COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC - 10911

MARCIA RHODES, ET AL.,
PLAINTIFFS-APPELLEES,

v.

AIG DOMESTIC CLAIMS, INC., ET AL.,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM A DECISION OF THE MASSACHUSETTS APPEALS COURT

AMICUS CURIAE BRIEF OF AMERICAN INSURANCE ASSOCIATION

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STATEMENT OF INTEREST OF *AMICUS* AMERICAN INSURANCE COMPANY

Amicus Curiae the American Insurance Association ("AIA") is a leading national trade association representing over 300 U.S. property and casualty insurance companies that collectively underwrote more than $117 billion in direct property and casualty premiums, including almost 38 percent of the commercial insurance market in the Commonwealth of Massachusetts. AIA members, ranging in size from small companies to the largest insurers with global operations, underwrite virtually all lines of property and casualty insurance.

On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this Court. The implications of this case for how punitive damages may be assessed against liability insurers and the desire to see that penalty damages under G.L. c. 93A are assessed in a sensible way are of significant interest and consequence to AIA's members.

AIA has appeared before this Court on several matters of consequence in the past, including *amicus* filings in Billings v. Commerce Ins. Co., 458 Mass. 194 (2010), Donovan v. Philip Morris, Inc., 455 Mass. 215 (2009) and Boston Gas Co. v. Century Ind. Co., 454 Mass. 337 (2009). Additionally, the U.S. Supreme Court has accepted *amicus* submissions from the AIA in its recent punitive damages cases such as State Farm v. Campbell, 538 U.S. 408 (2003) and Philip Morris USA v. Williams, 549 U.S. 306 (2007).

STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopts by reference the Statement of the Case and Facts set forth in AIGDC's brief.

STATEMENT OF THE ISSUES

1. Whether the Superior Court correctly ruled that doubled or trebled damages against a liability insurer for failing to timely offer settlement of a third party claimant's suit in violation of G.L. c. 176D, § 3(9)(f) should be limited to the plaintiffs' loss of use of the funds since the insurer defendant did not cause the underlying judgment?

2. Whether, if as Rhodes proposes, the underlying judgment should form the basis for doubling or trebling, any such award so exceed the damages actually caused by defendants as to exceed constitutional due process guarantees against excessive and arbitrary penalties and punishments?

SUMMARY OF THE ARGUMENT

I.A The 1989 amendments to G.L. c. 93A specifying that the underlying judgment be used as the basis for doubling or trebling damages arising out of the same underlying transaction or occurrence was prompted by rulings of this Court and the Appeals Court in the context of "first party insurance" (policies insuring a policyholder for loss to his person or property). There is no reason to believe that the Legislature meant to use the underlying tort judgment in this same manner in cases involving third party liability insurers for failing to settle the claims of tort claimants as, in such cases, the personal injury judgment that the claimant may obtain against the carrier's insured is entirely unrelated to any damages attributable to the insurer's claims handling conduct. (Argument I.A, pp. 10-12).

I.B A more sensible reading of the statute is that the amendments' requirement that this judgment involve the "same underlying transaction or occurrence" was meant to protect defendants such as liability insurers from an unjust award of damages based upon a judgment for which they were not responsible. In cases involving a liability insurer's failure to settle a third party tort claimant's suit in violation of G.L. c. 176D, § 3(9)(f), the cause of the insurer's c. 176D liability (inadequate claims handling) is entirely different from the transaction or occurrence giving rise to the underlying judgment against its insured (negligent operation of a motor vehicle). (Argument I.B, pp. 12-19.)

I.C There is no evidence that through these amendments the Legislature ever meant to single out liability insurers for special punishment. Unlike all other types of defendants who may be subjected to a doubling or trebling of c. 93A damages, liability insurers are uniquely *not* responsible for the damages giving rise to the underlying judgment. In such cases, the judgment results from personal injuries resulting from an accident caused by the insurer's policyholder, not due to any action on the part of the insurer in its subsequent defense, claims handling or efforts to settle the ensuing lawsuit. (Argument I.C, pp. 19-22).

I.D Rhodes' proposed construction of the 1989 amendments would strip out any element of causation as regards failure to settle claims against liability insurers, in contravention of this Court's repeated holding that causation is an essential element of liability under c. 93A. (Argument I.D, pp. 22-24).

II.A. Punitive damages present a risk of excessive and arbitrary awards to which insurers are exposed more than any other type of defendant. The danger of arbitrary punitive damage awards against liability insurers in a case of this sort is greatly magnified by the fact that Massachusetts is one of the few states that allow third parties to sue liability insurers for failing to promptly effectuate settlements and is alone in allowing third party plaintiffs to recover punitive damages against insurers based on a multiple of the underlying judgment. (Argument II.A, pp. 24-27).

II.B. In a succession of cases culminating with State Farm v. Campbell, 538 U.S. 403 (2003), the U.S. Supreme Court has ruled that the Fourteenth

Amendment's guarantees of due process are implicated by the risk of excessive and arbitrary punitive damages awards and that, as a result, in nearly all cases, only punitive damages awards that are less than ten times the size of the plaintiff's actual damages will satisfy due process. Further, where the plaintiff has already received a substantial compensatory award, a ratio of one to one may be more appropriate. (Argument II.B, pp. 27-30).

II.C. In the years since Campbell's issuance in 2003, courts around the country have set aside punitive damage awards that were more than ten times the size of the plaintiffs' actual damages and, in an increasing number of cases, are using a 1:1 ratio for such awards. (Argument II.C, pp. 31-36).

II.D. Although this Court has not yet had occasion to apply Campbell, its earlier ruling in Labonte adopting the BMW v. Gore principles that are the bedrock upon which the Campbell court's due process analysis rests, confirms that it should give effect to its holding in this case. Such a finding would be in keeping with numerous recent cases in which the Appeals Court has used a single-digit ratio to measure punitive damages awards based on Campbell. (Argument II.D, pp. 37-41).

II.E. Finally, *Amicus Curiae* urge this Court to reject any suggestion that the due process protections recognized in Campbell do not apply to excessive and arbitrary penalties awarded pursuant to statute. Any distinction between statutory and common law penalties is particularly inappropriate in a case such as this, where the statute in question does not set a specific dollar amount for fines or otherwise put a ceiling on the overall monetary damages that may be awarded for violations. In light of the uncertain exposure that a liability insurer might face based upon a judgment for personal injury damages that it did not cause, c. 93A presents the same potential for arbitrary and excessive awards without fair notice to defendants as prompted the Supreme Court to act in Campbell. (Argument II.E, pp. 41-45).

