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| **[Review of Civil and Administrative Legal Developments in Maine]** |
| Case Summaries |

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**ADMINISTRATIVE LAW**

* ***David M. Tourangeau and Marjorie J. Getz v. Janis Walsh and Paul Walsh and Maine Department of Environmental Protection*, 2014 ME 103** (Adjacency for purposes of notice requirements)
  + In an 80C appeal of the DEP’s approval of a Natural Resources Protection Act permit for construction of a pier, an unhappy neighbor argued that she is an abutting property owner and did not receive the required notice of the application. The Law Court found it was not error to conclude that when the landowner/applicant bought the lot adjacent to the lot where the proposed project would be located, and thus owned two lots, the party on the far side of the second lot is not an abutter to the first lot. (Pete LaFond)
* ***Fox Island Wind Neighbors v. DEP*, 2015 ME 53** (Judicial Review of what the Court characterized as an Enforcement Action)
  + This was an 80C appeal with attached independent section 1983 claim in which neighbors of the Fox Island Wind Project on Vinalhaven Island challenged DEP’s decision requiring operational changes at the facility to address excessive noise on the grounds that it did not go far enough. It is a complicated case factually and procedurally, but the decision involves some important issues of administrative and constitutional law. The Superior Court found that the challenged decision, which DEP called a condition compliance order, was a form of agency enforcement action. It then reviewed the order under traditional APA standards, found the order was not based on substantial evidence on the record and then remanded the matter back to DEP with instructions to DEP to take more aggressive action. DEP filed an interlocutory appeal to the Law Court arguing that the court erred by reviewing what it found to be an agency enforcement action as though it were final agency action subject to APA review, and violated separation of powers principles by directing DEP in how to conduct the enforcement of its laws. The Law Court found the case was subject to interlocutory review under an exception to the final judgment rule. It then found that the challenged order was indeed a form of enforcement activity, and that it was subject to traditional APA review. This latter finding seems inconsistent with several Law Court precedents, though Court did not expressly overrule any cases. Applying traditional APA standards of review, the court then upheld DEP’s decision, apparently recognizing the agency has great discretion in deciding how to enforce its laws. The court also dismissed the independent section 1983 claim. (Jerry Reid)
* ***Maine Medical Center v. Burwell***, **775 F.3d 470 (1st Cir. 2015)** (Deference to Agency)
  + Case over payment for Medicare/Medicaid services. One issue was what the appropriate level of deference was to accord HHS’s determination that the hospital was not entitled to reimbursement. Because Maine Medical failed to raise/argue this issue before the district court, it waived the argument in the First Circuit case. As such, the First Circuit afforded substantial deference to the HHS application of the “must bill” policy, which was neither plainly erroneous nor inconsistent with the regulations
  + HHS had not consistently adhered to the interpretation of the regulation that it advanced in this case. Maine Medical argued that, because of this inconsistency, the HHS’s decision was entitled to less deference. The Court disagreed. Agencies are “afforded a substantial measure of freedom to refine, reformulate, and even reverse their precedents in light of new insights and changed circumstances.” 775 F.3d at 480 (citation omitted). Accordingly, the Court rejected the hospital’s argument that the agency’s inconsistency undermined the deference owed to HHS’s decision.
* ***Passadumkeag Mountain Friends, et al. v. Board of Environmental Protection, et al*, 2014 ME 116** (Operative decision in an 80C Appeal; and an *Ex Parte* analysis in a non-adjudicatory licensing proceeding)
  + Before the review of whether there was substantial evidence in the record to support the Board’s approval, the Court wrestled with whether the Commissioner’s Decision, or the Board’s on the appeal is the operative decision on an appeal to Court. The Court had in a previous case stated the operative decision is the Board’s decision, based on statutory language saying the Board is not bound by the Commissioner’s findings of fact or conclusions of law. In this case, the Court also pointed to the fact that the Board engaged in an independent analysis of the record and made findings on the credibility of written reports from experts. Of concern in this opinion is the Court’s analysis of a claim of ex parte communication. No public hearing was held, and the Court agreed that public hearings are discretionary for wind power permit applications. However, the Court did not adopt our argument that the APA’s prohibition of *ex parte* communications would not apply. The Court said, “[W]e have not held that there is a bright-line rule that permits *ex parte* communications in all non-adjudicatory proceeding ...” The Court found that the communications, letters from the permit applicant (the appellant at that stage) to the Board Chair which were not copied to an interested person, did not affect the interested person’s due process rights, but the Court’s analysis was under an APA *ex parte* framework. (Peggy Bensinger)
* ***State of Maine v. Dan Brown/Gravelwood Farms* , 2014 ME 79** (Equitable Estoppel and State Government Functions)
  + The Maine Supreme Court denied Mr. Brown’s appeal of the Hancock County Superior Court’s decision granting a motion for summary judgment on a complaint alleging violations of milk distributor and food establishment licensing laws. Mr. Brown raised a number of issues in the appeal, the most substantial of which related to the Superior Court’s findings that equitable estoppel did not apply in this case and that the Town of Blue Hill ordinance, which purported to exempt him from compliance with the state’s licensing and inspection laws, were preempted by state law. The decision, written by Justice Alexander, rejected his equitable estoppel argument for two reasons. First, it found that there was no misrepresentation by the state that could support the application of equitable estoppel – the statement that Mr. Brown did not need to be licensed and inspected in order to sell milk from his farm stand was truthful at the time it was made, and the fact that the department later determined that he needed a license based on its review of the law did not render the earlier statements misleading or fraudulent. This is significant because it appears to recognize that state agencies policy choices, priorities and resources change over time. Second, even if there had been a misrepresentation, the decision held that equitable estoppel should not be applied to restrict a government from undertaking its essential functions – and protecting the public health from unsafe foods is an essential function of government. These holdings seem to clarify the circumstances where equitable estoppel do not apply against governmental entities. As to preemption, the Court held that the Blue Hill Ordinance would be preempted if construed to exempt Mr. Brown from compliance with state or federal licensing and inspections. However, the Court chose to interpret the ordinance as applying only to local (i.e., Blue Hill) regulation. However, the end result was the same. (Mark Randlett)
* ***Zablotny v. State Board of Nursing*, 2014 ME 46** (*De novo* Judicial Review of Agency Action Defined)
  + The patient’s sister filed a complaint against Zablotny with the State Board of Nursing in early 2009. A hearing was held to determine if grounds existed for disciplinary action against Zablotny’s license and the Board found that he had violated several statutes and Board rules and revoked his nursing license for two years. Zablotny then petitioned for *de novo* judicial review in the District Court pursuant to 10 M.R.S. § 8003(5).
  + At the request of the Court, the parties extensively briefed what they considered to be the Court’s duties in performing “*de novo* judicial review” pursuant to section 8003(5). The Court initially ruled that it was “of the view that *de novo* means *de novo* essentially” and therefore concluded that the court would be required to conduct a *de novo* hearing. However, the Board moved the court to reconsider and the court retracted its initial ruling and then determined that “*de novo* judicial review” precluded it from substituting its judgment for the Board’s on questions of fact. As a result, the court would not rehear the evidence presented to the Board but would instead base its review “solely upon the [agency] record filed with the Court.” The Court then entered a judgment affirming the Board’s decision revoking Zablotny’s license, finding “competent evidence to support the Board’s findings.” Zablotny appealed.
  + Looking at both the plain meaning of the statute and the legislative history to interpret the phrase “de novo judicial review” as used in 10 M.R.S. § 8003(5), the Law Court held that the trial court’s initial determination was correct and it was required to hold a *de novo* hearing. The trial court’s ultimate interpretation was erroneous, as was its denial of Zablotny’s motion to re-present evidence presented to the Board. The Law Court remanded the case and instructed the District Court to evaluate both the factual and legal issues and make its own independent decision. Specifically, the Law Court set forth that the District Court shall “hear the evidence presented, independently evaluate the testimony offered, make its own credibility determinations, and reach its own decision regarding revocation.” The Law Court further held that by doing this, “the court will afford licensees and the public the necessary procedural safeguards that the Legislature intended.”

