

INSIGHTS + NEWS

Lou Ciavarra Quoted in “SJC decision opens door to surcharge against breaching fiduciary” in Massachusetts Lawyers Weekly

JULY 5, 2022

On June 17, the SJC issued a decision in *Tocci, et al. v. Tocci, et al.*, and addressed a novel issue: whether a successful plaintiff in an action for a breach of fiduciary duty may recover its attorneys’ fees using surcharge, an equitable remedy that holds a fiduciary personally liable for the fiscal impact of his or her breach. Previously, this type of surcharge was only allowed in the trust context. In *Tocci*, the court concluded that surcharge may be used to award a plaintiff the costs of attorneys’ fees, when the plaintiff brings the litigation on behalf of a separate entity or common fund, but not when the litigation directly benefits only the plaintiff. Lou Ciavarra spoke with *Massachusetts Lawyers Weekly* about the decision:

Lou noted that in the context of a derivative proceeding, there is already a state law — G.L.c. 156D, §7.46 — that empowers a court to order the corporation to pay the plaintiff’s reasonable expenses, including counsel fees, if it finds that the proceeding has resulted in a substantial benefit to the corporation.

This decision in *Tocci* provides plaintiffs with another way to get reimbursed for their expenses: using surcharge to get the court to order the breaching fiduciary defendant to pay those fees instead.

When asked how judges will decide whether to follow the statute or use surcharge, Lou suggested that one bright line judges might begin to draw is separating cases by whether a fiduciary defendant has not only caused harm to the corporation but also benefited personally from that breach. When that factor is present, he noted, judges might be more inclined to grant surcharge. Lou added that either way, defendants are likely to argue that the Legislature has already designated a remedy by enacting §7.46 and that there is no reason to go beyond the regime lawmakers created.

Continue reading “[SJC decision opens door to surcharge against breaching fiduciary](#)” on the *Massachusetts Lawyers Weekly* website (subscription required).