TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

ISSUES PRESENTED FOR REVIEW.....1

STATEMENT OF THE CASE.....1

A. Nature of the Case.....1

B. Proceedings Below.....2

C. Disposition in the Trial Court.....3

D. Statement of the Facts Relevant to the Issues Presented.....5

SUMMARY OF ARGUMENT.....9

ARGUMENT.....11

I. Standard of Review.....11

II. The Trial Court's Punitive Damages Rulings Are Correct.....13

A. The Trial Court Correctly Refused to Double the Amount of the Underlying Judgment Where That Judgment Did Not Reflect the Actual Damages Caused by National Union's Conduct.....13

B. The Trial Court Correctly Used the Amount of Actual Damages as the Punitive Damages Multiplicand for Postjudgment Conduct.....18

C. The United States Constitution Prohibits the Rhodes' Construction of G.L. c. 93A's Punitive Damages Provision.....24

1. The Rhodes' Construction of the 1989 Amendment to G.L. c. 93A Would Violate the Reprehensibility Guidepost 25

2. The Rhodes' Requested Application of the 1989 Amendment to G.L. c. 93A Would Violate the Ratio Guidepost 27

3. The Rhodes' Construction of the 1989 Amendment Conflicts with the Legislative Purpose of G.L. c. 93A 31

III. The Trial Court Correctly Determined that the Rhodes' Rejection of a Reasonable Settlement Offer Precluded Their Recovery Based on G.L. c. 176D, § 3(9)(f).....32

IV. The Trial Court Correctly Determined that the Rhodes Suffered No Compensable Emotional Distress Damages Arising from National Union's Conduct.....36

V. The Trial Court Erred in Finding that the Appeal of the Judgment Against the Trucking Defendants Lacked Merit Because the Rhodes Presented No Evidence Concerning the Merits of the Appeal.....39

VI. The Trial Court Erred in Finding that the Rhodes Are Entitled to "Loss of Use" Damages Because the Rhodes Relinquished Their Claim for These Damages by Accepting a Settlement and Filing a Satisfaction of Judgment.....42

VII. Assuming That the Rhodes Are Entitled to Recover "Loss Of Use" Damages, the Trial Court Erred in Calculating the "Loss Of Use" Damages Awarded To the Rhodes.....46

CONCLUSION.....48

CERTIFICATE OF COMPLIANCE.....50

ADDENDUM

United States Constitution, Amendment XIV

M.G.L.A. Const. Amend. Art. 106

G.L. c. 93A, § 9
G.L. c. 176D, § 3(9)

Findings of Fact, Conclusions of Law, and Order (Appendix 17-91)

TABLE OF AUTHORITIES

CASES:

Anderson v. Brake King Auto., Inc.,
2006 Mass. App. Div. 15,
2006 WL 279040 (2006).....38

Aquino v. Pacesetter Adjustment Co.,
416 F. Supp. 2d. 181 (D. Mass. 2005).....30

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996).....24, 25, 30

Bobick v. United States Fid. & Guar. Co.,
439 Mass. 652 (2003).....33

Bolden v. O'Connor Café of Worcester, Inc.,
50 Mass. App. Ct. 56 (2000).....20

Chapman v. Katz,
448 Mass. 519 (2007).....14

Clegg v. Butler,
424 Mass. 413 (1997).....31

Clifton v. Massachusetts Bay Transp. Auth.,
445 Mass. 611 (2005).....25

Coffee-Rich, Inc. v. Commissioner of Public Health,
348 Mass. 414 (1965).....32

Cohen v Liberty Mut. Ins. Co.,
41 Mass. App. Ct. 748 (1996).....19

Commonwealth v. O'Brien,
423 Mass. 841 (1996).....41

DiMarzo v. American Mut. Ins. Co.,
389 Mass. 85 (1983).....41

Drywall Sys., Inc. v. ZVI Constr. Co.,
435 Mass. 664 (2002).....19

Exxon Shipping Co. v. Baker,
128 S. Ct. 2605 (2008).....24, 25, 28

Farm Bur. Life Ins. Co. v. American Nat'l Ins. Co.,
Slip Copy, No. 2:03cv646(TC), 2009 WL 361267
(D. Utah February 11, 2009).....29

Goddard v. Farmers Ins. Co. of Or.,
120 P.3d 1260 (Or. Ct. App. 2005).....29

Haddad v. Gonzales,
410 Mass. 855 (1991).....37

Hart v. GMAC Mtge. Corp.,
246 B.R. 709 (D. Mass. 2000).....37

Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.,
417 Mass. 115 (1994).....40, 41

Hershenow v. Enterprise Rent-a-Car Co. of Boston,
445 Mass. 790 (2006).....14, 15, 35

Hopkins v. Liberty Mut. Ins. Co.,
434 Mass. 556 (2001).....34, 35, 42

Hudgins v. Southwest Airlines, Co.,
No. 1 CA-CV 07-0366, 2009 WL 73251
(Ariz. Ct. App. January 13, 2009).....29

Iannacchino v. Ford Motor Co.,
451 Mass. 623 (2008).....16

John W. Egan Co. v. Major Constr. Mgmt. Corp.,
46 Mass. App. Ct. 643 (1999).....22

Jurinko v. Medical Protective Co.,
305 Fed. Appx. 13 (3rd Cir. 2008).....29

Kelley v. Kelley,
64 Mass. App. Ct. 733 (2005).....12

Leardi v. Brown,
394 Mass. 151 (1985).....35

Leavey v. Unum Provident Corp.,
295 Fed. Appx. 255 (9th Cir. 2008).....29

Liquor Liab. Joint Underwriting Ass'n of Mass. v. Great Am. Ins. Co., Nos. 96-3127, 96-4675,
16 Mass. L. Rptr. 268, 2003 WL 21048793
(Mass. Super. Ct. April 14, 2003).....20, 21

McCann v. Davis, Malm & D'Agostine,
423 Mass. 558 (1996)..... 19

McLearn v. Hill,
276 Mass. 519 (1931).....45

Millennium Equity Holdings, LLC v. Mahlowitz,
73 Mass. App. Ct. 29 (2008).....12

Milliken & Co. v. Duro Textiles, LLC,
451 Mass. 547 (2008).....13

Murphy v. National Union Fire Ins. Co.,
438 Mass. 529 (2003).....43

Nantucket v. Beinecke,
379 Mass. 345 (1979).....42

Paul v. Asbury Auto. Group, LLC,
No. 06-1603-KI, 2009 WL 188592
(D. Or. January 23, 2009).....29

Resendes v. Boston Edison Co.,
No. 970303, 2000 WL 421004
(Mass. Super. Ct. March 20, 2000).....40

Ruiz v. Bally Total Fitness Holding Corp.,
496 F.3d 1 (1st Cir. 2007).....44

Rule v. Fort Dodge Animal Health, Inc.,
604 F. Supp. 2d 288 (D. Mass. 2009).....15, 16

R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66 (2001).....19, 22, 23

Simon v. Weymouth Agric. & Indus. Soc'y, 389 Mass. 146 (1983).....12

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).....24, 25, 26, 27, 28

Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court, 448 Mass. 15 (2006).....45

Trinh v. Gentle Commc'ns, LLC, 71 Mass. App. Ct. 368 (2008).....25

Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411 (2005).....11

Wallace v. DTG Operations, Inc., No. 08-1474, 2009 WL 1025714 (8th Cir. April 17, 2009).....28

STATUTES AND RULES:

Massachusetts General Laws

c. 93A, § 4 30

c. 93A § 9.....*passim*

c. 176D, § 3(9) .....*passim*

c. 176D, § 7.....30

Massachusetts Rules of Civil Procedure

Rule 52(a) 11

ISSUES PRESENTED FOR REVIEW

The Defendants/Appellees, National Union Fire Insurance Company of Pittsburgh, Pa. and AIG Domestic Claims, Inc. ("AIGDC") (collectively "National Union")[1] raise the following issues in their Cross-Appeal:

A. The Trial Court Erred In Finding that the Appeal of the Judgment Against the Trucking Defendants Lacked Merit Because the Rhodes Presented No Evidence Concerning the Merits of the Appeal.

