

Massachusetts Cases To Watch In 2021

By **Chris Villani**

Law360 (January 3, 2021, 12:02 PM EST) -- An unprecedented year brought new types of litigation to the Massachusetts legal landscape while also delaying in-person jury trials and other cases that had been tracking toward a resolution in 2020, setting up a jam-packed Bay State court calendar in 2021.

Observers have their eyes on a number of significant cases in the new year, including an attempt by the state attorney general to pry data from Facebook Inc., a challenge to an automotive ballot question passed overwhelmingly by voters in November, and litigation tied to the COVID-19 pandemic that is testing the limits of older statutes.

There are also some familiar cases that will stay on the radar this year, including the U.S. Supreme Court's decision on whether to review Harvard University's race-conscious admissions policy and the long-awaited trials in the "Varsity Blues" scandal.

The Pandemic's Lingering Litigation Effects

In December, the Supreme Judicial Court ruled that Gov. Charlie Baker acted within the bounds of state and federal law when he invoked the Civil Defense Act to enact sweeping closures and restrictions aimed at stopping the spread of the coronavirus. But the top court made clear that the CDA cannot be used in just any health emergency and the severity of the crisis in the state could lesson with vaccines on the way.

It's something that could open the door to another challenge to Baker's authority, said Felicia Ellsworth of WilmerHale.

"You could see a world in which the restaurant association says 'there is enough herd immunity that we shouldn't be limited in any way,'" Ellsworth said.

Ellsworth noted the governor has been responsive to changing circumstances so far, one of the reasons the SJC said his orders are lawful. She said further pandemic-related litigation will take many different forms, including continued suits against universities that have moved to online-only instruction, or cases related to the availability of vaccines or the safety of returning to various activities.

That one of the earliest vaccines in line for approval was developed by Massachusetts-based Moderna could open the door to litigation in the Bay State should claims arise from that vaccine.

Tuition reimbursement suits have already been filed in Massachusetts, including by students at Harvard and Northeastern University. The schools have argued that their contractual obligations to students never included in-person instruction under any circumstances. But the students say they lost out on valuable in-person instruction and access to campus when the pandemic forced them online, and that they are entitled to some money back because of it.

A judge denied Northeastern's motion to dismiss the tuition suit in December. Harvard's motion to dismiss its suit is still pending.

The tuition cases are Chong et al. v. Northeastern University, case number 1:20-cv-10844, and Student A v. Harvard University, case number 1:20-cv-10968, in the U.S. District Court for the District of Massachusetts.

Hitting the Brakes on "Right to Repair"

Voters in November approved a revision to "Right to Repair," a 2013 Massachusetts law that gave independent auto body shops access to vehicle diagnostic and repair information that was already made available to car manufacturers. The revision extends the law to include a vehicle's telematics system, which can relate to navigation, GPS and other data that auto dealers feel is proprietary.

After the election, the Alliance for Automotive Innovation, which represents General Motors Co., Toyota Motor Corp. and Volkswagen AG, among others, filed suit against Attorney General Maura Healey in federal court, seeking to block the law from going into effect.

Paul Marshall Harris of Burns & Levinson LLP said the dealers have a strong case to be made against the state, despite the success of the initiative at the polls.

"I do think it's unconstitutional for the commonwealth of Massachusetts to force a manufacturer to give up their proprietary information," said Harris, who is not directly involved in the case but represents car dealerships.

The manufacturers warned in their complaint that access to this sensitive vehicle data "and to the secured vehicle systems that generate that data, could, in the wrong hands, spell disaster."

Harris said other states will be watching closely and may follow suit with their own versions of this first-of-its-kind law should the state prevail.

"I think it'll be a very good battle and it involves some intriguing first impression issue," said Brian Hurley of Rackemann Sawyer & Brewster, who is not involved in the litigation. "The core issue is: Who owns the data and who has the right to control it?"

Both sides have agreed the law should not be implemented while the case plays out before U.S. District Judge Douglas P. Woodlock this year.

The case is Alliance for Automotive Innovation v. Healey, case number 1:20-cv-12090, in U.S. District Court for the District of Massachusetts.

Defining Attorney-Client Privilege? There's an App for That.

Healey's office is also locked in a high-profile case against Facebook before the SJC over whether the social media giant can shield from her which apps on its platform may have compromised user data.

Facebook argues that the information, which it uncovered in an investigation launched in 2018 on advice from Gibson Dunn & Crutcher LLP in the wake of the Cambridge Analytica scandal, is protected by attorney-client privilege and by the attorney work product doctrine.

Todd & Weld LLP's Ingrid Martin said that, as a fundamental matter, attorneys need to pay attention any time attorney-client privilege and work product doctrine are being defined by a court. In this instance, if the SJC upholds a lower court decision compelling Facebook to turn over the app data, that could chill similar internal probes by companies that announce to the public that they are conducting those investigations, Martin said.

