

# Employer's bid to dodge fees fails

By Christina Pazzanese

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A company that unsuccessfully sued to enforce a non-compete agreement against a former employee must pay counsel fees as required by the agreement even though the fees were actually incurred by the worker's new employer, a Superior Court judge has ruled.

The plaintiff company argued that the defendant employee did not incur any out-of-pocket legal costs and thus the agreement's fee provision was not triggered.

Judge John S. McCann disagreed.

"Even in cases involving fee-shifting arrangements, ... the Appeals Court has observed that a contractual award of attorneys' fees may 'appropriately reflect[] that 'the plaintiff has dragged the defendant through a costly and ultimately fruitless exercise,'" McCann said. "Consistent with this principle, there is no reason why [the plaintiff] should escape liability for costs and fees under the covenant simply because a third party covered the costs of defending [the defendant] against [the plaintiff]'s costly and fruitless action."

The eight-page decision is *Genuine Parts Co. v. Autopart International, Inc., et al.*, Lawyers Weekly No. 12-133-10. The full text of the ruling can be ordered at [www.masslawyersweekly.com](http://www.masslawyersweekly.com).

## Unusual case

Garrett J. Harris of Gallagher & Associates in Malden represented the defendants. He said he believes McCann made the "right decision," but declined to discuss details of the ruling.

GPC's attorney, Tory A. Weigand of Morrison Mahoney in Boston, could not be reached for comment. The plaintiff

reportedly is appealing the decision.

Employment attorneys said the suit is unusual in that non-compete cases with fee-shifting arrangements rarely get appealed.

"A lot of these cases are won and lost at the preliminary injunction phase," said Brian J. MacDonough of Boston's Shilepsky, Hartley, Robb, Casey, Michon.

Many were not surprised the judge disagreed with the plaintiff's argument seeking to redefine what it means to incur legal costs.

"It's almost always the case that a new employer would absorb the cost of the lawsuit — as it should be," said Jay Shepherd of Shepherd Law Group in Boston.

Shepherd said the idea that the plaintiff should have gotten a windfall just because the new employer was nice enough to cover the defendant's legal costs defies logic. "When you hear that, you go, 'What?!'"

Donald C. Keavaney of Christopher, Hays, Wojcik & Mavricosa in Worcester said the language in the agreement between plaintiff GPC and defendant Edward Allard seems to have undermined the plaintiff's claims that Allard was not owed reimbursement.

"It came back to bite them. I don't think it was written the way they thought it was written. It didn't have that magical word 'incur.' It simply says the loser pays the winner," Keavaney said. "The judge got it spot-on."

Andover attorney William E. Hannum of Schwartz Hannum called it a "splitting-hairs" strategy that was both "very creative" and "flawed."



Hannum

"I think 'incurred' is someone charging a legal fee for services rendered, unlike pro bono," he said. "It seems to me this employee incurred a fee and was lucky enough to have his employer pay for it. I still think he incurred a fee."

Should GPC prevail on appeal, attorneys said, the decision could change the way non-compete agreements are drawn up and carried out in the

future.

"I don't know if it would necessarily impact the non-compete piece, [but] it would certainly impact the attorneys' fees provision," said Lawrence J. Casey of Shilepsky Hartley. "I think it would cause people to look at and redraft attorneys' fees provisions."

MacDonough agreed.

"You'll probably see people tailoring it to fit whatever the [Supreme Judicial Court's] decision" is on the issue of incurring fees, he said.

Hannum said he suspects some employers that are still willing to protect employees in disputes with former employers over non-compete agreements may look for new ways both to limit their costs and to meet a more exacting standard of "incurring" expenses, such as providing them with a "floating bonus" that runs through their payroll rather than promising an open-ended assumption of legal fees.

## Obligation to pay

In May 2005, co-defendant Allard entered into a non-compete agreement with his employer, GPC, that stipulated in the event of any action filed in connection with the agreement, the unsuccessful party

would be obligated to pay the successful party's counsel fees.

GPC failed in a subsequent bid to sue Allard for breaching the agreement after he sold his business and joined a new employer, Autopart International.

The plaintiff then opposed Allard's request under a covenant not to compete for \$101,314.50 in attorneys' fees and \$2,843.32 in related costs on several grounds: that Autopart was not a party to the non-compete agreement and therefore not owed any money; that Allard wasn't entitled to be reimbursed since he did not pay for the services out of pocket himself; that Allard was not the successful party in the action because a counterclaim of abuse of process he filed had failed; and that the fees Allard sought were not reasonable.

GPC asserted that numerous precedents supported its position that Allard was not entitled to recover fees and that those fees were unreasonable.

But McCann disagreed.

"Here, by contrast, it is undisputed that Allard was under no personal obligation to pay the costs and fees associated with his defense in the underlying action, and that Autopart paid them on Allard's behalf without any promise of remuneration," the judge said. "Nevertheless, under the circumstances, it would elevate form over substance to require

Allard to show that he rendered himself personally liable to pay his costs and fees in order to recover them. Though caselaw instructs that parties to contractual fee-shifting provisions may recover only those fees which they have actually incurred, a rigid interpretation of this rule would yield an incongruous result in this case."

to enforce the covenant," McCann wrote.

The judge spurned the plaintiff's claim that Allard should forfeit his right to recover fees and costs because he minimized his own financial exposure to the litigation by getting Autopart International to assume all his legal costs.

"It strains credulity to suggest that GPC contemplated at the time it agreed to bear the costs of unsuccessful litigation against Allard that a third party would gratuitously offer to bear the cost of Allard's defense. In this regard, GPC is in no worse a position than if Allard had insisted upon hiring Attorney Harris himself, and a contractual fee award appropriately reflects the parties' expectation that each litigant would assume certain risks in suing to enforce the Covenant Not To Compete," McCann said.

"Thus, the court adopts the premise that, where a party would have personally incurred costs and attorney's fees but for a third party's offer to pay them on the party's behalf, that party should not be precluded from asserting its right to recover reasonable costs and attorney's fees pursuant to a contractual fee-shifting provision," the judge wrote. "Nor should it be precluded from then assigning its right to payment to the third party, either by contract or under a subrogation theory. If the appellate courts intended a contrary result, it is not immediately apparent from the case law." **MLW**

**CASE:** *Genuine Parts Co. v. Autopart International, Inc. et al.*, Lawyers Weekly No. 12-133-10.

**COURT:** Superior Court

**ISSUE:** Should a plaintiff bound by a contractual fee-shifting provision be relieved from paying a defendant's counsel fees because a third party incurred those legal costs on the defendant's behalf?

**DECISION:** No, the defendant is not required to show that the expenses were paid out-of-pocket in order to collect fees for legal services

### Reasonable costs

While at first glance Allard's counsel fees of just over \$100,000 "appear to be excessive for a case that did not reach trial," the judge said, upon closer inspection they were reasonable given the significant time and money spent during discovery, particularly in the course of gathering numerous depositions.

"The high defense costs in this case were driven by the nature of GPC's claims against Allard and Autopart, which required significant discovery, and GPC assumed the risk of such costs when it brought this action