COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No.: 05-1360-BLS

Marcia Rhodes, Harold Rhodes, and Rebecca Rhodes,	)
Plaintiffs,	)
v.	)
AIG Domestic Claims, Inc. f/k/a AIG Technical Services, Inc., National Union Fire Insurance Company of Pittsburgh, PA, and Zurich American Insurance Company	)
Defendants.	)

POST-TRIAL BRIEF OF DEFENDANT ZURICH AMERICAN INSURANCE COMPANY

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INTRODUCTION

In their tort action against Carlo Zalewski, Driver Logistics Services, Inc. ("DLS"), Penske Truck Leasing Corp. ("Penske"), and Building Materials Corporation of America d/b/a GAF Building Materials ("GAF"),[1] Plaintiffs recovered more than $11.8 million dollars in compensation for the injuries duplicative they sustained as a consequence of Marcia Rhodes' automobile accident of January 2002. Nevertheless, Plaintiffs seek to recover an astounding $36 million in multiple damages under c. 93A against Zurich American Insurance Company in this action based solely on their contention that Zurich waited too long to make its $2 million policy limits available to the excess insurer, National Union, for its use in negotiations with the Plaintiffs. Despite putting on more than two full weeks of trial testimony and offering thousands of pages of exhibits, however, Plaintiffs were unable to prove facts that would warrant even a $25.00 nominal damage award against Zurich.

Specifically, and as explained in detail in this Post-Trial Brief, Plaintiffs failed to marshal evidence to prove Zurich violated c.176D and c.93A, that any violation caused Plaintiffs cognizable injury, or that Zurich's alleged violation was knowing or willful.

Plaintiffs made absolutely no effort to prove that if Zurich had taken steps to effectuate settlement earlier than November 2003, it is more likely than not that they would have settled their tort claims with AIGDC, avoided a trial, and thereby avoided the injuries they now claim. In fact, the record evidence amply supports the conclusion that the Plaintiffs and AIGDC always had substantially different views as to the value of Plaintiffs' damages and were never going to bridge the $2 million gap that divided them. Since Plaintiffs have not proven the essential

[1] Mr. Zalewski, DLS, Penske and GAF are hereinafter collectively referred to as the "Personal Injury Defendants." Plaintiffs' lawsuit against the Personal Injury Defendants in the Norfolk Superior Court is hereinafter referred to as the Underlying Action."

element of causation, the Court should enter judgment in Zurich's favor without even considering whether Zurich's attempts to effectuate settlement were prompt.

In addition, Plaintiffs failed to prove that Zurich violated the Statute by failing to promptly effect settlement when liability became reasonably clear because there is no evidence that Zurich violated the Statute by failing to promptly effect settlement when liability became reasonably clear because there is no evidence that damages in excess of Zurich's $2 million policy limits became "reasonably clear" at any point before November 2003—the point at which Zurich informed AIGDC that Zurich's primary policy limits would be exhausted and that a contribution from the excess insurer would be needed to effectuate a global settlement of Plaintiffs' claims. Nor did Plaintiffs prove that the liability (i.e., fault) of Zurich's insured, GAF, was reasonably clear before November 2003, or that important insurance questions affecting Zurich's potential exposure for the liabilities of DLS and Mr. Zalewski should have been resolved at an earlier point in time.

Furthermore, Plaintiffs failed to prove damages. Plaintiffs seek to recovery three categories of compensatory damages against Zurich: (i) certain costs allegedly incurred before and during the Underlying Action; (ii) unpaid interest on the judgments in the Underlying Action; and (iii) the "frustrations" of litigation—a creative name for emotional distress. For the reasons explained below, there is no legal or factual support for recovery of any of these alleged damages.

Even if there were evidence supporting Plaintiffs' contention that Zurich violated Chapters 176D and 93A by not making its policy limits available to the excess insurer earlier, and that Zurich's alleged violation *caused* Plaintiffs some legally cognizable loss, there is absolutely no proof that Zurich or any of its employees willfully or knowingly refused to take

steps to bring about a settlement with Plaintiffs. Absent proof that Zurich acted with ill will, improper motive or with knowledge that it was violating c.176D, Plaintiffs have no right to multiple damages. Finally, an award of multiple damages against Zurich based upon a multiple of the judgments entered in the Underlying Action would unquestionably violate the Due Process Clause of the United States Constitution.

For these reasons, and based on the evidence and legal principles discussed below, Zurich respectfully requests the Court to award Plaintiffs nothing and enter judgment in Zurich's favor as to Count III of the Amended Complaint.

ARGUMENT

I. PLAINTIFFS FAILED TO ESTABLISH A CAUSAL LINK BETWEEN ZURICH'S ALLEGED DELAY IN ATTEMPTING TO EFFECTUATE SETTLEMENT AND THE DAMAGES PLAINTIFFS NOW CLAIM.

In 2006, the Supreme Judicial Court reaffirmed that to be entitled to any relief under Chapter 93A, § 9, a plaintiff must demonstrate that the defendant's unfair or deceptive conduct caused the plaintiff an actual loss. *Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790, 800, 802 (2006); *see also Wallace v. American Mfrs. Mut. Ins. Co.*, 22 Mass. App. Ct. 938, 940 (1986) (a plaintiff must prove "a *causal connection* between the insurer's *failure to settle* (amounting to an unfair act by [the insurer] under relevant provisions of G. L. c. 93A and c. 176D) and the *injury* and loss for which recovery is sought.") (emphasis in original). In *Hershenow*, the Supreme Judicial Court expounded upon the causation element as follows:

> If any person invades a consumer's legally protected interests, and if that invasion causes the consumer a loss—whether that loss be economic or non-economic—the consumer is entitled to redress under our consumer protection statute. A consumer is not, however, entitled to redress under G.L. c. 93A, where no loss has occurred. To permit otherwise is irreconcilable with the express language of G.L. c. 93A, § 9, and our earlier case law.

Hershenow, 445 Mass. at 802. Absent proof that the defendant's conduct caused a cognizable loss, not even statutory damages of $25.00 are available under Chapter 93A, § 9. *Id.* at 799, n. 18 ("The statutory damage provision [of Section 9] does not supplant the requirement to prove causation under § 9. It merely eliminates the need to quantify an amount of actual damages if the plaintiff can establish a cognizable loss caused by a deceptive act.")

As this Court acknowledged in its *Consolidated Memorandum and Order on Defendants' Motions for Summary Judgment*, Zurich never had the ability to "effectuate settlement" of the Plaintiffs' claims against the Personal Injury Defendants because Plaintiffs were never willing to release their claims in exchange for a total payment within the $2 million limits of Zurich's primary Business Automobile Policy. (*Consolidated Order* at 3; *see also Joint Pretrial Memorandum*, p. 3). Since Zurich could not "effectuate settlement" within its $2 million policy limits, and because Zurich had no duty under Massachusetts law to pay Plaintiffs any portion of its policy proceeds without obtaining a release on behalf of the Personal Injury Defendants,[2] Plaintiffs never would have received the proceeds of Zurich's Policy before the entry of judgment in the Underlying Action (and thereby avoided the alleged injuries they now claim) unless they settled their tort claims with AIGDC before trial. Therefore, to establish the element of causation, Plaintiffs were required to prove that if Zurich had taken earlier steps to effectuate settlement,[3] it is more likely than not the Plaintiffs would have reached a compromise with AIGDC and received the insurance proceeds without the need for a trial.

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[2] *See Lazaris v. Metro. Prop. & Cas. Ins. Co.*, 428 Mass. 502, 505 (1998).

[3] As discussed in Section III, *infra*, below, what Chapter 176D and insurance industry custom and practice required of Zurich, once liability and damages in excess of its policy limits became reasonably clear, was that Zurich get the excess insurer involved in a global settlement effort and, ultimately, make its primary policy limits available to the excess insurer for use in its settlement negotiations with Plaintiffs. (Tr. Day 15 (Maser), pp. 132-35). On November 19, 2003, Kathleen Fuell of Zurich informed Nicholas Satriano of AIGDC of her belief that Zurich's policy limits were fully exposed, that a contribution from National Union would be needed to get the case settled, and that she intended to get authority to tender those policy limits to AIGDC. (Tr. Day 4 (Fuell), pp. 85-87). Zurich officially made those funds available to AIGDC on or about January 23, 2004. (*Id.*, pp. 89-91). Therefore, in the

Plaintiffs made no such showing at trial. To the contrary, the evidence demonstrates that regardless of when Zurich took steps to affect settlement, the Plaintiffs and AIGDC would not have reached a compromise. This is because, in the words of AIGDC's expert witness, J. Owen Todd, AIGDC and Plaintiffs always had "a substantial, but legitimate, difference of opinion regarding the appropriate settlement value of the case that was just too great to bridge." (Tr. Day 16 (Todd), p. 79). The following evidence plainly shows that Plaintiffs and AIGDC were never less than $2 million apart in their respective valuations of Plaintiffs' claimed damages:

A. From the date of the accident up through August 11, 2004 (the date of the mediation), Plaintiffs were unwilling to accept less than $8 million to settle their claims against the Personal Injury Defendants.

In August 2005, Marcia and Harold Rhodes responded to interrogatories propounded by AIGDC and National Union. In Interrogatory No. 9, Marcia and Harold Rhodes were asked to state, (i) what offers of settlement they would have accepted from January 2002 until the resolution of the Underlying Action; and (ii) "[i]f the amount you would have accepted changed at any time, please indicate for what periods of time each amount is applicable." (Exh. 122, pp. 8-9; Exh. 123, p. 8; Exh. 124, p. 8 & Exh. 125, pp. 8-9). In response to Interrogatory No. 9, both Plaintiffs provided the following answer:

> I believe **the family was willing to accept $8 million to resolve the underlying matter up through the mediation.** Stating what the family would have agreed to between the time of the mediation and the jury announcing its verdict would be speculative. After the jury verdict, I was willing to accept the full amount of the jury verdict plus all accrued interest to resolve the underlying matter.

Id. (emphasis added).[4]

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circumstances of this case, Plaintiffs bear the burden of proving that if Zurich had taken steps to "effectuate settlement" prior to November 19, 2003, it is more likely than not that Plaintiffs would have settled their tort claims with AIGDC, and thereby avoided a trial of the Underlying Action.

[4] The only rational inference to be drawn from the first two sentences of this answer is that Plaintiffs were <u>not</u> speculating when they responded that $8 million was the only offer they would have accepted before the mediation.

In the nineteen months since they signed those interrogatory answers, neither Marcia nor Harold Rhodes supplemented, corrected or amended the foregoing response to Interrogatory No. 9. (Tr. Day 9, p. 130).[5] Plaintiffs never changed their responses because they were truthful, accurate, and complete when given in August 2005, and they remain truthful, accurate, and complete today. Indeed, at trial, both Marcia and Harold Rhodes affirmed their answer to Interrogatory No. 9, and Mrs. Rhodes made clear the she knew when she signed the interrogatories that the amount of money she and her husband were willing to accept to settle the Underlying Action at various times was a very important fact in the Chapter 93A case. (Tr. Day 9 (H. Rhodes), pp. 157, 159-161; Day 6 (M. Rhodes), pp. 129-130).

During trial, Plaintiffs offered no evidence from which this Court could reasonably infer that there was a time before the trial of the Underlying Action when they were willing to accept a settlement offer of less than $8 million. Harold Rhodes testified during trial, as he had during his deposition in August 2006, that he drew a "line in the sand" at $8 million, and would not have accepted a total payment of $6 million or $7 million to settle his family's claims at the August 2004 mediation. (Tr. Day 9 (H. Rhodes), pp. 131-132).[6] Moreover, when asked during his August 2006 deposition whether there was ever a time when he would have accepted $6 million to settle the case, Mr. Rhodes testified as follows:

> **I don't know**. You know, again, there was never an offer made of $6 million, so we never considered it. You know, it's like **you don't think about these things**. I've got day-to-day stuff that's going on in my life and **you don't speculate** on stuff that's not happening, so I don't know. I mean, if you had put an offer on the table, **I don't know**, but you didn't do that.

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[5] It is noteworthy that Harold Rhodes supplemented his answers to *Zurich's* First Set of Interrogatories twice between June 2006 and August 2006, to correct certain inaccuracies in information concerning his earnings record.

[6] Mr. Rhodes' testimony that he was willing during the mediation to negotiate in the range of $6 million to $10 million does not warrant the inference that he would have *settled* for less than $8 million, since Mr. Rhodes made it clear that he was unwilling to accept a total settlement of $6 million or $7 million at the mediation.

(Tr. Day 10 (H. Rhodes), pp. 79-80) (emphasis added).

Marcia Rhodes' trial testimony on this subject was equally lacking in probative value. Despite her counsel's repeated efforts to lead Mrs. Rhodes to a favorable answer, she candidly admitted that she did not know, (i) whether she would have agreed to accept an amount less than $8 million in 2002 or 2003; or (ii) whether she would have accepted a *recommendation* from her husband and Mr. Pritzker to accept less than $8 million. (Tr. Day 6 (M. Rhodes), p. 173-174). After much prompting, Ms. Pinkham succeeded in getting Mrs. Rhodes to state that she "probably would have gone along with" her husband and her attorney if they both agreed that accepting something less than $8 million was "a good idea in order to make the case go away." (*Id.*, p. 174). As the Court correctly observed, however, that testimony "seems to lead nowhere," since Plaintiffs presented no evidence about any substantive communications between Messrs. Pritzker and Rhodes on the subject of settlement offers and demands. (*Id.*, pp. 174-75).[7]

In summary, Plaintiffs' answers to AIGDC and National Union's Interrogatory No. 9 stand as the only evidence of the amount of money Plaintiffs would have accepted to settle their claims from January 9, 2002 through August 11, 2004. At trial, Marcia and Harold Rhodes made it clear that they "don't know" whether either of them would have considered something less than $8 million at some other point in time, and that if a lesser amount had been offered, they would have relied on their attorney's advice in deciding whether to accept it. On this record, the Court can only speculate whether Plaintiffs might have accepted something less than $8 million to settle the case had Zurich taken earlier steps to effectuate settlement.

[7] Indeed, the Plaintiffs asserted the attorney-client privilege as to all such communications. (*Id.*)

B. At no time was AIGDC willing to pay Plaintiffs more than $6 million (including Zurich's $2 million policy limits) to settle Plaintiffs' claims in the Underlying Action.

While Plaintiffs were unwilling to accept less than $8 million to settle their claims, AIGDC never valued the Rhodes' damages at more than $6 million. AIGDC first placed a value on the case just before the mediation of August 11, 2004, after certain of the discovery it deemed necessary had been completed. That value was $4.75 million. (Exh. 87 (Depo. of Warren Nitti), p. 71; Tr. Day 14 (T. Kelley), p. 65; Exh. 44; Exh. 45).[8] Following the unsuccessful mediation, AIGDC's trial counsel, Campbell, Campbell, Edwards & Conroy (the "Campbell Firm"), completed the deposition of Marcia Rhodes and deposed Rebecca Rhodes. (Tr. Day 14 (T. Kelley), pp. 67-68). Despite having had the benefit of that additional discovery, AIGDC continued to value the Plaintiffs' damages at $4.75 million when trial began. (*Id.* pp. 68-69; Exh. 87, pp. 82-83).

On the first day of trial, AIGDC made a settlement offer of $3.5 million—the same offer it had made at the close of the mediation one month earlier. (Exh. 87, p. 6; Tr. Day 9 (H. Rhodes), p. 105) AIGDC and Mr. Pritzker exchanged additional settlement offers and demands as the trial of the Underlying Action progressed. (Exh. 87, p. 145). By the last day of trial, AIGDC had authorized Complex Director Warren Nitti to offer the Plaintiffs $6 million, a sum that included Zurich's $2 million primary policy limits and a $4 million contribution from National Union's policy. (*Id.*, pp. 144-45; Tr. Day 14 (T. Kelley), p. 69). Mr. Nitti extended that offer at the close of the evidence, just moments before closing arguments began, but Mr. Pritzker rejected it out of hand and did not counter. (Ex. 87, pp. 144-45; 147).

[8] The $4.75 million value included a $2 million contribution from Zurich, a presumed $1 million contribution from the insurer for third-party defendant Jerry McMillan's Professional Tree Service ("Professional Tree"), and $1.75 million in proceeds from National Union's excess policy. (Exh. 87, pp. 73, 75)

Plaintiffs put forth no evidence at trial from which the Court could reasonably infer that AIGDC would have valued Plaintiffs' claimed damages higher than $6 million at an earlier point if Zurich had notified AIGDC earlier of its intent to tender its policy limits. AIGDC arrived at its initial $4.75 million valuation after it had undertaken the additional discovery it felt was essential to a proper valuation of damages, including the deposition and an independent medical examination of Marcia Rhodes. (Exhibit 87, pp. 114-15; Tr. Day 14 (T. Kelley), pp. 67-68. Even after completing the deposition of Rebecca Rhodes between the mediation and the first day of trial, AIGDC's valuation did not change; its employees continued to value the damages at $4.75 million. (Tr. Day 14 (T. Kelley), pp. 68-69) Tracey Kelley of AIGDC, who placed the $4.75 million value on the case, testified that she felt that that figure was fair, reasonable and accurate at that time. (*Id.*, p. 65).

