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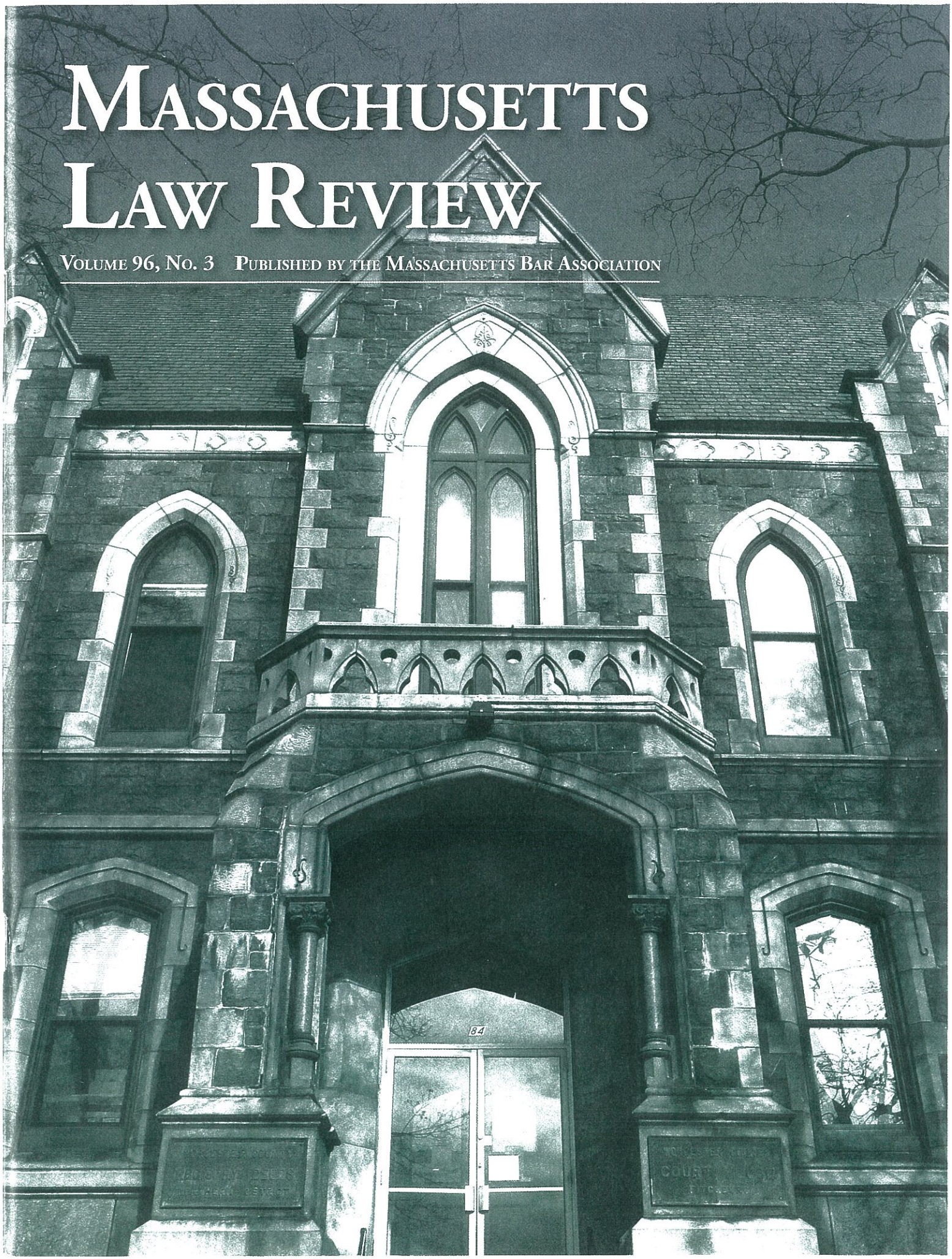