ARGUMENT

I. LIKE ALL OTHER C. 93A DEFENDANTS, LIABILITY INSURERS SHOULD ONLY BE LIABLE FOR THE DOUBLING OR TREBLING OF DAMAGES THAT THEY ACTUALLY CAUSED, NOT DAMAGES ATTRIBUTABLE TO INJURIES CAUSED BY THEIR POLICYHOLDERS.

This case highlights the difference between first and third party insurance. First party insurance provides that the insurer will pay money to a policyholder in compensation for damage to his person or property. Third party insurance (sometimes referred to as "liability insurance") provides that the insurer will defend its insured against claims by third parties that they have suffered injury because of the acts or omissions of the insured. Windt, Insurance Claims & Disputes (5th ed. 2007) (Supp. March 2011), Sec. 6:5. In the context of a G.L. c. 93A, a first party insurer's liability for a violation of G.L. c. 176D, § 3(9)(f) hinges on the insurer's failure to make a reasonable offer of settlement to its policyholder for a loss for which liability was reasonably clear. By contrast, the 93A exposure of a liability insurer to a third party tort claimant for failing to settle under Section 3(9)(f) arises out of a loss over which it has absolutely no control, namely the negligent acts of its insured that injured the plaintiff. Furthermore, unlike most c. 93A claims against first or third party insurers, there is no privity underlying a third party tort claimant's suit against a liability insurer for failing to settle pursuant to G.L. c. 176D, § 3(9)(f).

It is not at all apparent that the 1989 amendments to G.L. c. 93A, § 9(3),[1] which occurred in the wake of several significant appellate rulings involving *first party claims against first party insurers*, was ever meant to address the c. 93A exposure that *third party liability insurers* uniquely face for failing to settle *third party tort claimants'* suits in violation of Section 3(9)(f) of c. 176D.

Plaintiffs argue that the lower courts' rulings tying the calculation of punitive damages to the injury actually caused by the c. 93A violation - the lost use of the settlement funds - ignores the plain language of G.L. c. 93A, § 9(3). They insist that the text of Section 9(3) is so clear that the lower courts' interpretation is patently in error. In fact, neither the language of the statute, nor its claimed legislative history dictate such a result.

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[1] C. 580 ("the 1989 amendments" added the following provision to Section 9(3) and Section 11 of Chapter 93A: "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."

A. The Legislative History And Text Of The 1989 Amendments Evidence An Intention To Limit Their Scope To Damages Directly Caused By The Defendant.

The 1989 amendments were adopted in response to appellate decisions that did not subject first party insurers to the same punitive exposure as other defendants that were found to have willfully or knowingly violated G.L. c. 93A. In cases such as Bertassi v. Allstate Ins Co., 402 Mass. 366 (1988); Trempe v. Aetna Cas. & Sur. Co., 20 Mass. App. Ct. 448 (1985) and Wallace v. American Manufacturers Mut. Ins. Co., 22 Mass. App. Ct. 938 (1986) "Massachusetts courts had limited the measure of multiple damages against a bad faith insurer to the plaintiff's loss of use damages, measured by the interest lost on the amount the insurer wrongfully failed to provide the claimant." R.W. Granger & Sons, Inc. v. J&S Insulation, Inc., 435 Mass. 66, 83 (2001).

Bertassi, Trempe and Wallace were all cases in which a first party insurer declined to reimburse the insured for a personal loss, whether for damage to the insured's home (Trempe), theft of the insured's car (Wallace), or uninsured motorist benefits (Bertassi). There is no suggestion, however, that the Legislature intended to create an entirely new punitive damages remedy for *third party tort claimants* whose *third party liability insurers* may fail to effectuate prompt settlements of their claims against policyholders. Unlike first party cases, the judgment giving rise to the tort claimant's suit against a liability insurer is not the same as the loss caused by the insurer for failing to pay money to its insured under its insurance policy. Rather, the judgment reflects the injuries suffered by the tort claimant due to the negligent acts of the insured.

The point is not that the insurer physically causes the loss in either case—the insurer no more causes a tree to fall on the insured's house than it causes the insured's car to crash into a third party--but that the insurer's contractual promise, and thus the basis for its extracontractual liability, is different as between first and third party insurance. When a tree falls on an insured's home, his claim against his homeowner's carrier is the for the value of the downed tree and, if the insurer willfully fails to settle a covered loss, that value is also the basis for doubling or trebling under 93A. In the case of third party claimants and liability insurers, however, there is no contractual privity and the judgment recovered by the plaintiff is entirely unrelated to the insurer's contractual promises to its insured.

B. <u>The Legislature's Intention That The Effect Of These Amendments Only Extends To Cases Where The Judgment Was For Damages Caused By The Defendant Is Manifest In The Amendments' Requirement That The Judgment Be "On All Claims Arising Out Of The Same And Underlying Transaction Or Occurrence."</u>

Despite Rhodes' assertion that the underlying judgment should be the benchmark for all doubled or trebled awards under G.L. c. 93A, the Legislature's inclusion of a requirement that the judgment be for a claim involving the "same underlying transaction or occurrence" as forms the basis for the defendant's c. 93A liability clearly indicates an intention not to apply it in circumstances, such as those presented here, where the judgment arose out of a transaction or occurrence other than that causing the defendant's 93A liability. In a case of this sort, the cause of the plaintiff's underlying personal injury judgment is entirely different from the cause of the insurer's liability to the third party tort claimant for failing to settle her suit.

Although the term "transaction or occurrence" is not otherwise defined in the statute, it has a commonly understood meaning, as reflected in its usage throughout the Commonwealth's Rules of Civil Procedure.[2] Thus, compulsory counterclaims must be asserted pursuant to Mass. R. Civ. P 13(a) if the claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Similarly, Rule 14(a)(3) provides that a plaintiff "may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff." Likewise, Rule 15(c) provides that an amendment will relate back whenever the claim asserted in the amended pleading "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in

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[2] "Occurrence" also has a clear meaning in insurance coverage jurisprudence as meaning the cause of the insured's liability. See, e.g., Worcester Ins. Co. v. Fells Acres Day School, Inc., 408 Mass. 393 (1990) (suits by day care center victims who were allegedly subject to sexual abuse involved more than one "occurrence", since the sexual assaults were undertaken by various individuals at diverse times and locations) and RLI Ins. Co. v. Simon's Rock Early College, 54 Mass. App. Ct. 286 (2002) ("cause" of lawsuits against College for failing to prevent injuries to students and faculty resulting from their being shot by another student was the negligent conduct of the university, not each individual shooting incident).

the original pleading." See, e.g., Bengar v. Clark Equipment Co., 401 Mass. 554 (1988) (reversing lower court's allowance of amendment to add a new party because the amendment, which "presented a product liability claim based on alleged defects in the design and manufacture of the forklift and its sale without adequate warnings," asserted a claim which "did not arise, in the words of Rule 15(c), 'out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading,' which was a claim of negligent operation of a vehicle." Id., at 557).