It is noteworthy that AIGDC's offer of $6 million—the highest and best offer AIGDC authorized—was not authorized or communicated to Plaintiffs before the trial began, or even during the course of the trial as the evidence was coming in. Rather, AIGDC authorized and extended the $6 million offer on the last day of trial, after the close of the evidence, and after its Complex Director had observed the jury's reaction to the Plaintiffs' testimony and reported to his superiors that the evidence had gone in much more favorably for the Plaintiffs than AIGDC had anticipated. (*Id.*, pp. 56-57) That was, without question, the point in time of greatest litigation risk and uncertainty for AIGDC. By no process of logic could one conclude that AIGDC would have valued the case or authorized a settlement for more than $6 million at some earlier point when a jury verdict was not imminent and when AIGDC had no idea how the evidence would present. In summary, the record does not support the conclusion that if Zurich had tendered its policy limits earlier, AIG would have valued the case higher than $6 million. *See Phelan v. May*

Department Stores Co., 443 Mass. 52, 55 (2004)(a reasonable inference "must be based on probabilities rather than possibilities and cannot be the result of mere speculation and conjecture.")

The foregoing evidence amply demonstrates that AIGDC and Plaintiffs were never less than $2 million apart in their respective evaluations of the Plaintiffs' damages. Plaintiffs have not put forth evidence from which the Court could rationally conclude that they would have bridged that gap and achieved a settlement if Zurich had gotten AIGDC involved in the case before November 2003, or formally tendered its policy limits to AIGDC before January 2004. As Judge Owen Todd observed, the Rhodes case failed to settle because, as sometimes happens in personal injury litigation, the plaintiff and the defendant had a vastly different opinion as to the value of the plaintiffs' injuries and damages.

In *Clegg v. Butler*, which involved primary and excess insurance policies, the Supreme Judicial Court held that the primary insurer violated Chapter 93A by failing to contribute its policy limits toward a settlement until the eve of trial in the underlying tort action. 424 Mass. at 416. The Court concluded that the primary carrier's delay in offering its policy limit caused the plaintiffs to incur actual damages equal to interest on the primary insurer's policy limit from the date on which the primary insurer should have offered its limits to the date on which the excess insurer would have been willing to settle the case. *Id.* at 425. The facts of *Clegg* are fundamentally different from this case, however, in that the primary carrier's offer of its $250,000 policy limit was immediately followed by an offer of $425,000 from the excess insurer, and the plaintiff accepted the offers for a total settlement of $675,000. *Id.* at 416. The Court concluded that the promptness with which the case was settled after the primary insurer

made its policy limits available supported an inference that "had [the primary insurer] offered its policy limits earlier, [the excess insurer] would have settled earlier too." *Id.* at 423, n.8.

Here, in contrast to *Clegg*, Zurich informed the excess insurer that it would make its policy limits available for settlement in November 2003, and formally offered AIGDC its limits in January 2004—eight months before the trial. Ultimately, AIGDC, unlike the excess insurer in *Clegg*, was unable to settle Plaintiffs' claims despite having made offers substantially above the $2 million limit of Zurich's primary policy. Here, unlike in *Clegg*, there is no basis to infer that if Zurich had made its $2 million policy limit available to AIGDC at an earlier time, Plaintiffs and AIGDC would have reached a settlement and avoided further litigation. To award Plaintiffs any compensatory damages against Zurich based upon an earlier hypothetical date on which Zurich allegedly should have made its policy limits available to AIGDC and a hypothetical date on which Plaintiffs and AIGDC purportedly would have reached a settlement would be an exercise in sheer speculation, unsupported by the facts of this case. *See Kitner v. CTW Transp., Inc.*, 53 Mass. App. Ct. 741, 748 (Mass. App. Ct. 2002) (stating that under Chapter 93A, "the plaintiff bears the burden of proving entitlement to damages," and "damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty") (citation omitted); *Mitchell v. Money Store Mass., Inc.*, 12 Mass. L. Rptr. 348, 2000 Mass. Super. LEXIS 457, at *21 (Mass. Super. Ct. Nov. 20, 2000) (refusing to award ch. 93A damages based upon speculation that plaintiff might have been able to close on sale of home).

In sum, Plaintiffs have failed to prove, by a preponderance of the evidence, that they would have settled their tort claims with AIGDC and avoided a trial had Zurich taken steps to effectuate settlement prior to November 2003. Absent proof of a causal link between Zurich's

alleged violation of Chapter 93A and the damages they seek in this action, judgment should enter in Zurich's favor.

II. PLAINTIFFS FAILED TO PROVE THAT LIABILITY AND DAMAGES BECAME REASONABLY CLEAR PRIOR TO NOVEMBER 2003.

To prevail on their Chapter 93A/176D claim against Zurich, Plaintiffs were required to prove that Zurich failed to effectuate a prompt, fair and equitable settlement of their claims at the point in time when liability became reasonably clear. Plaintiffs did not suggest that Zurich failed to make *equitable* or *fair* attempts to settle their claims against the Personal Injury Defendants.[9] Instead, they argued that Zurich violated Chapters 176D and 93A by failing to *promptly* tender its $2 million policy limits to AIGDC and National Union for their use in settlement negotiations with the Plaintiffs.

An insurer's duty to "effectuate settlement" under Chapter 176D, § 3(9)(f) does not arise until both liability *and* damages have become "reasonably clear." *Clegg v. Butler*, 424 Mass. at 421 (1997). Of course, if an insurance policy provides no coverage for a particular insured, there can be no liability from the insurer's standpoint. (Tr. Day 10 (Kiriakos), p. 120)("If I don't have coverage, I don't have an exposure."); Tr. Day 15 (Maser), pp. 94-95).

In the context of a case in which the primary insurer had the opportunity to, but failed to, settle the underlying tort action within its policy limits, the Supreme Judicial Court held that the test to be applied in determining whether liability and damages were reasonably clear such that the insurer had a duty to settle under Chapter 176D was "not whether a reasonable insurer might have settled the case within the policy limits, but *whether no reasonable insurer* would have failed to settle the case within the policy limits." *Hartford Cas. Ins. Co. v. New Hampshire Ins.*

[9] Plaintiffs acknowledge that Zurich never had the *ability* to "effectuate settlement" of their claims within its $2 million policy limits, since any offer of $2 million or less would have been rejected regardless of when it was extended. (Pretrial Memorandum, p.3)

Co., 417 Mass. 115, 121 (1994) (emphasis added). Application of that rationale to this case requires that Plaintiffs prove that no reasonable insurer armed with the information and knowledge that Zurich possessed before November 2003 would have taken until November 2003 to notify the excess insurer that its policy proceeds were needed to settle the Plaintiffs' claims. *See O'Leary-Alison v. Metropolitan Prop. & Cas. Ins. Co.*, 52 Mass. App. Ct. 214, 217 (2001) (observing that resolution of a Chapter 93A claim is dependent upon a factual determination of the defendant's knowledge and intent.)

Finally, in determining when liability, coverage and damages became "reasonably clear" in a given case, a court should bear in mind that an insurer "must be given the time to investigate claims thoroughly to determine their liability." *Clegg*, 424 Mass. at 422. The Supreme Judicial Court's decisions interpreting the obligations of an insurer under G.L. c. 176D, § 3(9) "in no way penalize insurers who delay in good faith when liability is not clear and requires further investigation." *Id.*

The evidence at trial demonstrated that damages in excess of Zurich's $2 million policy limit did not become reasonably clear until late November 2003, after Zurich had a reasonable opportunity to review, evaluate and verify the documentation of Plaintiffs' alleged damages set forth in the Plaintiffs' demand package. (Exh. 10). Prior to that time, Zurich had received no medical records or bills concerning Mrs. Rhodes' treatment history, no documentation of Mrs. Rhodes' prognosis, and no information concerning her anticipated need for future care.

In addition, the liability of GAF on a *respondeat superior* theory was not reasonably clear at any point in 2002 or 2003 because the extent of GAF's control over Mr. Zalewski's daily driving activities had not been fully developed. Indeed, GAF's liability did not become reasonably clear

until March 2004, when Plaintiffs amended their Complaint to assert a claim against GAF under the Federal Motor Carrier statute.

Finally, while the fault of Carlo Zalewski and the vicarious liability of his employer, DLS, may have been apparent fairly early in the life of the case, and while Zurich had agreed to defend both of them under a reservation of rights, the extent to which the Zurich policy ultimately might respond for those defendants was not remotely clear until November 2003 when Zurich received the very surprising news that DLS and Zalewski did not have their own primary automobile liability insurance.

A. Damages at or in excess of $2 million did not become "reasonably clear" until late November 2003, after Zurich had a reasonable opportunity to review, evaluate and verify documentation of the Plaintiffs' alleged damages.

The evidence in this case establishes that Zurich, through the person of Kathleen Fuell, came to the realization that the Plaintiffs' claimed damages likely had a value in excess of $2 million at or around the time of the teleconference with AIGDC and defense counsel on November 19, 2003. (Tr. Day 4 (Fuell), pp. 139-140). Mrs. Fuell reached that conclusion after carefully analyzing the medical records, medical bills, the life care plan, the economist's report, a day-in-the-life video and other materials contained in the demand package submitted by Plaintiffs' counsel, and after considering the defense life care plan and input of GAF's defense counsel regarding the value of damages and the merits of the parties' claims and defenses. As discussed in greater detail below, Kathleen Fuell took appropriate and prompt steps to effectuate settlement on November 19, 2003, when she notified AIGDC of her intent to tender Zurich's policy limits to AIGDC and informed AIGDC of her view that a contribution from National Union would be needed to achieve a global settlement.

To sustain their claim that Zurich violated M.G.L. c. 176D, § 3(9)(f), Plaintiffs were required to prove that the information actually known to Zurich *before* November 2003 was sufficient to put the company on notice that Plaintiffs had sustained damages in excess of $2 million such that Zurich should have taken steps to effectuate settlement before November 2003. See *Hartford Cas. Ins. Co.*, 417 Mass. at 121. Once again, Plaintiffs have not met their burden.

1. Insurance industry custom and practice for the evaluation of damages in a bodily injury case.

Though they disagree on a number of points, the parties' expert witnesses agree about acceptable industry practices governing how a primary insurer must go about evaluating damages in a bodily injury case. When faced with a liability claim alleging catastrophic injury against its policyholder, industry custom and practice require that a primary insurer conduct a thorough investigation of damages and evaluate damages based on verifiable documentation. (Tr. Day 15 (Maser), pp. 109-112; Tr. Day 13 (Cormack), pp. 36-37; Tr. Day 11 (Kiriakos), pp. 18-19, 33; Tr. Day 1 (McIntosh), p. 146-147).[10] That documentation should include, among other things, proof of: (i) the claimant's past and present medical treatment; (ii) the claimant's past and present rehabilitative and therapeutic care; (iii) the claimant's past and present expenses for medical, rehabilitative and other care; and (iv) the claimant's past and present economic damages, such as lost earnings, the value of lost household services, modifications made to the claimant's residence, and specialized vehicles for transportation. (Tr. Day (Maser), pp. 111-112; Tr. Day, (Fuell) pp. 27-29). Additionally, in a case involving allegations of paralysis, the insurer's evaluation must be based upon documentation that enables it to determine whether the claimant is, in fact, paralyzed, and whether the paralysis is temporary or permanent. (Tr. Day 11 (Kiriakos), pp. 102-103). Moreover, in a paralysis case, the future care needs of the claimant and

[10] Plaintiffs' expert, Mr. Kiriakos, also testified that liability insurers owe a duty to their policyholders, shareholders and reinsurers to properly evaluate claims against their insureds. (Tr. Day 11 (Kiriakos), p. 36).

the costs for that care are essential to properly value damages. (Tr. Day 15 (Maser), pp. 111-12; Tr. Day 11 (Kiriakos), p. 33). For this reason, it is essential for an insurer like Zurich to demand documentation concerning the claimant's anticipated future medical expenses and medical care needs, past and anticipated future out-of-pocket costs, lost wages (past and future), and other claimed economic damages in order to properly evaluate the damages. (Tr. Day 15 (Maser), pp. 111-112) Conversely, it would be inconsistent with accepted claim handling practices for a primary insurer to make decisions regarding the settlement value of a case based solely on representations made by a claimant's attorney, or other second-hand information. (*Id.*, p. 110; Tr. Day 13 (Cormack), pp. 36-37).[11]

Zurich's claim handling guidelines, entitled "Liability Best Practices – Product Management," are consistent with these industry standards. (Exh. 64; Tr. Day 11, 109-110).[12] Both David McIntosh and Kathleen Fuell of Zurich were faithful to these principles in their

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[11] Karl Maser, Zurich's expert witness, explained the risk associated with relying on a claimant's attorney as follows: "they're in an adversarial posture with the defendant, and you need to be certain that what you're getting is in fact accurate information. And, obviously, a plaintiff's lawyer is going to be out there to try to make—to put his best foot forward for their client, which is their role....And so what you need to know is to—you need information in some type of a documented or verified form." (Tr. Day 15 (K. Maser), p. 110). Plaintiffs' expert agrees that evaluating damages based on information provided by a claimant's lawyer is a risky proposition because the lawyer may provide information that is intentionally false and such information would corrupt the insurer's evaluation of its exposure. (Tr. Day 11 (Kiriakos), pp. 101-102).

[12] Zurich's "Liability Best Practices" provide, in pertinent part:

> Injury and Damage Verification
>
> All claimed injuries and **damages are evaluated and verified** by the case manager **through credible evidence** and/or the use of appropriate experts/vendors. **File document will support the degree of injuries and damages** outlined in the case exposure evaluation. (Exh. 64, Bates No. ZA1239) (Emphasis added).
>
> * * *
>
> File Supports Payment
>
> Claim file is resolved within the reasonable settlement value. Circumstances of claim must support the decision to settle and the reasonable settlement amount. **Settlement value supported by appropriate file documentation.** (*Id.*, Bates No. ZA1244) (Emphasis added.)

approach to valuing damages in the Rhodes case. (Tr. Day 4 (Fuell), pp. 27-30; Exh. 74 (McIntosh), pp. 122-123).

2. Before late September 2003, Zurich did not possess any verifiable documentation of Marcia Rhodes' injuries or condition, or any other aspect of Plaintiffs' alleged damages.

Zurich did not directly investigate or otherwise administer the Rhodes family's claims against GAF and the other Personal Injury Defendants. Rather, the claims administration tasks were handled by Crawford & Company, the independent third-party administrator GAF had retained to administer all tort claims made against it.[13] In its capacity as TPA, Crawford coordinated and performed the investigation of the accident and Mrs. Rhodes' injuries. (Tr. Day 1 (McIntosh), p. 146). When it received the first notice of the Rhodes family's claims in early August 2002, Zurich's Liability TPA Claims Oversight Unit assumed responsibility for overseeing the administration of the Rhodes claim, pursuant to a Third-Party Administrator Agreement between Zurich and Crawford.[14] Crawford periodically sent GAF reports on its investigation. (Exhs. 66C - 66O). Beginning in August 2002, Crawford sent copies of those reports to Zurich's Liability TPA Claims Oversight Unit. (Tr. Day 1 (McIntosh), pp. 95-97, 99, 104, 134). Until September 2003, Crawford's reports were the sole source of Zurich's knowledge of Mrs. Rhodes' injuries and the other aspects of Plaintiffs' damages.

Prior to the end of July 2003, Crawford possessed none of Marcia Rhodes' medical records or bills, and had no other verifiable documentation concerning the nature and extent of Marcia Rhodes' injuries, her past medical care, her prognosis, or the alleged consortium damages

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[13] GAF paid Crawford for its TPA services and funded payments of legal fees and other expenses incurred with respect to a particular claim. (Tr. Day 3 (Fuell), p. 134; Exh. 62, Bates No. ZA0068). GAF also provided a set of specific instructions to be followed in the administration of claims against it. (*Id.*, pp. 147-148; Exh. 126).

[14] This type of arrangement is customary in the insurance industry. In this situation, the TPA, rather than the insurer, performs the direct claim handling functions. (Tr. Day 11 (Kiriakos), p. 107).

of Harold and Rebecca Rhodes. (Tr. Day 2 (Mills), pp. 110-111). For this reason, Crawford's reports to GAF in 2002 and 2003 provided only second-hand information about Plaintiffs' alleged damages. (Tr. Day 1 (McIntosh), pp. 134-35) Specifically, in his June 2002 Liability Transmittal Letter (the first report that Zurich received from Crawford), John Chaney of Crawford made the following comments about Mrs. Rhodes' injuries:

- "The contract operator of the GAF leased vehicle rear-ended the claimant, causing catastrophic injury...."
- "The last word we have is that the claimant remains unable to walk, and is in a long term re-hab center coming back to strength, after some serious complications, and secondary infections."
- "We see permanent paralysis likely for the claimant, who is only in her 40's, with permanent long term care needed."

