

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

No. SJC-13124

CP 200 STATE, LLC
Plaintiff-Appellee,

vs.

CIEE, INC.
Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF THE
COUNTY OF SUFFOLK

**BRIEF OF THE AMICUS CURIAE
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION**

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STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

The Massachusetts Defense Lawyers Association ("MassDLA"), amicus curiae, is a voluntary, non-profit, state-wide professional association of trial lawyers who defend corporations, individuals, and insurance companies in civil lawsuits. Members of the MassDLA work to promote the administration of justice, legal education, and professional standards and to promote collegiality and civility among all members of the bar.

As an association of civil defense lawyers, the MassDLA has a direct interest in the issues of public importance that affect MassDLA members and their clients. Those interests could be affected by the issue before the Court in this appeal, specifically whether the Court finds that an immediate interlocutory appeal lies from an order denying a motion for enforcement of a purported settlement agreement under the doctrine of present execution.

As part of fulfilling its purpose, the MassDLA has previously filed amicus briefs in the appellate courts of the Commonwealth. The MassDLA offers its experience and perspective to the Court as amicus curiae to assist in its resolution of the matter now before it.

STATEMENT OF THE ISSUES PRESENTED

"Whether, under the doctrine of present execution, an immediate interlocutory appeal lies from an order denying a motion for enforcement of a (purported) settlement agreement."

Announcement: The Justices Are Soliciting Amicus Briefs, CP 200 State, LLC v. CIEE, Inc., SJC-13124, Docket Entry #3 (SJC entered May 24, 2021) ("Announcement").

STATEMENT OF THE FACTS

The MassDLA, as amicus curiae, adopts the statements of facts regarding the prior proceedings and factual background as submitted in the briefs of CIEE, Inc. (Defendant-Appellant), and CP 200 State, LLC (Plaintiff-Appellee).

STATEMENT OF THE CASE

MassDLA is answering the Commonwealth of Massachusetts Supreme Judicial Court's solicitation for amicus briefs in the matter of CP 200 State, LLC v. CIEE, Inc., SJC-13124, to assist in determining whether an immediate interlocutory appeal lies under the doctrine of present execution from an order denying a motion for enforcement of a purported settlement agreement. In CP 200 State, LLC v. CIEE, Inc., this issue arose within the context of settlement negotiations following Plaintiff-Appellee's complaint for summary process eviction and breach of contract claim against its commercial tenant, Defendant-Appellant.

The doctrine of present execution is a common-law doctrine which provides for immediate appellate review of certain interlocutory trial court orders to avoid irreparable harm and promote judicial economy. Determining whether the doctrine of present execution provides immediate appellate review for orders denying a party's motion to enforce a purported settlement agreement requires analysis of: (1) the doctrine's evolution; (2) the doctrine's requirements for applicability; (3) its prior application in other contexts; and (4) the public policy considerations underlying its use in the context of purported settlement agreements.

SUMMARY OF THE ARGUMENT

A general prohibition exists against piecemeal appellate review of interlocutory trial court orders. Maddock v. Ricker, 403 Mass. 592, 597 (1988). The logic is simple; in the absence of authorization by a rule or statute, unfiltered review of non-dispositive trial court orders delays the resolution of disputes, increases the cost of litigation, and imposes a burdensome workload on the appellate courts. Patel v. Martin, 481 Mass. 29, 32 (2018). However, there are cases not covered by rule or statute in which certain trial court orders would harm parties in ways that cannot be reviewed upon the filing of a postjudgment appeal. To avoid irreparable harm in these cases and promote judicial economy, the Court has recognized and narrowly applied the doctrine of present execution, a judicially defined common-law exception to the general prohibition against interlocutory appellate review. Vincent v. Plecker, 319 Mass. 560, 562-63 (1946).

The matter of dispute currently before the Court is whether this common-law doctrine applies to a specific type of interlocutory trial court order, an order denying a party's motion to enforce a purported settlement agreement. As the Court's own precedent makes clear, such orders satisfy the doctrine's test for applicability and resemble the types of interlocutory orders previously granted appellate review under

the doctrine. Thus, the Court should find that orders denying a motion to enforce a purported settlement agreement can appropriately be subjected to interlocutory appellate review under the doctrine of present execution.

