SJC-12691

DOUGLAS M. RAWAN & another[1] vs. CONTINENTAL CASUALTY COMPANY.

Worcester. September 6, 2019. - December 16, 2019.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Insurance, Consent to settlement, Unfair act or practice. Consumer Protection Act, Unfair act or practice, Offer of settlement.

Civil action commenced in the Superior Court Department on August 16, 2011.

The case was heard by J. Gavin Reardon, Jr., J., on motions for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Daniel J. Lyne (Andrea L. MacIver also present) for the plaintiffs.

Regina E. Roman (Jessica H. Park & John G. O'Neill also present) for the defendant.

The following submitted briefs for amici curiae:

David J. Hatem, Patricia B. Gary, Paul T. Muniz, Jon C. Cowen, & Katherine L. Connolly for American Council of Engineering Companies of Massachusetts & another.

John J. Barter for Professional Liability Foundation, Ltd.

[1] Kristen A. Rawan.

Allen N. David, Maureen Mulligan, & Steven E. DiCairano for Boston Bar Association.

Steven L. Schreckinger & Harvey Nosowitz for American Property and Casualty Insurance Association & others.

Kristen M. Whittle, Alexandra L. Rotondo, & Derek M. Gillis for Massachusetts Defense Lawyers Association.

KAFKER, J. The defendant, Continental Casualty Company (Continental), issued a professional liability policy to its insured, Kanayo Lala, an engineer, that contained a consent-to-settle clause. After the plaintiff homeowners, Douglas M. Rawan and Kristen A. Rawan, sued Lala for engineering design errors, he refused to consent to settle as recommended by the insurer. Eventually, the homeowners commenced an action under G. L. c. 93A against Continental for its failure to effectuate a prompt, fair, and equitable settlement once liability had become reasonably clear, as required by G. L. c. 176D, § 3 (9) (f). The motion judge allowed summary judgment for Continental on all counts, finding that the consent-to-settle clause in Lala's policy limited Continental's ability to engage in further settlement practices with the plaintiffs once Lala refused to give Continental consent to settle the claims against him.

The dispositive question at issue in this appeal is whether consent-to-settle clauses in professional liability policies violate G. L. c. 176D, § 3 (9) (f). We conclude that they do not as a matter of law, but we hold that an insurer still owes residual duties to a third-party claimant under G. L. c. 176D,

even when an insured refuses to settle. In this case, Continental made good faith efforts to investigate the claim and encourage its insured to settle. Furthermore, given the insured's obstinacy, the particular shortcomings of Continental identified by the plaintiffs did not proximately cause harm to the plaintiffs. For these reasons, we affirm the decision of the Superior Court allowing Continental's motion for summary judgment.

1. Background. The following facts from the record are summarized in the light most favorable to the plaintiffs, the unsuccessful opposing party on the parties' cross-motions for summary judgment. See Dzung Duy Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436, 448 (2018). In 2005, the plaintiffs hired Lala, a registered professional engineer, to design structural members for their new home. Lala signed and stamped a construction control agreement with the town of Westborough (town). Lala significantly underestimated the building loads and stresses in his calculations for the design. He filed eleven construction control reports with the town's building commissioner over the course of the project, which falsely certified that the project complied with the State building code. After the construction was completed, its beams and joists began to crack. When the design errors became apparent, Douglas Rawan raised the issues directly with Lala in an

electronic mail (e-mail) message dated December 3, 2010. That message confirmed a prior conversation the plaintiffs had had with Lala in which he admitted his miscalculations in designing the home.

In August 2011, the plaintiffs commenced an action against Lala in Superior Court for professional negligence, negligent supervision, breach of contract, breach of the covenant of good faith and fair dealing, breach of the implied warranty of fitness, and violations of G. L. c. 93A. The plaintiffs' claims against Lala relied on the professional opinion of Neal Mitchell, a structural engineer they hired, who reviewed Lala's work. At the time of the underlying acts of negligence and at the time of the lawsuit, Continental insured Lala under a professional liability policy (policy).

a. The policy. The policy provided that Continental would "not settle any claim without the informed consent" of Lala. The consent-to-settle clause in Lala's policy did not contain a so-called "hammer clause" found in other insurance policies. A "hammer clause" generally requires an insurer to obtain the insured's approval before settling a claim for a certain amount -- however, a hammer clause "allows the insurer to limit its liability to that amount if the insured rejects the settlement." Mutual Ins. Co. v. Murphy, 630 F. Supp. 2d 158, 166 n.2 (D.

Mass. 2009).[2] This clause puts pressure on the insured's right to refuse consent to settle and thereby increases an insurer's ability to effectuate a settlement. See Freedman vs. United Nat'l Ins. Co., U.S. Dist. Ct., No. CV09-5959 AHM (CTx) (C.D. Cal. Mar. 1, 2010) (under terms of plaintiff's policy, insurer was able to invoke "hammer clause" if policyholder unreasonably refused to consent, thus allowing insurer to limit its liability under particular circumstances); J. Kesselman, A. Fox, & R. Sattler, Professional Liability Insurance Issues, in Massachusetts Liability Insurance Manual § 5.6.3 (Mass. Cont. Legal Educ. 3d ed. 2017) (Massachusetts Liability Insurance Manual) (defining "hammer clause" as "common provision in professional liability insurance policies [that] exposes the insured to liability for eventual judgments that exceed a reasonable settlement offer," somewhat tempering insured's right to consent to settlement).

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[2] An example of a typical "hammer clause" is as follows:

> "The insurer shall not settle any claim without the consent of the insured. If, however, the insured shall refuse to consent to any settlement recommended by the insurer and shall elect to contest the claim or continue any legal proceedings in connection with such claim, then the insurer's liability for the claim shall not exceed the amount for which the claim could have been settled plus claims expenses incurred up to the date of such refusal."

