176D Year in Review – 2019

By

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2019 HIGHLIGHTS -- EXECUTIVE SUMMARY

- Consent-to-settle provisions, requiring an insurer to get the informed consent of its insured before settling any claim under a professional liability insurance policy are lawful in Massachusetts and an insurer does not violate Chapter 176D by honoring that contractual right, even if liability is reasonably clear

- The insurer's statutory obligation to investigate claims has teeth and can be the basis for substantial liability

- A stipulated judgment between a third-party claimant and the insured will not necessarily be honored by the court as the measure of damages in a subsequent bad faith action against the insurer

- Bad faith litigation conduct may be a basis for Chapter 176D/93A liability for an insurer, but the line between "holding an opponent to the rules" and going too far is unsettled

- Obtaining and enforcing a default judgment against the insured may be a mistake that will haunt a third-party claimant when it comes time to pursue insurance coverage

DECISION OF THE YEAR

Insurer Does Not Violate Chapter 176D by Honoring Insured's Consent-to-Settle Right

The obvious 2019 decision of the year is Rawan v. Continental Casualty Company, 483 Mass. 654, 655 (2019), in which the SJC decided a question of first impression, holding that consent-to-settle clauses in professional liability insurance policies do not violate Chapter 176D, Section (3)(9)(f).

A consent-to-settle clause, which forbids the insurer from settling a claim without the informed consent of the insured, is a common feature of professional liability insurance policies. By statute in Massachusetts, Chapter 176D, section 3(9)(f) imposes on the insurer a clear statutory duty to effectuate a prompt, fair and equitable settlement when liability is reasonably clear. If liability is reasonably clear, but the insurer cannot make a settlement offer because the insured refuses to consent, there is a conflict between the insurer's duties under the policy terms and the statute.

In deciding that the insurer could lawfully honor the consent-to-settle provision even if liability was reasonably clear, the Court emphasized freedom of contract with regard to voluntary insurance coverage and reasoned that consent-to-settle clauses predated Chapter 176D but the legislature did not explicitly prohibit them. The Court explained that professional liability coverage is optional and that consent-to-settle clauses encourage professionals to carry coverage by "including the important protection of a professional's reputation and good will." The Court also reasoned that Chapter 176D was originally intended to "address the obligations of insurers towards insureds" and that the 1979 amendment expanding the universe of plaintiffs under M.G.L. ch. 93A was not intended to prohibit consent-to-settle clauses. Rather, the Court concluded that the duty of an insurer to settle with third-party claimants is "still subject to the insurer's contractual and statutory duty to its insured under the terms of its insurance policy and G.L. c. 176D."

The Court's emphasis on the voluntary nature of coverage for the insured in Rawan, who was an engineer, perhaps leaves open the door for future claimants to argue for a different result where the coverage is mandatory, such as where the insured is a doctor.

The Court recognized that there may be instances where an insurer would otherwise be obligated to settle a case under Chapter 176D, but be blocked by an unreasonable insured. In that instance, the Court suggested that the insured may be subject to multiple damages. This dicta, offered without citation to any authority, is highly questionable in light of prior decisions such as Morrison v. Toys R Us, Inc., 441 Mass. 451 (2004), which held that Chapter 176D applied only to companies in the business of insurance, and not to self-insured parties. It is hard to see what the basis is to apply Chapter 176D directly or by analogy to a recalcitrant insured.

The Court also held that the insurer still owes to a third-party claimant "residual duties" of good faith and transparency toward both its insured and the third-party claimant. These duties require a "thorough investigation of the facts, a careful attempt to determine the value of a

claim, good faith efforts to convince the insured to settle for such an amount, and the absence of misleading, improper or 'extortionate' conduct towards the third-party claimant." The Court, however, substantially diminished the impact of these ongoing duties by holding that the insured's "intractable position on settling the case" foreclosed any proximate cause of the claimant's harm as a result of the insurer's arguably bad faith conduct. Intractable insureds such as the engineer in Rawan should be rare, but in such circumstances the insurer is unlikely to be held liable under Chapter 176D.