(Exh. 66C, p. 2). Mr. Chaney's next Liability Transmittal Letter, dated September 25, 2002, contained no information about Mrs. Rhodes' injuries other than that she had sustained what Mr. Chaney characterized as a "catastrophic injury...." (Exh. 66D, p. 2 under "Summary"; Exh. 66E, p. 2 under "Summary"). The December 13, 2002 Liability Transmittal Letter was identical to the September letter. (Exh. 66E). The sole source of Mr. Chaney's information regarding Mrs. Rhodes' condition and prognosis was a January 2002 telephone conversation with Plaintiffs' counsel, Fred Pritzker. (Exh. 73 (Chaney Depo.), p. 61, ll. 9-19).

In his reports of September 2002 and December 2002, Mr. Chaney commented that the Rhodes case had a "potential case value" as to all remaining defendants "between $5 mil and $10 mil," and noted that the bodily injury reserve was low and should be raised to Zurich's $2 million policy limit. (Exh. 66D, p. 2; 66E, p. 2). As Mr. Chaney explained during his deposition, however, he possessed no medical information or documentation upon which to base a reserve recommendation—a fact which he communicated to David McIntosh of Zurich when they spoke by telephone for the first time on August 7, 2002. (Exh. 73 (Chaney Depo.), pp. 59-

60). Mr. Chaney further explained that he had nothing to support his comment regarding the "potential case value." (*Id.*, pp. 87-90). Thus, it was obvious that the dollar range expressed in Mr. Chaney's reports was, in his own words, "a guess." (*Id.*, p. 90.)[15]

Taken together, the Crawford reports of June, September and December 2002 did not contain sufficient information to enable Zurich to make a proper or rational determination as to the value of those damages. (Tr. Day 1 (McIntosh), pp. 135-36; pp. 146-47; Exh. 74 (McIntosh Depo., p. 111-113, 116; Tr. Day 15 (Maser), pp. 114-116). Mr. Chaney did not possess any medical records or other documentation related to damages when he authored the reports, (Exh. 73, pp. 166, 197), and the reports provided no indication as to how he reached the conclusions that "permanent paralysis" was likely or that "permanent long-term care" might be needed. Indeed, it was clear that the sole source of Mr. Chaney's knowledge of Mrs. Rhodes' injuries was the Plaintiffs' attorney, Fred Pritzker. (Tr. Day 15 (Maser), p. 116; Exh. 73, p. 134) For the reasons explained above, it would have been inconsistent with accepted claim handling practices for Zurich to evaluate the Plaintiffs' damages based on such unsubstantiated, second-hand information. (Tr. Day 15 (Maser), pp. 117-119).

Given the lack of damages-related documentation in his file as of December 2002, it was reasonable and consistent with good claim handling practices for David McIntosh of Zurich to continue pursuing such information through Crawford so as to put himself in a position to make

[15] During trial, Plaintiffs made much of the fact that Zurich did not receive Crawford's January 30, 2002 First Full Formal Report or its April 8, 2002 Liability Transmittal Letter, as if to suggest that there was a wealth of information in those reports concerning Mrs. Rhodes' injuries. A review of those reports reveals that they contained virtually nothing about Mrs. Rhodes' injuries, condition or prognosis. Specifically, the January 30, 2002 report merely states that "[w]e are not fully aware of the extent of the claimant's injuries, except that we know she remains in life threatening condition at UMass Medical Center, is paralyzed, suffers currently from pneumonia and pancreatic infection. To estimate ultimate exposure is premature, but we are aware this case will carry a high value." (Exh. 66A, p. 6). Even if Zurich had been privy to the January report, the scant information it contained on the subject of damages would have been far less in caliber and quantity than what Zurich needed to make a reasoned judgment concerning the potential value of the claims. (Tr. Day 15 (Maser), p. 183). The same may be said of the information in Crawford's April 8, 2002 report, which is identical to that set forth in the June 2002 report. (Exh. 66B, p. 2).

decisions regarding the value of the claim and its ultimate disposition. (Tr. Day 1 (McIntosh), p. 147-48; Exh. 74 (McIntosh Depo.), pp. 122-123; Tr. Day 15 (Maser), pp. 126-27). After having initially asked Mr. Chaney to obtain documentation of damages in August 2002 (Exh. 74 (McIntosh Depo.), p. 23), Mr. McIntosh made a number of follow-up requests to Crawford in 2003. (*See* Exh. 68 (Z Notes), Bates No. 1163 (1/21/03 entry), Bates No. 1162 (1/23/03 & 3/6/03 entries), Bates No. 1161 (5/16/03, 5/27/03 and 6/11/03 entries), Bates No. 1160 (6/11/03 & 8/25/03 entries); Exh. 110; Exh. 111; Tr. Day 1 (McIntosh), p. 99-100))[16] Mr. McIntosh's efforts included letters dated June 11, 2003 and July 11, 2003, in which he explained his need for detailed reporting regarding Mrs. Rhodes' injuries and her past, present and future medical care and expenses. (Exhs. 110 & 111).

In the Spring and Summer of 2003, Crawford sent GAF, Zurich and AIGDC three additional reports on the Rhodes family's claims. While it appeared from the reports that Crawford was privy to additional second-hand information concerning Mrs. Rhodes' condition, each report clearly revealed that Crawford was still working with GAF's selected defense counsel, Nixon Peabody LLP, to obtain medical records and other documentation of Plaintiffs' claimed damages. (Exhs. 66F, 66G & 66H).[17] Specifically, the reports contained the following information regarding damages:

Report Date	Information Regarding Damages
May 6, 2003 (Exh. 66F)	"**Medicals are being forwarded** and will approach the $1 million mark...." (p. 2)(Emphasis added).

[16] Given Mr. McIntosh's oversight role, and in light of his August 2002 request of Mr. Chaney, it was reasonable for him to expect that Mr. Chaney would take steps to investigate and report on both liability and damages between August 2002 and January 2003. (Tr. Day 15 (Maser), p. 182-83).

[17] Mrs. Mills reasonably relied on GAF's defense counsel to obtain medical records because Plaintiffs had filed suit and the adversarial process had begun. (Tr. Day 2 (Mills), p. 125).

June 4, 2003 (Exh. 66G)	"Defense" section: "As the claimant was in the hospital for 3 months and is paralyzed from the neck down with a bi-polar disorder....**We are following for documentation to confirm this. We shall then be in a position in order to fully evaluate this matter.**" (p. 2) (Emphasis added) "Claimant/attorney" section: Attorney Pritzker has not submitted a demand or all medicals in this matter. **Defense is following for this information to evaluate...**" (p. 3) (Emphasis added) "Medical Status" section: **We do not have any current medical information.** This may have been forwarded to GAF directly from defense [counsel]. We do know that the injury is a fracture to the 12th vertebrae causing the claimant to be paralyzed from the neck down. She is now also indicating that she has bi-polar disease and spent 3 months in the hospital. There was mention of the claimant deposition indicating that on one occasion she fell off of the toilet and fractured both of her legs but did not know this right away as she had no feeling in her legs...." (p.3) (Emphasis added)
July 22, 2003 (Exh. 66H)	"Defense" section: "There is a demand in for $18.5 million dollars, CLT atty states that the meds are approx. $1.3 mill and estimated 2 mill further meds and episodic events. Plt is claiming special damages of 3.8 million dollars. Te [sic] rest of the damages are for loss of consortium and pain and suffering. The demand did not include lost wages. There will be a more detailed demand sent along with a video." (p. 2) "Action Plan" section: **"We must secure the medical documentation secured from defense to forward to Zurich** as they have requested same. We hope that this will be documented in the official demand followed after the above verbal demand." (p.2)(Emphasis added).

Because they reflected only second-hand information about Mrs. Rhodes' condition provided by the Plaintiffs' counsel, the Crawford reports of May, June and July 2003, like those generated in 2002, did not enable Zurich to meaningfully evaluate the Plaintiffs' alleged

damages. (Tr. Day 15 (Maser), pp. 121-125).[18] In fact, Jody Mills of Crawford could not and did not place a settlement value on the case because there was "nothing concrete to indicate what the actual value was." (Tr. Day 2 (Mills), p. 121). She had no documents regarding Mrs. Rhodes' medical treatment or future medical needs. (Tr. Day 2 (Mills), pp. 110-111). Accordingly, the "potential case value" amounts in her May and July 2003 reports were based on nothing more than a "feeling" she had. (Tr. Day 2 (Mills), p. 21). Given Crawford's lack of verifiable supporting documentation, it would have been contrary to accepted claim handling practices for Zurich to act on Jody Mills' comments regarding "potential case value" contained in the May 2003 and July 2003 reports.

3. Zurich promptly evaluated and verified documentation of the Plaintiffs' damages after such documentation was received in September 2003.

The credible evidence at trial established that damages in the amount of $2 million or more did not become "reasonably clear" until late November 2003. (Tr. Day 15 (Maser), pp. 129-132; Tr. Day 13 (Cormack), pp. 50-51). It is undisputed that Zurich received no medical records, medical reports, medical bills, or other documentation of Mrs. Rhodes' injuries, past medical treatment or prognosis until mid-September 2003, when a copy of the August 13, 2003 demand package (Exh. 10) arrived. (Tr. Day 2 (Mills), pp. 107-110).[19] The demand package

[18] Crawford's Liability Transmittal Letter dated May 6, 2003 illustrates why a primary insurer cannot make decisions regarding case value based on a claimant attorney's representations. Contrary to what Mr. Pritzker had represented to defense counsel, Mrs. Rhodes' incurred medical expenses were nowhere near "the $1 million mark" as of May 6, 2003. In fact, in a demand letter served *three months later*, Mr. Pritzker represented that Mrs. Rhodes' incurred medical expenses were actually $413,977.68, or about 40% of the figure he first reported to defense counsel. (Exh. 10, p. 14).

[19] Though there is evidence that some of Mrs. Rhodes' medical records and related documentation were produced to the defense firm retained by GAF in April or May 2003, Plaintiffs failed to prove that those documents were ever forwarded to Crawford or Zurich. Indeed, Crawford's reports indicated that its adjuster, Jody Mills, understood as late as July 2003 that all medical records had not yet been produced in discovery and were being pursued by defense counsel. (Exh. 66F, 66G, 66H). Moreover, the documents produced in April 2003 related only to Mrs. Rhodes' *past* medical treatment and medical expenses, which was just one aspect of the damages alleged by Plaintiffs. The

contained medical bills, medical records, doctors' and nurses' reports, medical bills, bills from rehabilitation facilities and the other types of documentation Zurich needed to begin the process of valuing the Plaintiffs' claimed damages. Also, in light of Mrs. Rhodes' permanent paralysis and her apparent need for future care and treatment, the life care plan and other expert reports and medical summaries contained in the Plaintiffs' demand package (Exh. 10, Tabs 42, 47, 54, 56, 57 and 58) were equally critical to Zurich's evaluation of damages. (Tr. Day 4 (Fuell), pp. 27-30). None of that information had been furnished to Crawford or Zurich before the demand package arrived in September 2003. (*Id.*, pp. 31-40).

Though Mrs. Fuell reviewed the demand package in mid-September 2003, it was necessary and consistent with accepted claim handling practices to verify the damages being claimed so that she could secure appropriate settlement authority from her superiors. (Tr. Day 15 (Maser), pp. 129-131). To verify the damages, Mrs. Fuell, (i) obtained the opinions of the life care planner whom GAF's defense counsel had retained in September 2003;[20] (ii) in early October 2003, requested detailed reporting from GAF's defense counsel concerning the merits of the parties' claims and defenses and the potential value of the Plaintiffs' damages (counsel's reports were received in early November 2003); and (iii) conducted independent jury verdict research to get a sense for Plaintiffs' verdicts in similar cases in Massachusetts. (Tr. Day 4 (Fuell), pp. 76-81; Exh. 115; Tr. Day 15 (Maser), pp. 129-132). Mrs. Fuell's efforts to verify the damages were reasonable, timely and consistent with good claim handling practices within the insurance industry. (Tr. Day 15 (Maser), p. 130-132).

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records did not include a life care plan or other documentation of anticipated future healthcare expenses, or anticipated economic losses, which were critical components of damages.

[20] During trial, Plaintiffs' counsel suggested that the insurers should have retained their own life care planner earlier, but Plaintiffs' expert, Mr. Kiriakos, disagrees. In response to a question posed by Mr. Pritzker, Mr. Kiriakos opined that the appropriate time for the defense to hire a life care planner was, "[a]s early on as your demand letter [August 13, 2003]...." (Tr. Day 12 (Kiriakos), p. 30).

Despite that Zurich had no verifiable documentation of the Rhodes family's claimed damages until September 2003, and despite that Zurich's knowledge of Mrs. Rhodes' injuries and condition was limited to the second-hand information contained in the Crawford reports, Plaintiffs' expert, Arthur Kiriakos, opined that by September 2002, Zurich had all the information it needed to determine that the Rhodes family's damages had a value in excess of $2 million and to tender its policy limits to the excess insurer. (Tr. Day 10 (Kiriakos), pp. 113-117; 126-129). Remarkably, Mr. Kiriakos also opined that a claims professional can evaluate damages in a case involving catastrophic injury "in the abstract" and that things like medical records and bills are a "red herring." (*Id.*, pp. 113-114, 117; Tr. Day 11 (Kiriakos), p. 113).

Even if the Court could ignore the fact that Mr. Kiriakos is grossly underqualified to offer *any* opinion regarding the insurers' handling of the Plaintiffs' tort claims, his opinion that Zurich should have tendered its policy limits to AIGDC as early as April 2002 and no later than September 2002 cannot be taken seriously. No reasonable insurer in Zurich's position would have tendered $2 million to an excess insurer in a case like this without first obtaining documentation of the Plaintiffs' damages. As insurance expert Karl Maser pointed out, it would have been irresponsible and well below accepted industry standards for a Zurich adjuster to make *any* decision regarding case value or disposition based upon the information contained in the Crawford reports in 2002 and 2003.[21]

B. Plaintiffs failed to show that GAF's liability for Mrs. Rhodes' accident was "reasonably clear" in 2002 or 2003.

After Plaintiffs filed their lawsuit in July 2002, Zurich was asked to defend and indemnify not only its policyholder, GAF, but also the other putative tortfeasors, Penske, DLS

[21] As Mr. Maser explained, had an adjuster (like Mr. Kiriakos) dared to approach Mr. Maser, a claim executive, for $2 million in settlement authority based solely on the type of information contained in the Crawford reports, the adjuster would have been subjected to what Mr. Maser politely termed an "educational session." (Tr. Day 15, p. 118-119).

and Carlo Zalewski, for their potential liability in connection with Mrs. Rhodes' accident. In examining Plaintiffs' Chapter 93/176D claim, however, the Court need not consider whether or when the potential fault of Penske, DLS or Mr. Zalewski became "reasonably clear." The Plaintiffs voluntarily dismissed their claims against Penske (without any payment) before trial, thereby conceding that Penske's fault for the subject auto accident never became "reasonably clear." (Tr. Day 11 (Kiriakos), pp. 128-29). Additionally, while Zurich concedes that Crawford's investigation revealed that Mr. Zalewski's negligence had contributed substantially to Mrs. Rhodes' injuries, the extent to which Zurich might be required to indemnify Mr. Zalewski or his employer, DLS, in the event of an adverse judgment or settlement was *not* reasonably clear before November 2003. As discussed in Section II.C.3, *infra*, before November 2003, the question of whether DLS or Mr. Zalewski maintained their own policies of commercial auto liability insurance that might be primary to, or at least share on a *pro rata* basis with, the Zurich policy was unresolved. Since Mr. Zalewski and DLS appeared to be primarily liable for causing the accident, the potential availability of other primary insurance for DLS had the potential to substantially impact the extent to which Zurich's $2 million policy limit would be eroded. In view of the foregoing, only the fault of GAF is material to this analysis. For the reasons discussed below, GAF's liability was not reasonably clear at any time in 2002 or 2003.

In examining GAF's potential liability, the Court must consider "whether 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." *Demeo v. State Farm Mutual Automobile Ins. Co.*, 38 Mass.App.Ct. 955, 956-57, 649 N.E.2d 803 (1995). The question, therefore, is whether based on all of the facts known to Zurich at any time before it notified AIGDC that

excess insurance proceeds would be needed to settle the case, a reasonable person in Zurich's position would have concluded that GAF's liability was reasonably clear.

In their Complaint in the Underlying Action, the Plaintiffs alleged that GAF "directed Defendant Zalewski's daily driving activities," and was negligent in "exercising control over the contractors with whom [it] entrusted operation of an 18-wheel tractor trailer." (Exh. 228, ¶¶ 7, 30). The truck driver, Mr. Zalewski, was employed by DLS and was operating the tractor-trailer pursuant to an agreement between DLS and GAF that expressly provided that DLS was an independent contractor of GAF and that DLS employees were not deemed to be employees of GAF. (Exh. 10, Tab 3 (Zalewski Depo.), p. 9; Tab 9, Bates No. 001003).[22] As a general principle of Massachusetts law, a party cannot be held liable for the tortious acts of an independent contractor. *O'Brien v. Christensen*, 422 Mass. 281, 285, n.9 (1996). To prevail on their theory of vicarious liability against GAF, Plaintiffs bore the burden of proving in the Underlying Action that GAF had control over the details of Mr. Zalewski's work. *Corsetti v. Stone Co.*, 396 Mass. 1, 9-10 (1985). Thus, to determine whether GAF's liability on a *respondeat superior* theory was "reasonably clear," one must consider the facts developed as to that theory during the Underlying Action.

A number of factors were relevant to the assessment of whether GAF exercised control of Mr. Zalewski. They included such things as: (i) whether and the extent to which GAF instructed Mr. Zalewski as to *how* he was to drive and what routes he should take to his destination; (ii) whether and the extent to which GAF instructed Mr. Zalewski as to what precautionary steps he

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[22] Specifically, paragraph 17 of the Agreement between DLS and GAF provided as follows:

> DLS' relationship with Customer [GAF] is that of an independent contractor, and under no circumstances shall DLS, its agents, drivers, other employees or any other individual or entity associated in any manner with DLS be deemed to be the agent, employee, partner of or joint venturer with Customer, or be eligible to participate in any type of benefits offered to full-time or salaried employees of Customer, and DLS hereby waives its and its employees' claims to any such benefits. (Exh. 10, Tab 9, Bates No. 001003).

ought to take while driving; and (iii) whether GAF personnel ensured that Mr. Zalewski was properly licensed to drive. (Tr. Day 11 (Kiriakos), pp. 126-27). Notably, the Crawford reports from 2002 and 2003 were silent on the issue of GAF's control (or lack thereof) over Mr. Zalewski's daily activities. (*Id.*, p. 128). Crawford's Liability Transmittal Letters merely indicated that "[l]iability may fall to client [GAF] due to insurance contract obligations." (Exhs. 66C – 66F, 66H, 66J-66L; Tr. Day 11 (Kiriakos), p. 127-28). Nevertheless, those reports did assign only 25% of the aggregate liability to GAF. Thus, further investigation and discovery was needed on this subject before the liability of GAF could be reasonably assessed.

To be sure, the issue of control over Mr. Zalewski was hotly contested during discovery conducted in the summer and fall of 2003. (Tr. Day 7 (Deschenes), p. 96). The following facts discovered during the June 26, 2003, deposition of Carlo Zalewski, (*see* Exh. 10, Tab 3 (Zalewski Depo.)), strongly suggested that *DLS* exercised control over his daily driving activities:

- Mr. Zalewski was employed by DLS (p. 9);
- DLS provided Mr. Zalewski with rules (p. 48);
- Mr. Zalewski operated vehicles pursuant to DLS' standards (p. 49);
- DLS provided Mr. Zalewski with a manual about how he was expected to drive. (p. 55);
- DLS managed the drivers (p. 126);
- DLS paid Mr. Zalewski (p. 126);
- DLS issued Mr. Zalewski a W-2 form each year (p. 127);
- DLS paid for Mr. Zalewski's health benefits (p. 129);
- DLS maintained disability insurance for Mr. Zalewski (p. 175);

- DLS maintained workers' compensation insurance for Mr. Zalewski (p. 176);
- DLS issued a booklet with policies, rules and regulations on how to drive (p. 176-77); and
- Mr. Zalewski could pick which roads he chose to drive on his route. GAF did not tell him what route to take to get to the destination (p. 182)

(Exh. 10, Tab 3 (Zalewski Depo.).

Several documents exchanged during discovery in the Underlying Action also suggested that DLS, rather than GAF, exercised control over Mr. Zalewski's daily driving activities. Those documents included:

- GAF's Answer to Marcia Rhodes' First Set of Interrogatories, (Exh. 10, Tab 8), indicated that: (i) DLS directed Zalewski's daily driving activities for [GAF]. (Ans. No. 2); and (ii) DLS and its supervisor instructed, dispatched or otherwise assigned Zalewski to drive on [GAF] routes or deliver [GAF] loads for the entire time period that Zalewski was an independent contractor for [GAF]. (Ans. No. 3).
- Documents produced by DLS and entitled "DLS, Inc. & Customers (Contracted Motor Carriers) HOURS OF SERVICE POLICY, DRIVER LOGS POLICY LOG AUDITING POLICY, November 3, 1997," (Exh. 10, Tab 12), and "DLS, Inc. & Customers (Contracted Motor Carriers) DRIVER QUALIFICATION FILE (DQF), APPLICATION PROCESSING & MAINTENANCE POLICY November 10, 1998," (Exh. 10, Tab 14), set forth DLS's expectation for its employee-drivers to comply with all applicable Department of Transportation Regulations on the topics described in those documents; and
- A document entitled "DRIVER LOGISTICS SERVICE, INC., Executive Summary for GAF Corporation," (Exh. 10, Tab. 15), identifies the following relevant services to be furnished for GAF (Bates No. BMCA 0220):
    - Complete hiring, management and accounting of DLS drivers
    - Fully screens licensed and qualified drivers
    - Safety classes every 6 months, drug screening and random testing to keep drivers current with DOT regulations
    - Guidelines for employer/employee relations
        - Including a "Checklist on Avoiding "Co-Employment" Vulnerability (BMCA 0235)
    - Benefits provided by DLS to its drivers
    - Explanation of DLS' training process (BMCA 0230)

- Safety Policy Statement (BMCA 0239).

Armed with the foregoing facts and knowledge of Massachusetts law on the doctrine of *respondeat superior*, no reasonable insurer in Zurich's position would have reached the conclusion that GAF's liability was "reasonably clear" at any time in 2003 GAF's defense counsel, Greg Deschenes, testified that even as of the November 19, 2003 teleconference involving representatives of the insurers and GAF, Plaintiffs' ability to prove the level of control needed to prevail on a vicarious liability theory was still questionable. (Tr. Day 7 (Deschenes), p. 83). It appears that Plaintiffs' counsel, too, questioned the strength of their claim against GAF. In March 2004, counsel found it necessary to amend their Complaint *for a fourth time* to assert a new theory of liability against GAF predicated on the federal Motor Carrier Statute. (Tr. Day 7 (Deschenes), pp. 84-85; Ex. 72, p. 14, Docket Entry No. 38).[23] After that amendment, the likelihood of GAF being found liable for Mrs. Rhodes' accident increased significantly. (*Id.*)

C. Plaintiffs did not prove their allegation that Zurich's efforts to resolve coverage issues regarding DLS, Mr. Zalewski and Penske delayed its evaluation of Plaintiffs' damages or the tender of its policy limits to AIGDC.

During trial, Plaintiffs' expert witness, Arthur Kiriakos, opined that it took Zurich an unreasonably long period of time—thirteen months to be exact—to determine whether its policy obligated it to defend Penske, DLS and Mr. Zalewski, and that this process delayed Zurich's evaluation of the Plaintiffs' damages and, ultimately, the tender of its policy limits to AIGDC. (Tr. Day 10 (Kiriakos), pp. 122-23). Neither of Mr. Kiriakos' opinions withstands scrutiny.

[23] The Motor Carrier Statute, coupled with the Motor Carrier Safety Regulations, 49 C.F.R. § 390.5, transform independently contracted drivers into "statutory employees" and imposes liability on contractor's for an otherwise independent contractor.

1. Questions of defense coverage under the Zurich policy were resolved within four months—a reasonable period of time under the circumstances.

Though Plaintiffs tried to prove otherwise, the evidence at trial firmly established that Zurich did not receive notice of Marcia Rhodes' auto accident until August 7, 2002, the date on which John Chaney of Crawford telephoned David McIntosh of Zurich to bring the matter to Zurich's attention. (Exh. 68, Bates No. ZA1164 (8/7/2 entry); Exh. 67, Bates Nos. ZA587-588 (8/12/02 entry); Exh. 74 (McIntosh Depo.) p. 62; Tr. Day 3 (Fuell), pp. 137-38). It was at that time, less than one month after Plaintiffs had filed suit against the Personal Injury Defendants, that Penske requested a defense under the Zurich policy. (Exh. 68, Bates No. ZA1164 (8/7/2 entry).[24]

After discussing the matter with Mr. Chaney, Mr. McIntosh determined that it was prudent to provide a defense to Penske under a reservation of rights, and to refer the coverage question to a qualified Massachusetts coverage attorney. (Exh. 68, Bates No. ZA1163 (8/21/02 entry)). In September 2002, DLS and Mr. Zalewski likewise sought coverage under the Zurich policy. (Exh. 66D, p. 2 ("Current Status")). Their request was also referred to Zurich's coverage counsel, Taylor Duane Barton & Gilman LLP, for review and analysis. *(Id.)* Between August 2002 and December 2002, coverage counsel worked to gather necessary documentation from Penske, DLS and Zalewski, and analyzed Zurich's coverage obligations. Although it did not obtain all the necessary documents, counsel's analysis of Zurich's defense obligations was completed and furnished to Zurich in mid-December 2002, roughly four months after Zurich

[24] As John Chaney of Crawford explained during his deposition, coverage for Penske, DLS and Mr. Zalewski did not become an issue "until suit was filed and people started asking for defense and indemnification." (Exh. 73 (Chaney Depo.), p. 168, ll 2-18). Prior to the commencement of litigation against their policyholders, liability insurers do not customarily seek out other potential tortfeasors for whom to provide a defense, since those tortfeasors may well have their own insurance coverage protecting against liabilities. (Tr. Day 15 (Maser), p. 96). The custom and practice in the industry is for the insurer to wait until suit is filed to determine whether, in fact, the primary insurer owes a duty to defend any third parties.

received notice of the Rhodes family's claims. (Exh. 67, Bates ZA0583, 1/16/03 entry). Under the circumstances, the four months it took was well within an acceptable range in the insurance industry. (Tr. Day 15 (Maser), pp. 99-100) Zurich, through its coverage counsel, subsequently sent letters to Penske, DLS and Mr. Zalewski explaining that it would defend them subject to a reservation of rights to disclaim indemnity coverage. The reservations of rights were predicated on the potential availability of other primary insurance for DLS, Mr. Zalewski and Penske, the potential impact of those policies on Zurich's indemnity obligation, and the need to gather such policies. (Exhs. 105 & 106).

Plaintiffs suggest that Zurich should have resolved any coverage issues relating to DLS, Mr. Zalewski and Penske within 30 days, without the assistance of counsel, through a simple review of the Zurich policy. As insurance expert Karl Maser explained, however, this was not a simple, run-of-the-mill coverage analysis; there were several factors that necessitated review by qualified Massachusetts coverage counsel. (Tr. Day 15 (Maser), pp. 97-99). For instance, to determine whether Penske, DLS and Mr. Zalewski were covered under the Zurich policy, it was necessary to carefully examine the business contracts between those parties and GAF to determine the extent to which those contracts might impact the respective insurance obligations. (Tr. Day 15 (Maser), pp. 98). In addition, the policy form—a Massachusetts-specific, statutorily-mandated Business Auto form—contained non-standard coverages, terms and conditions. (*Id.*) It was prudent and consistent with good claim handling practices for Mr. McIntosh (a Florida-based employee responsible for oversight of TPA-handled claims in numerous states) to obtain the assistance of a coverage lawyer familiar with Massachusetts law and the unique coverage form in question. (*Id.*; Tr. Day 12 (Cormack), p. 41). In short, Mr.

Kiriakos' opinion that Zurich took an unreasonable amount of time to determine that Penske, DLS and Mr. Zalewski were entitled to a defense under the Zurich policy holds no water.

2. Throughout 2002, Plaintiffs' counsel provided no documentation concerning Marcia Rhodes' injuries or treatment with Crawford, the insurers or defense counsel and, in fact, ignored a request for such information.

Plaintiffs' contention that Zurich's investigation and evaluation of damages and its tender of policy limits to AIGDC were delayed by its efforts to resolve coverage issues was not borne out by the evidence presented at trial. What the evidence *did* reveal was a calculated refusal on the part of Plaintiffs' counsel to provide even basic information to the insurers concerning Mrs. Rhodes' injuries, treatment and prognosis.

Throughout 2002, Crawford's investigation of the Plaintiffs' damages was hampered by a lack of cooperation on the part of Plaintiffs' counsel. On or about January 2002, Mr. Chaney telephoned Fred Pritzker and requested, among other things, information and documentation concerning Marcia Rhodes' injuries and condition. (Exh. 73 (Chaney Depo.), p. 61, ll. 1-13; p. 130, l. 3 – p. 131, l. 17). [25] An experienced personal injury attorney, Mr. Pritzker was acutely aware that Crawford needed such information in order to administer and evaluate the claims. Based on that fact, Mr. Chaney felt no need to make follow-up requests. (*Id.*, p. 166, ll. 4-13).

By April 2002, Mr. Pritzker's law firm had amassed hundreds of pages of medical records and bills from Mrs. Rhodes' health care providers, and collected reams of additional

[25] Because Mr. Pritzker elected not to testify on his clients' behalf on matters other than litigation costs, the only evidence of what he and Mr. Chaney said during their telephone conversation in January 2002 is Mr. Chaney's sworn deposition testimony and electronic claim notes. In his examinations of several witnesses, Mr. Pritzker pointed out that Mr. Chaney failed to memorialize his request for damages-related documentation in his electronic claim notes, as if to suggest that the absence of a written record of that request proves that no such request was made. The Court should draw no such inference because, as Mr. Chaney explained during his deposition, he "did not and couldn't possibly document every single word of every conversation at every turn in the road on a case. It's just too voluminous. It would be to the point of being crippling. You couldn't do your job if you wrote every single word that ever took place." (Exh. 73 (Chaney Depo.), p. 167.) Moreover, Plaintiffs have given this Court no reason to doubt the veracity of Mr. Chaney's sworn testimony on this or any other subject.

records in the ensuing nine months. (Tr. Day 6 (Patten), pp. 57-61; Exh. 130 (Production Log)). Nevertheless, between January 2002 and January 2003, Mr. Pritzker and his colleagues did not send Crawford a single medical record, a single medical bill or any other document relating to Plaintiffs' claimed damages. (Exh. 73 (Chaney Depo.), p. 166, ll. 4-13; p. 184, ll. 2-16).[26] Given counsel's decision not to share documentation of Plaintiffs' alleged damages with Crawford, the suggestion that Crawford or Zurich should have been more diligent in evaluating Plaintiffs' alleged damages (at least between August 2002 through January 2003) is simply absurd.

3. The evidence does not support Plaintiffs' allegation that Zurich's attempts to identify sources of other primary insurance for DLS and Mr. Zalewski delayed its tender of policy limits to AIGDC.

Plaintiffs maintain, and their expert witness has opined, that Zurich's attempts to determine whether DLS, Mr. Zalewski and Penske maintained their own policies of liability insurance diverted Zurich's attention from the investigation, evaluation and disposition of Plaintiffs' claims and ultimately delayed the resolution of the Underlying Action. (Tr. Day 10 (Kiriakos), pp. 123-26). Once again, it appears that Mr. Kiriakos failed to consider the facts when formulating his opinions.

It is axiomatic that Zurich owed a duty to its policyholder, GAF, to ascertain whether Penske, DLS and Mr. Zalewski had their own policies of automobile liability insurance and, if

[26] Plaintiffs' counsel's decision to withhold such records and to maintain complete "radio silence" with Crawford in the first twelve months after Mrs. Rhodes' auto accident is flatly inconsistent with Plaintiffs' professed desire to resolve their tort claims without the need for litigation. Where claimants and their counsel are truly interested in settling claims short of litigation, they cooperate with insurance adjusters and share information concerning damages with the expectation of negotiating a settlement that will put money in the claimants' hands early on in the process. (Tr. Day 15 (Maser), pp. 127-28). Obviously, that was not the spirit in which Brown Rudnick handled Plaintiffs' claims in the underlying action. To the contrary, in an interview published in *Massachusetts Lawyers Weekly* in January 2005, Mr. Pritzker made it clear that his and Ms. Pinkham's strategy was to get the Rhodes family's claims into suit (so as to get the prejudgment interest clock ticking) and to aggressively litigate the case and reach trial as early as possible. (Exh. 120, p. 2). This would certainly explain why Mr. Pritzker did not communicate a settlement demand to defense counsel until August 2003—more than 13 months after he had filed suit on behalf of his clients and 19 months after Mrs. Rhodes was injured.

so, what the limits of such insurance were. (Tr. Day 15 (Maser), p. 102-03). This inquiry was critical for two reasons. First, it was quite possible that a policy maintained by Penske or DLS would provide *primary* coverage for GAF (as an additional insured), thereby rendering GAF's insurance policy with Zurich excess. (*Id.*, pp. 104-05); Tr. Day 11 (Kiriakos), p. 141). Second, even if the analysis revealed that GAF's policy provided primary coverage for GAF, Penske, DLS and Mr. Zalewski, it was possible that any primary coverage that DLS or Penske had would be shared on a *pro rata* basis with the Zurich policy. (Tr. Day 15 (Maser), pp. 104-05; Tr. Day 12 (Kiriakos), pp. 6-12). In either scenario, the availability of other insurance had the potential to substantially affect whether and the extent to which GAF's $2 million policy was exposed. (Tr. Day 15 (Maser), p. 103; Tr. Day 11 (Kiriakos), p. 132-33).[27] The uncertainty regarding the existence and impact of other insurance was the basis for Zurich's decision to fund the defense of Penske, DLS and Mr. Zalewski subject to a reservation of rights. (Exh. 105, pp. 6-7; Exh. 106, p. 7; Tr. Day 4 (Fuell), p. 71). Zurich did not withdraw its reservation of rights as to that issue before tendering its policy limits to AIGDC. (Tr. Day 4 (Fuell), pp. 121-22).

Consistent with industry custom and practice, Zurich delegated to its coverage counsel, Taylor Duane Barton & Gilman, the tasks of identifying other sources of primary coverage and, if such coverage was found, analyzing the so-called "other insurance" clauses of those policies and the Zurich policy under Massachusetts law to determine their impact on Zurich's obligations.

[27] It was reasonable for Zurich to expect that Penske would have its own coverage given Penske's size and the general rule that "the coverage follows the vehicle." (Tr. Day 15 (Maser), p. 103-05). Similarly, it was reasonable to anticipate that DLS would have insurance to protect it and its drivers against liability given the nature of its business. (*Id.*, pp. 103-104). The fact that General Star Indemnity Company had contacted Zurich's coverage counsel and identified itself as DLS's *excess* auto liability insurer provided yet another basis to believe DLS would have primary insurance to protect against this type of loss. (Tr. Day 11 (Kiriakos), pp. 131, 133).

Tr. Day 15 (Maser), pp. (Tr. Day 13 (Cormack), p. 41).[28] On a number of occasions during the period September 2002 to August 2003, Zurich's coverage counsel wrote to DLS's private counsel, DLS's assigned defense counsel (Morrison Mahoney), Penske and other parties seeking documentation of any primary insurance maintained by Penske, DLS and Mr. Zalewski. (Tr. Day 15 (Maser), p. 105-06; Tr. Day 12 (Kiriakos), pp. 13-20); Exhs. 105, 106, 108, 109). Coverage counsel received little cooperation, however.[29] Indeed, DLS's private counsel, Steven Leary, actually *refused* to share information concerning DLS's insurance program. (Exh. 67, Bates No. ZA0583; Tr. Day 12 (Kiriakos), pp. 16-18).[30] Consequently, the extent to which Zurich's policy would contribute as primary insurance remained unclear until November 2003, at which time Kathleen Fuell received Crawford's Liability Transmittal Letter dated November 13, 2003. (Tr. Day 4 (Fuell), p. 147; Tr. Day 2 (Mills), pp. 137, 150; Exh. 66L). In that report, Crawford noted that, due to an apparent error by DLS's insurance agent, DLS did not maintain a policy of primary auto liability insurance. (Exh. 66L, p. 2 ("Remarks" section").

At trial, Plaintiffs presented no evidence suggesting that Zurich waited for the results of its counsel's "other insurance" investigation before attempting to evaluate Plaintiffs' damages. Indeed, the evidence showed that coverage counsel's investigation proceeded independently and on a separate "track" from Zurich's repeated efforts to gather appropriate documentation of the Plaintiffs' damages. (Tr. Day 15 (Maser), pp. 106-07). Thus, Mr. Kiriakos' opinion that

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[28] Even Plaintiffs' expert acknowledged that the analysis of competing "other insurance" clauses and computation of the *pro rata* shares of two or more primary insurers are complex matters that should be undertaken by a coverage attorney. (Tr. Day 12 (Kiriakos), pp. 10-11).

[29] Though Plaintiffs' expert suggested that Zurich's coverage counsel should have asked GAF for copies of policies maintained by Penske, DLS and Mr. Zalewski, he admitted on cross-examination that he was aware of no evidence suggesting that GAF actually possessed copies of such policies. (Tr. Day 12 (Kiriakos), pp. 48-49).

[30] Plaintiffs' expert opined that based on DLS's refusal to provide this critical information, Zurich had every right to disclaim coverage to DLS. (Tr. Day 12 (Kiriakos), p. 19). In good faith, however, Zurich "stepped up" once again and defended DLS and Mr. Zalewski, subject to a reservation of rights on the issue of other insurance. (*Id.*; Exh. 105).

Zurich's attempts to identify sources of other insurance distracted the company from its efforts to investigate damages and dispose of the Plaintiffs' claims is utterly baseless.

III. WHEN LIABILITY AND DAMAGES BECAME REASONABLY CLEAR, ZURICH TOOK PROMPT AND APPROPRIATE STEPS TO EFFECTUATE SETTLEMENT OF PLAINTIFFS' CLAIMS.

As the Court acknowledged in its *Consolidated Memorandum and Order on Defendants' Motions for Summary Judgment*, Zurich did not have the ability to effectuate settlement of the Plaintiffs' tort claims within its $2 million policy limits because Plaintiffs were never willing to accept $2 million or less in exchange for a release. (*Consolidated Order* at 5). Where, as here, it becomes reasonably clear to a primary liability insurer that a claimant has sustained damages having a value in excess of the primary limits, the primary insurer must attempt to "effectuate settlement" by informing the excess insurer that the primary layer is fully exposed and getting the excess insurer involved in an effort to achieve a global settlement of the claim. (Tr. Day 15 (Maser), pp. 132-135). This is precisely what Kathleen Fuell of Zurich did when liability and damages in excess of $2 million became reasonably clear in late November 2003. (*Id.*, pp. 135-136). Accordingly, there was no violation of Chapter 176D.

A. Zurich's Notice that it would tender its policy limits to AIGDC on November 19, 2003 was a proper effort to effectuate settlement.

On November 19, 2003, Mrs. Fuell participated in a conference call with employees of GAF, GAF's insurance broker, GAF's defense counsel, Gregory Deschenes, AIGDC Complex Director Nicholas Satriano, and others, to discuss the merits of the claims and defenses in the Underlying Action, and to plan a strategy for moving the case into a settlement posture, including mediation. (Tr. Day 4 (Fuell), pp. 85-86, 88; Tr. Day 3 (Fuell), p. 124). During that teleconference, there was a consensus that it would take more than $2 million to settle the Rhodes family's tort claims. (Tr. Day 7 (Deschenes), p. 92). Kathleen Fuell understood, based

on statements made by defense counsel during that teleconference, that Plaintiffs' counsel had indicated that Plaintiffs would not participate in mediation unless an offer of at least $5 million were "on the table." (*Id.*, pp. 88-89; Tr. Day 3 (Fuell), p. 121; Exh. 13). In view of that information, and based on her evaluation and verification of the records contained in the demand package, Mrs. Fuell committed to seek authority from her superiors to tender Zurich's $2 million policy limits to AIGDC for its use in settlement discussions with the Plaintiffs. (Tr. Day 4 (Fuell), pp. 85-87; Exh. 13)

By announcing that she would seek to tender Zurich's policy limits to AIGDC, Mrs. Fuell properly put AIGDC on notice that any settlement of the Rhodes family's claims would require a contribution from National Union. (Tr. Day 15 (Maser), p. 136). The testimony of AIGDC Complex Director Nicholas Satriano confirms that fact. Mr. Satriano testified that he understood during the teleconference that Zurich, GAF's defense counsel and GAF's insurance broker were "reaching up" to AIGDC and asking it to get involved in the case and contribute to a global settlement. (Tr. Day 7 (Satriano), pp. 143-44; Tr. Day 9, p. 45). Mr. Satriano further explained that he recognized this as AIGDC's opportunity to become "fully involved" in the case and indicated during that teleconference that he was going to "get to work on this file." (Tr. Day 8 (Satriano), p. 84).

True to his word, Mr. Satriano "mobilized" and took a number of steps to assume control of the case during and immediately following the November 19, 2003 teleconference. (Tr. Day 9 (Satriano), pp. 45-46). During the teleconference, Mr. Satriano requested GAF's defense counsel and Crawford to provide their respective files. (Tr. Day 8 (Satriano), pp. 83-84; Tr. Day 7 (Deschenes), pp. 39-40). He received those materials within "a week or two" after the teleconference and reviewed them. (Tr. Day 8 (Satriano), pp. 89-92). Additionally, in December

2003, Mr. Satriano selected and "associated in" his own counsel, Campbell, Campbell, Edwards & Conroy (the "Campbell Firm"), to assist in the defense of GAF. By February 2004, Mr. Satriano felt he had everything he needed to complete his investigation of the claim, and was well on his way to doing so. (Tr. Day 9 (Satriano), p. 33-34). In summary, after Zurich "reached up" to AIGDC and National Union during the November 19, 2003 conference call, Mr. Satriano did everything he could to learn about the facts of the case, evaluate the case, and develop what he thought was the best tactical strategy to move the case toward resolution. (*Id.*, pp. 46-47). There can be no doubt that the steps Kathleen Fuell took to "effectuate settlement" on November 19, 2003 were not only consistent with industry custom and practice, but also accomplished her overarching goal of getting the excess insurer actively engaged in a global effort to settle the case. (Tr. Day 4 (Fuell), p. 140; Tr. Day 5 (Fuell), pp. 48-49).

B. Zurich's oral tender on January 23, 2004 was effective and consistent with industry custom and practice.

On January 23, 2004, while Mr. Satriano was in the midst of working with the Campbell Firm and reviewing the materials provided by Crawford and Nixon Peabody, Kathleen Fuell contacted him and formally offered Zurich's $2 million policy limits to AIGDC. (Tr. Day 4 (Fuell), pp. 89-91, 106; Tr. Day 9 (Satriano), pp. 44-45). During that telephone conference, Mr. Satriano inquired whether it was Zurich's position that its duty to defend was extinguished by the tender. He also declined to accept the policy limits tender because it was not in writing. (Tr. Day 9 (Satriano), p. 125) Mrs. Fuell agreed to review the Zurich policy and address Mr. Satriano's question about the defense obligation. (Tr. Day 3 (Fuell), pp. 106-107) Nevertheless, based on the January 23, 2004, telephone call with Mrs. Fuell, Mr. Satriano clearly understood that AIGDC "had the Zurich $2 million to work with in making any offer of settlement," and that "whatever [AIGDC] offered [it] could rely upon the $2 million...." (Tr. Day 9 (Satriano), pp.

44-45). Thus, Zurich's oral tender of its policy limits was effective and consistent with industry custom and practice, even though it was not accompanied by a firm statement of Zurich's position regarding the duty to defend. (Tr. Day 15 (Maser), pp. 136, 139-40).

Plaintiffs have suggested that Zurich improperly delayed the tender of its policy limits to AIGDC. This argument is not only factually unsupportable, it is illogical. Since the Zurich policy provides that a tender of policy limits extinguishes Zurich's obligation to fund the insured's defense, there was absolutely no economic or other incentive for Zurich to delay the tender in this situation, nor have Plaintiffs come forth with any evidence of such a delay. (Exh. 61, Bates No. BMCA 0080, §A (Coverage)). To the contrary, as insurance expert Karl Maser explained, Zurich had a strong financial incentive to tender its limits as soon as liability and damages in excess of its $2 million became reasonably clear. (Tr. Day 15 (Maser), 136-139).

Nor is there merit to Plaintiffs' contention that Zurich's failure to send AIGDC a letter[31] confirming the tender and explaining its position regarding its duty to defend before March 29, 2004 hampered AIGDC's investigation or evaluation of liability or the Plaintiffs' damages.[32] As discussed above, Nick Satriano of AIGDC took an active role in managing the *Rhodes* case after the November 19, 2003 conference call. In December 2003, January 2004 and February 2004, Satriano was working with the Campbell firm, and was reviewing materials provided by defense counsel and Crawford. By February 2004, he had all he needed to complete his investigation.

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[31] In an email to Mr. Satriano dated February 13, 2004, Kathleen Fuell confirmed Zurich's tender of its policy limits. (Exh. 117, Bates No. ZA0756) ("A few weeks ago, I called you to advise that we [Zurich] were offering up our $2,000,000 policy limits under the business auto policy for GAF/Building Materials."). Apparently, an electronic communication of the Zurich tender was not good enough for Mr. Satriano, even though AIGDC had no company policy requiring its personnel to insist on formal written tenders from primary insurers. (Tr. Day 7 (Satriano), p. 158).

[32] Since she is not an attorney, Kathleen Fuell wisely sought the assistance of qualified Massachusetts coverage counsel to determine whether Zurich had an ongoing defense obligation under the Policy and Massachusetts law. After receipt of the advice she needed, Ms. Fuell immediately wrote and dispatched the March 29, 2004 letter to AIGDC. (Exh. 33, Bates Nos. ZA0950-0951; Tr. Day 7 (Fuell), pp. 113-14; Tr. Day 15 (Maser), p. 141).

Notably, Zurich's alleged delay in providing a statement of its position regarding the defense obligation did not stop Mr. Satriano from convening in a critical March 5, 2004 strategy meeting with Mr. Conroy, Greg Deschenes and GAF employees (and without Mrs. Fuell) during which the valuation of the Rhodes family's damages, strategies for settling the case (including mediation), and the potential need for additional discovery were discussed and debated. (Tr. Day 8 (Satriano), pp. 12-13). Thus, whatever uncertainty existed in the mind of Mr. Satriano as to whether Zurich would eventually relinquish its defense obligation, it did not impact his ability to evaluate the Plaintiffs' damages and move the case toward resolution.

C. The insurers' disagreement regarding the funding of GAF's defense did not have any effect on the ultimate resolution of the Underlying Action.

Finally, Plaintiffs and their expert witness have suggested that a disagreement between AIGDC and Zurich over which insurer, if either, would fund the defense of GAF after Zurich tendered its policy limits delayed the resolution of the "tender issue" and the ultimate disposition of the Underlying Action. (Tr. Day 10 (Kiriakos), pp. 135-36). This contention bears no relationship to the evidence presented at trial. To be sure, an issue did arise as to whether Zurich or National Union would fund the defense of GAF and the other Personal Injury Defendants after Zurich tendered its policy limits. A gap existed in GAF's insurance program because, (i) under the Zurich policy, a tender of the policy proceeds extinguished Zurich's duty to defend the insured; and (ii) AIGDC's policy did not include a defense obligation. (Tr. Day 15 (Maser), pp. 139-140; Tr. Day 12 (Kiriakos), pp. 21-23). However, the disagreement over which insurer was to fund the defense did not arise until the end of March 2004 (more than two months after Zurich had tendered its policy limits to AIGDC) and lasted a mere four days. Zurich did not articulate its position on the issue until Kathleen Fuell sent her March 29, 2004 letter to Richard

Mastronardo of AIGDC (Mr. Satriano's successor). (Tr. Day 4 (Fuell), p. 94-95). In that letter, Mrs. Fuell informed AIGDC that Zurich would cease funding the defense of GAF and the other defendants. (Exh. 33). On March 31, 2004, AIGDC rejected Zurich's tender and took the position that GAF would be required to fund its own defense. (Exh. 34). On April 2, 2004, Kathleen Fuell sent an email to GAF and its coverage counsel explaining that, "although we have tendered the policy limits and offered to pay the money to AIG to deposit in an escrow account, we will continue to provide a defense to Building Material Corporation of America for this action." (Exh. 118).[33] Thus, the disagreement which began on March 29, 2004 ended a mere four days later, when Zurich "stepped up" for the benefit of its policyholder. Any argument that this four-day dispute impeded AIGDC's investigation or evaluation of the Plaintiffs' tort claims is a fiction.

D. Since AIGDC was not ready to contribute to a settlement offer by March 2004, Zurich authorized an offer of its policy limits.