In the case of a c. 93A claim against first party insurers, the underlying occurrence is the loss to the insured's person or property, which is the same as its claim for coverage. See Bonofiglio v. Commercial Union Ins. Co., 411 Mass. 31, 37 (1991) (arbitrated award of the insured's claim for uninsured motorist benefits arose out of the occurrence underlying the c. 93A action). By contrast, in the case of a c. 93A claim against a liability insurer for failing to settle a tort claimant's demands, the personal injuries suffered by the third party claimant result from an entirely different occurrence than the economic loss caused by the manner in which the insurer defended the lawsuit against its insured.

Just as in Bengar, the factual elements of Rhodes' claims against the insurers for failing to effectuate a timely settlement of her lawsuit against their insured is entirely different from her lawsuit against the insured for negligently operating the truck that struck her car. One is a suit in tort for personal injuries; the other is an action for insurance bad faith claiming economic loss. The auto accident that caused Marcia Rhodes' injuries was not the cause of the insurers' c. 93A legal liabilities. Although the auto accident may, in some metaphysical sense, be a pre-condition to the circumstances that ultimately gave rise to the insurers' claimed c. 93A liabilities (had the crash not occurred, there would never had been a suit to defend or settle), it is in no sense the cause of them.

Notably, the 1989 amendments use the term "judgment" in the singular. In case where a third party tort claimant seeks to recover against a liability insurer for failing to settle in violation of Section 3(9)(f), the judgment against the insured is distinct from the judgment against the insurer.

Even in a case where a c. 93A claim against a liability insurer is joined with a claim against its insured/tortfeasor, any judgments against the two respective defendants would be just that -- separate judgments -- because the wrongs for which the single plaintiff seeks recovery relate to different transactions or occurrences against the two defendants. A judgment for tort damages is sought against the tort defendant, and a judgment for c. 93A/176D damages is sought against the insurer. Each defendant would receive a separate judgment against it.

In light of this, the Legislature's usage of "judgment" in the singular rather than the plural is significant. The 1989 amendments contemplate a single judgment relating to a single transaction or occurrence. It therefore follows that the singular "judgment on all claims arising out of the *same* and underlying transaction or occurrence" must refer to a judgment predicated on actions of the c. 93A defendant itself [*i.e.*, the insurer].

If the Legislature had meant to refer to the plural judgments, so as to arguably include the amount of judgments against third-party insureds-defendants, it would have plainly said so. As drafted, however, the statute simply does not allow for its application in the manner suggested by Rhodes. In the third-party failure to settle an insurance claim context, the only plausible reading of the statute is that the "underlying transaction or occurrence" with respect to the c. 93A claim against a liability insurer is its alleged violation of c. 176D, rather than the tort action against a different defendant.

This result is reasonable and uniform -- in both the first party and third party contexts, the amount multiplied is the *actual* damages caused by the unfair or deceptive conduct as reflected in the judgment based on *that* conduct.[3] Where such a reading is

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[3] Indeed, numerous Superior Courts have so ruled. See, Loftis v. Liberty Mutual Ins. Co., 4 Mass. L. Rptr. No. 6, 101, 104 n. 3 (Mass. Super. Sept. 18, 1995)(Brassard, J.) ("Although the [1989 amendment] itself refers to multiplying damages from an underlying claim, the only way to avoid absurd results is to interpret this language as applying only where the defendant who brought about the underlying harm is the same defendant who violated G. L c. 93A"); Kapp v. Arbella Mutual Ins. Co., 5 Mass. L. Rptr. No. 19, 442, 443 ((Mass. Super. August 12, 1996)(McHugh, J.) ("... the award of single damages for loss of use of any wrongfully withheld funds or other foreseeable consequences of an improper failure to pay also determines the amount to be multiplied in the event that any alleged failure in this action is determined to have been knowing or willful"). See also Cohen v. Liberty Mutual Ins. Co., No. 91-0381-D (Mass. Super.

plausible, it is to be preferred over that urged by Clegg because of the statute's punitive nature. Libby v. New York, New Haven RR, 273 Mass. 522, 525-26 (1951).

In the context of a claim of this sort, therefore, in order for a judgment to form the basis for doubling or trebling a c. 93A award against an insurer it must arise in the same proceeding as determines the c. 93A liability of the insurer. As this Court observed in Drywall Systems, Inc. v. ZVI Construction Co., 435 Mass. 664, 668 (2002), "Where multiple damages are sought under G.L. c. 93A based on 'claims arising out of the same and underlying transaction,' those claims must be determined in the same proceeding with multiple damages claim." (Emphasis supplied.)

Nov. 24, 1992) (Lauriat, J.)("The purpose of the 1989 Amendment to c. 93A § 9(3) was not to eliminate the requirement that the plaintiff show a causal connection between the defendant's c. 93A violation and the actual damages for which he sought recovery... Expanding the statutory language to require that the underlying judgment be doubled or trebled, irrespective of a causal connection between the amount of that underlying judgment and the c. 93A violations, must be rejected as inconsistent with both the plain language of the statute and the intent of the statute's multiple damage provision.")

This observation accords with the Legislature's use of the singular "judgment" rather than the plural in the 1989 amendments, as the singular term contemplates one "judgment" (*i.e.*, the ultimate ruling of a court as between two litigants), rather than what Rhodes seeks to apply here - two separate disputes, one between Rhodes and the insured, and another between Rhodes and the insurers, which have been resolved in separate proceedings.

Thus understood, it is clear that the c. 93A claims against the insurers in this case do not arise out of the same transaction or occurrence as gives rise to the liability of their policyholder. *Amicus Curiae* submits, therefore, that the purpose and the plain language of the 1989 amendments in no way suggests that the Legislature meant to single out liability insurers for special punishment by allowing damages that they did not cause and over which they had no control to serve as the foundation for doubled or trebled c. 93A awards.