DECISION OF THE YEAR – RUNNER UP

Reasonable Investigation Requirement has Teeth and Stipulated Judgment May Not Be Honored as Measure of Damages

Judge Hillman's decision in Capitol Specialty Ins. Corp. v. Higgins, 375 F. Supp. 3d 124 (D. Mass. 2019) (Hillman, J.) was the other main contender for decision of the year. In March 2020, the First Circuit affirmed the trial court decision with regard to everything except the calculation of prejudgment interest. 2020 U.S. App. LEXIS 7616 (1st Cir. Mar. 11, 2020).

The three key takeaways from this decision are:

(1) An insurance company's obligation under M.G.L. ch. 176D(3)(9)(d) to conduct a "reasonable investigation based upon all available information" is meaningful and a potential basis for substantial liability;
(2) A plaintiff cannot depend on using a stipulated judgment with the insured as the measure of damages in a subsequent bad faith settlement practices action; and
(3) The trial court has significant latitude in determining the amount of its damage award.

Plaintiff Kailee Higgins was a 20-year-old exotic dancer at a club in Worcester. During their shifts, the dancers routinely drank alcohol, and the club told the dancers to encourage patrons to buy them drinks. On the night of November 27, 2010, Higgins worked a shift from 10 p.m. to 2 a.m., during which she consumed 15 tequila shots. At the end of her shift, one of the bouncers helped her to her car despite her obvious intoxication. She texted a friend that she was "maadd drunk" and between 15 and 30 minutes after leaving the club she was involved in a serious car accident in which she suffered permanent and disfiguring injuries.

The club reported the accident to Capitol shortly after the accident, and Capitol conducted a limited investigation consisting of interviewing the club employees involved, who, unsurprisingly, denied serving the under-age Higgins alcohol. The investigator outlined additional steps that should be taken to investigate the claim, but the insurer instead closed its file and terminated the investigation.

Approximately a year later, on February 3, 2012, Higgins' attorney wrote a demand letter for damages arising from the accident based upon the club's service of alcohol to a minor and the bouncer's assistance of the intoxicated Higgins to her car. Capitol responded with a denial of liability and closed its file for a second time in April 2012 without doing any further investigation. On February 22, 2013, Higgins filed suit, which she served on the club on May 23, 2013.

On May 24, 2013, Capitol re-opened its file and retained defense counsel. On May 30, 2013, just six days later, counsel wrote to Capitol with the results of his preliminary investigation, which revealed significant evidence to support Higgins's claims and refute the self-serving statements given by the club employees involved. In a series of subsequent letters from defense counsel, the evidence grew steadily more compelling that Higgins's claims were true. By August 23, 2013, defense counsel reported that it was "likely that [Higgins] did in fact consume alcohol during the time she was working," and that it was "unlikely that she consumed anything in her vehicle after leaving." Defense counsel stated that a seven-figure judgment was possible, but recommended taking the plaintiff's deposition. On December 6, 2013, defense

counsel took Higgins's deposition and found her credible. On December 19, 2013, Capitol offered Higgins the balance of the liquor liability policy less costs of defense – $284,000 – which Higgins rejected, demanding $1.3 million and asserting that the club's general commercial liability policy also covered her claims.

In June 2014, Capitol filed a declaratory judgment action seeking a declaration that only the liquor liability policy applied to Higgins's claims. On September 1, 2015, Capitol prevailed in that action and, approximately 6 weeks later, it tendered the remaining balance of the liquor liability policy – $267,170.88 – to Higgins without obtaining a release from her for itself or its insured.

In late 2014, Higgins had approached the club about settling in exchange for some payment plus a stipulated judgment plus assignment of claims against Capitol and an agreement not to pursue the club for collection of the judgment. The club asked Capitol to consent, and Capitol refused. On July 2, 2015, Higgins and the club nevertheless settled on those terms, and the club paid her $50,000 plus stipulated to a judgment in the amount of $7.5 million. With prejudgment interest, the full amount of the writ of execution issued was $9,734,733.85.

