COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

MARCIA RHODES,
HAROLD RHODES, AND REBECCA RHODES,
Plaintiffs,

v.

AIG DOMESTIC CLAIMS, INC.
(F/K/A AIG TECHNICAL SERVICES, INC.),
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
AND
ZURICH AMERICAN INSURANCE COMPANY,
Defendants.

CIVIL ACTION NO.

05-1360-BLS2
(JUDGE GANTS)

TRIAL BRIEF
AND
REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW OF DEFENDANTS, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA AND AIG DOMESTIC CLAIMS, INC.

Mark E. Cohen [BBO #089800]
Robert J. Maselek [BBO #564690]
THE MCCORMACK FIRM, LLC
One International Place - 7th Floor
Boston, MA 02110
Ph: (617) 951-2929
Fax: (617) 951-2672

Anthony R. Zelle [BBO #548141]
Brian P. McDonough [BBO #637999]
Zelle McDonough *(Co-Counsel)*
Four Longfellow Place - 35th Floor
Boston, MA 02114
Ph: (617) 742-6520
Fax: (617) 973-1562

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Defendants, AIG Domestic Claims, Inc. f/k/a AIG Technical Services, Inc. and National Union Fire Insurance Company of Pittsburgh, PA (collectively "AIGDC"), hereby request, at the close of the evidence, the following findings of fact and rulings of law based on the evidence presented at trial.

I. INTRODUCTION

After 16 days of trial testimony it is clear that the Plaintiffs have failed to meet their burden of proof as to all of the essential elements of their case. Plaintiffs have not established that they are entitled to relief based upon the facts and the law. The evidence is insufficient to support a

finding that AIGDC failed to effectuate prompt, fair and equitable settlement in violation of G.L. c. 176D §3(9)(f), or that AIGDC committed any unfair or deceptive act or practice in violation of Chapters 93A and/or 176D. Plaintiffs have failed to establish that they are entitled to recover any actual damages, or that they are entitled to any award of punitive damages. There is no credible evidence that would support a finding that AIGDC committed any willful or knowing violation of Chapter 93A.

Specifically, as an excess insurer, AIGDC had no duty to investigate, settle or otherwise act until the primary carrier has tendered its policy limits. The evidence established that, once Zurich "reached up" to AIGDC to request its involvement in order to try to settle the accident case, AIGDC promptly associated in defense counsel and took steps to obtain critical outstanding discovery necessary to evaluate the Plaintiffs's damages and prepare for the mediation (including Plaintiff's IME and Plaintiffs's depositions). AIGDC agreed that it would mediate the accident case once this critical discovery was undertaken. Although the extent of Plaintiffs's damages were not reasonably clear, AIGDC made reasonable settlement offers during the mediation, at trial, and thereafter.

Plaintiffs are not entitled to recover for the "stress of litigation" because they have not alleged nor proven the elements of a claim for either intentional or negligent infliction of emotional distress. They cannot show that they suffered any economic loss as a result of anything that AIGDC did or failed to do. They have not shown that the costs that they incurred in connection with the accident case were reasonable. They have waived any right to the amounts that they gave up by agreeing to a settlement for less than the total judgment (including post judgment interest) that they were awarded in the accident case. They are not entitled to recover any actual damages, because their Chapter 93A demand letter did not mention any of the elements of compensatory damages for which they now seek recovery.

AIGDC did not knowingly or willfully violate Chapter 93A. Thus, Plaintiffs are not entitled to recover double or treble the amount of the accident case judgment. Moreover, due to the settlement of the accident case, there is not any judgment that may be multiplied. Any award of

punitive damages in this case which would involve doubling or trebling of the judgment in the accident case, would violate AIGDC's constitutional right to due process.

II. LIABILITY

A. The Evidence Is Insufficient to Support a Finding That Defendants Failed to Effectuate Prompt, Fair and Equitable Settlement in Violation of Chapter 176D §3(9)(f)

1. As a Matter of Law, AIGDC Had No Legal Obligation to Investigate the Rhodes's Claim Prior to Zurich's Tender of its Liability Limit

It is well-established by courts across this country that, as a matter of law, an excess insurer need not investigate claims prior to the primary carrier's tender of its liability limit.

> [T]he Court holds that the primary carrier has the initial and principal duty to defend the common insured. **This approach provides a certainty that promotes the best interests of the insured as well as the insurers.** The rationale for this conclusion is well-stated in Appleman's treatise on insurance:
>
> > Excess insurance is routinely written in the insurance industry **with the expectation that the primary insurer will conduct all of the investigation, negotiation and defense of claims until its limits are exhausted** .... Thus the primary insurer acts as a sort of deductible and **the excess insurer does not expect to be called upon to assist in the details**. The duty of the primary insurer is not divisible **or limited to those suits that are within the policy limits** and the insuring agreement creates a duty to defend any suit regardless of the amount claimed against the insured and **the excess insurer is a third party beneficiary of the agreement**.

Progressive Cas. Ins. Co. v. Travelers Ins. Co., 735 F. Supp. 15, 19-20 (D. Me. 1990) (emphasis supplied), quoting J. Appleman, Insurance Law and Practice § 4682 at 28; Keefner v. U.S. Fire Ins. Co., 1991 WL 2233 *3 (D. Colo. 1991) ("[I]t is important to clarify the different roles of the excess carrier and the primary carrier. Excess insurance is routinely written in the insurance industry with the **expectation that the primary insurer will conduct all of the investigation, negotiation, and defense** of claims until its limits are exhausted.") (internal quotes omitted) (emphasis supplied); Allstate Ins. Co. v. Karl, 190 W. Va. 176, 437 S.E.2d 749, 755 n. 8 (1993) (same); Diamond State Ins. Co. v. Ranger Ins. Co., 47 F. Supp.2d 579, (E.D. Pa. 1999) ("Generally, the **primary insurer**

has the duty to conduct all of the investigation, negotiation and defense of claims until its limits are exhausted . . . .") (internal quotes omitted) (emphasis supplied); Keck, Mahin & Cate v. National Union Fire Ins. Co. of Pittsburgh, Pa., 20 S.W.3d 692, 701 (Tex. 2000) (noting that an excess carrier's duties to "act" - which includes the duty to accept reasonable settlements, to diligently explore coverage issues, to thoroughly investigate the merits of the third-party claim, to hire independent counsel to monitor the third-party claim, and to make a demand on the primary carrier to settle - do not arise until the primary insurer tenders its limits); Berglund v. State Farm Mut. Auto. Ins. Co., 121 F.3d 1225, 1228 (8th Cir. 1997) (until the primary carrier "offered its limits," the excess insurer, "had no obligation to pay anything or to evaluate seriously the" third-party claim).

Because judicial imposition of a pre-tender duty to investigate would undermine market expectations, it would threaten the availability of affordable excess insurance coverage:

> The obligations of the [primary and excess] carriers to the insured are somewhat different. **Because it has a duty to defend the insured and on average most claims are within its limits, the primary carrier charges a larger premium** for an equivalent amount of coverage. Because of its less frequent exposure, **the excess carrier generally charges lower premiums. Its obligation does not arise until primary limits are exhausted** . . . ."

Puritan Ins. Co. v. Canadian Universal Ins. Co., 775 F.2d 76, 79 (3d Cir. 1985) (emphasis supplied); see also, Hartford Accident & Indem. Co. v. Continental Nat'l Am. Ins. Co., 861 F.2d 1184, 1187 (9th Cir. 1989) ("An excess insurer **predicates the premiums it charges upon the obligations that it and the primary insurer assume**, including the primary insurer's obligation to defend all suits until exhaustion of its liability limits.") (emphasis supplied); Harville v. Twin City Fire Ins. Co., 885 F.2d 276, 278 (5th Cir. 1989) (**"[E]xcess liability insurers contract to provide inexpensive insurance with high policy limits by requiring the insured to contract for primary insurance** with another carrier.") (emphasis supplied).

In the absence of any duty to perform pre-tender investigation, and no justification for imposing such a duty, evidence demonstrating an excess carrier's purported failure to conduct an investigation is wholly irrelevant:

> [T]he duty of an excess carrier to cooperate in the defense and settlement of a suit against its insured does not arise unless and until the primary policy limits are exhausted or tendered. As the California court stated in Continental Cas. Co. v. Royal Ins. Co. of Am., 219 Cal.App.3d 111, 268 Cal.Rptr. 193, 196 (1990), there is no authority that holds an excess carrier should be charged with making sure the primary carrier fulfills its good faith obligations to the insured. Thus, **evidence of an excess carrier's conduct prior to the time any duties arise is irrelevant.** This rule is followed by most jurisdictions that have considered the question.

National Union Fire Ins. Co. of Pittsburgh, Pa v. Ins. Co. of North Amer., 955 S.W.2d 120, 137-38 (Tex. Ct .App. 1997) (emphasis supplied); see also Continental Cas. Co., 219 Cal. App.3d at 196-97 ("The excess carrier had no duty to investigate settlement options, no duty to hire lawyers to monitor its interests, and no right to expect to participate in the litigation. The excess carrier consequently had no duty to participate in the defense, and **any evidence of the excess's activities . . . is irrelevant.**") (internal citation and punctuation omitted)(emphasis supplied); Certain Underwriters of Lloyd's v. General Accident Ins. Co., 699 F. Supp. 732, 740 (S.D. Ind. 1988) ("The excess carrier consequently has no duty to participate in the defense, and **any evidence of the excess's activities . . . is irrelevant** . . . .") (emphasis supplied); Twin City Fire Ins. Co. v. Burke, 204 Ariz. 251, 63 P.3d 282, 287 (2003) ("Thus, until the primary carrier's policy limit is exhausted, **the excess carrier's conduct during the course of an underlying action against the insured is generally irrelevant** . . . . Until a primary insurer offers its policy limit, **the excess insurer does not have a duty to evaluate a settlement offer, to participate in the defense, or to act at all.**") (internal cite omitted) (emphasis supplied).

2. As a Matter of Standard Industry Custom and Practice, AIGDC Had No Duty to Investigate Prior to Tender

The evidence adduced at trial demonstrates that standard industry custom and practice comports with the well-founded position that, as GAF's excess insurer, AIGDC had no duty to

investigate pre-tender. AIGDC's claims handling expert, Mr. Cormack, testified that generally accepted practices governing the primary/excess relationship are reflected in a writing known as the "Guiding Principles." See Trial Transcript (hereinafter "TT"), Vol. XII, pp. 128-129. Mr. Cormack further testified that the Guiding Principles have been referred to or adopted by legal decisions, and represent what has been determined over the years to be the best way to handle claims where both primary and excess coverage exist. Id.

Mr. Cormack's testimony that the Guiding Principles evidence standard industry custom and practice is independently corroborated. See, e.g., Glassalum Intern. Corp. v. Albany Ins., WL 1214333 *4 (S.D.N.Y. 2005) (citing Monarch Cortland v. Columbia Cas. Co., 626 N.Y.S.2d 426, 431 (Sup. Ct. 1995) ("[T]he court employs the [Guiding Principles for Insurers of Primary & Excess Coverage] as an indication of a practice or a goal of the insurance industry.")), aff'd as modified, 646 N.Y.S.2d 904 (App. Div. 3d Dep't 1996);[1] United States Fire Ins. Co. v. Nationwide Mut. Ins. Co., 735 F. Supp. 1320, 1324-25 (E.D. N.C. 1990) (finding that the Guiding Principles "set forth the general standards of insurance practice"); Royal Ins. Co. of Amer. v. Reliance Ins. Co., 140 F. Supp.2d 609, 613 n.6 (D.S.C. 2001) ("The Guiding Principles have been used by courts as at least an indication of insurance business practice."); First State Ins. Co. v. Utica Mut. Ins. Co., 870 F. Supp. 1168, 1176 n. 17 (D. Mass. 1994) ("The Guiding Principles may, however, be relevant as a guide to responsible industry practice."). Mr. Cormack further testified that—and in accordance with Guiding Principle No. 1[2]—a primary insurer must discharge its duty to investigate promptly and

[1] As the Monarch Courtland court noted: "The Guiding Principles, enacted in 1974, were promulgated by the Claims Executives Counsel, composed of the American Insurance Association, the American Mutual Insurance Alliance, and eight unaffiliated companies, in an attempt to reduce the incidence of controversy between primary and excess insurers." 626 N.Y.S.2d at 430 n. 3.

[2] As the Royal Insurance court correctly articulates the Guiding Principles, "[b]asically, there are nine rules," including (in relevant part):

1. The primary insurer must discharge its duty of investigating promptly and diligently even those cases in which it is apparent that its policy limit may be consumed.

2. Liability must be assessed on the basis of all relevant facts which a diligent investigation can develop and in light of applicable legal principles. The assessment of liability must be reviewed

(continued...)

diligently even in those cases in which it appears that the policy limit will be consumed. See TT, Vol. XII, pp. 129-30. In this regard, the primary carrier owes the same responsibility to the excess carrier that it does to the insured. Id. at p. 115.

Therefore, in the Rhodes case, Zurich was required to investigate promptly and diligently, and without regard to whether it believed the case would exceed the primary limit. Id. at p. 130. Zurich's obligation in this regard was confirmed by the testimony of its claims person, Kathleen Fuell, that it is standard practice in the insurance industry for the excess carrier to rely on the primary carrier, defense counsel, and the insured to develop information necessary to verify that the primary policy limit is fully exposed. See TT, Vol. IV, p. 141.

Consistent with the position espoused by the majority of courts, Mr. Cormack also testified that standard industry custom and practice concerning a primary insurer's obligation to investigate, and an excess insurer's lack thereof, accurately reflects the economic realities and party expectations underlying the relationship. TT, Vol. XII, p. 157. Specifically, he testified that the proportionately greater premium paid by the policyholder to the primary carrier reflects the primary's anticipated burden of investigating and defending claims, whereas the proportionately lesser premium paid to the excess insurer reflects the understanding that it will not be performing these duties. Id. As Mr. Cormack succinctly summarized: "The whole theory of custom and practice in

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(...continued)

periodically throughout the life of a claim.

3. Evaluation must be realistic and without regard to the policy limit.

4. When from evaluation of all aspects of a claim, settlement is indicated, the primary insurer must proceed promptly to attempt a settlement, up to its policy limit if necessary, negotiating seriously and with an open mind.

5. If at any time, it should reasonably appear that the insured may be exposed beyond the primary limit, the primary insurer shall give prompt written notice to the excess insurer, when known, stating the results of investigation and negotiation, and giving any other information deemed relevant to a determination of the exposure, and inviting the excess insurer to participate in a common effort to dispose of the claim.

140 F. Supp.2d at 613 n. 6.

the industry and the Guiding Principles is that the primary is responsible for that investigation and the excess has the right to depend upon the primary to do it." TT, Vol. XII, p. 158.

Plaintiffs's purported expert on the primary/excess claims handling relationship, Mr. Kiriakos, had no appreciation of the economic considerations upon which the standard industry custom and practice is premised. See TT, Vol. XI, p. 13-14. In fact, Plaintiffs' expert had never even heard of the Guiding Principles. Id. at p. 14.

3. Despite Having No Obligation to Do So, AIGDC Nevertheless Took Reasonable Steps to Keep Itself Informed of Pre-Tender Developments

Despite having no obligation to do so, either under the law or pursuant to standard industry custom and practice, AIGDC nevertheless used reasonable efforts to keep itself informed of developments in the investigation and defense undertaken by the primary insurer. The reasonableness of AIGDC's conduct in this regard was acknowledged by Plaintiffs's own claims handling expert, Mr. Kiriakos.

Indeed, during the course of his cross-examination at trial, Mr. Kiriakos was shown a letter dated April 9, 2002 (just three months after Mrs. Rhodes's accident) from AIGDC's Complex Claims Director, Tracey Kelly, to John Chaney, the Senior Liability Adjuster for GAF's claim administrator, Crawford. The letter provides:

> In order to evaluate any potential exposure to the excess layer, I will need to review 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. Please provide me with copies of any of the aforementioned materials that you currently have and advise me when suit has been instituted. As we further discussed, I would also like to see the contracts between the various parties as well as the policies for Penske and Driver Logistic Services.
>
> By copy of this correspondence to defense counsel, I would request that they place me on their mailing list and coordinate with you to supply the above reference materials. Any urgent information can be forwarded to my E-mail address: Tracey.Kelly@AIG.com, or faxed to me at 212-458-5679.

See Exhibit 5, p. 1. [3]

[3] As explained in more detail below, AIGDC followed up on this initial request for information by subsequent phone calls and correspondence.

With regard to this letter, Mr. Kiriakos conceded that AIGDC had taken reasonable steps to procure relevant information. TT, Vol. XI at p. 39.

4. As Soon As the Primary Insurer "Reached Up" to It, AIGDC Used Reasonable Efforts to Investigate and Evaluate the Rhodes Claim; Despite GAF's Opposition to Its Efforts to Associate In Counsel

Nicholas Satriano, an AIGDC Complex Claims Director, testified that GAF and Zurich first "reached up" for AIGDC's involvement during a conference call on November 19, 2003. See TT, Vol. VII, p. 144. This testimony is consistent with that of Zurich's claims person, Kathleen Fuell, that she first sought AIG's involvement during that call. See TT, Vol. IV, p. 140.

Mr. Cormack testified that an excess insurer typically investigates a claim, after the primary insurer reaches up to it, by associating in counsel. See TT, Vol. XII, p. 155. He further explained that it is through the associated counsel that the excess insurer is able to learn if there are deficiencies in the defense, and, if possible, to attempt to rectify those deficiencies. Id. He also testified that when association of counsel is impeded, the excess insurer is obstructed from undertaking its investigation. Id.

