

INSURANCE RECOVERY NEWS

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BAD FAITH RULING AGAINST THE TRAVELERS AFFIRMED IN MASSACHUSETTS

by *Melissa A. Federico*

Recently the Massachusetts Appeals Court upheld a ruling that The Travelers Companies Inc. violated the Massachusetts Consumer Protection Act, M.G.L. c. 93A, as well as the Massachusetts unfair claims settlement practices statute, M.G.L. c. 176D, Section 3 (9) when it failed to contribute to the settlement of a trade secrets and defamation suit against its insured and failed to pay its insured's reasonable attorney's fees.

The underlying action in *Rass Corp. v. The Travelers Companies, Inc.*, No. 15-P-358, 2016 WL 6636281 (Mass. App. Ct. Nov. 10, 2016) arose out of Rass's decision to cut the underlying plaintiff out of its food marketing and distribution business. The underlying plaintiff brought suit against Rass in New Jersey, alleging that Rass's principal had committed trade libel, defamation, and misappropriation of trade secrets. Rass responded to the complaint by seeking advice from his own local Massachusetts attorney and by hiring a New Jersey attorney to defend the suit at a rate of \$275 per hour. Three months after the complaint was filed, Rass notified Travelers of the lawsuit. Travelers agreed to defend the case under a reservation of rights and subject to Traveler's unilateral decision to decrease defense counsel's hourly rate to \$200 per hour.

Rass's New Jersey attorney provided regular updates to Travelers and, as the case neared trial, recommended a settlement range of \$100,000 to \$150,000. On the trial date, the underlying plaintiff dropped her demand down from \$675,000 to \$175,000. Travelers advised Rass's attorney that it would contribute \$10,000 toward settlement on the condition that Rass waive its right to dispute its New Jersey attorney's reasonable hourly rate. When that offer was rejected, Travelers made a second offer of \$20,000 on the condition that Rass waive its right to seek indemnification under the policy. Rass likewise rejected the second offer and settled the case for \$175,000 without any contribution from Travelers.

Thereafter, Rass commenced suit in Massachusetts against Travelers, seeking indemnity for the settlement and the reasonable attorney's fees left unpaid by Travelers, and alleging violations of M.G.L. c. 93A. During the bench trial, Rass's expert witness, a New Jersey attorney specializing in intellectual property, testified on the reasonableness of the settlement and provided his opinion on the viability of the underlying plaintiff's claims under New Jersey law. The judge concluded that the settlement in large part reflected Rass's exposure to the underlying plaintiff's claims and that those claims were covered. He accordingly found that Travelers had breached its contractual duties by failing to contribute

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\$140,000 to the \$175,000 settlement. As to the attorney's fees issue, the judge found that there was little dispute that the hourly rate of \$275 was reasonable and awarded Rass damages for the difference not originally paid by Travelers. As to Rass's bad faith claim, the court found that Travelers' failure to contribute to the settlement and pay reasonable attorney's fees constituted a violation of M.G.L. c. 93A.

Travelers' challenge to the trial court's bad faith findings was rejected by the Appeals Court. The Appeals Court first observed that the trial court found that Travelers' acknowledged that it would be required to indemnify Rass if the underlying plaintiff prevailed on its claims; that Travelers was aware, or should have been aware based upon its duty to investigate, of the strength of the claims; and that Rass's likely exposure to a judgment in the six figures but Travelers offered a settlement contribution far below Rass's likely exposure. Second, by conditioning an inadequate contribution to the settlement on a waiver of Rass's right to seek attorney's fees or indemnification, the Appeals Court concluded that Travelers failed to effectuate a fair and equitable settlement of claims in which liability had become reasonably clear, in violation of M.G.L. c. 176D Section 3 (9)(d) and (f). Third, the Appeals Court held that by surrendering control of the defense to the insured under a reservation of rights, yet at the same time refusing to pay the hourly rate, Travelers unfairly compelled Rass to seek the unpaid fees through litigation, in violation of M.G.L. c. 176D Section 3 (9)(g). The Appeals Court concluded that those findings were well supported by the record and demonstrate a pattern of unfair conduct on the part of Travelers in violation of both M.G.L. c. 176D and 93A.

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