In the subsequent bad faith claims settlement litigation against Capitol, Higgins pursued both her own claims and those assigned to her by the club. The District Court entered judgment in Higgins' favor on her direct claims after trial, finding that Capitol failed to conduct a good faith investigation and failed to make a good faith settlement offer when liability was reasonably clear. It did not, however, use the stipulated judgment as the measure of her damages, but instead awarded $1.8 million in damages, which it trebled, finding that Capitol's bad faith injured Higgins by:

> depriving Ms. Higgins of the opportunity to engage in a timely settlement process, delay[ing] for a period of years her obtaining of the P.J.D. policy proceeds, needlessly forc[ing] her to litigate her tort claims against P.J.D., caus[ing] her to be unable to pay her significant unpaid medical expenses for a period of years, caus[ing] her physical and mental anguish and emotional distress, in addition to the severe physical, mental, and emotional injuries that she sustained in the motor vehicle accident, [and] by diminishing by almost $33,000.00 the insurance coverage that was ultimately left for her after the policy limits [were] unnecessarily eroded by litigation costs incurred once she made a claim.

This is an interesting decision on multiple levels. It imposes significant liability on the insurance company, despite its original investigation in which it interviewed several witnesses who were willing to deny serving Higgins alcohol. Once suit commenced, however, and defense counsel conducted a more rigorous investigation, he quickly concluded that the facts made these witnesses not credible and that Higgins was credible. The takeaway is that a reasonable investigation does not consist of finding some basis to deny liability. It requires the insurance company to evaluate the evidence in a more even handed manner and honor the conclusion that the facts support rather than reaching for some reason to deny the claim.

The damages award is also interesting because the First Circuit affirmed an award that has little discernable basis for the amount awarded. The trial court rejected the

stipulated $7.5 million as a basis for damages (implicitly finding it collusive), and explained the components of her injury and why it awarded damages, but there is no clear way to map this explanation to the $1.8 million in single damages the court awarded. One can only posit that the mental anguish and emotional distress components of the plaintiff's injuries gave the court latitude to determine its award. The First Circuit affirmed the amount finding no clear error.

OTHER IMPORTANT DECISIONS

Insurance Company Can Be Liable for Bad Faith Litigation Conduct

In Quincy Mutual Fire Insurance Company v. Atlantic Specialty Insurance Company, 2019 U.S. Dist. LEXIS 125927 (D. Mass. July 29, 2019) (Burroughs, J.), Quincy Mutual sued Atlantic Specialty for causing its insured to file a third-party complaint against Quincy Mutual's insured that it should have known was meritless if it had conducted a reasonable investigation. The Court denied summary judgment to Atlantic Mutual on a claim under M.G.L. ch. 93A, § 11 and observed that an insurance company is not an "ordinary defendant" and may be liable for litigation conduct. The case settled shortly after this decision.

In contrast, however, the First Circuit in Calandro v. Sedgwick Claims Mgmt. Servs., 919 F.3d 26, 37 (1st Cir. 2019) excused hardball litigation tactics by the insurer, which withheld the identity of two witnesses, as "hold[ing] its litigation adversary to the rules of discovery."

The takeaway from the combined decisions is that it is theoretically possible to hold an insurer liable for bad faith litigation conduct, but that courts will be slow to go there.

Plaintiff's Counsel May Not Want Default Judgment Against Insured

Careful plaintiff's counsel will make sure the defendant's insurer is timely notified of the plaintiff's claims and strongly consider consenting to lifting a default judgment against an absent insured in order to preserve coverage. Tiede v. Seneca Specialty Insurance Company, 2019 U.S. Dist. LEXIS 42185, at *5-7 (D. Mass. Mar. 15, 2019), provides a particularly good example. The plaintiff obtained a default judgment against the insured before the insurer received notice and successfully defended the default against the insurer's effort to lift it. The plaintiff won the battle but lost the war when the insurer successfully argued that the default was prejudice that excused it from coverage. See also Mathews v. Travelers of Mass., 2019 R.I. Super. LEXIS 81, at *16-30 (R.I. Super. Ct. June 28, 2019) (a Rhode Island Chapter 176D case analyzing prejudice to insurer from default judgment entered against insured and concluding insurer was prejudiced).

