

Mass. Appeals Court Holds Liability Uncertain Despite Verdict in Favor of Claimant

By Massachusetts statute, insurers must effectuate prompt, fair and equitable settlement of claims where liability has become reasonably clear. The time at which liability becomes reasonably clear presents a fact-intensive inquiry that is often imprecise. Indeed, the Massachusetts Appeals Court recently ruled that liability can remain unclear even in the face of a trial court verdict in favor of a claimant.

In so ruling, the court in **Gary P. Silva v. Steadfast Insurance Company**, No. 14-P-987 (August 7, 2015), clarified that in certain circumstances a claimant's appeal and disputes over the amount of judgment render liability uncertain, and the insurer does not violate the unfair claims settlement practices law or the Consumer

Protection Act by failing to effectuate a post-verdict settlement. The court also addressed the propriety of claims for personal damages and claims by third-party claimants brought under c. 93A, § 11, which govern claims in a business context.

Background

The case involves a lengthy procedural history. Associated Building Wreckers (Associated), was hired by the City of Holyoke to demolish a building adjacent to plaintiff Gary P. Silva's property, where Silva operated his auto body business. On January 19, 2006, as demolition occurred, the building collapsed onto Silva's property, causing extensive damage to his business. Steadfast Insurance Company issued a policy of insurance to Associated.

In December 2006, Silva brought suit against Associated (the underlying action). His complaint contained several counts, including a count for property damage and business loss, several counts for personal injuries, and a claim under the Consumer Protection Act, G.L. c. 93A, §§ 2 and 11, for injuries and damages. At the close of evidence, the judge directed a verdict in favor of Associated on Silva's nuisance, strict liability and G.L. c. 93A claims. Following trial, the judge awarded Silva approximately \$366,607 on his claim for breach of contract for property damage and business loss, which included damages for building repair, removal and demolition, as well as \$10,000 for personal property damage. The judge ruled in Associated's favor on the remaining claims for negligence, personal injury and trespass.

Associated did not appeal the judgment. Silva appealed the ruling on the trespass claim and the amount of damages awarded. His appeal was unsuccessful, and an execution on the judgment issued to Silva on November 9, 2012, for approximately \$671,217. During the period of time between the entry of judgment in June 2010 and the execution in November 2012, neither Associated nor Steadfast made any offer to settle, and Silva never made any demand during that period.

Less than one week after the execution issued, on November 14, 2012, Silva filed suit against Steadfast (the Steadfast action), alleging that Steadfast violated G.L. c. 176(d), §3(9) and G.L. c. 93A, §§ 2 and 11, by failing to effectuate a prompt, fair and equitable settlement after the judgment in the underlying action entered in June 2010.

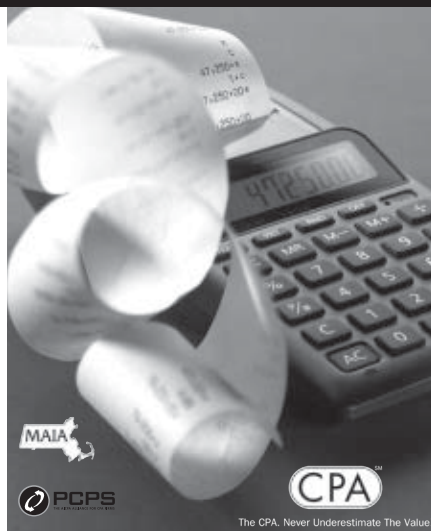
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Thereafter, in December 2012, Associated filed a motion for relief from the judgment in the underlying action, asserting the judgment failed to apply the setoff which had been specified by the judge in his findings. Silva objected, but Associated's motion was allowed.¹ Silva had previously received insurance payments from Steadfast in the amount of \$186,464, for which Associated was entitled to a setoff.

