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LEGAL Dimensions
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The Right to Settle Versus the Duty to Appeal

The long-standing tension between the express terms and implied "good faith" obligation under an insurance policy has engendered litigation over whether or in what circumstances an insurer must pursue an appeal of an adverse judgment pursuant to its contractual obligation to defend. Courts, to date, have framed the issue somewhat differently stating that, absent express language to the contrary, the duty to defend includes the duty to appeal[1] or, alternatively, that the duty exists where there are reasonable grounds to believe that the insured's interest might be served by an appeal.[2]

These seemingly broad formulations are, however, more circumscribed in application and properly so.

Two Massachusetts Superior Court decisions recently addressed the settle versus appeal divide.

Both courts, in different settings, found both the facts and law to require the entry of summary judgment for the insurer. Both decisions were well reasoned and, while revealing the inherent rub between the competing interests, recognized the need to impose limits to the implied obligation.

In **Gioiso & Sons, Inc. v. Liberty Mutual Ins., Co.**,[3] the Massachusetts Superior Court rejected a claim that a liability insurer was obligated to appeal an adverse verdict entered against the insured.

In **Gioiso**, high-deductible policies had been purchased from the insurer in which the insured was responsible to pay the first $300,000 of each covered loss with the insurer providing coverage for all losses in excess of that amount.

The dispute arose after the insured stopped purchasing the insurance from the insurer and initiated an action claiming that the insurer had set an unreasonably high amount under the security agreement/letter of credit resulting in the loss of business.[4] The insurer counter-claimed for an owed deductible.

The underlying claim subject to the deductible reimbursement centered on purported faulty excavation work by the insured. The insurer provided the insured a defense with the matter proceeding to trial and an adverse verdict. The insurer proceeded to pay the adverse judgment having determined that there were no viable grounds for an appeal. Under the deductible terms of the policy, the insurer claimed it was entitled to be reimbursed $112,997 for its claim payment. The insured refused to pay, asserting that the insurer was obligated to and failed to appeal the judgment.

As to the insurer's counterclaim for the deductible and the insured's defense that the insurer breached a duty to appeal the adverse verdict, the court noted that the policy expressly provided for a duty to defend and that this duty can and does, in certain circumstances, include a duty to appeal.

It acknowledged the insured's claim under a common formulation: i.e., that the duty to appeal arises "in all instances where it appears that substantial interests of the insured may be served."

According to the insured, "If there is any likelihood whatsoever that an appeal might have resulted in a judgment for [insured] as a matter of law, then clearly there were reasonable grounds to believe that an appeal might serve [insured's] interest."

In response, the insurer relied on the express right in the policy granting it the right to settle[5] and that the Massachusetts insurance practices statute mandated that it effectuate a settlement whenever liability is reasonably clear. As such, the discretion granted under the policy coupled with the risk that it could be found to have engaged in an unfair claims settlement practice gave the insurer the right to pay the claim and not appeal.

The court acknowledged that apply-

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[1] See, e.g., **Associated Automotive, Inc. v. Acceptance Indem. Ins. Co.**, 705 F. Supp. 2d 714, 724 (S.D. Tex. 2010).

[2] **Davis v. Allstate Ins. Co.**, 434 Mass. 174 (2001).

[3] 2016 Westlaw 5372570 (Massachusetts Superior Court 8/27/16)(Kaplan, J.).

[4] As part of the insurance purchase, the insured was obligated to enter into a security agreement and letter of credit with the insurer in order to secure the deductible and premium obligation. The amount under the security agreement and letter of credit was determined by the insured's claims history with a cap of $300,000.

[5] The policy provided that the insurer "may at [its] discretion, investigate any occurrence and settle any claim or suit that may result."

ing contractual interpretation and good faith principles, while easily stated, were difficult to apply in the case because "the economic burden of settlement does not fall entirely on the insurer or the insured, because the policy is retrospectively rated." It likewise found that the insurer, in settling the claim, was not shifting either the entire or even the majority of the burden onto the insured. The court proceeded to reject the claim that the policy language allowed the insurer to settle a claim regardless of the "economic" impact upon the insured.