# MASSACHUSETTS LAW REVIEW

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# Chapter 93A's *Hannon* Right Becomes the Latest Casualty of Arbitration Supremacy

## *McInnes v. LPL Financial LLC*

On August 12, 2013, the Supreme Judicial Court of Massachusetts ("SJC") decided *McInnes v. LPL Financial LLC*.[1] Justice Gants wrote the decision, which he began with the following:

> In *Hannon v. Original Gunite Aquatech Pools Inc.*, we held that, even where a consumer executed a valid contract agreeing to arbitrate all disputes, a plaintiff may not be compelled to arbitrate a claim alleging an unfair or deceptive trade practice in violation of [Mass. Gen. Laws] ch. 93A, § 9. We hold today that such claims must be referred to arbitration where the contract involves interstate commerce and the agreement to arbitrate is enforceable under the Federal Arbitration Act.[2]

For those who have followed the arbitration decisions of the Supreme Court of the United States ("Supreme Court") in recent years, Justice Gants's words were not surprising. Instead, those words just announced the latest casualty of the Federal Arbitration Act ("FAA").[3]

### I. Factual Background

In the case, plaintiff Jane B. McInnes ("McInnes") brought a number of claims against her former financial planner, LPL Financial LLC ("LPL"), and its principal, Karl G. McGhee Jr. ("McGhee") (together with LPL, "Defendants").[4] Her complaint included a claim for violation of section 9 of Massachusetts General Laws chapter 93A ("Chapter 93A").[5] The dispute arose out of McGhee's recommendation that McInnes purchase a certain type of life insurance policy.[6] McInnes alleged that the policy she purchased based on McGhee's recommendation was never an appropriate investment for her, that McGhee had subsequently formed an irrevocable trust for the policy and named himself as both the owner and the trustee, and that he had allowed the policy to lapse.[7]

After McInnes brought suit in Barnstable County Superior Court, the defendants moved to stay the court proceedings and compel arbitration pursuant to the Massachusetts Arbitration Act ("MAA").[8] In support of their motion, the defendants filed an affidavit of McGhee and an LPL new account application, signed by McInnes in 2003, which included an arbitration clause. Under the heading "Pre-Dispute Arbitration Agreement," the clause[9] provided the following broad language:

> In consideration of opening one or more accounts for you, you agree that any controversy between LPL arising out of or relating to your account, transactions with or for you, or the construction, performance or breach of this agreement whether entered into prior, on or subsequent to the date hereof, shall be settled in arbitration in accordance with the rules, then obtaining of the National Association of Securities Dealers Inc.[10]

In denying the defendants' motion to stay, the superior court judge, relying on the SJC's 1982 decision in *Hannon v. Original Gunite Aquatech Pools Inc.*,[11] held that McInnes could not be forced to arbitrate her Chapter 93A claim.[12]

The defendants then filed a second motion to stay the case and compel arbitration, this time arguing that the FAA controlled the effect of the arbitration clause on the dispute, and that the FAA preempted whatever rights McInnes may have had under *Hannon*.[13] A different superior court judge denied the second motion, finding that there remained viable issues as to the existence and enforceability of the arbitration clause.[14] After the second motion was denied, the defendants exercised their right to an interlocutory appeal of each of the denials.[15]

The SJC accepted the defendants' application for direct appellate review and vacated both orders.[16]

### II. Legal Background

Before delving into the SJC's holding, it is important to understand the legal context in which McInnes and the defendants argued the motions to stay. Unlike section 11 of Chapter 93A, which controls disputes where both parties are engaged in trade or commerce,[17] Chapter 93A's section 9 contains the following provision:

