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Chapter 176D Year in Review – 2019 in 20 Minutes

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2019 Highlights

- 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
  - Rawan v. Continental Cas. Co., 483 Mass. 654, 655 (2019).

- The insurer's statutory obligation to investigate claims has teeth and can be the basis for substantial liability
  - Capitol Specialty Ins. Corp. v. Higgins, 375 F. Supp. 3d 124 (D. Mass. 2019) (Hillman, J.)

- 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 (Capital Spec. Ins.)

2019 Highlights (Cont. -- 2)

- 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

    - Quincy Mutual Fire Insurance Company v. Atlantic Specialty Insurance Company, 2019 U.S. Dist. LEXIS 125927 (D. Mass. July 29, 2019) (Burroughs, J.)
    - 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").

2019 Highlights (Cont. – 3)

- 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

    - Tiede v. Seneca Specialty Insurance Company, 2019 U.S. Dist. LEXIS 42185, at *5-7 (D. Mass. Mar. 15, 2019) (default judgment against absent insured prejudiced insurer)

    - 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).

2019 Highlights (Cont. – 4)

- Plaintiffs must use care settling with the insured in absence of a judgment against the insured
    - Salvati v. Fireman's Fund Ins. Company, 368 F. Supp. 3d 85, 88 (D. Mass. 2019) (no do overs for ineffectively structured settlement)
    - Salvati v. Am. Ins. Co., 855 F.3d 40, 43 (1st Cir. 2017) (no judgment against insured, no duty to indemnify by insurer)

2019 Highlights (Page 5)

- Insured's exposure to punitive damages may matter in the bad faith failure to settle calculus, even if such damages are not covered.
  - 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).
- Beware Appellate Court dicta
  - Rawan – recalcitrant insured subject to multiple damages?
  - River Farm Realty Trust v. Farm Family Cas. Ins. Co., 943 F.3d 27, 37 (1st Cir. 2019) (more than negligence is required from a M.G.L. ch. 93A – true for Section 11 plaintiff, not for section 9).

2019 Trends

- Far more insurer decisions than plaintiff decisions in 2019.
    - May indicate over enthusiasm by the bar in bringing Chapter 176D claims
    - Rawan seems to me to be wrongly decided, but not much quarrel with most of the rest of the decisions
- More reported decisions in the federal court than the state.
    - Probably a consequence of the insurers' enthusiasm for removal to federal court
- Very few bad faith cases make it to trial
    - Power structure still favors the insurance companies

Questions?

See complete write up at https://www.ocmlaw.net/176d-year-in-review-2019-ga/