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Into the Breach When the Levee Breaks

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This paper discusses and outlines: insurers' extra-contractual liability and insureds' duties of cooperation under California, Florida, Illinois, Massachusetts and New York law and jurisprudence; and enforcement actions brought by the U.S. Equal Employment Opportunity Commission based on Federal Rule 23 and *Teamsters. v. United States*, 431 U.S. 324 (1977).

Extra-Contractual Liability (Bad Faith Claims)

1. California

a. Jurisprudential Duties & Standards

- i. Duties of good faith and fair dealing implied in every contract, including insurance contracts, so that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. *Kransco v. Am. Empire*, 23 Cal. 4th 390, 400 (2000).
 - ii. The policy determines the duties and responsibilities of which the insured is entitled. *Id.*
- b. Insurers have a duty to settle third party claims within policy limits when there is a substantial likelihood of recovery in excess of those limits. *Id.* at 401.
 - c. An insurer that breaches duty of good faith and fair dealing by unreasonably refusing to accept a settlement offer within policy limits may be held liable for the full amount of the judgment against the insured in excess of its policy limits.

2. Florida

a. Statute

- i. Florida provides a statutory based cause of action, allowing a person to bring a civil action against an insurer if they are damaged by certain acts of the insurer, such as:
 1. Failing to attempt in good faith to settle claims when, under all circumstances, the insurer could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his or her interests. §624:155.
- ii. This statute, thus, imposes a duty upon the insurer to administer a policyholder's claim in good faith, including settling claims within policy limits when it had a reasonable opportunity to do so.
 1. If duty is breached,
 - a. The insured is subject to liability for breach of contract and for violating the above statute;
 - b. The policyholder may sue for damages above the policy maximum and up to the full amount of injuries.

b. Jurisprudential Duties & Standards

- i. The duty of good faith obligates the insurer to advise the insured of..
 1. settlement opportunities
 2. the probable outcome of litigation
 3. the possibility of excess judgment, and
 4. any steps the insured might take to avoid excess judgment
- ii. Insurer must investigate facts, give fair consideration to reasonable settlement offers, and settle when a reasonably prudent person, faced with the possibility of paying the total recovery, would so do. *Harvey v. Geico*, 259 So. 3d 1, 6-7 (Fla. 2018)¹
- iii. In a case where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations. *Id.*

3. Illinois

a. Statute

- i. An insured tortfeasor only has a breach of contract action against his or her insurer for bad faith in failing to settle within the policy limits
 1. The duty to settle is implied in law to protect a policy holder from liability in excess of coverage as a result of their insurer's gamble.

b. Jurisprudential Duties & Standards

- i. An insurer has a *duty to act in good faith* when responding to settlement offers. *Haddick v. Valor Ins.*, 198 Ill. 2d 409, 414 (Ill. 2001).
- ii. An insurer's *duty to settle* arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of the policy limits, and a reasonable probability of a finding against the insured. *Id.* at 417.
 1. Duty does not arise until a third party demands settlement within the policy limits. *Id.*
- iii. If it appears there is a probability of an adverse judgment at trial against the insured and the judgment is likely to exceed the policy limits, an insurer must give equal consideration to both its own interests and its insured when settling. *Stevenson v. State Farm*, 257 Ill. App. 3d 179.183 (1993).
- iv. Conduct on behalf of an insurer constituting fraud, negligence, or bad faith may render the insurer liable for its failure to settle a case. *Browning v. Heritage Inc.*, 338 N.E. 2d 912, 947 (Ill. App. Ct. 1975).

