(b) refers to both the date a judge is appointed (for judges appointed on or after January 2, 1975) and the date a judge "entered the service of the Commonwealth or a political subdivision thereof" (for judges who entered such service between January 1, 1979, and January 1, 1988, or on or after January 1, 1988).

For the reasons set forth below, conclude that a judge (appointed to the bench in 1990, and who first entered the service of the Commonwealth in 1974, is subject to the lowest rate of deduction set forth in section 65D(b).

The "meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . ." *Boston Neighborhood Taxi Association v. Department of Public Utilities*, 410 Mass. 686, 690 (1991) (citation omitted). The plain language of the statute indicates that a judge who was continuously employed by the Commonwealth from 1974 to 1990 and appointed as a judge in 1990 (and thus "appointed on or after" January 2, 1975) is subject to the lowest rate of deduction set forth in section 65D(b). The first sentence of section 65D(b) uses the word "appointment" in setting forth the lowest rate of

<sup>4</sup> The judges retirement system differs in several significant respects from the retirement systems applicable to other public employees. First, as noted above, to the extent that the amount needed to pay judges retirement allowances exceeds the amount of funds in the Judges Retirement Fund, the retirement allowance is paid with funds from the same source as that from which judges salaries are paid, see G.L. c. 32, § 65D(h), in contrast to other public employees, whose retirement allowances are funded separately from sources other than the source for payment of their salaries. See G.L. c. 2, 22(3)(b). Second, whereas certain judges (those appointed before January 2, 1975) are non-contributing members of the judges' retirement system, see G.L. c. 32, § 65A, other public employees who are members of a retirement system must have contributed in order to receive retirement allowance. See G.L. c. 32, §§ 3(2), 32. Finally, the statute does not expressly authorize judges, upon their appointment to the bench, to transfer into the Judges Retirement Fund contributions they previously made into another retirement system, whereas other public employees may transfer their contributions from one retirement system to another upon changing jobs from one governmental unit to another unit that has a retirement system. See G.L. c. 32, § 3(8) (a).

deduction for judges "appointed on or after" January 2, 1975. The use of the word "appointed" in the first sentence clearly refers to date of appointment as a judge. A person appointed as a judge on or after January 2, 1975, thus qualifies for the lowest rate of deduction, unless that person also falls within one of the other two categories, that is, unless that person "entered the service of the Commonwealth or a political subdivision thereof" either between January 1, 1979, and January 1, 1988, or on or after January 1, 1988. The judge involved here, by virtue of his employment for the Commonwealth beginning in 1974, "entered the service of the Commonwealth" before either of those two dates, and thus does not fall into either the second or third categories. The only category into which this judge falls is the lowest rate of contribution set forth in the first category, applicable to judges appointed on or after January 2, 1975.

I note that, had the Legislature intended to base the medium and high categories solely on the date of appointment as a judge (rather than the date the person first entered the service of the Commonwealth in any capacity), the Legislature could have done so, simply by repeating the word "appointment" in defining the medium and high categories. The act that the Legislature did not do so is indicative of its intent. *Boston Neighborhood Taxi Association*, 410 Mass. at 689 (where Legislature has employed specific language in one paragraph of statute, but not in another, the language should not be implied where it is not present) (citations omitted).<sup>5</sup>

It might be suggested that the phrase "entered the service of the Commonwealth," as used in section 65D(b), refers only to "membership service," i.e., service during which the employee was a contributing member of a retirement system. Under that interpretation, the particular judge at issue would not have entered the "service" of the Commonwealth until 1990, the date of his appointment as a judge, because his earlier employment for the Commonwealth was for a state board whose employees are not members of any retirement system. Thus, under that interpretation, the judge would be subject to the highest, rather than the lowest, rate of contribution.