"It's certainly going to require some self-reflection by those of us who conduct internal investigations for companies as to how much of this information can be released publicly," Martin said. "Often it can be complicated to manage public relations when something terrible happens and the internal investigation of it, but I think that it's going to create some challenges [if the SJC affirms]."

The SJC heard arguments in the case in December and will render a decision in the new year. The justices seemed sympathetic to the challenge the attorney general's office faced in launching an investigation, but said case law seems to cut Facebook's way.

"You've got to do some of your own homework here," Associate Justice Scott L. Kafker told an assistant attorney general during the hearing. "You just can't ask for what they did, because some of it is going to fall within that privilege."

During the hearing, an attorney for Facebook noted that a California court overseeing a similar multidistrict suit may well be waiting for the SJC to be the first court to weigh in on the dispute.

The case is Healey v. Facebook Inc., case number SJC-12946, in the Supreme Judicial Court for the Commonwealth of Massachusetts.

Shifting the Burden in Immigration Cases

The American Civil Liberties Union of Massachusetts has frequently challenged the Trump administration's immigration policies, including a class action suit that the First Circuit is slated to decide this year that will determine whether the burden of proof in immigration detention cases should shift from the immigrant to the federal government.

The panel heard oral arguments in December, with one judge asking why the government should not be required to "prove issues of dangerousness by a certain standard." The policy, which forces immigrants to prove they are not dangerous or a flight risk in order to be freed from detention during their immigration proceedings, was struck down by a federal judge in 2019.

ACLU Legal Director Matt Segal said the change has already made a significant difference for members of the class.

"Detention by default in immigration court preceded the Trump administration," Segal said. "It's

something that the executive branch can really exploit if it means to develop anti-immigrant policies."

Under the ruling by U.S. District Judge Patti B. Saris, the government must now bear the burden of proof when requesting to detain a class of immigrants in New England, and the immigration judge must consider the immigrant's financial means when setting a bond amount.

While that particular case is tied to a long-standing issue, Segal said he hopes the Biden administration will curtail other policies the ACLU has challenged over the past four years.

"I would like to think that a Biden administration does not want to be in the position of standing up in court and arguing that those policies, steeped in racism, are lawful," Segal said. "But that will be up to the Biden administration."

In another major case involving immigration, the First Circuit will weigh in on whether state court Judge Shelley Joseph is protected by judicial immunity from a federal prosecution charging her with helping an undocumented immigrant evade federal custody by directing him to leave out the back door of her courthouse while U.S. Immigration and Customs Enforcement agents waited out front.

The prosecution of a sitting judge for an action taken while she was on the bench raised eyebrows around the legal community. The Massachusetts Association of Criminal Defense Lawyers, the American Immigration Lawyers Association and a dozen scholars of constitutional, criminal and immigration law have all filed amicus briefs in support of Judge Joseph.

The cases are *Pereira Brito et al. v. Barr et al.*, case numbers 20-1119 and 20-1037, in the U.S. Court of Appeals for the First Circuit and *U.S. v. Joseph et al.*, case number 1:19-cr-10141, in the U.S. District Court for the District of Massachusetts.

College Admissions on Course for More Headlines

Two cases tied to the college admissions process in very different ways — the star-studded "Varsity Blues" prosecution and the challenge to Harvard's use of race in the admissions process — could be set for dramatic conclusions in 2021.

The first trial in the "Varsity Blues" bribery cases was slated for the fall of 2020, but the pandemic pushed the trial to February 2021. Despite a desire by both the prosecution and the defense to delay that trial until September to protect the health of older attorneys and participants, octogenarian U.S. District Judge Nathaniel M. Gorton has said the case should be tried over the winter.

With new defendants still being charged, one as recently as November, all eyes will be on the trial even though the highest-profile defendants, including actress Lori Loughlin, have already pled out and been sentenced.

"The white collar bar is carefully watching the development of those cases," said Scott Ford of Mintz Levin Cohn Ferris Glovsky and Popeo PC, "particularly those who have either not yet pled or clients who could potentially be charged."

In the Harvard case, the First Circuit blessed the Ivy League school's use of race in the admissions process in a November opinion. Now the question becomes whether the U.S. Supreme Court, with a supermajority of Republican-appointed justices, will take the case and potentially end affirmative action

in the admissions process.

The cases are U.S. v. Colburn et al., case number 1:19-cr-10080, in the U.S. District Court for the District of Massachusetts and Students for Fair Admissions v. President & Fellows of Harvard, case number 19-2005, in the U.S. Court of Appeals for the First Circuit.

--Editing by Bruce Goldman.

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