4. Massachusetts

a. Statute

- i. G.L. c. 93A declares unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. G.L. c. 93A, §2(a). The statute provides that “if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two. G.L. c. 93A, §9(3).
- ii. G.L. c. 93A, §2(a) provides that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” “A private consumer ... who has been ‘injured by another person’s use or employment of any method, act or practice declared to be unlawful by section two ... or ... whose rights are affected by another person violating the provisions of [G.L. c. 176D, §3(9),]’ may recover damages under G.L. c. 93A, §9, for injuries arising out of the unlawful conduct.” *Hopkins v. Liberty Mut. Ins. Co.*, 434 Mass. 556, 564-565 (2001) (brackets by the court). Thus, a violation of G.L. c. 176D, §3(9) is also a violation of G.L. c. 93A, §9. *Id.* at 565.²
- iii. At least thirty days prior to filing an action under G.L. c. 93A, §9, “a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed to the respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for relief, makes a written tender which is rejected by the claimant may, in any subsequent litigation, file the written tender and an affidavit concerning its rejection and thereby limit recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner.” G.L. c. 93A, §9(3). “Together, the statutes require an insurer . . . ‘promptly to put a fair and reasonable offer on the table when liability and damages become clear, either within the thirty-day period set forth in G.L. c. 93A, §9(3), or as soon thereafter as liability and damages make themselves apparent.’” *Bobick v. U.S. Fid. And Guar. Co.*, 439 Mass. 652, 659 (2003) (quoting *Hopkins*, 434 Mass. at 566).
- iv. “The statutes at issue were enacted to encourage the settlement of insurance claims ... and discourage insurers from forcing claimants into unnecessary litigation to obtain relief. This goal of facilitating settlement is equally desirable whether the plaintiff is an insured or a third-party claimant and G.L. c. 93A, §9(1), confers standing where there is injury resulting from another’s unlawful acts. Standing does not depend on a party’s status as an insured or third-party claimant.” *Clegg v. Butler*, 424 Mass. 413, 419 (1997). Pursuant to G.L. c. 93A, §9, recovery is provided for the award of actual damages and, in addition, the award of up to three but not less than

two times such amount in the event that there has been a willful or knowing violation of G.L. c. 93A and/or G.L. c. 176D. In 1989, G.L. c. 93A was amended, “in response to cases which limited those damages subject to multiplication under c. 93A to loss of use damages, measured by interest lost on the amount the insurer wrongfully failed to provide the claimant.” *Kapp v. Arbella Mut. Ins. Co.*, 426 Mass. 683, 685-686 (1998). Under the amended statute, an insurer can be held liable for a multiple of the underlying judgment for a willful or knowing violation of G.L. c. 93A or if the refusal to grant relief upon demand was made in bad faith.

- v. To be willful or knowing, a violation need not be malicious, but must constitute more than negligence. Within that range is conduct that is “intentionally gainful,” *McGonagle v. Home Depot U.S.A., Inc.*, 75 Mass.App.Ct. 593, 600 n. 9 (2009), or demonstrates a willful recklessness or conscious, knowing disregard for its likely results, see *Gore v. Arbella Mut. Ins. Co.*, 77 Mass.App.Ct. 518, 531–532 (2010). See also *Rass Corp. v. Travelers Cos.*, 90 Mass. App. Ct. 643, 657 (2016). A person “‘acts knowingly’ with respect to a result if ‘he is aware that it is practically certain that his conduct will cause such a result.’” *Computer Sys. Engr., Inc. v. Qantel Corp.*, 571 F. Supp. 1365, 1374 (D.Mass.1983). “A judge need not make an express finding that a person willfully or knowingly violated G.L. c. 93A, § 2, as long as the evidence warrants a finding of either.” *Service Publications, Inc. v. Goverman*, 396 Mass. 567, 578 n. 13 (1986).

- iv. A G.L. c. 93A claim will fail if “[t]here was no ulterior motive, no coercive or extortionate objective.” *Framingham Auto Sales, Inc. v. Workers’ Credit Union*, 41 Mass. App. Ct. 416, 418 (1996); see also *River Farm Realty Trust v. Farm Family Cas. Ins. Co.*, 360 F.Supp.3d 31 (D. Mass. 2019) (rejecting G.L. c. 93A allegations premised on sub-competence in the absence of egregious or extortionate conduct by the insurer). “A business practice will be found unfair, and therefore unlawful, under G.L. c. 93A . . . if it can be found to be immoral, unethical, oppressive, or unscrupulous; or within the bounds of some statutory, common-law or other established concept of unfairness.” *Ellis v. Safety Ins. Co.*, 41 Mass. App. Ct. 630, 640 (1996). In other words, to prove a violation of G.L. c. 93A, you must have facts to establish the insurance company acted with a pernicious purpose in the handling of a particular claim.