> (6) Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action

1. 466 Mass. 256 (2013).
2. *Id.* at 257 (internal citations and abbreviation definitions omitted).
3. 9 U.S.C. §1 *et seq.*
4. *McInnes*, 466 Mass. at 257-58.
5. *Id.* at 257. The other claims were for fraud, intentional misrepresentation, breach of fiduciary duty, intentional infliction of emotional distress and violation of the Massachusetts Securities Act, Mass. Gen. Laws ch. 110A, §410. *McInnes*, 466 Mass. at 257.
6. McInnes v. LPL Fin. LLC, 466 Mass. 256, 258 (2013).
7. *Id.*
8. *Id.* at 258. The MAA is codified at Mass. Gen. Laws ch. 251, §§1 *et seq.*
9. *McInnes*, 466 Mass. at 258-59.
10. *Id.* at 259.
11. 385 Mass. 813 (1982).
12. McInnes v. LPL Fin. LLC, 466 Mass. 256, 259 (2013).
13. *Id.*
14. *Id.* at 259-60.
15. *Id.*
16. *Id.* at 260, 267.
17. *See* Mass. Gen. Laws ch. 93A, §11.

> under this section or to obtain injunctive relief or recover damages or attorney's fees or costs or other relief as provided in this section. Failure to exhaust administrative remedies shall not be a defense to any proceeding under this section, except as provided in paragraph seven.[18]

The legislature added this provision ("Paragraph 6") as part of the 1973 amendments to section 9 of Chapter 93A.[19]

As later explained by the SJC, the 1973 amendments were designed "to preclude stays in the absence of ... limited circumstances."[20] Those circumstances focus on instances where a governmental agency is involved and an adjudicatory hearing is required in order to later pursue a Chapter 93A claim.[21] To the SJC, this framework made it clear that the legislature designed the 1973 amendments, and Paragraph 6 in particular, to "[allow] consumers access to the courts to vindicate their rights, without first exhausting other remedies."[22]

The SJC did not address Paragraph 6 until *Hannon* in 1982.[23] Hannon was a dispute between an in-ground swimming pool installation company and a consumer who had purchased the company's services.[24] After the complaint was filed, the defendant moved to stay the proceedings pursuant to the MAA and an arbitration clause contained in the parties' pool installation contract.[25] The judge allowed the motion.[26] The plaintiff argued on appeal that Paragraph 6 made the judge's ruling improper.[27] The SJC agreed, holding that the consumer was not required to submit his Chapter 93A claim to arbitration.[28] Although arbitration did "not fall neatly into the categories" listed in Paragraph 6, the SJC viewed "it [as] comprehended within either 'common law' or statutory remedies."[29] To the SJC, the holding was consistent with the legislative intent of the 1973 amendments.[30] With that, the so-called *Hannon* right — the right to bring a section 9 claim to court even in the face of a valid, predispute arbitration clause — was born.

After the decision, Massachusetts courts understood consumers to have a *Hannon* right.[31] Although the motion to stay in *Hannon* was argued under the MAA,[32] the decision contained no language limiting its application to arbitration clauses governed by that statute.[33] At the time, the Supreme Court had not even affirmatively stated that the FAA could apply in state courts.[34] Within two years of *Hannon*, the Supreme Court[35] expressly found that it could both apply in state court and preempt conflicting state law.[36]

The reason that the distinction between the MAA and FAA matters is that the FAA controls any agreement to arbitrate "involving commerce."[37] By the mid-1990s, the Supreme Court firmly interpreted this language to mean that the FAA's reach was as far as the Commerce Clause would permit.[38] Of particular interest here, "involving commerce" meant that state statutory provisions that were in conflict with the FAA, including ones designed to protect consumers, would be preempted.[39] Although not yet challenged, Paragraph 6, as interpreted in Hannon, was clearly such a provision because it prohibited outright the arbitration of Chapter 93A claims.[40]

By the 2000s, Massachusetts courts were left trying to figure out what, if anything, remained of the *Hannon* right. Courts freely acknowledged that it still existed,[41] but it was clear that the *Hannon* right would almost always be preempted by the FAA.[42] For example, when faced with plaintiffs trying to assert their *Hannon* right in a dispute with their stockbroker, Judge Van Gestel wrote, "[t]his Court does not read *Hannon* ... as State law that can preclude arbitration in circumstances covered by the FAA."[43]

Although the focus here is on the impact on *Hannon*, the Supreme Court's decisions on FAA supremacy are both numerous and, as a few recent examples illustrate, much broader in scope. In 2009, the Supreme Court held that employees could not bring their individual age discrimination claims in court where their union's collective bargaining agreement provided for arbitration of discrimination claims.[44] In 2012, it overruled West Virginia's highest court, which had refused to enforce arbitration clauses contained in nursing home admission agreements as violating public policy after the facilities were sued for negligence causing personal injury and wrongful death.[45] The Supreme Court has also enforced class action

18. Mass. Gen. Laws ch. 93A, § 9(6).

19. *See* St. 1973, ch. 939; Hannon v. Original Gunite Aquatech Pools Inc., 385 Mass. 813, 826 (1982).

20. *Hannon*, 385 Mass. at 826. *See* Mass. Gen. Laws ch. 93A, §9(6)-(8).

21. *See* Mass. Gen. Laws ch. 93A, §9(7) (2006). *See also id.* at §9(8).

22. *Hannon*, 385 Mass. at 828.

23. *See id.* at 816, 825-27.

24. Hannon v. Original Gunite Aquatech Pools Inc., 385 Mass. 813, 814 (1982).

25. *Id.* at 814-15.

26. *Id.*

27. *Id.* at 816.

28. *Id.*

29. Hannon v. Original Gunite Aquatech Pools Inc., 385 Mass. 813, 826 (1982).

30. *Id.* at 826, 828.

31. *See, e.g.,* Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 378 (1990); Greenleaf Eng'g & Constr. Co. v. Teradyne Inc., 15 Mass. App. Ct. 571, 574-75 (1983).

32. *Hannon*, 385 Mass. at 825.

33. *See id.* at 814-29.

34. *See generally* Southland Corp. v. Keating, 465 U.S. 1 (1984) (applying FAA to state court proceedings and holding it preempted conflicting state statute); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (explaining FAA applies in state courts); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (applying FAA in diversity case in federal court for first time).

35. *See Moses H. Cone*, 460 U.S. at 26 n.34.

36. *Southland*, 465 U.S. at 16.

37. 9 U.S.C. §2.

38. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-75 (1995).

39. *Id.* at 280-82.

40. *See id.* at 271; *see also* AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1747 (2011).

41. *See, e.g.,* Beals v. Commercial Union Ins. Co., 61 Mass. App. Ct. 189, 195 (2004); Gargano & Assocs. PC v. John Swider & Assocs., 55 Mass. App. Ct. 256, 260 (2002); Simas v. House of Cabinets Inc., 53 Mass. App. Ct. 131, 137 n.8 (2001); Albertson v. Magnetmakers LLC, No. 99-4931-C, 2000 Mass. Super. Lexis 34, *3 n.2 (Mass. Super. Ct. Jan. 18, 2000).

42. *See, e.g.,* Seacoast Motors of Salisbury v. Chrysler Corp., 959 F. Supp. 52, 53 n.2 (D. Mass. 1997); Wolff v. Fid. Brokerage Servs. LLC, No. 01-2690-BLS, 2002 Mass. Super. Lexis 350, *8-9 (Mass. Super. Ct. Sept. 5, 2002).

43. Wolff v. Fid. Brokerage Servs. LLC, No. 01-2690-BLS, 2002 Mass. Super. Lexis 350, *8-9 (Mass. Super. Ct. Sept. 5, 2002).

44. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009).

