Hartford Fire Ins. Co. v Sedgwick Claims Mgt. Servs., Inc.
2021 NY Slip Op 30438(U)
February 16, 2021
Supreme Court, New York County
Docket Number: 653915/2015
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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HARTFORD FIRE INSURANCE COMPANY

Plaintiff,

- v -

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,

Defendant.

INDEX NO. 653915/2015

MOTION DATE _____

MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 231, 253, 254, 255, 256, 257, 266, 267, 268, 269, 270, 271, 272, 273

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 211, 212, 213, 214, 215, 229, 232, 233, 234, 235, 236, 237, 238, 239, 240, 274, 289

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 216, 217, 218, 219, 220, 221, 222, 223, 230, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 275

were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is

In this breach of contract action, plaintiff Hartford Fire Insurance Company (Hartford) seeks to recover a payment of $15 million from defendant Sedgwick Claims Management Services, Inc. (Sedgwick), asserting that Sedgwick breached its third-party administrator services agreement (Agreement) (NYSCEF Doc. No. [NYSCEF] 257,[1] Agreement) by its negligent administration of the action *Garrick Calandro, as*

[1] The court directs the parties to use NYSCEF numbers, not exhibit numbers, to cite to the court's docket in future filings.

Administrator of the Estate of Genevieve Calandro v Radius Management Services, Inc., et al. (Civil Action No. MICV2011-02874D [Middlesex Superior Court 2011]) (Wrongful Death Action.) Sedgwick's negligence allegedly exposed Hartford to treble damages in a subsequent federal action for failure to "effect prompt, fair and equitable settlements of claims in cases where liability is reasonably clear… ." (NYSCEF 238, Verified Complaint ¶ 66.) After this court denied Sedgwick's motion for summary judgment (NYSCEF 188, Decision and Order), the parties filed these motions *in limine*. Soon thereafter, jury trials were suspended due to COVID.[2] (NYSCEF 272, Note of Issue for Jury Trial.)

The factual background is set forth in this court's decision denying Sedgwick's summary judgment motion and will not be repeated in detail here. (NYSCEF 188, Decision and Order.) To summarize, Genevieve Calandro died at age 91 on August 16, 2008. (NYSCEF 238, Complaint ¶ 25.) In addition to a variety of health problems, after falling from her wheelchair, Calandro was taken from the insured nursing home (Insured) and hospitalized. (*Id*. ¶ 61.) Calandro's Estate, represented by David Hoey, Esq., filed the Wrongful Death Action on August 16, 2011. (*Id*. ¶¶ 26-27.) Sedgwick's claims manager, Mary Blair, hired Lawrence Kenney, Esq. to represent the Insured in the Wrongful Death Action. (*Id*. ¶¶ 30, 32.) On July 21, 2014, the jury returned a verdict

[2] Although jury trials remain dormant at this time due to COVID, this court is hopeful that this matter will be tried before a jury in 2021. The court appreciates the parties' patience.

of $1,425,000, $675,000 for pain and suffering and $750,000 for wrongful death, as well as punitive damages of $12,514,605 upon a finding of gross negligence.[3] (*Id.* ¶ 71.)

On September 30, 2014, the Calandro Estate demanded $40 million from Sedgwick and Hartford for purported bad faith and unfair trade practices for a failure to settle for which treble damages could be awarded under Massachusetts law.[4] (NYSCEF 192, Estate's 93A Demand Letter.)[5] On November 20, 2014, Hartford settled the 93A Action for $15.9 million.[6] (NYSCEF 238, Complaint ¶ 85). On December 5, 2014, the Estate filed its action against Sedgwick (93A Action). (NYSCEF 191, Winget aff ¶ 9; *see also* NYSCEF 214, *Calandro v Sedgwick,* 2017 WL 5593777 [D Mass 2017] [Civ Act. No. 15-10533].) Sedgwick offered to settle for $1.9 million, the amount of the compensatory damages and interest (NYSCEF 198, 93A Action Statement of Fact ¶16). However, there was no settlement with Sedgwick, and the matter proceeded against it.

Sedgwick moved for summary judgment, which was denied (*Calandro v Sedgwick Claims Mgt. Services*, 2017 WL 1496915 [D. Mass. 2017].) The District Court held that "[t]he record could reasonably support a conclusion that Defendant knowingly and willfully forced Plaintiff into unnecessary litigation when liability was reasonably clear." (*Id.* at *6.) On a motion for reconsideration, the District Court Judge granted

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[3] Damages for wrongful death constitute 95% of damages which are at issue here, not for damages for pain and suffering of $675,000. ([$750,000 + $12,514,605] / [$1,425,000 + $12,514,605].)

[4] Mass GL c. 176D, §3 and Mass GL c. 93A, §§9, 11.

[5] Hartford's Insured also served Hartford and Sedgwick with a demand letter but that matter was settled and is not at issue here. (NYSCEF Complaint ¶¶87-90).

[6] "On August 1, 2014, the court entered judgment against the Radius Entities in the amount of $14,447,906.51. Starting on that date, post-judgment interest accrued at a rate of 12%." (NYSCEF 238, Complaint ¶77). Hartford seeks damages of no less than $15.9 million (*id.* at 118). (See 93A Action, 264 F Supp 3d 321, 325.) Generally, the court references the damages here as $15 million.

