MASSACHUSETTS LAWYERS WEEKLY
www.masslawyersweekly.com
February 20, 2012
THE DOLAN COMPANY

Tort judgment deemed basis for 93A award

$22M in damages imposed on insurer

By Eric T. Berkman

Multiple damages stemming from an insurer's post-judgment failure to offer timely settlement of a catastrophically injured woman's tort claim in violation of chapters 93A and 176D should be calculated based on the $11 million underlying tort judgment, the Supreme Judicial Court has ruled.

The Appeals Court had previously ruled that multiple damages in the woman's third-party 93A/176D claim should be based on loss of use of the money from the time of the underlying tort judgment to the point that the case ultimately settled.

But the SJC reversed.

"Under the plain language of the 1989 amendment [to Chapter 93A], if a defendant commits a willful or knowing [93A] violation that finds its roots in an event or a transaction that has given rise to a judgment in favor of the plaintiff, then the damages for the Ch. 93A violation are calculated by multiplying the amount of that judgment," Justice Margot G. Botsford wrote for the court.

"[The defendant] argues that multiplying the tort judgment is improper because [its] postjudgment failure to settle did not cause the underlying tort judgment," Botsford continued. "These conclusions and arguments misread both the 1989 amendment and our decision in [2001's *R.W. Granger & Sons v. J & S Insulation, Inc*]."

The 32-page decision is *Rhodes, et al. v. AIG Domestic Claims, Inc., et al.*, Lawyers Weekly No. 10-025-12. The full text of the ruling can be found at masslawyersweekly.com.

'It means what it says'

Plaintiffs' counsel Margaret M. Pinkham of Pinkham Busny in Woburn said the ruling clarifies that Chapter 93A "means what it says," while confirming that punitive damages will be measured in the manner the statute prescribes.

"It sends a message to insurers that if they're going to delay until the last possible minute, particularly in cases where liability is clear and there are catastrophic injuries, they run the risk of getting hit with enormous punitive damages," she said.

Boston attorney Kurt B. Fliegauf said the ruling could have the unintended consequence of encouraging plaintiffs to reject reasonable settlement offers.

Pinkham's co-counsel, M. Frederick Pritzker of Brown Rudnick in Boston, said the court simply reiterated what has been the law for more than two decades.

"Because of various decisions, including [the decisions below] in our case, that's been somewhat muddied, but now it should be clear," he said.

Pinkham added that, from the plaintiffs' perspective, a ruling the other way would have been "devastating."

"We viewed the trial court's decision as creating a roadmap for insurers to delay until the last possible minute and only be faced with what was a slap on the wrist with loss-of-use damages," she said. "That's why it was so important for the [plaintiff's] family to push the issue to the SJC."

Arthur F. Licata, a plaintiffs' lawyer in Boston who was not involved in the case, said the SJC in *Rhodes* "has done more to redress the economic disparity between the powerful and the weak, and the rich and the poor, than all the legislation passed in Massachusetts in the last 20 years."

The case is particularly significant for "the little guy who gets hurt once when injured, and once again when they just string it out and hope to lowball and stonewall him," Licata said.

Licata also dismissed concerns that the willingness of liability insurers to write policies in Massachusetts at reasonable premium rates could be affected by a ruling like *Rhodes*.

"That's a red herring that's always brought out when a good decision comes down," he said. "Prior to this ruling, the Massachusetts courts were looked upon as paper tigers on the issue of Chapter 93A and 176D. … All this case does is bring us back into line with what's fair and reasonable."

Speaking for himself and not his client, Anthony R. Zelle of Zelle, McDonough & Cohen in Boston, who represented the defendants, said there are "substantial constitutional implications" in the SJC's reading of 93A's multiple damages provision, which the decision "sweeps … away in a rather cursory manner."

Specifically, Zelle referred to U.S. Supreme Court caselaw stating that certain "guideposts" must be applied to punitive damages awards to ensure they satisfy due-process requirements. In *Rhodes*, the SJC suggested that such a requirement was intended to apply to punitive awards by juries and not to those calculated by judges under a statutory formula, he said.

"While Justice Botsford correctly explains that the Supreme Court's analysis of excessive punitive damages awards stems from its concern with the wide discretion left to jurors when they are permitted to decide the amount, there is nothing in any Supreme Court case that considers the constitutional limits of punitive damages that suggests that the guideposts should be different when the amount of damages are decided by a judge," Zelle said.

Kurt B. Fliegauf of Conn, Kavanaugh, Rosenthal, Peisch & Ford in Boston said the ruling could have the unintended consequence of encouraging plaintiffs to reject reasonable settlement offers.

"The way the case reads, if there's any delay in making a reasonable settlement, if the case settles pre-trial the measure of damages is loss of use of money," said Fliegauf, who represents both plaintiffs and insurers. "But if it goes to trial, the damages are multiplied based on the underlying tort judgment. So if I'm a plaintiff's lawyer with a strong case and any evidence of bad-faith settlement practices early on, I may very well be dissuaded from accepting a subsequent reasonable offer. Because now I've got the possibility of reaching a huge judgment against the insurer that multiplies damages from the original tort claim dramatically."

Justice delayed?

On Jan. 9, 2002, plaintiff Marcia Rhodes was stopped by a police officer performing a traffic detail on Route 109 in Medway. An 18-wheel tractor-tanker slammed into her car, paralyzing her instantly.

