MERRILL SHEA

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For Bradley L. Croft, 2022 got off to an interesting, albeit hectic, start.

In the first week of February, he appeared before the Appeals Court to argue a matter of first impression. Days later, he stepped up — via Zoom — to tackle a separate issue with the justices of the Supreme Judicial Court.

That busy week resulted in two favorable, significant decisions in June.

In *Tocci, et al. v. Tocci, et al.*, the SJC decided that the equitable remedy of surcharge may be available for a plaintiff to recoup attorneys' fees from a fiduciary who breaches his duties to a corporation, but only if the plaintiff is suing on behalf of a separate entity or common fund and not purely for the plaintiff's own benefit.

The SJC's answer to the "novel question" protected Croft's client from having to pay counsel fees.

On June 7, the Appeals Court agreed with Croft that a construction project owner's failure to reject a contractor's applications for periodic progress payments pursuant to the requirements of the Prompt Payment Act constituted approval of the requests in *Tocci Building Corporation v. IRIV Partners, LLC, et al.* It was the first time the statute had been successfully used in its decade in existence.

A commercial litigator focused on the construction and real estate industries and who serves as president of his Boston firm, Croft can't recall a time that he was busier than when he was prepping for the appellate arguments in both cases.

"It really is a neat feature of our profession to be in a position to help clients solve their problems in a way that also impacts the industry," he says.

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Q. *In the Appeals Court case, what made you decide to use the Prompt Payment Act?*
A. I represented the general contractor of a project in Boston which involved the gut renovation of a commercial building. The project had progressed to the point of being substantially complete, but payments dried up. My client and the subcontractors went ahead and completed the work, but the owner was withholding about $5 million. My client needed to get some money flowing. This happened in 2020, when there was so much uncertainty about the impact of the COVID lockdown on the construction industry. And here is this law that has been on the books for around 10 years, in theory to address precisely this type of situation: to keep funds flowing so a GC or subcontractor is not put in the position of having to finance these large-scale construction projects. So why don't we see if this law actually has some teeth?

> **"The decision has really been a wake-up call to the entire commercial development industry in Massachusetts. The requirements of the statute do mean something, and there are actual consequences if it is violated."**

Q. *Critics have said the decision makes Massachusetts an outlier, by creating a situation in which if an invoice is not rejected, it is presumed to be accepted.*
A. This is not a one-size-fits-all law. It was drafted specifically by Massachusetts lawyers in Massachusetts trade organizations to apply in Massachusetts. It doesn't borrow from other jurisdictions or try to be a state version of a federal law. So, I don't see an apples-to-apples comparison to say that Massachusetts is an outlier.

I will say that the notion that a party who breaches a contract should be held to be responsible for the consequences of that breach is in line with longstanding precedent in probably every jurisdiction.

Q. *Now that you have found success with the statute, will we see it being applied more frequently?*
A. The law has already been the subject of several cases, and I know of at least one case where summary judgment was entered in favor of a contractor under very similar circumstances. The decision has really been a wake-up call to the entire commercial development industry in Massachusetts. The requirements of the statute do mean something, and there are actual consequences if it is violated.

Q. *Turning to the case before the SJC, walk me through your argument.*
A. There are only very limited exceptions to the American rule that, in every case, litigants bear their own costs of defense. Starting with that premise — and that courts only allow exceptions in extraordinary circumstances — there really are limited avenues to recover attorneys' fees from the opposing party, usually found under statute or by contractual right. The equitable concept of surcharge recognizes in the trust context that the beneficiary or whoever brought the claim shouldn't have to spend their own money, and it is only fair to recover what they have spent.

What the appellant tried to do [in *Tocci*] is translate that concept into the corporate fiduciary context to argue that a corporation who brings a claim against a fiduciary should be entitled to recover its attorneys' fees under the same concept of surcharge. But that's not what was being pursued here. This was a sort of punitive measure, where the corporation itself, which actually did pursue the claim, sought to get its attorneys' fees, not the beneficiary who needs to be made whole because they took on the action when no one else did. The SJC agreed: The justices declined to recognize a new exception to the American rule where an action was taken and fees spent for the direct benefit of the party bringing the suit.

Q. *What if the SJC had permitted surcharge in this case?*
A. Had the SJC allowed surcharge in this situation, we would have seen a huge uptick in breach-of-fiduciary-duty cases. The courts are already awash in these kinds of cases. I did a national search for similar cases and there really weren't any. You would think if it was a viable theory, it would have caught the attention of at least one court somewhere.

I give opposing counsel a lot of credit for coming up with a very creative theory, but ultimately the court got it exactly right. I am relieved that there isn't this whole new avenue to try to pursue attorneys' fees from the other side.

Allowing a surcharge in this situation would also disincentivize individuals from being a fiduciary. Fiduciaries make mistakes, that happens. To say that if a fiduciary happens to make a mistake, even an innocent mistake, and that person may be liable not just to reimburse the company for the financial consequences of that mistake but also to the other side for all their attorneys' fees, would create a disincentive to take on the role of fiduciary.

— Correy E. Stephenson