**BANKRUPTCY**

* ***Fahey v. Massachusetts Department of Revenue*, 779 F.3d 1 (1st Cir. 2015)** (“Timeliness” with regards to dischargability)
  + The debtors/appellants (the “Debtors”) failed to pay any tax to the Commonwealth for the years at issue. Eventually, each of the Debtors filed the missing returns, but still failed to pay any of the tax, interest, or penalties then due. More than two years later, each filed a voluntary petition for Chapter 7 bankruptcy protection with the hope of discharging the tax obligations due under the late filed returns.
  + § 523(a)(1)(B)(i) of the Bankruptcy Code excepts from a debtor’s general discharge a tax, with respect to which a return, or equivalent report, if required, “was not filed or given.” § 523(a)(1)(B)(ii) excepts from the general discharge a tax, with respect to which a return, or equivalent report, if required, “was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition.” Since the “returns” at issue were filed before two years before the petition date, the Debtors believed that the resulting tax liabilities would be discharged under 11 U.S.C. § 727.
  + The First Circuit Court of Appeals held that “timeliness” is a filing requirement under Massachusetts law. Accordingly, an untimely “return” does not qualify as a return for dischargeability purposes and therefore tax due under an untimely return is always excepted from discharge under § 523(a)(1)(B)(i). See 11 U.S.C. § 523(a)(\*) (“[T]he term ‘return’ means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements.”)). “Timeliness” is as much a filing requirement under Maine law as it is under Massachusetts law. See 36 MRS § 5227 (“The income tax return required by [Title 36, Chapter 823) must be filed on or before the date a federal income tax return, without regard to extension, is due to be filed.”); 26 U.S.C. § 6702(a) (“In the case of returns due section 6012, 6013, 6017, or 6031 [of Title 26] (relating to income tax under subtitle A), returns made on the basis of the calendar year shall be filed on or before the 15th day of April following the close of the calendar year . . . .”). The Fahey decision therefore appears to apply with the same force in the District of Maine as it does in the District of Massachusetts

**CHILD PROTECTION**

* ***In re M.C.*, 2014 ME 128, 104 A.3d 139** (No Arguable Issues of Merit on Appeal)
  + The Law Court outlined the proper appellate procedure “[w]hen a parent's attorney in a child protection case believes, in good faith, that there are no arguable issues of merit in an appeal…” *In re M.C.* at ¶ 7. In those circumstances, the parent’s attorney should take three steps: “1. File with the Court, with a copy to the client, a brief outlining the factual and procedural history of the case, and including a statement that counsel believes that there are no arguable issues of merit for an appeal. 2. Provide the client with notice that, if the client believes that there is a valid ground for appeal, the client should file (a) a brief with this Court identifying the issues the client wishes to raise on appeal, and (b) a request for the appointment of new counsel if the client desires new representation. 3. Request from this Court a reasonable extension of time for filing the appellant's brief to allow the client time to prepare and file a separate brief addressing the issues on appeal from the client's perspective.” *In re M.C.* at ¶ 7 (citations omitted.)
* ***In re J.H.,* 2015 ME 10, 108 A.3d 1271** (Statutory Presumption in Case of Emotional Harm)
  + The Probate Court presumed, pursuant to 22 M.R.S. § 4055(1–A)(A), that a father was unable or unwilling to protect his child from jeopardy and these circumstances were unlikely to change within a time reasonably calculated to meet the child’s needs “based on its finding that the father, by murdering the mother in the oldest son's immediate presence, had “acted in callous disregard” for the oldest son's emotional well-being and had failed to protect the oldest son from “a profound emotional injury” in a manner that is heinous and abhorrent to society.” *In re J.H.* at ¶ 5. The Law Court rejected the father’s argument that this statutory presumption applies only when a parent inflicts physical harm upon a child. The Court held: “Although we have only had occasion to discuss this presumption in cases involving physical harm to a child, *see, e.g., In re Brandi C.,* 1999 ME 68, 728 A.2d 679, we have not restricted the presumption to acts that cause physical harm to a child, and do not do so here because emotional harm can create jeopardy in the same way as physical harm.” *In re J.H.* at ¶ 7.
* ***In re T.C.*, 2015 ME 20, \_\_ A.3d \_\_** (Parent’s Failure to Appear at Hearing Following Notice)
  + A father, despite proper notice, failed to appear at the hearing on the Department’s petition to terminate his parental rights. He provided no explanation for his absence. The father’s attorney moved to continue the hearing. The District Court denied the father’s motion to continue, held an evidentiary hearing in the father’s absence, and issued an order terminating the father’s parental rights. The Law Court affirmed: “[G]iven that the father received advance notice of the hearing and chose not to appear, the court did not abuse its discretion by denying the father’s attorney’s motion to continue the termination hearing.” *In re T.C.* at ¶ 6.
* ***In re C.A.*, 2015 ME 34, \_\_ A.3d \_\_** (Sufficiency of the Evidence Challenge)
  + The Law Court affirmed, on sufficiency of the evidence, the District Court’s order terminating the parental rights of a mother based upon her failure to protect her child from injuries inflicted by the child’s father: “Here, competent record evidence demonstrates that the mother failed to respond appropriately to the child's bruises, which, as the court noted in its termination judgment, were “‘sentinel injuries,’ injuries often observed in children who later sustained severe injury.” The mother failed to recognize the risk that the father posed to the child. She did not seek medical attention for the child's injuries or report them to the Department, but instead took affirmative steps to keep them from being discovered. Until the eve of the TPR hearing, she prioritized her relationship with the father over the child's need for safety and refused to consider the possibility that the father was responsible for the child's injuries, even though he was alone with the child when the injuries occurred and both medical evaluations indicated that his explanations for the injuries were not plausible. Although the injuries themselves were not life threatening, they were injuries *inflicted* on a very young and extremely vulnerable child, and were properly deemed to create jeopardy. Sufficient evidence thus supports the court's finding, by clear and convincing evidence, that the mother is unwilling or unable to protect the child from jeopardy and that these circumstances are unlikely to change within a time that would meet the child's needs.” *In re C.A.* at ¶ 13.
* ***In re E.A.*, 2015 ME 37, \_\_ A.3d \_\_** (Children Born to Parents with Significant CP History)
  + In 2003, a mother inflicted injuries to her two-year-old son that resulted in his death.  She was convicted of manslaughter.  The father was convicted of assault for inflicting injuries upon the same child two days before his death.  These injuries did not contribute to his death.  In 2013, the mother gave birth to premature twins and the Department sought child protection orders as to each child.  After a four day evidentiary hearing, the District Court found that the twins are in circumstances of jeopardy based upon the parents’ conduct with regard to their first child, and based upon the parents’ continued insistence that their son’s death was not the result of inflicted injuries. The District Court also found an aggravating factor as to each parent and entered an order relieving the Department of its obligation to provide reunification services. The Law Court affirmed the jeopardy findings on sufficiency of the evidence and also affirmed the District Court’s finding of the existence of an aggravating factor. The Law Court held that the District Court “properly considered the parents' past conduct and whether they have sufficiently accepted responsibility for their actions.” *In re E.A.* at ¶ 9. Finally, the Law Court held that the Confrontation Clause of the Sixth Amendment does not apply in child protection proceedings.

