COMMONWEALTH OF MASSACHUSETTS.

Appeals Court.

No. 2009-P-0619.

SUFFOLK COUNTY.

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

v.

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

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT.

REPLY BRIEF FOR THE PLAINTIFFS-APPELLANTS, MARCIA RHODES, HAROLD RHODES AND REBECCA RHODES.

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I. INTRODUCTION

Zurich and National Union - huge national insurance companies - cynically and insultingly imply, without much subtlety, that a punitive damage award of $22.7 million each would be an unfair "windfall." The Trial Court apparently shared this view, deeming it "foolish" to even suggest that the Rhodes Family is entitled to punitive damages measured by the $11.365 million judgment. App., Vol. I, p. 69.

The Rhodes Family urges the Court to reject this suggestion outright, for two reasons. First, it is absolutely irrelevant. The applicable statute gives the trial court no discretion; upon finding a willful violation, the statute absolutely mandates the trial court to award punitive damages of either double or triple the underlying judgment. The punitive damage relief that the Rhodes Family requests is based squarely on that plain mandate.

Second, even if "fairness" were somehow relevant, the real question would be what is necessary to accomplish the legislative purposes of punishment and deterrence. Here, the relief requested is only a minute fraction of one percent of the insurers' surplus funds.[1] The "punitive" damages that the Trial Court did impose against National Union and AIG Domestic Claims

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[1] In calendar year 2005, Zurich had surplus assets of $5.5 billion (App., Vol. XI, p. 6379) and National Union had $8 billion in surplus assets (App., Vol. X, p. 6308).

("NU/AIGDC") do not even result in a slap on the wrist, let alone punish or deter egregious statutory violations. There is nothing whatsoever unfair or inequitable about the relief that the Rhodes Family requests.

The Trial Court's decision, if upheld, tells insurers how to delay as long as possible, make late low offers, go to trial and appeal to further delay payment and then point the finger at their own agents and other insurers to avoid liability. The insurers' briefs simply parrot the Trial Court's conclusion that the Legislature intended to limit the application of chs. 176D/93A to "cases that would have settled (or settled earlier) had the insurer performed its duty to provide a prompt and reasonable settlement offer." App., Vol. I, pp. 72-73. Neither the Trial Court nor the insurers cite any legal support for this argument, and for good reason: the statutes and established precedent do not require consumers to prove hypotheticals to recover for bad faith settlement practices.

This Court is presented with three critically important issues under chs. 176D/93A: 1) can an insurer avoid responsibility for making a prompt settlement offer by delegating its obligations to third parties and then blaming other insurers; 2) can an insurer "cure" willful and knowing violations by making a late offer right before trial; and 3) can punitive damages be limited to lost use of funds where there is both an underlying judgment and a willful violation? Unless each question is decided in the negative, insurers will be further emboldened to engage in unfair settlement practices, completely undermining chs. 176D/93A.

II. THE STATUTORY LANGUAGE MUST CONTROL

NU/AIGDC argues that it is correct to award punitive damages based only on "actual" economic damages caused by its willful violation. However, NU/AIGDC and the Trial Court ignore the mandate of the statute: "For the purposes of this chapter, the amount of actual damages to be multiplied by the court <u>shall be</u> the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence . . . ." G.L. c. 93A, § 9 (emphasis added); <u>see</u> Rhodes Br. at 16-24.

NU/AIGDC attempts to explain away the holding in <u>R.W. Granger & Sons, Inc. v. J&S Insulation, Inc.</u>, which settled the issue that the underlying judgment is used to calculate punitive damages even if the insurer's violation did not "cause" judgment to enter. 435 Mass. 66 (2001). NU/AIGDC contends <u>Granger</u> stands for the proposition that the underlying judgment can only be multiplied if it is a judgment that entered directly against the insurer. No distinction between a surety and liability insurer is warranted or supported by the statute or the case law; whether liability is based on a surety bond or a liability policy, in neither situation does the insurer cause the initial injury that leads to the insured's liability. As such, NU/AIGDC's argument is nonsensical. Of course, none of the cases under chs. 176D/93A support such an argument since it would eviscerate the statutory scheme. See Tallent v. Liberty Mutual, No. 1977-1777H, 2005 W.L. 1239284 (Mass. Super. Ct. Apr. 22, 2005)(doubling $2 million judgment entered against construction company based on insurer's bad faith conduct in appealing that judgment).

NU/AIGDC's argument fails both under the plain language of the statute, which does not differentiate between sureties and liability insurers, and in the face of Granger's facts: the plaintiff subcontractor's original claim that led to the judgment that formed the basis of punitive damages was based solely on the wrongdoing of the insured contractor, and the 93A claim against the insurer/surety was limited to events that took place after entry of the verdict against the insured. 435 Mass. at 68-70. The surety did not cause the original injury leading to the verdict, just as the crash in this case caused the initial injuries that led to the underlying judgment in favor of the Rhodes Family. Regardless of the fact that it was the insured's conduct that caused the entry of judgment in Granger, the punitive award against the insurer was measured by the amount of the judgment that the insurer was obligated to pay solely because of the existence of a surety bond. Id. at 83. Despite NU/AIGDC's desperate attempt to distinguish a surety from a liability insurer, neither is responsible for the harm addressed by the underlying verdict, but both are subject to multiples of the resulting judgment if they willfully or knowingly deny prompt recovery of the sums owed to the claimant. Id. at 81-82.

NU/AIGDC also relies on Cohen v. Liberty Mut. Ins. Co., 41 Mass. App. Ct. 748 (1996). That case does nothing to advance NU/AIGDC's cause because: (1) in that case, liability was not even reasonably clear to the insurer until after judgment entered; (2) because the 1989 amendment had not been briefed, this Court explicitly limited its holding to those facts, id. at 755 n.5; (3) the Cohen court did not use lost use of funds to calculate the punitive award, but instead used the policy limits – a result NU/AIGDC presumably does not wish this Court to follow; and (4) Granger subsequently resolved the question not reached in Cohen, holding that the underlying judgment serves as the basis of punitive damages even for post-judgment conduct.

III. NU/AIGDC'S DUE PROCESS CHALLENGE FAILS

An award that comports with a statutory cap is presumed constitutional even against a due process challenge. See Romano v. U-Haul Int'l, 233 F.3d 655, 673 (1st Cir. 2000) ("punitive damages award that comports with a statutory cap provides strong evidence that due process rights have not been violated"); Labonte v. Hutchins & Wheeler, 424 Mass. 813, 827 (1997).

To succeed in its constitutional challenge, NU/AIGDC bears the "heavy burden" of proving, beyond a reasonable doubt, that there are "no conceivable grounds which could support [the] validity" of the punitive damages provision of c. 93A. Leibovich v. Antonellis, 410 Mass. 568, 576 (1991) ("We inquire only whether the statute falls within the legislative power to enact, not whether it comports with a court's idea of wise or efficient legislation."); see also Schilb v. Kuebel, 404 U.S. 357, 364 (1971) ("Legislatures are presumed to have acted constitutionally"); Commonwealth v. Welch, 444 Mass. 80, 100 (2005) (same).

NU/AIGDC is unable to carry this heavy burden; its cavalier statement that the punitive damage scheme is "irrational" does not suffice. The Legislature amended the punitive damage provision of c. 93A in response to cases that limited punitive damages to lost use of funds. Kapp v. Arbella Mut. Ins. Co., 426 Mass. 683, 685-86 (1998). In doing so, the Legislature was not only deliberate in crafting its response to the statute's lack of "teeth" in enforcing the prohibition against unfair settlement practices, but also careful in the application of the enhanced penalty. First, an insurer must act willfully or knowingly for the statutory multiplier to be triggered; and second, a judgment must enter on the underlying claim. Id.

It makes sense that the Legislature would encourage insurers, through threat of greater exposure, to take their responsibility to settle valid claims even more seriously in catastrophic injury cases because the underlying harm is more serious, and claimants have a greater need for funds. It was also entirely rational for the Legislature to direct judges to use the underlying judgment as the measure of punitive damages because of the practical reality that insurers, not insureds, control the pace and timing of the settlement process.[2]

Punitive damages, by definition, have the dual goals of punishment and deterrence and must be sufficiently large to achieve these aims. Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 17-18 (1998). In order to achieve these dual goals, the Legislature designed a scheme whereby:

> [t]he specter of a punitive sanction many times the loss directly caused by the

[2] This rational assumption was validated here: the insured wanted to respond to Plaintiffs' settlement demands and make an offer by November 2003, but only Zurich could authorize an offer. Even when approval was granted in January 2004, Zurich did not make an offer to the Rhodes Family. GAF wanted NU/AIGDC to put more money on the table in March 2004 but AIGDC refused. App., Vol. I, pp. 30-31. There is also no question that unless and until the Rhodes Family prosecuted the underlying action, they would not have received any settlement offers. Indeed, Zurich waited until the day before the pretrial conference, 26 months after the crash, to make an offer and NU/AIGDC's first offer came less than four weeks before trial.

> [insurer's] bad faith settlement practices provides an important disincentive to [insurers] who would force a claimant into litigation to recover monies to which it is clearly entitled.

Granger, 435 Mass. at 84.

Because the punitive damages provision is an integral part of a rational statutory scheme, it must be enforced. Coffee-Rich, Inc. v. Comm'r of Public Health, 348 Mass. 414, 422 (1965) ("All rational presumptions are made in favor of the validity of every legislative enactment."); Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 65 n.11 (1st Cir. 2005) (substantial deference must be afforded to legislative determination of appropriate sanctions).

A. BMW And State Farm Are Inapplicable To Statutory Punitive Damage Awards

NU/AIGDC's reliance on BMW of North America v. Gore, 517 U.S. 559 (1996) and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003), is misplaced. These decisions addressed the due process concerns that require defendants to have fair notice of potential penalties in the context of a jury's unlimited potential to base an award on a distaste for big business and the nationwide conduct of the defendants. See Phillip Morris USA v. Williams, 549 U.S. 346 (2007). These concerns are absent here: there was no jury and the insurers had notice of the statutorily proscribed penalty.

The rationales of BMW and State Farm simply do not apply to statutory punitive damages. In fact, the statutory scheme established by the Legislature is precisely the design praised by the Supreme Court in its most recent punitive damages decision, in which the Court expressly declined to engage in a due process analysis. See Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2629 (2008)("The more promising alternative [for Legislatively set punitive damages is] pegging punitive to compensatory damages using a ratio or maximum multiple").

Similarly, many courts faced with a State Farm challenge to a statutory scheme decline to apply its guidepost analysis. For example, in Zomba Enters. v. Panorama Records Inc., the Sixth Circuit held that State Farm and BMW do not apply in statutory damages cases, and upheld an award with a ratio of statutory to actual damages of 44:1. 491 F.3d 574 (6th Cir. 2007), cert. denied, 128 S. Ct. 2429 (2008). The BMW guideposts were intended to remedy "unregulated and arbitrary use of judicial power," and this remedy "is not implicated in [a Legislature's] carefully crafted and reasonably restrained statute." Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) (upholding $19 million punitive award where damages were $59,000) (citation omitted); see also Accounting Outsourcing, LLC v. Verizon Wireless Pers. Communs., L.P., 329 F. Supp. 2d 789, 808-09 (M.D. La.

2004) (upholding statutory damage provisions and refusing to apply State Farm and BMW); Vista Resorts, Inc. v. Goodyear Tire & Rubber Co., 117 P.3d 60, 75 (Colo. Ct. App. 2004) (calling reliance on State Farm and BMW "misplaced" in rejecting due process challenge to statutory punitive damages provision).

B. Even if State Farm and BMW did apply, c. 93A comports with its guidelines

In both BMW and State Farm, the Supreme Court declined to impose any "bright-line ratio" that a punitive award cannot exceed.[3] Instead, the Court provided "guideposts" for considering whether a punitive damage award violates due process: (1) the degree of reprehensibility of the misconduct; (2) the disparity (or ratio) between the actual or potential harm suffered and the punitive award; and (3) the difference between the punitive award and comparable civil penalties. BMW, 517 U.S. at 574; State Farm, 538 U.S. at 418, 425. Chapter 93A duly comports with these guideposts and thus, survives constitutional challenge.

i. The Reprehensibility Guidepost is Satisfied

In evaluating reprehensibility, the BMW court suggested consideration of: (1) whether the harm was physical or purely economic; (2) whether the conduct evinced an indifference or reckless disregard for the

[3] In fact, in deciding these cases, the Court did not overrule its decision in TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) which upheld a state court award 526-times greater than actual damages as not so "grossly excessive" as to violate due process.

safety of others; (3) whether the target was financially vulnerable; (4) whether the defendant engaged in repeated acts of misconduct; and (5) whether the harm was the result of intentional malice, trickery or deceit or mere accident. BMW, 517 U.S. at 575-80.

By limiting punitive damage awards to cases of "knowing or willful" violations of the statute, c. 93A ensures that the fifth factor is always present. In fact, all of the reprehensibility factors are present in this case: The Rhodes Family suffered non-economic harm as a result of the frustrations of litigation; the insurers' conduct evinced an "indifference or reckless disregard" for the physical and emotional well-being of the entire Rhodes Family, who suffered financial strain and stress as a result of the insurers' actions; and the multiple violations of c. 176D evidenced repeated misconduct.

ii. Chapter 93A comports with the Ratio Guidepost

The Legislature has capped punitive damages at "up to three, but not less than two, times" the underlying judgment. Accordingly, consistent with State Farm, no award for willful or knowing violations of c. 176D will ever exceed three times the statutorily-defined damages.

NU/AIGDC, however, argues that application of the statute as written would violate the ratio guidepost because it would yield a 50:1 ratio between the actual damages it caused and the punitive award. Courts following State Farm disagree; when a compensatory award is small or nominal, "a punitive damages award may exceed the normal single digit ratio because a smaller amount "would utterly fail to serve the traditional purposes underlying an award of punitive damages, which are to punish and deter." Saunders v. Branch Banking & Trust Co., 526 F.3d 142, 154 (4th Cir. 2008); see also Willow Inn, Inc. v. Public Serv. Mut. Ins. Co., 399 F.3d 224 (3d Cir. 2005) (upholding 75:1 ratio in first-party bad faith action); Myers v. Workman's Auto Ins. Co., 95 P.3d 977, 988-89 (Idaho 2004) (ratio of 400:1 was not unconstitutionally excessive given the nominal amount ($735) of the compensatory damages).[4] Accordingly, the ratio guidepost does not preclude the punitive damages mandated by c. 93A.[5]

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[4] See also Abner v. Kan. City S. R.R., 513 F.3d 154, 165 (5th Cir. 2008) (affirming punitive damages award of $125,000 accompanying nominal damages of $1); Kemp v. AT&T, 393 F.3d 1354, 1364-65 (11th Cir. 2004) (allowing punitive damages award of $250,000 accompanying compensatory damages of $115.05); Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 674-78 (7th Cir. 2003) (affirming $186,000 punitive damages award accompanying compensatory damages of $5,000); Lee v. Edwards, 101 F.3d 805, 811 (2d Cir. 1996) (rejecting ratio analysis because "the compensatory award here was nominal, [so] any appreciable exemplary award would produce a ratio that would appear excessive by this measure").

[5] The civil penalty guidepost derives from the notion that deference should be shown "to legislative judgments concerning appropriate sanctions for the conduct at issue." BMW, 517 U.S. at 583. The Legislature amended c. 93A to define the appropriate sanction for willful or knowing violations.

In this case, the size of the Defendants requires a large award for there to be any impact. The insurers cannot establish that their due process rights will be violated if this Court overturns the Trial Court and directs that a punitive damage award of $22.7 million be entered against each of them.

IV. THE RHODES FAMILY PROVED THAT THEY WERE INJURED AS A RESULT OF THE INSURERS' WILLFUL PRE-JUDGMENT VIOLATIONS OF CHS. 176D/93A

The Trial Court held that because the Rhodes Family did not show that this case would have settled before trial, that they did not suffer harm from Zurich's 26-month delay in making an offer or from NU/AIGDC's further willful and knowing delay in not making any settlement offer for months. By doing so, the Trial Court essentially held that when NU/AIGDC finally extended an offer of $3.5 million, the Rhodes' rejection of the offer cured the previous willful violations of c. 176D. At the same time, the Trial Court ignored the negative effect that Zurich's delay had on the overall settlement posture of the parties.

This ruling was error because to recover under 176D/93A, Plaintiffs do not need to prove the impossible – that they would have accepted some imaginary offer, thus hypothetically settling the case. Rhodes Br. at 24-27. Furthermore, going to trial is not the only "injury" that insurers' unfair settlement practices can cause. Indeed, the Defendants' combined efforts chilled the settlement process, all but guaranteeing that no settlement would result. Plaintiffs are entitled to recover from both insurers for the injury they caused: hindrance of a legitimate negotiation process.

A. Zurich Does Not Address The Trial Court's Failure to Find A 176D/93A Violation As A Matter Of Law

Zurich claims that the Rhodes Family attacks the Trial Court's factual findings, and therefore, this Court's review is limited. Zurich Br. at 13. To the contrary, other than challenging the Trial Court's ruling that the Rhodes Family would not have accepted a prompt hypothetical offer of $6 million, or that the case "never" would have settled even if the insurers complied with c. 176D, the Rhodes Family relies on the Trial Court's findings of fact as the basis to overturn its erroneous rulings of law absolving Zurich from liability. See Granger, 435 Mass. at 73 ("ruling that conduct violates G.L. c. 93A is a legal, not a factual, determination."); Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 474 (1991) (conduct amounted to "unfair or deceptive act or practice" as matter of law).

Chapter 176D places the duty to investigate claims and effectuate settlement squarely on insurers. See G.L. c. 176D, §§ 3(9)(b), 3(9)(c), (3)(9)(f). The facts found by the Trial Court demonstrate that Zurich sat on its hands, ignoring the urgings of its third-party administrator ("TPA") Crawford & Co., and waiting for others, including Plaintiffs, to do its job for it. This Court has the opportunity to again rule that such "studied indifference" violates chs. 93A/176D and is not to be tolerated. See Miller v. Risk Mgmt. Found. of the Harvard Med. Inst., Inc., 36 Mass. App. Ct. 411, 419 (1994).

As Zurich admits, when distilled to its core, its total activity on the Rhodes claim consisted of:

- Inexplicably waiting eight months (1/02 - 8/02) to open a file, even though its agent had notice of the claim immediately after the accident (notably, Zurich does not address the fact that it is imputed with its agent's knowledge), and sent multiple reports and the July 2002 Complaint to its corporate headquarters (Zurich Br. at 3-4; App. Vol. I, pp. 18-19, 20 n.2, 23);[6]
- Waiting 11 months (1/02 - 12/02) to obtain a coverage opinion (Zurich Br. at 4-5);
- Waiting a total of 22 months (1/02 - 11/03) to learn that DLS, the truck driver's employer, had no insurance at all (Zurich Br. at 7; App., Vol. I, pp. 28-29);

[6] These facts are readily distinguished from those in John Doe v. Liberty Mut. Ins. Co., where the insurer was not liable for a six-month delay in denying coverage where the first claim letter was "lost in transit," and it responded to a second claim letter. 423 Mass. 366, 371-72 (1996).

- Failing to determine the third-party defendant had $1 million in coverage, not $3 million, which easily could have been done (App., Vol. I, p. 31);
- Failing to review medical records produced by Plaintiffs to defense counsel (another agent of Zurich) in April 2003;[7]
- Waiting to evaluate the claim until receiving the August 2003 settlement demand; and
- Taking a total of 26 months (1/02 - 3/04), until immediately before the final pretrial conference, (seven months after the demand), to make an offer (Zurich Br. at 9; App., Vol. I, p. 38).

Zurich readily acknowledges that it could not settle this case for its "meager" $2 million policy limits. Zurich Br. at 43. Yet all it was obligated to do was determine that the exposure exceeded its $2 million policy limits, and either communicate an offer to the Plaintiffs, or tender the policy limits to the excess carrier. See Zurich Br. at 45. Determining

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[7] Contrary to Zurich's suggestion that the Trial Court found that the first production of medical records accompanied Plaintiffs' August 2003 Demand (Zurich Br. at 5, 6), the Court noted that defense counsel had the records, but the Crawford adjuster and Zurich did not obtain them from counsel. App., Vol. I, p. 25. Furthermore, the evidence was undisputed that Plaintiffs could have produced UMass records and bills as early as April 2002. Plaintiffs provided medical records and bills in response to discovery requests in April 2003 and supplemented their production in June 2003. App., Vol. III, pp. 981-983. Zurich claims to have needed these records to evaluate the claim, but never bothered to review them when they were readily available.

exposure was not terribly complicated. Crawford accurately did it without reviewing medical records, a life care plan or a research memo from counsel. Indeed, every single person who valued the claim did so at more than double Zurich's policy limits.[8]

Had Zurich simply complied with its own policies on claims adjusting, (see Rhodes Br. at 39-41, addressing another issue Zurich ignores in its brief), it would have complied with its statutory obligations by tendering its policy limits well before the second anniversary of the crash that paralyzed Marcia Rhodes.[9]

B. The Trial Court Improperly Required Plaintiffs to Prove a Hypothetical Pre-Trial Settlement Thereby Ignoring the Injurious Chilling of the Settlement Process

The Defendants merely echo the Trial Court's erroneous conclusion that the Plaintiffs could not have suffered any injury because they did not prove that

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[8] The various valuations were as follows: Crawford adjustors - $5-10 million (later $5-7 million)(App., Vol. I, pp. 24, 28); Kathleen Fuell of Zurich - well in excess of $10 million (up to over $17 million) (Id. at 33); GAF's Defense Counsel - $6.6 - 9.6 million (Id. at 35); Nicholas Satriano of NU/AIGDC - "anywhere from 8 [million] on that we were discussing this case." (App., Vol. IV, p. 1250); Warren Nitti of NU/AIGDC - $6 million (App., Vol. I, p. 39); Tracey Kelly of NU/AIGDC - $4.75 million (Id.).

[9] Though Zurich characterizes Marcia Rhodes' injury as "losing the use of her legs" it is undisputed that Marcia lost all sensation, mobility, control and voluntary functioning from the waist down, including the loss of all bladder and bowel control and sexual sensation, and a litany of complications including osteoporosis, multiple bone fractures, decubitus ulcers, infections and recurring emergency room visits, surgeries and hospitalizations. The severity of Mrs. Rhodes' injuries demonstrates how easy it should have been for Zurich to realize damages exceeded $2 million.

they would have accepted a prompt (hypothetical) $6 million offer in May 2004. App., Vol. I, p. 64. This analysis is flawed for several reasons. First, just as it is beyond our ability to foretell the future, no one among us can say with certainty what would have happened in the past if certain facts were different. The uncertainty created by the insurers' statutory violations should not be used to penalize the Rhodes Family. Clegg v. Butler, 424 Mass. 413, 421 n.8 (1997).

Second, after having imposed this improper standard of proof on the Rhodes Family, the Trial Court compounded its legal error by making erroneous factual findings. The Rhodes Family never said they would not have settled for less than $8 million. Instead, Marcia Rhodes testified that she did not know if she would have agreed to accept less than $8 million in 2002 or 2003 because there was no offer to consider. App., Vol. III, p. 175. Harold Rhodes testified that after rejecting NU/AIGDC's $3.5 million offer at mediation, the family was willing to continue the mediation by agreeing to negotiate in the range of $6-$10 million. App., Vol. IV, pp. 1537-38. When asked if he would have accepted $6 million at any time, he responded:

> A. I don't know. You know, again, there was never an offer made of $6 million, so we never considered it. You know, it's like you don't think about these things. I've got day-to-day stuff that's going on in my life and you don't speculate on stuff that's not happening, so I don't know. I mean, if you had put an offer on the table, I don't know, but you didn't do that.

Id. at 1657.[10] Thus, the Trial Court's analysis of hypothetical offers is wrong legally and factually.

Third, the Trial Court's ruling defines the concept of "injury" much too narrowly, suggesting that the only compensable injury is going to trial. Under Leardi v. Brown, 394 Mass. 151 (1985) unfair conduct that "acts as a powerful obstacle to a [consumer's] exercise of his legal rights" and "would deter [consumers] from exercising their legal rights" causes "injury" under c. 93A. Hershenow v. Enterprise Rent-A-Car, 445 Mass. 790, 800 (2006). Refusing to engage in any settlement discussions, even after receiving a settlement demand, followed by late and low offers, creates enormous obstacles to claimants' participation in any real negotiation process that it causes an "injury" under chs. 176D/93A.[11]

The entire purpose of c. 176D, 3(9)(f) is to level the playing field and give insurers as much of an incentive to settle as injured consumers. The

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[10] Additionally, when asked by defense counsel, Mr. Rhodes testified that he really could not say for sure how the family would have responded to various hypothetical offers before or during mediation because the actual offers did not prompt the family to discuss moving from the $8 million figure they agreed to when preparing for mediation. App., Vol. IV, pp. 1565-68; 1594-96. Indeed, when Mr. Rhodes was asked, for the third time, whether the family would have accepted $6 or $7 million, he testified: "I'm pretty sure not, no. I mean, I don't know. I don't know." Id. at 1596.

[11] This injury is in addition to the "frustrations of litigation" and emotional distress damages set forth in the Rhodes Br. at pp. 27-34.

Legislature used the word "prompt" in the statute for a reason - c. 176D does not permit last-minute offers, late offers, or half-hearted efforts on the part of insurers. When a party extends its hand to another, it is no surprise that the outstretched arm will eventually be withdrawn if the other party does not make an effort to also reach out.

Though the law did not require them to, the Rhodes Family took the first step toward settlement after defense counsel asked for an offer. App., Vol. IV, p. 1156. Having gone to considerable effort in putting together the August 2003 settlement demand, including an embarrassing day-in-the-life video in which Marcia Rhodes exposed the tedium and lack of privacy she suffered because she could not transfer from her wheelchair to the toilet without help, the Plaintiffs were ignored. The Rhodes Family repeatedly asked when they could expect a response, but defense counsel could not answer. Id. at 1159-60, 1167. In December 2003, the Rhodes Family served another demand adding statutory interest: "it was almost 2 years since Marcia's crash and we hadn't heard anything . . . what we wanted to do is get a wake-up call to say pay attention to us - talk to us. You know, this has gone on an awfully long time now." Id. at 1534. Three more months passed with no response.

Ultimately, seven months after the first demand, Zurich offered its $2 million. The extended lack of response poisoned the process and created a powerful obstacle to settlement, which was then compounded by NU/AIGDC's refusal to make an offer outside of mediation. App., Vol. I, p. 35. Plaintiffs agreed to mediation in April, but then had to wait until August for it to be scheduled. NU/AIGDC's first offer of only $750 thousand more, mere weeks before trial, was insulting.

The injury that the insurers caused, on top of the frustration of litigation, was a chilling of the Plaintiffs' settlement efforts since further action on their part seemed futile after two demands were ignored, and then they were rebuffed with late and unreasonably low offers. As the Rhodes Family suffered injury in the form of a lost opportunity for a real dialogue or negotiation toward settlement, they are entitled to at least nominal damages and the punitive damages provided for in the statute.

NU/AIGDC relies heavily on a handful of cases in which the Supreme Judicial Court found no "injury" under c. 93A. These putative class action cases, where plaintiffs alleged deceptive marketing or unlawful provisions in car rental agreements do not control the Rhodes' claim of unfair insurance practices under chs. 93A/176D. Cf. Rule v. Fort Dodge Animal Health, Inc., 604 F. Supp. 2d 288 (D. Mass. 2009) (holding plaintiff failed to show injury from deceptive marketing where she received full benefit of what she paid for since her dog remained free of heartworm); Hershenow, 445 Mass. 790 (2006)(holding deceptive collision damage waiver form caused no injury where none of putative class members were involved in accident during lease term, and provision was never invoked).

The Supreme Judicial Court's understandable reticence to open the door to class action lawsuits in defective product or contract cases in which plaintiffs obtained the benefit of their bargain, does not change the fact that here, the insurers' delays, and indeed, willful statutory violations, caused injury that is compensable under chs. 176D/93A. See Leardi, 394 Mass. at 160-61 (finding injury where landlord's illegal lease provision had effect of deterring tenants from pursuing rights); see also Aspinall v. Philip Morris Cos., Inc., 442 Mass. 381 (2004) (finding injury where deceptive advertising caused consumers to purchase and use cigarettes that exposed them to higher levels of tar and nicotine); Iannachino v. Ford Motor Cos., 451 Mass. 623 (2008)(finding defective door latches, which had not malfunctioned, caused injury because of increased risk of personal injury and economic harm).

C. Zurich Must Be Held Responsible For Its Role In The Overall Injury To Plaintiffs

Zurich apparently assumes that a primary insurer cannot be liable under 176D/93A where the excess insurer engages in wrongful conduct. In doing so, Zurich tries mightily to distinguish Clegg v. Butler, where the excess carrier settled the claim soon after the primary insurer tendered its policy. Zurich Br. at 49. Yet, Clegg stands for the exact proposition that the Rhodes Family asserts: a primary carrier can and will be held liable for its delay, separate and apart from the actions of the excess carrier:

> If we were to follow the position taken by the dissent, when a primary insurer and an excess insurer both cover a claim, a primary insurer who subjects a party to improper delay would never be liable for the injuries caused by such behavior, because there would always be some uncertainty as to what the excess insurer would have done if the primary insurer had behaved differently. We do not believe such a result comports with the language or intent of G. L. c. 176D, § 3(9), or G. L. c. 93A. The evidence regarding the excess insurer's readiness to pay, both as to timing and amount, must necessarily be indirect and inferential . . . . If, as the dissent suggests, such evidence is insufficient, the injured party would never be able to recover damages in respect to the delay in receiving payment from either the excess insurer or the primary insurer. Primary insurers cannot avoid liability for their unfair settlement practices under G. L. c. 176D, § 3(9), by pointing to the uncertainty surrounding a claim against an excess insurer, when that uncertainty stems from the primary insurer's own behavior and delay.

Clegg, 424 Mass. at 421 n.8. The SJC rejected Zurich's arguments in both Clegg and Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556 (2001), neither of which were overruled by Hershenow or any other case. See Rhodes Br. at 24-33.

This case presents the exact scenario warned of in Clegg. While the Trial Court correctly found that

NU/AIGDC knowingly and willfully violated 176D/93A by not extending an offer in May 2004 (App., Vol. I, p. 60), NU/AIGDC could not extend any offer until Zurich relinquished its policy limits. It is not an overstatement to say that Zurich did essentially nothing on the Rhodes claim until September 2003.

It requires no leap of logic to conclude that if Zurich paid attention to the claim in 2002 or earlier in 2003, it would have tendered its policy limits much earlier than January 2004 and made its offer much sooner than March 31, 2004. App., Vol. IV, p. 1201. Nicholas Satriano of NU/AIGDC testified that \$6.6-\$9.6 million was a reasonable range to value the case, and he discussed a settlement value of "\$8 [million] on."[12] Satriano and his supervisor may well have agreed on settlement authority in that range, especially given NU/AIGDC's very recent experience in a Rhode Island case, where a jury returned a \$19 million verdict in favor of a paralyzed plaintiff whose stopped car had been rear-ended.[13] Even accepting the Trial Court's erroneous conclusion that the Rhodes Family would never have settled the case for less than \$8 million, that figure was squarely within Satriano's range.

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[12] App., Vol. IX, pp. 1249-50, 1319-20, 1486-87; App., Vol. X, pp. 6242-43. Had Zurich tendered its policy limits in 2002 or early 2003, there would have been no impediment to NU/AIGDC conducting more discovery. App., Vol. I, pp. 54-56.

[13] App., Vol. VI, pp. 92-94.

All that can be said with any certainty about settlement efforts after Zurich made its offer is that NU/AIGDC made an offer four months later and then continually increased its offers up to $6 million until it ran out of time when the jury returned its verdict. App., Vol. I, pp. 40-41. The Rhodes Family had been willing to negotiate in a range of $6-$10 million at mediation one month earlier.[14] Based on this evidence, it cannot be concluded that the case never would have settled. Sterlin v. Commerce Ins. Co., Worcester Superior Court C.A. No. 2003-01965 (Tucker, J.) (January 20, 2009)(finding that if insurer had made offer sooner, claimants would have reached agreement on how to split the policy limits that much sooner).

In order for c. 176D to have any meaning or effect, Zurich must be held accountable for essentially ignoring the Rhodes Family for 18 months, and then still taking another seven months after Plaintiffs' demand to make the first offer in a case that had always been valued to be at least $5 million. The Trial Court's legal conclusion that Zurich complied with chs. 176D/93A must be reversed.

V. NU/AIGDC'S CROSS-APPEAL ISSUES ARE UNAVAILING

NU/AIGDC argues that the Trial Court erred in ruling that its appeal was filed in bad faith because there was "no evidence" presented at trial. In fact, there was ample evidence: Attorney Deschenes testified

[14] App., Vol. IV, pp. 1538-1540.

that settlement and verdict research yielded an average settlement figure of $6.6 million and a verdict figure of $9.6 million. App., Vol. I, p. 35. Nicholas Satriano agreed that those numbers were reasonable values. App., Vol. IV, pp. 1248-49. NU/AIGDC's expert testified that it was the insurer in a Rhode Island case where the jury awarded $19 million to a woman who was paralyzed after her stopped car was rear-ended. App. Vol. XI, pp. 2639-41. This evidence fully supports the finding that NU/AIGDC acted in bad faith by claiming the verdict was "excessive." NU/AIGDC's argument on the merits of its evidentiary claim must also be rejected. It is well-settled that evidentiary challenges rarely result in new trials. As the Trial Court found and NU/AIGDC admitted (App., Vol. I, p. 41), all NU/AIGDC would have gained had it bucked the odds and won a new trial, was another plaintiff's verdict, with even more interest added to the judgment.

NU/AIGDC's claim that the Rhodes Family waived all right to recover post-judgment interest is also meritless as the family explicitly reserved its claim:

> 4. Expressly excluded from this settlement is the plaintiffs' claims for violation of Massachusetts General Laws, Chapters 176(D) and 93(A) entitled *Marcia Rhodes, et. al v. AIG Domestic Claims Inc., et al*. . . .; the plaintiffs reserving all rights to pursue their claims under that lawsuit.

App., Vol. VIII, p. 3576.

Having expressly reserved the right to pursue all claims in this action, the Rhodes family retained their right to seek post-judgment interest. NU/AIGDC's related argument that the filing of a Satisfaction of Judgment precludes recovery of post-judgment interest, is also unavailing. See Rothenberg v. Boston Housing Auth., 335 Mass. 597, 600-01 (1957) (holding that creditor's filing of satisfaction of judgment did not preclude creditor from later recovering post-judgment interest); see also Rhodes Br. at 34-36.

NU/AIGDC did not raise equitable estoppel below, and therefore, has not preserved this argument on appeal. Granger, 435 Mass. at 73-74; Trustees of the Stigmatine Fathers, Inc. v. Sec. of Admin. & Fin., 369 Mass. 562, 565 (1976) (argument raised for first time in post-trial motion need not be considered on appeal). Regardless - even apart from the requirement that "one who seeks equity must do equity" and NU/AIGDC was found to have willfully and knowingly engaged in unfair settlement practices - NU/AIGDC's argument must fail. A fundamental requirement of equitable estoppel is reasonable reliance. See Weston Forest & Trail Ass'n., Inc. v. Fishman, 66 Mass. App. Ct. 654, 659 (2006) (for estoppel to apply, reliance must be reasonable under the circumstances and reliance was not reasonable where property owner knew of conservation restriction on property but failed to confirm that structure would comply). Given the express retention of the 93A claims, no representation of foregoing any 176D/93A damages was made, and therefore, there was nothing for NU/AIGDC to "reasonably" rely upon.

NU/AIGDC's argument that the Trial Court erred in calculating lost use of funds damages is easily rejected. The measure of lost use of funds in cases where there was a pre-trial settlement or otherwise no judgment, i.e., interest at a "fair" rate or the rate of return that would have been earned if the funds were invested, is of no significance once judgment enters. A statute governs the calculation of post-judgment interest, and the Trial Court followed it. See G.L. c. 231, § 6C.

VI. CONCLUSION

For the reasons stated herein, and in the Rhodes opening Brief, the Rhodes Family hereby requests that this Court reverse the Superior Court's decision, in part, and order that the Superior Court:

1. Enter judgment in favor of Plaintiffs and against NU/AIGDC, awarding double the amount of the underlying judgment, $22,730,668, as required by G.L. c. 93A, § 9;

2. Amend judgment in favor of Plaintiffs and against NU/AIGDC, awarding lost use of money damages to total $991,645.71;

3. Enter judgment in favor of Plaintiffs and against NU/AIGDC, awarding compensatory damages for pre- and post-judgment "frustrations of litigation" including emotional distress;

4. Issue findings and enter judgment in favor of Plaintiffs and against Zurich, awarding compensatory damages for "frustrations of litigation" including emotional distress;

5. Enter a separate judgment against Zurich for a knowing and willful violation of G.L. c. 176D and

awarding double the amount of the underlying judgment, $22,730,668, as required by G.L. c. 93A, § 9; and

6. Remand this matter to the Trial Court to determine the reasonable costs and attorneys' fees the Plaintiffs shall recover for pursuing claims against Zurich.

Respectfully submitted,

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