ARGUMENT

I. The Denial of a Motion to Enforce a Purported Settlement Agreement Satisfies the Doctrine of Present Execution's Requirements for Providing Immediate Interlocutory Appellate Review.

a. The Doctrine of Present Execution is Intended to Serve as a Limited but Flexible Exception to the General Prohibition Against Piecemeal Appellate Review.

A party to a case does not possess a general right to appellate review of an interlocutory trial court order.

Maddocks, 403 Mass. at 597. This settled principle preserves judicial resources by rejecting piecemeal review of trial court rulings that are non-dispositive of a case's underlying merits.

R.J.A. v. K.A.V., 34 Mass.App.Ct. 369, 372 (1993). Nevertheless, a party may establish a right to appellate review of an interlocutory trial court order from one of two originating sources: a rule or statute authorizing such review, or the common-law doctrine of present execution permitting such review.

Maddocks, 403 Mass. at 597. Despite the general prohibition against appellate review of interlocutory orders, an array of statutory and procedural rule provisions authorize an appeal by

right of such adverse orders.¹ Additionally, even when authorization for interlocutory appellate review cannot be found

¹ The following statutes and rules, among others, provide for an appeal of an interlocutory order by right:

- G.L. c. 278, § 28 ("A defendant aggrieved by a judgment of the district court or of the superior court in any criminal proceeding may appeal therefrom to the supreme judicial court");
- G.L. c. 185, § 15(d) ("Questions of law arising in the superior court may be appealed by any party aggrieved by any opinion, direction, or judgment of the court to the appeals court or, subject to the provisions of section ten of chapter two hundred and eleven A, to the supreme judicial court");
- G.L. c. 211, § 3 (allowing a petition for review of a bail determination);
- G.L. c. 261, § 27D ("In any case where the court denies a request for waiver, substitution or payment by the commonwealth of fees and costs, pursuant to section twenty-seven C or any other provision of law, the applicant may take an appeal as hereinafter provided. If the matter arises in the superior, the land, the probate or the housing court departments, the appeal shall be to a single justice of the appeals court at the next sitting thereof");
- G.L. c. 231, § 6G ["Any party aggrieved by a decision on a motion pursuant to section six F may appeal as hereinafter provided. If the matter arises in the superior, land, housing or probate court, the appeal shall be to the single justice of the appeals court at the next sitting thereof");
- G.L. c. 239, § 5 ("If either party appeals from a judgment of the superior court, a housing court, or a district court in an action under this chapter, including a judgment on a counterclaim, that party shall file a notice of appeal with the court within 10 days after the entry of the judgment. An execution upon a judgment rendered pursuant to section 3 shall not issue until the expiration of 10 days after the entry of the judgment");
- G.L. c. 212, § 3A(c) ("In any case where the superior court dismisses the case as provided in this section, the plaintiff may take an appeal as hereinafter provided. The appeal shall be to a single justice of the appeals court at the next sitting thereof");
- G.L. c. 240, § 18 ("Any party aggrieved by a finding or decision of the land court that the enforcement of any such restrictions or limitations would be injurious to the public interests may appeal therefrom to the supreme judicial court, which may draw from the facts and instruments stated in the record, findings or decision any inferences of fact that might have been drawn therefrom at a trial, and reverse or order such modification of said findings or decision as justice may require");
- G.L. c. 215, § 9 ("A person aggrieved by an order, judgment, decree or denial of a probate court made after this chapter takes effect, may, within thirty days after the entry thereof, appeal therefrom to the appeals court or, subject to the provisions of section ten of chapter two hundred and eleven A, to the full court of the supreme judicial

under a statute or rule, the Court maintains discretion to still forgo the general prohibition against piecemeal appellate review and establish a party's right to such review through application of the doctrine of present execution.

As a creature of common law, the doctrine of present execution has evolved over the course of nearly a century.

