

Recovery of multiple attorneys' fees under Chapter 93A

Published: 1:00 am Mon, April 9, 2007

By ROBERT D. COHAN

Your client can recover multiple attorneys' fees under G.L.c. 93A when those fees can properly be characterized as damages. This will depend on whether you can establish that your client was "forced" to incur those fees. Climbing that hill requires some forethought.

Some cases obviously merit an award of multiple counsel fees, but others are less obvious. This article addresses both scenarios, and points out some tactical considerations.

As a general rule in Massachusetts, "a litigant must bear his own expenses including attorney's fees, except where a statute permits the award of costs, a valid contract [or] stipulation provides for costs, or rules concerning damages permit[] recovery." *Judge Rotenberg Educational Center, Inc. v. Commissioner of the Department of Mental Retardation*, 424 Mass. 430, 468 (1997).

In the absence of a statute, contract, stipulation or rule, Massachusetts common law permits recovery of attorneys' fees only if those fees are the damages that your client suffered as a result of someone's wrongdoing, not merely the costs of litigation, which all litigants must bear. *Malloy v. Carroll*, 287 Mass. 376, 385 (1934); *Police Comm'r. of Boston v. Gows*, 429 Mass. 14, 17-19 (1999); *M.F. Roach Co. v. Provincetown*, 355 Mass 731, 732-33 (1969).

To recover, the claimant must establish that the defendant's wrongful conduct "necessarily requires him to employ counsel to gain redress for the wrong," or that the employment of counsel is "imperative," in order to protect one's rights. *Malloy*, 287 Mass. at 385.

While it can be argued that this is almost always the case, the Supreme Judicial Court has identified a number of situations where attorneys' fees are not to be considered damages. *Harrison v. Textron, Inc.*, 367 Mass. 540, 554 fn. 11 (1975).

These include legal expenses incurred in a successful suit to obtain a conveyance of land as directed by statute; a successful defendant's counsel fees in a suit for specific performance of an agreement to sell real estate; the prevailing party's counsel fees in an equity proceeding in the Probate Court; a successful litigant's counsel fees in a Superior Court equity proceeding; and counsel fees in a declaratory judgment proceeding and in an arbitration award. *Id.*

'Forced' to hire lawyer?

In the past decade, a body of law has developed applying the concept of attorneys' fees as damages to claims under Chapter 93A. Following prior common law, the issue turns on whether a party is "forced" to hire a lawyer. Where a party is sued, there is little difficulty establishing that he was forced to incur counsel fees for his defense.

In *Columbia Chiropractic Group, Inc. v. Trust Insurance Co.*, 430 Mass. 60 (1999), Trust Insurance brought a counterclaim under G.L.c. 93A, Sect. 11, alleging that Columbia Chiropractic's claims amounted to an unfair or deceptive attempt to collect bills for unneeded or overpriced services.

The SJC agreed and ruled that, "[i]f a violation of G.L. c. 93A, sec. 11, forces another to incur attorney's fees, those fees are a loss of money or property and may be recovered as G.L. c. 93A damages." *Id.* at 63.

The SJC found that Trust Insurance's litigation expenses were "actual damages" caused by the violation of G.L.c. 93A, Columbia Chiropractic's violations were willful and knowing, and "the judge was warranted in doubling them." *Id. Accord, Bruce Campbell & Associates, Inc. v. Carpiolato Corp.*, 52 Mass. App. Ct. 1112, *2 fn. 4 (2001) (unpublished); *Federal Ins. Co. v. HPSC, Inc.*, 2005 WL 2206071 *2 (D. Mass. 2005); *In re: Hart*, 246 B.R. 709, 736 fn. 27 (Bkrcty. D. Mass. 2000).

On the other hand, where your client is the plaintiff and initiates litigation, it is not at all apparent that he is "forced" to incur attorneys' fees. In *Tech Plus, Inc. v. Ansel*, 59 Mass. App. Ct. 12 (2003) rev. den. 440 Mass. 1108 (2003), the Appeals Court made clear that the claimant bears the burden of proof. While that might be obvious where someone is sued, it requires some evidentiary showing where a plaintiff initiates suit, and the plaintiff in *Tech Plus* failed to make that showing.

In *Tech Plus*, the plaintiff brought an action in multiple counts for interference with advantageous business, contractual and prospective business relations; violation of the employee's duty of loyalty; defamation; intentional infliction of emotional distress; civil conspiracy; and unfair practices in violation of 93A.