During the November 19, 2003 conference call, Kathleen Fuell of Zurich informed Mr. Satriano of AIGDC of her belief that a contribution of National Union's policy proceeds would be needed to effectuate a global settlement of the Plaintiffs' claims. At that time, AIGDC declined to contribute. (Tr. Day 7 (Satriano), p. 128) Not long after that conference call, Mrs. Fuell formally tendered Zurich's policy limits to AIGDC and had other communications with Mr. Satriano. At no time during that period, however, did AIGDC accept Zurich's tender or commit to contributing excess insurance proceeds to a settlement offer. (Tr. Day 8 (Satriano) p. 10; Tr. Day 9 (Satriano) pp. 44-45; Exhs. 33, 36, 117). Lacking a commitment from AIGDC, Zurich did the only other thing it could do to effectuate settlement: it authorized GAF's defense

[33] Incidentally, Plaintiffs' expert, Mr. Kiriakos, testified that this was precisely what industry custom and practice required Zurich to do in these circumstances: put aside its differences with the excess insurer so that the excess insurer could move toward a resolution of the Underlying Action. (Tr. Day 12 (Kiriakos), pp. 24-25).

counsel to offer its full $2 million policy limit to Plaintiffs in exchange for a release. That offer was immediately communicated to and rejected by Plaintiffs' counsel. (Tr. Day 7 (Deschenes), pp. 95, 105). These further efforts by Zurich are a further reflection of its good faith approach to the Rhodes' family's claims.

IV. NO PLAINTIFF HAS PROVEN THAT HE OR SHE SUFFERED A COGNIZABLE LOSS

A plaintiff seeking relief under Chapter 93A, § 9 must prove that she suffered some actual, cognizable loss as a consequence of the defendant's alleged unfair or deceptive practice. *Hershenow,* 445 Mass. at 798 (affirming judgment for defendant where plaintiffs failed to demonstrate they suffered economic or noneconomic loss). The loss may be economic (i.e., a loss of money or property), or non-economic, as in the case of a personal injury or severe emotional distress. *Id.* at 799-800. Absent proof of a loss (as opposed to simply the invasion of a legally protected interest), not even statutory damages of $25.00 are recoverable. *Id.* at 799, n.18.

In December 2006, this Court correctly predicted that the Plaintiffs would have difficulty establishing that they suffered an actual loss as a consequence of Zurich and AIGDC's alleged failure to effectuate settlement of their tort claims. *Consolidated Memorandum and Order on Defendants' Motion for Summary Judgment,* p. 5. Plaintiffs' principal obstacle to proving a loss is the fact that the Plaintiffs collectively recovered $11.8 million in the Underlying Action—approximately 50% more than they were willing to accept to settle the case in August 2004. Another barrier is the principle that precludes Plaintiffs from recovering damages in this action for which they were already compensated in the Underlying Action. *Id.*

Based on the evidence at trial, it appears that Plaintiffs seek to recover three categories of damages against the defendants. First, Plaintiffs claim economic damages comprised of, (i)

$142,192.73 in costs allegedly incurred and paid in the Underlying Action; and (ii) "7 or $800,000" in unpaid interest on the judgments in the Underlying Action. (Tr. Day 9 (H. Rhodes), p. 108). Second, Plaintiffs seek damages for feelings of anxiety, anger, frustration, and embarrassment they claim to have experienced as a result of the litigation process and trial. For the reasons explained below, Plaintiffs are not entitled to recover any damages against Zurich.

A. Plaintiffs have not proven an economic loss attributable to Zurich's conduct.

Ironically, Plaintiffs' success in the Underlying Action stands as an obstacle to recovery in this action. The record evidence firmly establishes that from the date of Mrs. Rhodes' accident through at least the first day of trial, Plaintiffs were willing to settle their claims against the Personal Injury Defendants for a payment of $8 million. (*See Section I.A, supra*) By taking their case to verdict, Plaintiffs ultimately recovered $11.8 million—nearly 50% more than they would have accepted in settlement. (Tr. Day 9 (H. Rhodes), p. 108). Having recovered $3.8 million more through trial than they would have received in a settlement with the insurers, Plaintiffs cannot reasonably claim they suffered any economic loss due to the insurers' alleged failure to effectuate a prompt, fair and equitable settlement.

B. Plaintiffs waived any claim to statutory costs and accrued pre-judgment interest when they settled their claims with AIGDC and filed a Satisfaction of Judgments in the Underlying Action.

On September 28, 2004, judgments entered in favor of each of the Plaintiffs in the Underlying Action. The judgment for each Plaintiff included the amount of the jury's award, statutory pre-judgment interest of 12% from July 12, 2002, and the Plaintiff's "costs of action." (Exh. 72, pps. 19-20, Docket Entries 97, 98 and 99.) On October 12, 2004, Plaintiffs filed a Request for Post-Judgment Costs, together with the Affidavit of M. Frederick Pritzker, wherein they requested the Superior Court to award them costs totaling $54,057.37. (Exh. 229). The

costs included many of the items for which Plaintiffs seek recovery in this action, such as filing fees, fees for service of process, expert fees and costs associated with depositions. (*Id.*).

In June 2005, while AIGDC's appeal of the judgments and Plaintiffs' Request for Post-Judgment Costs were pending, Plaintiffs and AIGDC reached a settlement, the terms of which were memorialized in Mr. Pritzker's letter to Warren Nitti of AIGDC dated June 3, 2005. (Exh. 60). Pursuant to the agreement, (i) National Union was to pay Plaintiffs a total of $8,965,000 in three installments; (ii) AIGDC was to immediately withdraw its appeal on behalf of the defendants; (iii) upon receipt of the final installment, Plaintiffs agreed to file a "Judgment Satisfied" with the Court "thereby ending the case"; and (iv) Plaintiffs expressly reserved from the settlement agreement the right to pursue their Chapter 176D/93A claims against AIGDC and National Union. (*Id.*) Mr. Nitti countersigned the agreement on behalf of National Union and AIGDC on June 3, 2005. (*Id.*) Pursuant to the settlement agreement, National Union dismissed its appeal and made the three payments to the Plaintiffs. (Exh. 72, p. 24, Docket Entry No. 128). On September 7, 2005, after AIGDC made its final payment, Plaintiffs filed a Satisfaction of Judgments with the Norfolk Superior Court in which they asserted that "***the judgments which entered after jury verdict on September 28, 2004 have been satisfied in full.***" (Exh. 21 (emphasis added); Exh. 72, p. 24, Docket Entry No. 129).

By filing the Satisfaction of Judgments, Plaintiffs waived their right to any taxable costs they incurred in the Underlying Action, including all costs requested in their Request for Post-Judgment Costs. Waiver is a voluntary relinquishment of a known right. *Attorney General v. Industrial National Bank of Rhode Island*, 380 Mass. 533, 537 n.4 (1980). The Request for Post-Judgment Costs reflects Plaintiffs' awareness of their right to recover all taxable costs. In an effort to avoid an appeal of the judgments, Plaintiffs reached a compromise with AIGDC.

Through that compromise, and the Satisfaction of Judgments filed pursuant thereto, Plaintiffs voluntarily relinquished their right to recover such costs. Plaintiffs' counsel admitted the same at trial. (Tr. Day 16 (Pritzker), Day 16, pp. 25-26). Having given up their right to recover such costs, Plaintiffs cannot reasonably claim them as damages in this action.

Plaintiffs' claim for any unpaid pre-judgment interest that accrued in the Underlying Action fails for the same reason. As a threshold matter, Plaintiffs failed to prove at trial that any of the pre-judgment interest awarded by the Superior Court remains unpaid, nor did they attempt to quantify such interest. In fact, the only evidence concerning unpaid interest is Harold Rhodes' testimony that "we had to give up 7 or $800,000 to settle [with AIG]." (Tr. Day 9 (H. Rhodes), p. 108). Thus, the Court could only speculate as to whether Plaintiffs' suffered a loss of pre-judgment interest. Even if the evidence supported a claim for such interest, however, the Plaintiffs have clearly waived the right to recover it. Having settled with AIGDC and represented to the Norfolk Superior Court that the judgments that entered in September 2004 (and included statutory interest) were "satisfied in full," Plaintiffs voluntarily relinquished the right to recover any interest.

C. Plaintiffs cannot recover any accrued post-judgment interest from Zurich because Zurich is not responsible for the accrual of that interest.

Though it is not clear from any of their submissions to this Court, it appears that Plaintiffs also claim that *Zurich* deprived them of approximately $700,000 to $800,000 in unpaid post-judgment interest on the judgments that entered in September 2004. Even if Plaintiffs had put forth evidence sufficient to enable the Court to calculate unpaid post-judgment interest, Zurich cannot be held liable for that interest because the interest accrued, if at all, because at

AIGDC's request National Union filed a Notice of Appeal of the judgments was filed and National Union did not pay Plaintiffs the balance of the judgments until September 2005.

On or about December 22, 2004, Zurich paid Plaintiffs the sum of $2,322,995.75, which consisted of its $2 million policy limit plus accrued post-judgment interest on the underlying judgments from the date judgment entered through December 22, 2004. (Exh. 128, p. 1). This payment was made pursuant to the Policy's Supplementary Payments provision, which states as follows:

> **A. COVERAGE**
>
> * * *
>
> **2. COVERAGE EXTENSIONS**
>
> a. Supplementary Payments. In addition to the Limit of Insurance, we will pay for the "insured":
>
> ...
>
> (6) all interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" we defend, *but our duty to pay interest ends when we have paid*, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

(Exh. 61, Bates No. BMCA 0070). Since AIGDC and National Union had filed a Notice of Appeal in October 2004, Zurich had no legal obligation to make this payment. By issuing the payment when it did, however, Zurich terminated any obligation under the Policy to pay for post-judgment interest. Any post-judgment interest that accrued after December 22, 2004 and before National Union paid its final installment to Plaintiffs pursuant to the settlement agreement of June 2005 was the responsibility of National Union, the excess insurer. (Exh. 69, Bates No.

001972).[34] Since Zurich had no obligation to pay post-judgment interest that accrued after December 22, 2004, and since any such interest accrued due to AIGDC and Plaintiffs' inability to reach a final settlement, Zurich cannot be held liable for any such accrued interest.[35]

D. Plaintiffs are not entitled to recover non-statutory costs allegedly charged by Brown Rudnick Berlack & Israels.

Having claimed litigation costs as damages in this action, Plaintiffs bear the burden of proving not only the amount of such costs but also when the costs were incurred, who incurred them, and that they were reasonable. Plaintiffs claim $142,192.73 in costs allegedly incurred from the date that Brown Rudnick commenced representation of the Plaintiffs in January 2002, through December 31, 2004. (Exh. 90, 91; Tr. Day 16 (Pritzker), p. 18). In an attempt to prove this element of damages, Plaintiffs offered "pro-forma" reports of costs incurred throughout the Underlying Action, as well as Mr. Pritzker's testimony that the costs charged and incurred were reasonable. (Tr. Day 12 (J. Kelly), p. 54; Tr. Day 16 (Pritzker), p. 20).

A Chapter 93A plaintiff bears the burden of proving entitlement to damages, but "damages cannot be recovered when they are remote, speculative, hypothetical and not within the realm of reasonable certainty." *Kitner v. CTW Transp., Inc.,* 53 Mass. App. Ct. at 748. Plaintiffs have not proven their alleged costs with a reasonable degree of certainty. First, Plaintiffs have not shown that any of them actually paid any of the costs in question, and have instead asked the Court to *assume* that they all paid some portion of those costs. Second, since Plaintiffs did not identify with any certainty the dates on which certain "outside" expenses were

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[34] The insuring agreement between National Union and GAF provides that:

> [W]e will pay on behalf of the Insured those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay by reason of liability imposed by law...because of Bodily Injury that takes place during the Policy Period and is caused by an Occurrence happening anywhere in the world.

[35] Plaintiffs' recovery of any accrued and unpaid post-judgment interest is also barred because they forefeited any right to it when they compromised their claims AIGDC and National Union in order to avoid an appeal.

incurred, the Court cannot reasonably ascertain which costs were incurred after liability and damages became "reasonably clear" within the meaning of Chapter 176D, § 3(9)(f). Third, Plaintiffs have failed in their effort to demonstrate that the costs allegedly incurred were reasonable.[36]

1. No Plaintiff has proven that he or she paid any of the costs allegedly charged by Brown Rudnick.

Throughout the course of this action, Plaintiffs have approached their claims as a joint venture. As the Court is aware, however, the Plaintiffs had distinct tort claims against the Personal Injury Defendants and, consequently, each must prove in this case that the insurers' alleged failure to effectuate a prompt, fair and equitable settlement of his or her claim caused some form of damage. *See Hershenow*, 445 Mass. at 798. Because each Plaintiff is claiming costs as an element of his or her compensatory damages in this action, each Plaintiff had the burden of proving what costs he or she actually paid.

During trial, neither Marcia, Harold nor Rebecca Rhodes testified as to the amount of costs, if any, he or she personally paid to Brown Rudnick. Plaintiffs' counsel did call Janet Kelly, a Brown Rudnick billing coordinator, in an attempt to bolster the case for costs. During cross-examination, however, Ms. Kelly candidly admitted that she did not know, and that there is no way to determine, how much (if any) of the costs claimed by Plaintiffs were actually paid by Harold Rhodes or by Rebecca Rhodes or by Marcia Rhodes. (Tr. Day 12 (J. Kelly), pp. 91-92). Since Plaintiffs failed to present that information, the Court cannot determine with any degree of certainty whether, for example, Marcia Rhodes actually paid her lawyers for any of the costs claimed. It appears that Plaintiffs expect the Court will *assume* that each of them paid some of these costs. To draw such an inference would be an exercise in speculation. *Squeri*, 32 Mass.

[36] In addition, and for the reasons explained in Section IV.B., *supra*, Plaintiffs are not entitled to recover any of the $54,057.37 in statutory costs they claim to have incurred in the Underlying Action.

App. Ct. at 209 ("While proof of damages does not require mathematical precision, it must be based on more than mere speculation.") Having failed to meet their burden of proof, Plaintiffs may not recover any alleged non-statutory litigation costs against Zurich.

2. Plaintiffs presented no evidence that would enable the Court to determine which costs were incurred after the point when liability and damages became reasonably clear.

Even assuming the Court could rationally infer that any of the Plaintiffs paid costs to Brown Rudnick, it cannot determine which of those costs are compensable as damages in this case. At best, Plaintiffs would be entitled to recover only those costs incurred *after* the date on which liability and damages became reasonably clear, as determined by the Court.[37] Plaintiffs' evidence provides no reliable basis to make this determination, however.

Billing coordinator Janet Kelley testified that with respect to "outside" costs, that is, those costs not incurred by using equipment in the Brown Rudnick office, she could not determine when the costs were incurred, based on a review of the summary of costs marked as Exhibit 91. (Tr. Day 12 (J. Kelley), pp. 55, 78). The date shown in the column next to each cost entry in Exhibit 91 represents the date on which Brown Rudnick's Accounting department paid the outside cost. (*Id.*, p. 55). While there was testimony that Accounting ordinarily paid each disbursement on the day a receipt was received, it was up to the individual attorney to submit receipts for "outside" costs for reimbursement, and there was no deadline for the submission of such receipts. (*Id.*, pp. 72-73). Therefore, the *payment* dates clearly do not correlate to the dates on which the costs were actually *incurred.*

In overruling the Defendants' objection to Exhibits 90 and 91, the Court commented that this evidentiary deficiency impacts its weight, not its admissibility. (*Id.*, pp. 69-70). Under the

[37] Not surprisingly, Plaintiffs seek to recover costs incurred as far back as January 2002—six months before they even filed suit in the Underlying Action. Costs incurred before the time when the Court determines liability became reasonably clear are not compensable.

circumstances, however, the Court should assign no weight to this evidence. While Ms. Kelley testified that often times the description next to each cost entry in Exhibit 91 includes information from which one could discern the date on which the cost was incurred, that is not true for all entries. (*Id.*, pp. 72-73). Indeed, some of the cost entries are actually multiple costs that are "bundled" into a single disbursement. An example can be found on page 137 of Exhibit 91, where Mr. Pritzker was reimbursed $159.00 for mileage, which amounts to roughly 397 miles of driving. (Tr. Day 16 (Pritzker), p. 39). Without knowing the exact date on which these costs were incurred, the Court can only guess as the total amount of costs that were incurred after the date on which it deems liability became reasonably clear.

3. Plaintiffs failed to establish the reasonableness of the costs for which they seek to recover.

Plaintiffs failed to show that the costs claimed were reasonable. Though Plaintiffs suggested otherwise, the fact is that a substantial volume of the costs and expenses in question constitute law firm overhead. Exhibits 90 and 91 are replete with examples of such charges, including "in-house" copying charges at a rate of $.20 per page; faxes at a hefty $1.25 per page; local and long distance telephone charges;[38] secretarial overtime; and something called "in-house binding." (Exh. 90, 91).[39] Worse yet, Brown Rudnick appears to have billed the Plaintiffs for Mr. Pritzker's *personal* cellular telephone airtime and long-distance charges, purportedly based on an allocation model developed by, of course, Mr. Pritzker. (Tr. Day 16 (Pritzker), pp. 29-31).

In an attempt to justify these charges, Plaintiffs relied upon Mr. Pritzker to offer the opinion that all of the costs were "fair and reasonable." (*Id.*, p. 15). Among the costs Mr.

[38] There was testimony at trial that Brown Rudnick maintained a flat-rate telephone plan, but nevertheless charged clients the "Bell" rates for long-distance calls. (*Id.* at 49). Thus, at least some amount of the long distance calls identified in Exhibit 91 constitute profit for Brown Rudnick.