J. Kesselman, A. Fox, & R. Sattler, Professional Liability Insurance Issues, in Massachusetts Liability Insurance Manual § 5.6.3 (Mass. Cont. Legal Educ. 3d ed. 2017).

b. Factual background of the action against Continental. Lala contacted Jack Donovan, a claims representative for Continental, in late November 2011 for assistance in resolving the plaintiffs' lawsuit against him. Donovan opened the matter as a "pre-claim" assistance file in January 2012, as Lala did not yet wish to invoke his coverage and elected to defend himself pro se. Continental retained a law firm to represent Lala in January 2012, and attorneys Thomas K. McCraw and Jeff Alitz of that firm informally advised Lala until officially appearing on his behalf after Lala invoked his coverage under the policy in August 2012.

Lala's policy stated that Continental had "the right and duty to defend any claim against [Lala] seeking amounts that are payable under the terms of this Policy, even if any of the allegations of the claim are groundless, false, or fraudulent. We will designate or, at our option, approve counsel to defend the claim. We are not obligated to defend any claim or pay any amounts after the applicable Limit of Liability has been exhausted." Continental exercised its duty to defend here when the attorneys appointed by Continental filed appearances on Lala's behalf in September 2012.

Mitchell, the plaintiffs' consulting engineer, met with Donovan in April 2012 to discuss and review Lala's work. Mitchell concluded that Lala had made serious computational

errors based on erroneous engineering assumptions. Mitchell questioned "all of the loading that was used in Mr. Lala's initial computations," and stated that Lala's "revised computations illustrate a complete lack of understanding of structural design."

In May 2012, Donovan suggested engaging a third-party engineer to review Lala's engineering work and Mitchell's assessment with the hope of "reach[ing] an accord." Donovan also suggested selecting a third-party mediator if the parties could not agree on the extent of Lala's liability after meeting with the third-party engineer. More specifically, on June 1, 2012, Donovan wrote:

> "I will reach out to [Mitchell] . . . to set up a meeting in which I will also invite a third engineer so we may have a frank and exhaustive discussion of the issues. . . . I think [at] the same time we may think about a mediation in an effort to get this matter into a forum where each side can express its side of the issues."

Counsel for the plaintiffs agreed to have Thomas Heger act as the third-party engineering expert and to have Heger meet with Lala and Mitchell. Donovan also indicated he was reaching out to separate mediators at the same time that he was arranging for the third-party engineer.

In June 2012, Donovan wrote to Lala and Alitz, stating: "I think we could agree that the case may be six figures," and suggested pursuing mediation. Alitz responded, telling Donovan

and Lala that "[t]here is [zero] chance at settling this [case] for under $100,000."

On August 4, 2012, Mitchell wrote an e-mail message to Donovan summarizing his review of Lala's engineering work. In that message, Mitchell concluded that "this was the worst example of improper engineering that I have seen in my 45 years of professional practice." Mitchell identified multiple structural design errors, and concluded that the home lacked the proper professional structural engineering required by the State building code and the town.

In September 2012, the plaintiffs' counsel reached out to Heger to ask whether he had come to any conclusions. Heger responded that he was currently putting together a summary of his findings, but "need[ed] to defer to Mr. Donovan on whether this information can be shared with the various parties." In summarizing his findings, Heger agreed with Mitchell's conclusions and concerns about the structural adequacy of the plaintiffs' house: "Bottom line; I found the same serious design errors as Neal Mitchell and some additional ones as well as overstresses in the repaired beams that Neal did not get involved with." Heger independently reviewed six of the nineteen structural issues that Mitchell identified, and found that, of those six issues, five failed to meet the minimum strength and deflection requirements of the State building code.

Heger submitted his review to Donovan on September 6, 2012. At that time, Continental refused to provide a copy of the Heger report to the plaintiffs or their counsel.

On September 10, 2012, the plaintiffs served Heger with a subpoena, and served a notice of deposition to opposing counsel. On September 17, 2012, counsel for Lala claimed Heger was a "mediator," and that Heger would therefore not appear in response to the subpoena. The plaintiffs filed a motion to compel the deposition of Heger and production of his report, which the court granted in November 2012. On October 1, 2012, the plaintiffs wrote a demand letter to Continental pursuant to G. L. c. 93A, alleging that Continental violated G. L. c. 176D, § 3 (9) (f), when it failed to effectuate a prompt, fair, and equitable settlement of the plaintiffs' claim against Lala despite his clear liability. At the same time, the plaintiffs wrote a letter to counsel for Lala demanding damages of $272,890. Continental responded to the plaintiffs' demand on October 9, 2012, proposing a mediation in late October or early November. The plaintiffs then moved to amend their complaint, adding Continental as a defendant and alleging that it engaged in bad faith settlement practices, thus violating G. L. cc. 93A and 176D. The court allowed the plaintiffs' motion to amend, but stayed further proceedings against Continental until the case against Lala had been concluded.

In November 2012, Lala consented to a settlement offer to the plaintiffs of $100,000 to be paid from the policy. Thomas McCraw, Lala's attorney, extended the offer to the plaintiffs' counsel on November 29, 2012.

In January 2013, McCraw wrote to Continental, representing that the plaintiffs no longer wished to settle and intended to take the matter to trial. Lala thereupon withdrew his authorization for any settlement offers to be made to the plaintiffs. Months later, in May 2013, the plaintiffs made a formal demand of $1,324,390, identifying multiple instances of worsening conditions in their home. Lala represented to his attorney that he had no interest in making a settlement offer in response to that demand.

In May 2013, the plaintiffs moved to compel production of Lala's insurance policies issued by Continental from 2005 to 2013, which the trial court granted on June 10, 2013. Until the motion was granted, Continental had represented the applicable claims coverage for Lala as $250,000 per claim and $500,000 per policy year, which was the limit of Lala's 2012 policy with Continental. It was not until after the court granted the motion to compel that Continental represented the appropriate policy period for the matter, which was January 1, 2010, to January 1, 2011, with coverage of $500,000 per claim and $1 million per policy year.

