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An Insurer's Willful or Knowing Violation of Mass. Gen. Law, Ch. 93A, § 9

The Supreme Judicial Court Of Massachusetts Issues a New Decision Clarifying the Measure of Damages

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Earlier this year, the Supreme Judicial Court of Massachusetts issued its much anticipated decision, *Rhodes v. AIG Domestic Claims, Inc.*, 461 Mass. 486 (2012), clarifying the scope of damages when an insurer is found to have willfully or knowingly committed an unfair settlement practice in violation of the Massachusetts Consumer Protection Act (M.G.L. c. 93A, § 9).

In awarding sanctions totaling \$22 million, the court determined that the measure of damages for an insurer's willful or knowing violation of § 9 of Massachusetts' prohibition of unfair settlement practices *must* be calculated as a multiple of the underlying tort *judgment* rather than the actual harm caused by the insurer's

conduct. On the other hand, where the underlying tort claim settled prior to entry of a judgment, damages will be determined as a multiple of the actual harm caused by the insurer's violation.

The court also held that an insured or tort plaintiff is not required to prove that, pre-judgment, it would have accepted a reasonable settlement offer had the insurer made one. This holding reduces the burden on the plaintiff to prove causation, but does not eliminate it entirely.

As discussed in greater detail below, the *Rhodes* decision identifies certain pitfalls for insurers to avoid when negotiating the settlement of a tort claim and provides instruction on how courts are likely to apply the double or treble damages prescribed by the Massachusetts Consumer Protection Act.

MASSACHUSETTS' PROHIBITION OF UNFAIR SETTLEMENT PRACTICES

The Massachusetts Consumer Protection Act applies where bad acts occur "primarily and substantially" in Massachusetts. The Act protects both individuals, (M.G.L. c. 93A, § 9), and businesses, (M.G.L. c. 93A, § 11), from unfair methods of competition and unfair or deceptive business practices, including unfair settlement practices.

In Massachusetts, once tort liability becomes reasonably clear, for individuals, insurers have a duty to effectuate a

prompt, fair and equitable settlement of an insured's or tort plaintiff's claims. M.G.L., ch. 176D, § 3(9)(f). Unlike an individual plaintiff who can rely on violation of Mass. Gen. Law, ch. 176D, § 3(9) as a *per se* violation of Mass. Gen. Law, ch. 93A, § 9, a business plaintiff must prove a violation of Mass. Gen. Law, ch. 93A, § 2. *Polaroid v. Travelers Indem. Co.*, 414 Mass. 747, 754 (1993); *see also Watts Water Techs., Inc. v. Fireman's Fund Ins. Co.*, SUCV2005-02604-BLS (Mass. Super. Mar. 20, 2009) ("[A] business plaintiff permitted to sue under § 11 of Chapter 93A may not sue under § 9 for alleged violations of Chapter 176D."). A failure to comply with this requirement constitutes an unfair settlement practice, which may be pursued directly by the insured or tort plaintiff. *See* M.G.L., ch. 93A, § 9; *Rhodes*, 461 Mass. at 494-495. An insurer's liability for unfair settlement practices will vary depending on the culpability of the insurer. At a minimum, the insurer will be responsible for actual damages or \$25, whichever is greater, and attorney's fees, but, if the court finds that the insurer's action was willful or knowing, the judge *must* grant double or treble damages. *Id.* at ch. 93A, § 9(3).

A central issue in *Rhodes* was whether a court must double or treble the insured's actual damages or the damages awarded in the underlying action. The answer, as discussed by the Supreme Judicial Court, depends on whether the underlying ac-

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tion was settled prior to or after the court entered judgment.

UNDERLYING TORT LITIGATION IN RHODES

In January 2002, Marcia Rhodes suffered catastrophic injuries when a tractor trailer hit the rear end of her car paralyzing her. She, her husband and daughter brought a tort action against, among others, the truck driver for his negligence. The court found that there was never any dispute that the accident was caused by the driver's negligence and that Rhodes was not contributorily negligent. In November 2002, the truck driver admitted to sufficient facts to support a finding that he was guilty of criminally operating negligently to endanger.

The accident triggered coverage under two policies: primary coverage was afforded by a policy, which had a \$2 million limit ("Primary Insurer"), and excess insurance was provided by an umbrella policy, which had a \$50 million limit (the "Excess Insurer"). The case proceeded to trial, and, in September 2004, a jury awarded the plaintiffs approximately \$9.41 million, which, with interest, totaled \$11.3 million. Defendants appealed. A week later, plaintiffs sent demand letters under Mass. Gen. Law, ch. 93A, § 9 to the Primary and Excess Insurers.

SETTLEMENT NEGOTIATIONS

By September 2002, the Primary Insurer had estimated that the value of the tort case was between \$5 and \$10 million, exceeding its policy's limit. In January 2004, the Primary Insurer tendered its \$2 million policy limits to the Excess Insurer and continued to pay the defense costs of the underlying litigation.

Plaintiffs made settlement demands prior to the trial and the parties agreed to mediate; settlement of the tort action, however, did not happen until approximately nine months *after* the jury verdict. With respect to settlement, the court fo-

cused on the fact that, in the spring of 2004, a year after the defendants received a settlement demand for \$16.5 million, and the Primary Insurer had tendered its limits to the Excess Insurer, the defendants made their first settlement offer for \$2 million.

Subsequently, during mediation on the eve of trial, the Excess Insurer offered \$3.5 million in response to plaintiffs' demand for \$15.5 million. The parties ultimately were not able to reach a settlement and the mediation broke down before the Excess Insurer increased its offer to the full amount it was authorized to settle (\$3.75 million).

Three months after the trial, in response to the plaintiffs' 93A demand letter, the Excess Insurer increased its offer to \$7 million, which included the \$2 million limits of the Primary Insurer. A week later the Primary Insurer paid the plaintiffs \$2,322,995.75 without receiving any release from the Chapter 93A claim against it. The parties did not reach a settlement of the tort claim until June 2005, when the plaintiffs accepted \$8.965 million. By that time, however, the plaintiffs had already filed their Chapter 93A claims against the insurers.

LITIGATION OF THE PLAINTIFFS' MASSACHUSETTS GENERAL LAW, CHAPTER 93A CLAIM

The trial court held that the Excess Insurer violated its duty to effectuate a prompt, fair and equitable settlement before trial of the plaintiffs' tort action and again following the judgment in the case. The court found the violation to be willful and knowing and calculated damages between pre- and post-judgment conduct. As for pre-judgment conduct, the court awarded no damages, having concluded that the plaintiffs would not, in any event, have accepted a timely reasonable offer. As for the post-judgment conduct, the court calculated damages as

the lost interest on the final settlement with the Excess Insurer between the date the negligence case should have settled, January 2005, and the date it actually did settle, June 2005. The court held that the Primary Insurer did not engage in unfair settlement practices.

The plaintiffs appealed the measure of damages applied by the trial court. The Excess Insurer did not appeal the court's finding that it willfully and knowingly violated Mass. Gen. Law, ch. 176D, § 3(9) (f) and ch. 93A, § 9. On appeal, the Massachusetts Appeals Court overturned the trial court's award of damages. The appellate court held that the measure of damages for the pre-verdict violation should have been the loss of use of the funds the Excess Insurer had offered in settlement before the trial. The Appeals Court also awarded the plaintiffs loss of use damages for the Excess Insurer's post-judgment violation.

SUPREME JUDICIAL COURT HOLDING

The Supreme Judicial Court disagreed with both the trial court and appellate court regarding the measure of damages. Rather than calculate damages based on the plaintiffs' loss of use, the court awarded damages based on the underlying judgment for \$11.3 million, resulting in an award of \$22 million. Significantly, before reaching this holding, the court explained that the plaintiffs were not obligated to prove that had the Excess Insurer tendered a prompt, fair or equitable settlement offer, they would have accepted it.

THE PLAINTIFFS' BURDEN OF PROOF WHEN ALLEGING UNFAIR SETTLEMENT PRACTICES

In 2006, the Supreme Judicial Court, in *Hershenow v. Enterprise Rent-A-Car Co. of Boston*, 445 Mass. 790 (2006), held that, under Chapter 93A, plaintiffs must show a causal connection between the claimed violation of their rights and an

actual loss in order to recover damages. Although *Hershenow* did not involve claims for unfair settlement practices by an insurer, in *Rhodes*, the appellate court held that *Hershenow* required plaintiffs to prove that they would have accepted a reasonable settlement offer had one been made prior to trial.

On further review, the Supreme Judicial Court rejected the appellate court's application of *Hershenow*. Specifically, the court stated "[n]othing in *Hershenow* supports the conclusion that our decision in that case was intended to change the law and place a new burden on plaintiffs to prove that they would have accepted a prompt, reasonable settlement offer, had the insurer made such an offer." *Rhodes*, 461 Mass. at 497. Thus, plaintiffs' burden of proving causation will be satisfied merely by proving the insurer's action caused them to suffer a loss or an adverse consequence.

MEASURE OF DAMAGES

When determining the correct measure of damages to apply, the Supreme Judicial Court relied upon the Legislature's 1989 amendment to Chapter 93A, §§ 9 and 11. The amendment, in pertinent part, states:

[I]f the court finds for the petitioner, recovery shall be in the amount of actual damages ... or up to three but not less than two times such amount if the court finds that the use of employment of the act or practice was willful or knowing violation [Chapter 93A, § 2] ... For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence. ...

The court noted that this amendment "was intended to increase the potential penalties for insurers who engaged in unfair claim settlement practices. ..." *Id.*

at 498. Interpreting the language of the amendment and its purpose, the court held that, whether or not an unfair settlement practice occurs pre- or post- verdict, the measure of damages for a willful or knowing violation will be a multiple of the underlying judgment.

Critically, the court explained that, where an underlying *judgment* is not reached — for instance, when a case settles — the measure of damages for a willful or knowing violation will be determined by multiplying the *actual damages* not the settlement. The same is true for an arbitration award. While an arbitrator is entitled to calculate the measure of damages for a willful or knowing violation of Mass. Gen. Law, ch. 93A by doubling or tripling the arbitration award, a court is not entitled to do so.

The \$22 million award of damages was double the amount of the judgment and approximately 20 times the amount of damages awarded by the trial court for the plaintiffs' loss of use. Because the court focused on the amount of the judgment — and not on the amount of the loss of use — the court explained that the award was not so "grossly excessive" as to violate the Excess Insurer's due process protections, particularly given that a judge, not a jury, made the award of punitive damages. *Id.* at 504. This conclusion all but forecloses the argument that an award of double or treble damages based on a tort judgment violates an insurer's right to due process.

The court did limit the plaintiffs' recovery by holding that the plaintiffs were not entitled to actual damages for loss of use in addition to multiple damages for the insurer's willful violation.

While the *Rhodes* decision has now clarified the measure of damages, if the court finds a willful or knowing violation of Mass. Gen. Law, ch. 93A, § 9, there will

be collateral consequences from this ruling. On the one hand, parties should be more likely to settle Mass. Gen. Law, ch. 93A, § 9 claims where liability is reasonably clear. On the other, plaintiffs may attempt to leverage the *Rhodes* decision to garner more favorable settlements, as any verdict could be doubled or tripled if the court finds, in a subsequent proceeding, that an insurer committed an unfair settlement practice. Given that, insurers should take extra care to document the steps they have taken to promptly, fairly and equitably settle the underlying tort claims. Such a record should both discourage any effort by plaintiffs to prolong settlement in favor of going to trial and demonstrate the insurer's good faith compliance with Mass. Gen. Law, ch. 93A, § 9 and ch. 176D, § 3(9).

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