45. *See* Marmet Health Care Ctr. Inc. v. Brown, 132 S.Ct. 1201, 1202-04 (2012).

waivers contained in consumer arbitration clauses even though such waivers were unconscionable under settled California law.[46]

More recently, the Supreme Court has articulated a so-called Effective Vindication Exception, which would invalidate an arbitration provision that essentially serves as a prospective waiver of a party's right to pursue a claim.[47] The Supreme Court explained that this exception "would certainly [invalidate] a provision in an arbitration agreement forbidding the assertion of certain statutory rights ... [a]nd it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[48] This exception is limited, however, as the Supreme Court has also stated that "the fact that [a claim] is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."[49] Although the articulation of the Effective Vindication Exception does serve as a slight retrenchment by the Supreme Court, the scope of the exception is narrow and its application in particular circumstances is unclear.[50]

When it comes to conflicting state law, the Supreme Court has made it clear that the FAA truly is "the supreme Law of the Land."[51] The SJC is acutely aware of this truth, as evidenced by its most-recent decision in *Feeney v. Dell Inc.*[52]

## III. The *McInnes* Decision

It was in this context that McInnes sought to invoke her *Hannon* right after the defendants initially moved to stay the court proceeding pursuant to the MAA.[53]

The SJC first laid out the MAA's legal framework.[54] Unless the contract affects interstate commerce, the MAA controls.[55] If a party challenges the validity of the arbitration agreement, the MAA requires the judge to first determine if there is a material factual dispute on the issue, and, if so, then conduct an expedited evidentiary hearing on the issue and decide it as a matter of law.[56]

If the underlying contract affects interstate commerce, however, the SJC explained that the arbitration clause is governed by the FAA instead.[57] On a validity challenge, the FAA requires the judge to sever the arbitration provision from the rest of the contract, determine its legitimacy and leave the validity of the remainder of the contract to the arbitrator.[58] Of particular importance to the case, the SJC then quoted the Supreme Court for the proposition that "'[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.'"[59]

The SJC turned to the first judge's denial of the defendants' motion to stay pursuant to McInnes's *Hannon* right.[60] Because McInnes was a resident of Massachusetts and McGhee worked in Pennsylvania, the dispute clearly involved interstate commerce, thereby triggering the FAA.[61] The SJC then clarified *Hannon* by explaining that "[b]ecause our holding in *Hannon* does not apply to any arbitration agreement governed by the FAA, the judge erred in relying on that holding to deny the defendants' first motion to stay proceedings and compel arbitration."[62] Interestingly, the SJC was noncommittal about the future of the *Hannon* right when the MAA, rather than the FAA, controls the arbitration clause.[63]

On the second motion's denial, the SJC explained that the judge incorrectly treated it as if the defendants had sought summary judgment.[64] Initially, if the judge was concerned about the enforceability of the arbitration clause, he should have ordered and conducted an expedited evidentiary hearing as required by the FAA.[65] In this case, however, there was no evidence to support McInnes's contention that the agreement had been procured by fraud.[66] Again citing recent Supreme Court precedent, the SJC explained that it was not enough for McInnes to have alleged that the arbitration provision was part of an adhesion contract to invoke the so-called "Effective Vindication Exception."[67] She was not "prevented from pursuing a remedy" by being compelled to arbitrate, because she had not waived any statutory or common law remedy, the fees did not make access to the forum impracticable (especially where she was seeking more than $330,000 in damages), and the arbitrator had the same power as a court to award damages, attorney fees and multiple damages if she were to prevail on her Chapter 93A claim.[68]

46. *See* AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1744-53 (2011).

47. *See* American Express Co. v. Italian Colors Rest., 133 S.Ct. 2304, 2310-11 (2013).

48. *Id.*

49. *Id.* at 2311 (emphasis in original).

50. *Compare* Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 921, 925-27 (9th Cir. 2013) (invoking exception to invalidate arbitration clause where unconscionable provision required putative employee to split arbitrator fee evenly with defendant employer), with Pla-Fit Franchise LLC v. Patricko Inc., No. 13-cv-489-PB, 2014 U.S. Dist. Lexis 69047, *17 (D.N.H. May 20, 2014) (upholding arbitration clause and requiring franchisee to arbitrate claims related to two separate locations in two separate arbitrations).