Res Judicata Bars Effort to Remedy Settlement Error and Pursue Excess Insurer

In Salvati v. Fireman's Fund Ins. Company, 368 F. Supp. 3d 85, 88 (D. Mass. 2019), the third-party plaintiff settled with the insured in a deal that provided for payment of policy limits by the primary policy and assignment of defendants' rights to pursue the excess insurer for $5 million. Their initial effort to recover from the insurer failed because the court held that they had failed to structure the settlement in a way that would trigger a duty to indemnify by the insurer. See Salvati v. Am. Ins. Co., 855 F.3d 40, 43 (1st Cir. 2017). The plaintiff then returned to the Superior Court, re-opened the case, and filed an agreement for judgment in order to remedy the problem. The court rejected the renewed pursuit of coverage on res judicata (claim preclusion) grounds.

QUICK HITS – OTHER DECISIONS

Federal:

First Circuit Court of Appeals:

River Farm Realty Trust v. Farm Family Cas. Ins. Co., 943 F.3d 27, 37 (1st Cir. 2019). The First Circuit affirmed a decision for the insurer on a Chapter 176D/93A claim and asserted that more than negligence is required for a Chapter 93A violation. The facts of the case, however, presented quite a weak Chapter 176D argument on a variety of bases, and the overbroad statement that more than negligence is required from a M.G.L. ch. 93A, § 9 plaintiff is dicta, which this author submits is incorrect in a case where such negligence results in a breach of Chapter 176D. The statement is correct in the context of a Section 11 claim. Boyle v. Zurich American Insurance Company, 472 Mass. 649, 661 (2015) (Boyle, which is cited by the First Circuit opinion, is a Section 11 claim). For the trial court decision, see 360 F Supp. 3d 31 (D. Mass. 2019) (Woodlock, J.) (inadvertent mix up of two claims by insurer was not bad faith).

U.S. District Court for the District of Massachusetts:

State Farm Fire & Casualty Company v. Pike, 389 F. Supp. 3d 94, 101 (D. Mass. 2019) (the court denied the insurer's motion for summary judgment, holding that taking the facts in the light most favorable to the insured, the fact finder could conclude that the insured's negligence was reasonably clear in connection with a claim for failure to prevent sexual abuse).

Doe v. Hreib, 384 F. Supp. 3d 137, 138 (D. Mass. 2019). After the jury entered a large judgment ($18.4 million) for plaintiff but while a motion for remittitur was pending, the plaintiff and individual doctors settled in an agreement that included a provision that the plaintiff would cooperate in a motion to vacate the judgment entered. The plaintiff nevertheless objected to a motion to vacate, and the court allowed the motion over his objection, noting that to do otherwise would give the plaintiff a potential windfall if the plaintiff proved willful or knowing violation of Chapter 176D. Id. at 139.

Cohne v. Navigators Spec. Ins. Co., 361 F. Supp. 3d 132 (D. Mass. 2019) (Young, J.) (no Chapter 176D liability where insurer owed no duty to defend nightclub bouncer accused of assault and battery).

Martins v. Vt. Mut. Ins. Co., 2019 U.S. Dist. LEXIS 136955, at *13-14 (D. Mass. Aug. 14, 2019) (Saylor, J.) (no coverage in automobile policy for inherent diminution in value of car after accident).

Farm Family Life Ins. Co. v. Haacke, 2019 U.S. Dist. LEXIS 225236 (D. Mass. July 15, 2019) (Talwani, J.) (summary judgment for life insurance company and agent where insured made misrepresentations in application for insurance, allegedly with advice of agent).

Fernando v. Fed. Ins. Co., 2019 U.S. Dist. LEXIS 89429, at *36-40 (D. Mass. May 28, 2019) (Bowler, M.J.) (four-year statute of limitations under Chapter 93A governed alleged failure to investigate claim rather than two-year contract claim limitations period).

Mills Constr. Corp. v. Nautilus Ins. Co., 2019 U.S. Dist. LEXIS 55256 (D. Mass. Mar. 31, 2019) (Talwani, J.) (summary judgment for insurer on both duty to defend and Chapter 93A liability).

Culley v. Bank of Am., N.A., 2019 U.S. Dist. LEXIS 53709, at *39-43 (D. Mass. Mar. 29, 2019) (Hennessy, J.) (Excusing pleading deficiency in failing to allege Chapter 176D claim through Chapter 93A, but dismissing claim on substantive grounds including failure to send presuit demand letter, statute of limitations, and failure to allege unfair or deceptive conduct).