Massachusetts courts have recognized that clauses which provide the excess insurer with the opportunity to associate with the insured, give the excess insurer the, "right to associate itself with the insured and the primary insurer in the defense and control of a claim which is at the excess policy level." Employer's Liab. Assurance Corp. v. Hoechst Celanese Corp., 43 Mass. App. Ct. 465, 481 (1997). The option to defend is included for the protection of the excess insurer and may be exercised, for example, in situations where there is significant exposure in excess of the primary limits and the insured or primary insurer is not providing a strong defense. S. Seaman & C. Kittredge, Excess Liability Insurance: Law and Litigation, 32 Tort & Ins. L. J. 657 (Spring 1997); D. Richmond, Rights and Responsibilities of Excess Insurers, 78 Denv. U. L. Rev. 29, 45 (2000) ("Excess insurers need an option to defend in order to protect themselves in cases where the insured's exposure exceeds its primary policy limits and the primary insurer is not mounting a

strong defense."); Employers Nat'l Ins. Corp. v. General Acc. Ins. Co., 857 F. Supp. 549, 554-55 (S.D. Tex. 1994) (if the reasonable range of likely outcomes of the underlying lawsuit far exceeds the primary policy limits, the excess carrier may request that it assume primary responsibility for the management of the case). As one commentator stated:

> Experience shows that the real purpose of any excess carrier's option to defend is to protect the insured and itself against the possibility of uncooperative primary carriers. By providing the insured with cocounsel the excess carrier can assure the insured and itself that they will be kept informed of at least the formal steps in the progress of claims in suit. . . . No court has held that the conduct of a cocounsel provided by an excess carrier has breached any duties of cooperation or has otherwise prejudiced the primary carrier's handling of the defense. This is either because of the infrequency of raising omitted defenses or because excess carriers and their counsel take such steps judiciously. (It could also be a combination of these two things.) Experience of insurance counsel teaches that behavior of this kind is infrequent because it is undertaken with great reluctance and only with great need. The reluctance is born of deference to the primary carrier's control of the defense. The great need exists in only a few cases where the primary carrier has omitted something which could affect the outcome of the case.

D. Wall, Litigation and Prevention of Insurer Bad Faith, §6.09 (1994).

AIGDC attempted to associate in counsel shortly after the conference call of November 19, 2003. See, e.g., Exhibit 21. Unfortunately, AIGDC's attempt to do so was met with resistance from GAF. See Exhibit 23. Indeed, as late as February 4, 2004, GAF's coverage counsel, Anthony Bartell, was still expressing opposition to the association, indicating "serious doubts as to whether [associated counsel] would assist in GAFMC's defense of the underlying action or whether he would use his position to advance AIG's coverage positions." See Exhibit 28. However, the asserted basis for Mr. Bartell's continuing opposition was specious; as indicated by the letter Mr. Satriano wrote in response to Mr. Bartell, on February 13, 2004, AIGDC had never communicated any reservation of rights regarding the National Union policy. See Exhibit 215, p. 2; Testimony of Cormack, TT, Vol. XII, pp. 139-40, 143-44, 146-47.

5. Post-Tender, AIGDC Continued to Encounter Resistance to Its Efforts to Rectify Existing Deficiencies in the Coverage and Damage Investigations

Subsequent to the difficulties that it encountered in associating in counsel, AIGDC encountered resistance to its efforts to rectify the deficiencies in the insurance coverage and damages investigations. These deficiencies included: (1) AIGDC had never been provided information resolving whether other primary insurance (e.g., policies issued to DLS and/or Penske) might exist; (2) Plaintiffs had refused to produce Marcia Rhodes's psychological records (pre- and post-accident) and the records had never been pursued by a motion to compel production; (3) Mrs. Rhodes's deposition had not been taken; (4) Rebecca Rhodes's deposition had not been taken; and (5) the defendants had not requested an independent medical examination of Marcia Rhodes. See, e.g., Testimony of Cormack, TT, Vol. XIII, pp. 9-13, 20.

Despite the fact that information regarding other insurance would clearly inure to the benefit of their mutual insureds, Zurich refused AIGDC's request in April 2004 for its coverage opinion. Testimony of Tracey Kelly, TT Vol. XIV, pp. 24-25. Similarly, in May 2004, AIGDC's effort to extend the trial date to ensure sufficient time to complete the IME, the depositions and motion practice on the withheld psychological records was rebuffed by Zurich and GAF. Id. at pp. 25-27; see also Exhibits 39, 40, 42. It was not until June 2004 that AIGDC was able to take control over the defense and continue its efforts to complete its investigation. Testimony of Tracey Kelly, TT, Vol. XIV, p. 27; Testimony of Deschenes, TT, Vol. VII, p. 48.

6. Mr. Kiriakos's "Expert" Opinions Concerning the Duties of an Excess Insurer Should Be Accorded No Weight

Due to the underwhelming nature of his excess insurance experience, Mr. Kiriakos' "expert" testimony that AIGDC breached the duties of an excess insurer should be accorded no weight. Mr. Kiriakos testified that he has never worked for an excess claims department and was not even aware of the meaning of the basic term, "attachment point," until it was explained to him. TT, Vol. X, p. 139; Vol. XI, p. 16. Moreover, he could not even recall if any of the claims that he actually worked on ever involved an excess policy issued by his own insurance company employer—*i.e.*,

the situation in which he would have been required to act as an excess claims handler. Id., p. 140.

More significantly, contrary to his bald conclusion that AIGDC's handling of the Rhodes claim was "unreasonable," Mr. Kiriakos's testimony affirmatively establishes that AIGDC's conduct fully comported with both its obligations as an excess carrier and standard industry custom and practice for discharging same. Indeed, Mr. Kiriakos agreed that an excess carrier has a right to rely on the primary carrier to properly conduct the defense and investigation. TT, Vol. XI, p. 13. He also agreed that a proper investigation necessarily requires determinations as to all available coverage, liability and damages. Id., pp.14-15.

With regard to the investigation of available insurance coverage, Mr. Kiriakos agreed that because an excess policy is generally excess over all applicable primary policies, it is incumbent upon an excess insurer to determine the extent of available primary coverage. Id., p. 17. Mr. Kiriakos also acknowledged that, despite requesting the Penske policy from Crawford and GAF as early as April 2002, it was not provided to AIGDC until June 2004. Id. Similarly, Mr. Kiriakos agreed that it was absolutely appropriate for AIGDC to consider insurance coverage available to the joint tortfeasor, McMillan's Tree Service, in assessing the exposure of its own insureds. Id., p. 78-79.

With regard to the determination of settlement value, Mr. Kiriakos also agreed that an insurance company cannot simply rely on the assertions of plaintiff's counsel; rather, he testified that insurance companies, including excess carriers, must make independent determinations as to settlement value. Id., pp. 36-37. With regard to the damages component of settlement evaluation, he testified that in order to conduct a proper damages investigation an insurer "MUST" obtain all documentation of plaintiff's past medical condition, present condition, and future prognosis. Id., pp. 18-20. Moreover, he testified that when a plaintiff contends that she has sustained exacerbation of a pre-existing psychological condition, it is appropriate for the insurer to try to obtain medical documents necessary to establishing a pre-accident baseline. Id., pp. 34-35.

Consistent with this testimony regarding the components of a proper damages investigation, Mr. Kiriakos confirmed that independent medical examinations and depositions of plaintiffs are both ways that insurers customarily investigate damages. Id., p. 21. More importantly, he testified that AIGDC acted within standard industry custom and practice when it sought an independent medical examination of Marcia Rhodes, and depositions of both Marcia Rhodes and Rebecca Rhodes. Id. pp. 27-28.

As Mr. Kiriakos expressly acknowledged that everything AIGDC sought to do was consistent with both its obligations under its policy and standard custom and practice for investigation and evaluation, certainly no evidentiary basis exists for his opinion that AIGDC handled the claim "unreasonably."

B. AIGDC Did Not Violate Chapter 93A, by Failing to Make an Offer Before the Mediation of the Accident Case, Because Liability Was Not Reasonably Clear At Any Time Before the Mediation

1. Liability Is Not "Reasonably Clear," for Purposes of Chapters 93A and 176D, until the Extent of a Plaintiff's Damages Becomes Reasonably Clear

Under G.L. c. 93A and c. 176D, an insurer does not have any duty to make any settlement offer until liability is "reasonably clear." G. L. c. 176D § 3(9)(f); Clegg v. Butler, 424 Mass. 413, 420-21 (1997) ("A duty to settle does not arise until liability has become reasonably clear and that liability encompasses both fault and damages.") (internal citations omitted); Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass 671, 677 (1983).

In determining whether damages have become reasonably clear, the appropriate inquiry is whether the ***extent*** of the plaintiff's damages is "reasonably clear." Therefore, an insurer, "is not required to put a fair and reasonable offer on the table until liability and damages have become apparent." Bobick v. U.S. Fid. & Guar. Co., 439 Mass. 652, 659 (2003); see also Spencer Press, Inc. v. Utica Mut. Ins. Co., 1 Mass. L. Rep. 469, 1994 Mass. Super. LEXIS 350, *34 (Mass. Super. Ct. January 27, 1994) (Gershengorn, J.) ("Whether liability is reasonably clear depends not only

on the merits, but also upon questions of causation and extent of injuries."), aff'd 42 Mass. App. Ct. 631 (1997).[4]

The SJC also explained, in Bobick, that when there is a, "legitimate difference of opinion," as to the extent of the damages, liability is not reasonably clear. 439 Mass. at 659; see also Clegg, 424 Mass. at 421; Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 564 (2001).

Massachusetts courts employ an objective standard to decide when liability has become reasonably clear. Demeo v. State Farm Mut. Auto Ins. Co., 38 Mass. App. Ct. 955, 956-957 (1995). As the Appeals Court has noted: "What matters in the G.L. c. 93A case is whether the insurer reasonably believed that the insured's liability was not clear or was unreasonable in holding that belief." Bolden v. O'Connor Cafe of Worcester, Inc., 50 Mass. App. Ct. 56, 66-67 (2000); see also O'Leary-Alison v. Metropolitan Property & Cas. Ins. Co., 52 Mass. App. Ct. 214, 217 (2001) ("The relevant inquiry is whether [the insurer] reasonably believed that its insured's liability with respect to damages was not clear . . . Here, the judge found that Metropolitan had multiple reasons to be skeptical of O'Leary-Alison's damage claims, including an independent medical examination, which indicated the extent of the damages was not reasonably clear."); Tyler v. Safety Ins. Co., 14 Mass. L. Rep. 585, 2002 Mass. Super. LEXIS 186, *18 (Mass. Super. Ct. April 30, 2002) (Quinlan, J.) ("In assessing a claim against an insurer, the inquiry is whether [the insurer] reasonably believed that its insured's liability with respect to damages was not clear".), aff'd 61 Mass. App. Ct. 1119 (unpublished decision), 2004 WL 1656492 (Mass. App. Ct. July 23, 2004) (noting that "[l]iability under c. 93A and 176D based on unfair settlement practices is generally characterized by an absence of goof faith and the presence of extortionate tactics.") (internal quotes omitted)).

Furthermore, the mere fact that an insurer is slow to make an offer, after liability becomes reasonably clear, is not a violation of Chapter 93A. Broaddus v. Mass West Ins. Co., 18 Mass. L.

[4] At the trial of the present case, Plaintiffs's own expert, Arthur Kiriakos, agreed that if the claimant's prognosis is not clear, then liability cannot be "reasonably clear." TT, Vol. XI, p. 73.

Rep. 552, 2004 Mass. Super. LEXIS 539, *18-20 (Mass. Super. Ct. April 30, 2002) (Brassard, J.) ("A delay of making a settlement offer for several weeks after liability became reasonably clear would not warrant c. 93A liability." The Court also noted that Massachusetts cases have held that a six month delay, which was not due to any bad faith or ulterior motives, was not a Chapter 93A violation, while a two and one-half year delay in making an offer, after the time liability was clear, was a violation of the statute).

The Supreme Judicial Court has explained that: "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." Clegg, 424 Mass. at 421.

2. The Extent of the Plaintiffs's Damages in The Rhodes Accident Case Was Not Reasonably Clear Before the Mediation

Based upon the evidence that was presented at the trial of the Chapter 93A case, it is obvious, for numerous reasons, that Plaintiffs have not met their burden of proving that the extent of their damages, which is an essential component of "liability," as that term is used in Chapter 176D §3(9), was reasonably clear before the verdict in the accident case. See Testimony of Tracey Kelly, TT, Vol. XIV, p. 30.

Mrs. Rhodes's damages could not have been reasonably clear before the mediation (or before the trial for that matter) because she had not even come close to reaching a medical end result. There can be no doubt that Mrs. Rhodes had not even seriously begun her rehabilitation or come close to reaching a medical end result prior to the accident case trial, as Mrs. Rhodes herself, and numerous other witnesses, testified at the trials of both this case and the accident case. See Testimony of Marcia Rhodes, TT, Vol. VI, pp. 119-124 (Stating: (1) "No one person who is paralyzed has one set of injuries that they would put a number on and say, well, she's a paraplegic so you can expect her to need x dollars, because you don't know what's going to come

around the road"; (2) There is a wide range of complications from which a paraplegic may suffer; (3) She had a difficult post accident course, with many complications and was bedridden due to pressure sores and leg fractures through October 2003; (4) At the time of the accident trial, she was just, "starting rehabilitation all over again, rather than continuing on with the rehabilitation I started with and then jumping back into the game. It was like starting all over;" and (5) At the time of trial of her accident case, her level of rehabilitation was not, "what was to be expected if the case was a normal, straightforward, paraplegic case, which it wasn't."); Id. at 142-44 (At the time of the accident trial, she was starting to learn to drive and was supposed to be learning to self-transfer, but was not having success in learning how to self-transfer); Testimony of Harold Rhodes, Vol X pp. 67-72 (At the time of the accident case trial, Mrs. Rhodes's physicians wanted her to lose weight and engage in aquatic therapy to gain upper body strength, but she had not been able to do this due to complications she had suffered. In 2004, Mrs. Rhodes had not been able to even begin in the normal type of rehabilitation process that is expected from someone who has suffered an injury of her type.); Testimony of Arthur Kiriakos, Vol. XI, p. 57 (At the time of the accident trial, Mrs. Rhodes was just beginning the rehabilitation process.).

Moreover, at the trial of the accident case, the Plaintiffs's experts repeatedly asserted that the level of functioning of T-12 paraplegics, like Mrs. Rhodes, varies widely and that Mrs. Rhodes's then current level of rehabilitation fell far below the normal range of rehabilitation that could be expected from injuries of this type. See Exhibit 71 (Accident Case Trial Testimony of Norman Biesaw, Volume V of Exhibit 71, p. 104; Accident Case Trial Testimony of Elizabeth Roaf, Volume IV of Exhibit 71, p. 220; Accident Case Trial Testimony of Adele Pollard, Volume V of Exhibit 71, p. 131-132).

Because Mrs. Rhodes had only begun her rehabilitation process, she had not reached a medical end result, and had not even really been able to begin her rehabilitation process, her future prognosis and the extent to which she could learn to rehabilitate herself and prevent future

complications was not determinable by AIGDC. See Testimony of Tracey Kelly, TT, Vol. XIV, pp. 19-20; Testimony of Arthur Kiriakos, TT, Vol. XI, p. 73.

The extent of Rebecca Rhodes's damages also could not have been reasonably clear to AIGDC before the mediation, because her deposition was not taken until August 25, 2004, two weeks after the mediation and less than two weeks before the start of the accident trial. AIGDC wanted to obtain Mrs. Rhodes's mental health records in order to determine what effect the accident was having on the relationship between Mrs. Rhodes and Rebecca, before deposing either Mrs. Rhodes or Rebecca. The depositions were promptly scheduled once the motion to obtain the mental health records was denied. See Testimony of Tracey Kelly, Vol. XIV, pp. 29-30.

The extent of Mr. Rhodes's damages also could not have been determined before the mediation. Until May 2004, AIGDC did not have any information at all about the basis for his loss of consortium claim, other than the demand letter that was written by Mr. Rhodes's own counsel. Mr. Rhodes's deposition summary was not provided to AIGDC until May 2004. Id. Additional information was obtained by AIGDC, concerning Mr. Rhodes's consortium claim, when Mrs. Rhodes's treating physicians were deposed in May 2004, and they testified about marital issues the Rhodes had experienced before and after the accident.[5] Id. By the time this information about Mr. Rhodes's consortium claim was received by AIGDC in May 2004, AIGDC was in the process of trying to compel production of the mental health records, and counsel for AIGDC and counsel for the Plaintiffs were already engaged in discussions regarding the scheduling of the mediation.[6] AIGDC reasonably believed that Mrs. Rhodes's psychological records would provide further information about the nature and extent of Mr. Rhodes's loss of consortium. The motion to compel the production of the psychological records was denied on June 16, 2004, and the depositions of

[5] Plaintiffs's expert, Arthur Kiriakos, noted that, until the treating physicians' depositions were taken in May 2004, AIGDC had no way to assess how they would come across which, he agreed, was an important factor in valuing the case. TT, Vol. XI, pp. 33-35.

[6] AIGDC naturally wanted to obtain the psychological records before deposing Mrs. Rhodes and then mediating the case; once the motion to obtain the psychological records was denied, AIGDC immediately scheduled the depositions of Mrs. Rhodes and Rebecca and the mediation. See Testimony of Tracey Kelly, TT, Vol. XIV, pp. 27-28.

Mrs. Rhodes and Rebecca were scheduled immediately thereafter. Until Mrs. Rhodes and Rebecca were deposed, a full understanding of the basis for Mr. Rhodes's loss of consortium claim could be not ascertained.

Even after the mediation, AIGDC, through defense counsel, sought to further investigate the damages by asking the court to conduct an in camera review of the psychological records–the court denied that motion on August 23, 2004, shortly before the commencement of the trial. See Exhibit 72, p. 16.

Additionally, it was reasonable for AIGDC to not make any separate offers on the consortium and loss of parental society claims, because the Plaintiffs refused to negotiate these claims separately. Rather, Plaintiffs were only interested in a "package deal." See Testimony of Harold Rhodes, TT, Vol. IX, p. 133.[7]

Plaintiffs's damages were not reasonably clear before AIGDC was able to complete discovery as to the damages issues. GAF and Zurich opposed AIGDC's efforts to associate in defense counsel and obtain discovery. See Exhibit 20 (December 19, 2003, letter from Anthony Bartell to Satriano noting that GAF needs to "evaluate the propriety of Mr. Conroy's eleventh-hour introduction into the underlying action[.]"); Exhibit 21 (December 24, 2003, letter from William Conroy to Gregory Deschenes requesting file materials), Exhibit 23 (January 14, 2004, letter from Bartell to Satriano noting that GAF was still in the process of "evaluat[ing] Mr. Conroy's admission to GAFMC's defense team[.]"); Exhibit 28 (February 4, 2004, letter from Bartell to Satriano and Conroy noting GAF's "concern" regarding Mr. Conroy's addition to the defense team); Exhibit 215 (February 13, 2004, letter from Satriano to Bartell reiterating that AIGDC had decided to associate in Conroy as counsel); Exhibit 72, pp. 14-15 (William Conroy admitted as counsel for GAF pro hac vice on May 3, 2004); Exhibit 39 (May 21, 2004, e-mail correspondence from Kathleen Fuell to Martin Maturine taking issue with the filing of the motion to extend discovery); Exhibit 40 (May 21,

[7] Plaintiffs presented no evidence at trial, expert or otherwise, concerning what was a reasonable settlement value of the consortium and loss of parental society claims.

