NATIONAL UPDATES FROM THE COURTS

MASSACHUSETTS

Parties Seeking PIP Benefits May Refuse Insurer's Tender and Pursue Claim, Including Costs and Fees

In a recent opinion, the SJC held that an unpaid party who has brought a claim under the personal injury protection (PIP) provision of the automobile insurance statute may refuse the insurer's tender of amounts due and payable, proceed with its claim and continue to seek its costs and attorney's fees as provided under the statute. The case is *Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Grp.*, 469 Mass. 800 (2014).

There, the plaintiff had provided chiropractic services to the insured after she suffered injuries in an automobile accident. The insured provided timely notice of the accident to her automobile insurer, the defendant, and applied for PIP benefits. Pursuant to its rights under the policy and relevant statutes, the defendant requested that the insured undergo an independent medical examination (IME) by a licensed chiropractor of the defendant's choosing. After this IME, the defendant's chosen chiropractor determined that the insured had reached "maximum therapeutic benefit" and, therefore, would not require any further services for her injuries sustained in the automobile accident. A licensed chiropractor employed by the plaintiff disagreed and administered nine more treatments to the insured.

The action before the SJC stemmed from the dispute as to the amount owed for the reasonable and necessary treatment of the insured's injury. The plaintiff brought its claim under the PIP provision of G.L. c. 90, § 34M, which allows an unpaid medical provider who has treated an insured to step into the shoes of the insured and seek recovery of PIP benefits from the insurer. Six days prior to trial, the defendant sent the plaintiff a check for the disputed amount as a purported "full and final settlement" of the insured's claim. The plaintiff rejected this offer to settle. The defendant thereafter filed for and was granted summary judgment on the plaintiff's claims. The case came before the SJC on plaintiff's appeal and defendant's application for direct appellate review.

An unpaid party under § 34M who receives a judgment for an amount payable by the insurer is entitled to costs and attorney's fees. In *Fascione v. CNA Ins. Companies*, 435 Mass. 88 (2001), the SJC held that a claimant under § 34M who accepts the insurer's tender may not then seek costs and fees. Subsequent cases in the Appellate Division were split over whether *Fascione* therefore required an unpaid party's claim to extinguish for failure to accept tender by the insurer.

§ 34M provides that claims for unpaid PIP benefits sound in contract. Under the principles of contract law, a tender of payments owed is only valid when made within the time frame set forth in the contract. Here, the statute provides an unpaid party with a right of action where benefits owed by the insurer remain unpaid for thirty days. Any tender made after this period need not be accepted.

In holding that an unpaid claimant for PIP benefits may refuse untimely (though complete) tender and pursue costs and attorney's fees, the SJC reasoned that the 30-day payment period and the provision for costs and fees were intended to encourage swift payment to accident victims, discourage undue delay and

control the costs of auto insurance by reducing litigation. To give preclusive effect to an 11th hour tender would frustrate this purpose and leave a claimant unable to recover costs already incurred as a result of the insurer's delay. Accordingly, summary judgment for the defendant was reversed and remanded.

MA Appeals Court Declines to Extend "Mode of Operation" Approach to Slip and Fall Liability

A three-judge panel of the Massachusetts Appeals Court declined to extend the "mode of operation" approach to slip and fall liability, limiting its application to self-serve businesses. The unpublished decision is *Sarkisian v. Concept Restaurants, Inc.*, No. 13-P-154 (Mass. App. Ct. Oct. 17, 2014).

There, the plaintiff was injured after slipping in a puddle on the floor of the defendant's bar/nightclub. She argued that given the defendant's chosen mode of operation, the hazard of spilled drinks was reasonably foreseeable and, therefore, the defendant should be held liable for injuries caused by this dangerous condition regardless of whether the defendant had knowledge of the puddle's existence or the opportunity to remedy it. Offering some guidance to business owners whose liability for slip and fall accidents was unclear, the Appeals Court held that the mode of operation approach applies only to premises liability cases in which the defendant operates a self-service establishment.