The driver was employed by Driver Logistic Services, which was assigned to drive for GAF Building Corp.

GAF carried a $2 million liability policy with Zurich American Insurance Co., and a $50 million excess policy with National Union Fire Insurance. AIG Domestic Claims, Inc., was National Union's claim administrator.

On July 12, 2002, the plaintiff, along with her husband and daughter, brought a tort action against the driver, DLS, GAF and the Penske Corp., which had leased out the truck.

The driver admitted to sufficient facts to support a guilty finding to criminal charges stemming from the accident.

Meanwhile, Zurich's adjustor reported that liability was clear and estimated that the case was worth between $5 million and $10 million.

The plaintiffs made a $15 million settlement demand in November 2002, which went unanswered. AIGDC in particular apparently refused to make a settlement offer prior to mediation.

On March 18, 2003, GAF's counsel communicated to AIGDC that its failure to tender settlement violated chapters 93A and 176D, but AIGDC took no action. At the end of March, GAF's counsel offered the plaintiffs the $2 million Zurich policy limits, which the plaintiffs rejected.

In mid-April, the plaintiffs agreed to mediation, but AIGDC initially refused to participate. Finally, three weeks before the case was scheduled to go to trial, AIGDC agreed to mediation, where it offered $3.5 million. The plaintiffs rejected the offer as well.

The case went to trial and resulted in a $9.5 million jury verdict, which came to approximately $11.3 million with interests and adjustment.

After trial, AIGDC appealed, arguing that the verdict was excessive.

On Nov. 19, 2004, the plaintiffs sent a 93A/176D demand letter to Zurich and AIGDC. Zurich paid the plaintiffs its $2 million policy limits. But AIGDC did not settle until June 2005, when the plaintiffs agreed to accept approximately $9 million.

The plaintiffs then brought 93A/176D claims in Superior Court against both insurers.

After a bench trial, then-Superior Court Judge Ralph D. Gants found that AIGDC had indeed violated Chapter 93A by not making a timely settlement offer. But he also found the $3.5 million that it ultimately made at mediation to be reasonable — albeit at the "low end" — and that the plaintiffs would have rejected anything less than $8 million. Accordingly, he found, AIGDC's pre-trial behavior did not leave them any worse off than if the offer had come sooner, so they were not entitled to multiple damages stemming from the delay.

Gants did find, however, that the plaintiffs were entitled to multiple damages stemming from AIGDC's post-trial conduct and awarded loss-of-use damages from the judgment date until the point that the matter was finally settled, and doubling the amount for misconduct.

The Appeals Court affirmed Gants' ruling on the post-trial conduct, but rejected his finding that the plaintiffs suffered no actual damages as a result of AIGDC's pre-trial behavior.

The court found that the damages as a result of the pre-trial behavior should also be multiplied based on loss of use from the date AIGDC should have made an offer until the date of its $3.5 million offer at mediation.

The SJC subsequently granted the plaintiffs' application for further review.

Underlying judgment

On appeal, the SJC rejected AIGDC's argument that multiplying the tort judgment was improper because its post-judgment failure to settle did not cause the underlying judgment.

"[W]hether the deceptive conduct caused the tort judgment is irrelevant," said Botsford, pointing out that 93A does not require a causal relationship between the unfair practice and underlying judgment itself. "[R]ather, the statutory causation requirement focuses on the relationship between the unfair practice and injury to the plaintiff."

The SJC was similarly unconvinced by AIGDC's assertion that a judgment can only arise "out of the same and underlying transaction or occurrence" as a 93A claim when the claimant is suing his or her own insurer as opposed to bringing a third-party claim as in *Rhodes*.

"[T]he 1989 amendment makes no distinction between first-party and third-party insurers for any purpose, including calculation of multiple damages," Botsford said. "Had the drafters of the 1989 amendment intended to allow multiple damages to be awarded on judgments only in cases where an insured sued his own insurer, presumably they would have stated it explicitly."

Finally, the SJC dismissed AIGDC's contention that using the underlying tort judgment as the basis for multiple damages violated its due-process rights under the Constitution.

According to AIGDC, a line of Supreme Court cases required every punitive award to pass a due-process analysis using three "guideposts": that the defendant's conduct is sufficiently reprehensible to merit the award; that the ration between compensatory damages is not excessive; and that the disparity between the punitive award and civil penalties imposed in comparable cases is not excessive.

The SJC, however, stated that that requirement likely only applied to cases in which juries are calculating and awarding punitive damages, as opposed to judges doing so under a statutory formula.

"Nonetheless, there is no need to decide whether the … guideposts govern multiple damages awards under Ch. 93A because if we were to assume that the guideposts do apply, this award would pass constitutional muster," Botsford said.

In ordering that the case be remanded to Superior Court for recalculation of damages, the SJC described the $22 million sum that would result as "enormous."

"[B]ut the language and history of the 1989 amendment leave no option but to calculate the double damages award … based on the amount of the underlying tort judgment," the court concluded, adding that the Legislature might wish to consider expanding the range of permissible punitive damages awards in unfair claim settlement practice cases brought under 93A and 176D.

MLW

Eric T. Berkman, an attorney and formerly a reporter for Massachusetts Lawyers Weekly, is a freelance writer.