White and Williams LLP

Massachusetts Nuclear Verdict Leads To $90M Bad Faith Award

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Insurers in Massachusetts have long struggled with the demands of MGL ch. G.L.c 176D, § 3(9)(f), which requires "prompt, fair and equitable settlements of claims in which liability has become reasonably clear." Last month a Superior Court ruling illustrated the potentially draconian consequences of a violation: finding an insurer liable for more than $90 million in bad faith damages, in a case that might have settled under $3 million with proper handling.

The claimant, John Rooney, was a mason who fell off a scaffold at a construction site. He sued the general contractor. The general contractor, in turn, sought coverage as an additional insured under a series of Liberty Mutual policies issued to Rooney's employer – the masonry company – with combined aggregate limits of $19.5 million.

Liberty's adjuster hired an investigator to explore the circumstances of the accident. The investigator interviewed the witnesses who had seen the injury. He said the accident occurred because Rooney had put down a plank to bridge two scaffolds at the limits of his lanyard's reach and was stepping onto the plank when the lanyard retracted. Based on the witnesses' testimony, he suggested Rooney had failed to properly relocate the lanyard "hookup," and was contributorily negligent for the accident.[1]

Liberty assigned the claim to field counsel, who pursued the theory of contributory negligence. Discovery progressed. It soon emerged that that there were two scaffolds at the site – an interior scaffold, put up by the general contractor, and an exterior scaffold put up by a subcontractor. In interrogatories and at deposition, Rooney said the accident occurred when he was stepping across a gap in the interior scaffold and was yanked backward by his lanyard. (OSHA does not allow gaps of this kind, so Rooney's version of events would have meant the scaffolding was not OSHA compliant.) Contradictory testimony emerged about whether Rooney was allowed to use the interior scaffolding, and whether it was regularly checked. At least one witness continued to believe, and testified, that Rooney fell off a plank. Another witness told defense counsel Rooney had been a careless worker, although he declined to repeat the statement at deposition.

In December 2018, Rooney's counsel demanded $5 million in settlement, based on lost future wages of $1.3 million, medical expenses of $400,000, and a $1 million workers comp lien. Liberty did not respond. Liberty's counsel, with thirty years' experience handling these kinds of cases, opined there was a seventy percent chance of a defense verdict and even if plaintiff prevailed, a fifty-fifty split on contributory negligence. Liberty also consulted a second counsel, who opined that liability was "fifty-fifty," depending on whether a jury found Rooney credible or not.

In May 2019, Liberty roundtabled the claim. The adjuster reported defense counsel's appraisal, i.e., a seventy percent chance of a defense verdict. He also presented Liberty's investigator's version of events: i.e., that Rooney caused the accident by putting a plank across the scaffolding, where he was not permitted to work. At the end of the roundtable, the adjuster increased the reserve to $500,000, based on a 25% chance of a plaintiff's verdict, and likely damages of approximately $2 million.

In September 2019 the case was mediated. Liberty offered $350,000 in settlement against a demand of $2.9 million. After the mediation, discovery continued. Rooney provided an expert disclosure suggesting that the interior scaffold violated OSHA regulations, and that the general contractor's failure to inspect the scaffolding caused the accident.

In January 2021, Liberty's original counsel stepped back due to his impending judicial appointment. Liberty's second counsel wrote a pretrial report, giving a likely range of damages between $2 million and $5 million. Once again, he set the chance of a defense verdict as fifty-fifty, depending on "whether a jury finds [Rooney] credible or not." Even if Rooney prevailed, defense counsel thought, a jury was likely to assign him 30-50% comparative negligence.

In early 2021, several other roundtables were held, at which Liberty continued to rely on counsel's view that the likelihood of a defense verdict was between 50% and 75%. Based on those estimates, Liberty made the decision to take the case to trial. As trial loomed, the two defense counsel estimated the likely damages award at $3.5 million, and set the high range at $5 million. They lowered their estimate of a defense verdict to 40% but estimated, if plaintiff did recover, that comparative negligence would lower any award by a further 40%.

