Transcription of Oral Argument for SJC-10911

October 6, 2011

Bailiff: Court, all rise. Hear ye, hear ye, hear ye. All present having anything to do before the Honorable Justices of the Supreme Judicial Court now sitting in Boston, before the Commonwealth, draw near and you shall be heard. God save the Commonwealth of Massachusetts. The Court is now open, please be seated.

Court Clerk: Docket No. SJC-10911; Rhodes versus A.I.G. Domestic Claims.

Margaret Pinkham: Good morning, Your Honor. My name is Margaret Pinkham. I will be addressing Zurich American Insurance's liability under Chapter 176D for five minutes. My co-counsel, Fred Pritzker will address the measure of punitive damages in AIGDC's liability. With us at counsel's table is our colleague Daniel Brown. We are here this morning on behalf of Marcia, Harold, and Rebecca Rhodes to ask this Court to enforce Chapter 176D and 93A. This case is not at the margins of the law. It squarely presents fundamental issues of consumer protection. Marcia Rhodes was paralyzed when she was rear-ended by a tractor-tanker on January 9th, 2002. There was no uncertainty as to who was at fault for the accident or that her injuries were catastrophic. Trial Court determined that those facts were immediately apparent. Yet the Rhodes family existed in a state of uncertainty for 812 days. It took Zurich two years, two months, and 22 days to communicate a settlement offer of $2 million, on a claim that its adjuster had repeatedly valued at five to ten million dollars.

Justice Margot Botsford: What obligation did Zurich have to deal with AIGDC, before communicating with you or with your clients? Because of the excess, because of, as you say, catastrophic injuries, clearly the excess policy is implicated and so the relationship between Zurich on that point and AIGDC, in terms of them communicating with you?

Counselor Pinkham: Well, Your Honor, I don't believe that Zurich's obligation to communicate with the plaintiffs was in any way implicated or constrained by its relationship with the excess carrier.

Justice Botsford: Is it the case that when the policy was finally tendered it went through AIG?

Counselor Pinkham: I don't understand what you mean by finally tendered?

Justice Botsford: In other words, it wasn't given directly to you at the time, right?

Counselor Pinkham: Um, the Trial Court found that there was a verbal tender made to AIG in January, 2004. That verbal tender was rejected. On March 31, 2004, Zurich communicated a settlement offer of $2 million directly to the Rhodes family.

Justice Robert J. Cordy: To settle the whole case?

Justice Botsford: No, that was without ...

Counselor Pinkham: They had to communicate a settlement offer and that was the settlement offer they communicated, correct.

Justice Cordy: Right. Their whole policy.

Counselor Pinkham: Correct.

Justice Cordy: So what happened then?

Counselor Pinkham: I'm sorry, I didn't hear you.

Justice Cordy: So what happened? They tendered their whole policy, so what happened? What happened?

Counselor Pinkham: To the offer?

Justice Cordy: They tendered their whole policy and what then happened?

Justice Botsford: Did the money change hands?

Counselor Pinkham: No, Your Honor. And AIG then eventually took over defense of the case after a period of months in which there was some jockeying between Zurich and AIG as to who was going to pay for defense costs.

Justice Botsford: Ok, so you're saying but for that jockeying ... and I know this isn't your claim, but I'm just trying to figure out this relationship, but for that jockeying about who was going to pay defense costs, ordinarily, once it was tendered in March, not in January, but in March, I take it, without any of the contingencies, it would have been paid to you, is that right?

Counselor Pinkham: No, Your Honor, not under the practice that they followed. It was available to AIG.

Justice Botsford: Is that part of your complaint? Is that part of your complaint that it was going through AIG?

Counselor Pinkham: Not as to Zurich, Your Honor. The crucial position that we take as to Zurich is that it failed to investigate the claim. It failed to act in accordance with its own policies, and that Zurich's delay ...

Justice Botsford: So when do you say, when do you say, is the sort of outside limit of when it should have tendered its policies?

Counselor Pinkham: Your Honor, based on the ... the short answer is November, 2002.

Justice Botsford: And the accident was in February, 2002?

Counselor Pinkham: January of 2002.

Justice Botsford: January of 2002.

Counselor Pinkham: Um, and I point the Court to Zurich's own policies. Under Zurich's own policies, it was required to investigate coverage, damages and liability immediately. Zurich waited until the Rhodes family made a settlement demand before it began to assess damages and coverage and liability was clear, no one had to analyze liability. And I would ask the Court to review Zurich's Best Policy Practices. It's contained in the record appendix at 3655. And, in addition, Zurich's claims notes at page 3757 demonstrate that Zurich didn't even comply with its own policies. Had Zurich complied with its policy, it would have complied with its statutory obligations. Now, Your Honor, the other issue I'd like to address is even if you take the Trial Court's findings of fact as they are written, the Trial Court found the damages were reasonably clear in the fall of 2003. The Rhodes family communicated settlement demands to Zurich in August and December of 2003. Yet, as I just indicated, Zurich didn't communicate an offer to the Rhodes family until March of 2004. That delay at a point in time ...

Justice Botsford: Didn't you say that they did it earlier but it was rejected?

Counselor Pinkham: No, that was, again, Your Honor, this is actually crucial; I thank you for asking that question. The tender from AIG, excuse me, the tender from Zurich to AIGDC was invisible to the Rhodes family. All the Rhodes family knew in January of 2004 was that it had been two years since the accident, they had communicated two settlement demands and all that we heard from Zurich was radio silence. The Rhodes family had no idea of what was going on behind the curtain between the primary and the excess carrier. And we would ask the Court to find that, based on Zurich's delay, even on the facts found by the

Trial Court, that Zurich violated Chapter 176D. And, based on its complete failure to comply with either the duty to investigate, set forth in Chapter 176D, and its own policies, that that violation was willful and knowing.

Chief Justice Ireland: You're going to have to leave there.

Counselor Pinkham: Thank you, Your Honor. I will leave it to Mr. Pritzker to address the measure of punitive damages that we ask for against Zurich.

Fred Pritzker: Good morning, Your Honor. Fred Pritzker, I am going to address the plain meaning of the governing statutes in this case, 176D and 93A.

Justice Botsford: Are you ... you briefed, but you're not going to address, whether, the issue of low end of reasonable, that is the August number?

Counselor Pritzker: Not at all, not at all, Your Honor. Um, in fact, it doesn't matter in this case.

Justice Botsford: No, I appreciate that fact.

Counselor Pritzker: But I am going to address the willful and knowing and knowing violations of AIGDC, both before and after the plaintiffs obtained an $11.365 million judgment at the jury verdict, um, in, um, 2004. What happened is, well, before we get there, the plaintiffs are seeking the mandatory doubling of that underlying judgment, under the 1989 amendment to 93A. And they seek these mandatory punitive damages because of the willful and knowing violations of AIGDC.

Justice Botsford: But, are you, I think this is your argument, but it's not your whole argument. You're arguing today you're focusing on post-judgment conduct, is that right?

Counselor Pritzker: I'm focusing on both, Your Honor, although it doesn't matter, um, because under Hopkins ...

Justice Botsford: Well, if you take the trial judge's findings ...

Counselor Pritzker: Yes.

Justice Botsford: It does matter. But you're saying?

Counselor Pritzker: Well, I suggest to the Court that while the trial judge found that there were no damages relating to the pre-judgment violation that was overruled by the Appeals Court.

Justice Botsford: Right, but we're not bound by that.

Counselor Pritzker: I certainly understand that. But we're in the position, and this Court is in the position, that there are two published decisions, one of which holds that there was no liability to AIGDC for the pre-judgment violation.

Justice Botsford: Correct.

Counselor Pritzker: And another recorded decision that there is liability. But in both of them, um, the doubling of the underlying judgment was refused.

Justice Botsford: Right.

Counselor Pritzker: It was also refused in the post-judgment violation.

Justice Botsford: Right, so, ok.

Counselor Pritzker: And, um, I suggest to the Court that where all of the elements of 176D and 93A have been met, namely, there has been a violation of 176D. Let's focus on post-judgment for the time being. That violation caused a loss. The Trial Court found that. That violation caused damages. They were assessed as "loss-of-use" damages. The Court found that the violation was willful and knowing and actually described AIG's conduct as "insulting," "ridiculous," "intended to bully the plaintiffs into accepting an unreasonably low settlement." Um, all of those indicia were present, post-judgment. And yet the judge refused to double the underlying judgment. And he did so on the basis that it makes no sense to double the underlying judgment when the insurer did not cause that judgment to occur. I suggest to the Court that this creates an exception to Chapter 93A of rather broad proportions, which was not expressed, and I suggest to the Court, was not intended. All post-judgment violations, in all post-judgment violations, the violation never causes the judgment, because it occurs after the judgment has already entered. So by definition, it can't cause the underlying judgment. It also is the case that for all of the third-party claims, at least the ones that I can think of, um, the underlying judgment, excuse me, is caused by the insured, not the insurer. The claim for 93A against the insurer is on the basis that 93A enables the third-party claimant to go directly against the insurer under 93A, section 9, subsection 1.

Chief Justice Roderick Ireland: If we agree with you, what would the rule in the case be, going forward?

Counselor Pritzker: That where there is a willful violation and where there is an underlying judgment that um, um, is, um, achieved by the plaintiff, that for punitive damages purposes, for deterrent purposes, as they were amended in 1989, the, um, the punitive damages should be double the underlying judgment.

Justice Cordy: Can I ask you about the Hopkins case? Explain to me how the Hopkins case fits into your analysis here?

Counselor Pritzker: Um, it fits in ...

Justice Cordy: That would be inconsistent with your analysis, correct?

Counselor Pritzker: No, not at all, Your Honor.

Justice Cordy: Ok, explain.

Counselor Pritzker: There was no underlying judgment.

Justice Cordy: And that's because a reasonable offer was made late and accepted.

Counselor Pritzker: Accepted, and so the case settled.

Justice Cordy: OK.

Counselor Pritzker: And where there is a settlement and no judgment, then the amendment to, um, the 1989, the 1989 amendment, doesn't apply.

Justice Cordy: Let's say that the AIG had come in late as it rarely did, and made an offer of $10 million, but it wasn't accepted, and the jury came back with $9 million.

Counselor Pritzker: Yes.

Justice Cordy: Would you say, "Well, their offer came in late, and therefore we do go to judgment. There still should be punitive damages, even though the offer that came in was very much on the high side, and

was very reasonable and fair in the circumstances -- still, because it went to trial, there was a judgment. That is what's in the statute."

Counselor Pritzker: Chapter 176D is a mandatory statute setting forth a course of conduct for insurers. And that course of conduct mandates under subsection 'f' that an insurer will effect a fair and equitable settlement once liability is reasonably clear. That is the mandate, and …

Justice Cordy: Well, so you have two prongs to that …

Counselor Pritzker: … it was violated.

Justice Cordy: … when is it reasonably clear such that an offer, a fair and reasonable offer, should be made? And the second is, is the offer fair and reasonable? So here in my scenario, we have a late offer. Should have been made earlier, but which would be viewed probably in retrospect and otherwise as fair and reasonable, but was not accepted, and the case went to judgment.

Counselor Pritzker: Yes.

Justice Cordy: And if it had been accepted, the punitive damages would not be calculated twice judgment. Where it hasn't been accepted, they would be calculated at twice judgment.

Counselor Pritzker: That's, that's right, but keep in mind, Your Honor, that if it's accepted, there is no judgment.

Justice Cordy: Well, I understand that.

Counselor Pritzker: If it is not accepted and if the violation is willful and knowing, and I think that that's key, because what we're dealing with here is a punitive damage statute to deter this kind of behavior. And when the willful and knowing violations are couched in terms of "insulting" and "ridiculous," I suggest to the Court that the hypothesis that the Court has just raised is really inapt.

Justice Cordy: Well, I'm just posing a hypothetical. I'm trying to understand.

Counselor Pritzker: I understand that.

Justice Cordy: ... when it is that punitive damages ought to apply and that this is the case, I take it that was described in the footnote 16 of the Hopkins[1] situation, unresolved situation where it's a late but very reasonable offer which is not accepted and the case goes to judgment. How do you calculate punitives in that circumstance?

Counselor Pritzker: Well, I suggest to the Court that footnote 16 deals with compensatory damages, and that's all that it deals with.

Justice Cordy: All right. Now you're going to have to explain that to me, because I really don't understand.

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[1] Commentary. Although not included in the oral argument, I thought it would be useful for the reader to review the specific text of footnote 16 in Linda Hopkins vs. Liberty Mutual Insurance Company (2001): "We need not decide in this case whether the same measure of damages would apply in a case where an insurer, having initially violated G. L. c. 176D, s. 3 (9) (f), and G. L. c. 93A, s.s. 2 and 9, thereafter makes a fair and reasonable (but nevertheless tardy) offer of settlement, which is refused by a claimant." For more information, see http://masscases.com/cases/sjc/434/434mass556.html.

Counselor Pritzker: Ok, what we have is several, we have several layers to this statutory scheme. First, there has to be a violation. Then there has to be a loss, a loss being defined as the deprivation of a legal right.

Justice Botsford: But wasn't Hopkins a willful and knowing case?

Counselor Pritzker: I'm sorry.

Justice Botsford: Wasn't Hopkins a willful and knowing case?

Counselor Pritzker: Yes, it was, Your Honor.

Justice Botsford: So, how can you be sure that footnote 16 was about compensatory damages?

Counselor Pritzker: Because what -- because the, um, footnote gave compensatory damages of "loss-of-use" funds and it said that those damages might be different if the ...

Justice Botsford: .. they doubled them, right?

Counselor Pritzker: No, yes -- they did double them, but that wasn't what the footnote ...

Justice Botsford: Right.

Counselor Pritzker: ... was attached to. It was attached to the, the, um, "loss-of-use" of funds, and the footnote said that those "loss-of-use" of funds might be different if the plaintiff didn't accept the offer. I'm sorry, it didn't accept the offer. And the reason for that is that the period of the "loss-of-use" of funds would be, um, different if there's an acceptance, because that cuts off the liability, the compensatory liability to be doubled or, um, it would be different if it wasn't accepted, in which case, they continue on.

Justice Cordy: Let me understand what you're suggesting ought to happen here. Are you suggesting, number one, that there should be the actual damages assessed for this delay period, which is what the Appeals Court did?

Counselor Pritzker: And, and that's what they did. They did.

Justice Cordy: And, and, and in addition to that, double punitive damages?

Counselor Pritzker: Yes, Your Honor.

Justice Cordy: Both of those assessments. Not that the double punitive damages essentially is the recovery under 93A?

Counselor Pritzker: That's correct, Your Honor. That's our position.

Justice Cordy: So you get both.

Counselor Pritzker: We get both.

Justice Cordy: Compensatory loss-of-use damage and the punitive?

Counselor Pritzker: That's correct.

Justice Cordy: And you say that's what 93A says?

Counselor Pritzker: Well, 93A says that you get compensatory damages and you double those compensatory damages unless there has been an underlying judgment. And if there has been an underlying judgment, you substitute the underlying judgment for the actual damages and double those.

Justice Cordy: Well, if you substitute -- well, shouldn't that take care of everything?

Justice Botsford: Yeah, shouldn't that just replace the compensatory damages?

Counselor Pritzker: I don't believe that that's the way the statute reads, Your Honor.

Justice Botsford: Wouldn't you be better off if it did?

Counselor Pritzker: [laughs]

Justice Botsford: We're getting to stratospheric numbers here. I just ...

Counselor Pritzker: Well, we're getting to stratospheric numbers anyway, Your Honor.

Justice Botsford: I know we are, but it seems to me …

Counselor Pritzker: And that's the last point that I wanted to make -- that I know that the AIGDC will be arguing that there's no relationship between the stratospheric damages and their willful violation, and I suggest differently. I suggest that there is a nexus between the underlying judgment and the willful behavior, and it is this. When you're dealing with catastrophic injuries, as an occurrence, or very, very large transaction as an underlying transaction, then the potential or actual judgment is going to be very large, and the willful or knowing, or and knowing, in this case, behavior, the insurer takes the risk that if they violate the statute, the doubling of that judgment is going to be huge. That's what the legislature intended, and it's very clear.

Chief Justice Ireland: Your time is up.

Counselor Pritzker: Thank you, Your Honor, and I appreciate your consideration.

John P. Ryan: Good morning, members of the Court. John P. Ryan on behalf of National Union Fire Insurance Company of Pittsburgh, PA, and AIG Domestic Claims, which for purposes of this argument, I'm just going to refer to as "the insurer." With me also is Attorney Anthony Zelle on behalf of the same parties. I'd like to begin this and move away from my prepared remarks and return to the Chief Justice's questions as it ties into Justice Cordy's question, "What is the rule, or what should be the rule going forward tied into the education and points that are raised by the Hopkins case?" And we'd suggest that the rule going forward and the answer to the question of footnote 16, respectfully, in the Hopkins case, would be that there is no meaningful distinction, and the rule going forward should be where the carrier, albeit willfully, as in Hopkins, knowingly, as in Hopkins, late, as in Hopkins, nevertheless comes forward with a reasonable offer, and there's a panoply – that can be low reasonable, mid reasonable, high reasonable, as in Justice Cordy's question – then at that point, the measure of damages should be the loss of the use of the money, and there's a very practical reason for that, because if the rule is employed as has just been suggested by learned counsel, our opponent, then the whole purpose of the statute will be defeated. A quick illustration. If the carrier is late and delays that was found here, but comes forward six months, seven months, twelve months, with a reasonable offer as Judge Gants stated in his opinion, no intelligent plaintiff or reasonably well-represented plaintiff will accept that offer, because he or she would now know the mere lateness has exposed the carrier to a multiple of the underlying judgment under the plaintiff's proffered rule. So it would drive the plaintiff away from the settlement process and, concomitantly, it would drive the carrier away from the settlement process, because the carrier would have no incentive once it passed the late marker on the highway knowing that, well, as a matter of law we're now exposed to the underlying judgment, there's

nothing to be done, and they could anticipate that that type of offer will be used against them in a later 93A action.

Justice Botsford: How do you explain the Granger case?

Counselor Ryan: Your Honor, the Granger case, and I would suggest answers a question that was put to learned counsel on the other side, and the Granger case is the proper application of the statute, Your Honor, in this regard. Granger was an action against the subcontractor, general contractor against the one or the other. In that case, Your Honor, the actual damages from the same and underlying transaction or occurrence was the breach of the contractual relationship between the parties. So it fit all the language of the statute, actual ...

Justice Botsford: But it was … the case talks about the judgment. It focuses on the judgment, doesn't it?

Counselor Ryan: It does, Your Honor, but where there is a coalescence in this ...

Justice Botsford: It doesn't make the point that it's just because of that coalescence.

Counselor Ryan: Your Honor, that is correct, but if we read the statute as even the amendment which requires, and we keep referring to quote, the "underlying judgment," which is not what the amendment, the 1989 amendment, says. It says "actual damages for purposes of this chapter shall be the judgment on all claims, *quote*, arising out of or from the same and" -- it's a conjunction -- "underlying transaction or occurrence." That's the language of the statute.

Justice Botsford: Yes.

Counselor Ryan: In Granger, Your Honor, the underlying transaction or occurrence was in fact the breach of contract, and contract damages were the proper measure to be multiplied. In the tort case, Your Honor, in the tort case, the injuries by the plaintiff for the late but reasonable settlement offer emanate from 176D, the underlying transaction or occurrence is the lateness of the offer.

Justice Botsford: But it seems to me you're just ignoring the word "judgment" in your analysis.

Counselor Ryan: I don't believe I am, Your Honor, because ... May I give you another illustration? If, for example, we had as Bertassi, Trempe, Wallace -- the cases to which the 1989 amendment was responsible according to the decisions of this Court historically. Those were all cases where there was a judgment which the insured had and its direct contractual relationship with the insurer. Those are cases where the courts had decided only loss-of-use damages were to be used, and the legislature amended the statute ... no, no. Where the actual damages are the contractual breach between the companies, Your Honor. That's the amount that should be, and it satisfies the same and underlying transaction, Your Honor. That's the type of judgment to which the statute speaks. And we would say, Your Honor, that the language of the statute does not allow for the interpretation that's being proffered here by the plaintiffs in this case.

Justice Cordy: It strikes me that looking a little bit at Justice Berry's dissent in the Appeals Court case.

Counselor Ryan: Yes.

Justice Cordy: That once you have been late and you haven't afforded a prompt, fair and reasonable offer, and you come in just before trial with an offer, that the burden on the insurer should be pretty high. Not just a low offer, in a broad reasonable range, but literally a final offer, and one may even measure the verdict against the final offer to determine whether it was really fair in the circumstances. Why isn't that the way to look at this?

Counselor Ryan: Because, Your Honor, first of all, we're constrained by the language of the statute, which I won't go back through, but I think it's important to realize ...

Justice Cordy: If we're constrained by the language of the statute that could be very problematic. I'm trying to figure out ... OK. Go ahead.

Counselor Ryan: Because, Your Honor, if we ... let's take your illustration, respectfully. If we move along that time line, the grading of exposure to the insurer is actually increasing, because the interest is increasing. Let's say a typical serious case in the superior courts of the Commonwealth are 24 or 36 months to get reached. We reach that level. If there's a delay just before trial, we're probably moving out of the doubling range into the trebling range because of the nature of waiting for the party to wait that long. If that offer is not commensurate, just prior to trial, then we have a factual finding that the offer was not reasonable and we have a double breach by the carrier, and that loss-of-use, Your Honor, has a larger component of interest. It has a larger component, potentially, of trebling, and the damages …

Justice Cordy: The whole idea, the whole idea is, is to get away from the situation where insurers essentially do what is alleged to have happened here. Withhold what is obviously a case that needs to be settled at a fair and reasonable basis, draws it right down to the end, puts maximum pressure on the insured, really forces a trial, or acceptance of a very low offer. That's what the whole statutory scheme is intended to prevent, so …

Counselor Ryan: But in this case, Your Honor, the trial was not forced by the insurer's conduct. The Trial Court …

Justice Cordy: Oh, yes it was.

Counselor Ryan: Well, respectfully, Your Honor, the Trial Court found as a fact that the offer that was made at the August mediation by the insurer, in this case, the 3.5 million dollars, if memory serves me correctly, was a reasonable offer.

Justice Cordy: The low end of a ...

Justice Botsford: The low end.

Justice Cordy: … reasonable offer.

Counselor Ryan: Understood. Understood.

Justice Cordy: Made on the eve of trial.

Counselor Ryan: But a reasonable offer, Your Honor.

Justice Cordy: Not a final offer. Not something that was in the middle range.

Counselor Ryan: I understand, and the counter, His Honor will recall, was from, I believe, from 16.5 million to 15 million dollars, and the offer was rejected. That's perfectly appropriate for a plaintiff to decide whether or not to proceed to trial.

Justice Cordy: And maybe that's perfectly appropriate …

Justice Botsford: There's two weeks left till trial …

Counselor Ryan: I understand that, Your Honor, but ...

Justice Cordy: It is perfectly appropriate, if it had been timely. Been made months, months before, and you could actually engage in narrowing that range. But, isn't that part of the problem?

Counselor Ryan: In this particular case, Your Honor, the Trial Court found that liability was not reasonably clear in all of its elements, as I recall the facts, until May of 2004, approximately three months prior to the mediation which took place in August, and that's a finding of fact by the trial judge. So the interval of time we're talking about, Your Honor, is approximately three months, and I think it's noteworthy ...

Justice Cordy: The liability wasn't established?

Counselor Ryan: Well, Your Honor ...

Justice Cordy: Liability wasn't established?

Counselor Ryan: Both components have to be present. There has to be clarity with respect to the liability and damages, and the Trial Court so found, and indicated all the bases its finding that liability and damages were not reasonably clear until approximately May of 2004. In this case, the finding by the trial judge in this case wound up in a punitive damages award of just slightly less than a million dollars. I believe it was $488,000, doubled. He might have trebled it. That was within his discretion of determination based on the conduct. And I believe the record will show an award of attorneys' fees of approximately a million dollars. We're speaking about a sanction. With regard to the three-month interval, and then the five-month interval between the period between the mediation, I'm sorry, and after the judgment, rather a five-month interval. A total of approximately eight months when you add the two numbers together, even if we would accept the pre-verdict period for the sanction, ultimately, that's in the vicinity of about two million dollars. So, Your Honor, we'd suggest that this statute does, by applying that measure of damages, accomplish a significant penalty against the insurer. We also believe, Your Honors, that it is consistent with decisions of this Court, most notably the Drywall decision. In the Drywall decision, this Court will recall, that the comment was made by the Court that the amendment requires that the punitive damages element, for a judgment to be applicable, it must arise out of the same trial and underlying proceeding. And that's within the Drywall case, and that the 1989 amendment, retained the causal nexus between the event, the carrier's activity and the damages sought, the punitive damages.

Justice Botsford: So you say it isn't the same proceeding because ... Oh boy. Because the judgment was the tort action, and this is the 93A action?

Counselor Ryan: We're saying, Your Honor, they had two separate proceedings which do not arise out of the same and underlying transaction or occurrence, which is the language of the amendment, Your Honor.

Justice Botsford: And they don't, because?

Counselor Ryan: Because, Your Honor, the conduct of the carrier is its lateness in making a reasonable offer under 176D. The underlying transaction for the plaintiff's rights against the defendant insured was the trucking accident itself. And we would say, Your Honor, that does not comport with the mandatory language of Chapter 93A, Section 9, as amended in 1989.

Chief Justice Ireland: Thank you, Counsel.

Counselor Ryan: Thank you, Your Honor.

Counselor Morkan: Good morning. May it please the Court. My name is Linda Morkan. I am an attorney with Robinson and Cole. With me is Attorney Greg Varga and, together, we represent Zurich American Insurance, an appellee in this case. Your Honors, I'd like to address two points that were made by Attorney Pinkham. The first is that she stated to this Court that this case, as respects the plaintiffs in Zurich, is about

the investigation, a poor investigation by Zurich. That is incorrect. That is not what this case is. That is not what the plaintiff's claims against Zurich were. In fact, the plaintiff tried to amend their complaint post-trial, to raise a claim of an inadequate investigation. And the Trial Court denied that motion.

Justice Cordy: I'm sorry. Tried to raise ...

Counselor Morkan: A claim that Zurich had improperly investigated. Inadequately investigated the claim. What this ...

Justice Cordy: I'm sorry. What complaint are we talking about, here?

Counselor Morkan: The plaintiff's.

Justice Cordy: The 93A complaint?

Counselor Morkan: The plaintiff's complaint against Zurich, as violating 176D.

Justice Cordy: And when was that complaint filed?

Counselor Morkan: It was after the resolution of the tort action, Your Honor.

Justice Cordy: Right, so you're saying they were trying to amend that complaint?

Counselor Morkan: At the end of ... I'm sorry. I'll back up. When they brought suit against the insurers, the claim ...

Justice Cordy: They brought suit against the insurers.

Counselor Morkan: Correct.

Justice Cordy: Go ahead.

Counselor Morkan: The claim against Zurich was that it failed to effectuate a prompt, equitable settlement offer after liability and damages had become ...

Justice Cordy: This claim ...

Counselor Morkan: ... reasonably clear.

Justice Cordy: … was brought after the jury verdict.

Counselor Morkan: Correct. So the only claim against Zurich is not that it poorly investigated the plaintiff's claims, but that it failed to make a fair settlement offer after liability had become clear. That is the issue that the Trial Court reviewed, and that the Trial Court decided, finding in Zurich's favor, saying that, in fact, the roughly eight weeks that passed between the time that liability and damages were reasonably clear, and the time that Zurich tendered its two million dollar policies, was not a violation of 176D.

Justice Cordy: OK, so give me the dates on that. When did the Trial Court judge find that damages and liability were reasonably clear?

Counselor Morkan: On November 19, 2003. And in the Memorandum of Decision, he goes to great lengths to explaining why that was the date, for Zurich, that liability and damages were clear. Thereafter, approximately eight weeks passed until mid-January, which is when Zurich tendered its policy limits. And again ...

Justice Cordy: Now, when you say "tendered," did they tender them to the plaintiff?

Counselor Morkan: To the excess. And that is the ... In the case, we have primary and an excess insurer. That is the primary's obligation, which is to tender to the excess. And, in fact, the plaintiffs concede that point, in their reply brief. I'm sorry, Justice Botsford. I just wanted to make sure I got that out.

In their reply brief at 16, the plaintiffs specifically state what Zurich's statutory obligation is. Is to tender their limits to the excess. And that's what they did.

Justice Botsford: So, but I thought that the argument this morning was that it was, the phrase was, "radio silence" in January.

Counselor Morkan: Well, it may be. It's true that it's invisible to the insured.

Justice Botsford: Would you say that complies with the consumer, emphasis consumer, protection laws?

Counselor Morkan: Indeed ... well, because we're talking about a primary and an excess level, when a primary insurer tenders its policy limits, if it, as it did here, actually offers that amount to the insured, the insured, in taking that tender, would have to release the insurers. And, obviously, in a case like this ...

Justice Botsford: Well, that's not ...

Counselor Morkan: ... where the damages were going to exceed those policy limits, the plaintiffs aren't ... They're not in a position to make that two million dollars be final.

Justice Botsford: Wasn't the ultimate tender without releasing any liability ...

Counselor Morkan: Yes, because, and that's why the tender goes to the excess. The excess puts that two million in their proverbial pocket, and then decides what, out of the excess policy, the excess insurer will offer to the insureds.

Justice Cordy: So once the tender is made to the excess carrier, Zurich's liability under 176D is done.

Counselor Morkan: It's ... They're ...

Justice Cordy: Even if that tender is never ...

Justice Botsford: Communicated.

Justice Cordy: ... isn't tendered to the plaintiff ...

Counselor Morkan: Correct. Correct.

Justice Cordy: ... for a long time.

Counselor Morkan: Although, in this case, Zurich did make that extra step, and said to the plaintiffs, "We have tendered our two million dollars, and we'll offer it to you ..."

Justice Botsford: In March.

Counselor Morkan: I believe it was March, Your Honor. Although they had tendered to the excess before that.

Justice Botsford: So how can it do that if it was obligated ... I mean, how did it make that tender directly ...

Counselor Morkan: Well because the offer is, "We'll give you our two million dollars, but we need a release." That's what insurance companies need to do that to protect their insureds. And the plaintiffs are like, "Our damages are far in excess of two million dollars. We can't accept that money now and give you a release." Although it was understood, at that point, that that two million dollars was on the table, that Zurich had tendered.

Justice Botsford: Well, the plaintiff's argument, I think, doesn't go beyond March, does it?

Counselor Morkan: Well, in fact, it ...

Justice Botsford: Doesn't it say that March was not reasonably prompt?

Counselor Morkan: But, in essence, what the Trial Court said is, that the terminal date wasn't March. The terminal date is January. So that period, the trigger date being November and the terminal date being January, that's the period that he investigated as, "Was that a reasonable time for Zurich to tender its limits, make that offer, under the policy?"

Justice Francis X. Spina: Just one question.

Counselor Morkan: Yes, sir?

Justice Spina: A factual question. I thought that I heard Attorney Pinkham say that there was "radio silence," but you're saying that you made the tender to AIG.

Counselor Morkan: Correct.

Justice Spina: Because the plaintiff rejected your request.

Counselor Morkan: I'm sorry, Justice Spina. I don't mean to be confusing. Chronologically, what happened is, in a phone call in November of 2003, which involved both representatives from Zurich and AIG, Zurich told AIG, "We're going to tender. You know, I have to get the approval from the upper chain, but we're going to tender our limits." That actually happened in January.

Justice Spina: Tender to the plaintiffs?

Counselor Morkan: Tender to the excess. That's what the primary does.

Justice Spina: But did you ever make the offer to the plaintiff …

Counselor Morkan: Yes, so in January ...

Justice Spina: … but the plaintiff refused to give you the release.

Counselor Morkan: In March. January we tendered to the excess insurer, thereby putting the responsibility on them to go forward. And then, in March, communicated with the plaintiff directly, and said, "We're willing to pay our two million dollars." It was rejected because they weren't going to release all of their claims for that amount.

Chief Justice Ireland: Thank you.

Counselor Morkan: Thank you.