**CHILD SUPPORT**

* ***Pitts v. Moore*, 2014 ME 59** (*De facto* parent)
  + In November 2009 Amanda Moore had a child and named her boyfriend, Michael Pitts, as the father. In 2011 Pitts and Moore separated and Moore asserted another man, Eric Hague, was the biological father of the child. Paternity testing confirmed Moore’s assertions.
  + Moore and Hague did not want Pitts to have contact with the child, but the District Court determined that Pitts was the child’s *de facto* parent since Pitts had made a permanent commitment to the child, the child and Pitts had formed a bond, and continued contact between the child and Pitts was in the child’s best interest. The District Court awarded Pitts unsupervised contact, but did not award or impose any parental rights and responsibilities, including decision making or a child support obligation, on him.
  + On appeal the issue was “how a person who is not a biological or adoptive parent may, over the objection of the child’s fit biological or adoptive parent, obtain…that full panoply of parental rights and responsibilities as a *de facto* parent.”
  + The court laid out three stages to determine parental rights and responsibilities for a person seeking *de facto* parent status:
    - a party seeking *de facto* parenthood status must establish his or her standing by making a prima facie showing of the elements of *de facto* parenthood, i.e., an unequivocal, committed, and responsible parenting role and harm to child if that relationship is terminated
    - if petitioner satisfies that prima facie burden, petitioner must then prove those elements by clear and convincing evidence
    - if, and only if, the individual is a de facto parent, the court must then establish the extent of petitioner's rights and responsibilities under the statutes governing parental rights and responsibilities, and this would include child support.
  + As of May 2015, An Act to Update Maine’s Family Law, L.D. 1017, is before the Legislature and will specifically address the requirements for the court to adjudicate a person to be a *de facto* parent.
* ***Eaton v. Paradis*, 2014 ME 61** (*De facto* Parent)
  + Andrea Brown, the mother of James Eaton, appealed an order from the District Court denying her de facto parental rights with respect to her grandchildren. Kelly Paradis and James Eaton had two children, and in 2006 an order was entered in the District Court that found Paradis and Eaton to be the biological parents of the children and awarded primary residence to Paradis.
  + In November 2007 Paradis asked Brown to take the children as she was in a serious domestic violence situation with a new boyfriend. Eaton then filed a motion to modify seeking primary residence of the children that was granted. However, the children continued to live with Brown and Paradis rarely had contact. Brown took the child to their counseling, medical and dental appointments. Eaton had occasional visits with the children.
  + Paradis filed a motion to modify the parental rights in November 2011 and Brown filed a motion for de facto parental rights supported by Eaton. The District Court found that Brown had “acted as primary caregiver and custodian of these children for a significant period of time” and had a “parent-like” relationship with the child, but as neither child nor the parents acknowledged Brown as a parent required by prior case law, she failed to establish standing to proceed with her claim that she is a *de facto* parent. Brown filed a motion to reconsider that was denied and then appealed to the Law Court.
  + The Law Court referenced its recent decision in *Pitts v. Moore* and remanded the case back to the District Court for reconsideration of both the record and any additional evidence presented by the parties, in light of their opinion in *Pitts*.
* ***Murphy v. Bartlett*, 2014 ME 13** (Contempt, ability to comply)
  + Bartlett was held in contempt for failure to comply with a divorce judgment. At the contempt hearing, the District Court found him able to pay as ordered.
  + On appeal, he argued that the court’s judgment was based upon erroneous factual findings. The Law Court determined the argument must be addressed in two parts: by first examining “the court’s findings regarding Bartlett’s ability to comply with the divorce judgment” and then examining “the remedial sanctions imposed by the court to cure Bartlett’s contempt.” In regards to Bartlett’s ability to comply with the divorce judgment the Law Court laid out a two part analysis calling for 1) a review of “the court’s judgment of contempt to the extent that it was based on Bartlett’s failure to comply with the divorce judgment to the fullest extent possible as of the date of the contempt judgment” and 2) a review of “the court’s finding that Bartlett has the prospective ability to make all of the payments required by the divorce judgment.”
  + The Law Court reaffirmed that “to find a party in contempt, the complaining party must establish by clear and convincing evidence that the alleged contemnor failed or refused to comply with a court order and presently has the ability to comply with that order.” Compliance is “not an all or nothing proposition” and a party subject to a court order “must comply to the fullest extent possible, regardless of whether such efforts result in compliance in whole or in part.” (citing *Efstathiou v. Efstathiou*, 2009 ME 107, ¶ 11, 982 A.2d 339.) The Law Court held that there was competent evidence to support the District Court’s finding that Bartlett had not complied with the divorce judgment to the fullest extent possible, citing Bartlett’s bank statements, earnings history and own testimony that he voluntary missed four days of work to take two vacations. However, the Law Court vacated the District Court’s sanction of incarceration and remanded back to the District Court to “1) determine with particularity Bartlett’s ability to prospectively comply with the divorce judgment”; 2) clearly provide a description of the action required for Bartlett to purge the contempt, and 3) “impose a remedial sanction the court deems necessary.” The Law Court essentially held that in this case Bartlett’s expenses and obligations exceeded his net income, and because of this, Bartlett did not have the prospective ability to make his required payments pursuant to the contempt order.