Sedgwick's motion for summary judgment on Sedgwick's "novel" theory that its offer to settle for $1.9 million within 93A's statutory safe harbor period precludes Sedgwick's liability for treble damages but determined that a trial was still necessary as the Court did not have "sufficient information at this time to determine whether an award in this litigation against Sedgwick for its misconduct would be doubly paying plaintiffs for Hartford's misconduct" (*Calandro v Sedgwick Claims Mgt. Services*, 264 F Supp 3d 321, 325 [D Mass 2017].) After trial in federal court on the 93A Action, the District Court found in favor of Sedgwick to the extent that "[l]iability on the wrongful death claim was not reasonably clear at any point in the litigation because causation was fairly disputed", and thus, an offer to settle the Calandro matter was not required. (NYSCEF 214, *Calandro v Sedgwick,* 2017 WL 5593777, *18.)[7] The United States Court of Appeals, First Circuit, affirmed. (NYSCEF 215, *Calandro v Sedgwick,* 919 F3d 26 [1st Cir. 2019].) Collectively, these are the Federal Decisions at issue here and that Sedgwick seeks to put before the jury.

In motion sequence number 005, Sedgwick moves to preclude Hartford from admitting evidence or argument at trial concerning: (1) the Consolidated Statement of Material Fact Submitted Pursuant to Massachusetts District Court Local Rule 56.1 (Statement of Fact) in the 93A Action on Sedgwick's motion for summary judgment; (2) Blair's report concerning Sedgwick's administration of another claim in New York, *Douris v Little Neck Nursing Home (*Douris Report); (3) the admission of the 93A Demand Letters; (4) Hartford's expert testimony by Michael Gilleran; (5) Hartford's

[7] The federal court clarified its trial decision finding "no evidence that Sedgwick independently evaluated the case." (93A Action, 2018 WL 2932352, *1 [D. Mass. 2018].)

expert testimony by Timothy Yessman to the extent that he offers speculation or relies on facts not in evidence; (6) Yessman's testimony to the extent that it does not rebut specific aspects of the reports and direct testimony furnished by Sedgwick's experts; (7) any testimony seeking to establish that Hartford was exposed to extra-limits liability absent a violation of 93A and that Hartford's damages were proximately caused by anything other than Sedgwick's failure to comply with Chapters 93A in administering the Wrongful Death Action; (8) any argument or testimony seeking to establish that Sedgwick's failure to issue a reservation of rights letter exposed Hartford to extra-limits liability; and (9) attorney Kenney's July 9-10, 2014 email correspondence or, alternatively, permit Sedgwick to redact prejudicial and inflammatory statements contained therein. Finally, Sedgwick moves to admit evidence or argument concerning the Federal Decisions.

In motion sequence number 006, Hartford moves to preclude Sedgwick from entering into evidence or referencing before the jury or in voir dire the Federal Decisions.

In motion sequence number 007, Hartford moves to preclude Sedgwick from offering at trial the expert testimony of Thomas E. Peisch.

Hartford's complaint circumscribes the evidence at trial. In its first cause of action for indemnification, Hartford alleges that, pursuant to Article 11 of the Agreement, Sedgwick agreed that it would indemnify Hartford for all losses and litigation expenses resulting from Sedgwick's "'negligent acts or omissions in the performance of the Services, or intentional misconduct on the part of [Sedgwick], its Service Providers, directors, officers, attorneys, representatives, servants, associates, and assignees . . .

or . . . any material misrepresentation or breach by [Sedgwick] of any representation, warranty or obligation set forth in this Agreement'" (NYSCEF 238, Complaint ¶ 96.) Hartford alleges that "Sedgwick failed to adequately perform and negligently performed its services to the Hartford with respect to the [Wrongful Death Action], including … its failure to:

a. Advise the Radius Entities and Hartford of the risk of a substantial adverse verdict;

b. Advise the Radius Entities and Hartford of the risk of punitive damages;

c. Advise the Radius Entities and Hartford regarding the terms and content of the Trial Stipulation regarding the Radius Entities' liability;

d. Conduct a reasonable investigation, evaluation and adjustment of the Estate's claims against the Radius Entities;

e. Ensure that the Radius Entities were made aware of the 2014 trial;

f. Exercise the settlement authority it requested, and which was provided by Hartford;

g. Extend a separate settlement offer on behalf of the Radius Entities;

h. Fully communicate settlement demands and negotiations to the Radius Entities and Hartford;

i. Fully inform Hartford or the Radius Entities about the Estate's claims and associated risks;

j. Obtain information from the Radius Entities relative to the Estate's claim and discovery requests, and defenses to those claims;

k. Prepare and submit to Hartford for review and approval, a reservation of rights letter to be issued to the Radius Entities on the Policy's exclusion for punitive damages;

l. Properly manage the Estate's claims and lawsuit against the Radius Entities;

m. Report promptly any actual or potential coverage issues, including the Policy's exclusion for punitive damages;

n. Settle the claims against the Radius Entities though liability was reasonably clear; and

o. Settle the claims against the Radius Entities within the Policy limit despite the Estate's offers to settle within the Policy limit."

(*Id.* ¶ 97.)

In its second cause of action for breach of contract, Hartford alleges that Sedgwick breached the Agreement by the above actions (*Id.* ¶ 107.)

Hartford must establish that Sedgwick breached the Agreement through its handling of the Wrongful Death Action which resulted in a judgment of $15 million in damages against the Insured. Under the Agreement, Sedgwick's duty to indemnify Hartford is triggered if Sedgwick was negligent.

