

Wednesday, June 24, 2020



O'Connor
Carnathan
and Mack LLC

The Insurer's Duty To Settle Uncovered Claims



Presented by Sean T. Carnathan

Author, Massachusetts Bad Faith Insurance Litigation
(2d ed. 2020, Lawyers Weekly Books)

Disclaimer

This presentation is intended for the general information of its audience and is intended for practicing attorneys.

It reflects the opinion of the author only, is based on Massachusetts law and is not legal advice concerning any particular situation.

Every situation is unique and should be independently analyzed.

Parties confronting insurance coverage issues are specifically and explicitly advised to seek independent legal advice.

In for One, In for All

- The Duty to Defend is broader than the Duty to Indemnify, and if the Insurer must defend any claim in the complaint, it must defend them all (except for title insurance).
 - Deutsche Bank Nat'l Ass'n v. First Am. Title Ins. Co., 465 Mass. 741, 746 n.11 (2013).
 - GMAC Mtg., LLC v. First Am. Title Ins. Co., 464 Mass. 733, 738-739 (2013).

Insurer Duty of Good Faith

- An insurer owes its insured a duty of good faith and due care while defending an action under the Policy
 - Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 118-19 (1994).
 - Negligence standard of reasonable conduct
 - Common prudence to discover facts as to liability and damages to make intelligent settlement decision
 - **No reasonable insurer would have failed to settle**
 - Can be liable in tort, contract or under Chapter 176D

Insurer's Right to Settle

- An Insurer generally has the right to settle covered claims.
 - See Johnson v. Proselect Ins. Co., 2016 Mass. Super. LEXIS 374, at *27-28 (Oct. 12, 2016) (no breach of good faith and fair dealing by exercising right to settle).
- Unless the policy provides otherwise
 - But see Rawan v. Continental Cas. Co., 483 Mass. 654, 655 (2019) (approving consent-to-settle provisions in professional liability policies).

No Duty to Settle Uncovered Claims

- Insurer does not generally have a duty to settle uncovered claims
 - St. Paul Fire & Marine Ins. Co. v. Convalescent Servs., 193 F.3d 340, 343 (5th Cir. 1999)
 - Stephens v. Dairyland Ins. Co., 2013 U.S. Dist. LEXIS 99808, at *7 (M.D. Fla. May 30, 2013) (“if a claim is not covered by the insurance policy, an insurer could not have acted in bad faith in refusing to settle a non-covered claim”).
- Duty to Settle Does Not Arise under Chapter 176D unless liability, damages and coverage are all reasonably clear.
 - See, e.g., Styller v. National Fire & Marine Ins. Co., 95 Mass. App. Ct. 538, 546 (2019) (if coverage correctly denied, no Chapter 93A liability).

If Covered Claims are Settled or Dismissed, No Further Duty to Defend

- If during litigation, the covered claims are dismissed or settled, the Insurer may withdraw its defense.
 - Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 395 (2003) (no duty to continue to defend after plaintiff amended complaint in a manner that did not assert a covered claim).
 - Ricardelli v. Merrimack Mut. Fire Ins. Co., 2001 Mass. Super. LEXIS 177, at *8-9 (Mar. 22, 2001) (Hillman, J.) (insurer within its rights to settle covered claims and withdraw defense).
 - Society Ins. v. Bodart, 819 N.W.2d 418, 425-26 (Wis. Ct. App. 2012) (once insurer settles covered claims, its duty to defend ends).

Good Faith Duty Still Applies to Settlement of Covered Claims

- Insurance Company, therefore, cannot **in bad faith** settle only the covered claims
 - Lockwood Int'l, B.V. v. Volm Bag Co., 273 F.3d 741 (7th Cir. 2001) (insurer paid plaintiff over \$1 million to file amended complaint deleting covered claims).
 - Allstate Indem. Co. v. Oser, 893 So.2d 675, 677 (Fla. App. Ct. 2005) (insurer potentially liable for bad faith for only settling covered claims when it could have settled all claims for same amount).
- **Therefore, if the insurer can settle all claims for the price of the covered claims, it should be held to have a duty to do so**

Insurer That Breaches Duty to Settle is Liable for Excess Judgment

- Under Mass. Law, Insurer that fails to settle when no reasonable insurer would fail to do so **or** make a good faith offer when liability is reasonably clear is liable for any excess judgment.
 - Hartford Casualty Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115 (1994).
 - Williamson-Green v. Interstate Fire * Cas. Co., 2017 Mass. Super. LEXIS 70 (Mass. Super. Ct. May 26, 2017) (Salinger, J.) (insurer who breaches duty to settle is liable for all consequential damages, potentially including punitive damages for wrongful death).

Under Massachusetts Law, Excess Judgment Liability May Include Punitive Damages

- 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, noting that insurer left insured exposed to claim for punitive damages for which the policy did not provide coverage).
 - Williamson-Green v. Interstate Fire & Cas. Co., 2017 Mass. Super. LEXIS 70 (Mass. Super. Ct. May 26, 2017) (Salinger, J.) (insurer who breaches duty to settle is liable for all consequential damages, potentially including punitive damages for wrongful death).

Massachusetts Public Policy Allows for Coverage of Punitive Damages

- M.G.L. ch. 175, § 47, clause Sixth(b) – “no company may insure any person against legal liability for causing injury, **other than bodily injury, by his deliberate or intentional** crime or wrongdoing, nor insure his employer or principal if such acts are committed under the direction of his employer or principal” (emphasis added).
- Andover Newton Theological Sch. v. Continental Casualty Co., 409 Mass. 350, 353 n.2 (1991) (statute codifies Mass. public policy).
- “Massachusetts law does not insulate an insurer from liability for damages incurred because its insured caused bodily injury, engaged in reckless or grossly negligent misconduct, or did both.” Williamson-Green, 2017 Mass. Super LEXIS 70, at *2.

Other Jurisdictions Preclude Coverage for Punitives, Even in Bad Faith Failure to Settle Cases

- Contrast: Soto v. State Farm Ins. Co., 83 N.Y.2d 718 (1994) (punitive damages are not insurable and therefore cannot be a component of a recovery for bad faith failure to settle).
- See also Magnum Foods v. Continental Cas. Co., 36 F.3d 1491, 1505 (10th Cir. 1994) (following Soto, applying Oklahoma law).

In Massachusetts, an insurer that fails to settle covered claims against its insured either negligently or in bad faith is exposed to liability for any excess judgment, including an award of punitive damages against its insured.

Conceptual Take Aways

- If the Insurer can settle all the claims, covered and uncovered, for the price of settling the covered claims, then it should be held to have a duty to do so (if it has a duty to settle the covered claims)
- If no reasonable insurer would have failed to settle, then it has a duty to do so
- In evaluating its position in a case where there are uncovered claims, even for punitive damages, the well-advised insurance company will take exposure to such claims into account
- Plaintiffs attorneys should also be bearing this concept in mind when making settlement demands

Scenarios

- Liability reasonably clear on covered claims but not uncovered claims
 - Alleged damages within policy limits
 - Plaintiff makes demand within policy limits to settle all claims
-
- Liability reasonably clear on all claims
 - Covered claim damages are small
 - Uncovered claim damages are large
 - Plaintiff makes demand well in excess of policy limits
-
- Liability reasonably clear on uncovered claims, but not covered claims
 - Potential damages large across board
 - Plaintiff makes demand within policy limits

Questions?



Slides available at <https://www.ocmlaw.net/webinar-archive/>