B. The Trial Court Erred In Finding that the Rhodes Are Entitled to "Loss Of Use" Damages Because the Rhodes Relinquished Their Claim for These Damages by Accepting a Settlement and Filing a Satisfaction of Judgment.

C. The Trial Court Erred in Calculating the "Loss Of Use" Damages Awarded To the Rhodes.

STATEMENT OF THE CASE

A. Nature of the Case

The Plaintiffs, Marcia, Harold and Rebecca Rhodes ("the Rhodes") allege that National Union's handling of their claims against Carlo Zalewski, Driver Logistic Services ("DLS"), Penske Truck Leasing Co. ("Penske"), and GAF Building Corp. ("GAF") (collectively "the trucking defendants"), National Union's insureds, violated G.L. c. 93A and c. 176D.

---

[1] As the Trial Court noted, "if AIGDC is liable here, National Union is equally liable." *Appendix, 20 n.1* (hereinafter *A.__*).

After collecting $11,835,000 in satisfaction of their judgment against the trucking defendants, the Rhodes tried this case to recover punitive damages from both National Union and Zurich American Insurance Company ("Zurich") in the amount of $45,461,336.

B. Proceedings Below

On July 12, 2002, the Rhodes filed suit in Norfolk County Superior Court, to recover personal injury and loss of consortium damages arising out of a January 9, 2002 motor vehicle accident (the "Accident Case"). *A.22*. On September 15, 2004, the jury awarded the Rhodes $9,412,000 ($7,412,000 to Marcia Rhodes, $1.5 million to Harold Rhodes, and $500,000 to Rebecca Rhodes). *A.41*. After deducting the $550,000 settlement with Professional Tree Service ("Professional Tree"), a third-party defendant in the Accident Case, and adding interest, the total amount due from the trucking defendants was approximately $11.3 million (the "Underlying Judgment"). *Id.*

On April 8, 2005, the Rhodes filed suit against National Union and Zurich for alleged violations of G.L. c. 93A and G.L. c. 176D. *A.42*. On June 2, 2005, National Union and the Rhodes settled the Accident Case for $8,969,500. *Id.* The value of the judgment at

the time of the settlement, including postjudgment interest, was $9,864,134.40.[2] The Rhodes agreed to a payment of the settlement amount in three installments. *Id.* Upon receipt of the third payment, the Rhodes filed a "judgment satisfied." *A.6923-25.* The Rhodes insisted on the filing of a judgment satisfied pleading. *A.3575-76.* The Rhodes had previously received $2,322,995 from Zurich on behalf of the trucking defendants and $550,000 from the insurer for Professional Tree. *A.42.* Thus, the Rhodes received $11,842,495 in settlement of the Accident Case. *Id.*

C. Disposition in the Trial Court

On June 3, 2008, following a 16-day bench trial, Superior Court Judge Ralph Gants issued Findings of Fact, Rulings of Law, and an Order ("the Order"). *A.17-81.* In his Order, Judge Gants recognized the limitations on punitive damages established by the

---

[2] As of September 28, 2004, the amount owed was $11,365,334.14 (the judgment of $9,412,000; pre-judgment interest of $2,503,334.14; less $550,000 because of the Professional Tree settlement). On December 22, 2004, Zurich paid $2 million plus all post judgment interest up to that time. *A.42.* Thus, as of December 22, 2004, the amount owed was $9,365,334.14. The judgment earned $498,800.26 in postjudgment interest between December 22, 2004 and June 2, 2005.

United States Supreme Court. The Trial Court made the following determinations:

(a) Prior to the Accident Case trial, National Union made a reasonable settlement offer. *A.63-64.*

The Rhodes do not take issue with this determination on appeal.

(b) National Union should have made the reasonable offer earlier. Id. at pp. 59-60. National Union's failure to provide a prompt settlement offer was willful and knowing. *A.70-71 n.15.*

National Union disagrees with the Trial Court's conclusion that it should have made a reasonable offer earlier and that its failure to do so was willful and knowing. National Union, however, is not seeking reversal on this ground.

(c) The delay in making the pre-trial settlement offer did not cause the Rhodes any damages. *A.64.*

The Rhodes contend that the Trial Court should have awarded them emotional distress damages and should have awarded $22,730,668 in punitive damages. National Union disagrees and contends that the Trial Court correctly determined that this alleged delay did not cause the Rhodes to suffer any injury.

(d) After the Accident Case trial, National Union initially failed to promptly make a reasonable settlement offer, causing $448,250 in actual damages. *A.75-77.*

National Union contends that the Trial Court erred in finding that National Union initially failed to promptly make a reasonable settlement offer after the Accident Case trial because the Rhodes

presented no evidence concerning the merits of the appeal. National Union and the Rhodes both contest the amount of actual damages determined by the Trial Court; and

(e) National Union's post-verdict violation "was willful and knowing." Therefore, the Trial Court doubled the amount of actual damages to $896,500 in actual and punitive damages. *A.79.*

National Union contends that the Trial Court erred in finding that National Union willfully and knowingly failed to promptly make a reasonable settlement offer after the Accident Case trial because the Rhodes presented no evidence concerning the merits of the appeal. The Rhodes contend that the Trial Court should have used the amount of the Underlying Judgment as the multiplicand. National Union disagrees.

On September 29, 2008, the Rhodes filed a Notice of Appeal as to the judgments rendered in favor of Zurich and against National Union. *A.14.* On October 20, 2008, National Union filed a Notice of Cross-Appeal. Id.

D. Statement of Facts Relevant to the Issues Presented

On January 9, 2002, a truck driven by Carlo Zalewski struck Marcia Rhodes's vehicle, leaving her a paraplegic. *A.17-18.*

At the time of the accident, GAF had a $2 million primary automobile insurance policy with Zurich and a $50 million excess umbrella policy with National

Union. *A.18.* Under the Zurich Policy, GAF had a $250,000 per claim self-insured retention. *Id.*

On August 13, 2003, the Rhodes' counsel made a written settlement demand of $16.5 million. *A.25.*

On January 23, 2004, Zurich verbally tendered Zurich's policy limits to National Union. *A.33.* Before April 1, 2004, the trucking defendants offered the Rhodes $2 million to settle the Accident Case and invited the Rhodes to mediate. *A.38.*

At the August 11, 2004 mediation, the Rhodes initially demanded $15.5 million, plus payment of Ms. Rhodes' health insurance premiums for the remainder of her life. *A.40.* National Union, on behalf of the trucking defendants, offered $2.75 million. *Id.* The Rhodes responded with a $15 million demand, and National Union increased the offer to $3.5 million. *Id.* Professional Tree then settled with the Rhodes for $550,000. *Id.* The Trial Court concluded that:

> [T]he mediation was doomed to fail in view of the positions taken by the Rhodes and [National Union]. Mr. Rhodes, who effectively spoke for the family as to settlement, would not have accepted any settlement offer at mediation less than $8 million and no one involved in this case at [National Union] would have agreed at mediation to pay that amount to resolve the case.