Redstar Entm't, LLC v. Sentinel Ins. Co., 2019 U.S. Dist. LEXIS 38179, at *3-4 (D. Mass. Mar. 11, 2019) (Casper, J.) (Section 11 plaintiff faces a higher liability hurdle than a Section 9 plaintiff).

Duane v. Vt. Mut. Ins. Co., 2019 U.S. Dist. LEXIS 30457 (D. Mass. Jan. 25, 2019) (Boal, M.J.), recommended decision adopted by the court in 2019 U.S. Dist. LEXIS 29978 (D. Mass. Feb. 26, 2019) (Stearns, J.) (summary judgment for insurer in dispute over payment of attorneys' fees to counsel selected by the insured after the insurer reserved its rights).

Clarendon Nat'l Ins. Co. v. Phila. Indem. Ins. Co., 2019 U.S. Dist. LEXIS 3322 (D. Mass. Jan. 8, 2019) (Sorokin, J.) (summary judgment for defendant on duty to defend and Chapter 93A/176D).

U.S. Bankruptcy Court for the District of Massachusetts:

Goldsmith v. Marsh USA, Inc. (In re Glasshouse Techs.), 604 B.R. 600, 641-42 (Bankr. D. Mass. 2019) (Panos, J.) (violation of Chapter 176D is evidence of a Chapter 93A violation in a Section 11 case). The Goldsmith decision notes that the inverse proposition is not true – violations of Chapter 93A are not violations of Chapter 176D. Where there is no independent cause of action for violation of Chapter 176D, and claims for its violation are asserted through Chapter 93A, any other conclusion would be circular.

Massachusetts Court of Appeals:

Leslie v. Travelers Ins. Co., 2019 Mass. App. Unpub. LEXIS 682, at *4 (Mass. App. Ct. Oct. 16, 2019) (insurer's settlement offers reasonable where damages unclear, affirming summary judgment for insurer, which offered $260,000 pretrial in a case where the jury awarded just over $10,000 in the aggregate).

Surabian Realty Co., Inc. v. CUNA Mut. Group, 2019 Mass. App. Unpub. LEXIS 481, at *4 (Mass. App. Ct. June 25, 2019) (liability not reasonably clear where uncertainty about liability and damages remained through appeal).

Styller v. National Fire & Marine Ins. Co., 95 Mass. App. Ct. 538, 546 (2019) (if coverage correctly denied, no Chapter 93A liability).

Cruikshank v. MAPFRE U.S.A., 94 Mass. App. Ct. 662 (2019) (trustee in bankruptcy for bankrupt tortfeasor was in privity with victim of accident who previously pursued and lost claim against tortfeasor's insurer for bad faith settlement practices).

Saez v. Liberty Mut. Fire Ins. Co., 2019 Mass. App. Unpub. LEXIS 351 (Mass. App. Ct. May 6, 2019) (affirming summary judgment for insurer where plaintiff failed to raise a triable issue of fact that the defendant was an insured under the homeowner's policy at issue).

Massachusetts Superior Court:

Williamson-Green v. Interstate Fire & Cas. Co., 2019 Mass. Super. LEXIS 1232 (Mass. Super. Ct. Dec. 18, 2019) (Sanders, J.) (triable issues of fact whether insurer failed to effectuate settlement when liability was reasonably clear, interesting for noting that insurer left insured exposed to claim for punitive damages for which the policy did not provide coverage).

Chapter 176D Cases in Other Jurisdictions:

Johnson v. Johnson, 2019 U.S. Dist. LEXIS 112391, at *10 (D.R.I. July 8, 2019) (Chapter 93A claim barred where no evidence of presuit demand letter).

Hartford Fire Ins. Co. v Sedgwick Claims Mgt. Servs., Inc., 2019 N.Y. Misc. LEXIS 5326 (N.Y. Sup. Ct. Oct. 4, 2019) (third party claims administrator denied summary judgment in action by insurer for negligent claims handling exposing the insurer to Chapter 93A/176D liability).