I reject that interpretation, however, because section 65D(b), in contrast to certain other provisions in chapter 32, does not expressly refer to "membership service." Section 22(1) (b), for example, uses the phrase "member in service of the system" in the course of setting forth the applicable rates of contribution for members of other retirement systems.<sup>6</sup>

Similarly, the definition section of the statute, section 1, defines "membership service" as service as an employee in a governmental unit since becoming

---

<sup>5</sup> My conclusion that the Legislature, in using the phrase "entered the service of the Commonwealth or a political subdivision thereof," intended to include service on the Commonwealth in a capacity other than as a judge, is further supported by the fact that judges are employees of the Commonwealth, not of any "political subdivision." Had the Legislature intended to make the deduction rate turn solely on the date of a person's appointment as a judge, the Legislature would not have referred to service for a political subdivision. In any event, it is plain that the judge involved here, having entered the service of the Commonwealth in 1974, did not enter the service of the Commonwealth either between January 1, 1979 and January 1, 1988, or on or after January 1, 1988, and therefore is not within the medium or high contribution categories.

<sup>6</sup> Certain decisions by the Contributory Retirement Appeal Board have been called to my attention that based the rate of contribution for other public employees under section 22(1)(b) on the date membership service and contribution began. Those decisions, however, were based on the different provisions of section 22 (h)(b), and involved persons whose previous work for the Commonwealth was part-time and/or temporary, thus making it unclear in the first instance whether their previous employment made them "employees" in "service" as those terms are defined in c. 32, § 1 and used in section 22(1)(b).

<sup>7</sup> Accordingly, my opinion here should not be construed as expressing any view as to the appropriate rates of contribution applicable to other retirement systems, which are governed by the different statutory language set forth in G. L. c. 32, § 22(1)(b), and which systems differ in several important respects from the judges' retirement system. See *supra* n. 4.

a member of a system, whereas "service" is defined solely by reference to service as an employee in any governmental unit or which regular compensation is paid. G.L. c. 32, § 1. Insofar as section 65D(b) does not contain that language, I decline to interpret it as if the Legislature had intended to equate "entry of service" with "membership service." My conclusion in this regard is based on the established principle that where specific language appears in one portion of a statute but not another, the absent language should not be read into the provision from which it is missing. *Boston Neighborhood Taxi Association*, 410 Mass. at 689; *Beeler v. Downey*, 387 Mass. 609, 616 (1982).<sup>7</sup>

This interpretation does not lead to an unreasonable result. See *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 79-80 (1982) (statute should be given a reasonable construction). The Legislature could reasonably have determined that it was desirable to reward judges for service for the Commonwealth prior to January 1, 1979, by affording such judges the lowest rate of contribution, even if the service prior to 1979 was not membership service as a contributing member of a retirement system, and even if such service was in a capacity other than as a judge. Such a determination is consistent with the Legislature's decision to exempt judges appointed to the bench prior to January 2, 1975 from *any* contribution to the Judges Retirement Fund. In these two ways, the Legislature has decided to treat judges more favorably, based on prior public service, than employees subject to other retirement systems. Such favorable treatment may have been intended to compensate for the fact that, unlike other public employees, judges who have prior membership service are not able to transfer contributions from another retirement system into the judges' retirement system. See *supra* n.4.

### III.

In sum, the language of section 65D(b) leads me to conclude that a judge who was appointed to the bench in 1990, and who entered the service of the Commonwealth in 1974 as an employee of a state board whose employees were not subject to any state retirement system, is subject to the lowest rate of contribution, applicable to judges "appointed on or after January second, nineteen hundred and seventy-five."<sup>8</sup>

Sincerely,  
Scott Harshbarger  
Attorney General

<sup>8</sup> I have also been asked my opinion regarding the applicability of a deduction from the judges salary for Medicare, pursuant to 26 U.S.C. § 3101(b). Insofar as the applicability of the deduction for Medicare depends on an interpretation of federal law, however, I express no view as to whether such deduction properly applies to the judge in question. See 1985/1986 Op. Atty. Gen. No. 9, Rep. A.G., Pub. Doc. No. 12 at 40, 43 n.2 (1986) (noting that Attorney General ordinarily does not issue opinion as to interpretation of federal law); 1984/1985 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 89, 93 (1985) (declining to render formal opinion as to whether propose state regulations would violate federal antitrust laws); 1979/1980 Op. Atty. Gen. No. 10, Rep. A.G., Pub. Doc. No. 14 at 116, 119 (1980) (declining to interpret federal law governing receipt of federal funds from Department of Health, Education and Welfare).

