Supreme Judicial Court.

FOR THE COMMONWEALTH OF MASSACHUSETTS.

No. SJC-10911.

SUFFOLK COUNTY.

MARCIA RHODES, HAROLD RHODES
AND REBECCA RHODES,
PLAINTIFFS-APPELLANTS,

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-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT.

**BRIEF FOR THE DEFENDANTS-APPELLEES,
AIG DOMESTIC CLAIMS, INC. F/K/A AIG TECHNICAL SERVICES, INC.
AND NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA.**

Anthony R. Zelle, BBO #548141
tzelle@zelmcd.com
Mark E. Cohen, BBO #089800
mcohen@zelmcd.com
Robert J. Maselek, BBO #564690
rmaselek@zelmcd.com
ZELLE MCDONOUGH & COHEN
101 Federal Street, 14th Floor
Boston, MA 02114
Tel: (617) 742-6520
Fax: (617) 742-1393

Dated: May 2, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

Massachusetts General Laws

Acts and Resolves of Massachusetts

Massachusetts Rules of Civil Procedure

State Statutes

National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") and its claims administrator, AIG Domestic Claims, Inc., ("AIGDC") respectfully submit this brief to aid the Court in its further appellate review of this matter.[1]

STATEMENT OF THE ISSUES

1. Was the Trial Court's determination that the Plaintiffs-Appellants, Marcia, Harold and Rebecca Rhodes ("the Rhodes") did not suffer any loss due to AIGDC's pretrial violation of G.L. c. 93A clearly erroneous where the Rhodes rejected a reasonable offer of $3.5 million and Mr. Rhodes testified that the Rhodes never would have accepted any offer less than $8 million?

2. Did the Trial Court correctly hold that the Rhodes are not entitled to recover any damages for AIGDC's pretrial c. 93A violation when that violation did not cause the Rhodes any injury and they were not any worse off than they would have been if the violation had not occurred?

---

[1] National Union and AIGDC will be referred to collectively as "AIGDC," unless it is necessary to distinguish between the issuer of the insurance policy, National Union, and the claim administrator, AIGDC. AIGDC is now known as Chartis Claims, Inc.

3. Did the Trial Court and the Appeals Court correctly hold that loss of use is the proper measure of damages when AIGDC's late, but reasonable, settlement offer did not cause the Rhodes to either try the motor vehicle accident lawsuit to a conclusion or litigate an appeal to completion?

4. Did the Trial Court and Appeals Court correctly refuse to multiply the judgment arising out of the Rhodes' motor vehicle accident case where AIGDC's pretrial conduct did not "force the trial that yielded that judgment" and, after the verdict, AIGDC "made a fair offer and the case settled before any appellate briefs were filed?"

5. Does a tort claim resulting from a motor vehicle accident that is covered by an insurance policy arise out of the "same and underlying transaction or occurrence" as a c. 93A claim against the insurer based on its failure to make a timely offer to settle the motor vehicle accident claim?

6. Would AIGDC's constitutional right to due process be violated if the judgment in the motor vehicle accident case is doubled and the Rhodes are awarded 40-50 times their actual damages?

7. Did the Trial Court correctly hold that the Rhodes cannot recover emotional distress damages when they did not prove the elements of an intentional infliction of emotional distress claim and they did not claim any physical harm resulted from their alleged emotional distress?

STATEMENT OF THE CASE

A. Nature of the Case

The Rhodes have appealed from judgments rendered by the Superior Court and the Appeals Court. The Rhodes contend that AIGDC violated G.L. c. 176D, § 3(9)(f), and, in turn, G.L. c. 93A, § 2, by failing to effectuate a prompt, fair and equitable settlement of a motor vehicle accident claim against National Union's policyholders (National Union's policyholders are referred to as "the trucking defendants"). National Union insured the trucking defendants under an excess insurance policy with a $50 million policy limit, which applied after a $2 million primary policy issued by Zurich American Insurance Company ("Zurich") was exhausted. Appendix 18 (hereinafter A.__).

B. Proceedings Below

On July 12, 2002, the Rhodes filed suit in Norfolk County Superior Court against the trucking

defendants for Marcia Rhodes' personal injuries and for Harold and Rebecca Rhodes' loss of consortium. The motor vehicle accident case resulted from a January 9, 2002, motor vehicle accident. A.22. On September 15, 2004, the motor vehicle accident case jury awarded the Rhodes $9,412,000 ($7,412,000 to Marcia Rhodes, $1.5 million to Harold Rhodes, and $500,000 to Rebecca Rhodes). A.41. After deducting $550,000 based upon the Rhodes' settlement with Professional Tree Service ("Professional"), a third-party defendant, and adding pre-judgment interest, the judgment against the trucking defendants totaled approximately $11.3 million. Id.

On April 8, 2005, the Rhodes sued AIGDC and Zurich alleging violations of c. 93A and c. 176D. A.42. On June 2, 2005, the Rhodes accepted AIGDC's offer to settle the motor vehicle accident case for $8,969,500. Id. The Rhodes had previously been paid $2,322,995 by Zurich and $550,000 by Professional. Id. Therefore, the Rhodes ultimately received $11,842,495 for the damages they suffered as a result of the motor vehicle accident. Id.

C. Disposition in the Trial Court

Superior Court Judge Ralph Gants issued detailed Findings of Fact, Rulings of Law, and an Order. A.17-81. He determined:

- As an excess insurer, National Union's duty to effectuate settlement of the Rhodes' claims did not arise until May 1, 2004. A.60;

- AIGDC's $3.5 million offer made during mediation on August 11, 2004 was reasonable, though late. A.63-64;

- AIGDC's delay in making the pretrial settlement offer did not cause the Rhodes any "actual compensable damages" because "the evidence decisively demonstrates that the plaintiffs would not have accepted a reasonable settlement offer [or anything less than $8 million] regardless of when it was offered." A.64, 69. Therefore, since "the Rhodes have failed to prove the required element of causation . . . they are not entitled to an award of either actual or punitive damages" for AIGDC's delay in making the pretrial settlement offer. A.73;

- AIGDC failed to make a reasonable settlement offer after judgment entered in the motor vehicle accident case, until approximately five months after a reasonable offer should have been made. A.75-77;

- AIGDC's postverdict delay in settlement caused the Rhodes to sustain $448,250 in actual damages based upon their five month "loss of use" of the settlement funds. Id.;

- AIGDC's postverdict delay in settlement was willful and knowing and supported a punitive damages award that was double the $448,250 in actual damages. A.80. "However, when the insurer's failure to make a prompt and fair settlement offer occurs after the issuance of the judgment, it makes no sense to multiply the judgment because the insurer's conduct

did not force the trial that yielded that judgment." A.79;

- AIGDC's pretrial and postverdict conduct was "not 'extreme and outrageous'" as required to satisfy the elements of a claim for intentional infliction of emotional distress. A.78.

On September 29, 2008, the Rhodes appealed the Trial Court's judgment. A.14. AIGDC cross-appealed, but AIGDC is not pursuing the issues raised in this cross-appeal in this Court.

D. Disposition in the Appeals Court

On November 23, 2010, the Appeals Court affirmed the Trial Court's decision in all but one respect. The Trial Court had concluded:

> It is plain to this Court that AIGDC's delay [in making a pretrial offer in the Accident Case] did not cause the plaintiffs any actual compensable damages. Mr. Rhodes testified that he and his family would not have accepted any offer less than $8 million, which is more than the $6 million their own expert opined would have constituted the low range of a reasonable offer. Therefore, this Court is certain that, had AIGDC made a prompt reasonable settlement offer on or before May 1, 2004, even an offer that their own expert testified would have been reasonable, the Rhodes would have rejected that offer.

A.64.

The Appeals Court ruled:

> [E]vidence that [plaintiffs] would not have settled their claims for less than $8 million at mediation, less than a month before trial, was speculative as proof of whether they would have settled their claims had AIGDC put forth a

> reasonable offer months earlier, and should not serve as the basis for denying recovery for the insurer's misconduct.

Rhodes v. AIGDC, Inc., 78 Mass. App. Ct. 299, 307 (2010). The Appeals Court determined that the Rhodes are entitled to recover for loss of use of $3.5 million from May 1, 2004, to August 11, 2004 and remanded this matter to the Superior Court to determine the amount of damages caused by AIGDC's pretrial failure to make a timely offer. Id.

The Rhodes timely filed an Application for Further Appellate Review.

E. Statement of the Facts Relevant to the Issues Presented

Marcia Rhodes suffered serious injuries, including paraplegia, on January 9, 2002 when her automobile was struck by a truck owned and operated by the trucking defendants. A.17-18.

On August 13, 2003, the Rhodes' counsel made a $16.5 million written settlement demand. A.25. It was not until January 22, 2004 that Zurich agreed to contribute its $2 million policy limit to a settlement offer. A.33. On January 23, 2004, Zurich verbally tendered Zurich's policy limits to AIGDC. A.33. Zurich subsequently offered the Rhodes $2 million to settle

the motor vehicle accident case. A.38. The Rhodes rejected this offer. Id.

Counsel for the Rhodes and counsel for the trucking defendants discussed scheduling a mediation to pursue settlement further. A.38. A mediation took place on August 11, 2004. A.39. At the mediation, the Rhodes initially demanded $15.5 million, plus Marcia Rhodes' health insurance premiums for life. A.40. AIGDC initially offered $2.75 million. Id. The Rhodes responded with a $15 million demand, and AIGDC increased its offer to $3.5 million. Id. Professional then settled with the Rhodes for $550,000. Id. The Trial Court concluded:

> [T]he mediation was doomed to fail in view of the positions taken by the Rhodes and AIGDC. Mr. Rhodes . . . would not have accepted any settlement offer at mediation less than $8 million[.]

Id.

Judge Gants made a factual finding that "this Court is certain" that the Rhodes would have rejected AIGDC's reasonable settlement offers, even if they had been made on or before May 1, 2004. A.64. The Trial Court determined that "the evidence decisively demonstrates that the plaintiff[s] would not have

accepted a reasonable settlement offer regardless of when it was offered."[2] A.69.

The trial in the motor vehicle accident case began on September 7, 2004. A.40. Prior to trial, the trucking defendants stipulated to liability. Id. Before closing arguments, AIGDC offered the Rhodes $6 million. A.41. The Rhodes' counsel did not communicate that offer to the Rhodes, effectively rejecting it. Id. On September 15, 2004 the jury returned its verdict. A.41. On November 10, 2004, the trucking defendants appealed on the grounds that: (a) the verdict was excessive; and (b) the Trial Court erred by denying motions to obtain Marcia Rhodes' psychological records. Id.

On November 19, 2004, the Rhodes sent a demand letter to Zurich and AIGDC, alleging that they each had violated c. 176D, § 3(9)(f) and c. 93A by failing to effectuate a prompt, fair and equitable settlement

---

[2] These findings were supported by Harold Rhodes' answer to an interrogatory which asked: "Please state what offers of settlement [the Rhodes] would have accepted from January 2002 until the resolution of the underlying matter." A.6797. Mr. Rhodes answered that "the family was willing to accept $8 million to resolve the underlying matter up through the mediation." Id. At trial, Mr. Rhodes testified: "I stand by that answer." A.1566.

of the motor vehicle accident case. A.42. AIGDC responded on December 17, 2004, by offering $7.0 million, comprised of the $2 million primary policy limit previously tendered by Zurich and $5 million from National Union's excess policy. Id. Zurich responded to the c. 93A demand letter on December 22, 2004, by paying the Rhodes $2,322,995.75. Id. This payment reflected Zurich's policy limit and the accrued postjudgment interest. Id.

On May 2, 2005, AIGDC increased its settlement offer to $5.75 million. Id. When added to the amounts the Rhodes previously received to compensate them for their injuries arising out of the motor vehicle accident, the offer totaled $8.63 million. The Rhodes rejected this offer, but settled on June 2, 2005 for $8.965 million. Id. The total amount received by the Rhodes for the damages arising out of the motor vehicle accident was $11,842,495. Id.

SUMMARY OF ARGUMENT

The Trial Court's factual determination that the evidence "decisively demonstrates that the plaintiffs would not have accepted a reasonable settlement offer" at any time before the motor vehicle accident case trial was supported by the evidence and was not

clearly erroneous. A.69. Therefore, this finding may not be disturbed on appeal. Pages 13-17.

Similarly, the Trial Court correctly ruled that the Rhodes were not entitled to any recovery based on AIGDC's three month delay in making a settlement offer before the motor vehicle accident trial because "proving a causal connection between a deceptive act and a loss to the consumer is an essential predicate for recovery under our consumer protection statute." Hershenow v. Enter. Rent-A-Car Co. of Boston, Inc., 445 Mass. 790, 798 (2006). The pretrial c. 93A violation is not actionable because it did not cause the Rhodes to suffer any loss. The Trial Court correctly found as a matter of fact that "the Rhodes have suffered no actual damage from AIGDC's breach of G.L. c. 176D, § 3(9)(f)," and thus as a matter of law, "they are not entitled to an award of either actual or punitive damages." A.73. Pages 18-23.

The Trial Court correctly refused to multiply the judgment in the motor vehicle accident case to determine the punitive damages in the c. 93A case, because the delays, before and after the trial, did not cause the Rhodes to try the motor vehicle accident case to a conclusion or litigate the appeal to

completion. It is unchallenged that AIGDC made reasonable settlement offers to the Rhodes before, during and after the motor vehicle accident case trial. Pages 24-37.

In addition, the judgment in the motor vehicle accident case cannot be used as the multiplicand for the punitive damage award under c. 93A because this judgment did not "aris[e] out of the same and underlying transaction or occurrence" as the Rhodes' c. 93A claim against National Union and AIGDC. The occurrence giving rise to the motor vehicle accident case was the trucking defendants' wrongdoing. The c. 93A claim arose out of AIGDC's claim handling conduct. Pages 26-29.

The Rhodes' argument that they are entitled to more than $22 million in punitive damages, based on a multiple of the motor vehicle accident case judgment, would also violate the United States Constitution's due process clause. Such an award is not rationally related to the compensatory damages caused by the c. 93A violation and would be more than fifty times the actual damages awarded by the Trial Court. Pages 37-48.

Finally, the Trial Court correctly found that the Rhodes failed to present sufficient evidence of emotional distress to support an award of emotional distress damages. Pages 48-50.

ARGUMENT

I. The Trial Judge's Factual Finding That AIGDC's Tardy, Though Reasonable, Settlement Offer Before The Trial "Did Not Cause The Plaintiffs Any Compensable Damages" Was Not Clearly Erroneous.

Mass. R. Civ. P. 52(a) provides that:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

This Court has held that a trial "judge's findings will be set aside only if clearly erroneous." Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 420 (2005) (internal citations omitted). This Court is "bound" by the Trial Court's "findings of fact that are supported by the evidence, including all inferences that may reasonably be drawn from the evidence." Id. See also Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 636-37 (2010) (The Trial Court's factual findings must be upheld unless this Court has a "definite and firm conviction that a mistake has been committed."

(quoting Kendall v. Selvaggio, 413 Mass. 619, 620-21 (1992)).

In the present case, Judge Gants presided over the c. 93A trial and had the opportunity to view the witnesses' demeanor and observe their testimony. He was in "the best position to assess the credibility of the witnesses and to determine the facts." Id. 636-37. Based on his review of the evidence, Judge Gants wrote:

> The issue the Court must now confront is whether AIGDC's breach of its duty to provide a prompt settlement . . . caused the plaintiffs to suffer any damages. **It is plain to this Court** that the delay did not cause the plaintiffs any compensable damages. Mr. Rhodes testified that he and his family would not have accepted any offer less than $8 million, which is more than the $6 million their own expert opined would have constituted the low range of a reasonable offer. Therefore, **this Court is certain** that, had AIGDC made a prompt reasonable settlement offer . . . the Rhodes would have rejected that offer.

A.64 (emphasis added). In response to the Rhodes' argument that "they need not prove that they would have accepted the settlement offer to prove that the failure to make a prompt settlement offer caused them damages," A.65, the Trial Court explained:

> The instant case illustrates how foolish it would be to interpret Hopkins [v. Liberty Mut. Ins. Co., 434 Mass. 556 (2001)] as permitting a finding of actual damages for an insurer's failure to make a prompt settlement offer when

> the evidence decisively demonstrates that the plaintiff would not have accepted a reasonable settlement offer regardless of when it was offered. Under such an interpretation, the plaintiffs would be able to establish some actual damages even though they suffered none.

A.69.

Contrary to the Rhodes' assertion, the Trial Court did not require the Rhodes to prove that they would have accepted a "hypothetical" pretrial offer as a condition to recovery. Rhodes Br. 24-27. Rather, Judge Gants determined that the evidence presented at trial plainly established (to such an extent that he was "certain") that the Rhodes would have rejected AIGDC's reasonable $3.5 million offer, even if it had been made "on or before May 1, 2004." A.64.

The Trial Court's decision expressly relied on Mr. Rhodes' testimony to support the factual finding that the Rhodes would not have accepted AIGDC's settlement offer even if it had been made on May 1, 2004, when liability became reasonably clear. A.64. In addition, the trial record includes Mr. Rhodes' answer to an interrogatory asking "what offers of settlement [the Rhodes] would have accepted from January 2002 until the resolution of the underlying matter." Mr. Rhodes answered: "the family was willing to accept $8

million to resolve the underlying matter up through the mediation." A.6797. At trial, Mr. Rhodes testified: "I stand by that answer." A.1636.

Despite the record support for the Trial Judge's finding that the Rhodes never would have accepted less than $8 million, the Appeals Court reversed the Trial Court on this point. The Appeals Court found that the evidence relied upon by Judge Gants "was speculative as proof of whether they would have settled their claims had AIGDC put forth a reasonable offer months earlier." Rhodes, 78 Mass. App. Ct. at 307.

It was improper for the Appeals Court to reverse the Trial Judge's factual finding that AIGDC's three month delay in making a reasonable pretrial offer did not cause the Rhodes to suffer a loss. The Appeals Court engaged in fact-finding, an improper role for that court. See Demoulas v. Demoulas Super Markets Inc., 424 Mass. 501, 509-510 (1997)(internal citations omitted)("We recognize that the [trial] judge, who has a 'firsthand view of the presentation of evidence, is in the best position to judge the weight and credibility of the evidence.'"). Moreover, the Appeals Court improperly reasoned that "the statutory purpose [would be] better served if evidence that the

plaintiffs rejected AIGDC's $3.5 million offer less than a month before trial, or even hoped for significantly more at that late date, is not relied upon to suppose that the settlement process was doomed from the start." Rhodes, 78 Mass. App. Ct. at 310 (emphasis supplied). Whether the Trial Judge's factual determinations were clearly erroneous, however, should not depend upon whether the supposed statutory purpose would be "better served" by a contrary finding.

The Appeals Court misconstrued the evidence on which Judge Gants based his factual finding. Mr. Rhodes' testimony concerning the amount his family would have accepted was not temporally confined to the mediation. Rather, Mr. Rhodes affirmed at trial his sworn interrogatory answer: that from January 2002 through the mediation in August 2004, the Rhodes were not willing to accept less than $8 million to settle the motor vehicle accident case.

Based upon the evidence presented at trial, it was not clearly erroneous for Judge Gants to find that the Rhodes would not have accepted AIGDC's reasonable pretrial settlement offer if it had been made on May 1, 2004.

II. The Trial Court Correctly Held That The Rhodes Are Not Entitled To Recover Any Compensatory or Punitive Damages For The Pretrial c. 93A Violation Because That Violation Did Not Cause Them To Sustain Any Loss.

Since this Court has held that to recover under c. 93A a plaintiff must prove the defendant's violation of the statute caused the plaintiff to suffer a loss, it should affirm the Trial Court's holding that the Rhodes are not entitled to recover any damages based upon AIGDC's pretrial violation of c. 93A. See Hershenow, 445 Mass. at 798.

A. Because the Evidence Decisively Demonstrated that the Rhodes Would Have Rejected A Timely Pretrial Settlement Offer and Would Have Tried the Motor Vehicle Accident Case Unless They Were Offered $8 Million, They Did Not Suffer Any Loss Due to AIGDC's Failure to Make a Reasonable Offer Earlier.

The Trial Court's determination that it would be "foolish" to permit the Rhodes to recover damages for AIGDC's delay in making a reasonable settlement offer, when the delay did not force them to proceed to trial, was based upon this Court's affirmation in Hershenow that recovery under c. 93A requires a plaintiff to prove that the violation of the statute caused an actual injury. A.69.

In Hershenow, the plaintiffs argued that a collision damage waiver form in a car rental agreement

contained impermissible provisions. Hershenow, 445 Mass. at 791. The automobiles rented by the plaintiffs, however, had not been involved in any collisions. Id. at 792. This Court rejected the plaintiffs' claim that the defendant's allegedly deceptive waiver form had caused a "per se injury" for c. 93A purposes, holding that "proving a causal connection between a deceptive act and a loss to the consumer is an essential predicate for recovery under our consumer protection statute." Id. at 791, 798.