2004 letter from Bartell to Maturine taking issue with AIGDC's efforts to continue the trial to complete discovery); and Exhibit 41, pp. ZA 0820-21 (June 3, 2004, e-mail correspondence from Fuell to Maturine requesting information concerning proposed additional discovery).

First, AIGDC reasonably determined that an independent medical examination by a board certified physiatrist –a physician who specializes in the treatment of paralysis– was necessary in order to ascertain the extent of Mrs. Rhodes's damages. Specifically, AIGDC felt that the IME was essential in order for it to assess to what extent Mrs. Rhodes could achieve a better level of rehabilitation and independence and could increase her strength and level of fitness and therefore reduce future complications and improve her quality of life. See Testimony of Satriano, TT Vol. VIII, pp. 97-99, and Vol. IX, pp. 5-7 and Testimony of Tracey Kelly, TT Vol. XIV, pp. 10-11.

The Plaintiffs's expert, Arthur Kiriakos, quibbled with whether an IME truly was essential in this case. This testimony is absurd, especially given Mr. Kiriakos's admission that it is his own practice to order an IME in **every** personal injury case that he handles.[8] See TT, Vol. XI, pp. 25-28; and Vol. XII, pp. 32 ("I order it every time there is a personal injury.") and 41-44. Whether Mr. Kiriakos would or would not have ordered an IME in this case, however, is not the relevant issue. Rather, the issue is whether it was in bad faith for AIGDC to seek to obtain the IME. On this point, even Mr. Kiriakos testified that it was **not** below industry standards for AIGDC to want to conduct an IME on Mrs. Rhodes. See TT, Vol. XI, pp. 26-28; and Vol. XII, pp. 41-44 (agreeing that the level of Mrs. Rhodes's rehabilitation was relevant to the determination of what the damages would be). See also Testimony of Kiriakos, Vol. XI, pp. 18-20 (It was essential for AIGDC to obtain all medical and psychological records, especially given the seriousness of the injuries and the amount of the demand.); and p. 21 (It is customary for an insurer to obtain an IME and not just when there are serious injuries.). The experts for both Zurich (Karl Masur) and AIGDC (William Cormack) also

[8] Even Harold Rhodes agreed that it was reasonable for AIGDC to request the IME. See TT, Vol. IX, p. 138. He understood that the purpose of the IME was to determine what level of rehabilitation and participation in activities of daily living his wife could be expected to achieve. Id. at p. 139.

testified that it was perfectly proper and in full accordance with industry standards and practices for AIGDC to request that Mrs. Rhodes undergo an IME, in order to determine what would be her future prognosis and what degree of rehabilitation and independence Mrs. Rhodes could achieve. See Testimony of Masur, TT, Vol. XV, p. 158; Testimony of Cormack, TT, Vol. XIII, pp. 10-11, 18-19, and 102-103.

The Plaintiffs have noted that the phsyiatrist that conducted the IME, Dr. Hanak, was not actually called by the defense to testify at the trial of the accident case. Whether a discovery or investigation tool, such as an IME, is properly requested, however, cannot be determined through the use of a rear view mirror, based upon to what extent the discovery or investigation actually results in useful information. Instead, what is relevant is whether AIGDC could have reasonably believed that an IME could be useful in order to ascertain or verify the extent of Mrs. Rhodes's damages. The experts who testified at the trial of this case were in full agreement that conducting an IME was reasonable.

Second, AIGDC reasonably believed that it was essential to take the depositions of Mrs. Rhodes and Rebecca in order to determine the extent of the Plaintiffs's damages. Numerous witnesses testified that a deposition of a plaintiff, in a personal injury case, is the key discovery or investigative tool in the case, for a variety of reasons, including the need to probe the witness's testimony as to the substantive basis of his or her claim and to assess how likeable, believable and honest the plaintiff will appear at trial. On this point, there was again complete agreement among the experts who testified at trial, including the Plaintiffs's own expert, Mr. Kiriakos. The expert witnesses were in agreement that the deposition of a plaintiff (and of other key witnesses for that matter) is essential in order to assess the extent of a plaintiff's damages and, at the very least, it is not bad faith for an insurer to seek to depose all of the plaintiffs. See Testimony of Kiriakos, TT, Vol. XI, pp. 28-29 (an insurer wants to depose a witness to see how they will come across on the witness stand, whether they will be believable and likeable or are exaggerating or telling the truth.

"I agree that it's . . . the legal way to . . . from a discovery perspective to assess it. . . . It certainly is one way to assess it); Testimony of Tracey Kelly, TT Vol. XIV, pp. 22-23; Testimony of Cormack, TT, Vol. XIII, pp. 10-12, 17-18.

The Plaintiffs have made the specious arguments that the deposition of Mrs. Rhodes was not necessary because the defense life care planner interviewed Mr. and Mrs. Rhodes in connection with formulating the life care plan and because the defense had available to it a victim impact statement that Mrs. Rhodes had written at the time Mr. Zalewski was sentenced. As AIGDC's witnesses explained at trial, however, this type of information can hardly replace the use of a deposition (which is conducted by defense counsel and requires testimony in a formal setting and under oath) as a means to obtain information about damages from a plaintiff and to assess their credibility, believability and likeability. See Testimony of Cormack, TT, Vol XIII, pp. 18-19; Testimony of Tracey Kelly, TT, Vol. XIV, pp. 22-23.

Third, AIGDC reasonably believed that it was necessary to obtain, prior to the depositions and mediation, Mrs. Rhodes's psychological records, in order to evaluate the extent of Plaintiffs's damages. Specifically, AIGDC properly wanted the mental health treatment records, in order to ascertain what was Mrs. Rhodes's baseline mental health condition before the accident and to what extent her relationship with her family was damaged as a result of the accident. See Testimony of Satriano, TT, Vol. VIII, pp. 105-106; Testimony of Tracey Kelly, TT, Vol. XIV, pp. 17, 19-22.

It was reasonable for AIGDC to seek to obtain production of these records given the claim of Mrs. Rhodes that her pre-existing psychological conditions were exacerbated by the accident. In fact, the expert witnesses– again including the Plaintiffs's own expert, Arthur Kiriakos– and several fact witnesses, all agreed that it is appropriate for an insurer to seek to obtain the mental health records of a plaintiff when, as here, the plaintiff puts their mental health at issue by claiming an exacerbation of a pre-existing psychological condition. See Testimony of Kiriakos, Vol. XI, p. 19; Testimony of Cormack, TT, Vol. XIII, pp. 11-12, 103 (the mental health records were the, "most

pertinent medical records that [he believed] . . . had a bearing on putting a number on the case[.]"); Testimony of Satriano, TT, Vol. VIII, p. 106; Testimony of Tracey Kelly, TT, Vol. XIV, p. 17.

In the accident case, Mrs. Rhodes expressly claimed that her pre-existing psychological conditions were exacerbated by the accident. See Exhibit 10, p. 11 of August 13, 2003, demand letter ("Marcia suffers from Attention Deficit Hyperactivity Disorder (ADHD) and Bipolar Disorder. These conditions have worsened since the crash."); Exhibit 75, p. 10 (Mrs. Rhodes noted in her interrogatory answers in the underlying case that, "since I suffer from ADHD and bi-polar disorder, my mental condition has significantly worsened as a cause of the accident[.]"); and Exhibit 71, Accident Case Trial Transcript, Testimony of Mrs. Rhodes, Vol. III, pp. 44-48; 156-158 (Mrs. Rhodes testified that before the accident she had been on numerous mental health-related medications, including Prozac, Lithium and Ritalin). Expert testimony during the accident case trial also established that Mrs. Rhodes's post-accident depression had negatively impacted her rehabilitation. See Exhibit 71, Accident Case Transcript, Testimony of Adele Pollard, Volume V, pp. 133-134.

Fourth, as several witnesses testified at trial, including the Plaintiffs's own expert, Mr. Kiriakos, AIGDC also needed to determine what was its "attachment point," in order to evaluate the damages for which it could be liable to the Rhodes. See Testimony of Kiriakos, TT, Vol. XI, pp. 16-17; (although Kiriakos was unfamiliar with the term "attachment point," he admitted that it in order for AIGDC to determine when it would have to "start [ ] paying" it was necessary for AIGDC to obtain copies of any primary policies that may be available to Zalewski, DLS and Penske); Testimony of Cormack, TT, Vol. XII, pp. 160-61, Vol. XIII, pp. 38; Testimony of Tracey Kelly, TT, Vol. XIII, pp. 126-27. In order to do that, AIGDC had to find out what other insurance was available to Penske, Zalewski and DLS, because the National Union policy would have been excess over all primary policies that insured Penske, Zalewski and DLS. AIGDC sought this information promptly upon receipt of the claim in early 2002, and it followed up to request the other insurance policies

numerous times thereafter. See, e.g., Exhibit 5, Exhibit 210, Exhibit 70, pp. 2204-05. AIGDC was not provided with the Penske policy, however, until June 2004, and it was never provided with any written confirmation of Crawford's hearsay account that DLS did not have any insurance coverage for the Rhodes claim. Testimony of Cormack, TT, Vol. XIII, pp. 6-7, 42-43; and Testimony of Kiriakos, TT, Vol. XI, p. 17.

Finally, in order to assess the extent of the damages for which its insureds could be liable to the Rhodes, AIGDC needed to determine what amounts the tree service would contribute and how much insurance was available to the tree service. See Testimony of Cormack, TT, Vol. XII, pp. 132-133; and Testimony of Tracey Kelly, TT, Vol. XIV, p. 18; see also Bobick, 439 Mass. at 660 (noting that an insurer may reasonably allocate its valuation of a plaintiff's damages between insured and non-insured defendants, and a carrier may base its offer on its insured's share of damages, not on the whole injury, regardless of the doctrine of joint and several liability. The Court said Chapter 93A does, "not require an insurer to settle not only its own, but another solvent tortfeasor's liability.").

The tree service did not even answer the third party complaint until December 2003. See Exhibit 72, p. 13. It was not until shortly before the mediation, that AIGDC finally was told that the tree service did not have excess insurance.[9] Plaintiffs's expert, Mr. Kiriakos, testified it was "absolutely" reasonable to look into how much insurance coverage the tree service had. TT, Vol. XI, p. 79. AIGDC correctly determined that insurers for the tree service would pay the policy limits to settle the case and prevent an excess, uninsured judgment against the tree service. Testimony of Tracey Kelly TT, Vol. XIV, p. 46.[10] In fact, the undisputed evidence at trial indicated that

[9] There was uncertainty whether the tree service had $1 million or $3 million in available coverage. See Testimony of Tracey Kelly, Vol. XIV, pp. 17-19; Exhibit 19, p. ZA 1270 (noting that McMillan's had $3 million in general liability coverage).

[10] M.G.L. c. 231B §2 governs the determination of contributions among joint tortfeasors. It provides:

> In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires, the collective liability of some as a group shall constitute

(continued...)

Specialty National, one of the insurers for the tree service, had reserved the case for its full $1 million policy limits; gave its counsel $800,000 in authority at the mediation; and was prepared to pay the full policy limits if necessary. Testimony of Todd, TT, Vol. XVI, pp. 67-68, 117; and Testimony of Cormack, Vol. XIII, pp. 21-22.

It is apparently the Plaintiffs's position that if it was reasonably clear that the Rhodes's damages exceeded $2 million, by no matter how small of an amount, AIGDC had a legal obligation to make some offer, even though what was the amount of the damages in excess of $2 million could not be ascertained. Aside from that not being the law of Massachusetts (as explained above), that position would not make any common sense, because it would require an insurer to make a "best case for the insured" offer that never would be accepted by any plaintiff. The entire point of Chapter 176 §3(9) is to require insurers to ***effectuate settlement*** when and if the extent of the plaintiff's damages has become reasonably clear. Making an insurer go through the motions of making an offer that both it and the plaintiff know will not be accepted, does not promote the goal of effectuating a settlement. See Testimony of Owen Todd, TT Vol. XVI, pp. 80-81 (experienced lawyers will not consider settlement until there is a high degree of certainty as to what the nature and costs of future medical care will be). Instead, requiring an insurer to make an offer before it can reasonably ascertain what actually would be a reasonable settlement amount, would more

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[10](...continued)
a single share; and (c) principles of equity applicable to contribution generally shall apply.

A defendant whose liability is based solely on the theory of respondeat superior is not a joint tortfeasor with its agent. See, e.g., Elias v. Unisys Corp., 410 Mass. 479, 481 (1991); Wolfe v. Ford Motor Co., 386 Mass. 95, 101 (1982) ("[Defendant] would be entitled to indemnity (and hence to the denial of [co-defendant's] motion for contribution), if his liability to the plaintiffs were solely derivative or vicarious, that is, based on a "pass through" of co-defendants wrongful acts."). Because the liability of GAF, DLS and/or Penske for Zalewski's negligence was strictly vicarious, these parties would have been considered a single tortfeasor for purposes of determining pro rata contribution among joint tortfeasors. Therefore, in the event that McMillan's Tree Service had been found liable for Mrs Rhodes's accident, and regardless of its comparative fault, only two "shares" would exist for purposes of determining pro rata contribution. As such, Zalewski (or his equitably subrogated insurers) would be entitled to a 50% contribution from McMillan's. Thus, because a determination of even 1% liability for the accident would have likely resulted in exposure for McMillan's that was in excess of its insurance coverage, AIGDC was justified in expecting that McMillan's insurers would be willing to put up that full amount at mediation.

likely have the effect of chilling the settlement negotiations and result in more cases going to trial in the end.

Tracey Kelly testified that once the parties agreed, in or around May 2004, that there would be a mediation once the discovery that AIGDC was requesting was completed, it would not been productive to make a pre-mediation offer. Rather, she reasonably deemed it best to wait until the mediation to make an offer, when she knew that the parties would be sitting down face to face to discuss settlement with the assistance of a trained, neutral, mediator. See TT, Vol. XIV, p. 28. Mr. Kiriakos also agreed that it is useful to conduct settlement negotiations at a mediation when the mediator can point out the strengths and weaknesses of each side's position and get the parties to compromise. TT, Vol XI, p. 38.

It is not necessary in this case to speculate as to what would have been the effect of AIGDC making a, "best case for the insureds" settlement offer at or shortly after the time that Zurich tendered its policy limits to AIGDC in 2004, because we know the answer to that question. Mr. Rhodes testified that the Rhodes family would not have accepted anything less than $8 million to settle the case at any time before the mediation, see TT, Vol. IX, pp. 129-31; Vol. X, p. 58, and the evidence indicates that AIGDC was never willing to pay that much before the verdict was rendered. We also know that Mr. Rhodes claimed to feel insulted by the $2 million policy limits offer that Zurich made at the end of March 2004 and by the offers that were made by AIGDC at the mediation. Therefore, the evidence clearly demonstrates that it would it have been counterproductive for AIGDC to have made an offer before the mediation, and we can be certain that any such offer would not have been accepted. Consequently, the failure of AIGDC to make such an offer cannot have caused the Plaintiffs to suffer any loss, which is a prerequisite to recovery under Chapter 93A. See Hershenow v. Enterprise Rent-a-Car Company of Boston, 445 Mass. 790 (2006).

C. Damages Were Not Reasonably Clear After the Trial of the Accident Case

The liability of AIGDC's insureds was not clear after the trial of the accident case. The Plaintiffs have not introduced any evidence whatsoever that would contradict AIGDC's assertion that it had a meritorious basis for an appeal. The Plaintiffs did not present any expert testimony as to the merits of the appeal, and their expert, Mr. Kiriakos, who is not an attorney, expressly admitted that he is not qualified to render any opinion as to the merits of the appeal. See TT, Vol. XI, p. 86.[11] Therefore, there is not any evidence to contradict AIGDC's position, that it did not act in bad faith by filing a notice of appeal. See Exhibit 50 and Testimony of Cormack, TT, Vol. XIII, p. 22-24; Testimony of Tracey Kelly, Vol. XIV, pp. 62-63.

The primary grounds for the appeal was the introduction at trial of testimony from Mrs. Rhodes that she suffered from "profound depression" as a result of the accident, which was different in nature from the depression from which she had suffered before as a result of her Bi-Polar condition, and that she contemplated suicide as a result of this depression. Exhibit 71, Volume III, p. 139 ("I'm depressed. Not the manic depressive depressed, giving up depressed. Like, what's the point, that kind of depressed . . . I wish I had been killed in the crash instead of just paralyzed. I think about how many Valium it would take. Dark thoughts. Things I shouldn't be thinking about but I do."). This type of dramatic testimony hardly qualifies as "garden variety" emotional distress. As explained above, due to the Plaintiffs's opposition to AIGDC's request for the production of Mrs. Rhodes's mental health records, and the court rulings on the motion to compel production of these records and the motion for in camera inspection of the records, AIGDC was prevented from discovering what was Mrs. Rhodes's baseline mental health condition and from determining to what extent that pre-existing condition was exacerbated by the accident. See Testimony of Cormack, TT, Vol. XIII, pp. 29, 33.

[11] Likewise, both Mr. Kiriakos and AIGDC's expert testified that the filing of post trial motions is routine and appropriate in cases of this nature in order to preserve the right to appeal. See Testimony of Kiriakos, TT, Vol. XI, pp. 85-86 and Testimony of Cormack, TT, Vol. XIII, pp. 22-23.

Mr. Kiriakos also agreed with the testimony of AIGDC's witnesses that the merits of the appeal of these evidentiary issues could not have been properly assessed by AIGDC until it received and had the opportunity to have its appellate counsel review the trial transcript. See Testimony of Kiriakos, TT, Vol. XI, pp. 86-88, Testimony of Cormack, TT, Vol. XIII, pp. 23-24. Nevertheless, AIGDC settled the accident case before the trial transcript was ever received. Testimony of Tracey Kelly, TT, Vol. XIV, pp. 62-63.

Accordingly, liability in the accident case (i.e., the amount of the damages for which the insureds would be held liable) could not have been reasonably clear in the post trial period, notwithstanding the jury verdict in favor of the Plaintiffs.

D. All of the Offers That Were Made by AIGDC Were Reasonable under the Circumstances

In making a settlement offer after liability has become reasonably clear, Chapters 93A and 176D do not require an insurer to make its final or best offer, just one that is reasonable under the circumstances. The relevant circumstances include the amount of plaintiff's demand and plaintiff's negotiating tactics. As the Supreme Judicial Court emphasized in Bobick:

> ***Negotiating a settlement, particularly when damages are unliquidated is, to an extent, a legitimate bargaining process. 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. Experienced negotiators do not make their final offer first off and experienced negotiators do not expect or take seriously the representation that it is.***

Bobick, 439 Mass at 660 (internal punctuation omitted) (emphasis added) (citing Forcucci v. U.S. F. & G. Co., 11 F.3d 1, 2 (1st Cir. 1993); see also Panzarella v. Travelers Ins. Co., 2002 Mass. Super. LEXIS 160, **60-61, 71-73 (Mass. Super. Ct. April 26, 2002) (Rup, J.) (***Chapter 176D "was not designed to eliminate the bargaining that is the heart of the litigation process, and it does not call for the insurer's final offer, but only one within the scope of reasonableness.***" The Court also said that the insurer was not acting in bad faith when it, "had legitimate reasons for assigning a value to the claim which was significantly lower than the Plaintiff's demand [and it] could consider what it viewed as an excessive demand from the Plaintiffs in formulating its

response.") (emphasis added); Almy v. Commercial Union Ins. Co., 6 Mass. L. Rep. 420, 1997 Mass. Super. LEXIS 564, *22 (Mass. Super. Ct. February 13, 1997) (Fabricant, J.) ("Chapter 176D permits an insurer to consider a claimant's negotiating posture in formulating its own. . . . ***The language chosen by the Legislature reflects its full awareness of the norms of negotiation. It did not prohibit insurers from negotiating or from doing so in accordance with those norms, which include each party considering the other party's stance at each stage to determine the amount of distance it needs to attain from its target to insure that the ultimate result will be at, rather than above, the target.***"). Plaintiffs's expert, Mr. Kiriakos, also testified that negotiations commonly occur over a protracted period of time and involve a great deal of back and forth. TT, Vol. XI, pp. 41-42.

The evidence is largely undisputed as to the amounts of the settlement demands and offers that were made in the accident case. Prior to the mediation, AIGDC placed a full value on the Rhodes accident case of $4.75 million. By that time, Zurich had already committed to paying its $2 million underlying policy limits, and AIGDC believed (correctly as it turned out) that the insurer for the tree service would be willing to pay the $1 million policy limits in order to avoid an excess judgment against McMillan's. Therefore, AIGDC gave its adjuster, Warren Nitti, $1.75 million in settlement authority at the mediation that took place on August 11, 2004. Testimony of Tracey Kelly, TT, Vol. XIV, pp. 53.

At the mediation, Nitti initially offered $2.75 million (which included Zurich's $2 million and did not include the expected $1 million contribution from the tree service), in response to the Plaintiffs's $19.5 million demand. Testimony of Harold Rhodes, TT, Vol. IX, p. 99; Testimony of Kiriakos, Vol. X, p. 137.

The Plaintiffs responded by demanding $15 million, plus an assumption of Mrs. Rhodes's future health care costs. See Exhibit 70, p.2221(August 12, 2004 entry) and Testimony of Tracey Kelly, TT Vol. XIV, p. 53. Since Mrs. Rhodes suffered from a variety of physical and emotional

disorders, it is obvious that new health insurance could not have been purchased for Mrs. Rhodes. AIGDC's witnesses testified that such an open ended demand could not possibly have been seriously considered by AIGDC, nor would it be agreed to by any other insurer, for that matter, as that would leave the file open and would not resolve the case. See Testimony of Todd, Vol. XVI, pp. 71-72; and Testimony of Tracey Kelly, Vol. XIV, p. 55.

Despite the fact that this demand would have been impracticable for any insurer to actually agree upon, AIGDC nevertheless responded by increasing its offer to $3.5 million (again not including the expected contribution by the tree service). See Exhibit 70, p. 2221 (August 12, 2004 entry) and Testimony of Tracey Kelly, Vol. XIV, p. 53. This offer (assuming a $1 million contribution from the tree service) represented just $250,000 less than the total value that AIGDC had placed on the case at that time. Even once AIGDC learned that the Plaintiffs had settled with the tree service at the end of the mediation for $550,000, the last offer that was made by AIGDC at the mediation represented more than 85% of what AIGDC reasonably considered to be the full value of the case.

As explained above, Chapters 93A and 176D do not require an insurer to make a last and final offer of the full value it places on the case, especially when, such as in the Rhodes case, the plaintiff's demand exceeds that value by several multiples and the plaintiff has shown a total unwillingness to compromise. As the evidence at trial indicated, AIGDC reasonably believed that the Plaintiffs were seeking to settle the case for an amount in excess of $10 million, which was a far higher amount than the amounts for which AIGDC ever valued the case before the accident trial. See Testimony of Tracey Kelly, Vol. XIV, pp. 55-56; and Testimony of Todd, TT, Vol. XVI, pp. 71-73.

During the accident trial, AIGDC perceived that the evidence was going in better for the Plaintiffs than it had anticipated. AIGDC had been unable to obtain even an in camera review of the psychological records and it was unable to counter Mrs. Rhodes's testimony about profound

depression and suicidal ideation, because it had no baseline for comparison. The Rhodes, especially Mr. Rhodes and Rebecca, appeared to be connecting better with the jury than AIGDC had anticipated. See Testimony of Tracey Kelly, TT, Vol. XIV, pp. 56-57. For these reasons, AIGDC continued to make additional offers at trial, with the final offer being $6 million (not including the $550,000 that the tree service had already agreed to pay) in the face of a more than $12 million lowest demand (including the tree service's contribution). Attorney Pritzker responded to the $6 million offer by simply rejecting it, without any counter, or even informing the Rhodes that such an offer had been made. Id.; Testimony of Harold Rhodes, Vol. X, pp. 16-17.

After trial, despite what it believed to be a meritorious appeal, AIGDC valued the case at nearly $10 million ($7 million of AIGDC's money, plus the more than $2.3 million Zurich paid and the $550,000 tree service contribution), as compared to an approximately $12 million judgment (including post-judgment interest). See Exhibit 87, Excerpts and Exhibits from Nitti Deposition, pp. 116-119 and Exhibit 10 to Nitti Deposition [post-trial Executive Claim Summaries]. This valuation represented more than 80% of the total amount of the judgment and interest. During the post-trial period, AIGDC literally bid against itself, increasing the offer even though the Plaintiffs refused to budge even one penny off of the total judgment. See Exhibit 206, Responses 11-12 (AIGDC increased post-trial offers although Plaintiffs did not reduce demand). Eventually, the Plaintiffs did agree to compromise and the case settled in June 2005. See Exhibit 60.

The **ONLY** evidence that could support the Plaintiffs's assertion, that the offers made by AIGDC were not reasonable, is the testimony of Arthur Kiriakos. To say that Mr. Kiriakos's opinion as to the value of the accident case rests upon thin ice is a vast understatement. Kiriakos has never worked in an excess claims department; he could not recall if he has ever handled a case in which his employer issued an excess policy; and, as far as he could recall, his only involvement with excess insurance has come in cases in which his employer or client issued a primary policy and another carrier issued an excess policy. See Testimony of Kiriakos, TT, Vol. X, pp. 139-140

and Vol. XI, p. 92. He never worked in a job in which he had settlement authority of more than $500,000 and he hasn't had authority of more than $175,000 since 1990. See Testimony of Kiriakos, TT, Vol. XI, pp. 93-98.

The evidence at trial as to Mr. Kiriakos's professional experience certainly does not portend expertise for valuing paraplegia cases. Mr. Kiriakos did not base his testimony as to the purported unreasonableness of AIGDC's offers upon any jury verdicts or settlements. Instead, his testimony was solely based on his own "feeling" as to what the case was worth, and that feeling was premised on his own personal experience. Kiriakos said that he arrived at his estimated settlement value without looking any documentation whatsoever. See TT, Vol. XI, pp. 53, 62-63. He said that all he had to know in order to put a value on the case was that Mrs. Rhodes was paralyzed and Zalewski was at fault for the accident. TT, Vol. X, pp. 113-14; Vol. XI, p. 25. If this was the case, then every paralysis case involving the fault of the insured would be worth the exact same amount of money, no matter what complications the plaintiff sustains; what level of rehabilitation she achieves; where the case is venued; how believable and likeable the plaintiff is; or any other one of the many different factors which AIGDC's and Zurich's witnesses said have to be taken into account in order to determine the value of a case. Testimony of Fuell, TT, Vol. V, pp. 62-69; Testimony of Satriano, TT, Vol. VIII, pp. 117-129; Testimony of Tracey Kelly, TT, Vol. XIV, pp. 31-37. This testimony by Mr. Kiriakos is plainly absurd.

Kiriakos has only been involved in two paraplegic cases that he could recall. All that he could remember about those cases was that one was in 1983 and involved a motor vehicle accident in Boston with a plaintiff who was intoxicated and unbelted and the other involved a foundry accident in Ohio. See TT, Vol. XI, pp. 12-13. No further evidence about these two cases was introduced by the Plaintiffs–we do not know whether these cases settled or were tried or what was the result.

Moreover, conspicuously absent from his testimony was even a suggestion that his involvement in the two paralysis cases he has handled included his evaluation of the injuries for settlement purposes. We can readily conclude from his other testimony that such was not the case. Simply stated, throughout his claims handling career, it was never his job to evaluate injuries within the settlement range—or even close to it—that he has ascribed to the Rhodes claim.

It is almost laughable for the Plaintiffs to contend that Mr. Kiriakos's minimal experience qualifies him as an expert who can opine on the value of the Rhodes case. This Court should entirely disregard the testimony of Mr. Kiriakos regarding whether AIGDC's offers were reasonable.

Most importantly, Mr. Kiriakos settlement evaluation of the Rhodes claim does not even satisfy the standard of proper damages investigation that he identified. Id., pp. 62-63. He testified that a proper damages investigation requires—and particularly so for a claim involving a $19.5 million demand—that all documentation of the plaintiff's past medical condition (including pre-accident condition), current condition, and future prognosis, be obtained and reviewed. Id. pp. 18-19. In fact, he testified that a proper damages investigation requires that all information that "may or will impact the evaluat[ion]" be obtained and reviewed. Id. Furthermore, he conceded that the simple knowledge that a plaintiff has been rendered a paraplegic would only provide a "beginning point" for damage evaluation purposes:

Q So in this case, all you needed to know, Mr. Kiriakos, is that Mrs. Rhodes was a paraplegic and she was rear-ended. Is that your testimony?

A That is a beginning point.

Q Well, that wasn't the end point, was it?

A No, it's not.

Id., p. 25.

In contrast to Mr. Kiriakos's lack of relevant experience, AIGDC presented Tracey Kelly and Owen Todd as witnesses. Ms. Kelly who, unlike Mr. Kiriakos, is an attorney and had many years experience in private practice before arriving at AIGDC, was an Assistant Vice President in charge

of the AIGDC Excess Department's Complex (the most serious cases) North Unit, at the time she placed a value on the Rhodes case. She had been with AIGDC for more than four years at the time she put a value on the Rhodes case. See Testimony of Tracey Kelly, Vol. XIII, p. 141. She explained that her current job virtually entirely consists of putting values on catastrophic injury cases (and some serious property damage cases), including burn, wrongful death, quadriplegia and paraplegia cases. See Testimony of Tracey Kelly, Vol. XIII, pp. 128-129. Only about 1% of the cases she handles go to trial. See Testimony of Tracey Kelly, TT, Vol. XIV, p. 51. Part of the background that she brought to the evaluation of the Rhodes case was in-house training as to the valuation of paraplegic cases and her review of a chart, that had been prepared by outside counsel, summarizing verdicts and settlements in paraplegia cases, including cases in Massachusetts. See Testimony of Tracey Kelly, TT, Vol. XIII, pp. 135-136.

Tracey Kelly testified that her valuation of the Rhodes case was based on numerous discussions that she had about the case with the claims handlers that she supervised, Martin Maturine and Warren Nitti; her review of various documents, including the Narrative Report and Executive Claims summary (both of which she edited); and her professional judgment and experience. See Testimony of Tracey Kelly, TT, Vol. XIV, pp. 39-42. Based upon her experience and judgment and a review of all of the various economic and non-economic factors that go into settling claims of this nature (and to which she testified in detail at trial), she concluded, before the mediation, that the case had a total settlement value of $4.75 million.[12] Id.

In determining a reasonable settlement value, Kelly took into consideration that AIGDC would be offering Plaintiffs a partially structured settlement, which was designed to guaranty payment of Mrs. Rhodes's health care expenses for the rest of her life. See Testimony of Tracey Kelly, TT Vol. XIV, p. 42-43. Mr. Kiriakos testified that a structure provides a substantial benefit to a claimant, because all of the periodic payments are tax free. TT, Vol. XI, pp. 39-40; see also

[12] The reasonableness of Ms. Kelly's evaluation is supported by the evidence that the insurer for the tree service evaluated the total exposure in the $3-$5 million range, see Testimony of Cormack, TT, Vol. XIII, pp. 21-22.

Testimony of Tracey Kelly, TT Vol. XIV, p. 43-44. Therefore, considering the structure component, the AIGDC offers were worth substantially more than would have been the case if the offers had been presented solely on a lump sum basis.

As the trial progressed, Ms. Kelly changed her evaluation, based upon the changed circumstances. She eventually recommended a $6 million offer, on top of the tree service's $550,000 contribution. See Testimony of Tracey Kelly, Vol. XIV, pp. 56-58.

Mr. Todd is a former Massachusetts Superior Court judge, who sat for a time in Norfolk County. He was formerly the Chairman of the largest law firm in Boston, and now he is a name partner in his own mid-size Boston based litigation firm. Mr. Todd is also one of the highest regarded and most experienced mediators and arbitrators in the area, having arbitrated or mediated hundreds of cases. He has a wealth of experience in serious personal injury cases. He has had experience handling paraplegia cases as an attorney, a judge and a mediator. See Testimony of Todd, TT, Vol. XVI, pp. 52-58. He also testified that he regularly keeps abreast of Massachusetts judgments and settlements, by reading *Massachusetts Lawyer's Weekly* and other jury verdict and settlement publications. Id. at p. 95.

Mr. Todd testified that, based upon his experience and knowledge, all of the offers that were made by AIGDC, through the time of the trial, were within what he believed was a reasonable settlement range. See TT, Vol. XVI, pp. 59, 65, 70-71, 74. Indeed, he thought the final $6 million offer was at the high end of a reasonable settlement range. Id. at 124.

Further support for AIGDC's evaluation of the accident case was provided by Mr. Rhodes, Mr. Kiriakos and even by counsel for the Rhodes. Mr. Rhodes agreed at trial that the accident case jury could have come back with a verdict of less than $5 million. Indeed, he said that they could have come back with almost anything. He also agreed that pain and suffering and loss of consortium damages are very difficult to value. See Testimony of Harold Rhodes, TT, Vol. IX, pp.

134, 138; see also Testimony of Todd, Vol. XVI, p. 112 (agreeing with Attorney Pritzker that valuing pain and suffering and loss of consortium involve, "big unknowns").

Kiriakos admitted that Crawford's $5 million evaluation of the case in September, October and November 2003 was reasonable.[13] See Testimony of Kiriakos, TT Vol. XI, pp. 73-76. Although Kiriakos tried to back away from this statement by claiming that by November 2003 Crawford's evaluation was not reasonable (because it was "a little lower" than his own opinion), he did not testify as to any facts or circumstance that changed, from October 2003 to November 2003, to render Crawford's $5 million evaluation of the case unreasonable. Id.

Plaintiffs's counsel, Margaret Pinkham, acknowledged to *Lawyer's Weekly*, after the verdict, that the Plaintiffs's "biggest fear" was that the jury could come back with a $2 million verdict and think that was a lot of money. See Exhibit 202. Mr. Todd also testified that a $2 million verdict of the Rhodes case in Norfolk County would not have been surprisingly low. See Testimony of Todd, TT, Vol. XVI, p. 77.

The Plaintiffs may contend that two other pieces of evidence support their position that the offers made by AIGDC before trial were not reasonable: (1) Testimony about the $6.6 million "settlement number" that attorney Deschenes referred to at the March 2004 meeting; and (2) a single jury verdict–the Oliveira verdict in Rhode Island in 2002. This evidence, however, provides no support whatsoever for the Plaintiffs's position. Deschenes himself testified at trial that the $6.6 million number was not what he believed was the settlement value of the accident case, but merely constituted the average settlement amount of several other cases (he did not specify how many) he had found in settlement and verdict reporters. There was no evidence concerning what were the facts of these cases (other than that Deschenes said he did not use product liability cases; he tried to find cases in the Massachusetts area, but did not limit his research to Massachusetts; and

[13] Crawford's evaluation, like that of Kiriakos, was solely based on the "feeling" of the Crawford adjuster (who had never handled a paraplegia case before) and was not based on any documentary evidence. Testimony of Mills, TT, Vol. II, p. 121.

he tried to use cases that involved clear liability); so the Court has no means to determine the degree to which these cases were or were not comparable to the Rhodes case. See Testimony of Deschenes, TT, Vol. VII, pp. 51-55. Another huge problem with Deschenes's methodology is that, even if the cases were factually comparable, the use of averaging could entirely skew the final average if there were one large settlement and the rest of the settlements were smaller.

It is plain that the Oliveira case provides a poor comparison to the Rhodes case for a host of reasons that were explained by Mr. Todd, including: (1) the Defendant in Oliveira was an intoxicated minor; (2) the Defendant struck a car parked on the side of the road while traveling at a high rate of speed; (3) the Defendant did not come to Ms. Oliveira's assistance when she was trapped in her burning car; (4) Ms. Oliveira's injuries included extensive third degree burns and cognitive brain damage; (5) she was a tetraplegic (limited use of her hands and arms), not a paraplegic; (6) her special damages (which included a lost wage claim) were at least several times what Mrs. Rhodes claimed; (7) Ms. Oliveira was permanently institutionalized because she could not care for herself and her daughter and niece were not able to care for her, which caused an estrangement from her family; and (8) the case was tried in Providence County, which is noted for its liberal verdicts.[14] See Testimony of Todd, TT Vol. XVI, pp. 91-95, 115-118. Indeed, the only similarities between the Oliveira and Rhodes cases is that they both involved motor vehicle accidents that occurred in New England and the insured driver was at fault.

With regard to the post-trial offers, there is no evidence at all from which the Court could conclude that the offers were not reasonable. Mr. Kiriakos said (without even knowing what were the merits of the appeal), that it would have been reasonable for AIGDC to offer, after the trial, 80-85% of the judgment. TT, Vol. XI, p. 91. AIGDC's valuation of the case after the trial was squarely in that range. See Exhibit 87, Excerpts and Exhibits from Nitti Deposition, pp. 116-119

[14] By comparison, the undisputed evidence at trial was that Norfolk County is a conservative venue when it comes to jury verdicts. See Testimony of Kiriakos, Vol. XI, pp. 31-32; Testimony of Todd, Vol. XVI, pp. 52-53; and Testimony of Tracey Kelly, Vol. XIV, p. 35.

and Exhibit 10 to Nitti Deposition [post-trial Executive Claim Summaries]. Mr. Cormack also opined that AIGDC's post trial offers were reasonable. Accordingly, there is not any evidence that would contradict AIGDC's position, that it made reasonable offers after the trial—especially considering that the Plaintiffs refused to budge off of the total judgment amount, until the day that the case settled. Notwithstanding that, AIGDC bid against itself.

E. Plaintiffs Cannot Recover for Any Injury Allegedly Arising From AIGDC's Decision to File a Notice of Appeal, As They Have Presented No Expert Testimony Establishing the Absence of Reasonable Grounds for Doing So

As a matter of law, "[w]hether an appeal raises valid issues depends upon an **expert legal assessment** of what occurred at trial: actions, rulings and instructions to the jury by the trial judge; objections and motions by trial counsel; testimony, or lack thereof, by witnesses; and the state of the law on the points in issue." Resendes v. Boston Edison Co., 2000 WL 421004 *11 (Mass. Super. 2000) (emphasis supplied); see also Tallent v. Liberty Mut. Ins. Co., 2005 WL 1239284 *13 (Mass. Super. 2005) ("whether there are reasonable grounds to appeal depends upon a **reasoned legal assessment** of what occurred at trial, including: (1) the rulings and instructions to the jury by the trial judge; (2) the objections and motions by trial counsel; and (3) the state of the law on the points in issue.") (emphasis supplied).

Bearing the foregoing standards in mind, Plaintiffs have failed to satisfy their burden of proof for establishing that AIGDC's filing a notice of appeal constituted bad faith. In short, Plaintiffs presented no evidence of expert legal assessment of the merits of the issues identified for appeal. Indeed, their only expert, Mr. Kiriakos, expressly denied being qualified to do so:

> Q Now, you're not claiming that you're qualified to render an opinion on the merits of the appeal in the Rhodes case, right?
>
> A No, I am not.

See TT, Vol. XI, p. 86.

III. DAMAGES

A. Even If This Court Finds That AIGDC Did Not Make a Reasonable Offer, The Plaintiffs Have Not Proven That They Suffered Any Injury Because They Have Not Proven That They Would Have Accepted A Reasonable Offer

In order to recover in a Chapter 93A action, it is essential that the plaintiff prove that the defendant's violation of Chapter 93A caused him or her to suffer a "loss." Hershenow. The Court in Hershenow explained that this means that a plaintiff must prove that the defendant's actions caused the plaintiff to be *worse off* than he would have been had the defendant not committed the violation. Referring to the holding that there was a legally cognizable injury in Leardi v. Brown, 394 Mass. 151, 474 N.E.2d 1094 (1985), the SJC said in Hershenow: "The mere existence of statutorily prohibited lease provisions placed all tenants *in a worse and untenable position than they would have been* had the leases complied with the requirements of Massachusetts law." Id. at 800 (emphasis added). The court then explained that since the plaintiffs in Hershenow *were not worse off* because of any alleged violation, they had not suffered any loss. The Court added: "Nor did the Plaintiffs experience any other claimed economic or non-economic loss. The CDW [Collision Damage Waiver] made neither rental customer *worse off* during the rental period than he or she would have been had the CDW complied in full with the requirements of G.L.c.90 §31E." Id. at 800-801. (emphasis added)

In the present case, the Plaintiffs have not proven that they would ever have accepted a reasonable offer. Their answers to interrogatories explicitly state that they never would have accepted less than $8 million to settle the case. Mr. Rhodes gave the following testimony at trial:

> Q Mr. Rhodes, I'd like to read you one of your answers to an Interrogatory that was propounded by my client, AIGDC, and it's your answer to interrogatory number nine. The question was: please state what offers of settlement you would have accepted from January 2002 until the resolution of the underlying matter. If the amount you would have accepted changed at any time, please indicate for what periods of time each amount is applicable.

And your answer is:

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

A That's what I said in my interrogatory. Later on, a similar question was asked in the deposition where I further clarified that.

Q Well, Mr. Rhodes, I don't care what you said in your deposition. My question is, do you stand by this answer or don't you?

A Well, I – yes, I stand by that answer –

Q Okay. And you did not file any supplemental answers to interrogatories to that question giving any other answer, did you?

A No, I didn't.

(TT, Vol. IX, pp. 129-130).

Considering that the Plaintiffs's expert acknowledged that a $5 million offer would have been reasonable as of at least October 2003, Testimony of Kiriakos, Vol XI, pp. 73-76, it is obvious that the Plaintiffs never would have accepted an offer that their own expert believes would have been reasonable. Kiriakos specifically testified that it was not bad faith for AIGDC to reject every settlement demand the Plaintiffs made during the course of the case. Id. at 71-73. Thus, the Rhodes cannot prove that they were placed in a worse position by AIGDC's alleged failure to make a reasonable offer. Put another way, the Plaintiffs cannot show that they suffered any "loss" as a result of any Chapter 93A violation by AIGDC. If AIGDC had made the same offers earlier, or had made an offer in the range Plaintiffs's expert conceded would have been reasonable, the Plaintiffs still would have tried the accident case and incurred the same costs and alleged stress of litigation for which they now seek recovery. Likewise, in these circumstances, the accident case still would have been tried and appealed and the Plaintiffs still would have foregone the amounts of the judgment that they did not receive as a result of the eventual settlement of the accident case.

The Plaintiffs have argued that Hopkins v. Liberty Mut. Ins. Co., 343 Mass. 556 (2001) holds to the contrary. However, Hopkins is distinguishable from the facts of this case, because (as the Court noted in the oral argument of the summary judgment motions in this case), in Hopkins, the Plaintiff did eventually accept the Defendant's offer, so that the Court did not have to guess as to what the Plaintiff would have done had an offer been made. Id, at 560. By contrast, in this case, the Plaintiffs have stated under oath that they never would have settled for less than $8 million.

Finally, the Plaintiffs argued in their summary judgment memorandum that they, "lost the opportunity" to make the choice as to whether to accept or reject a reasonable offer before the mediation, and that this "loss of opportunity" constitutes a loss under Leardi. However, where the undisputed evidence demonstrates that plaintiffs would not have availed themselves of this opportunity, any such lost opportunity did not place them in any worse position than they would have been in if they had that opportunity, so they have not suffered any legally cognizable loss.

B. The Plaintiffs Cannot Recover Economic Damages Because AIGDC Did Not Cause the Plaintiffs to Suffer Any Economic Loss

The Plaintiffs's actual total recovery in the accident case was $11,837,996, which is far more than what the Plaintiffs would have recovered if the parties reached a pre-trial settlement at the amount Mr. Rhodes claimed he would have accepted, i.e., $8 million.

It is readily apparent that the Rhodes suffered no economic damages as a result of any conduct on the part of AIGDC. Assuming that the parties had reached a settlement in the $5-$8 million range before trial,[15] the Plaintiffs would have recovered far less money by settling, than they ultimately recovered after the trial. Harold Rhodes testified that he invested the settlement amounts in low risk bonds, which have earned a maximum of 3.5% per annum. TT, Vol. X, p. 64.

[15] Plaintiffs's expert, Mr. Kiriakos, testified that his settlement range was $6-$8 million, TT, Vol. X, pp. 146, 173-77. He also testified that the estimated "potential case value" of $5 to $7 million contained in the Crawford reports from September 24, 2003 onward (Exhibits. 66J, 66K and 66L) was, "a reasonable range[.]" TT, Vol. XI, p. 73-74. Mr. Kiriakos contradicted the clear, unambiguous disclosure made by the Plaintiffs in the expert interrogatories, TT, Volume X, pp. 176-77, by testifying at trial (and disclosing for the first time) that his opinion as to the settlement value was limited to the Summer 2003 time frame. According to Mr. Kiriakos, in November 2003, $5 million would have been "a reasonable starting point[.]", although "a little lower" than he valued the case. TT, Vol. XI, pp. 74-75.

Thus, even assuming that the Rhodes had received $8 million in early February 2004, and invested it at 3.5%, by September 2005 (when all of the proceeds were received from the Defendants), the Plaintiffs would have earned an additional $443,333.34, for a total of $8,443,333.34. Assuming that the Rhodes had received $6 million in early February 2004, by September 2005, the Plaintiffs would have earned an additional $332,500.00, for a total of $6,332,500. If the parties had agreed upon a $5 million settlement in October 2003 (as noted above, Plaintiffs's expert admitted that a $5 million offer would have been reasonable in October 2003), then the Plaintiffs would have earned an additional $350,000 by September 2005, for a total of only $5,350,000.

By taking the case to verdict, however, and earning 12% per year in pre-judgment and post judgment interest, which resulted in a total judgment of approximately $12 million, the Plaintiffs ultimately recovered far more money than they would have if they had accepted a $5-8 million settlement. By September 2005, the Plaintiffs recovered $8,965,000 from AIGDC, see Exhibit 60, $2,322,996 from Zurich, see Exhibit 128, and $550,000 on behalf of McMillan's Professional Tree Service. TT, Vol. XI, p. 84. Thus, Plaintiffs's actual total recovery as of September 2005 was $11,837,996; ***approximately $3,394,663 to $6,487,996 more than the Plaintiffs would have recovered if the parties had reached a pre-trial settlement at amounts Mr. Rhodes and the Plaintiffs's own expert testified would have been reasonable***.

The Plaintiffs are not entitled to recover any economic damages, due to the economic benefit that the Plaintiffs received by taking the case to trial, rather than by settling.

C. The Plaintiffs May Not Recover In this Action the Costs Incurred in Litigating the Underlying Action; Nor May They Recover Any Post-Judgment Interest Related to the Accident Case

1. The Plaintiffs Have Waived Any Right to Recover Taxable Costs and Post-Judgment Interest in the Settlement of the Underlying Action

Following the verdict in the accident case, the Rhodes requested an award of costs, pursuant to G. L. c. 261 and Mass. R. Civ. P. 54. See Exhibit 229. In this motion, the Rhodes

sought reimbursement of $54,057.37 they incurred for filing fees, service of process, expert fees and deposition costs in the accident case. Id. This motion was never acted upon by the court, because, according to the testimony of attorney Pritzker, "the case settled before [the motion] could be decided[.]" TT, Vol. XVI, p. 24.

On June 20, 2005, the accident case settled. See Exhibit 60. Mr. Pritzker then wrote to AIGDC to, "confirm and memorialize the settlement between the Plaintiffs and the Defendants[.]" Id. According to this letter, the terms of the settlement were: (a) Plaintiffs would be paid $8,965,000 in three monthly installments; (b) Defendants would withdraw the appeal, with prejudice; (c) If the payments were made, then the Plaintiffs would file a Judgment Satisfied form, "thereby ending this case[;]" and (d) Plaintiffs's bad faith claims settlement claims were expressly excluded from the settlement. Id. Plaintiffs's counsel testified at trial that, as part of the settlement, the Plaintiffs "forewent" recovery of the underlying costs and the post-judgment interest that had by then accrued. Testimony of Pritzker, TT, Vol. XVI, p. 26.

After the settlement was consummated, Plaintiffs filed a Satisfaction of Judgment with the Court. The Plaintiffs acknowledged in this pleading that, "the judgments which entered after jury verdict on September 28, 2004 have been satisfied in full." Exhibit 221.

The Plaintiffs have waived their right to recover, as damages, in this action: (1) the costs that were at issue in their Motion for Costs; and (2) the post-judgment interest or other portions of the judgment in the accident case, because they agreed to settle the underlying case and filed a Satisfaction of Judgment. In consideration of this settlement agreement, AIGDC paid the Plaintiffs nearly $9 million and gave up its right to appeal the accident case judgment. The Plaintiffs affirmatively indicated that the judgment had been satisfied, "in full."

Waiver is the "intentional relinquishment of a known right." Normandin v. Eastland Partners, Inc., ____ Mass. Ct. App. ____, 2007 Mass. App. LEXIS 23, *21 (March 7, 2007) (quoting Niagara Fire Ins. Co. v. Lowell Trucking Corp., 316 Mass. 652, 657 (1944)); Dynamic Machine

Works, Inc. v. Machine & Electrical Consultants, Inc., 444 Mass. 768, 771 (2005). The Plaintiffs intentionally relinquished any right to recover the post-judgment interest and costs they "forewent," as part of the settlement of the accident case. They may not recover such amounts in this case.

2. The Plaintiffs Have Failed to Substantiate Their Costs or to Establish That the Costs Were Reasonable or Necessary

The Plaintiffs have not met their burden of proving that any of the costs were reasonable, necessary or recoverable from AIGDC.

First, the Plaintiffs cannot recover any costs, because they did not introduce any back-up documentation from which the Court could assess the reasonableness or necessity of the expenses.[16] Rather, the Plaintiffs produced only cost summaries. Exhibits 90 and 91. The court should disregard all of the purported costs because of the failure to support the summaries with the documents from which they were supposedly created. See Roberts v. Department of State Police for the Commonwealth of Massachusetts, 2002 Mass. Super. LEXIS 464, **10, 19 (September 26, 2002) (Houston, J.) (noting that request for fees should be reduced or denied if the prevailing party has not submitted "proper documentation in proper specific detail"; disallowing request for outside expenses not accompanied by "vendor documentation.").

As explained above, AIGDC is not liable for damages incurred before the tender of limits by Zurich. There has been no evidence introduced as to when the outside costs that are included in the costs summary, Exhibit 90, were incurred. The spreadsheet prepared by Brown Rudnick only indicates when Brown Rudnick paid the expenses. See Testimony of Pritzker, TT, Vol. XVI, p. 27. Janet Kelly, Brown Rudnick's billing coordinator, testified that the dates on the spreadsheet are the dates when Brown Rudnick, "actually cut the check to pay whatever the outside costs were." TT, Vol. XII, p. 76. She agreed that there is no way to tell from Exhibits 90 and 91, with

[16] Notably, although Pritzker said that he reviewed all of the costs before they were billed to the Rhodes, out of the well over 6,000 cost entries for which the Rhodes now seek recovery, he could not recall a single instance in which he disallowed any charge on the basis that it was excessive or was not reasonable or necessary. He only disallowed a few cost entries, because they were clearly charged to the wrong case. TT, Vol. XVI, pp. 20-22.

respect to outside costs, exactly when the costs were incurred. TT, Vol. XII, p. 78. For example, $4,200 was paid to Rampion Video Productions in April 2004 for services that were actually rendered in Spring 2003. Testimony of Pritzker, TT, Vol. XVI, p. 38. The Plaintiffs's failure to provide any back-up documentation for "outside" costs (i.e., all of the expenses, with the exception of in house copying and phone charges), precludes recovery of these costs, because it cannot be determined with any reasonable certainty when the costs were actually incurred.

Many of the costs for which recovery is sought are patently inappropriate and unreasonable, rendering all of the charges suspect. Courts generally disallow requests reimbursement for a law firm's overhead, "which, in turn, is subsumed within the fee structure of a firm's professionals and will not be reimbursed." In re Malden Mills Indus., Inc., 281 B.R. 493, 497 (Bankr. D. Mass. 2002). "Overhead" has been held to include routine office expenses, and clerical or ministerial functions, such as secretarial overtime and document production charges. Id. at 501; see also Stanford v. President and Fellows of Harvard College, 2001 Mass. Super. LEXIS 180, * 5 (March 21, 2001) (Cratsley, J.) ("Consistent with the practice of some trial judges, costs for items that should be absorbed as overhead in an attorney's hourly rate are not compensable.[17] Thus, ***all costs for photocopying, postage, telephone charges, faxes, legal research, travel and expedited delivery are excluded.***") (emphasis added); Rolland v. Cellucci, 106 F. Supp. 2d 128, 145 (D. Mass. 2000) (Court disallowed request for expenses which, "are part of an organization's overhead," including document assembly; telephone calls; travel, transportation and parking; supplies; postage and mail delivery; facsimile use; computerized research; meals and conferences; and in-house copying).

[17] It should be of no significance that, in this case, Brown Rudnick took the accident case on a contingency, rather than charging on an hourly basis. Brown Rudnick took little risk (given that the case was a "rear ender" with serious injuries) and it charged a nearly $4 million fee (on top of the costs) for a motor vehicle accident case, in which only damages were disputed by the time of trial. The fee Brown Rudnick collected almost certainly dwarfed what it would have charged on an hourly basis, even at that firm's normal rates.

In Roberts v. Department of State Police for the Commonwealth of Massachusetts, 2002 Mass. Super. LEXIS 464, **16-20 (Mass. Super Ct. September 26, 2002), Judge Houston discussed in detail what types of costs may not properly be recovered:

> General and Administrative Expenses
>
> Attorney Nissenbaum requests "General and Administrative" expenses in the amount of $3,134.46 for time expended in the civil action and $428.00 for time expended in the Internal Affairs cases. The calculation of this fee is based on a percentage of the total cost of the hours billed. This fee is meant to cover unitemized long distance telephone costs, postage and excess postage, in-house photocopying and in-town hand delivered packages, highway tolls, local travel, cabs, meals and other miscellaneous expenses. The fee is also supposed to cover overtime by secretaries.
>
> Though the Court recognizes that this system simplifies Attorney Nissenbaum's bookkeeping and is further willing to accept his representation that the fee historically only covers half to three quarters of his expenses, it is not acceptable in the fee-shifting context. First, ***many of the costs covered by the fee are overhead that the Court presumes are included in an attorney's hourly rate, such as administrative support staff and in-house photocopying.*** See Kuzma v. IRS, 821 F.2d 930, 933-34 (2d Cir. 1987) (distinguishing "identifiable out-of-pocket disbursements for items such as photocopying, travel and telephone costs" from "non-recoverable routine office overhead, which must normally be absorbed with the attorney's hourly rate"). ***Second, the out-of-pocket expenses that could be reimbursed, such as postage and tolls, cannot be reimbursed without documentation.*** To be reimbursable, fees incurred during litigation must be identifiable. Alfonso v. Aufiero, 66 F. Supp. 2d 183, 201 (D.Mass. 1999) (citing, Le Blanc Sternberg v. Fletcher, 143 F.3d 748, 763 (2d Cir. 1998) for the proposition that only identifiable out-of-pocket expenses can be reimbursed). The General and Administrative Fee request is denied due to lack of substantiation and specificity.
>
> Faxes
>
> Attorney Nissenbaum requests $165.50 for faxes at a rate of **fifty cents per page.**[18] ***In-house local faxing falls into the same category of overhead as analyzed above and is not reimbursable, as it is presumed by the Court to be included in an attorney's professional fee.*** This request is disallowed. Additionally, even if the faxing was an out-of-pocket expense, reimbursement would not be allowed without documentation of the expenditure and a thorough analysis of the reasonableness of the charges incurred.
>
> Federal Express
>
> Attorney Nissenbaum requests $212.12 for Federal Express expenses. Reasonable postage is reimbursable as cost of litigation beyond the in-house expenses presumed to be part of overhead. Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995) (postage and outside photocopies are reimbursable); Aston v. Secretary of Health and Human Servs., 808 F.2d 9, 12 (2d Cir. 1986) (postage is reimbursable). ***The Court would normally review the invoices and/or receipts***

[18] By contrast, Brown Rudnick charged $1.25 per page for faxes. Testimony of Pritzker, TT, Vol. XVI, p. 16.

> ***from the expenses incurred to verify the expenditures and their nature and purpose.*** Attorney Nissenbaum has not included any documentation regarding the Federal Express expenses . . . ***Without vendor documentation, the Court in its discretion disallows this request.***

Most of the costs, for which Plaintiffs seek recovery in this case, constitute unreimbursable overhead, and all of the costs lack any requisite documentation. For example, the charges for Mr. Pritzker's cell phone use are part of "overhead," and, in any event, these charges are not reasonable, necessary, or properly chargeable as damages in this matter. Mr. Pritzker testified that, after identifying the specific calls that were related to the Rhodes matter (such as calls to and from the Rhodes), he, "took the time to determine for that month what portion of my time was spent on any particular matter, and I apportioned the cell phone costs appropriately." TT, Vol. XVI, pp. 29-30. This manner of allocation is inappropriate and unreasonable. In addition, Brown Rudnick did not provide any back-up documentation from which the accuracy of this method of allocation could be verified. Moreover, Mr. Pritzker could not even testify for certain that the costs billed to the Rhodes for in-house telephone calls did not include a profit component, "because over the period of time we had different plans with different telephone vendors. Some of those were on a flat basis, and yet I believe that the computer was set up to charge, at least for a period of time, on what the Bell rates were, Bell telephone rates were for long-distance calls, and there may have been a profit there." TT, Vol. XVI, pp. 47-48.

In addition, the copying costs that were billed to the Rhodes matter are also part of the Brown Rudnick firm's overhead, and in any event, they are excessive. According to Mr. Pritzker, the 20 cents per page cost for in-house copying was, "determined by our accounting department, taking into account both what other firms in the city were charging at the time, the cost for the actual copying, and an overhead factor, because our copying center is used." TT, Vol. XVI, pp. 31-32. Significantly, the actual copying cost is only one of three factors that went into calculation of the copying rate. Similarly, it is inappropriate to include firm overhead costs in the amount charged to clients for electronic research services. Id. The amounts billed to the Rhodes for

secretarial overtime, id. at p. 35, also constitute firm overhead, and are not a properly reimbursable expense. See Eli Lilly and Co. v. Zenith Goldline Pharmaceuticals, Inc., 264 F. Supp. 2d 753, 763 (S.D. Ind. 2003) (disallowing request for secretarial overtime expenses because a "lawyer's rates are expected to include compensation for required administrative and secretarial help.").

The Rhodes seek recovery for the utilization of courier services to hand deliver documents to opposing counsel. It is apparent that, in this case, as in the Eli Lilly case, hand delivery was, "the preferred method of communication. . . . There was nothing urgent about matters in this case that would justify shifting the costs of [hand deliveries]. . . . The use of the express courier services might have been a convenience to lawyers who were cutting their deadlines closely, but there is no reason to justify shifting that cost to the opposing party beyond what was reasonably necessary for the case. Absent some evidence as to why these particular deliveries were urgent, the court should disallow these costs." Eli Lilly, 264 F. Supp. 2d at 779. Likewise, it is not appropriate for the Rhodes to seek as damages in the case the cost of overnight mail packages sent to Mr. Pritzker's Florida home. See Testimony of Pritzker, TT, Vol. XVI, pp. 41-42.

Finally, and perhaps most outrageously, Plaintiffs are seeking compensation for the nearly $3,000 cost of renting a conference room in a hotel in Dedham for the duration of the accident case trial, for use as a "war room." Testimony of Pritzker, TT, Vol. XVI, pp. 31-32. There was simply no reasonable reason why a conference room had to be rented for use during trial, especially considering that the trial only focused on damages, and the Plaintiffs have failed to introduce any evidence to explain why it was reasonable or necessary to do so.

For the foregoing reasons, the request for costs should be denied in their entirety.

3. Plaintiffs Are Foreclosed from Recovering Any Actual Damages, Because They Did Not Mention Any of These Elements of Damage in Their Chapter 93A Demand Letters

Plaintiffs' Chapter 93A Demand Letters, Exhibits 51 and 55, did not allege any of the categories of "actual damages" that they are now seeking, i.e., damages for emotional distress,

litigation costs, and forgone portions of the judgment (in fact, the demand letters were written well before the Plaintiffs settled the accident case). Rather, these demand letters reference only the potential of double or treble the underlying judgment as damages. Therefore, Plaintiffs may not now recover for emotional distress, litigation costs, and forgone portions of the judgment, because they failed to reasonably describe, in their Chapter 93A demand letters, the damages for which they are now seeking recovery.

It is a prerequisite to recovery under Chapter 93A §9 that, at least 30 days before filing suit, the claimant must have sent the defendant a demand letter, setting forth the factual basis for the claimed violation of Chapter 93A and the asserted damages. The statute provides that a demand letter must, "reasonably describe the unfair or deceptive act or practice relied upon **and the injury suffered**." G.L. c. 93A §9(3) (emphasis added).

Failure to properly identify in the demand letter the nature of the damages being sought precludes the later recovery of such damages in a subsequent Chapter 93A lawsuit. See, e.g., Dolan v. Utica Mut. Ins. Co., 1987 U.S. Dist. LEXIS 2845 *2-3 (D. Mass. March 23, 1987) ("The terms of the statute require that the [demand] letter be one reasonably describing the unfair or deceptive act or practice relied upon by the plaintiff. The claims outlined in the demand letter limit the c. 93A claims that may be made in court. The test for adequate specificity of a c. 93A demand letter is whether the letter reasonably describes the deceptive acts relied on, and is sufficient to give the defendant an opportunity to review the facts and the law involved to see if the requested relief should be granted or denied and to enable the defendant to make a reasonable tender of settlement in order to limit the recoverable damages.) (internal citations and punctuation omitted); Simas v. House of Cabinets, Inc., 51 Mass. App. Ct. 131(2001) ("An adequate demand letter will define the injury suffered and the relief demanded in a manner that provides the prospective defendant with an opportunity to review the facts and the law involved to see if the requested relief should be granted or denied and enables him to make a reasonable tender of settlement.") (internal

citations and punctuation omitted); Logan v. Arbella Mut. Ins. Co., 1998 Mass. Super. LEXIS 94 (Mass. Super. Ct. June 15, 1998) (demand letter inadequate because it did not indicate what specific injuries were allegedly suffered); Tallent v Liberty Mut. Ins. Co., 2005 WL 1239284, at *26 (Mass. Super. Ct. April 22, 2005) ("Any relief that is not set out in the demand letter cannot be granted."); Thorpe v. Mutual of Omaha Ins. Co., 984 F.2d 541 (1st Cir. 1993); Clegg v. Butler, 424 Mass. 413, 423 (1997) ("Separate relief on actions not so mentioned is foreclosed as a matter of law."); Bressel v. Jolicoeur, 34 Mass. App. Ct. 205,211 (1993) (same).

D. The Plaintiffs Cannot Recover under Chapter 93A for Emotional Distress for the Mere "Stress and Frustrations of Litigation"

1. The Plaintiffs Have Failed to Prove Intentional, or Even Negligent, Infliction of Emotional Distress, and Therefore They Cannot Be Awarded Damages for Emotional Distress

The Plaintiffs have urged the Court to award them emotional distress damages for the "stresses and frustrations of litigation." They argue that such emotional distress damages constitute a "foreseeable non-economic loss" under Chapter 93A. Not a single Massachusetts case, however, has ever awarded a plaintiff damages for emotional distress for the stress and frustration of litigation. Even though emotional distress is a compensable "injury" under Chapter 93A §9 under some circumstances, in Massachusetts, plaintiffs cannot meet their burden of proof for recovering emotional distress damages, whether in a Chapter 93A claim or otherwise, unless they prove either intentional infliction of emotional distress (or perhaps some other intentional tort); or "physical harm manifested by objective symptomatology," as a result of their emotional distress. See Payton v. Abbott Labs, 386 Mass. 540, 547 (1982).

The Plaintiffs have neither alleged nor proven that they suffered any objective symptoms as a result of emotional distress. Indeed, to prove a claim for negligent emotional distress, a plaintiff, "must do more than allege 'mere upset, dismay, humiliation, grief and anger.'" Gutierrez v. Massachusetts Bay Transportation Authority, 437 Mass. 396, 412 (2002), quoting Sullivan v.

Boston Gas Co., 414 Mass. 129, 137 (1993). Instead, a plaintiff must present evidence of more concrete physical or mental suffering.

None of the Plaintiffs is alleging negligent infliction of emotional distress. Rebecca Rhodes stipulated that she did not suffer any physical symptoms of emotional distress as a result of anything defendants did or failed to do. See Exhibit 201. Harold Rhodes testified that he is not seeking recovery for any physical manifestations of emotional distress. See TT, Vol. X, p. 21. Marcia Rhodes did not testify that she suffered any physical manifestations of emotional distress.

Nor have any of the Plaintiffs pled or proven intentional infliction of emotional distress. In Haddad v. Gonzales, 410 Mass. 855 (1991), the Supreme Judicial Court, for the first time, addressed whether damages for emotional distress are recoverable under Chapter 93A. There, the court affirmed the Plaintiff's recovery of emotional distress damages under Chapter 93A, where the Plaintiff proved all the elements of intentional infliction of emotional distress. Specifically, the Plaintiff presented evidence that her landlord had, in addition to keeping her apartment in a deplorable condition, harassed her, screamed at her, threatened to "buy" the judge, threatened to have her sent back to Puerto Rico and made lewd comments to her. Id. at 856-857.

Significantly, although the Plaintiff in Haddad pled (in addition to her cause of action under Chapter 93A), a separate cause of action for common law intentional infliction of emotional distress, the specific question addressed by the Supreme Judicial Court in the Haddad case was whether the plaintiff could recover emotional distress damages *as part of her Chapter 93A claim.* The Court did not consider whether the Plaintiff could recover damages under her common law intentional infliction of emotional distress claim. This is made clear by the fact that the Court's analysis, concerning the propriety of awarding emotional distress damages, appeared under the heading: "*Recovery for intentional infliction of emotional distress under G. L. c. 93A, §9.*" Id. at 864. The Court observed that, "[b]ecause severe emotional distress is a form of personal injury, it would seem to follow that it also is compensable under §9, if the injury is the product of a violation of G.L.

c. 93A §2." Id. at 865 (internal citation omitted). The court then held that, "[p]laintiffs 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." Id. at 869. Since the Plaintiff in Haddad carried this burden of proof, the court concluded that, "[t]he [trial] judge therefore correctly awarded [her] damages *under c. 93A* for her emotional distress." Id. at 872 (emphasis added). See also, Hart v. GMAC Mortgage Corp., 246 B.R. 709, 736(D. Mass. 2000) ("The court has found no case in which a plaintiff has recovered emotional distress damages under c. 93A in the absence of proof of intentional infliction of emotional distress.").

Thus, as indicated by the SJC in Haddad, in all Chapter 93A cases, a plaintiff must prove all the elements of intentional infliction of emotional distress in order to recover emotional distress damages. The Rhodes have made the nonsensical argument that Haddad only requires a plaintiff to prove intentional infliction of emotional distress in a Chapter 93A case if a common law cause of action for intentional infliction of emotional distress is asserted in conjunction with the Chapter 93A claim. This is plainly *not* what the Court in Haddad meant, given that the Court did not even deal with the Plaintiff's common law claim for intentional infliction of emotional distress. Rather, the Haddad Court was clearly concerned with the Plaintiff's burden of proof for emotional distress *as a compensable injury under Chapter 93A*. The Plaintiffs's argument, that a plaintiff has to prove intentional infliction of emotional distress when the plaintiff is alleging both common law intentional infliction of emotional distress and is seeking recovery under Chapter 93A for emotional distress, but a plaintiff does not have to prove intentional infliction of emotional distress when the plaintiff is only seeking recovery of Chapter 93A emotional distress damages and is not alleging common law intentional infliction of emotional distress, is absurd. That would mean that a plaintiff would have a different and higher burden of proof for recovery of emotional distress damages when the defendant is expressly alleging infliction of severe emotional distress on the plaintiff, than when the

plaintiff is not alleging such egregious behavior on the part of the defendant, but is instead alleging a routine Chapter 93A violation.

Within the past year, the Appellate Division of the District Court addressed a plaintiff's burden of proof for emotional distress damages under Chapter 93A, in dicta, in Anderson v. Brake King Automotive, Inc., 2006 Mass. App. Div. 15, 17-18 (2006). In that case, the Plaintiff sought recovery for breach of contract, negligence, breach of warranty, and Chapter 93A violations, as a result of a dispute involving the repair of her vehicle. She did not claim any damages for common law emotional distress. Rather, she only sought damages for emotional distress under her Chapter 93A cause of action. The Plaintiff appealed the trial court's exclusion of her evidence of emotional distress, arguing that she was entitled to an award for emotional distress as consequential damages for the Defendant's Chapter 93A violations. The Court first found that the Defendant did not violate Chapter 93A, and as such, held that there could be no award for damages under Chapter 93A. But then, the Court went on to explain that, even if there had been a violation of Chapter 93A, the Plaintiff could not recover any damages, because she had failed to: (1) prove 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.

The public policy rationale for requiring a plaintiff to prove intentional—or in the very least, negligent—infliction of emotional distress causing physical harm, in order to recover emotional distress damages, was explained by the Supreme Judicial Court in Payton. In that case, the Court emphasized that proof of physical harm is required in negligent infliction of emotional distress cases because, without physical harm, emotional distress is, "likely to be 'so temporary, so evanescent and so relatively harmless,' that the task of compensating for it would unduly burden defendants and the courts." Id. at 552 (internal citation omitted). The Court also noted that, "[a] plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer emotional distress . . . It is in recognition of the tricks that the human mind can play

upon itself . . . that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress." Payton, 386 Mass. at 547. The Court in Payton also noted that recovery for intentional infliction of emotional distress requires proof that, among other things, "the defendant's conduct was extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized community." Id. at 555. Over the years, the Supreme Judicial Court has continued to insist on these standards of proof, even while recognizing that other states have lowered or eliminated the plaintiff's burden to prove physical harm in a negligent infliction of emotional distress case. See, e.g., Sullivan, 414 Mass. at 132-140 (1993). Accordingly, there is simply basis for this Court to apply a lesser standard of proof for emotional distress damages, merely because the emotional distress claim has arisen in the context of an alleged Chapter 93A violation. No other Massachusetts Court has done this, and it would be improper for this court to do so here.

First Agricultural Bank v. Cappuccino of the Berkshires, Inc., 1986 Mass. App. Div. 110 (1986), upon which Plaintiffs heavily rely, actually provides them with no assistance. That case was a decision of the Appellate Division of the District Court that was written long before Haddad and more than 20 years before Hershenow and Anderson. Even more significantly, in the First Agricultural Bank case, the Plaintiff was only allowed to recover for emotional distress under Chapter 93A because she demonstrated that the Defendant had committed an independent intentional tort–abuse of process. In the present case, the Rhodes have not pled or alleged, much less proven, that Defendants committed any independent intentional tort.

The Rhodes case is a perfect example of why the courts have required substantial proof of emotional distress. The evidence in this case is based purely on the testimony of the Plaintiffs themselves and a few others who supposedly observed the Plaintiffs's facial expressions and tone of voice and concluded that they were suffering from stress and anxiety as a result of the alleged wrongful failure to settle the accident case. They have presented no medical testimony to support

their emotional distress claims and, as stated above, they are not claiming they suffered any physical symptoms as a result of the emotional distress. The Plaintiffs have not alleged, nor have they presented, any evidence that AIGDC's conduct was, "extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized community." Moreover, the actual testimony of the Plaintiffs establishes only that, during the time that Mrs. Rhodes was learning to endure paraplegia and undergoing resulting medical setbacks, and Mr. Rhodes was learning to care for his wife and handle all of the new responsibilities associated with being the spouse of a paraplegic, the Rhodes were frustrated and angry, ostensibly primarily as a result of having to go to trial in the accident case. This is obviously the kind of subjective, inherently unverifiable and insubstantial evidence that the Supreme Judicial Court has decided may not provide a basis for an award of emotional distress damages.

Specifically, Mrs. Rhodes testified that she left all of the details of the lawsuit to Mr. Rhodes and her lawyers, see TT, Vol. VI, p. 73, and she was not actively involved in the accident case in any way, except for answering interrogatories, testifying at a deposition and at the trial and submitting to an Independent Medical Exam. TT, Vol. VI, p. 93. Nonetheless, she claimed that she felt general "anger," "disbelief," "shock" and stress at the prospect of going through trial. TT, Vol. VI, pp. 101, 103. She also felt disbelief, discomfort, and embarrassment at having to answer interrogatories in the underlying case, TT, Vol. VI, p. 76, and embarrassment and anger over having to submit to an IME. TT , Vol VI, pp. 83- 87. Additionally, she felt disbelief and anger about being deposed because she felt that the accident was a "no-brainer" and she should not have to answer questions that the defense counsel "already knew the answers to." TT , Vol. VI, pp. 89-90. She felt anxiety and embarrassment when she testified at trial because she doesn't like to be the "center of attention" and she was worried that she would "screw up the case." TT , Vol. VI, p.107. Finally, she felt "total disbelief" and "horror" when AIGDC filed an appeal, because she thought a

verdict would mean she would be paid immediately and because, again, the case was a "rear-ender" and there was "no doubt about what happened." TT, Vol. VI, pp. 113-114.

This is precisely the type of testimony the Supreme Judicial Court has ruled is insufficiently objective to provide a basis for emotional distress damages recovery, quite like the "mere upset, dismay, humiliation, grief and anger," that was referred to by the Supreme Judicial Court in Gutierrez.

Moreover, Mrs. Rhodes's anger, disbelief and embarrassment were not reasonable under the circumstances. See Sullivan, 414 Mass. at 132 (holding that one element of proof for an emotional distress claim is that "a reasonable person would have suffered emotional distress under the circumstances of the case."). It is simply not reasonable for a plaintiff to a personal injury action that she filed to expect that she should not have to answer interrogatories, be deposed, or submit to an independent medical examination. Also, Mrs. Rhodes's expectation that the case should have been settled at mediation solely because it was a "rear-ender" and thus a "no-brainer" was clearly not reasonable. Mrs. Rhodes apparently had no understanding that a plaintiff's damages must be substantiated before any settlement offer must be made by an insurer, and, even then, it is perfectly legitimate for an insurer to negotiate over the amount of damages. See Bobick, 439 Mass. at 659, 661-662 ("USF&G was not required to put a fair and reasonable offer on the table until liability and damages were apparent. . . . 'Negotiating a settlement, particularly when the damages are unliquidated is, to an extent, a legitimate bargaining process.'") (quoting Forcucci v. United States Fid. & Guar. Co., 11 F.3d 1, 2 (1st Cir. 1993)). Accordingly, the anger and disbelief that Mrs. Rhodes felt as a result of her irrational expectations cannot be compensated in an emotional distress claim.

Similarly, Mrs. Rhodes's failure to understand that evidentiary issues (related to her testimony about emotional distress suffered as a result of the accident), created a basis for post-trial motions and the filing of a notice of appeals, simply is not reasonable. The Plaintiffs have presented no evidence, expert or otherwise, that the appeal was without merit. Significantly, Mrs. Rhodes was

not angry about the *reason* for AIGDC'S appeal; she was merely angry that she did not receive the proceeds from the verdict immediately upon the announcement of the verdict. Any such distress, resulting from her plainly irrational expectations, is insufficient to support a claim for emotional distress.

Rebecca Rhodes gave similar nebulous, vague and subjective testimony regarding her alleged emotional distress. She was "worried" about the stress on her mother and father. TT, Vol. V, pp. 118-119. She was "a little nervous" about her father's alleged anxiety about the lawsuit, TT, Vol. V., p. 122; as trial came closer, she was "a little more nervous." TT, Vol. V, pp.123-124. On the witness stand, she was "a little sad" and "very nervous," because she did not want to hurt her parents' feelings and because she was asked personal questions. TT, Vol. V, p.135-137.[19] She cried on the witness stand. TT , Vol. V, p.137. Finally, the appeal made her "afraid" that she would have to go back to court and testify. TT, Vol. V, p.143. None of this testimony evidences the kind of emotional distress that could be compensable in Massachusetts. As the Supreme Judicial Court explained in Gutierrez, 437 Mass. at 413, tears clearly are not the type of objective evidence that can support an emotional distress award.

Moreover, Rebecca Rhodes cannot recover for the "stress and frustrations of litigation," because she was not even aware that she was a party in the underlying case until well after it was resolved. She did not find out that she was a Plaintiff in the underlying case until she turned 18 in April 2006, almost one year after the accident case settled. TT, Vol. V, p. 145. She said that her stress over the accident case resulted from concern about the effect of the case on her mother and her concern about having to testify as a witness. TT, Vol. V, pp. 145-146. A person who does not know that they are a party to litigation, cannot logically suffer emotional distress as a result of the stress and frustration of having to litigate a case. If Rebecca were allowed to recover emotional distress damages here, then any witness in a case, or any relative of a party to a case, could

[19] Rebecca testified that the questions that she was asked at trial that upset her were asked by her own attorney and defense counsel only asked her about 24 or 25 questions. TT, Vol. V, pp.147, 153.

recover emotional distress damages in a Chapter 93A case. There clearly is no authority that would support such an expansive proposition.

The testimony about Harold Rhodes's alleged emotional distress was not any more concrete or objective than that of Mrs. Rhodes or Rebecca. By the end of 2003 (within one month after AIGDC received Plaintiffs's demand package), Mr. Rhodes was "completely angry" and "mortified" that the case had not settled, because he thought the case was a "no-brainer." TT, Vol. IX, pp. 113-114. He felt "anxious" when the case did not settle directly after Mr. Zalewski's guilty plea, which took place in November 2002. See Exhibit 51, p. 2; TT, Vol. IX, p.112. He was "insulted" and "very angry" about Zurich's initial $2 million policy limits offer, and was "outraged" by AIGDC's offers at mediation. TT, Vol. IX, pp. 98-100. He was "angry" when he listened to the defendant's life care planner testify that there was no need for certain home renovations, TT, Vol. IX, p.126, even though these renovations had actually been completed long before the accident trial began. See Exhibit 71, Accident Case Trial Transcript, Vol. VI, pp. 99-101, 114-118. None of this testimony shows that Harold Rhodes suffered anything more than mere upset and anger, and thus it does not meet the burden of proof required for emotional distress claims.

Like his wife, Mr. Rhodes became distressed because his *entirely unreasonable* expectations were not being met. His expectation that the case would be settled by the end of 2002, and his resulting anger that this expectation had not been met, were clearly not reasonable. It took his lawyers one and one-half years after the accident to even put together a demand package, partly because they had initially told the accident case Defendants that Mrs. Rhodes's medical bills were three times what they actually were. See Testimony of Johanna Mills, TT, Vol. II, pp. 80-81. Nonetheless, Mr. Rhodes felt that the Defendants should have settled the accident case even before receiving any demand or medical documentation or conducting any discovery, because the case was a "no-brainer," since Mr. Zalewski had pled guilty. However, Mr. Rhodes's own testimony belies the logic of such thinking. For instance, he admitted that he knew that the amount of damages a

jury may find, even in a case where liability had been admitted, could vary widely, TT, Vol. X, p.15, could have been less than $5 million, and indeed it could have been anything. TT, Vol. X, p.59. He also agreed that pain and suffering and loss of consortium damages are very subjective and difficult to quantify. TT, Vol. IX, pp.136-138. In addition, he admitted that AIGDC's desire to conduct an IME before settling the case was reasonable. TT, Vol. IX, p.138. Thus, Mr. Rhodes obviously understood that settlement requires a meeting of the minds as to the value of a case and requires much more analysis than simply acknowledging that the other driver was at fault. While his stated expectation that AIGDC should have just handed over a settlement check (in an amount of at least than $8 million), merely because Mr. Zalewski had pled guilty, is not particularly credible, it is patently unreasonable. Consequently, any distress that Mr. Rhodes suffered as a result of AIGDC's failure to meet his expectations is not compensable. (In any event, as explained above, AIGDC cannot be liable for any damages suffered by any of the Plaintiffs prior to the time Zurich tendered the primary policy limits to AIGDC.).

Likewise, Mr. Rhodes's alleged distress over the fact that AIGDC filed an appeal after the jury verdict is not reasonable. Mr. Rhodes is a businessman with very distinguished credentials. No reasonable person with his education and experience could claim astonishment at the idea that a jury verdict can be, and often is, appealed.

2. The Plaintiffs's Alleged Distress Concerning Their Financial Situation Is Not Compensable, Because it Was Not Reasonable

None of the Plaintiffs is entitled to recover emotional distress damages resulting from their alleged anxiety over their financial situation, because their purported distress over their financial situation was not reasonable. Mrs. Rhodes and Rebecca admittedly had no real understanding of the family's finances. TT, Vol. VI, pp. 131-132. Neither of them knew even when any of the accident case settlement money was actually paid, TT, Vol. V, p. 145; Vol. VI, pp. 135-136, and Mrs. Rhodes did not know what amounts she received in settlement. TT, Vol. VI, p.134.

Likewise, Harold Rhodes has failed to prove that his distress as a result of purported financial concerns was reasonable. Mr. Rhodes testified that he was "scared to death" in August 2004, because he had only $167,000 in "liquid assets" (not including his home value [$470,000 in equity alone], personal property or retirement accounts). TT, Vol. IX, p.122. However, as of August 2004, his total net worth was $899,842, and this did not even include the family's share of the $550,000 tree service settlement, which had been reached at the August 11, 2004 mediation and was paid in September 2004. TT, Vol. X, pp. 28-31. Moreover, except for the basement renovations, which were ongoing by August 2004 (Mr. Rhodes could not recall whether they had been paid for by the end of August 2004); the major out-of-pocket expenses the Rhodes incurred as a result of the accident (the home renovations and the purchase of a handicapped equipped van) had already been paid well before August 2004. TT, Vol. X, pp. 35-39. In the more than two and one half years since the accident, all other out of pocket expenses the Rhodes had incurred (mostly home health aide costs) had totaled about $126,000 to $127,000, which was less than the Rhodes's net from the tree service settlement alone, even after they settled the health insurance lien and paid the attorney's fees on the tree service settlement. TT Vol. X, p.39.

Moreover, by December 2004, the Rhodes had received an additional $2,322,996 from Zurich, TT, Vol. IX, p.107, which was more than the present value of Mrs. Rhodes's entire life care plan (the vast majority of which was covered by the Rhodes's health insurance anyway). TT, Vol. X, p. 56, 32. According to the Rhodes's own expert, the present value of the life care plan was approximately $1.4-$1.9 million, depending on Mrs. Rhodes's life expectancy. TT, Vol. X, p.56. Furthermore, by September 2004, Mr. Rhodes had a full time job, so he had a source of income. TT, Vol. X, p. 42.

In addition, by early April 2004, Mr. Rhodes knew that the trial of the accident case was scheduled to take place in September 2004, and by August 2004 he knew that knew that liability had been stipulated to in the accident case and that the family would be compensated for whatever

amount of damages they were entitled to collect. TT, Vol. X, pp.54-55. Accordingly, no reasonable person in Mr. Rhodes's situation would have been especially anxious about his financial situation from any time from April 2004 onward.

3. The Plaintiffs Are not Entitled to Recover Any Emotional Distress Damages Resulting From the "Day in the Life" Video

All three of the Plaintiffs repeatedly emphasized in their testimony the distress that they allegedly suffered in connection with the "day in the life" video, that was produced by the Plaintiffs's own attorneys. Stephen Rhodes said that this was the "low point" for Mr. Rhodes. TT Vol. V, p. 24. Yet, it was the Plaintiffs who themselves had the day in the life video made, in order to buttress their damage claims, and they made the decision to play it at the accident trial. See Testimony of Carlotta Patton, TT, Vol. VI, pp. 27-29. A day in the life video is not required as part of the litigation process and was not requested by the Defendants to the accident case or by AIGDC (or Zurich). In fact, the video was produced in early 2003, long before AIGDC could possibly have had any duty to make a settlement offer.

The decision to make the video, play it at trial and to put the family through the accompanying discomfort, was purely a strategy decision on the part of the Plaintiffs's attorneys, and, consequently, the Plaintiffs cannot show that any distress related to the video was "caused" by the defendants, as is required in order to prove damages under Chapter 93A.

4. The Plaintiffs Cannot Meet Their Burden of Proving That They Suffered Compensable Emotional Distress as a Result of the Defendants's Actions

The Rhodes have the burden of proving that, in addition to the distress they were suffering as a result of Mrs. Rhodes's injury, they were also suffering *separately* from distress caused by the AIGDC's actions, and that this separate and simultaneous distress allegedly caused by the AIGDC was sufficiently severe to constitute an actionable claim for emotional distress under Chapter 93A. The hurdles that this burden of proof present to the Plaintiffs's case is insurmountable. How can

the Plaintiffs establish, for instance, that it is more likely than not that their anxiety, anger, upset, etc., was caused solely by the actions of the Defendants? And how can they prove that they are not now looking back on that distress through a different lens (a Chapter 93A lens) and consciously or unconsciously re-characterizing the distress as having been caused by the Defendants? It is precisely this type of conundrum that the Supreme Judicial Court was referring to in Payton: "A plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer emotional distress. . . . It is in recognition of the tricks that the human mind can play upon itself . . . that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress." Id. at 547.

E. AIGDC Cannot Be Held Jointly and Severally Liable for Alleged Injuries That It Did Not Concurrently Cause

It is well settled that co-defendants can only be held jointly and severally liable for injuries caused by their concurrent conduct. O'Connor v. Raymark Indus., Inc., 401 Mass. 586, 591 (1988) ("We have said before, and we repeat, 'that if two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable.'"), (quoting Chase v. Roy, 363 Mass. 402, 408 (1973); see also, Bajowski v. Sysco Corp., 115 F. Supp.2d 133, 138 (D. Mass. 2000) ("Here, the acts of the Defendants were not "concurrent"--they were thirteen days apart.").

Clearly, AIGDC had no duty to attempt to effectuate settlement *before* Zurich tendered its primary liability limit. At trial, Zurich's claims adjuster, Ms. Fuell, testified that she first received authority from her supervisor to make the Zurich policy limits available to AIGDC on January 23, 2004, and that she communicated this information to Mr. Satriano by telephone either that same day or the following day. See TT, Vol. IV, pp. 89-90. She also testified that Mr. Satriano responded to the information by indicating the he did not view it as a formal tender of the liability limits, because

unresolved questions remained as to who would be responsible for paying future defense costs. Id. at p. 90. Ms. Fuell testified that she replied by indicating that Mr. Satriano had made a good point, for which she had no answer, and that she would research the question and provide him with a formal response. Id.

Ms. Fuell testified that the next time she and Mr. Satriano communicated was on February 13, 2004. Id. at p. 91. On that day, Mr. Satriano reiterated that any tender would have to be by formal writing. See Exhibit 30. When asked why he wouldn't consider the Zurich policy limit to be available for purposes of making settlement offers until after he received a formal written tender, Mr. Satriano explained that he was concerned that AIGDC's use of the Zurich policy limit might be misconstrued as an agreement to assume the defense obligation, which Satriano suspected Zurich was going to attempt to tender. See TT, Vol. IX, p. 72.

AIGDC's claims handling expert testified that, under such circumstances, AIGDC's requirement that Zurich make its tender by a formal writing fully comported with standard industry custom and practice:

> Q Do you have an opinion as to whether AIG acted in accordance with the standard industry custom and practice when it requested Zurich to provide a written tender?
>
> A Yes.
>
> Q And what's your opinion?
>
> A. That's acceptable practice.
>
> Q What's the basis for your opinion?
>
> A. It was not clear as to what was entailed in that tender; were they actually asking AIG to take over the defense that Zurich had been conducting. We see later on that when Zurich did write, and did write a letter tendering their limits, they also said that they had no duty to defend, and basically that AIG would have to defend.

See Testimony of Cormack, TT, Vol. XII, p. 155; see also Exhibit 33 (Zurich's formal written tender, dated March 29, 2004 (providing that, "Zurich . . . transfers its defense obligations of all insured and additional insured to AIG . . . .").

In addition, Plaintiffs's own claims handling expert, Mr. Kiriakos, also testified that tender should be made by formal writing:

> Q Now let's go to one of your other opinions in the case. And this opinion number four in your expert report. And it says: Within the insurance industry, the primary carrier has a duty to formally tender its policy limits to the excess carrier in writing. Right?
>
> A Yes, sir.
>
> Q That's still your opinion?
>
> A Yes, it is.
>
> Q And now the reason for that is because when there is a tender both the primary insurer and the excess insurer have to have a complete understanding of exactly what's being tendered, right?
>
> A Yes, sir.
>
> Q And that's because you can tender policy limits?
>
> A Yes, sir.
>
> Q A primary insurer can. And a primary insurer – and also in some instances can try and tender its defense to the excess carrier. In other words, say: Take over the defense of the case, right?
>
> A Yes, they can.

See TT, Vol. XI, pp. 64-65.

On April 2, 2004, Zurich clarified in writing that it would continue to defend GAF, despite the fact that its policy did not require it to do so, and although it had previously demanded that AIGDC assume the defense. Testimony of Kathleen Fuell, TT, Vol. IV, pp. 95-96. Only then could AIGDC be certain what was being tendered by Zurich. Because no basis exists for finding that AIGDC concurrently contributed to any failure to effectuate settlement prior to April 2004, similarly no basis

exists for finding AIGDC jointly and severally liable for any injuries allegedly sustained before that time.

F. Plaintiffs Cannot Recover Multiple Damages Because There Certainly Was Not Any Willful or Knowing Violation of Chapter 93A by AIGDC

1. A Finding of a Willful or Knowing Violation of Chapter 93A Requires a Purposeful and Culpable State of Mind

To recover a multiple damages award from AIGDC, Plaintiffs would have to prove that AIGDC committed a "willful or knowing" violation of Chapter 93A. There is no evidence from which the Court could make such a finding. Computer Systems Engineering, Inc., v. Qantel Corp., 571 F. Supp. 1365, 1373-75 (D. Mass. 1983), thoroughly discussed the meaning of "willful or knowing."[20] First, the Court noted that both willful and knowing refer to the defendant's state of mind, and that state of mind must involve some culpability. Second, the Court pointed out that this standard is different from negligence and gross negligence, because those are both objective standards. By contrast, to prove that a Chapter 93A violation was "willful and knowing," it is not enough for a plaintiff to show what the defendant "should have known," but rather, a plaintiff must establish that the defendant did, in fact, know he was violating Chapter 93A. Therefore, "merely negligent (or even grossly negligent conduct, it would seem) is not culpable in the sense relevant to this determination." Id. at 1375-1376. See also Bakis v. National Bank of Greece, S.A., 1998 WL 34064622, *17 (Mass. Super. Ct. Dec. 15, 1998) (the"severe sanction" of multiple damages

[20] Both section 11 and section 9 cases use the same "willful or knowing" language and this language is interpreted the same in connection with both sections. See Shaw v. Rodman Ford Truck Center, Inc., 19 Mass. App. Ct. 709, 710-712 (1985) (after noting that sections 9 and 11 have the same "willful or knowing"standard, the court stated, "[a]lthough neither of our appellate courts has had occasion to consider the ramifications of the word 'willful' in G.L. c. 93A, §§9(3) *and* 11...those ramifications have been explored and carefully considered by Judge Keeton of the United States District Court for the District of Massachusetts in his well reasoned opinion in [Computer Systems Engineering, Inc], in which, after a review of the relevant Massachusetts cases, the following conclusions were reached: 'To prove that the defendant committed a knowing violation by fraud, the plaintiff may show that the agents of the defendant knew that the fact they represented to be true was not true. Similarly, to prove that the defendant committed a willful violation by fraud, the plaintiff may prove that agents of the defendant knew they did not know whether the fact represented was true or false-that they made the representation without knowing whether it was true or false and with reckless disregard for whether it was true or false.'").

under Chapter 93A is only "warranted by conduct involving a purposeful level of culpability, such as the deliberate concealment or misrepresentation of facts intended to prejudice the plaintiff.") (citing Wasserman v. Aganastopoulos, 22 Mass. App. Ct. 672, 681 (1986)).

There is not a shred of evidence in the present case of any subjective bad faith or malicious purpose on the part of AIGDC. Rather, the AIGDC claims personnel simply evaluated the settlement value of the case differently than did the Plaintiffs and their counsel, and AIGDC sincerely believed that additional discovery and investigation needed to take place in the few months between the time Zurich tendered its policy limits to AIGDC and the time that the mediation was scheduled. Based upon the evidence introduced at trial, it hardly could be concluded by the Court that AIGDC acted in a knowing or willful manner in any respect.

2. A Review of Massachusetts Cases That Have Found That There Was a Willful or Knowing Violation of Chapter 93A Compels the Conclusion That There Was No Such Violation in This Case

The Massachusetts cases which have found willful or knowing violations of Chapter 93A do not support such a finding in this case. For example, in Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556 (2001), the Plaintiff was injured as a result of a motor vehicle accident, which the evidence established early on was the fault of the insured defendant. The Plaintiff received medical treatment for her injuries for two years after the accident and then made a settlement demand to the insurer. Liberty Mutual, the primary carrier, did not tender its first offer to the Plaintiff until two years after the demand and four years after the accident. The court held that liability was reasonably clear approximately 2½ years after the accident, because, by then, the Plaintiff's damages were "reasonably established." Id. at 559. (The court noted that, between the time of the accident and the Plaintiff's first demand, the "Plaintiff's medical situation remained unresolved." Id. at 558.) In Hopkins, the court found that Liberty Mutual had committed a knowing violation of Chapter 93A, because it refused to make any offer of settlement for more than two years after it knew "the extent of the Plaintiff's damages." Id. at 561. In stark contrast, in the present case, the

evidence presented at the accident trial by Mr. and Mrs. Rhodes and Plaintiffs's medical experts was that even at that time, her medical prognosis remained unresolved.

In this case, unlike Hopkins, although the fault of the insured driver was established soon after the accident, the extent of the Plaintiffs's damages was not clear. Unlike Liberty Mutual in Hopkins, AIGDC did not unreasonably refuse to tender an offer of settlement after damages were reasonably established. On the contrary, once Zurich tendered its limits, AIGDC diligently attempted to document and confirm the extent of Mrs. Rhodes's damages. AIGDC acted in good faith when it agreed to mediate and it made substantial settlement offers, despite the fact that the extent of Mrs. Rhodes's damages was not reasonably clear and without having had a thorough opportunity before the mediation to investigate all of the factors bearing on the issue of damages.

Even if AIGDC could have established the extent of Mrs. Rhodes's damages, Hopkins still would not support a finding of a Chapter 93A violation, much less a willful or knowing violation, in this case. As the Court has already determined, AIGDC did not have a duty to make an offer before Zurich tendered its policy limits to AIGDC in 2004. AIGDC engaged in a great deal of discovery and investigation (despite roadblocks raised by the Plaintiffs and GAF) after the tender. AIGDC ultimately scheduled a mediation and made offers at the mediation just a few months after the tender.

In Clegg v. Butler, 424 Mass. 413 (1997), Utica, a primary insurer, knew soon after an automobile accident that its insured was at fault. The insurer investigated damages by ordering an IME, requesting and obtaining medical documents from the Plaintiff, and retaining a neurologist to review the Plaintiff's medical records. The court found that the liability as to damages was reasonably clear thirteen months after the accident -- but only after the insurer had obtained sufficient medical documentation; completed the IME; received the report of the neurologist; and its claim managers obtained authorization to settle. By that time, the court noted: "Utica possessed all but one of the medical reports and examinations it considered vital to the reasonableness of the

Clegg's $750,000 settlement demand." Id. at 422. In holding that liability was not reasonably clear until Utica possessed this information, the Court specifically stated that, "insurers must be given the time to investigate claims 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." Id. at 421.

Here, AIGDC did not have an IME or other information "it considered vital" (such as the Plaintiffs's depositions) until shortly before trial, and it never was able to obtain the mental health records (this issue was not finally resolved until days before the trial). Nevertheless, AIGDC made a reasonable offer, based upon the information it possessed at that time, at the mediation. Thus, Clegg does not support an award of multiple damages here. It should also be noted that, in Clegg, the Court seemed particularly bothered by Utica's behavior in allowing its investigators to interview the Plaintiffs, even though they were represented by counsel; and by Utica's invasion of the Plaintiffs' privacy when Utica attempted to contact nurses who treated them, both of which may have accounted for the Court's trebling of damages. Of course, in the present case, there is no evidence whatsoever of any similar conduct on AIGDC's part.

Metropolitan Property & Cas. Ins. Co. v. Choukas, 47 Mass. App. Ct. 196 (1999), is another case where the court found a primary insurer's violation of Chapter 93A to be willful and knowing, but which is easily distinguished from the present case. In Choukas, the insurer refused to make any offer at all. In addition, damages in that case were reasonably clear. Here, after the Zurich policy limits were tendered to it, AIGDC immediately agreed to mediate the case after it had performed necessary discovery. The mediation was scheduled promptly, even before all such discovery was obtained, after AIGDC's effort to continue the trial was denied.

The Court also found a willful and knowing violation of Chapter 93A by the defendant, which was a claims handling organization for a primary insurer, in Miller v. Risk Management Foundation, 36 Mass. App. Ct. 411 (1994). However, that case likewise is distinguishable. In Miller, the insurer

made its first offer nineteen months after liability (presumably both fault and damages) was reasonably clear. Id. at 419. In addition, the insurer made "virtually no investigation of the facts." Id. In obvious contrast, in the present case, once Zurich "reached out" to it, AIGDC, despite opposition from the Plaintiffs and GAF, did its best to promptly fill in the gaps left by Crawford's inadequate investigation. (Of course, AIGDC could not control the litigation or fully investigate until after it received the tender of the primary limits and associated in counsel). Thus, Miller does not support an award of multiple damages in this case.

G. Because the Accident Case Was Resolved by a Settlement, the Underlying Judgment Cannot Serve As the Multiplicand for Purposes of Doubling or Trebling

In the unlikely event that this Court were to find that AIGDC violated Chapter 93A, and that it did so willfully and knowingly, the underlying judgment cannot serve as the multiplicand for doubling or trebling purposes. Despite the fact that a judgment entered against the insureds before the accident case was settled, and plaintiffs filed a "Judgment Satisfied" pleading, it is beyond purview that the accident case actually was resolved by a *settlement*. See Exhibit 60. By the terms of the settlement, AIGDC agreed to pay $8,965,000, which was considerably less than the total judgment amount (including post-judgment interest) and it withdrew the appeal of the judgment. Id. The Appeals Court has expressed explicit reservations as to the appropriateness of utilizing a judgment for doubling or trebling purposes, when there has been a subsequent settlement after the entry of judgment. See Bolden v. O'Connor Café of Worcester, Inc., 50 Mass. App. Ct. 56 (2000).

In Bolden, the Plaintiffs obtained a $20 million judgment against the insured defendant, a bar, on a dram shop claim. Id. at 57. Post-judgment, and while an appeal was pending, Plaintiffs entered into a settlement whereby the insured assigned its rights against its insurer in exchange

for Plaintiffs's agreement not to execute on the judgment against it. Id. Thereafter, Plaintiffs asserted claims against the insurer alleging that its pretrial settlement attempts were made in bad faith. Id.

In Bolden the Appeals Court explained:

> G.L. c. 93A, §9(3), states, in relevant part, that "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 . . . 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." In Cohen v. Liberty Mut. Ins. Co., 41 Mass.App.Ct. 748, 755, 673 N.E.2d 84 (1996), we stated that even when bad faith is found in a G.L. c. 176D/93A suit, the "actual" damages are those losses which were the foreseeable consequence of the insurer's unfair or deceptive conduct. Thus, it appears that in the present situation, only if the fact finder in the [plaintiffs'] G.L. c. 93A lawsuit were to conclude that the twenty million dollar judgment in the dramshop liability tort suit was both the measure of . . . actual damages and the foreseeable consequence of a bad faith unfair settlement practice by the [insurer], would the underlying judgment be doubled or trebled as damages.

Bolden at 730 n.9 (emphasis added).

Thereafter, the court amplified this assessment by noting:

> Although the [insurer] stresses the liability aspect as its chief interest in the G.L. c. 93A case and does not dwell on the desirability of its being able to reduce or eradicate the large judgment, this is nonetheless a point we should consider. Were the [plaintiffs] successful in establishing in the c. 93A action that the [insurer]'s bad faith settlement practices foreseeably caused the excess verdict to enter in the dramshop case, that verdict arguably would be the measure of damages to be doubled or trebled.
>
> **It appears at least somewhat *unsettled*, however, whether such an underlying judgment remains the basis for "actual damages" under G.L. c. 93A § 9(3), if, as here, a settlement . . . is reached after judgment.**

Bolden at 735-36 (emphasis supplied). Further expounding on this point, the court surmised that,

> "[i]f the judgment in the present case were not the basis for a G .L. c. 93A damages award due to the agreement by the [Plaintiffs] not to execute on the judgment, the [insurer] arguably would be responsible only for the ascertainable losses suffered . . . which were the foreseeable consequence of the [insurer]'s unfair conduct.

Id. at 736 (citing Cohen, 41 Mass. App. Ct. at 755).

As contemplated by the Bolden court, the judgment obtained by the Rhodes in the underlying accident case ought not be the basis for a G.L. c. 93A damages award in this action, due to the parties' subsequent settlement. Under such circumstances an insurer ought only be potentially liable for the ascertainable losses suffered which were the foreseeable consequences of its alleged unfair conduct. See Cohen, 41 Mass. App. Ct. at 755. Certainly, the nearly $12 million judgment entered in the underlying accident case is not the measure of the actual damages sustained by the Rhodes because of any alleged unfair settlement practices: See Bolden at 730 n.9.

H. Multiplying the Amount of the Verdict in the Underlying Case, Even Though the Verdict Has No Relationship Whatsoever to the Amount of Any Damages Caused by Any Violation of Chapter 93A by AIGDC, Would Violate AIGDC's Constitutional Right to Due Process

1. AIGDC Incorporates Its Previous Arguments Regarding the Constitutional Issue

With the exception of the following section, which addresses an issue that was raised during oral arguments on AIGDC's Motion for Summary Judgment, AIGDC has already fully briefed the due process issues related to punitive damages in its Summary Judgment memoranda. Accordingly, AIGDC incorporates herein those arguments by reference.

2. The Due Process Clause Imposes Strict Limits on Statutory Punitive Damage Schemes, As Well As Jury Awards of Punitive Damages

The question has arisen in this case as to whether the United States Supreme Court's constitutional analysis, which imposes limits on excessive jury awards of punitive damages, applies equally to statutory punitive damages. The BMW v. Gore and State Farm v. Campbell cases, and the Supreme Court's prior decisions regarding due process limits on statutory penalties, make it clear that due process considerations do indeed limit punitive damages that may be awarded under statutes.

The Supreme Court's first cases involving violations of the Due Process Clause's substantive limit on monetary awards, arose where, as here, a statute fixed a damages award that had no relationship to any actual damages incurred. In Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915), the Supreme Court held that a provision authorizing statutory damages of $100 per day against a telephone company, for refusing to provide phone service to a customer, violated due process, when the company's action was in good faith and was consistent with longstanding practice. The Court held that the statutory penalties were, "so plainly arbitrary and oppressive as to be nothing short of a taking of . . . property without due process of law." Id. at 491; see also, Missouri Pac. Ry. Co. v. Tucker, 230 U.S. 340, 351 (1913) (statutory damages of $500 for overcharging a customer $3 violated due process because the damages were, "grossly out of proportion to the possible actual damages").

In addition, courts in several more recent cases have acknowledged that statutorily imposed damages can implicate due process concerns. For example, the Second Circuit has observed that, "combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis . . . with the class action mechanism that aggregates many claims . . . may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages--yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award." Parker v. Time Warner Entertainment Co., L.P., 331 F.3d 13, 22 (2d Cir. 2003). Parker dealt with the Plaintiff's motion to certify a class seeking statutory damages under the Cable Communications Policy Act of 1984. The district court had denied certification, in part, because it was concerned that the, "potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues." Id. at 22. The Second Circuit agreed that the district court's concern was legitimate, but held that the due process issue was not relevant to whether to certify the class. Instead, the Court

explained that, "it may be that in a sufficiently serious case the due process clause might be invoked, not to prevent certification, but to nullify that effect and reduce the aggregate damage award." Id.

In a similar case, Murray v. New Cingular Wireless Services, Inc., 323 F.R.D. 295 (N.D. Ill. 2005), the court considered whether to certify a class of plaintiffs who sought damages from Cingular for its violation of the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq. The FCRA provides for statutory damages between $100 and $1,000 per plaintiff, which could have resulted in a minimum total damage award of $73,340,000, if the court allowed certification. Cingular argued that its due process rights would be violated if the class were certified, because the potential statutory award was so grossly disproportionate to the actual harm (The actual pecuniary injury could have been zero.). The court, quoting In re Napster Copyright Litig., Leiber v. Bertelsmann AG, 2005 U.S. Dist. LEXIS 11498 (N.D. Cal. June 1, 2005), stated, "these cases are doubtlessly correct to note that a punitive and grossly excessive statutory damages award violates the Due Process Clause" Id. at 304, n.12. However, it allowed certification of the class, because "[r]educing an unnecessarily large statutory damage award is a more palatable option than allowing defendants to commit substantive violations of the law and escape liability essentially because they have violated the rights of too many individuals, all of whom want to sue as is their right."

Finally, in Henderson v. Love, 181 S.W.3d 810, 815-816 (Tex. Ct. App. 2005), the Court noted that the statute at issue in that case, which imposed liquidated damages for failing to provide an annual financial report, would be "constitutionally suspect" if considered alone, outside the context of other statutes. The court reasoned that, standing alone, the statue could support liquidated damages of $750,000 on a contract worth only $38,500. Further, the Court explained that (as in our case), there was no relation between the liquidated damages and any actual damages, and there was no obvious relationship between the offense and the liability under the statute. For these reasons, the statute was deemed to be "constitutionally suspect."

In addition, the United States Supreme Court in Gore specifically referenced various *statutory* damages schemes in its ratio analysis. In that case, the Court said: "The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree. Scholars have identified a number of early English statues authorizing the award of multiple damages for particular wrongs." BMW of North America, Inc. v. Gore, 517 U.S. 559, 580-581. The Court added that: "Present-day federal [statutory] law allows or mandates imposition of multiple damages for a wide assortment of offenses." Id. at n. 33. Moreover, the Supreme Court in State Farm, specifically referred to these same statutory damage schemes, when it enunciated the principle that "single-digit multipliers are more likely to comport with due process." State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424. ("The Court [in Gore] further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . or, in this case, of 145 to 1."). Clearly, then, the Supreme Court's pronouncements that the Due Process Clause imposes limits on excessive civil awards, is rooted in its analysis of various statutory damages schemes. Therefore, there is no reason to believe that the Due Process Clause does not limit excessive statutory punitive damages, just as it limits jury awarded punitive damages.

WHEREFORE, Defendants National Union and AIGDC request that judgment be entered in this action:

A. Dismissing Plaintiffs' Complaint against National Union and AIGDC; and

B. Awarding National Union and AIGDC their costs of suit and such other and further relief as the court may deem fair and proper.

Respectfully submitted,

Mark E. Cohen [BBO #089800]
Robert J. Maselek [BBO #564690]
THE McCORMACK FIRM, LLC
One International Place - 7th Floor
Boston, MA 02110
Ph: (617) 951-2929
Fax: (617) 951-2672

Anthony R. Zelle [BBO #548141]
Brian P. McDonough [BBO #637999]
Zelle McDonough *(Co-Counsel)*
Four Longfellow Place - 35th Floor
Boston, MA 02114
Ph: (617) 742-6520
Fax: (617) 973-1562

CERTIFICATE OF SERVICE

I, Robert J. Maselek, certify that on this 28th day of March 2007, I caused a copy of the foregoing to be served by hand delivery upon the following:

M. Frederick Pritzker
Margaret M. Pinkham
Daniel J. Brown
Brown, Rudnick Berlack Israels LLP
One Financial Center
Boston, MA 02111
Counsel for Marcia Rhodes, Harold Rhodes, and Rebecca Rhodes

Gregory Varga
Elizabeth Sackett
Robinson & Cole LLP
One Boston Place
Boston, MA 02108
Counsel for Zurich American Insurance Co.

Robert J. Maselek, Jr.

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