The following PJIs, tailored to this case, will be given by the court to the jury as the law of New York:

This is an action for breach of contract under New York law. The applicable standard for the jury is set forth in PJI 4.1 which provides:

> PJI 4:1 Contracts—Elements
> "As you have heard, the plaintiff AB seeks to recover damages for breach of contract. AB claims that (he, she, it) had a contract with the defendant CD requiring that CD [*state nature of defendant's alleged contractual promise(s)*], that AB did what (he, she, it) was required to do under the contract and that CD breached the contract by [*state nature of plaintiff's claim of breach*]. CD claims that [*state defendant's claims and the factual contentions on which they are based, such as:* (he, she, it) did not agree to the contract, there was no agreement on an essential term of the contract, (he, she, it) did what (his, her, its) was required to do under the contract, (he, she, it) was excused from performing, plaintiff did not do what (he, she, it) was required to do under the contract].
>
> AB has the burden of proving, by a preponderance of the evidence, that (he, she, it) had a contract with CD requiring that CD [*state nature of defendant's alleged*

contractual promise(s)], that AB did what (he, she, it) was required to do under the contract, that CD breached the contract by not doing what (he, she, it) was required to do under the contract and that AB sustained damages because of CD's breach.

If you decide that AB had a contract with CD [*state nature of defendant's alleged contractual promise(s)*], and that AB did what (he, she, it) was required to do under the contract, and that CD breached the contract by [*state nature of plaintiff's claim of breach*], you will find for AB [*state where appropriate*: on (his, her, its) breach of contract claim] and you will go on to consider AB's damages. If you decide that [*state as appropriate*: AB did not have a contract with CD, AB did not do what (he, she, it) was required to do under the contract, CD did not breach the contract, or CD's performance was excused], you will find for CD [*state where appropriate*: on AB's breach of contract claim] [*state where appropriate*: and you will report to the court]."

As to negligence, the court will modify PJI 2:10 Common Law Standard of Care—Negligence Defined—Generally

"Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances."

PJI 2:70 Proximate Cause—In General

"An act or omission is regarded as a cause of an injury [*in bifurcated trial, substitute:* accident or occurrence] if it was a substantial factor in bringing about the injury [*in bifurcated trial, substitute:* accident or occurrence], that is, if it had such an effect in producing the injury [*in bifurcated trial, substitute:* accident or occurrence] that reasonable people would regard it as a cause of the injury [*in bifurcated trial, substitute:* accident or occurrence]. [*The remainder of the charge should only be provided where there is evidence of comparative fault or concurrent causes.*] There may be more than one cause of an injury [*in bifurcated trial, substitute:* accident or occurrence], but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it."

Accordingly, the issues at trial here under New York law will be: (1) What were Sedgwick's tasks under its Agreement with Hartford; (2) whether Sedgwick performed those tasks; (3)(a) if not, did Sedgwick's failure constitute a breach of contract; (3)(b)

did the breach cause damage to Hartford; (4) if Sedgwick performed its tasks, was its performance negligent; and (5) if so, (a) did Sedgwick's negligence cause damage to Hartford or (b) was Hartford the proximate cause of its damages because Hartford's evaluation of the 93A risk was unreasonable in light of the facts and circumstances at the time. There are two temporal points for the jury's consideration if Sedgwick was negligent: (1) did Sedgwick's negligence cause the jury verdict in the Wrongful Death Action; and/or (2) did Sedgwick's negligence cause Hartford's uncertainty as to whether Hartford would be successful during the 93A Action.

Discussion

Federal Decisions in the 93A Action

In motion sequence number 06, Hartford seeks to exclude the Federal Decisions as highly prejudicial and confusing to the jury. On the flip side, in motion sequence number 05, Sedgwick asks the court to admit the Federal Decisions as evidence that (1) Hartford's assumptions were wrong and it settled too quickly, making Hartford, not Sedgwick the proximate cause of Hartford's loss; and that (2) Sedgwick did not violate 93A. Sedgwick also asserts that the Federal Decisions rebut Hartford's expert testimony that Sedgwick's settlement practices failed to comply with 93A.

This court rejects any effort to revisit the issue determined by the Federal Decisions: whether liability was reasonably clear prior to trial; it was not, said the federal court. (NYSCEF 214, *Calandro v Sedgwick Claims Mgmt Servs*, 2017 WL 5593777, *affd* 919 F3d 26.)[8] Rather, the federal court found that "because causation was fairly

[8] With regard to Calandro's conscious pain and suffering, 5% of the damages, which do not trigger punitive damages, the First Circuit clarified that Sedgwick did not violate 93A because it made a reasonable settlement at an appropriate time. (Id., 919 F3d at *35.)

disputed," the insurer's duty to act in good faith and make a fair settlement offer was never triggered. (*Id.* at *7.) Sedgwick cannot rely on the Federal Decisions in this action to argue that Sedgwick's settlement practices were not negligent. Indeed, the First Circuit commented on Sedgwick's performance as less than "textbook model" and noted that the District "Court was troubled by some deficiencies in Sedgwick's investigation **…"** (919 F3d at 37.) The District Court's finding that "[o]n July 14, Kenney made an oral offer of settlement of $250,000 to Hoey," or that "Blair attempted to engage in settlement negotiations one month before the trial but Hoey rebuffed her" (*Calandro v Sedgwick Claims Mgmt Servs,* 2017 WL 5593777, *5, 7) was not a finding that Sedgwick made a timely and fair settlement offer, nor that Sedgwick did not violate 93A when it made a proper offer. How could it be without the predicate finding that liability was reasonably clear? Rather, the First Circuit distinguished between an offer of settlement with regard to the pain and suffering versus settlement of the wrongful death claims and noted that the District Court focused on wrongful death. (919 F3d at 35.)

