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IN THIS ISSUE

The Massachusetts Appeals Court has added to the body of law in the Bay State on insurers' potential exposure to extra-contractual liability. This critical analysis of the decision raises questions about the soundness of the court's approach to claims under Chapters 93A and 176D of the Massachusetts General Laws.

Duty to Defend, Duty to Indemnify…Duty to Settle? Results-Oriented Decision in Massachusetts Confuses Carriers, Sows Confusion

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There is an old maxim that bad facts make bad law. Herewith a tale as old as time: two groups of men at a bar exchange heated words. Precisely how the spat over a barstool began is hotly contested, as is culpability for the subsequent altercation on the street. The skirmish ends with one of the men on the ground. Liability, causation, and damages are all in doubt.

The normative question that the Massachusetts Appeals Court addressed in its decision in *Chiulli v. Liberty Mutual Insurance, Inc.,* 97 Mass. App. Ct. 248, No. 18-P-1288 (Apr. 2, 2020), is whether a carrier, in those circumstances, has an obligation to make a prompt, fair, and equitable offer of settlement on behalf of the bar, when it is subsequently sued by the loser of the fight. Contrary to the Supreme Judicial Court's decisional law and the findings of fact made after a trial, the intermediate appeals court answered that question in the affirmative. This results-oriented decision means that trials will become rarer, even for defensible cases.

The Facts

Some would say that Sonsie is an upscale bar and restaurant located along trendy Newbury Street in Boston's fashionable Back Bay neighborhood. It is known for having floor-to-ceiling glass doors that it opens wide on sunny days, allowing patrons to see and be seen as they enjoy their brunch. Late at night, its glass doors are closed; and the bar is usually heaving with patrons who have some means and a strong thirst.

One evening in June 2008, Robert Chiulli was at Sonsie with a group of his friends. At some point, Jeffrey Reiman sat on a barstool that had previously been occupied by someone in Chiulli's group. This prompted a fierce argument between Chiulli's group and Reiman. A bartender overheard the escalating exchange, and he summoned his manager. The manager separated Reiman from Chiulli's group, and he instructed the doorman to keep an eye on the men.[1]

Reiman moved to a new barstool and began to call his friends. Victor Torza and Garret Rease joined Reiman at Sonsie within minutes. The manager again intervened when Torza attempted to approach Chiulli's group, keeping them separated. Sometime later, Reiman approached Chiulli's group, said something, and then walked out of the restaurant, followed immediately by the manager, then Chiulli's group, and then Torza and Rease.[2]

A melee broke out on Newbury Street. The decision recites that there was considerable debate about who threw the first punch, but there was no doubt about how the fight ended: Rease knocked Chiulli unconscious. Whether from the blunt force of a punch or his fall to the ground, the decision does not say, but Chiulli suffered traumatic brain injuries that required him to re-learn basic

[1] Slip Op., *3.

[2] Slip Op., *3-*4.

daily living skills. He incurred medical bills in excess of $600,000.[3]

The Underlying Suit

Chiulli subsequently filed a negligence suit against Reiman, Torza, Rease, Sonsie, and Sonsie's corporate owner, the Lyons Group.[4] Chiulli's theory was that Sonsie was negligent in its security practices because it failed to remove Reiman and his friends from the bar, and because it failed to ensure that the sparring groups did not leave the restaurant together. Chiulli presented his claim partly through expert testimony. The bar offered no experts, but it nonetheless took the position that it had reasonably responded to the "barstool incident" – and that Chiulli bore ultimate responsibility for the fight because he threw the first punch. Defense counsel rated the probability of a defense verdict at 70-80%.[5]

After a three-week trial in the federal district court in Boston, the jury largely agreed with Chiulli. On November 19, 2012, the jury rendered a plaintiff's verdict that found Sonsie 90% at fault, Chiulli and Rease each 5% at fault, and Chiulli's damages as $4,494,665.83. Following post-verdict motions, the court entered an amended judgment on September 30, 2013, in the amount of $4,501,654.74.[6]

The Available Coverage

Sonsie had purchased a liability insurance program. The primary policy afforded coverage up to a limit of $1 million. A different carrier insured against excess exposure. As is typical with primary coverage, that insurer controlled the defense of the underlying suit until it concluded that its policy limit was exhausted, at which point it was required to tender its policy limit and control of the defense to the excess carrier.