Maddocks, 403 Mass. at 598; Vincent, 319 Mass. at 562-63. The Court has applied this doctrine in a limited fashion to preserve the appellate courts' interest in limiting piecemeal appeals from trial court decisions which delay resolution of the merits of a case. Patel, 481 Mass. at 32; Elles v. Zoning Bd. of Appeals of Quincy, 450 Mass. 671, 673-74 (2008). The evolution of the doctrine of present execution reveals that the doctrine is not only narrowly tailored, but it is also flexible.

Although the doctrine's application is limited, its use over

court. Said courts shall have like powers and authority with respect thereto as upon an appeal in any civil action");

- Mass. R. Crim. P. 15(a)(1) (Providing the Commonwealth with the right to appeal a decision by a judge granting a motion to dismiss a complaint or indictment or a motion for appropriate relief made pursuant to Rule 13(c));
- Mass. R. Crim. P. 15(a)(2) ("A defendant or the Commonwealth shall have the right and opportunity to apply to a single justice of the Supreme Judicial Court, in the form and manner prescribed by a standing order of that court, for leave to appeal an order determining a motion to suppress evidence prior to trial. If the single justice determines that the administration of justice would be facilitated, the justice may grant that leave and may hear the appeal or may order it to the full Supreme Judicial Court or to the Appeals Court for determination.");
- Mass. R. Crim. P. 15(a)(3) ("Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge discharging a person pursuant to G.L. c. 119, Section 72A");
- U.R.I.P. 12(a) (Granting a right to review of an impoundment order).

time indicates that it is flexible enough to serve its purposes of preventing irreparable harm and promoting judicial economy in more than one kind of case. See LaChance v. Commissioner of Correction, 463 Mass. 767, 768, n.3 (2012) (finding the doctrine of present execution permitted interlocutory appeal for an order denying a cross motion premised upon defendant's asserted right to qualified immunity); see also Borman v. Borman, 378 Mass. 775, 779 (1979) (holding the doctrine of present execution permitted interlocutory appeal for an order disqualifying a husband's law partners as counsel in an action for divorce).

The Court first used the phrase "doctrine of present execution" in 1979, but its practice of permitting appellate review of certain interlocutory orders which were otherwise not entitled to such review by right under a statute or rule, extends decades before that time. Patel, 481 Mass. at 32, n.3. As early as the 1940s, the Court sanctioned appellate review of certain trial court orders, ranging from the liquidation of a partnership to the sustaining of demurrers to claims of title, which were neither dispositive of the underlying case's merits nor statutorily entitled to appeal. Ferrick v. Barry, 320 Mass. 217, 219 (1946); Vincent, 319 Mass. at 562-63.

In these early cases, the Court made clear that only a "final decree" from the trial court could receive such treatment, since the Court still relied upon the general

prohibition against immediate review of interlocutory orders to avoid an inefficient use of appellate judicial resources.

Vincent, 319 Mass. at 562-63. At this time, the Court was not yet operating under the explicit parameters of a fully articulated doctrine. Id. Instead, it used the following single-pronged analysis to distinguish between which trial court orders were purely interlocutory, subject to the general prohibition against appellate review, and which orders were "final decree[s]" worthy of receiving a judicially created exception to this general prohibition. Id. at 564, n.3. The Court explained that "if the decree is to be executed presently, so that appeal would be futile unless the decree could be vacated by the prompt entry of an appeal in the full court, the decree is a final one." Id. The Court's "final decree" analysis served as a precursor to the doctrine of present execution, and this analysis later became substantively integrated into the Court's test for determining the doctrine's application.

In the seminal case in which the Court first explicitly referred the doctrine of present execution, two interlocutory trial court orders were brought up on appeal in cross-actions for divorce. Borman, 378 Mass. at 779. The husband appealed from the order of the Probate Court judge disqualifying as counsel two of his law partners. Id. at 776. The wife appealed

from the judge's order that she must answer all questions at depositions or have her claims for alimony and division of marital property struck. *Id.* Using its "final decree" analysis, the Court determined that the order disqualifying the husband's counsel was properly brought up on appeal because it had a "final" impact on the husband that was "similar in effect to the orders and decrees listed under the doctrine of present execution." *Id.* at 780.