In June 2013, Continental's claim consultant, Thomas Hedstrom, contacted Lala to clarify Lala's coverage under the policy. Hedstrom wrote that Continental would be providing coverage for the plaintiffs' claims against Lala, including coverage for the claim and claim expenses, and that Lala's policy provided a limit on liability of $500,000 for each claim and $1 million for all claims made during the applicable policy year. Hedstrom advised Lala that the limit applied to both the claim and claim expenses, such as attorney's fees, and that in the event of an excess judgment, Lala would be responsible for any excess of the remaining policy limits. Lala still refused to consent to any settlement offers in response to the plaintiffs' demand.

In June 2013, counsel for Lala also retained Lisa A. Davey to peer review only select structural elements of the plaintiffs' home. Davey's review was based on a limited review of particular structural issues, and the scope of her review was not the same as Mitchell's or Heger's. Further, the damages Davey assessed in her August 2013 report -- between $100,000 and $120,000 -- did not take into account the impact that the required work would have on the house as a whole. In her deposition, Davey admitted that her repair estimate was based in part on the analysis of an estimator who never inspected the property, but with whom she spoke on the telephone.

Nevertheless, Davey's narrow review concluded that certain members were overstressed and did not comply with the State building code.

In November 2013, Hedstrom wrote to Lala to confirm whether it was still his position to refuse settlement. Hedstrom suggested extending a $100,000 settlement offer to the plaintiffs based on the damages estimated by Davey. Lala agreed, and McCraw extended the offer in December 2013. The plaintiffs rejected this offer, and did not reduce their demand of approximately $1.3 million from May 2013.

In March 2014, McCraw sent an e-mail message to Lala in which he addressed the real possibility of a verdict at trial in excess of the remaining limits of the policy. In the message to Lala, McCraw wrote:

> "If the Rawans succeed in convincing the jury of their claims, and the jury awards them all the money they seek, you could face a verdict of $1.324 million, tripled under Chapter 93A to nearly $4 million, and face paying the Rawans' attorneys' fees, likely into the hundreds of thousands of dollars. Any judgment will also carry a statutory interest rate of 12% from the date of filing suit in September 2011. Nearly three years later in 2014, that will add approximately 36% in interest on top of the judgment and attorneys' fees. Given these factors, any significant judgment against you will dwarf your insurance limits, leaving your personal assets exposed for the Rawans to pursue to satisfy the excess judgment. . . . With the stakes as high as they are given the alleged damages, the 93A issue, and the relatively low insurance available to cover a judgment against you, it would make sense to explore settlement in order to avoid the potential exposure of your personal assets."

McCraw thus urged Lala to consider making an offer to the plaintiffs to eliminate the possibility of an excess verdict. In response, Lala stated the issue should be left to a jury, and that he would not initiate any further settlement offers.

In July 2014, McCraw reiterated the real possibility of an excess verdict against Lala. Lala, however, was not willing to initiate a settlement offer, despite being advised of the risk. McCraw again recommended re-engaging in settlement discussions before trial in September 2014. Jeffrey Alitz, also counsel for Lala, "recommend[ed] in the strongest terms" that Lala authorize his attorneys to contact the plaintiffs' counsel to determine whether a settlement could be reached within the remaining limits of the policy. Lala declined to authorize his attorneys to do so. However, on the eve of trial, Lala instructed his attorneys to make an offer to the plaintiffs of $35,000. When the plaintiffs rejected the offer and countered with a demand for $900,000, Lala instructed his attorneys to proceed with the trial and not to pursue settlement negotiations any further.

The case was tried in September 2014. The jury found that Lala was negligent in his design of the home and awarded the plaintiffs $400,000 in damages. In an advisory verdict, the jury also awarded the plaintiffs $20,000 in damages for violations of G. L. c. 93A. After reviewing the jury's verdict, the trial judge ruled that Lala's violations of G. L. c. 93A --

misrepresentations to the town that the home construction was in compliance with the building codes and misrepresentations to the plaintiffs regarding Lala's insurance coverage -- were either knowing or reckless. The court thus doubled the jury's base award of c. 93A damages to $40,000.

After trial, Mitchell continued to inform the plaintiffs' counsel of the ongoing deterioration of the plaintiffs' home in April 2015, stating that "[s]tructural movement and load transfer from overloaded members is dramatically increasing the damage to this residence." Mitchell estimated that the initial damages he calculated in 2012 increased by more than fifty percent as a result of repairs not being made.

In June 2015, Continental tendered a check in the amount of $141,435.98 to the plaintiffs, which Continental represented was the remaining amount on Lala's policy after deducting the legal fees incurred in defending Lala. Thereafter, Lala paid the plaintiffs in full, thus satisfying the judgment against him as well as the award of attorney's fees.

Once the suit against Lala had been tried, the plaintiffs amended their complaint against Continental, alleging violations of G. L. cc. 93A and 176D. As in their earlier complaint, the plaintiffs alleged that Continental violated its duty under G. L. c. 176D, § 3 (9) (f), to effectuate a prompt, fair, and equitable settlement of their claim against Lala. The

plaintiffs similarly claimed that Continental violated its duty to conduct a reasonable investigation pursuant to G. L. c. 176D, § 3 (9) (d). The plaintiffs also made additional claims under G. L. cc. 93A and 176D against Continental for its "pre-verdict litigation conduct" in withholding the Heger report and misrepresenting Lala's policy limits.

The plaintiffs moved for summary judgment on their claim that Continental failed to effectuate a settlement pursuant to G. L. c. 176D, § 3 (9) (f), and Continental cross-moved for summary judgment on all counts. A Superior Court judge granted Continental's motion for summary judgment, and the plaintiffs appealed. We transferred the plaintiffs' appeal to this court on our own motion.