In Hershenow, this Court reasoned that the collision damage waiver did not make the plaintiffs any "worse off during the rental period than he or she would have been" had the form complied with the applicable regulations. Id. at 800-01. Even assuming that the waiver was "unfair and deceptive," the plaintiffs "nevertheless failed to establish that the 'per se' deception caused a loss. For that reason, there can be no recovery under G.L. c. 93A, § 9(1)." Id. at 801. Because there was no loss, the plaintiffs were not even entitled to recover nominal damages. Id. See also Rule v. Fort Dodge Animal Health, Inc., 604 F. Supp. 2d 288, 305 (D. Mass. 2009) (c. 93A complaint dismissed where plaintiff injected her pet

dog with an allegedly risky heartworm medication, but the dog suffered harm and the complaint "alleged no personal injury, no property damage, and no economic injury.").[3]

In the present case, the Rhodes' argument that they are entitled to damages as a result of AIGDC's pretrial c. 93A violation, Rhodes Br. 28-29, is unfounded because the Trial Court found the Rhodes sustained no injury or loss as a result of AIGDC's delay in making a reasonable settlement offer. The Rhodes were not made any worse off by AIGDC's three month delay in making its reasonable pretrial settlement offer because, as the Trial Court found, they would have rejected any reasonable offer made before trial. Rather, as a result of their decision to try the motor vehicle accident case, they ultimately collected $11,835,000, far more than the reasonable offers made by AIGDC at mediation and

---

[3] In contrast to Hershenow and Rule, in Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008), the plaintiffs alleged that their motor vehicles' doors were defective. Id. at 624. Although the doors had never malfunctioned, the plaintiffs alleged that they nonetheless could "open accidentally." Id. at 626. This Court held that the plaintiffs had alleged an actionable "injury" under c. 93A because they were "worse off" since they owned defective vehicles that were worth less than non-defective vehicles. Id. at 624-25.

during trial. A.42. It was the Rhodes' decision to try the motor vehicle accident case unless they received an offer of at least $8 million - not the three month delay by AIGDC in making a reasonable offer - that caused the "litigation related stress" which the Rhodes contend was their injury.

B. The Trial Court Correctly Resolved the Issue Reserved By This Court in Hopkins v. Liberty Mutual: Whether a Failure to Make a Timely Settlement Offer Entitles a Plaintiff to Recover Damages When the Plaintiff Rejects a Late Offer and the Delay Causes No Injury.

The Trial Court correctly distinguished Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556 (2001), because the parties in Hopkins settled before trial. In Hopkins, the plaintiff's acceptance of the insurer's late, but reasonable, offer demonstrated that "if this reasonable offer had been made within 30 days of the Chapter 93A letter, as required, the plaintiff would have settled the case without filing suit." A.67-68. In Hopkins, this Court explained that:

> We need not decide in this case whether the same measure of damages would apply in a case where an insurer, having initially violated G.L. c. 176D, § 3(9)(f), and G.L. c. 93A, §§ 2 and 9, thereafter makes a fair and reasonable (but nevertheless tardy) offer of settlement, which is refused by a claimant.

Hopkins, 434 Mass. at 567 n.16. In the present case, as the Trial Court noted, "[t]he factual scenario expressly reserved by the Court in Hopkins is precisely the scenario presented to this Court." A.68.

In arguing that the Trial Court misconstrued Hopkins, the Rhodes focus on this Court's determination that "[a]n insurer's statutory duty to make a prompt and fair settlement offer does not depend on the willingness of a claimant to accept such an offer." Hopkins, 434 Mass. at 567. That proposition, however, has no application where AIGDC made a reasonable but belated pretrial offer and the delay did not cause the Rhodes any injury. To hold otherwise would condition the insurer's liability on whether the claimant chooses to accept or reject a reasonable offer instead of on whether the insurer made a reasonable offer.

The Rhodes also miss the point in arguing that the Trial Court found that AIGDC's reasonable but "late offer nullifies [the] previous violation" - the delay in making an offer. Rhodes Br. 28. The Trial Court's decision was based on the Rhodes' failure to prove that AIGDC's delay in making an offer caused any

injury, not the effect of the belated offer on the prior violation.

Moreover, Hopkins was decided prior to this Court's decision in Hershenow and as the Trial Court observed:

> [T]o the extent that Hopkins can be understood to hold that a plaintiff is entitled to recover damages from an insurer for its failure to make a prompt settlement offer without proving that the plaintiff suffered any loss arising from that unfair act (because the plaintiff would have rejected the offer had it been timely made), Hopkins was effectively overruled by [Hershenow].

A.68. Hopkins relied upon Leardi v. Brown, 394 Mass. 151 (1985), to support the determination that plaintiff did not have to prove an actual injury caused by the violation of c. 93A to recover damages. In her concurring opinion in Hershenow, Justice Cowin expressed her opinion that the court should have expressly overruled Leardi. She wrote: "The court's effort to distinguish the cases seems to me to arise not so much from analytical conviction but from a desire to avoid acknowledging that Leardi was wrongly decided." Hershenow, 445 Mass. at 804.

III. "Loss Of Use" Is The Appropriate Measure of Actual Damages and, in The Present Case, the Amount To Multiply To Determine The Punitive Damages.

The Trial Judge determined that AIGDC's failure to make prompt reasonable offers to settle the Rhodes' claims before and after the verdict violated c. 176D, § 3(9)(f) and, consequently, c. 93A. Though the Trial Court found the pretrial violation did not cause the Rhodes any injury, the Court found that as a result of the post-trial c. 93A violation, the Rhodes were deprived of the use of $8,965,000 for approximately five months. Calculating the value of the loss of use of these funds at 1% per month, the Trial Court awarded the Rhodes $448,250 in actual damages. A.77. Since the Trial Judge also found that AIGDC's failure to make a timely reasonable post-trial settlement offer was a willful and knowing violation of c. 176D, he awarded two times this amount pursuant to c. 93A, § 9(3). A.78.

The Appeals Court agreed with the loss of use measure of damages for the post-trial violation and also concluded that the damages for the pretrial c. 93A violation "should be measured by loss of use principles." Rhodes, 78 Mass. App. Ct. at 312.

Accordingly, the Appeals Court remanded the matter "for a determination of the loss of use damages."

A. The Trial Court and Appeals Court Correctly Multiplied the Actual Damages Resulting from the Rhodes' Loss of Use of the Settlement Funds to Calculate the Punitive Damages, Because AIGDC's Postverdict Violation of c. 93A Did Not Cause the Judgment in the Motor Vehicle Accident Case.

With respect to the postverdict conduct, the Appeals Court agreed with the Trial Court. Judge Gants explained:

> This Court finds that the appropriate amount doubled is the actual damages. . . . [W]hen the insurer's failure to make a prompt and fair settlement offer occurs after the issuance of the judgment, it makes no sense to multiply the judgment because the insurer's conduct did not force the trial that yielded that judgment."

A.78-79. Likewise, the Appeals Court ruled:

> where a settlement was reached postverdict, and litigation at the appellate level had not commenced to a significant degree at that time, we conclude that the statutory purpose was served by measuring punitive damages according to loss of use rather than the underlying tort judgment.

Rhodes, 78 Mass. App. Ct. at 314.

The Rhodes fail to articulate any rationale or cite any authority to support their contention that the punitive damage award can be a multiple of the judgment they obtained in the motor vehicle accident case where that judgment was not caused by AIGDC's

pretrial or posttrial violations of c. 93A. Rhodes Br. 20-21. The causation requirement in c. 93A's punitive damage provision expressly requires this causal connection.

B. The Trial Judge and the Appeals Court Correctly Construed the "Same and Underlying Transaction or Occurrence" Provision in the 1989 Amendment to c. 93A.

In 1989, the Massachusetts Legislature amended c. 93A, to add the following language:

> For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim.

1989 Mass. Acts 580. In the present case, the Rhodes' c. 93A claim is the only claim arising out of the underlying occurrence - AIGDC's unfair insurance settlement conduct. The judgment in the motor vehicle accident case arose out of the negligent conduct of the trucking defendants. Accordingly, the actual damages that are to be multiplied is the judgment on the c. 93A claim, i.e. $448,250.

In contrast, the same transaction or occurrence supporting a claim under c. 93A may also support a breach of contract, misrepresentation, or other claim.

See e.g., Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664, 673 (2002) (The same acts that supported the breach of contract claim supported the determination that the defendant violated c. 93A and c. 93A damages were in the same amount as the contract damages); Whelihan v. Markowski, 37 Mass. App. Ct. 209, 212-13 (1994) (personal injuries caused by building code violations); Federal Ins. Co. v. HPSC, Inc., 480 F.3d 26, 36-37 (1st Cir. 2007) (claim by policyholder for wrongful denial of insurance benefits.); Grand Pac. Fin. Corp. v. Brauer, 57 Mass. App. Ct. 407, 421 (Mass. App. Ct. 2003 (conversion); Professional Servs. Group, Inc. v. Town of Rockland, 515 F.Supp.2d 179, 196-97 (D. Mass. 2007) (aiding and abetting a breach of fiduciary duty in a bid rigging scheme). In each of these cases, the amount multiplied to determine the punitive damages under c. 93A was the loss caused by the c. 93A violation and the loss resulting from the other "claims arising out of the same and underlying transaction of occurrence."

In Clegg v. Butler, 424 Mass. 413, 424 (1997), this Court observed that the portion of the 1989 Amendment stating "the amount of actual damages multiplied by the court shall be the amount of the

judgment on all claims arising out of the same and underlying transaction or occurrence"

> was apparently enacted in response to cases such as Bertassi v. Allstate Ins. Co., 402 Mass. 366 (1988); Trempe v. Allstate Cas. & Sur. Co., 20 Mass. App. Ct. 448 (1985); and Wallace v. American Mfrs. Mut. Ins. Co., 22 Mass. App. Ct. 938 (1986), which limited those damages subject to multiplication under c. 93A to loss of use damages, measured by the interest lost on the amount the insurer wrongfully failed to provide the claimant. See Cohen v. Liberty Mut. Ins. Co., 41 Mass. App. Ct. 748 , 753-754 (1996); Greelish v. Drew, 35 Mass. App. Ct. 541 , 542 n.3 (1993).

The cases identified in Clegg: Bertassi, Trempe, and Wallace, each involved a breach of contract claim by a policyholder against an insurer that refused to pay the first party claim. The same transaction - the insurer's refusal to honor its contractual obligations under the policy issued to the plaintiff - gave rise to both the contract damages and loss of use damages, but the amount multiplied to determine the punitive damage award did not include the breach of contract damages.

One flaw in the Rhodes' argument is that their c. 93A claims arose out of AIGDC's unfair insurance claim handling conduct, while the judgment against the trucking defendants arose out of the motor vehicle accident that injured Marcia Rhodes. Viewed in the

context of the language of the 1989 amendment, the actual damages arising out of AIGDC's violation of c. 93A did not arise out of the same occurrence as the judgment arising out of the motor vehicle claim. The Rhodes contend they are entitled to "double or triple the **underlying judgment,**" referring to the judgment in the motor vehicle accident case. Reply Br. 1 (emphasis added). However, in the statute, the terms "underlying" and "same" refer to the transaction or occurrence out of which the judgment arises.[4]

Since the judgment obtained by the Rhodes as a result of the motor vehicle accident did not arise out of the same transaction or occurrence as the judgment on the c. 93A claim, the Trial Court correctly multiplied the actual damages caused by AIGDC's unfair insurance settlement conduct to determine the amount of punitive damages.

---

[4] The 1989 Amendment uses the conjunctive term "same **and** underlying" to describe the "transaction or occurrence" out of which the judgment to be multiplied must arise. While "failure to settle" bad faith claims brought by a claimant against a liability insurer, such as the present matter, do not arise out of the same occurrence as the claimant's tort claim against the policyholder, first party bad faith claims brought by a policyholder, such as those involved in Bertassi, Trempe, and Wallace, do involve the same and underlying occurrence.

C. The Manner in Which the Rhodes Interpret the 1989 Amendment to c. 93A Conflicts with c. 93A's Legislative Purpose.

The Rhodes contend that AIGDC's delay in making pretrial and/or post-trial settlement offers entitle them to $22,730,668 in punitive damages, despite the findings by Judge Gants that they suffered no harm as a result of AIGDC's delay in making the pretrial offer and they sustained only $448,250 in actual damages resulting from the delay in the post-trial offer. Where the Trial Judge found that AIGDC's pretrial "conduct did not force the trial" of the motor vehicle accident case and that AIGDC "made a fair offer and the case settled before any appellate briefs were filed," applying the multiplication provision of c. 93A in this manner would not further the statute's purposes of promoting settlement and deterring unfair insurance settlement practices.

The Trial Court recognized that AIGDC did not force the Rhodes into litigation by withholding insurance proceeds. Although AIGDC's pretrial offer was late, because the Rhodes rejected a reasonable offer the delay did not force the Rhodes to proceed to trial. A.64. Nor would awarding the Rhodes $22,730,668 in punitive damages further the 1989 Amendment's

legislative purpose by promoting settlement. A.72. The Trial Court observed:

> To allow a plaintiff to obtain actual and punitive damages when it would not have settled the case even with a reasonable settlement offer would actually discourage plaintiffs to settle, which was the opposite of what the Legislature intended when it enacted the 1989 amendment.

Id.[5]

The Rhodes' proffered construction of the 1989 Amendment would conflict with c. 93A's legislative purpose (as well as AIGDC's due process rights, discussed infra at 37-48), because it would not be "reasonable in [its] nature, directed to the prevention of real evils and adapted to the accomplishment of [its] avowed purpose." Coffee-Rich, Inc. v. Commissioner of Public Health, 348 Mass. 414, 425 (1965). Consequently, this construction should be rejected.

---

[5] The Rhodes' suggestion that "[i]njured plaintiffs generally do not play 'Gotcha' with insurance companies" completely misses the point. Rhodes Br. 23. The Rhodes received a reasonable offer before trial and a higher offer during the trial. Nevertheless, they rejected these offers and chose to proceed to a verdict. As a result, their (presumably) reasoned decision informed by counsel resulted in a larger recovery than would have been the case had they accepted either of AIGDC's offers.

D. The Rhodes' Reliance on Granger and Gore is Misplaced.

The Rhodes' reliance on R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66 (2001) is misplaced because it fails to recognize that the party asserting the c. 93A claim in Granger, J & S Insulation ("J&S"), had a direct claim on a surety bond issued by the c. 93A defendant, United States Fidelity & Guaranty Company ("USF&G"). J&S had the same first party rights against USF&G under the bond as it had under its contract with Granger. Unlike National Union, a third party liability insurer which had an insurance contract with the trucking defendants but which had no direct relationship with the Rhodes, USF&G was a "surety that contracts directly as a principal to pay the sum of money for which [it] is secondarily liable." John W. Egan Co. v. Major Constr. Mgmt. Corp., 46 Mass. App. Ct. 643, 646 (1999) (quoting Welch v. Walsh, 177 Mass. 555, 559 (1901)). In Egan, the Court recognized the distinction between a surety and a third party liability insurer that undermines the Rhodes' reliance on Granger: a plaintiff suing a surety, "need not go to judgment

against the principal in order to ground the surety's liability . . . ." Id. at 647.

In Granger, after a jury ruled in favor of J&S on its breach of contract claim against Granger, "J&S immediately made demand on USF&G for payment "on account consistent with the jury verdict" and after receiving no response it "filed a motion seeking entry of judgment against USF&G as surety, including treble damages for violations of G.L. c. 93A, § 11 and G.L. c. 176D." 435 Mass. at 68-69. The claims based on USF&G's wrongful failure to make payment under the bond, where liability was reasonably clear, was the same conduct that gave rise to the c. 93A claim. Id. Since the judgment against USF&G on the c. 93A claim arose out of the same "transaction or occurrence" as the bond claim, this Court affirmed the Trial Court's determination that the amount to be multiplied was the amount of the judgment that had directly entered against the surety on the bond claim, plus the interest which reflected the loss of use damages:

> In this case, J&S **recovered a judgment on its bond claim against USF&G** (as well as its subcontract claim against Granger), and has proved that USF&G acted willfully and knowingly in a manner prohibited by G.L. c. 93A, § 2, entitling it to multiple damages. By awarding to J&S double **"the amount of the judgment" on its**

> **underlying surety bond claim**, the judge did precisely what the language of the 1989 amendment requires.
>
> * * *
>
> The Legislature directed that where, as here, a plaintiff **obtains a judgment against an insurer** subject to multiple damages because it acted in bad faith in denying reasonable settlement of the plaintiff's underlying claim, the defendant insurer "shall be" subject to "multiplication of the judgment secured by the plaintiff on the underlying claim, thereby risking exposure to punitive damages many times greater than multiplication of the lost use of money alone."

Id. at 82-84 (emphasis added).

Because J&S had a direct claim against USF&G on the bond, the judgment against USF&G was similar to a judgment by a policyholder against its insurer with which it has a first party relationship. In contrast, the present case involves a third party liability insurance policy and a judgment against National Union's insureds, the trucking defendants. Here, the "plaintiff obtain[ed] a judgment against an insurer" in the amount of $448,250. Thus, in this case, the Trial Court and the Appeals Court determined the punitive damages in the same manner that was affirmed by this Court in Granger: they multiplied the judgment based on all claims arising out of the conduct that gave rise to the Rhodes' c. 93A claim, i.e., AIGDC's delay in making an offer to settle the claim against

the trucking defendants. See Granger, 435 Mass. at 83-84 (the c. 93A claim arose out of the same transaction or occurrence as the claim against USF&G under the bond: the wrongful denial of the claim after the verdict when the liability on the bond had become reasonably clear).

Similarly misplaced is the Rhodes' reliance on Gore v. Arbella Mut. Ins. Co., 77 Mass. App. Ct. 518 (2010) to support their contention that the judgment in their motor vehicle accident case arose out of the same transaction or occurrence as the judgment on their c. 93A claim. In Gore, the Appeals Court considered two claims asserted under c. 93A. Id. at 519. The first was a direct claim by Angelina Dattilo, as a third-party claimant, based upon Arbella's failure to settle her personal injury claim against Arbella's insured, Anthony Caban. Id. at 522. Arbella failed to settle Dattilo's motor vehicle accident claim within the policy limits, despite having the opportunity to do so. Dattilo and Caban then entered into a consent judgment for an amount far exceeding the policy limits. Id. at 521-22. The second claim was brought by Dattilo as the assignee of Arbella's insured, Caban, based upon damages sustained by Caban

resulting from Arbella's failure to settle, exposing him to liability in excess of the policy limits. The assigned claim arose out of the same transaction or occurrence as the direct claim: Arbella's failure to settle Datillo's claim against Caban.

In Gore, the court relied upon this Court's decision in Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664 (2002) to reach its conclusion that the "same and underlying transaction or occurrence" gave rise to the judgments on both Dattilo's direct claim ($20,000 in actual damages) and the assigned claim ($430,000 in actual damages). Gore at 530-31. In Drywall, this Court explained: "where multiple damages are sought under G.L. c. 93A based on 'claims arising out of the same and underlying transaction,' those claims must be determined in the same proceeding with the multiple damages claims." Id. at 668. Accordingly, in Gore, the Court decided that because Arbella knowingly violated c. 176D, § 3(9)(f) by failing to settle Datillo's claim against Caban, Arbella's violation of c. 176D, § 3(9)(f), and in turn, c. 93A, caused Datillo and Caban to enter into the consent judgment. Consequently, the "actual damages on the assigned claim" were "determined in the same

proceeding with the multiple damages claim," and the judgments on both claims could be multiplied. Id. at 535 (quoting Drywall, 435 Mass. at 668 n.3).

In contrast, the Rhodes' judgment against the trucking defendants was not caused by AIGDC's violation of c. 93A. Nor were the damages on the Rhodes' claims arising out of the motor vehicle accident determined in the same proceeding as their c. 93A claims. Consequently, the Gore decision provides no support for the Rhodes' argument that the judgment on their motor vehicle accident claim arose out of the same and underlying transaction or occurrence as the judgment on their c. 93A claim.[6]

IV. The Constitution's Due Process Clause Prohibits the Rhodes' Proffered Construction of c. 93A's Punitive Damages Provision.

Determining the punitive damages to impose on AIGDC by multiplying the judgment arising out of

---

[6] The operative facts in Gore are also significantly different. Unlike Caban, National Union's insureds, the trucking defendants, never faced a risk of liability in excess of the $50 million policy. They could not assert, or assign to the Rhodes, any claim like the one assigned by Caban to Dattilo. In addition, where the Gore Court affirmed the trial court's finding that Dattilo would have accepted the policy limit to settle the claim if Arbella had offered to pay it in a timely fashion, Judge Gants found that the Rhodes never would have accepted a reasonable pretrial offer. A.73.

Marcia Rhodes' motor vehicle accident would violate AIGDC's constitutional right to due process. Punitive damage awards must be rationally related to the compensatory damages. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2627 (2008); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996). The Rhodes seek to recover more than $22 million in punitive damages even though it is uncontested that (1) AIGDC made reasonable settlement offers before, during and after the trial of the motor vehicle accident case; and (2) AIGDC was found to have delayed less than three months before trial and only five months after trial in making reasonable settlement offers. The punitive damages sought by the Rhodes are fifty times the actual damages found by the Trial Court. Therefore, the punitive damages sought by the Rhodes do not bear any rational relationship to the actual damages. Moreover, the Rhodes' theory irrationally seeks to tie the punitive damages based upon AIGDC's c. 93A violation to the compensatory damages caused by the trucking defendants.

The Supreme Court has held that "grossly excessive" punitive damage awards violate the

Fourteenth Amendment's due process clause. State Farm 538 U.S. 408 at 416; Exxon, 128 S. Ct. at 2627; BMW, 517 U.S. at 585-86. This Court has also subjected punitive damages awards to due process scrutiny. See Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 109 (2009); Labonte v. Hutchins & Wheeler, 424 Mass. 813, 826-27 (1997); Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 623 (2005).

The Supreme Court has identified 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 damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." State Farm, 538 U.S. at 418; BMW, 517 U.S. at 574-75.

A. The Manner in Which the Rhodes Interpret the 1989 Amendment to c. 93A Would Violate the Reprehensibility Guidepost.

The Supreme Court has held that "the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct." BMW, 517 U.S. at 575. The

following factors are relevant in considering the degree of reprehensibility:

> [T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419.

