

Are Punitive Damages Insurable in Massachusetts? The Trial Court Says “Yes.”

A trial court judge in Massachusetts recently ruled that where bodily injury is caused by reckless or grossly negligent conduct, punitive damages are insurable and not void against public policy. In the case of **Michelle Williamson v. Interstate Fire and Casualty Company**, 34 Mass. L. Rprt. 20 (2017), the decedent died from injuries sustained when a bucket-lift tipped over while he was inspecting a roof. The decedent’s estate filed suit for wrongful death against both the lift manufacturer and the company that rented out the lift, Equipment 4 Rent, Inc. (E4R). A jury found both negligent and awarded \$4.3 million in compensatory damages and \$5.9 million in punitive damages based on gross negligence. Interstate Fire and Casualty Company, the rental company’s insurer, paid its share of the compensatory damages but refused to pay the punitive damages, citing public policy. E4R assigned its rights against Interstate to the plaintiff.

The plaintiff filed suit against Interstate, alleging that it failed to settle the claims against E4R after liability became reasonably clear. The complaint asserted a claim on behalf of the decedent’s estate and as assignee of E4R; the latter alleged that E4R’s damages included “being exposed to an uncovered punitive damages awarded that would have been avoided had Interstate settled the ‘underlying action.’” Interstate filed a motion for partial judgment on the pleadings, arguing that requiring it to pay any portion of a punitive judgment, even as a consequential damage resulting from the failure to settle a meritorious claim, would violate public policy. In support of this position, Interstate cited four other jurisdictions that have applied some form of a bar against

insuring punitive damages. See **PPG Industries, Inc. v. Transamerica Ins. Co.**, 975 P.2d 652, 658 & 656 (Cal. 1999); **Lira v. Shelter Ins. Co.**, 913 P.2d 514, 516 (Colo. 1996); **Soto v. State Farm Ins. Co.**, 635 N.E.2d 1222, 1225 (N.Y. 1994); **Wolfe v. Allstate Property & Cas. Ins. Co.**, 790 F.3d 487, 492 (3d Cir. 2015) (applying Pennsylvania law).

The trial court first set forth the familiar standard that an insurer with a duty to defend also has a duty to settle a claim within the policy limits where liability is reasonably clear. See **Medical Malpractice Joint Underwriting Assn. of Massachusetts v. Goldberg**, 425 Mass. 46, 60 n.33 (1997). Violation of this duty opens the insurer to liability in tort for negligently breaching the duty to settle, in contract for breaching the insurance policy, and/or for violating G.L. c. 93A by committing an unfair settlement practice. An insurer who breaches such a duty to settle a claim is liable for all losses that were foreseeable consequences of the breach, even if those damages exceed the policy limits. See **Gore v. Arbella Mut. Ins. Co.**, 77 Mass. App. Ct. 518, 526 (2010).

The trial court next distinguished the cases cited by the defendant, noting that each of those states have determined globally that punitive damages are not insurable. Massachusetts, however, does not have such a rule. As the Supreme Judicial Court held in **Sheehan v. Goriansky**, 321 Mass. 200, 203 (1947), public policy only bars liability arising from intentional misconduct, not reckless misconduct. This common-law rule was superseded by G.L. c. 175, § 47, which states that “no company may insure any person against any legal

liability for causing injury, other than bodily injury, by his deliberate or intentional crime or wrongdoing.” Thus, because the punitive damages award was based on the bodily injury caused to the decedent, there is no public policy bar against insuring that conduct. Additionally, the trial court held that the statute expressly permits insurers to indemnify insureds for liability flowing from grossly negligent or reckless conduct regardless of whether the conduct caused bodily injury. The Supreme Judicial Court has narrowly interpreted the statutory prohibition of insuring against punitive damages to apply only to deliberate or intentional misconduct.

The trial court noted that its decision was not inconsistent with the case of **Santos v. Lumbermens Mut. Cas. Co.**, 408 Mass. 70 (1990), in which the Supreme Judicial Court held that punitive damages imposed under the wrongful death act are not recoverable under the underinsured motorist provisions of each automobile insurance policy. The Supreme Judicial Court narrowly tailored its holding in **Santos** and explicitly noted that it was not deciding “whether a tortfeasor’s insurer may be obliged to pay for punitive damages[.]” leaving undecided the question whether punitive damages are insurable. Finally, the trial court noted that even where an insurance policy explicitly excludes coverage for punitive damages generally, such a contractual provision would not limit the liability for consequential damages flowing from the mishandling of settlement of the claim, including punitive damages for a foreseeable award of punitive damages against an insured.

Because this ruling was issued on a

partial motion for judgment on the pleadings, to which there is no immediate right to an appeal, the case will now progress through the normal litigation process and, presumably, wind its way up through the appellate courts. Until then, however, **Santos** remains the most recent decision from the Supreme Judicial Court to address the insurability of punitive damages. Time will tell whether the Appeals Court or Supreme Judicial Court will use this case as a vehicle to finally answer the question left undecided in **Santos**. ■

Uninsured Motorists on the Rise, Finds Study

WORCESTER, MASS. — Nearly one in eight U.S. drivers was uninsured in 2015 — a situation that is putting insured drivers at greater risk in the event of an auto accident, according to the findings of a recent study directed by the Insurance Research Council (IRC) and cosponsored by The Hanover Insurance Group.

The study found that 13% of all U.S. motorists were uninsured in 2015, up from 12.3% in 2010, following a seven-year decline.

Although nearly every state requires drivers to carry auto insurance, some drivers choose to violate the laws and drive without it. The numbers of uninsured motorists varied between states, ranging anywhere from 4.5% to 26.7%, according to the IRC.

Florida, Mississippi, New Mexico, Michigan and Tennessee were the top five states with uninsured motorists, while North Carolina, Massachusetts, New York and Maine have the lowest rates.

Although Massachusetts did have one of the lowest rates, it nevertheless experienced the largest percentage point increase over a 10-year period.

“While some states saw significant drops in their uninsured motorists rates, the overall rate is increasing nationwide. This can mean added risk for all motorists,” cautioned Elizabeth A. Sprinkel, senior vice president of the IRC.

When an uninsured driver is at fault in an accident, insured drivers, or their insurance companies, often are left to pay for the resulting physical damage and health costs.

Similarly, an underinsured driver may not have high enough limits on his or her policy to cover all costs of damage caused.

“The results of the survey sound an alarm,” said Daniel Halsey, president, personal lines, at The Hanover. “Uninsured motorists represent a significant risk to insured drivers. With the average cost of an uninsured motorist claim around \$20,000, excluding any physical damage to the vehicle, the best approach is to make sure you have the proper insurance in place to protect yourself in the event of an accident.” ■

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