Further, the court rejects Sedgwick's proposal because it effectively invites the federal court to be an additional juror. (See *Cary Oil Co v MG Ref & Mktg, Inc.*, 257 F Supp 2d 768, 773 [SDNY 2003] [decision in arbitration of related employment disputed introduced to jury may create the impression that decision-maker has already decided negligence].) However, the Federal Decisions inject trial evidence that may not be before this jury.[9] On te other hand, the jury here may have the benefit of attorney

[9] Hartford challenges Blair's testimony on October 31, 2017 in the 93A Action of an offer of settlement $250,000 in the Wrongful Death Action as contrary to her prior deposition

Hoey's testimony which the federal court did not have as he represented Calandro in that action. (NYSCEF 214, *Calandro v Sedgwick Claims Mgmt Servs,* 2017 WL 5593777, *2 n. 2.) Therefore, this court rejects Sedgwick's interpretation of the Federal Decisions and denies its motion. (*Metropolitan Transp. Auth. v Peerless Weighing & Vending Mach. Corp.*, 158 Misc 2d 832, 840 [Sup Ct, Queens County 1993] [excluding evidence "based upon the [plaintiff's] erroneous interpretation of the court's prior decision" because it "lack[ed] probative value."].)

Likewise, the court rejects Sedgwick's collateral estoppel argument. The "identical issue" -- whether Sedgwick negligently administered the Wrongful Death Action -- was not decided in the 93A Action. (*David v Biondo*, 92 NY2d 318, 322 [1998].) Further, Hartford was not a party to the 93A Action that went to trial; it settled. Thus, it did not have a full and fair opportunity to litigate whether Sedgwick was negligent in failing to offer a meaningful settlement.

Further, the Federal Decisions would be confusing to the jury, raising a "distracting collateral issue." (*Leffler v Feld*, 79 AD3d 491, 491-92 [1st Dept 2010] [citation omitted]). It is clear from the record that the parties agree that the existence of the 93A Action is central here. However, the court rejects Sedgwick's emphasis on the result. The parties assessed the risk of proceeding with the 93A Action differently. In 2014, Hartford interpreted the pendency of the 93A Action as magnifying its exposure because the Wrongful Death Action judgment could be trebled and settled with Calandro for $15 million to avoid treble that amount. At the same time, Sedgwick

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testimony. (NYSCEF 163, Blair trial testimony, tr 2:64, 2:68-72; NYSCEF 269 Blair Deposition Tr 35:16-24.)

proceeded to trial. The relevant issue is how the parties evaluated that risk and why they diverged at the time that the decision to proceed or settle was made. The Federal Decisions were made well after the parties made their critical decisions. (*Amini v Arena Const. Co., Inc.*, 110 AD3d 414, 415 [1st Dept 2013] [expert's observations of scene of trip and fall made "years after the accident . . . have no probative value"].) The Federal Decisions are not relevant to that evaluation. The court also rejects Sedgwick's argument the Federal Decisions are necessary to cross Hartford's expert on 93A. As discussed further below, Gilleran's testimony is limited to the wrongful death damages for which there was no finding that Sedgwick complied with 93A with a good faith offer since liability was not reasonably clear.

Certainly, since the Federal Decisions did not exist until well after the Wrongful Death Action, they cannot speak to whether Sedgwick's alleged negligence resulted in the Wrongful Death Action's jury verdict. (*Tehozol v Anand Realty Corp*, 41 AD3d 151, 152 [1st Dept 2007] [criminal activity after plaintiff attacked in lobby no probable value as to whether locks were working on day of plaintiff's attack].) The actions are different; the law is different; and the facts are different. Therefore, there is no threat to the public policy against inconsistent verdicts.

Hartford's motion to preclude Sedgwick from entering into evidence or referencing before the jury or in voir dire the Federal Decisions is granted and Sedgwick's motion for its admission is denied.

Statement of Fact in 93A Action

On the other hand, the Statement of Fact in the 93A Action (NYSCEF 198) is admissible as some evidence of facts that existed prior to the 93A action, albeit as

informal judicial admission. (*Matter of Liquidation of Union Indem. Ins Co of NY*, 89 NY2d 94, 103 [1996] ["It would be unseemly, to say the least, to permit [a party] to renege on its court-submitted evidence."]; *Sparks v N. Shore Univ. Hosp.*, 2018 WL 3089413, *3 [Sup Ct, Queens County 2018] [court admitted statement of facts in pleadings and affirmation in support of motion as informal judicial admission].) Admissions in one proceeding are admissible in a subsequent proceeding. (*Matter of Matter of Liquidation of Union Indem. Ins. Co. of New York*, 89 NY2d 94, 103 [1996].) Sedgwick's legally unsupported contention otherwise is rejected. The difference between the Statement of Fact and the Federal Decisions is that Sedgwick's asserted facts predate the Federal Decisions.