The punitive damages sought by the Rhodes would be unconstitutionally excessive given the Trial Court's findings of fact. Any harm caused by AIGDC's reasonable but tardy settlement offers did not evidence any threat or indifference to the health or safety of others. The compensable violation found by the Trial Court occurred after the Rhodes had already received nearly $3 million from Zurich and Professional. Consequently, the Rhodes were not financially vulnerable. The Trial Court did not find that AIGDC engaged in any pattern of wrongful conduct and although AIGDC's conduct was found to be willful, it was not intentional or malicious. A.78.

B. The Manner in Which the Rhodes Interpret the 1989 Amendment to c. 93A Would Violate the Ratio Guidepost.

The second guidepost requires reasonableness and proportionality between the harm caused by the defendant and the punitive damages awarded the plaintiff. State Farm, 538 U.S. at 426. The Rhodes' request for $22,730,668 in punitive damages would yield more than a 50:1 ratio between what the Trial Court found were the actual damages and the punitive damages and a 40:1 ratio between what the Appeals Court found were the actual damages and the punitive damages.

The Supreme Court explained that while there is no rigid rule regarding a constitutionally acceptable ratio between compensatory and punitive damages, "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." State Farm, 538 U.S. at 410. In the present c. 93A case, where "compensatory damages are substantial, a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." State Farm, 538 U.S. at 425.

In Exxon, the Supreme Court has noted that many States have "impos[ed] statutory limits on punitive

awards, in the form of absolute monetary caps, a maximum ratio of punitive to compensatory damages, or, frequently, some combination of the two. The States that rely on a multiplier have adopted a variety of ratios, ranging from 5:1 to 1:1." 128 S. Ct. at 2623 (citations omitted). In the jurisdictions that have adopted a multiplier, the amount multiplied is the compensatory damages caused by the defendant.[7]

When c. 93A is applied in any context other than a case involving a liability insurer's failure to settle a case brought against its policyholder, the amount multiplied is the amount of compensatory damages. Where, as here, a c. 93A claim is brought against an insurer by a third party whose underlying claim is asserted against the insurer's policyholder, however, the judgment against the policyholder does

---

[7] Following the ratio guidepost established by the Supreme Court, numerous courts have reduced punitive damages awards in bad faith claims brought against insurers. See e.g., Jurinko v. Medical Protective Co., 305 Fed. Appx. 13, 19, 30 (3d Cir. 2008)(in bad faith claim based upon liability insurer's failure to settle a medical malpractice claim, 3.8-1 ratio was reduced to 1:1); Leavey v. Unum Provident Corp., 295 Fed. Appx. 255, 259 n.1 (9th Cir. 2008)(in bad faith claim, punitive damages were reduced from 7.5:1 ratio to 1.5:1 ratio); Walker v. Farmers Ins. Exchange, 63 Cal. Rptr. 3d 507 (Cal. Ct. App. 2007) (in bad faith case involving liability insurance policy, punitive damages reduced from more than 5.5:1 ratio to 1:1).

not reflect the compensatory damages caused by the insurer.[8]

The Rhodes argue that the multiplication provision in c. 93A, § 11 satisfies the ratio guidepost, because it is limited to "double or triple the underlying judgment." Rhodes Reply Br. 1. But the statute does not simply refer to the "underlying judgment." Rather, it provides that the amount to be multiplied is the amount of the "judgment on all claims arising out of the same and underlying transaction or occurrence." The judgment on the motor vehicle accident claim did not arise out of the same and underlying transaction or occurrence as the c. 93A claim. The Rhodes' contention that the statute requires the multiplication of damages caused by the policyholder would result in punitive damages awards

---

[8] Massachusetts is one of a "distinct minority of states" that permit a third party claimant to bring a bad faith failure to settle claim against the tortfeasor's insurer. Carford v. Empire Fire & Marine Ins. Co., 891 A.2d 55, 60-61 (Conn. Ct. App. 2006) ("Only a distinct minority of states have allowed a third party claimant a private cause of action against the insurer.") Massachusetts is the only state, however, that bases the punitive damages assessed against an insurer on a multiple of the judgment awarded against the insurer's policyholder. Compare G.L. c. 93A, §9(3) with Kan. Stat. § 304.12-235; Mont. Code Ann. § 33-18-242(4); Fla. Stat. § 624.155(5); La. Rev. Stat. §§ 22:658, 22:1220; N.M. Stat. § 57-12-10.

that have no relationship whatsoever with the actual compensatory damages caused by the unfair or deceptive trade practice. By contrast, in bad faith cases against insurers based on the insurer's wrongful denial of benefits owed to the policyholder under the insurance contract, the compensatory damages that may be multiplied are the damages actually caused by the insurer. The interpretation of the multiplication provision posited by the Rhodes was considered by a Massachusetts federal court judge to "present[] a serious constitutional question[.]" Aquino v. Pacesetter Adjustment Co., 416 F. Supp. 2d. 181, 184 (D. Mass. 2005).

In the present case, the Trial Court's multiplication of the compensatory damages actually caused by the violation correctly applies c. 93A's multiplication provision and satisfies the Constitution's Due Process Clause.[9]

---

[9] The Rhodes' interpretation of the multiplication provision also violates the civil penalty guidepost, "the difference between [the punitive damages] and the civil penalties authorized or imposed in comparable cases." BMW, 517 U.S. at 575. Massachusetts law authorizes a $1,000 civil penalty for a c. 176D violation, see c. 176D, § 7, and a $5,000 civil penalty for violating c. 93A. See c. 93A, § 4.

C. The Rhodes Incorrectly Argue that "BMW and State Farm Simply Do Not Apply to Statutory Punitive Damages."

The Rhodes argue that the punitive damages authorized by c. 93A are immune from due process scrutiny because they are "statutory punitive damages." See Rhodes Reply Br. 8-10. This argument is without merit. The Supreme Court has explained that "**every** award" of punitive damages must comply with the due process standards set forth in BMW and State Farm. Exxon, 128 S. Ct. at 2626 (emphasis added). Thus, c. 93A's punitive damages scheme is subject to the Supreme Court's due process standards, just as punitive damages jury verdicts are.

The Rhodes argue that c. 93A's punitive damages scheme "is precisely" what the Supreme Court suggested would be the "more promising alternative" to open-ended punitive damage liability. Rhodes Reply Br. 9. But they fail to recognize that in Exxon, the Supreme Court stated that the "more promising alternative" to address due process concerns is to peg "punitive to **compensatory damages** using a ratio or maximum multiple." Id. at 2629. In this context, it is obvious that the compensatory damages to which the punitive damages are to be pegged are those compensatory

damages caused by the party against which the punitive damages are awarded.

Moreover, while c. 93A authorizes the award of punitive damages and sets forth the means to calculate the amount of those damages, that amount is not a statutorily-set, pre-determined amount. Thus, the cases cited by the Rhodes to support their argument that c. 93A punitive damage are beyond due process scrutiny are inapposite.

In Sony BMG Music Entm't v. Tenenbaum, 721 F.Supp.2d 85 (D. Mass. 2010), a copyright infringement case, Judge Gertner acknowledged that "[t]here is a split of authority" as to whether the BMW and State Farm analysis applies to "statutory damages." Id. at 100-01. "Statutory damages," however, "are not only, or even primarily, intended to punish copyright infringers. They are also intended to compensate copyright owners in instances where the harm imposed by the infringer's conduct is difficult to calculate." Id. at 102. Significantly, the court noted that "BMW and State Farm are not irrelevant in a case involving statutory damages merely because the defendant arguably has 'fair notice' of the amount of damages that might be imposed on him." Id. The court pointed

out that the Supreme Court has recognized that "its punitive damages jurisprudence has both procedural and substantive components." Id. The court concluded that "the due process principles articulated in the Supreme Court's recent punitive damages case law are relevant to" a copyright infringement case. The court reduced the statutory damages from $675,000 to $67,500. Id. at 117.

The cases relied upon by the Rhodes with respect to this issue all involve either specific pre-set penalties dissimilar to the c. 93A scheme or else they involve compensatory damages directly caused by the party against whom the punitive damages were assessed. See Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 578 (6th Cir. 2007)(copyright infringement statutory damages); Accounting Outsourcing, LLC. v. Verizon Wireless Personal Commc'ns, L.P., 329 F.Supp.2d 789, 808 (M.D. La. 2004)(penalties awarded under Louisiana Unsolicited Telefacsimile Messages Act and Telephone Consumer Protection Act); Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F.Supp.2d 455, 460 (D. Md. 2004)(copyright infringement).

In Vista Resorts, Inc. v. Goodyear Tire & Rubber Co., 117 P.3d 60, 74-75 (Colo. Ct. App. 2004), the

court rejected a due process challenge to the treble damages provision of the Colorado Consumer Protection Act. But in that case, the court was multiplying the damages directly caused by the defendant, not (as the Rhodes contend here) the damages caused by a third party, i.e., National Union's insureds.

V. The Trial Court Correctly Determined That the Rhodes Suffered No Compensable Emotional Distress Damages Arising From AIGDC's Conduct.

The Trial Court determined that the Rhodes did not prove "any damages beyond 'loss of use' damages." A.77. The Trial Court expressly found that "[t]here is not sufficient evidence of emotional distress arising from these unreasonably low postjudgment offers to award emotional distress damages." Id. The Trial Court concluded that the Rhodes presented "insufficient evidence" of emotional distress because: (a) AIGDC's conduct was not "extreme and outrageous;" and (b) the Rhodes' emotional distress was not "sufficiently 'severe'." These findings of fact were not clearly erroneous. Id.

The Rhodes make a cursory argument that "[e]motional distress damages can be awarded in chs. 176D/93A cases without pleading or proving intentional infliction of emotional distress." Rhodes Br. 33-34.

The Rhodes cite no authority, however, to support this assertion. The Trial Court correctly held that: (a) a c. 93A plaintiff must "satisfy the elements of an intentional infliction of emotional distress claim in order to establish emotional distress damages in a Chapter 93A case;'" and, (b) the "'frustrations of litigation'" are not compensable "unless those frustrations rise to the level required for recovery of damages under an intentional infliction of emotional distress claim." A.77-78.

The Trial Court's decision on this issue followed this Court's holding in Haddad v. Gonzales, 410 Mass. 855, 869 (1991). In Haddad, this Court found: "Plaintiffs alleging the intentional infliction of emotional distress in c. 93A actions still must satisfy all of the jurisdictional requirements of the statute, and still must carry the difficult burden of proof applicable to all intentional infliction of emotional distress claims."). See also Hart v. GMAC Mtge. Corp., 246 B.R. 709, 736 (D. Mass. 2000)(noting no courts have found that a plaintiff can recover "emotional distress damages under Chapter 93A in the absence of proof of intentional infliction of emotional distress"); Anderson v. Brake King Auto.,

Inc., 2006 Mass. App. Div. 15, 17-18, 2006 WL 279040, at *3 (2006) (c. 93A plaintiff could not recover emotional distress damages because she failed to prove: (1) intentional infliction of emotional distress, as required by Haddad; or (2) that she had suffered any physical harm, as required for a cause of action for negligent infliction of emotional distress).

CONCLUSION

For the foregoing reasons, this Court should affirm the Trial Court's determinations that: (a) the Rhodes did not sustain any compensatory damages due to AIGDC's delay in making its pretrial settlement offer; (b) the Rhodes are not entitled to recover any punitive damages because of AIGDC's pretrial conduct; and (c) loss of use is the appropriate measure of actual damages and, in the present case, the amount to multiply to determine the punitive damages. Moreover, using the motor vehicle accident case judgment to calculate punitive damages against AIGDC would be inconsistent with c. 93A and would violate AIGDC's constitutional right to due process.

ADDENDUM

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts

incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

MASSACHUSETTS CONSTITUTION
M.G.L.A. Const. Amend. Art. 106

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

MASSACHUSETTS GENERAL LAWS
CHAPTER 93A
REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION

Section 9
Civil actions and remedies; class action; demand for relief; damages; costs; exhausting administrative remedies

Section 9. (1) Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action in

the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

(2) Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such manner as the court directs.

(3) At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. In all other cases, if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or

practice complained of violated said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The demand requirements of this paragraph shall not apply if the claim is asserted by way of counterclaim or cross-claim, or if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth, but such respondent may otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section. Notwithstanding any other provision to the contrary, if the court finds any method, act or practice unlawful with regard to any security or any contract of sale of a commodity for future delivery as defined in section two, and if the court finds for the petitioner, recovery shall be in the amount of actual damages.

(3A) A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as herein provided. The demand requirements and provision for tender of offer of settlement provided in paragraph (3) shall also be applicable under this paragraph, except that no rights to equitable relief shall be created under this paragraph, nor shall a person asserting a claim hereunder be able to assert any claim on behalf of other similarly injured and situated persons as provided in paragraph (2).

(4) If the court finds in any action commenced hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with

said action; provided, however, the court shall deny recovery of attorney's fees and costs which are incurred after the rejection of a reasonable written offer of settlement made within thirty days of the mailing or delivery of the written demand for relief required by this section.

[There is no paragraph (5).]

(6) Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action under this section or to obtain injunctive relief or recover damages or attorney's fees or costs or other relief as provided in this section. Failure to exhaust administrative remedies shall not be a defense to any proceeding under this section, except as provided in paragraph seven.

(7) The court may upon motion by the respondent before the time for answering and after a hearing suspend proceedings brought under this section to permit the respondent to initiate action in which the petitioner shall be named a party before any appropriate regulatory board or officer providing adjudicatory hearings to complainants if the respondent's evidence indicates that:

(a) there is a substantial likelihood that final action by the court favorable to the petitioner would require of the respondent conduct or practices that would disrupt or be inconsistent with a regulatory scheme that regulates or covers the actions or transactions complained of by the petitioner established and administered under law by any state or federal regulatory board or officer acting under statutory authority of the commonwealth or of the United States; or

(b) that said regulatory board or officer has a substantial interest in reviewing said transactions or actions prior to judicial action under this chapter and that the said regulatory board or officer has the power to provide substantially the relief sought by

the petitioner and the class, if any, which the petitioner represents, under this section.

Upon suspending proceedings under this section the court may enter any interlocutory or temporary orders it deems necessary and proper pending final action by the regulatory board or officer and trial, if any, in the court, including issuance of injunctions, certification of a class, and orders concerning the presentation of the matter to the regulatory board or officer. The court shall issue appropriate interlocutory orders, decrees and injunctions to preserve the status quo between the parties pending final action by the regulatory board or officer and trial and shall stay all proceedings in any court or before any regulatory board or officer in which petitioner and respondent are necessarily involved. The court may issue further orders, injunctions or other relief while the matter is before the regulatory board or officer and shall terminate the suspension and bring the matter forward for trial if it finds (a) that proceedings before the regulatory board or officer are unreasonably delayed or otherwise unreasonably prejudicial to the interests of a party before the court, or (b) that the regulatory board or officer has not taken final action within six months of the beginning of the order suspending proceedings under this chapter.

(8) Except as provided in section ten, recovering or failing to recover an award of damages or other relief in any administrative or judicial proceeding, except proceedings authorized by this section, by any person entitled to bring an action under this section, shall not constitute a bar to, or limitation upon relief authorized by this section.

MASSACHUSETTS GENERAL LAWS
CHAPTER 176D UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE ACTS AND PRACTICES IN THE BUSINESS OF INSURANCE

Section 3 Unfair methods of competition and unfair or deceptive acts or practices

Section 3. The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:--

(1) Misrepresentations and false advertising of insurance policies: making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement which:--

(a) Misrepresents the benefits, advantages, conditions, or terms of any insurance policy;

(b) Misrepresents the dividends or shares of the surplus to be received on any insurance policy;

(c) Makes any false or misleading statements as to the dividends or share or surplus previously paid on any insurance policy;

(d) Misleads or misrepresents the financial condition of any person or the legal reserve system upon which any life insurer operates;

(e) Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof;

(f) Misrepresents for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy;

(g) Misrepresents for the purpose of effecting a pledge or assignment of or effecting a loan against any insurance policy; or

(h) Misrepresents any insurance policy as being shares of stock.

(2) False information and advertising generally: making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Defamation: making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any person, and which is calculated to injure such person.

[Clause (4) effective until October 1, 2010. For text effective October 1, 2010, see below.]

(4) Boycott, coercion and intimidation: entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance; any refusal by a nonprofit hospital service corporation, medical service corporation, insurance or health maintenance organization to negotiate, contract or affiliate with a health care facility or provider because of such facility's or provider's contracts or affiliations with any other nonprofit hospital service corporation, medical service corporation, insurance company or health maintenance organization; or any nonprofit hospital service corporation, medical service corporation, insurance company or health maintenance organization establishing the price to be paid to any health care facility or provider at a level equal to the lowest price paid to such facility or provider under a contract with any other nonprofit hospital service corporation, medical service corporation,

insurance company, health maintenance organization or government payor.

[Clause (4) as amended by 2010, 288, Sec. 18 effective October 1, 2010. See 2010, 288, Sec. 68. For text effective until October 1, 2010, see above.]

(4) Boycott, coercion and intimidation: (a) entering into an agreement to commit, or by concerted action committing, an act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance; (b) an refusal by a nonprofit hospital service corporation, medical service corporation, insurance or health maintenance organization to negotiate, contract or affiliate with a health care facility or provider because of such facility's or provider's contracts, type of provider licensure or affiliations with any other nonprofit hospital service corporation, medical service corporation, insurance company or health maintenance organization; or (c) an nonprofit hospital service corporation, medical service corporation, insurance company or health maintenance organization establishing the price to be paid to any health care facility or provider by reference to the price paid, or the average of prices paid, to such facility or provider under a contract or contracts with any other nonprofit hospital service corporation, medical service corporation, insurance company, health maintenance organization or preferred provider arrangement.

(5) False statements and entries: (a) knowingly filing with any supervisory or other public official, or knowingly making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or knowingly causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of a person; or (b) knowingly making any false entry of a material fact in any book, report or statement of any person or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report or statement of such person.

(6) Stock operations and advisory board contracts: issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

(7) Unfair discrimination: (a) making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract; or (b) making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) Rebates: Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any insurance contract, including but not limited to a contract for life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance or annuity any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance contract, or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

Nothing in clauses (7) or (8) of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices:--(i) in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payment directly to an office of the insurer in the amount which fairly represents the saving in collection expenses; (iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experienced thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

(9) Unfair claim settlement practices: An unfair claim settlement practice shall consist of any of the following acts or omissions:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(f) Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

(h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(i) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(j) Making claims payments to insured or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;

(k) Making known to insured or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements of compromises less than the amount awarded in arbitration;

(l) Delaying the investigation or payment of claims by requiring that an insured or claimant, or the physician of either, submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(m) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

(n) Failing to provide promptly a reasonable explanation of the basis in the insurance policy in

relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(10) Failure to maintain complaint handling procedures; failure of any person to maintain a complete record of all of the complaints which it has received since the date of its last examination, which record shall indicate in such form and detail as the commissioner may from time to time prescribe, the total number of complaints, their classification by line of insurance, and the nature, disposition, and time of processing of each complaint. For purposes of this subsection, "complaint" shall mean any written communication primarily expressing a grievance. Agents, brokers and adjusters shall maintain any written communications received by them which express a grievance for a period of two years from receipt, with a record of their disposition, which shall be available for examination by the commissioner at any time.

(11) Misrepresentation in insurance applications: making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money, or other benefit from any insurers, agent, broker, or individual.

(12) Any violation of sections ninety-five, two B, one hundred eighty-one, one hundred eighty-two, one hundred eighty-three, one hundred eighty-seven B, one hundred eighty-seven C, one hundred eighty-seven D, one hundred eighty-nine, one hundred ninety-three E, or one hundred ninety-three K of chapter one hundred seventy-five.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. NOTIFY SUPERIOR COURT
CIVIL ACTION
NO. 05-1360-BLS1

MARCIA RHODES, HAROLD RHODES, and REBECCA RHODES,
Plaintiffs

vs.

AIG DOMESTIC CLAIMS, INC. f/k/a AIG Technical Services, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, and ZURICH AMERICAN INSURANCE COMPANY,
Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The plaintiffs, Marcia Rhodes, Harold Rhodes, and Rebecca Rhodes (collectively, "the Rhodes"), have filed this action against the defendants AIG Domestic Claims, Inc., formerly known as AIG Technical Services ("AIGDC"), National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), and Zurich American Insurance Company ("Zurich"), alleging that these insurers violated G.L. c. 176D,§ 3(9)(f) (and, in turn, G.L. c. 93A) by failing to effectuate a prompt, fair, and equitable settlement of a tort claim in which liability was reasonably clear. This Court conducted a 16-day bench trial between February 5, 2007 and March 31, 2007, followed by extensive briefing. Based on the testimony at trial and the exhibits admitted into evidence, viewed in light of the governing law, this Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

In the early afternoon of January 9, 2002, Professional Tree Service was grinding tree stumps off Route 109 in Medway and had retained a Medway patrolman on paid detail to stop one lane of traffic at a time to protect the safety of its tree service truck and employee. The police officer stopped a Toyota driven by Marcia Rhodes, then 46 years old. After she came to a

6-2-05 police gave IV HAND TO HIS PARTNER

full stop, an 18-wheel trailer truck driven by Carlo Zalewski struck the rear of Ms. Rhodes car and pushed it off the road down an embankment. The tractor-trailer had struck her car with such force that the trunk had been pushed into the back seat of the vehicle. Ms. Rhodes was conscious when the police officer ran over to her aid, but she had lost all feeling below her waist. As a result of the traffic accident, she suffered, among other injuries, a fractured spinal cord at T-12 and broken ribs. The accident left her a paraplegic, unable to walk.

Zalewski at the time of the accident was employed by Driver Logistic Services ("DLS"), and had been assigned by DLS to drive the truck for GAF Building Corp. ("GAF"). GAF had leased the truck from its owner, Penske Truck Leasing Co. ("Penske").