**CONSTITUTIONAL ISSUES**

* ***Ohio v. Clark*, 135 S. Ct. 2173 (2015)** (Confrontation Clause)
  + Clark’s girlfriend’s son’s preschool teachers noticed injuries on the child at school one day. The child revealed that Clark was the source of the injuries and the teachers then notified authorities. At his trial for child abuse, Clark used the Confrontation Clause to argue for exclusion of the child’s statements to his teachers. Previous Supreme Court decisions clarified that the Confrontation Clause prohibits “testimonial” statements by a nontestifying witness to be admitted in a trial. A statement qualifies as a testimonial statement if the “primary purpose” of the statement was as an out of court substitute for testimony. Courts must go a step further, though, because the Confrontation Clause does not ban statements that would have been admissible in a criminal case at the time of founding.
  + This case was the first instance in which the Court addressed statements made to someone other than law enforcement. The Court, in light of all relevant circumstances, determined the statements were not testimonial and therefore could be admitted. The child presented the statements in response to teachers’ questions about an on-going threat: the possibility of abuse. The main goal was not to gather evidence to prosecute Clark, but to protect the child. Statements to those other than law enforcement officers are not categorically allowed, but the fact that the statements were made by a small child to his teachers was relevant. Mandatory reporting obligations on schools do not convert the conversation into a statement to law enforcement agents.
* ***State v. Kimball***, **2015 ME 67** (Confrontation Clause re: 9-1-1 calls)
  + Kimball was convicted of domestic violence assault. He appealed, claiming his constitutional right to confront a witness was violated when the victim was unwilling to testify but Court admitted the emergency 9-1-1 call recording and the victim’s statements to an emergency medical technician (“EMT”).
  + Due to frequent issues regarding victim testimony at domestic violence trials, hearsay exceptions have been applied to allow admission of a victim’s previous statements, including statements made under the stress of excitement and/or statements made for medical diagnosis and treatment. The admissibility of statements is limited by the US Supreme Court’s interpretation of the Confrontation Clause. *See* *Crawford v. Washington*, 541 US 36. The Confrontation Clause guarantee only applies to “testimonial” evidence, which the Supreme Court described as “typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* at 51. Confrontation Clause challenges must be examined under a two-step inquiry: 1) whether the evidence is hearsay, and 2) if it is hearsay, whether it was testimonial in nature.
  + The Supreme Court distinguished testimonial from non-testimonial evidence in an “excited utterance” context: statements are considered testimonial when made after the conclusion of an on-going emergency, with the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution. Statements are nontestimonial, and potentially admissible, when made under circumstances objectively indicating that the primary purpose of the questioning is to enable police assistance to meet an ongoing emergency. *Davis v. Washington*, 547 U.S. 813, 822.
  + Maine uses four criteria to distinguish between testimonial and nontestimonial statements in the context of a 9-1-1 call:
    - The caller is speaking about events as they are actually happening
    - It would be clear to a reasonable listener that the victim is facing an ongoing emergency
    - The nature of the questions asked and answered are objectively necessary and elicited for the purpose of resolving the present emergency
    - The victim’s demeanor on the phone and circumstances at the time of the call evidence an ongoing emergency
  + The victim’s 9-1-1 call in this case was made during an on-going emergency, even though she had locked Kimball out of the house by the time she made the call. Kimball was still at large and outside the home. She was exhibiting distressed demeanor and had fresh injuries to her face and throat. The questions asked during the phone call consisted of questions about the victim’s injuries and whether Kimball was still outside the residence.
  + Statements to medical personnel do not need to be made during an on-going emergency because statements to medical personnel are a separate category of hearsay exception from “excitable utterance” and by their nature, these statements are not made for the purpose of establishing facts but for the immediate purpose of diagnosis and treatment.
* ***City of L.A. v. Patel*, 2015 U.S. LEXIS 4065, 83 U.S.L.W. 4520 (U.S. June 22, 2015)** (Constitutionality of Statute)
  + A group of motel owners challenged LA Municipal Code §41.49, which required hotel operators to record certain specified information about their guests and provide that information to any LA Police Officer who requested it. Failure to make the records available upon request was a criminal misdemeanor. Respondents argued these were unreasonable Fourth Amendment searches because the law subjected hotel owners to punishment for failure to turn over the records but did not offer them an opportunity for precompliance review.
  + The Court held that facial challenges under the Fourth Amendment are not categorically barred or disfavored and that §41.49 was unconstitutional because it qualified as an administrative search under the Fourth Amendment but did not provide the hotel operators with an opportunity for precompliance review. The Court rejected petitioner’s argument that the hotel industry was a “closely regulated industry” and thus subject to more relaxed standards.
* ***Mariners for Fair Bear Hunting v. IF&W*, No. CV14414 (Me. Super. Ct., Cum. Cty., Oct. 22, 2014) 2014 WL 7920844** (Superior Court decision on Government Speech)
  + Plaintiffs alleged both FOAA violations and ultra vires political activity on the part of IFW and its employees in opposing Question 1, which would have outlawed bear baiting, trapping and hounding. They also moved for a temporary restraining order enjoining IFW from “unlawfully and irreparably influencing the outcome of the election via impermissible political activity.” The Court denied the motion because IF&W’s statute authorizes the agency to engage in this sort of public education effort, and because the government speech doctrine precludes the relief Plaintiffs sought. Plaintiffs immediately appealed on the government speech claim and filed a motion for expedited review five days after filing their notice of appeal and six days before the election, which we opposed. The Law Court denied the motion for expedited review. The Plaintiffs continued to pursue their claim following the election, and in March we filed a motion to dismiss it as non-justiciable based on either standing or mootness grounds. We also filed a stipulation with the Plaintiff indicating that the matter, if justiciable, was ready to be decided on the merits based on the prior evidence and briefs. The Superior Court granted our motion to dismiss and the Plaintiffs have again appealed to the Law Court. (Mark Randlett)
* ***State v. Collins***, **2015 ME 52** (constitutionality of probation condition prohibiting defendant contact with his minor child)
  + Collins was originally charged with unlawful sexual conduct against his son, but pled guilty to the lesser charge of misdemeanor assault. One of his probation terms prohibited him from having contact with his son except as permitted by the court. Collins sought to modify this term to allow him more contact with his son. Collins’ therapist provided a letter stating that Collins was not progressing in therapy, denied victimizing the child, and refused to take a polygraph. The trial court ruled that the probation term would remain the same and that even supervised contact was inappropriate at the time. The trial court did expressly note that Collins would have the opportunity to modify his order if he could demonstrate that his counseling had become effective and he had gained insight into the situation.
  + Law Court noted that while parents have a fundamental liberty interest to raise their children, protecting a child from harm is a compelling governmental interest that justifies a narrowly tailored restriction on that interest. When framed properly, conditions affecting an offender’s rights of contact with his child who is the victim are narrowly tailored to serve this compelling interest and do not unconstitutionally infringe on an offender’s parental rights. A court’s determination of parental rights in a family law proceeding is not dispositive of sentencing issues in a related criminal prosecution of the parent.
* ***State v. Reckards***, **2015 ME 31** (constitutionality of statute – void for vagueness)
  + Reckards moved to dismiss criminal cases against him on the grounds that the statute defining a “synthetic hallucinogenic drug” was unconstitutionally vague. He argued that the term “derivative” in the statute was ambiguous and that the statute as a whole was too complex for an ordinary person to understand.
  + The Court decided that since “derivative” has a common meaning that can be looked up in the dictionary, the term in and of itself is not unconstitutionally vague. Additionally, federal courts have rejected vagueness challenges when the statute contained an adequate scienter requirement, meaning the State would still have to prove a guilty mind beyond a reasonable doubt. The statute at issue in *Reckards* required the defendant knew or believed he possessed the specified drug, and consequently the Court ruled the statute was not unconstitutionally vague.

