

BAD FAITH BLOG

# Excess Settlement Did Not Expose Massachusetts Excess Carrier to Contractual or EC Liability

AUTHOR: SANDBERG PHOENIX

Salvati's husband died as a result of a work injury. Ms. Salvati sued several parties she believed responsible for her husband's death. The parties in the underlying action and their primary carrier agreed at mediation to a \$6,000,000 settlement. The primary carrier tendered its \$1,000,000 in coverage, but the excess carrier (American Insurance Company (AIC) refused to pay. The case against AIC asserted breach of contract, declaratory judgment, Massachusetts Consumer Protection violation, unfair and deceptive acts in insurance, and professional negligence for failure to settle the claims. The district court dismissed the claims finding the underlying action "was dismissed with prejudice and no judgment entered against the underlying defendants, AIC's insured." In addition, contractual liability under the excess policy was a necessary predicate to the consumer protection and professional negligence claims. The count for failure to settle an insurance claim for which liability had become reasonably clear was dismissed because there is no "private cause of action and is enforceable only by the commissioner of insurance." The First Circuit affirmed the dismissals with prejudice but, for the most part, on different grounds.

*Salvati v. American Insurance Company*

The District Court concluded a judgment against the underlying defendants in excess of the primary policy was required to trigger coverage under the excess policy. The First Circuit disagreed. The Court found that the duty to indemnify under the excess policy could be triggered by a settlement in excess of the primary policy that was not reduced to a judgment. Even so, the First Circuit affirmed the dismissal of the breach of contract count because the defendants in the underlying case never incurred any legal obligation to pay Salvati. Rather, the terms of the settlement agreement completely foreclosed their liability exposure to Salvati while, at the same time, assigning to Salvati their rights to pursue AIC. Salvati argued that AIC's duty to indemnify arose because the "entire settlement was made in compensation for the acts of the underlying defendants 'and that those acts were covered by AIC's excess policy.'"

The First Circuit noted, however, that the settlement agreement did not make the underlying defendants “legally obligated” to pay Salvati the \$5,000,000 she sought from AIC. For that reason, AIC’s duty to indemnify was never triggered. Accordingly, AIC’s refusal to indemnify was not a breach of contract. The First Circuit described different ways the settlement agreement could have been structured which might have triggered the duty to indemnify, but it was unwilling to either “rewrite the settlement agreement so that it triggers the excess policy” or “rewrite the language of the excess policy to cover the settlement agreement.”

Massachusetts General Laws Chapter 176D prohibits unfair and deceptive insurance practices. However, the statute “provides no private cause of action and is enforceable only by the commissioner of insurance.” For that reason, the Court affirmed the District Court’s dismissal of that count. The Court also agreed that the District Court had properly dismissed the declaratory judgment claim, the professional negligence claims, and the Massachusetts General Laws Chapter 93A consumer protection claim for unfair and deceptive insurance practices, because “AIC’s obligation to pay under the excess policy was a necessary pre-condition” for each of those claims.

The First Circuit’s ruling in *Salvati re-enforces Massachusetts’* precedent that there is no private cause of action under Massachusetts General Laws Chapter 176D. In addition, it confirmed that Massachusetts General Laws Chapter 93A claims for consumer protection violations cannot proceed against insurance carriers unless there has been a breach of the insurance company’s obligation to pay under the policy. Accordingly, in Massachusetts, like many other states, a duty to indemnify under the policy of insurance is almost always a necessary predicate to statutory extra-contractual liability exposure.