In contrast, the Court found that the order requiring the wife to answer all questions asked at upcoming depositions was not properly brought up on appeal for two reasons. *Id.* at 782. First, the Court found that the wife's appeal was not yet ripe for appellate review because unless and until she was required to answer questions asked during a deposition, the order had no impact on the case. *Id.* Second, applying the "final decree" analysis from *Vincent v. Plecker*, the Court determined that the wife was not entitled to interlocutory review of this second adverse order because she possessed the ability to have her claim meaningfully reviewed after the trial court entered a final judgment. *Id.*; See *Vincent*, 319 Mass. 564, n.3.

Under the test laid out in *Borman*, for a trial court order to receive interlocutory appellate review, it must satisfy two requirements. *Id.* First, the order must pertain to an issue collateral to the case's underlying controversy. Second, it

must create an adverse impact that is not reviewable "after a definitive determination of rights and liabilities." Id. at 782 & 782, n.12.

Although the Court formally acknowledged the doctrine of present execution for the first time in Borman, it did not tread new ground. As evidenced by its incorporation of the "final decree" analysis, the Court in Borman had the same concern about the irreparable harm as the Vincent court did. See Borman, 378 Mass. at 782; Vincent, 319 Mass. 564, n.3. Unlike the Court in Vincent, however, the Court in Borman balanced this concern for irreparable harm with a concern for judicial economy. In this way, the Borman court built on past precedent and qualified that precedent's future application by adding a second prong to the analysis. See Borman, 378 Mass. at 782.

Less than ten years later, in Maddocks v. Ricker, the Court affirmed the use of this two-pronged analysis for determining the application of the doctrine of present execution. Maddocks, 403 Mass. at 598-99. Subsequent applications of the doctrine have persistently followed the narrowly-tailored guidelines under Borman as well. Elles, 450 Mass. at 674; Patel, 481 Mass. at 32-33. As evidenced by the doctrine's evolution, this two-pronged test is narrowly tailored, but it is also flexible enough to continue to serve its intended purposes of promoting

judicial economy and preventing irreparable harm in more than one type of case.

b. Orders Denying a Motion to Enforce a Purported Settlement Agreement Satisfy the First Prong of the Court's Two-Pronged Analysis for Determining the Doctrine's Applicability, as Such Orders are Collateral to the Underlying Dispute.

In determining whether an interlocutory trial court order is subject to appellate review under the doctrine of present execution, the Court has looked to determine if the order addresses "issues that are collateral to the underlying dispute in the case." Maddocks, 403 Mass. at 596. If an appeal "involves issues collateral to the basic controversy and if an appeal from a judgement dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate." Id. at 600.

Collateral issues are those which would "not have to be considered at trial" or would not be appropriate to consider at trial should the case proceed to such an event. Id. at 596. Whether a valid settlement agreement was executed is a collateral issue. When a trial court denies a motion to enforce the parties' purported settlement agreement, the issues underlying such an order pertain to the substance and form of the negotiations and compromises offered by the parties in the case. See Decision and Order on Defendant's Motion to Enforce the Settlement Agreement at 1-2, CP 200 State, LLC v. CIEE,

Inc., No. 2084CV01237 (Mass. Sup. Ct. Nov. 25, 2020) (evaluating the parties' communications during settlement negotiations as a basis for reaching a conclusion of law on the motion before the court). Under prevailing state rules of evidence, purported settlement agreements are definitionally collateral to any dispute since evidence of a compromise or offer to compromise is virtually inadmissible at trial. Mass. Evid. § 408 (providing that evidence pertaining to compromise negotiations introduced for reasons other than "to prove or disprove the validity or amount of a disputed claim" is inadmissible).

Because the appeal in this case involves a settlement agreement, it is collateral to the basic controversy in this case. The basic controversy in this case is whether commercial tenant, Defendant-Appellant, is liable for breach of contract and whether summary process eviction is appropriate as a result. The issue on appeal is whether a settlement agreement was executed between Plaintiff-Appellee and Defendant-Appellant. In contrast to the basic controversy, the issue on appeal would not be appropriate before a jury because evidence of settlement agreements is virtually inadmissible. Additionally, the issue on appeal involves different witnesses and different evidence than the basic controversy.