**CONSUMER PROTECTION:**

* Personal Jurisdiction Issues:
  + ***Mississippi ex rel Hood v. AU Optronics*, 134 S.Ct. 736 (2014)** (Class Action Fairness Act does not apply to AG cases therefore no diversity jurisdiction for removal)
  + ***Daimler v. Bauman,* 134 S. Ct. 746 (2014); *Walden v. Fiore,* 134 S. Ct. 1115 (2014)**
    - Out-of-state businesses are arguing these cases represent a change in the law of personal jurisdiction and are filing motions to dismiss in all our cases under 12(b)(2). This is a new trend and companies are now refusing to negotiate with me unless we agree in writing that they have not waived any jurisdictional defense by participating in talks.
* ***FTC v. Wyndham Worldwide Co.*, 10 F.Supp 3d 602 (D.N.J. 2014)** argued in Nov. 2014 (no decision yet)
  + Wyndham suffered 3 security breaches that compromised 69,000 consumer payment card accounts. FTC sued alleging Wyndham deceived customers by making false representations that it had implemented reasonable measures to protect personal information and that Wyndham’s failure to protect customers’ information from unauthorized access is unfair. Wyndham moved to dismiss arguing that the FTC’s substantive unfairness standards for data security exceed the agency’s authority. The District Court Judge ruled for FTC. Wyndham’s interlocutory appeal was certified to 3rd Circuit where the case is pending a decision.
  + If FTC prevails, then it will be clear that data breaches violate the FTC Act and hence the Maine Unfair Trade Practices Act which is to be construed consistent with federal courts’ interpretations of the FTC Act. If Wyndham wins—there will be no federal or state regulatory enforcement over data security issues which will have to be addressed, if at all, legislatively.

