

Massachusetts Supreme Judicial Court Rules That Consent-To-Settle Clause Does Not Violate Insurer's Statutory Good Faith Settlement Obligations

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The Supreme Judicial Court of Massachusetts ruled that inclusion of a consent-to-settle clause in a professional liability policy does not violate state statutory law requiring insurers to engage in good faith settlement negotiations. *Rawan v. Cont'l Cas. Co.*, 136 N.E.3d 327 (Mass. 2019).

Continental issued a professional liability policy to Lala, a structural engineer. The policy included a consent-to-settle clause, which provided that Continental would not settle any claim without Lala's consent. The policy did not contain a "hammer clause" stating that Continental's liability would be limited if Lala refused to settle. After Lala was sued by homeowners, Continental agreed to defend, conducted an investigation, and encouraged Lala to settle. Lala refused, and the case went to trial, resulting in a judgment in the homeowners' favor. Continental paid the homeowners the remaining policy limits after payment of defense costs, and Lala paid the balance.

The homeowners sued Continental, alleging that it had violated statutory law by failing to effectuate a prompt and equitable settlement of their claims. The court addressed whether a consent-to-settle clause in a professional liability policy inherently conflicts with an insurer's statutory obligation to effectuate a prompt settlement once liability has been clearly established. The court held that such clauses do not violate statutory law. In reaching this conclusion, the court acknowledged potential tension between a consent-to-settle provision and insurers' statutory settlement obligation, but found no legislative intent to prohibit such clauses. Additionally, the court explained that it would be inappropriate to impute Lala's refusal to settle to Continental for purposes of finding a statutory violation given that Continental's ability to settle was contingent upon Lala's consent. The court therefore held that an insurer's statutory duty to effectuate a prompt, fair settlement does not require the insurer to violate a consent-to-settle clause, even where liability has been clearly established.

However, the court cautioned that an insurer who honors a consent-to-settle clause is not necessarily exonerated from statutory settlement duties. Rather, the determination of whether an insurer has complied with its dual obligations is fact specific. The court concluded that Continental satisfied its statutory obligations by conducting a thorough investigation and value assessment of the claim against Lala and by engaging in good faith efforts to convince Lala to settle.

Addressing a separate issue, the court held that although certain pre-verdict conduct on the part of the insurer was potentially "problematic," it did not harm the homeowners. More specifically, the court found that Continental's decision not to share an engineering report with the

homeowners and a misstatement regarding policy limits (whether intentional or accidental) did not result in any harm to the homeowners; rather, Lala’s refusal to settle was the proximate cause of plaintiffs’ harm.

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