If the case was considered settled, granting interlocutory appeal for such a collateral issue would be the ultimate

instance of judicial economy. On appeal, the Court would only need to review emails and possibly hear testimony from the participants regarding thoughts on settlement. Such evidence would never come in during a trial for the basic controversy of this case. Moreover, there is no concern that either party would lose its day in court on this issue because it is not appropriate before a jury in the first place.

The issue on appeal in this case is a collateral issue. The question of whether a valid settlement agreement was executed is not the basic controversy in this case, and it would not be heard at trial. Additionally, granting immediate interlocutory appeal for this issue could not be more judicially expedient. For these reasons, interlocutory appeal is appropriate, so long as the second prong of the doctrine of present execution test is satisfied.

c. Orders Denying a Motion to Enforce a Purported Settlement Agreement Satisfy the Second Prong of the Court's Two-Pronged Analysis for Determining the Doctrine's Applicability, as Such Orders Involve a Harm that Cannot Effectively be Remedied After the Trial Court's Entry of a Final Judgment.

That an interlocutory order deals with issues that are collateral to the underlying dispute is not enough for the doctrine of present execution to apply. Matter of Hamm, 487 Mass. 394, 401 (2021). For the doctrine to apply, in addition to satisfying the collateral issue prong, an interlocutory trial

court order must "interfere with rights in a way that cannot be remedied on appeal from the final judgment." Elles, 450 Mass. at 674-73. If the interlocutory order is "effectively unreviewable on appeal" from a final judgment of the trial court, then the second prong for determining the doctrine of present execution's application is satisfied. Borman, 378 Mass. at 780.

Over the years, the Court has adopted a nuanced approach to determining whether an interlocutory order imposes a harm that is "effectively unreviewable on appeal." Shapiro v. City of Worcester, 464 Mass. 261, 264 (2013) (explaining the test for determining the doctrine of present execution's application in light of the standard laid out in Elles). The Court has found that "merely causing a party to be subjected to the delay and expense inherent in further litigation does not make such an order 'effectively unreviewable.'" R.J.A., 34 Mass.App.Ct. at 374. Additionally, merely showing intrinsic harm caused by an interlocutory order is not, on its own, sufficient to satisfy this requirement when a viable postjudgment remedy still exists. Patel, 481 Mass. at 36, n.5.

For example, in Patel v. Martin, the defendants claimed a right of immediate appeal from a discovery order in which the judge ordered disclosure of communications between a trust which owned property that was at issue in the case and the attorney

the trust had worked with for over twenty years. Id. at 31. The motion judge found that there was not an attorney-client relationship between the trust and the attorney with respect to the purchase and sale of the trust's property at issue in the case. Id. As such, attorney-client privilege did not prevent the disclosure of communications between the parties. Id.

When considering whether interlocutory appeal was appropriate for this discovery order, the Court acknowledged that whenever a judge orders disclosure in a discovery dispute, "the aggrieved party can claim that its rights cannot be fully vindicated on appeal, because otherwise protected communication or documents will be revealed that the party was entitled to keep confidential." Id. at 36. The Court found, however, that a postjudgment appeal offers a viable remedy for this intrinsic harm, and for this reason, interlocutory appeal was not appropriate. Id. "Where a postjudgment appeal offers a viable, albeit imperfect, remedy," the Court will not grant a right to interlocutory appeal. Id.

In contrast, when a specified claim can be made "where protection from the burden of litigation is precisely the right to which [the party] asserts an entitlement," then that party "has the right to an immediate appeal under the doctrine of present execution" from a trial court order infringing upon that right. Estate of Moulton v. Puopolo, 467 Mass. 478, 485 (2014).

For this reason, the Court has most often found the right to immediate appeal under the doctrine of present execution in immunity cases.

An asserted right to immunity from suit would "be lost forever unless that right is determined" by appellate review of an adverse interlocutory order. Breault v. Chairman of Bd. of Fire Comm'rs of Springfield, 401 Mass. 26, 21 (1987); Mooney v. Warren, 87 Mass.App.Ct. 137, 138-39 (2015). Moreover, the categorization of a right as one securing immunity from suit is often dispositive of the question of the doctrine's application in a given context, since the Court has found that the denial of a motion filed "on immunity [from suit] grounds is always collateral to the action because it is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated.'" Kent v. Commonwealth, 437 Mass. 312, 317 (2002). Thus, a trial court order that infringes upon a litigant's right to immunity, which definitionally would be "lost forever" if it were not appealable "until the close of litigation" at the trial court, "meets the criteria of the rule of present execution." Brum v. Town of Dartmouth, 428 Mass. 684, 688 (1999).

