

COMMONWEALTH OF MASSACHUSETTS

# Appeals Court

No. 2009-P-0619

SUFFOLK COUNTY

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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.

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ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

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

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Dated: September 27, 2010

No. 2009-P-0619

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SUFFOLK COUNTY

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## SUPPLEMENTAL ARGUMENT

Although the factual situation in Gore v. Arbella Mut. Ins. Co., 77 Mass. App. Ct. 518 (2010), is completely different from the facts of the Rhodes' G.L. c. 93A case against National Union, the Appeals Court's discussion of the appropriate measure of damages in Gore supports Judge Gants' damages rulings in the present case.<sup>1</sup>

**I. Because the Facts Are So Dissimilar, The Appeals Court's Analysis of the c. 93A Liability Issues in Gore Has No Bearing on the Liability Issues in the Present Case.**

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 on Arbella's failure to settle in a timely fashion her claim for injuries caused by Arbella's insured, Anthony Caban. Id. at 522. The second claim (the "assigned claim") was based on damages sustained by Caban, caused by Arbella's failure to settle Dattilo's claim and its failure to timely communicate and inform Caban that Dattilo had offered to settle her claim for the policy limit. Id.

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<sup>1</sup> As in their principal brief, appellants use "National Union" to refer to National Union Fire Insurance Company of Pittsburgh, Pa. and AIG Domestic Claims, Inc.

The most significant factual distinction between the facts in Gore and the facts in the present case is that unlike Arbella's insured (Caban), National Union's insured, GAF Building Corp., never faced the risk of a judgment in excess of the policy limit. The policy limit was \$50,000,000 and fully protected GAF after the judgment was entered. A. 6920. Thus, the insured never asserted a bad faith claim against National Union (or its claims administrator, AIG Domestic Claims, Inc.). Nor did National Union's insured ever assign any claim to the Rhodes.

Another significant factual distinction is that in Gore, the Appeals 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. Gore, 77 Mass. Ct. App. at 520, 529. In the present case, the Rhodes do not challenge the trial court's finding that numerous reasonable offers were made before the trial of the Accident Case (presenting the Rhodes' personal injury and loss of consortium claims against National Union's insureds), and they offered no evidence to support a finding that they would have accepted any reasonable offer if it was made sooner. To the contrary, Mr.

Rhodes testified that the Rhodes never would have accepted an offer of less than \$8 million, because they believed a jury would award more, and the Rhodes' expert admitted that an offer of \$6 million was reasonable. A. 64. Judge Gants noted that it would be "foolish" to permit the Rhodes to recover damages for National Union's delay in making a reasonable settlement offer before trial of the underlying matter "when the evidence decisively demonstrates that the plaintiff[s] would not have accepted a reasonable settlement offer regardless of when it was offered." A.69. Judge Gants also stated: "since it is plain that the Rhodes would not have settled this case before trial even if [National Union] had made a prompt and reasonable settlement offer (even the offer [the Rhodes'] own expert declared reasonable), the Rhodes have failed to prove the required element of causation - that [National Union's] failure to make a prompt settlement offer before trial caused them any actual damages." A.73 (parenthetical in original).

Judge Gants' factual finding on the subject of causation also contrasts with the Gore court's causation finding on the assigned claim. The Appeals Court in Gore affirmed the trial court's award of

\$430,000 in actual damages on the assigned claim because the injury to Caban was caused by Arbella's c. 93 violation. The Appeals Court described the violation as Arbella's "tactic of delay" and "failure to inform" which "led [Dattilo] to spurn Arbella's late tender and seek an excess judgment." Gore at 528. As noted above, in the present case, there is no factual basis to support a finding that National Union's pre-verdict conduct caused any actual damages to the Rhodes, and of course, the post-verdict c. 93A violation did not cause the judgment in the Rhodes' personal injury case.

**II. The Appeals Court's Analysis of the Damages Issues in Gore Supports Judge Gants' Damages Rulings in Rhodes.**

As in Gore, Judge Gants correctly used the amount of actual damages determined in the c. 93A proceeding as the amount to multiply to calculate the punitive damages.<sup>2</sup> In Gore, the trial court not only determined that Arbella caused \$20,000 in actual damages on

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<sup>2</sup> Judge Gants found that National Union initially failed to promptly make a reasonable settlement offer after the trial in the Accident Case and that this violation of c. 93A was willful or knowing. A.75-79. National Union does not waive its argument that this finding was clearly erroneous because the Rhodes presented no evidence concerning the merits of the appeal.

Dattilo's direct claim, but also determined **in that proceeding** that plaintiff was entitled to \$430,000 on the assigned claim. Gore at 530-31. The Appeals Court ruled that the trial court's "determination of the reasonableness of Dattilo's damages on the assigned claim [ ] was separate and apart from the settlement agreement," *i.e.*, the consent judgment in the personal injury case against Arbella's insured. Gore at 535, n. 19. Thus, the Appeals Court concluded that it was appropriate to multiply these actual damages since they satisfied c. 93A's "same and underlying" requirement. Id. at 535-36; see also, G.L. c. 93A, § 9 ("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").

Consistent with the holding in Gore, Judge Gants rejected the Rhodes' claim that the punitive damage award against National Union and AIGDC should include a multiple of the judgment in the separate Accident Case against National Union's insured. The Gore court's analysis of the "same and underlying" requirement relied on Drywall Sys., Inc. v. ZVI

Constr. Co., 435 Mass. 664 (2002). In Drywall, the Supreme Judicial Court explained that, "[W]here 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.

Unlike the present case in which the judgment the Rhodes seek to multiply was awarded in the separate proceeding against National Union's insureds, in Gore the damages for the assigned c. 93A claim were determined in the c. 93A trial. The Appeals Court explained that since "the c. 93A trial . . . provided a single proceeding in which to determine both the underlying assigned claim and any multiple damages on that claim," the damages were subject to multiplication under G.L. c. 93A. Id. at 535, n.18. The Appeals Court concluded that "the actual damages on the assigned claim are subject to multiplication" because the damages incurred in connection with assigned claim were "determined in the same proceeding with the multiple damages claim." Id. at 535 (quoting Drywall, 435 Mass. at 668).

Judge Gants' decision to use the amount of the Rhodes' actual damages (\$448,250 in delay damages caused by what Judge Gants described as an "initial failure" of National Union to promptly make a reasonable settlement offer after the verdict) as the punitive damages multiplicand is consistent with Gore. In arguing that the Trial Court was required to multiply the amount of judgment against National Union's insureds determined in the separate Accident Case, the Rhodes disregard that the motor vehicle accident caused by National Union's insured is not the same transaction or occurrence that gave rise to the c. 93A claim. The Chapter 93A trial that is the subject of this appeal, not the underlying trial against National Union's insured, provided the "single proceeding" in which to determine the actual damages caused by National Union's conduct and any multiple damages on that claim. See, Gore at 535 n.18.

Respectfully submitted,

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Dated: September 27, 2010

CERTIFICATION

Pursuant to Mass.R.A.P. 16(k), I, Anthony R. Zelle, certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6); Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18; and Mass. R. A. P. 20.

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