C. <u>Chapter 176D Uniquely Exposes Liability Insurers To C. 93A Claims From Third Parties Whose Claims Are Based Upon Injuries That Were Not Caused By And That Ante-Date Any Contact With the Liability Insurer.</u>

Liability insurers play a vital role in our civil justice system. At any given time, they are responsible for the defense of millions of individual and business insureds throughout the United States. Liability insurers hire defense counsel, adjust claims and settle losses to protect their policyholders. Their involvement is crucial to the successful and efficient administration of tort law.

Liability insurers also face a unique extra-contractual liability exposure in Massachusetts. Not only may their policyholders sue them for improper case handling, in Massachusetts, third party tort claimants may sue them under G.L. c. 93A for failing to promptly effectuate the settlement of cases in which liability is reasonably clear. G.L. c. 176D, § 3(9)(f); <u>Clegg v. Butler</u>, 424 Mass. 313, 319 (1997).

Alone among c. 93A defendants, liability insurers are not responsible for personal injury damages suffered by the claimant. As discussed in the preceding section, the insurers in this case did not cause the auto accident that injured Marcia Rhodes.

Rather, the damages due to a liability insurer's violation of G.L. c. 176D is for the economic loss that the plaintiffs suffer due to any delay in making a reasonable offer of settlement. See Bobick v. USF&G, 439 Mass. 652, 659, 662 (2003) and Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 566-67 (2001).

The lack of any causal relationship between the underlying judgment and the basis for imposing c. 93A liability upon a liability insurer is even more apparent in cases such as this where the insurer is alleged to have willfully failed to settle the case *after* a judgment had already entered against its policyholder.

Rhodes' reading of Section 9(3) would single out liability insurers for unique treatment among c. 93A defendants, subjecting them to liability for doubled or trebled damages based on damages that they did not cause. A liability insurer's obligations under G.L. c. 93A should be measured based on the damages that it caused and not by the injuries caused by its policyholder, injuries which ante-date its claims handling and arise out of circumstances over which it had no control. See International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 858 (1983)(multiple damages under c. 93A should be assessed individually against each defendant).

D. <u>**In Keeping With The Causation Element Of G.L. c. 93A And This Court's Damages Jurisprudence, A Liability Insurer's Exposure Should Be Based Upon Damages That It Caused.**</u>

The elemental requirement that a defendant's liability should reflect the damages that it caused is reflected throughout this Court's damages jurisprudence, including its analysis of G.L. c. 93A. <u>See</u> <u>R.W. Granger & Sons, Inc. v. J&S Insulation, Inc.</u>, 435 Mass. 66, 80-81 (2001) ("We have interpreted the statute, before and after the 1989 amendments, to require a plaintiff who seeks damages under G.L. c. 93A to establish a causal link between the insurer's wrongful conduct and the loss that plaintiff claims to have suffered.") Likewise, this Court declared in <u>Hopkins</u> that "there must be a causal relationship between the alleged act and the claimed loss." 434 Mass. at 567-568. Yet, no matter how it is described or veiled, at the heart of Rhodes' plea to this Court is the contention that this causal link should be eliminated in cases involving knowing and willful misconduct by liability insurers.

To date, this Court has not decided whether a judgment against a tortfeasor insured should serve as the basis for doubled or trebled 93A damages against his liability insurer.[4] The issue was raised—but not answered—in Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 567 (2001). In Footnote 16, this Court declared:

> 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 thereafter makes a fair and reasonable (but nevertheless tardy) offer of settlement, which is refused by a claimant.

In the absence of a definitive holding from this Court, the Appeals Court has reached conflicting views on the issue. See Cohen v. Liberty Mut. Ins. Co., 41 Mass. App. Ct. 748 (1996)(holding that it makes no sense to treble a liability insurer's 93A liability based on personal injury judgment) and Yeagle v. Aetna Cas. & Sur. Co., 42 Mass. App. Ct. 640 (1997) (ruling that judgment may be used in the case of liability

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[4] R.W. Granger & Sons, Inc. v. J&S Insulation, Inc., 435 Mass. 66, 80-81 (2001), which Plaintiffs rely upon in their filings with this Court, is not to the contrary. The dispute in R.W. Granger involved the plaintiff's first party rights under a surety bond, not liability insurance.

insurers but only with respect to doubled or trebled awards).

Amicus Curiae therefore urges this Court to retain the crucial element of causation in the analysis of damages award and to hold that liability insurers not be singled out for unique treatment under the statute in cases involving suits by third party tort claimants for a violation of c. 176D, § 3(9)(f).

II. THIS COURT SHOULD NOT INTERPRET THE EFFECT OF THE 1989 AMENDMENTS IN SUCH A WAY AS WOULD PLACE G.L. C. 93A IN CONSTITUTIONAL JEOPARDY.

If Rhodes is correct that the Legislature intended to subject liability insurers to such dramatically different punitive damages than would be recoverable under c. 93A against any other defendant, then the amendments must fail as unconstitutionally infringing the due process rights of liability insurers not to be subject to excessive and arbitrary punishment.

Amicus Curiae observes that this constitutional inquiry is not needed if this Court adopts the entirely plausible view that the 1989 amendments were not meant to single out liability insurers for excessive and arbitrary punishment, especially as it should not be presumed that the Legislature meant to violate defendants' due process rights by enacting these amendments. See Gillespie v. City of Northampton, 460 Mass. 148, 152 (2011) ("it is well settled that a statute is presumed to be constitutional and every rational presumption in favor of the statute's validity is made"). As above, a more plausible reading of these amendments is that the underlying judgment should only form the basis for doubling or trebling a judgment for damages actually caused by a defendant. If this Court disagrees, however, it is necessary that it also consider the constitutional implications of such an analysis.

A. The Role Of Punitive Damages In Our Civil Justice System.

The goal of punitive damages is deterrence and retribution. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) ("punitive damages are imposed for purposes of retribution and deterrence"). By providing recoveries in the form of multiple damages, costs and attorneys' fees, G.L. c. 93A[5] is a

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[5] Doubled and trebled awards under G.L. c. 93A are punitive both in their purpose and effect. Drywall Systems, Inc. v. ZVI Const. Co., Inc., 435 Mass. 664, 670 (2002); C & I Steel, LLC v. Travelers Cas. & Sur. Co. of America, 70 Mass. App. Ct. 653 (2007), rev.

"punishment and deterrence" to defendants. International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 858 (1983).

The U.S. Supreme Court has observed that "punitive damages pose an acute danger of arbitrary deprivation of property." State Farm v. Campbell, 538 U.S. 403, 417 (2003), quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994). Due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." Campbell, 538 U.S. at 416.

Insurers have been found to face a higher risk of excessive punitive damages awards than any other industry. Eric Moller, *et al.*, Punitive Damages and Financial Industry Verdicts, 24 (Rand Institute for Civil Justice 1997) ("juries in insurance cases tend to reach higher punitive damages awards relative to the compensatory damages awarded than those hearing other types of cases"). The danger of arbitrary punitive damages awards against liability insurers in the Commonwealth is greatly magnified by the unique 1989 amendments to c. 93A. Massachusetts is not only

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denied, 450 Mass. 1109 (2008); and McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 717 (1990).

one of a handful of states that allows non-insureds to sue liability insurers for ailing to promptly settle their claims but is alone in allowing such tort claimants to recover punitive damages in such cases.

B. The U.S. Supreme Court's Emerging Due Process Jurisprudence Protects Defendants Against Punitive Damages Awards That Are Arbitrary and Excessive.

Prior to Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), the U.S. Supreme Court had never directly considered the matter of whether punitive damages awards could be so excessive as to violate due process. Indeed, as recently as 1989, the U.S. Supreme Court had maintained a "hands off" approach to state punitive damages awards, declaring in Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257, 262 (1989) that "neither the excessive fines clause of the Eighth Amendment nor federal common law circumscribed awards of punitive damages in civil cases between private parties."

Since Haslip, however, the U.S. Supreme Court has issued seven significant opinions[6] shaping the bases

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[6] See TXO Production Corp. v. Alliance Resources, 509 U.S. 443 (1993) (holding that the harm likely to occur from a defendant's conduct was relevant to the due process inquiry); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) (holding that due process requires

upon which punitive damages awards should be scrutinized. As among these rulings, the most relevant here has been State Farm v. Campbell, 538 U.S. 408 (2003), in which the Court reversed a Utah Supreme Court opinion that had reinstated a $145 million bad faith award, declaring that (1) out-of-state evidence should not have been taken into account in calculating punitive damages; (2) a punitive damages award that was seventy times greater than the plaintiff's actual damages violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution; and (3) courts considering challenges to these awards must employ a *de novo* standard of review. In particular, the Court declared that:

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post-judgment review of a punitive damages award); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (identifying "guideposts" for measuring whether awards are arbitrary and excessive); Cooper Industries v. Leatherman Tool Grp., Inc., 532 U.S. 424 (2001) (adopting a *de novo* standard of review for determining the constitutionality of punitive damages awards); State Farm v. Campbell, 538 U.S. 408 (2003) (identifying evidence that, if used to support a punitive damages award, will violate due process); Philip Morris USA v. Williams, 549 U.S. 346 (2007) (holding that a punitive damages award that is based on harm to others violates due process); and Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (applying 1:1 ratio for punitive damages under federal maritime law).

> The Due Process Clause of the Fourteenth Amendment prohibits excessive or arbitrary punishments on a tortfeasor. This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion. The reason is that elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.

538 U.S. at 416-17 (Internal citations omitted).

While declining to adopt a "bright line" ratio for assessing whether punitive damages awards are unreasonably excessive, the Campbell Court observed that:

> Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In Haslip, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to

> the line of constitutional impropriety. We cited that 4-to-1 ratio again in Gore. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 or, in this case, of 145 to 1.

538 U.S. 425 (Internal citations omitted).

> In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them.

538 U.S. at 426.

C. **Since Campbell, Courts Have Consistently Contained Punitive Damages Awards Within Single Digit Ratios And, In Many Cases, Have Ruled That Such Awards Should Not Exceed The Plaintiff's Actual Damages At All.**

In the immediate aftermath of Campbell, courts around the country swiftly reversed pre-2003 punitive damage verdicts that exceeded the recommended single digit ratio.[7]

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[7] See Williams v. Philip Morris, Inc., 51 P.3d 670 (Or. App. 2002) (97:1 ratio) and Clark v. Chrysler Corp., 310 F.3d 461 (6th Cir. 2002) (13:1 ratio). See also McClain v. Metabolife International, Inc., 259 F. Supp. 1225 (N.D. Ala. 2003)(reducing award against diet pill manufacturer from $1 million (20:1) to $450,000); Hudgins v Southwest Airlines, 212 P.3d 810 (Ariz. App. 2009)(reducing an 8:1 ratio to 1:1 in a case where the plaintiff had already received $500,000 for emotional injuries); Ceimo v. General American Life Ins. Co., CV 00 1386 (D. Ariz. September 17, 2003) (reducing ratio of punitive damages in insurance bad faith case from 12:1 to 1:1); Advocat, Inc. v. Sauer, 111 S.W.3d 346 (Ark. 2003)(reducing punitive damages award in wrongful death case against nursing home); TVT Records v. Def Island Jam Music Group, 279 F. Supp.2d 413 (S.D.N.Y. 2003) (reducing ratio from 2.2:1 to 1:1 in dispute between two music companies in light of the fact that the compensatory award was over $22 million); Parrish v. Sollecito, 280 F. Supp.2d 145 (S.D.N.Y. 2003) (reducing ratio in Title VII sex discrimination case from 33:1 to 3.3:1); Romo v. Ford Motor Co., 113 Cal. App. 4th 738, 6 Cal. Rptr. 3d 793 (2003) (reducing wrongful death/products award from $290 million to $23.7 million); Henley v. Philip Morris, Inc., 112 Cal. App. 4th 198, 5 Cal. Rptr. 3d 42 (2003) (reducing smoker's punitive damages award from $26.5 million to $9 million for a 6:1 ratio); Roth v. Farner-Bocken Company, 667 N.W.2d 651 (S.D. 2003) (reversing 42:1 award); and Waddill v. Anchor Hocking, 78 P.3d 570 (Or. App. 2003) (reducing

In Boeken v. Philip Morris, Inc., 127 Cal. App. 4th 1640 (2005), the California Court of Appeal held that a jury's award of $3 billion in punitive damages and $5.5 million in compensatory damages was outside the constitutional limits set by the U.S. Supreme Court in Gore and Campbell. Even though the trial judge had already reduced the plaintiff's punitive recovery to a mere $100 million, the Court of Appeal ruled that even a ratio of 18-1 was still unconstitutionally excessive. Similarly, a ratio of 42:1 was held to be unconstitutional in Bardis v. Oates, 14 Cal. Rptr. 3d 89 (Cal. App. 2004), although the court found the defendant's conduct sufficiently egregious that it still allowed a punitive award that was nine times as large as the plaintiff's actual damages.

A 20:1 ratio was reversed in Roth v. Farner-Bocken Company, 667 N.W.2d 651 (S.D. 2003). The South Dakota Supreme Court held that although an employer had invaded a former employee's privacy by opening a letter that he received at the office and then photocopying its contents, any harm suffered by the

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punitive ratio in personal injury case from 9.9:1 to 4:1).

plaintiff was economic as opposed to physical and that the employer's conduct put no one's health or safety at risk. Finally, even if the employer's concealment of this information was in the nature of trickery and deceit, the plaintiff had already been fully compensated for any damages that he suffered as a result of the employer's invasion of his privacy.

Furthermore, in recent years, a growing number of jurisdictions have ruled that punitive damages awards should not exceed the amount of the plaintiff's actual damages, especially where the compensatory award is a substantial one. See Williams v. ConAgra Poultry Co., 378 F.3d 790, 799 (8th Cir. 2004)(punitive award in a wrongful termination case reduced from $6 million to $600,000 on the grounds that the plaintiff's award of $1 million was quite substantial already) and Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594 (8th Cir. 2005) (adopting 1:1 ratio).

In an age discrimination case where the jury awarded $1 million in past compensatory damages, $4.5 million in future economic compensatory damages, $500,000 in non-economic compensatory damages and $10 million in punitive damages, the Sixth Circuit ruled in Morgan v. New York Life Ins. Co., 559 F.3d 425 (6th

Cir. 2009) that although the punitive award did not violate Ohio state due process protections, it did conflict with Campbell. The court ruled, therefore, that the punitive award must be reduced to an amount not to exceed $6 million for a ratio of 1 to 1.

In a Pennsylvania insurance bad faith case, the Third Circuit ruled in Jurinko v. Medical Protective Co., 305 Fed. Appx. 13, 2008 WL 5378011 (3rd Cir. December 24, 2008) that although a medical liability insurer acted outrageously in failing to settle the claims, an award of punitive damages that was four times the size of the compensatory damage award was unconstitutionally excessive. In ordering that a 1:1 ratio be used (thus reducing the punitive award to $1.6 million from $6.25 million), the court emphasized the substantial size of the compensatory damages awarded, as well as the fact that the injury in question was economic, not physical, and not the product of repeated reprehensible conduct by the insurer.

In Walker v. Farmers Ins. Exchange, 153 Cal. App. 4th 965 (2d Dist. 2007), the California Court of Appeal upheld a $1.5 million punitive damages award for an insurer's bad faith handling of claims involving putative insureds under its condominium policy but also ruled that given the large compensatory award to the insureds, which included a punitive element, the trial court's reduction in the jury's original award to a ratio of 1:1 against the compensatory award was appropriate and consistent with the constitutional principles of due process. The jury had originally awarded punitive damages of $8.4 million, a sum that the Superior Court reduced to $1.5 million while upholding the jury's conclusion that Farmers' refusal to provide a defense based upon its adjuster's unfounded theory of the case and its failure to follow its own procedures, warranted a finding of bad faith. The Second District ruled that while 3 or 4 to 1 is a guideline norm in California, a 1:1 ratio was appropriate where the jury had also awarded each of the claimants $750,000 for emotional distress particularly as the emotional distress awards contained a punitive element against Farmers. The court rejected the insured's argument that the deterrent role of punitive damages would be eliminated if the original $8.4 million award was not reinstated, observing that the insurer's having to pay $1.5

million in punitive damages was not simply just another cost of doing business.

Even where courts have not limited punitive damages to a 1:1 range, they have nearly universally kept them within single digit limits of the plaintiff's actual damages.[8]

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[8] See Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 345 F.3d 1366 (Fed. Cir. 2003), cert. denied 124 S. Ct. 1423 (2004)(concluding that Campbell did not require that a $50 million punitive damages award be reduced since it was only three times the total amount of compensatory damages awarded); Bogle v. McLure, 332 F.3d 1347 (11th Cir. 2003)(upholding 3.8:1 ratio for Georgia reverse discrimination case); Greenberg v. Paul Revere Life Ins. Co., 91 Fed. Appx. 539 (9th Cir. 2004), cert. denied, 124 S. Ct. 2918 (2004)(affirming 4:1 ratio for bad faith case); Diamond Woodworks, Inc. v. Argonaut Ins. Co., 109 Cal. App. 4th 1020, 135 Cal. Rptr. 2d 736 (2003)("we have no doubt that anything exceeding a 4-to-1 ratio would not comport with due process under Campbell); Goddard v. Farmers Ins. Co. of Oregon, 22 P.3d 1224 (Or. App. 2005)(reducing punitive damages in bad faith case to 3:1); and Austin v. Specialty Transport Services, Inc., 594 S.E.2d 867, 877 (S.C. App. 2004)(2.5:1 ratio "comported with due process").

The sole exception are cases that fall within the two specific exceptions recognized in Campbell where double digit awards have been allowed because the plaintiff's injuries are so inchoate as to be difficult to quantify or where the plaintiff has only received a miniscule award of compensatory damages for those injuries. As an example of the former, see Williams v. Kaufman County, 352 F.3d 954 (5th Cir. 2003)(emotional distress from strip search)(upholding 150:1 ratio for emotional distress suffered by nightclub employees who were repeatedly subjected to strip searches by sheriff's employees.) As an example of the latter, see (Mathias v. Accor Economy Lodging,

D. **<u>The Supreme Judicial Court Has Not Had Occasion To Assess The Application Of Post-Gore Due Process Jurisprudence To Punitive Awards.</u>**

To date, Massachusetts has not had occasion to engage in this national dialogue concerning the constitutional limitations and due process protections accorded punitive damages awards. This Court did adopt the <u>BMW v. Gore</u> guideposts for measuring the size of an award in <u>Labonte v. Hutchins & Wheeler</u>, 424 Mass. 813, 826-27 (1997), a case that was decided shortly after <u>Gore</u> was issued. Since <u>Labonte</u>, however, this Court has not had occasion to consider the evolution in the Supreme Court's thinking on this issue and, in particular, the refinement of the <u>Gore</u> guideposts in cases such as <u>State Farm v. Campbell</u>. While this Court's post-<u>Labonte</u> jurisprudence has considered issues such as the extent to which a defendant's reprehensibility may justify a larger punitive damages award, it has not considered whether the sheer size of certain awards renders them arbitrary and unconstitutionally excessive when they

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<u>Inc.</u>, 347 F.3d 672 (7th Cir. 2003)(upholding 37:1 ratio where compensatory award for bed bug bites was only $5,000). Neither of these exceptions has application here.

are so far out of proportion to the actual damages for which the defendant is legally responsible.

During this period, the Appeals Court has had several occasions to consider the application of State Farm v. Campbell to Massachusetts law. In each instance, it has required that such awards be within a single digit ratio to the compensatory damages awarded to the plaintiff. See Borne v. Haverhill Golf & Country Club, Inc., 58 Mass. App. Ct. 306 (2003)(sustaining punitive damages awarded in gender discrimination case, holding that the size of the awards to the nine plaintiffs, which ranged from a high of 3.96 to a low of 1.37, were "impressive" but not so large as to require reduction pursuant to State Farm v. Campbell) and Ciccarelli v. School Dept. of Lowell, 70 Mass. App. Ct. 787 (2007)(holding that a ratio of five to one was not unconstitutionally excessive in a case of employment retaliation was appropriate in light of the outrageous conduct of the defendant and did not contravene Campbell).

By contrast, a punitive damages award that was ten times the size of the plaintiff's actual damages was set aside as being unconstitutionally excessive in Clifton v. MBTA, 62 Mass. App. Ct. 164 (2004), rev'd on other grounds, 445 Mass. 611 (2005). In Clifton, a victim of racial discrimination was awarded $500,000 in compensatory damages for emotional distress and $5 million in punitive damages. After the plaintiff refused to accept a *remittitur* of the punitive damages award to $500,000, the trial judge (Gants, J.) ordered a new trial on the issue of punitive damages and reported the entire case to the Appeals Court. The Appeals Court held that the Superior Court had not abused its discretion, either in ordering a new trial or in granting the defendant's *remittitur* motion. Both actions were proper, based upon the fact that the jury had awarded $5 million in punitive damages but only $500,000 in damages for emotional distress as the result of the plaintiff being exposed to a hostile work environment.

On review, this Court ordered a new trial. As there would be a new trial on damages, this Court observed that it "need not discuss the high punitive damages awarded the plaintiff in this case, or the propriety of the judge's reduction of that award to one-tenth of its former size." 445 Mass. at 623. However, the Court did take the occasion to comment on the considerations that a trial court should take into account in ruling on a motion to remit punitive damages in cases where they were claimed to be unconstitutionally excessive:

> General factors to be considered in determining whether a punitive damages award is excessive were set forth by the United States Supreme Court in BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996), and adopted by this court in Labonte v. Hutchins & Wheeler, 424 Mass. 813, 826-827 (1997). They are "the degree of reprehensibility of the defendant's conduct"; the ratio of the punitive damages award to the "actual harm inflicted on the plaintiff"; and a comparison of "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." BMW of N. Am, Inc. v. Gore, supra at 575, 580, 583.

Id. at 623.

This Court, in Labonte, adopted the bedrock Gore principles, principles which the U.S. Supreme Court subsequently amplified in State Farm v. Campbell. *Amicus Curiae* urges this Court to confirm its adherence to those principles, to join the evolving due process jurisprudence exemplified in the cases discussed in Parts B(2) and (3), supra, and, in particular, to abide by the Supreme Court's admonition that punitive damage awards should be in close proportion to a plaintiff's actual damages. *Amicus Curiae* urges this Court to subscribe to the Campbell court's stricture that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."

In this case, Rhodes did not suffer physical injury at the hands of the insurers. Nothing that the insurers did placed the plaintiff's health or safety at risk. Nor is there evidence of repeated recidivist misconduct. Under the circumstances, and in conformity with the Supreme Court and other judicial decisions discussed above, a $22 million punitive award against the insurers, an award that is over fifty times as large as the damages actually caused by their claimed failure to attempt to effectuate a timely settlement, is not reasonable, is not proportionate to the amount of harm that the insurers actually caused to Rhodes, and is not within due process mandated by the Fourteenth Amendment.

E. Statutory Standards For Punitive Awards Are Subject To The Same Due Process Scrutiny As Common Law Awards.

Rhodes may argue that the constitutional standards otherwise applicable to common law punitive damages have no application to statutory schemes such a c. 93A where the amount of damages is fixed by statute. There is, however, no rational basis for distinguishing between statutory and common law punitive awards in a case such as this, where under the interpretation of the 1989 amendments proffered by Rhodes, the statutory limitation to double or trebled damages does nothing to give notice to an insurer with respect to the scope of a claimed extra-contractual obligation that is dependent on a verdict based on the conduct of others.

The application of Campbell due process protections to statutory penalties is the subject of a spirited academic debate[9] and among the issues shortly to be decided by the First Circuit in Sony BMG Music Entertainment, Inc. v. Tennenbaum, 721 F. Supp.2d 85 (D. Mass. 2010), appeal pending No. 10-1883 (1st Cir. 2011)(whether District Court erred in reducing award of $675,000 in statutory penalties pursuant to 17 U.S.C. § 504(c) for a student's illegal sharing of 30 copyrighted music files on the grounds that the award was unconstitutionally excessive and arbitrary).

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[9] Blaine Hanson, Due Process In Statutory Damages, 3 Georgetown Journal of Law and Public Policy, Vol. 3 No. 2 (2005). See also Pamela Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy In Need of Reform. 51 Wm. & Mary L. Rev. 439 (2009).

Whatever the First Circuit's eventual ruling in Tennenbaum, *Amicus Curiae* submits that the rules courts have adopted with respect to statutes that expressly identify a dollar penalty are wholly different from those which merely indicate that some undefined amount may be doubled or trebled.

An example of the former was discussed in State of Missouri v. Spilton, 315 S.W.3d 350 (Mo. 2010), in which the Missouri Supreme Court rejected the defendant's claim that statutory penalty for Medicare fraud violations was unconstitutionally disproportionate to the actual harm caused by such misconduct. Spilton had pleaded guilty to 325 separate instances of Medicare fraud. The Missouri Medicare Fraud statute prescribed a penalty of not less than $5,000, and not more than $10,000, per violation. It also mandated an additional penalty of three times the actual damages that the government suffered because of the misconduct. Spilton was assessed a penalty of $1.625 million, and argued that the penalty was excessive because the government had separately been awarded actual damages of $45,385 that then were trebled under the statute. The Missouri Supreme Court disagreed, ruling that the Medicare

Fraud statute was neither vague nor arbitrary, and clearly put defendants on notice of the penalties they would suffer for its violation.

In Spilton, the Missouri Supreme Court declared that "[s]tatutory civil penalties are different than jury-imposed punitive damages because statutes define, in advance, the prohibited conduct and the legislatively prescribed penalty." Unlike the Missouri statute, which clearly warned citizens that violations would result in a penalty of at least $5,000 per violation, G.L. c. 93A merely advises liability insurer defendants that they can face doubled or trebled damages. It sets no cap on what that ultimate exposure may prove to be, an exposure totally dependent on the underlying judgment returned against their insured for damages resulting solely from the insured's conduct. See also Romano v. U-Haul Int'l, 233 F.3d 655, 672 (1st Cir. 2000)(applying Gore analysis to award of punitive damages to a Title VII claimant but holding that award was not arbitrary or unconstitutionally excessive; the amount of such damages is defined and capped by statute).

Unlike the statutes in these cases, which give fair notice to a defendant that it will face specific dollar damages if it breaks the law in a willful way, a liability insurer would have no means of predicting the range of damages that could be awarded against it for a c. 176D violation under the analysis proposed by Rhodes. G.L. c. 93A does not provide a dollar range. It merely puts the carrier on notice that a willful violation could subject it to an award of two or three times some unknown number without any sort of cap on what that ultimate exposure may prove to be depending on the judgment in the tort case against the policyholder, thus placing them within the "zone of arbitrariness" identified by the Supreme Court in Gore, 517 U.S. at 566 that, lacking "fair notice" to defendants of the damages for which they may be declared liable, requires the same Due Process protections as the Court has otherwise recognized for common law punitive damages awards. In contrast, the interpretation of the 1989 amendments by the trial judge in this case does provide the liability insurer with a specific understanding of its punitive damage exposure: like all other c. 93A defendants, the punitive damage exposure is two or three times the actual damages caused by the unfair or deceptive conduct.

CONCLUSION

This case presents the Court with the opportunity to clarify an issue left unanswered in Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 567 (2001) which has since given rise to conflicting opinions from the Appeals Court: whether G.L. c. 93A damages that are to be doubled or trebled against a *liability insurer* for willfully failing to make a timely offer to settle the plaintiff's claim against its policyholder should be calculated based on the *economic loss* actually attributable to the insurer's delay or the *personal injur*ies caused by the insurer's policyholder. The latter have no causal relationship to the unfair or deceptive conduct giving rise to the liability of the insurer under c. 93A. *Amicus Curiae* submits that both the text of c. 93A and its sensible purpose mandate that liability insurers should be treated no differently than all other defendants found liable for a willful or knowing violation of c. 93A. The punitive damages should be in proportion to the actual damages caused by their conduct. Accordingly, the trial court did not err in doubling the award against AIGDC based on the plaintiffs' loss of use of the settlement funds rather than the underlying $8 million personal injury judgment.

In arguing that the lower court erred and that their right to doubled damages should be based on the verdict in Rhodes' personal injury suit, plaintiffs would overturn a central tenet of this Court's damages jurisprudence and c. 93A itself, namely that there must be a causal relationship between the damages awarded to the plaintiff and the defendant's conduct. The insurers in this case did not cause Marcia Rhodes' paraplegia.

Where there is no causal nexus between the violation of c. 93A and the damages awarded, the doubling or trebling prescribed by c. 93A does not satisfy the Fourteenth Amendment's due process protections that were adopted by this Court in 1996 in Labonte and which have since evolved through subsequent opinions of the U.S. Supreme Court, most notably in State Farm v. Campbell, 538 U.S. 408 (2003). Accordingly, if this Court reverses the trial court's determination and holds that when the defendant is a liability insurer, causation is not required in the case of doubled or trebled damages, then, on a case-by-case basis, the punitive damages award must be scrutinized in the light of Campbell's single-digit multiplier guidepost. Given that the actual "loss of use" damages in this case were two percent of the $22 million that Rhodes claims to be entitled to, the requested relief exceeds the constitutional standards for measuring the size of such awards and mandates that this Court provide the due process protections against excessive and arbitrary penalties adopted in State Farm v. Campbell.

This Court should not countenance an interpretation of the 1989 amendments that would place c. 93A's effectiveness in constitutional jeopardy. To the extent that the language of the statute is ambiguous and the legislative history of the amendments uncertain, this Court should adopt an interpretation that comports with its traditional notions of damages, the purpose of c. 93A, and the constitutional due process limitations that apply to punitive awards.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Michael F. Aylward, counsel for *Amicus Curiae* American Insurance Association, hereby certify that two (2) true copies of the above document were served upon M. Frederick Pritzker, Esquire, Margaret M. Pinkham, Esquire and Daniel J. Brown, Esquire of Brown Rudnick, LLP, One Financial Center, Boston, MA 02111; Anthony R. Zelle, Esquire of Zelle McDonough & Cohen LLP, 101 Federal Street, Boston, MA 02110; and Gregory P. Varga, Esquire and Danielle Andrews Long, Esquire of Robinson & Cole, LLP, One Boston Place, Boston, MA 02108, by priority mail, postage prepaid on September 16, 2011.

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<u>**CERTIFICATE PURSUANT TO MASS. R. A. P. 16(k)**</u>

I, Michael F. Aylward, counsel for *Amicus Curiae* American Insurance Association, hereby certify that this Brief complies with the rules of this Court that pertain to the filing of briefs and other papers, including, but not limited to: Mass. R. App. P. 16(a)(6)(pertinent findings or memoranda of decision); Mass. R. App. P. 16(e)(references to the record); Mass. R. App. P. 16(f)(reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h)(length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).

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No. SJC - 10911

MARCIA RHODES, ET AL.,
PLAINTIFFS-APPELLEES,

v.

AIG DOMESTIC CLAIMS, INC., ET AL.,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM A DECISION OF
THE MASSACHUSETTS APPEALS COURT

AMICUS CURIAE BRIEF OF AMERICAN INSURANCE ASSOCIATION

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS