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Practical Tips on Policyholder Claims for Insurer Bad Faith

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Sponsoring Section/Committee(s):

- Insurance and Tort Litigation Section
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176D Liability Advantage: The Section 9 Plaintiff

Chapter 93A, Section 9

Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder **or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D** may bring an action in the superior court

Example: Peabody Essex Museum v. United States Fire Ins. Co.,
802 F.3d 39 (1st Cir. 2015)

176D Liability Advantage: A Subsection 3(9)(f) Claim – Failure to Settle When Liability Reasonably Clear

That means reasonably clear:

- (1) Coverage
- (2) Liability
- (3) Damages

If Liability is not reasonably clear, the other species of claims are difficult or impossible to get a 176D determination. E.g., . . .

Subsection 3(9)(d) – failure to conduct reasonable investigation

Subsection 3(9)(e) – failure timely to affirm or deny coverage

Subsection 3(9)(g) – forcing insured to litigate

Example: House of Clean, Inc. v. St. Paul Fire & Marine Ins., 705 F. Supp. 2d 102 (D. Mass. 2010).

176D Liability Advantage: Insured Reasonably Cooperative

An insured who refuses to cooperate with insurer requests for information may have more difficulty persuading a court that the insurer violated Chapter 176D even if the policy did not require that the insurer provide the requested information.

Example: Michael v. Trustmark Ins. Co.,
2003 Mass. Super LEXIS 129 (Jan. 14, 2003).

Chapter 176D Liability Advantage: Simple Coverage Situation

Complex coverage determinations make it hard to contend the insurer is acting in bad faith if it does not accept coverage.

Examples: House of Clean (environmental contamination, coverage but no 176D liability)

Gore v. Arbella, 77 Mass. App. Ct. 518 (2010)

Chapter 176D Liability Advantage: Simple Factual Situation

Complex and/or disputed key facts make it hard to contend an insurer is acting in bad faith by declining coverage or to make a substantial settlement offer.

Examples: Gore (simple facts - car accident, 176D liability)

Thomas v. Metropolitan Life Ins. Co., 40 F.3d 505
(1st Cir. 1994).

Chapter 176D Liability Advantage: Inattentive Claims Representative

A claims representative who properly requests additional information and continues to investigate after denying coverage does much to inoculate the insurer from Chapter 176D liability.

Examples: Thomas (no Chapter 176D/93A liability; evidence showed that claims representative investigated insured's assertions)

Sterlin v. Commerce Ins. Co., 2009 Mass. Super. LEXIS 17
(Feb. 2, 2009)

Federal Ins. Co. v. HPSC, Inc., 480 F.3d 26 (1st Cir. 2007)

Chapter 176D Liability Advantage: Shifting Defense Theories

If an insurer asserts a defense to coverage, and then shifts to a totally different defense when the first defense is proven wrong, it had better be right about there being no coverage.

Examples: Federal Ins. Co. (when insurer was shown its defense to coverage was erroneous, it shifted to a new theory).

Wasserman v. Commerce Ins., 2002 Mass. Super. LEXIS 319
(July 9, 2002) (ignored SJC decision)

Hejinian v. General American Life, 2009 Mass. Super LEXIS 70
(Jan. 13, 2009)

Policyholder Uphill Battle

- Section 11 Plaintiff
- Complex coverage or facts
- Attentive Claims Representative
 - Uncooperative Insured
- Good Insurer Communication, Consistent Position



Insurer In Trouble

- Section 9 Plaintiff
- Simple coverage and facts
- Sloppy Claims Representative
 - Cooperative Insured
- Shifting Defense Theories



Your Case