[39] There can be little doubt that Brown Rudnick profited from these charges, though Mr. Pritzker tried to mask these profits within the firm's "overhead." (*Id.* at 48). Notably, Mr. Pritzker was forced to admit, in response to the Court's questions, that profit is really just "a function of the way the accounting department accounts for it." (*Id.*)

Pritzker felt it "fair and reasonable" to pass along to his clients were charges for Federal Express deliveries to and from his vacation home in Palm Beach Gardens, Florida—deliveries that were solely for the convenience of Mr. Pritzker. (*Id.*, p. 43). Zurich has no intention of occupying the Court's time with a line-item review of the unreasonable costs for which Plaintiffs seek compensation. That is a task *Plaintiffs* have left to the Court. As the Court considers the Plaintiffs' claim for costs, however, it should bear in mind the source of the opinion regarding the reasonableness of these charges. Since it was Mr. Pritzker and his law partners who benefited from the alleged payment of these charges, and given the Plaintiffs' substantial difficulty in proving *any* damages that would entitle them to relief against Zurich, Mr. Pritzker's bias is obvious and, therefore, his testimony should be afforded no evidentiary weight.

In conclusion, even if the Court were inclined to devote hours of its time reviewing all 6,353 of the cost entries contained in Plaintiffs' 271-page "pro-forma" disbursement report (Exh. 91), the evidence regarding this component of damages is patently insufficient and unreliable. Having failed to prove that any Plaintiff actually paid for such costs, that the costs in question were reasonable or incurred after liability and damages became reasonably clear, no Plaintiff should be compensated for them.

E. Plaintiffs are not entitled to damages for alleged emotional harm because they failed to prove the essential elements of a claim for intentional infliction of emotional distress.

It is well settled that Chapter 93A, § 9, permits recovery for personal injury losses, such as *severe* emotional distress. *Hershenow*, 445 Mass. at 798. Recovery for severe distress is permitted, however, only where the elements of the torts of intentional infliction of emotional distress or negligent infliction of emotional distress are satisfied. *See Haddad v. Gonzalez*, 410 Mass. 855, 871-72 (1991); *Hart v. GMAC Mortgage Corp.*, 246 B.R. 709, 727 (2000) (observing

that a Chapter 93A plaintiff "must establish the elements required for the common law torts of either intentional infliction of emotional distress...or negligent infliction of emotional distress.") In *Haddad v. Gonzalez*, 410 Mass. 855, 871-72 (1991), the Supreme Judicial Court affirmed an award of emotional distress damages to a Chapter 93A plaintiff where the defendant landlord's conduct was found to be intentional, extreme and outrageous, and caused severe emotional injury. In reaching its conclusion, the Court reasoned that,

> In *Leardi v. Brown*...we held that under the amended version of § 9(1), the invasion of any legally protected right was compensable. In *Maillet v. ATF-Davidson, Co*....we clarified that this included invasions in the form of injury to the person....Because ***severe emotional distress*** is a form of personal injury,...it would seem to follow that it is also compensable under § 9, if the injury is the product of a violation of G.L. c. 93A, § 2.

Id. at 865 (emphasis added); *see also*, *Lingis v. Waisbren*, 2006 WL 452942 (Mass. Super. Ct. (Suffolk), Feb. 25, 2006) (in legal malpractice action, court awarded damages under c. 93A for *intentionally* inflicted and severe emotional distress, even in absence of separately count for that tort).

By contrast, the court in *Hart v. GMAC Mortgage Corp.* concluded that the while the claimant had proven a Chapter 93A violation, he was not entitled to compensatory damages for the anger, anxiety and frustration he experienced as a result of the defendant's unfair conduct. In denying this relief, the court observed that,

> More importantly, he did not prove either intentional or negligent infliction of emotional distress, and, in the absence of reckless conduct or physical symptoms sufficient to support liability for these common law torts under Massachusetts law, there can be no recovery for emotional distress under Chapter 93A. The Court has found no case in which a plaintiff has recovered emotional distress damages under Chapter 93A in the absence of proof of intentional infliction of emotional distress. *See Haddad v. Gonzalez*, 410 Mass. at 870-72, 576 N.E.2d 658.

246 B.R. at 736.

To be entitled to damages against Zurich for any species of alleged emotional harm, the Plaintiffs were required to prove: (i) that the emotional distress they experienced was "severe"; (ii) that Zurich intended to inflict severe emotional distress or knew or should have known that its conduct would likely cause such distress; (iii) that Zurich's conduct was extreme and outrageous; and (iii) that Zurich's conduct did, in fact, cause each Plaintiff's alleged distress. *Haddad*, 410 Mass. at 871. Plaintiffs put forth no such evidence.

The evidence concerning the Plaintiffs' respective emotional reactions to the litigation process, trial preparation and trial does not rise to the level of "severe emotional distress," i.e., distress of such a character that "no reasonable man could be expected to endure it.'" *George v. Jordan Marsh Co.*, 359 Mass. 244, 254 (1971). For instance, Harold Rhodes and his brother, the Honorable Stephen Rhodes, provided the following testimony regarding Harold's mental state at various stages of the underlying action: (i) Harold became "anxious" about the litigation in November 2002 after Mr. Zalewski's criminal proceedings terminated (Tr. Day 9 (H. Rhodes), p. 112); (ii) he exhibited "increasing frustration" with the legal process in 2002 and 2003, and "anxiety" due to discovery undertaken in 2003 and the production of the day-in-the-life video (Tr. Day 5 (S. Rhodes), pp. 21, 23-24); (iii) he was angry about the initial $2 million offer he received in March 2004 (Tr. Day 9 (H. Rhodes), p. 99); (iv) by the end of 2003, he began to feel "concerned" and exhibited frustration about the state of the family's finances, and by August 2004, he was "scared" about financial issues; (*Id.*, pp. 113-114, 122; Tr. Day 5 (S. Rhodes), p. 29); (v) during the course of the mediation, his emotions went from "excited and as happy as I could possibly be" to "hopeless," "depressed," and "outraged" after receipt of the first offer from AIGDC (Tr. Day 9 (H. Rhodes), pp. 100, 124-125); and (vi) during the trial in September 2004, he felt anger, frustration and sorrow when observing the testimony of the defense life care

planner and when observing his wife and daughter testify (*Id.*, pp. 126-27; Tr. Day 5 (S. Rhodes), p. 35-36). Even if Harold Rhodes could separate these emotions from the emotional turmoil he was experiencing in 2002, 2003 and 2004 as a result of his wife's auto accident and the tremendous upheaval in his life, feelings of frustration, anger, anxiety and sorrow are feelings that many people feel every day. There is nothing "severe" about them.

The same is true for the emotional reactions described by Marcia Rhodes and Rebecca Rhodes. Rebecca Rhodes testified that she felt "nervous" when her father told her she might need to become involved in the litigation (though she did not say when he told her), "very nervous" about testifying in a deposition, and "a little sad and...very nervous" when she testified during trial. (Tr. Day 5 (R. Rhodes), pp. 123, 127, 135). Similarly, the principal "emotions" Marcia Rhodes experienced during the course of the Underlying Action were disbelief, anger, and embarrassment. Specifically, she testified that:

- she was in disbelief and embarrassed that she had to respond to interrogatories in Spring 2003; felt embarrassed, angry and "indignant" when she submitted to an independent medical examination in July 2004; and felt anger and disbelief that she had to testify in a deposition in August 2004 (Tr. Day 6 (M. Rhodes), pp. 76, 78 83, 89);

- she was in disbelief and felt an invasion of privacy when she thought about the fact that the case was not resolved in the two years following the accident (*Id.*, p. 89);

- she reacted with disbelief to news that the mediation was unsuccessful (*Id.*, p. 103);

- she felt angry and anxious when she learned that she and her daughter would have to testify at trial (*Id.*, pp. 102-04); and

- she was embarrassed during the trial when her lawyers chose to display the day-in-the-life video for the jury (*Id.*, pp. 110-111).

Even if the Court were to credit the Plaintiffs' testimony regarding their feelings, their emotional reactions to simple discovery and other aspects of the litigation process are a far cry from the "severe" emotional distress that is required to recover such damages.

Plaintiffs also failed to show that the conduct of which they accuse Zurich—failing to tender its policy limits to AIGDC earlier—was undertaken intentionally or with knowledge that it would cause the Plaintiffs any degree of emotional upset, much less extreme emotional distress. As demonstrated in Section II.A, *supra*, above, during his time overseeing the Rhodes family's tort claims, David McIntosh of Zurich was attempting to gather information and verifiable documentation that would put him in a position to properly evaluate the Plaintiffs' injuries and damages. Unfortunately, medical documentation and other information Mr. McIntosh needed to evaluate the case (including documents related to Mrs. Rhodes' future case needs) did not arrive at Zurich until after Kathleen Fuell assumed control of the file in September 2003. Once she reviewed the demand package, however, Ms. Fuell took prompt and appropriate steps to move the case quickly toward settlement, including a tender of Zurich's policy limits to AIGDC. Plaintiffs have come forth with no evidence whatsoever from which the Court could rationally infer that Mr. McIntosh or Ms. Fuell intentionally refused or deliberately failed to take earlier steps to effectuate settlement, or that either of them was aware or should have known that the company's failure to tender its policy limits to the excess insurer earlier was causing or would cause severe emotional distress.

Finally, no aspect of Zurich's handling of or attempts to effectuate settlement of the Rhodes family's claims could be reasonably described as "extreme and outrageous." The Supreme Judicial Court has explained that this element of the common law tort is a "principal bulwark against excessively broad recovery...." *Foley v. Polaroid Corp.*, 400 Mass. 82, 99 (1987). Liability cannot be predicated upon "'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.*, citing Restatement (Second) Tort, § 46. Rather, liability has been found "only where the conduct has been so outrageous in character, and so extreme in

degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.*

If the evidence concerning Zurich's conduct in this case reveals anything, it is that its employees, Kathleen Fuell and David McIntosh, used their honest business judgment in attempting to obtain, evaluate and verify documentation of the Plaintiffs' damages and attempting to resolve all pertinent coverage and "other insurance" issues. Thus, even if the Court were to identify flaws in Zurich's oversight of the Plaintiffs' tort claims, there is no basis to conclude that its employees' conduct was atrocious or "beyond all possible bounds of decency." Finally, the Plaintiffs cannot credibly argue that the acts of requesting the Plaintiffs to answer interrogatories, requesting an independent medical examination, or requesting that Plaintiffs give depositions in the Underlying Action were extreme or outrageous. Indeed, such discovery is a normal part of the litigation process—a fact which one of the family's advisors, Judge Stephen Rhodes, explained to them. (Tr. Day 5 (S. Rhodes), pp. 40-41).

In an attempt to end-run the high standard of proof of a claim for intentional infliction of emotional distress, Plaintiffs argued at summary judgment, and will no doubt contend in their post-trial submission, that the Supreme Judicial Court's decision in *Clegg v. Butler*, 424 Mass. 413, authorizes recovery for the "frustrations" of litigation even without proof of the elements of a common law tort.[40] *Clegg* says no such thing. The relevant passage from *Clegg* reads as follows:

> Whether a settlement is eventually reached or nor, unjust delay subjects the claimant to many of the costs and frustrations that are encountered when litigation must be instituted and no settlement is reached. Moreover, when an insurer wrongfully withholds funds from a claimant, it is depriving the claimant

[40] Plaintiffs cannot satisfy the elements of the tort of negligent infliction of emotional distress claim because none testified that he or she sustained any physical manifestation of alleged distress. In fact, Rebecca Rhodes stipulated to this. (Exh. 201)

> of the use of those funds. '*This is precisely the type of damage we have described as appropriately being subject to multiplication in an action under c. 93A.*' Schwartz v. Rose, 418 Mass. 41, 48, 634 N.E.2d 105 (1994).

Id. at 419 (Emphasis added).

When viewed in the context of the cited case, *Schwartz v. Rose*, it is clear that the "type of damage" to which the *Clegg* Court was referring in the foregoing excerpt was *interest* on monies wrongfully withheld by the insurer, not the "frustrations" of litigation. Moreover, there is nothing in *Clegg* or any appellate decision published in its wake suggesting that a Chapter 93A claimant may recover emotional distress in the absence of proof of either physical manifestations or intentional, extreme and outrageous conduct on the part of the defendant. Indeed, since the Supreme Judicial Court's historical approach to claims of emotional injury has been to "open the door" to recovery "narrowly and with due caution," *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144 (1976), it is illogical to assume, as Plaintiffs do, that the *Clegg* Court intended to swing that door wide open for claimants who seek to recover such damages through the vehicle of Chapter 93A, as opposed to common law.

F. Plaintiffs failed to prove that their "frustration" with the litigation process was distinct from the emotional turmoil, or mental anguish caused by Mrs. Rhodes' accident and the resulting upheaval in their lives.

Even assuming Massachusetts law permitted recovery for the "frustrations" of litigation in the context of Chapter 93A, Plaintiffs are not entitled to compensation for such feelings in this case. This is because during trial, Plaintiffs failed to put forth evidence that would enable the Court to determine whether the feelings they experienced during the course of litigation were distinct from the palpable emotional distress they suffered as a result of Mrs. Rhodes' auto accident. The evidence of alleged emotional distress is reviewed for each Plaintiff below.

1. **Harold Rhodes**

In addition to the emotional trauma he experienced in the aftermath of Mrs. Rhodes' automobile accident, (Tr. Day 5 (S. Rhodes), p. 36-37), Harold Rhodes endured profound changes in his life and his family relationships. The accident also created numerous other sources of stress for Harold Rhodes in 2002, 2003 and 2004. The following were among them:

- The relationship between Harold and Marcia Rhodes went from husband-and-wife before the accident to caregiver-patient after the accident (Exh. 71 (*Rhodes v. Zalewski* trial transcript), Vol. VI, pp. 102-06; Tr. Day 6 (M. Rhodes), pp. 166-67). The change in their relationship was a great source of emotional trauma for both Harold and Marcia Rhodes (Tr. Day 6 (M. Rhodes), pp. 166-67);

- Because of the injuries sustained by his wife, Harold Rhodes had to assume the added responsibility of being *mother* to their daughter, Rebecca. (Exh. 71, Vol. VI, pp. 110-111). This included, of course, providing transportation for Rebecca—another responsibility that used to be Marcia's.

- Between January 9, 2002 and September 2004, Marcia Rhodes had more than 450 doctors' appointments, occupational therapy and physical therapy sessions, nursing visits, visits to medical specialists, psychiatric care appointments and other appointments outside her home. (Exh. 71, Vol. VI, p. 127; Exh. 10, pp. 13-14). Mr. Rhodes was in charge of coordinating all of those appointments and ensuring that each doctor knew what care others were providing to Mrs. Rhodes. (Exh. 71, Vol. VI, pp. 108-109). In addition, Mr. Rhodes spent countless hours transporting Mrs. Rhodes to and from all of those appointments. (Tr. Day 6 (M. Rhodes), pp. 168-169).

- In 2002, 2003 and 2004, Harold Rhodes acted as his wife's *de facto* "patient advocate," and regularly battled with the family's health insurer for coverage for important medical equipment and treatment his wife needed during her rehabilitation. (Tr. Day 6 (M. Rhodes), p. 171-72).

- In 2002, 2003 and 2004, Mr. Rhodes had the added stress of dealing with contractors and architects on a regular basis in connection with the substantial renovations made to the family's home to accommodate Mrs. Rhodes' disability. (Exh. 71, Vol. VI, pp. 97-101, 112-118); Tr. Day 6 (R. Rhodes), p. 151).

Given the substantial and profound changes in Harold Rhodes' lifestyle and family relationships, and in light of the new and significant sources of emotional distress he was forced to grapple with as a result of the accident, his claim that the discovery process or any other

aspect of the Underlying Action caused his frustration or emotional distress is simply not credible. Even if the Court were to credit his testimony, however, Mr. Rhodes has not met his burden of distinguishing between the distress he experienced due to the lawsuit or the defendants' failure to settle it and the emotional trauma he endured because of the fundamental changes in his life.

2. Marcia Rhodes

Following her unfortunate accident, and upon learning of her condition and the fact that she would never walk again, Marcia Rhodes lapsed into a profound depression. (Exh. 71, Vol. III, pp. 50-51). Her depression lasted up through the trial of the Underlying Action in September 2004. (*Id.*, p. 51). In response to her counsel's questions during trial, Mrs. Rhodes described her emotional state as follows:

> Q: In the last few months, can you describe how your mood has been?
>
> A: I'd have to say I'm depressed.
>
> Q: Can you describe it?
>
> A: I'm depressed. Not the manic depressive, depressed, giving up depressed. Like, what's the point, that kind of depressed. I don't see the point of all this, going through all of this ... I feel like I'm going through the motions, because it's expected of me to go through the motions. But that's all I'm doing is going through the motions. I'm not – there's a part of me that's not involved in this at all. It's removed itself from this and maybe I'll never accept it. Maybe I will, but right now everyday is just getting through the day. That's my big goal.
>
> Q: When you feel like that, what do you think about?
>
> A: I think about the fact that I wished I had been killed in the crash instead of just paralyzed. I think about how many Valium it would take. Dark thoughts. Things I shouldn't be thinking about but I do.