The plaintiff argued that the attorneys' fees incurred constituted damages under the statute. Not so, said the SJC.

Relying on *Columbia Chiropractic*, the SJC observed that, to constitute damages, the plaintiff must show that she was "forced to incur such expenses as a result of the defendants' initiation of litigation which itself constituted a violation of the statute." *Tech Plus, Inc.*, 59 Mass. App. Ct. at 21 (emphasis supplied).

The plaintiff cannot establish this "merely by showing that she has incurred attorney's fees and other costs in bringing an action under the statute." *Id. Accord, Fafard Real Estate & Development Corp. v. Metro Boston Broadcasting*, 345 F. Supp. 2d 147, 154 (D. Mass. 2004).

Note that a suit to recover damages “unrelated to the unfair act or practice that forms the basis of the c. 93A claim” may not be considered an action one is “forced” to take so as to open the door to an award of attorneys’ fees as damages. *Doering Equipment Co. v. John Deere Co. — A div. of Deere & Co.*, 61 Mass. App. Ct. 850 (2004).

In 2005, the Appeals Court entered the fray once again with its decision in *Siegel v. Berkshire Life Insurance Co.*, 64 Mass. App. Ct. 698 (2005), clearly indicating that counsel fees as damages under 93A may arise beyond the counterclaim scenario of *Columbia Chiropractic*.

In *Siegel*, the Appeals Court found that the plaintiff was “required ... to take legal action to protect her rights” as a result of the defendant’s unfair and deceptive conduct. *Id.* at 702 (emphasis supplied).

The defendant’s misconduct placed the claimant’s interests in a life insurance policy in jeopardy and “she was required to obtain legal representation” and intervene as a party defendant in a lawsuit. *Siegel*, 64 Mass. App. Ct. at 699-700.

Unlike *Columbia Chiropractic*, no lawsuit had been brought against the plaintiff, but the Appeals Court, relying on *Columbia Chiropractic*, nevertheless ruled that the attorneys’ fees thereby incurred should be treated as actual damages under the statute. *Siegel*, 64 Mass. App. Ct. at 703.

The court reasoned that the defendant’s unfair practices “made it necessary for [the plaintiff] to protect her rights in the policy by intervening in the creditors’ lawsuit and, in that sense, [the defendant] compelled her entry into the litigation.” *Id.* at 701.

Sorting out fees

Tactically, attorneys should be mindful of their burden of proof from the outset. The 93A demand letter, a prerequisite to suit under Section 9, readily lends itself to developing an evidentiary basis for such a claim, but no such demand is required as a prerequisite to a claim under Section 11.

Nevertheless, a written demand for relief prior to initiating legal action could set the ground work for establishing that your client has been forced to take action to protect his rights when his demand for settlement is ignored.

But even where the argument can be made that a claimant is forced or compelled to take legal action, there remains the burden of sorting out those fees that are damages and those that are incurred pursuing a claimant’s rights under Chapter 93A.

The distinction between attorneys’ fees that can be characterized as damages, and therefore subject to multiplication, and counsel fees incurred pursuing a 93A claim, although simple in concept, does not lend itself to a bright line division in practice.

Consider the *Columbia Chiropractic* situation: Columbia Chiropractic sues Trust Insurance for inflated and fabricated bills. Trust Insurance files an answer and counterclaim under 93A. When Trust Insurance successfully defends against Columbia Chiropractic and prevails on its 93A counterclaim, were not all of the attorneys' fees incurred vindicating Trust Insurance's rights under the statute?

After all, in order to prove a violation of Chapter 93A, Trust Insurance had to prove that there was no valid debt, which is, of course, the essence of its defense against Columbia Chiropractic's claims.

Separating out the attorneys' fees incurred as actual damages from attorneys' fees incurred vindicating rights under the statute becomes something of a judgment call for the lawyer dissecting his bill to put his time in one bucket or the other.

It is best done with some forethought as bills are generated, rather than afterwards when they may be difficult to parse.

If you have a contingent-fee agreement, there is support for the proposition that your contingent fee should be treated as damages and multiplied. See *Unger v. Lambert*, 2007 WL 867053 (Mass. Super. Ct., March 12, 2007) (Fremont-Smith, J.). Note that, in that case, upon awarding damages that were twice the plaintiff's attorneys' fees, the court declined to award counsel fees for the Chapter 93A count, reasoning that it would be duplicative. *Id.* at *2.

Robert D. Cohan is a trial attorney and partner with Cohan, Rasnick, Myerson in Boston. His practice includes business litigation on a contingent-fee basis.