According to the court, "the duty to defend is not so easily cast off. On the other hand, the duty to defend cannot reasonably compel [the insurer] to pursue any appeal that has any conceivable chance of being successful."

The court found no breach of the duty to appeal as the only evidence as to the merits of any appeal was a 5% to 10% chance of success. It was troubled by the 5% to 10% proffer as it lacked identification and explanation of the appellate issues to be pursued.

According to the court, "the issue cannot be decided based on a percentage likelihood of success on appeal in the absence of some mathematically valid means of assigning such a percentage, and none was suggested in this case."

A second Superior Court decision issued only a few weeks after **Gioiso** addressed a claim of a duty to appeal under a professional medical malpractice policy.[4] The case was decided under New Hampshire law and involved a $5 million adverse verdict rendered against a New Hampshire physician.

Following the adverse verdict, which was in excess of the applicable coverage, the insurer proceeded to settle the claim within its policy limits. The insured physician objected to any settlement claiming that she had not been provided an adequate defense at trial and that the insurer was obligated to appeal given meritorious issues identified by appointed counsel.

It was contended that New Hampshire law imposed an implied duty to act in good faith which included an obligation to appeal whenever it is in "the best interests" of the insured. The insured argued that since there were meritorious issues to pursue, it was a breach of the duty of good faith for the insurer to settle against her wishes.

The insurer countered by contending that the duty of good faith and fair dealing has never been found in New Hampshire to extend to or create a duty to appeal whenever the insured so demands. It relied on the express terms of the policy which negated any need for the insured's consent to settle post-verdict and provided that the insurer could settle when it "deems expedient" and even if avenues of appeal remained available.[5]

Further, it was contended that there could be no viable claim even if there could be found an implied duty of good faith and fair dealing because the insurer settled within policy limits and eliminated any financial liability or exposure to the insured in doing so.

The court agreed with the insurer. While New Hampshire has long recognized that an insurer owes an insured a duty of reasonable care in the handling and settlement of a third-party liability case in circumstances where an insurer's conduct exposes the insured to personal liability,[6] the court refused to expand that principle to impose a mandatory obligation to appeal even if such an appeal could be shown to have substantial merit.

It noted that New Hampshire courts "will not find a breach of the duty of good faith and fair dealing merely because a party has invoked a specific, limited right that is expressly granted by an enforceable contract."

The court refused to utilize notions of implied good faith to override the express terms of the policy, which terms included the right to settle as the insurer "deems expedient" and without the consent of the insured following an adverse verdict and regardless of whether or not the verdict or judgment could still be challenged or appealed.

According to the court, "by settling the underlying case within policy limits following the adverse verdict, [the insurer] invoked a right expressly granted to it by the policy" and "this decision ... cannot constitute a breach of the implied covenant of good faith and fair dealing."

These recent cases are notable as they

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[4] Decision and Order of Defendants' Motion for Summary Judgment Massachusetts Superior Court (10/12/16) C.A. No. 2013CV3981 (Pierce, J.)

[5] The policy provided: "[insurer] shall have the right and duty to defend with defense counsel selected by US...and WE may make any investigation and settlement of any CLAIM or SUIT as WE deem expedient." A "Consent to Settle Endorsement" provided: "[insurer] shall not settle any CLAIM or SUIT against any practitioner scheduled on Group Schedule attached to DECLARATIONS---without the SCHEDULE PRACTITIONER's written consent....If the SCHEDULED PRACTITIONER consents to settlement or is deemed to have consented, then WE may settle the CLAIM or SUIT for such amount up to applicable Limit of Liability of the POLICY and on such terms as WE in OUR judgment determine. WE shall not be obligated to obtain consent to settle any CLAIM or SUIT against any SCHEDULED PRACTITIONER: (1) After a jury verdict, judgment, or any other ruling by a court....establishing or ruling is subject to appeal or further judicial review."

[6] Dumas v. State Fram Mut. Auto Ins. Co., 111 N.H. 43, 47-48 (1971); Dumas v. Hartford Accident & Indem. Co., 94 N.H. 484, 488-89 (1947): Bennett v. ITT Hartford Grp. Inc., 150 N.H. 753, 757-58 (2004).