(*Id.*, pp. 138-39). Mrs. Rhodes confirmed during this trial that the primary sources of her emotional distress in 2002, 2003 and 2004 was her physical condition and her attempts at recovery and rehabilitation following the accident. (Tr. Day 6 (M. Rhodes), pp. 162-164).

As the Court is aware, the jury in the Underlying Action fully compensated Mrs. Rhodes for all emotional distress and mental suffering she has experienced and will experience in the future as a consequence of the accident, her injuries and her disability, including her anxiety and depression. (Exh. 71, Vol. VII, pp. 109-113). Given the accident's profound and lasting effect on Mrs. Rhodes' emotional state, and in light of her testimony that she was not actively involved in the Underlying Action and left all legal matters to her husband (*Id.*, p. 73), the contention that her experiences of responding to discovery, submitting to an independent medical examination, being part of a day-in-life-video displayed to a jury,[41] and testifying in a deposition and at trial caused Mrs. Rhodes distinct emotional injury is simply not credible.

3. Rebecca Rhodes

Similarly, Plaintiffs failed to prove that the being part of litigation triggered in Rebecca Rhodes any feelings that she was not already experiencing either due to her pre-accident emotional/psychiatric problems, her mother's injuries or the impact that the accident had on her family life.

For years prior to her mother's accident, Rebecca Rhodes had experienced emotional problems so severe as to warrant weekly counseling sessions with a social worker. (Tr. Day 5 (R. Rhodes), p. 148-49; Exh. 71, Vol. III, pp. 145-46). In addition, she underwent a course of treatment with her psychiatrist that included anti-depressants and anti-anxiety medication. (*Id.*)

[41] The decisions to put Mrs. Rhodes through the production of a day-in-the-life video and to display the video to a jury were tactical judgments made by Plaintiffs' counsel. (Tr. Day 16 (Pritzker), p. 46). The argument that the production or display of the video somehow justifies an award of emotional distress damages against Zurich is specious.

This treatment continued through 2002, 2003 and 2004. (Tr. Day 5 (R. Rhodes), p. 149; Exh. 71, Vol. III, p. 145). After Marcia Rhodes' accident, Rebecca Rhodes had a whole host of new problems to deal with, not the least of which were her mother's paralysis and the significant changes in the family dynamic. (Tr. Day 5 (R. Rhodes), pp. 147-48). Those issues, which had nothing to do with the litigation that was filed on her behalf, caused Rebecca Rhodes great stress and nervousness. (*Id.*)

During the course of the Underlying Action, Rebecca Rhodes was not aware that she was a party to that case and had no involvement whatsoever in any discussions concerning settlement. (*Id.*, pp. 145-46). The only concern Rebecca had about the litigation arose in or around August 2004, when she learned she might have to testify in a deposition and/or at trial. (*Id.*) She was present at trial for only one day, however, and testified for a very brief period of time. (*Id.*, 146). Notably, the vast majority of her testimony was given in response to questions from her own lawyer. (Exh. 71, Vol. III, pp. 181-210). In fact, defense counsel asked about 25 questions in total. (Tr. Day 5 (R. Rhodes), pp. 146-47; Exh. 71, Vol. III, pp. 181-210). Moreover, it was *Ms. Pinkham*, not defense counsel, who asked Rebecca the questions that made her uncomfortable and sad, necessitating a recess. (Tr. Day 5 (R. Rhodes), pp. 153-54).

Given Rebecca Rhodes' minimal involvement in the Underlying Action, and considering her lifelong struggle with anxiety and the new emotional problems caused by her mother's accident, Plaintiffs' contention that the lawsuit caused Rebecca Rhodes distinct emotional distress meriting compensation is without merit.

In conclusion, the Court's prediction that Plaintiffs would have difficulty establishing actual damages at trial was accurate. Plaintiffs struggled mightily to put forth *some* evidence of an injury caused by the Defendants alleged failure to settle with them for $8 million or less

before a trial in which they recovered nearly $12 million. The reason for this is obvious: Plaintiffs have not been harmed. Marcia Rhodes testimony is compelling evidence of that fact. During her deposition in this action, Mrs. Rhodes was unaware that she and her family had received payments totaling approximately $11.8 million from the insurers. (Exh. 101 (Depo. of M. Rhodes), pp. 38-39). She testified, however, that if her family did receive the money (including interest) awarded by the jury in the Underlying Action, she would not pursue any further litigation against Zurich, National Union or AIGDC. (*Id.*, p. 42.) Of course, the Plaintiffs did, in fact, receive the money awarded by the jury, the only rational inference to be drawn from Mrs. Rhodes' testimony is that *she* firmly believes there is no injury for which to recover in this action.

V. PLAINTIFFS ARE NOT ENTITLED TO AN AWARD OF MULTIPLE DAMAGES AGAINST ZURICH BECAUSE THERE IS ABSOLUTELY NO EVIDENCE OF A KNOWING OR WILLFUL VIOLATION OF CHAPTER 93A, § 2.

For the reasons discussed above, Zurich maintains that there is no basis in law or fact upon which to conclude that Zurich violated Chapter 176D or 93A, or that its alleged delay in tendering its policy limits to AIGDC caused any of the damages claimed by the Plaintiffs. However, even if this Court were to conclude that liability and damages became reasonably clear in excess of $2 million at some point before November 2003, and that the Plaintiffs and AIGDC would have reached a settlement if Zurich had tendered its policy limits sooner, the evidence clearly does not support an award of multiple damages against Zurich.

Multiple damages under Chapter 93A are punitive in nature and are reserved for the most egregious and offensive conduct. *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 853 (1983); *Lingis v. Waisbren*, 20 Mass. L. Rep. 439, *23; 2006 Mass. Super. LEXIS 58 (Mass. Super. Ct. January 25, 2006). Chapter 93A, § 9 provides for the multiplication of damages only

when there has been a finding that the defendant's unfair or deceptive practice was "knowing or willful." M.G.L. c. 93A, § 9. In *Parker v. D'Avolio*, the Supreme Judicial Court observed that,

> it is only in the rare and exceptionally egregious case that such a finding should be made. It has been held that bad faith is 'not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will.'

40 Mass. App. Ct. 394, 402-03 (1996).

Both "knowing" and "willful" in the context of Chapter 93A claims concern the defendant's state of mind.

> The statutory term "knowing" refers to a state of mind existing at the time of acting....
>
> The term "willful" also, both in this statutory context and in ordinary usage, is most reasonably interpreted as referring to a state of mind existing at the time of acting -- a state of mind involving "culpability" at least, *cf. International Fidelity Insurance Co., v. Wilson*, 387 Mass. 841, 853, 856, 443 N.E.2d 1308, 1316-1317 (1983) -- and perhaps some more precisely defined state of mind. Negligence does not satisfy this test. (Internal citations omitted)...
>
> The standard prescribed by "willful," as well as the standard prescribed by "knowing," is a state-of-mind standard that requires the fact finder to determine *not whether a defendant...should have had that state of mind, but whether in fact the defendant...did have that state of mind.* Even though evidence that an ordinarily prudent person would have known, and that the defendant should have known, may be received as circumstantial evidence that the defendant did know, the question the fact finder must answer is whether in fact the defendant did know.

Computer Systems Engineering, Inc. Qantel Corp., 571 F. Supp. 1365, 1374-75 (1983). (Emphasis added).

Within a reasonable time after it received verifiable documentation of the Plaintiffs' alleged damages, Zurich, in the person of Kathleen Fuell, took prompt and appropriate steps to effectuate settlement in mid-November 2003 by notifying AIGDC of her intent to tender Zurich's policy limits to the excess insurer, and by getting AIGDC moving toward a global

settlement of the case. In short, Mrs. Fuell did exactly what a primary insurer should do in that situation and did it in a timely manner. But even if the Court were to conclude that fault and damages became reasonably clear *before* Zurich possessed documentation of Mrs. Rhodes' injuries and Plaintiffs' alleged damages, Plaintiffs can point to no evidence that would warrant the conclusion that David McIntosh or Kathleen Fuell actually knew that. Nor did Plaintiffs introduce a single document or elicit any testimony at trial from which the Court could infer that Zurich personnel deliberately or willfully withheld Zurich's policy limits from Plaintiffs or the excess insurer, or otherwise acted with ill will or a dishonest purpose toward Plaintiffs. To the contrary, the record reveals that prior to receipt of the demand package, Zurich personnel, in the exercise of honest business judgment, believed that the company did not possess sufficient documentation of damages to properly or meaningfully evaluate the case. Since there is no proof that any Zurich employee refused to attempt a settlement and did so with a culpable state of mind, multiple damages are not warranted.

VI. A PUNITIVE DAMAGES AWARD BASED ON A MULTIPLE OF THE UNDERLYING JUDGMENTS WOULD VIOLATE ZURICH'S DUE PROCESS RIGHTS.

Plaintiffs insist that a finding of a knowing or willful violation of Chapter 93A requires the Court to award Plaintiffs multiple damages equal to two or three times the judgments entered in the Underlying Action. For all of the reasons stated above, the evidence does not support an award of any damages against Zurich, much less punitive damages. Even if the Court were to conclude that Zurich's conduct rose to the extraordinarily egregious level that would warrant a multiple damages award, however, the Court should not use the underlying judgments of $11.8 million as the multiplicant because to do so would violate Zurich's Due Process rights under the United States Constitution. The enormous disparity between a punitive damages award of $24 million or $36 million and any *de minimus* compensatory damages Plaintiffs could hope to prove

in this case would be grossly disproportionate and, therefore, constitutionally impermissible under the Supreme Court's holding in *BMW of North America, Inc. v. Gore* and its progeny.42[1]

A. This Court has the authority to decide the constitutionality of a punitive damage award under G.L. c. 93A.

While Massachusetts courts traditionally grant deference to legislative enactments, total deference to the Legislature is not warranted or appropriate. The Supreme Judicial Court has made clear that while "[w]e owe great deference to the Legislature to decide social and policy issues,...it is the traditional and settled role of the courts to decide constitutional issues." *Goodridge v. Department of Public Health*, 440 Mass. 309, 339 (2003). Thus, this Court has the authority to determine the constitutional effect of an award of double or treble the underlying judgment on Zurich.

B. A multiple of the underlying judgments would be grossly excessive and unconstitutional.

Multiple damages awarded under Chapter 93A are "essentially punitive damages." *McEvoy Travel Bureau, Inc. v Norton Co.*, 408 Mass 704, 714 (1990). Punitive damages are assessed as a deterrent of future conduct and as punishment for past conduct. *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 416 (2003)(*citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)). "While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *Campbell*, 538 U.S. at 416 (2003)(*citing Cooper Industries, Inc.*, 532 U.S. at 559; *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific*

42[1] 517 U.S. 559 (1996)(identifying the ratio between actual damages and the punitive damage award as one of the guideposts in determining whether a punitive damage award is grossly excessive).

Mut. Life Ins. Co. v. Haslip, 449 U.S. 1 (1991)). Thus, the Due Process Clause of the Fourteenth Amendment "imposes limits on both the procedures for awarding punitive damages and the amounts forbidden as 'grossly excessive.'" *Philip Morris USA v. Williams*, 2007 U.S. LEXIS 1332, ***4 (February 20, 2007)(*citing Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)).43[2]

Grossly excessive punitive damage awards violate the Due Process Clause of the Fourteenth Amendment because such awards further no legitimate purpose and constitute an arbitrary deprivation of property. *See Campbell*, 538 U.S. at 416 (2003)(*citing Cooper Industries, Inc.*, 532 U.S. at 433; *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991)). In *Gore*, the United States Supreme Court identified the following three guideposts to determine whether a punitive damage award is grossly excessive: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases.44[3] *Campbell*, 538 U.S. at 418 (*citing Gore*, 517 U.S. 559 (1996)).45[4]

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[43] The constitutional limitations are particularly relevant here because Chapter 93A imposes no cap on punitive damages. *See e.g. Rodriguez-Torres v. Caribbean Forms Manufacturer, Inc.*, et al., 399 F.3d 52, 65 (1st Cir. 2005)(noting that punitive damage awards that comport with a statutory cap provide strong evidence that a defendant's due process rights have not been violated)(*citing Romano v. U-Haul Int'l*, 233 F.3d 655, 670 (1st Cir. 2000)).
44[3]

[45] Plaintiffs claimed during trial that the fact that Zurich is a wealthy company capable of paying a $36 million award is a factor to consider in determining the amount of any punitive damage assessment could be. The wealth of a defendant, however, cannot justify an otherwise unconstitutional punitive damage award. *Campbell*, 538 U.S. at 427 (2003).

1. There is no evidence of reprehensible conduct on the part of Zurich.

To determine the reprehensibility of a defendant's conduct, a Court must consider whether: (1) the harm to the plaintiff was physical rather than economic; (2) the tortious conduct evidenced an indifference to or a reckless disregard of the health or safety of others; (3) the conduct involved repeated actions or was an isolated incident; and (4) the harm resulted from intentional malice, trickery, or deceit, or mere accident. *Campbell*, 538 U.S. at 410-411 (2003)(*citing Gore*, 517 U.S. 575, 576-577 (1996)). "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Campbell*, 538 U.S. at 419. Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. 575.

Application of these standards to the facts of this case compels the conclusion that Zurich's conduct was in no way reprehensible. First, none of the Plaintiffs claims to have suffered any physical harm, nor did they attempt to prove that Zurich acted with reckless disregard of their health or safety. Moreover, the Plaintiffs claims are based on one single incident, not repeated conduct. Further, there is no evidence that Zurich acted with intentional malice, trickery or deceit. In sum, there is absolutely no evidence to support a finding that Zurich's conduct was reprehensible.

2. There would be a gross disparity between any actual harm caused by Zurich and a punitive damages award of $24 or $36 million.

Plaintiffs have alleged less than $1 million in economic damages and seek compensation for the "frustrations of litigation" from all three defendants, yet they have asked this Court to award them either $24 million or $36 million in punitive damages. Even assuming Plaintiffs had

succeeded in proving compensatory damages of $1 million against Zurich (an assumption that is wholly unwarranted), the ratio of punitive damages to actual damages would be an astonishing 36 to 1, or 24 to 1, depending on the award. The Supreme Court has made clear that while there is no bright line test to determine the reasonableness of a punitive damages award, "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process in practice." *Campbell*, 538 U.S. at 410; *Aquino v. Pacesetter Adjustment Co.*, 416 F. Supp. 2d 181, 184 (Mass. 2005), *citing Campbell*, 538 U.S. at 425. In fact, the Supreme Court repeated in *Campbell* that "four times the amount of compensatory damages (a 4-1 ratio) might be close to the line of constitutional impropriety." *Id.*; *see also, Philip Morris USA*, 2007 U.S. LEXIS at ***10 (February 20, 2007), (wherein the Supreme Court continued to observe its "longstanding historical practice" of setting the outermost constitutional boundaries of punitive damages at "two, three, or four times the size of compensatory damages"). Under *Campbell*, and *Phillip Morris USA,* the double-digit ratios between punitive and actual damages here are clearly unconstitutional and would violate Zurich's Due Process rights. *Campbell*, 538 U.S. at 411.

3. There is a substantial difference between the punitive damages requested by Plaintiffs and the civil penalties authorized by Chapter 93A for the conduct alleged.

The final guidepost articulated in *Campbell* also compels the conclusion that multiplication of the judgment in the Underlying Action would be unconstitutional. The maximum civil sanction that may be imposed upon a insurer for a violation of Chapter 176D is $1,000.00. M.G.L. c. 176D, § 7. A violation of Chapter 93A can result at most in a civil penalty of $5,000. M.G.L. c. 93A, § 4. The difference between those miniscule penalties and the punitive damages award requested by Plaintiffs in this case is so obvious that it requires no discussion.

In summary, application of the *Campbell* guideposts to the facts of this case yields the conclusion that a punitive damages award equal to two or three times the underlying judgment would result in a clear violation of Zurich's Due Process rights. For this additional reason, the Court should reject Plaintiffs' claim for multiple damages.

CONCLUSION

For all of the foregoing reasons, Defendant Zurich American Insurance Company submits that Plaintiffs have failed to meet their burden of proving at trial the requisite elements of their claim against Zurich for violation of Chapters 93A and 176D. Accordingly, Zurich respectfully requests the Court to enter judgment in its favor.

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Dated: March 28, 2007

CERTIFICATE OF SERVICE

I, Gregory P. Varga, certify that on this 28th day of March, 2007, I caused a copy of the foregoing to be served via electronic mail upon:

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