First Circuit Upholds Protection For Insurers in Massachusetts: Demand Letters Do Not Trigger a Duty to Defend

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By Peabody and Arnold on January 9, 2017

The First Circuit recently upheld Massachusetts' longstanding protection for insurers: Chapter 93A demand letters do not trigger an insurer's duty to defend or indemnify its insured.

The plaintiff in *Sanders v. Phoenix Ins. Co.* (**843 F.3d 37 (1st Cir. 2016)**) sought to invoke an exception to the longstanding rule that an insurer need not defend its insured until formal suit has been filed. This post will not delve into the background facts, but instead relies on Judge Selya's poetic synopsis:

> This case begins with a tragic tale of unrequited love and morphs into a series of imaginative questions regarding the coverage available under a standard form homeowner's insurance policy. But when imagination runs headlong into settled legal precedent, imagination loses.
>
> For our purposes, the plaintiff sought coverage under a homeowner's policy containing the following language:
>
> If a claim is made or a suit is brought against any insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, even if the claim or suit is false, we will:
>
> …..
>
> b. provide a defense at our expense of counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate.

First, the court found that this language conveyed a promise to provide a defense to a formal suit, but not to a mere claim. The court then proceeded to the next question: whether the Chapter 93A demand letter served in the underlying matter triggered Phoenix's duty to defend.

The general rule is that there is no duty to defend until suit is filed, but the plaintiff argued that Chapter 93A letters fit within an exception to this rule articulated by the Massachusetts Supreme Judicial Court in *Hazen Paper Co. v. U.S. Fid. & Guar. Co., 407 Mass. 689 (1990)* . In that case, the SJC found that "CERCLA" notices issued by the EPA were more than just demand letters and wielded such an impact on an insured's potential liability that they triggered a duty to defend.

The *Sanders* plaintiff argued that Chapter 93A letters fall within this exception because failure to respond to them can expose an insured to multiple damages, attorney's fees, and costs.

> Judge Selya disagreed, noting that the SJC's ruling in *Hazen Paper* was narrow and case-specific. He also noted that Chapter 93A demand letters and CERCLA letters have vastly differing impacts on an insurer: failure to respond to the CERCLA letter "would have all but forfeited the insured's

> case." Failure to respond to a Chapter 93A letter "has a much more limited effect."
>
> Chapter 93A demand letters are fairly comparable to demand letters sent in anticipation of garden-variety personal injury litigation. Given the frequency with which they are used and the important differences that distinguish them from CERCLA letters, we are reluctant to widen the narrow boundaries sketched by the *Hazen Paper* court and hold that Chapter 93A demand letters are a functional equivalent of a suit.

Thus remains the status quo. Chapter 93A demand letters do not trigger a duty to defend. The court also noted that, since the duty to defend is broader than the duty to indemnify, 93A demand letters likewise fail to trigger the latter.

Judge Selya's opinion is articulate, well-reasoned and, at times, entertaining. We encourage you to read it.