Simply because the doctrine of present execution is most frequently applied in immunity cases, however, does not mean that the doctrine can only be applied in that context. There is

nothing in the case law limiting the applicability of the doctrine of present execution to immunity cases. See Estate of Moulton, 467 Mass. at 485. Regardless of the type of case, "where protection from the burden of litigation is precisely the right to which [the party] asserts an entitlement," that party "has the right to an immediate appeal under the doctrine of present execution" from a trial court order infringing upon that right. Id.

The right secured by the formation of a settlement agreement is effectively equivalent to a right to immunity from suit in that the right asserted is protection from the burden of litigation. See Breault, 401 Mass. at 21. In both instances, a defendant is seeking to have the matter dismissed on the grounds that continued litigation is legally impermissible under statute, in an immunity case, or under a privately constructed agreement, in the case of a settlement agreement. Compare id. at 27-28 (explaining the defendant's position that, as a public official, he was immune from liability under Federal or State civil rights laws) with Brief of Defendant-Appellant at 22, CP 200 State, LLC v. CIEE, Inc., No. 2021-P-0088 (Mass. App. Ct. Mar. 8, 2021).

The right harmed by a trial court order denying a defendant's motion to enforce a purported settlement agreement is precisely like the asserted right to immunity that would be

"lost forever" if the order remained unreviewable until the trial court's disposition of the case. An appeal from a judgment dispositive of the entire case would not protect the client's interests because the damage would already be done. Maddocks, 403 Mass. at 600. The better investment is for the appellate court to spend a short amount of time taking the appeal of the trial court's order denying the motion to enforce a purported settlement agreement. This would only require a review of emails and possibly short testimony from the participants. The appeal would alleviate the need for a jury trial, which is a more significant commitment of the court and jurors to sit on a case than if the court took the appeal. Furthermore, whether a settlement agreement existed is a contract issue that should be decided by a judge.

A defendant seeking application of the doctrine of present execution in either circumstance cannot "vindicate his or her rights on appeal from a final judgment because the [defendant] would already then have defended the case at trial," which is exactly what their alleged right was capable of preventing. Lynch v. Crawford, 483 Mass. 631, 634 (2019). Thus, as has consistently been shown to be the case in the context of a denied motion asserting immunity from suit, a trial court order denying a party's motion to enforce a purported settlement agreement must satisfy the second prong of the test for

determining the doctrine of present execution's application.

See id.

II. Applying the Doctrine of Present Execution to Denials of Motions to Enforce Purported Settlements Agreements Promotes Judicial Economy.

Judicial policy has historically favored the creation, and enforcement, of settlement agreements. Hansen v. Rhode Island's Only 24 Hour Truck & Auto Plaza, Inc., 962 F.Supp.2d 311, 315 (D. Mass. 2013). In addition to respecting the autonomy of litigants to create their own resolution to a case's underlying controversy, settlement agreements are favored for their ability to avoid the continuation of costly and time-consuming litigation. Crosby Valve, LLC v. OneBeacon American Insurance Company, 35 Mass.L.Rptr. 202, 203 (Super. Ct. 2018). In serving this function, settlement agreements simultaneously preserve scarce judicial resources and effectuate the allocation of those resources towards cases that require a judicially imposed solution. Id. Orders denying motions to enforce purported settlement agreements undermine this important judicial policy by potentially permitting parties to renege on agreements privately reached and simultaneously drawing scarce judicial resources towards such cases at the trial court level that have, according to the defendant, already been independently resolved.