- vii. The multiple damage provisions of G.L. c. 93A are designed to impose a penalty, *Heller v. Silverbranch Constr. Corp.*, 376 Mass. 621, 627–628 (1978), that varies with the culpability of the defendant. *Linthicum v. Archambault*, 379 Mass. 381, 388 (1979). The purpose of multiple damages is to deter callous and intentional violations of the law and to promote pre-litigation settlements by making it unprofitable for a defendant to ignore a plaintiff’s request for relief. *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 856 (1983). Multiple damages are “the appropriate punishment” for forcing plaintiffs to litigate clearly valid claims. *Heller*,

supra at 628. In assessing the defendant’s culpability, the relevant question is whether the defendant “willfully or knowingly employed an unfair or deceptive practice,” not whether it knowingly violated G.L. c. 93A. *Id.* at 627.

b. Jurisprudential Duties & Standards

- i. G.L. c. 93A, §9 provides that the prospective defendant has 30 days after the receipt of the demand for relief to make an offer of settlement to the G. L. c. 93A claimant. It is crucial that the prospective defendant comply with this deadline because a failure to respond to a G.L. c. 93A demand letter is, in itself, a violation of G. L. c. 93A. *Brandle v. United States Fidelity & Guar. Co.*, 819 F.Supp. 101, 200 (D. Mass. 1993).
- ii. In light of the 30 day deadline to respond to a G. L. c. 93A demand letter, it is crucial to begin a prompt investigation of the claim as soon as possible. This means that, to the extent possible, witnesses to the alleged representations should be interviewed and documents should be gathered and reviewed prior to responding to the G. L. c. 93A demand letter. The information ascertained from the investigation will aid the defendant to arrive at a reasonable estimate of the potential damages award and to determine whether to respond with a reasonable settlement offer.
- iii. Pursuant to G.L. c. 93A, §9, the failure to offer a reasonable settlement offer with knowledge or reason to know that the practice complained of violated G. L. c. 93A, is a further ground, besides an initial claim based on a willful or knowing violation, for an award of multiple damages. Therefore, if the circumstances warrant, the response to a G. L. c. 93A demand letter should include a reasonable offer of settlement.
- iv. Furthermore, the extension of a reasonable offer achieves another purpose. If the prospective defendant extends a written offer of settlement, which is rejected by the claimant, and in any subsequent action the court finds that the settlement offer rendered was reasonable in relation to the injury suffered by the claimant, then:
 1. Recovery for the plaintiff shall be limited to the amount which the defendant had offered in the response to the demand letter (thereby avoiding the possibility of actual damages, or double to treble damages in the case of willful or knowing violations), G. L. c. 93A, §9(3); and
 2. Recovery for the plaintiff’s attorney’s fees and costs incurred after the rejection of such reasonable written offer of settlement shall be denied (thereby avoiding the award of such fees and costs which ordinarily goes to a prevailing plaintiff in a c. 93A case), G. L. c. 93A, §9(4).
- v. Whether a settlement offer is reasonable is to be determined by the court. The burden of proving that the settlement offer was “reasonable” is on the defendant/offeree. *Bachman v. Parkin*, 19 Mass. App. Ct. 908, 910-11 (1984). The

reasonableness of a settlement offer must be determined “in the light of the situation as a whole, one aspect of which [is] the size of the plaintiffs’ demand.” *Forcucci v. United States Fidelity and Guaranty Co.*, 11 F.3d 1, 2 (1st Cir. 1993). The defendant is not required to be absolutely right, but merely reasonable in its approach to making the settlement offer. In addition, whether liability, including causation and damages, is clear or highly likely must also be considered. *Parker v. D’Avolio*, 40 Mass. App. Ct. 394, 395-96 (1996).

- vi. Where the claimant has difficulty in establishing actual damages, a tender of nominal damages, in the minimum statutory amount under G. L. c. 93A of \$25.00, can possibly prevent an award of attorney’s fees and costs. Such a tender of nominal damages would be reasonable in relation to the claimant’s actual injury due to his inability to prove substantial damages.