Sedgwick moved for summary judgment in the 93A Action and submitted a "statement of material facts as to which there is no genuine issue to be tried." (NYSCEF 198, Statement of Fact at 1.) The facts stated therein are unremarkable, e.g. dates, parties, documents. (*Id.*) Hartford seeks to rely on the Statement of Fact for what it does not say: the absence of an offer of settlement in the Wrongful Death Action. However, there will be no negative inference; the Statement of Fact does not say many things. The reverse is not true: that omitted statements are not facts admitted by Sedgwick. This limitation will thwart any temptation to give the jury here a seminar on federal civil procedure. In the Statement of Fact, Sedgwick details its responsibilities to Hartford which Hartford asserts are contrary to its description of its responsibilities in this case. Moreover, Sedgwick's contention that the facts asserted therein are for the purposes of its summary judgment motion only is rejected as Sedgwick fails to identify any such limitation in the Statement. (*Vasconcellos v City of New York*, 2015 US Dist

LEXIS 121572 *2-3 [SDNY 2015] [to limit the admission under Local Rule 56.1, party must predicate their argument with "even if" or some derivation thereof].) Sedgwick's description of its summary judgment motion as limited to its novel theory[10] is simply wrong. (*See* 93A Action, 2017 WL 1496915.)

Sedgwick's remedy is to explain its statement of Fact or put it in context.[11]

Blair's Report on *Douris v Little Neck Nursing Home*

Hartford intends to introduce Blair's report from a case preceding the Wrongful Death Action to show Blair's preexisting knowledge of a jury's reaction to pressure sore cases. The Douris Report, dated March 11, 2010, arises from a New York action. (NYSCEF 201, Douris Report.) Blair wrote "[j]uries are not favorable to pressure sore cases and therefore we anticipate they will find in favor to the plaintiff regardless of the positive arguments we produce. It is recommended that we proceed to mediation and negotiating the best settlement up to the reserve." (*Id.* at 4.)

Sedgwick objects, arguing that there are disparities between the Douris and Calandro cases and the relevance of the Douris Report is outweighed by the danger of unfair prejudice against Sedgwick.

Blair's Douris Report is relevant to Blair's understanding of the risks of proceeding to trial in a wrongful death case against a nursing home in which the decedent had suffered pressure sores. (see *New York City Asbestos Litig.,* 2017 N.Y.

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[10] Sedgwick's "novel" argument in the 93A Action was that in response to Calandro's demand, before it filed the 93A Action, and long after the judgment in the Wrongful Death Action, Sedgwick offered to settle for $1,990,197. The court agreed that the offer would limit Sedgwick's damages; Sedgwick avoided treble damages. It was not that there was a settlement offer in the Wrongful Death Action.

[11] Sedgwick may propose to the court a limiting instruction within 30 days before the trial date. Otherwise, waived.

Slip Op. 30005[U], *17 [Sup Ct, NY County 2017] [granting motion in limine to allow trade association publication in evidence to show defendants knew or should have known about the health hazards of asbestos).]

Sedgwick fails to identify any prejudice. Its opposition goes to weight not admissibility. (*See People v Yazum*, 13 NY2d 302, 304 [1963] ["[A]ll that is necessary is that the evidence have relevance, that it tends to convince that the fact sought to be established is so. That it is equivocal or that it is consistent with suppositions other than guilt does not render it inadmissible."].) Sedgwick is welcome to present the differences at trial. "Assessment of the weight of the evidence" is the province of the jury as finder of fact. (*Dominguez v Manhattan and Bronx Surface Tr. Operating Auth.*, 46 NY2d 528, 534 [1979].) It is for Sedgwick to highlight the distinctions between *Douris* and the Wrongful Death Action and to challenge Hartford's contention that *Douris* proves Blair's relevant understanding.

Hartford may use the Douris Report as some evidence of Sedgwick's negligence by failing to evaluate and apprise Hartford of the risks of proceeding to trial in the Wrongful Death Action, and by failing to take appropriate steps to settle the case before trial. Therefore, Sedgwick's motion is denied.

Thirty days before the trial date, the parties may submit a joint proposed redacted report to the court or, if the parties cannot agree, they may submit competing redacted reports.

93A Demand Letter

Hartford intends to rely on the 13-page 93A demand letter that set out Calandro's allegations, and corroboration thereof, against Hartford based on Sedgwick's claims

handling in support of its risk assessment when it settled the Wrongful Death Action. (NYSCEF 192, 93A Demand.) After receiving the Calandro demand letter, Hartford evaluated its risk as

> A. "So given that we were confronted with the possibility, or the path, the choice of unconditionally tendering something in the neighborhood $15 million dollars or alternatively trying to seek total resolution of the dispute, in getting releases for the parties we approached the plaintiff about withdrawing the 93A letter and instead participating in a settlement process with us, in mediation and the plaintiff was willing to do that with certain conditions.
>
> And we met those conditions and went to mediation and were able to resolve it with finality for an amount of money that was approximately what we would have had to unconditionally tender with no protection coming back to us. So, we chose that course of action."

(NYSCEF 239, Hotaling Tr. at 43:17-44:10.)

Sedgwick contends that Hartford's settlement on the $1 million insurance policy was premature, misguided, and unnecessary. Sedgwick objects to Hartford's use at trial of the 93A demand letter as highly prejudicial and inadmissible hearsay. Certainly, if Calandro's attorney testifies, the letter may be offered into evidence and he can be cross examined. Sedgwick is welcome to propose a limiting instruction to put the 93A demand letter in context prior to 30 days before the trial date.