Id.[3]

Trial commenced on September 7, 2004. *Id.* Prior to trial, Zalewski, DLS, and GAF stipulated to their liability. *Id.* During the trial, the parties stipulated to the dismissal of all claims against Penske. *A.40-41.*

Before closing arguments, National Union increased its offer to $6 million (which included Zurich's $2 million policy limit). *A.41.* The Rhodes' counsel did not communicate that offer to the Rhodes, effectively rejecting it. *Id.* On September 15, 2004 the jury returned its verdict and on September 28, 2004 the Underlying Judgment entered against the trucking defendants. *A.41.*

On November 10, 2004, the trucking defendants filed a notice of appeal. *Id.* The notice of appeal preserved National Union's right to challenge: (a) the excessiveness of the verdict; and (b) the Trial

---

[3] Mr. Rhodes's interrogatory answers indicated that "the family was willing to accept $8 million to resolve the underlying matter up through the mediation." *A.6797.* At trial, Mr. Rhodes affirmed his interrogatory answer. *A.1565-66* ("I stand by that answer[.]"); *A.1636* (Mr. Rhodes claims that he has "been damaged because instead of paying [him] . . . $8 million [he] . . . had to go through trial.").

Court's denial of the motions to obtain Ms. Rhodes's psychological records in discovery. *Id.*

On November 19, 2004, the Rhodes sent a "demand letter," pursuant to G.L. c. 93A § 9, to Zurich and National Union, alleging that Zurich and National Union had engaged in unfair settlement practices in violation of G.L. c. 176D, § 3(9)(f) by failing to effectuate a prompt, fair and equitable settlement. *A.42*. National Union responded to the demand letter on December 17, 2004, by offering $7.0 million (including Zurich's $2 million). *Id.* Zurich responded to the G.L. c. 93A demand letter on December 22, 2004, by paying the Rhodes $2,322,995.75; its policy limits plus accrued postjudgment interest. *Id.*

National Union increased its settlement offer on May 2, 2005 to $5.75 million (when added to the sums previously received the offer totaled $8.63 million). *Id.* Settlement discussions continued, and on June 2, 2005, the Rhodes settled with National Union. *Id.* National Union withdrew the notice of appeal and paid the Rhodes $8.965 million in three installments: (a) $3 million on July 5, 2005; (b) $3 million on August 5, 2005; and (c) $2.965 million on September 5, 2005. *Id.* Combined with the amounts paid by Zurich and

Professional Tree, the Rhodes received $11,842,495 in settlement of the Accident Case. *Id.*

SUMMARY OF ARGUMENT

The Trial Court correctly determined that the Rhodes were not entitled to any recovery for National Union's conduct prior to the entry of judgment in the Accident Case because National Union's approximately three month delay in making its reasonable settlement offer did not cause the Rhodes to suffer any harm. *Pages 13-18.* The Rhodes were not any worse off on the day the offer was made (and rejected) than they were on the day the Trial Court found the offer should have been made. *Id.* If National Union had made the same offer earlier, the Rhodes still would have rejected the offer, tried the Accident Case, and incurred exactly the same costs and suffered exactly the same stress of litigation for which they sought recovery. *Id.*

The Trial Court correctly used the judgment against National Union - rather than the judgment in the underlying case against the trucking defendants - to determine the amount of punitive damages arising from National Union's postjudgment violation of G.L. c. 176D § 3(9)(f). *Pages 18-23.* Since National

Union's postjudgment conduct did not cause the entry of the Underlying Judgment, Judge Gants correctly rejected the Rhodes' claim that the Underlying Judgment should serve as the multiplicand. *Id.*

The Rhodes' request to use the Underlying Judgment as the punitive damages multiplicand would result in a more than 50:1 ratio between compensatory and punitive damages. This result would violate National Union's constitutional right to due process and would conflict with the legislative purpose of G.L. c. 93A and 176D to promote pre-trial settlements and avoid trials. *Pages 24-32.*

The Trial Court also correctly found the Rhodes did not proffer sufficient evidence of their alleged emotional distress. *Pages 36-38.*

The Trial Court's finding that the appeal of the Underlying Judgment lacked merit is untenable as a matter of law because the Rhodes presented no evidence concerning the merits of the appeal. *Pages 39-42.* Where there is no evidence, the Trial Court, like a jury, may not base a finding of fact on its own knowledge and experience. *Id.*

The Trial Court's finding that National Union's postjudgment conduct entitled the Rhodes to "loss of

use" damages is clearly erroneous because the "actual" damages were satisfied when the Rhodes settled the underlying matter. *Pages 42-46.* Consequently, the Rhodes waived or are estopped from recovering these damages in this action. *Id.* To the extent "loss of use" damages are appropriate the Trial Court erred in calculating the amount of "loss of use" damages awarded to the Rhodes. *Pages 46-48.*

ARGUMENT

I. Standard of Review

Mass. R. Civ. P. 52(a), as amended, 423 Mass. 1402 (1996), provides that:

> In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The Appeals Court is "bound" by the Trial Court's "findings of fact that are supported by the evidence, including all inferences that may reasonably be drawn from the evidence. The judge's findings will be set aside only if clearly erroneous." Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 420 (2005) (internal citations omitted); see also

Simon v. Weymouth Agric. & Indus. Soc'y, 389 Mass. 146, 148(1983) ("We give due weight to the findings of the judge who has heard the testimony and who has had an opportunity to weigh the credibility of the witnesses."). While the Appeals Court may not substitute its judgment for that of the Trial Court, it may "scrutinize without deference the propriety of the legal criteria employed by the trial judge and the manner in which those criteria were applied to the facts." Kelley v. Kelley, 64 Mass. App. Ct. 733, 739 (2005) (quoting Iamele v. Asselin, 444 Mass. 734 741 (2005)).

A factual finding is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Millennium Equity Holdings, LLC v. Mahlowitz, 73 Mass. App. Ct. 29, 36-37 (2008) (internal citations omitted).

"Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact," the "boundaries" of the conduct that may violate G.L. c. 93A "is a question of law."

Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 563 (2008) (internal citations omitted).

II. The Trial Court's Punitive Damages Rulings Are Correct.

A. The Trial Court Correctly Refused to Double the Amount Of the Underlying Judgment Where That Judgment Did Not Reflect the Actual Damages Caused By National Union's Conduct.

The Trial Court correctly determined that National Union's delay in making its reasonable settlement offer prior to the entry of judgment in the Accident Case did not cause the Rhodes to suffer any damages. The Trial Court noted that:

> [S]ince it is plain that the Rhodes would not have settled this case before trial even if [National Union] had made a prompt and reasonable settlement offer (even the offer [the Rhodes'] own expert declared reasonable), the Rhodes have failed to prove the required element of causation-that [National Union's] failure to make a prompt settlement offer before trial caused them any actual damages.

A. 73.

The Rhodes contend that the delay entitled them to $22,730,668 in punitive damages even though they suffered no harm as a result of National Union's conduct before judgment entered in the Accident Case.

Judge Gants recognized the evidentiary gap in the Rhodes' argument. He noted that it would be "foolish" to permit the Rhodes to recover damages for National

Union's delay in making a reasonable settlement offer "when the evidence decisively demonstrates that the plaintiff[s] would not have accepted a reasonable settlement offer regardless of when it was offered." *A.69.* Judge Gants' conclusion that the Rhodes sustained no loss or damage because of the delay was not "clearly erroneous." See Hershenow v. Enterprise Rent-a-Car Co. of Boston, 445 Mass. 790, 800-01 (2006). Even where the defendant has committed an unfair act or practice, no Chapter 93A relief is available unless the plaintiff suffers an "injury or loss." Chapman v. Katz, 448 Mass. 519, 536-37 (2007).