**CRIMINAL**

* ***Elonis v. United States*, 135 S.Ct. 2001 (2015)** (Internet Threatening)
  + 18 USCS § 875(c) makes it a crime to transmit “in interstate or foreign commerce any communication containing any threat…to injure the person of another.” Anthony Elonis, aka “Tone Dougie”, an aspiring rapper, posted a series of rap lyrics on Facebook that included violent fantasies about killing his ex-wife, co-workers, police, and staging a school shooting. He was arrested and charged under § 875(c). The trial court allowed, and the Third Circuit affirmed, a jury instruction that Elonis could be found guilty if a reasonable person would interpret his posts as a threat. On appeal Elonis claimed the jury should have been instructed that the Government must prove he intended for the lyrics to be a threat. The Supreme Court overturned his conviction, holding that “negligence” is not a sufficient *mens rea* to support a conviction under § 875(c), contrary to the view of nine different Court of Appeals. The Court declined to address whether “recklessness” would be sufficient, since neither party argued the point in the lower courts.
* ***State v. Johansen, 2014 ME 132*** (Statements Obtained in Violation of Miranda Rights)
  + Extends the Court’s ruling in *State v. Caron* (334 A. 2d 495 (Me. 1975)) to a Fifth Amendment context. The exclusionary rule, requiring courts to suppress evidence obtained in violation of procedural safeguards established to protect the privilege against self-incrimination, does not apply to probation revocation proceedings unless the probationer presents proof of widespread police harassment or other proof of a serious due process violation.
  + Seth Johansen was out on probation, terms of which included refraining from criminal conduct. A neighbor reported to police that Johansen had stolen from his apartment, which Johansen later admitted. Johansen moved to suppress his statements to police officers, arguing that he had made those statements to police following an initial in-custody indication that he did not want to speak with law enforcement.
* ***State v. Lovett*, 2015 ME 7** (Standing as Necessary Prerequisite to Challenge Search of Vehicle)
  + Police found cocaine in a car in which Paul Lovett was a passenger. Lovett was charged with unlawful trafficking of scheduled drugs. He moved to suppress the evidence found in the vehicle.
  + The Law Court found that Lovett lacked standing to challenge the evidence because he failed to show that he specifically had a reasonable expectation of privacy in the vehicle or that he had an interest in the property that was seized.
  + Cited Supreme Court case *Rakas v Illinois* (439 U.S. 128) as support for the notion that to challenge the search of a vehicle the challenger must demonstrate a possessory interest in the vehicle or an interest in the property seized. The Law Court has previously found that a defendant must demonstrate their own reasonable expectation of privacy to show a violation of the Fourth Amendment. *See* *State v. Maloney*, 1998 ME 56, ¶ 6, 708 A.2d 277
* ***State v. Jaime***, **2015 ME 22** (Alternative Suspect Evidence in Murder Cases)
  + Jaime was accused of murdering his girlfriend. At trail, he tried to establish his son as a viable alternative suspect, but was not allowed to present evidence about a possible relationship between his son and the victim, which the Court held was an error. The Court also found, however, that the error was harmless because testimony about the son’s possible relationship with the victim was admitted for other reasons.
  + Evidence regarding alternative suspects will be admitted at trial if:
    - The evidence is otherwise admissible, and
    - The admissible evidence is of sufficient probative value to raise a reasonable doubt as to the defendant’s culpability by establishing a reasonable connection between the alternative suspect and the crime. The reasonable connection can be established without clearly linking the alternative suspect and the crime.
* ***State v. Graham***, **2015 ME 35** (Compare & Contrast Between Defense of Mental Abnormality and Affirmative Defense of Insanity)
  + Graham convicted of attempted kidnapping and assault, appealed contending that court erred in analyzing mental abnormality defense.
  + Insanity is an affirmative defense requiring defendant to prove by a preponderance of the evidence that he/she suffered from a mental disease or defect (defined as a severely abnormal mental condition that grossly and demonstrably impairs a defendant’s perception or understanding of reality) that rendered him/her unable to appreciate the wrongfulness of his/her conduct.
  + Mental abnormality requires sufficient evidence that a defendant suffered from an abnormal condition of the mind that raises a reasonable doubt as to whether the defendant possessed the requisite culpable mental state for the particular offense charged. The abnormality does not need to possess a specific character. The defense does not relieve the defendant of responsibility, but calls into question whether the State has proven its case beyond a reasonable doubt.
  + Mental abnormality negates the existence of a culpable mental state; insanity serves as an excuse. A defendant may raise both defenses.
* ***State v. Kierstead***, **2015 ME 45** (Voluntariness of Confession in Murder Case Where Defendant Had Consumed Drugs, Alcohol, and Attempted Suicide)
  + In a deal gone bad, Kierstead shot and killed his meth dealer, then attempted to overdose on the victim’s Vicodin medicine. He slept for a period of time but upon waking called the police to report his actions. He showed signs of low-level acetaminophen overdose, particularly nausea and vomiting. He also had been drinking alcohol. He explained the series of events several times to law enforcement but at trial tried to suppress his statements.
  + Statements were allowed and the Law Court affirmed, because he showed no signs of mental impairment. Multiple individuals evaluated him after the shooting and described him as calm, cooperative, and lucid. He was not staggering or slurring his words. He repeatedly affirmed that he understood his Miranda rights and was willing to speak with police. By all accounts he seemed to comprehend the situation.
* ***State v. Murphy***, **2015 ME 62** (Right to Testify, Sufficiency of Evidence)
  + Murphy was a Riverview patient who attacked a worker and stabbed her repeatedly with a pen.
  + Record must show that *unrepresented* defendants understand their right to testify/ not testify. This rule does not apply to represented clients, because it is assumed that represented clients are advised of their rights by their attorney.
  + It is within the purview of the trial court to resolve factual issues and determine whether the defendant proved by a preponderance of the evidence that he/she lacked the capacity to be criminally responsible for his/her conduct. The trial court is also free to accept or reject the opinions of competing experts. In this case, the trial court was not in error by accepting one expert testimony over the other.
* ***State v. Butsitsi***, **2015 ME 74** (Rejecting Challenge to Manner of Imposing Sentence Based on Appearance of Racial Bias)
  + Court will apply obvious error review to unpreserved claims of error, including judicial bias claims.
  + Trial Court’s statements should be considered in context of the trial and hearing as a whole. Courts are given wide discretion in determining what information to consider in imposing a sentence, but sentences based on race or national origin are unconstitutional.
  + In this case, it was Butsitsi’s attorneys who pushed the “cultural underpinnings” of the conflict and argued for the Court to consider Butsitsi’s upbringing in the Congo. The Court noted that it did consider his early exposure to violence and viewed this as a mitigating factor. It then sentenced him to a term less than the basic sentence it had enunciated. The evidence did not, therefore, show a judicial bias against Butsitsi based on country of origin.

**DEPARTMENT OF CORRECTIONS**

* ***Holt v. Hobbs*, 135 S. Ct. 853** (Accommodation of Prisoners’ Religious Practices)
  + The Arkansas Department of Corrections prohibited a Muslim prisoner, who believed that his religion required him to grow a beard, from doing so. As a compromise, plaintiff offered to grow only a ½ inch beard. The Department denied his request and indicated that he would face discipline if he grew a beard.
  + The prisoner sued, alleging that the Department’s prohibition violated the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). Under RLUIPA, a prisoner challenging a particular policy must show initially that the policy substantially burdens his religious exercise. If proven, the burden then shifts to the correctional authorities to show that the policy is necessary to meet a compelling interest of the institution and that the facility has chosen the least restrictive means of achieving that interest. RLUIPA is therefore much more protective of prisoners’ religious freedoms than the First Amendment because it makes it more difficult for correctional authorities to justify restrictions on the practice of religion in a prison or jail.
  + In *Holt*, the court held that the prisoner met his initial burden of proving that the prohibition on growing a beard placed a substantial burden on his religious expression. The sincerity of the prisoner’s beliefs was not in dispute, and evidence was submitted that, while not all Muslims shared the same belief, a substantial number interpreted the Koran as requiring men to grow their beards.
  + The Department attempted to justify the restriction by arguing that prisoners could use their beards to hide contraband and that a prisoner could alter his appearance quickly simply by shaving off his beard, thereby making him more difficult to identify. The Court rejected both of these justifications. First, it fairly scoffed at the notion that a prisoner could hide something in a half-inch beard. The Court also noted that the Department’s no-beard policy was inconsistent with its policy of allowing prisoners to grow their hair longer than half an inch. The Court also noted that the vast majority of state prison systems, as well as the Federal prison system, did not impose similar restrictions. Finally, the Court stated that the Department could avoid the problem of prisoners being able to change their appearance by photographing a prisoner clean-shaven when he first arrived at the prison and then photographing him with a beard. The Court held that the Department failed to meet its burden of showing that the policy restricting the plaintiff’s religious expression was the narrowest approach to meeting its goals.
  + It is clear that the Court’s decision in *Holt v. Hobbs* will require the federal courts to take a closer look at prison and jail policies that restrict religious expression. However, the Court also stated that in interpreting RLUIPA, courts should be mindful that the analysis is conducted in a correctional setting, where considerations of institutional security are very important. The Court also noted that, if a religious activity is being used as a cover for illicit conduct, the institution can appropriately question the sincerity of the prisoner’s beliefs. Finally, if it is discovered that the prisoner is abusing a religious accommodation in a way that undermines the facility’s compelling interests, the correctional authorities may withdraw the accommodation altogether.

**DEPT. OF HEALTH AND HUMAN SERVICES**

* ***Armstrong v. Exceptional Child Center, Inc.,*** **135 S. Ct. 1378, (Mar. 31, 2015)** (slip opinion) (Enjoinment of State Officials)
  + Providers of “habilitation services” under Idaho’s Medicaid state plan sued the state’s Department of Health and Welfare services, claiming that Idaho reimbursed them at rates lower than 42 U.S.C. §1396a(a)(30)(A) permits, and seeking to enjoin Idaho to increase reimbursement rates. The Ninth Circuit Court of Appeals found that the Supremacy Clause gave the providers an implied cause of action, and that they could sue under this implied right of action to seek an injunction requiring Idaho to comply with section 30(a).
  + The United States Supreme Court reversed. It reasoned that, “the ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity,…It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause.” 2015 U.S. \_\_, at 6 (slip op.). The Court held that there is no implied cause of action within the Supremacy Clause to sue state officials.
  + Separately, the providers argued that their claims could proceed against Idaho in equity. However, the Court stated that “the power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations.” Id. at 6. “…[T]he Medicaid Act implicitly precludes private enforcement of §30(A), and respondents cannot, by invoking our equitable powers, circumvent Congress’s exclusion of private enforcement.” Id. The Court noted that two aspects of section 30(A) establish Congress’s intent to foreclose equitable relief. First – the sole remedy Congress provided for a State’s failure to comply with Medicaid’s requirements (ie – a State’s breach of the Spending Clause contract), is the withholding of Medicaid funds by the federal Department of Health and Human Services. Id. at 7. In addition, Section 30(A) lacks specific rights-creating language needed to imply a private right of action. “…[A] private right of action under federal law is not created by mere implication, but must be unambiguously conferred.” Id. at 11 (citation omitted).
* ***Mayhew v. Burwell***, **772 F.3d 80 (1st Cir. 2014)** (Medicaid Coverage for 19/20 yr-olds)
  + The Department of Health and Human Services sought to drop Medicaid coverage for 19 and 20 year olds whose families met the low-income requirements by proposing an amendment to the Medicaid state plan. The Centers for Medicare and Medicaid Services (CMS) disapproved the amendment, stating that it violated the maintenance of effort (MOE) provision in the Affordable Care Act, which requires states accepting Medicaid funds to maintain their Medicaid eligibility standards for children. DHHS petitioned the First Circuit Court of Appeals for review, arguing that the federal disapproval and the MOE provision were unconstitutional. The First Circuit determined that the MOE provision was constitutional as applied.
* ***Bruns v. Mayhew***, **750 F.3d 61 (1st Cir. 2014)** (Medicaid/Equal Protection)
  + Medicaid-ineligible aliens filed a class action lawsuit against DHHS Commissioner, claiming that the discontinuation of a state program to provide state-funded medical coverage to Medicaid-ineligible aliens violated the Equal Protection Clause of the Fourteenth Amendment by continuing to provide Medicaid benefits to U.S. citizens.
  + The Court determined that, when it repealed the supplemental aliens-only program, the Maine Legislature did not deprive the appellants of a benefit that it continued to provide to citizens – or to anyone else. Consequently, the appellants could not point to any similarly situated individuals who remained engaged in the same activity vis a vis the government entity. 750 F.3d at 69. The Court determined that Maine was under no constitutional obligation to extend equivalent state-funded benefits to federally-ineligible aliens. Because Maine was not obligated to extend these benefits in the first place, it follows that termination of the benefits did not violate the Equal Protection Clause. *Id*. at 70. The disparate treatment challenged by appellants is not attributable to state legislation – rather, it was as a result of Congress’s enactment of PRWORA, restricting their eligibility for public benefits such as Medicaid. *Id*. The Court upheld the district court’s denial of the appellants’ request for a preliminary injunction and remanded the case to the district court with an order to dismiss the claims*. Id*.
* ***Treworgy v. Mayhew***, **2015 WL 541687 (D.Me. Feb. 10, 2015)** (Expungement of records)
  + Paul Treworgy passed away while being considered a “ward of the State.” His wife and son sought to expunge or modify the DHHS records naming him as a ward, claiming that the records contained false, misleading, and damaging statements. The District Court found that, with respect to the claims stated against Commissioner Mayhew in her official capacity, “the Recommended Decision rightfully acknowledges that generally there must be continuing, present adverse effects in order to state an official capacity claim for prospective injunctive relief under 42 U.S.C. § 1983.” When someone alleges that she has suffered stigmatization as a result of the actions of a government official, she must show “an adverse effect on some interest ‘more tangible’ than reputational harm. To use the popular catch phrase, the complaining party must satisfy a ‘stigma plus’ standard.” To satisfy the stigma plus standard, “one must plausibly allege that both the stigma and the other tangible “plus” effect of the alleged constitutional violation are directly attributable to the named governmental defendant.” In this case, the Plaintiffs failed to satisfy the stigma plus standard, because any negative effects could not be directly attributable to Commissioner Mayhew; rather, they were the result of the Probate Court’s decision to put Mr. Treworgy under public guardianship. “The fact remains that any prospective injunction by this Court directing Defendant Mayhew, in her official capacity, to expunge the records related to Mr. Treworgy’s guardianship proceedings would not necessarily result in the expungement of these records to the extent that the records are held by the Probate Court.” Furthermore, the Plaintiffs could not satisfy the stigma plus standard because the prospective injunctive relief sought (expungement of records) addressed only reputational harm. Because Mr. Treworgy died, the liberty interests that were impacted by the Commissioner’s actions no longer existed, and the Plaintiffs could not show that the “plus factor” was ongoing to justify injunctive relief.
* ***John F. Murphy Homes, Inc. v. State of Maine***, **2014 WL 3824323 (Me. B.C.D. July 7, 2014)** (Discovery)
  + The case involved a disagreement about the “nature and purpose of contention interrogatories.” Rule 33(b) of the Maine Rules of Civ. Procedure includes language reflecting that contention interrogatories are not per se objectionable. The Court in this case explained that contention interrogatories do not necessarily infringe on the attorney work product doctrine:

First, in some cases, when answering contention interrogatories, the party is only giving the factual specifics which it contends supports a claim or defense, which does not impinge on an attorney’s impressions or analysis as to how the attorney will apply the law to the facts. Second, the discovery rules regularly allow litigants to gain information revealing a party’s legal theory, because the information sought will appear during trial, if not before. This information is expected to be revealed, and in fact, the attorney should emphatically raise and advance the theory of the case when answering a contention interrogatory.