[7] A number of courts have proceeded to give full effect to such language and reject the contention that there is a due care obligation to appeal. See Feliberty v. Damon, 72 N.Y. 2d 112 (1988); Schuster v. South Broward Hosp., 591 S. 2d 174 (Fla. 1992); Marginian v. Allstate Ins. Co., 481 N.E. 2d 600 (Ohio 1985); Papudesu v. Medical Malpractice Joint Underwriting Ass'n of Rhode Island, 18 A. 3d 495, 499 (R.I. 2011); Caplan v. Fellheimer Eichen Brauerman & Kaskey, 68 F. 3d 828, 837 (3rd Cir. 1995).

both address the settle versus appeal tension and impose necessary limits to efforts to extend the duty to defend through implied "good faith" obligation.

Under most policies, the insurer retains a broad right to settle claims in an express provision that should not be easily diluted by implied good faith concepts. Indeed, there is the substantial view that the express contractual terms providing for the right to settle in the insurer, even if stated in terms of "in its discretion" or "as it deems expedient," should not be altered by implied obligation.[7]

It remains that the terms of the policies represented the express intent to place the insured on notice that the insurer had the exclusive authority to pursue settlement within policy limits and, in **Johnson**, to do so without consent following an adverse verdict and even if there were available avenues of appeal.[8]

To the extent the duty to appeal can arise even in the face of language granting the insurer a right to settle, the decisions in **Giosio** and **Johnson** demonstrate that any such duty is far from absolute. It is implicated only when the insurer's decision to settle and not appeal impairs an interest or right of the insured under the policy. Courts have phrased the duty to appeal to exist when such an appeal is in the "interest" of the insured with any such potential appeal further demonstrated to be meritorious. Both decisions demonstrate that both components are independent requisites to the duty to appeal.

In **Gioiso**, the court found the discretionary right to settle did not eliminate a claim of a breach of a duty to appeal as the insured, due to the large deductible, faced adverse financial and economic harm in the adverse verdict. This was a sufficient interest to trigger an obligation to appeal so long as any potential appeal was found meritorious.

The insured's exposure to the large deductible was certainly an interest of the insured under the policy. As to the merits component, not only was it determined to be separate and distinct from the need to show an impairment of a policy-based interest, but the court in **Gioiso** appropriately recognized that the conclusory 5% to 10% chance of success proffer allocated to the appeal did not demonstrate a triable issue as to any duty to appeal.

In **Johnson**, unlike **Gioiso**, the focus was not on whether any appeal was meritorious, but it was instead on the contractual terms and the need for a substantial interest of the insured under the policy to be impaired. There was neither a financial nor economic exposure nor an extinguishment of any counter or other existing claim of the insured posed by the settlement.

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[8] Ibid.

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[9] See **Western Polymer Technology, Inc. v. Reliance Ins. Co.**, 38 Cal. Rptr. 2d 78 (Cal. Ct. App. 1995); **Rogers v. Chicago Ins. Co.**, 964 So. 2d 280, 284 (Fla. App. 2007); **Bleday v. OUM Group**, 645 A. 2d 1358, 1363 (Pa. 1993)

There was no deductible to be paid with the insurer settling the excess verdict within policy limits and extinguishing any financial liability of the insured.

To the extent the insured in **Johnson** wanted to appeal to serve a collateral interest, such as vindication or reputation, they are not the kinds of "interests" that trigger any duty to appeal or which override the insurer's right to settle.

An insurer's defense and indemnity obligation applicable to covered claims does not extend to the entire range of the insured's well-being.[9] In terms of good faith, the insurer's actions impaired neither the policy's benefits and purposes nor the insured's interests under the policy.

An insured's right to settle as provided under a policy requires judicial recognition and protection. This is particularly true where the insured is not left exposed to an economic burden, excess verdict, claim extinguishment or uncovered claims to defend.

Moreover, to the extent such an economic burden exists, there still must be a substantive proffer demonstrating a truly viable and meritorious issue to appeal. To hold otherwise runs counter to the strong public policy favoring settlements. ■