In Hershenow, the plaintiffs argued that the defendant car rental company utilized a collision damage waiver form that contained impermissible provisions. Hershenow, 445 Mass at 791. The automobiles rented by the plaintiffs, however, had not been involved in any collision or otherwise sustained damage during the rental period. Id. at 792. The Supreme Judicial Court rejected the plaintiffs' claim that the defendant's allegedly deceptive waiver form had effected a "per se injury" for purposes of G.L. c. 93A, holding that "proving a causal connection between a deceptive act and a loss to the consumer is an

essential predicate for recovery under our consumer protection statute." Id. at 791, 798. Since the plaintiffs did not "experience any other claimed economic or noneconomic loss," the waiver "made neither rental customer worse off during the rental period than he or she would have been" had the waiver complied with the applicable regulations. Id. at 800-01. Even assuming that the waiver was "unfair and deceptive," the plaintiffs "nevertheless failed to establish that the 'per se' deception caused a loss. For that reason, there can be no recovery under G.L. c. 93A, § 9(1)." Id. at 801. Because there was no "loss," the plaintiffs were not entitled to recover nominal damages.[4] Id.

In Rule v. Fort Dodge Animal Health, Inc., 604 F. Supp. 2d 288 (D. Mass. 2009), the plaintiff had injected her pet dog with an allegedly risky heartworm medication, but no complications (or heartworm) occurred during the warranted life of the medication. Id. at 295. Judge Woodlock dismissed the c. 93A claim because the plaintiffs' complaint "has alleged no

[4] Contrary to the Rhodes' argument, Appellants' Brief, 28-29, since the Trial Court found the Rhodes sustained no injury as a result of National Union's delay in making a reasonable settlement offer, the Rhodes were not entitled to recover nominal damages.

personal injury, no property damage, and no economic injury." Id. at 305.

By contrast, in Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008), the plaintiffs alleged that the outside doors on their vehicles were defective. Id. at 624. Although the doors had never malfunctioned, the plaintiffs alleged that the doors could "open accidentally" because of a manufacturing defect. Id. at 626. The Supreme Judicial Court held that the plaintiffs had alleged an actionable "injury" under c. 93A. Id. at 624-25. The Iannacchino plaintiffs were "worse off" because they owned defective vehicles which were worth less than nondefective vehicles.[5]

The Rhodes argue that since National Union's approximately three month delay in making its reasonable settlement offer before the trial in the Accident Case was found to be "willful and knowing," the Trial Court had no choice but to award punitive damages based on a multiple of the Underlying Judgment. *A.70-71 n.15*. This argument ignores the

---

[5] In Iannacchino, the Supreme Judicial Court dismissed the plaintiffs' complaint because it did not adequately plead "sufficient factual allegations" concerning the alleged "defect." Iannacchino, 451 Mass. at 625.

prima facie elements of causation and injury. The Trial Court correctly determined that the Rhodes were not entitled to recover *any* damages (punitive or compensatory) as a result of any pre-verdict conduct because they failed to establish these essential elements of their c. 93A claims. *A.64*. Similar to the plaintiffs in Rule and Hershenow, the Rhodes were not adversely affected by the c. 93A violation complained of, in this case the alleged delay in receiving a settlement offer, because they would have rejected the offer and would have proceeded to trial even if the offer had been made earlier. Mr. Rhodes stated under oath that the Rhodes never would have accepted an offer that the Trial Court found was reasonable because they believed a jury would award more. While this decision turned out to significantly benefit the Rhodes,[6] it was this decision - not any delay by

[6] The Rhodes would not have accepted less than $8 million to settle the Accident Case. *A.64*. The Rhodes' expert testified at trial that a $6 million offer would have been reasonable. Id. The Rhodes ultimately collected $11,835,000. *A.42*. Thus, the Rhodes recovered $3,835,000 more than they would have accepted before the judgment to settle the Accident Case (and $5,835,000 more than the amount their own expert testified would have been a reasonable settlement) because the case proceeded to trial.

National Union in making the offer - that caused the purported "injury" (the stress of litigation).

B. The Trial Court Correctly Used the Amount Of Actual Damages as the Punitive Damages Multiplicand for Postjudgment Conduct.

Concluding that the only actionable bad faith violations occurred *after* judgment entered in the Accident Case, Judge Gants correctly rejected the Rhodes' argument to use the Underlying Judgment as the multiplicand. As Judge Gants explained:

> [The issue] is whether the amount doubled is the actual damages or the amount of the judgment. This Court finds that the appropriate amount doubled is the actual damages. . . . [W]hen the insurer's failure to make a prompt and fair settlement offer occurs after the issuance of the judgment, it makes no sense to multiply the judgment because the insurer's conduct did not force the trial that yielded that judgment.

A. 78-79.

In 1989, the Legislature amended G.L. c. 93A, adding the following language:

> For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the *same* and *underlying* transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim.

1989 Mass. Acts 580 (emphasis added). The Rhodes argue that the 1989 Amendment required the Trial Court to use the Underlying Judgment as the multiplicand.

They disregard the fact that the tort claim against the trucking defendants is not the "same" transaction or occurrence that gave rise to the alleged c. 93A damages. In the simplest terms, National Union's post-trial conduct did not cause the Underlying Judgment.

In R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66 (2001), the Supreme Judicial Court recognized the requirement that both "before and after the 1989 Amendment . . . a plaintiff who seeks damages under G.L. c. 93A [must] establish a causal link between the insurer's wrongful conduct and the loss a plaintiff claims to have suffered." Id. at 80-81. See also McCann v. Davis, Malm & D'Agostine, 423 Mass. 558, 561 (1996) (defendant's conduct must be proximate cause of plaintiff's loss to recover under c. 93A); Cohen v Liberty Mut. Ins. Co., 41 Mass. App. Ct. 748, 755 (1996) (1989 Amendment did not abolish need for a plaintiff under c. 93A to show causal connection between defendant's wrongful conduct and resulting damages); Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664, 667-68 (2002) (1989 Amendment expanded "recovery of punitive damages to a multiple of all

damages caused by the unfair or deceptive act or practice").

This Court has expressed reservations regarding the appropriateness of multiplying a judgment in an underlying case in a G.L. c. 93A action against an insurer, when there has been a postverdict settlement. See Bolden v. O'Connor Café of Worcester, Inc., 50 Mass. App. Ct. 56, 68 (2000) ("Were the [plaintiffs] successful in establishing . . . that the [insurer]'s bad faith settlement practices foreseeably caused the excess verdict to enter in the dramshop case, that verdict arguably would be the measure of damages to be doubled or trebled. It appears at least somewhat unsettled, however, whether such an underlying judgment remains the basis for 'actual damages' under G.L. c. 93A § 9(3), if, as here, a settlement . . . is reached after judgment.").

Superior Court Judge Hines considered a similar circumstance and reached the same conclusion as Judge Gants in this matter. In Liquor Liabilty Joint Underwriting Association of Massachusetts v. Great American Insurance Company, Nos. 96-3127, 96-4675, 16 Mass. L. Rptr. 268, 2003 WL 21048793 (Mass. Super. Ct. April 14, 2003), the insurer's violation of G.L.

c. 93A occurred after the entry of a default judgment against its insured. Judge Hines noted that:

> The Estate's argument that the underlying default judgment represents the actual damages on which the calculation of multiple damages must be based cannot be reconciled with the [Appeals Court's] holding in *Cohen*. The requirement that a plaintiff show a causal connection between the damages and the wrongful conduct necessarily excludes the default judgment in the underlying tort action as the basis for the award of multiple damages. Here the wrongful conduct alleged by the Estate in its G.L. c. 93A claim occurred *after* the default judgment in the underlying suit. . . . The loss here is obviously the Estate's right to the use of those funds it would have received if LLJUA had timely paid the policy limit toward the underlying tort judgment.