In addition to satisfying the two-pronged analysis discussed above, trial court orders denying motions to enforce

purported settlement agreements are worthy of immediate interlocutory review under recent Court precedent addressing the doctrine of present execution. As the Court explained in Patel, determining the applicability of the doctrine of present execution in a given context is "a balancing act" that is intended to weigh the harm of imposing costly appellate litigation upon a party against the harm done to a party suffering "from a trial court order that is irremediable on postjudgment appeal." 481 Mass. at 37.

Specifically, when engaging in such a balancing act, the Court has been hesitant to extend the doctrine where doing so would increase judicial "workloads" in such a way that has an "adverse impact on judicial efficiency." Maddocks, 403 Mass. at 599; Patel, 481 Mass. at 37. The Court has expressed reservations in the past when asked to extend the doctrine of present execution in circumstances where doing so could impose time-consuming appellate litigation on both the parties to the case and the scarce judicial resources of the Appeals Court. See Patel, 481 Mass. at 36. (expressing concern over the prospect of delays and increased litigation costs that could arise from applying the doctrine of execution to an interlocutory appeal from a trial court order denying a motion for a protective order prohibiting disclosure of privileged communications).

In other circumstances, however, applying the doctrine of present execution promotes judicial economy rather than jeopardizing it. Where court orders wrongfully permit cases to proceed, applying the doctrine of present execution to grant immediate interlocutory appeal prevents time-consuming litigation and preserves scarce trial court resources. See Brief of Defendant-Appellant at 29, CP 200 State, LLC v. CIEE, Inc., No. 2021-P-0088 (Mass. App. Ct. Mar. 8, 2021). Where orders wrongfully permit cases to proceed despite binding out-of-court resolutions having already been agreed to, as in the present case, immediate interlocutory appeal would promote judicial economy by reserving judicial resources for cases that require a judicially imposed solution.

As a result, under the balancing act analysis advanced in Patel, application of the doctrine of present execution to orders denying motions to enforce purported settlement agreements is appropriate. See Patel, 481 Mass. at 37. Application of the doctrine to such orders would not only promote judicial economy, but it would also alleviate an otherwise irremediable harm that would befall a defendant who is denied immediate appellate review of such an order. See id.; P.W. v. M.S., 67 Mass.App.Ct. 779, 784 (2006) (prioritizing the preservation of judicial resources over whether or not a

particular interlocutory trial court order is fully "final" and thereby permitted appellate review by way of its status alone).

CONCLUSION

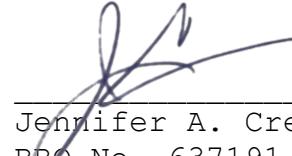
The doctrine of present execution is a common law doctrine that the Court should apply to an order denying a purported settlement agreement to permit immediate interlocutory appeal. Although a general prohibition exists against piecemeal appellate review of interlocutory trial court orders, there are exceptional cases in which such review is appropriate. Where an order on a collateral issue causes irreparable harm to the aggrieved party, the Court has applied the doctrine of present execution to permit immediate interlocutory appeal and promote judicial economy.

Applying the doctrine of present execution to settlement agreements could not be more corollary or judicially expedient. The appeal of an order denying a purported settlement agreement will have different facts and evidence of a settlement agreement that would not be admissible at trial. Allowing the Court to review such an order would save the Court's precious time and energy by alleviating the need for a jury trial. This case is a perfect opportunity for the Court to apply the doctrine of present execution.

Respectfully submitted,

**MASSACHUSETTS DEFENSE LAWYERS
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By its attorneys,



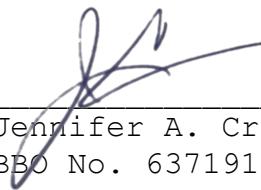
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Dated: October 8, 2021

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)

I hereby certify that the foregoing brief complies with all of the rules of the Court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.

Signed under the pains and penalties of Perjury this 8th day of October, 2021.



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CERTIFICATE OF SERVICE

I, Jennifer A. Creedon, hereby certify that I have filed the foregoing document through the eFileMA.com system and notice was sent electronically to the following participants and also a courtesy copy sent via U.S. First-Class mail, postage prepaid:

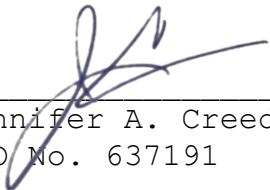
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