Silva then moved in the underlying action to amend the judgment to recover additional costs. His motion was allowed in part. In March 2013, an amended judgment of approximately \$342,202 was entered for Silva, representing actual damages, prejudgment interest, post-judgment interest and costs. On March 28, 2013, Steadfast paid Silva the full judgment.

In the bad faith action against Steadfast, the parties filed on cross motions for summary judgment, and the Superior Court judge granted summary judgment for Steadfast. Steadfast, the judge ruled, had not violated G.L. c. 176D because Silva's appeal of the June 2010 judgment rendered Associated's liability uncertain. Judgment entered in March 2014, and Silva appealed.

Several disputes were presented to the Appeals Court. Steadfast argued that it was entitled to judgment as a matter of law because Silva asserted his claims under c. 93A, § 11 which applies in business contexts, though he sought damages in his personal capacity, and also because he was a third-party claimant. Silva asserted the Superior Court erred in awarding summary judgment to Steadfast because, Silva argued, Steadfast failed to make an offer to settle post-verdict.

A Claim May Be Presented Under § 11 Even if Asserted by a Third-Party Claimant and Even if Seeking Personal Damages

As an initial matter, the Appeals Court addressed the propriety of Silva's claims being presented under G.L. c. 93A, § 11, rather than § 9. Steadfast asserted that Silva's claims were within the pur-

view of G.L. c. 93A, § 9, which governs claims brought by anyone not engaged in trade or commerce, because Silva sought both personal and business damages. Steadfast further argued that it was unprecedented for third-party claimants to assert claims under G.L. c. 93A, § 11, because of the lack of privity between third-party claimants and insurers. Had Silva's claims been within the purview of G.L. c. 93A, § 9, rather than § 11, the claims would have failed as a matter of law, for Silva's failure to comply with the prerequisites to suit mandated by § 9, namely, a demand letter.

The Appeals Court began with in an examination of the relationship between the Consumer Protection Act, G.L. c. 93A and the unfair claims settlement practices provisions of G.L. c. 176D. The Consumer Protection Act protects both individual consumers and businesses from unfair business practices which are immoral, unethical or oppressive, or which are otherwise unfair as established by statute or common law. The statute defining unfair claims settlement practices, G.L. c. 176D § 3, prohibits "unfair or deceptive acts or practices in the business of insurance". Section 3(9) recites acts and omissions which constitute unfair claim settlement practices.

G.L. c. 176D, § 3, does not provide a private right of action. Thus, a claim for a

violation of c. 176D, § 3 must be brought under G.L. c. 93A, § 9 or § 11. Chapter 93A, § 9 specifically allows consumers to bring claims thereunder for violations of G.L. c. 176D, without regard to whether those claims amount to an unfair business practice under c. 93A, § 2. Chapter 93A, § 11, which governs claims brought by a person acting in trade or commerce, on the other hand, does not expressly incorporate violations of c. 176D, § 3(9). Therefore, to bring a claim under § 11, a business must, as a prerequisite, establish a business relationship between it and an insurer, and then may assert violations of c. 176D as evidence of an unfair business practice. However, violations of c. 176D range from technical or trivial to major, and conduct which violates c. 176D does not necessarily violate c. 93A.

As an initial matter, the Appeals Court addressed Steadfast's argument that Silva's claims fell within § 9 and therefore failed because Silva had not sent Steadfast a demand letter as required by the statute. First, Steadfast argued that because Silva asserted claims for both personal and business damages, his claims were within the purview of § 9. The Court summarily rejected this argument. As a matter of law, there was no precedent in Massachusetts to support Steadfast's position. Whether a claim may be brought under § 11 is a fact-specific inquiry, which looks at the nature of the transaction as

¹ Silva appealed, and the application of the setoff was affirmed.

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well as the character of the parties and their activities, and the history of transactions between the parties. Moreover, as a matter of fact, Silva, vis-à-vis his auto business, Associated and Steadfast, as the insurer of Associated, were all engaged in trade or commerce in the context of the incident and claims.

