

MASSACHUSETTS SUPREME JUDICIAL COURT WATCH

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Two cases of significance to municipalities are pending before the Massachusetts Supreme Judicial Court. The first involves the question of whether the Criminal Harassment Statute is unconstitutional when applied to public figures. The second involves whether a municipality may be subject to liability under the Massachusetts Consumer Protection Act.

Commonwealth v. Harvey J. Bigelow, SJC-11974

On October 20, 2015, the SJC transferred this case on its own initiative to consider the constitutionality of the Massachusetts Criminal Harassment statute, G.L. c.265, §43A ("Section 43A"), as applied to harassing communications to public figures that may also include protected political speech. In this case, Bigelow sent a Town of Rehoboth Selectman and his wife a series of anonymous letters criticizing the Selectman's actions and qualifications for office coupled with allegedly threatening, ominous, and intimidating content concerning the Selectman's marital relationship. A Taunton District Court jury found Mr. Bigelow guilty under Section 43A of two counts of criminal harassment. Bigelow moved for a required finding of not guilty, the District Court (Hon. Gregory L. Phillips), however, denied that motion and Bigelow appealed.

Bigelow claims that Section 43A is unconstitutional as applied to his conduct because his actions were in pursuit of his First Amendment right to free speech. In other words, he argues that the letters were designed to criticize the actions of the Selectman, and therefore contained protected political speech rather than "fighting words" or "true threats." The Commonwealth, on the other hand, argues that the letters consisted of more than "pure" speech, as they were designed to cause serious and reasonable alarm. As such, it is the Commonwealth's position that such communications should not be exempt from punishment merely because they were accompanied by protected political speech. Oral arguments were held on January 8, 2016 and the case is under review by the SJC.

Depending on the Court's ruling, the possibility of prosecution under Section 43A will provide significant protections for public officials when criticism crosses the line into threatening an abusive behavior. We will, therefore, continue to monitor this litigation and apprise you of any significant developments.

Johnson Golf Mgt., Inc. v. Town of Duxbury & others, SJC-12000

Although the question of whether a municipality is subject to the Massachusetts Consumer Protection Act, G.L. c.93A ("Chapter 93A"), has been presented on a number of occasions, the Appeals Court has yet to subject a municipality to liability thereunder. Chapter 93A essentially protects consumers against unfair or deceptive conduct "in the marketplace" and provides for actual damages, double or treble damages if the plaintiff can prove willful and knowing violation of Chapter 93A, and, possibly attorneys' fees and costs.

THE LEADER IN PUBLIC SECTOR LAW

On November 16, 2015, the SJC, again on its own initiative, transferred this case to decide whether a municipality may be subject to liability pursuant to Chapter 93A, and if so, under what circumstances. Here, the plaintiff, Johnson Golf Mgt., Inc. ("Johnson Golf") alleges that the Town of Duxbury violated the Uniform Procurement Act, G.L. c.30B ("Chapter 30B"), in the process used to award a management contract for a Town-owned golf course. Importantly, the plaintiff further alleges that the Town's statutory violations constituted unfair and deceptive acts or practices subjecting the Town to multiple damages and attorneys' fees under Chapter 93A.

In April 2013, a 14-day jury trial was held in the Plymouth Superior Court. The jury found that the Town's procurement practices violated Chapter 30B, but that the Town did not act in bad faith. However, the jury also found that the Town's procurement process violations constituted a willful and knowing unfair or deceptive act or practice in violation of Chapter 93A. As a result, Johnson Golf was awarded double damages totaling \$400,000 in lost net profits and \$325,000 in attorneys' fees and costs.

The Superior Court (Hon. Kenneth V. Desmond, Jr.) denied the Town's motion to set aside the jury's verdict on the Chapter 93A claims, finding:

- (1) the Town engaged in "trade or commerce" where:
 - a. ownership and management of a golf course "does not in any way relate to governmental activity" as it is not required by the General Court or otherwise linked to Town operations; and
 - b. the Town's primary motivation for leasing the golf course to a management company was to earn a profit;
- (2) the availability of Chapter 30B remedies for bidding violations does not preclude additional liability and multiple damages for the same violations under Chapter 93A; and
- (3) Chapter 93A implicitly waives municipalities' sovereign immunity.

In contrast, the Town argues that the Commonwealth and its political subdivisions are immune from Chapter 93A liability on the basis of sovereign immunity. The doctrine of sovereign immunity limits a governmental entity's liability for negligent acts of its employees. The Town further asserts that Chapter 93A should not apply in cases arising under Chapter 30B, as procurement actions taken by the Town under such circumstances are motivated by legislative mandate and not in connection with "trade or commerce."

Depending on the Court's ruling, this case may expose municipalities to additional avenues of liability and have a significant impact on a number of governmental functions. We will, therefore, continue to monitor this litigation and apprise you of any significant developments.

Should you have any questions about these cases or their implications, please feel free to contact Attorney George X. Pucci or Attorney Gregg J. Corbo by e-mail at gpucci@k-plaw.com or gcorbo@k-plaw.com or by phone at 617.556.0007.

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