51. U.S. Const., Art. VI, cl. 2.

52. *See* Feeney v. Dell Inc., 466 Mass. 1001, 1001-03 (2013); Feeney v. Dell Inc., 465 Mass. 470, 491-507 (2013).

53. McInnes v. LPL Fin. LLC, 466 Mass. 256, 259 (2013).

54. *Id.* at 260-62.

55. *Id.* at 260.

56. *Id.* at 261-62.

57. *Id.* at 262.

58. McInnes v. LPL Fin. LLC, 466 Mass. 256, 262 (2013).

59. *Id.* at 262-63 (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011)).

60. *McInnes*, 466 Mass. at 263-64.

61. *Id.* at 264.

62. *Id.*

63. McInnes v. LPL Fin. LLC, 466 Mass. 256, 264 n.9 (2013) ("Because the contract here involved interstate commerce, we do not address whether claims under [section 9] must be referred to arbitration where the contract includes an agreement to arbitrate but does not involve interstate commerce and, therefore, falls outside the scope of the [FAA].").

64. *Id.* at 264.

65. *Id.* at 265.

66. *Id.*

67. *Id.* at 265-67 (citing American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 1310 (2013); AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1750 n.6 (2011)).

68. McInnes v. LPL Fin., LLC, 466 Mass. 256, 266-67 (2013).

Accordingly, the SJC vacated both orders and remanded the case, directing the superior court to stay the proceedings and compel arbitration.[69] The case subsequently settled in January, 2014.[70]

## IV. The End of *Hannon*

Although the SJC's decision in *McInnes* was not surprising,[71] it is the latest example of the FAA's staggering ability to preempt state law. After *McInnes*, it is not entirely clear what, if anything, could possibly remain of the *Hannon* right.

For the FAA not to control the effect of an arbitration clause, the relationship between the parties cannot be one "involving commerce."[72] The Supreme Court interprets this phrase to mean that the FAA reaches to the full extent of the Commerce Clause.[73] In theory then, the *Hannon* right could only still exist in a dispute arising out of a wholly intrastate consumer transaction, where the MAA would control the effect of the arbitration clause, but the SJC declined to confirm even this principle in *McInnes*.[74]

Given the reach of the Commerce Clause, the reality is that whether or not the *Hannon* right technically still exists in circumstances controlled by the MAA does not make much of a difference. By way of example, albeit from the civil rights context, the sale of a hot dog at a snack bar in the middle of Arkansas affected interstate commerce because some of the ingredients contained in the bun were produced and processed in other states.[75] If this consumer transaction affects interstate commerce, and thereby would trigger the FAA, it is difficult to even articulate a hypothetical wholly intrastate consumer transaction that could give rise to a Chapter 93A claim. Such a hypothetical transaction could not affect interstate commerce, but the consumer plaintiff would still need to prove that the defendant was engaged in "trade or commerce."[76] The need to both avoid interstate commerce and establish commercial activity makes it difficult to imagine circumstances that will be controlled by the MAA.

Given this difficulty, as a practical matter, the *Hannon* right to have section 9 claims tried in court no longer exists. The *Hannon* right is simply the latest casualty of the scope of the FAA.

— Matthew S. Furman

69. *Id.* at 267.

70. *See* McInnes v. LPL Fin. LLC, Barnstable County Superior Court, No. 11-00570, Docket Entry No. 21 (January 31, 2014).

71. *See* Warfield v. Beth Israel Deaconess Med. Ctr. Inc., 454 Mass. 390, 400 n.14 (2009).

72. 9 U.S.C. §2.

73. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274-79 (1995).

74. *See* McInnes v. LPL Fin. LLC, 466 Mass. 256, 264 n.9 (2013).

75. *See* Daniel v. Paul, 395 U.S. 298, 303-05 (1969).

76. Mass. Gen. Laws ch. 93A, §2.