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September 27, 2010

Appeals Court Clerk's Office
John Adams Courthouse
One Pemberton Square, Suite 1200
Boston, Massachusetts 02108-1705

Re: Marcia Rhodes et al. v. AIG Domestic Claim, Inc. et al.
Appeals Court No.: 2009-P-0619

Dear Sir/Madam:

Enclosed for filing in the above-captioned action please find the following:

1. seven copies of the Memorandum of Defendant-Appellee Zurich American Insurance Company Briefing *Linda Gore v. Arbella Insurance Co.*, 77 Mass. App. Ct. 518 (2010); and

2. Certificate of Service.

Very truly yours,

Danielle Andrews Long

Enclosures

cc: Gregory P. Varga, Esq.
Linda L. Morkan, Esq.
Daniel J. Brown, Esq.
Anthony R. Zelle, Esq.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2009-P-0619

MARCIA RHODES, HAROLD RHODES, AND REBECCA RHODES

Plaintiffs/Appellants

v.

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

Defendants/Appellees

ON APPEAL FROM A JUDGMENT OF THE
SUFFOLK COUNTY SUPERIOR COURT

MEMORANDUM OF DEFENDANT-APPELLEE ZURICH AMERICAN INSURANCE COMPANY BRIEFING *LINDA GORE V. ARBELLA INSURANCE CO., 77 Mass. App. Ct. 518 (2010)*

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ARGUMENT

This Court has asked the parties to brief the applicability of the recently-released decision in *Gore v. Arbella Ins. Co.*, 77 Mass. App. Ct. 518 (2010), to the issues in this appeal. As set forth more fully in the following pages, the defendant-appellee, Zurich American Insurance Co., does not believe that *Gore v. Arbella* has any applicability to the Plaintiffs' claim that the Trial Court (Gants, J.) erred in entering judgment for Zurich in this appeal.

A. *Gore* and This Case Are Factually Dissimilar

Although both this case and *Gore* nominally involve claims brought under G.L. chapter 93A, the substantive issues presented in *Gore* have no relevance to the factual findings made by the Trial Court in this case regarding the reasonability of Zurich's conduct in tendering its policy limits when it did.

The facts of *Gore* are rather straightforward: Within a month of a motor vehicle accident in Florida involving a driver insured by Arbella, counsel for one of the injured parties, Mrs. Dattilo, sent Arbella a demand letter seeking payment of the full $20,000 per person policy limits. The letter demanded the tender within thirty days and agreed to accept that payment in exchange for a full release from all liability. 77 Mass. App. Ct. at 519.

Arbella, although having determined even by that early date that its insured was solely at fault for the accident and that the damages exceeded by at least $100,000 the per person policy limits, did not respond to the demand, nor did it notify its insured that he could be exposed to liability in excess of his insurance coverage. *Id.* at 520. In light of Arbella's silence, the injured party, Mrs. Dattilo, filed suit. *Id.*

Some seven months after receipt of the demand letter, Arbella offered to tender the $20,000 policy limits to Mrs. Dattilo in full satisfaction of her claims, but she rejected the offer. Ultimately, she settled with the insured and took an assignment of his claim against Arbella for unfair settlement practices. *Id.*

Dattilo thereafter made another demand on Arbella for $1.4 million, but Arbella counter-offered for approximately $23,000. Dattilo filed suit against Arbella individually and as assignee of the insured's rights. The case was tried to the court which found the issues for Dattilo and awarded her just over $1 million. *Id.* at 522.

The trial judge found that Arbella simply ignored Mrs. Dattilo's demand letter, not responding until some five months later and, even then, reporting only that its investigation was not yet completed. Another two months passed before Arbella made an offer to pay the policy limits. The trial judge found this

was ample evidence to support a finding that Arbella had failed to make a prompt and equitable offer of settlement, *id.*, as required by statute, and this Court affirmed that factual finding. *Id.* at 530.

The facts in *Gore* are in stark contrast to the facts found in this case. The Trial Court here found that Zurich acted reasonably in handling Plaintiffs' claim and tendered its $2 million policy limits to the excess insurer promptly after liability and damages were reasonably clear. Decision, at 34-35, Appendix I at 50-51; *see also id.* at 35-36; App. I at 51-52.

As laid out more fully in Zurich's brief, there was considerable evidence to support the Trial Court's conclusion that Zurich had acted reasonably, including evidence of the circumstances under which Plaintiffs first made their claims, Zurich's claim handling process, its investigation of the liability, and coverage issues and its consultations with the excess carrier, AIGDC. *See* Zurich's Appellee's Brf. at 19-30.

The Trial Court found that, on the basis of that considerable evidence, liability and damages did not become reasonably clear until mid-November 2003 and Zurich actually

tendered its policy in mid-January 2004. Decision at 32-33, App. I. at 48-49.[1]

Thus, for the Trial Court, the question in this case was whether that January tender was "prompt" within the meaning of Massachusetts law. The resolution of that question is one of fact, not law. Clegg v. Butler, 424 Mass. 413, 421 (1997) (citing Kohl v. Silver Lake Motors Inc., 369 Mass. 795, 799 (1976) (determination of reasonableness is a question of fact)).

This case and *Gore* concern dramatically different facts; there can be no serious claim that *Gore* has any relevance to the issue of whether Zurich is liable to the Plaintiffs. In *Gore*, the trial court found - as a factual matter - that Arbella had violated chapter 93A by failing to timely respond to the claimant's settlement demand. Those findings were entitled to deference by this Court. First Pa. Mge. Trust v. Dorchester Sav. Bank, 395 Mass. 614, 621 (1985). Here, the trial court rejected the contention that Zurich should have acted sooner in order to "effectuate a prompt settlement" of the claim. That finding is entitled to the same degree of deference. *Gore* was decided on the basis of the facts found there, and this case must be decided on its own facts. There is no overlap.

B. Gore And This Case Are Legally Dissimilar

[1] The Plaintiffs have not claimed that the Trial Court's findings in this respect were clearly erroneous. See Zurich's Appellee's Brf. at 12-14, 19.

As respects the Plaintiffs' claims against Zurich, *Gore* and this case are as legally dissimilar as they are factually dissimilar. Here, in addition to finding that Zurich did not violate G.L. chapter 93A, the Trial Court also held that even if Zurich had violated the statute, the Plaintiffs could not have accepted an earlier tender, therefore, the Plaintiffs could not establish that they were injured by Zurich's alleged "delay." Decision at 36, App. I at 52.

This holding is in no way called into question by anything contained in the *Gore* decision. *Gore* did not involve an excess insurer (so there was no consideration of the special circumstances under which a primary insurer tenders its policy), nor did *Gore* involve a claim that the plaintiff would have rejected a timely offer of settlement: To the contrary, Mrs. Dattilo unequivocally represented her willingness to accept $20,000 in full settlement of her claims against Arbella's insured. 77 Mass. App. Ct. at 519. In defense of its action, Arbella challenged the propriety of her quick issuance of a demand letter (within a month of the accident) and argued that Mrs. Dattilo was trying to manufacture an unfair insurance practices act claim by filing a demand before the insurer could possibly determine liability and damages. *Id.* at 529.

In resolving that claim ~ and holding that the claimant's early demand was perfectly legitimate ~ the *Gore* Court made a

passing reference to the Supreme Judicial Court's decision in *Hopkins v. Liberty Mut. Ins. Co.*, 434 Mass. 556 (2001):

> Where liability has become reasonably clear, we have recognized that, consistent with the purpose of G.L. c. 176D, § 3(9), to protect claimants and encourage settlements, "[a]n insurer's statutory duty to make a prompt and fair settlement offer does not depend on the willingness of a claimant to accept such an offer."

Id. (quoting *Hopkins*).

The Plaintiffs might attempt to stretch the *Gore* Court's quote of *Hopkins* to apply to the issues before this Court, but such a stretch would be unwarranted. First, the quote from *Gore* is clearly dicta: there was no allegation in *Gore* that Mrs. Dattilo was not willing to accept the policy limits; indeed, as stated *supra*, the evidence was that she herself made an offer to settle, thereby indicating her willingness.

Second, Gore's recitation of this quote from *Hopkins* (which was followed by a brief discussion of *Metropolitan Prop. & Cas. Co. v. Choukas*, 47 Mass. App. Ct. 196, 200 (1989), *overruled on other grounds by Murphy v. National Union Fire Ins. Co.*, 438 Mass. 529, 533 n.7 (2003)), does not appear to take into consideration the decisions of the Supreme Judicial Court that post-date *Hopkins* and have held that, in order to recover under chapter 93A, a plaintiff must adduce evidence of an actual injury. *See* Zurich's Appellee's Brf. at 40-50.

Simply stated, since *Hopkins* and *Choukas* were decided, the Supreme Judicial Court has reaffirmed that, to be entitled to relief under chapter 93A, § 9, a plaintiff must demonstrate that the defendant's unfair or deceptive conduct caused the plaintiff an actual loss. *Hershenow v. Enterprises Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790, 800, 802 (2006). The Court held that: "A consumer is not ... entitled to redress under G.L. c. 93A, where no loss has occurred. To permit otherwise is irreconcilable with the express language of G.L. c. 93A, § 9, and our earlier case law." *Id.* at 802.

As recognized by Judge Gants, the direct application of *Hershenow* to the facts of this case results in the legal conclusion that the Plaintiffs - even if they had established that Zurich violated chapter 93A - could not establish an injury done to them because the undisputed facts showed that the Plaintiffs were not prepared to take Zurich's $2 million in order to compromise the entire case. The Plaintiffs were looking for additional compensation from the excess carrier, AIGDC. Thus, unless the entire case could be settled, the Plaintiffs were destined for trial regardless of Zurich's conduct. *See* Appellee's Brf. at 40-50.

Thus, to the extent that the dicta in *Gore* regarding acceptance of settlement offers is relied on by the Plaintiffs in their supplemental brief, this Court should reject their

overtures. While the quote from *Hopkins* is eye-catching (Plaintiffs relied on it in their initial brief), a court must examine the facts and circumstances of each case and determine whether the possibility of a compromise affects the question of causation. That is the analysis the Trial Court here engaged in, and its factual findings and legal conclusions should be affirmed.[2]

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For all of the foregoing reasons, the judgment of the Trial Court should be affirmed.

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[2] In correspondence submitted to this Court regarding the release of *Gore*, the Plaintiffs and AIGDC both sought to discuss the effect of *Gore* on the question of the proper calculation of punitive damages under chapter 93A.

As the Plaintiffs did not recover against Zurich, this issue has no relevance in their appeal from the judgment in Zurich's favor. Thus, Zurich will not offer any opinion on how *Gore* is applicable to that question.

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Dated: September 27, 2010

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CERTIFICATE OF SERVICE

I, Danielle Andrews Long, counsel for Defendant-Appellee Zurich American Insurance Company, hereby certify that on this 27th day of September, 2010, two copies of ***Memorandum of Defendant-Appellee Zurich American Insurance Company Briefing Linda Gore v. Arbella Insurance Co., 77 Mass. App. Ct. 518 (2010),*** were served, via first class mail, postage prepaid, and electronic mail, to:

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