Legal news & views

Issue: VI February 2013

Dear Patty,

Thank you for reading **news & views** from Kenney & Sams, P.C. We value your time and promise to keep the content brief, educational and direct. If you would like to discontinue receiving this type of communication, please unsubscribe below.

The Kenney & Sams Difference

Kenney & Sams, P.C. achieved great success over the course of the past year, and was again selected for inclusion in the national publication *Best Law Firms in America*. Chris Kenney, the firms managing partner, was named the Defense Lawyer of the Year by the Mass Defense Lawyers Association.

We had several opportunities to demonstrate our skill and expertise in advocating for our clients. The firm handled trials, arbitrations and mediations over the past year and produced consistently positive results. The trials and arbitration ranged from employment disputes to construction matters, tort and contract claims and business disputes.

We are grateful to our outstanding staff for the work they do to support our efforts on behalf of our clients. Kenney & Sams, P.C. is able to service clients throughout the region from our offices in

In This Issue

Quick Links

Newsletter Archive
www.KandSLegal.com

Worcester Business Journal's 2012 TOP WORKPLACES

Kenney & Sams, P.C. recognized as a Best Place to Work 2012 by the Worcester Business Journal.
Top Workplaces

Kenney Sams, P.C. New Website

Exciting news! Please visit our new website.

www.KandSlegal.com

Boston Massachusetts and the MetroWest region of Massachusetts. We look forward to working with you to resolve your disputes and protect your business and personal interests in 2013.

Arbitration Victory

Chris Kenney and **Ryan Menard** recently achieved a major victory in the arbitration of an employment dispute. Our client, a major international food manufacturer, was sued by a former employee and her labor union for alleged wrongful termination of her employment. The claim was tried before an arbitrator at the American Arbitration Association. Following Attorney Kenney's opening statement, the union and former employee both decided to voluntarily withdraw the grievance and dismiss the claim for no money paid.

Wind Turbine on Cape Cod Bay

Mike Sams represents Aquacultural Research Corp. in a courtroom battle over the construction of a Wind Turbine on Cape Cod Bay.

See Full Article

Breach of Contract Success

David Kerrigan, Chris Kenney, and Ryan Menard recently resolved a breach of contract lawsuit claim against our client on the first day of trial in Supreme Court. Our client, a regional general contractor, was sued by a business development consultant over alleged commissions. We demonstrated through discovery that the consultant had not earned the commissions, and was seeking to exploit an ambiguity in the commission agreement. On the first morning of trial preceding jury empanelment, the court granted our motion for key evidentiary rulings that eviscerated the plaintiff's case. Following this ruling, the plaintiff reduced his settlement demand by 90% and the claim was dismissed with prejudice.

Ed Prisby Joins Kenney & Sams

Kenney & Sams, P.C. is pleased to announce that Edward Prisby has joined the firm.

Ed's practice includes all areas of civil litigation with a focus on business litigation issues, shareholder disputes, estate disputes, trademark disputes, civil rights claims, tort claims, wrongful death cases, construction disputes and employment litigation.

NOTEWORTHY SUCCESSES

Joe Calandrelli successfully achieved summary judgment in a real estate dispute involving a purchase and sale agreement. The plaintiff's claimed that the developer sold them a parcel of property 1/2 the size of what the plaintiff intended to buy, the agreement referenced (and what their purchase price was based on). Joe argued all representations and warranties in that the purchase and sale agreement were extinguished once the plaintiff accepted the deed from

Massachusetts Appeals Court: Economic Loss Rule Need Not Be Pleaded As Affirmative Defense

By: Michael Sams and Ryan Menard

The economic loss rule is something we encounter in property damage-related construction cases.

Last month, the Massachusetts Appeals Court held that the economic loss rule, which bars negligence claims that do not involve personal injury or property damage beyond damage to a defective product itself, does not need to be pleaded as an affirmative defense.

Construction litigators often assume that the economic loss rule must be pleaded as an affirmative defense or is waived, because the doctrine can completely defeat a negligence claim even where the plaintiff's allegations are true. In Wyman v. Ayer Properties, LLC, 83 Mass. App. Ct. 21, 240-25 (2012), however the Appears Court held that it is the defendant's burden to deny them - and thus a defendant need not plead the economic loss rule as an affirmative defense.

In Wyman, the trustees of a condominium sued the condominium's builder after discovering numerous defects in the windows, roof, and masonry. Id. at 22-23. Many of the plaintiffs' damages stemmed only from the economic costs of replacing the defective construction and, therefore, were subject to the economic loss rule. The economic loss rule provides that "purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage." Id. at 25, quoting FMR Corp. v. Boston Edison Co., 415 Mass. 393, 395 (1993). In keeping with the doctrine's purpose - to remove tort recovery for claims which "fall within the remedial range of contract and warranty law and not within the more uncertain range of reasonably foreseeability governing tortious negligence damages" - the economic loss rule prohibits negligence claims based on the property damage of an allegedly defective product or structure. Id. at 26.

The builder's counsel did not plead the economic loss rule as an affirmative defense in its answer; instead, it argued the defense at trial. Nevertheless, the court applied the rule after the trial to bar most of the plaintiff's damages. Id. at 23-24. The plaintiff appealed, claiming that the defendant was required to plead the economic loss rule as an affirmative defense. Id. at 24.

The Appeals Court upheld the trial judge's application of the

the seller.

Joe Calandrelli recently achieved summary judgment in a case involving a personal injury suffered by an airline employee when he stepped into a hole in the tarmac while guiding a plane into its taxiing gate. The plaintiff sued claiming negligent maintenance of property by the defendant for failing to fix the hole. Summary judgment was achieved by claiming that the tarmac was a "way" within the meaning of Chapter 84, which imposes certain obligations on plaintiffs claiming injuries arising from defects in what is traditionally limited to sidewalks and roads. This was the first time that the Chapter 84 defense was successfully applied to the "air-side" operations of an airport. Because Joe was able to persuade the judge that Chapter 84 applies to this case, and because the plaintiff failed to comply with his obligations under Chapter 84, the case was dismissed at Summary Judgement.

MBA

Chris Kenney will serve as a regional delegate to the Massachusetts Bar Association's House of Delegates for the 2012 - 2013 year.

Mike Sams will serve as delegate-at-large to the Massachusetts Bar Association's House of Delegates for the 2012 - 2013 year.
Read More

Join Our Mailing List

economic loss doctrine, holding that as a matter of law a defendant does not waive the defense by failing to plead it affirmatively. Id. at 24-25. The Court, recognizing that valid damages are an element of negligence that a plaintiff must allege, held that the economic loss doctrine, rather than burdening the defendant to invoke it, "implicitly places the burden on the plaintiff to prove that its property damage resulted proximately from the negligent conduct of the defendant. Physical injury or property damage beyond pure economic loss and beyond damage to the product itself is an element of damages to be proved by the plaintiff, and not an affirmative defense to be pleaded by the defendant." Id.

Better Than Your Broker: Prejudgment Interest in Massachusetts

By: Adam Ponte

Massachusetts law generally allows plaintiffs to obtain prejudgment interest on top of whatever damages they are awarded at trial. Prejudgment interest begins to accrue on the court's monetary award from the date you file the complaint for a tort claim or on the date of breach for a contract claim. It continues to accrue until the court enters judgment for the plaintiff.

For both tort and contract actions, Massachusetts law provides a whopping twelve percent (12%) per year prejudgment interest rate. G.L. c. 231, § 6B; G.L. c. 231, § 6C.[1] This means that in a case that concludes years after the conduct giving rise to the claim, the prevailing plaintiff could receive a significant payment in addition to the court's damages award. Therefore, potential defendants and insurers must be aware of the Massachusetts prejudgment statutes because they create a significant risk of increased financial exposure associated with a claim.

The purpose of prejudgment interest is not to penalize the wrongdoer, but to only compensate the plaintiff for the loss of use or unlawful detention of money. McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 717 (1990); see also Salvi v. Suffolk County Sheriff's Dept., 67 Mass. App. Ct. 596, 609 (2006) ("Prejudgment interest is ... inappropriate on an award of punitive damages."). The exclusive legislative purpose behind prejudgment interest is to properly compensate plaintiffs; a 12% interest rate arguably has no rational relation to such goal. Therefore, because the prejudgment interest rate of 12% is above any reasonable rate of return that an investor could achieve in today's market, there is a debate as to whether this

exorbitant rate violates the Due Process Clause. These statutes have not been amended since 1982, when, perhaps, a rate of return in the market over 10% was actually possible.

The statutes that provide for prejudgment interest distinguish between tort and contract actions. It is important to know the difference between these statutes because timing is everything when it comes to prejudgment interest. For tort actions, the 12% annual interest rate accrues from the date you file a complaint to start the lawsuit, not when the injury occurred. G.L. c. 231 § 6B. On the other hand, for contract actions, the 12% per year interest rate accrues from: (1) the date that the breach of contract occurred; (2) the date that the plaintiff alerted the defendant of the breach, demanding performance or payment; or (3) the date of the commencement of the case. G.L. c. 231 § 6C.[2] Below are two basic examples that demonstrate the severe increase in costs Massachusetts defendants could face as a result of prejudgment interest.

- If a jury awarded $10M in damages to the estate of a wrongful death plaintiff, and the lawsuit started four years before the judgment entered, the defendant could be ordered to pay an additional $4.8M on top of the $10M (4 years of interest at a 12% interest rate).[3]
- In a breach of contract case where the breach occurred one year before the plaintiff filed suit, and the case continued for two years before the court awarded a $2M judgment, the defendant could be ordered to pay an additional $720,000.000 in prejudgment interest (three years of interest at a 12% interest rate.

Insurers must also pay close attention to the prejudgment interest statutes. In certain cases, a court may order an insurer to pay prejudgment interest, on top of the damages awarded, even if the total payment exceeds policy limits. If a policy does not unambiguously disclaim the insurer's duty to pay prejudgment interest as an element of damages, Massachusetts courts could hold the insurer liable to pay prejudgment interest regardless of policy limits. See Chicago Ins. Co. v. Lappin, 58 Mass. App. Ct. 769 (2003) (finding prejudgment interest not subject to policy limits when insurance contract explicitly obligated insurer to pay "all sums for which they became legally obligated to pay as damages," without any language to the contrary). But see Mayer v. Medical Malpractice Joint Underwriting Ass'n of Massachusetts, 40 Mass. App. Ct. 266, 273 (1996) (holding insurer not liable to pay prejudgment interest above policy limits when "Supplementary Payments" section of policy differentiated between "costs" and "interest."). Consequently, based on a policy's language concerning interest as an element of damages, or lack thereof, an insurer could be liable for paying awards above policy limits.

Massachusetts's prejudgment interest rate is significantly higher

than the rate in the vast majority of other states. Defendants could be forced to pay awards far greater than what actually "compensates" plaintiffs for their inability to use the funds. This should be a crucial consideration throughout the entire process of defending a claim. Whether you are negotiating a settlement or estimating the appropriate amount of damages at trial, remember that the plaintiff could walk away with an additional payment that is based on a rate of return higher than anything he could find on Wall Street.

---

[1] Unlike most states, Massachusetts provides a fixed 12% interest rate for prejudgment interest (as opposed to a floating rate that adjusts automatically per U.S. Treasury yields).

[2] Whether interest accrues from the date of breach or when the plaintiff demanded performance depends on the plaintiff's ability to establish a fixed date for either of these events. Otherwise, the clerk will compute interest from the date that the plaintiff filed the complaint.

[3] G.L. c. 229, § 11 provides the 12% prejudgment interest for wrongful death judgments.