Steadfast also argued that it was unprecedented for a third-party claimant to assert a claim against an insurer under G.L. c. 93A, § 11. The court disagreed, relying on Supreme Judicial Court (SJC) precedent. The SJC has affirmed the right of third-party claimants to bring suit against insurers under c. 93A, § 9, as the statutory prohibition on failing to effectuate a prompt, fair, and equitable settlement once liability has become reasonably clear, c. 176D, §3(9)(f), is not limited to first-party situations where a claimant was in contractual privity with the insurer. Additional cases demonstrated the ability of third-party claimants to bring suit under § 11. Moreover, the court reasoned, the goal of c. 176D is to facilitate the settlement of insurance claims. The goal remains the same whether the claimant is an insured or a third party, and whether the plaintiff is an individual or a business. Thus, the court held, there was no basis for a rule prohibiting third-party claimants in the context of alleged unfair claims settlement practices

from bringing suit under c 93A, § 11.

Liability May Not Be Reasonably Clear Despite the Entry of Judgment in Favor of a Claimant Where the Claimant Launches an Appeal

The Appeals Court then evaluated the substance of Silva's argument that Steadfast had violated c. 176D, § 3(9)(f), by "failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." Silva objected only to Steadfast's post-verdict settlement practices. He asserted that Steadfast violated c. 176D, §3(9)(f) as a matter of law, by failing to effectuate a settlement between June 2010, when judgment in the underlying action originally entered in his favor, and March 2013, when Steadfast paid the judgment. Steadfast countered that liability only became reasonably clear in March 2013 after the resolution of Silva's appeals and the parties' motions to amend the judgment.

The Appeals Court rejected Silva's arguments, and affirmed summary judgment in favor of Steadfast. As a matter of law, the Court held, Steadfast's post-judgment conduct was outside the bounds of what might qualify as a violation of G.L. c. 93A.

The Appeals Court began its analysis by highlighting the purpose of c 176D,

§3(9), to encourage the settlement of claims and discourage insurers from forcing claimants into unnecessary litigation. Pursuant to c 176D, §3(9)(f), an insurer's duty to settle a claim arises only when liability has become reasonably clear. Liability involves both fault and damages.

The Appeals Court noted that the procedural history of the underlying action post-verdict was complex, which complicated the inquiry as to whether fault and damages were reasonably clear. Following the entry of judgment in Silva's favor in June 2010, Silva did not seek to enforce the judgment, nor did he make a demand for settlement on Steadfast. Instead, Silva appealed the judgment on multiple grounds. This, the court reasoned, undercut the certainty fault and damages. On the other hand, Associated did not appeal the judgment, so some amount of liability and damages was established when judgment entered in June 2010. Further muddling the situation, Steadfast had previously paid Silva more than \$186,400, which served as the basis of the setoff which was the subject of Silva's second round of appeals in the underlying action. Between the entry of judgment in June 2010 and the execution in November 2012, Steadfast made no settlement offers.

The Appeals Court held that, as a matter of law in the circumstances, Steadfast had not engaged in unfair and deceptive practices under c. 93A, §§ 2 and 11. The Court reasoned that once Silva appealed multiple claims previously found to be without merit by the trial judge, the amount of damages was not reasonably clear. On appeal, Silva's claims were again determined to be without merit, confirming the reasonableness of Steadfast's conduct. Moreover, the amount of damages required several adjustments in the trial court. The Appeals Court relied on case law establishing that an insurer does not violate c. 93A by taking a legally correct coverage position or by rightfully refusing to pay damages not covered by a policy.

The Appeals Court then explained at length that its ruling was consistent with established Massachusetts law. The Court contrasted the SJC's holding in **R.W. Granger & Sons v. J & S Insulation Inc.**, where the SJC found



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a post-verdict violation of §3(9)(f). There, the SJC rejected an insurer's argument that liability was not reasonably clear following a verdict because the amount of attorney's fees was disputed. Liability was reasonably clear, the SJC reasoned, when comparing the amount of potential attorney's fees to the certainty of the jury verdict and the interest awarded. Moreover, in that case, the plaintiff, unlike Silva, had made a demand for payment within a month of the verdict. Thus, the late settlement offer was not fair or equitable. The court also distinguished the SJC's ruling in **Rhodes v. AIG Domestic Claims Inc.**, where given the catastrophic injuries including permanent paraplegia, liability was reasonably certain and the post-judgment offer was "insulting."

The Appeals Court noted that the Steadfast action was in stark distinction to **R.W. Granger & Sons** and **Rhodes**. The amount of damages became uncertain when Silva appealed the judgment. This was bolstered by the fact that both Silva and Steadfast later brought successful motions to amend the judgment amount in the underlying action.

The Appeals Court also distinguished the case from those holding that the insurer's duty to make a prompt and fair settlement offer does not depend on the claimant's willingness to accept such offers. The rule remains true if liability and damages are reasonably clear. However, in the Steadfast action, the amount of damages remained uncertain until the appeals and post-judgment motions were complete. Therefore, Steadfast's acts did not violate of c. 176D or c. 93A, and the judgment of the Superior Court was affirmed.

Implications of the Case

If any doubt remained, it is now clear that a third-party claimant may bring suit under G.L. c. 93, § 11 despite lack of privity with the insurer. Moreover, although a claim seeks personal damages, it may still be brought under § 11 in appropriate factual circumstances. Therefore, insurers may not summarily rely on a claimant's failure to follow the protocol of § 9, i.e., a demand letter prior to suit, in defending such claims. Rather, a court will make fact-specific inquiry as to the propriety of claims

asserted under c. 93A, § 11.

Moreover, it is now clear that although a judgment has been entered in favor of a claimant, liability may nonetheless remain unclear. Liability encompasses both fault and damages, which may become uncertain if a claimant appeals a judgment or otherwise contests the amount of the judgment. In such a case, the insurer does not violate c. 176D by failing to effectuate settlement. However,

an appeal or other dispute does not render liability unclear where the disputed amount is trivial compared to the overall verdict. For example, the amount of disputed attorney's fees may be small when compared to a verdict. Thus, it remains imperative for insurers to examine the circumstances of any post-verdict appeal and recognize that the duty to effectuate a fair and prompt settlement remains, unless liability, that is, fault and damages, are truly brought into question. ■

U.S. P-C Insurers' Results Largely Unchanged in First Half of 2015, Says Fitch

CHICAGO — U.S. property-casualty (P-C) insurers' operating performance remained essentially unchanged in the first half of 2015, with \$25.5 billion in aggregate operating earnings reported, according to a new report by Fitch Ratings.

Favorable reserve development and limited catastrophic loss activity helped to offset sluggish investment income, Fitch said in the report, "U.S. Property/Casualty Insurers' Midyear 2015 Financial Results."

Due to modest growth in shareholders' equity, annualized operating return on average equity (ROAE) dropped slightly to 8.1% from 8.4% in the prior period. The net income ROAE declined more significantly to 8.6% versus 10% in first half of 2014 due to a reduction in realized investment gains.

Underwriting performance remains favorable, as the group calendar-year combined ratio equaled the prior-year measure of 94.2%. Maintaining or improving underwriting performance going forward may prove challenging as competitive forces are promoting flat to declining insurance pricing in many market segments, according to Fitch.

Generating an operating ROAE above 10% remains a challenge in the current marketplace. Only one-third of the companies in the group reported a

double-digit operating ROE in first-half of 2015.

Fitch's rating outlook for each of the sectors covered in the report (commercial, personal and reinsurance) is stable. The report noted that broad-based rating changes are unlikely in the next 12 – 24 months.

Personal and commercial lines have stable fundamental sector outlooks; however, the reinsurance sector outlook is negative as intense market competition and sluggish cedent demand have resulted in a soft reinsurance market, although there are some recent signs that the market is stabilizing. ■



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