

## **“Massachusetts Appeals Court Rules That Insured Is Entitled to Recover Costs In Bringing Coverage Suit Against Insurer”**

In *John Moriarty & Assocs., Inc. v. Zurich Am. Ins. Co.*, No. 22-P-275, 2023 WL 2719362 (Mass. App. Ct. Mar. 31, 2023), the Massachusetts Appeals Court for Middlesex County vacated a lower court’s dismissal of Zurich American Insurance Co (“Zurich”) from a declaratory judgment action brought by John Moriarty & Associates, Inc. (“JMA”), a general contractor, and an additional insured on a commercial general liability insurance policy issued by Zurich. The court determined that JMA had adequately pled its breach of contract claim against Zurich and was entitled to recover its costs of bringing the coverage suit.

The coverage dispute arose from an underlying work site injury claim. According to the court’s opinion, JMA engaged two subcontracting companies for its project. PJ Spillane performed waterproofing work while Triple G Scaffold Services Corp. (“Triple G”) was hired by JMA to perform scaffolding at the job site. An employee of PJ Spillane fell at the job site and sued JMA and Triple G for his injuries. JMA sought coverage from PJ Spillane’s commercial general liability policy, which was issued by Zurich and of which, named JMA as an additional insured.

On July 24, 2020, Zurich accepted JMA’s tender and agreed to defend and indemnify JMA without a reservation of rights. However, it later changed its position after receiving a request that it also defend and indemnify JMA against Triple G. Zurich rescinded its acceptance of coverage, denied JMA’s tender for defense and indemnity in connection with Triple G’s claim, and only agreed to defend the underlying negligence claim against JMA under a full reservation of rights. Triple G eventually dropped its demand that JMA provide it with defense and indemnity on the claim. However, when JMA notified Zurich of Triple G’s rescission, Zurich refused JMA’s request that it withdraw its reservation of rights. Instead, Zurich renewed its reservation of rights, including expressly reserving “the right to recoup any amounts paid as defense expenses that can be attributable to liability that is not potentially covered, if allowed by law.”

On February 24, 2021, JMA sued Zurich, alleging that the insurer had failed to pay any defense costs and that the insurer had breached its contract by only providing coverage under a reservation of rights. Zurich then made payments to JMA in October and November 2021. The lower court dismissed the claims against Zurich upon a finding that it had made payments towards JMA’s defense costs and that it had acknowledged it had a duty to defend subject to a reservation of rights.

On appeal, the court held that JMA adequately alleged its breach of contract claim and was entitled to receive its costs in prosecuting its case against Zurich. The court explained, “[w]here Zurich insisted on proceeding subject to a reservation of rights, JMA was entitled to maintain control of its defense and to seek payment of its legal bills from Zurich. At that point, Zurich was required to reimburse JMA for reasonable attorney’s fees incurred by JMA’s chosen counsel... JMA alleged that Zurich failed to do so, thus prompting JMA’s initiation of this action. These allegations adequately set out a breach of contract claim premised on Zurich’s nonpayment of JMA’s defense costs.” The court further found that JMA’s right to recover its costs in bringing

the coverage action was “a natural extension” of the Massachusetts’s Supreme Judicial Court’s decision in *Preferred Mut. Ins. Co. v. Gamache*, 426 Mass. 93, 686 N.E.2d 989 (1997). The court held that while the *Gamache* decision addressed the right of policyholders to recoup costs in establishing an insurer’s duty to defend, the reasoning applied even more strongly in the present case, where Zurich had already conceded its duty to defend but then refused to fulfill that duty. The court further commented, “[t]he breach of the duty to defend is worse where the insurer acknowledges that it has the duty to defend but then refuses to comply with that duty than where the insurer merely has a good faith disagreement about its duty to defend.”

The court also examined Zurich’s argument that it is entitled to recoup defense costs. At oral arguments, Zurich asserted that it could seek recoupment if “(1) the underlying litigation revealed that the foreman’s claim was not ultimately covered; ... and (2) JMA forced Zurich to defend through some unfair behavior that had a ‘flavor of extortion.’” The court acknowledged that in Massachusetts it is an “open issue” “whether an insurer may seek to recoup costs of a defense undertaken pursuant to a unilateral reservation of rights.” The court ultimately did not decide on the issue but stated that, “even if Massachusetts would recognize this basis for recoupment (a point which we do not reach at this juncture), that does not necessarily mean that an insurer may reserve a right to recoup on this ground without identifying some factual basis to support that assertion.”