

MA SJC Rules Attorney's Fees Awarded Under G. L. c. 93A Are Not Covered by Liability Policy

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In *Vermont Mutual Insurance Company v. Poirier*,^[1] the Massachusetts Supreme Judicial Court (SJC) ruled that attorney's fees awarded under M.G. L. c. 93A are not covered by a Businessowner's Liability Policy,^[2] because such fees are not "damages because of 'bodily injury,'" or "costs taxed against the insured."

The insureds in *Poirier* operated a cleaning business (Servpro). They were sued by a customer who alleged respiratory problems caused by exposure to chemicals used in Servpro's cleaning products. After voluntarily dismissing claims for breach of contract and negligence, the customer proceeded to trial for violations of the Massachusetts consumer protection statute, M.G.L. c. 93A.^[3] The trial judge found Servpro had committed an unfair or deceptive act by committing a breach of the implied warranty of merchantability. He awarded plaintiffs \$272,248.67 in damages, \$215,328.00 in attorneys' fees and \$15,447.61 in costs.^[4] The Appeals Court upheld the award and awarded additional appellate attorney's fees and costs, totaling \$23,570.35.

Vermont Mutual Insurance Company (Vermont Mutual) issued a Business owner's Liability Policy to Servpro. It paid \$696,669.48 to the customer, representing the amount of the underlying damage award plus interest. It then sued for a declaration that "the policy issued by Vermont Mutual ... [did] not provide coverage for the attorney fee [component of the] award." A Superior Court judge ruled against Vermont Mutual, finding the attorney's fees were "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,'" and fell within the Policy's insuring agreement.

The SJC reversed. It held the insuring agreement — obliging an insurer to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' ..." — referred only to "physical injuries and the money damages required to compensate them."^[5] By contrast, it held, attorney's fee awards under M.G.L. ch. 93A are intended to deter misconduct, and to serve the public interest in bringing misconduct to light. In short, where a plaintiff prevails in a M.G.L. ch. 93A suit involving allegations of bodily injury, the attorneys' fee component of the award do not reflect "damages because of bodily injury," but reflect "the cost of bringing suit to recover the ... relief requested."^[6] These fees fall outside the insuring agreement, and the attorneys' fee component of the judgment is not covered.^[7]

The decision is an important one for insurers in Massachusetts, who often find themselves defending insureds against M.G.L. ch. 93A allegations. In many cases, these allegations are frivolous. But where the M.G.L. ch. 93A allegations are sufficiently serious and robust, and the likelihood of an attorneys' fee award appears sufficiently substantial, insurers may wish to consider the possibility (and the implications) of a reservation of rights.

If you have any questions or need more information, please contact Eric Hermanson (hermansone@whiteandwilliams.com, 617.748.5226) or Austin D. Moody (moodya@whiteandwilliams.com, 617.748.5206).

[1] 490 Mass. 161 (2022).

[2] The coverage form at issue provides coverage that is nearly identical to what is provided by a standard Commercial General Liability (CGL) Policy and it can be assumed that this decision applies with equal force to CGL policies.

[3] M.G.L. ch. 93A § 9 provides remedies for consumers who are damaged by a company's "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Defendants who are found to have violated the statute may be held liable for the plaintiff's actual damages, plus reasonable attorneys' fees and costs. M.G.L. ch. 93A, § 9 (4). In cases of knowing or willful misconduct, the damage award may be doubled or trebled. . M.G.L. ch. 93A, § 9 (3). A separate statutory provision, M.G.L. ch. 93A § 11, provides remedies for business and commercial plaintiffs.

[4] The judge did not find Servpro had acted knowingly or willfully; and declined to award multiple damages.

[5] *Id.*, at 166.

[6] *Id.*, at 167.

[7] *Id.*, at 169. The SJC also rejected the (alternative) argument that attorney's fee awards under M.G.L. ch. 93A should be covered under as "Supplementary Payments," i.e., as "costs taxed against the insured in the 'suit.'" It agreed with Vermont Mutual that this language — "costs 'taxed' against the insured" — refers to a "narrower, technical meaning of court-related or nominal costs recoverable as a matter of course to prevailing parties."

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