At the time of the accident, GAF had a $2 million primary automobile insurance policy with Zurich, and a $50 million excess umbrella policy with National Union. Under the Zurich Policy, GAF had a self-insured retention of $250,000 per claim, including defense costs, and retained the authority to approve payments up to that amount. Zurich had to approve any settlement of a claim that involved payment of more than $100,000. GAF had retained Crawford & Company ("Crawford") as its Third Party Administrator ("TPA") to adjust its claims and Zurich also entered into a Third Party Administrator Agreement with Crawford to adjust its GAF claims. As Zurich's TPA for GAF claims, Crawford provided various adjustment services, including accepting and acknowledging proofs of loss, maintaining claims files, investigating all reported claims and evaluating their merits, proposing Claim Reserve guidelines, and retaining attorneys approved by Zurich to defend claims.

Crawford received notice of the claim arising from the January 9, 2002 accident involving Ms. Rhodes that same day. On January 30, 2002, John Chaney, a Senior Liability Adjuster for

Crawford, issued what he characterized as his First Full Formal Report regarding the accident. Chaney classified the claim as "catastrophic," and therefore declared that it will be reportable to both GAF and Zurich. Chaney had interviewed Zalewski by telephone on January 10, 2002, and reported that Zalewski said that he was descending a long gradual hill on Route 109, traveling roughly at the speed limit of 35 miles per hour when a car "popped out" of an intersecting street, causing him to go to his brake "vigorously." When he saw that this car had passed, he put his foot to the gas pedal, returned his eyes from that car to the road ahead, and saw Rhodes' car only 20-30 feet ahead. He put on his brakes, but they locked and he had too little space to stop. He said he saw no warning signs of work being done near the area of the accident. He was cited criminally for Operating Negligently to Endanger, and taken for drug and alcohol tests. The alcohol test was negative. The drug test had yet to be processed, but Zalewski denied that drugs or alcohol played any role in the accident. He said he was unaware of any defects in his truck. The police report confirmed his account, but noted that a truck traveling downhill in Zalewski's direction on Route 109 to the accident scene would have had 800 feet of straight, clear visibility. The police report also noted that the truck had one inoperative brake, but this was not deemed a factor in the accident.

As to damages, Chaney wrote that he was not fully aware of the extent of Ms. Rhodes' injuries, "except that we know she remains in life threatening condition at UMass Medical Center, is paralyzed, [and] suffers currently from pneumonia and pancreatic infection." He opined that the case "will carry a high value" but that it was premature to estimate the ultimate exposure.

Chaney noted that Ms. Rhodes had retained counsel, attorney Frederick Pritzker of the

law firm of Brown Rudnick Freed & Gesmer, PC. At GAF's suggestion, Crawford retained the law firm of Nixon Peabody, LLP to represent GAF. Chaney asked GAF to notify the excess carrier (National Union), which it did. Chaney provided a copy of this report to the Vice President for Risk Management at GAF, the attorney at Nixon Peabody representing GAF, and Zurich at its corporate headquarters in Shaumberg, Illinois.

While this Court has no doubt that Chaney indeed did send his First Full Formal Report to Zurich's headquarters, the Report appears not to have found its way to any of Zurich's claims representatives, probably because Zurich had not earlier been notified of the claim and had established no claims file to which it could be sent. AIGDC, which served as the claims administrator for National Union and, for all practical purposes, managed National Union's excess insurance claims, received a copy of this Report on February 4, 2002 because GAF's broker gave written notice to AIGDC of the claim on that date, enclosing both the Report and the police report.[1]

Chaney's next transmittal to GAF was on April 8, 2002, with copies sent to AIGDC and Zurich's postal box.[2] Chaney noted that Zalewski was clearly liable for Ms. Rhodes' injuries due to his lack of attention and he opined that Zalewski's liability may be imputed to GAF.[3] He

---

[1] Since AIGDC served as National Union's claims administrator and managed the Rhodes' excess insurance claim, this Court will simply refer to AIGDC when speaking of the excess insurer. There is no dispute that, if AIGDC is liable here, National Union is equally liable.

[2] Since AIGDC had earlier been notified of the claim and established a claim number, it received this transmittal; Zurich still had no claim number so this transmittal, too, was lost in its paperwork limbo.

[3] Chaney apparently mistakenly believed that Zalewski was employed by GAF; Zalewski was actually employed by DLS. GAF had retained DLS as an independent contractor to provide drivers for the trucks GAF leased from Penske.

foresaw the possibility of contribution from Penske for faulty maintenance (although he noted that this did not cause the accident), and from Professional Tree Service and the Town of Medway for not having placed warning signs and for poorly managing traffic. He awaited the legal opinion of defense counsel as to the potential for contribution from other possible tortfeasors. He recommended that the policy limits of $2 million be put in reserve. However, no reserve was yet put in place because only Zurich had the authority to set a reserve of greater than $100,000, and no one at Zurich yet knew of this claim.

The next day, on April 9, 2002, Tracey Kelley, whose unusual title at AIGDC was "Complex Director" (which at AIGDC effectively meant that she was assigned complex claims, defined as claims with a potential value of more then one million dollars), wrote Chaney to inform him that she was handling the excess claim on behalf of AIGDC. She asked for copies of "all pleadings, investigative materials regarding the accident and/or damages claimed, a synopsis of any medical records received and reviewed, deposition summaries, dispositive motions and all analysis of liability and/or damages prepared by defense counsel."

On April 16, 2002, Ms. Rhodes, for the first time since the accident, returned home. She had undergone spinal fusion surgery at the University of Massachusetts Medical Center following the accident and remained there for a month. She was then released to Fairlawn Rehabilitation Hospital, where she had remained for two months before being allowed to return home. At home, she was confined to a wheelchair and dependent on others to move her from her wheelchair to her bed or to the toilet. In May 2002, she was hospitalized again, this time at Milford-Whitinsville Regional Hospital, for emergency surgery to remove a gangrenous gall bladder. After a week of recovery, she was transferred to Whittier Rehabilitation Hospital, where

she remained for two weeks before coming home in June 2002. Shortly thereafter, because of her intensive physical therapy, she developed tendonitis and bursitis in her arms and shoulders and had to stop all physical therapy to allow them time to heal.

On July 3, 2002, GAF's law firm -- Nixon Peabody-- informed Penske by letter that, under their Lease & Service Agreement dated May 18, 1992, Penske was an additional insured on the GAF liability policies. Consequently, by this time, GAF understood that its liability policies with Zurich and National Union covered Zalewski, GAF, DLS, and Penske with respect to the Rhodes accident.

On July 12, 2002, Ms. Rhodes, Mr. Rhodes, and their daughter, Rebecca Rhodes, who was then 14 years old, filed a civil complaint in Norfolk County Superior Court against Zalewski, DLS, Penske, and GAF. Ms. Rhodes sought damages for her injuries; Mr. Rhodes and Rebecca sought loss of consortium damages. The claim against Zalewski was premised on his negligence in causing the accident. The claim against DLS was premised on its vicarious liability for Zalewski's negligence, since he was a DLS employee acting within the scope of his employment at the time. The claim against GAF alleged that it was negligent in failing to exercise control over the independent contractor to whom it entrusted its leased trucks. The claims against Penske alleged two distinct legal theories: (1) that it was negligent in failing to exercise control over the the independent contractor to whom it entrusted the trucks it owned and (2) that it was legally responsible under G.L. c. 231, § 85A for the conduct of the driver who drove the truck it owned.[4]

---

[4] Under G.L. c. 231, § 85A, once the plaintiffs prove that the truck was registered in the name of Penske as owner at the time of the accident, it is "presumed" that the truck was "operated, maintained, controlled or used by and under the control of a person for whose conduct

Although Chaney's notes reflect that he sent a copy of the Rhodes complaint to Zurich at its Illinois headquarters on or about August 1, 2002, Zurich only learned of the case when it was asked to resolve a dispute that had arisen between GAF and Penske. Although GAF's attorney had informed Penske by letter on July 3 that Penske was an additional insured on GAF's policies, GAF changed its position after suit was brought and told Penske that it would neither defend nor indemnify Penske as to the claim. GAF also contended that there would be a conflict if Nixon Peabody were to represent Penske, and that Penske needed to retain separate counsel. On August 7, 2002, Chaney sent a "formal letter of notification" to Zurich and, perhaps most importantly, telephoned David McIntosh, a claims director at Zurich, to inform him of the coverage dispute with Penske. With personal contact finally having been made with a Zurich claims director, Chaney faxed to McIntosh various papers in his claim file (but omitted his First Full Formal Report and April 8, 2002 transmittal) and Zurich belatedly opened a claim file on August 21, 2002.

Zurich did not immediately take any action as to the Rhodes claim apart from resolving questions of coverage. McIntosh referred the matter to Zurich's coverage counsel to determine who was covered under the GAF policy. Zurich agreed to pay for Penske's separate counsel under a reservation of rights.

On August 30, 2002, the Rhodes filed an amended complaint which added a negligent maintenance claim against Penske. On September 27, 2002, the Rhodes served their first set of

---

[Penske] was legally responsible, and absence of such responsibility shall be an affirmative defence to be set up in the answer and proved by the defendant." G.L. c. 231, § 85A. This means that ownership of the truck is prima facie evidence of control, sufficient to defeat any motion for summary judgement or directed verdict, but rebuttable with evidence to the contrary.

requests for the production of documents to all defendants. Little new transpired as discovery proceeded. Although Crawford appears to have obtained no new information of consequence and had not received any of Rhodes' medical records, its view of the value of the case appeared to solidify. Chaney's transmittal letter of September 25, 2002, which was sent directly to McIntosh at Zurich, estimated the potential case value as between $5 million and $10 million. He also continued to recommend that the case be reserved at the policy limits of $2 million.

On November 21, 2002, Zalewski admitted to sufficient facts to support a finding of guilt as to his criminal charge in District Court and apologized for what he had done. Ms. Rhodes prepared a detailed written victim impact statement for his sentencing.

On May 6, 2003, Jody Mills, who had taken over as adjuster of the Rhodes file at Crawford, prepared a transmittal letter which noted that GAF's attorney in the Rhodes case had said that he did not expect the case to run its usual litigation course because of the severity of Ms. Rhodes' injuries. Counsel said that Ms. Rhodes' medical expenses would approach $1 million, but no demand had yet been made by Rhodes' counsel. Mills, like Chaney before her, continued to estimate the potential case value as between $5 million and $10 million.

In early June 2003, McIntosh of Zurich asked Mills for a full formal report, which she provided to him on June 4, 2003. Her report noted that Rhodes' attorney had yet to submit a demand or provide medical records. She also noted that she did not yet have a copy of Rhodes' medical records, although she understood that they had been provided in discovery to GAF's counsel.

In a transmittal letter dated July 22, 2003, Mills wrote that she had been advised by GAF's counsel that Rhodes' attorney had made an oral settlement demand of $18.5 million, with

incurred medical expenses estimated at $1.3 million and future medical expenses estimated at $2 million. He also told her that Rhodes' attorney would be providing a more detailed written demand, along with a "day in the life" videotape. Mills at this time had yet to obtain the medical records from GAF's counsel, even though Zurich had asked for a copy, but she hoped they would be included with the written demand.

The written demand, along with the "day in the life" videotape, was provided to GAF's counsel on August 13, 2003, but the amount of incurred medical expenses ($413,977.68) was less than half of what orally had been represented.[5] Perhaps as a consequence, the amount of the written demand ($16.5 million) was below the oral demand. This demand included special damages totaling $2,817,419.42, comprised of:

- incurred medical expenses of $413,977.68;
- the present value of combined future medical costs arising from her paraplegia of $2,027,078;[6]

---

[5] Carlotta Patten, the Brown, Rudnick associate who handled various discovery matters for the Rhodes litigation, acknowledged that Rhodes' April 2003 answers to interrogatories declared that her medical expenses exceeded $1 million. This figure was largely based on a tally provided by United Health Care, Rhodes' health insurer. However, when Patten obtained the various certified medical bills later in the spring of 2003, she observed discrepancies between these bills and the United Health Care totals, which she later learned arose from widespread duplication that reduced by more than half the actual amount of medical expenses. Rhodes' attorneys postponed completion of the written demand until they could resolve these discrepancies.

[6] The medical amounts were projected by Adele Pollard, a registered nurse with Case Management Associates, Inc, who first estimated Ms. Rhodes lifetime medical expenses assuming that she lived 34.7 more years (based on normal life expectancy) and then estimated those lifetime expenses assuming she lived only 24.4 more years (based on a lower than normal life expectancy arising from her injuries). The total relied upon was the average of these two estimates, reduced by present value calculations prepared by an economist.

- the loss of household services of $292,379; and
- out-of-pocket expenses of $83,984.74.

The demand was carefully documented and included all Rhodes' medical records, along with Pollard's life care plan and an expert economist's report regarding the value of lost household services and present value calculations. The "day in the life" videotape chronicled what was described as a typical day for Ms. Rhodes, which depicted the enormous time and effort needed to move her from her bed to her wheelchair, to bathe her, to feed her, and to prepare her for bed, as well as the nursing care and home assistance needed to assist her with these mundane, everyday needs.

McIntosh changed his duties at Zurich in late August or early September 2003, so Rhodes claim file was reassigned to Katherine Fuell. McIntosh did not brief her on the claim or provide her with any background; she was left to get up to speed on the claim based solely on the contents of the claims file at Zurich and her review of McIntosh's contemporaneous typed notes, which every claims director was required to make and which were referred to as "Z notes." The last two Z notes McIntosh wrote before the transfer to Fuell reflected his frustration with the paucity of investigation conducted and the information provided by Crawford. Under Zurich's TPA agreement with Crawford, it was Crawford's job to serve as the case manager, to manage the litigation, and to ensure that the insureds had an effective and strategically sound legal defense, but Zurich ultimately had to resolve the claim. His June 11, 2003 "Z note" observed that he needed a "complete damage picture" – "full injury information, the medical costs both past and future, likewise we need the same for earnings." He also wanted defense counsel to conduct verdict research regarding the likely verdict in the case, and a litigation plan setting forth the

current status of the case and the plan for moving forward. His last "Z note," dated August 25, 2003, said simply, "I have heard nothing from the TPA."

On September 11, 2003, Mills sent a letter to McIntosh (apparently still believing he was handling the claims file at Zurich) regarding the status of the case. She enclosed a copy of Rhodes' written demand, as well as a copy of the "day in the life" videotape. It is useful to summarize what information Fuell had in her possession once she received this letter and its attachments in mid-September 2003:

- Based on the medical records included by Rhodes' counsel in the written demand, it was plain that Ms. Rhodes had been rendered a paraplegic as a result of the accident and that she would remain a paraplegic until she died.

- Based on the medical records and the day in the life videotape, it was plain that Ms. Rhodes' life after the accident had become very confined, with a large share of her waking hours devoted to performing the mundane tasks that used to take her only minutes. It was less plain what the long-term prognosis was for her to lead a more normal life, albeit limited by her paraplegia, if she could lift herself onto a wheelchair, operate a motorized wheelchair, and learn to drive a minivan accommodated to her limitations.

- The documented medical expenses already incurred had reached more than $410,000, and there were likely to be substantial future medical and everyday expenses arising from her paraplegia.

- Zalewski was nearly certain to be found negligent in the accident. While Zurich was paying for his defense under a reservation of rights, there should have been little question that he was covered by GAF's Zurich policy, since the policy covered anyone occupying a covered automobile, and a covered automobile included any vehicle leased for a term of six months or more, which included the tractor-trailer that GAF leased from Penske which was driven by Zalewski.

- There was no evidence that Zalewski was separately covered by his own automobile accident policy, but there was no verification yet that he had no other primary insurance. DLS, as Zalewski's employer, was nearly certain to be found vicariously liable for Zalewski's negligence. As with Zalewski, there was yet no evidence that DLS had its own primary insurance but there was also no verification that it had no primary insurance. GAF's coverage counsel on May 29, 2003 had asked in writing for the defense attorney jointly representing Zalewski

and DLS to furnish all relevant insurance policies, but the defense attorney had so far ignored the letter and provided no response.

- There was some possibility that Penske would be found negligent for its failure to maintain the brakes, but it did not appear that flawless brakes would have prevented the accident.

- Professional Tree Service had been deposed and defense counsel intended to seek leave to add it as a third-party defendant in the action because of its alleged failure to provide adequate warning signs around its work area. At the time, Crawford understood that it had a $3 million policy. In fact, it had two policies, each with a $1 million limit, only one of which would provide coverage.

- Crawford was consistently recommending that the reserve be established at the $2 million policy limits.

- With respect to the litigation, Zalewski had been deposed but none of the three Rhodes had yet been deposed. Nor had anyone asked Ms. Rhodes to undergo an Independent Medical Examination. Defense counsel had agreed that a defense life care planner should be retained to prepare a life care plan, which could then be compared with the plan devised by Rhodes' life care planner.

On September 24, 2003, Mills prepared another transmittal letter that dropped the potential case value from $5-10 million to $5-7 million because the incurred medical expenses were less than half of the amount that she had been told. The letter reflects that mediation had begun to be discussed among counsel, because it notes that Rhodes' attorney had asked for a good faith offer before he would agree to mediation.

Early in October 2003, Fuell sent forms to Crawford asking GAF's defense counsel, Greg Deschenes of Nixon Peabody, to provide a case evaluation regarding the strength of the Rhodes' case and of any legal defenses. In the second week of November 2003, Fuell received two documents that triggered her request for a conference call with defense counsel, Crawford, and AIGDC, which occurred on November 19, 2003.

The first triggering document was a transmittal letter from Mills dated November 13,

2003 that used stronger language than any she had used before. Although Crawford had repeatedly requested that the reserve be increased to the policy limits, Zurich had yet to take any action, which left the reserve at $50,000 – the limit of the reserve that Crawford alone could authorize. Mills noted that the inadequate reserve could be seen as improper if a regulatory agency examined Zurich's financials, and urged that the reserve be increased to $2 million "at once to keep on the correct side of regulators." For the first time, Mills reported that, according to DLS's attorney, DLS had no insurance coverage of its own due to an error by its insurance agency. Therefore, there was no indication that any defendant likely to be found liable, apart from the third-party defendant Professional Tree Service, held any primary insurance that could share in the liability. Mills reported that it was unproductive to continue the infighting among the defendants and that attention should instead be focused on moving to a good settlement posture. She noted that Rhodes' attorney was a "successful big case lawyer," that his demand was not unreasonable in light of the special damages of nearly $3 million, and that he was "attempting to set up defendants for a 93A violation by making an early demand, asking for a good faith offer before submitting to non-binding arbitration." She "strongly" endorsed surrendering Zurich's policy limits of $2 million as a good faith position prior to mediation. She also noted that it would be better if only one insurer managed the mediation and that this could be accomplished by tendering the policy limits, essentially leaving it to AIGDC to mediate the case.

The second triggering document was Deschenes' case evaluation, which was sent to Crawford and received by Fuell at or around the same time as Mills' transmittal letter. Zurich did not waive its attorney-client privilege, so the content of this document remains unknown to

this Court. However, based on Deschenes' testimony at trial, it is plain that Deschenes was eager to move the case to mediation. In June 2003, before receiving Rhodes' written demand, he had suggested to Rhodes' attorney that they stay discovery and proceed straight to mediation, but Rhodes' attorney refused to agree to a stay. However, he and Rhodes' attorney had agreed to proceed to mediation without first deposing Marcia and Rebecca Rhodes, sparing them the burden of being deposed unless the mediation failed. Late in October 2003, Deschenes telephoned Mills to ask for the authority to make an offer, since Rhodes' attorney had insisted upon an offer as a precondition to mediation.

The participants in the conference call on November 19 were GAF's insurance broker, GAF's inside counsel and risk management vice president, Fuell from Zurich, Deschenes, and Nick Satriano, AIGDC's Complex Director. Satriano had taken over the Rhodes excess claims file at AIGDC in June 2003.[7] Deschenes reviewed with the others the status of the case, the theories of liability, the defenses, and the likely damages. Deschenes informed them that Rhodes' attorney had asked for a good faith offer as a precondition to entering into mediation. Fuell said that she did not personally have the authority at Zurich to tender the $2 million policy limits, but she intended to ask her superiors for approval of such a tender. The conferees agreed that $2 million was not going to cover the settlement and that AIGDC would have to put up money for the case to settle. Deschenes pressed for a preliminary offer of $5 million prior to mediation.

Satriano was unhappy about being pressed to put up money before he was up-to-speed on

---

[7] Satriano was the fifth claims director at AIGDC to take responsibility for this file, following four others who had responsibility for the file for roughly three months apiece.

the case. He had only passively reviewed the claims file at AIGDC, and it only contained the Crawford reports, which he felt to be conclusory and unreliable. The conference call was the first time he had spoken to Deschenes about the case. He told the conferees that he was new to the file and did not have much of the information that was being discussed at the conference. He asked Deschenes to send him a copy of his file and all the information he had. He said he would study that information and become fully involved in the case. He also said he wanted to bring in associate counsel, that is, he wanted to add to the GAF defense team Attorney William Conroy from the law firm of Campbell & Campbell to jointly represent GAF and AIGDC in the lawsuit. He was challenged by others as to the need for associate counsel, but Satriano did not back down, since he did not have confidence in Deschenes and did not think he was sensitive to the needs of an excess insurer.

Satriano vigorously disagreed with the recommendation that they should offer $5 million prior to the mediation, and refused to commit at that time to putting up any AIGDC money towards a settlement offer. Both Satriano and Fuell understood from Deschenes that Rhodes' attorney had demanded $5 million as "the price of admission" to mediation. In fact, Rhodes' attorney had never stated this or any other number; he had simply insisted upon a good faith offer prior to mediation to ensure that the mediation would not be a waste of time. Rather, Deschenes believed the $5 million to be a good faith preliminary offer and pressed the insurers to offer it, and they conflated his recommendation with Rhodes' attorney insistence upon a good faith offer. This misunderstanding was never corrected; Satriano and Fuell left the conference with the understanding that Rhodes' attorney had refused to enter into mediation unless the insurers first made an offer of no less than $5 million.

The conference ended with Fuell committing to request authority within Zurich to tender the $2 million policy limits, and asking Deschenes to provide her with the information she needed to make that request. Satriano committed to read the case materials that Deschenes was to provide him but did not commit to any offer.

On November 24, 2003, Deschenes sent Satriano the demand letter, medical records, preliminary defense life care planner report, pleadings, case evaluations, and various reports. Satriano did bring in Conroy as associate counsel in December, and Conroy on December 24 asked Deschenes to send him all "correspondence, pleadings, depositions, and all discoverable documentation" for his review, but asked him to hold off on sending him the 10 boxes of discovery materials.

Following the meeting, Fuell went to work to prepare the BI Claim Report, which was a prerequisite to her obtaining authority at Zurich to tender an amount as large as $2 million. On or about December 5, 2003, she had received the final version of the defense life care plan, prepared by Jane Mattson, which determined that Ms. Rhodes life care costs would total $1,239,763, which was $787,315 less than the present value of Ms. Rhodes' combined future needs in her demand letter.[8] The primary differences between the plaintiff and defense life care plans were that the defense life care plan assumed a shorter life span for Ms. Rhodes (24 years vs. 28.9 years), provided fewer hours per week for home care aides, and assumed that she could reside in the Rhodes' living room rather than in her own modified bedroom.

On December 19, 2003, Fuell submitted her BI Claim Report, which asked for approval

---

[8] Mattson's preliminary life care plan, issued on October 2, 2003, had estimated the total life care costs as $1,487,827.

before the end of the year to tender the $2 million policy limits to AIGDC. She stated that the probability of a plaintiff's verdict was 100 percent, and that there was no possibility of a finding of comparative negligence. She estimated, with respect to the damage award for pain and suffering, a 10 percent risk of an award of $11 million, a 50 percent risk of an award of $12.25 million, and a 10 percent risk of an award as high as $13.75 million damage. She gave an estimated value of the total damage award as nearly $17.88 million. Fuell, however, badly misstated the amount of past medical bills in her Report, describing them as $2.817 million, which was the total amount of special damages in the demand letter; the past medical bills were $413,977.68. As a result, her special damages, even with her low end estimate, was $4.317 million, which was $1.5 million more than the special damages estimate in Rhodes' demand letter. Even eliminating this error, however, it is plain that Fuell in her Report anticipated a total damage award of considerably more than $10 million.

Fuell had sent her Report to Kathy Langley at Zurich, not realizing that Langley was leaving Zurich at the end of that month. Langley told her between Christmas and New Year's Day that she had recommended approval of the full tender to Thomas Lysaught of Zurich, who was to make the decision, but had yet to hear from him. On January 21, 2004, Fuell emailed Lysaught directly and asked if he had reviewed her request for authority to tender the $2 million policy limits. Lysaught gave his approval on January 22.

On January 23, 2004, Fuell telephoned Satriano at AIGDC and verbally tendered to AIGDC the policy limits. Satriano said he would not accept a verbal tender and needed it in writing. He added that the writing needed to address whether Zurich was simply tendering its policy limits and would continue to pay for the defense of the case, or whether it was also

tendering the defense obligation, i.e. whether it would refuse to pay any longer for the defense upon the tender. She told him she would need to review the policy to determine Zurich's defense obligation upon tender and would send him a letter incorporating the correct policy language. She added that, while she would get him a written confirmation, Zurich intended to tender its policy limits and has already advised both the client and the broker of the tender. Satriano admits that, as a result of this telephone call, he knew that he had Zurich's $2 million available for any settlement.

Fuell had not responded to Satriano in writing by February 13, 2004, and Satriano grew concerned about the risk of confusion as to whether Zurich was seeking to tender its defense obligations along with its policy limits. That day, he emailed Fuell that AIGDC had not yet received any formal offer of tender, that any formal offer must be in writing, and any written offer may not be communicated by email. He added that "my current understanding is that the primary insurer has NOT relinquished their duty to defend the insured in this litigation" and that he expected Zurich, as primary insurer, to continue its obligation to defend regardless of any tender. Fuell replied that day by email that she had never stated that Zurich was "in any way relinquishing our defense obligations to the insured ...." She said that she expected to have access to the policy when she returned to the office on Monday so that she can provide written notification to him. She ended by reiterating that, even without a formal writing, Zurich has offered the full limits of its policy to AIGDC, and AIGDC can rely upon that tender in communicating a response to plaintiffs' demand.

Although he did not yet have a formal writing from Zurich memorializing the tender, Satriano certainly understood that he had Zurich's tender because he attended a meeting on

March 4, 2004 at GAF's home office in New Jersey to discuss the case without inviting Zurich. On March 1, a few days before this meeting, the Rhodes had moved to amend their complaint against GAF to add a count under a federal motor carrier's statute which would plainly have made GAF vicariously liable for Zalewski's negligence. The motion to amend, over GAF's objection, was allowed on March 16. As a result, GAF, which before was defending a claim that it had negligently failed to supervise an independent contractor, was now defending a vicarious liability claim based on Zalewski's negligence, and consequently had essentially no chance of escaping liability.

Present at the March 4 meeting, apart from Satriano, were various GAF representatives, Deschenes, Conroy, and GAF's insurance broker. At this meeting, Deschenes presented the results of the jury verdict and settlement research he had conducted, which focused on automobile accident cases, mostly in Massachusetts, in which liability was probable or reasonably clear and which involved severe damages, many of them resulting in paraplegia. The average settlement among these comparable cases was $6,647,333; the average verdict was $9,696,437. GAF wanted to respond to Rhodes' demand, which had increased in December 2003 to $19.5 million. All thought that Rhodes' demand was too high, but no one suggested that it was unworthy of a response. Satriano, however, was adamantly opposed to making a $5 million offer prior to mediation or to making any offer in order to cause Rhodes' attorney to agree to mediation. He said he was willing to go to mediation but did not want to set an improper artificial starting point for the mediation. Since AIGDC was not willing to make an offer prior to mediation and Pritzker had earlier said that an offer was a precondition to mediation, this meeting accomplished little towards agreeing upon a settlement posture. At the

close of the meeting, Satriano simply told Conroy to tell Pritzker that they were still working on a response to his settlement demand and would get back to him.

The meeting, however, did provide some guidance regarding litigation strategy. Conroy said he had identified a physiatrist (an expert in physical medicine) to conduct an Independent Medical Examination ("IME") of Ms. Rhodes to determine the severity of her present condition and her ability to recover some functioning through rehabilitation. There was also some discussion of deposing Ms. Rhodes and her daughter, but no decision was made as to whether to proceed with their depositions before any mediation.

For all practical purposes, the failure to develop a settlement position at this March 4 meeting meant that no reasonable settlement offer would be presented before the pretrial conference on April 1, 2004, since Satriano knew at the meeting that he had been called to active military duty in Iraq and that responsibility for the Rhodes excess claim file at AIGDC was to be transferred in his absence to Richard Mastronardo, who did not attend the meeting.

GAF's coverage attorney, Anthony Bartell, was so frustrated by AIGDC's unwillingness to agree upon a settlement offer that he wrote Satriano on March 18 that AIGDC's failure to commence settlement negotiations with Rhodes' attorney despite his settlement demand more than seven months ago violated its obligation under G.L. c. 176D, § 3(9)(f) "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." He also informed Satriano that, once Zurich formalized its tender, GAF would offer Zurich's $2 million to the Rhodes to settle their claims.

Zurich did not resolve the question of its defense obligations upon tender until March 29, 2004. Fuell wrote Mastronardo a formal letter stating that Zurich was tendering its $2 million

policy limits and that its duty to defend the insured and additional insureds under the Policy ended with the tender. The letter quoted the provision of the Zurich Policy that declared:

> Our duty to defend or settle ends ... when we tender, or pay to any claimant or to a court of competent jurisdiction, with the court's permission, the maximum limits provided under this coverage. We may end our duty to defend at any time during the course of the lawsuit by tendering or paying the maximum limits provided under this coverage, without the need for a judgment or settlement of the lawsuit or a release by the claimant.

The letter stated that, effective April 5, 2004, Zurich was transferring all its defense obligations to AIGDC. The letter asked to whom the $2 million check should be made payable to and to whom it should be sent.

Mastronardo orally rejected Zurich's March 29 formal written tender because of its attempt to transfer to AIGDC the defense obligation. He stated that AIGDC had no defense obligation under its excess policy and that the issue of legal fees needed to be resolved between Zurich and GAF. On April 2, 2004, Martin Maturine, AIGDC's Complex Director for Excess Specialty Claims, wrote Zurich to confirm that it had rejected Zurich's tender of primary policy limits. AIGDC's rejection of the tender was spurious. Maturine focused on the provision in the National Union Policy that declared that National Union "shall have the right and duty to defend any claim or suit seeking damages covered by the terms and conditions of this policy" when the limits of all underlying insurance policies providing coverage to the insured "have been exhausted by payment of claims to which this policy applies." (emphasis in Maturine letter but not in Policy). In essence, AIGDC was declaring that its duty to defend commenced only upon payment of policy limits so it was going to reject the tender of those limits in order to prevent such payment from occurring.

On April 2, 2004, Fuell informed GAF and all counsel that, in light of AIGDC's rejection

of its tender, Zurich had made a "business decision" to continue to pay all defense costs in the Rhodes litigation. Fuell said that Zurich had offered to deposit its $2 million tender in an escrow account and reserved its rights to recover its defense costs from AIGDC.

Soon after the formal tender on March 29, before the April 1 pretrial conference, Deschenes, on behalf of GAF, offered Pritzker $2 million to settle the Rhodes' claims and invited Pritzker to mediate the case. Pritzker considered the offer wholly inadequate, and said he wanted to mull over whether mediation was worth doing in light of that offer. A few weeks later, however, Pritzker agreed to mediate, and invited the defendants to select a mediator.

While the Rhodes were willing by mid-April 2004 to proceed to mediation, AIGDC did not wish to proceed to mediation until it had concluded the additional discovery it now insisted it needed. After Satriano left for Iraq, Maturine took over as the Complex Director of the Rhodes claim file and Tracey Kelly, who had been the Complex Director in charge of the file in April 2002, was promoted to Complex Claims Supervisor and assumed supervisory authority over the case. They did not wish to proceed to mediation until Marcia and Rebecca Rhodes had been deposed, the IME of Marcia Rhodes had been completed, and they had obtained Marcia Rhodes' prior psychological records. They also wanted to explore various insurance coverage issues which they felt had not been adequately resolved – the amount of coverage carried by Professional Tree Service and whether Zalewski was a covered person under the Penske policy.

Pritzker would not agree to hand over Ms. Rhodes' psychological records, so defense counsel filed a motion seeking such discovery, which was denied on June 11, 2004. Since the discovery deadline had passed, defense counsel also filed a motion on June 18, 2004 to extend

discovery and extend the trial date.[9] On July 8, 2004, Superior Court Judge Elizabeth Donovan denied the motion but permitted the depositions of Marcia and Rebecca Rhodes to proceed, since Pritzker had earlier agreed with defense counsel that they could be postponed beyond the discovery deadline.

The mediation was scheduled for August 11, 2004. The IME of Marcia Rhodes was conducted on July 20, 2004 by the defendants' expert physiatrist. Marcia Rhodes was deposed on August 4, 2004. Rebecca was not deposed until August 25, 2004, after mediation failed.

Maturine left AIGDC in June 2004 so yet another Complex Director, Warren Nitti, was assigned to the Rhodes file. He was asked to compile a narrative report regarding the Rhodes' claim, which he completed on August 3, 2004. Nitti recommended that authority be given to pay a settlement of $6 million, but Kelly overruled him and authorized a settlement of only $4.75 million. She intended to offer a structured settlement with an annuity to pay for Ms. Rhodes' life care plan, because the annuity could be obtained for less than the value of the life care plan and offered tax advantages to the Rhodes. While Kelly, on behalf of AIGDC, gave settlement authority up to $4.75 million, she understood that this would include only $1.75 million of AIGDC's monies, since $2 million of the settlement was to come from Zurich's policy and she assumed that the remaining $1 million would come from Professional Tree Service, who AIGDC had determined had $1 million in coverage and figured would be willing to pay policy limits in order to avoid the risk of far greater exposure at trial.

---

[9] A similar motion had been filed on May 17, 2004 but it was withdrawn after GAF objected to the filing of that motion. GAF agreed to the filing of the motion only after Maturine warned GAF in writing that its continued denial of consent to its filing may constitute a breach of the insured's obligation of cooperation and may result in AIGDC disclaiming coverage.

At the mediation on August 11, which was attended, among others, by Pritzker, Nitti, and Attorney Peter Hermes on behalf of Professional Tree Service, the Rhodes made an initial settlement demand of $15.5 million, plus defense payment of Ms. Rhodes' health insurance premiums for the remainder of her life. Nitti, on behalf of the GAF-insured defendants, counter-offered with $2.75 million. After further discussion, the Rhodes counter-offered with $15.0 million, and Nitti increased the defendants' counter-offer to $3.5 million. Meanwhile, Professional Tree Service reached a separate settlement with the Rhodes, agreeing to pay them $550,000 for a release. Nitti never offered the full amount of his authority of $3.75 million. Nor did AIGDC revisit whether to increase Nitti's authority after it learned that the Tree Service had settled for $450,000 less than AIGDC had anticipated. In retrospect, it is now clear that the mediation was doomed to fail in view of the positions taken by the Rhodes and AIGDC. Mr. Rhodes, who effectively spoke for the family as to settlement, would not have accepted any settlement offer at mediation less than $8 million and no one involved in this case at AIGDC would have agreed at mediation to pay that amount to resolve the case.

After the mediation, defense counsel deposed Rebecca Rhodes and attempted again to persuade the court to grant them access to Ms. Rhodes' prior psychological records, asking the court to conduct an *in camera* review of those records to determine their relevance at trial. This motion, filed on an emergency basis on August 19, was denied on August 23.

No settlement negotiations were conducted or further counter-offers communicated before trial commenced on September 7, 2004. Just prior to the trial, Zalewski, DLS, and GAF stipulated to their liability, meaning that the trial would only decide the questions of Penske's liability and the amount of damages suffered by the Rhodes. During the course of trial, the

parties stipulated to the dismissal of all claims against Penske, leaving only damages to be decided by the jury.

Nitti attended the trial and reported that it was progressing more favorably to the Rhodes than AIGDC had anticipated. After the close of evidence but before closing arguments, Nitti, having obtained authority from AIGDC, increased its offer to $6 million, which included Zurich's $2 million, but not the Tree Service's $550,000. Pritzker did not communicate that offer to the Rhodes, effectively rejecting it. When the jury returned with its verdict on September 15, it awarded Ms. Rhodes $7,412,000 for her injuries, Mr. Rhodes $1.5 million on his consortium claim, and Rebecca Rhodes $500,000 on her consortium claim, for a total award of $9.412 million, not including the 12 percent simple interest that had accrued in the roughly 2 years and two months since the complaint had been filed, which added roughly another 26 percent to the total. Judgement entered for the Rhodes on September 28, 2004. After deducting the $550,000 settlement with Professional Tree Service, all of which was paid to Ms. Rhodes, the total amount due from the GAF-insured defendants was roughly $11.3 million.

On October 8, 2004, Nitti sought internal approval within AIGDC to prosecute an appeal. The proposed appeal had two grounds: (1) the alleged excessiveness of the verdict, and (2) the court's denial of the defendants' motions to obtain Ms. Rhodes' psychological records in discovery. Nitti declared there was a "possibility" of gaining a new trial based on the denial of the psychological records; he admitted that "[t]he chances of obtaining relief on remittitur are more remote."

On October 18, 2004, the defendants moved for a new trial or, in the alternative, remittitur. On November 10, they filed notice of appeal. Their new trial motions were denied on

November 17. On November 19, the Rhodes sent a Chapter 93A demand letter to Zurich and AIGDC, alleging that they had engaged in unfair settlement practices in violation of G.L. c. 176D, § 3(9)(f) by failing to effectuate a prompt, fair and equitable settlement. They demanded a reasonable settlement within 30 days.

AIGDC responded to the Chapter 93A demand letter on December 17, 2004 by offering $7.0 million, of which $1.25 million would go towards purchasing a life care plan for Ms. Rhodes. This offer included Zurich's $2 million, but did not include the $550,000 already obtained from Professional Tree Service. This settlement offer required the Rhodes not only to release all defendants as to the personal injury claims but also to release all claims under Chapters 93A and 176D. Zurich responded on December 22, 2004 by paying the Rhodes $2,322.995.75 without obtaining any release, which included its $2 million policy limits plus accrued post-judgment interest on the entirety of the underlying judgment from the date that judgment entered. The Rhodes replied by filing this action on April 8, 2005.

AIGDC increased its structured settlement offer on May 2, 2005 to $5.75 million, which, when one includes the amounts paid by the Tree Service and Zurich, brought the total amount to $8.62 million. Pritzker replied on May 12, insisting that the Rhodes would settle for nothing less than the entirety of the settlement, plus interest. On June 2, 2005, after further negotiations, Pritizker confirmed in writing the terms of the Rhodes' settlement with AIGDC: AIGDC would withdraw the defendants' appeal and pay the Rhodes $8.965 million, with $3 million to be paid on July 5, another $3 million to be paid on August 5, and the $2.965 million balance to be paid on September 5. Adding the amounts paid by Zurich and the Tree Service to this total, the plaintiffs obtained roughly $11.835 million in settlement of their tort action. The Rhodes did not

promise to dismiss their Chapter 93A action against AIGDC as part of the settlement.

CONCLUSIONS OF LAW

G.L. c. 176D, § 3 sets forth various acts that are defined as "unfair or deceptive acts or practices in the business of insurance," and therefore violations of G.L. c. 93A, § 2. G.L. c. 176D, § 3. Among these forbidden acts are various "unfair claim settlement practices," of which the best known is "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." G.L. c. 176D, § 3(9)(f). As our appellate courts have interpreted this provision, some flesh has been added to the spare bones of this statutory obligation. These interpretations have made clear that:

1. The obligations in G.L. c. 176D, § 3(9)(f) are not simply owed to the insurance company's policyholders, but also to those third parties making claims against its policyholders. See, e.g., Clegg v. Butler, 424 Mass. 413, 419 (1997).

2. To "effectuate" a settlement means to make a settlement offer. See, e.g., Hopkins v. Liberty Mutual Insurance Company, 434 Mass. 556, 567 (2001).

3. The obligation to make a settlement offer is triggered only when "liability has become reasonably clear," and "liability encompasses both fault and damages." Clegg v. Butler, 424 Mass. at 421; Metropolitan Property and Cas. Ins. Co. v. Choukas, 47 Mass. App. Ct. 196, 199 (1999).

   AIGDC argues that, in a tort case such as this where the accident resulted in paraplegia, damages are not reasonably clear until the jury renders its verdict because the damages arising from the pain and suffering of the accident victim and the loss of consortium of her spouse and children are inherently unclear and unquantifiable. The Supreme Judicial Court has plainly rejected this proposition, which would effectively negate the statutory obligation of insurance companies to make a prompt and fair settlement offer in nearly all tort cases. See Clegg v. Butler, 424 Mass. at 421; Hopkins v. Liberty Mutual Insurance Company 434 Mass. 556, 567-578.

   In Clegg, the accident victim's car had been struck in a head-on collision and he suffered serious injuries that certainly would have justified a substantial award for pain and suffering. 424 Mass. at 414-415. The Supreme Judicial Court nonetheless affirmed the trial judge's finding that it was a "100% liability case against the insured," and that the insurance company therefore was obliged to have made a settlement offer within 30 days

of plaintiff's Chapter 93A letter demanding a settlement offer. Id. at 421. In Hopkins, the accident victim's car was struck from the rear and pushed into the vehicle in front, resulting in a spinal injury that permanently prevented the plaintiff from returning to her work as a plumber. 434 Mass. at 557-558.. Even though these injuries would have resulted in substantial pain and suffering, the Supreme Judicial Court still found that liability was reasonably clear and, therefore, that the insurance company had an obligation to make a settlement offer within 30 days of its receipt of the plaintiff's Chapter 93A demand letter. Id. at 560-561, 569. In contrast, in O'Leary-Alison v. Metropolitan Property & Cas. Ins. Co., even though negligence was plain because the plaintiff had been rear-ended by the defendant's car, the Appeals Court found that liability was not reasonably clear in large part because the independent medical examiner found no physical condition warranting treatment. 52 Mass. App. Ct. 214, 217-218 (2001).[10]

Therefore, when the Supreme Judicial Court speaks of damages being reasonably clear, it effectively means that (1) it is reasonably clear that the plaintiff has suffered substantial injury caused by the negligence of the defendant, and (2) the extent of those injuries is reasonably clear. It does not mean that it is reasonably clear how much a jury would award the plaintiffs for pain and suffering or loss of consortium, because juries hearing the same evidence plainly will differ in the amounts they award to compensate plaintiffs for these intangible losses.

4. An insurance company is entitled to delay making a settlement offer until liability – negligence and damages – is reasonably clear and may conduct a diligent investigation to determine whether liability indeed is reasonably clear. As the Supreme Judicial Court declared in Clegg:

> Insurers must be given the time to investigate claims thoroughly to determine their liability. Our decisions interpreting the obligations contained within 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.