As you know, a plaintiff bringing a claim under G. L. c. 93A must prove that the unfair practice caused “some kind of separate, identifiable harm arising from the violation itself.” *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 503 (2013); *see also Hershenov v. Enterprise Rent-A-Car Co. of Boston*, 445 Mass. 790, 791 (2006) (“proving a causal connection between a deceptive act and a loss to the consumer is an essential predicate for recovery under our consumer protection statute”). In other words, per se deceptive acts are not automatically injurious. *Id.* at 798. The injury requirement of G.L. c. 93A is designed “to guard against vicarious suits by self-constituted attorneys general who see a wrong but have not actually been harmed by the wrong.” *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.*, 469 Mass. 813, 823 (2014).

5. New York

a. Statute

- i. New York does not provide a statutory based cause of action for an insurer’s bad faith.
 - 1. Instead, plaintiff can bring a direct action for bad faith against an insurer when an insurer fails to settle an action within policy limits, resulting in a judgment against the insured for an amount that exceeds their policy limits.

b. Jurisprudential Duties & Standards

- i. Insurers owe insured a duty of good faith and fair dealing to act in the insured’s best interest in defending and settling their claims. *Pavia, infra*.
- ii. To establish bad faith, a plaintiff must show that the insurer’s conduct constituted a gross disregard of the insureds interests; a conscious or knowing indifference to the probability that the insured would be held personally liable for a large judgment if the settlement is not accepted. *Pavia v. State Farm*, 82 N.Y. 2d 445, 453-54.

Insured's Duty to Cooperate

1. California

a. Duty to Cooperate

- i. An insurer may assert defenses based upon a breach by the insured such as a cooperation clause, but the breach is not a valid defense unless the insurer was substantially prejudiced thereby.
- ii. No presumption of prejudice. *Campbell v. Allstate Ins.*, 60 Cal. 2d 303,305-06.

2. Florida

a. An insurer will be released from their obligation to pay if they can successfully establish that their insured breached their duty to cooperate.

- i. In a breach of cooperation clause case, the insurer must show a material failure to cooperate which substantially prejudiced the insurer in defense of the case. *Bankers Ins. v. Macias*, 475 So. 2d 1216, 1217-18 (Fla. 1985); *Ramos, infra*.
 1. Insurer must show that it exercised diligence and good faith in bringing about the cooperation of its insured and must show that it has complied in good faith with the terms of the policy. (*Ramos v. Northwestern Mut. Ins.*, 336 So. 2d 71, 75 (Fla. 1976)).

3. Illinois

- a. The insurer depends on an insured for fair disclosure of facts surrounding a claim, because the insured is the one with knowledge of such facts. [in order to protect itself from such claims]
- b. A cooperation clause obligates the insured to disclose all of the facts within his or her knowledge and otherwise to aid the insurer in its determination of coverage under the policy
 - i. To establish a breach, the insurance company must show that it exercised a reasonable degree of diligence in seeking the insured's participation and the insured failure to participate was due to a refusal to cooperate/ Whether the insured breached the cooperation clause requires the insurer to show an exercise of a reasonable degree of diligence in seeking the insured participation and that the insured's lack of participation represented a willful refusal to cooperate.
 - ii. Determination depends on the facts and circumstances of a particular case.

- c. To be relieved of its contractual obligations under a policy, an insurer must show that the insured's refusal to cooperate in its investigation caused it substantial prejudice, which will not be presumed.
 - i. To establish substantial prejudice, the insurer needs to show the insured's violation of the cooperation clause hampered its investigation or in defending the underlying action.
 - ii. No presumption of prejudice.

4. Massachusetts

- a. There is an established rule in Massachusetts that the failure of an insured to cooperate with an investigation pursued by an insurance company may result in a material breach of a condition precedent to an insurance contract precluding any recovery. *See, e.g., Mello v. Hingham Mut. Fire Ins. Co.*, 421 Mass. 333 (1995).
- b. An insured's failure or refusal to produce documents requested by the insurance company constitutes a material breach of the insurance contract. *Rymsha v. Trust Ins. Co.*, 51 Mass. App. Ct. 414, 418 (2001) (insurer made showing of prejudice where insured's refusal to furnish the reasonably requested pertinent information put the insurer in the untenable position of either paying the claim without question and without any means by which to investigate its validity or being sued for breach of contract and unfair acts and practices).
- c. An insurance company's request for an examination under oath, if reasonable under the circumstances, is "strictly construed as a condition precedent to the insurer's liability." *Mello*, 421 Mass. at 337; *Rymsha*, 51 Mass.App.Ct. at 417. "A condition precedent defines an event which must occur before ... an obligation to perform arises under [a] contract." *Hanover Ins. Co. v. Cape Cod Custom Home Theater, Inc.*, 72 Mass. App. Ct. 331, 335–36, 891 N.E.2d 703, 707 (2008).

5. New York

- a. Three Prong test to avail in defense:
 - i. An insurer asserting the defend of a failure to cooperate must demonstrate that
 1. it acted diligently in seeking to bring about the insureds cooperation,
 2. that the efforts employed by the insurer were reasonably calculated to obtains the insured's cooperation, and
 3. that the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction.
 - ii. Insured must also establish the breach to be both substantial and material. (more than a mere breach of contract) (*Mount Vernon Fire Inc. v. 170 East 106th St. Realty*, 622 N.Y.S. 2d 758, 759 (Sup. Ct. 1995)).

- b. In order to prevail in a defense of non-cooperation, a insurer is required to show, by a preponderance of the evidence, that the insured had engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents. *Avarello v. State Farm Fire and Cas.*, 616 N.Y.S. 2d 796, 797.
- c. The duty of an insured under a cooperation clause is satisfied by substantial compliance. *DePicciotto v. Wallis*, 575 N.Y.S. 2d 881, 882.

EEOC Enforcement Actions Based on Federal Rule 23 and *Teamsters*

- FRCP Rule 23
 - Requires
 - Numerosity
 - Commonality
 - Typicality, and
 - Adequacy of representation
- EEOC is not required to comply with FRCP 23/Rule 23 does not apply to EEOC litigation.
- Pattern and Practice cases are generally evaluated by the courts using a bifurcated- two phase burden shifting paradigm adopted in *Teamsters. v. United States*, 431 U.S. 324 (1977).
 - Phase I
 - Plaintiff bears burden of proving that the discrimination was the company's standard operating procedure, i.e. statistical & anecdotal evidence.
 - If met, a rebuttable presumption arises that all individual employment decisions made during the period of the pattern or practice was discriminatory.
 - Phase II
 - If burden is met, the burden shifts to the employer to defeat the plaintiffs prime facie showing by demonstrating that the plaintiffs proof is either inaccurate or insignificant i.e. statistical evidence was flawed or provide a nondiscriminatory explanation.
 - Because of presumption, the burden rests on the employer in PII to demonstrate that the employment decision for each individual employee was not the product of discrimination, but was taken for lawful reasons.
- *Teamsters* Significance/Impact
 - The Supreme Court decision in *Teamsters* strengthened the ability of plaintiffs to challenge systematic bias in the workplace.

- The Court’s decision endorsed a bifurcated approach to pattern and practice lawsuits, dividing them into two distinct phases: liability and remedial.
 - Liability Phase: Plaintiffs can use statistical and anecdotal evidence to establish a presumption of discrimination, shifting the burden to the employer to rebut the claim.
 - Remedial Phase: Addresses individual relief
- This approach makes it easier for plaintiffs to challenge widespread bias via presumptions and statistical evidence in place of intent

¹ Insurer aware that motor vehicle accident exposed insured to liability that could have exceeded the \$100,000 policy limits. *Boston Old Colony v. Gutierrez*, 386 So. 2d 783 (Fla. 1980) has same premises and standards.

² G.L. c. 93A, §9(1) expressly provides that “[a]ny person ... whose rights are affected by another person violating the provisions of [G.L. c. 176D, §3(9)] may bring an action....” G.L. c. 176D, §3(9)(f) provides that an insurer commits an unfair settlement practice by “[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.”