2014 WL at \*2 (citation omitted).

* + In determining whether a contention interrogatory is proper, the Court applies three variables: (1) the timing of the contention interrogatory in relation to the discory process in the case; (2) the form of the contention interrogatory in terms of focus and breadth: whether it presents a reasonably focused and narrow question, or is so vague, general or sweeping that it can only be read to elicit an epic narrative response; and (3) the form the the contention interrogatory in terms of whether it seeks to elicit the factual contentions supporting a legal contention, or seeks to elicit a purely legal contention independent of factual contentions. *Id*. All three of these variables were at issue in the *John F. Murphy Homes* dispute and the decision contains a description of the Court’s reasoning and factors considered for each of the variables.

**FOIA/FOAA**

* ***New Hampshire Right to Life v. U. S. Department of Health and Human Services***, **778 F.3d 43 (1st Cir. 2015)** (*petition for cert. pending*) (Freedom of Information Act)
  + Involved a Freedom of Information Act (“FOIA”) request and the applicability of two FIOA exemptions, that for confidential commercial information (§ 552(b)(4)) (Exemption 4), and that for inter/intra agency memoranda ((§ 552(b)(5)) (Exemption 5).
  + The Court explained that “commercial information is confidential if disclosure is likely (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” 778 F.3d at 49 (internal citations omitted). Commercial information is considered confidential if disclosure is likely to either: “(1) impair the Government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id*. at 50 (internal citations omitted). While – in analyzing the second prong, a court need not conduct a sophisticated economic analysis, “conclusory or generalized allegations” are insufficient. *Id*. Parties objecting to disclosure need not show actual competitive harm; rather, they must show “actual competition and a likelihood of substantive competitive injury in order to bring that commercial information within the realm of confidentiality.”
  + FOIA’s Exemption 5 shields documents that are normally immune from civil discovery, including those protected by the deliberative process (ie – they reflect “advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated”) and attorney-client privileges. *Id.* at 52. This Exemption “facilitates government decision-making by: (1) assuring subordinates will feel free to provide uninhibited opinions, (2) protecting against premature disclosure of proposed government policies, and (3) preventing confusion among the public that may result from releasing various rationales for agency action.” *Id*.
* ***The Lewin Group, Inc. v. Department of Health and Human Services***, **2014 WL 1270193 (Me. B.C.D. Mar. 13, 2014)** (Maine Freedom of Access Act)
  + The Lewin Group, which was awarded a contract under an RFP, objected to the disclosure of certain documents per an FOAA request, claiming the documents were proprietary, confidential, and “trade secrets”, thus exempt from FOAA. The Department determined the documents were not “trade secrets” and informed The Lewin Group it would be disclosing the documents. Lewin then filed a Rule 80C appeal seeking to enjoin the Department’s production of the documents.
  + Lewin argued that the FOAA standard of review (*de novo*) should apply. The Department argued that the FOAA standard does not apply, because the present appeal is not a FOAA action. A FOAA action is limited to compelling the holder of public documents to release them; there is no cause of action for prohibiting an agency or official from disclosing information. Rather, the Department argued that this is a “reverse-FOAA” action, and the proper standard of review is the more deferential one set forth by the Administrative Procedure Act. The Court agreed with the Department and as such reviewed the Department’s decision for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record. The Court also noted that the general purpose of FOAA was to open public proceedings and ensure that public actions and records are available to the public, thus, FOAA should be construed liberally.

**Anti-Trust**

* ***N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S.Ct. 1101 (2015)**
  + In a previous case, *Parker v. Brown*, the Court interpreted the antitrust laws of the Sherman Act to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. 317 U.S. 341, 350-351.
  + A nonsovereign actor, meaning one whose conduct does not automatically qualify as that of the sovereign State itself, controlled by active market participants (such as the NC State Board of Dental Examiners) enjoys *Parker* immunity only if it satisfies two requirements:
    - the challenged restraint…be one clearly articulated and affirmatively expressed as state policy, and
    - the policy…be actively supervised by the State
      * Active supervision includes:
        + The supervisor reviewing the substance of the anticompetitive decisions, not merely the procedures followed to produce it
        + The supervisor having the power to veto or modify particular decisions to ensure they accord with the state policy, and
        + The state supervisor may not itself be an active market participant
        + The mere potential for state supervision is not an adequate substitute for a decision by the State

**Federal Preemption**

* ***Ouellette v. Mills***, **F.Supp. 3d, 2015 WL 751760 (D.Me. 2015)** (Torresen, C.J.) (Preemtion Challenge to Maine Law)
  + In 2013, the Maine Legislature passed the MPA Amendments which exempted certain entities from State licensing requirements with the purpose of expanding the definition of “mail order prescription pharmacy” to allow specified entities located outside of the United States to dispense prescription medications by mail to Maine residents. The FDCA creates a regulatory scheme that sets limits on the importation of prescription drugs from other countries.
  + Pharmacists and pharmacy trade organizations brought action against Maine’s Attorney General and Commissioner of Administrative and Financial Services alleging that the federal Food, Drug, and Cosmetics Act (the “FDCA”) preempted certain state law amendments to the Maine Pharmacy Act (the “MPA Amendments”) regarding importation of foreign pharmaceuticals.
  + The MPA Amendments were preempted by the FDCA. This case provides a useful discussion and analysis of facial preemption principles. The Court begins with a discussion of the general framework for preemption: the theory behind preemption and the competing presumptions regarding preemption. The Court then addressed the Plaintiffs’ allegations of field preemption and conflict preemption—focusing primarily on field preemption, but not addressing express preemption which the Plaintiffs did not raise as an issue.

After analyzing the subject, the Court concluded that the FDCA occupies the field of importation of pharmaceuticals from foreign countries. Because the MPA Amendments were found to be contrary to the clear Congressional intent to occupy this field, they were held to violate the Supremacy Clause of the United States Constitution and were therefore preempted. U.S. Const. art. VI, cl. 2.