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## ***IMPORTANT DEVELOPMENT IN MASSACHUSETTS INSURANCE LAW***

### ***What You Need to Know***

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Massachusetts law now requires an insurer to pay “market hourly rates” to an attorney defending under a reservation of rights, and such rates will not be limited by the insurer’s stated panel rates.

### ***Factual Background and Procedural History***

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The Massachusetts Appeals Court recently decided an insurance law question that potentially bears on every case in which a carrier issues a reservation of rights. Click [here](#) to read the Appeals Court’s decision in Northern Security Insurance Company, Inc. v. R.H. Realty Trust, et al., Mass. App. Ct. 11-024-11.

In Northern Security, the insurer had agreed to defend an insured trust under a reservation of rights. Exercising its right under Massachusetts law, rather than accept panel counsel the insured chose its own defense counsel, a well known and respected Boston litigator. Because his friends and neighbors were members of the insured trust, counsel agreed to charge the insured \$225 per hour, which was unusually low for him in this type of case. (Counsel later testified to a usual rate of between \$315 and \$385 per hour under similar circumstances.)

The insurer accepted the insured’s choice, in a manner of speaking. It delayed inordinately in paying counsel’s bills, and it refused to honor his already discounted rate of \$225, insisting instead that he be paid at the rate of \$150 per hour, which was in line with the insurer’s panel counsel rates.

Additionally, the insurer delayed in paying typical expenses associated with the defense of the lawsuit.

Ultimately, the case was settled favorably to the insured. The law firm took action against the insurer for its refusal to pay the \$225 hourly rate to which counsel had agreed with the insured, and for its delay tactics and related behavior. The firm also brought a claim under Chapter 93A.

At trial, the judge determined that counsel’s hourly rate was understated considerably. He ruled that a fair and reasonable hourly rate for these services was \$350 per hour, and ordered the insurer to pay that amount. He also found that the insurer could not reasonably or plausibly believe that it did not have to pay at a rate of \$225 per hour given a prior judge’s ruling that this amount was per se reasonable. On this and other bases, the trial judge found a violation of Chapter 93A.

### ***Legal Analysis and Practical Impact***

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The Appeals Court affirmed all but one aspect of the decision below. It determined that a lawyer defending under a reservation of rights is entitled to be paid a market hourly rate. While the Court did not rule out that “panel” rates could be the equivalent to market rates, it found the evidence “overwhelmingly” in support of the \$225 rate. Furthermore, the Court took some umbrage at the insurer’s delay in payment and refusal to negotiate, particularly in light of the very favorable outcome achieved by the defense attorney.

The Appeals Court reversed one aspect of the lower court's ruling; that counsel's fee should be based on the market rate of \$350 per hour. Here, the lawyer had hurt his own cause by agreeing to quote a rate of \$225 to his friends and neighbors who were part of the insured trust. As a matter of legal principle, the Appeals Court found that the contracted rate of \$225 was the measure for compensatory damages, even if \$350 was a reasonable rate.

While well settled that insurers lose the right to control counsel selection when they issue reservations of rights, it has long been uncertain what happens when the insured insists upon counsel who charges a higher hourly rate than the panel rates the insurer prefers to pay. Northern Security settles the issue: The insured's counsel is entitled to market rate compensation, not restricted by the insurer's panel rates. The trial court will take available evidence on what is market rate. While it

is possible that panel rates could equal market rate, that is most unlikely in view of the common knowledge that panel rates are discounted substantially. Further, as would seem obvious, in these circumstances it does not behoove insurers to take advantage of counsel who is forced upon them by delaying payment and the like.

One open question remains. The Appeals Court noted that the policy in Northern Security could have made explicit provision for the cost of defense in various situations, potentially including a reservation of rights and the involvement of non-panel counsel. Northern Security had no such provisions in its policy. Proactive insurers should consider properly drafted policy provisions that could establish parameters for the rates charged by an insured's private counsel. It remains to be seen whether such a policy provision would be enforceable under Massachusetts law.

*This client advisory was written by **James B. Peloquin**. If you wish to inquire further about our Torts and Insurance Practice Group, please contact **James B. Peloquin, Thomas E. Peisch**, or your attorney at **Conn Kavanaugh Rosenthal Peisch & Ford, LLP**.*

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