2. Discussion. a. Standard of review. "Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law" (quotation omitted). Surabian Realty Co. v. NGM Ins. Co., 462 Mass. 715, 718 (2012). The interpretation of an insurance policy is a question of law subject to de novo review. Id. In the instant case, the question whether consent-to-settle clauses violate G. L. c. 176D as a matter of law does not require the resolution of any disputed facts. In contrast, the question whether the particular acts of the insurer -- other

than entering into an insurance contract with a consent-to-settle clause -- violated G. L. c. 176D requires the application of law to the facts. We conclude, however, that there is no genuine issue of material fact in the instant case because the insurer's complained-of conduct did not cause the plaintiffs' injury. The injury here was undisputedly caused by the obstinacy of the insured, not the particular acts or omissions of the insurer that the plaintiffs have identified.

b. Relevant statutory provisions. General Laws c. 176D, § 3 (9), regulates the insurance business and identifies "unfair claim settlement practices." The failure to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear" is an unfair claim settlement practice. G. L. c. 176D, § 3 (9) (f). Similarly, an insurer's refusal to pay claims "without conducting a reasonable investigation based on all available information" constitutes an unfair claim settlement practice. G. L. c. 176D, § 3 (9) (d). These provisions "were enacted to encourage settlement of insurance claims . . . and discourage insurers from forcing claimants into unnecessary litigation to obtain relief." Morrison v. Toys "R" Us, Inc., Mass., 441 Mass. 451, 454 (2004), quoting Hopkins v. Liberty Mut. Ins. Co., 434 Mass 556, 567-568 (2001). A violation of G. L. c. 176D amounts to an unfair or deceptive act or practice for purposes of claims made under

G. L. c. 93A. Morrison, supra. See Hopkins, supra at 562 ("G. L. c. 176D . . . , which is consumer oriented, was designed to remedy a host of possible violations in the insurance industry and to subject insurers committing violations to the remedies available to an injured party under G. L. c. 93A").

c. Legality of consent-to-settle clauses. The issue presented is whether consent-to-settle clauses in professional liability policies violate an insurer's obligations under G. L. cc. 93A and 176D because the insurer has entered into a contract with its insured that provides the insured with a right to consent to, or reject, any settlement offer. More precisely, the issue is whether such a contract conflicts with an insurer's statutory obligation to effectuate a prompt settlement under G. L. c. 176D, § 3 (9) (f), once liability has been clearly established.

For the reasons explained in detail infra, we discern no legislative intent to preclude consent-to-settle clauses in professional liability policies. This is an area of insurance that is voluntary, not mandatory, and thus subject to freedom of contract principles absent legislative direction to the contrary. Consent-to-settle clauses in professional liability policies predate the passage of G. L. cc.93A and 176D, § 3 (9), and more particularly the 1979 amendment to G. L. c. 93A that allowed third parties adversely affected by insurers' failures

to comply with G. L. c. 176D to bring suit against those insurers; yet, there has been no legislative action to prohibit consent-to-settle clauses. Consent-to-settle clauses also serve valuable purposes in the professional liability context, including the important protection of a professional's reputation and good will. Moreover, consent-to-settle clauses encourage professionals to purchase this voluntary line of insurance, thereby providing more secure funding for the payment of third-party claims. In these circumstances, we will not infer legislative intent to prohibit consent-to-settle policies because there may exist tension between consent-to-settle clauses and an insurer's obligation pursuant to § 3 (9) (f) to effectuate a reasonable settlement once liability has been clearly established.

i. Voluntariness of professional liability insurance. Professional liability insurance is not one of the lines of insurance products mandated by law or with legislatively dictated and defined provisions. Contrast G. L. c. 90, § 1A (requiring motor vehicle liability insurance); G. L. c. 90, § 34M (requiring personal injury protection benefits in motor vehicle liability policies); 211 Code Mass. Regs. § 95.08 (2006) (mandatory provisions in life insurance policies); 266 Code Mass. Regs. § 3.04 (2017) (mandatory insurance for home inspectors); 956 Code Mass. Regs. § 8.03 (2019) (mandatory

health insurance for students).[3] Instead, professional liability insurance is optional.

ii. Purposes of consent-to-settle clauses. Consent-to-settle clauses serve important purposes in this optional line of insurance. Most importantly, they encourage professionals to purchase such insurance, thereby providing coverage for the insured and deeper pockets to compensate those injured by the insured. Including a consent-to-settle clause differentiates these policies from other types of liability policies, such as homeowners and commercial general liability policies, which commonly provide that the insurer will have the "right and duty to defend any suit against the insured . . . and may make such investigation and settlement of any claim or suit as it deems expedient." Western Polymer Tech., Inc. v. Reliance Ins. Co., 32 Cal. App. 4th 14, 18 (1995). See Murach v. Massachusetts Bonding & Ins. Co., 339 Mass. 184, 186 (1959).

Control over settlement is particularly important to professionals, as settlement of malpractice claims directly implicates their reputational interests. "Insured professionals are often more likely than other insured entities to resist settlement of underlying claims [because] settlement of an

[3] Medical malpractice insurance, however, is mandated professionally liability insurance under Massachusetts law. See G. L. c. 112, § 2; 243 Code Mass. Regs. § 2.07(16) (2019).

underlying claim may adversely affect the professional's reputation or might actually encourage future lawsuits against the professional." Massachusetts Liability Insurance Manual, supra at § 5.6.2. See also 14 Couch on Insurance § 203:10 (3d ed. 2005) ("Policies such as medical malpractice or other professional liability coverage may contain provisions requiring the insured's consent to settlement, because of the potential effect that a professional negligence or misconduct claim may have on a professional's reputation and future ability to practice his or her profession"). Insurers and professionals may also have very different perspectives regarding malpractice settlements. For insurers, the benefits of smaller dollar settlements may greatly outweigh the costs of reputational damage to the professional caused by settling a malpractice claim; for professionals, the opposite may be true. Syverud, The Duty to Settle, 76 Va. L. Rev. 1113, 1174 (1990) ("[Reputational] stakes in any settlement or judgment may lead the professional to actively oppose settlement in many cases, even where the potential liability and the proposed settlement are well within policy limits"). See also 14 Couch on Insurance § 203:10; Massachusetts Liability Insurance Manual, supra at § 5.6; J. Cowin and L. Goldberg, Insurance Coverage for Municipalities, in Massachusetts Municipal Law § 17.4.9 (Mass. Cont. Legal Educ. 2d ed. 2015). Thus, consent-to-settle

provisions are both significant safeguards for insureds to defend their professional reputations and important incentives for the purchase of such insurance.

