COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No. 05-1360-BLS2

MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, HAROLD RHODES ON BEHALF HIS MINOR CHILD AND NEXT FRIEND, REBECCA RHODES,	)
Plaintiffs,	)
v.	)
A.I.G. DOMESTIC CLAIMS, INC. f/k/a A.I.G. TECHNICAL SERVICES, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, and ZURICH AMERICAN INSURANCE COMPANY	)
Defendants.	)

POST-TRIAL BRIEF

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REBECCA RHODES,
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INTRODUCTION

This case is not about what a third party administrator needs to do its job. It is not about a primary insurer's needs, nor an excess carrier's. This case is about Marcia Rhodes, and how the Defendants utterly failed her in her time of need.

The Defendants' conduct represents precisely what the Legislature sought to dissuade with the enactment of c. 176D. It also demonstrates the need for the 1989 amendment to c. 93 A, and a punitive damage statute that has the power to punish intentional violations and serve as a deterrent to all insurers who flaunt their duty to "effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear." G.L. c. 176D, § 3(9)(f). If the Defendants in this action are not subjected to treble damages for their cavalier disregard of the Rhodes family, then it is unlikely there would ever be another unfair settlement practices case warranting the full statutory penalty. As a result, the insurance industry will believe there is not much risk in engaging in unfair settlement practices in Massachusetts.

Mrs. Rhodes was paralyzed when Carlo Zalewski drove an 80,000 pound truck into her stopped car on January 9, 2002. Zalewski's liability was immediately clear, but Zurich did not make a prompt effort to effectuate settlement, whether it was on notice of the claim in January or August 2002. Zurich violated its own guidelines by failing to assess coverage and damages in a timely manner, yet it refuses to accept responsibility for its failures. Instead, Zurich blames its agents, though any missteps of Crawford or defense counsel are Zurich's as well. Zurich ignored Crawford's recommendation to post policy limits for at least 16 months and ignored Crawford's $5-10 million valuation for more than a year, although its primary obligation under c. 176D was to assess whether its $2 million policy was exposed and to tender those limits to the excess carrier. Zurich waited for Plaintiffs to collect, synthesize and package the facts and relevant documents rather than conduct its own investigation. Zurich's focus on its financial interests took precedence over its duty to effectuate settlement. Zurich intentionally delayed any settlement activity for months while it tried to find other primary policies to share in its exposure, and then intentionally delayed any settlement activity for several more months as it planned to tender the cost of defense, only to later retain that obligation and reserve its rights against AIG. Zurich's claims handling practices, and its failure to respond in any way to Plaintiffs' settlement demand, demonstrates "studied indifference" to the claim and the Rhodes family, which is a willful violation of c. 93A. Zurich is subject to punitive damages regardless of: a) its policy limits; b) whether the case would have settled if the excess carrier was reasonable; or c) AIG's subsequent unfair settlement practices.

AIG's adjustors were willfully ignorant of the claim, as they did nothing of substance for more than 20 months. Given the amount of time that had passed and the amount of information available to it, AIG should have prompted Zurich to tender sooner or at least have been ready to act immediately upon Zurich's tender. Instead, AIG adopted a head in the sand posture, followed by an adversarial approach with everyone, rather than take steps to effectuate settlement. AIG's failure to adopt any policies or guidelines on how to adjust claims is an intentional act that results in lax claims handling practices and no focus on a claim unless "trial is imminent" - another violation of c. 176D.

AIG agreed with defense counsel's valuation of the case at $6.6 - 9.6 million in March 2004, yet it ignored advice of counsel and GAF's desire to make a $5 million offer at that time. AIG refused to make any offer or go to mediation, even after GAF's counsel advised it of its obligation to do so under c. 176D. AIG intentionally delayed making an offer while it pursued discovery it said was "necessary" to value the claim. Yet, when trial was imminent, AIG's

adjuster was able to put value on claim without the "necessary" discovery. AIG ignored its adjuster's recommendation to settle the case for $6 million, and instead placed an unreasonably low value on the claim based on year-old information.

AIG purposefully sent its adjuster to mediation with $1 million less than its valuation because the third party defendant had a $1 million primary policy. AIG offered only $750,000 of its own funds as its first offer at mediation, and did not even offer the full $1.75 million that was authorized. After the third party defendant broke off from the defense group and made a direct settlement with the Rhodes family for $550,000, AIG did not increase its settlement authority. Nor did it increase its case value after the Underlying Defendants stipulated to liability. Instead, AIG waited until after the close of evidence to finally offer its adjuster's $6 million value. The jury returned verdicts totaling $9,412 million, to which interest was applied, and AIG filed an appeal in bad faith just to have leverage to compel the Rhodes family to settle for much less than they were entitled to under their judgments.

Zurich and AIG are each liable for: 1) the emotional distress suffered by the Rhodes family due to their unfair claims handling practices; 2) more than $138,000 in litigation costs incurred after January 2003, at which time a reasonable settlement offer should have been made; and 3) denying the Rhodes family the use of more than $1 million because of the delay in paying the judgments, including interest, between September 28, 2004 - September 6, 2005, when the last payment was made by the Defendants. Zurich and AIG each acted intentionally in violating c. 176D, and each is subject to "up to three, but not less than two times" the judgments entered in the Underlying Action because the Legislature intends to punish unfair settlement practices, not reward them.

ARGUMENT

I. Statutory Requirements

Under G.L. c. 93A, § 9 and c. 176D, § 3(9)(f), insurers are obligated to "effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear." The purpose of the statute is "to encourage settlement of insurance claims . .. and discourage insurers from forcing claimants into unnecessary litigation to obtain relief." Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 567-68 (2001) (quoting Clegg v. Butler, 424 Mass. 413, 419 (1997)). When liability is reasonably clear an insurers' failure to make any settlement offer or making unreasonably low settlement offers constitute unfair settlement practices. Id at 566 n.14, 569 (affirming punitive damages where insurer deliberately refused to make any settlement offer at least two years after fault and damages were reasonably clear); Miller v. Risk Mgmt. Found, of the Harvard Med. Inst., Inc., 36 Mass. App. Ct. 411, 419-20 (1994) (awarding treble damages for lack of response to demand and unreasonableness of late-coming settlement offer).

In determining whether liability is "reasonably clear" the inquiry is "whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insurer was liable to the plaintiff." Demeo v. State Farm Mut. Ins. Co, 38 Mass. App. Ct. 955, 956-57 (1995) (noting cost of defense, size of plaintiff s demand and insurer's "business judgment" with respect to whether to make settlement offer are not relevant to issue of liability). Stated another way, in resolving issues of liability under Chapter 93 A, including the issue of bad faith, what matters is "whether the [insurer] reasonably believed that liability was not clear, or was unreasonable in holding that belief." Bolden v. O'Connor Cafe of Worcester, Inc., 50 Mass. App. Ct. 56, 67 (2000).

The Court does not need to determine what a reasonable settlement offer would have been at any particular time, only whether the insurer proffered a fair settlement offer once liability was clear. Met. Prop, and Cas. Ins. Co. v. Choukas, 47 Mass. App. Ct. 196, 200 (1999). Where the insurer makes no settlement offer, the Court has its answer. Hopkins, 434 Mass. at 566 n.14, 569. When an insurer does make a settlement offer, it bears the burden of showing that it was reasonable. Bobick v. United States Fid. & Guar. Co., 439 Mass. 652, 660-61 (2003) (if case had gone to trial, insurer would have had to prove its offer was reasonable).

A. Zalewski's Liability Was Clear In January 2002

Within two weeks of the January 9, 2002 crash, Zurich's third party administrator ("TPA") and agent, Crawford & Co. ("Crawford"), determined that Carlo Zalewski was likely to be found liable because he had sufficient view of the scene and admitted he had not been watching what was in front of him before the accident. The facts necessary to establish Zalewski's liability were set forth in the Medway Police Report, which was completed on January 13, 2002, and which was provided to Crawford shortly thereafter. The report indicated that Sergeant Boultenhouse, who was wearing white gloves and an orange "POLICE" vest over his jacket, had stopped Mrs. Rhodes' car as McMillan's Professional Tree Service ("McMillan's") was grinding stumps on the eastbound side of Route 109. Marcia Rhodes' brake lights were working and lit at the moment of impact.

There was an unobstructed view of Mrs. Rhodes' car from the crest of a small hill 750 feet away and Zalewski admitted he had looked away, purportedly to watch a car that had turned in front of him to travel west. When he turned his attention back to what was in front of him, it was too late to stop. Zalewski was charged with negligent operation/driving to endanger at the scene.

II. Zurich Violated Chapters 93A And 176D

Zurich's insured, GAF (the motor carrier for whom Zalewski was driving), learned of the accident immediately and faxed its contracts with Penske (the leasing company that owned the truck) and DLS (the company that assigned Zalewski to GAF) to its broker and John Chaney at Crawford on January 10, 2002. Crawford was on Zurich's approved TPA list, and under contract with Zurich to provide claims administration services. Zurich was therefore on notice of claim before August 2002. On January 30, 2002, Crawford issued its First Full Formal Report to GAF and copied it to Zurich's home office and Nixon Peabody, LLP, defense counsel for GAF. The First Full Formal Report stated that Crawford was putting Zurich on notice of the claim, and it described: 1) the statement Chaney took from Zalewski; 2) a summary of the police report; 3) the identity and relationships of the entities who were subsequently named as defendants in the Rhodes personal injury action ("Underlying Defendants" and "Underlying Action"); 4) Chaney's visit to the scene; 5) the liability of the driver; and 6) Mrs. Rhodes' life threatening injuries, her paralysis and other medical conditions.

Crawford's administrative staff was responsible for addressing envelopes and mailing correspondence, and it was their practice to send mail to the addresses that adjusters included on the correspondence. Under Massachusetts law, there is a presumption that any correspondence mailed to the correct address is received. See, e.g., Anderson v. Town of Billerica, 309 Mass.516, 518 (1941) (mailing, postage prepaid, of a properly addressed letter is prima facie evidence of its receipt by the addressee); Commonwealth v. Crosscup, 369 Mass. 228,239-240 (1975) (presumption rests on natural inferential value of basic fact of mailing). Accordingly, Zurich received notice of the claim by early February 2002 when the First Full Formal Report,

identifying the Building Materials Corporation of America d/b/a GAF policy number on the first page, was mailed to Zurich's home office in Illinois. This report was sent to AIG on February 4, 2002 along with notice of the claim and the police report. Beginning with its next report, Crawford began to copy AIG, in addition to Zurich, on its reports. Both Zurich and AIG had all the facts necessary to establish Zalewski's fault and liability within a month of the accident. Neither, however, acted on those facts until 2004.

Crawford continued to update Zurich and AIG throughout 2002-2003, and consistently communicated that the driver was at fault, stating on April 8, 2002, and thereafter, "we see this [liability] clearly falls to the DLS driver due to lack of attention and this liability to the extent of policy limits may be imputed to GAF." Crawford mailed the April Transmittal Letter to "P.O. Box 66946, Chicago, IL," the same P.O. Box that was used for correspondence sent through November 2003, all of which was received by Zurich. Accordingly, Zurich also received notice of the claim in April 2002. Kathleen Fuell testified that Zurich had no idea what happened to Crawford's initial correspondence, but once Zurich informed its TPA of David McIntosh's name (not a Zurich claim number), it admittedly received all Crawford reports. Zurich's inability to have a system in place to adequately process the first two reports and direct them to its claims manager is Zurich's failure. Zurich was also apparently unable to direct updates from defense counsel to the appropriate staff person, as Morrison Mahoney's 2004 correspondence was returned to it.

A. Zurich Breached Its Own Guidelines

Crawford updated the insurers on Mrs. Rhodes condition, noting in April 2002: "[t]he last word we have is that the claimant remains unable to walk, is in a long-term rehab center coming back to strength, after some serious complications, and secondary infections." As John Chaney spoke with Plaintiffs' counsel only once in January, he must have been receiving information from defense counsel, who was being updated by Plaintiffs' counsel before suit was filed. Zurich, meanwhile, was doing nothing. Mrs. Rhodes was discharged from the rehab hospital on her wedding anniversary, April 16, 2002 - after three full months of in-patient treatment.

Also starting with the April 2002 Transmittal Letter, and no less than ten times afterward, Crawford advised Zurich to increase its reserves to the $2 million policy limits. Under Zurich's Liability Best Practices Guidelines, Zurich was ultimately responsible for all aspects of the claim:

> The insured and claimant are to be contacted within 1 business day ... The case manager must be the one to make contact with those parties. Contact by third parties, such as independent adjusters, does not qualify as contact.21 The case manager should develop and pursue a proactive strategy to obtain all necessary evidence and information, and should not abandon the investigation to counsel or the discovery process.22 Estimated realistic case exposure is proactively recognized as soon as practicable, but no more than 30 days from our receipt of information evidencing that exposure … Case reserves reflect our estimated realistic exposure given the degree of liability, severity of loss and measure of damages.

The Underlying Action was filed on July 12, 2002. Zurich finally opened a file and in mid-August 2002, McIntosh authorized Crawford to hire counsel for Penske, and Corrigan, Johnson & Tutor was retained. David McIntosh did precious little on the claim even after receiving Crawford's June 10, 2002 Transmittal Letter, which stated:

> CURRENT STATUS: PLEASE REFER TO OUR FULL FORMAL REPORT OF 1/30/2. IN THIS REPORT WE OUTLINED THE VARIOUS POTENTIAL TORT FEASORS IN THIS LOSS … WE NOTE YOU HAVE BEEN COPIED IN ON ALL THIS DOCUMENTATION.

Despite this express reference to a Full Formal Report dated January 30, 2002 and other documentation sent to Zurich, no one - not McIntosh - not Fuell - ever bothered to ask for Crawford's pre-suit work product. Zurich's expert testified that it would have been good claims handling practice to go back to try and determine what Crawford had done. Failure to comply with good claims handling practice is, of course, bad claims handling practice, which supports a finding that Zurich violated c. 176D. In the same Transmittal Letter, Crawford noted that the reserve was low and recommended that it be raised to the $2 million policy limit.31Zurich, however, took the position that it could not address the reserve until it determined which of the entities involved in the accident were covered by its policy.

B. Zurich Ignored Claim While Waiting For A Coverage Opinion

Under Zurich's Liability Best Practices, "[a]ll applicable coverage issues are recognized immediately upon receipt of information (first notice, pleading …) evidencing the potential coverage issues. Investigation of facts relevant to coverage issues initiated no more than 2 business days after receipt of information … Investigation is pursued in a proactive manner." Coverage decisions at Zurich are to be made no more than 30 days from the receipt of the information necessary to make the determination. Zurich would not allow Crawford or GAF to make coverage decisions, and McIntosh did not even attempt the very straightforward analysis of determining whether the defendants in the Underlying Action were insureds. To do so, Zurich had to analyze its policy and refer to the three-page DLS/GAF contract and the five-page Penske contract, both of which GAF faxed to Crawford on January 10, 2002. As was readily demonstrated during the testimony of Arthur Kiriakos, the determination that Zalewski was an insured required Zurich to read the "Who is an Insured" section of the policy (insured includes "[a]nyone else while using with your permission, a covered "auto" you own, hire or borrow") and the MA Commercial Auto Endorsement ("all vehicles leased for a term of six months or longer" are specified as "covered autos you own"). Since GAF's lease with Rollins/Penske was first entered into on May 18, 1992, and was still in place in 2002, the Penske tractor was a "covered auto you own" and Zalewski was insured under the Zurich policy.

McIntosh reviewed the Penske lease, but overlooked the provision requiring GAF to include Penske as an additional named insured. His first note on the file stated: "did not find a requirement to add Penske as an additional insured." He also concluded that Penske "has the maintenance duty, not the insured," despite Paragraph 6A of the Penske contract:

> A policy of automobile liability insurance as is usual and customary insuring Rollins as additional insured, and Lessee and their respective agents and employees against liability for Bodily Injury or Death and Property Damage caused by an occurrence arising out of the ownership, maintenance, use or operation of the Vehicle(s) will be furnished and maintained by the party indicated on the Lease(s) … Said insurance shall be primary and not contributory or excess coverage.

Pursuant to the contract, the Certificate of Liability Insurance, the second page of the Zurich policy, identifies Penske as the certificate holder, and that the "Certificate Holder is named as Additional Insured/Lessor & Loss Payee ..." Rather than look at the plain language of the policy, McIntosh made a lateral pass to coverage counsel in August 2002.

Meanwhile, the lawsuit was proceeding without any oversight from Zurich. Throughout the fall of 2002, the Plaintiffs served document requests and interrogatories on the Underlying Defendants. Beginning with its September 2002 transmittal letter, Crawford repeatedly told Zurich and AIG that the exposure on this case was likely between $5-10 million. In November, 2002, Zalewski admitted to sufficient facts to support a guilty finding on the criminal charges against him. T here is no indication that Zurich made any inquiry into the status of Zalewski's criminal charges. In her victim impact statement, Mrs. Rhodes stated:

> Before this accident, my life was a series of typical days filled with household chores, chauffeuring my daughter Becca, who was 13 at the time and working on my antiques and collectibles business …
>
> I do remember immediately knowing upon impact that I was now paralyzed from the waist down, but I also knew I was not a quadriplegic, as evidenced by the searing pain above my waist. I remember asking the police to call my husband. I even remember giving them the number to dial. I remember the fireman telling me not to be scared of the "Jaws of Life," and finally I saw my wonderful husband's head peek through the passenger side and assure me he was there. At that point I demanded and received pain-killers.
>
> * * *
>
> When I finally got word that I was to be transferred to a Rehabilitation center I wasn't scared because nothing could possibly be worse than those last 3 weeks in UMass Medical. In many ways I was wrong.
>
> As the weeks passed I received messages of good cheer, visitors, friends and most of all family, but I nonetheless slowly sank into a profound depression. It does not help to tell someone who is depressed that they should cheer up, that the feeling will go away, that things will get better or my personal favorite: I was lucky, things could have been worse. People want to see you trying and want to see a stiff upper lip. Obviously these are people who have never had their lives up-ended by a debilitating physical injury.
>
> I finally left Fairlawn for home in mid-April, 3 months after my accident. Now my days were filled with complete strangers involved in my most personal needs. My afternoons were made up of Nurses visits, Physical and Occupational therapists and trips to a long list of doctors I had to start seeing.
>
> * * *
>
> Now, on a typical day, and solely due to the negligence of Mr. Zalewski, every minute of every day has to be carefully planned for, carried out and/or compromised.
>
> I have a home health aide come into the house to wake me up at 7:30 am. She helps me out of my Air Cushioned Hospital Bed. The air cushions are there to prevent skin breakdowns, which are common to quad and paraplegics and can become a life threatening condition. My care aid helps me transfer to a specially sized, special order wheelchair, again with a special air cushion for dermatological reasons.

My aide then wheels me into the bathroom where I transfer to a padded commode and start a bowel program that I prefer not to get into the specifics on, but suffice it to say it takes 2 Vi to 3 hours every morning. This is also when my catheter, which I must now wear every minute of every day, is emptied.

* * *

At this point I want to tell you that somehow, in the months that followed my continuing hospital recovery, my wonderful husband managed to have the house remodeled for a paraplegic, bring in an income, raise our wonderful daughter Rebecca, and still tend to my physical and emotional needs. And at the risk of digressing even further, I want to briefly touch on the subject of remodeling and how much is really involved .... Quite frankly, the up-front cost of becoming disabled are [sic] staggering. I don't know how the less fortunate newly paralyzed victim can afford it. I've been lucky in that my wonderful husband has managed to afford to pay for the $450 wheelchair cushion, or the $350 transfer board I need to get from the bed to the wheelchair or any other seat in the house. Most people couldn't even dream of these "luxuries," which are really necessities.

But back to my typical day ... after I shower, which is a very scary proposition, I transfer back into the chair and then back into bed so my care giver can look over my body for any skin abrasions, cuts or bruises; talk about an intrusive experience. Then the care giver puts on my "Depends," which I need since I still require a full-time catheter. My care giver then helps me get the special stockings on that tone my now useless leg muscles and to facilitate blood circulation. By the time I am fully clothed and back in my wheelchair it is usually around 12:00, and the whole morning has been lost.

* * *

We have been fortunate in one area. Again, solely thru [sic] the efforts of my loving husband, we've been able to by [sic] an electric bike for muscle stimulation, and electric wheelchair, which was prescribed because of my tendonitis and bursitis and are even looking at a piece of equipment that lets quads or paraplegics stand in place. Of course we're talking thousands of dollars here. I can't begin to guess how the typical American can afford everything that's needed.

* * *

From the moment I awake until I am put into bed, I am being monitored by someone. My care aid, family member or friends... I rarely find my self alone, which for me is one of the most devastating results of this accident. I have always been the person that helped others out. Now, I suddenly find that I have to rely on others ... and I hate it. I'm also the type of person who does not like to be the center of attention . .. but now I am because of this damn wheelchair and I hate it.

* * *

My life now has no spontaneity, no privacy, no intimacy with my husband and no long-term forcible [sic] medical improvements in my condition. These are the things the defendant has cost me.

Incredibly, despite knowing that the claim had been pending for eight months, and that suit had been filed in July 2002, McIntosh was content to do nothing until January 2003, when coverage counsel concluded that all Underlying Defendants were insureds. Rather than sit around

and wait months for a coverage opinion, he should have done something . .. "sometimes you have to go get [the opinion]." There was no reason Zurich could not investigate damages as it awaited the coverage decision.

Given that its "Other Insurance" provision stated that for "any covered 'auto' you own, this Coverage Form provides primary insurance,"49 Zurich should have proceeded on a dual track: 1) making the determination that each of the Underlying Defendants were "insureds" and taking steps to effectuate settlement; and, concurrently 2) exploring the existence or applicability of other policies to determine additional sources of contribution. Zurich, however, was more interested in devoting its time and energy to finding other primary policies to cover the Underlying Defendants and decreasing its exposure, than in complying with its own standards. Zurich spent five fruitless months trying to find another primary policy that covered Zalewski, DLS and/or Penske. Alternatively, Zurich could have tendered to AIG, paid out the $2 million policy limits, and then focused on trying to collect from other primary insurers for some portion of the $2 million. See Harlevsville Mut. Ins. Co. v. Zurich-American Ins. Co., 578 S.E.2d 701, 702 (N.C. App. 2003) (commercial garage owner's liability insurer brought declaratory judgment action against business automobile liability insurer, Zurich, for contribution and pro rata share of the costs after $1.5M jury verdict in favor of plaintiff); Auto-Owners Ins. Co., Inc. v. Zurich US, 377 F. Supp. 2d 496,497-498 (D.S.C. 2004) (Zurich and Auto-Owners agreed to a certain split of settlement while reserving right to seek declaratory relief, then Auto-Owners sought declaratory judgment that Zurich should have paid more); State Farm Fire & Cas. Co. v. Zurich Ins. Co., 111 F.3d 42, 43-44 (6th Cir. 1997) (tenant's insurer brought action against landlord's insurer for declaratory judgment regarding costs of settlement in personal injury action). Zurich, however, chose to do nothing on the claim while it pursued, in vain, other policies it hoped would reduce its indemnity and defense exposure.

C. Zurich Ignored Facts After Coverage Was Determined

Finally, one year after it was put on notice of the claim, Zurich agreed to defend the Underlying Defendants under a very limited reservation of rights, which only excluded independent negligence of the corporate entities. There was no reservation of rights to Zalewski, who was clearly at fault for the accident.51 By January 2003, Zurich had no excuse for its failure to take steps to effectuate settlement because it knew that it had to defend and indemnify all of the Underlying Defendants, and its TPA had repeatedly advised that the exposure was $5-10 million. Zurich "had reason to know of its liability for [the Rhodes] claim under its insurance policy with [GAF] several months prior to its receipt of [Plaintiff] demand letter, yet it failed to settled [the] claim or tender its policy at that time or for more than a year thereafter." Cohen v. Liberty Mut. Ins. Co., 41 Mass. App. Ct. 748, 756 (1996) (finding willful violation and assessing treble damages).

In March 2003, Zurich continued to focus only on its financial interests, not on the substance of the claim.52 Zurich reasoned that since the coverage issue was resolved, it needed Crawford to determine the "impact on both the indemnity exposure as well as the expense." Yet, Zurich had known for months that the driver was liable and an insured. Whether the other Underlying Defendants were covered hardly changed the exposure, it only increased the cost of defense. Meanwhile, Plaintiffs responded to GAF's document requests and interrogatories, producing almost 2000 pages of records including operation reports, discharge summaries, nursing notes, UMass Medical Center bills, summaries of the Rhodes family's out-of-pocket expenses, and Mrs. Rhodes' victim impact statement, as well as interrogatory responses from Marcia, Harold and Rebecca Rhodes, in April, 2003.54 Mrs. Rhodes' interrogatory responses stated in part:

5(a). ... [M]y husband has spent $190,000 to date for equipment and supplies as well as purchasing a handicapped van and making preliminary modifications to our house that were necessary for me to come home after months of inpatient treatment. We will begin construction soon on a more complete renovation/remodeling so that I can live in more than two rooms and so our family can all eat meals together again. The new addition is estimated to likely cost in excess of $250,000. I cannot estimate the dollar value of my pain and suffering and the fact that I have been rendered a paraplegic, and the devastating effects my injuries and continued complications have had on me, my relationship with my husband and daughter, and our lifestyle.

6). On January 9, 2002, as I was traveling on Route 109 in Medway, I saw a police officer and truck on the side of the road. The officer indicated that I should stop, which I did, near Trotter Drive on Route 109. After I had been stopped, I glanced in the rearview mirror and saw the tractor trailer bearing down on me. I turned my wheels to the right, but the truck smashed into me before I could get out of the way.

13. My spinal cord was fractured at T-12, leaving me paralyzed from my waist down. I also suffered broken ribs, deep vein thrombosis (blood clot) in my left leg, a cerebral hematoma, pancreatitis, pneumonia, a pneumo-thorax, anemia, elevated blood function and endocrinology tests, as well as bruises and contusions to my body. I was hospitalized for one month at UMASS Medical Center where I underwent spinal fusion surgery, had two 6 inch titanium rods inserted along my spine, and required the use of a ventilated breathing machine. Many times my body temperature was very high. Additionally, I had one blood clot removed and then I had a blood clot filter inserted into my body. I was released to Fairlawn Rehabilitation Hospital where I stayed for another two months. My recovery was impeded by the fact that I had contracted Methicillin Resistant Staphylococcus Aureus (MRSA) [a staph infection] and could not undergo any physical therapy while the staph infection was being treated. When I did do physical and occupational therapy, it was extremely painful and depressing. I developed a second blood clot in my leg, which is currently being treated with Coumadin, for which I require weekly blood examinations - which are quite painful - to check my INR/PT levels. This blood clot has caused my leg to swell extensively, making physical therapy practically impossible. By the time I was released from Fairlawn, I was still essentially entirely dependent on other people to accomplish any transfer from my wheel chair to my bed or from my wheel chair to the toilet, etc. Since I was paralyzed, I could not feel any pain or discomfort, and was unable to detect that fluid had begun to build up around my gall bladder. In May, 2002, my body temperature became quite high, I was nauseous, and I began to vomit. Therefore, in May, 2002 I had to be hospitalized again at the Milford-Whitinsville Regional Hospital to undergo emergency surgery to remove a gangrenous gall bladder. After one week of recovery at Milford Hospital, I had to go for another two weeks of rehabilitation at Whittier Rehabilitation Hospital and came home again in June.

Shortly thereafter, because 1 was undergoing such intensive physical therapy and practicing in trying to maneuver my wheel chair, I developed tendonitis and bursitis and had to stop all physical therapy until my arms and shoulders could heal. In the Fall of last year, I began to suffer stomach pain, which was ultimately attributed to the rods inserted in my spine (described as "Juncture Pain"), and I was advised that this would be pain that I would have to live with. I am currently taking Percocet each day to deal with this pain. At this point in time, I still required the assistance of another person to achieve any transfers. I continued physical therapy in October 2002, and by November 2002, I could maneuver my wheel chair around my house, but still had difficulty in making transfers.

Unfortunately, I developed Level 1, Level 2 and Level 3 pressure sores in early December, 2002, and had to remain in bed, on my sides for almost three months to relieve pressure on the sores. Since I was unable to continue with physical and occupational therapy, once again I developed severe bursitis and tendonitis, which is requiring a multiple series of ultra-sound treatments and which I am still undergoing. Then, in February, 2003,1 fell off the commode during a transfer back to my wheelchair and landed on the hard tile floor. Because I have no feeling in my legs, it was impossible to determine if I had broken or fractured any bones. Shortly thereafter, as I was almost recovered from the pressure sores in early March, 2003,1 developed an infection in my right leg and was treated with antibiotics. The infection was very resistant to treatment and I had to go to Milford Hospital to be treated twice, on two separate occasions, with intravenous antibiotics every twenty-four hours for three days in a row. In the course of treatment for my leg infection, it was ultimately determined that I had two broken bones in my right leg — the tibia and fibula — and one fracture near my left knee. I have been fitted with a full leg cast on my right leg. The doctors believe that these bones were fractured during the fall in February. Again, because I have no feeling below my waist, I was unaware that these bones were broken. In addition to the broken bones, in March, 2003,1 was diagnosed as suffering from osteoporosis. At this time, I am currently undergoing ultrasound treatments again to relieve my bursitis and tendonitis. I still require the assistance of at least one person (and usually two people) to make any transfers and still suffer from bursitis and tendonitis in my shoulders and upper back. In addition, I perform a multiple-hour bowel program every morning (which lasts up to as long as four hours), as I have no control over elimination functions. I also have to do urine removal via a full-time Foley catheter, from which I have suffered several urinary tract, bladder, and fungus infections. Additionally, on several occasions, there has been blood, and other foreign material in my urine. On April 5, 2003,1 again fell from the toilet during transfer and had to be taken to the emergency room for x-rays. I did not suffer additional fractures, but additional pressure sores were discovered and I must resume bed rest (with my leg in a cast) for another month to allow the sores to heal, further aggravating the bursitis and tendonitis. I now live with back spasms, general all-over body pain, general fatigue, very restricted living limitations, a great loss of personal independence, seemingly unrelenting stress, and daily personal embarrassment.

Based on the discovery responses—which Plaintiffs could have provided much sooner had Zurich or defense counsel asked for them before February 2003— Zurich had "enough information to know it was highly probable that it would be liable to the full extent of its policy." Clegg, 424 Mass. at 422. Still, Zurich did not offer its limits to Plaintiffs, or tender its limits to AIG for another year. An insurer is required to "promptly to put a fair and reasonable offer on the table as soon ... as liability and damages make themselves apparent." Hopkins, 434 Mass. at 566. Far from promoting settlement, Zurich's claims handling demonstrated "a continuing unwillingness to extend a reasonable offer of settlement," which foreseeably forced the Rhodes family to litigate. Clegg, 424 Mass. at 422-23 (finding insurer had reason to know damages exceeded $250,000 limits based on $750,000 demand, yet insurer did not make offer or tender policy limits until two years later at mediation scheduled shortly before trial); Hopkins, 434 Mass. at 559-60 (awarding multiple damages where insurer deliberately refused to make offer until 1996, despite knowing in 1992 that insureds were at fault, and knowing extent of damages by late 1994).

D. Zurich Only Has Itself To Blame For Its Failures

When it finally focused on the substance of the claim, all Zurich did was complain that it needed more information to support Crawford's value. McIntosh, however, had known the facts of the accident since August 2002 at the latest. He knew the $50,000 reserve was too low and that liability was "adverse to the insured" but he still never requested or authorized an increase. Defense counsel and Crawford were working for Zurich, but McIntosh never asked counsel at Nixon Peabody (GAF), Morrison Mahoney (Zalewski and DLS), or Corrigan Johnson and Tutor (Penske) for the thousands of pages of medical records and bills that were produced, for any other discovery60 or for their analysis of the claim.

McIntosh rationalized his inaction by stating that he was not the adjuster - he was the case manager, and it was Crawford's job to stay on top of the claim, not his. While McIntosh may have believed he was not required to lift a finger, Zurich's own Liability Best Practices Guidelines required much more: "The case manager is to confer with defense counsel to develop a focused, cost-effective litigation strategy, regardless of the complexity of the case .... [t]he litigation plan should target the immediate actions necessary to move the case closer to a reasonable disposition .... [t]he litigation plan should be routinely re-evaluated (at least every 180 days) to reflect material changes in facts, law, or other relevant factors."

According to Zurich's expert, a home office case manager such as McIntosh, has the role of trying to move things along, and if he was dissatisfied with the TPA, there was no prohibition against calling any of the defense counsel directly. If the investigation or evaluation was not being done to Zurich's satisfaction, it had the opportunity and obligation to do something about it. Other than requesting documents in 2003, Zurich did not make any specific requests of Crawford or defense counsel to do anything. Crawford noted that "medicals are being forwarded" in May 2003 but Zurich never followed up. By that time, Attorney Deschenes had concluded that "this matter should not run the usual litigation course due to the severity of the injury." The fact that Zurich chose to not apply pressure to Crawford or defense counsel is Zurich's fault - no one else's.

Pointing the finger at Crawford does more to damn Zurich than absolve it—Crawford was Zurich's agent, and therefore, any mishandling of the claim by Crawford is imputed to Zurich. Douglas v. Holvoke Mach. Co., 233 Mass. 573, 576 (1919) (negligent actions performed by servant in accomplishing his master's business are attributable to master). The same is true for defense counsel. Zurich has maintained throughout this action that all of its communications with Nixon Peabody, Morrison Mahoney and Corrigan, Johnson & Tutor, are privileged attorney-client communications. See Imperiali v. Pica, 338 Mass. 494, 499 (1959) (defense attorney represents both insurer and insured and owes to each a duty of good faith and due diligence). Zurich cannot escape that position now, which is the law of the case. Thus, any purported failures of counsel are attributable to Zurich as its own failures. Burt v. Gahan, 351 Mass. 340, 342-343 (1966) (acts of attorney in conduct of litigation are binding upon the client); Blake v. Hendrickson, 40 Mass. App. Ct. 579, 582 (1996) (actions of party's attorney are attributable to party because attorney was party's agent); Marketplace Center, Inc. v. Allen Bress, No. 02-0153 BLS1, 2006 Mass. Super. LEXIS 375, at *10 (knowledge of defense counsel is binding on client).

E. Zurich Made Plaintiffs Do The Investigation For It

"If liability is reasonably obvious and the injuries serious, an insurer is not excused from making an offer ... even without a firm demand from the claimant. In this instance, an insurer may not wait until a settlement offer has been made, but has an obligation to respond to the claim without a demand." Eric Mills Holmes, Holmes Appleman on Insurance 2d: Law of Liability

Insurance, § 137.4(C), p. 163 (2003), and cases cited. Zurich, however, was content to sit on its hands, waiting for Plaintiffs to make the first move.

In June 2003, Attorney Deschenes asked Plaintiffs' counsel for a demand.69 Plaintiffs made a verbal demand of $ 18.5 million in July 2003, followed by the August 13 written demand that Deschenes forwarded to Crawford. Jody Mills told Zurich that the package was in and forwarded a copy to the insurers. Zurich contends that it was never in a position to evaluate the Rhodes claim until after it received the Plaintiffs' demand package, and that it needed the "backup" and "documentation" to prove Mrs. Rhodes' medical condition and all expenses. Yet, as important as Zurich contends this "backup" was, it did not ask for it "nor reasonably attempt to obtain further medical information" until more than a year after the accident. Ctegg, 424 Mass. at 417. AIG admits that in this type of case, "nobody is faking it."72 Had Zurich bothered to do jury verdict research on paraplegia cases in 2002, it would have found the same cases, with the same settlements and verdicts well in excess of Zurich's $2 millionpolicy limits, that Attorney Deschenes and Kathleen Fuell found in 2003. Accordingly, Zurich could have accurately determined that the case was worth more than its policy limits just by looking at jury verdicts in 2002, without poring over Mrs. Rhodes' medical records or bills.

Defendants point to the mistaken overstatement of past medical expenses as an example of why insurers need back-up before valuing a case.74 What Defendants ignore, however, is that they had access to all of Mrs. Rhodes medical records from UMASS, Fairlawn and Milford Whitinsville in April 2003 -the UMASS bills alone were in excess of $200,000.75 Had anyone bothered to ask for this information sooner, Plaintiffs could have produced the UMass records and bills in April 2002.76 Plaintiffs supplemented their production in June 2003 with 750 more pages of records,77 Zurich never reviewed those either. The Defendants argue that if Plaintiffs really wanted to settle the case, its counsel should have voluntarily produced the medical records - even though no one requested them. Chapter 176D and Zurich's own guidelines place the duty to investigate on the insurer - not the claimant. Zurich bears the blame for not retrieving the "documentation" it required to evaluate the claim - the buck stops with Zurich, not Crawford, not defense counsel, and not the plaintiffs. See Mongeon v. Arbella, 2004 Mass. Super. LEXIS 157, *6-7, 35-36 (Mass. Super. Ct. April 23, 2004) (attached hereto as Exhibit C) (insurer has duty to investigate facts and may not stand by until insured proves coverage is applicable, and insurer had obligation to request and obtain plaintiffs full medical records).

The August 13, 2003 demand was sent to counsel of record and included considerable detail about the Rhodes family and the crash; hundreds of pages of medical records (which had already been produced months before); photographs of Mrs. Rhodes in the hospital, the decubitis ulcers (pressure sores on her buttocks), and the full leg cast for the fractures she suffered during a fall; a life care plan and economist's report as well as a "Day in the Life" video, all of which supported Plaintiffs' claim for $2.8 million in past and future economic damages.78 According to Zurich and Crawford, the demand had all of the backup that was required to value the claim.79 But Zurich made no offer, even though its policy gave it the right to make payment to Plaintiffs without a release.

There was no reason why Zurich had to wait until the Plaintiffs produced a life care plan before hiring its own planner to review Mrs. Rhodes' medical records and interview her, but defense counsel and their life care planner interviewed Mr. and Mrs. Rhodes in September 2003. The defense's life care plan was completed in October 2003.81 Harold Rhodes was deposed in October 2003 and testified to the "significant" strain on his marriage given his new responsibilities as a caregiver, and Morrison Mahoney described how he broke down in tears as he described teaching his wife how to perform digital stimulation. Zurich and AIG had

possession of, or ready access to, more than enough information to evaluate the claim before August 2003.83 Yet no offer, much less a reasonable one, was communicated to Plaintiffs.

F. Zurich Tried to Delay With Last Minute Third Party Claims

Zurich tried to slow the pace of the Underlying Action by waiting until shortly before discovery closed to file a third party complaint against the Town of Medway, even though it knew state law would preclude recovery. Just as outrageous was the decision to file a third party action against McMillan's Tree Service for failing to put up any traffic control devices, when McMillan testified in July 2003 that he always put cones out when he worked, and that he had put two cones around the stump grinder before the accident. As such, McMillan complied with Mass. Highway guidelines that required "channelizing devices," including cones, to be used at "mobile work areas." The fact that there was no viable claim against the Town, and that McMillan complied with the guidelines, did not stop Zurich from filing suit because it was more interested in spreading its exposure among as many insurers as it could find (and delaying the case) than it was in making a prompt settlement offer. Zurich "provoked unnecessary litigation" in violation of Chapters 93A and 176D. Clegg, 424 Mass. at 417.

G. Zurich Took An Unreasonably Long Time To Tender

Crawford determined by September 2002 that liability was significant and would exceed $5 million based on Mrs. Rhodes' catastrophic injuries and her complete lack of culpability. Crawford's determination was reasonable. GAF communicated its desire to settle the case to defense counsel before the suit was a year old.89 Robert Manning, GAF's Risk Manager, reviewed the Plaintiffs' settlement demand and concluded, within "a couple" of days, that the case had a value of $6-$ 10 million.90 Ms. Fuell saw the demand package in September 2003, and she knew "instinctually" that the case was worth more than $2 million.

Deschenes told Crawford in late September that Plaintiffs wanted a good faith offer to be extended before any mediation. According to AIG's expert, it is customary and not unreasonable for plaintiffs' attorneys to make such a request. By November 2003, GAF was pressing to make a $5 million offer and days after John Chaney sent a "wake-up call" to deal with the claim, GAF had a conference call with Zurich and AIG.94 Attorney Deschenes and GAF communicated their desire to make a $5 million offer to Zurich and AIG.95 Ms. Fuell advised AIG during the November 19th call that she would seek authority to tender Zurich's policy limits.96 Fuell still had to paper her file, which she didn't do until December 2003, when she valued the claim between $12.9 million and $18.1 million.97 She concluded that there was a 100% chance of a Plaintiffs' verdict and she apportioned liability to Zalewski and the other insureds at 80%.98 Ms. Fuell did not request authority to raise reserves until after Plaintiffs sent their second demand for $19.5 million. Only after being reminded by GAF's broker about this "sensitive claim" did Fuell bother to follow up with the decision maker.99 She had not done so sooner because he was a "very busy person" who "travels quite a bit."100 Meanwhile, the Rhodes family anxiously awaited a response. Zurich finally raised the reserves on January 23, 2004 and told AIG that its $2 million was available for settlement, but still made no offer to Plaintiffs.

H. Dispute Over Defense Costs Delayed Offer

Both Fuell and Nicholas Satriano were quite cognizant of the burden of defending the Rhodes claim in January 2004.101 Because Fuell knew she had to justify Zurich's position that it was tendering both the defense and $2 million policy limits to AIG, she wanted to make sure the tender letter was bullet proof. She waited until February 2004 to ask for a certified copy of the

policy, and did not send a formal letter until March 29, 2004, two months after AIG insisted on a formal written tender and five months after communicating her intent to tender.

GAF's counsel testified that the cost of defense issue delayed the $2 million settlement offer he conveyed to Plaintiffs.102 The fact that AIG rejected the tender of defense obligations was hardly a surprise, and Zurich decided to keep paying for the defense and reserved its rights against AIG in early April 2004. Had Zurich reserved its rights against AIG in January, Deschenes would have been able to communicate a response to the Plaintiffs' settlement demands months sooner. Again, Zurich put its financial interests before those of the insured and the claimant. Despite the fact that there was a 100% likelihood that Plaintiffs would prevail at trial and the case value was several times more than the policy limit, Zurich actually prevented a settlement offer from being made before March 31, 2004. As such, Zurich knowingly violated c. 176D.

I. Zurich's "Studied Indifference" Warrants Punitive Damages

Zurich simply cannot explain its statutory failures. It claims it did not act for eight months because the correct claims handler did not receive notice although it never disclaimed coverage for insufficient notice of the claim. Zurich, however, did receive notice of the Rhodes claim well before August 2002 as its agent was on notice, Crawford's First Full Formal Report was sent to Zurich's home office, and subsequent reports were sent to the same address at which David McIntosh later received reports. Zurich's mishandling of those documents is its responsibility.

Zurich's only explanation for doing nothing for the next year and refusing to respond to Plaintiffs' settlement demands, which by itself is a violation of 93A/176D, is that this was a "complicated" case, with lots of parties. The only issue Zurich chose to focus on was whether there were other primary policies available to cover the claim and reduce its exposure. The determination of who was an insured was hardly "complicated" for an insurance company just because there were four defendants:

> The insurer, as a professional defender of lawsuits, is held to a standard higher than that of an unskilled practitioner. What might be ignorance in one instance may be unforgivable oversight of the insurer; what might be neglect in one instance might well constitute bad faith on the part of the insurer.
>
> The question is always: Did the insurer exercise that degree of skill, judgment, and consideration for the welfare of the insured, which it, as a skilled professional defender of lawsuits having sole charge of the investigation, settlement, and trial of the suit may have been expected to utilize?

The answer for Zurich is a resounding "No."

When Zurich finally tendered its policy limits in 2004 - two years after Mrs. Rhodes was rear-ended and paralyzed, its justification was not based on any facts that could not have been ascertained in 2002, including an estimate of the cost of future care, which Zurich's expert testified is always a component of damages in a case with a paralyzed claimant.106 Yet Zurich waited until the fall of 2003 to analyze that component of damages, and then waited another six months to tender its limits and respond to Plaintiffs' settlement demands. Zurich's conduct provides ample evidence of a willful or knowing violation of its obligations under c. 176D. See Mongeon, 2003 Mass. Super. LEXIS at 47-48 (awarding treble damages where insurer did not

focus on damages until after coverage determination, and damages were based on facts that had not changed in two years prior to tender); Hopkins, 434 at 566 n.14, 569 (multiplication of damages warranted where insurer deliberately refused to make any settlement offer at least two years after fault and damages were clear); Miller, 36 Mass. App. Ct. at 419-420 (treble damages for lack of response and unreasonableness of late-coming settlement offer).

Zurich's prolonged inaction and delay show complete apathy toward the Rhodes family and a total unwillingness to take steps necessary to "effectuate settlement." Zurich had the ability to respond swiftly, as demonstrated in December 2004 when it responded to Plaintiffs' 93A demand letter by paying its policy limits and post-judgment interest within 30 days.107 Zurich was not adequately motivated until its own financial interests were at stake since even the plight of Marcia, Harold and Rebecca Rhodes failed to generate any action.

Such "studied indifference," evidenced by inexplicable delay and failure to respond to the demands, is more than a mere 93A/176D violation, it warrants multiple damages. R.W. Granger & Sons, Inc. v. J&S Insulation, Inc., 435 Mass. 66, 71 (2001) (imposing punitive damages for inexplicable delay of four months between demand and inadequate settlement offer and other "cavalier" conduct); Miller, 36 Mass. App. Ct. at 419 (trebling damages where insurer's "studied indifference" sank below negligence where liability was reasonably clear, but no response to first demand for six months, and first offer was unreasonably low); Mongeon, 2004 Mass. Super. LEXIS at *28-30, 33,41-42 (imposing punitive damages where insurer offered policy limit two years after demand with no change in facts during the delay).

J. Zurich's Unfair Practices Caused Injury to Rhodes Family

An insurer's violation of Chapters 93A/176D must cause injury, see Wallace v. American Mfrs. Mut. Ins. Co., 22 Mass. App. Ct. 938, 940-41 (1986), but there is no requirement that the insurer be the sole cause of a plaintiff s injury, nor is there any requirement that Zurich have caused all of Plaintiffs' injuries. See Kattar v. Demoulas, 433 Mass. 1,15 (2000) (joint and several liability for compensatory damages is proper under c. 93 A because it ensures that plaintiffs may recover and be made whole); Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc., 445 Mass. 790, 799 (2006) (loss includes monetary loss, loss of property, emotional distress, or the "invasion of any legally protected interest") (quoting Leardi v. Brown, 394 Mass. 151,159(1985)).

Zurich is responsible for all damages it caused before it tendered to AIG. Zurich was obligated to respond to Plaintiffs' demands, even if only to say that its policy was clearly insufficient to settle the case, and that it would tender its limits to enable the excess carrier to engage in settlement negotiations. Zurich's failure to do so violated c. 176D, making it responsible for all reasonably foreseeable consequences. E.g., Hopkins, 434 Mass. at 560-61 (insurer did not respond to plaintiffs demand letters); Clegg, 424 Mass. at 422 (no offer made until mediation, three years after accident); Miller, 36 Mass. App. Ct. at 419 (insurer did not respond to first demand for six months).

During the 7-month period between the August 2003 demand and Zurich's offer, the Rhodes family became increasingly concerned about the fact that the insurers had not responded, and more and more concerned about their assets and their future.108 By the time of the first offer on March 31, 2004, Zurich's $2 million provided no relief, it was an insult.109 All of the stress caused by Zurich's "radio silence," which was broken by an unreasonable offer communicated only because the Final Pre-Trial Conference was looming, was Zurich's fault.

III. AIG Violated Chapters 93A And 176D

Despite the fact that AIG knew its policy would be exposed in February 2002, it ignored the Rhodes family. When it finally began to pay attention, rather than try to effectuate settlement, AIG became everyone's opponent. AIG fought with GAF and its coverage counsel, with Zurich and with Plaintiffs until it could no longer ignore the September 7, 2004 trial date. Only when trial was "imminent" did AIG make the first of its lowball offers. AIG's conduct demonstrates that it had no real interest in settling for a fair amount, it only sought to wear the Plaintiffs down until they had to take what was offered, and it almost succeeded.110 See Royal Ins. Co. of America v. Reliance Ins. Co., 140 F. Supp. 2d 609, 616 (D.S.C. 2001) (refusing to impose liability on primary carrier for taking away excess carrier's "leverage" when it tendered policy limits directly to plaintiffs; describing insurer's practices as supporting the "caricature of the insurance industry as a monolith which must impoverish plaintiffs in order to achieve favorable settlements."); Tallent v. Liberty Mut. Ins. Co., No. 1997-1777H, 2005 WL 1239284, at *18 (Mass. Super. Ct. April 22, 2005) (attached as Exhibit E) (imposing double damages for attempting to "extort the [plaintiffs] into a settlement for far less than they were owed.")

A. Although Policy Was Exposed, AIG's Adjusters Did Nothing

AIG deliberately delayed evaluating the claim: it assigned adjusters through a revolving door, and the first person who made any attempt to value the claim was the seventh and final adjuster, Warren Nitti. AIG then summarily rejected his recommendation. AIG's non-involvement can be summed up very simply:

- February 11,2002: After receiving notice of the claim, a copy of the police report and Crawford's First Full Formal Report, AIG opened a claim in the complex claim unit, meaning it recognized the claim as one that could expose at least $1 million of the excess policy.111
- February 12, 2002 - April 8, 2002: Nothing.
- April 9,2002: Tracey Kelly, AIG's first adjuster, sent a letter to Crawford asking for certain documents.112
- April 10, 2002 -January 15, 2003: Ms. Kelly made a couple of telephone calls to Crawford.113
- January 16, 2003: Ms. Kelly sent a letter to Crawford asking for information.114
- January 17, 2003 - June 2003: Three more adjusters were successively assigned to the claim and did nothing.115
- June 2003 - August 29, 2003: Nicholas Satriano became the fifth adjuster and made one notation that he should follow up on the claim.116
- August 30, 2003 - November 18, 2003: Nothing.

From the beginning, AIG knew that its policy was likely exposed by at least $1 million, and by September 2002, at the latest, AIG should have "started to roll up its sleeves" when Crawford notified it of the potential exposure of $5 - 10 million, more than double the primary's limits.117 Given the likely exposure, AIG had a duty to at least:

> [R]ide shotgun, if you will, over the primary carrier's shoulders, receiving copies of everything. That's part of their investigation; to include coverage analysis, to include liability reporting, to include damages. They don't have to wait for a formal tender. And then at thatpoint, they're postured and ready for the tender because they have a complete file.

See Employers Nat'l Ins. Co. v. General Accident Ins. Co., 857 F. Supp. 549, 554-55 (S.D. Tex. 1994) (when excess liability is likely, excess insurer may interject itself into settlement negotiations before primary tenders); Fidelity & Cas. Co. v. Cope, 444 So. 2d 1041,1044-45 (Fla. Dist. Ct. App. 1984) (excess insurer had duty to attempt to settlement once reasonably clear that liability exceeded primary policy), quashed on other grounds, 462 So.2d 459 (Fla. 1985). Had AIG paid attention to the claim, it could have addressed any issues with the investigation or evaluation, and then it would have been in a position to act on the claim. Instead, AIG waited until November 2003 to even speak with Zurich and/or the insured. By doing nothing on the claim for 20 months, AIG failed to comply with industry standards:

> Good industry practice should require the excess insurer, where warranted, and where advised of a serious accident, to:
>
> 1. Make written request for immediate information and to be kept advised of all new developments.
> 2. Make a request to, and review the primary file as often as needed.
> 3. Make known to the primary, in writing, any further investigation that the excess carrier believes necessary.
> 4. Make known to the primary any differences in evaluation or in settlement negotiations and try to resolve such differences.
> 5. In the event of noncooperation, give fair warning to the primary that where warranted every effort should be made to settle the claim or suit within the limits of the primary carrier, and where this is not possible to obtain the lowest settlement figure for its consideration and further action. U9

On November 19, 2003, Zurich and GAF "reached up" to AIG for assistance in responding to Plaintiffs' settlement demand.120 Ms. Fuell told Satriano she would request authority to tender the $2 million policy limits to AIG, which everyone knew would not settle the case. Since Plaintiffs asked for a good faith response to the 3-month old demand before going to mediation, GAF and Zurich asked AIG to contribute to what they believed was a reasonable settlement offer. AIG knew there was "an insured who, obviously, was very concerned about this litigation" and who wanted to make a $5 million settlement offer.123 Satriano, however, needed information because AIG had ignored the claim and he had done nothing of substance during the six months he was assigned to it. Crawford immediately sent a "shadow copy" of its Rhodes file, and Attorney Deschenes sent a letter and package of materials five days later124 so Satriano could get caught up and "become fully involved in the case."

By December 2003, Satriano recognized that liability "was going to definitely rest with the driver" and "you would have to be significantly inexperienced to say that there was not going to be significant liability placed upon someone on the defense team if not many individuals on the defense team." In fact, he knew there was "no chance on God's green earth" that Zalewski would not be found liable for Mrs. Rhodes' injuries. Since Zalewski was covered under the excess policy, allocation of liability between the Underlying Defendants was irrelevant. AIG, however, refused to do anything to effectuate settlement; instead, it hired Campbell Campbell Edwards & Conroy ("CCE&C"), and hunkered down for a fight.

B. AIG Sparred Rather Than Make Settlement Offer

When an insurer acts on behalf of the insured in the conduct of litigation and settlement of claims, it assumes a fiduciary relationship. Holmes, Supra., § 137.1(C)(3), p. 105, and cases cited. In that role, the insurer owes a duty to exercise the utmost good faith and reasonable discretion in evaluating the claim, and if a reasonable person obligated to pay the recoverable

damages would settle for the amount within policy limits, it becomes the legal duty of the insurer to do so. Id, § 137.1(C)(2) (2003). The insurer may not disregard the interests of the insured and it cannot put its own interests ahead of the insured's. Lee R. Russ & Thomas F. Segalla, Couch on Insurance §§ 198:24 etseq., 203:12, 203:13 (3d ed. 2005), and cases cited therein. AIG was aware of these duties, but chose to ignore them.

Rather than consider the interests of its insured or the claimants, AIG immediately took an antagonistic approach because GAF had the nerve to ask it to contribute to an offer.131 On December 19, 2003, one month after GAF's request for $3 million in settlement funds, GAF's coverage counsel asked AIG to respond to the two-year-old demand for coverage.132 Attorney Bartell sent another letter in January 2004 because Satriano did not return his calls, had not responded to the request to confirm coverage, and had not taken a position on responding to Plaintiffs. Again, in February 2004, Bartell asked for a decision, warning "[fjurther delay jeopardizes settlement discussions .. " Satriano waited until February 13, 2004, two months after Bartell's first letter and three months after the November conference call, to respond AIG's approach went from passive-aggressive to confrontational when it started threatening GAF with disclaiming coverage.

AIG took a similar approach with Zurich. On January 23, 2004, Zurich confirmed it was tendering its policy limits. Tracey Kelly testified that if a primary insurer verbally offers its policy limits, AIG can use that money to make an offer. However, Satriano immediately rejected it, claiming all tenders had to be in writing.140 Ms. Fuell reiterated the tender by e-mail:

> [T]he insured is anxious for you to take a position so that a response can be made to the demand previously presented on behalf of the plaintiff. Regardless of whether or not you have our position in writing, you are fully aware of our assessment of this matter and should have no problem of proceeding accordingly in the best interests of our mutually insured."

Even though AIG has no policy requiring formal written tenders—and in fact, has no policies or procedures applicable to the excess claims unit,142 which in and of itself is a violation of Mass. Gen. L. c. 176D, Satriano insisted on a "formal" written tender.

AIG now claims it simply wanted to make sure it was not assuming the defense, but there is nothing in the National Union policy that would require AIG to assume the defense by making a settlement offer that included Zurich's money, nor did Zurich ever take that position. Warren Nitti testified that he "absolutely" would have worked toward settlement when Zurich tendered, and that there was no reason why AIG and Zurich could not have worked together to make a joint offer, but AIG clearly had no interest in settlement in early 2004.

AIG's prevarications continued on March 5, 2004, when Satriano told GAF that AIG was willing to mediate as long as there was no "price of admission." It is clear, however, that AIG had no intention of going to mediation, nor did it expect to settle the case at mediation.147 During the meeting, Attorney Deschenes described liability and damages and showed the Day in the Life video. He also discussed the strict liability that GAF faced under federal regulations governing motor carriers, as was alleged in Plaintiffs' Third Amended Complaint, which Plaintiffs filed after six months had passed with no response to the August 13, 2003 demand.149 Deschenes conducted settlement and jury verdict research on personal injury/auto cases involving serious injuries and probable liability (excluding medical malpractice and products liability cases) and he identified the average of settlements in comparable cases as $6,647,333 and the average verdict value of comparable cases as $9,696,437.15° Satriano "didn't ever disagree" with those numbers

because "[i]t was pretty obvious that these ranges ... [were] not unreasonable given the facts and circumstances."151 In fact, he believed the numbers provided "a pretty accurate range" because "it's a range from anywhere, say, from eight on that we were discussing this case."

GAF and Attorney Deschenes reminded AIG that Plaintiffs wanted a good faith offer before going to mediation as a starting point to the negotiations, just as defense counsel had asked for one in the form of a demand,153 and they reiterated their belief that it was in GAF's best interest to advance settlement discussions by offering $5 million.154 Ignoring the advice of counsel and the wishes of its insured, AIG refused to contribute to any offer in March 2004 — even one less than $5 million.155 Instead, AIG claimed that it could not go to mediation until it obtained mental health records, depositions and an IME and then threatened to disclaim coverage if GAF failed to cooperate.156

There is no question that Attorney Deschenes knew liability was clear and was advising settlement. In fact, as early as May 2003, he concluded: "this matter should not run the usual litigation course due to the severity of the injury." Morrison Mahoney, as early as January 2004, also expected that AIG would be interested in making an offer or going to mediation.158 Yet, AIG refused to make a settlement offer for almost a year after Plaintiffs' demand.

Satriano believed that no response was necessary:

> The demand was so high. So it was - sometimes, it's - well, it's ridiculous, it's way too high, you know, maybe the evaluation was eight to ten, or eight to 12, but certainly not 16. So I don't care if we don't answer it at 16. I don't care if it goes to 50.

That is not the law in Massachusetts. As AIG's counsel has written: "the fact that the claimant has made an unreasonably high demand, or has not made any demand at all, does not excuse the insurer from making a reasonable offer of settlement when liability (i.e., both fault and damages) has become reasonably clear." Mark E. Cohen, "The Fundamental Principles of Massachusetts Law Regarding Bad Faith," p. 3, available at http://www.mccormackfirm.com/pub.html; Brandlev v. U.S. Fid. & Guar. Co., 819 F. Supp. 101, 105 (D. Mass. 1993) (size of demand provides no excuse for delay because "the Act is directed to insurers and not to plaintiffs' attorneys."); Bobick, 439 Mass. at 660-61 ("excessive demands on the part of a claimant... do not relieve an insurer of its statutory duty"); Choukas, 47 Mass. App. Ct. at 200 (plaintiffs "attorney's settlement tactics did not relieve [insurer] of its statutory duty to attempt to effectuate a prompt, fair settlement of [plaintiffs] claim and therefore tender an offer to reach that goal.").

In the end, nothing was decided at the March 5,2004 meeting, it just solidified the polarization.160 Showing the rift that AIG had created, Bartell sent a letter castigating AIG and advising that its failure to make a reasonable offer, regardless of the amount of the demand, violated Chapters 93A and 176D.161 Attorney Bartell also reinforced GAF's desire to make a good faith settlement offer and go to mediation.162 GAF's in-house counsel, Jane Gordon, was understandably frustrated by AIG's refusal to contribute even one cent to a settlement offer, while it threatened GAF about its duty to cooperate.163

Had AIG listened to its insured and defense counsel, instead of plodding forward on what it thought was "the better timetable,"164 the instant action may never have been necessary. Instead, AIG chose to ignore them even after the explicit reference to c. 176D in the Bartell letter, thus evidencing its bad faith. See Daniels v. Horace Mann Mut. Ins. Co., 422 F.2d 87, 90 (4th Cir. 1970) (insurer did not act in good faith when did not accept recommendations of counsel and

agents and made no serious attempt to settle); Holmes, Supra., § 137.3(B), p. 138 (rejection of advice of counsel and ignoring insured's interests are factors in finding bad faith, along with strength of claimant's case, severity of the injuries and insufficient investigation by the insurer), § 137.3(E)(1), p. 150 ("When the refusal [to settle within policy limits] is persistently maintained against the advice of counsel and repeated recommendations of the adjuster, on complete information concerning the probability of a large verdict, it is sufficient to warrant an inference of bad faith").

AIG continued to spar over defense costs when Zurich finally sent its formal tender and took the position that it no longer had to defend the claim.165 AIG immediately rejected the tender,166 and accused Zurich of "Bad Faith" claims handling.167 When Attorney Bartell asked AIG to confirm that defense counsel could make a $2 million settlement offer the day before the April 1, 2004 Pretrial Conference, AIG continued its adversarial posturing and took the position that GAP risked assuming its own defense by doing so.168 Although it should not have affected the insurers' obligations to the insureds or the Plaintiffs because they could have dealt with the issue separately,169 the jockeying over the duty to defend between January and April 2004 further delayed the first response to Plaintiffs' August 2003 demand. Demonstrating the virtual pointlessness of the dispute, AIG sent CCE&C to the Final Pre-Trial Conference, and that firm took over as lead counsel for GAF. Once Zurich backed down and agreed to pay the defense costs, AIG directed the defense strategy, and turned its sights on Plaintiffs.

C. AIG Should Have Made An Offer Upon Tender

AIG should have been proactive from the time it received notice of the claim in February 2002 since it knew its policy was going to be exposed. If it had paid attention, AIG would have been able to identify any concerns with the investigation, it would have known the facts of the case, and it therefore could have acted when GAF and Zurich reached up to the excess layer on November 19, 2003. Instead, AIG shirked its responsibilities to the insured and the Rhodes family for a full 20 months by keeping its head in the sand. After it learned its insured wanted to respond to Plaintiffs' demand and that Zurich was going to contribute its $2 million, AIG took another two months to get up to speed before Kathleen Fuell obtained authority to tender the policy limits. Given that AIG received Crawford's reports, Crawford's entire file and Deschenes' work product, and could have reviewed Plaintiffs' discovery responses, AIG should have been able to respond to Plaintiffs' demand by January 2004. As Warren Nitti testified:

> [W]hen the primary carrier has indicated that a - that they are willing to put up their money in terms of settlement and it is then incumbent on the excess insurer to make a determination of how to proceed with the file, and that would include a fair offer, an attempt to settle the claim based upon analysis of the file materials.

If Defendants had made the $5 million offer that GAF wanted to make, and been willing to negotiate thereafter, their response likely would have been reasonable. Instead, AIG did nothing. By March 2004, Satriano agreed with Attorney Deschenes' $6.6 - $9.6 million range. Had AIG offered $6.6 million at that time, that would have been a reasonable offer. Instead, AIG prevented any offer in excess of $2 million from being made until August 2004 - eight months after Zurich's tender.

D. AIG Did Not Need More Discovery To Value Case

In April 2004, Plaintiffs' counsel agreed to mediate and said Defendants could choose the mediator, but AIG was not interested.172 Regardless of the facts of the case or the plight of the

Rhodes family, AIG had a "timetable" it wanted to operate on,173 and a discovery checklist it insisted on completing before even attempting to value the case. In May 2004, instead of taking steps to effectuate settlement, AIG instructed CCE&C to extend discovery (which had closed in October 2003) and postpone the trial date, but it subsequently withdrew the motion174 because it had been served without GAF's input.175 Zurich and GAF were both opposed to the motion and were increasingly frustrated with AIG's handling of the claim. AIG again threatened to disclaim coverage even though Nixon Peabody had already served a motion to compel mental health records, just as AIG wanted. AIG reiterated that there would be no mediation until the depositions of Marcia and Rebecca Rhodes and an IME were completed.178 In June 2004, CCE&C served and filed the motion to extend discovery and to postpone the trial.179

AIG never considered the agreement between Plaintiffs and GAF's counsel to conduct depositions after the close of discovery. Rather than ask Plaintiffs to schedule the depositions, or ask for an IME, AIG decided to be confrontational. Judge Donovan denied the motion to continue on July 8, 2004. Only then did AIG notice the deposition of Marcia Rhodes and ask if she would submit to an IME. Per the agreement with Attorney Deschenes, Plaintiffs agreed.

The additional discovery was nothing more than an excuse to delay for AIG's tactical advantage - the longer it took and the more uncomfortable the Plaintiffs were made to feel, the more likely they were to take a smaller settlement to avoid trial. Indeed, AIG's expert testified that AIG believed Plaintiffs would settle for less rather than go through a trial.182

GAF's defense counsel knew the depositions of Marcia and Rebecca Rhodes were not needed in order to effectuate settlement, and volunteered to defer them because "we did not want to have to make them go through the process of a deposition just for mediation. If and when it was necessary, we reserved and preserved the right to take their depositions."183 Penske's counsel (Corrigan, Johnson & Tutor) and Zalewski/DLS's counsel (Morrison Mahoney) apparently agreed that those depositions were not necessary because they never noticed them. Zurich's expert testified that it is appropriate to forego Plaintiffs' depositions to attempt settlement.184 Satriano even admitted that he did not need a deposition to know that Mrs. Rhodes would testify that "her injuries were devastating," "that her injuries had a very detrimental effect on her daughter and husband," "that she was very frustrated by the limitations imposed upon her because of her injuries," or that she would be sympathetic to a jury.185 Tracey Kelly also knew Mrs. Rhodes would be a sympathetic plaintiff: "[s]he was a blameless victim, you know, whose entire life was changed."

If AIG truly "needed" more information about Plaintiffs' demeanor in 2004, it had several ways to get it. Morrison Mahoney described Mr. Rhodes' demeanor during his deposition, and AIG had a deposition digest. AIG could have learned about Mrs. Rhodes' demeanor and "jury appeal" from Morrison Mahoney since it attended the life care plan interview in September 2003, or Satriano, Maturine, Nitti or Kelly could have watched the Day in the Life video or contacted their expert, Jane Mattson, to ask about the Rhodes' jury appeal. No one at AIG did any of those things.

Nor did AIG "need" an IME to confirm that Mrs. Rhodes' paralysis was permanent because the defense's life care planner reviewed her medical records.190 AIG's claim that it needed an IME to refute Plaintiffs' experts is not credible.191 It was not as if Mrs. Rhodes or her counsel handpicked her treating physicians - the trauma doctors were assigned by UMASS Medical Center, and Dr. Roaf, a physiatrist who is board certified in three specialties: Physical Medicine and Rehabilitation, Internal Medicine and Spinal Cord Medicine,192 was assigned to Mrs. Rhodes upon her admission to Fairlawn Rehabilitation Hospital.193 Mrs. Rhodes' treating

physicians' diagnoses and prognoses were well documented, and the doctors were deposed to preserve their trial testimony. AIG had already received summaries of their testimony from CCE&C before the IME was even scheduled.194 Zurich's expert concurred that an IME was not essential, and even if it were useful, it could have been conducted in conjunction with the life care plan back in 2003.195 AIG had no reason to wait until weeks before trial to conduct the IME, other than to intimidate Plaintiffs and make Mrs. Rhodes give serious thought to settling the case. Mongeon, 2003 Mass. Super. LEXIS 437, at *41 (unreasonable delay in ascertaining condition of plaintiff constitutes bad faith). Notably, the IME report, which AIG contends was crucial to its evaluation, was not offered as an exhibit in this case or the Underlying Action and Dr. Hanak, who conducted the IME, was never called to testify. The IME was simply:

> [S]uperfluous, especially in the eleventh hour, given all the medical, given two life-care planners, given all the other documents that have been produced, including her own doctors, who are independent of one another, who are verycredible in and of themselves. There's no need for it. No need to put the plaintiff in this case through that all over again.

Lastly, AIG had no right to Mrs. Rhodes' mental health records, and pursuing them was just one more unfair tactic. Satriano and Kelly testified that Mrs. Rhodes' therapy records would shed light on the "family dynamic," thereby providing ammunition against Harold and Rebecca's consortium claims. Such an admission, in and of itself, warrants a finding that AIG intentionally engaged in unfair practices. Ms. Kelly went further, relying on her mistaken belief that AIG had a right to those records because Mrs. Rhodes' treating physicians (not her therapists) testified that there had been talk of divorce.199 AIG had every opportunity to seek discovery on the loss of consortium claims in every deposition; there was no excuse for piercing Mrs. Rhodes' therapist-patient privilege.

AIG's "official position" for seeking the mental health records is that Mrs. Rhodes allegedly sought to recover for exacerbation of pre-existing conditions.201 Yet, when Plaintiffs offered to produce the records that dealt with ADHD and the bi-polar condition, AIG chose to file a motion to compel. The August 2004 emergency motion did not even mention exacerbation,203 but instead claimed that since Mrs. Rhodes said she was "profoundly depressed" and felt utter despair and hopelessness because of her injuries, the defense had a right to test this "self-diagnosis" through an in camera review of all of her therapy records.204 Judge Chernoff and Judge Donovan both recognized AIG's fishing expedition for what it was and properly denied the motions to compel.205 Clegg, 424 Mass. at 417 (insurer had "sufficiently adequate documentation" to warrant offer but it "provoked unnecessary litigation in the faint hope of discovering damaging information").

Ultimately, Warren Nitti was able to complete his narrative report and place a $6 million value on the claim without completing AIG's "checklist:" he did not have the mental health records; the IME report; or an understanding of Marcia and Rebecca Rhodes' testimony as neither deposition had yet been taken. In fact, everything in his report came from either Plaintiffs' year-old demand or the defense expert's October 2003 life care plan. The real reason that AIG did not place a value on the claim or try to settle before August 2004 is "because trial was not imminent" until then. Such a practice is a clear violation of Chapters 93A/176D.

AIG has claimed that liability was not reasonably clear until after the verdict because Mrs. Rhodes had not yet reached an endpoint in her recovery209 and pain and suffering is hard to quantify.210 If that were true, liability would never be reasonably clear in any personal injury action until a verdict is returned, and insurers would not have to make settlement offers to a

plaintiff who seeks to recover pain and suffering - even a plaintiff who is tragically paralyzed through no fault of her own. If AIG's position were valid, then c. 176D would have absolutely no effect, and insurers would be encouraged to delay as long as possible to get catastrophically injured plaintiffs to settle for short dollars because they desperately need money. That is not the law in Massachusetts. Cohen, "The Fundamental Principles of Massachusetts Law Regarding Bad Faith," at p. 2 ("The 'reasonably clear' standard requires that a reasonable settlement offer be made when liability becomes obiectivelv clear, not when liability becomes certain.") (emphasis added); see R.W. Granger, 425 Mass. at 75-76 ("damages may be 'reasonably clear' well before, or indeed in the absence of, a judicial order resolving every contested issue."); Clegg, 424 Mass. at 418 (insurer's duty to claimant does not require liability and damages to be "determined in an appropriate, legal forum or agreed upon.").

Rather than aiding in its defense, such an argument is ultimately an admission that AIG knowingly and/or willfully engaged in unfair settlement practices. If damages are not clear until a jury renders a verdict, then as of September 15, 2004, damages were reasonably clear because the jury returned its verdict. Yet, for almost another year, AIG repeatedly offered Plaintiffs significantly less than the jury award. Such an admission is damning.

E. AIG's Low Valuation Resulted in Bad Faith Offers

It is undisputed that to make a good faith offer, an insurer would have to include some compensation for each component of damages where fault and causation are reasonably clear. In this case, a good faith offer had to include a component for economic damages, pain and suffering, and two loss of consortium claims. It is axiomatic that where fault is not at issue and the plaintiff suffers catastrophic injuries, pain and suffering is a significant portion of damages. See, e.g.. Cuddy v. L & M Equipment Co., 352 Mass. 458, 462 (1967) (pain and suffering must compensate "for the loss of time, the physical pain and the mental suffering, both that undergone [sic] in the past and likely to occur in the future."). The value that AIG placed on the Rhodes claim was well below what it reasonably should have been under the facts and circumstances. As such, all offers based on that value were, by definition, unreasonable.

In March 2004, Satriano knew that $6.6 million to $9.6 million was "a pretty accurate range" because "it's a range from anywhere, say, from eight on that we were discussing this case."212 In June, Martin Maturine (the adjuster between Satriano and Nitti) told Zurich "it is clear that National Union's policy has the greater exposure in this claim than that of Zurich's." Right before mediation, Warren Nitti valued the claim at $6 million. Tracey Kelly, who did not review any documents and had no idea what was in the file, undercut the "very experienced" adjuster and valued the case at only $4.75 million.214 Ms. Kelly's valuation was unreasonable. She mistakenly believed that the economic damages were only $2 million, relying on the Defense expert's life care plan value and costs incurred by the Rhodes family as of August 2003. Her non-economic damages valuation, which included Mrs. Rhodes' pain and suffering and both loss of consortium claims, was $2.75 million. Warren Nitti testified that interest is always considered in settlement discussions.215 Yet it was two years after suit was filed and there was no reflection of the 25% in accrued interest. Had Ms. Kelly included interest, the $4.75 million value would have been $5.95 million. It is well settled that, contrary to Owen Todd's contention that statutory interest is a "reward for going to trial," it is intended to compensate plaintiffs for the lost use of money. E.g., McEvov Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 717 (1990) (prejudgment interest not intended to make damaged party more than whole, but merely to compensate for loss of use); Salvi v. Suffolk County Sheriffs Dept, 67 Mass. App. Ct. 596,609 (2006) (prejudgment interest compensates plaintiffs for lost use of money; recovery of such does not make winner better off for having chased it).

At no point in time did AIG challenge the out-of-pocket expenses of the Rhodes family, including past medical expenses, home modification costs, or the value of lost household services. AIG simply did not bother to confirm what the numbers were one month before trial. When Mr. Nitti completed his report in August 2004, he relied on information from August and October 2003. During that year, Mrs. Rhodes' home health aide costs increased to over $95,000; medical costs grew to more than $452,000; and home renovations, including quotes to make the basement accessible, exceeded $300,000.217 All together, Plaintiffs had $911,000 in economic damages before even looking at future medical care.

From January 2002 until September 2004, the only contested expense was the difference between the two life care plans, which according to Nitti, was based primarily on "a five year greater life expectancy and a one-time [anticipated] home modification cost contained in plaintiffs life care plan."218 Satriano knew that home renovation costs were part of Plaintiffs' economic damages219 and so did Ms. Mattson,220 but AIG did not include the $250-300,000 home renovation cost in its valuation. Ms. Matson included only $20,000 for kitchen modifications because she believed it was appropriate for Mrs. Rhodes to sleep in the living room. She also proposed fewer home health aide hours because she believed Harold and Rebecca could pitch in as health aides, and she did not even consider Mrs. Rhodes' increased

217 Underlying Trial Transcript, Ex. 71, Vol. VI, pp. 120-123.

218 Ex. 45. p. 2076. In his report to Tracey Kelly, Mr. Nitti identified the present value of the defendants' life care plan as $1,487,827. Ex. 45, p. 2076. The average present value cost of a life care plan presented with Plaintiffs' demand was $2,027,078, combined with lost household services, it totaled $2,319,457. Ex. 10, pp. 14-15.

219 Satriano Testimony, TT, Vol. 8, p. 120.

220 Underlying Trial Transcript, Ex.71. Vol. IV, pp. 158-64.

221 Ex. ll.pp.2.13.

needs as she aged or if Harold predeceased her.222 Additionally, Ms. Mattson's life care plan was based on an assumption that Mrs. Rhodes' life span was shortened,223 but AIG did not place a value on the years it said would be taken off Mrs. Rhodes' life.

Even if the jury agreed with the defense life care planner and thought Harold and Rebecca Rhodes should act as home health aides, and for Mrs. Rhodes to be relegated to the living room, AIG still would have to add the almost $900,000 in undisputed costs to its $1.5 million life care plan, meaning AIG's economic damages value should have been $2.4 million at a minimum. On top of that, AIG had to take the 25% accrued interest into consideration, bringing its value of economic damages to just under $3 million, and then add something for Mrs. Rhodes' extensive pain and suffering and the two consortium claims.224 Because it did not even look at current economic damages, let alone the other elements of the Plaintiffs' damages, AIG did not reasonably value the claim; without doing that, it could not make a good faith offer. Moreover, the difference between the life-care plans decreased by trial. Plaintiffs' life- care plan no longer included "anticipated" home modifications because so much time had passed that many renovations had been done. Additionally, Mrs. Rhodes psychotropic medications were taken out of Plaintiffs' life care plan, which reduced it, on average, by another $200,000.225 Despite the fact that the difference between the valuation of the only disputed element of economic damages had decreased by hundreds of thousands of dollars, AIG was willing to spend $300,000 of its own money,226 and a lot more of Zurich's, to litigate over a $400,000 difference.

222 Underlying Trial Transcript, Ex. 71. Vol. IV, pp. 91, 149-54, 158-64, 181-82, 185-86; Ex. 45: Harold Rhodes Testimony, TT, Vol. 9, p. 126

223 Underlying Trial Transcript, Ex.71. Vol. IV, pp. 166-67, 179-82.
223 224
Defense counsel reported, through Crawford, that spousal consortium claims were typically $500,000. 9/24/03 Claims Note and Transmittal Letter, Ex. 67, p. ZA 0576.
225 Underlying Trial Transcript, Ex. 71. Vol. V, pp 154-55, 172-73; Ex. 10. Tab 58.
226 Ex. 95, showing $306,814.86 in legal fees paid by AIG.
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In all, the Defendants spent more than $950,000 in litigating the case. The Rhodes family could have made much better use of that money.

F. AIG Doomed Mediation By Reducing Authority

In addition to having an unreasonably low value, AIG gave Nitti only $3.75 million in settlement authority (including Zurich's $2 million) "because they had $1 million from McMillan's."228 AIG's first offer of $2.75 million, almost an entire year after Plaintiffs' demand, was only enough to cover the absolute minimum of the special damages, with little or nothing for the other components of damages. Miller, 36 Mass. App. Ct. at 419-420 (treble damages imposed where first offer was unreasonably late and constituted half of what should have been offered). Far from being reasonable, an offer "becomes adversarial when it's that low."229 Raising the offer to $3.5 million did not approach the realm of reasonableness. Given that trial was only one month away, "[t]he time for posturing had passed, and the time to make a realistic offer was at hand." Yeagle v. Aetna Cas. & Surety Co., 42 Mass. App. Ct. 650, 652 (1997) (finding 93A/176D violation where insurer's offers were less than its reserves and well below the value of the claim, forcing plaintiff to try the case to verdict).

McMillan's insurance should have had no bearing on AIG's settlement value or authority because McMillan's was a third party defendant, not an insured. The excess policy was triggered when the primary policies of all insureds were exhausted. By August 2004, AIG knew there were no other primary policies covering its insureds, all of whom would be jointly and severally liable for the judgment AIG knew would enter in favor of the Rhodes family.230 The only legal issue regarding McMillan's was whether Zalewski and DLS could recover on the contribution claim set forth in the third party complaint. If AIG was so confident that

227 Ex. 63, showing $646,016 for defense costs incurred on behalf of Zurich and GAF; Ex. 95.
228 Nitti Dep., Ex. 87A. pp. 73-75; Kelly Testimony, TT, Vol. 14, p. 48.
229 Kiriakos Testimony, TT, Vol. 10, p. 137.
230 Ex. 45, p. 2076.
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McMillan's was liable, it should have paid the Rhodes family and sought subrogation from McMillan's insurers later. Instead, it shaved $1 million off Nitti's settlement authority. AIG obviously did not consider the ridiculousness of its position that every other insurer would put in their policy limits before AIG put up a penny —including the third party defendant that complied with all guidelines by putting cones out at the worksite, and vigorously contended that its conduct did not contribute to the accident.234 According to defense counsel, Zalewski was 100% at fault,235 which was a reasonable conclusion since this accident did not occur on a blind curve. Zalewski drove 750 feet down a slight hill on a straight road, with no one between him and Mrs. Rhodes' car. Over that long stretch, the worksite on the side of the road, Mrs. Rhodes' car with red brake lights illuminated in the middle of the road, and Sergeant Boultenhouse directing traffic in his blaze orange "POLICE" vest, all failed to get Zalewski's attention.236 Adding a "men working" sign to the cones and the police detail would not have prevented the accident. The very slim possibility of "tagging" McMillan for contribution did not change AIG's obligation to make a fair and reasonable offer. AIG's decision to not authorize Nitti to use $2.75 million of AIG's

money at mediation shows AIG's intentional violation of c. 176D. See Bobick, 439 Mass at 661 n.15 (possible existence of other tortfeasors does not limit insurer's obligation where the theory of liability is weak); Hauptman v. St. Paul Ins. Cos., No. 02-557, at 10-12 (Mass. Super. Ct. April 6, 2006) (Quinlan, J.) (trebling damages where insurer

231 Ex. 69,p.001985-86. 232NittiDep.,Ex. 87A,p. 82-84.

233 Cormack Testimony, TT, Vol. 13, pp. 21-22, 64.

234 Mr. Cormack's opinion that it was reasonable for AIG to assume that it would get McMillan's $1 million is based solely on Specialty Insurance Company's reserves for the claim. Cormack Testimony, TT, Vol. 13, pp. 21-22. However, that cannot serve as a legitimate basis for AIG's conduct because Attorney Cohen admitted that AIG did not learn of Specialty's reserves until after mediation. TT, Vol. 5, p. 190. Whether an insurer acted reasonably is based solely on its knowledge of the facts at the time, not what it learned about other parties after the fact. E.g., Bolden v. O'Conner Cafe of Worcester, 50 Mass. App. Ct. 56, 66 (2000).

235 Ex. 16.

236 Ex. 10, Tabs 1, 6 (Police Reports).

repeatedly offered less than its value on the claim and intentionally offered amount equal only to special damages and would "go up slowly from there.") (attached hereto as Exhibit F) Furthermore, because of its failure to either inquire about or understand the Massachusetts contribution statute, AIG unreasonably believed that if McMillan's was found 1% at fault for the accident, it would be liable to the Plaintiffs for the entire judgment under the theory of joint and several liability. The Plaintiffs, however, never sued McMillan's - so McMillan's would not be liable to them. Only AIG's insureds had a claim against McMillan's. Under the contribution statute, a joint tortfeasor is entitled to contribution from other tortfeasors if it has paid more than its pro rata share of common liability, which is different from joint and several liability. Mass. Gen. Laws c. 231B §§ 1, 2. If McMillan's were found liable, its contribution would have been to DLS and Zalewski for a pro rata share, not to the Plaintiffs for the entire judgment. E.g., Zeller v. Cantu, 395 Mass. 76, 77 (1985) (contribution statute imposes liability equally among all tortfeasors).

It is clear that it was AIG's strategy to strong-arm the third party defendant at mediation by scaring McMillan's into believing the case was a "break-your-company situation."238 Even more egregious was AIG's purposeful decision to rely on that arm-twisting when it reduced Nitti's settlement authority by the $1 million it expected to squeeze from McMillan's, instead of putting its $2.75 million on the table and keeping the subrogation claim against McMillan separate. AIG now blames Plaintiffs for failing to make its $3.5 million offer "reasonable" because Plaintiffs did not "hold up" McMillan's for the full million.239 Making sure AIG's offer was reasonable was never Plaintiffs' responsibility.

Kelly Testimony, TT, Vol. 14, pp. 18-19 (McMillan's was "in for a penny, in for a pound"). Todd Testimony, TT, Vol. 16, p. 72. Kelly Testimony, TT, Vol. 14, p. 54.

Because it refused to offer what it thought the claim was worth, regardless of the contribution claim, AIG cannot show that its offers were reasonable. See Bolden, 50 Mass. App. Ct. at 66 (noting insurer must establish that its settlement offers were reasonable and made in good faith, given its own knowledge at the time of the relevant facts and law concerning the claim); Mongeon, 2003 Mass. Super. LEXIS 437 at *41 (finding bad faith based on adjuster's "erroneous view that under Massachusetts law an insurer is not liable to its insured for damages representing the aggravation of a preexisting injury," where insurer had "no justification or good- faith basis for this erroneous belief about such a fundamental precept of Massachusetts tort law."). AIG's expert claimed its $2.75 and $3.5 million offers were reasonable only because he assumed

McMillan's was contributing $1 million on top of those offers.240 That assumption did not reflect reality. In fact, Owen Todd testified that the low end of his "reasonable range" was $4 million.241 AIG's offers at mediation, as well as its first offer at trial, were below its expert's "reasonable range."

After the McMillan $550,000 settlement with Plaintiffs, AIG failed to apply the law to the facts. It appears that AIG did not educate itself about the contribution statute until after

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mediation, when CCE&C sent a "post-mediation status report and legal analysis." Nitti then reported that the $550,000 settlement between McMillan and the Rhodes family "extinguished any right of contribution for the remainder of McMillian's [sic] coverage."243 As its own expert testified, AIG had an obligation to increase its offer "to bring it up to the range of a reasonable settlement" after mediation,244 but AIG failed to do so.245

240 241

Todd Testimony, TT, Vol. 16, pp. 70-71; 74-75. IdL,pp. 127-28.

242 Ex. 84. p. 3. item 54.

243 Ex. 47.

244

Todd Testimony, TT, Vol. 16, p. 128.

G. AIG's Unreasonable Offers Continued at Trial

Zalewski, DLS and GAF stipulated to liability before trial,246 but AIG's offer on the first day of trial remained at $3.5 million, including Zurich's $2 million policy limits.247 Even if combined with the $550,000 McMillan's settlement,248 the total compensation offered to the Rhodes family was $4,050,000 - well below AIG's $4.75 million valuation, which itself was unreasonably low. After the close of evidence, AIG finally made an offer of $6 million,249 Nitti's original value. Mr. Todd repeatedly stated that he was not going to "testify as to timing of offers or anything." Timing, however, is everything. Had AIG offered $6 million earlier in the case, it may have been reasonable, but waiting until the jury was deliberating was not.251

Six months earlier, $6.6 - 9.6 million was admittedly an "accurate range" and AIG and GAF were discussing anywhere from $8 million and above for the case.252 As the case wore on, interest and expenses accrued and the value of the claim only grew. When the Defendants stipulated to liability, interest was guaranteed. Taking the 25% of accrued interest into account, the $6 million offer was the equivalent of a jury award of $4.8 million. At trial, Plaintiffs presented evidence of $3.2 million in special damages, plus pain and suffering and two loss of consortium claims, and the "jury seemed to really like Harold and Rebecca Rhodes."254 On

245 As of August 20, 2004, Nitti updated the Executive Claim Summary, but AIG's potential gross exposure remained at $1.75 million, the same as it had been on August 3, 2004. Compare Ex. 47 and Ex. 46. Nitti Dep., Kelly Testimony, TT, Vol. 15, p. 55.

246 AIG Ans., irjj 83, 85; Ex. 82, Tab 4, AIGDC Admissions, Nos. 52, 55; Ex. 82, Tab 7, National Union Admissions, Nos. 57, 60; Ex. 82, Tab 1, Zurich Admissions, Nos. 48,49.

247 AIG Ans., TJ88; Harold Rhodes Testimony, TT, Vol. 9, pp. 105-06.

248 It was not clear that any offers were in addition to the $550,000 and the first time that statement was made was in December 2004. See Ex. 54.

249 Kelly Testimony, TT, Vol. 15, p. 73.

250 Id, p. 101.

251 Kiriakos Testimony, TT, Vol. 10, pp. 145-47. AIG's expert, Owen Todd, opined that the offers during trial were reasonable, based on the erroneous belief that AIG offered $6 million at the beginning of trial and went up from there because of how well the trial was going for the Plaintiffs. Todd Testimony, TT, Vol. 16, pp. 129.

252 Satruano Testimony, TT, Vol. 7, pp. 115-16; Ex. 83A. p. 182-83.
253 Kiriakos Testimony, TT, Vol. 10, pp. 146-47.
254 Nitti Dep., Ex. 87A, pp. 144-149, Kelly Testimony, TT, Vol. 14, pp. 56-57.
54

September 15, 2004, the jury awarded a total of $9.412 million - just as Attorney Deschenes had predicted on March 5, 2004 - showing the unreasonableness of AIG's offers. Cf Bobick, 439 Mass. at 662 (timely offer that is not substantially less than jury verdict, warrants finding that the offer was reasonable); Forcucci v. USF&G, 817 F. Supp. 195, 202 (D. Mass. 1993) (timely $25,000 offer not unreasonable when compared to $55,000 award).

H. AIG Filed Appeal In Bad Faith

Judgments entered on the jury verdicts on September 28, 2004. The Rhodes family thought they had surmounted the last hurdle and that they could finally get on with their lives. But, AIG was not nearly ready to spend $9 million of the $50 million excess policy limits merely because the jury had spoken. Instead, AIG continued its unfair practices when it filed an appeal and repeatedly offered significantly less than the judgment.

AIG presented no evidence or opinions that it acted reasonably after trial, and with good reason. Considering Plaintiffs had a jury verdict in hand, interest continued to accrue and AIG had no real belief that the appeal would succeed, its continuing conduct leads to only one conclusion: AIG intended to use the appellate process as leverage to squeeze the Rhodes family to take less than they were legally entitled to recover. See Tallent, 2005 WL 1239284, at *19 (doubling underlying judgment where post-judgment lowball offers demonstrated that insurer "used the appellate process in an attempt to extort the [plaintiffs] into a settlement for far less than they were owed."); see also R.W. Granger, 435 Mass. at 76-77 (affirming punitive damages where "USF&G denied payment, interposed a groundless denial of liability, and then sought to leverage a favorable settlement" where USF&G offered no explanation for post-verdict offer lower than
255 The verdict included $7,412,000 awarded to Marcia Rhodes, $1,500,000 awarded to Harold Rhodes, and $500,000 awarded to Rebecca Rhodes. Ex. 72. pp. 19-20, Docket Entries 97-99; AIG Ans., U 91; Ex. 82, Tab 1, Zurich Admissions, Nos. 51-52; Tab 4, AIGDC Admissions, No. 63; Tab 7, National Union Admissions, No. 68; Nitti Pep., Ex. 87A. pp. 151-54.
256 Ex. 72, pp. 19-20, Docket Entries 97-99; Ex. 82, Tab 1, Zurich Admissions, No. 53; Tab 4, AIGDC Admissions, No. 65; Tab 7, National Union Admissions, No. 70.
55

verdict plus interest); Hauptman v. St. Paul Ins. Cos., No. 02-557, at 10-12 (Mass. Super. Ct. April 6, 2006) (Quinlan, J.) (trebling damages where insurer repeatedly offered less than its value on the claim and intentionally offered amount equal only to special damages and would "go up slowly from there.") (attached hereto as Exhibit F).

Judge Donovan denied AIG's post-trial motions on November 15,2004.257 Appellate counsel filed the notice of appeal,258 claiming the verdict was excessive and that Judge Donovan's refusal to excuse a juror and her refusal, along with a separate ruling by Judge Chernoff, denying access to Mrs. Rhodes' mental health records, were reversible error. AIG now focuses on the consortium verdicts as excessive, not Mrs. Rhodes' judgment,259 even though Nitti reported that the jury liked both Harold and Rebecca Rhodes. AIG also claimed it had a "reasonable" basis to appeal because it was "sandbagged" at trial when Marcia Rhodes testified that she was depressed about being paralyzed and Rebecca Rhodes cried as she testified about the change in her relationship with her mother.260 Yet it had no right to Mrs. Rhodes' mental health records to use as a basis to undermine the consortium claims.

The Plaintiffs hardly need expert testimony on the issue of AIG's bad faith in pursuing an appeal; "it is relatively rare for evidentiary errors to result in a reversal in a civil action." Bolden, 50 Mass. App. Ct. at 67. Even appellate counsel said there was a mere "possibility" of getting a new

trial. The idea that not one, but two judges who denied access to Mrs. Rhodes' mental health records abused their discretion, and that such records would have changed the verdict because they "might" have contained information about her husband and daughter, or

257 Ex. 72. p. 22, Docket Entry 116.

258 AIG retained appellate counsel before the post-trial motions were filed. Ex. 50, p. 2129 (October 8, 2004); E2L 72, p. 20, Docket Entry 101 (October 18, 2004).

259 Kelly Testimony, TT, Vol. 14, p. 62.

260 AIG Summary Judgment Br., pp. 19-20.

261 Nitti Pep., Ex. 87A, pp. 160-163.

because Mrs. Rhodes testified that she was depressed about never being able to walk again, is so far-fetched it compels the conclusion that AIG never expected to prosecute, much less win, the appeal. See Tallent, 2005 WL 1239284 at *19 (doubling underlying judgment where insurer was objectively unreasonable in offering significantly less than judgment plus interest while pursuing appeal based purely on evidentiary and contribution issues); Holmes, Supra., § 137.2(J), pp. 128-129, and cases cited (facts for reversal must be very strong and chances of success much greater than chances for failure for insurer to insist upon appeal because, "[t]he application of the good-faith test to the settlement of claims by an insurer... must be more exacting at the appeal stage of proceedings than before or during trial.").

Even if AIG's appeal were wildly successful, since liability had been stipulated, all it could win was another trial on damages years down the road,263 at which time prejudgment interest would have exceeded 50%. Such a result would be a Pyrrhic victory indeed. Tallent, 2005 WL 1239284, at *4 (noting adjuster's observation of same because of additional legal fees and costs).

AIG's privilege log is completely devoid of any post-verdict or post-judgment analysis from either counsel at CCE&C or the counsel AIG hired for the appeal, Sloane & Walsh.264 There is evidence, however, that defense counsel did not expect an appeal. Steven Penick of Crawford spoke to defense counsel who tried the case in order to update Zurich and put defense counsel's statements, verbatim, into his e-mail: "We are not anticipating an appeal."265 It is reasonable to infer from that statement that counsel did not recommend an appeal, assuming AIG

262 Had Mrs. Rhodes actually sought to recover for exacerbation of her pre-existing conditions, the Underlying Defendants would certainly be liable for such damages. Mongeon, 2004 Mass. Super. LEXIS at *39-40 (it is fundamental precept of Ma. law that tortfeasor liable for aggravation of pre-existing injury).

263 Nitti Dep., Ex. 87A. p. 123; Kelly Testimony, TT, Vol. 14, pp.62.

264 Ex. 84.

265 Penick Dep., Ex. 76, pp. 160-161. Ex. 49 at ZA 0857. Presumably, Mr. Penick spoke to Lawrence Boyle, because he remembered it being Mr. Boyle or Penske's counsel, Mr. Johnson. Penske, however, was dismissed from the case before the verdict. Patten Testimony, TT Vol. 6, p. 40.

bothered to ask. Additionally, AIG has not asserted the "advice of counsel" defense, which raises a red flag because if counsel had recommended an appeal, AIG would certainly assert such a defense. Instead, it implies that counsel advised AIG that an appeal would not be successful in overturning the verdict and that AIG should pay the judgment and let the Rhodes family get on with their lives. Phillips v. Chase, 201 Mass. 444, 450 (1909) ("claim of the privilege may be referred to as indicating party's opinion that the evidence, if received, would be prejudicial."); see Frizado v. Frizado, 420 Mass. 592, 596 (1995) (adverse inference can be drawn from assertion of privilege). The appeal was just one more item on AIG's unwritten checklist of ways to delay as

much as possible to wear down Plaintiffs and forestall payment as long as possible. I. AIG Tried To Use Appeal To Extort Low Settlement

On November 19, 2004, Plaintiffs served a Chapter 93 A Demand Letter on National Union and Zurich.266 In response, Zurich offered and tendered to Plaintiffs $2,322,995.75, representing its policy limits and post-judgment interest. In contrast, AIG responded by offering a total of $7,000,000 (including Zurich's $2 million limits), part of which would be structured, to settle the $9,412,000 judgment, plus the 28 months worth of pre- and post- judgment interest—valued at approximately $12,000,000—and the 93A claim.268 Although AIG was told more than once that Plaintiffs were not interested in a structured settlement, Tracey Kelly insisted on offering one anyway because structured settlements save insurers money.

266 Ex.51: AIG Ans., 1ffl 93, 113; Zurich Ans., Iffl 93, 134; Ex. 82. Tab 4, AIGDC Admissions, No. 66\ Ex. 82, Tab 7, National Union Admissions, No. 71; Ex. 82, Tab 1, Zurich Admissions, No. 54.

267 Zurich Ans., ^ 94; Ex. 82, Tab 1, Zurich Admissions, No. 55; Ex. 52, p. ZA 0963; Ex. 53, p. ZA 0992.

268 AIG Ans., U 95; Ex. 82, Tab 4, AIGDC Admission, No. 67; Ex. 82, Tab 7, National Union Admission, No. 72; Nitti Pep., Ex. 87A, pp. 165-66.

269 Ex. 87A, Nitti Dep., pp.147-48, 168.

270 Kelly Testimony, TT, Vol. 14, pp. 42-43.

On January 20,2005, AIG confirmed that the $7,000,000 settlement offer included Zurich's $2 million and that it was intended to settle all of Plaintiffs' claims.271 After Plaintiffs served a Chapter 93A Demand Letter directly on AIGDC in February,272 it reiterated the same $7 million offer to settle the Underlying Action mid the 93A claim.273 On May 2, 2005, AIG offered $5.75 million, $2 million of which would be structured, on top of the $2.3 million already paid by Zurich and the $550,000 from Professional Tree, to settle the Underlying Action

and the 93 A claim. As such, this offer was less than 70% of what Plaintiffs were entitled to recover in the Underlying Action alone. In June 2005, Plaintiffs accepted $8,965 million to settle the Underlying Action.275 When combined with the amounts previously paid by Zurich and McMillan's, the total was less than the verdict with pre-judgment interest,276 and excluded post-judgment interest and statutory costs.277 AIG dismissed its appeal, and the Plaintiffs filed a

Satisfaction of Judgment in September 2005.

Although it submitted redacted excess claim summaries from January 2005, AIG asserts that it valued the claim at $9.55 million in January 2005 ($7 million from AIG, $2 million from Zurich and $550,000 from McMillan's).280 If AIG did in fact value the claim at $9.5 million, that value was unreasonably low because it excluded pre and post-judgment interest.

271 AIG Ans., Iffl 98-101: Ex. 82, Tab 4, AIGDC Admissions, Nos. 68-70; Ex. 82, Tab 7, National Union Admissions, Nos. 73-75.

272 Ex. 55; AIG Ans., J 102; Ex. 82, Tab 4, AIGDC Admissions, No. 71: Ex. 82, Tab 7, National Union Admissions, No. 76.

273 Ex. 56, p. 4; AIG Ans., ffl| 103-04; Ex. 82, Tab 4, AIGDC Admissions, No. 72; Ex. 82, Tab 7, National Union Admissions, No. 77; Nitti Dep., Ex. 87A, pp. 165-66.

274 Nitti Dep., Ex. 87A. pp. 165-67; Ex. 58.

275 Ex. 60.

276 As shown in the chart attached as Exhibit F, as of the date of the judgment, after subtracting the $550,000 settlement, Plaintiffs were entitled to $11,365,334.14. Plaintiffs' total recovery, without the $550,000, was $11,287,995.75, a difference of $77,338.39.

277 The Plaintiffs moved for statutory costs in the Underlying Action, but the Notice of Appeal was filed before the Court ruled on the motion. Ex. 72, pp. 20-22, Docket Entries 105, 114.
278 Ex. 60: AIG Ans., U 105; Ex. 82, Tab 4, AIGDC Admissions, Nos. 73-74; Ex. 82, Tab 7, National Union Admissions, Nos. 78-79.
279 Exs. 218-219.
280 Nitti Dep., Ex. 87A, p. 125.
59

Furthermore, that valuation constitutes an admission of AIG's bad faith because until June 2005, AIG offered millions of dollars less than its supposed value. Offering only 75% of an unreasonably low value of a claim, when it had no real belief that its appeal would be successful and did not even believe $7 million was enough to settle the case,281 clearly shows bad faith. Tallent, 2005 WL 1239284, at * 17 ("Objective bad faith may be found where a potential defendant offers 'much less than a case is worth in a situation where liability is either clear or highly likely.'").

J. Nitti's Testimony Establishes AIG's Institutional Bad Faith

AIG decided not to present live testimony from Warren Nitti, who of all the AIG staff, had the most substantive knowledge of the claim. Mr. Nitti's testimony was quite telling: he reviewed the entire file and created a very detailed memo before he placed a $6 million value on the claim, but he was immediately overruled by Tracey Kelly, who was unfamiliar with the facts.282 After the mediation, Mr. Nitti knew that AIG's $4.75 million value would not settle the case, but was told to offer even less than that anyway. During trial, he told Ms. Kelly that Plaintiffs' case was going in well, and that the jury seemed to like Rebecca and Harold Rhodes, but she did not authorize him to offer $6 million until after the close of evidence.284 After trial, Mr. Nitti did not recommend an appeal, but his superiors ordered it anyway. After the post- trial motions were denied, Nitti had no expectation that $7 million would be enough to settle the claim, but he played no part in deciding what to offer.286 He told Tracey Kelly that the Plaintiffs were not interested in a structured settlement, but she still instructed him to include a structured
Nitti Dep., Ex. 87A, p. 125.
Nitti Dep., Ex. 87A, pp. 71, 146.
Harold Rhodes was the last witness. He testified on September 14-15, Ex. 71, at Volumes VI-VII.
Kelly Testimony, TT, Vol. 14, pp. 58-59.
Id, pp. 157-58.
Id, pp. 158-59.
60

component in subsequent offers.287 AIG did not want these facts to come into evidence through live testimony because Mr. Nitti's testimony shows AIG's bad faith in ignoring the recommendations of its "very experienced" adjuster- the only person who knew the case and attended the trial.

IV. Zurich and AIG Cannot Point The Finger To Avoid Liability

A. AIG Cannot Blame Plaintiffs For Its Bad Faith AIG cannot escape by blaming Plaintiffs for a supposedly unreasonable demand. Regardless of Plaintiffs' actions, AIG took no steps to effectuate settlement until well after liability was reasonably clear, and when it finally put some money on the table, its offers were unreasonably low. The law is clear: "the fact that the claimant has made an unreasonably high demand, or has not made any demand at all, does not excuse the insurer from making a reasonable offer of settlement when liability (i.e., both fault and damages) has become reasonably clear." Cohen, "The Fundamental Principles of Massachusetts Law Regarding Bad Faith," at p. 3; Bobick, 439 Mass. at 660-61 ("even excessive demands by a claimant do not relieve the insurer of its statutory duty to extend a prompt and equitable offer of

settlement."); Choukas, 47 Mass. App. Ct. at 200 (even an inflexible position of claimant's attorney regarding settlement amount does not relieve the insurer of the obligation to make a fair settlement offer), overruled on other grounds, Murphy v. Nat'l Union Fire Ins. Co., 438 Mass. 529, 533 n.7 (2003); DeMeo, 38 Mass. App. Ct. at 956 (noting size of plaintiff s demand is unrelated to likelihood of defendant's liability and therefore not relevant to liability).
Even if Plaintiffs' settlement positions were relevant, AIG cannot credibly argue that the demands were so high as to be unreasonable. As AIG recognizes, "experienced negotiators do not make their final offer first off, and experienced negotiators do not expect it, or take seriously
287 Id, p. 168.

a representation that it is." Forcucci v. U.S. Fid, and Guar. Co.. 11 F.3d 1, 2 (1st Cir. 1993). 88
The very experienced adjusters at AIG must have understood that the $16.5 million demand represented a cap on the settlement value, and that the Plaintiffs were likely willing to accept a lower figure.
Mr. Chaney even told Zurich and AIG that the Plaintiffs' demand was not unreasonable given the large special damages,289 and the demand was well within Kathleen FuelPs range of $12.9 million to $18.1 million. In fact, the first written demand was millions of dollars less than an August 2002 jury verdict in a comparable case where a woman was rear-ended while parked in Providence, RI, resulting in catastrophic injuries - a claim which AIG was certainly familiar with as it was the insurer.290 See Verdict Reporter (Massachusetts, Connecticut, Rhodes Island), Vol. 14, Issue 5, p. 30 (divorced plaintiff was rear-ended and suffered permanent paraplegia and severe impairment of upper limbs with past medicals exceeding $1 million and future care of $4 million, jury returned $18.9 million verdict - worth $27.9 million with interest - and case settled post-trial for $15 million); Providence Journal Bulletin, 2002 WLNR 5312652 (August 11, 2002) (reporting Chase Manhattan Auto. Finance Corp. is ordered to pay $28 million to Pawtucket woman partially paralyzed when her car was struck by a man driving a car leased from Chase); J AS Publications, Inc., 2002 WL 32058080, date of verdict August 7, 2002 (describing injuries as fractures of thoracic (back) cervical (neck) spine injury to 48-year-old divorced data entry clerk) (all articles are attached hereto as Exhibit G).
AIG's first offer did not even cover special damages and its second offer barely did. Nonetheless, Plaintiffs decreased their demand at mediation to $15 million (a total move of $4.5
288 In Forcucci, the court held that the insurer's prompt response to a Chapter 93A demand letter, with a $25,000
offer was neither unreasonably late nor unreasonably low in light of the subsequent arbitration award of $55,000.
AIG, however, was faced with a settlement demand in the Rhodes case in August 2003, and with another demand in
December 2003. It made no offer until August 2004.
289Ex.66L.p.2.
290 Todd Testimony, TT, Vol. 16, p. 94.

million from the December 1, 2003 demand). Plaintiffs were willing to negotiate in a range of $6 - 10 million, but AIG was not.292 In fact, AIG was not going to make any reasonable moves since Warren Nitti did not have authority to offer $4.75 million, never mind $6 million.293 Up until the jury verdict, each time AIG made an unreasonable settlement offer, Plaintiffs reduced their demand.294 While AIG complains that it was forced to bid against itself post- verdict, it cannot claim, and did not offer any opinions, that Plaintiffs were unreasonable in asking for the jury verdict and statutory interest to which they were entitled. In fact, AIG offered no opinions that its post-verdict conduct was reasonable.

B. Defendants Cannot Blame Each Other To Escape Liability Because the Defendants made either no offers, or repeatedly made unreasonably low offers, the Court does not need to decide what a reasonable amount would have been, only that the offers themselves, and/or the failure to make any offer until 2004, were unreasonable. Mongeon, 2004 Mass. Super. LEXIS, at *33 (finding that defendant's successive offers were unreasonable and holding defendant liable for delay until it finally made reasonable offer, tendering policy limit). Zurich and AIG both delayed in making any offers until long after liability was clear, and therefore are both liable. AIG continued its violations by making unreasonably low offers. A negligent failure to settle "where a prudent insurer would have settled is sufficient to establish liability." Federal Ins. Co. v. HPSC, Inc., 2005 WL 2206071 at *3 (D. Mass. 2005) (attached hereto as Exhibit H), affd. _ F.3d_, 2007 WL 765714 (1st Cir. March 15, 2007).

291 Harold Rhodes Testimony, TT, Vol. 9, pp. 101-02; Hermes Testimony, TT, Vol. 5, pp. 186-87. AIG has repeatedly stated that Plaintiffs' last offer at mediation was $15 million plus the assumption of healthcare. However, every person who was at the mediation, including Warren Nitti, testified that the Plaintiffs last demand was $ 15 million, it did not include payments for healthcare or any other ongoing obligation. IdL; Nitti Dep., Ex. 87A, p. 150; Ex. 54.

292 Harold Rhodes Testimony, TT, Vol. 9, pp. 100-02.

293 Kelly Testimony, TT, Vol. 14, pp. 46, 53.

294 Exs. 122,123.

Zurich contends that it should escape liability because the case did not settle before trial. This argument has already been rejected in Massachusetts: "Whether a settlement is eventually reached or not, unjust delay subjects the claimant to many of the costs and frustrations that are encountered when litigation must be instituted and no settlement is reached." Clegg, 424 Mass. at 419. Zurich also relies on AIG's violations as giving it a "get out of jail free card" because it was followed by an insurer who also engaged in unfair settlement practices. Fundamentally, Zurich's position is that it can only be found to have harmed the Rhodes family if there had been no excess insurer, or if the excess insurer had acted reasonably and settled the case. Similarly, AIG tries to escape by blaming Zurich for a bad investigation. The Defendants' positions are nonsensical. The purpose of c. 176D is to protect claimants from being forced into needless litigation by insurers; letting either Defendant off the hook simply because this case involves a primary and excess insurer who both violated the statute would undermine that purpose.

Zurich and AIG each violated their obligations to effectuate settlement and each harmed the Plaintiffs. Additionally, Zurich and AIG's wrongful conduct overlapped from November 2003 to March 2004. During that time, both insurers hindered settlement efforts and delayed any response to the Plaintiffs while fighting about who would pay the lawyers. The insurers should have been looking after the claim first, and dealing with each other separately,295 rather than jockeying for position on defense costs, which could have been sorted out later. See, e.g., Premier Ins. Co. of Massachusetts v. Jean E. Furtado, 428 Mass. 507, 510 (1998) (insurer took reasonable steps to resolve dispute by filing declaratory judgment action, and therefore did not violate c. 176D); National Union Fire Ins. Co. v. American Motorists Ins. Co., 504 S.E.2d 673, 674 (Ga. 1998) (subrogation claim filed by National Union, as excess carrier, after it accepted the primary insurer's tender and assumed the defense; noting: "by requiring an excess insurer to

295 Ex. 34. p. ZA 955; Kiriakos Testimony, TT, Vol. 10, pp. 132-34; Hermes Testimony, TT, Vol. 5, pp. 170, 189.

investigate and notify a primary carrier of any claim for subrogation, we would be placing the insurer's interest ahead of the insured because the excess insurer would be required to delay action until it completed an investigation" and "the better policy is to encourage insurers to

promptly protect their insureds' interests and to hold disputes among themselves in abeyance").296

Zurich and AIG's conduct stands in stark contrast to that of McMillan's insurers, One Beacon (business auto coverage) and Specialty National (commercial general liability). Though each insurer contended that the other's policy provided primary coverage for Zalewski/DLS's claim against McMillan's, both participated in the mediation and contributed equally to McMillan's settlement with the Rhodes family.297 Only after their insured was protected and dismissed from the suit did they "fight" about the coverage issue in a declaratory judgment action.298 As Attorney Hermes testified, even when there is a coverage dispute, the insurer "protects the interest of the insured, first, and deals with coverage issues second."299

When viewed as a whole, the Defendants' combined failures created an incredible delay in effectuating a fair and equitable settlement. Together, Zurich and AIG forced the Rhodes to continue to litigate and to "incur the inevitable 'costs and frustrations that are encountered when litigation must be instituted and no settlement is reached.'" Hopkins, 434 Mass. at 567. Zurich should not be allowed to claim that it is not liable because AIG did not settle the case in the six months between the "formal" tender and trial. Likewise, AIG cannot be allowed to argue that its

296 See also Zurich American Ins. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.. No. A-4260-01T1, 2003 WL 23095605 (N.J. Super. Ct. App. Div. May 7, 2003) (declaratory judgment action filed by Zurich seeking reimbursement for litigation costs because PMA, not Zurich, had the duty to provide defense); Fireman's Fund Ins. Co. v. AIG Hawaii Ins. Co., Inc., 126 P.3d 386 (Haw. 2006) (declaratory judgment action against AIG regarding duty to defend).

297 Hermes Testimony, TT, Vol. 5 at 189.

298 Specialty National Ins. Co. v. OneBeacon Ins. Co., U.S. Dist. Ct., D.MA. C.A. No. 04-12306 RCL (judgment entered in favor of OneBeacon in declaratory judgment action on basis that Specialty National's policy covered the claim).

299 Hermes Testimony, TT, Vol. 5, at 170.

delay and lowball offers were reasonable because Zurich investigated poorly and took so long to relinquish control. If the Defendants' arguments were given any credence, the result would be illogical: in any case involving more than one insurer, each could intentionally refuse to settle, then point at the other to escape liability, thereby nullifying the Legislature's intent in enacting c. 176D. Instead, the insurers' arguments support a finding that they are both liable to the Rhodes family for their statutory violations.

C. Plaintiffs Need Not Prove Offer Would Be Accepted

Mass. Gen. Law c. 176D places a duty squarely on the shoulders of insurers to effectuate prompt and equitable settlements. That duty does not depend on whether the Plaintiffs would have accepted a late settlement offer, or any prior hypothetical settlement offer. "[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." Hopkins, 434 Mass. at 569 (imposing punitive damages and rejecting insurer's argument that lack of evidence that plaintiff would have accepted an offer means there was no causal nexus between its delay and any harm); see Bobick, 439 Mass. at 662-63 (restating rule that plaintiffs do not need to prove they would have accepted hypothetical offer). Zurich cannot benefit from its inexplicable delay by claiming "no harm, no foul" simply because its policy limits were $2 million. Indeed, Zurich's failure to respond to Plaintiffs' demand caused Mr. & Mrs. Rhodes to suffer stress and anxiety and unnecessary costs.

Nor can Zurich hide behind the assumption that had it tendered its $2 million sooner, the case would have gone to trial anyway. Even though no amount of money would adequately compensate the family, the Plaintiffs wanted to resolve the case. But no offer came, or at least no reasonable offer.300 Nonetheless, Plaintiffs are not required to prove a hypothetical, and neither Zurich nor AIG can rely on 20/20 hindsight to exonerate themselves. Hopkins, 434

300 Harold Rhodes Testimony, TT, Vol. 9, pp. 99-06, 124-28.
66

Mass. at 567 ("when the defendant failed to make any offer at all, the plaintiff should not be required to show that she would have accepted a hypothetical settlement offer, had one been forthcoming."), Bobick, 439 Mass. at 662-63. During the time that Zurich was handling the claim, it could not know what Plaintiffs were willing to accept, nor could it have known what AIG was going to offer, because even AIG had not yet made the determination.

Furthermore, Zurich cannot contend that AIG would never have offered more than $6 million, as it did on the last day of trial; in fact, no one can know that. Satriano thought $6.6- $9.6 million was a reasonable range, and discussed "$8 million and on" in early 2004. Had Zurich tendered in 2003, AIG may well have concluded that the value was $8-$10 million when Satriano and his supervisor, Richard Mastronardo, were handling the case, especially in light of AIG's prior experience in the Oliveira case, where the jury returned a $19 million verdict.301 "Primary insurers cannot avoid liability for their unfair 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 422, n. 8.

All that can be objectively known about the post-tender activities is that after Plaintiffs continued to reject AIG's offers, AIG continued to increase them, and when Plaintiffs were able to hold on for a year after the verdict, AIG eventually paid almost $9 million to settle the Underlying Action ~ for a total payment from AIG, Zurich and McMillan's of $11.837 million. From those facts, the Court can infer that if Zurich had tendered sooner, AIG's offers would have continued to rise until AIG eventually made a reasonable offer. Clegg, 424 Mass. at 422, n. 8 (excess insurer's prompt offer after primary's tender supported an inference that if primary had tendered sooner, the case would have settled sooner). Nor can Defendants prove that Plaintiffs never would have settled for less than $8 million. Aside from being irrelevant, it does not

301 Owen Todd Testimony, TT, Vol. 16, p. 94.
67

support their argument. Plaintiffs never discussed what they would accept to settle the case before mediation because no good faith settlement offers had been made- there was nothing for them to discuss until the mediation, where the $3.5 million offer was not high enough to prompt them to reconsider their $8 million settlement position.302 With other day-to-day concerns, "you don't speculate on stuff that's not happening ... if you had put an offer [of $6 million] on the table, I don't know, but you didn't do that."303 If an offer of $6 million had been made at mediation (or before), Harold Rhodes didn't know what he would have done, other than rely on the advice of his brother and counsel. All that can be said for sure, even with the benefit of hindsight, is that the offers at mediation did not cause Plaintiffs to consider settling for less than $8 million, but the Plaintiffs wanted the case to be resolved.

Requiring Plaintiffs to prove that a hypothetical offer would have been accepted would have a perverse effect. Insurers would be encouraged to never make an offer because Plaintiffs could then never prove that an imaginary an offer would have been made, or that it would have been accepted. Such a requirement would undermine the purpose of encouraging settlement, which is precisely why the Hopkins court held that the plaintiff did not have to prove she would have accepted a hypothetical offer in order to prove the insurer caused her to suffer damages. 434 Mass. at 569.

V. Damages

Compensable injury under Chapter 93 A includes "the invasion of any legally protected interest of another." Leardi, 394 Mass. at 159-60 (1985) (explaining that injury may occur without actual economic damage, which is why the statute allows for nominal damages). Plaintiffs are entitled to recover for all foreseeable economic and non-economic loss resulting

302 Harold Rhodes Testimony, TT, Vol. 9, pp. 104-06, 130-31; Vol. 10, pp. 79-80.
303 Id Vol. 10, pp. 79-80.
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from such an invasion, including: (1) emotional distress arising from the frustrations of unnecessary litigation; (2) the added costs of litigation; and (3) loss of use of the money that should have been paid earlier. Because Defendants' collective unfair settlement practices caused those injuries, Plaintiffs are entitled to collect from either Defendant. Kattar, 433 Mass. at 15 (joint and several liability for compensatory damages is proper under c. 93 A because it ensures that plaintiffs may recover and be made whole).

A. Plaintiffs Can Recover For "Costs And Frustrations" Of Litigation The "frustrations of litigation," including a plaintiffs anxiety associated with watching assets being depleted while insurers refuse to communicate a fair settlement offer, are foreseeable non-economic losses and exactly the type of harm that Chapters 93 A and 176D are intended to prevent. Clegg, 424 Mass. at 419 ("Unjust delay subjects the claimant to many of the costs and frustrations that are encountered when litigation must be instituted and no settlement is reached."); see Hershenow, 445 Mass. at 798 ("Legislature intended to permit recovery when an unfair or deceptive act caused a personal injury loss such as emotional distress, even if the consumer lost no 'money' or 'property'"); First Agric. Bank v. Cappuccino of the Berkshires, Inc., 1986 Mass. App. Div. 110, 114 (1986) (affirming trial court's finding that emotional distress and legal fees incurred from malicious abuse of process "assuredly supply the requisite quantum of harm" under Chapter 93 A).304

Massachusetts is not alone; a number of courts have specifically found that emotional distress damages are recoverable as part of bad faith claims handling cases. Ace v. Aetna Life Ins. Co., 139 F.3d 1241, 1249-50 (9th Cir. 1998) (emotional distress as a measure of damages in a bad faith action does not have to be "severe" because "when an insurance company wrongly

304 AIG has argued that Plaintiffs must prove every element of an intentional infliction of emotional distress claim or show physical manifestations of harm in order to recover for emotional distress under Chapters 176D and 93 A, yet it has been unable to identify one Massachusetts case that actually has such a holding.
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refuses to honor its obligations, emotional distress is a natural and believable response."); Waters v. United Services Auto. Ass'n., 41 Cal. App. 4th 1063,1072 (1996) ("The principal reason for limiting recovery of damages for mental distress is that to permit recovery of such damages would open the door to fictitious claims, to recover for mere bad manners, and to litigation in the field of trivialities.... Obviously, where, as here, the claim is actionable and has resulted in substantial damages apart from those due to mental distress, the danger of fictitious claims is reduced, and we are not here concerned with mere bad manners or trivialities but tortious conduct resulting in substantial invasions of clearly protected interests.").305

B. Frustrations Of Litigation

Marcia and Harold Rhodes waited for years for their claim to be resolved. They thought that once Zalewski admitted to sufficient facts to warrant a guilty finding in November 2002, they would be done. After they responded to discovery in April 2003, they thought the insurers had all they needed to know. Surely after the demand package and the "Day in the Life" video were reviewed in August 2003, the insurers would settle. Once the IME and her deposition was done, Mrs. Rhodes thought there could be no further need for litigation. Finally, the turning point arrived at mediation in August 2004 when a room full of insurance representatives came to Boston. But Marcia and Harold's hopes were dashed again. They had to go to trial, and obtained a jury verdict in September 2004. The black cloud that had loomed over their lives was gone, or so they thought. Zurich did not pay, and AIG appealed.

305 See also DiDomenico v. New York Life Ins. Co., 837 F. Supp. 1203, 1206 (M.D. Fla. 1993) (allowing emotional distress damages under statutory cause of action for bad faith refusal to settle); Patel v. United Fire & Cas. Co., 80 F. Supp. 2d 948, 957-58 (S.D. Ind. 2000) (citing exception to Indiana's rule requiring physical manifestation of emotional distress for intentional torts and ruling that bad faith claims handling claim constitutes intentional tort); Nassen v. Nat'l. States Ins. Co., 494 N.W.2d 231, 237, 238 (Iowa 1992) (affirming award for bad faith and fraud in denial of insurance claim that included emotional distress "resulting from premature dissipation of plaintiffs' assets"); State Farm Mut. Ins. Co. v. Shrader, 882 P.2d 813, 833-34 (Wyo. 1994) (emotional distress damages recoverable where plaintiff has also suffered other loss such as economic damages).

306 Marcia Rhodes Testimony, TT, Vol. 6, pp. 73-74, 76-77, 79-85, 87, 98, 101-102, 113-114; Harold Rhodes Testimony, TT, Vol. 9, pp. 99-100, 112-14, 124-28; Steven Rhodes Testimony, TT, Vol. 5, pp. 20-21, 23-29, 31-35.

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Marcia Rhodes hoped the litigation would end after April 2003.307 She couldn't believe that it was still "dragging on" in the summer of 2004 and that she had to go to a doctor to "prove she was paralyzed"- it was "ludicrous" and it made her very angry that the IME was done "so late in the game:"

[w]hat could they find? I mean, that I wasn't paralyzed and I was faking it? [In my deposition] I was answering questions that they already knew the answer of, and they just wanted to hear me say what they already knew. That made me really angry.309

Then, she had to repeatedly describe personal matters and answer the same questions over and over, even though the accident was a rear-ender, a "no-brainer." The litigation process, which had "gone on and on and on" was a "horror" that culminated in a trial:

I remember I was extremely embarrassed [at trial] ... I do have a clear memory of the judge getting off the bench . . . standing next to the jury box so she could watch the video.. .It was very hard for me to have somebody watching this unpleasant experience of my having to go through what I have to go through now that's an average day in my life.310

For Harold Rhodes, the litigation was a war of attrition:

The financial burden was always a weight on my shoulders - as was "The Trial." The Underlying Action was a black cloud that loomed over me and my family for more than two years - it was as though we could not really start living our "post- accident" lives as a family until The Trial was over and we had achieved some finality and certainty. My ability to act as a parent to Rebecca, and to compensate for Marcia's inability to fill the role that she had prior to the Accident, was greatly compromised by my stress over the lawsuit and uncertainty of our financial future.

I had to become a party to litigation in order to be compensated for the way my relationship with my wife changed after the Accident, and I had to remain a party to litigation because the insurance companies refused to do the right thing and compensate me, my wife and my daughter for our losses. In fact, the insurance companies did not even show my family the common courtesy of acknowledging, much less responding to, our initial settlement offer. I had to fill the role of litigation decision-maker because it was not a burden that either my

307 Marcia Rhodes Testimony, TT, Vol. 6, pp. 81-82.

308 Marcia Rhodes Testimony, TT, Vol. 6, p. 87.
309 Marcia Rhodes Testimony, TT, Vol. 6, p. 89.
310 Marcia Rhodes Testimony, TT, Vol. 6, p. 111.

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wife or daughter could bear - so I bore it alone. I had to spend hours and hours of my life with lawyers, preparing for testimony, testifying in a deposition, participating in mediation and even testifying in court, despite the fact that the Personal Injury Defendants had stipulated to liability, because the insurance companies did not make a reasonable settlement offer. I will never get those hours back, and they took a toll on me.
Words cannot explain my fury at having to watch my poor wife sit in her wheelchair beside the witness stand, visibly uncomfortable being the center of attention - something she has always hated. I tried my best to control my emotions during the trial and to remain clinical when I testified about the personal care I provide to my wife, but I could not help but cry, and what husband can help but be embarrassed when talking about his wife's bowel movements or menstruation? .. . Then to add insult to injury, AIGDC appealed the verdict, creating additional financial insecurity and anxiety.311
Mr. Rhodes was visibly agitated and upset as he watched the trial unfold and had to listen to the defense life care planner say "that it would be okay for Marcia to live ... she could comfortably live in a living room on a hospital bed for the rest of her life . .. [a]nd then she said that Marcia only needed a certain amount of care, just in the mornings because I would be there and Becca would be there to take care of her, to mean that we would be the personal care attendants for Marcia."312
Having to testify in front of strangers about extremely personal matters was bad enough,313 but Marcia and Harold Rhodes also had to watch their only child do the same thing.314
As Mr. Rhodes explained:
I have never been so angry, or so powerless, as when my daughter broke down in tears on the witness stand and Judge Donovan called a recess. Marcia and I were on the other side of the courtroom, and there was nothing we could do to protect our only child.315
311 Ex. 204, Harold Rhodes Answer to Zurich's Interrogatory No. 3.
312 Harold Rhodes Testimony, TT, Vol. 9, p. 126; Marcia Rhodes Testimony, TT, Vol. 6, p. 109; Patten Testimony, TT, Vol. 6, p. 40.
313 Marcia Rhodes Testimony, TT, Vol. 6, pp. 89-90, 91-92, 103-08, 110-12; Harold Rhodes Testimony, TT, Vol. 9, pp. 113-14; Vol. 10, pp. 8-9; Steven Rhodes Testimony, TT, Vol. 5, pp. 35-36.
314 Harold Rhodes Testimony, TT, Vol. 9, p. 128; Marcia Rhodes Testimony, TT, Vol. 6, pp. 102-03, 108-10.
315 Ex. 204, Harold Rhodes Answer to Zurich's Interrogatory No. 3.
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Despite her parent's best efforts to shield her, Rebecca Rhodes understood that the lawsuit was critically important to her mother's well-being and that it was an incredible source of stress for her parents, especially her dad.316 Though she did not understand that she herself was a party, she felt immense pressure when she testified because she did not want to say anything that would hurt her mother's case or her feelings. She watched as the lawsuit weighed on her parents, especially her mother.318 All of that created such a high level of stress that Rebecca felt compelled to leave her house to get away from it before trial, even though she knew her mother

was very worried when she went for walks along Route 109.319 Rebecca Rhodes broke down in tears while on the witness stand at trial - yet her mother could not reach her from her wheelchair to comfort her.

C. Financial Stress

Mr. Rhodes was terrified that the family would run out of money quickly, given that they had burned through almost half a million dollars and still had not received a reasonable settlement offer.321

Because of the rate at which we were expending funds, and the uncertainty as to the amount or timing of any recovery, I was very concerned about paying for Marcia's personal care and treatment, so much so that we even cut down on the hours of her personal care attendant from 8 hours/day to 4 hours/day when we learned that the Personal Injury Defendants were going to appeal the judgment. Doing so increased the burden and stress imposed on me, as I needed to care for both Marcia and Rebecca;

The financial strain on me and my family was enormous while the Underlying Action was pending.322

316 Rebecca Rhodes Testimony, TT, Vol. 5, pp. 116-19, 121, 126-27.

317 Rebecca Rhodes Testimony, TT, Vol. 5, pp. 127-296, 135, 150.

318 Rebecca Rhodes Testimony, TT, Vol. 5, pp. 118-19, 121-22, 123-27, 129-41.

319 Rebecca Rhodes Testimony, TT, Vol. 5, pp. 122, 129-34, 150.

320 Rebecca Rhodes Testimony, TT, Vol. 5, at p. 137.

321 Harold Rhodes Testimony, TT, Vol. 9, pp. 113-14, 120-22, Vol. 10, p. 80; Marcia Rhodes Testimony, TT, Vol. 6, pp. 94-95.

Ex. 204, Harold Rhodes Answer to Zurich's Interrogatory No. 3.

After August 2003, Mr. Rhodes became increasingly stressed and concerned because no one responded to the demand package and the family's assets were being depleted. The effect that the financial pressures and the litigation were having on Mr. Rhodes was quite evident to his family.324

I felt as if I was the cause of this stress and I felt very guilty about [Harold's] having to deal with all this financial stress and legal stress so he could keep me out of it, so I could concentrate on progressing physically forward in my recovery.325 [A] great deal of financial concern was how we were going to fix this house so that it would now be wheelchair accessible for me because this was the way it was going to be... he was very concerned as to where we were going to find the money to do that.326 And I also found out quite a bit later that my husband had to take out a loan, which I knew from my life with my husband he is opposed to any debt. He pays cash for everything. And I knew that he was very upset about the fact that he had to ... borrow money just to keep the process of my getting better going.327

The first offer from the defense - $2 million - did not calm Harold Rhodes' fears. It inflamed them. Zurich and AIG's combined failures caused great angst. AIG's expert admitted that AIG relied on the fact that the Rhodes family would rather take less money to settle the case than put themselves through trial. Marcia Rhodes thought the case would be over when the jury returned its verdict.329 She was wrong. AIG preyed on the Plaintiffs' fears and exacerbated their emotional distress when it appealed the verdict:

[T]his is when I realized that if they can delay this for two more years, we would be in dire financial straits. And I was just absolutely afraid that we wouldn't be able to withstand two more years and then we would just have to take whatever they offered.330

323 Harold Rhodes Testimony, TT, Vol. 9, pp. 113-14; Steven Rhodes Testimony, TT, Vol. 5, p. 21.

324 Steven Rhodes Testimony, TT, Vol. 5, pp. 21-25, 29-35, 45; Rebecca Rhodes Testimony, TT, Vol. 5, pp. 121-22, 121-22; Marcia Rhodes Testimony, TT, Vol. 6, pp. 93-96.

325 Marcia Rhodes Testimony, TT, Vol. 6, p. 96.
326 Marcia Rhodes Testimony, TT, Vol. 6, p. 93-94
327 Marcia Rhodes Testimony, TT, Vol. 6, p. 95.
328 Todd Testimony, TT, Vol. 16, p. 117.
329 Marcia Rhodes Testimony, TT, Vol. 6, pp. 113-14.
330 Harold Rhodes Testimony, TT, Vol. 9, p. 128.

The McMillan settlement—of which the Rhodes family received approximately $165,000 after paying attorneys' fees and the medical lien — provided no comfort for the family as they had gone into debt to modify their home. AIG has incredible gall to suggest that the Rhodes' financial stress was not so bad because McMillan's insurers complied with their statutory obligations, while AIG steadfastly refused to make a reasonable settlement offer. As Mrs. Rhodes testified:

Q. Is it fair to say that that eased quite a few of the financial concerns that you were having, you had this more than half-million dollars that you had received from the tree company?
A. You're kidding right? No, no.
Q. That didn't ease your financial concerns at all?
A. No. Knowing what our medical bills were and were likely to be and not even knowing what was going down the road in the immediate future, that money didn't touch it, no.332

D. The Costs Of Litigation

Litigation is not cheap, even in a contingency fee case. The Rhodes family had to pay over $142,000 in litigation expenses during the Underlying Action;333 trial-related expenses alone exceeded $50,000.334 From the point in time that liability was reasonably clear and the Defendants should have settled, Plaintiffs should not have had to incur any additional costs. Thus, Plaintiffs' damages are reflected in all litigation disbursements following the date on which a reasonable offer should have been made. Miller, 36 Mass. App. Ct. at 421 (1994) (costs are recoverable as foreseeable consequence of unfair settlement practices).

331 Harold Rhodes Testimony, TT, Vol. 9, pp. 106-07.
332 Marcia Rhodes Testimony, TT, Vol. 6, p. 131.
333 Pritzker Testimony, TT, Vol. 16, p. 21.
334 Harold Rhodes Testimony, TT, Vol. 9, pp. 109-10; Janet Kelley Testimony, TT, Vol. 12, pp. 73-74; Ex. 90.

1. Zurich Should Have Tendered Its Policy Limits By January 2003

Zurich received notice and great detail about the accident by February 2002. By the time Plaintiffs filed the complaint in July, Zurich already had five months to evaluate liability, damages and coverage. That was more than enough time to determine that it had to defend and indemnify all of the Underlying Defendants. Given Zalewski's clear negligence and the severity of Mrs. Rhodes' injuries, Zurich should have been able to "document" that the claim would exceed its policy limits, and tender its limits to AIG when the complaint was filed in July 2002. Even if Zurich received notice of the claim in August 2002, it should have tendered its limits no later than January 2003. When Zurich requested a coverage decision, its investigation should not have ceased since GAF was obviously an insured and its own policies required it to take action. When Zurich received the coverage opinion in January 2003, it already had five months to confirm that the claim was worth more than $2 million. Zurich had no excuse for not tendering its policy limits to AIG by January 2003, at the latest.

2. AIG Should Have Been Ready To Make An Offer As Soon As Zurich Tendered

AIG should have been paying close attention to the Rhodes claim after February 2002, when it determined that its policy could be exposed by at least $1 million, and especially after September

2002, when Crawford evaluated exposure at $5-10 million. If it had paid attention to Crawford's Liability Transmittal Letters, AIG could have asked for information on the claim much sooner and would have been able to identify any deficiencies in the investigation and address them. AIG should have been ready to make a reasonable offer to Plaintiffs when Zurich tendered. Because Zurich and AIG both failed to make prompt efforts to effectuate settlement, they are responsible for $138,453 in Plaintiffs' costs after January 2003. In addition to incurred
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litigation costs, the Rhodes family had to compromise their position that they were entitled to recover the verdict and all statutory interest. Therefore, Defendants are also responsible for the lost use of the money to excess of $1 million. VI. Lost Use Of Funds Damages
While AIG complains that it was forced to "bid against itself post-trial, Plaintiffs relinquished more than $1 million of interest in order to obtain some certainty about their financial situation so they could move on with their lives. "[W]hen an insurer wrongfully withholds funds from a claimant, it is depriving that claimant of the use of those funds;" such harm is compensable under Chapter 93 A. Clegg, 424 Mass. at 419; see Hopkins, 434 Mass. at 560 (affirming interest from the time a reasonable offer should have been made to the time of settlement); Miller, 36 Mass. App. Ct. at 420 (damages for lost use of money measured by interest).
The Rhodes family is entitled to be compensated for the lost use of the money they should have been paid, measured by statutory interest from the date that Defendants should have paid to the dates on which they made payment. See Mirageas v. Mass. Bay Trans. Auth., 391 Mass. 815, 821 (1984) (interest "is awarded to compensate for the delay in the plaintiffs obtaining his money."); Mongeon, 2004 Mass. Super. LEXIS 157, * 47 (using 12% to measure lost use damages). As of September 28, 2004, when judgment entered, the value of the Plaintiffs' case was crystal clear; Plaintiffs were entitled to $9,412 million, plus pre-judgment interest, less the $550,000 from Professional Tree, for a total of $11,365,334.336 From September 28, 2004 until the Plaintiffs were finally paid, Defendants wrongfully withheld money from the Plaintiffs, "depriving [them] of the use of those funds." Clegg, 424 Mass. at 419. By
335 Harold Rhodes Testimony, TT, Vol. 9, pp. 108-11.
336 Ex. 72. p. 19-20, Docket Entries 97-99.
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September 2005, the Rhodes family was paid a total of $11,287,996, representing a loss of $77,338.
As payments toward the amount owed to Plaintiffs were made in December 2004, and then in July, August and September 2005, Plaintiffs do not claim that they lost the use of the entire verdict value for a year. Even so, when the verdict value is reduced by the payments received between 2004-2005, the lost use of funds totals $990,896.338 Unless Plaintiffs are allowed to recover for the lost use of the money, Defendants will receive a combined financial bonus for their unfair conduct, at the Rhodes family's expense, of $1,068,234.
Defendants contend that the Rhodes family is not entitled these damages because a satisfaction of judgment was filed in the Underlying Action. That is not the law in Massachusetts. See Rothenberg v. Boston Housing Auth., 335 Mass. 597, 600-01 (1957) (filing of satisfaction of judgment did not preclude judgment creditor from later recovering post- judgment interest). Judgment entered against the Underlying Defendants, not Zurich or AIG. Plaintiffs are not seeking to recover lost use of funds from the Underlying Defendants, nor does the satisfaction of judgment insulate the Defendants from damages in this action. Plaintiffs are entitled to recover damages based on Defendants' intentional withholding the funds that should have been paid. Zurich waited until the end of 2004 to pay out its policy limits, and did so only in response to a c. 93 A demand letter. Just because AIG was successful in dragging the case out long enough to drive down Plaintiffs' settlement price does not mean that either Defendant is entitled to a credit.

To the contrary, Defendants should be admonished for not making payment when liability was reasonably clear.

337 Ex. 90, Tab D.

338 The Chart attached hereto as Exhibit I provides a detailed breakdown of the judgment amount, payments received, and accrued interest, accounting for the multiple payments over time.

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VII. Punitive Damages

Both Zurich and AIG "willfully or knowingly" violated Mass. Gen. Laws c. 176D, § 3 by rat

"refusing to effectuate [a] prompt, fair and equitable settlement [where] liability ha[d] become ^ reasonably clear." Plaintiffs are therefore entitled to statutory damages under Mass. Gen. Laws

c. 93 A, §9 of "up to three, but not less than two times... the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence." As has been frequently recognized, the Legislature determined that multiplying the interest for the lost use of money was not a sufficient deterrent to unfair settlement practices. See Clegg, 424 Mass. at 424; R.W. Granger, 435 Mass. at 83 n.21 (noting loss of use damages not sufficiently punitive when plaintiff forced to litigate to the end); Yeagle, 42 Mass. App. Ct. at 655 (multiplication of mere ^ interest probably not sufficiently punitive). The Legislature increased the risk of engaging in unfair and deceptive acts, thereby increasing the deterrent effect of the statute. Id; Kapp v. Arbella Mutual Ins. Co.. 426 Mass. 683, 686 (1998) ("bad faith defendant risks multiplication of TO judgment, thereby risking exposure to punitive damages many times greater than the lost money

alone.").

These statutes must be given their ordinary meaning. Bronstein v. Prudential Ins. Co. of r^ America, 390 Mass. 701, 704, 708 (1984) ("To stretch the meaning of a statute so as to adjust an

alleged injustice, inequity or hardship could cause a multiplicity of interpretations as each alleged injustice, inequity or hardship arose."). In this case, there is a judgment and it must be r^ multiplied as mandated by Chapter 93A, § 9. Yeagle, 42 Mass. App. Ct. at 653-54 ("where a

claimant has recovered a judgment on the underlying claim, 'actual damages' shall be taken to be the amount of the judgment for the purpose of bad faith multiplication (and for that purpose ^ only)."); Griffin v. Commercial Union Ins. Co., No. 934137, 1998 WL 1181744, *15 (Mass.

Super. Ct. 1998) (doubling amount of judgment in underlying trial); Cohen v. Liberty Mut. Ins.

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Co., 41 Mass. App. Ct. 748, 756 (1996) (where interest is component of underlying judgment, amount to be multiplied includes both verdict and interest).

A. Zurich Cannot Evade Plain Language Of Statute

^ The fact that Zurich was one of two insurers that violated the statute does not alter its application. Zurich was in control of the claim from January 2002 - February 2004. It can hardly contend that it did not contribute to the judgment that entered six months after it tendered its policy limits. There is no statutory basis for interpreting Chapter 93 A in a manner that limits Zurich's exposure for punitive damages. See R.W. Granger, 435 Mass. at 84-85 (refusing to

reduce punitive damages by amount paid by insured because giving insurer a "credit" "would contravene the Legislature's intent to impose a stiff penalty under Chapter 93 A" for willful ^ violations); Int'l Fid. Ins. Co. v. Wilson, 387 Mass. 841, 857-58 (1983) (punitive damages under
c. 93 A are to be imposed separately, otherwise intent of punishment would be frustrated by rum
limiting plaintiff to single punitive award, and would prevent multiple defendants from each ^ having to pay for their own misconduct); compare Cohen v. Liberty Mut. Ins. Co., 41 Mass.
App. ct. 748, 755-56 (1996) (using policy limits as multiplicand where default judgment entered before insurer knew of its liability). rm B. Punitive Damages Do Not Violate Due Process
An award which comports with a statutory cap established by the Legislature is presumed constitutional. See e^ Labonte v. Hutchins & Wheeler, 424 Mass. 813, 826 (1997) (only where r^ there is no cap on punitive damages must the Court scrutinize punitive award); Romano v. U-
Haul Int'L 233 F.3d 655, 673 (1st Cir. 2000) ("award that comports with a statutory cap provides strong evidence that a defendant's due process rights have not been violated"). It is well-settled p^ that the Defendants bear a "heavy burden" in overturning c. 93 A by proving beyond a reasonable
doubt that there are "no conceivable grounds which could support its validity." Leibovich v.
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Antonellis, 410 Mass. 568, 576 (Mass. 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."); Commonwealth v. Welch, 444 Mass. 80,100 (2005) ("our canons of statutory interpretation [] require we presume statutes to be constitutional"); St. Germaine v. Pendergast 416 Mass. 698, 703 (Mass. 1993) ("every rational presumption in favor of the statute's validity is made").
The Defendants cannot satisfy this heavy burden. The measure of punitive damages specified by the Legislature is clearly grounded on a rational set of facts, such that it must be enforced by this Court. Coffee Rich, Inc. v. Comm'r of Public Health, 348 Mass. 414, 422 (1965) ("Enforcement is to be refused only when it is in manifest excess of legislative power."); see also Teneco Oil Co., Inc. v. Dep't of Consumer Affairs, 876 F.2d 1013, 1021 (IstCir. 1989) (a legislative enactment will stand if there is "any conceivable set of facts that could establish a rational relationship between them and the [] government's legitimate ends."). "[A] court deciding whether a punitive award violates due process must accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." Rodriguez- Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 65 n. 11 (1st Cir. 2005).
The punitive damage scheme established by Chapters 176D/93A is entirely rational:
The added language was inserted in response to cases which limited those damages subject to multiplication under c. 93 A to loss of use damages, measured by the interest lost on the amount the insurer wrongfully failed to provide the claimant. It was aimed at the situation where a defendant insurer, acting in bad faith, failed to settle a claim reasonably, obliging the plaintiff to litigate unnecessarily. The 1989 amendment provides that a bad faith defendant risks multiplication of the judgment secured by the plaintiff on the underlying claim, thereby risking exposure to punitive damages many times greater than multiplication of the lost use of money alone.
Kapp, 426 Mass. at 685-86. The Legislature was not only deliberate in crafting its response to an existing problem, but also careful in the application of the enhanced penalty it chose as a

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remedy: First, a defendant insurer must act willfully or knowingly for the statutory multiplier to be triggered; and second, a judgment must enter on the underlying claim for such a judgment to serve as the base multiplicand. LI

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 (1997); see also State Farm Mut. Auto. Ins. Co. v. Campbell 538 U.S. 408, 416 (2003) ("punitive damages ... are aimed at deterrence and retribution."). To ensure that these dual goals are met, the Legislature designed a scheme whereby "the specter of a punitive sanction many times the loss directly caused by the [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." R.W. Granger, 435 Mass. at 84 (rejecting argument that double damages was excessive since bad faith "only" caused plaintiff to lose use of money). The statute rationally encourages insurers to take the responsibility to settle valid claims even more seriously in cases with high values because the underlying injury is more serious, and plaintiffs accordingly have an even greater need for prompt settlement. An insurer's failure to comply with the requirements of C.176D in such circumstances would foreseeably result in a large judgment, which would foreseeably serve as a large multiplicand. Importantly, the statute permits insurers to control their own exposure; an insurer can easily relieve itself of all liability, including liability for the enhanced punitive damages, by making a prompt, fair and equitable settlement offer, irrespective of whether the case actually settles or proceeds to a judgment. E.g. Bobick, 439 Mass. at 663.

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The statutory scheme should function exactly as the Legislature intended in this case where the claimant is a "blameless victim ... whose entire life was changed" by catastrophic injuries caused by defendants who admitted liability. Moreover, it was rational for the Legislature to use the underlying judgment as the multiplicand because the insurer, not the insured, controls defense of the claim and all settlement offers. Here, GAF wanted to settle the case in 2003. Zurich did not put its money on the table until 2004. GAF still wanted to settle in March 2004, but AIG refused.340 GAF did not want to go to trial,341 but once AIG became involved, it called the shots and did not make a reasonable settlement offer until June 2005.

1. Caselaw Governing Punitive Damages Awarded By Jury Is Inapplicable

This case is jury-waived, the penalties are statutorily proscribed, and the only conduct at issue is that of the named Defendants who failed to effectuate settlement in a rear-ender involving catastrophic injuries. The United States Supreme Court's jurisprudence on the issue of common law punitive damages, 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), does not help the Defendants as these two cases simply address the need to give notice of the potential severity of punitive awards issued by "unconstrained" juries. See Phillip Morris USA v. Williams, No. 05-1256, 549 U. S. (2007) (noting prior decisions were based on need to avoid arbitrary determination of punitive damages and to "cabin the jury's discretionary authority to avoid depriving defendant of "fair notice" of the severity of the penalty").

The BMW and State Farm analysis doesn't apply to a statutory punitive damages scheme such as Chapters 93A/176D. For that reason, a number of other courts have declined to apply those holdings to cases involving statutory damages. In Vista Resorts, Inc. v. Goodyear Tire &

339 Kelly Testimony, TT, Vol. 14, p.23.

340 Ex. 77. p. 118.

341 Ex. 77. p. 135.

Rubber Company, the Colorado Court of Appeals rejected a challenge to the Colorado Consumer Protection Act's statutory punitive damages provision, and found the defendant's reliance on State Farm and BMW was "misplaced because [] these cases involved unfettered jury discretion in awarding punitive damages, not statutory damage multipliers." 117 P.3d 60, 75 (Colo. App. 2004); see also LowrVs Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) (upholding $19 million statutory award where actual damages were $59,000, finding BMW does not limit statutory awards).

The BMW rationale "is not implicated in [a legislature's] carefully crafted and reasonably restrained statute." IdL (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991) ("As long as the discretion is exercised within reasonable constraints, due process is satisfied")). See also Accounting Outsourcing, LLC v. Verizon Wireless Pers. Communs., L.P., 329 F. Supp. 2d 789, 809 (D. La. 2004) (upholding treble damages for willful statutory violations and refusing to extend the State Farm and BMW beyond their intended application.); Rodriguez- Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 65 (1st Cir. 2005) (upholding award in accord with Title VII statutory cap, stating that award was "within the range that Congress thought appropriate to punish and deter malicious or reckless Title VII violations"); Gilbert v. Security Finance Corp. of Oklahoma, Inc., 2006 OK 58 (2006) (holding punitive damage statute need not track BMW and State Farm factors where it addresses the concerns identified in those cases).

2. Chapter 93A Comports With Due Process

The Supreme Court has declined to impose any "bright-line ratio" which a punitive award cannot exceed.342 Nor has the Court overruled its decision in TXO Production Corp. v.

342 The Court has identified "guideposts" for evaluating punitive damages: (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. State Farm, 538 U.S. at 418,425.

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Alliance Resources Corp., 509 U.S. 443 (1993) which upheld an award 526-times greater than actual damages as not so "grossly excessive" as to violate due process.343 Since 1989, insurers have been on notice that the penalty for a knowing or willful violation is "up to three, but not less than two, times the amount" of the underlying judgment. The Plaintiffs have presented evidence in the Defendants' knowing misconduct. Defendants' delay showed 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 Defendants' actions, including their repeated failures to take prompt steps to effectuate a fair settlement during two and a half years of litigation. Zurich and AIG knew of Mrs. Rhodes' catastrophic physical injuries and of the devastating effect those injuries had on her and her loved ones. Crawford reported early on that all of the plaintiffs were in counseling. Defendants knew that Mrs. Rhodes herself was especially vulnerable given her pre-existing conditions, yet they turned a blind eye to her needs and their statutory obligations. Though "it was clear that [Mrs. Rhodes] was an innocent plaintiff and that she hadn't done anything wrong,"344 AIG was intent on digging up whatever dirt it could lay its hands on, including a focus on medical use of marijuana and alleged testimony of "treating physicians about the problems that existed in the family." "These . . .were ... not 'pro' things for the plaintiff on their case and we needed to examine those issues."345

An insurer's willful and knowing violation of Chapter 93 A in cases with "blameless victims" who suffer catastrophic injuries are more egregious than in cases with minor injuries. If anything, the Legislature's message to insurers is to be even more careful to extend prompt and
Factors impacting punitive damages include: (1) whether the harm was physical or purely economic; (2) whether the conduct evinced an indifference or reckless disregard for the 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 575-580.
344 Kelly Testimony, TT, Vol. 14, p. 35.
345 Id, p. 22.
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fair settlement offers in cases with very high damages, as it is reasonable to infer that claimants in such cases have suffered great harm and are financially vulnerable.
By limiting punitive damage awards to "knowing or willful" violations, and on these facts, Chapter 93 A amply complies with due process. No award for willful or knowing violations of c. 176D will ever exceed three times the statutorily-defined damages. The Defendants' financial condition is also relevant to the determination of whether double or treble damages will be sufficiently punitive. Labonte v. Hutchins & Wheeler, 424 Mass. 813 (1997); State Farm, 538 U.S. 408, 427-28 (2003). Both Defendants reported "total net admitted assets" of $28 billion dollars in 2005, which more than justifies a treble award in these circumstances.346
If punitive damages under c. 93 A are held unconstitutional, c. 176D would utterly fail to fulfill the Legislature's intent. Marcia, Harold and Rebecca Rhodes are poster children for the need to have an unfair settlement practices statute that actually accomplishes what the Legislature intended. Should these Defendants avoid punitive damages, insurers could follow the "Rhodes strategy" with impunity, because all they would face is what the Legislature deemed insufficient in 1989, a "lost use of money" award that will be less than the cost of defense, and just another small cost of doing business. Removing the only teeth in c. 176D, as applied under c. 93 A "would create a preposterous rule ... Such a rule would encourage insurance companies to offer nothing rather than to make a good faith offer based on the likely value of the claim. This would create the exact opposite incentives of what the Legislature had in mind when it enacted Sec. 3(9)(g)." Whvte v. Connecticut Mutual Life Insurance Co., et aL 818 F.2d 1005, 1112, n. 23 (1st Cir. 1987) (rejecting insurer's argument that since it never made an offer in case where jury awarded $250,000, it did not violate prohibition against offering "substantially less
Ex. 88, p. 2; Ex. 89, p. 2.
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than the amounts ultimately recovered " because it would mean that an insurer that offered $0 would not violate the statute, but one that offered $1 would be liable).
CONCLUSION
As the Court is well aware, its ruling in this case will be closely read, and will signal whether c. 176D remains a true remedial statute. Similarly, the enforcement of c. 176D through c. 93A will signal whether insurers who intentionally engage in unfair settlement practices will face the consequences of their delay and refusal to make a prompt, fair settlement offer in a catastrophic injury claim where liability was crystal clear.
The Plaintiffs respectfully request that the Court make the following rulings of law:
a) Zurich, National Union and AIGDC violated c. 176D, Section 3(9)(f).
b) National Union and AIGDC violated c. 176D, Section 3(9)(c) by failing to adopt and implement reasonable standards for the prompt investigation of claims arising out of insurance policies.

c) Zurich violated c. 176D, § 3(9)(b) by failing to acknowledge and act reasonably promptly upon communications with respect to claims.
d) Zurich's statutory violations were willful.
e) National Union and AIGDC's statutory violations were willful.
f) Zurich, National Union and AIGDC's statutory violations caused the Plaintiffs to suffer damages, including emotional distress, litigation costs in the Underlying Action, and the lost use of funds.
g) Zurich, National Union and AIGDC are liable to Plaintiffs for the foreseeable harm resulting from their unfair settlement practices including: 1) emotional distress; 2) litigation costs incurred after January 2003 equal to $138,453; and 3) lost use of funds equal to $1,068,234.
h) The total of the judgments in the Underlying Judgment which entered on September 28, 2004, equal to $11,365,996, shall be multiplied by a factor of three and awarded against each defendant. As National Union and AIG were, in effect, a single actor, they are jointly liable for a single judgment.
i) Plaintiffs are entitled to recover their reasonable attorneys' fees and costs incurred in this action, and shall submit appropriate affidavits for the Court's review.
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Respectfully submitted,
MARCIA RHODES, HAROLD RHODES, and REBECCA RHODES,
By their attorneys,

DATED: March 28, 2007

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CERTIFICATE OF SERVICE
I hereby certify that on this day, a true and accurate copy of the above document was served via hand delivery on the attorney of record for each party at:

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