424 Mass. at 413. A corollary to this principle is that an insurance company may not unreasonably delay making an offer once its investigation has determined that negligence and damages are reasonably clear. Nothing bars an insurance company from continuing its investigation in the hope that it will uncover new information that may pinpoint the precise amount of damages or disprove damages that otherwise appeared reasonably clear, but it may not postpone its settlement offer while it pursues these investigative

---

[10] The insurance company, despite the disputed evidence as to whether the plaintiff had been injured in the accident, still made a settlement offer of $20,000 in O'Leary-Alison. Id. at 216. Therefore, the Appeals Court essentially found that the insurance company's offer was reasonable under the circumstances, since it did not need to consider whether the insurance company had an obligation to make an offer.

possibilities.

5. The reasonable clarity of damages depends on the amount of the policy limits. In a catastrophic injury where negligence is not materially disputed, damages are reasonably clear to the primary insurer with modest policy limits once it is reasonably clear that the amount of damages will exceed those policy limits, even if the total scope of damages is not yet reasonably clear. See Clegg, 424 Mass. at 421-422 (since primary insurer knew or should have known that Clegg was permanently and totally disabled from work, there was no reasonable doubt that the damages exceeded the $250,000 available under the primary policy). Consequently, damages may be reasonably clear to the primary insurer before they are reasonably clear to the excess insurer.

Armed with these interpretations, this Court will now determine whether Zurich and/or AIGDC breached its statutory obligation "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." G.L. c. 176D, § 3(9)(f).

Did Zurich Breach its Obligations as a Primary Insurer under G.L. c. 176D, § 3(9)(f)?

In the instant case, it was reasonably clear by January 30, 2002, when Crawford, Zurich's TPA, issued its First Full Formal Report, that Zalewski was negligent in causing Ms. Rhodes' injuries in the accident, that Ms. Rhodes was not comparatively negligent, and that Ms. Rhodes suffered catastrophic injuries from the accident. The scope of her damages, however, could not have been reasonably clear at least until August 13, 2003, when the Rhodes made their written settlement demand, which set forth the amount of medical expenses she had incurred. The calculation of the amount of medical expenses had gotten so confused that the Rhodes needed to delay the submission of this settlement demand until their attorneys could sort out this confusion and determine why the totals claimed by Ms. Rhodes' health insurer did not match the amount claimed in her medical bills. This confusion had caused the Rhodes to declare in an answer to an interrogatory that her medical expenses exceeded $1 million when they totaled less than half that amount – $413,977.68 – at the time of their settlement demand. In short, it was not even

reasonably clear to plaintiffs' counsel how much Ms. Rhodes had incurred in medical bills until August 2002, and that calculation was the necessary starting point for any calculation of total damages.

The life care plan for Ms. Rhodes' future medical needs comprised roughly $2.03 million of the roughly $2.8 million in special damages claimed by the Rhodes in that demand letter. Zurich was not obliged to accept the life care plan estimates made by Rhodes' expert; it was entitled, as part of its due diligence in determining the amount of damages that were reasonably clear, to retain its own life care expert to prepare her own estimates and to analyze Rhodes' expert's life care plan. Since the Rhodes' life care plan was provided to the defense in mid-August, the slowest summer month of the year, Zurich acted with reasonable timeliness in obtaining Mattson's preliminary estimates from her life care plan on October 2, 2003. From that estimate of roughly $1.49 million, it should have been reasonably clear that Ms. Rhodes special damages alone, based solely on medical bills that were now in Zurich's possession and its own life care expert's preliminary estimate, totaled more than $1.9 million. Since there was no doubt that Ms. Rhodes had been rendered a paraplegic and that she and her family were entitled to substantial damages for pain and suffering and loss of consortium, it should have been reasonably clear by October 2, 2003 that the total damages incurred from the accident would far exceed the Zurich policy limits of $2 million.

This does not mean, however, that by October 2, 2003 it was reasonably clear that Zurich should tender its policy limits to AIGDC, GAF's excess insurer. While it was plain by then that Zalewski and DLS would be found negligent (Zalewski for his own negligence and DLS, as his employer, for its vicarious responsibility for his negligence), it had not yet been ascertained

whether Zurich was the only primary insurer providing coverage for Zalewski's and DLS's negligence. It was certainly reasonable for Zurich to seek to determine whether Zalewski and DLS had their own primary coverage, apart from the coverage GAF provided to them through its policy as additional insureds, and Zurich had retained coverage counsel in part to make this determination. While one would think that this question of coverage could have been resolved sooner, since Zurich was providing a defense for both Zalewski and DLS that was contingent upon their continued reasonable cooperation with Zurich, it was only on November 13, 2003 that Zurich obtained information on which it reasonably could rely – Crawford's transmittal letter reporting a conversation with DLS's attorney who stated that, because of an error by DLS's insurance agency, it had no primary coverage apart from Zurich's.

Once Zurich had this information and reviewed the case evaluation it had sought from GAF's defense counsel, it should have been clear by mid-November 2003 that:

- Zurich was the only primary insurer for the two defendants who certainly would be found liable – DLS and Zalewski;
- Zurich was the only primary insurer for another defendant, GAF;
- Penske may have had another primary insurer apart from Zurich, but it was not reasonably likely to be found liable. While Penske may have been negligent in failing to maintain the brakes of Zalewski's tractor-trailer, there was no evidence that any deficiency in the brakes caused the accident. In addition, while Penske's ownership of the truck provided prima facie evidence under G.L. c. 231, § 85A that Penske was legally responsible for Zalewski's conduct, which would have been sufficient to defeat a motion for summary judgment or directed verdict, the evidence would not likely have been strong enough to win at trial, since Penske simply leased the truck to GAF, who retained DLS to drive it.
- Professional Tree Service, a third-party defendant, may have been liable for failing to post proper warning signs and its alleged negligence may have caused the accident, but its liability was less than reasonably certain. At that time, it was not clear how much insurance coverage Professional Tree Service had, but Zurich could quickly have determined that it held $1 million in primary coverage.

On November 19, 2003, Fuell, Zurich's Complex Director in the case, declared at the conference call with defense counsel and AIGDC's Satriano that she did not have the authority herself to tender the $2 million policy limits but she was going to seek that authority. While Fuell did not orally inform Satriano at AIGDC that she had obtained the necessary authority and was tendering the full policy limits until her telephone call of January 23, 2004, it is plain that AIGDC understood from the time of the November 19, 2003 conference call that Zurich was going to tender its policy limits and acted accordingly. At the meeting, Satriano asked for all relevant documents so that he could become fully informed regarding the claim and evaluate the $5 million settlement offer recommended by GAF's attorney. He also declared his intention to add an attorney representing AIGDC's interests to the GAF defense team in the litigation.

The Rhodes contend that Zurich's delay in tendering its policy limits violated its statutory obligation to "effectuate prompt ... settlements of claims in which liability has become reasonably clear." G.L. c. 176D, § 3(9)(f). Before considering what "prompt" means under this statute, this Court needs first to determine when Zurich actually tendered its policy limits. As noted earlier, Fuell verbally tendered to AIGDC the full policy limits in her telephone call to Satriano on January 23, 2004, but Satriano rejected the tender on two grounds: (1) he wanted it in writing; and (2) he wanted the writing to address whether Zurich was also tendering its defense obligation. It was the latter ground that delayed the written confirmation of Zurich's tender, since Fuell needed to determine from the policy language whether Zurich was going to continue to pay for the defense of the case. On February 13, 2004, she provided Satriano with written email confirmation that Zurich had tendered its policy limits and that AIGDC can rely upon that tender in making a settlement offer to the Rhodes, but the email also indicated that Fuell had not

resolved whether the tender meant that Zurich no longer intended to pay for the insureds' defense of the case. Fuell did not send the formal letter of tender until March 29, 2004 and AIGDC rejected the tender because it disclaimed any continued obligation to pay for defense costs. Although this Court is not aware of any written correspondence from AIGDC accepting Zurich's tender after Zurich agreed on April 2, 2004 to continue to pay all defense costs, it is plain that AIGDC's acceptance of the tender commenced upon its receipt of Zurich's April 2 letter.

This Court finds that, for all practical purposes regarding settlement of a civil action, Zurich effectively tendered its policy limits to AIGDC on January 23, 2004 with Fuell's verbal tender. From that telephone call, AIGDC knew that it effectively had Zurich's $2 million policy limits in its pocket to include in any settlement offer and that, from that moment, the obligation to make a settlement offer had shifted to AIGDC. It was reasonable for AIGDC to insist that Zurich clarify whether it was seeking also to tender the defense obligation to AIGDC but AIGDC could not reasonably reject Zurich's tender of policy limits because of that ambiguity. If it could, the insurers' settlement obligation could stagnate in legal limbo, with the primary insurer trying to tender policy limits and the excess insurer rejecting the tender, leaving no insurer to make a reasonable settlement offer to the plaintiffs. Rather, AIGDC was obliged to accept the tender of policy limits and resolve separately the question of which insurer now had the obligation to pay defense costs. As noted earlier, if one looks at what AIGDC did rather than what it said, it is clear that it had accepted the tender of policy limits well before Zurich agreed to continue to pay defense costs on April 2, 2004, because it did not even invite Zurich to the meeting at GAF headquarters on March 4, 2004 to discuss legal strategy and settlement offers.

The question then is whether Zurich's tender on January 23, 2004 was "prompt" within

the meaning of G.L. c. 176D, § 3(9)(f). To be sure, Zurich had effectively completed its due diligence by the November 19, 2003 meeting and Fuell knew then that she was going to recommend that Zurich tender its full limits. However, in order to obtain authority for so large a tender, Fuell had to prepare a detailed BI Claim Report, which she did not complete until December 19, 2003. That Report then had to be reviewed by the approving officer and authorization given, which did not happen until January 22, 2004, in part because the person to whom the Report was addressed left Zurich at the end of December 2003.

This Court notes that, in Hopkins, the Supreme Judicial Court effectively defined "prompt" to mean 30 days after the plaintiff on December 29, 1994 had sent the Chapter 93A letter demanding a settlement offer as required by G.L. c. 176D, § 3(9)(f), even though the plaintiff had on October 14, 1994 sent a settlement demand letter and liability was reasonably clear by the end of October 1994.. 434 Mass. at 559-560, 568. See G.L. c. 93A, § 9(3) (requiring a plaintiff to make a written demand for relief at least 30 days before filing a Chapter 93A action). Here, Rhodes' attorney chose not to characterize their settlement demand on August 13, 2003 as a demand for a settlement offer under G.L. c. 176D, § 3(9)(f); indeed, no settlement offer was demanded under Chapter 93A until after the jury's verdict. Therefore, Fuell was under no statutory deadline when she sought approval of the tender and, as a result, Zurich lacked the urgency that would have been stimulated by such a deadline.

To be sure, an insurer may breach its obligation to effectuate a prompt settlement of a claim without a Chapter 93A demand letter, but the absence of such a demand may affect the determination of whether the obligation of promptness was breached. For all practical purposes, the meaning of "prompt" must be understood in its context, since the failure to be "prompt"

under G.L. c. 176D, § 3(9)(f) is itself an unfair act in violation of Chapter 93A. Viewed in that context, this Court does not find that Zurich's delay from November 19, 2003 to January 23, 2004 violated its obligation to make a "prompt" tender. It is reasonable for an insurance company to require a tender as large as $2 million to be authorized at a high level in the company and it is equally reasonable to require that such a request be accompanied by a detailed written justification such as the BI Claim Report. It is reasonable to expect that such a written justification will require a significant amount of time to prepare and for the authorizing officer to consider, and it is reasonable to expect that the time needed will be greater when this work is being performed during the busy holiday season between Thanksgiving and New Year's Day. While this Court has no doubt that Zurich could have and should have provided the required authorization for the tender earlier than January 22, 2004, it does not find it to be an unfair act to have failed to do so. Therefore, this Court finds that Zurich acted with the promptness required under G.L. c. 176D, § 3(9)(f) when it provided AIGDC with its verbal tender of policy limits on January 23, 2004.

This Court further finds that, even if Zurich had violated its duty to provide a prompt tender and was obliged to have furnished it within days of the November 19, 2003 conference call, the earlier tender would not in any way have affected either the timing or the amount of AIGDC's subsequent settlement offer. There is literally nothing that AIGDC would have done differently had Zurich's formal tender been provided during the November 19, 2003 conference call. By the end of that conference call, Satriano understood that he was going to obtain Zurich's full $2 million tender, gathered all the documents he needed to take over the case, and announced his intention to bring in associate counsel. This Court recognizes that AIGDC had no "reason to

examine or determine the extent of its liability" until Zurich, the primary insurer, "was prepared to address the possibility that the [plaintiffs] were entitled to its policy limits," Clegg, 424 Mass.at 421-422 n. 8, but AIGDC certainly understood from the November 19 conference call that it needed urgently to determine the reasonable extent of its liability. This Court also recognizes that AIGDC, as the excess insurer, had "no obligation or incentive to make an explicit commitment until the primary insurer has acted," id. at 422 n. 8, and that Zurich did not furnish its authorized tender until January 23, 2004. AIGDC, however, after it received Zurich's tender, saw no urgency to make a settlement offer, and ultimately decided not to make a settlement offer until the mediation in August 2004. This Court is certain, based on the strategic posture AIGDC took in this action, that AIGDC would not have made a settlement offer prior to the mediation even if Zurich had made its tender on November 19 itself.[11]

---

[11] The Rhodes argue that, if they prove that Zurich failed to make a prompt tender of its policy limits, they are entitled to Chapter 93A damages even if they failed to prove that Zurich's delay in furnishing its tender had any consequence on AIGDC's settlement conduct, citing Clegg.

In Clegg, the primary insurer failed to respond to the plaintiffs' various settlement offers, the earliest coming in September 1991, until July 1992, and that settlement offer, which was less than policy limits, was found to be unreasonably low because it was reasonably clear that damages well exceeded the policy limits. 424 Mass. at 414-423. The primary insurer only offered its policy limits at the mediation in May 1994, just before the scheduled trial, and the excess insurer quickly agreed to add $425,000, allowing the case to settle at or around mediation for $675,000. Id. at 416. The Supreme Judicial Court held that the plaintiffs were entitled to damages equal to "the interest lost on the money wrongfully withheld by the insurer." Id. at 423. Justice O'Connor, in dissent, observed that the plaintiffs had failed to prove that they had been deprived of the use of settlement money for any period of time because they would not have been paid the tender of policy limits to the excess insurer and there was no evidence that the excess insurer would have settled the case earlier than the mediation if the primary insurer had tendered earlier. Id. at 428-429 (Dissent, O'Connor, J.). The majority responded to Justice O'Connor's dissent with two separate and distinct arguments. First, the Court essentially declared that the plaintiff was not required to prove that the primary insurer's delay in providing a full tender delayed the ultimate settlement of the case. The Court wrote:

Therefore, this Court finds that Zurich did not violate its obligation under G.L. c. 176D, §

> If we were to follow the position taken by the dissent, when a primary insurer and an excess insurer both cover a claim, a primary insurer who subjects a party to improper delay would never be liable for the injuries caused by such behavior, because there would always be some uncertainty as to what the excess insurer would have done if the primary insurer had behaved differently. We do not believe such a result comports with the language or intent of G.L. c. 176D, § 3(9), or G.L. c. 93A. The evidence regarding the excess insurer's readiness to pay, both as to timing and amount, must necessarily be indirect and inferential in a case such as this, since the excess insurer has no obligation or incentive to make an explicit commitment until the primary insurer has acted. If, as the dissent suggests, such evidence is insufficient, the injured party would never be able to recover damages in respect to the delay in receiving payment from either the excess insurer or the primary insurer. Primary insurers cannot avoid liability for their unfair settlement practices under G.L. c. 176D, § 3(9), by pointing to the uncertainty surrounding a claim against an excess insurer, when that uncertainty stems from the primary insurer's own behavior and delay.
>
> Id. at 422 n. 8.

Second, the Court essentially declared that the trial judge had found that the primary insurer's delay had caused the excess insurer to delay its final settlement offer, and thereby delayed the effectuation of the settlement. The Court noted, "The promptness of [the excess insurer's] settlement also supports the judge's inference that had [the primary insurer] offered its policy limits earlier, [the excess insurer] would have settled earlier too." Id.

Therefore, it is not clear from Clegg whether the Supreme Judicial Court held that a plaintiff in a G.L. c. 176D action is entitled to the interest on the amount the primary insurer should have tendered from the date the tender should have occurred, even if there is no evidence that the plaintiff would have received the use of the tendered money if it had been timely tendered or whether it simply held that the trial judge had found that the excess insurer would have settled far earlier had the primary insurer promptly tendered, and that the primary insurer's delay thereby caused the plaintiff the loss of use of the tendered money.

This Court need not resolve whether the former or the latter holding was intended by the Supreme Judicial Court in Clegg because the Supreme Judicial Court subsequently made it clear in Hershenow v. Enterprise Rent-A-Car Company of Boston, Inc., that, to establish liability in a Chapter 93A action, the plaintiff must not only prove an unfair and deceptive act or practice but must also prove that the unfair act or practice "caused a loss." 445 Mass. 790, 798 (2006). Therefore, even if the Supreme Judicial Court intended the former holding in Clegg, it repudiated that holding in Hershenow, and required the plaintiff to prove its loss, not merely assume it. Hershenow at 801-802 (finding that there is no per se injury under Chapter 93A).

3(9) to make a prompt tender of its full policy limits and, if it did, its delay did not cause the Rhodes to suffer any injury or loss because the delay did not affect either the amount or timing of AIGDC's settlement offers. As a result, judgment shall enter for Zurich in this action.

Did AIGDC Breach its Obligations as an Excess Insurer under G.L. c. 176D, § 3(9)(f)?

Before the November 19, 2003 conference call, as this Court earlier noted, AIGDC had no duty to "examine or determine the extent of its liability" because Zurich, the primary insurer, had not yet indicated that it was prepared to tender its policy limits. See Clegg, 424 Mass. at 421-422 n. 8. Despite the absence of such a duty, AIGDC had recognized shortly after it received notice of the claim that, in view of the catastrophic injuries suffered by Ms. Rhodes, the tender would likely occur and AIGDC would then assume responsibility for the claim. Cognizant of that likelihood, it monitored the claim and reviewed the transmittals it received from Crawford.

Once Fuell informed Satriano during that November 19, 2003 conference call that she intended to seek Zurich's authorization to tender the policy limits, AIGDC was placed on notice that the tender was imminent and that it would soon assume responsibility for the Rhodes' claim. Satriano acted appropriately during the conference call by asking for all the relevant documents regarding the claim so that he could knowledgeably examine the extent of AIGDC's liability regarding this claim. He also acted appropriately in retaining Conroy as associate counsel to ensure that there was an attorney on the GAF defense team whose judgment he respected and who would reliably protect AIGDC's interest in the litigation.

As earlier noted, until Satriano obtained Zurich's verbal tender on January 23, 2004, AIGDC, as the excess insurer, had no duty to make any settlement offer to the Rhodes. Id.

However, once that tender was made, AIGDC assumed responsibility for and control over the Rhodes claim, including the responsibility to make a prompt and fair settlement offer.

The evaluation regarding a fair settlement offer that AIGDC, as the excess insurer, needed to make was somewhat different from the evaluation of Zurich, the primary insurer. Since its policy limits were $2 million, Zurich simply needed to make four determinations:

1. Was it reasonably clear that at least one of its insureds would be found liable?
2. Did any of its insureds have other primary insurance that covered this loss?
3. How much, if any, could the third-party defendant, Professional Tree Service, or its insurer be expected to contribute towards any settlement?
4. Was it reasonably clear that the damages suffered by Ms Rhodes, her husband, and her daughter exceeded the $2 million policy limits, plus any reasonably expected contribution from Professional Tree Service or its insurer?

At the time Fuell made these determinations, it was nearly certain that Zalewski and DLS would be found negligent, and there was no evidence that these additional insureds had any other primary insurance. Fuell recognized that Professional Tree Service could be found liable for failing to provide adequate signage and, at the time, believed that it held $3 million in liability insurance (in fact, it held only $1 million in liability insurance). Fuell had no difficulty finding that, even with a reasonable contribution from Professional Tree Service, the Rhodes' reasonably clear damages far exceeded Zurich's $ 2 million policy limits.

AIGDC, as the excess insurer, also needed to make four determinations regarding a fair settlement offer, but they differed slightly from Zurich's determinations:

1. Was it reasonably clear that at least one of its insureds would be found liable?

2. Did any of its insureds have other primary or excess insurance that covered this loss?

3. How much, if any, could the third-party defendant, Professional Tree Service, or its insurer be expected to contribute towards any settlement?

4. What amount of damages was relatively clear?

By the time Zurich verbally tendered its limits on January 23, 2004, AIGDC had more than two months to evaluate the case. By this time, AIGDC should have known that no IME had yet been requested of Ms. Rhodes and that neither Ms. Rhodes nor Rebecca Rhodes had yet been deposed. Discovery in the case had closed on September 30, 2003, but Pritzker earlier had orally agreed with GAF's attorney to make Ms. Rhodes and Rebecca Rhodes available for deposition after the discovery deadline if the defendants insisted upon their being deposed. This Court finds (as did the Rhodes' expert at trial) that, as part of AIGDC's due diligence in determining whether damages were reasonably clear, it was appropriate for AIGDC to insist that Ms. Rhodes submit to an IME and that Ms. Rhodes and Rebecca Rhodes be deposed. An excess insurer, until the primary insurer tenders its policy limits, does not have the authority to influence the strategic decisions regarding discovery made by the insured's defense counsel. Therefore, upon Zurich's tender, it was appropriate for AIGDC to revisit those decisions and determine whether there was additional discovery that it believed necessary to determine whether liability (here, the extent of damages) were reasonable clear. However, AIGDC could not delay its arrangements for the IME or these depositions in order to delay its obligation to make a prompt settlement offer, especially since discovery in the case had closed and it was scheduled for trial in September 2004.