Traditionally, a plaintiff in a slip and fall case must show that the defect alleged to have caused her injury was present at the time of her fall and that the defendant either knew of its presence or had a reasonable opportunity to discover and remedy the defect. The SJC modified this approach for slip and fall cases occurring in self-service grocery stores. In such cases, the plaintiff need not show that the owner knew of the hazardous condition or had a reasonable opportunity to discover and remedy it. Rather, the plaintiff need only show that the owner's mode of operation (i.e., as a self-service grocer) naturally created a risk of falling that the owner could reasonably foresee or anticipate. *See Sheehan v. Roche Bros. Supermarkets, Inc.*, 448 Mass. 780 (2007). However, the SJC did not elaborate on whether the mode of operations approach applied in other contexts, causing considerable uncertainty for business owners.

In reaching its decision, the Appeals Court noted that other jurisdictions that also apply the mode of operations approach had taken steps to limits its application. Absent any further guidance from the SJC, the Court chose to similarly limit the approach to cases in which the defendant operates a self-service business. Finding that the defendant club was not a self-service establishment as contemplated by *Sheehan*, the court held that the plaintiff must show that the defendant had actual knowledge of the puddle in which she fell or that it should have known about the puddle and failed to clean it up before it caused her accident. Under the facts before it, the plaintiff was unable to make such a showing and summary judgment for the defendant was affirmed.

The case is unpublished and, therefore, is not a binding precedent. Nonetheless, it offers some welcome clarification for business owners and may have placed the burden on the SJC to explain the full reach of *Sheehan*.

Occasional Presence Does Not Amount to "Occupancy" Under Standard Fire Insurance Policy

Interpreting a MA standard fire insurance policy, the US District Court for the District of Massachusetts found that the homeowner's occasional visits to the property for repair purposes, including infrequent overnight stays, did not sufficiently "convey the appearance of residential living" and, therefore, the policy's vacancy provision excluded coverage. *See Murphy v. National Grange Mut. Ins. Co.*, No. 12-11363-FDS (D. Mass. Oct. 16, 2014).

There, the insured sought coverage for damage to her home caused by arson on May 15, 2011. When reporting the fire, the insured admitted that the property had been vacant since January of 2011. The policy in question was a standard Massachusetts fire insurance policy, containing a standard vacancy provision. This provision provided that the insurer would not be liable for loss caused by fire occurring while the building is vacant beyond a period of 60 days. Accordingly, the insurer denied coverage.

Without the insured's knowledge, the property's mortgage holder had hired a property inspection company to conduct routine visits to the property. Inspection reports from the period of apparent vacancy indicated that the property was "occupied" and "secure" and that the utilities were on. After obtaining these reports in October of 2012, the insured sought reconsideration of her claim. When the insurer again denied coverage, the insured brought suit for breach of contract and violations of M.G.L. c. 93A.

After removing to the federal district court on the grounds of diversity jurisdiction, the insurer moved for summary judgment. The insured sought to include the inspection reports in her opposition, claiming that these reports showed that the property was "occupied" and that coverage therefore applied.[1]

In granting the insurer's motion for summary judgment, the Court found as a matter of law that "the property had been 'vacant' within the meaning of the policy for sixty consecutive days prior to the fire." In so finding, the Court noted that the standard vacancy provision exists because the risk of loss is higher when the property remains unattended and no residents are present to ward off vandals or respond to fire emergencies. This risk is particularly high when the property is unattended in the hours of darkness. The owner's occasional presence for daytime repairs and sporadic overnight stays did not "convey the appearance of residential living" sufficient to address these concerns and render the property "occupied" under the policy.

[1] The insurer moved to strike these reports. Rather than address the admissibility of the entire report, the Court assumed the truth of their factual statements, which were largely undisputed, and struck the conclusory statement that the house was "occupied."

While acknowledging the difficulty its decision could pose for property owners seeking to make improvements prior to a sale, the Court found that the policy clearly barred coverage under the facts before it. Because the 93A claim was derivative of the insured's breach of contract claim, summary judgment was granted on all claims.

RHODE ISLAND

Supreme Court Holds that a Partial Payment Offer of Judgment Does Not Include Prejudgment Interest

The Supreme Court of Rhode Island recently held that an offer of judgment, accepted only as part payment, does not include prejudgment interest unless explicitly provided for in the offer. The case is *Raiche v. Scott*, Nos. 2012-189-Apeal, 2012-190-Apeal (R.I. Oct. 31, 2014).

There, the plaintiff brought claims of breach of contract and unjust enrichment to recover the unpaid balance of an invoice for construction work completed on the defendants' home. Before the suit went to trial, the defendant presented an offer of judgment to the plaintiff pursuant to Rule 68 of the Superior Court Rules of Civil Procedure and deposited $50,000 into the Registry of Court. [2] The plaintiff accepted the offer as part payment only and proceeded with the action on the sole issue of the amount of damages.[3] The plaintiff collected this sum roughly a year later on October 30, 2009.

A bench trial followed in which the judge awarded $5,455.50 over the $50,000 already paid, plus interest and costs. The amended final judgment ordered prejudgment interest to be paid on the total award, beginning with the accrual of plaintiff's action and ending on the date of collection for the offer of judgment and on the date of judgment for the amount awarded above $50,000. On appeal, the Supreme Court considered whether a tender made on an offer of judgment, when accepted as part payment, includes prejudgment interest.

In holding that an offer of judgment does not include prejudgment interest, the Court reasoned that Rule 68's allowance for part acceptance of an offer of judgment must be read in conjunction with the entire rule. Rule 68(c) provides that a partially accepted offer is inadmissible as evidence "*except in a proceeding to determine interest or costs*." (emphasis added). Taken as a whole, the language of Rule 68 is clear and unambiguous and cannot be read to automatically include prejudgment interest in an offer of judgment.

Nonetheless, the Court did note that this construction is merely the default rule for part acceptance of an offer of judgment pursuant to Rule 68. Nothing in the opinion bars a party from explicitly stating within the offer that prejudgment interest *is* included in the offer. To be effective, however, the offer must specifically state which portion of the offer is considered compensation and which portion is considered prejudgment interest.

Finally, the Court considered when the accrual of interest on a partially accepted offer of judgment should stop – whether

[2] Rule 68 allows a defendant to make a settlement offer at least 10 days before trial that, if accepted, shall be entered as judgment by the clerk.

[3] As noted by the Court, this procedural mechanism allowing for acceptance as part payment only is "fairly unique" to Rhode Island.

at the time of deposit with the Registry of Court or upon collection by the other party. Looking to the commentary to Rule 68, which recognized that a party elects acceptance as part payment at his or her own option, the Court determined that prejudgment interest shall apply to an offer of judgment accepted as part payment from the time the claim accrues until the date the funds are deposited with the Court Registry.

TEXAS

Supreme Court Holds Order to Compel Discovery of Claim Files Other than Plaintiff's Was Abuse of Discretion

The Supreme Court of Texas recently granted an insurer's petition for writ of mandamus and ordered the trial court to withdraw its order compelling discovery of claim files of insureds other than the plaintiff. The case is *In re Lloyds Ins. Co.*, No. 13-0761 (Tex. Oct. 31, 2014).

The underlying case involved a suit by the insured alleging that the insurer had undervalued her claims for damage to her home after two separate storms swept through Cedar Hill, TX in September 2011 and June 2012. In an attempt to prove her claim, the insured sought discovery of all claim files from the past six years involving three individuals adjusters and all claim files from the past year involving the two adjusting firms that handled her claims. Additionally, she sought the personal information of the policyholders associated with each such claim.

The insurer objected to these discovery requests as "overbroad, unduly burdensome, and seeking information that was neither relevant nor calculated to lead to the discovery of admissible evidence." However, the trial court ordered the production of claims files handled by the adjusting firms associated with her claims, limiting the scope of discovery to those claims made in Cedar Hill and stemming from the two storms that damaged the insured's property. After the court of appeals denied its petition for mandamus relief, the insurer appealed to the Supreme Court of Texas.

In holding that the insured's discovery requests were overly broad, the Court noted that such a request may be overbroad – regardless of whether or not it is burdensome – so long as it is not "reasonably tailored to include only matters relevant to the case." Here, however, the insured could not show that her requests were in any way relevant. As the Court explains, the insurer's handling of the claims of unrelated third parties is in no way probative of its handling of the specific claims of the insured. Without more, the broad net she sought to cast amounted to a mere "impermissible fishing expedition."

Moreover, the insured's request was not aided by the trial court's narrowing the scope of discovery to claims brought after specific events in a specific location. While discovery requests must be limited in scope, they must also be "reasonably calculated to lead to the discovery of admissible evidence." The ability to meet one burden will not excuse the failure to meet the other.

Accordingly, the Court held that the trial court abused its discretion in compelling discovery and, therefore, granted conditional mandamus relief and ordered the trial court to vacate its discovery order.

MASSACHUSETTS

Supreme Judicial Court Holds That a Fully Reimbursed Insured May Still Pursue Claims of Bad Faith

Recently, the SJC held that a plaintiff who had been fully reimbursed by its insurer need only demonstrate "concrete monetary or property loss" in order to pursue a claim under c. 93A, § 11; the statute does not require further proof that such loss remains uncompensated. The case is *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.*, No. SJC-11477 (Mass. Oct. 15, 2014).

The action stemmed from the insurer's denial of coverage for the plaintiff's environmental dispute with the Department of Environment Protection (DEP), a matter that had by then concluded with the plaintiff incurring significant legal expenses and remediation costs.[4] After the Superior Court allowed for partial summary judgment declaring that the insurer had a duty to defend in the DEP matter, the plaintiff amended its complaint to add a claim under c. 93A, § 11 for the insurer's failure to defend. Shortly thereafter, the insurer agreed to reimburse the plaintiff for all of its expenses, plus interest.[5] In light of these reimbursements, the Superior Court granted summary judgment for the insurer as to the further contract claims, but denied the insurer's motion for summary judgment on the 93A claim. Both parties sought interlocutory appeal and the case was transferred to the SJC.

The insurer argued that where the plaintiff had been fully reimbursed for its damages, it could not meet its burden of showing a loss of money or property caused by the alleged 93A violations.[6] The plaintiff, however, argued that any reimbursement could only serve as an offset to damages awarded under 93A rather than as a total bar to recovery.

In siding with the plaintiffs, the SJC refused to read into § 11's loss element a further requirement that such losses remain uncompensated. To do so, reasoned the SJC, would undercut the broad remedial nature of c. 93A, the purpose of which is "to deter misconduct" and to "encourage vindicative lawsuits." Though the statute also encourages the settlement of claims, permitting a defendant to tender a written settlement offer in order to limit its exposure to single damages, the insurer here failed to avail itself of this option. To equate the insurer's reimbursement – made nearly six years after the claim was originally tendered and then only after its duty to defend was established in court – to the settlements envisioned by c. 93A would frustrate the statutory goal of deterring bad faith delay. Accordingly, the plaintiff could maintain its c. 93A claim so long as it established a loss of money or property resulting from the insurer's breach, regardless of its acceptance of compensatory payments.

Additionally, the insurer argued that the recovery of damages under c. 93A requires a prior judgment to establish the amount

[4] The plaintiff sought declarations that the insured had a duty to defend and to indemnify and brought breach of contract claims for the insurer's failure to do so.

[5] There were initial disputes as to the extent of plaintiff's expenses, but by the time the matter reached the SJC both parties agreed that the damages resulting from the breach of duty to defend had been fully reimbursed.

[6] Claims brought by a company under § 11 require a showing of actual damages, unlike those brought by a consumer under § 9.

of damages upon which recovery can be based. The SJC disagreed. Rather, § 11 provides that the amount of actual damages shall serve as the basis for recovery, an amount that may be multiplied for willful or knowing misconduct. Only under a particular exception, however, will the basis for recovery will be the amount of a judgment on an underlying claim.

As the SJC explained, this exception can only serve to increase a claimant's damages under c. 93A. For example, where an insurer wrongly denies coverage for injuries caused by a third party, the insured may be forced to bring suit against the insurer for coverage. Any judgment obtained by the insured will likely be the amount due under the policy. There, that judgment will serve as the basis for multiplied damages under c. 93A, though the actual damages caused by the insurer's refusal to settle will typically be loss of use damages, i.e., the interest on the amount owed under the policy and wrongfully withheld by the insurer. The result is meant to be punitive.

However, this is merely an exception to the general rule and, therefore, a prior judgment will not serve as a prerequisite to c. 93A claims. Where, as here, there can be no underlying judgment because the parties have reached a settlement that did not release the c. 93A claims, the basis for recovery will be the actual damages caused by the unfair or deceptive practices of the insurer. If the complained of practice is a breach of the insurer's duty to defend, then such damages will typically be out-of-pocket expenses plus interest.

On remand, the plaintiff will need to establish that the insurer's breach of its duty to defend constituted a c. 93A violation. Upon a showing that such a breach was willful or knowing, the actual damages resulting from this breach will serve as the basis for multiplication. Finally, should an award be granted – whether multiplied or not – the final award will be offset by the amount already paid by the insurer.

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