Ch. 176D in Commercial Litigation – When Does Liability Become ‘Reasonably Clear?’

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Statutory Framework Mass Gen. L. ch. 176D, Sec. 3 (9)

An unfair claim settlement practice shall consist of any of the following acts or omissions:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(f) Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

(h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(i) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

. . .

(n) Failing to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

Common Issues

- Denial of claim without “Reasonable Investigation”
- Prompt decisions and communications
- Failing to “effectuate settlement” when liability is reasonably clear

Importance of Liability Being ‘Reasonably Clear’

If liability is not ‘reasonably clear,’ there may be no recoverable harm (in a private claim) for any other violation. See e.g., Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 678 (1983).

There are arguments to the contrary.

As a practical matter, often this issue is litigated with the benefit of hindsight (after a verdict) and all claims handling decisions are reviewed knowing that they generated a settlement offer less than a verdict.

The Difference Between Ordinary Settlement Offers and Required Settlement Offers

- When does ch. 176D really apply?
  - Disputed claims are negotiated every day
    - Does Ch. 176D apply?
    - Is a carrier free to make a bad business decision?

When Does Liability Become Reasonably Clear?

Objective or Subjective Standard?

When Does Liability Become Clear – Hypotheticals

- Fault is clear, but damages are not.
- Fault is clear, but relative fault is not.
- Fault is clear, but coverage (for some claims, e.g., punitives) is not.
- Fault is clear, but the other side will not negotiate.
- Insured thinks fault is clear and wants to settle.
- Insured thinks fault is not clear and does not want to settle.

How to Prove/ Disprove it

- Claims Experts
- Lawyers as fact witnesses
- Lawyers as experts
- Dealing with privileges – Attorney-Client; Attorney Work Product; Mediation; Settlement