It appears that AIGDC had determined, at least by the March 4, 2004 meeting at GAF's headquarters, that it wished an IME, because Conroy before the meeting had looked for and

found a physiatrist to conduct that IME. Yet, AIGDC demonstrated no apparent urgency to schedule the IME; it was not conducted until July 20, 2004, nearly the latest possible time for the IME to be conducted and for defense counsel to have the benefit of the IME report before the mediation on August 11. It is equally clear that AIGDC had not determined by that meeting that the depositions of Ms. Rhodes and Rebecca Rhodes were necessary to determine whether damages were relatively clear because, although the matter was discussed, no decision was made at that meeting as to whether to depose them. The fact that AIGDC did not know whether it wished to depose these two parties even though more than three months had passed since it knew it would assume responsibility for this catastrophic claim demonstrates that AIGDC did not believe that their depositions were necessary to determine whether liability was reasonably clear. Rather, the reason to depose them was simply to gauge how credible they would be at trial, and this reason was offset by the fear that deposing them would harden the plaintiffs' already tough position as to settlement. Indeed, AIGDC proceeded to mediation without having ever deposed Rebecca Rhodes.

AIGDC also insisted that its attorneys seek discovery of Ms. Rhodes' psychological records, which AIGDC argued was imperative before it could determine whether liability was relatively clear. This Court disagrees. G.L. c. 176D, § 3(9) provides that a settlement offer need not be made until liability becomes "reasonably clear," it does not permit a settlement offer to be postponed until everything that may be relevant to damages has been uncovered. If a settlement offer is allowed to await the completion of any possible discovery that may be admissible at trial on the issue of damages based on the premise that liability is not reasonably clear until every bit of possible evidence has been located and scrutinized, then the obligation to give a prompt

settlement offer would be rendered toothless. It was reasonably clear that Ms. Rhodes had been permanently rendered a paraplegic by the accident, that her life had been forever transformed, and that she was often depressed by how limited her life had become. While it may be relevant at trial that she had previously been treated by a psychologist for depression, such information could not materially change the extent of the pain and suffering arising from the accident.

The fact of the matter is that AIGDC did not delay its settlement offer in order to conduct the IME or to depose Ms. Rhodes or to obtain Ms. Rhodes' psychological records; it delayed its settlement offer because it did not want to make any offer until mediation and it wanted, for strategic purposes, to wait until nearly the eve of trial to mediate the case. As a result, AIGDC did not make any settlement offer in this case until the mediation on August 11, 2004, almost exactly one year from the date that the Rhodes made their settlement demand. The issue, then, is whether delaying the settlement offer this long satisfied AIGDC's duty under G.L. c. 176D, § 3(9) to make a "prompt" settlement offer.

This Court finds that liability, including the extent of damages, in this case was reasonably clear by December 5, 2003, when the final version of the defense life care plan had been prepared by Mattson. By then, discovery had closed, all medical records had been produced, the plaintiffs had presented their detailed settlement demand, and the defense had their own life care plan to compare with that presented by the Rhodes' life care plan expert. To be sure, more would be learned after that date regarding the progress of Ms. Rhodes' recovery, but that is always the case in a catastrophic injury that does not result in death. If an insurance company is entitled to find that liability is not reasonably clear until an end point has been reached regarding the defendant's recovery, then the obligation to make a prompt settlement

offer would have no practical consequence in a catastrophic injury case because that end point is rarely reached before trial (unless the defendant dies before trial).[12] Therefore, liability was reasonably clear when Zurich tendered its policy limits to AIGDC on January 23, 2004. As noted earlier, this Court would permit AIGDC to delay its settlement offer if, upon tender, it believed in good faith that an IME and the deposition of all plaintiffs was necessary for liability to be reasonably clear, but only if AIGDC made best efforts to ensure that this additional discovery was completed promptly. As also noted, it is plain that AIGDC made no such effort.

AIGDC, however, contends that the time was not yet ripe to make a settlement offer because there remained coverage issues that had yet to be resolved, including the extent of Professional Tree Service's policy limits. Pragmatically, it should not have taken long for AIGDC to ascertain from Professional Tree Service that its policy limits were only $1 million rather than the $3 million that Zurich understood. This Court finds that, while it was reasonable for AIGDC to examine these coverage issues before making a settlement offer, these efforts, too, need to be made with reasonable promptness, given that discovery had closed and that a substantial amount of time had passed since the plaintiffs' settlement offer. This Court finds that AIGDC made no reasonable effort to resolve promptly the outstanding coverage issues.

This Court concludes that, even allowing a generous amount of time for AIGDC to

---

[12] Indeed, because of a variety of complications that Ms. Rhodes suffered in 2003 as a result of the accident that left her bedridden until October 2003 (bed sores and a broken leg), Ms. Rhodes did not begin her rehabilitation until at or around the time of the mediation. Therefore, there was no possibility of any end result from that rehabilitation becoming known until long after the trial had ended. Moreover, as a result of those complications, Ms. Rhodes' medical bills increased and, if anything, her long term prognosis grew worse. Therefore, the passage of time in no way should have diminished AIGDC's estimation of Ms. Rhodes' damages.

become familiar with the claim, to obtain additional discovery it thought necessary to make liability reasonably clear, to resolve coverage issues, and to obtain internal approval within AIGDC, AIGDC violated its duty to make a prompt settlement offer once liability was reasonably clear by failing to make a settlement offer by May 1, 2004. May 1 was roughly eight months after the plaintiffs' settlement demand, seven months after discovery had closed, more than five months after AIGDC knew that Zurich was to tender its policy limits, more than three months after Zurich's verbal tender of limits, two months after the meeting at GAF headquarters where GAF pressed for a settlement offer, one and a half months after GAF's coverage attorney warned AIGDC that its failure to commence settlement negotiations constituted a breach of its obligations under G.L. c. 176D, § 3(9), one month after the formal written tender and the pretrial conference, and a few weeks after Pritzker agreed to mediation based only on Zurich's settlement offer of policy limits.

AIGDC's delay in making a prompt settlement offer cannot be justified by the magnitude of plaintiffs' settlement demand, which at that time was $19.5 million. "An insurer's statutory duty to make a prompt and fair settlement offer does not depend on the willingness of a claimant to accept such an offer." Hopkins, 434 Mass. at 567. Nor can it be justified by Pritzker's supposed demand for a $5 million offer before entering into mediation. Not only did Pritzker never make such a demand, but AIGDC never even explored with Pritzker whether he would enter into mediation prior to a settlement demand, which he effectively did based upon Zurich's tender to him of its settlement limits. An insurer may delay its settlement offer until mediation only if it promptly arranges for mediation, so that the settlement offer made during mediation satisfies its obligation of promptness.

Having found that AIGDC breached its duty to make a prompt settlement offer once liability was reasonably clear, this Court now turns to the question of whether the settlement offer it ultimately made at mediation – $3.5 million – was a reasonable settlement offer to effectuate a fair settlement. This Court finds it was at the low end of the reasonable range of settlement offers.

AIGDC's Kelly provided Nitti with settlement authority to offer $3.75 million, which included Zurich's $2 million and assumed that Professional Tree Service would offer its policy limits of $1 million. This Court finds the latter assumption reasonable, even though Professional Tree Service ultimately settled for only $550,000. While Professional Tree certainly had a triable case as to liability, in sharp contrast with Zalewski, DLS, and (with the amendment adding the claim under the federal motor carrier statute) GAF, it faced the likelihood of a judgment well above policy limits if it were found liable. AIGDC reasonably expected that Professional Tree Service, to avoid that possibility, would have pressured its insurer to furnish its policy limits if it needed to do so to settle the action.

Nitti only offered $3.5 million of that $3.75 million in authority, and this Court must evaluate the reasonableness of the offer in light of the amount actually offered, not the amount authorized to be offered. "The statute [G.L. c. 176D, § 3(9)] does not call for [a] defendant's final offer, but only one within the scope of reasonableness." Bobick v. United States Fid. & Guar. Co., 439 Mass. 652, 662 (2003), quoting Forcucci v. United States Fid. & Guar. Co., 11 F.3d 1, 2 (1st Cir.1993).

In determining the reasonableness of that offer, this Court is mindful that it is truly determining whether the offer was so low that it constituted an unfair act under Chapter 93A.

That is a difficult task when, as here, most of the damages are intangible, compensating Ms. Rhodes for her pain and suffering and her husband and daughter for their loss of consortium. In conducting this analysis, this Court must look to all the circumstances, including the reasonableness of the offer in relation to the injuries suffered by the plaintiffs and the reasonableness of the plaintiffs' demand. See Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 799-801 (1976) (settlement offer must consider injuries actually suffered by plaintiffs); Bobick, 439 Mass. at 662 ("excessive demands on the part of a claimant .. may be considered as part of the over-all circumstances affecting the amount that would qualify as a reasonable offer in response"). See also Clegg, 424 Mass. at 420 ("Our standard for examining the adequacy of an insurer's response to a demand for relief under G.L. c. 93A, § 9(3), is 'whether, in the circumstances, and in light of the complainant's demands, the offer is reasonable.'"), quoting Calimlim v. Foreign Car Ctr., Inc., 392 Mass. 228, 234 (1984).

This Court examines the reasonableness of AIGDC's final offer at mediation from two separate angles. First, the Court looks to the amount of special damages that would clearly be established at trial even if the jury credited the defense experts rather than the plaintiffs' experts. At the time of the mediation, relying on the outdated calculation of past medical expenses set forth in Rhodes' August 13, 2003 settlement demand, Ms. Rhodes had incurred at least $413,977.68 in medical bills. The defense life care planner's final estimate of the cost of Ms. Rhodes' life care plan was $1,239,763. The defense had not challenged the settlement demand's estimate of $292,379 for the loss in household services or the out-of-pocket expenses incurred of $83,984. Therefore, if the case had proceed to trial as planned in September 2004, the defense could not reasonably have disputed that Ms. Rhodes special damages were at least $2.03 million.

AIGDC appears to have come to the same conclusion; AIGDC's Kelly, who set the offer, estimated the special damages to be $2 million. If the jury awarded only those special damages and did not pay a penny for pain and suffering or loss of consortium, those special damages alone, with common interest of 12 percent per annum from July 12, 2002 (the date the complaint was filed), would have yielded a verdict of roughly $2.56 million. For that judgment to have reached the settlement offer of $4.5 million (including the $1 million anticipated contribution from Professional Tree Service), the jury would have had to award damages for pain and suffering and loss of consortium of roughly $1.54 million (which, with interest, would total $1.94 million).

This Court then asks whether, if the jury had awarded the plaintiffs at trial $1.54 million in pain and suffering and loss of consortium damages, the trial judge would likely have found that award to be so unreasonably low that the plaintiffs were entitled to additur. While such an award would certainly be stingy, even in a county like Norfolk County which is generally viewed as a favorable venue by defense counsel, this Court cannot say with confidence that a motion for additur in those circumstances would be more likely than not to prevail. Since this Court cannot conclude that such a verdict would be found so unreasonably low as to demand an additur, this Court cannot conclude that a settlement offer of this amount is so low as to be unreasonable.

Alternatively, this Court considers the evidence offered by the insurance experts at trial who testified as to whether this offer fell within the reasonable range of settlement offers. This Court concurs with the defense expert, former Superior Court Judge Owen Todd, who testified that the AIGDC's settlement offer of $3.5 million was within the reasonable range, albeit at the low end of that range. In adopting his opinion, this Court considered the entirety of the

circumstances, including the plaintiffs' unreasonably high settlement demands, the fact that a life care plan may be purchased at less net cost through a structured settlement with an annuity, and the historically low jury awards in Norfolk County.[13]

The issue the Court must now confront is whether AIGDC's breach of its duty to provide a prompt settlement offer by failing to make any settlement offer until August 11, 2004 caused the plaintiffs to suffer any damages. It is plain to this Court that the delay did not cause the plaintiffs any actual compensable damages. Mr. Rhodes testified that he and his family would not have accepted any offer less than $8 million, which is more than the $6 million their own expert opined would have constituted the low range of a reasonable offer. Therefore, this Court is certain that, had AIGDC made a prompt reasonable settlement offer on or before May 1, 2004, even an offer that their own expert testified would have been reasonable, the Rhodes would have rejected that offer. While all three members of the Rhodes family testified to the emotional distress they suffered from the prolonged litigation and Mr. and Ms. Rhodes testified to their anger at the defendants for failing to make a timely, reasonable offer, it is plain to this Court that their emotional distress would not have materially diminished had the defendants earlier made a settlement offer that their attorney would promptly have rejected. Nor would the costs they incurred from the litigation have been diminished if an earlier offer had been presented and turned down. Nor would the financial problems that the Rhodes family suffered from their savings having been depleted to pay the substantial costs of renovating their home to accommodate Ms. Rhodes' paraplegia and to pay the costs of the litigation in any way have been

---

[13] Having so found, this Court also finds that AIGDC's offer at the close of evidence at trial of $6 million which, with Professional Tree's $550,000, would have provided the Rhodes with a total of $6.55 million was also within the range of reasonable offers.

lessened from an earlier settlement offer that they would have rejected. In short, all of these problems – the emotional distress arising from the frustrations of litigation, the substantial costs of litigation, even in a contingent fee case, and the fear of financial ruin – arose from the fact that the minimum settlement they were prepared to accept was well above the settlement that the defendants were prepared to offer or were required by Chapter 176D to offer.

The plaintiffs respond that they need not prove that they would have accepted the settlement offer to prove that the failure to make a prompt settlement offer caused them damages, citing Hopkins. In Hopkins, the Supreme Judicial Court declared:

> The defendant argues that the judge erred in concluding that the plaintiff met her burden of proving that its unlawful conduct caused her to sustain any damages. The defendant points to the absence of any testimony or evidence from the plaintiff that she would have accepted an offer of $400,000 in January, 1995, combined with her rejection of subsequent offers in the same amount. These events, the defendant argues, demonstrate that there is "no causal nexus between [the defendant's] failure to make the $400,000 offer in January of 1995 and any interest which may have been lost as a result of that failure." The defendant concludes that, "[w]ithout such a nexus, [the plaintiff] may only recover (at most) nominal damages." We disagree.
>
> General Laws c. 176D, § 3(9) (f), and G.L. c. 93A, § 9, together require an insurer such as the defendant promptly to put a fair and reasonable offer on the table when liability and damages become clear, either within the thirty-day period set forth in G.L. c. 93A, § 9(3), or as soon thereafter as liability and damages make themselves apparent. The defendant concedes on appeal that its failure to effectuate a prompt and fair settlement of the plaintiff's claim violated G.L. c. 176D, § 3(9) (f). The defendant's violation caused injury to the plaintiff, see Leardi v. Brown, 394 Mass. 151, 159 (1985), quoting Restatement (Second) of Torts § 7 (1965) (injury in context of consumer protection legislation, such as G.L. c. 93A, is the "invasion of any legally protected interest of another"); and, under G.L. c. 93A, § 9, the plaintiff is "entitled to recover for all losses which were the foreseeable consequences of the defendant's unfair or deceptive act or practice." DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 101 (1983).
>
> We reject the defendant's contention that the plaintiff has not shown that she was adversely affected or injured by its conduct. The defendant's deliberate failure to take steps, as required by law, to effectuate a prompt and fair settlement in January, 1995, when the liability of its insureds was clear, forced the plaintiff to institute litigation, and, in so doing, to incur the inevitable "costs and frustrations that are encountered when

litigation must be instituted and no settlement is reached." Clegg v. Butler, 424 Mass. 413, 419 (1997). An insurer's statutory duty to make a prompt and fair settlement offer does not depend on the willingness of a claimant to accept such an offer. See Metropolitan Prop. & Cas. Ins. Co. v. Choukas, 47 Mass.App.Ct. 196, 200 (1999). Accordingly, quantifying the damages for the injury incurred by the plaintiff as a result of the defendant's failure under G.L. c. 176D, § 3(9) (f), does not turn on whether the plaintiff can show that she would have taken advantage of an earlier settlement opportunity. The so-called causation factor entitles a plaintiff, like the plaintiff here, to recover interest on the loss of use of money that should have been, but was not, offered in accordance with G.L. c. 176D, § 3(9) (f), if that sum is in fact included in the sum finally paid to the plaintiff by the insurer. It is this amount of money that has been wrongfully withheld from the plaintiff, and it is this sum on which the defendant must pay interest to remedy its wrongdoing. "This is precisely the type of damage we have described as appropriate[ ] ... in an action ... under [G.L.] c. 93A." Clegg v. Butler, *supra*, quoting Schwartz v. Rose, 418 Mass. 41, 48 (1994).

"The statutes at issue were enacted to encourage settlement of insurance claims ... and discourage insurers from forcing claimants into unnecessary litigation to obtain relief" (citation omitted). Clegg v. Butler, *supra*. An insurer should not be permitted to benefit from its own bad faith, where, as occurred here, it violated G.L. c. 176D, § 3(9) (f), by intentionally failing to make a prompt, fair offer of settlement. The defendant could have avoided the imposition of damages by making a prompt and fair offer of settlement that complied with G.L. c. 176D, § 3(9) (f), within thirty days of receiving the plaintiff's G.L. c. 93A demand letter, as provided by G.L. c. 93A, § 9(3) ("[a]ny person receiving [a written demand for relief] who, within thirty days ... makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner"). Had such an offer been made, and rejected by the plaintiff, the burden would have been on the defendant to prove that the offer was reasonable. See Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 799 (1976). In circumstances such as this, when the defendant failed to make any offer at all, the plaintiff should not be required to show that she would have accepted a hypothetical settlement offer, had one been forthcoming. See Metropolitan Prop. & Cas. Ins. Co. v. Choukas, *supra* at 200. We considered a similar argument when deciding the Clegg case and rejected it. See Clegg v. Butler, *supra* at 428-429 (O'Connor, J., dissenting) (arguing that actual damages had not been proved, because, even though primary insurer [defendant] had unlawfully failed to offer prompt and fair settlement, plaintiffs had not shown that excess insurer subsequently would have made offer that was acceptable to them).

We reject the defendant's contention that the plaintiff has not shown that she was adversely affected or injured by its conduct. The defendant's deliberate failure to take steps, as required by law, to effectuate a prompt and fair settlement in January, 1995,

> when the liability of its insureds was clear, forced the plaintiff to institute litigation, and, in so doing, to incur the inevitable 'costs and frustrations that are encountered when litigation must be instituted and no settlement is reached.

Hopkins, 434 Mass. at 565-569 (footnotes omitted).

While one can certainly see why the plaintiffs claim that Hopkins is determinative, this Court finds that it is not, for two reasons. First, the facts in Hopkins were materially different from those in the instant case. The Supreme Judicial Court in Hopkins, on those facts, appears to have found that the insurer's conduct caused actual damages because the Court recognized what it characterized as "the obvious rule that, in order to recover actual damages under G.L. c. 93A, § 9, there must be a causal relationship between the alleged act and the claimed loss." Id. at. 567-568, n.17. In Hopkins, after having made her initial settlement offer but before filing suit, the plaintiff sent a Chapter 93A letter to the insurer demanding a settlement offer, and filed suit only after the insurer responded to that demand letter without making an offer of settlement. 434 Mass. at 559. When the insurer, belatedly but prior to trial, made a settlement offer of $400,000, the offer was accepted by the plaintiff. Id. 434 Mass. at 559-560. In finding that "[t]he defendant's deliberate failure to take steps, as required by law, to effectuate a prompt and fair settlement in January, 1995, when the liability of its insureds was clear, forced the plaintiff to institute litigation, and, in so doing, to incur the inevitable 'costs and frustrations that are encountered when litigation must be instituted and no settlement is reached," id. at 567, quoting Clegg, 434 Mass. at 419, the Supreme Judicial Court appears to have found that, if this reasonable offer had been made within 30 days of the Chapter 93A letter, as required, the plaintiff would have settled the case without filing suit. That is why the costs of the litigation can be said to have been caused by the insurer's failure to make a prompt settlement offer. That

is also why the Court found that the plaintiff had suffered damages in the form of lost interest – if the settlement offer had been made promptly after receipt of the Chapter 93A demand letter, the plaintiff would have accepted the offer and enjoyed the use of the $400,000 promptly thereafter, rather than having to wait, as she did, until the eve of trial to have use of that $400,000. See Hopkins at 567 (interest was wrongfully withheld from plaintiff). Indeed, the Supreme Judicial Court expressly noted in Hopkins, "We need not decide in this case whether the same measure of damages would apply in a case where an insurer, having initially violated G.L. c. 176D, § 3(9)(f), and G.L. c. 93A, §§ 2 and 9, thereafter makes a fair and reasonable (but nevertheless tardy) offer of settlement, which is refused by a claimant." Id. at 567, n. 16. The factual scenario expressly reserved by the Court in Hopkins is precisely the scenario presented to this Court.[14]

Second, to the extent that Hopkins can be understood to hold that a plaintiff is entitled to recover damages from an insurer for its failure to make a prompt settlement offer without proving that the plaintiff suffered any loss arising from that unfair act (because the plaintiff would have rejected the offer had it been timely made), Hopkins was effectively overruled by the Supreme Court's subsequent decision in Hershenow v. Enterprise Rent-A-Car Company of Boston, Inc., 445 Mass. 790 (2006). As observed in note 11 *supra*, the Supreme Judicial Court in Hershenow held that, to establish liability in a Chapter 93A action, the plaintiff must not only

---

[14] This Court also recognizes that the Supreme Judicial Court in Bobick v. United States Fid. & Guar. Co. held that it was error for a Superior Court judge to grant summary judgment in a Chapter 176D/93A case based on the plaintiff's failure to prove that he would have been willing to accept a reasonable settlement offer at any time before trial. 439 Mass. at 662-663. The Bobick Court, however, simply cited Hopkins for its ruling, and did not provide any analysis of causation beyond that in Hopkins. Id. at 663. Moreover, this finding of error was dictum because the Court found that the settlement offer was reasonable as a matter of law, and therefore did not need to address the question of causation. Id.

prove an unfair and deceptive act or practice but must also prove that the unfair act or practice "caused a loss." 445 Mass. at 798 (2006). The Court made clear that there is no such thing as a "per se injury" under Chapter 93A; "a plaintiff seeking a remedy under G.L. c. 93A, § 9, must demonstrate that even a per se deception caused a loss." Id. Since there is a "required causal connection between the deceptive act and an adverse consequence or loss," id. at 800, and since there can be no adverse consequence or loss from the failure of an insurer to make a prompt and reasonable settlement offer if the plaintiff would have rejected that offer, Hershenow, although not an insurance case, must stand for the proposition that a plaintiff, to prevail on a Chapter 93A/Chapter 176D claim, must prove not only that the insurer failed to make a prompt or reasonable settlement offer but also that, if it had, the plaintiff would have accepted that offer and settled the actual or threatened litigation.