Id. at *42.

Where an insurer's wrongful conduct in connection with the settlement of a claim against its insured does not cause the entry of the underlying judgment, the underlying judgment against the insured may not serve as the multiplicand. The Trial Court correctly gave meaning to the term "same and underlying transaction or occurrence" and held that only the "actual damages" should be doubled.

The Rhodes' reliance on Granger is misplaced. Granger involved unique circumstances that are readily distinguishable from the Rhodes matter. In Granger, a subcontractor sought to recover multiple damages from

a payment bond surety. Unlike a liability insurer such as National Union, a "surety contracts directly as a principal to pay the sum of money for which he is secondarily liable." John W. Egan Co. v. Major Constr. Mgmt. Corp., 46 Mass. App. Ct. 643, 646 (1999) (quoting Welch v. Walsh, 177 Mass. 555, 559 (1901)). The plaintiff "need not go to judgment against the principal in order to ground the surety's liability toward the creditor; the creditor may sue both principal and surety in one action . . . or sue each individually." Id. at 647.

In Granger, the subcontractor obtained a direct judgment against the surety for actual damages. Granger, 435 Mass. at 69. The Supreme Judicial Court held that the amount to be multiplied in this particular circumstance was the amount of the judgment that had entered against the surety:

> In this case, J&S ***recovered a judgment on its bond claim against USF&G*** (as well as its subcontract claim against Granger), and has proved that USF&G acted wilfully and knowingly in a manner prohibited by G.L. c. 93A, § 2, entitling it to multiple damages. By awarding to J&S double ***"the amount of the judgment" on its underlying surety bond claim,*** the judge did precisely what the language of the 1989 amendment requires.
>
> ***

> The Legislature directed that where, as here, a plaintiff ***obtains a judgment against an insurer*** subject to multiple damages because it acted in bad faith in denying reasonable settlement of the plaintiff's underlying claim, the defendant insurer "shall be" subject to "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."

Id. at 82-84 (emphasis added).

Unlike Granger, where the judgment entered directly against the surety, the present case involves a liability insurance policy and the judgment in the underlying case entered against the Trucking Defendants, not National Union. The only judgment that has ever entered against National Union in the present case was the $448,250 judgment in the Order. The Trial Court in the present case did exactly what the Granger court did - it used the $448,250 judgment against National Union as the multiplicand. Granger, 435 Mass. at 83-84. The Rhodes misconstrue Granger, confounding the distinction the Supreme Judicial Court clearly drew between a judgment against an insurer (or surety as was the case in Granger) and a judgment against the insureds as in the present case.

C. The United States Constitution Prohibits the Rhodes' Construction of G.L. c. 93A's Punitive Damages Provision.

Using the Underlying Judgment to calculate punitive damages as claimed by the Rhodes would violate National Union's right to due process. The measure of punitive damages must be rationally related to the compensatory damages resulting from National Union's conduct. It is irrational to tie the measure of punitive damages to the compensatory damages caused by the trucking defendants.

The Rhodes' proposition that National Union's liability for punitive damages is based on the damages caused by its insured, rather than National Union's own conduct, is neither rational nor reasonable.

The United States Supreme Court has held that, "grossly excessive" punitive damage awards violate the due process clause of the Fourteenth Amendment to the United States Constitution. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2627 (2008) ("The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996).

The United States Supreme Court has identified three guideposts to determine whether an award of punitive damages is grossly excessive: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." State Farm, 538 U.S. at 418; BMW, 517 U.S. at 574-75. See also Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 623 (2005); Trinh v. Gentle Commc'ns, LLC, 71 Mass. App. Ct. 368, 375-76 (2008).[7]

1. The Rhodes' Construction of the 1989 Amendment to G.L. c. 93A Would Violate the Reprehensibility Guidepost.

The United States Supreme Court has noted that "the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct." BMW, 517

[7] The Supreme Court has explained that "***every*** award" of punitive damages must comply with the due process standards set forth in BMW and State Farm. Exxon, 128 S. Ct. at 2626 (emphasis added). Thus, G.L. c. 93A's remedial scheme is subject to the Supreme Court's due process standards.

U.S. at 575. The following factors are relevant in considering the degree of reprehensibility:

> [T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419.

As applied in this case, the punitive damages sought by the Rhodes ($22,730,668) would be unconstitutionally excessive given the Trial Court's findings of fact. Any harm caused by the passage of time between the post-verdict offer and the settlement was purely economic. The Trial Court did not determine that National Union's conduct evidenced any threat or indifference to the health or safety of others. At the time of the violation, after judgment entered in the Accident Case, the Rhodes family was not financially vulnerable because they had already received nearly $3 million from Professional Tree and Zurich.[8] The Trial Court did not find that National

[8] The nearly $3 million the Rhodes had already recovered exceeded the Rhodes' special damages of $2,817,419.42 (comprised of: (a) incurred medical expenses of $413,977.68; (b) the present value of

Union engaged in any pattern of wrongful conduct and although its conduct was found to be willful, it was not intentional, malicious, or trickery.

2. The Rhodes' Requested Application of the 1989 Amendment to G.L. c. 93A Would Violate the Ratio Guidepost.

The second guidepost requires reasonableness and proportionality between the amount of harm caused by the defendant and the amount of punitive damages awarded to the plaintiff. State Farm, 538 U.S. at 426. The Rhodes' request for $22,730,668 in punitive damages would yield more than a 50:1 ratio between what Judge Gants found were the actual damages caused by National Union and the punitive damages. The United States Supreme Court in State Farm stated that while there is no rigid rule with regard to a constitutionally acceptable ratio between compensatory and punitive damages, "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." State Farm, 538 U.S. at 410. Where, as here, "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit

---

combined future medical costs of $2,027,078; (c) the loss of household services of $292,379; and (d) out-of-pocket expenses of $83,984.74). *A.25-26.*

of the due process guarantee." State Farm, 538 U.S. at 425. That is exactly what Judge Gants awarded in this matter. Moreover, the Supreme Court has explained that in maritime cases, "given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio . . . is a fair upper limit[.]" Exxon, 128 S. Ct. at 2633. The Supreme Court has also explained that:

> [I]n most American jurisdictions the amount of the punitive award is generally determined by a jury in the first instance, and that "determination is then reviewed by trial and appellate courts to ensure that it is reasonable." Many States have gone further by imposing statutory limits on punitive awards, in the form of absolute monetary caps, a maximum ratio of punitive to compensatory damages, or, frequently, some combination of the two. The States that rely on a multiplier have adopted a variety of ratios, ranging from 5:1 to 1:1.

Exxon, 128 S. Ct. at 2623 (internal citations and footnotes omitted). Many lower federal courts and state courts have applied State Farm and BMW to significantly reduce punitive damages awards.[9] State

[9] See, e.g., Wallace v. DTG Operations, Inc., No. 08-1474, 2009 WL 1025714, at *4 (8th Cir. April 17, 2009) (Eighth Circuit reduced amount of punitive damages

Farm and BMW have been applied to restrict punitive damages in insurance bad faith cases.[10]

Judge Gants applied the statute as written giving force and effect to the term "same and underlying transaction or occurrence." Thus, he multiplied the damages caused by National Union's post-trial delay in satisfying the judgment. The punitive damages requested by the Rhodes would not be a multiple of the

---

from 16:1 ratio to 1:1 ratio); Paul v. Asbury Auto. Group, LLC, No. 06-1603-KI, 2009 WL 188592, at *11 (D. Or. January 23, 2009) (court reduced 18:1 ratio to 1:1 ratio); Hudgins v. Southwest Airlines, Co., No. 1 CA-CV 07-0366, 2009 WL 73251, at *16 (Ariz. Ct. App. January 13, 2009) (8:1 ratio between punitive damages and compensatory damages reduced to 2:1).

[10] See Jurinko v. Medical Protective Co., 305 Fed. Appx. 13, 19, 30 (3rd Cir. 2008) (In first-party bad faith claim against an insurer, jury returned verdict of $1,658,345 in compensatory damages and $6,250,000 in punitive damages (3.8:1 ratio). Third Circuit reduced punitive damages to 1:1 ratio); Farm Bur. Life Ins. Co. v. American Nat'l Ins. Co., Slip Copy, No. 2:03cv646(TC), 2009 WL 361267, at *10 (D. Utah February 11, 2009) (jury awarded total of $62,722,000 in punitive damages and $3,606,214 in compensatory damages (17:1 ratio), court reduced ratio to 1:1); Leavey v. Unum Provident Corp., 295 Fed. Appx. 255, 259 n.1 (9th Cir. 2008) (in first-party bad faith claim against insurer, reduction of punitive damages from 7.5:1 ratio to 1.5:1 ratio was consistent with Exxon); Goddard v. Farmers Ins. Co. of Or., 120 P.3d 1260, 1262, 1282-84 (Or. Ct. App. 2005) (jury awarded approximately $1,280,000 in compensatory damages and over $20 million in punitive damages. Punitive damages award was unconstitutionally excessive; maximum amount of permissible punitive damages was three times compensatory damage award).

actual damages caused by National Union. As noted above, the amount of the judgment in the tort case against the trucking defendants arose out of a motor vehicle accident. It bears no relationship to any actual damages caused by National Union's delay in settling that claim after the verdict. The delay was the actionable violation of G.L. c. 93A and 176D. The damages caused by that violation is the proper multiplicand. It would be unconstitutional to apply the 1989 Amendment as construed by the Rhodes. See Aquino v. Pacesetter Adjustment Co., 416 F. Supp. 2d. 181, 184 (D. Mass. 2005) (noting that damages scheme mandated by the 1989 Amendment, "presents a serious constitutional question[.]").[11]

---

[11] The Rhodes' requested application of the 1989 Amendment would also violate the civil penalty guidepost, "the difference between [the punitive damages) and the civil penalties authorized or imposed in comparable cases." BMW, 517 U.S. at 574. Massachusetts law authorizes civil penalties of $1,000 for a violation of Chapter 176D, see G.L c. 176D, § 7, and $5,000 for a violation of G.L. c. 93A. See G.L. c. 93A, § 4. The $22,730,668 in punitive damages sought by the Rhodes would be 4,546 times the civil penalty authorized by G.L. c. 93A and 22,730 times the civil penalty authorized by Chapter 176D.

3. The Rhodes' Construction of the 1989 Amendment Conflicts with the Legislative Purpose of G.L. c. 93A.

Applying the 1989 Amendment as urged by the Rhodes does not further the purpose of G.L. c. 93A and G.L. c. 176D to promote settlements or to deter bad faith. G.L. c. 93A punitive damages are "intended to penalize insurers who unreasonably and unfairly force claimants into litigation by wrongfully withholding insurance proceeds." Clegg v. Butler, 424 Mass. 413, 425 (1997). Judge Gants recognized that National Union did not force the Rhodes into litigation by withholding insurance proceeds. National Union extended an offer that Judge Gants determined was reasonable. Awarding the Rhodes $22,730,668 in punitive damages would not further the legislative purpose of the 1989 Amendment by promoting settlement. *A.72.* Judge Gants observed that:

> To allow a plaintiff to obtain actual and punitive damages when it would not have settled the case even with a reasonable settlement offer would actually discourage plaintiffs to settle, which was the opposite of what the Legislature intended when it enacted the 1989 amendment. . . . The punitive damage provision is plainly meant to pressure insurers to make reasonable settlement offers, lest the plaintiff be forced into a trial that he otherwise would have settled. If the plaintiff, however, could win punitive damages regardless of whether he would have accepted a reasonable offer, then a smart

> plaintiff (or a plaintiff intelligently represented), once he recognized that the insurer had failed to make a prompt or reasonable offer, would choose not to settle the case and proceed to trial, even if the insurer later made a reasonable settlement offer, because the plaintiff could obtain punitive damages of double or treble the underlying judgment only if he proceeded to judgment and did not settle or arbitrate the case.

Id.[12]

The Rhodes' construction of the 1989 Amendment would conflict with the Legislative purposes of G.L. c. 93A as it would not be "reasonable in [its] nature, directed to the prevention of real evils and adapted to the accomplishment of [its] avowed purpose." Coffee-Rich, Inc. v. Commissioner of Public Health, 348 Mass. 414, 425 (1965).

III. The Trial Court Correctly Determined that the Rhodes' Rejection of a Reasonable Settlement Offer Precluded Their Recovery Based on G.L. c. 176D, § 3(9)(f).

The Trial Court did not require the Rhodes to prove that they would have accepted a "hypothetical

---

[12] The Rhodes' blithely suggest that "[i]njured plaintiffs generally do not play 'Gotcha' with insurance companies." Appellants' Brief, 23. While experienced plaintiffs' attorneys frequently do attempt to "set up" insurance companies for bad faith claims, the Rhodes "gotcha" comment completely misses the point. The Rhodes received a reasonable offer before trial. Nevertheless, they chose to proceed to trial and they obtained a verdict that led to a significantly larger judgment that was ultimately paid in full.

offer" as a condition to recovery. Appellants' Brief, 24-27. Rather, Judge Gants determined that the Rhodes were not entitled to any recovery based on National Union's delay in extending the actual "reasonable" settlement offer of $3.5 million because the evidence established that they would not have accepted any offer less than $8 million. To avert this conclusion, the Rhodes misconstrue the nature of National Union's duties to effectuate settlement under c. 176D, § 3(9)(f). The Supreme Judicial Court has explained that "[n]egotiating a settlement, particularly when the damages are unliquidated is, to an extent, a legitimate bargaining process. The statute, G.L. c. 176D §3(9), does not call for a defendant's final offer, but only one within the scope of reasonableness. Experienced negotiators do not make their final offer first off, and experienced negotiators do not expect it, or take seriously a representation that it is." Bobick v. United States Fid. & Guar. Co., 439 Mass. 652, 662 (2003) (internal punctuation and citation omitted). The Trial Court's decision was not based on what might have happened if National Union had made a higher offer. Judge Gants instead based his decision on the evidence that pre-

trial settlement of the Accident Case did not occur because the Rhodes refused to consider a reasonable offer. The Rhodes would not settle for anything less than $8 million, an amount which far exceeded what the trial court found would have been a reasonable settlement offer and which even exceeded the amount the Rhodes' own expert testified would have been a reasonable settlement offer. *A.64.*

The Trial Court correctly distinguished Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556 (2001), because the parties in that case did negotiate a pre-trial settlement and the facts established that "if this reasonable offer had been made within 30 days of the Chapter 93A letter, as required, the plaintiff would have settled the case without filing suit." *A.67-68.* In Hopkins, the Supreme Judicial Court explained that:

> We need not decide in this case whether the same measure of damages would apply in a case where an insurer, having initially violated G.L. c. 176D, § 3(9)(f), and G.L. c. 93A, §§ 2 and 9, thereafter makes a fair and reasonable (but nevertheless tardy) offer of settlement, which is refused by a claimant.

Hopkins, 434 Mass. at 567 n.16. In the present case, Judge Gants noted, "[t]he factual scenario expressly

reserved by the Court in Hopkins is precisely the scenario presented to this Court." *A.68.*

In their argument that the Trial Court misconstrued Hopkins, the Rhodes focus on the Supreme Judicial Court's determination that "[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 567. That proposition, however, has no application here where the Trial Court found that the Rhodes refused to accept a fair and reasonable offer that was tardy. Thus, the Trial Court's ruling did not require the Rhodes to prove that they would have accepted a hypothetical offer.

Moreover, Hopkins was decided prior to Hershenow, and the Hopkins court relied upon suspect authority, Leardi v. Brown, 394 Mass. 151 (1985), to support its determination that the plaintiff had suffered an injury.[13] The Trial Court explained that "to the

---

[13] Leardi is questionable precedent in light of Hershenow. Justice Cowin, concurring in Hershenow, suggested that the court should expressly overrule Leardi, and noted that "[t]he court's effort to distinguish the cases seems to me to arise not so much from analytical conviction but from a desire to avoid acknowledging that Leardi was wrongly decided." Hershenow, 445 Mass. at 804.

extent that Hopkins can be understood to hold that a plaintiff is entitled to recover damages from an insurer for its failure to make a prompt settlement offer without proving that the plaintiff suffered any loss arising from that unfair act (because the plaintiff would have rejected the offer had it been timely made), Hopkins was effectively overruled by [Hershenow]." *A.68.*

IV. The Trial Court Correctly Determined that the Rhodes Suffered No Compensable Emotional Distress Damages Arising from National Union's Conduct.

Judge Gants determined that the Rhodes did not prove "any damages beyond 'loss of use' damages." *A.77.* He expressly found that "[t]here is not sufficient evidence of emotional distress arising from these unreasonably low post-judgment offers to award emotional distress damages." Id. These determinations that the Rhodes presented "insufficient evidence" of emotional distress because: (a) National Union's conduct was not "extreme and outrageous;" and (b) the Rhodes' emotional distress was not "sufficiently 'severe,'" were not clearly erroneous. Id.

The Rhodes make a cursory argument that "[e]motional distress damages can be awarded in chs. 176D/93A cases without pleading or proving intentional

infliction of emotional distress;" (Appellants' Brief, 33-34) however, they cite no authority to support this assertion. In contrast, in Hart v. GMAC Mtge. Corp., 246 B.R. 709 (D. Mass. 2000), a federal Bankruptcy Court judge observed that the "Court has found no case in which a plaintiff has recovered emotional distress damages under Chapter 93A in the absence of proof of intentional infliction of emotional distress." Id. at 736.

Judge Gants correctly noted that: (a) the Supreme Judicial Court requires that a G.L. c. 93A plaintiff "satisfy the elements of an intentional infliction of emotional distress claim in order to establish emotional distress damages in a Chapter 93A case;'" and, (b) the "'frustrations of litigation'" are not compensable "unless those frustrations rise to the level required for recovery of damages under an intentional infliction of emotional distress claim." *A.77-78.* See Haddad v. Gonzales, 410 Mass. 855, 869 (1991) ("Plaintiffs alleging the intentional infliction of emotional distress in c. 93A actions still must satisfy all of the jurisdictional requirements of the statute, and still must carry the difficult burden of proof applicable to all

intentional infliction of emotional distress claims."); Hart, 246 B.R. at 736 (where the plaintiff "did not prove either intentional or negligent infliction of emotional distress, and, in the absence of reckless conduct or physical symptoms sufficient to support liability for these common law torts under Massachusetts law, there can be no recovery for emotional distress under Chapter 93A."); Anderson v. Brake King Auto., Inc., 2006 Mass. App. Div. 15, 17-18, 2006 WL 279040, *3 (2006) (even if there had been a violation of G.L. c. 93A, the plaintiff could not recover emotional distress damages because she had failed to prove: (1) intentional infliction of emotional distress, as required by Haddad; or (2) that she had suffered any physical harm, as required for a cause of action for negligent infliction of emotional distress).

Based on the evidence, Judge Gants found that National Union's conduct was not "extreme and outrageous" and that the Rhodes' purported postjudgment emotional distress was not sufficiently "severe" to warrant damages.

V. The Trial Court Erred in Finding that the Appeal of the Judgment Against the Trucking Defendants Lacked Merit Because the Rhodes Presented No Evidence Concerning the Merits of the Appeal.

The Trial Court determined that National Union unreasonably delayed in settling the Rhodes' claim after judgment entered in the Accident Case. *A.75-76.* The Trial Court explained that the first question that must be considered in evaluating the "fairness of the insurer's offer" following a verdict against its insured is "What is the likelihood that the appeal will succeed?" *A.73.* The Trial Court determined that: (a) no "reasonable insurer could have concluded that a 40 percent discount of the judgment was reasonable in view of [National Union's] meager chance of prevailing on appeal." *A.75;* and (b) "[t]he appeal rested on unusually feeble arguments[.]" *A.74.*

The Trial Court's conclusion that National Union's decision to appeal the Underlying Judgment violated G.L. c. 93A required the Rhodes to present expert testimony concerning "what occurred at trial: actions, rulings and instructions to the jury by the trial judge; objections and motions by trial counsel; testimony, or lack thereof, by witnesses; and the state of the law on the points in issue." See

Resendes v. Boston Edison Co., No. 970303, 2000 WL 421004, at *11 (Mass. Super. Ct. March 20, 2000).

Since the Rhodes failed to present any evidence as to what a reasonable insurer would have done after judgment entered in the Accident Case, there is no factual basis to support the conclusion that "no reasonable insurer" would have responded to the Rhodes' demand for the full amount of the judgment including interest with an offer of $7 million. *A.75.* See Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 121 (1994).

Indeed, the ***only*** expert the Rhodes called at the trial of the present case, Arthur Kiriakos, expressly denied being qualified to evaluate the merits of the appeal:

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

A.1846.

Where, as here, the determination is complex and involves matters requiring specialized knowledge (such as the merits of an appeal), a finding of bad faith in the settlement of a claim is not warranted without evidence of the practice of the industry in similar

circumstances and expert testimony that the insurer violated sound claims practices. Hartford Cas. Ins. Co., 417 Mass. at 119-20 ("We have held that a finding of bad faith in the settlement of a claim against an insured was warranted by evidence of what the practice of the industry was in similar circumstances and by expert testimony that the insurer violated sound claims practices in not resolving a coverage question in favor of its insured."); DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 98-99 (1983) (holding that the trial court's legal conclusions were supported by factual findings based on expert testimony that insurer violated "sound claims practice" and acted differently than other insurance companies).

National Union recognizes that the Trial Judge has many years of experience as an attorney and jurist. Nonetheless, a trial judge as fact finder may not bring his or her own expert knowledge and experience to bear to supply the opinion evidence necessary to support a plaintiff's bad faith claim. See Commonwealth v. O'Brien, 423 Mass. 841, 558 (1996) (quoting Furtado v. Furtado, 380 Mass. 137, 140 n.1 (1980)) ("[a] judge's reliance on information that is not part of the record implicates fundamental fairness

concerns. . . . Thus, '[a] judge may not rely on his private knowledge of particular facts that are not matters of which he can take judicial notice.'"); Nantucket v. Beinecke, 379 Mass. 345, 353 (1979) ("Judicial notice is not to be extended to personal observations of the judge or juror.").

VI. The Trial Court Erred In Finding that the Rhodes Are Entitled to "Loss Of Use" Damages Because the Rhodes Relinquished Their Claim for These Damages by Accepting a Settlement and Filing a Satisfaction of Judgment.

The Trial Court determined that as a result of National Union's delay in settling the Rhodes' claims after judgment entered in the Accident Case, the Rhodes were entitled to recover the "loss of use" of the settlement funds from the time the Trial Court found National Union should have settled in January 2005 to the time the Accident Case did settle in June 2005. *A.76-77*. The Trial Court measured the "loss of use" damages at the statutory postjudgment rate of interest of one percent per month, concluding that the five month delay resulted in loss of use damages of $448,250. *A.77*[14]

[14] The Trial Court applied the same measure of damages that would have been applied if the Accident Case had settled prior to judgment. See Hopkins, 434 Mass. at 567 (the plaintiff may "recover interest on the loss

While the "loss of use" damages were deemed by the Court to be the "actual damages," the Rhodes are not entitled to a "loss of use" award because they filed a Satisfaction of Judgment when they settled the Accident Case. The accord and satisfaction extinguished their right to recover any postjudgment interest related to the Accident Case. *A.3575-76; A.6923-25.*

The Accident Case settled on June 20, 2005. *A.3575-76.* The Rhodes' counsel wrote to National Union to "confirm and memorialize the settlement between the Rhodes and the defendants[.]" Id. According to this letter, the terms of the settlement were: (a) the Rhodes would be paid $8,965,000 in three monthly installments; (b) National Union would withdraw the trucking defendants' appeal, with prejudice; (c) if the payments were made, then the Rhodes would file a Judgment Satisfied form, "thereby ending this case." Id. The Rhodes' counsel testified that, as part of the settlement, the Rhodes "forewent" recovery of the postjudgment interest that had by then accrued. *A.2576.* After National Union paid the third

---

of use of money that should have been, but was not, offered[.]"); Murphy v. National Union Fire Ins. Co., 438 Mass. 529, 532 (2003).

installment of the settlement, the Rhodes filed a Satisfaction of Judgment, extinguishing ipso facto the postjudgment interest. *A.6923-25.* The Rhodes acknowledged in this pleading that "the judgments which entered after jury verdict on September 28, 2004 have been satisfied in full[.]" Id.

Therefore, the Rhodes compromised and waived their right to recover postjudgment interest as damages in this action. Waiver is "an intentional relinquishment or abandonment of a known right or privilege." Ruiz v. Bally Total Fitness Holding Corp., 496 F.3d 1, 10 (1st Cir. 2007) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The Rhodes intentionally relinquished - and "forewent" - any right to recover postjudgment interest, which represents the "actual" or "loss of use" damages awarded in this case.

It is fundamentally unfair to permit the Rhodes, on the one hand, to induce National Union to settle the underlying claim by agreeing to forego postjudgment interest, while, on the other hand, permit the Rhodes to recover the exact same damages through the "back door" as part of the G.L. c. 93A lawsuit.

The Rhodes are also estopped from recovering "actual damages" in this action that were compromised as part of a negotiated settlement in the Accident Case. Equitable estoppel is applied to prevent "results contrary to good conscience and fair dealing[.]" McLearn v. Hill, 276 Mass. 519, 524 (1931). Equitable estoppel is appropriate where a party demonstrates: "(1) a representation intended to induce reliance on the part of a person to whom the representation is made; (2) an act or omission by that person in reasonable reliance on the representation; and (3) detriment as a consequence of the act or omission." Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court, 448 Mass. 15, 27-28, (2006) (quoting Bongaards v. Millen, 440 Mass. 10, 15 (2003)).

Equitable estoppel is appropriate here because: (1) the Rhodes' counsel represented that the entire Underlying Judgment was the subject of the Parties' settlement agreement; (2) the representation was clearly intended to induce reliance on the part of National Union; (3) National Union withdrew the notice of appeal of the Underlying Judgment and paid the Rhodes $8,965,000 in reasonable reliance on the

representation; and (4) National Union suffered a detriment as a direct consequence of its reliance on the representation when it withdrew the notice of appeal and paid a substantial amount of money to the Rhodes.

VII. Assuming That the Rhodes Are Entitled to Recover "Loss Of Use" Damages, the Trial Court Erred in Calculating the "Loss Of Use" Damages Awarded To the Rhodes.

The Trial Court determined that the Rhodes were able to establish "loss of use" damages arising from National Union's postjudgment conduct consisting of "the interest the plaintiffs would have earned on this money had the settlement been reached in December 2004 rather than June 2005." *A.76.* The Trial Court calculated the damages by utilizing the "post-judgment rate of interest of one percent per month" resulting in an award of $448,250. *A.77.*

The Trial Court's use of the statutory postjudgment interest rate of 12% per year is clear error because the only evidence at trial on this issue indicated that the Rhodes would have earned at best 3.5% per year in interest if the settlement had been paid earlier. Harold Rhodes testified at trial that he invested the settlement monies paid by the

Professional Tree's insurers, Zurich, and National Union in "[l]ow-risk bonds" that earned "closer now to three and a half percent post-tax" in interest. *A.1642*. Thus, the Trial Court should have used 3.5% per year rather than 12% per year to calculate loss of use damages, resulting in a $130,739.58 actual damage award. Assuming that it was appropriate to award double the judgment, the total damages award should have been $261,479.16.

The Rhodes argue that the Trial Court should have awarded them loss of use damages of $991,645.71 rather than $448,250.00. Appellants' Brief, 34-36. The Rhodes ignore: (a) Harold Rhodes' testimony noted above; (b) the Trial Court's factual findings as to when National Union was obligated to make a post-verdict offer; and (c) the Rhodes agreed to forego statutory postjudgment interest as part of the settlement with National Union. The Rhodes assume that National Union was obligated to pay the entire amount of the Underlying Judgment on the date the judgment entered, without giving National Union any time to consider the merits of the appeal or to engage in a good faith negotiation process. The Trial Court

did not determine that the timing of National Union's initial post-trial offer was unreasonable.

While National Union contends that the Trial Court should not have awarded any "actual damages" for loss of use, if "loss of use" damages are appropriate, the Trial Court should have awarded $130,739.58 in actual damages. While National Union contends that the Trial Court should not have concluded that National Union's post-verdict violation "was willful and knowing," assuming that it was appropriate to award double the judgment, the total damages award should have been $261,479.16.

CONCLUSION

For the foregoing reasons, National Union requests that this Court affirm the Trial Court's determination that: (a) the Rhodes did not sustain any compensatory damages due to National Union's delay in making its pre-trial settlement offer; (b) the Rhodes were not entitled to recover any punitive damages because of National Union's pre-verdict conduct; and (c) the Rhodes were not entitled to recover an additional $22,730,668 in punitive damages (twice the amount of the Underlying Judgment) against National Union because of National Union's post-verdict delay

in making a reasonable settlement offer. National Union requests that this Court reverse the Trial Court's determination that: (a) the appeal of the Underlying Judgment against the trucking defendants in the Accident Case lacked merit; (b) the Rhodes are entitled to "loss of use" damages for the postjudgment conduct; and (c) to the extent "loss of use" damages are appropriate the Trial Court erred in calculating the amount of "loss of use" damages awarded to the Rhodes. Thus, the Trial Court should have used 3.5% per year rather than 12% per year to calculate loss of use damages, resulting in a $130,739.58 actual damage award. Assuming that it was appropriate to award double the judgment, the total damages award should have been $261,479.16.

Respectfully Submitted,

Dated: August 3, 2009

Anthony R. Zelle, BBO# 548141
Mark E. Cohen, BBO #089800
Brian P. McDonough, BBO# 637999
Robert J. Maselek, BBO #564690
ZELLE MCDONOUGH & COHEN
101 Federal Street, 14th Floor
Boston, MA 02114
Tel: (617) 742-6520
Fax: (617) 742-1393

CERTIFICATION

Pursuant to Mass.R.A.P. 16(k), I, Anthony R. Zelle, certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6); Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18; and Mass. R. A. P. 20.

_____

Anthony R. Zelle, BBO# 548141