The primary insurer did not to make any settlement offers to Chiulli during the course of the underlying case, except for one offer of $150,000 during the trial.[7]

The 93A Demands

On December 5, 2012, Chiulli sent demands to both the primary and excess insurers under Chapter 93A of the Massachusetts General Laws – the Massachusetts Consumer Protection Act.[8] The statute broadly prohibits unfair or deceptive practices in trade or commerce. *See* Mass. Gen. L. c. 93A § 2. With respect to claims under the statute by individual real persons, a provision of the law deems any violation of Chapter 176D (which prohibits unfair insurance claim practices) to be a *per se* violation of Chapter 93A. *See* Mass. Gen. L. c. 93A § 9(1). A claimant who prevails under

[3] Slip Op., *4.
[4] Because there is no need to distinguish between them, Sonsie and Lyons Group are collectively referred to as "Sonsie" in this discussion.
[5] Slip Op., *4, *7-*8.
[6] Slip Op., *5.
[7] Slip Op., *5-*6.
[8] Slip Op., *6.

Chapter 93A is entitled to recover his reasonable attorneys' fees plus damages. If the defendant's breach of Chapter 93A is found to be willful or knowing, the damages award must be doubled – and, in the discretion of the trial judge, it may be tripled. *See* Mass. Gen. L. c. 93A § 9(3).

Chiulli alleged that the carriers had breached their statutory duty to effectuate a prompt, fair, and equitable settlement of the federal court case once liability had become reasonably clear, in derogation of G.L. c. 176D § 3(9)(*f*). His letter demanded approximately $5.7 million to resolve the underlying case. In a subsequent letter, Chiulli clarified that he did not intend to release any Chapter 93A claims against the carriers.[9]

Frustrated by the lack of a response to Chiulli from the primary carrier as well as its reluctance to settle, the excess insurer sent a separate demand to the primary carrier under Chapter 93A on December 27, 2012. The primary insurer tendered its policy limit and statutory interest to the excess insurer the following day. [10]

With funds from the primary carrier in hand, the excess insurer sent Chiulli a written offer to settle the underlying case for $5.5 million on January 4, 2013. Chiulli accepted it, and he gave a release that expressly carved out any claims against the carriers under Chapter 93A.[11]

The 93A Action

Chiulli subsequently brought suit against both insurers on his Chapter 93A claims, alleging that his damages and Sonsie's liability were reasonably clear well before trial in the underlying case. The excess carrier secured summary judgment and exited the suit.[12]

The primary carrier vigorously disputed that liability was "reasonably clear" prior to the trial of the personal-injury suit. Following another full trial on the Chapter 93A claim, the judge, sitting without a jury, made detailed factual findings and concluded that Sonsie's liability to Chiulli had become reasonably clear on November 12, 2016, at the end of closing arguments in the underlying action. The trial judge determined that the defense below "never seemed to really grasp" Chiulli's argument that his injuries were caused by Sonsie's negligent security practices, regardless of who threw the first punch. After closing arguments concluded, the judge wrote that "a reasonable insurer could make an objective review of all the evidence as it actually unfolded during the course of the trial" and conclude that both liability and damages had become reasonably clear at that point in time.[13]

Chiulli urged the court to award significant damages on his Chapter 93A claim, arguing that he was in "dire need of cash" at the

[9] Slip Op., *6.
[10] Slip Op., *6.
[11] Slip Op., *6-*7.
[12] Slip Op., *7.
[13] Slip Op., *7-*8.

conclusion of the trial below and that the carrier knew that an appeal might induce him to settle for less. After hearing all the evidence, the trial judge made specific findings that Chiulli ultimately suffered no damages, because the settlement with the excess insurer far exceeded the verdict's value. The judge also specifically found that the insurer's failure to make a settlement offer was not willful or knowing. Accordingly, the trial judge awarded Chiulli the minimum statutory damages of $25, plus attorneys' fees from the date that liability became reasonably clear through the conclusion of the Chapter 93A trial.[14]

The Appeal

Both sides cross-appealed. Turning aside one of the insurer's claims of error, the Appeals Court held that the carrier could not invoke a statutory defense to the Chapter 93A action because the settlement offer made to Chiulli in January 2013 was not premised upon a global release of claims – rather, by its terms, it offered to settle just the personal-injury action.[15]

The Appeals Court turned aside the insurer's second claim of error by affirming that the standard used to determine whether liability is "reasonably clear" for purposes of G.L. c. 176D § 3(9)(*f*) is an "objective" one that "calls upon the fact finder to determine whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insurer was liable to the plaintiff." *See Demeo v. State Farm Mutual Auto Insurance Company*, 38 Mass. App. Ct. 955, 956-57 (1995).[16] The court stated that an insurer's obligation to tender a reasonable settlement offer might arise even where triable issues of fact remain.[17] The trial court's judgment that liability and damages were both reasonably clear by the time that the underlying case went to the jury was affirmed.[18]