The instant case illustrates how foolish it would be to interpret Hopkins as permitting a finding of actual damages for an insurer's failure to make a prompt or reasonable settlement offer when the evidence decisively demonstrates that the plaintiff would not have accepted a reasonable settlement offer regardless of when it was offered. Under such an interpretation, the plaintiffs would be able to establish some actual damages even though they suffered none. Those modest actual damages, however, would be only the tip of the iceberg of what the insurer would be required to pay in the Chapter 93A action. In 1989, the Legislature amended G.L. c. 93A, § 9(3) to add the italicized language quoted below:

> [I]f the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two ... *For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of*

the existence or nonexistence of insurance coverage available in payment of the claim.

G.L. c. 93A, § 9(3) (italics added). The Supreme Judicial Court and the Appeals Court have interpreted this amendment to mean that, if the plaintiff went to trial in the underlying case and obtained a judgment, and if the plaintiff proves some actual damages arising from the insurer's violation of Chapter 176D and establishes that the violation was willful or knowing, the amount of damages to be doubled or trebled is not the actual damages but the amount of the underlying judgment. See, e.g., Clegg v. Butler, 424 Mass. at 424; Kapp v. Arbella Mut. Ins. Co., 426 Mass. 683, 685-686 (1998); Yeagle v. Aetna Cas. & Sur. Co., 42 Mass. App. Ct. 650, 655 (1997) (the 1989 amendment "threatened a bad faith defendant with multiplication of the amount of the judgment secured by the plaintiff on his basic claim – a total that might be many times over the interest factor" and that "exceeded the injury caused by the c. 93A violation"). As the Supreme Court declared in Clegg:

> The italicized portion of this statute was inserted by St.1989, c. 580, § 1, which was apparently enacted in response to cases such as Bertassi v. Allstate Ins. Co., 402 Mass. 366 (1988); Trempe v. Aetna Cas. & Sur. Co., 20 Mass. App. Ct. 448 (1985); and Wallace v. American Mfrs. Mut. Ins. Co., 22 Mass. App. Ct. 938 (1986), which limited those damages subject to multiplication under c. 93A to loss of use damages, measured by the interest lost on the amount the insurer wrongfully failed to provide the claimant. ... This amendment greatly increased the potential liability of an insurer who wilfully, knowingly or in bad faith engages in unfair business practices.

424 Mass. at 424. Therefore, in this case, if this Court, under Hopkins, were required to find that the plaintiffs suffered even nominal damages from being denied a prompt settlement offer that they certainly would have rejected, and if this Court were to find the violation willful or knowing (which it does)[15], the plaintiffs would be entitled to receive, not merely those nominal damages

---

[15] This Court does find that AIGDC's failure to provide a prompt settlement offer was willful and knowing. AIGDC had been warned for months before May 1, 2004, by GAF,

and the reasonable attorney's fees they incurred in prevailing upon their Chapter 93A/176D claim, but also double or triple the amount of the judgment they received in the underlying personal injury case – that is, $22.6 million or $33.9 million.

The Legislature made clear, however, that these extraordinarily punitive damages were limited to cases where there was, not only willful or knowing conduct, but also some actual damages. See Kapp, 426 Mass. at 685-686 (1998); Yeagle, 42 Mass. App. Ct. at 652-656. The Legislature could have declared that the underlying judgment should be treated as actual damages, but it did not; it required proof of actual damages and used the amount of the underlying judgment only to calculate punitive damages. See id.[16] Since the plaintiff would suffer actual damages from lost interest only if the plaintiff would have accepted the earlier, reasonable settlement offer, the Legislature effectively limited both actual and the far greater punitive damages to those cases that would have settled (or settled earlier) had the insurer

---

GAF's defense counsel, and GAF's coverage counsel, that it should make a settlement offer in response to the plaintiffs' August 13, 2003 settlement demand, but AIGDC failed to heed these warnings and decided to make no settlement offer until the mediation was conducted one month before trial. In short, as this Court earlier found, AIGDC did not delay its settlement offer to conduct the investigation needed to make liability reasonably clear; it delayed it because it thought it would be in a better strategic posture if the offer were postponed until the mediation and it did not wish the mediation to occur until trial was nearly imminent.

[16] In Kapp and Yeagle, the Supreme Judicial Court and the Appeals Court understood that the actual damages would generally be loss of use damages, that is, lost interest. In fact, if the case did not settle because of the absence of a reasonable settlement offer and proceeded to judgment, the plaintiff would have suffered loss of use damages only if the reasonable settlement offer should have been provided before the complaint was filed because the plaintiff would receive 12 percent per annum common interest on the amount of the judgment from the date the complaint was filed. The more likely form of actual damages would be "the costs and frustrations that are encountered when litigation must be instituted and no settlement is reached," including any attorney's fees or costs incurred by the plaintiff from having to proceed to trial. Clegg, 424 Mass. at 419.

performed its duty to provide a prompt and reasonable settlement offer. See Kapp, 426 Mass. at 686 (1989 amendment "was aimed at the situation where a defendant insurer, acting in bad faith, failed to settle a claim reasonably, obliging the plaintiff to litigate unnecessarily"). In those cases where the plaintiff would have rejected even a reasonable settlement offer, then the insurer's failure to make a prompt and reasonable offer is not the reason why the case proceeded to trial.

To allow a plaintiff to obtain actual and punitive damages when it would not have settled the case even with a reasonable settlement offer would actually discourage plaintiffs to settle, which was the opposite of what the Legislature intended when it enacted the 1989 amendment. The Supreme Judicial Court in Clegg observed:

> The multiple damages provided under c. 93A are punitive damages intended to penalize insurers who unreasonably and unfairly force claimants into litigation by wrongfully withholding insurance proceeds. As part of a statutory scheme meant to encourage out-of-court resolutions, the statute does not punish settling insurers by placing the entire settlement award at risk of multiplication.

424 Mass. at 425. Just as it takes "two to tango," it also takes two to settle a case. The punitive damage provision is plainly meant to pressure insurers to make reasonable settlement offers, lest the plaintiff be forced into a trial that he otherwise would have settled. If the plaintiff, however, could win punitive damages regardless of whether he would have accepted a reasonable offer, then a smart plaintiff (or a plaintiff intelligently represented), once he recognized that the insurer had failed to make a prompt or reasonable offer, would choose not to settle the case and proceed to trial, even if the insurer later made a reasonable settlement offer, because the plaintiff could obtain punitive damages of double or treble the underlying judgment only if he proceeded to judgment and did not settle or arbitrate the case. See Clegg, 424 Mass. at 424-425 (punitive damages of double or treble the underlying judgment are available only when underlying case

proceeds to judgment, not if it is resolved through settlement or arbitration).

Therefore, this Court finds that, since it is plain that the Rhodes would not have settled this case before trial even if AIGDC had made a prompt and reasonable settlement offer (even the offer its own expert declared reasonable), the Rhodes have failed to prove the required element of causation – that AIGDC's failure to make a prompt settlement offer before trial caused them any actual damages. Since the Rhodes have suffered no actual damages from AIGDC's breach of G.L. c. 176D, § 3(9)(f), they are not entitled to an award of either actual or punitive damages.

The final issue this Court must address is whether AIGDC breached its obligation to provide a reasonable settlement offer after trial. As noted earlier, the total amount due under the September 28, 2004 judgment was roughly $11.3 million, and that amount was increasing at a rate of 12 percent per year as a result of post-judgment interest. An insurer's duty to settle a case does not end with the judgment, unless the insurer promptly pays the judgment. When the insurer, as here, causes a notice of appeal to be filed, the insurer continues to have a duty to settle what is now the appellate litigation. While the standard under G.L. c. 176D, § 3(9)(f) remains the same after judgment – the insurer must still provide a prompt and fair offer of settlement once liability has become reasonably clear – the existence of the judgment should change the insurer's evaluation of what constitutes a fair offer. Pragmatically, assuming the policy limits are sufficient, the insurer will be obliged to pay the judgment, with post-judgment interest, unless the insured defendant prevails in overturning the verdict on appeal. Therefore, the questions that need to be considered in evaluating the fairness of the insurer's offer include:

- What is the likelihood that the appeal will succeed?

- If it does succeed, is the result likely to be a new trial, dismissal of the claim, or a reduction in the amount of the judgment?
- If the appeal obtains a new trial, what is the likelihood that the defendant will prevail at this new trial? If the plaintiff were to prevail, what is the likelihood that the damages found by the jury will differ greatly from those found by the jury at the first trial?

If AIGDC asked itself these questions, which it should have, it would have been apparent that none of the answers bode well for AIGDC. The appeal rested on unusually feeble arguments – the trial court's denial of the defendants' motion for remittitur and its denial of the defendants' motion for discovery of Ms. Rhodes' psychological records. In light of Ms. Rhodes' paraplegia and the extent to which it irrevocably diminished her life and that of her husband and daughter, the likelihood that an appellate court would find that the trial judge abused her discretion by denying the defendants' motion for remittitur is microscopic. The likelihood that an appellate court would find that the trial judge abused her discretion by denying the defendants' motions for disclosure of Ms. Rhodes' psychological records is less fanciful than with the denial of the remittitur but reasonably should still be recognized as minimal. The defendants' motion for disclosure of these records was filed long after discovery had closed. For that reason alone, its denial was well within the discretion of the trial judge. Moreover, the plaintiffs argued that Ms. Rhodes intended to testify only to "garden variety" emotional distress, and did not intend to offer psychological testimony that the accident caused Ms. Rhodes to suffer from a psychiatric disorder. It was well within the Court's discretion to deny the privileged records based on this representation. AIGDC, according to Nitti's internal request for AIGDC approval to prosecute an appeal, apparently believed that Ms. Rhodes' testimony at trial about her pre-existing bi-polar

disorder required disclosure of these records. It is not clear from this record whether defense counsel objected to this testimony or argued at trial that it opened the door to disclosure of her psychological records but, assuming the defendants preserved their rights on appeal, there is no reason to believe that this testimony unfairly prejudiced the jury in any way that would have affected its verdict. Nitti acknowledged that this testimony was to her pre-existing bi-polar disorder; he does not contend that she testified that the accident caused her bi-polar disorder.

Moreover, even if the Appeals Court were to have found that the trial judge abused her discretion by denying discovery of Ms. Rhodes' psychological records, the best that AIGDC could do is obtain a new trial as to damages, since the AIGDC-insured defendants had already stipulated to liability. Apart from selecting a different jury, there was no reason for AIGDC to believe that a second trial would go any better for it than the first. However, what is certain is that the pre-judgment interest on any verdict would be considerably greater. It would likely take at least two years for the appeals process to conclude and a new trial to be conducted, so the judgment would likely be increased by 50 percent to account for pre-judgment interest rather than the roughly 25 percent increase for pre-judgment interest in the original judgment.

In view of all these factors, AIGDC's offer of $7.0 million on December 17, 2004 in response to the plaintiffs' Chapter 93A demand letter, which included Zurich's $2 million and was roughly 60 percent of the amount then owed under the judgment, was not only unreasonable, but insulting.[17] No reasonable insurer could have concluded that a 40 percent discount of the judgment was reasonable in view of AIGDC's meager chance of prevailing on appeal. When one

---

[17] The roughly $11.3 million judgment issued on September 28, 2004 increased by one percent per month as a result of post-judgment common interest. Therefore, with 2 1/2 months having passed since the judgment, the amount due under the judgment by December 17, 2004 was roughly $11.6 million.

considers that AIGDC also required release of the plaintiffs' claims under Chapters 93A and 176D, the offer becomes even more ridiculous. This Court finds that AIGDC did precisely what Chapter 176D was intended to prevent – attempt to bully the plaintiffs into accepting an unreasonably low settlement rather than wait the roughly two years for their appeal to conclude and the judgment to be paid. See R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66, 77 (2001) (G.L. c. 176D, § 3(9)(g) "expresses a legislative purpose to penalize the practice of 'low balling,' i.e. offering much less than a case is worth in a situation where liability is either clear or highly likely"), quoting Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 343 (1994).

In contrast with AIGDC's failure before trial to provide a prompt offer of settlement, it is plain from the facts of this case that, if a reasonable offer of settlement had been made on December 17, 2004, it would have resulted in settlement of the case and the voluntary dismissal of the appeal because the case did settle in June 2005 once a reasonable settlement was proffered. At that time, AIGDC finally agreed to pay the Rhodes $8.965 million, in three installments, not including the roughly $2.32 million that Zurich had already paid to the Rhodes on December 22, 2004 and not including any release of the plaintiffs' right to file the instant lawsuit. Since a prompt, reasonable post-judgment offer would have resulted in a settlement, the plaintiffs are able to prove so-called "loss of use" damages arising from AIGDC's post-judgment breach of its obligation under G.L. c. 176D, § 3(9)(g), that is, the interest the plaintiffs would have earned on this money had the settlement been reached in December 2004 rather than June 2005. See Hopkins, 434 Mass. at 567 ("The so-called causation factor entitles a plaintiff ... to recover interest on the loss of use of money that should have been, but was not, offered in accordance with G.L. c. 176D, § 3(9)(f), if that sum is in fact included in the sum finally paid to the plaintiff

by the insurer."). This Court finds that, if the reasonable offer ultimately made by AIGDC on or about June 2, 2005 had been made on December 17, 2004, it is more likely than not that a settlement would have been reached by January 2, 2005 rather than June 2, 2005, and the first of three installment payments would have been paid five months earlier – on February 5, 2005 rather than July 5. Measuring loss of use damages at the post-judgment rate of interest of one percent per month, AIGDC's unreasonable delay in making a reasonable settlement offer cost the Rhodes $448,250.[18]

This Court does not find that the plaintiffs, on this record, have established any damages beyond "loss of use" damages. There is not sufficient evidence of emotional distress arising from these unreasonably low post-judgment offers to award emotional distress damages. The Supreme Judicial Court requires that a plaintiff satisfy the elements of an intentional infliction of emotional distress claim in order to establish emotional distress damages in a Chapter 93A case. Haddad v. Gonzales 410 Mass. 855 (1991). This Court, while it finds AIGDC's conduct to be knowing and willful, does not find it be "extreme and outrageous." See id. at 871. Nor does this Court find the defendants' emotional distress to be sufficiently "severe" during the post-judgment period to warrant damages, if only because Zurich's payment of $2.32 million on December 22, 2004 alleviated the plaintiffs' immediate financial distress. See id..

The Rhodes argue that, when an insurer breaches its obligation to make a prompt and reasonable offer of settlement, the Supreme Judicial Court has suggested that a plaintiff is entitled to compensation for the "costs and frustrations that are encountered when litigation must

---

[18] This Court calculated the interest by multiplying the amount AIGDC ultimately offered ($8.965 million) by .05. This Court did not include the amount paid by Zurich on December 22, 2004 in this calculation, which included all post-judgment interest through that date.

be instituted and no settlement is reached." Clegg, 424 Mass. at 419. See also Hopkins, 434 Mass. at 567 (insurer, by forcing the plaintiff to institute litigation, forced the plaintiffs "to incur the inevitable 'costs and frustrations that are encountered when litigation must be instituted and no settlement is reached'"), quoting Clegg, 424 Mass. at 419. This Court agrees that the financial costs of litigation that the plaintiff was forced to incur by the insurer's failure to comply with its obligations under G.L. c. 176D are compensable under Chapter 93A. However, the plaintiffs did not offer any evidence as to any costs of litigation the Rhodes incurred after December 2004, so this Court will not award any damages for such costs. This Court does not agree that the emotional costs of litigation – the so-called "frustrations" of litigation – are compensable unless those frustrations rise to the level required for recovery of damages under an intentional infliction of emotional distress claim. While the Supreme Judicial Court in Clegg and Hopkins certainly acknowledged that litigation carries "frustrations" with it, the damages in both cases were limited to "loss of use" damages, not emotional distress damages. Clegg, 424 Mass. at 425; Hopkins, 434 Mass. at 560, 567.

This Court further finds that AIGDC's $7.0 million settlement offer, including Zurich's $2 million and including a release of the plaintiffs' claims under Chapters 176D and 93A, made on December 17, 2004 and repeated in writing on March 18, 2005, was not only unreasonably low but also constituted a willful and knowing violation of G.L. c. 176D, § 3(9)(g). This Court finds that double, rather than treble, damages are appropriate here only because AIGDC later came to its senses and made a reasonable post-judgment offer before the appellate litigation began in earnest.

The final issue this Court needs to confront in this legal odyssey is whether the amount

doubled is the actual damages or the amount of the judgment. This Court finds that the appropriate amount doubled is the actual damages. This Court understands why the Legislature in enacting the 1989 Amendment to G.L. c. 93A, § 9(3) would wish to punish an insurer who, by its willful or knowing failure to make a prompt and fair settlement offer, forces a litigant to proceed to trial to obtain a reasonable judgment. In such cases, the Legislature authorized the doubling or trebling of the underlying judgment to deter insurers from engaging in such unfair conduct. However, when the insurer's failure to make a prompt and fair settlement offer occurs after the issuance of the judgment, it makes no sense to multiply the judgment because the insurer's conduct did not force the trial that yielded that judgment. It may arguably be appropriate to multiply the post-appeal judgment if the insurer's failure to make a prompt and fair post-judgment settlement offer forces the litigant to litigate the full appellate process but that did not happen here – AIGDC made a fair settlement offer and the case settled before any appellate briefs were filed. Consequently, this post-judgment violation of Chapter 176D is comparable to the pre-trial violation of Chapter 176D in which the insurer belatedly makes a fair settlement offer and the case settles before trial (albeit later than it should have). In such cases, the Supreme Judicial Court has declared that the 1989 Amendment to G.L. c. 93A, § 9(3) does not apply, because it applies only to cases in which the insurer's conduct forces the plaintiff to proceed to trial to obtain a judgment, not to cases resolved by settlement or arbitration. See Clegg, 424 Mass. 424-425.

Consequently, this Court finds that AIGDC is liable only for double the actual "loss of use" damages of $448,250, which totals $896,500, plus the Rhodes' reasonable attorney's fees and costs incurred in prosecuting this Chapter 93A action.

ORDER

For the reasons detailed above, this Court ORDERS that:

1. This Court finds that Zurich did not violate its duty as the primary insurer under G.L. c. 176D, § 3(9)(f) " to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." G.L. c. 176D, § 3(9)(f). When final judgment ultimately enters in this case, judgment shall enter in favor of the defendant Zurich, with statutory costs only.

2. This Court finds that National Union and AIGDC, prior to the issuance of the final judgment, violated their duty as the excess insurer under G.L. c. 176D, § 3(9)(f) "to effectuate prompt ...settlements of claims in which liability has become reasonably clear," G.L. c. 176D, § 3(9)(f), but their violation did not cause the plaintiffs to suffer any actual damages.

3. This Court finds that National Union and AIGDC, after the issuance of the final judgment, violated their duty as the excess insurer under G.L. c. 176D, § 3(9)(f) " to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." G.L. c. 176D, § 3(9)(f). This Court finds that the actual damages caused by this violation are limited to "loss of use" damages in the amount of $448,250.

4. This Court finds that the violation found in paragraph 3 *supra* was willful and knowing, and that doubling the amount of actual damages is an appropriate punitive award for such violation. Therefore, this Court orders that National Union and AIGDC, jointly and severally, shall pay the plaintiffs $896,500 in actual and punitive damages.

5. This Court finds, under G.L. c. 93A, § 9(4), that National Union and AIGDC shall also

pay to the plaintiffs the reasonable attorney's fees and costs incurred in prosecuting this action against National Union and AIGDC. No later than June 27, 2008, the plaintiffs shall serve their application for reasonable attorney's fees and costs, supported by appropriate affidavits and documentation. No later than July 25, 2008, National Union and AIGDC shall serve any opposition to the plaintiffs' application, and the application and opposition will be filed forthwith. A hearing regarding the application for attorney's fees shall be conducted on July 30, 2008 at 2:00 p.m.[19]

Ralph D. Gants
Justice of the Superior Court

DATE: June 3, 2008

I HEREBY ATTEST AND CERTIFY ON 4-16-09 THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: Asst Clerk

[19] This Court will change this hearing date if it interferes with any counsel's trial or vacation schedule.

No. SJC-10911.

MARCIA RHODES, HAROLD RHODES
AND REBECCA RHODES,
PLAINTIFFS-APPELLANTS,

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-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT.

BRIEF FOR THE DEFENDANTS-APPELLEES, AIG DOMESTIC CLAIMS, INC. F/K/A AIG TECHNICAL SERVICES, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

SUFFOLK COUNTY.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS