Policyholder Veto Power Over Settlement Does Not Conflict with Insurer's Duty to Settle Under Massachusetts Unfair Insurance Practices Statute.

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Insurer Is Still Obligated To Conduct Reasonable Investigation And Make Good Faith Effort To Settle When Liability Is Reasonably Clear.

Many professional liability policies provide that the insurer will not settle without the policyholder's consent. These consent-to-settle clauses give professionals – engineers, architects, lawyers, and medical professionals, among others – the ability to control the settlement of cases alleging professional negligence.

In *Rawan* v. *Continental Casualty Co.*, SJC-12691 (Mass. 2019), the Massachusetts Supreme Judicial Court rejected the argument that consent-to-settle clauses should be prohibited on the basis that they conflict with an insurer's obligation to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear" under Massachusetts General Laws Chapter 176D, §3(9)(f). Full disclosure: Steve Schreckinger and I submitted an amicus brief supporting the insurer's position on behalf of the American Property and Casualty Insurance Association, the Medical Professional Liability Association, and the Massachusetts Insurance Federation.

The plaintiffs-appellants in *Rawan* successfully sued an engineer for structural errors in a new home design. After collecting the covered portion of the judgment from the insurer, and the excess from the engineer, the plaintiffs sued the insurer, asserting that it had failed to promptly and fairly settle the claim when liability was reasonably clear, forcing them to litigate the case against the engineer through trial, in violation of the unfair insurance practices statute, Chapter 176D. The insurer, and defense counsel retained by the insurer, had encouraged the engineer to consent to settlement, but the amount he authorized was not sufficient to settle the case and he declined to consent to further negotiations.

A trial judge granted summary judgment for the insurer, finding that the insurer had attempted to settle to the extent permitted by the policyholder under the consent-to-settle clause. The plaintiffs appealed, arguing that the consent-to-settle clause violated the public policy embodied by Chapter 176D and was therefore prohibited in Massachusetts.

The plaintiffs argued that Chapter 176D, §3(9)(f) requires an insurer to effectuate settlement when liability is reasonably clear, and that an insurer is not permitted to contract away that statutory imperative. Further, the plaintiffs argued, the consent-to-settle clause in the engineer's policy lacked a "hammer clause," a common feature that qualified the policyholder's veto power by limiting coverage to the settlement amount vetoed by the policyholder. Giving the policyholder unfettered control over settlement, the plaintiffs argued, completely abdicated the duty to settle under the statute.

The Court disagreed, stating that, notwithstanding the language of the statute, an insurer was only required to make good faith efforts to effectuate a settlement. Further, the statute does not expressly prohibit consent-to-settle clauses, which existed when the statute was enacted, and in the absence of such a prohibition the Court would not interpret the statute to intrude on the freedom of insurers and policyholders to contract as they see fit. Further, the Court stated, professional liability insurance is for the most part voluntary coverage (not mandatory like, for example, motor vehicle insurance), and prohibiting consent-to-settle clauses might discourage policyholders with an interest in protecting their reputations from purchasing insurance at all, depriving third party claimants of a potential source of recovery.

The Court went on to hold that a consent-to-settle clause did not eliminate an insurer's statutory obligations to conduct a reasonable investigation and to make a good faith effort to settle claims when liability was reasonably clear. Here, the Court pointed out, the insurer did a thorough investigation, encouraged mediation and settlement, and indeed convinced the reluctant policyholder to make an offer, although not one sufficient to settle the case.

The Court was troubled by some allegations with respect to the insurer's conduct toward the plaintiffs, including efforts to prevent discovery of an expert report, and an alleged misrepresentation with respect to the policy limit (because the trial court decided the case on summary judgment these allegations were required to be viewed in the light most favorable to the plaintiffs). However, the Court concluded that it was the policyholder's withholding of consent, and not the insurer's actions, that caused the harm to the plaintiffs.

In short, consent-to-settle clauses are valid and enforceable in Massachusetts – even consent-to-settle clauses that lack a hammer clause or any other check on the policyholder's veto power – and an insurer will not be liable for a failure to settle that is due to the policyholder's exercise of its rights under such a provision. However, the presence of a consent-to-settle clause does not eliminate an insurer's obligations under Chapter 176D to conduct a reasonable investigation and make good faith efforts toward settlement when liability is reasonably clear.