

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 17-11982-RGS

JON DUANE

v.

VERMONT MUTUAL INSURANCE COMPANY

MEMORANDUM AND ORDER ON THE REPORT  
AND RECOMMENDATION  
OF THE MAGISTRATE JUDGE

February 26, 2019

STEARNS, D.J.

This is one of those puzzling cases in which a dispute over a collateral matter, in this case the reasonableness of attorneys' fees billed to the defendant insurer for a defense of its insured, had metastasized into a billing nightmare in which neither side can realistically expect to recover its sunk costs. That said, I agree with Magistrate Judge Boal that the material differences of opinion between the two reputable retained experts over the appropriateness of the unpaid fees precludes an award of summary judgment on Count I.<sup>1</sup> She also correctly points out that Chapter 176D of the

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<sup>1</sup> I also agree that there is no good reason to strike Judge Todd's report or to exclude his testimony. As she observed, any perceived unfairness to Vermont Mutual can be cured by permitting it to depose Todd on all relevant

Massachusetts General Laws does not authorize the private cause of action asserted by Duane in Count III (and I do not understand Duane to argue otherwise). *See Salvati v. Am. Ins. Co.*, 855 F.3d 40, 49 (1st Cir. 2017) (cited by Magistrate Judge Boal). Consequently, her Recommendation will be ADOPTED.<sup>2</sup>

ORDER

Plaintiff Duane's motion for summary judgment on Count I is DENIED. Vermont Mutual's motion for summary judgment on Count III is ALLOWED. Vermont Mutual's motion to strike Todd as an expert witness is DENIED. Leave to depose Todd is GRANTED to Vermont Mutual. The Clerk will set the remaining claims for trial, assigning the case our next available date.

SO ORDERED.

/s/ Richard G. Stearns  
UNITED STATES DISTRICT JUDGE

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issues, including his conversations with Attorney Driscoll.

<sup>2</sup> I have reviewed the Objections to the Magistrate Judge's Report filed by each of the parties, and nothing said persuades me differently.