iii. Freedom of contract and legislative oversight. "The general rule of our law is freedom of contract, [and] it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements" (quotations and citations omitted). Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 320 (1996). This principle certainly applies to voluntary lines of insurance. Absent legislative intervention, "an insurance policy is a bargained-for contract, . . . and . . . the parties should have the benefit of their stated bargain" (citation omitted). Great Divide Ins. Co. v. Lexington Ins. Co., 478 Mass. 264, 268 (2017). Although the freedom to contract is not absolute and is sometimes outweighed by public policy, "[c]ourts do not go out of their way to discover some illegal element in a contract or to impose hardship upon the parties beyond that which is necessary to uphold the policy of the law" (quotation omitted). Beacon Hill Civic Ass'n, supra.

In reviewing whether a contract is void as a matter of public policy, "[t]he test is . . . whether the underlying tendency of the contract under the conditions described was manifestly injurious to the public interest and welfare."

Beacon Hill Civic Ass'n, 422 Mass. at 321, quoting Adams v. East Boston Co., 236 Mass. 121, 128 (1920). "'Public policy' in this context refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare." Beacon Hill Civic Ass'n, supra.

iv. Consent-to-settle clauses and G. L. c. 176D. With these principles in mind, we consider both the statutory language at issue and the public interests implicated by consent-to-settle clauses. We begin with the recognition that consent-to-settle clauses are not directly addressed in G. L. c. 176D. Indeed, they are not in any way referenced in G. L. c. 176D, nor are they discussed in the legislative history.

We consider the absence of any express or implied prohibition, or even any reference to consent-to-settle clauses in the legislative history, to be significant. Consent-to-settle clauses have been common, long-standing features of professional liability policies. See A. David & T. Pomorole, Legal and Accounting Malpractice, in Business Torts in Massachusetts § 14.6.3(c) (Mass. Cont. Legal Educ. 2d ed. 2016) ("Most professional liability policies give the insured professional the right to consent to any settlement"); Syverud, 76 Va. L. Rev. at 1176 ("Today, [professionals] can all choose policies giving them the right to veto any settlement"); J.D.

Long & D.W. Gregg, Property and Liability Insurance Handbook 482 (1965) ("unlike most general liability policies, written consent of the insured is required in the settlement of any claim or suit [in medical professional liability policies]"). Consent-to-settle clauses certainly predate the passage of G. L. c. 176D, § 3 (9) and the amendments to G. L. c. 93A in the 1970s, which are discussed in more detail infra. Yet, the legislature did not express any intention to prohibit or otherwise limit consent-to-settle provisions when enacting these statutory provisions.

The basis of the plaintiffs' contention that consent-to-settle provisions are prohibited in professional liability policies is the language in G. L. c. 176D, § 3 (9) (f), which provides that the failure "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear" is an unfair claims settlement practice. More particularly, they claim that an insurer's obligation to make a settlement offer once liability has become reasonably clear is inconsistent with consent-to-settle clauses that eliminate an insurer's unilateral ability to settle a claim once it has made such a determination.

An understanding of the history of § 3 (9) (f), and the evolution of its enforcement pursuant to G. L. c. 93A, is necessary to understand its application to consent-to-settle

clauses. This provision was originally designed to address the obligations of insurers towards insureds, particularly in the context of insurance policies in which insurers retained control over settlement. As this court explained, "[o]ne obvious legislative concern was that entities that profit from selling insurance policies not abuse exclusive rights and duties to control litigation vested through those same policies." Morrison, 441 Mass. at 454-455. This was of particular concern in cases involving verdicts in excess of policy limits. See e.g. Murach, 339 Mass. at 186-187 (defining, in seminal decision, common-law duty in excess liability cases as follows: "Although [policy] language leaves the matter of settlement entirely to the insurer's discretion, its privilege in this respect imports a reciprocal obligation . . . to act in good faith"). Thus, at the time of their enactment, the provisions of G. L. c. 176D, § 3, were focused on the imbalance of the relationship between insurer and insured. See St. 1972, c. 543, § 1.[4] If anything, consent-to-settle clauses helped to correct that imbalance by giving the insured control over the settlement process. At the time § 3(9) passed in the Legislature, third parties did not even have standing to bring suits under G. L.

[4] In 1972, the Legislature replaced the entire text of G. L. c. 176D, inserted by St. 1947, c. 659. See St. 1972, c. 543, § 1.

c. 93A, and were thus not a focal point for the Legislature when defining insurers' duties under G. L. c. 176D.

The plaintiffs nonetheless emphasize that, in the original draft of the bill introducing § 3 (9) (f), the Legislature replaced the suggested language "[n]ot attempting in good faith to effectuate" with "[f]ailing to effectuate," thus forgoing the opportunity to narrow an insurer's obligations under the statute to good faith attempts. Compare 1972 House Doc. No. 5239 at 10, line 172, with G. L. c. 176D, § 3 (9) (f), as appearing in St. 1972, c.543, § 1.[5] We do not consider this subtle language change to be particularly informative with regard to the legality of consent-to-settle provisions.[6] If the Legislature had intended for such a change to be designed to prohibit consent-to-settle provisions because insurers no longer

[5] In reviewing the change in the language of G. L. c. 176D, § 3 (9) (f) from 1972 House Doc. No. 5239 at 10, line 172, it appears that subsection (f) was changed to create more consistent language throughout § 3 (9). For example, other subsections of § 3 (9) use the words "failing to acknowledge," § 3 (9) (b), "failing to adopt," § 3 (9) (c), and "failing to affirm," § 3 (9) (e), instead of "not acknowledging," "not adopting," and "not affirming." The change in the original draft of § 3 (9) (f) is thus even less instructive in our analysis.

[6] In their reply brief, the plaintiffs also distinguish G. L. c. 176D from Cal. Ins. Code § 790.03 (h) (5) (West 2013), which requires that an insurer "attempt[] in good faith to effectuate prompt, fair and equitable settlement." The plaintiffs contend that the lack of the word "attempt" in § 3 (9) (f) imposes a broader affirmative obligation on Continental in this case. We consider this argument unpersuasive as well.

had the unilateral right to effectuate a settlement, we conclude that it would have said so more expressly. See, e.g., Lazaris v. Metropolitan Prop. & Cas. Ins. Co., 428 Mass. 502, 506 (1998) (G. L. c. 176D, § 3 [9] [f], was not so specific as to deny insurer right to insist on release by claimant before paying its insured's policy limits, where "[i]f the Legislature wants to require an insurance company [to do otherwise], it may amend the statute").

Moreover, the statute has not been interpreted to require the effectuation of settlements as opposed to good faith efforts to effectuate settlement; the language change relied on by the plaintiffs therefore appears to be a distinction without a difference. See, e.g., Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 118 (1994) ("the liability of an insurer with respect to its refusal or failure to settle a claim against its insured has traditionally been decided on the standard of whether the insurer exercised good faith judgment on the subject"); Silva v. Norfolk & Dedham Mut. Fire Ins. Co., 91 Mass. App. Ct. 413, 418 (2017) ("settlement offers must be made in good faith given the insurer's knowledge at the time of the relevant facts and law concerning [the] claim" [quotations and citation omitted]).

We also do not interpret the 1979 amendment to G. L. c. 93A, § 9, to prohibit consent-to-settle clauses in

professional liability insurance policies. See St. 1979, c. 406, § 1. The 1979 amendment changed the requirement for standing to bring a suit under G. L. c. 93A, § 9, from "[a]ny person who purchases or leases goods, [or] services . . . and thereby suffers any loss of money or property . . . as a result of the use or employment by another person of an unfair or deceptive act or practice declared unlawful," G. L. c. 93A, § 9, as amended through St. 1971, c. 241, to "[a]ny person . . . who has been injured by another person's use or employment of any method, act or practice declared to be unlawful . . . ." G. L. c. 93A, § 9, as amended through St. 1979, c. 406, § 1. The amendment followed this court's decision in Dodd v. Commercial Union Ins. Co., 373 Mass. 72, 79-81 (1977), which held that policy holders -- but not third party claimants -- could "bring the potent remedies of chapter 93A to bear on claim settlement practices." Billings, The Massachusetts Law of Unfair Insurance Claim Settlement Practices, 76 Mass. L. Rev. 55, 59 (1991). See Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass 671, 675 (1983). The 1979 amendment allowed for "third-party claimants . . . to bring actions against liability insurers who violate G. L. c. 93A." Clegg v. Butler, 424 Mass. 413, 418 (1997). Thus, "the specific duty contained in subsection (f) [failure to effectuate prompt, fair, and equitable settlements of claims] [was no longer] limited to those situations where the

plaintiff enjoys contractual privity with the insurer." Id. at 419. Rather, "[t]he text of G. L. c. 93A, § 9 (1), and our interpretation in Van Dyke [supra, an insurance case involving a consent-to-settle clause,] are both clear affirmations of third-party rights, and we cannot accept [the] argument that only insureds are owed a duty of fair dealing when it comes to an insurer's settlement practices." Id. at 418.

As discussed supra, at the time of the 1979 amendment to G. L. c. 93A, there was no doubt that consent-to-settle clauses were in existence. See Van Dyke, 388 Mass. at 676 n.6 ("the [consent-to-settle] policy was, of course, issued long before the 1979 amendment of G. L. c. 93A, § 9"). Yet there was neither an express prohibition of, nor a limitation on, such clauses nor even any discussion of them in the legislative history when expanding standing to third-party claimants under G. L. c. 93A.

Recognizing that insurers owe a duty to third-party claimants, and that such third-party claimants have standing to sue insurers, is also different from defining the types of contracts into which insurers may enter with their insureds or requiring insurers to subordinate to third parties their duties to their insureds when conflicting duties arise. Indeed, we have recognized the possibility of G. L. c. 176D imposing conflicting obligations on insurers, but have held that an

insurer must respect its obligations to its insured absent legislative guidance to the contrary. For example, in Lazaris, 428 Mass. at 506, we held that an insurer may insist on a release by a claimant before paying its insured's policy limits for damages that exceed those limits, and that such insistence on the insurer's part did not violate its statutory duty to effectuate a prompt, fair, and equitable settlement under G. L. c. 176D. We held:

> "The insurer has a duty to its insured. If it does not fulfil that duty, it may violate G. L. c. 176D, § 3 (9), and be liable to its insured. See Hartford Cas. Ins. Co.[, 417 Mass. at 120]. If we read § 3 (9) (f) as requiring payment of the policy limit without a settlement of claims against the insured, then an insurance company would be forced to watch both flanks. On one side, the company may be sued for unfair settlement practices by a claimant disgruntled by the company's failure to pay, and, on the other side, the company may be sued by an insured disgruntled by the company's payment of the policy limit without obtaining a release. We do not construe G. L. c. 176D, § 3 (9) (f), to place insurers in such a position. . . . If the Legislature wants to require an insurance company, without obtaining a settlement, to pay the policy limits in a case like the one before us, it may amend the statute."

Id. Thus, to the extent the insurer has a duty to a third-party claimant to effectuate settlement under G. L. c. 176D, § 3 (9) (f), that duty is still subject to the insurer's contractual and statutory duty to its insured under the terms of its insurance policy and G. L. c. 176D absent legislative direction or instruction to the contrary.

We recognize that, in certain circumstances, an insurer would be obligated to make a settlement offer had its insured not refused consent. Some insureds, like the insured in the instant case, will not settle even where such a refusal is unreasonable and against the advice of the insurer itself. In such circumstances, the claimant will have to proceed to trial, even where the insurer would have otherwise been required to make a settlement offer. Despite this tension, we cannot conclude that the Legislature intended to ban all consent-to-settle professional liability policies because some insureds will act unreasonably. Those unreasonable insureds can and should be held to account at trial and suffer the possibility of large, multiple damages awards. The claimant also is in no worse a position than he or she would have been if the professional had not purchased insurance. Such insureds, arguably, are the type who would not buy insurance in the first place if they could not control the decision to settle.

For all of these reasons, we do not consider it appropriate to impute the insured's refusal to settle here to Continental for purposes of a G. L. c. 93A violation when Continental's ability to settle the claim was contingent on the insured's consent. See Clauson v. New England Ins. Co., 254 F.3d 331, 340-341 (1st Cir. 2001) (declining to treat insured's rejection of settlement offer as insurer's rejection of same for purposes

of Rhode Island's rejected settlement statute, R.I. Gen. Laws, § 27-7-2.2, and emphasizing that insurer "had no ability to control or direct [the insured], who acted in direct contradiction of [the insurer's] recommendations" during settlement process).

In sum, consent-to-settle clauses are neither prohibited by G. L. c. 176D, § 3 (9) (f), nor "manifestly injurious to the public interest and welfare" (citation omitted), and therefore, nothing renders them unenforceable as a matter of public policy. See Beacon Hill Civic Ass'n, 422 Mass. at 321. We therefore hold that consent-to-settle provisions are valid under Massachusetts law, and that an insurer's duty to effectuate a prompt, fair, and equitable settlement under § 3 (9) (f) does not require the insurer to violate a consent-to-settle provision, even when liability has been clearly established.[7]

[7] For the same reasons that we conclude that consent-to-settle clauses are not prohibited by G. L. c. 176D, § 3 (9) (f), or otherwise in violation of public policy, we also reject the argument that only consent-to-settle clauses paired with hammer clauses are permissible. The statute and its legislative history likewise neglect to require, or even mention, hammer clauses. Such a specific redrafting of voluntary insurance policies requires specific legislative direction, as it intrudes even further on freedom of contract principles. The hammer clause also will diminish the incentive professionals have to purchase this voluntary insurance, which, as explained supra, serves a valuable purpose: it benefits third parties by providing deeper pockets for recovery.

d. Third-party claimants and an insurer's duty to act in good faith. Our conclusion that consent-to-settle clauses are not in violation of public policy does not mean that an insurer who honors a consent-to-settle clause is otherwise exonerated from the duties imposed by G. L. c. 176D. The existence of such a clause is not conclusive. See Van Dyke, 388 Mass. at 676 n.6. See also Insurance Co. of N. Am. v. Medical Protective Co., 768 F.2d 315, 319 (10th Cir. 1985) ("It is common practice for an insurer to conduct settlement negotiations in advance of obtaining the insured's final consent to the agreement. These negotiations must be conducted in good faith and without negligence, . . . regardless of whether or not the insured eventually will consent" [citation omitted]).

The determination whether an insurer has complied with its dual obligations, despite the existence of a consent-to-settle clause, is a factual one to be measured in terms of the insurer's good faith efforts and transparency toward both its insured and a third-party claimant. These efforts would include a thorough investigation of the facts, a careful attempt to determine the value of a claim, good faith efforts to convince the insured to settle for such an amount, and the absence of misleading, improper, or "extortionate" conduct towards the third-party claimant. See Darcy v. Hartford Ins. Co., 407 Mass. 481, 491 (1990) ("an insurer may not disclaim liability due to

lack of cooperation [of an insured] unless it has exercised 'diligence and good faith' in obtaining that cooperation," which is factual question requiring examination of efforts "to investigate the circumstances attending the [incident]"); Clegg, 424 Mass. at 416, 419 ("Whether a settlement is eventually reached or not," insurer violated G. L. c. 176D when it determined probable value of case during investigation of traffic accident caused by its insured after analyzing medical records, but failed to make settlement offer after it "knew or should have known that [plaintiff] was permanently and totally disabled"); Caira v. Zurich Am. Ins. Co., 91 Mass. App. Ct. 374, 381 (2017), quoting Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 344 (1994) ("Liability under G. L. c. 176D and c. 93A based on unfair claim settlement practices is generally characterized by '[a]n absence of good faith and the presence of extortionate tactics'" [emphasis added]); McLaughlin v. American States Ins. Co., 90 Mass. App. Ct. 22, 32 (2016) (reasonable investigation requires taking "basic steps toward obtaining an independent or neutral assessment of . . . potential fault").

The plaintiffs contend that Continental did not do enough to effectuate a settlement or properly investigate the plaintiffs' claims, even if the consent-to-settle provision itself was permissible. We conclude that Continental did make good faith efforts to investigate the claims and effectuate a

settlement consistent with its duty to its client (Lala) and the third-party claimants (the plaintiffs). Continental agreed to defend and indemnify Lala. Through its adjusters or attorneys, it thoroughly investigated the underlying facts, and informed Lala of the results of its investigation. It encouraged mediation to both Lala and the plaintiffs. It explained the vulnerabilities of the case to Lala, encouraging him to settle. Finally, it helped convince the reluctant Lala to offer $100,000. Although its conduct towards the plaintiffs was more problematic, for the reasons discussed infra, we conclude they caused the plaintiffs no harm.

When Lala refused to offer more than $100,000 -- even when his attorneys warned him of a potential seven-figure judgment -- and when Continental made clear that Lala would be responsible for paying any judgment in excess of his policy limits, it was clear that further investigation and additional efforts to effectuate settlement would be pointless.[8] In these circumstances, with such obstinacy on the part of Lala, we

[8] In Murach v. Massachusetts Bonding & Ins. Co., 339 Mass. 184, 189 (1959), we stated that, "[w]here a claim is made for an amount greater than the limits of the policy . . . [i]t is the duty of the insurer to disclose to its insured its adverse interest with respect to the extent of its liability under the policy." In that case, we held that "the insurer fulfilled its duty in this respect by its communication to the insured advising them of the possibility of a verdict in excess of the policy limit." Id. We conclude Continental similarly fulfilled its duty in this case.

cannot conclude that Continental did not make good faith efforts to investigate the claims or effectuate a settlement consistent with its own obligations to its insured.

e. Causation: Continental's conduct and the plaintiffs' loss. The plaintiffs also allege that Continental's "persistent effort" to hide the Heger report and the misrepresentations of Lala's insurance coverage violated G. L. cc. 93A and 176D, § 3 (9) (a) ("[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue"). We recognize that these actions, when viewed in the light most favorable to the plaintiffs, remain questionable and might rise to the level of a G. L. c. 176D claim in other circumstances where, for example, the parties were not far apart in settlement discussions, and such conduct may have affected the possibility of settlement. An insurer has a duty to a third-party claimant not to engage in misleading, improper, or extortionate conduct or otherwise act in bad faith. We emphasize that the conduct at issue here, viewed in the light most favorable to the plaintiffs, is problematic to Continental's duty as an insurer to act in good faith, and we do not condone it.[9]

[9] Because of our decision here, we need not reach the thorny issue whether the handling of Heger and his report amounted to unfair or deceptive practices under G. L. c. 93A or was within the parameters of zealous advocacy in defense of the insured. We have held that a party's conduct during litigation can constitute a violation of G. L. c. 93A under certain

Nevertheless, "[e]ven when an insurer's conduct is unfair or deceptive in violation of G. L. c. 93A, the [plaintiffs] must prove that the insurer's conduct was the cause of any loss [they] sustained." Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747, 763 (1993). See Tyler v. Michaels Stores, Inc., 464 Mass. 492, 503 (2013) ("[the] distinct injury or harm [must] arise[] from the claimed unfair or deceptive act itself"); Hartford Cas. Ins. Co., 417 Mass. at 125 ("The absence of proof of causation [was] fatal to [the excess insurer's] G. L. c. 93A and G. L. c. 176D claims"); Van Dyke, 388 Mass. at 678 ("any omission by [the insurer] to comply with G. L. c. 176D, § 3 (9), did not cause any injury to or adversely affect the [third-party] plaintiffs"); DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 100-101 (1983) (insurer's refusal to settle exposed

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circumstances. See Schubach v. Household Fin. Corp., 375 Mass. 133, 137-138 (1978) (defendants' filing of collection action against the plaintiffs in inconvenient location was "unfair" for purposes of G. L. c. 93A). See also Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 217 F.3d 33, 43 (1st Cir. 2000), cert. denied, 531 U.S. 1146 (2001) (insurer's conduct -- "raising multiple, shifting defenses [many of them insubstantial] in a lengthy pattern of foot-dragging and stringing [plaintiff] along, with the intent . . . of pressuring [plaintiff] to compromise its claim -- had the extortionate quality that marks a [G. L. c.] 93A violation"); Trenwick America Reins. Corp. v. IRC, Inc., 764 F. Supp. 2d 274, 305 (D. Mass. 2011) ("while there is considerable debate about whether litigation tactics alone can rise to the level of a Chapter 93A violation, there is little doubt that a course of conduct beginning before litigation and continuing unabated, thereafter may do so").

insured to liability). Here, the decision to claim that Heger was acting as a mediator and to withhold the Heger report until ordered by the trial court to produce it did not cause the plaintiffs' harm. Lala's intractable position on settling the case became even more apparent after the plaintiffs reviewed the Heger report. The delay in issuing the report made no difference. Van Dyke, supra.

Likewise, the misrepresentation of Lala's policy limits -- whether intentional or accidental -- did not proximately cause the plaintiffs' harm. In fact, Lala did not waver in his refusal to settle once he learned that the policy limits were twice the amount Continental originally represented. Moreover, Continental tendered the remaining policy limits to the plaintiffs in partial satisfaction of the judgment against Lala, and the excess verdict was paid in full by Lala following the trial. The plaintiffs were not harmed by Continental's incorrect representations regarding Lala's policy limits. Our reasoning does not change when taking the cumulative impact of Continental's alleged misconduct into account, as the plaintiffs urge us to do: any chance of reaching a settlement was thwarted by Lala's refusal to consent, which was the proximate cause of the plaintiffs' harm. For these reasons, summary judgment is appropriate on the remainder of the plaintiffs' claims.

3. Conclusion. A consent-to-settle provision in an insurance policy does not violate an insurer's duty to effectuate a prompt, fair, and equitable settlement under G. L. c. 176D, § 3 (9) (f). However, a consent-to-settle provision is not a carte blanche for an insurer to engage in unfair or deceptive conduct with a third-party claimant merely because the insured declines to reach a settlement. An insurer still owes a duty to conduct a reasonable investigation and engage in good faith settlement attempts consistent with its duty to both its insured and the claimant. In the instant case, Continental did make good faith efforts to investigate the claim and effectuate settlement, particularly in light of its insured's stubborn refusal to settle. Although certain actions Continental took in the course of its settlement discussions were questionable, these actions did not cause the plaintiffs' harm in this case. The proximate cause of the plaintiffs' harm was the insured's refusal to settle, and not any conduct attributable to Continental. The judgment of the Superior Court is therefore affirmed.

So ordered.