The Appeals Court then turned to Chiulli's cross-appeal, which required it to review the

[14] Slip Op., *9.
[15] Slip Op., *10-*13.
[16] It is beyond the scope of this article to delve into the epistemological problems presented by this formulation of the standard. Observe, however, that the Appeals Court expressly recognized that "whether and when the insured's liability and damages become reasonably clear, which is based on the insurer's assessment of the facts known or available at any given time, is not susceptible of precise legal certainty." *See* Slip Op., at *15-*16. Observe, too, that the Appeals Court cited the Supreme Judicial Court's teaching that liability "is not 'reasonably clear' if there is a 'legitimate different of opinion as to the extent of the insured's liability,' or a 'good faith disagreement' over the amount of damages." *See id*., at *15, *citing Bobick v. United States Fid. & Guar. Co.*, 439 Mass. 652, 660 (2003) (some internal punctuation omitted). Finally, note that the "objective" standard is measured subjectively: "what matters in the G.L. c. 93A case is whether the insurer reasonably believed that the insured's liability was not clear, or was unreasonable in holding that belief." *See id*., *17, *citing Bolden v. O'Connor Café of Worcester, Inc.*, 50 Mass. App. Ct. 56, 67 (2000) (some internal punctuation omitted).
[17] The opinion never articulates an answer to the question of what an "objectively reasonable" settlement offer actually is (how it is to be measured, and whether the policy's limits have any bearing on the same).
[18] Slip Op., *13-*18.

trial court's findings of fact. Chiulli had argued that the trial judge's determination that the insurer's actions were neither willful nor knowing could not stand. The Appeals Court cited to its own precedent to state that it would only give deference to the subsidiary factual findings made by the trial judge, *see Hyannis Anglers Club, Inc. v. Harris Warren Commercial Kitchens, LLC*, 91 Mass. App. Ct. 555, 560-61 (2017), and it would reserve the right to reverse the ultimate findings as a matter of law. Following its recitation of the subsidiary facts found by the trial judge, the Appeals Court summarily held that those findings compelled the conclusion that the insurer had acted willfully and knowingly, as a matter of law, in derogation of G.L. c. 176D § 3(9)(*f*).[19] The case was remanded for entry of judgment consistent with the opinion, and the award of extra-contractual damages.[20]

Concluding Thoughts

Traditionally, Massachusetts has not been seen as a hot-bed of bad-faith claims against insurers. Other states generate flashy headlines – few will quickly forget the $9 million judgment against GEICO that the Florida Supreme Court handed down in 2018, for example – but not Massachusetts. *Chiulli* should give one pause, not least because the Appeals Court's decision seems to overlook the Supreme Judicial Court's repeated holdings that a carrier's obligation to make an objectively reasonable settlement offer under G.L. c. 176D § 3(9)(*f*) arises only after each of liability, causation, and damages becomes "reasonably clear." *See*, *e.g.*, *Hopkins v. Liberty Mut. Ins. Co.*, 434 Mass. 556, 566 (2001).

What particularly sows confusion, and what is more pernicious, is that the Appeals Court held that a trial court's findings with respect to an insurer's conduct can be set aside, depending upon whether one views the findings as "subsidiary" or "ultimate." Traditionally, any findings of fact are the exclusive province of the trial court. An appellate tribunal sits to correct errors of law, with the remedy for legal errors that affect the findings of fact being remand for a new trial.

Here, the Massachusetts Appeals Court announced that it would reverse "ultimate findings" (whether of fact or of law is elided in the opinion) if they were not supported by the "subsidiary" findings. Whether the Appeals Court meant to or not, the result of its decision is to cast doubt upon the integrity of the trial court's factual findings, leaving open the possibility that an appellate court will second-guess the evidence and make contrary findings of fact.

A trial under G.L. c. 93A based on an alleged violation of G.L. c. 176D § 3(9)(*f*) already amounts to an effort to second-guess claims-handling decisions. The Appeals Court's holding invites trial-court losers to shoot the moon: if the trial judge rules against them, they can hope for a second bite at the apple

[19] Slip Op., *20-*22.

[20] Slip Op., *23.

if they draw an appellate panel that is willing to re-weigh the evidence and decide the case in their favor. Faced with that prospect, it would hardly be unreasonable for carriers to become trial-shy and instead elect to settle a higher proportion of dubious or at least debatable claims, with less regard for the recommendations of defense counsel and serious consequences for the price of insurance on the market.

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