In July 2021, the case went to trial. The day after trial began, the trial judge struck Liberty's witness testimony as to Rooney placing a plank on the scaffolding. Nonetheless, at the close of the evidence, a trial observer – hired by Liberty – saw a sixty-five percent chance of a defense verdict. For his part, Liberty's defense counsel initially referred to the case as a "toss-up." At the end of Rooney's testimony, he lowered that number to 25%, which was less favorable, but still north of "reasonably clear." Against plaintiff's demand of $4 million, Liberty offered a high-low of $500,000 to $2.5 million, which was rejected. Ultimately, the jury came back with a verdict of $26.6 million. With interest, judgment entered in the amount of $45.5 million. This was, of course, well beyond the Liberty policies' aggregate limits.

At the subsequent bad faith trial, Judge Squires-Lee concluded that Liberty had failed to "conduct a reasonable investigation based upon all available information." She harshly criticized Liberty's continuing reliance on its investigator's initial reports – finding those reports were not "admissible evidence," and that they had been superseded and were no longer reliable in light of information that emerged later in discovery. She harshly criticized Liberty for not reviewing the job site contract (which had standard provisions assigning safety responsibility to the general contractor), for not carefully reading deposition summaries that described plaintiffs' theory of the case, and for overlooking photos of gaps in the scaffolding, missing safety documents, evidence that masons were allowed on the interior scaffolding, and the absence of a witness who would testify that the scaffolding was inspected. She criticized Liberty's counsel for so-called "errors" in their reports, which said, for example, that Rooney's employer was not allowed to use the interior scaffolding, when photographs showed some workers doing so. She described Liberty's independent trial observer as "biased."

She concluded that if all information had been considered, the general contractor's liability would have been reasonably clear by June 2021, and the range of Rooney's damages would have been reasonably clear in a range between $4.5 and $5 million. In reaching this conclusion, she declined to credit the report of the supposedly "biased" trial observer, who had observed the evidence presented at trial and estimated a 65% chance of a defense verdict. She declined to credit the reports of Liberty's two defense counsel, who each placed the chance of a defense verdict in June 2021 between 50% and 75%, and who continued to describe the case – until after Rooney testified – as "an absolute toss-up." She declined to credit counsel's conclusion that if Rooney were to prevail his likely award – without reduction – would be approximately $3.5 million; and she expressed skepticism at counsel's view that comparative negligence would probably reduce any verdict by 40% or so if liability was found.

Going further, the judge concluded Liberty's violation was "willful," that Liberty had "deliberately closed its eyes to known and available information," and that "no reasonable carrier would have failed to settle" if that evidence had been considered. *Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.*, 417 Mass. 115 (1994).[2] Having found the violation willful, she said, the statute left her no discretion but to impose damages of twice the jury's verdict, i.e., $90,971,612.

The decision is troubling for multiple reasons. Perhaps most troubling is the judge's insistence on finding "reasonably clear liability," notwithstanding the professional advice Liberty sought and received throughout the case. That advice came from two separate, highly experienced defense counsel, and was supported – to the extent support was needed – by the in-court observations of an independent trial observer the court dismissed as "biased."

Adjusters in liability cases – who typically are not practicing lawyers – routinely rely on outside counsel to review the evidence, consider the testimony, and evaluate the cases they are handling. Most Massachusetts courts, in turn, recognize counsel's advice as providing a kind of safe harbor, i.e., a defense against bad faith liability. In finding Liberty liable, the court implied this longstanding practice was unreasonable. It suggested that an adjuster – rather than crediting defense counsel's opinions – must embark on a separate, "objective determination of whether liability is reasonably clear," i.e., "a neutral assessment of liability, separate from [defense counsel's] litigation strategy." How an adjuster is supposed to do this is unclear.

Appeal is likely. White and Williams will continue to monitor and advise.

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[1] Under Massachusetts' "modified contributory negligence" rule, a plaintiff who is more than 51% at fault cannot recover damages. If a plaintiff is negligent to a lesser degree, their recovery is proportionately reduced.

[2] An arguably less strict standard is set forth in *Demeo v. State Farm Mut. Ins. Co.,* 38 Mass. App. 955, 956-57 (1995), imposing liability when "a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insured was liable to the plaintiff." Judge Squires-Lee acknowledged the tension between the cases but found it made no difference, since Liberty would be liable even under the stricter *Hartford* standard.