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Policyholder can split 93A claims versus insurance co.

By David E. Frank

A policyholder could file a Chapter 93A lawsuit against an insurance company even though he had already obtained a final declaratory judgment in the case, the 1st U.S. Circuit Court of Appeals has ruled.

In an issue of first impression, the defendant insurance company argued that claim preclusion principles prevented the suit from moving forward where the two matters, which were controlled by state law, involved the same set of facts.

But the 1st Circuit, in an opinion written by Senior Judge Bruce M. Selya, disagreed.

"After canvassing the Massachusetts cases, examining the precedents elsewhere, consulting scholarly literature, and weighing relevant policy rationales, we believe that we can predict with some assurance that the [Supreme Judicial Court], if faced with the question presented in this appeal, would likely follow the rule set out in section 33 of the Restatement (Second) of Judgments," Selya wrote. "In other words, we do not think that the SJC would construe a final judgment in a declaratory action that did not raise coercive claims as barring a subsequent damages action asserting such claims, even though the latter arose out of the same transaction."

The 23-page decision is *Andrew Robinson International, Inc., et al. v. Hartford Fire Insurance Company,* Lawyers Weekly No. 01-344-08.

More bargaining power

Boston lawyer Jack P. Milgram, who represented the policyholder, said the ruling will provide aggrieved plaintiffs and their counsel with more leverage at the bargaining table.

Until now, Milgram said, insurance companies have had sole discretion in deciding whether a Chapter 93A claim should be litigated alongside or separate from a declaratory action.

"The [insurance company] had the option of filing motions to stay or sever the claims, but what this case stands for is that the policyholder can make the very same decisions by simply reserving or splitting the 93A claim," he said.

Although the issue had never been raised in Massachusetts, Milgram said he found five federal circuit courts that had recognized similar rights.

"The SJC and the Appeals Court have never specifically adopted Rule 33 of the Restatement of Judgments, which is what we relied on in regard to the declaratory judgment exception," he said. "But our research showed that this rule is almost universally accepted everywhere else."

Milgram said support for his position was so widespread that Selya's ruling contained two full pages of string citations from the different courts that had adopted the principle.

"The 1st Circuit has now found that, in Massachusetts, a policyholder can bifurcate a petition for declaratory relief on a first-party property claim with a subsequent lawsuit under 93A," he said. "That's really important to the consumer because what it does is level the playing field between the policyholder and the insurance company."

AP PHOTO

SELYA
Writes decision for 1st Circuit

Felicia H. Ellsworth, of WilmerHale in Boston, represented the insurance company. She did not respond to requests for comment.

Something's in the air

The plaintiff, Andrew Robinson International, was a tenant in a building located in Boston. It was insured by defendant Hartford Fire Insurance Co., which also insured a law office that abutted the plaintiff's unit.

The plaintiff purchased a Hartford Spectrum business insurance policy, which contained a form specifying that the insurance company would pay for direct physical loss at the property.

One exclusion in the policy, dealing with pollution, stated that "we will not pay for loss or damage caused by or resulting from the discharge, dispersal, seepage, migration, release or escape of 'pollutants' unless … caused by any of the 'specified causes of loss.'"

In April 2003, while the law office was conducting renovations, contractors sandblasted the interior walls and caused the release of dust into the air.

The dust contained lead that migrated to the plaintiff's unit. The Boston Public Health Commission subsequently or-

CASE: *Andrew Robinson International, Inc., et al. v. Hartford Fire Insurance Company*, Lawyers Weekly No. 01-344-08

COURT: 1st U.S. Circuit Court of Appeals

ISSUE: Could a policyholder file a Chapter 93A lawsuit against his insurance company even though he had already obtained a final declaratory judgment?

DECISION: Yes

dered an immediate cleanup, suggesting building occupants relocate to another location "because they can't be around during the clean-up process."

The plaintiff eventually filed a first-party claim against the insurance company. A few months later, it sued the insurance company, seeking a declaratory judgment that the pollution exclusion clause did not bar recovery for damages.

The court concluded that lead-laden dust released within a commercial building did not constitute pollution and, therefore, did not trigger the policy exclusion.

The insurance company allowed the declaratory judgment to become final and paid the plaintiff's claim. Eight months later, the plaintiff again sued the insurance company in state court, alleging that its conduct amounted to an unfair and deceptive trade practice in violation of Chapter 93A.

The insurance company removed the matter to federal court on diversity grounds and persuaded U.S. District Court Judge Nathaniel B. Gorton to dismiss the case based on res judicata principles.

All roads lead to Rome

In reversing the dismissal, Selya noted that neither party asked to have the question certified to the SJC even though it involved the interpretation of state law.

Although no reported Massachusetts decision had ever explicitly adopted the Second Restatement in this context, the judge wrote that at least four cases — including two from the SJC — had cited approvingly "to some incarnation of that section."

"These Massachusetts cases strongly suggest that when faced with the question that is now before us, the SJC will adopt the articulation of claim preclusion principles limned in section 33 of the Second Restatement," he said. "In an effort to weaken the force of this reasoning, Hartford's able counsel marshals a number of other Massachusetts cases. In the end, this effort proves fruitless."

In reviewing holdings from other jurisdictions, Selya said the vast majority of states that had addressed the problem had opted to apply a special rule of claim preclusion.

"Many of these courts have cited explicitly to some edition of the Restatement," he said. "To this point, all roads lead to Rome."

Selya similarly downplayed Gorton's concerns that the plaintiff may have engaged in strategic litigation by intentionally splitting the claims.

"But every lawyer — or, at least every competent lawyer — factors strategic considerations into decisions affecting his or her handling of litigation," he said. "Moreover, the type of claim-splitting that worried the district court is precisely what the Restatement rule contemplates." MLW