



Insurance Coverage **ALERT**

\$22.6 Million Award Based on Claims Administrator's Failure to Make a Timely and Reasonable Settlement Offer

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In [Rhodes v. AIG Domestic Claims, Inc.](#), 461 Mass. 486, ___ N.E.2d ___ (2012), the Supreme Judicial Court of Massachusetts evaluated whether the measure of punitive damages in a bad faith lawsuit resulting from insurers' alleged failure to promptly settle a claim when liability was reasonably clear should be based on the loss of use of that settlement money or on the amount of the judgment in the underlying case. Plaintiffs alleged a violation of: (1) Mass. Gen. Laws ch. 176D, § 3(9)(f), which requires prompt, fair and equitable settlements when liability becomes reasonably clear, and (2) the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, § 9. A violation of Mass. Gen. Laws ch. 93A, § 9 automatically entitles the aggrieved party to an award of attorneys' fees and costs and, if the violation was willful and knowing, double or treble damages.

In the underlying case, plaintiffs obtained an \$11.3 million judgment against the insured resulting from a car accident with a tractor trailer. The judgment was appealed. Approximately 8.5 months after the judgment, plaintiffs reached a settlement with the insurers of the tractor trailer. However, after the judgment, but prior to the settlement, plaintiffs initiated the bad faith lawsuit against the insurers, alleging the failure to timely offer a reasonable settlement.

In the bad faith lawsuit, plaintiffs sought damages based on the insurer's failure to settle the claim both before and after the judgment. The Court clarified some of its earlier decisions and held that, in order to establish causation, plaintiffs needed only prove that they suffered a loss due to the insurer's failure to make a timely and reasonable offer. Plaintiffs did not need to prove that they would have accepted the offer had one been made. However, the Court ultimately did not evaluate the prejudgment conduct because it found that the postjudgment conduct, in failing to make a timely and reasonable settlement offer after the \$11.3 million judgment, was sufficient to find a violation of Mass. Gen. Laws ch. 93 and 176D.

Regarding the measure of damages in the bad faith case, a violation of Mass. Gen. Laws ch. 93A, § 9 allows the court to double or treble the damages if the violation was willful and knowing. Because the claims administrator's conduct was found to have been willful and knowing, the discussion turned on whether: (1) the loss of use of the settlement monies, or (2) the amount of the underlying judgment, should form the basis of the award of multiple damages. The trial court and the lower appeals court found that the loss of use damages should be the determinative amount. However, the Supreme Judicial Court interpreted Mass. Gen. Laws ch. 93A, § 9, which provides that "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,” to require a court to multiply the actual judgment in the underlying case, and not the amount of damages stemming from a claim of loss of use. As a result, the Court remanded the case to the trial court for a redetermination of damages in accordance with its finding that the \$11.3 million judgment should be doubled.

Practice Note

The Supreme Judicial Court’s decision is significant because insurers that are found to have willfully and knowingly violated Mass. Gen. Laws ch. 93A can no longer argue that loss of use of the settlement monies are the damages that form the basis for the multiple damage award. Insurance companies that issue policies and adjust losses in Massachusetts must timely evaluate whether to make a reasonable settlement offer once liability becomes reasonably clear or they may otherwise be exposed to a doubling or trebling of the underlying judgment, even where, as here, the negligence side of the case is settled for less than the judgment.

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