Massachusetts Lawyers Weekly, Dec. 8, 2010

Insurance Co. Sanctioned for Late Settlement Offer

BY DAVID E. FRANK

Civil litigators say a recent Appeals Court decision involving an $11 million personal injury judgment means plaintiffs are no longer be required to prove causation and damages when making claims against insurance companies for failure to effectuate prompt settlement offers.

"One of the reasons so many people are reacting to this ruling is that it really was an open question until the Appeals Court weighed in," said Anthony R. Zelle, who represented the defendant insurance company in Rhodes, et al. v. AIG Domestic Claims, Inc., et al. "The important thing for lawyers to recognize now is that a late settlement offer, even if it is deemed reasonable, is no longer going to remove the specter of punitive damages from a Chapter 93A analysis."

The court reversed Judge Ralph D. Gants, who was sitting in the Superior Court at the time, for improperly considering evidence that a personal injury plaintiff would not have accepted a late settlement offer of $3.5 million even if it had been made within the statutorily prescribed time period.

Hans R. Hailey of Boston, who argued a 2003 Supreme Judicial Court case heavily cited in Rhodes, said an insurance company's duty to make prompt and fair settlement offers does not depend on the willingness of the claimant to accept it.

"Even an outrageous demand on the part of the plaintiff does not relieve an insurer of their obligation to make a reasonable offer," he said. "It's nice to see such a clear statement from the Appeals Court on this question, but I'm really surprised to hear that so many lawyers and judges thought that type of evidence could be considered."

The 41-page decision is Lawyers Weekly No. 11-231-10.

HEAD-SCRATCHING

Although the insurance company violated Chapters 93A and 176D by failing to make an offer once liability was clear, M. Frederick Pritzker, who represented the plaintiff in Rhodes, said Gants unfairly placed the burden on his clients to prove they would have accepted the terms if made earlier.

"When the insurer makes a late offer, which is deemed to be reasonable, the Appeals Court has now ruled quite clearly that such evidence is not relevant to the question of punitive damages," said Pritzker, a lawyer at Brown Rudnick in Boston.

To show that an insurance company has acted in good faith, defendants have long been permitted to introduce such evidence, said Zelle, who practices at Zelle, McDonough & Cohen in Boston.

"One of the reasons we are scratching our heads over this case is that the rule generally is that, if the insurance company makes a reasonable offer, they should be insulated from bad-faith damages," he said. "Even though AIG made a reasonable offer, the Appeals Court said they are still going to hit them up for damages."


DAVID WHITE

David W. White Jr. of **Breakstone, White & Gluck** in Boston represented a plaintiff in a 2003 SJC case involving similar issues. He criticized the Appeals Court for rejecting the plaintiffs' argument in Rhodes that punitive damage awards are to be calculated by multiplying the underlying judgment.

Instead, Judge Elspeth B. Cypher, writing for the court, held that the amount to be doubled or trebled should be measured by applying loss-of-use principles, White said.

Using such a calculation, damages are determined by looking at the time between when the insurance company breached its duty to make an initial offer and the date a reasonable offer was finally made.

"The court chose a path that is most

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unusual and disappointing," White said. "There is no precedent for doing this."

When the Legislature amended Chapter 93A in 1990, White said, it clearly intended for the judgment to be the foundation for a damage award.

"Chapter 93A law has developed in a sort of a zigzag fashion, and it is hard for judges to figure out which way they should be looking at any given moment," he said. "What this case has done is take something that is reasonably confusing and make it even more confusing."

TOO LATE

In January 2002, plaintiff Marcia Rhodes' vehicle was hit from behind by an 18-wheel trailer truck in Medway. Her injuries left her permanently paralyzed.

Defendant AIG was the claims administrator for the truck's insurance company.

As early as April 2002, a third-party administrator characterized the claim as "catastrophic" and reported to AIG that the driver of the truck was clearly liable.

That same month, the plaintiffs filed suit against the driver, his employer and several related companies.

In September 2002 and May 2003, the third-party administrator provided the defendant with an estimate of the plaintiffs' case of between $5 million and $10 million. In August, the plaintiffs sent a written demand for $16.5 million, which went unanswered.

The plaintiffs agreed to mediate in April 2004, but AIG refused, claiming the need for more discovery. With a September 2004 trial date looming, AIG finally mediated and offered to settle for $3.5 million.

The victim's husband, Harold Rhodes, testified that he would not have accepted a settlement offer of less than $8 million at that time.

At trial, the parties stipulated to liability and proceeded only on the issue of damages. The jury returned a $9.412 million judgment. With interest and adjustments, the total came to $11.3 million.

The plaintiffs also filed suit against AIG and other defendants for failure to effectuate a prompt, fair and equitable settlement of their tort claims.

At a jury-waived trial, Gants found the plaintiffs incurred costs and suffered emotional distress. The distress came from the uncertainties of litigation as the matter dragged on past the point at which liability was clear and a settlement offer from AIG was statutorily due.

But Gants pointed to Mr. Rhodes' testimony that, by the time the $3.5 million offer was made, he would not have settled for less than $8 million. Based on that, the judge held that a timely offer would not have materially diminished the plaintiffs' harm because they would have proceeded with litigation anyway.

NO SPECULATION

In reversing Gants, Cypher said, the causal link between AIG's unfair settlement practices and the injury to the plaintiffs was sufficiently established. She ruled that AIG failed to initiate settlement talks once the merits of the claim were clear, a strategy that deprived the plaintiffs of the opportunity to engage in a timely settlement process.

"[E]vidence that they would not have settled their claims for less than $8 million at mediation, less than a month before trial, was speculative as proof of whether they would have settled … had [AIG] put forth a reasonable offer months earlier," she wrote. "Given the uncertainty of the effect that unfair settlement practices and prolonged pretrial maneuvering may have on the claimant's circumstances and outlook when a late settlement offer finally is made, we think the plaintiffs' recovery here should not turn on conjecture as to what they might have done had [AIG] not abused its position."

AIG was willing to risk a deliberate violation of the law in the hope that the plaintiffs' mounting frustrations and financial strain would work to the insurer's benefit, Cypher said, noting that the treble damages provision of Chapter 93A was designed to deter such a strategy.

Cypher concluded, however, that damages should not be measured by using the $11 million judgment obtained at trial.

"[D]amages should be calculated between the time [AIG] breached its duty to make the initial offer, and the date the reasonable offer finally was made and rejected," she said. "This is the same result to the insurer had its late but reasonable offer been accepted."

For more information about the judges mentioned in this story, visit the Judge Center at www.judgecenter.com.

CASE: Rhodes, et al. v. AIG Domestic Claims, Inc., et al., Lawyers Weekly No. 11-23110

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