Sedgwick's motion is denied in any case. Sedgwick fails to identify any specific unfair prejudice. In addition, Hartford is not offering the 93A demand letter for its truth, but to establish the context in which it settled. Therefore, the court rejects Sedgwick's hearsay objection. (*Equato Intl Inc. v NH Street Investors*, 43 Misc. 3d 251, 263 [Sup Ct, NY County 2014] [demand letter is not hearsay].) The Demand Letter is relevant to whether Hartford's decision to settle was reasonable or whether Hartford is the proximate cause of Hartford's loss, as Sedgwick argues. (*Piehnik v Graff*, 158 AD2d

863, 864 [3d Dept 1990] [where there was a question of whether plaintiff failed to mitigate damages by refusing to have surgery, plaintiff's testimony as to out of court statements by his wife, a nurse, and his daughter, a doctor, which influenced his decision regarding his surgery was admissible because it went to his state of mind].) Rather, Sedgwick's remedy is to cross Hartford on its investigation of the facts asserted in the 93A demand letter and risk evaluation.

Causation of Hartford's Damages

It is undisputed that an insurer may be held liable in excess of its policy under Massachusetts law based in its failure to comply with 93A. Sedgwick insists that Hartford's alleged damages arise solely from 93A, but that Hartford was never exposed to liability in excess of its policy limit of $1 million. Thus, nothing Sedgwick did or did not do exposed Hartford to liability; Sedgwick could not have been the proximate cause of Hartford's damages of $15 million. Sedgwick seeks to exclude any evidence of extra-limits liability or any damages other than those that flowed from 93A.

The court rejects Sedgwick's request because it overlooks the predicate action from which the 93A liability arises; there is no 93A liability unless there is an underlying litigation that was not settled. Hartford is entitled to prove at trial that Sedgwick violated the contract resulting in the initial judgment of $1.4 million of which Hartford would be responsible for its $1 million policy limit. Moreover, Sedgwick's focus on 93A is too narrow. While 93A focuses on the harm to an injured plaintiff, such as the Calandro Estate, being forced to prosecute its case when liability is reasonably clear, this action focuses on harm to Hartford if its contract was breached; Sedgwick's argument overlooks the difference. Rather, Sedgwick's argument here is the functional equivalent

of its summary judgment motion which was already denied. (*See Scalp &Blade, Inc v Advest, Inc*. 309 AD2d 219, 224 [4th Dept 2003].)

Reservation of Rights Letter

Sedgwick seeks to exclude any evidence concerning Sedgwick's admitted failure to issue a reservation of rights letter.

Hartford asserts that having undertaken and controlled (through Sedgwick) the defense of the case and having (as a result of Sedgwick's breaches and negligence) prejudiced the Insured in their defense, Hartford was estopped from disclaiming responsibility for the judgment against the Insured. Hartford argues that Sedgwick's admitted failure to reserve rights on behalf of Hartford is responsible for Hartford's obligation to cover the its Insured's losses and settle the case as it did.

Sedgwick counters that its failure to issue a reservation of rights letter is irrelevant because the $1.45 million compensatory award was covered by the $1 million policy. According to Sedgwick, there was no risk of Hartford paying beyond the $1 million policy limit for the balance of the compensatory award or the punitive damages unless there was a violation of 93A. Sedgwick insists that since it complied with 93A, the insurer would never be liable for the full amount of any damages, including punitive damages. Sedgwick's reliance on Hartford's expert Gilleran (NYSCEF 252, tr. at 85:12-88:18) is mistaken and its argument is circular and rejected.

Rather, under Massachusetts law, in the absence of a reservation of rights, an insurer is estopped from raising coverage defenses after the case has progressed and on the eve of trial. Where an insurer has "led the assured to rely exclusively on its protection during the period when he might have protected himself, [it] cannot, in

fairness, thereafter, withdraw that protection." (*Specialty Natl Ins. Co. v OneBeacon Ins. Co.,* 486 F3d 727, 735 [1st Cir. 2007].) Therefore, Hartford may present evidence on Sedgwick's failure to issue a reservation of rights.

Attorney Kenney's July 9-10, 2014 email correspondence

Sedgwick engaged attorney Kenney to represent Insured in the Wrongful Death Action. Sedgwick objects to Hartford's introduction of Kenney's July 9-10, 2014 email correspondence with the Calandro Estate's attorney Hoey and copied to Blair as prejudicial and inflammatory (Email). Alternatively, Sedgwick requests permission to redact prejudicial and inflammatory statements contained therein. Kenney wrote:

- "[T]hanks to your [the Estate's] settlement strategy you are now getting the opportunity to earn your money the hard way."
- "As far as the case is concerned, I am pissed that you have tried to hang Mary out to dry, and you know you did, but not as pissed as Mary is." "[Y]ou have now given [Mary Blair] absolute free rein to take a verdict."
- "[Blair] absolutely would have done better I'm sure had you asked."

(NYSCEF 206, Email.) At his deposition, Kenney explained that he was disturbed by Hoey's attitude and professionalism and accused Hoey of "setting up" Blair. (NYSCEF 205, Kenney tr. at 63:6-23.)

Sedgwick has maintained throughout this litigation that it made pre-verdict settlement offers on behalf of the Insured before the $15 million verdict in the Wrongful Death Action, that it adequately apprised Hartford regarding the case, and thus it was not negligent in its representation of Hartford. The Email among Kenney, Hoey, and Blair provides some evidence of a reason that Sedgwick did not attempt to settle the Wrongful Death Action; Blair and Kenney were angry at the Estate's attorneys because they had entered into a secret settlement with the doctor.

Hartford asserts five hearsay exceptions depending on how the Email is offered. Thus, the court reserves decision to determine this issue at trial in context.

Gilleran's Testimony

Hartford offers the testimony of Gilleran as an expert on Massachusetts's 93A, best practices within the insurance industry for administering claims against nursing homes, and how Sedgwick departed from those standards. Specifically, Gilleran opines that Sedgwick never made a reasonable offer of settlement of the Wrongful Death Action to the Estate under 93A.[12] (NYSCEF 240, Gilleran Report at 15.)

Sedgwick challenges Gilleran's qualifications and asserts that he usurps the jury's fact-finding function and the court's duty to inform the jury of the law.

> "Basically, the admissibility of the testimony of an expert is governed by the answers to the following three questions: "1. Is the subject concerning which he is to testify, one upon which the opinion of an expert can be received? 2. What are the qualifications necessary to entitle a witness to testify as an expert? 3. Has the witness those qualifications" (Richardson, Evidence [10th ed], § 367, pp 339-340, quoting *Jones v Tucker,* 41 NH 546, 547)."

(*Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140, 149 [1976].)

The issue here is whether Sedgwick breached its contract with Hartford because it was negligent as defined by New York law. The court will give the law to the jury which will decide whether Sedgwick was negligent and/or breached the contract.

Gilleran's testimony will be limited to explaining the context for Hartford's decision to settle during the 93A window. He may testify to practice and procedure. He

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[12] The First Circuit affirmed the trial court's decision that the joint offer on February 6, 2014 of $275,000 was prompt and reasonable based on Kenney's trial report wherein he estimated "the verdict potential for the wrongful death and conscious pain and suffering claims as an aggregate, to be between $300,000 and $500,000 (which presumably would be split between the two defendants.") (919 F3d at 38 n. 7.) The defendant doctor settled thereafter.

may also testify about how Sedgwick's settlement offer, if any, comported with the requirements of 93A. His testimony will help the jury understand Hartford's risk allegedly due to Sedgwick's breach of contract. However, any testimony about what the Insured would have done differently if Sedgwick had not been negligent is speculative and not admissible.

This court also rejects Sedgwick's objection to Gilleran's qualifications. Gilleran has written a treatise and articles on the subject of 93A for 30 years and has advised insurance companies on their obligations to settle. (NYSCEF 268, Mass. Practice Series Vol. 52, The Law of Chapter 93A, 2d ed.) The subject of how 93A impacts insurance company decision making and timing is precisely the type of knowledge beyond the understanding of a juror. Therefore, Gilleran's testimony is limited to the legal framework of 93A and how insurance companies evaluate their risk under that framework.

Yessman's Testimony

Sedgwick objects to Yessman's testimony to the extent that it goes beyond rebuttal concerning claims handling. Specifically, Sedgwick objects to Yessman testifying about optimal negotiating tactics, timing and techniques in the context of handling an insurance claim. (NYSCEF 273, Yessman Report; NYSCEF 208, Yessman Transcript.) Hartford identified Yessman as a rebuttal witness to Sedgwick's experts, but now Sedgwick fears that Hartford will offer Yessman on its case in chief. Sedgwick offers Eodice to testify to the custom and practice in the insurance industry for determining a reasonable settlement value of a given claim and its interplay with the policy limit and the insurance industry's practices regarding "special claims." (NYSCEF

209, Eodice Report ¶35.) Sedgwick offers Peisch's testimony about the relationship between the professional services of a defense attorney and a claims administrator in the context of a personal injury litigation. (NYSCEF 210, Peisch 11/20/17 Report.) Specifically, Peisch was retained to provide his professional opinion with respect to claims handling, but as discussed below, his testimony will be limited to his area of expertise. The court rejects Sedgwick's objections as Yessman's testimony falls squarely within the parameters of Sedgwick's experts' testimony. (NYSCEF 273, Yessman Report ¶ 2.)

Sedgwick objects to Yessman's testimony to the extent that he offers speculation or relies on facts not in evidence. Yessman's testimony is barred to the extent that he predicts what the Insured would have done differently if Sedgwick had not been negligent. Likewise, his testimony will exclude comments about the Wrongful Death Trial he did not attend; his testimony will be limited to his own observations and experience.

The court rejects Sedgwick's procedural objection to Yessman because it has had an opportunity to depose him. Hartford may present his testimony at any time. There is no need to offer Yessman on rebuttal, as Sedgwick requests, since Yessman's testimony counters Sedgwick's witnesses. Sedgwick has failed to identify any actual prejudice or unfair surprise. Moreover, Sedgwick's fails to identify New York law to support its position. This court also rejects Sedgwick's suggestion that Hartford's intent and prejudice to Sedgwick is "self-evident." Sedgwick must identify the prejudice.

Peisch's Testimony

In motion sequence number 007, Hartford moves to preclude Sedgwick from offering at trial the expert testimony of Peisch. (NYSCEF 244, Peisch 6/20/18 Deposition; NYSCEF 220, Peisch 10/13/18 Deposition; NYSCEF 221, Peisch 11/20/17 Report; NYSCEF 222, Peisch 8/29/18 Rebuttal.) Peisch is a seasoned trial attorney with over 40 years as a member of the Massachusetts bar during which he has defended insured individuals and institutions in personal injury and a variety of other cases, representing owners/operators of long-term care facilities, including nursing homes. (NYSCEF 243, Peisch Biography.) As a result, he has worked extensively with insurance claims professionals and third-party administrators over the years. (*Id.*) Sedgwick offers Peisch to testify about Massachusetts ethical and legal standards applicable to lawyers. (NYSCEF 221, Peisch 11/20/17 Report). Hartford objects to Peisch's testimony on Massachusetts law and ethics as confusing and because he is not a claims administrator, and thus, cannot opine on whether the Wrongful Death Action was properly handled by Sedgwick in the run up to the trial.

In evaluating Peisch's testimony, the court finds *Kulak v Nationwide* instructive. The Court of Appeals endorsed the admissibility of expert testimony from experienced trial lawyers as respects a "bad faith" claim against an insurer where the trier of fact was called upon to determine if $7,500 was a reasonable settlement offer for the underlying wrongful death case in light of possible defenses that could be envisioned in favor of the insured automobile owner. (40 NY2d 140, 146 [1976].)

In that case, defense lawyers were found qualified to provide expert testimony as to settlement practices generally within the insurance industry. While the *Kulak* Court

rejected efforts to have the lawyer-experts opine as to how the plaintiff's claims should specifically be decided, it did broadly recognize their qualifications to offer testimony as to relevant practices and procedures within the insurance industry for determining settlement values, evaluating the viability of defenses and related purposes. The Court

> "distinguish[ed] between testimony that relates to automobile accidents in general and testimony that is addressed to the individual action on which the excess liability claim is predicated in particular. We first assume that a proper foundation is laid – i.e., that the witness called to the stand is familiar with the practices of insurers and defendants in evaluating personal injury and property damage claims. Such knowledge may have been acquired in consequence of direct representation of insurers or defendants, or may have come from broader experience in the field of automobile accident litigation which has included substantial exposure to such practices… On the basis of such foundations the witness should be permitted to identify considerations relevant to the assessment of personal injury claims by insurers in general and then to describe the materiality and weight customarily ascribed to each. So, in this case, the testimony as to factors to be considered in evaluating a personal injury case for settlement was admissible.

(*Id.*)

One of the issues at trial is whether Sedgwick's negligence unreasonably exposed Hartford and its Insured to risk. Sedgwick blames Kenney, the trial attorney Sedgwick hired. There will be no sideshow on whether Kenney should be blamed; this is not an attorney malpractice case. Rather, the issue here is whether Sedgwick, breached its obligations under an agreement as a claims administrator governed by New York law. Sedgwick offers Peisch to testify about the Massachusetts professional standards to explain what is part of a claims professional's role, i.e. what responsibilities and decisions must be left to the judgment of a licensed defense attorney. While Peisch has never tried a pressure sore case or a nursing home case, he can testify as to his experience as a seasoned litigator in personal injury actions interacting with claims

administrators and insurance companies. (*Id.*) The Kenney's trial strategy not to call two nurses who worked at the nursing home where Calandro resided before her death is not the issue in this case. Again, this is a case about whether Sedgwick performed its duties under the Agreement. Accordingly, Peisch shall not opine on Kenny's professional abilities nor testify about the two nurses. Peisch may testify about his experience with the absence of defense witnesses as compared to a large number of plaintiff's witnesses and assessing the emotional impact of certain witnesses on the jury, if any, when evaluating a case.

As to Blair statements on exposure analysis and settlement values, Peisch opines that he does not believe that any comments by Blair might have been "worthy of defense counsel's consideration." (NYSCEF 222, Peisch 8/29/18 Report at 2.) Peisch is limited to testifying about his own experience working with insurers and their claims administrators and how he valued, or not, their comments, generally, not Blair's comments in particular.

Hartford objects to Peisch's testimony that the jury verdict in the Wrongful Death Action was not foreseeable. This court agrees that without actual experience with nursing home cases involving pressure sores, Peisch is not qualified to opine on whether the jury verdict in the wrongful death case was foreseeable. Likewise, Peisch is not qualified to rebut Gilleran whose testimony is limited to Chapter 93A. Admittedly, Peisch has no experience with 93A.

The motion is granted to the extent that Peisch is limited to testifying about the practices and procedures of trying a personal injury case and his interactions as a trial

attorney with the insurance company and claims manager. There will be no lesson on Massachusetts attorney ethics which is a collateral issue.

This constitutes the decision of this court. All remaining arguments have been considered and do not yield an alternative result.

Accordingly, it is

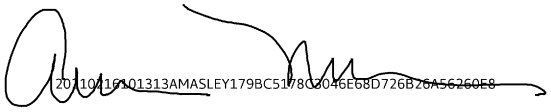
ORDERED that Sedgwick's motion 05 is granted in part; and it is further

ORDERED that Hartford's motion 06 is granted; and it is further

ORDERED that Hartford's motion 07 is granted in part, and it is further

ORDERED that the parties are directed to mediation; and it is further

ORDERED that the parties shall appear for a pre trial conference to set a trial date on February 22, 2021 at 4 pm.



2/16/2021
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE